SOME REFLECTIONS ON WORLD TRADE ORGANIZATION AND PROTECTIVE MECHANISMS IN ITS FRAMEWORK

Aida Gugu (LL.M.)*

Introduction

Albania became part of World Trade Organization (hereinafter WTO) in 2000 after carrying out the negotiation process with WTO member countries. The negotiation process before the membership and later, the application process of commitments to WTO have been associated with the undertaking of reforms and standards increase, necessary to adapt to nowadays global trade trends. The initiatives taken by the Albanian state to fulfill the commitments in WTO framework are becoming more and more important not only because they influence the country's economic development, but also because they comprise "conditions" for the European and regional integration. One observes currently a greater awareness of the interest groups for the recognition of commitments made by our state to WTO and knowing more closely the way this organization functions. This awareness comes also as a result of effects increase by market liberalization, which in plain words, could be summarized in the competition increase, products and services greater exchange and offer, which have a direct impact on local business and customer interests.

With regard to trade liberalization, WTO system achievements, among others, are made by the legal definition to the counter liberalization or protective actions, *like an exception from the general rule for free trade*; and the possibility *to use these mechanisms only in situations defined in WTO agreements.* The existence of protective measures is often linked to the detrimental consequences mitigation for various industries coming mainly from market liberalization. Their use in accordance with WTO rules gives the possibility to industry to revive and to the government to enjoy the same support in the country, in spite of the measures taken.

Therefore, in order to assist all the interest groups, it is necessary to clarify some of the rules and principles of this organization and the protective mechanisms existing in the framework of its agreement. By knowing these we understand even more the reasons why Albania became a WTO member, and the possibility to use the legal space to protect the local business.

The article will be divided in two parts. The first will focus on the reasons giving birth to WTO, its principles and institutions, the mechanism solving conflicts in WTO, as well as the kinds of obligations and rights arising for the states. Importance will be given to the admission of a country to WTO, where Albania membership will be an illustration of the theoretical analysis following in this work. Whereas the second part will analyze the protective mechanisms, existing in WTO/GATT, giving a general picture of the conditions and concrete possibilities for using these mechanisms.

---

* Aida Gugu is an Annalist of Trade Policies in the Albanian Centre for International Trade

FIRST PART

I. How was WTO born?

I.1.1 GATT, WTO predecessor

The ideas given long ago for the creation of sustainable international economic institutions are crystallized in 1944 and later on. Two of the most important moments of that period relate to: 1) economic institutions creation after Bretton Woods[1] system (World Bank and International Monetary Fund); and 2) the creation of the General Agreement on Trade and Tariffs (hereinafter GATT). We should stress that GATT does not belong to Bretton Woods system, but it was created later. At that period (1946) talks were held on the creation of an International Trade Organization, (ITO), which would complete the system of economic institutions created. While the two first ones (FMN, BB) would address monetary and bank problems, the latter would cover trade problems, completing thus the institutional framework related to world economy. It was not in vain that WTO, created later, was called the missing leg of the "bench" created in Bretton Woods system.

ITO first draft was proposed by United States of America in 1946 followed by a series of discussions, where the most recent dates in 1948 in Havana. In the meantime together with the idea of ITO creation, the idea of GATT creation was interwoven (General Agreement on Trade and Tariffs), as its integral part. ITO would include a treaty for the creation of international institutions on trade, whereas GATT would include firstly, negotiations on the gradual tariffs reduction and secondly, a general clause with regard to tariff obligations. The first efforts to create this organization failed and ITO never entered into force. The failure came more as a result of its disapproval by the American Congress, whereas continued to exist as the sole result of negotiations and continued to be applied under some special conditions[2].

GATT never entered into force as an international treaty and its application was made possible by the Provisional Protocol (PPA)[3]. GATT application by this protocol foresaw: 1) GATT first and third part application with no exceptions; 2) second part application, as long as it did not come against the existing legislation of GATT[4] member countries. So, GATT Contracting Parties had the right of the so-called "grand father

[1] Bretton Woods Conference was held in 1944 in USA and it addressed the solution of many economic problems generated by the war and those existing before World War II.

[2] Though USA was the initiator of this agreement, GATT 47 was never ratified by American Congress and USA ratified it only when they ratified Marrakech Agreement that created WTO. It remained only a document signed by the American President, which worried many lawyers of the time about its practical application in USA. For more, see: Raj Bhala "International Trade Law; Theory and Practice, Second Edition, Lexis Nexis 2001, p. 129

[3] See: John H. Jackson *"The World trading system" Law and policy of International Economic Relations*" Second Edition, MIT press, 2002. p.39

[4] GATT first part referred to MFN tariffs (principle of most favored nation) the third part was totally procedural. The second part had to do with the important obligations like the customs quotes procedures and other protective measures.

clause[5]", which in some way, convinced them to agree on GATT existence. One of WTO achievements was exactly the elimination of these clauses.

In spite of the its difficulties of foundation and application from the international point of view, GATT went on existing for a relatively long time and it served as a basic document for the negotiations round about trade relations. GATT also offered a system of conflicts solving, which though not very successful, helped in some way in the practical application of this agreement.

I.1.2 WTO Creation

During the years of GATT existence eight rounds were held focused mainly on tariffs reduction and the discussion of other non tariff questions related to trade until WTO creation itself[6]. Uruguay round (1986-1993) was followed by Marrakech agreement signing, which sanctioned the creation of the organization itself on April 15, 1994. WTO was created as an international organization and the multilateral agreements its constituent parts included more than products trade[7]. Moreover in WTO framework the most efficient mechanism of conflicts solving was designed, which was not encountered before under the international organizations umbrella[8].

From a general survey, the scheme of the treaties founded in Uruguay Treaty is: The WTO Creation Treaty and the three Annexes. Annex I "Multilateral Agreement on Gods Trade" include the important agreements like GATT 94[9] and the Specific Agreements[10], The General Agreement on Trade and Services (hereinafter GATS), and the Agreement on Trade Aspects of Intellectual Property Rights (hereinafter TRIPs). The second included Agreement on Conflicts Solving (hereinafter DSU) and the third included Mechanisms of Trade Policies Review. The acceptance of these treaties as a "single undertaking", so as "single package", marks an important step in the negotiations. The price of joining WTO is precisely the membership in the agreement that created

---

[5] "Grand father clause" was the right, recognized for GATT Contracting Parties to deviate from the obligations, deriving from its second part, when they come against existing home laws.

[6] GATT rounds until WTO creation are: Geneva Round 1940, Annecy Round (1948-1949), Torquay Round (1950-1951), Geneva Round (1955-1956), Dillon Round (1960-1962), Kennedy Round (1964-1967), Tokyo Round (1973-1979), and Uruguay Round (1986-1994). An increase of member countries was observed during these rounds, a greater involvement of world trade in dollar value and the negotiations became complex leading to difficulties in decision making. For more see for each round: Raj Bhala supra note, 2, p 132

[7] The agreement range comprised also fields untouched until then, like services, intellectual property, and other investments.

[8] Patricio Grane *"Remedies under WTO law*" Journal of International Economic Law 2001, p. 755

[9] Connection between current GATT (94) and GATT (47) is foreseen in paragraph 4, article 2 of the agreement which created WTO. Both agreements are legally different and they contain different clauses. This means that GATT 94 is not subsequent to GATT 47

[10] In Annex 1A of the multilateral Agreements on goods, besides GATT 94, included are the Agreements on Agriculture (AoA), on Sanitary and Phyto - Sanitary Measures (SPS), on Technical Barriers in Trade (TBT), on Trade in Investments Measures (TRIMS), on products Origin Rules, Import Licenses, on Antidumping and Protective Measures. Parts of this Annex are also the Memoranda of Understanding on GATT 47 existing articles interpretation, the legal status of which is unclear. For most of the member countries they define a general obligation or clarification of procedures already applied and recognized by WTO member countries. For more, see: J. Jackson, supra note 3, p. 77

WTO and the multilateral agreements mentioned above[11]. The only legal package is accepted not only by member countries in the moment of WTO creation, but also by countries which will join later[12].

Besides the multilateral[13] agreements which are optional, everything else is compulsory for the parties. This acceptance of the agreements as a single package brings about some difficulties during their practical application and concretely in cases when they norm the same fields. Thus, many GATT 47 articles have been completed by special agreements[14], which, n case of conflict, have priority over its other articles. Anyhow, in spite of this general rule, referring to the WTO Jury and Appeal Body jurisprudence, we may say that the relations between them are characterized by: *conflict, obligations evading, repetition and duplicity*[15].

In case of conflicts between GATT and agreements that are part of various annexes, the rule followed is that the specific agreements (lex specialis) [16] have priority for questions regarding their regulatory spectrum.

I.1.3 Main WTO Institutions

In order to strengthen the rule of law and order principle in trade relations within WTO, its founders created the institutional mechanisms for decision making, agenda processing, management of market liberalization, trade policies review and conflicts solution.

Ministers Conference is the highest decision taking body for all the questions regarding agreements, for the admission of new members and for the beginning of trade rounds. It consists of all member countries representatives[17] and it convenes at least once in 2 years[18]. In the interval between the two meetings, the organization activity is led by

---

[11] Christopher Arup "*The new World Trade Organization Agreements, Globalizing law through services and intellectual property"*, Cambridge University press, 2000, p 47

[12] Read article II together with article XII of WTO agreement.

[13]Multilateral Agreements are: Agreement on Civil Airplanes Trade, Agreement on Public Procurements, International Agreement on Dairies, International Agreement on Meat and Livestock.

[14] It is about Antidumping agreements, Subsidizing and Counteracting Measures, Protective Emergent Measures, etc. In GATT 47 Agreement they were summarized in some special articles, like article IV, XIX, etc.

[15] The WTO institutions general spirit is that of applying the agreements cumulatively and in this context a special aid is given by Vienna Convention on International Treaties 1969. For more, see n relations between GATT and other agreements in annex IA: Elisabetta Montaguti & Maurits Lugard*: " The GATT 1994 and other Annex 1ª Agreements: Four different relationships?*", Journal of International Economic Law , 2000, p.473-484

[16] For questions regarding the intellectual property TRIPs has priority over GATT because the first is qualified as lex specialis by the Jury in the question India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R. For more, see: Marc Bronkers: "The Exhaustion of Patent Rights under the WTO Law", Journal of World Trade, 32(5), 1998, p. 143

[17] Article IV:1 of WTO creation agreement.

[18] Since WTO creation 5 Ministers Conferences have been held: Singapore (1996), Geneva 1998, Seattle 1999, Doha 2001 and Cancun 2003. Doha marked the opening of a new important Round in reaching some compromises and its Development Agenda continues to be negotiated. Cancun made no progress and the parties continued to disagree on many questions, which will be part of the discussion in the new meeting in

the General Council which is also made up of member state representatives. There are two specialized bodies under it, The Trade Policies Review Body and the Disagreements Solving Body (hereinafter DSB), who operate according to the respective procedures and comprise of member state representatives. With regard to special agreements, WTO foresees a special council for each agreement, like the Products, services and Intellectual Property Council. The Ministers Conference is also responsible for the creation of specific Committees, like the Development Committee, Trade and Environment Committee. (see: annex I)

I.1.4 Principles on which WTO trade system functions

Since WTO agreements are complex and cover a range of fields and are applied by a great number of countries, they rely o some principles which serve also as the foundations of the multilateral trade system sustainability itself. In broad lines they may be summarized in (1) the nondiscrimination principle and this includes: (A) the Principle of the Most Favored Nation and (B) National Treatment, (2) Free Trade, which should be realized gradually by negotiations, (3) Predictability, which is realized through compulsoriness[19] and transparency[20], (4) Promotion of a fair competition (reciprocity), (5) Encouragement of development and reforms[21]. Each of these principles is concretely reflected in the agreement articles having the same applicability importance. Anyhow, will focus on some of them further on.

I.1.4.1 Principle of the Most Favored Nation

The first obligation arising by membership in WTO and in the relevant agreements is that of the Principle of Most Favored Nation application (MFN), on the basis of which every WTO member state should accord to all other member countries the same treatment, privilege, advantage accorded to a concrete country for the trade relations in goods, for the intellectual property and services[22]. This obligation reduces progressively the discrimination level among the countries in trade relations[23]. The achievement of this obligation in itself relies on the "immediate" and "unconditional" principles, which means that the non discriminatory treatment will be accorded to all the countries at the same time, and on the other hand, this treatment will be accorded to WTO member countries without expecting any profit in the exchange and without requiring the fulfillment of any concrete condition by the other party. Anyway, exceptions are made

---

Geneva in 2005. We may mention here agriculture, "Singapore questions which include competition and trade, investments, transparency, public procurements, intellectual property and industry".

[19] Compulsoriness is created by the obligation to keep a certain level of tariffs and quotes.

[20] Transparency requires making public the norms and rules regarding trade and the continuous informing of WTO.

[21] Understanding the WTO: "Principle of the Trading System", in WTO Webpage, www.wto.org

[22] See: Article I of GATT 94 and Article II of GATS, Article 4 of TRIPs, which summarize the same terminology.

[23] The Principle of the Most Favored Nation comprises: Change of tariffs and other obligations applied in trade relations, their mode of establishment, administrative procedures in customs, the legal regime of sale, transport, distribution of goods and services in a certain territory and the rules which cover the intellectual property, the patent and the copyright.

from the application of this principle among others in two cases: 1) In case of the creation of a customs union and a free trade zone[24]; 2) in the preferential relations established between a developed country and a developing country[25].

I.1.4.2 National Treatment (NT)

While MFN principle is linked to the trade regime among states, often known as "norm applied in the borders" the National Treatment principle is linked to the trade regime inside the country. This principle sanctions the obligation of every member state to treat equally the local products and services and those of the other countries, fulfilling thus the principle of non discrimination in trade relations inside and outside the territory of a state [26]. Based on this principle, all the taxes, rules and laws of a country should not accord a more favorable treatment to local products or services with the purpose of protecting them against foreign products or services[27]. The completion of these criteria, so, *making favors* on the one hand and *the protection purpose* on the other, comprise conditions for this principle violation[28]. Both elements should exist *simultaneously;* therefore it is often difficult to verify them in practice. A great assistance was given by the Jury and the Appeal Body in WTO, in their verification from case to case, creating thus a rich correspondence.

I.1.4.3 Reciprocity Principle

Reciprocity principle existed in trade relations since GATT time and it should be understood more in the political context more than the juridical one. This principle finds application more in negotiations between the parties and in some cases it is sanctioned in the agreement itself, like, for instance article XXVIII of GATT, which foresees making negotiations to reduce tariffs in reciprocity between the parties. Reciprocity in its earlier meaning was mainly the trade balance regarding tariffs. But presently, in the conditions of a more sophisticated negotiation by WTO member states, it is intertwined with "fair trade" principle[29], which is translated into a reciprocity for markets access, ensured also by issuing adequate laws and norms by one party so that the other party realizes this right.

---

[24] See article XXIV of GATT 94. Based on this article, free trade agreements and customs union are created. Deviation from MFN is realized by the application of very low or zero tariffs only for countries that are parties in the se agreements, or a more favorable regime for services for the countries that are parties in the agreement.

[25] For example, European Union accorded before a preferential treatment to Albania in the framework of the General Preferential System (GSP), which allows the application of very low or zero tariffs for Albanian products exported to EU.

[26] See article III of GATT, article XVII of GATS and article 3 of TRIPs.

[27] Tariffs are excluded in this principle.

[28] Article III of GATT foresees among other that: The Contracting Parties accept that taxes or other obligations should not be applied in the imported or local products with the purpose of national production protection.

[29] This kind of reciprocity was called aggressive reciprocity by the individual states or groups of states. For more, see: Richard Senti and Patricia Conlan, World Trade Organization, 1997

I.1.5 Decision Making Process in WTO

WTO is the only institution of the international trade system which rose as a result of the continuous negotiations by its founding members. Every WTO member state has the right of a vote[30]. Contrary to the other organizations like IMF or World Bank, it does not apply pondering in voting, as for example: percentage of a country's weight in world trade or the contribution paid. So, it foresees equal voting possibility for all the countries in spite of there economic level[31]. Usually majority voting is preferred in decision taking, but for questions concerning GATT often consensual decision taking is preferred. Article IX of WTO creation agreement foresees this. This is the only article, which foresees consensual decision taking and it is presumed to be extended in all the Uruguay Round agreements, but this remains only one interpretation. On the other hand, the idea of consensus may give the veto right to each state. Anyhow, we should admit that there is now unanimity in decision taking, the states that are not present and those who abstain can not prohibit consensual decision taking.
The common decisions are taken by consensus in the Ministers Conference and the General Council and in the cases, when the consensus is not reached, the decisions are taken by majority of all of the people present[32]. WTO agreement and its annexes interpretation is made by the Ministers Conference, and it is approved by ¾ of WTO member states. Based on WTO agreement, the Ministers Conference may vote the exemption of a country from the obligation of Annex I or WTO Agreement. The request to exempt temporarily from WTO obligation is made in the relevant Councils. To take such decision, when consensus is not achieved, decision is required to be taken by ¾ of WTO member states[32].

I.2 Conflicts solving

Part of Uruguay Round is the Memorandum for the Rules and Procedures managing Solution and Disagreements (hereinafter DSU), as an integral part of WTO creation agreement. The conflicts solving mechanism, sanctioned in this agreement, marks an a achievement not only in absolute terms, that is, in the efficiency shown within international system, but also in comparative terms, referring thus to other conflict solving mechanisms (for example International Court of Justice). Essential characteristic of this system is the *obligation* for *conformity*, which realizes an important element, not encountered before by international laws: the binding power[34]. Its success is linked to the sanctioning of some elements in article 3.2 of DSU, like: *security and predictability of multilateral trade relations, guarantee of rights and obligations related to agreements for all the parties and the agreements interpretation on the bases of international right interpretation norms.* However the advantages brought by this system compared to the system applied in GATT time, may be summarized in:

[30] The only exception is made in the case of EU, where and European Community has one vote and each member country in EU has one vote, (15+1) votes.

1) Establishing and deadlines and procedures in solving disagreements, from consultation to the adoption of recommendation from the Jury/Appeal Body.
2) Creation of an Appeal Body, which reviews the Jury legal interpretation of disagreements. The Appeal Body can not be considered as a court, it comprises a quasi-judicial mechanism.
3) The immediate adoption of the Jury and Appeal Body recommendations and delivery of the authorization as a response, if no consensus is reached to adopt the report.
4) The authority of the complaining party in order to require authorization to respond also in sectors that are not an object of conflict when the Jury report is not applied or when no satisfactory solution of the situation is achieved[35].

Starting from the above we reach conclusion that WTO is considered today as an organization with "teeth", but this does not necessarily mean that the Jury or the Appeal Body may impose on one state to change or invalidate a law issued against any obligation of the agreement. However, its recommendations are followed by the parties and the obligation for conformity creates the possibility to solve the conflict without counteracting as a first measure in case of violation.

I.2. 1 Procedures for conflicts solving

Every WTO member country should notify for issuing a rule affecting an agreement obligation[31]. This notification in most of the cases is accompanied by consultations that are necessary to solve the problems arising from its application, because it may happen that this rule comes against the agreements, causing harm on WTO. The interested parties should try for a satisfactory solution of the situation[32].

If such a consultation is not successful, then the affected party may deposit a request for the creation of the Jury (in the form of a complaint) to solve the disagreement[33]. Such a request may be made by one state or by some states together.

The Jury body is appointed by WTO Secretariat and it *should be approved by parties in conflict.* Its members' number goes from three to five when the parties require the latter. They are elected from the international, jurists, where a special care is attached to the conflict of interests[34].

---

[31] It is about normal notification procedures concerning the issuing of a sanitary measure or a counterbalance measure, subsidies, protection etc. This is a demand contained in all the WTO agreements. See for example article 25 of the agreement concerning Subsidies and Counterbalancing Measures, or article X of GATT 47

[32] Consultation is a necessary sanctioned demand in DSU. Article 4 of this agreement foresees the goal and procedures to be followed so as to avoid the accusations.

[33] See article 6 of DSU . The principles on which its work relies during the solution of a conflict are foreseen in article 7 of DSU.

[34] Usually in the jury people who have connections with states in conflict r have a declared attitude for questions concerning the concrete agreement, often in this level are involved academics and people with knowledge in the field of international commercial law who have an open attitude for a question. WTO Secretariat keeps a permanent jury list. If the states who are parties in the conflict do not agree about Jury body than it is elected by consultations between the General WTO Director, DSB Director and the Head of the Respective Council. See article 8 of DSU concerning the Jury creation.

After the composition of the Jury Body the hearing takes place for the claims of parties in the process and the third parties. The hearing is accompanied by the presentation of an intermediary jury report, with its comments and conclusions. Only after the parties have expressed their additional objections or suggestions for the first recommendation draft, the Jury makes the final report to be sent to DSB.

The report should be approved by DSB within a definite time as long as the latter agrees, or the discontent party does not appeal he question. If the question is appealed, it is heard by three out of seven permanent Appeal Body members elected by DSB[35] itself. The Appeal Body has jurisdiction only for questions concerning the law and with the agreements interpretation and in this case it is obliged to follow interpretations made by the Ministers Conference[36]. The Appeal Body reports are automatically adoptable by DSB, save the cases when no consensus is achieved to approve[37].

DSB does the monitoring of Appeal Jury and Body recommendation application to bring the rule that is the object of the conflict with WTO agreements in accordance with the respective agreement. If the state in question does not bring the law[38] in conformity with Appeal Jury and Body recommendations, then the other party may require the DSB authorization for response[39].

However another possibility is offered to the discontent party by the recommendation application, which, after using the consultation possibility, requires again the creation of a new Jury to examine the compatibility with the Jury or Appeal Body recommendations[40].

Fr a general view made to the system of conflicts solving in WTO, we observe that it is accompanied by negotiations and continues consultations and with a tendency to apply its results[41]. This unique system is conditioned by the very nature of the commercial relations which carry in themselves a great economic interest. In most of the cases it is necessary t take into account the special conditions that some countries and sectors involved in the conflict have.

I.2.3 Kinds of rights used in WTO

Multilateral trade system is based among others on the concept of rights and mutual duties for the parties relying on WTO treaties. In cases of violation of these

[35] Article 17 of DSU
[36] Shih article IX of WTO Agreement
[37] Article 17 paragraph 14 of DSU
[38] Bringing the rule in accordance with the Recommendation can be done by an existing law amendment or its total invalidation. The jury bodies may make suggestions for the manner of bringing the situation in accordance with the agreement, but this remains in the framework of voluntary and not compulsory recommendations to be applied by the states. See article 19 of DSU.
[39] Article 22.6 of DSU
[40] See article 21. 5 of DSU and 22.2 , 22.6 of DSU. During the application of this procedure and the article on the authorization for counterbalancing response, a conflict has been observed in the schedules placed by them, which has created the so-called "Sequencing Problem", encountered for the first time in the case of Bananas, European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 1997
[41] Antonio Casses " International Law" Oxford University Press 2001, p. 225

obligations or rights deriving from agreements, every WTO member state may require the interruption of these acts through the conflicts solving mechanism.[42]

The current mechanism offered by WTO foresees explicitly giving up one act or law coming against the agreement and bringing the situation in accordance with the recommendations given by WTO conflicts solving bodies[43]. This right leads us to the conclusion that the restitution notion, *status quo ante*, known by international law is applied to some extent in the context of WTO laws. So, the right claimed in WTO framework is *prospective* and it does not aim at restituting to the former state the parties in conflict, being thus in complete accordance with the perception of this means in the framework of international public right.

Article 3 (7) of DSU foresees hierarchically the rights that may be used in by parties in the conflicts solving mechanism.

First, the removal of the measure which is against an article of the agreement is required.

Second, the compensation is required, which is realized only when the law invalidation is practically impossible or when it serves as a temporary measure not in conformity with the agreement until the law invalidation.

Third, the claiming country may suspend the application of concessions or other mutual obligations deriving from the agreement, after it has been authorized by DSB[44]. In the cases of claims without agreement violation [45], the first means used is compensation. The state which prevented "the satisfactory effects" that had to be realized by the agreement application is not obliged to invalidate the law that brought this obstacle, but only to compensate the other party.

I.3 Albania and WTO

I.3.1 Membership Process

A few rules have been sanctioned in WTO for the conditions and the way of admission of a country in WTO. WTO, like many international organizations is composed of states that founded it and states that joined it in 1995[46] based on article XII of WTO Agreement. Not much is understood by the content of article XII about the criteria and procedures for a country's admission in WTO, creating thus a legal vacuum for the membership process. Membership has been realized more on the basis of unwritten rules and practically necessary precedents have been created to sanction the administrative way of membership.

---

[42] Shih DSU treated above, I.2

[43] Neni 19 i DSU

[44] Neni 3 (7) i DSU

[45] Shih nenin XXIII të GATT. Këtu bëhet fjalë për ato ligje të cilat nuk bien ndesh me marrëveshjet e WTO-së por pengojnë realizimin e të drejtave dhe përfitimeve të ofruara nga marrëveshjet.

[46] Since 1995 about 47 countries have applied and negotiated to become WTO members and from these countries half have been countries with an economy in transition, see: Marc Bacchetta and Zdenek Drabek: " Effects of WTO Accession on Policy Making in Sovereign States: "*Preliminary lessons from the recent experience of transition countries"*, WTO Staff working Paper, 2002 p. 2 in www.wto.org

Membership is made by negotiations for the "admission terms" between the candidate country and WTO and these terms are different for different states, as a consequence, the economic condition of a state determines the admission terms. These "terms" consist in a number of obligations deriving from the agreements and in definite trade policies contained in the membership Protocol of each state. The negotiated conditions are closely connected with the status by which one country joins WTO. The latter is important because it conditions the transitory period of WTO agreements application. So article XIV of WTO agreement foresees that the countries which have accepted WTO agreement, after its entry into force, apply the concessions and other obligations after a period of time starting from the moment this agreement enters into force as if they had accepted the agreement since the date of its entry into force[47]. So as a conclusion a transitory period has been foreseen for all the countries becoming WTO members.

The admission status is also linked with the possibility of using the "Preferential Treatment" clauses, defined in WTO agreements[48]. These clauses have been used for the less developed and developed countries, which should be qualified as such in the moment of joining WTO. In the framework of WTO currently there is no definition about the developing countries, they may be declared as such in the moment of joining WTO and everything depends on the negotiated terms. Concerning the less developed the situation is simpler, because they are recognized as such by United Nations, which have a list for such countries.

The admission process is characterized by asymmetrical relations, because the countries joining WTO, cannot negotiate with the existing countries other additional benefits, and the WTO existing countries require no more than a status quo. It has been observed that in most of the cases the countries joining later have been required to undertake more obligations than the existing WTO countries[49], because the organization itself has in its foundations the continuous trade liberalization.

I.3.2 Membership of Albania in WTO

Albania like many other states became WTO member with complete rights and obligations, after handing over and ratifying the membership protocol, based on article XII of WTO agreement[50]. The protocol is the company by the Work Group Report[10],

[47] See: Law on admission of Albania in WTO, Law No. 8648, date 28/7/2000

[48] The Preferential and Differential Treatment Clauses have been included in WTO agreements for the developing and less developed countries in order to teach two goals: first, to create equal conditions and a fair competition when the countries infrastructure is different; second, to avoid the deformations coming from the negotiating power of the developed countries. These treatments consist in the temporary derogation frm the agreements obligations, reduced tariffs for these countries goods, decrease of subsidies, defining a basis for the countervailing measures and the and limited flexibility for the specific obligations. Howevber, durin the years of WTO existence, the use of these rights was not easy for the above categories and the content of these laws has been much contested. The S&D treatment is part of Doha Agenda for renegotiation and improvement, with the purpose of using them by less developed countries. See: "Doha Round Briefing series, Special and Differential Treatment" , ICTSD, Vol.1 No 13, February 2003

[49] Bernard M. Hoekman & Michel M. Kostecki *" The Political Economy of the World Trading System ; The WTO and Beyond"* Second Edition , Oxford University Press 2001, p. 67

[50] Albania ratified the Protocol of admission in WTO by Law 8648, date 28/7/2000

which contains the schedule of commitments for the immediate and gradual liberalization of products tariffs and the services liberalization schedule, the application of standards for intellectual property protection and this document contains also the reforms related to privatization and a series of other measures concerning of institutionalization of market economy in Albanian The status with itch Albanian joined WTO, is that of a country with economy in transition[51]. This is observed also in the commitments that it has under taken for the reforms in the privatization of state companies. This can also be observed in the commitments it has made for the state companies privatization. A general view of the Protocol observes two categories of obligations. The first are in concrete terms and consist in fulfilling the commitments of the kind of tariffs reducing an services liberalization, which will be realized by applying the above-mentioned WTO principles. The second category has to do with the laws harmonization and bringing them in accordance with Uruguay Round agreements. Special agreements require that this bringing be continuous and Albania should notify WTO whenever it issues or amends a law affecting the fields related with them.

The obligations undertaken by Albania are unavoidable as long as they are linked with the obligations defined b the agreements themselves. For example: a change in the tariff higher than that defined by the membership Protocol would comprise a violation of article II:1 of GATT 94. This would give the right to every trade partner with Albania to require the change or the cancellation of this law that sanctions the tariff not in conformity with the commitments schedule, or give the right to him to require the authorization for response. The only way to deviate from the agreements obligations is the use of protection mechanisms offered by the agreements themselves for this purpose, which are the object of the second part of this article[52].

To realize the continuous communication among the groups of interest within the country, and within Albania and WTO, the WTO Secretariat has been erected in the Ministry of Economy. By this organization, Albania realizes also one of the important WTO principles like that of transparency and continuous notification.

It remains interesting to clarify which is the status of the agreement itself in our internal system from the international law point of view. Is it possible that agreement articles be invoked by Albanian Courts?

First, we may say that WTO agreements have been ratified on the basis of Constitution articles that cover international agreements[53]. Based on article 122 of the Constitution, these agreements become part of our internal system when they are ratified and published in the official gazette and they are directly applicable when they define explicit obligations and rights[54].

The direct application of WTO agreement is part of an open debate and it is determined by two elements: first, by the kind of system in which a country is classified;

[51] Marc Bacchetta and Zdenek Drabek, supra note 43

[52] GATT and other WTO agreements allow temporary evasion of obligations in situations defined by law and on the basis of procedures offered by agreements. In every case the balance of a free trade should not be lost and this should be shown in every mechanism used.

[53] WTO membership protocol was ratified on the basis of articles 78, 83.1 and 121 of Albanian constitution.

[54] Articles 122 of Albanian constitution.

dualist or monist[55], and second, by the nature of the agreement itself, "self applicability" of its articles[56]. Article 122/1 of the Constitution foresees that the international agreements become part of our internal system after their ratification in the parliament and the publication in the Official Gazette. From this point of view we may say that Albania belongs to the monist system. On the other hand this paragraph foresees that the agreements are directly applied when they are self applicable. To define this status of WTO agreements (their self applicability) the experience of other countries like EU or USA will be taken into consideration, as long as the Albanian Courts have not made any interpretation of this agreement. The courts of these countries have qualified GATT and the other WTO agreements not directly applicable[57]. This line of reasoning is assisted by the fact that these agreements are addressed to the states and do not generate rights and duties for the individuals[58]. WTO system itself or its agreements do not foresee the exhaustion of the internal judicial system before a case goes to the Jury in WTO[59]. So if the jurisprudence of these Courts will hire by the Albanian Courts in the framework of the comparative legislation, then the agreements would not be directly applicable even in our internal system.

SECOND PART

II.1. General Survey on WTO protective mechanisms

In general the trade agreements allow the general protection and exemption from some obligations deriving from them. This possibility consists in recognizing the right of a government or of a country to abandon or modify temporarily an obligation deriving from trade relations with the scope of home product protection.

In the General Agreement on Trade and Traffic (hereinafter GATT), part of Uruguay Round agreements[60], such mechanisms are foreseen, which though *an open violation of free trade*, have always been acceptable by the negotiating parties because they served as an *"rescue valve"* for the governments of various states. The moderate clauses in

[55] The monist system changes the international norm and makes it part of the internal only through the ratification of the agreement by a constitutional body, whereas the dualist system considers it as a special part from internal norms and it is transformed into an internal law only by special mechanisms (like the issuing of a law) for the application of an international norm in the internal legislation, in every sovereign state. For more see the systems: Cassese, supra note 45, p.163

[56] For more see: John Jackson; *"Status of Treaties in domestic legal systems- A Policy Analysis"*, American Journal of International Law, 86,310 , 1992

[57] See: Meinhard Hilf, "*The Role of National Courts in International Trade Relations*", Michigan Journal of International Law, 18, 321, 1997 , Decision of European Court of Justice in the case: Portugal gainst European Council, C-149/96, 1999

[58] Geert A Zonnekeyn "The Latest on Indirect Effect of the WTO Law in the EC Legal Order; The Nakajima case law Misjudged?" Journal of International Economic Law (2002) 597-608

[59] In spite of this conclusion, many authors have thrown the idea that invoking WTO laws in the internal system would strengthen the latter. The only achievement that might be mentioned in ths context is the decision of EU First Instance Court in cases Cordis against European Union T- 18/99, Bocchi Food Trade International against European Union, T-30/99, March 2001, which accepts the review of European rules in the light of WTO norms. See: ibid, and Hilf, supra note. 63

[60] Uruguay Round took place in 1986-1994

WTO/GATT agreements for the protective and exclusion mechanisms are divided in two main categories[61]:

1) In the first group are those mechanisms which refer to the situations defined legally and which allow a gradual increase of import barriers[62]. In this group the division is made between those situations which are called "unfair trade", which in most cases are subsidies for export and the other group foresees those situations that are not necessarily linked to the actions which comprise unfair trade, as for instance the emergent measures against imports increase.
2) In the second group exemptions from the general obligation are foreseen. This group includes the articles foreseeing protective measures for moral, public health, natural resources reasons. The measures taken in this context should not be discriminating and should not prevent free trade[63]. For example: Measures taken for national security; and the possibility to negotiate and modify schedules when the compensation has been offered by the country which requires applying this right.

The focus of this work will be the legal and practical clarification of some of these mechanisms[64]. A good part of them today is represented by special agreements like the one for antidumping or the protective measures. Since these agreements have a very large range of problems and require a true study, their elaboration will be general. The greatest concentration will be on GATT articles and references in specific agreements that will be made in case of changes or for further clarifications.

In general these mechanisms are used for the protection of special industries and fro these only three (trade balance, general exemptions and national security), require a larger economic reasoning. The measures referring to special industries are supported by a certain category of argumentation and claim, which are related mainly to the local companies' protection from the foreign competition.

II.1.1 Renegotiation of concessions (article XXVIII of GATT)

Scheduling of the concessions attached to the protocol of a country admission in WTO, comprises the schedule that is attached to GATT 94 agreement as an annex[65]. Tariffs in this schedule are compulsory for application by all member countries and every change in them that is not in conformity with the rules comprises a violation of article II:1 of GATT[66].

---

[61] Bernard M. Hoekman & Michel M. Kostecki *"The Political Economy of the World Trading System; the WTO and Beyond"* 2Ed. Oxford Press, 2001, p. 303

[62] We might mention here: Anti dumping, Counteracting Measures, Measures for the payments balance, Protection of infant industries, Specific protection measures, etc.

[63] See article XX of GATT, the paragraphs of this article are read in accordance with its preamble which foresees prohibition of discrimination in the measures taken for the environment or people's life protection and are accompanied by trade restrictions.

[64] The listing row makes no difference for the importance or hierarchy of these articles. The advantages and difficulties of their practical application will be presented for all the elaborated articles.

[65] Article II: 7 of GATT 94

[66] Article II: 1 of GATT 94 foresees that: Each contracting party should accord to the other party in trade no less favorable treatment than the one presented to the relevant schedule, annex of this agreement.

The compulsory tariffs may be modified or drawn only on the basis of rules set in article XXVIII of GATT 94. Tariffs negotiation has been used almost every year of GATT existence (1947-1995) and more rarely in WTO framework[67]. In GATT jurisprudence, only one case was brought before the Jury in the framework of this article's second paragraph[68].

The main principles on which concessions modification or removal are realized are:

1) *compensation by the country that requires such a thing* (hereinafter we will refer to it as the applicant country) *liberalizing other products.*
2) *Preserving the same reciprocity and bilateral advantage for the concessions,* so *preserving the same favorable treatment for other countries.* (article XXVIII: 2)[69]

Paragraphs of article XXVIII in broad lines include:

- The negotiation period for removing or modifying the concession.
- Countries involved in negotiations or consultations.
- Actions to be taken after the negotiations, whether an agreement has been reached or not between the parties.

Article XXVIII of GATT defines the continuous right within the defined deadlines for each state to negotiate the concessions whereas article XXVIII bis defines the rules for a multilateral round where all the countries for tariffs negotiations are involved.

A three year period starting from 1958 comprises the renegotiation *legal period* for the schedules modification or removal. Based on paragraph I of article XXVIII of GATT 94 and Ad Article XXVIII, the applicant country will notify all the countries ***for its aim*** of modification and it should do this no later than 6 months and no earlier than 3 months, before the ending of the legal period, (e.g.: between 1.7. 1987 and 30.9.87 before the starting of a three year period, for example, 1st of January 1988). Albania might use this possibility at the end of 2003, so that it could reflect the changes in 2004 Fiscal Package.

In spite of this three year legal period, paragraph 4 of article XXVIII recognizes the applicant country the right to make such a request at any time, requiring a preliminary authorization by the member countries, after it has presented this request to the Products Council.

Paragraph 5 of the article also defines that every state may reserve this right for the coming legal period, notifying the countries before the end of the three year legal period.

II.1.1.1 What should notification include

Notification should include products and tariffs respective numbers for which modification is required, and the countries which have the right of the first negotiator for this product. It should be clearly defined whether it is for modification or withdrawal from the obligation taken. If it is about the modification, then the offered change should be presented for notification, or notified to the partied concerned as soon as possible.

---

[67] Bernard M. Hoekman & Michel M. Kostecki, supra note 67, p. 309. The authors relate this fact to the readjustment of tariffs as a result of Harmonized System application by WTO member states.

[68] Canada-Withdrawal from Tariffs Concessions – Jury Report, L/4636-25S/42, 28 April 1978. The question had to do with renegotiation for the tariffs modification from specific to Ad valorem, for zinc and lead, between European Economic Community and Canada. The latter claimed that this modification of tariffs comprised a violation of paragraph 2 of article XXVIII of GATT.

[69] See: Instruction for tariffs notifications and non tariff measures in WTO Web Page: WT/TC/NOTIF/MA/1

Import statistics in a three year period for this product should be attached to the notification. If the applicant country presents no statistics for import, then it should take into consideration export statistics offered by the parties interested in this concession. Rom the date the statistics are made available, the other countries have 90 days available to notify their interest for participation in this renegotiation[70].

II.1.1.2 Countries taking part in the renegotiation:

According to paragraph I of article XXVIII, the applicant country should negotiate with:

a) countries that have negotiated since the beginning with the applicant country: nluded here are the countries which have bilateral agreements and are registered in the schedule, and those who took part in the negotiation round. With regard to the latter, the countries are considered t have an initial negotiation right if they demonstrate a principal interest, which is proved by taking into consideration a *reasonable period.* This reasonable period is calculated on the trade exchanges between the two countries for three years.

b) countries which have a principal interest: are considered those countries, which during the reasonable period, before the renegotiations have a greater concentration of trade in the applicant country market, than in the countries with which negotiation was held at the beginning, or that they would have had in absence of discrimination in quotes. To this category might be added also countries which show a great interest, because this product occupies an important place in its export.(Ad article XXVIII:7) .

c) countries with a substantial interest: this category includes countries which have or should have had in absence of discrimination in quantity restrictions, a significant part of the applicant country market. In GATT practice, a 10 % of the applicant country market has been recognized as a general rule to qualify the country as a substantial supplier of the applicant country.

Every country which thinks that it has a principal or substantial interest in the concession in question and willing to negotiate should, in the period of 90 days, after the distribution of statistics, communicate its claims in a written form to the applicant country and inform WTO secretariat. If these claims are accepted by the applicant country, then the country in question takes part in the negotiations, otherwise the country raising the claim should address the claim to the Council.

II.1.1.3 Negotiations results

Three situations are foreseen as possible to happen after the renegotiations:

1) Countries with principal and substantial interest reach an agreement: the countries are notified about the result and the tariff is modified. Negotiations should be concluded before the application of the new tariff.

2) Countries with principal interest reach an agreement, but countries with substantial interest do not agree, the latter are free that no latter than 6 months, after concluding the agreement, counteract removing an equivalent concession, negotiated at the beginning with the applicant country. (Article XXVIII: 3 (b).

[70] ibid.,

3) Countries with principal interest cannot achieve an agreement before the end of the legal period defined by paragraph I; the applicant country is again free to withdraw or modify the concession, but all the countries who were involved in negotiations or consultations are also allowed that, no later than 6 months after the end of the meeting respond by withdrawing an equivalent concession, negotiated since the beginning with he applicant country (XXVIII: 3(a))[71]

II.1.1.4 Interpretation memorandum for article XXVIII of GATT 94

Some paragraphs of article XXVIII of GATT 47 have been discussed in Uruguay Round. They refer to: a) additional definitions for the countries which have a principal interest, b) trade level between influenced countries, c) modification for new products, d) substitution of tariffs with tariff quotes, e) giving a right for initial negotiation.

a) **Countries with additional principal interest:** are the countries that have a high export percentage influenced by this concession. These countries are not part of the category of the countries foreseen in paragraph of article XXVIII. The aim of adding this category is to allow in negotiation also countries with a small or average level export.

b) **Trade based on MFN tariff**: only trade based on MFN tariff should be considered for the definition of a country with principal interest. This paragraph will not be applied in cases when trade between countries involved a) is increased as a result of the preferential treatment or b) will become such after concluding the negotiations.

c) **New products**: When a tariff has been withdrawn or modified n the products for which there are no three year statistics, the right of the first negotiating country is given to the country to which this right was given when other classifications were used: some clarifications are given me also for the countries that are categorized in the group of countries with principal and substantial interest.

d) **Tariff quotes**: When a tariff has been substituted by a quote, the compensation amount should surpass the trade quantity influenced by this substitution, but it should not surpass the amount o compensation caused by the complete withdrawal of the concession.

e) **Countries with new renegotiating right**- the country having a principal interest in the modified or withdrawn concession, will be recognized this right in the compensating concession, as long as they do not agree for another compensating way between them.

The above clarified elements should be included in the notification document of each country that requires renegotiating the tariffs. By a general look at the article we can s that the consultations and the political will between the parties is the one which defines the negotiations results. In the case of Albania the article application was somewhat difficult because in most of the cases, the argumentations built for the protection policies required by home industries, are not supported by statistical data[72].

II.2. Exemption from WTO and GATT obligations (Article IX:3 of WTO and Article XXV:of GATT, Waiver)

[71] ibid.

[72] See statistical data on beer or oil in ACIT database. www.acit-al.org

WTO and GATT agreements allow the exemption of a state from the obligations deriving from them, but the realization of this possibility is practically difficult. The rules for granting this exemption are foreseen in article XXV:5 of GATT and article IX:3 WTO Agreement. Though article IX:3 is more detailed, both articles define the same main criteria for granting it. Firstly: the exemption will be allowed only in **exceptional circumstances** and secondly: only when approved by a supermajority of WTO members (3/4 of the members).

The fact should be stressed that there is no large definition of what exceptional circumstance means in the framework of the article. Moreover, no reference is made to some other GATT article or in situation dictated by WTO agreement articles in general[73]. Rom the practice of this article application, it has been observed that in most of the cases the exemption has been made for bilateral agreements that were not qualified on the basis of article XXIV[74] of GATT and comprised a violation for the other GATT articles[75].

Paragraph 4 of article IX of WTO Agreement defines that giving this preference should be justified by exceptional circumstances that dictate it and it should also be accompanied by the conditions and terms that accompany this exemption. Usually the exemption from the obligations is given for one year. In the cases when it is given for more than one year, it should be accompanied by a reassessment of the situation that dictated it, so that assessment can be made whether the exceptional circumstances still exist an giving this exemption is justified.

Concerning the request for voting, article XXV: 5 of GATT foresees two separate situations:

1) First, the contracting parties should vote by 2/3 in order to give the right of exemption from obligations for the applicant country.
2) Second, this participation of 2/3 should include more than half of the contracting parties.

In the case of the exceptional situation voting, that is, when the parties convene to vote whether a concrete situation is qualified as such or not, the contracting parties might chnge the voting formula. But they should never avoid the threshold of 50+1.

This dividing voting test foreseen in GATT has been changed by article IX:3 (a) of WTO, which foresees only voting by ¾. According to this article every exemption from the multilateral agreements (including GATT) should be approved by ¾ of Ministers Conference members. Article IX:3 (b), foresees that initially the request to be exempt from obligations is addressed to the relevant Council, as for example, that of products, services or intellectual property. The latter presents this request to the Ministers Conference within 90 days. The conference defines whether exceptional circumstances justifying the measure taken exist, the conditions and terms that should be attached to it,

[73] Note on Waivers and Amendments in Raj Bhala:" International Trade Law: Theory and Practice", Lexis nexis, 2Ed. 2001, p. 580

[74] Article XXIV of GATT defines the conditions and rules for the creation of Free Trade Agreement and the Customs Unions.

[75] See: USA request for giving again the exemption for the agreement signed with Canada about cars, Goods Council Work Group: "United States-Imports of Automotive Products" G/L/103, 4/09/1996. Likewise exemption was granted for the partnership agreement between European Community and African Countries until 2007 for the application of preferential tariffs for products coming from African Countries to EU. In both cases the agreements comprises a violation of article I of GATT, that is, the MFN principle.

and the reassessment of the situation if prolongation or removal of exemption is required. In all these stages the Ministers Conference cplys the same role played by GATT Goods Council before WTO existence.

For different aspects WTO requires the surmounting of the proving burden by the country requesting the exemption. In many cases the exemption might consist in prolonging a period for an obligation application, or a transitory period, and in this context many of WTO agreements include articles of special and differentiated treatment (S&D) for the developing and the less developed countries. The use of these article is easier because it requires a simple consensus for the prolongation of the transitory period[76], in the meantime, exemption (waiver) requires a voting by ¾, which is practically difficult to be reached. Therefore WTO member countries unable to use articles S&D, are obliged to fulfill politically and economically the difficult obligations included in the agreement[77]. Albania has invoked this article (IX: 3 of WTO) for the prolongation of deadlines with regard to Telekom liberalization at the end of 2003.

II.3. Emergent measures against special products import (Article XIX of GATT and Safeguard Agreement)

II.3.1 The historical and economic reasons for the existence of safeguards

The existence of a clause to avoid the obligations deriving from free trade dated even before the existence of article XIX in GATT. Unite States of America were the first who used such a clause in 1943 and later President Truman issued an act which defined that such a clause should be included in all the trade agreements that America concluded[78].Later this clause as named "Safeguards against special products import" and it was foreseen in article XIX of GATT 47. But the reason for having such a clause even in GATT is not yet clear. Many skeptics about this article call it an opposition to the trade liberal and competing spirit foreseen by GATT. In spite of this attitude, here are at least fur arguments for this clause existence[79] and they are:

1) **Reestablishing the competitiveness conditions**

The measures established in the framework of article XIX give to the damaged industry the possibility to revive and adapt again to the competition conditions. By this time and these measures the possibility is given to industry to regenerate revenues and maximize the profit. The international trade market and especially the consumers do not profit from this situation.

2) **Costs redistribution**

Article XIX is a means for the costs distribution and the market adjustment. Since the local producers encounter a competitive import product, then they are obliged to start the production o competitive products for import, and such a phenomenon is accompanied by the readjustment of the factors: worker, human capital physical capital, etc.

[76] see: for example, articles 65, 66 of TRIPs- (Agreement of Trade Aspects Intellectual Property Rights)
[77] see : Bahla "International Trade Law and Theory" supra note 2, p. 579
[78] ibid., p. 1118
[79] ibid.,

3) Political saving valve

In such a situation when one of the industries is harmed by import increase the existence of this clause gives to the government the chance to take all the measures to protect it. In its absence, the pressure on government would lead the latter to take more protective measures for the local production, which might comprise violation of WTO rules.

4) Theory of public selection

This clause urged the WTO member countries and concretely the GATT members to take part in more binding concessions, something that could not be realized in the absence of this clause. This theory is nothing else than the application of macroeconomic instruments in the in political behavior. Article XIX in this context authorizes policymakers to focus more on the needs of a harmed industry. It serves as a key to regulate the trade off between market liberalism, created during the agreement signing and the possibility to protect after the agreement has entered into force. So, in some way, the existence of this clause helps the policymakers to avoid the "fear", coming as a consequence of undertaking numerous obligations. S a conclusion, the existence of this clause creates the conditions for accommodation WTO member states interests, within the interests and the nature of the agreement itself.

II.3.2 Emergent measures against import and Article XIX of GATT

In the framework of the articles which allow temporary avoidance or protection from the obligations deriving from GATT, there is article XIX of GATT, which allows the taking o some measures (called protection measures) against the import of a product, when it is thought that the local industry has been harmed, with the purpose of ***readjusting it, so that it can be revived.***

Te harm on this industry should come by a direct effect which is caused by bthe import increase and it is not necessary to be demonstrated that the imports are dump or subsided by the respective states. Uruguay Round brought the creation of "Safeguards Agreement", which explains and elaborates in a more complete way article XIX of GATT. In case of conflict between article XIX of GATT and one article of the agreement in question, the latter has priority.

Article XIX and the agreement require that, *if an unforeseen situation* happens in a member country *and it causes harm on the similar local production and the directly competing on,* then this country *takes protection measures* suspending the obligation in general or by removing or modifying the tariff concessions.

With regard to the word "unforeseen development" the Appeal Body in WTO gave in the case Argentina Footwear[80] and Korea-Dairy[81] a more detailed clarification of what is meant by this term. The safeguards agreement contains no definition for this situation, the only clarification is given somewhat in article XIX:1(a). Referring to the very meaning of the word "unforeseen", TA foresees this situation as unexpected for the

[80] Case: "Argentina-Safeguard Measures on Imports of Footwear" , W/T/DS121/AB/R, adopted on 14 / 12/ 1999

[81] Case: "Korea-Safeguard Measures on Imports of Certain Dairy Products", W/T/DS98/AB/R 14 /12/ 1999

local industry. ***So the situation should be unexpected and the conditions that dictated it should complete the requirements of article 2.1 of the Safeguards Agreement and these requirements are: 1) the product has been imported `to that extent and in those conditions; 2) which cause;3)a serious harm or a threat for serous harm to the local industry.***
WTO Safeguard Agreement requires that the member countries may apply a safeguard measure only after an investigation carried out by the relevant authority and make it public according to requirements of article X of GATT 94.

II.3.3 A general survey on WTO Safeguard Agreement (SA)

- As we mentioned above, a safeguard is applied when we are in the conditions of article XIX of GATT. The measures should not be discriminating for the countries, save the cases when there are preferential relations and in the cases when the quotes are set, which show that the big imports come from a special country.
- Measures should be placed after a complete investigation by a public competent authority, an investigation which starts at the request of the enterprises, the product of which has been harmed by this import. The notification should be made for all the interested groups and the possibility should be given to the latter to give their opinion.
- "Serious harm" or "threat for serious harm" of industry should be assessed during the investigation when this harm has become evident.
- It should be demonstrated that the import increase has caused serious harm. And moreover if other factors other than import increase have cause the harm, these factors should be taken into account.
- If applied the safeguards should protect r prevent the serious harm attributed only to import increase and facilitate the revival of the local industry. The measures should be liberalized increasingly. These measures include tariffs and quantity restrictions.
- The safeguards are limited in 4 years, but they may be prolonged to 8 years and the applicant country should prove that the industry is still harmed and still needs revival.
- If the measure has been applied more than 3 years, than it should be reviewed and if possible remove or liberalize in an accelerated way.
- The country applying such a measure, should demonstrate that it keeps substantially an equivalent level of concession with the country which is influenced by this export restriction. The countries I question may agree for the compensation. And if no agreement is reached, the exporting country may respond unilaterally. However this right is used by the countries influenced by safeguards for three years, or by countries where this measure has been used against imports which have increased in relative terms, but not yet in absolute terms[82] compared to local product.
- The safeguards may be applied against import by developing countries as long as it comprises 3% of the total import, or the import from the developing countries comprises 9 % of all imports.

[82] The absolute and the relative increase define two different situations which do not necessarily coexist. So, with the absolute increase it may happen that the exports of an importing country may increase, without necessarily having an increase of the local production. Whereas in the relative increase, though import has not increased, again compared to local production it marks an increase, because the latter has decreased.

This agreement found a large application in WTO framework. However in the case of Albania it cannot be invoked, because our country has accepted not to apply it as long as the inner legislative framework is missing[83]. So as a consequence, there is a need to issue a law that enables the application o safeguards and reflects the rights and obligations deriving from the agreement.

II.4 Government assistance for the economic development (Article XVIII of GATT 1994)

Article XVIII of GATT was included in the category of those articles that create **special and particular treatments for the developing countries and the less developed countries.** This argument is not drawn fro the article's content, but from the explanations and argumentations made on its existence. This article among others allows the modification or the removal of concessions in certain situations based on some procedures defined in it: I principle it aims at ensuring the protection of a developing countries industry, when there is a claim that it influences in the development f the economy and the increase of life standard in a country[84].

Firstly, article XVIII: A & C of GATT 94 foresees protection for the infant industry. In order for the claim of a country to rely on these sections it should argue that this industry: a) is in the early stage of development and b) it influences the standards increase in that country. Moreover this country should prove that its government cannot help the development of this industry, with the purpose of increasing the citizens standard of living and/or no other measure consistent with the obligations deriving from GATT can be invoked in such a way that the goal can be reached, that is, to protect this industry[85].

The country willing **to undertake** such an action according to section A or C[86] should consult in advance the countries that have an interest for this concession and WT, and present the compensation scheme, which in value should be the same with the one required to be protected. If no agreement is reached within 60 days, then the country willing to modify or remove the sanctions, may do it but at the same time it becomes subject of countervailing measures allowed by WTO[87].

Section B of article XVIII of GATT has been used more in WTO. This article refers to the payments balance and in order to realize this possibility, the country requires import quantitative restriction for the products it requires to protect. However, the protective mechanisms offered by this article do not have a great economic support because in most of the cases, import quantitative restrictions are not suitable measures to revive an industry and in general the mechanisms offered by this article cannot be replaced by measures that have more an economic sense as subsidies, public investments,

---

[83] See: Protocol of Albania membership in WTO. W/T/ACC/ALB/53 and W/T/ACC/ALB/41, in WTO Webpage www.wto.org

[84] WTO CTD to review provisions on economic development , Bridges Trade News , Vol 6, No 31, 18 September, 2002

[85] ibid.,

[86] When tariffs modification is required, the claim of a country is supported by article XVIII; A, and the procedure as I mentioned is the same with hat of renegotiation, article XXVIII of GATT. Other paragraphs B and C allow quantity restrictions as protective measures for this industry.

[87] Article XVIII of GATT

and protective measures[88]. Moreover, WTO countries are depositing proposals related to the paragraphs of this article for further clarifications and the possibility and the concrete situations in which it can be used.

The possibility of applying this article in Albania's conditions is limited, not only for the economical reasons elaborated above, but also for the fact that it is not qualified as a developing country or less developed country in WTO framework.

II.5. Subsidy and countervailing measures (Article XVI of GATT and The Subsidies and Countervailing Measures, SCM)

An important result of Uruguay Round is also the Agreement on Subsidy and Countervailing Measures (hereinafter SCM[89]), which completed materially and procedurally article XVI and article XVI of GATT 94 concerning subsidies. The new things brought by this agreement might be summarized in:

- It gives for the first time the definition of "subventions" and "serious harm".
- It prohibits exports subventions and the subsidy contingent used for the local production.
- It creates a general idea about harms brought by some kinds of subsidies.
- It defines and strengthens the procedures for showing the cases when the harm is serious in the foreign market.
- It defines the categories of government assistance and which will be not – countervailing in the cases and terms defined by the agreement.
- It requires by the developing and less developed countries to present the subsidized exports and the subsidized imports substitutes and to accelerate the presentation of these exports, when this country manages to be competitor in global markets for this product category.
- It requires the application of conflicts solving system offered by WTO which will assist that the Jury reports are not blocked by those governments that are applying subsidies for exports[90].

Article 1 of the agreement defines that the subsidies are realized when there is: *1) financial contribution by the government or some other public organization within the territory of that country[91] and 2) confer of benefit [92]*. Both conditions should exist simultaneously, that is a grant cannot be called subsidy if it does not confer benefit for the one receiving it. The agreement does not define what benefit is, but the Appeal Body in the case (Canada – Civil Airplanes)[93] defined that: *the benefit is conferred when the receivers of the subsidy benefit to that level that would not be possible without this contribution*[94].

In the context of countervailing measures, article 14 of the agreement SCM defines when this kind of measure gives benefits. The subsidies should also be specific, to

[88] See Hoekman & Kotescki, supra note 67, p. 339
[89] Agreement on Subsidies and Countervailing Measures
[90] See: Raj Bahla: "The Uruguay Round SCM Agreement",
[91] The agreement itself foresees a list of the kinds of financial contributions, like credits, grants, etc.
[92] Article 1 of SCM agreement, 1994
[93] Case – Canada – Rules influencing civil airplanes export. WT/DS70/AB/R
[94] Canada – Civil Airplanes, Report of TA, before 157

support one definite sector or product, otherwise it would be difficult to qualify a measure based on the agreement. There are three kinds of "specifics" defined by the agreement: Specific Companies – the government targets a specific company; Specific Industry – the government defines a special industrial sector; Specific Regions – the government subsidizes sectors in separate areas of the country.

The agreement defines three categories of subsidies:

1) Subsidies prohibited by law or in fact – are those foreseen by article 3 of the agreement and are mainly those that are firstly linked to the performances in export[95].

2) Countervailing Subsidies – here are included those measures contested by WTO, or are subject of countervailing measures[96]. Subsidies in action are not expressly prohibited, but become subject of a complaint in WTO, when they cause negative effects disfavoring the other party. There are three kinds of negative consequences: 1) Harm on local industry and in this case the harmed country may use countervailing measures. 2) Serious harm is usually accompanied by exports displacement and the country may be suited as the harmer of the export interests for the other country. 3) When the benefits conferred by GATT 94 are aggravated. For example, when market access increases as a result of tariffs decrease (in GATT framework), it is prevented by subsidies.

3) Inactive Subsidies – are some subsidies conferred in certain conditions and situations. So, based on article 8.2 of the agreement clearly defined these exceptional cases: a) government assistance for industrial researches and activities related to competition; b) government assistance for some areas in disadvantage; c) government assistance to adapt the work environment to the requirements for environment protection. In these cases the countervailing measures cannot be applied.

II.5. 1 Countervailing Measures

Part V of SCM agreement foresees when a country may use countervailing measures an for this, they are foreseen *materially*, that is, when such a measure can be taken, and procedurally, so the way in which it can be taken. A country may apply a countervailing measure only when it reaches the conclusion that *imports have been subsidized* and have *caused harm* on local production. A *causal relation* should exist between these two conditions, because otherwise such measures cannot be applied. The conditions which define whether a product has been subsidized or not have been given in broad lines above and they are reflected in the first part of the agreement.

This part foresees the first and the final steps to be taken, and the time during which this measure will be applied. These steps should be transparent and all the interested parties should give their opinion on this decision and the relevant authority should give a complete explanation on how did it achieve these results.

II.5.2 Notification

[95] Together with the agreement there is an annex list for prohibited subsidies.

[96] See: "Agreement on Subsidies and Countervailing Measures ("SCM Agreement) overview" in WTO Webpage.

Based on the agreement for both kinds of measures, the subsidies and the countervailing measures, every WTO member is obliged to notify the SCM Committee. Article 25 of the agreement requires that all the member countries notify the subsidies used for all kinds of industries sectors and agricultural subsidies. The notifications made are subject of discussion and review in SCM Committee. On the other hand, article 32.6 of the agreement foresees the notification for all the laws and acts issued in the framework of countervailing measures. In this case the countries should notify the first measures taken, the final acts, the time of this measure application, and the relevant authority dealing with the investigation[97].

As in the case of protecting measures against imports increase, Albania cannot use the countervailing measures for the subsidized products, because it has not completed the legal framework. As in the first case, the legislation completion is a necessity, because many of our trade partners export subsidized exports. The completion of this legal framework would give to the local business the possibility to better protect n the conditions of unfair competition.

II.6. Anti dumping measures (Article VI; 1-2, 4-6 of GATT, and the Agreement on the Application of Article VI of GATT (Antidumping Agreement ADA)

Article VI of GATT foresees that dumping is caused when an exporter sells product in the foreign market at a lower cost than the product value itself. So, in broad lines, this practice happens when the price, with which the producer offers the product, is lower than that offered in his on country[98]. The difference between the local price and that in the foreign market is usually called "dump margin". The formula used to calculate the dump is:

$$\text{Dump percentage}^{99} = \frac{\text{Normal value} - \text{export price X 100}}{\text{Export Price}}$$

The discipline offered by GATT for dumping was completed by the Code negotiated in Kennedy Round. Anti Dumping Agreement, (hereinafter ADA) was concluded in Uruguay Round and it became part of the Sole Package offered by this Round.

ADA, offers more details and rules for all the anti dumping procedures, fro the investigation and certification that it exists up to taking countervailing measures to protect the local production and to eliminate the unfair trade[100].

Like the agreement for SCM, ADA also comprises of material and procedural articles. First, article 2 of the agreement defines the dump calculation according to the formula explained above. This formula foresees a standard dumping calculation, whereas article 2.2 of ADA foresees the alternative ways of dumping calculation. These ways are used in the cases when the usual trade situation has no product sales in the exporting country market, then the comparison is made with the export price of a third country

[97] See: "SCM Agreement, a General Overview" WTO Webpage.
[98] I this case the selling price in the country market is equal to the product value.
[99] If the formula value is positive then there is dump, if it s negative or zero, then there is no dump.
[100] See: John Jackson "World Trading System", Second Edition 2002, p. 247-274

proving that he export price includes the product value plus the administrative selling cost. Further are the rules on he bases of which the material harm will be defined. It is important to certify even in the case, as I the case of SCM, that there is a causal relation between dump and the harm caused to an industry by this dump[101].

The definition of what comprises local industry is an important element defined by the agreement. So article 4 of ADA classifies as "local industry" that industry, which produces "similar products"[102] to those imported and is dump.

Concerning the procedural aspect, the agreement has foreseen as the main requirement the existence of transparency, that is al the investigations and measures that should be made transparent. The investigation may start by a petition of the harmed producers and the further actions are realized by the specialized public authority. All the investigation rules have been foreseen in the agreement. For example, the investigation may not last more than 1 month from its starting day.

Article 9 of the agreement defines the measures taken by the country whose industry has been harmed by dump products and the rules about its compensation. In this case a customs tax is set, the value of which should be lower than the dump percentage[103]. Another measure is that when the price is undertaken by the exporters, who increase it (the price) in order to eliminate the harm of the local product[104]. One of the achievements of the agreement is the so-called "sunset" clause (article 11 of ADA), which foresees the possibility of reviewing the antidumping measures within 5 years from their application date.

The continuous notification of the measures taken in the framework of antidumping and their application should become known in advance WTO Antidumping Practices Committee.

ADA agreement is one of the agreements invoked largely n the mechanisms of conflicts solving in WTO, and its articles have been further clarified and elaborated by the Jury and the Appeal Body[105].

Albanian Parliament has approved the law on Antidumping and the latter is a reflection of the agreement articles. However, its application requires a better understanding of the law itself, and a better cooperation among the business and public authority groups to carry out the investigations so that the harm caused to the local business dump imports can be eliminated.

Conclusions

Free trade promotion, harmonization of trade policies and balances preservation in economic developments, until the alleviation of global poverty, nowadays, comprise World Trade Organization prerogatives. The latter was conceived not only to sanction the principles and terms in which these aims would be realized, but to also offer suitable

[101] Article 3 of ADA foresees the factors to be taken into account in defining the harm and paragraph 5 f the article requires the existence of the relation between the two elements.
[102] Similar products are those having common characteristics and replacing each other.
[103] See paragraph 3 article 9 of ADA.
[104] See Article 8 of ADA
[105] For more see: “Agreement on application of Article VI of GATT, a general view". In WTO Webpage, www.wto.org

mechanisms for achieving them. The bodies created in this organization realize the participation of member countries in making global policies but however, the possibility developing and less developed countries to impose on this decision taking remains contested. This process often is turned into a battlefield of hot debates and clash of interests.

The mechanism of conflicts solving is another possibility which guarantees predictability of trade relations and realization of rights and obligations for al the parties I agreement. Though its role today is limited in the demand and obligation for compatibility the fact that a great number of o cases goes to the Conflicts Solving Bodies shows that this mechanism works and marks an achievement in international trade relations. WTO includes a series of fields which make its action range more complex. Under its umbrella it is aimed to crystallize more and more fields which are connected to market liberalization.

By WTO membership, Albania creates more possibilities to develop an economy in accordance with the international rules and standards. In the membership framework it has undertaken a series of commitments, which affect fields with a great economic importance, therefore the trade policies are accompanied debates efforts of all groups of interest to keep the balance between trade liberalization and local business strengthening. In spite of the difficulties, the participation in WTO remains a necessary condition for the prevalence of rule and law I trade relations, a condition affecting directly the economic development of the country.

All the actions coming against these liberalizing processes comprise an open violation of its agreement articles. Therefore in order to keep a continuous balance between the various groups of interests and the unexpected trade developments, WTO member countries have allowed special clauses used to protect local industries. Once again it should be stressed that their application should be made only when the terms foreseen by the law, that is, by WTO agreements, are fulfilled and only on the basis of respective procedures. In every case of its use, the reciprocity and liberalizing balances preservation is required and they are realized through the obligation for compensation and by setting deadlines and the possibility to reassess the protective measures and conditions that created them.

The protection of local industries from the import increase is realized by articles that allow the tariffs negotiation and the application of protective measures, when it is certified that imports increase up to the point of harming the local production. For both mechanisms a compensating scheme is offered for the trade partners.

Another group of protective measures refers to the cases when we have to do with unfair trade, like dump or subsidized imports. In these cases no compensation is required, but a transparency in taking countervailing measures and the protection level should be no bigger than the harm caused.

WTO agreements and Conflicts Solving Bodies have offered a field of application and consolidation for these rights. The questions coming to WTO on the basis of these articles have helped in a better understanding o the protection possibilities foreseen by the agreements.

In the conditions of Albania a difficulty is observed in the qualification of concrete situations, that is, the possibility to protect within the legal room offered by the agreements, because in most of the cases the respective legislation does not exist, or there

is not a good articulation of the local business claims. Therefore the cooperation among groups of interest, (Government - Business), t complete the legal framework and preserve the conformity with WTO laws, is the only way to avoid the conflicts and strengthen the market economy.

Annex I: WTO Structure