



**Customs Union and CIS FTA in the WTO context:  
conflicts of laws and jurisdiction.**

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**Таможенный союз и ЗСТ СНГ в контексте ВТО:  
коллизийный и юрисдикционный аспекты**

Alexey Anischenko/Алексей Анищенко

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- The Issue
- Potential challenges
- Legal Framework
- Recent Advisory Opinion of the CIS Economic Court
- Perspectives



In 1973 *Sir Ian Sinclair* observed

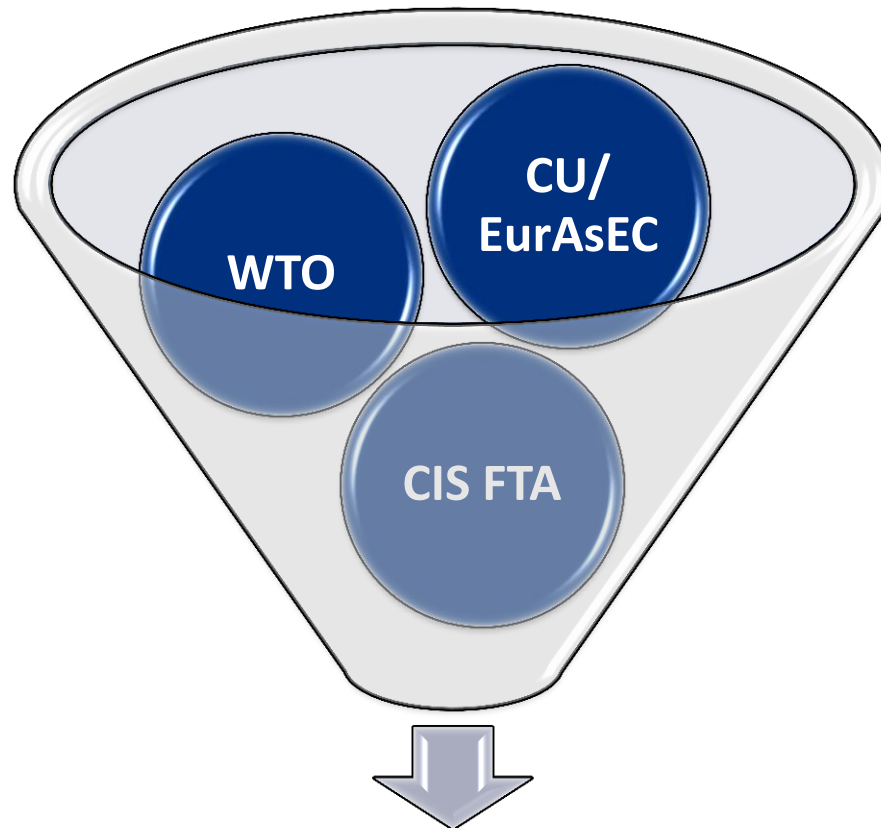
“with the post-war growth in international co-operation, accompanied by a massive increase in the numbers and range of international agreements of a law-making character, **the problem of incidental conflict between successive treaties has become more acute.**”

Source: Sinclair, I. 1973. *The Vienna Convention on the Law of Treaties*. 1<sup>st</sup> ed. Manchester: Manchester University Press.

# CIS “Spaghetti bowl”

CIS FTA (9)	CU (3)	EurAsEC (5)	WTO (6)
Armenia			Armenia
<b>Belarus</b>	<b>Belarus</b>	<b>Belarus</b>	
<b>Kazakhstan</b>	<b>Kazakhstan</b>	<b>Kazakhstan</b>	
Kyrgyzstan*		Kyrgyzstan	Kyrgyzstan
Moldova			Moldova
<b>Russia</b>	<b>Russia</b>	<b>Russia</b>	<b>Russia</b>
Tadzhikistan*		Tadzhikistan	Tadzhikistan
Ukraine			Ukraine
Uzbekistan*			

# Who decides and on which legal basis?



**Law ? Venue**

- WTO+CU+CIS FTA Member vs WTO+CIS FTA Member
- WTO+CU+CIS FTA Member vs WTO+EurAsEC Member
- WTO+CU+CIS FTA Member vs CU+CIS FTA Member
- WTO+CU+CIS FTA Member vs CIS FTA Member
- CU+CIS FTA Member vs WTO+CIS FTA Member
- CU+CIS FTA Member vs WTO+EurAsEC Member
- CU+CIS FTA Member vs CU+CIS FTA Member
- CU +CIS FTA Member vs CIS FTA Member
- WTO+EurAsEC Member vs CIS FTA Member
- WTO Member vs CU+CIS FTA Members

# Possible Negative Effects

- “Abusive” forum shopping → ■ Defendant forced to litigate in difficult fora
  - Parallel proceedings
  - Successive proceedings
  - Conflicting decisions → ■ Fragmentation of international trade law
- Lack of legal economy  
■ Lack of legal certainty



- Vienna Convention on Law of Treaties (art. 26, 30, 34)
- GATT (Art. XXIV), GATS (Art. V), DSU (Art. 23)
- Agreement on the Functioning of the Custom Union in the Framework of the Multilateral Trade System of 19.05.2011
- Treaty on Establishment of EurAsEC of 10.10.2000
- Agreement on Status of CIS Economic Court of 06.07.1992
- Statute of the EurAsEC Court of 05.07.2010
- CIS Free Trade Area Agreement of 18.10.2011



# Possible Venues



- **Art. XXIV GATT:5**

*“ ... the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area ...; **Provided that:**”*

- **Art. V:1 GATS**

*“This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, **provided that** such an agreement:”*

- **Art. 23:1 DSU**

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

- **Every treaty in force is binding** upon the parties to it and must be performed by them in good faith (art. 26)
- When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions **of that other treaty** prevail (art. 28.2)
- When all the parties to the earlier treaty are parties also to the later treaty ... the earlier treaty applies only to the extent that its provisions are compatible with those **of the later treaty** (art. 28.3)
- A treaty does not create either obligations or rights for a **third State** without its consent (art. 34)

- From the date of accession of any of the Parties to the WTO, the **provisions of the WTO Agreement** as set out in its Protocol of Accession, **including the commitments** undertaken by this Party as part of the terms of its accession to the WTO, **which relate to matters that the Parties have authorized Customs Union Bodies to regulate** in the framework of the Customs Union, as well as the legal relationships, regulated by the international treaties, constituting the legal framework of the Customs Union, **shall become a part of the legal framework of the Customs Union.**
- Regardless of the provisions in paragraphs 1 and 3 of this Article, **a Party which is not a Member of the WTO shall have the right to deviate from the provisions of the WTO Agreement**, including the commitments undertaken by the Party which are WTO Members that are part of the legal framework of the Customs Union, to the extent that the legal framework of the Customs Union and the decisions of Customs Union Bodies are required to be adjusted pursuant to Article 2 and/or its national legal regime autonomously regulates the matter.

*Art. 1 of the Treaty On the Functioning of the Customs Union  
in the framework of the Multilateral Trading System*

- The Parties shall adopt measures to adjust the legal framework of the CU and the decisions of its Bodies to comply with the WTO Agreement .... Prior to adoption of such measures the **provisions of the WTO Agreement, including the commitments** undertaken by the Parties as a terms of their accession to the WTO, **shall prevail** over respective provisions of the treaties concluded within the framework of the CU and of the decisions adopted by its Bodies.
- The rights and obligations of the Parties resulting from the WTO Agreement , as set out in each Party's Protocol of Accession, including the commitments undertaken by this Party as part of the terms of its accession to the WTO, which become part of the legal framework of the CU, **can not be abrogated or limited by decision of the Bodies of the CU, including the EurAsEC Court**, or an international agreement concluded between the Parties.
- When making an international treaty in the framework of the Customs Union and when CU Bodies adopt and apply CU acts, the Parties **shall ensure the consistency of these treaties and acts with the WTO Agreement.**

*Art. 1 of the Treaty On the Functioning of the Customs Union  
in the framework of the Multilateral Trading System*

- This Agreement does not prevent the Parties from participation in agreements on customs union, free trade and/or frontier trade **in accordance with WTO rules** and, in particular, Art XXIV GATT 1994.
- Provisions of this Agreement shall apply **in relations between CU and CES members** inasmuch as they do not contradict:
  - International agreements, concluded by them within CU and CES, as well as decisions of CU Bodies made in accordance with them;
  - Bilateral treaties, concluded between CU and CES members.
- Member's participation in [above mentioned] international agreements shall not restrict their rights or discharge their obligations under this Agreement **towards other Members**, which are not parties to those agreements.

***Art. 18 CIS FTA***



- ... the dispute may, **at the discretion of a Member**, to be submitted for consideration by the **CIS Economic Court**... or **commission of experts** in accordance with the procedure for settlement of disputes, provided in Annex 4
- Disputes on questions, that are regulated in this Agreement by reference to the provisions of the WTO Agreements, between parties, which are WTO members, are resolved **in accordance with respective WTO agreements**. **This shall not deprive** the Parties, which are WTO members, to make use of above means of dispute resolution.

*Art. 19 CIS FTA*

- Interpretation of art 2.1 of the CIS FTA Agreement 2011
- Question: What is the “**customs territory**” of a CIS FTA Member that is also a CU Member in the context of CIS FTA?
- Issues before CIS EC:
  - **Does CIS EC have jurisdiction?** YES
  - **May CIS EC apply WTO and/or CU law?** NO ANSWER





- The three presidents discussed key areas in integration cooperation, the functioning of the Customs Union and Common Economic Space functioning, progress on the drafting of the **agreement to establish the Eurasian Economic Union as from January 1, 2015**, and the possibility of drafting an agreement on Armenia's accession to the future union.

<http://eng.kremlin.ru/news/6768>

# Case by case approach: a system will be construed over time



- “Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements — Innovative or Variations on a Theme?”
- *Claude Chase, Alan Yanovich, Jo-Ann Crawford, and Pamela Ugaz, WTO, June 2013*
- Available at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201307\\_e.htm](http://www.wto.org/english/res_e/reser_e/ersd201307_e.htm)
- “Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements”
- *Kwak, Kyung; Marceau, Gabrielle, WTO, 26 April 2001*
- Available at: [http://www.wto.org/english/tratop\\_e/region\\_e/sem\\_april02\\_e/marceau.pdf](http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf)

## Thank You! Questions?

**Alexey Anischenko**

Partner

phone +375 17 306 21 02

mobile +375 29 621 08 01

[alexey.anischenko@sorainen.com](mailto:alexey.anischenko@sorainen.com)

### **Estonia**

Pärnu mnt 15

10141 Tallinn

phone +372 6 400 900

fax +372 6 400 901

[estonia@sorainen.com](mailto:estonia@sorainen.com)

### **Latvia**

Kr. Valdemāra iela 21

LV-1010 Riga

phone +371 67 365 000

fax +371 67 365 001

[latvia@sorainen.com](mailto:latvia@sorainen.com)

### **Lithuania**

Jogailos 4

LT-01116 Vilnius

phone +370 52 685 040

fax +370 52 685 041

[lithuania@sorainen.com](mailto:lithuania@sorainen.com)

### **Belarus**

ul Nemiga 40

220004 Minsk

phone +375 17 306 2102

fax +375 17 306 2079

[belarus@sorainen.com](mailto:belarus@sorainen.com)