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## Integrating in a Rough Neighbourhood? The Part of Sustainable Development in the EU Economic Integration Efforts in the post-Soviet Space: the Case of Moldova by A. Aseeva and A. Shishkova

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# Integrating in a Rough Neighbourhood? The Part of Sustainable Development in the EU Economic Integration Efforts in the post-Soviet Space: the Case of Moldova

Anna Aseeva\* and Alexandra Shishkova\*\*

## Abstract

*Gunnar Wiegand and Evelina Schulz have labelled the European Union (EU)'s trade facilitation efforts in the post-Soviet space as an integration 'in a rough neighbourhood'. With this in consideration, this article looks at the impact of the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Moldova on the development of the latter in a broader context of the EU's Eastern Partnership (EaP) and European Neighborhood Policy (ENP). There is a clear link between the EaP/ ENP framework, within which the policy of extending EU legislation to the post-Soviet states is actively promoted, and the Association Agreement with Moldova. Our analysis of the implementation of Moldova's economic integration into the EU market highlights not only positive but also several negative trends of this process. Namely, in the shorter term, Moldova's economic, political and social benefits from the DCFTA are far from sustainable, as they are primarily associated with drastic legislative changes, as well as an increase in the export of raw materials and low-tech goods. In the long term, however, the DCFTA provisions bear the potential for the sustainable development of Moldova; but the effectiveness of their implementation depends primarily on solving systemic problems in the country. Against this background, we then offer an analysis of recent transnational disputes over one of the most crucial elements of Moldova's sustainable development—namely, electricity. In particular, the so far latest ruling in the Energoallians 20 year-long row is essential both for the resolution of future transnational energy disputes under the Energy Charter Treaty (ECT) and for a better understanding of the EU's attitude towards Moldova and its further European integration.*

## 1. Introduction

Moldova's geographic location is strategically advantageous for many reasons. Neighbouring the European Union (EU) at the West, it has the potential to further develop trade and investment relations with EU member states. Looking Eastwards, Moldova can both supply its products and services to the markets of the Commonwealth of Independent States (CIS) and provide transit routes between the CIS and the EU. However, following the independence of Moldova, a period of internal political conflicts, as well as external crises of all sorts, has arisen. This has considerably affected the country, consequently not allowing it to explore its commercial capabilities to the full. To date, it is the poorest country in Europe.<sup>1</sup> The paradox is that many of the difficulties that Moldova faces are caused by its—allegedly advantageous—location, especially at the present stage of international relations, namely, because of the recent rows between the EU and Russia as a consequence of the crisis in Ukraine.

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<sup>1</sup> World Bank, 'The World Bank in Moldova' (10 April 2019)

<<https://www.worldbank.org/en/country/moldova/overview>> accessed 13 September 2019.

Some of the internal difficulties relate to the polarity of the political elite, part of which seeks a gradual integration with the EU, while the other part aims at strengthening the relations with the CIS countries - especially Russia. Moreover, for most of the political elite, progressing in either of the above directions often excludes the possibility of fully fostering relations with both sides.

External challenges relate to the instability of the political situation in the region, in which Moldova may lose markets for its products and services. For instance, at the beginning of 2019, Russia had imposed sanctions against Ukraine; restricting the import of more than 50 commodity items to the Russian Federation, including not only goods produced in Ukraine but also products transported through its territory.<sup>2</sup> Since Moldova mainly exports its products to Russia through Ukraine, this has become an obstacle for Moldovan producers trying to export their goods to the Russian market.<sup>3</sup> Although this barrier was gradually removed through an exception accorded to Moldovan suppliers,<sup>4</sup> this external political situation obviously affects the development of the country.

In this situation, the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Moldova can be seen as a lever, although this avenue is debatable on many accounts. The DCFTA is an integral part of the Association Agreement (AA) between the EU and Moldova, negotiations on the creation of which began back in 2010.<sup>5</sup> In 2014, the EU signed AAs/DCFTAs with Georgia, Moldova, and Ukraine, and since then the EU-Moldova DCFTA thus applied provisionally until its full ratification by the parliaments of EU member states and entered into force on 1 July 2016.<sup>6</sup>

In this regard, it is essential to understand how the form, content, and context of the DCFTA could affect the economic and social development of Moldova (section 2) and to what extent it is likely to contribute to the sustainable development of the country and a wider affected geo-economic area in the region (section 3). There is usually a gap between law-on-the-books and law-in-action. In the context of our article, there is a risk that EU provisions will be transposed to the country's legislation, but will in practice be hardly implementable because of the absence of significant modernization of Moldovan production infrastructure, weak institutions and lack of financial resources (section 4). An overall assessment of positive and negative effects of the DCFTA on achieving sustainable development in the country is summarized in section 5, with a bonus on recent transnational disputes involving Moldova. In section 6, we provide our concluding remarks.

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<sup>2</sup> Igor Kuleshov, 'Молдавский экспорт теряет градус' (*Коммерсантъ*, 11 January 2019) <<https://www.kommersant.ru/doc/3850670>> accessed 9 June 2019.

<sup>3</sup> *ibid.*

<sup>4</sup> Valery Oktiabrev, 'Россия разрешила транзит молдавских товаров по территории Украины, рассказал Додон' (*Парламентская газета*, 2 February 2019) <<https://www.pnp.ru/economics/rossiya-razreshila-tranzit-moldavskikh-tovarov-po-territorii-ukrainy-rasskazal-dodon.html>> accessed 13 September 2019.

<sup>5</sup> European Commission, 'Association Agenda Between the European Union and the Republic of Moldova' European Commission (Brussels, 26 June 2014) <[https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/customs/policy\\_issues/international\\_customs\\_agreements/geomoldukr/eu\\_moldova\\_association\\_agenda\\_26\\_06.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/policy_issues/international_customs_agreements/geomoldukr/eu_moldova_association_agenda_26_06.pdf)> accessed 9 October 2019, 1.

<sup>6</sup> Wirtschaftskammer Steiermark, 'Handelsabkommen der EU mit Moldau' (3 January 2019) <[https://www.wko.at/service/aussenwirtschaft/Handelsabkommen\\_EU-Moldau.html](https://www.wko.at/service/aussenwirtschaft/Handelsabkommen_EU-Moldau.html)> accessed 9 October 2019.

## 2. An Overview of the DCFTA and its Place in the EU Eastern Partnerships

The conflict in Ukraine is one of the critical recent examples of exogenous events adversely affecting the economic position of Moldova and its overall development. Moreover, it is suggested that the latest crisis in Ukraine is a result of the interference of not only Russia but also Western powers, with the EU playing a notable role. Namely, coercive, top-down and not bottom-up policies of the EU towards Ukraine manifested in political pressure on then-President Viktor Yanukovich to sign the EU-Ukraine AA, sharply contrasting with a relatively long process of reforms that most of the other post-communist economies must have gone through.

In this light it appears that a rather thin line separates illegal coercive interference from legal foreign policy tools of economic and soft power. These powers are used vigorously by the EU, especially in navigating under the banners of the European Neighbourhood Policy (ENP)<sup>7</sup> and the Eastern Partnership (EaP),<sup>8</sup> both actively promoting the rule of law in post-Soviet space, including Ukraine, as a prerequisite before accession process. A bold example of coercive interference in Ukrainian domestic politics was Western politicians' physical presence and support for regime change in the country and the US involvement behind the scenes.<sup>9</sup>

Liberal economic development requires a legal system which protects contractual and property rights.<sup>10</sup> A heightened significance of both the private and the economic spheres in the trade and investment liberalization efforts is thought impossible without participation of public authority regulating in the public interest. The principle and politics of the neoliberal rule of law, however, make this combination very unbalanced and clearly tilting in favour of the highest possible protection of property and contractual rights, often involving an enhanced interference in national policy space and derogations of both sovereign and human rights.<sup>11</sup>

Admittedly, depicting the recent events in Ukraine as consequences of a coercive economic and political interference of the West - including the EU - with the prospects of protecting Western companies investing in Ukrainian land and resources is quite contestable and not readily acceptable, especially from the perspective of a mainstream narrative regarding this conflict.<sup>12</sup> Notably, in no way our article aims to diminish the role of Russia in the Ukrainian crisis, but, instead, to emphasize other, not less essential roots and workings of this conflict.

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<sup>7</sup> European External Action Service, 'European Neighbourhood Policy (ENP)'

<[https://eeas.europa.eu/topics/european-neighbourhood-policy-enp\\_en](https://eeas.europa.eu/topics/european-neighbourhood-policy-enp_en)> accessed 8 September 2019.

<sup>8</sup> European External Action Service, 'Eastern Partnership (EaP)' <[https://eeas.europa.eu/topics/eastern-partnership\\_en](https://eeas.europa.eu/topics/eastern-partnership_en)> accessed 8 September 2019.

<sup>9</sup> See eg Peter Conradi, *Who Lost Russia? How the World Entered a New Cold War* (Oneworld Publications 2017) 253-255.

<sup>10</sup> See generally Nicolás Perrone, 'The international investment regime and local populations: are the weakest voices unheard?' (2016) 7(3) *Transnational Legal Theory* 383.

<sup>11</sup> *ibid.*

<sup>12</sup> See eg Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan 2015); Christopher Mark Davis, 'The Ukraine conflict, economic-military power balances and economic sanctions' (2016) 28(2) *Post-Communist Economies* 167.

Whilst, for instance, displacement due to armed conflict today can clearly constitute a violation of international humanitarian law (IHL),<sup>13</sup> coercive interference in domestic politics and legal order and the regime change due to the developmental rule of law projects as a vehicle of the protection, promotion and facilitation of foreign investments has a quite ambiguous legal status. Yet, international investment relations imply a set of ground rules, including legal and political reform and the regime change, which interfere in the domestic legal order. In the example of Ukraine, coercive, top-down policies of the EU imposed on Ukraine manifested themselves in political coercion to sign the EU-Ukraine AA. The latter would then prepare the necessary legal and policy framework that would be more welcoming, easier and especially more secure for foreign investors in Ukraine, thus both facilitating and protecting high-volume inflows of foreign direct investment (FDI) to the country.

Recent processes under the rubric of the EU neighbourhood policies regarding Moldova should as a result be scrutinized from not only the mainstream neo-classical economic perspective but also through the lens of economic interference; at times a disproportional one. Namely, the AA between EU and Moldova covers the political, economic, social and cultural ties between the two parties. Our article looks at the DCFTA integrally, which is primarily aimed at developing trade relations. Under AA art 1, among the main objectives is the desire to expand economic and trade ties for the gradual integration of Moldova into the EU internal market, including through the DCFTA, which aims to liberalize market access following the rights and obligations arising out of the World Trade Organization (WTO) membership.<sup>14</sup> This provision thus clearly indicates that the DCFTA is mainly based on WTO law.

What is different from a 'usual' FTA and represents a 'deep' integration is that Moldova should introduce into its national legislation up to 80% of EU regulatory and legal norms in the field of trade, investment and related issues.<sup>15</sup> There is a transitional period of harmonization of legislation, which varies from 2 to 15 years, depending on the sector.<sup>16</sup> At the same time, this integration bears significant restrictions. Namely, the DCFTA does not provide Moldova with the possibility to vote in determining common rules. Neither does it expand Moldova's access to EU assistance and redistribution mechanisms or implies that the country gets full access to the EU internal market in the short- or at least medium-term.<sup>17</sup>

The DCFTA thus aims at creating close trade and economic relations, which, over time, can move to a new level of deeper integration. On the one hand, the DCFTA framework seems to take into consideration the time intensity of the prospective harmonization of the national legislation of Moldova with the EU norms depending on the sector. That consideration could contribute to a smoother adaptation of the country to EU legal system. On the other hand,

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<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, in force 7 December 1978) 1125 UNTS 609 art 17.

<sup>14</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, 7.

<sup>15</sup> See generally Dorina Baltag and Giselle Bosse, 'The EU's Eastern Partnership with Moldova: A 'Best-Case' Scenario for EU Security Community-Building?' in Pernille Rieker (ed), *External Governance as Security Community Building. The Limits and Potential of the European Neighbourhood Policy* (Palgrave Macmillan 2016) 49.

<sup>16</sup> Gunnar Wiegand and Evelina Schulz, 'The EU and Its Eastern Partnership: Political Association and Economic Integration in a Rough Neighbourhood' in Christoph Herrmann, Bruno Simma and Rudolf Streinz (eds) *Trade Policy between Law, Diplomacy and Scholarship: Liber amicorum in memoriam Horst G. Krenzler* (European Yearbook of International Economic Law Springer 2015) 321.

<sup>17</sup> Baltag and Bosse (n 15) 54.

though, the introduction of such a large amount of EU norms in such a short period of time can become superficial. Namely, formal adoption of legislation could, in fact, differ from its effective implementation due to a possible lack of necessary skills and technology, corruption, and bureaucracy that may impede the expected results.

The conditions of the DCFTA are mainly enshrined in Section V ‘Trade and Trade-Related Matters’ of the AA, as well as in the annexes and protocols, which are also an integral part of it.<sup>18</sup> Section V, which is divided into 15 chapters, defines the following:

- regulation of access to the commodity market; the use of safeguard measures and technical barriers to trade (TBT);
- issues related to standardization and metrology; sanitary and phytosanitary measures (SPS); simplification of customs procedures;
- trade in services and electronic commerce;
- regulation of capital movements; issues related to government procurement; intellectual property rights;
- trade in energy, as well as regulation of other issues related to increased transparency, fair competition and dispute resolution principles.<sup>19</sup>

Accordingly, the DCFTA covers a wide range of trade and investment issues, from trade in goods and services to e-commerce and capital flows. All the economic activities of Moldova are affected by the DCFTA. Obviously, it provides favourable opportunities for the economic development of the country. At the same time, Moldova needs to make substantial and targeted efforts to harmonize its relevant legislation with the applicable EU norms. Only in this case is the effective implementation of the DCFTA provisions is assumed.

The goal within the framework of access to the commodity market is to achieve the creation of a free trade zone during the transition period, which should not be longer than ten years from the effective date of the AA.<sup>20</sup> In accordance with DCFTA art 147, each of the parties must reduce or cancel customs duties on goods originating from the other party, as provided for in Annex XV to the AA.<sup>21</sup> This annex defines the conditions for access to the market for a list of commodity items. Many of them are subject to duty-free importation and no quotas. Some of the products, however, are subject to quantitative restrictions and clearly defined duties.<sup>22</sup> Relatively high tariffs persist on many agricultural products. This is as expected the EU seeks to protect its agricultural producers, since the European Common Agricultural Policy (CAP) has always been a beloved but spoiled child of the EU integration.

### **3. The Place of Sustainable Development in the DCFTA**

For the purposes of our article, chapter 13, entitled ‘Trade and Sustainable Development’ in the section ‘Trade and Trade-Related Matters’ deserves special attention. According to art 364, each party to the DCFTA should strive to ensure that its national legal norms and policies ensure and promote a high level of environmental and labour protection, as well as aim to improve legislation in this area.<sup>23</sup> It becomes apparent that in the fields of

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<sup>18</sup> Association Agreement (n 14) 148.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid* 37.

<sup>21</sup> *ibid* 38.

<sup>22</sup> *ibid* 211.

<sup>23</sup> *ibid.*

environmental and labour protection, and similar societal issues, Moldova must incorporate EU's regulatory and legal standards in order to achieve this 'high level' of protection. Indeed, those standards are rather high in the European space but might be backbreaking for implementation in Moldova in the medium term.

Considerable attention is paid to the need to implement international environmental agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC) 1992 and its Kyoto Protocol.<sup>24</sup> Linking those to compliance with the DCFTA is, in many ways, an expression of commitment to the environmental values by the EU. It is evident that Moldova, being an undersized market economy with a small territory, is unable to make any significant contribution to the implementation of this international convention, the realization of which depends primarily on the actions of the global champions of atmospheric pollution, such as China, the United States, India, Russia, Japan, or the EU itself.<sup>25</sup>

Promoting investment in the production of environmental goods and services, protecting the rights of workers, as well as the conservation of biological diversity, forest conservation and its sustainable management, and responsible management of fish resources appear essential to the sustainable development of Moldova under the aforementioned chapter of the DCFTA. According to art 374, the DCFTA parties are required to review and assess the impact of the implementation of Title V of the AA on sustainable development, for example, through 'trade-related sustainability impact assessments.'<sup>26</sup> These provisions of the AA are likely to incentivize the development of Moldova both in terms of technological innovation and environmental protection. Investment in more sustainable production in general, as well as an increased investment in the production of environmentally friendly processed goods and high-tech products can boost the competitiveness of Moldovan goods on the international market, thereby making a significant contribution to the country's sustainable economic growth.

All in all, the DCFTA seems to pay considerable attention to the sustainable development of Moldova. Fulfilment of the conditions of the DCFTA is likely to move the country to a new, sustainable level of economic development. However, this raises the question of both the effectiveness and actual feasibility of the implementation of the provisions of the DCFTA.

There is, for example, a risk that EU provisions will be transposed to the country's legislation, but will in fact not be effectively implemented, or even cause harm, because of the absence of a significant modernization of the production infrastructure, weak institutions and a lack of financial resources.

For instance, in July 2016, while transposing the Directive 2009/72/EC on EU common rules for the internal market in electricity,<sup>27</sup> the Moldovan Parliament - through a new Electricity Bill - modified the regulatory framework of national electricity tariffs. On the one hand, Moldova thus respected the condition that relevant EU law must be transposed to the

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<sup>24</sup> *ibid*, 2.

<sup>25</sup> World Population Review, 'Pollution By Country 2019' (24 October 2019) <<http://worldpopulationreview.com/countries/pollution-by-country/>> accessed 27 October 2019.

<sup>26</sup> Association Agreement (n 14) 123.

<sup>27</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance) OJ L 211, 14.8.2009, 55–93.

country's legislation. But, on the other hand, the impact of these adjustments has amounted in 2017 to the losses of EUR 20.6 million.<sup>28</sup> Namely, it affected several parameters of an updated electricity tariff methodology that was set in a Settlement Agreement between an EU investor and Republic of Moldova under the supervision of the Energy Community Secretariat (ECS) and the International Monetary Fund (IMF) following an investor-state dispute settlement discussed in detail further, in section 5 of the article.

In addition, according to our above analysis, the question arises as to what extent the provisions of the DCFTA, and generally the EU's EaP policies, are legitimate and democratic in the situation when they somehow compel (if not force altogether) the country to adopt such a large amount of European legislation in such a short period of time. It is assumed that the Annexes to the AA related to Moldova's EU Internal Market access will be updated considering the evolution of EU law (legislation, policies and principles).<sup>29</sup> This implies a 'dynamic approximation,' in which Moldova is obliged to automatically and permanently bring its legal system in line with not only the current *acquis* of the EU but also with the future EU legislation.<sup>30</sup> Such conditions of integration put Moldova in a narrow framework, under which, without having the right to vote and impact on the adoption of European legislation, it will be forced to adopt all those EU norms related to its access to the EU market. This makes the country overly dependent on European legislators and any further development of and within the EU, introducing unpredictability and possible risks to the economic, political and social future of the country. The next section delves into some of such workings.

#### 4. Implementation of the DCFTA Provisions: Practical Questions

For the DCFTA to start functioning, Moldova had to start extensive large-scale reforms to change its legislation in accordance with EU law. Back in 2012-2013, it adopted more than 4,000 standards on TBT, about 81 EU regulatory acts on SPS measures, as well as amended other areas of trade-related legislation.<sup>31</sup> These reforms have certainly contributed to improving the regulation of trade processes at the national level and laid the foundation for introducing the provisional application of the DCFTA.

Since the DCFTA started its operation in 2014, Moldova demonstrated a very strong trade performance. To wit, Moldovan imports from the EU increased from 44.5% in 2013 to 49.5% in 2018, while the share of exports to the EU in the total of Moldova's exports rose from 46.9% in 2013 to 68.8% in 2018.<sup>32</sup> In five years between 2013 and 2018, the total exports of goods from Moldova to the EU increased by 60% in monetary terms and by 73% in terms of constant prices.<sup>33</sup>

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<sup>28</sup> Energy Community (EC), 'Gas Natural Fenosa vs Moldova. (Sailing in Troubled Waters)' (*Energy Community Dispute Resolution Forum*, 27 September 2018), 18.

<sup>29</sup> Wiegand and Schulz (n 16) 339.

<sup>30</sup> *ibid.*

<sup>31</sup> Baltag and Bosse (n 15) 59.

<sup>32</sup> International Trade Centre (ITC), 'Trade Map: List of importing markets for a product exported by Moldova' <[https://www.trademap.org/Country\\_SelProductCountry\\_TS.aspx?nvpm=1%7c498%7c%7c%7c14719%7cTO TAL%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c4%7c1](https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c498%7c%7c%7c14719%7cTO TAL%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c4%7c1)> accessed 10 October 2019.

<sup>33</sup> Constant prices are the figures once the negative effect of prices changes due to inflation and other factors is removed, which, in the case of Moldova shows even stronger export performance. Ricardo Giucci, Veronika Movchan and Woldemar Walter, 'The economic effect of the DCFTA on Ukraine, Moldova and Georgia. A



At the same time, imports from the EU to Moldova did not grow as significantly as the other way around. This indicates a positive course of the country's integration into the European market, as this contributes to the increase in Moldova's exports over its imports. However, despite this improvement, the trade balance in relation to the EU remains negative. In 2018, in value terms, imports from the EU amounted to USD 2.8 billion, while Moldova's exports only USD 1.9 billion.<sup>34</sup> Nonetheless, these positive changes give hope for more significant achievements in the long term, when Moldova can bring its legislation in line with EU standards, as well as increase the productivity and quality of its goods and services.

The implementation of the approximation of the Moldovan DCFTA-related national legislation with the relevant EU standards is largely facilitated by financial support from Brussels. In 2014, under the ENP, Moldova received about EUR 131 million for reforms in the field of economic development and energy, justice and education.<sup>35</sup> For the period 2017-2020, the EU has developed a new programme of financial support for Moldova, in which the rubrics of sustainable and comprehensive economic growth are a priority.<sup>36</sup> During the programme, Moldova's financial support is expected to range from EUR 284 to 348 million, while about 35% of all aid is planned to be spent on economic development.<sup>37</sup>

The EU connects the need for the economic development of Moldova precisely with the importance of improving the innovation and investment climate in the country in the context of the implementation of the DCFTA conditions.<sup>38</sup> All along the EU's developmental aid efforts, its financial support to Moldova was supposed to contribute to the improvement of the country's legislative base, to promote ensuring the protection of labour rights, as well as improving production efficiency in the country. However, this money eventually fell into the wrong hands under conditions of high corruption in the country and the rule of the oligarchic regime under the leadership of Vladimir Plahotniuc. This ultimately led to an infamous theft of USD one billion from the country's banking system in 2014, creating the biggest Moldovan banking crisis and the subsequent collapse of the national currency Leu (MDL).<sup>39</sup> At that time, Brussels suspended Moldova's support, apparently fearing that any new financial assistance would also vanish, renewing it only in 2016.<sup>40</sup> Thus, corruption, political instability, and weak institutions in the country undermine the possibility of effectively implementing the provisions of the DCFTA. It is hoped that in the light of the new political

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comparative analysis' (*Berlin Economics* 1 July 2019) 15-16, <<https://berlin-economics.com/the-economic-effect-of-the-dcfta-on-ukraine-moldova-and-georgia-a-comparative-analysis/>> accessed 4 October 2019.

<sup>34</sup> Baltag and Bosse (n 15) 59.

<sup>35</sup> European External Action Service, 'The Republic of Moldova and the EU' <[https://eeas.europa.eu/delegations/moldova/1538/node/1538\\_en](https://eeas.europa.eu/delegations/moldova/1538/node/1538_en)> accessed 10 October 2019.

<sup>36</sup> European External Action Service, 'Single Support Framework for EU support to Moldova (2017-2020)' <[https://eeas.europa.eu/sites/eeas/files/single\\_support\\_framework\\_2017-2020\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/single_support_framework_2017-2020_0.pdf)> accessed 14 October 2019.

<sup>37</sup> *ibid* 6.

<sup>38</sup> *ibid* 5.

<sup>39</sup> Francesco S. Montesano, Tony van der Togt and Wouter Zweers, 'The Europeanisation of Moldova: Is the EU on the Right Track?' (2016) Netherlands Institute of International Relations 'Clingendael' 7. See also Richard Balmforth, 'Billion dollar bank scam shakes faith in little Moldova's pro-EU leaders' (*Reuters*, 10 August 2015) <<https://www.reuters.com/article/us-moldova-fraud-insight/billion-dollar-bank-scam-shakes-faith-in-little-moldovas-pro-eu-leaders-idUSKCN0QF1KC20150810>> accessed 14 September 2019.

<sup>40</sup> European External Action Service, 'Отношения между ЕС и Республикой Молдова. Справочный материал. Представительство Европейского Союза в Республике Молдова' (10 May 2019) <[https://eeas.europa.eu/delegations/moldova/26814/отношения-между-ес-и-республикой-молдова-справочный-материал\\_ru](https://eeas.europa.eu/delegations/moldova/26814/отношения-между-ес-и-республикой-молдова-справочный-материал_ru)> accessed 14 October 2019.

forces that came into power in June 2019, Moldova will take the path of sustainable development.

The funds invested by Brussels can make a significant contribution to the fulfilment of the DCFTA conditions for approximation of legislation, as well as contribute to improving the quality of Moldovan goods and the business environment in the country as a whole, but only if effective and working institutions are formed in Moldova, which requires sustained and joint efforts on the part of political forces, civil society and business.

## **5. Effects of the DCFTA and of General Economic Liberalization on Achieving Sustainable Development in Moldova**

The analysis of the DCFTA provisions showed that many of its norms are aimed at the sustainable development of Moldova. The DCFTA allows Moldova a slower reduction in tariffs on imports from the EU, which contributes to the protection of some unstable sectors of the economy from the competition.<sup>41</sup> A positive outcome of the latter is that an increase in Moldovan exports to the EU outnumbers an increase in its imports from the Union. Smooth integration into the European market contributes to economic growth and stability in weak sectors of the country's economy.

Moldova is expected to implement food safety reform, which is likely to increase the export of Moldovan agricultural products to the EU.<sup>42</sup> Higher standards in the field of food products are likely to enhance the competitiveness of Moldovan products and expand markets. It is also an essential incentive for modernizing industrial equipment in the country and increasing not only productivity but also the sustainability of food production.

The inclusion of many EU regulations in national legislation also serves as an essential incentive for sustainable development. For example, the DCFTA is pressing on Moldova to adopt the Directive 2003/4/EC on public access to environmental information and the Directive 2003/35/EC on public participation in the preparation of specific environmental plans and programmes.<sup>43</sup> The adoption of these legal norms will increase public involvement in environmental issues, as well as serve as an incentive to increase the demand for environmentally friendly products in the domestic market, which will undoubtedly adjust the structure of production in the country towards increasing organic production. This, in turn, is likely to stimulate the demand for Moldovan products in foreign markets, where the ecological value of goods only increases every year. Thus, in the long run, this will bring the country closer to effectively achieving sustainable development.

With all the positive changes, Moldova's integration into the European market is equally associated with several negative consequences and risks that create additional uncertainty and impede the country's sustainable development.

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<sup>41</sup> Tatjana Muravska and Alexandre Berlin, 'Towards a New European Neighbourhood Policy (ENP): What Benefits of the Deep and Comprehensive Free Trade Agreements (DCFTAs) for Shared Prosperity and Security?' in Tanel Karikmäe and Archil Chochia (eds) *Political and Legal Perspectives of the EU Eastern Partnership Policy* (Springer 2016) 34.

<sup>42</sup> European External Action Service, 'The Republic of Moldova and the EU' (12 May 2016) <[https://eeas.europa.eu/delegations/moldova/1538/node/1538\\_en](https://eeas.europa.eu/delegations/moldova/1538/node/1538_en)> accessed 9 October 2019.

<sup>43</sup> Tom Theuns, 'The legitimacy of free trade agreements as tools of EU democracy promotion' (2019) 32 (1) *Cambridge Review of International Affairs* 3-21, 14.

Since food security and the protection of its agricultural producers are vital for the EU, Moldovan agricultural products are not in high demand in the EU market. The traditional key export market for this type of Moldovan products is the CIS market. Currently, about 70% of Moldova's agricultural products, typically, wine, fruits and vegetables, are exported to the CIS countries—Russia, Belarus, Ukraine, etc.<sup>44</sup> Since, in many respects and for political reasons, Russia has limited the supply of Moldovan products after Moldova's signing of AA, manufacturers from Moldova lost the Russian market for their products that were beneficial to them.<sup>45</sup> At present, it has been possible to temporarily simplify the export of Moldovan goods to Russia following the agreements of the pro-Russian President of Moldova, Igor Dodon.<sup>46</sup> However, this agreement is a geopolitically-driven deal and not sustainable. Accordingly, Moldovan agrarian producers find it challenging to adapt to the DCFTA. In certain periods they suffer losses and geopolitics plays here a significant role.<sup>47</sup>

The break in the trade relations between Moldova and Russia indirectly contributed to the growth of Moldova's exports to the EU market.<sup>48</sup> This means that the increase in Moldova's exports to the EU is primarily associated with a reduction in customs tariffs and a reorientation of the country to the European market, and is hence practically not associated with longer-term structural changes in the country's economy and the increase in production efficiency.

Consequently, another negative impact follows from the above DCFTA conditions. Namely, since the DCFTA is part of the AA, it is more politicized than more typical free trade agreements, such as for example, the EU-South Korea FTA.<sup>49</sup> Here it is likely that trading conditions will serve broader geopolitical and other strategic interests rather than their direct goals.<sup>50</sup> Namely, it is not impossible for the DCFTA conditions to represent a mechanism, which, if necessary, can be used by the EU as a lever of economic coercion of Moldova.

It is also worth noting that the more Moldova integrates into the EU market, the more it becomes economically dependent on the integration bloc. More than half of agri-food products are exported to three EU countries: 30% of those go to Romania<sup>51</sup> and more than half of industrial products, namely, 52% are exported only to the Romanian market.<sup>52</sup> Moldova's high dependence on the export of goods to individual EU countries reduces the economic and political security of the country. These tendencies deprive Moldova of alternative development paths and drive it into a particular framework, where there is practically no room for choice. Moldova's obligation to implement the current and future EU

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<sup>44</sup> Dmitry Malyshev, 'Молдавия между Западом и Востоком' *Международная жизнь* (Moscow, 2019) 2 <<https://interaffairs.ru/jauthor/material/2155>> accessed 9 October 2019.

<sup>45</sup> Deutsche Welle, 'Die Abhängigkeit der Republik Moldau von der russischen Wirtschaft' (25 July 2014) <<https://www.dw.com/de/die-abh%C3%A4ngigkeit-der-republik-moldau-von-der-russischen-wirtschaft/a-17806917>> accessed 14 October 2019.

<sup>46</sup> Izvestia, 'Путин и Додон договорились упростить поставки продуктов и вина в Россию' (1 November 2018) <<https://iz.ru/807236/2018-11-01/putin-i-dodon-dogovorilis-uprostit-postavki-produktov-i-vina-v-rossiiu>> accessed 14 October 2019.

<sup>47</sup> Sputnik, 'Фермеры протестуют в Кишиневе' (25 August 2015) <<https://ru.sputnik.md/news/20150825/1487255.html>> accessed 13 September 2019.

<sup>48</sup> Gucci, Movchan and Walter (n 33) 17.

<sup>49</sup> Fabienne Bossuyt, Jan Orbie and Lotte Drieghe, 'EU external policy coherence in the trade-foreign policy nexus: foreign policy through trade or strictly business?' (Springer Nature 2018).

<sup>50</sup> *ibid.*

<sup>51</sup> Adrian Lușor, 'ZLSAC după 5 ani de implementare: impactul estimat și concluzii pentru următorii 5 ani' (2019) Chișinău: Expert – Grup: Centru Analitic Independent 10.

<sup>52</sup> *ibid.* 13.

norms in its legislation reduces the country's ability to pursue an independent economic policy and, under certain geopolitical circumstances, can become a lever for manipulation.

Negative changes are also observed in the structural export of goods. The share of raw materials in exports from Moldova to the EU increased from 2013 to 2018 from 23% to 28%, while the share of semi-processed products decreased from 5% to 2% and the share of processed products also declined from 73% to 70% over the same period.<sup>53</sup> The decrease in trade in the value-added of goods certainly has a negative impact on the sustainable development of the country. The growth in Moldova's supplies to the EU of raw materials rather than processed and high-tech goods is likely to divert Moldova from modernization and increase the risk of the country's dependence on the export of raw materials. This entails a trade short-termism and prevents the development of new production methods and technologies in the country.

Paradoxically, the implementation of the DCFTA did almost not contribute at all to attracting EU FDI to Moldova. FDI increased by 4% from 2013 to 2017 from 2.1 to USD 2.2 billion.<sup>54</sup> Such a little growth of FDI flows from the EU indicates that the DCFTA eventually did not have a significant impact on the country's attractiveness for FDI. For the development of a favourable investment climate in the country, structural institutional reforms, a reduction in the level of corruption and an increase in transparency in the business environment and society are necessary.

The few investment disputes in which the country has recently been involved show, however, that Moldova is more than open to follow the international standards of foreign investment law on an equal footing with Western countries through stretching to the full the capabilities of not only international investment arbitration but also mediation, among others.

Given the space limits, we will consider only two disputes that we consider the most relevant for this article because they involve foreign investors from the EU, various EU-based dispute settlement fora, the ECT and even EU law.

The first dispute arose between the Spanish group Naturgy (the then-Gas Natural Fenosa at the moment of the conflict) and the Republic of Moldova.<sup>55</sup> Naturgy Energy Group S.A. is a Spanish natural gas and electrical energy utilities company operating primarily in Spain, and at the moment of the facts was the largest supplier and distributor of electricity in Moldova.<sup>56</sup>

The root cause of this conflict was the electricity tariff deviation in Moldova, which, by the end of November 2015 created a gap of EUR 75 million.<sup>57</sup> The deficit was due to a difference between the national electricity tariffs and the actual purchase price of electricity—a gap, created by a 2014 Moldovan banking crisis and a subsequent collapse of MDL suddenly and drastically raising the electricity prices.<sup>58</sup>

The gap had caused to the then-Gas Natural Fenosa (GNF) significant monetary damage as well as an ensuing deficit of financial resources in the country's electricity sector, thus

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<sup>53</sup> Giucci, Movchan and Walter (n 33) 20.

<sup>54</sup> *ibid* 21.

<sup>55</sup> Energy Community (EC) (n 28).

<sup>56</sup> *Naturgy*, 'Home' <<https://www.naturgy.com/en/home>> accessed 17 October 2019.

<sup>57</sup> EC (n 28) 14.

<sup>58</sup> *See this sec and n 37.*

jeopardizing its investment capacity and overall sustainable development.<sup>59</sup> The end consumers of electricity—ordinary Moldovan citizens—were potentially the most affected parties because of the risk of possible electricity supply interruptions.

In August 2015, the GNF initiated arbitration proceedings against Moldova at the International Centre for Settlement of Investment Disputes (ICSID) under the ECT.<sup>60</sup> At the mediation stage, the ECS acted as a mediator, and the parties entered into negotiations in February 2015.<sup>61</sup> Ultimately, the GNF and the Government of Moldova signed the settlement agreement in June 2016. The agreement recognized a deficit of EUR 82 million as of December 2016 that Moldova committed to pay via tariffs in four years starting from 2017 (EUR 20.5 million per year).<sup>62</sup> The GNF promised on its side to extend the period of recovery of the deficit up to four years in order to reduce the negative consequences for the final consumers.<sup>63</sup>

In February 2018, the Moldovan regulator eventually approved a new electricity tariff methodology, in close coordination with the ECS and consultation with the World Bank. In June 2018, the 2018 tariff was set in accordance with the new methodology.<sup>64</sup>

While the above case, as well as an overall fragile political and financial situation of the country triggered in 2014, rather damaged the reputation of Moldova among EU investors, ultimately the end result of that dispute—a settlement reached through international mediation—shows that the country readily cooperates with interested parties and reaches compromises. This case equally demonstrates that Moldova is open to not only international arbitration but also mediation.

The *Energoalians* saga, which started much earlier than the GNF dispute and is still ongoing, equally concerns the vital element of development and overall welfare of the country—electricity supply. It is a row involving Moldova, but clearly reaching far beyond Moldova and even post-Soviet space, and bearing importance for the whole Eurasian region. The dispute arose out of a 1999 electricity supply arrangement between the Ukrainian state-owned enterprise Ukrenergo (producer), Ukrainian private company Energoalians SARL (distributor), BVI company Derimen Properties Ltd (exporter/ supplier) and Moldovan state-owned entity Moldtranselectro (customer). The arrangement was based on two 1999 tripartite electricity supply contracts (n° 01/01 of 1 February 1999 and n° 24/02 of 24 February 1999), which, in sum, stipulated that Ukrenergo would produce electricity and sell it to Energoalians, the latter would sell it to Derimen, and the latter would then export and supply it to Moldtranselectro, which would deliver the electricity to the final consumers in Moldova.<sup>65</sup>

Moldtranselectro defaulted on part of its payments under that arrangement and in May 2000 Derimen assigned to Energoalians its right to claim debts arising from Moldtranselectro's default on payments under the electricity supply contract n° 24/02.<sup>66</sup> Energoalians thus

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<sup>59</sup> EC (n 28) 14.

<sup>60</sup> *ibid* 15.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid* 16.

<sup>64</sup> *ibid* 22.

<sup>65</sup> *Republique de Moldavie v Société Komstroy*, CA Paris, 1ère Ch, 24 September 2019, n° 18/14721 [*Moldova v Komstroy*], 2.

<sup>66</sup> *ibid* 3.

claimed the debt on Derimen's behalf that Moldtranselectro partially paid; Energoalians attempted to collect the rest of the debt in the Moldovan and then Ukrainian courts.<sup>67</sup> After unsuccessful attempts, in 2010, Energoalians brought a claim against Moldova under both the ECT and the 1995 Ukraine-Moldova bilateral investment treaty (BIT).<sup>68</sup> By that time, Moldtranselectro was liquidated, and its assets were allocated to another Moldovan state-controlled enterprise, hence in all claims, the representative of Moldtranselectro is the government of Moldova.

In the award issued on 23 October 2013, a three-member *ad hoc* United Nations Commission on International Trade Law (UNCITRAL) tribunal seated in Paris ruled that a contract debt qualified as an investment under the ECT, and ordered to Moldova to pay USD 49 million in compensation.<sup>69</sup> Dominic Pellew, the President of the tribunal, dissented, disagreeing with the tribunal upholding its jurisdiction under the ECT.<sup>70</sup> According to Pellew, for an investment to be protected under the ECT, it must clearly contribute to the economy of the host state, whereas the acquisition of debt, obviously, does not make such contribution.<sup>71</sup> He stressed that Energoalians had invested neither capital nor effort in return for the right to claim the relevant debts, and, hence, rather than contributing to the country's economic development, in his view, the debt transfer had imposed a burden on Moldova.<sup>72</sup>

Moldova has brought an action for annulment of this award by a declaration of 25 November 2013.<sup>73</sup> Meanwhile, in October 2014, the Ukrainian company Komstroy acquired the rights of the company Energoalians.<sup>74</sup> In April 2016, partially drawing on the above Pellew's position, Paris Court of Appeals set aside the UNCITRAL *Energoalliance* award, arguing that the UNCITRAL tribunal wrongly upheld jurisdiction.<sup>75</sup> Komstroy filed an appeal to the French Court of Cassation. In March 2018, the Court of Cassation held that Paris Court of Appeals erred in setting aside the award.<sup>76</sup> The Court of Cassation considered the Court of Appeals erred in requiring a contribution to the host state economic development to be a qualificatory requirement under the ECT, saying that it had 'added a condition that the treaty does not provide for.'<sup>77</sup> The Court of Cassation annulled the Court of Appeals decision and sent back the parties in front of the same court to reconsider the case by a differently constituted bench.<sup>78</sup>

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<sup>67</sup> *id.*

<sup>68</sup> *Energoalliance Ltd v the Republic of Moldova*, UNCITRAL, Unofficial Translation of the Arbitral Award (25 October 2013) [*Energoalliance v Moldova*].

<sup>69</sup> *ibid* 225-228.

<sup>70</sup> *Energoalliance Ltd v the Republic of Moldova*, UNCITRAL, Dissenting Opinion of Arbitrator Dominic Pellew (25 October 2013) 3, 26.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.* See also Yuri Mantilla, 'Paris Court of Appeal may revisit definition of 'investment' under Energy Charter Treaty' (*International Law Office*, 31 January 2019) <<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Paris-Court-of-Appeal-may-revisit-definition-of-investment-under-Energy-Charter-Treaty>> accessed 16 October 2019.

<sup>73</sup> *Moldova v Komstroy*, 3.

<sup>74</sup> *ibid* 4.

<sup>75</sup> *id.*

<sup>76</sup> *Energoalians SARL (Komstroy) v Republique de Moldavie*, Civ 1ère, 28 March 2018, n° 16-16568, ECLI:FR:CCASS:2018:C100352.

<sup>77</sup> Mantilla (n 72).

<sup>78</sup> *Moldova v Komstroy*, 4.

Strikingly, after a *de novo* review, instead of shedding more light, in one way or another, on a possible ‘French way’ of interpreting the definition of ‘investment’ under the ECT,<sup>79</sup> on 24 September 2019, Paris Court of Appeals decided to...request a preliminary ruling from the Court of Justice of the European Union (CJEU).<sup>80</sup> As a short reminder, a case may be decided with the help of a preliminary ruling procedure under art 267 of the Treaty on the Functioning of the European Union (TFEU). Any national court of an EU member state may request the CJEU’s interpretation of EU law, which should be subsequently followed by not only that court, but all EU member states because preliminary rulings are final determinations of EU law, with no scope for appeal.<sup>81</sup>

So, the Paris Court of Appeals now requests the CJEU’s interpretation of the following preliminary questions:

- Should art 1(6) of the ECT be interpreted as meaning that an acquired sales contract debt, not implying any contribution of the investor to the host state, may qualify as an ‘investment’ under that article?
- Should art 26(1) of the ECT be interpreted as meaning that an acquisition by an investor of a Contracting Party of a debt created by an economic operator foreign to state parties may qualify as a protected investment?
- Should art 26(1) of the ECT be interpreted as meaning that a debt belonging to an investor, resulting from a contract of sale of electricity delivered at the border of the host state, may constitute an investment made in the zone of another Contracting Party, in the absence of any economic activity exercised by the investor in the territory of the latter?<sup>82</sup>

Aside from a very important—and still unresolved in this saga—question of the scope of ECT art 1(6), the third question makes sense if we specify that the electricity was supplied under the conditions ‘DAF Incoterms 1990’,<sup>83</sup> that is, to the Ukraine-Moldova border, on Ukraine side.<sup>84</sup>

The 2019 decision of the Paris Court of Appeals to request a CJEU preliminary ruling will have significant consequences not only for Moldova but also for likely future of energy disputes in the CIS region, as well as for ECT law, not to mention EU law. Indeed, in its previous relevant judgement relating to the ECT, the famous *Achmea* ruling, the Luxemburg Court underlined the incompatibility between the ECT and EU law.<sup>85</sup> Notably, in the *Achmea* case, the issue was the future of intra-EU BITs, as well as any disputes arising out of them. In the *Electroalians* row, however, what is at stake, aside from clarifying the scope of ECT art 1(6), is whether dealing a blow or not to Moldova—the poorest country in Europe fighting a

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<sup>79</sup> Mantilla (n 72).

<sup>80</sup> *Moldova v Komstroy*, 13.

<sup>81</sup> Art 267, Treaty on the Functioning of the European Union (TFEU). Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union (TEU and TFEU), signed on 13 December 2007, OJ C 326 , 26/10/2012, 0001 – 0390.

<sup>82</sup> *Moldova v Komstroy*, 13.

<sup>83</sup> ‘DAF’ means ‘delivered at frontier’.

<sup>84</sup> *Moldova v Komstroy*, 3.

<sup>85</sup> CJEU, Case C-284/16, *Slovak Republic v Achmea BV*, ECLI:EU:C:2018:158.

potential enforcement of millions of EUR worth of debt arising out of a contract for the sole purpose of selling electricity.

The much-awaited preliminary ruling by the CJEU in this case might surely clarify the list of covered assets, the scope and definition of investment, and the settlement of disputes between an investor and a Contracting Party under the ECT. Moreover, it is also likely to shed light on a possible ‘EU way’ (or, for sure, ‘Luxemburg way’) of interpreting the definition of ‘investment’ under the ECT, as well as on the relationship between the ECT and EU law in the context of extra-EU BITs and any disputes arising out of them. We suggest, however, that the prospective ruling will arguably demonstrate the EU technocrats’ (of the CJEU as well as the Commission, that is) attitude towards Moldova, its development, and possibly the future of its integration with the EU.

## **7. Conclusions**

In the long term, the DCFTA between Moldova and the EU does have prospects to become an essential tool in the economic modernization of the country and the achievement of sustainable development. The foundation laid down in the DCFTA regulations contains progressive directions for the country’s development towards innovation, the production of environmentally friendly products and the improvement of the quality of life of the population.

The approximation of the national legislation of Moldova with the norms and standards of the EU will improve the quality and competitiveness of Moldovan goods. However, in the short- and medium-term, the prospects of an effective implementation of the DCFTA provisions are blurry due to political instability in the country, corruption and weak institutions. Moldova is increasing its exports to the EU. At the same time, there is a negative trade balance with the integration bloc: the exports increase mostly due to the reduction of tariff duties and reorientation from other sales markets, while little effort is put into improving the quality of goods, increasing productivity and modernizing the economy of the country.

Moldova needs to enhance its investment attractiveness, modernize production facilities and increase the creation of value-added products using domestic raw materials. Besides, it is necessary to create conditions for the diversification of sales markets. This can be difficult in situations such as when Moldova is obliged to continually adopt updated European standards on issues related to the EU internal market’s access. In the absence of transparency in the allocation of resources in the country, there is a risk that the EU’s financial support for Moldova will not achieve the desired results, but only further exacerbate corruption.

In the conditions of the disunity of states in international relations, trade agreements can be used against sustainable development, both national and global. It is necessary to consider and direct all efforts of countries, especially developed ones, to not use economic instruments for political purposes preventing the emerging economies from rising to a new level of sustainable development.