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*WTO law and the EU: a nexus of  
reactive, coercive and proactive  
approaches*

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authors than paper presenters

# The EU and WTO law: a nexus of reactive, coactive and proactive approaches

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## Work in progress: COMMENTS ARE WELCOME

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## Introduction

The discussion about the application of WTO law in the Community legal order is not new. While the importance of the issue is undoubted from a constitutional, political and economic perspective, academic comment has hitherto focussed on the judicial attitude towards the WTO and in particular, the rulings delivered by the Court of Justice denying

direct effect to WTO law.<sup>1</sup> In most cases, it did not extend to the multifarious aspects of the application of WTO law.<sup>2</sup> This contribution aims to engage the political institutions of the Union in the analysis alongside the Court of Justice and the process of interaction between the judiciary and legislative to fully comprehend the broader ramifications of WTO law within the EU constitutional order.

In this respect, the present analysis aims to cut across institutional practice, draw the commonalities between the approaches of the different institutions towards WTO law and explore their interdependence. It will then attempt a classification on the basis of their common characteristics. The Court of Justice's approach will maintain the focus of attention and will form the starting point of the discussion. It is well established that the Court of Justice has, in principle, denied the direct effect of WTO law. This approach shall be coined with the term reactive. The Court however, has not always maintained such an approach and, in certain circumstances, voluntarily submitted the Community under the normative control of WTO law. This approach shall be called coactive. The existence of proactive elements in the coactive approach notwithstanding, the main locus of the proactive approach can be located in the activity of the political institutions. Their role is increasingly important and their approach will also be categorised under the same system of classification. In some cases there is interaction between the political and judicial and this will be explored and assessed. In the end a critical analysis of the different approaches will follow, an examination of the political and legal considerations behind this categorization and the necessary conclusions shall be drawn.

## **Reactive approach**

### ***The Court of Justice***

#### **Introducing the concept of direct effect**

The application of WTO law in the Community legal order contains a number of possibilities and considerations. However, the starting point to comprehend the Court's case-law is whether international law can be directly effective.<sup>3</sup> The concept of direct effect was not invented by the European Court of Justice. In some of the original Community Member States, belonging predominantly to the monist legal tradition, international treaties were intended to confer rights on individuals.<sup>4</sup> The concept has in international law appeared under several headings ranging from direct applicability and self-executing provisions to direct effect.<sup>5</sup> In international law, the determination of whether a certain provision is directly effective is a matter for domestic law. Domestic law

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<sup>1</sup> Allan Rosas, "Annotation of Case C-149/96 Portugal v. Council" (2000) 37 CMLRev. 797; Francis Snyder, "The Gatekeepers: The European Courts and WTO Law" (2003) 40 CMLRev. 313.

<sup>2</sup> A notable exception can be found in Grainne de Búrca and Joanne Scott, "The Impact of the WTO on EU Decision-Making" Harvard Jean Monnet Working Paper 6/00.

<sup>3</sup> Jan Klabbers, "International Law in Community Law: The Law and Politics of Direct Effect" (2002) 21 YEL 263

<sup>4</sup> Eileen Denza, *The Intergovernmental Pillars of the European Union*, (OUP, 2002) at p. 14.

<sup>5</sup> Klabbers, *op. cit. supra* note 3 at 272.

will also determine the conditions under which this would be done. This is not so in the Community legal order where the Court of Justice reversed this thesis and held in *Van Gend en Loos*<sup>6</sup> that the Community is a special case and that the determination of whether Community law can be directly effective derives from Community law itself.<sup>7</sup> This statement recognises that, as a result of the new legal order created by the Community treaties, not only individuals were conferred rights that national courts were bound to protect but also the same Community norms possess right-conferring qualities which established this new legal order and contributed to its development and flourishing.

The definition of direct effect is not without controversy. According to the 'objective' or 'classic' definition of direct effect the capacity of invocation by national courts is the decisive criterion.<sup>8</sup> Hartley, on the other hand, provides the following definition: "The European Court has, on numerous occasions, made clear what is meant by direct effect: if a legal provision is said to be directly effective, it means that it grants individuals rights which must be upheld by national courts".<sup>9</sup> Prechal provides a broader definition: "Direct effect is the obligation of a court or another authority to apply the relevant provisions of Community law, either as a norm which governs the case or as a standard for legal review".<sup>10</sup> The latter definition, exposes the considerations relating to direct effect within the GATT/WTO context as the analysis of the right of individuals to invoke provisions of WTO law in national and Community courts has often been confused with the appropriateness of the those provisions as a criterion for legality of Community law. Despite its attractiveness the latter definition of direct effect should be resisted. While the Court in its early case has connected those qualities they should be treated as distinct.<sup>11</sup>

### ***Monism v. dualism***

The question whether WTO law has direct effect in the Community legal order is inextricably linked with the reception of international law in the Community.<sup>12</sup> Several arguments have been made in an effort to classify the Community legal order as a monist or dualist following the traditional distinction in international law.<sup>13</sup> The Court in *Haegeman* significantly stated that an international agreement is an act of the institutions for the purposes of being interpreted by the Court in accordance with Article 234 EC Treaty and that the provisions of such an agreement form an integral part of the Community legal order.<sup>14</sup> This was taken to be the confession of monism for the Community legal order and maybe at the time and in the light of the way the Member States viewed international law from their own domestic perspective, it may have been so. Conversely, in *Kupferberg*,<sup>15</sup> it demanded for the incorporation of the norms contained in

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<sup>6</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>7</sup> Klabbers, *op. cit. supra* note 3 at 273.

<sup>8</sup> Paul Craig & Grainne de Búrca, *EU Law: Texts, Cases and Materials*, 3<sup>rd</sup> edition (OUP, 2002), at p. 180

<sup>9</sup> Hartley Trevor, *The Foundations of European Community Law*, 4<sup>th</sup> edition (OUP, 1998) at p. 187.

<sup>10</sup> Prechal Sacha, *Directives in European Community Law*, (OUP, 1995) at p. 148.

<sup>11</sup> The Court was criticised for connecting legality with direct effect. See, Ulrich Everling, "Will Europe slip on Bananas? The Bananas judgment of the Court of Justice and national courts" (1996) 33 CMLRev. 401 at 421; Fernando Castillo de la Torre, "The Status of GATT in EC Law Revisited" (1995) 29 JWT 53 at 58.

<sup>12</sup> WTO law not being a self-contained regime. See Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AJIL 535 at p. 577.

<sup>13</sup> For a general discussion see, Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> edition (OUP, 2003) at pp. 33-34 and 40-45.

<sup>14</sup> Case 181/73 *Haegeman v. Belgium* [1973] ECR 449 at paras. 4 and 5.

<sup>15</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641

the EC-Portugal Free Trade Agreement for those provisions to develop direct effect.<sup>16</sup> The differences in approach may be attributed to the content of the international agreement as, in some cases, it is necessary to adopt internal measures so as to give full effect to its provisions.<sup>17</sup> Bourgeois suggests that the Court has taken a monist approach with regard to international agreements with the exception of the WTO Agreement where it took a dualist approach.<sup>18</sup> As he explains, although before the establishment of the WTO it could not state that the GATT forms an integral part of Community law because the Community was not formally a Contracting Party, it did not change its stance in the case law on the direct effect of the WTO.<sup>19</sup>

### ***Criteria for direct effect***

The Court when analysing Article 21 of the Free Trade Agreement with Portugal implicitly confirmed that the criteria for the direct effect of provisions of international law would be similar to those established for Community law, namely a clear, precise, unconditional obligation without any need for implementing measures left with the Member States. However, it added that the nature and structure of the Agreement may prevent a trader from invoking the provision before a court in the Community.<sup>20</sup> The need for an examination of the purpose and nature of the agreement was repeated by the Court in *Demirel*.<sup>21</sup> Despite the criticism that the additional criterion for the direct effect of international agreements received by commentators in its early stages,<sup>22</sup> the Court has been consistent in this requirement and its imposition affected the analysis of the direct effect of WTO law. The purpose and content of the agreement condition will therefore necessitate the juxtaposition between the EC and the WTO legal orders within the broad context of global governance.

### **The GATT era: From *International Fruit* to *Bananas***

During the GATT era, the Court was faced with the application of the GATT for a first time in *International Fruit*.<sup>23</sup> The case concerned three regulations on the common market organisations of the markets in the fruit and vegetables sector and their legality against Article XI GATT. The Court found that first, the Community, not a GATT Contracting Party at the time, was bound by the GATT Agreement;<sup>24</sup> second, that the Court had jurisdiction to give a preliminary ruling on validity upon a request from a national court even if the legality of the Community act was contested against a provision of international law; third, its jurisdiction, however, depended on whether that provision of

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<sup>16</sup> Klabbers, *op. cit. supra* note 3 at pp. 292-297.

<sup>17</sup> Jacques Bourgeois, "The European Court of Justice and the WTO: Problems and Challenges" in J.H.H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, (OUP, 2000) p. 71 at 77-78.

<sup>18</sup> *Ibid* at p. 107.

<sup>19</sup> *Ibid* at p. 103.

<sup>20</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at paras. 10-22.

<sup>21</sup> Case 12/86 *Meryem Demirel v. Stadt Swäbisch Gmünd* [1987] ECR 3719 at para. 14.

<sup>22</sup> Schermers, "Community Law and International Law" (1975) 12 CMLRev. 77 at p. 80.

<sup>23</sup> Joined Cases 21/72 & 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219

<sup>24</sup> The Court refrained from saying that the GATT forms an integral part of the Community legal order. See, Bourgeois, *op. cit. supra* note 17 at p. 103.

international law was capable of conferring rights on individuals.<sup>25</sup> The Court then found that owing to the great flexibility of the GATT provisions and in particular, those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the inadequacy of the provisions for the settlement of the disputes between the Contracting Parties, individuals could not invoke GATT provisions before national courts.<sup>26</sup> Therefore, the Court was unable to examine the validity of the regulations because of the lack of direct effect.

Despite suffering criticism for denying direct effect to the GATT in *International Fruit*,<sup>27</sup> the Court maintained its stance in subsequent rulings and the principle's application was extended not only to the circumstances of preliminary rulings on validity but also preliminary rulings on interpretation,<sup>28</sup> and also annulment proceedings.<sup>29</sup> The latter have attracted significant interest as they could have formed the forum where GATT-inconsistent policy choices could be tested by Member States which found themselves in the minority at the time of adoption of the measures in the Council. The Court of Justice has taken a uniform position regarding the possibility to invoke GATT law in either national or Community courts. In the first *Bananas* judgment it held that

“those features of the GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, **also**<sup>30</sup> preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty”.<sup>31</sup>

Individuals may not invoke GATT law in national courts even more so when such legislation is invoked in order to challenge Community law. Neither can Member States or Community institutions invoke GATT law to challenge Community law.<sup>32</sup> The Court's thesis, as interpreted at the time in the light of *International Fruit*, meant that because the provisions of the GATT do not have direct effect, they cannot serve as a criterion for legality. With the benefit of hindsight, it can be argued here,<sup>33</sup> that the Court meant that the same defining features of the GATT preclude its provisions both from being invoked by individuals in national or Community courts **and** serving as a standard for the review of legality of secondary Community law.

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<sup>25</sup> *International Fruit Company op. cit. supra* note 23 at paras. 4-9.

<sup>26</sup> *Ibid* at para. 27.

<sup>27</sup> Ernst-Ulrich Petersmann, “Application of the GATT by the Court of Justice of the European Communities” (1983) 20 CMLRev. 397, *idem*, “The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law” in Hilf, Jacobs and Petersmann, *The European Community and the GATT*, (Kluwer, 1989) pp. 53-59; Kuilwijk, *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights?*, (Nexed Editions, 1996).

<sup>28</sup> Case 266/81 *SIOT* [1983] ECR 731; Joined Cases 267/81 & 269/81 *SAMI* [1983] ECR 801; Case C-469/93 *Chiquita Italia* [1995] ECR I-4533.

<sup>29</sup> Case 9/73 *Carl Schlüter v. Hauptzollamt Lörrach* [1973] ECR 1135; Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

<sup>30</sup> Emphasis added

<sup>31</sup> Case C-280/93 *Germany v. Council* [1994] ECR I-4973 at para. 109

<sup>32</sup> Piet Eeckhout, “The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems” (1997) 34 CMLRev. 11 at pp. 24-29.

<sup>33</sup> *Contra*, Eeckhout who argues that the Court simply extended the principle of direct effect to cover also direct actions for annulment in Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, (OUP, 2004), p. 249.

## **The WTO Era: Portugal v. Council**

### ***Background and facts***

At the conclusion of the Uruguay Round of Multilateral Trade Negotiations which led to the transformation of the GATT into the WTO the basic issue which the Court was faced with in Opinion 1/94 was the delimitation of competences between the Community and its Member States for the conclusion of the WTO Agreement. Shortly thereafter, the question of direct effect of WTO law in the Community legal order started inundating the Court in the form of requests for preliminary rulings made by national courts.<sup>34</sup> In most of them, the Court denied grasping the nettle<sup>35</sup> despite pressure from academics<sup>36</sup> and the encouragement from Advocate Generals<sup>37</sup> to revisit its case law on the matter in the light of the revolution brought to the multilateral trading system with the foundation of the WTO. The Court could all but deliver a definitive ruling on the matter and the case of *Portugal v. Council* seemed as a prime candidate when the issue was raised by AG Saggio who suggested a change in policy.

The case concerned an action for the annulment of Council Decision 96/386 concluding two Memoranda of Understanding with India and Pakistan on market access arrangements for textile products between the parties. Negotiations for the Memoranda had taken place in the margin of the Uruguay Round negotiations and were signed shortly after the conclusion of the WTO Agreements. Portugal, who voted against the decision in the Council,<sup>38</sup> applied for the annulment alleging that the Council Decision violated certain provisions of the GATT, the Agreement on Textiles and Clothing, the Agreement on Import Licensing and general principles of Community law such as the principle of transparency, the principle of cooperation and the principle of legitimate expectations.<sup>39</sup>

### **Opinion of AG Saggio**

After having given the historical background of the WTO Agreement on Textiles and Clothing and a brief analysis of the Memoranda of Understanding with India and Pakistan,

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<sup>34</sup> Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603; Case C-183/95 *Affish v. Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315; Case C-147/96 *Netherlands v. Commission* [2000] ECR I-4723; Case C-106/97 *Dutch Antillean Dairy Industry v. Douane-Agenten* [1999] ECR I-5983; Case C-301/97 *Netherlands v. Council* [2001] ECR I-8853; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior and Assco Gerüste GmbH* [2000] ECR I-11037; Case C-377/98 *Netherlands v. Council* [2001] ECR I-7079; Case C-452/98 *Dutch Antilles v. Council* [2001] ECR I-8973; Case C-89/99 *Schieving-Nijstad* [2001] ECR I-5851; Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159; Case T-52/99 *T-Port v. Commission* [2001] ECR II-981; Case T-1/99 *T.Port v. Commission* [2001] ECR II-465; Case T-18/99 *Bocchi Food Trade v. Commission* [2001] ECR II-913.

<sup>35</sup> Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603 at para. 35; C-183/95 *Affish v. Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315.

<sup>36</sup> Pierre Pescatore, "Free World Trade and the European Union: The reconciliation of interests and the revision of dispute resolution procedures in the framework of the WTO" in Van Kappel and Heusel (eds.), *Free World Trade and the European Union: The Reconciliation of Interests and the Review of the Understanding on Dispute Settlement in the Framework of the World Trade Organization*, (Vol 28, Series of Publications by the Academy of European Law in Trier, Bundesanzeiger, 2000) p. 9.

<sup>37</sup> AG Tesaro in Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603; AG Cosmas in C-183/95 *Affish v. Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315.

<sup>38</sup> Rosas, *op. cit. supra* note 1 at p. 801.

<sup>39</sup> Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paras 53 *et seq.*

AG Saggio went on to examine the alleged breach of general principles of the Community legal order. He then focussed on the examination of the breach of the rules of the WTO Agreement. The Advocate General made a brief overview of the Court's case law regarding international agreements generally and the GATT in particular, and held that it is only the GATT rules which require direct effect for their application as a criterion of legality of the Community acts.<sup>40</sup> It further held that the requirement for incorporation or express reference, as indicated by the Court in the first Bananas case,<sup>41</sup> reduces the scope of Article 300(7).<sup>42</sup> He went on to analyse the novel characteristics of the WTO system and then to dismiss, in the light of the relevant provisions of the Vienna Convention on the Law of Treaties and the Opinion of Advocate General Tesauro in *Hermès*,<sup>43</sup> the importance of the Council statement in the eleventh recital of the preamble to the Council Decision concluding the WTO Agreement which declares that the Agreement including its annexes is not susceptible to direct invocation in Community or Member States courts. The recital was treated as nothing more than a policy statement which cannot affect the jurisdiction of either the Community or national courts to interpret and apply the rules in the WTO Agreements.<sup>44</sup> The AG then dismissed also the argument of reciprocity based on the principle *in adimpleti non est adimplendum*.<sup>45</sup> He then however, held that the obligation to apply WTO law does not extend to the violation of primary Community law. If WTO law is found to be in conflict with primary Community legislation the latter should be upheld despite the risk of the Community suffering international responsibility.<sup>46</sup> The Advocate General concluded his analysis by arguing that the inclusion of a system for the settlement of disputes within the WTO does not usurp the Court of Justice's jurisdiction to interpret and apply WTO rules and to annul or sanction any internal measures which might be contrary to those rules.<sup>47</sup> The Advocate General then went on to analyse the substance of the claims by the Portuguese Republic and considered them all unfounded.<sup>48</sup>

## Judgment

In its judgment the Court held that

“having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.”<sup>49</sup>

This statement is foundational of the *jurisprudence constante*<sup>50</sup> of the Court of Justice denying GATT/WTO law the status of criterion for legality owing to its lack of direct

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<sup>40</sup> AG Saggio Opinion in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 18.

<sup>41</sup> Case C-280/93 *Germany v. Council* [1994] ECR I-4973 confirming the *Nakajima* and *Fediol* doctrines.

<sup>42</sup> AG Saggio Opinion in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 18.

<sup>43</sup> AG Tesauro in Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603 at para. 24.

<sup>44</sup> AG Saggio Opinion in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 20.

<sup>45</sup> Enshrined in Article 60 of the Vienna Convention on the Law of Treaties and meaning that the failure of one party to observe its obligations under an agreement does not justify the other parties from applying the agreement among themselves.

<sup>46</sup> AG Saggio Opinion in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 22.

<sup>47</sup> *Ibid.* at para. 23.

<sup>48</sup> *Ibid.* at paras. 25-35.

<sup>49</sup> *Portugal v. Council*, *op. cit. supra* note 39 at para. 47.

<sup>50</sup> The case law is considered settled for all purposes and this is exemplified by the fact that the Court, following Article 104(3) of its Rules of Procedure, responded to the Finanzgericht Hamburg by means of an

effect in the Community legal order.<sup>51</sup> In order to arrive at this conclusion the Court first started with the statement from *Kupferberg* that the parties to an agreement have the power to determine the effect the agreement will have and the means for its implementation within the parties' legal orders.<sup>52</sup> In the absence of an agreement thereon,<sup>53</sup> the Court juxtaposed the system established under the WTO Agreement with the GATT and declared that although the former differs significantly from the provisions of GATT 1947 it still accords considerable importance to the negotiation between the parties. This is proven by the fact that, while under Article 3(7) DSU measures found inconsistent with the agreement should be withdrawn, there is a possibility for compensation and, should this be declined, retaliation against the party whose legislation was found to be inconsistent with the WTO Agreement.<sup>54</sup> The Court then laid down the two basic considerations for the denial of direct effect, namely the lack of reciprocity,<sup>55</sup> and the freedom of the political institutions.<sup>56</sup> The basic argument behind the principle of reciprocity is that the most important commercial partners of the Community do not allow their domestic courts to review the legality of their legislation against WTO law. The dismissal of the principle of reciprocity in *Kupferberg* should be distinguished since, while the WTO system is based on reciprocal and mutually advantageous arrangements, the EEC – Portugal Free Trade Agreement introduced a certain asymmetry of obligations.<sup>57</sup> It further held that the grant of direct effect would lead to disuniform application of WTO rules in the different WTO members.<sup>58</sup> In addition, the freedom of political institutions would be usurped should the obligation of the Community to comply with the WTO rules be devolved to the judicature.<sup>59</sup> The Court then held that such an interpretation is consonant with the last recital of Council Decision 94/800.<sup>60</sup> It ended its analysis on the direct effect of WTO law by confirming the *Nakajima* and *Fediol* doctrines by stating that the Court may only review the legality of Community measures in the light of the WTO rules only when the Community intended to implement a particular obligation assumed within the context of the WTO or where the Community measure expressly refers to the precise provisions of the WTO Agreements.<sup>61</sup>

### ***The principle of reciprocity***

Resort to the need for reciprocity in order to grant direct effect to international agreements was a novel requirement of the Court's judgment in *Portugal v. Council*. In *Bresciani*, a case concerning the interpretation of the Yaoundé Convention, the Court introduced the principle only to explain that in the circumstances governing the Yaoundé Convention strict reciprocity should not apply due to the intention of the Community to assist the

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order to the question raised in the context of a case relating to the Bananas litigation. Case C-307/99 *OGT Fruvthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen* [2001] ECR I-3159.

<sup>51</sup> Maintaining, unfortunately, the confusion between direct effect and standard of review for WTO law.

<sup>52</sup> *Portugal v. Council supra* note 39 at paras. 34-35; cf. *Kupferberg supra* note 20 at paras. 17-18.

<sup>53</sup> *Portugal v. Council supra* note 39 at para. 41. Kuijper mentions that a proposal to effect of granting the WTO Agreement with direct effect brought during the negotiations by the Swiss delegation was rejected. See, Peter Jan Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the European Community" (1995) 6 EJIL 222

<sup>54</sup> *Portugal v. Council supra* note 39 at paras. 36-39.

<sup>55</sup> *Ibid.* at paras. 42-45.

<sup>56</sup> *Ibid.* at paras. 40 and 46.

<sup>57</sup> *Ibid.* at para. 42.

<sup>58</sup> *Ibid.* at para. 45.

<sup>59</sup> *Ibid.* at para. 46.

<sup>60</sup> *Ibid.* at para. 48.

<sup>61</sup> *Ibid.* at para. 49. The analysis of those cases can be found below.

development of the associated countries by granting privileges to them.<sup>62</sup> Accordingly, the rights which the nationals of the parties to the Yaoundé Convention could invoke in Member States' courts were unconditional to reciprocal treatment of Community citizens in the countries of those nationals. The issue was raised in subsequent judgments,<sup>63</sup> and the statement of Advocate General Rozés in *Kupferberg* exposes similar considerations to those under *Portugal v. Council*

“To recognise a provision of that Agreement as having direct effect without the guarantee that an individual may rely on the provision in Portugal on the same terms and with the same results in relation to legal protection would, by reason of the absence of reciprocity, lead to the Community's being at a disadvantage and that would not correspond to the discernible intention of the Contracting Parties.”<sup>64</sup>

The Court however held that the fact that one contracting party affords direct effect to the provisions of the agreement while the other does not, does not constitute lack of reciprocity.<sup>65</sup>

Reciprocity has been central in the Court's denial of direct effect in *Portugal v. Council*, a position not treated favourably by commentators.<sup>66</sup> In its essentials, the Court held that since the major trading partners of the Community do not grant direct effect to WTO law, in the interests of the principle of reciprocity, the Court of Justice was precluded from doing so.<sup>67</sup> The counterargument that the lack of reciprocity can be detected in other international agreements but this did not prohibit the Court from granting direct effect was rebutted with the asymmetry of obligations and the generally asymmetric relations established under other international agreements. As Eeckhout points out there are certain inherent asymmetries within the WTO system as well, bringing the examples of the Community as a Customs Union and the preferential treatment of developing countries within the WTO system.<sup>68</sup> It should be argued that despite the fact that the asymmetry argument sits more comfortably at the assessment of the object and purpose of the agreement for the purposes of establishing its potential direct effect, it serves an additional function with regard to reciprocity. The Court is justified in its position not only from a pragmatic perspective – suffering a significant comparative disadvantage against the USA and Japan – but also from a doctrinal perspective. The asymmetry in the Community's bilateral agreements features as an essential element of the design of those agreements. It expresses the Community's decision to grant rights under the agreement to third, usually less developed, countries thereby encouraging trade and the integration of those countries in the multilateral trading system. It could be argued that this is what essentially the WTO preferential provisions towards developing countries purport to do. However, the asymmetry established in the multilateral framework of the WTO is not bilateral but a characteristic of the system. In this respect, it should be argued that the existence of preferential treatment within the WTO system in favour of developing countries does not affect the EC – US relations within the same system, at least no more than the asymmetric

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<sup>62</sup> Case 87/75 *Bresciani v. Amministrazione Italiana delle Finanze* [1976] ECR 129 at para. 23. This was mainly a response to the AG Trabucchi argumentation on the lack of direct effect.

<sup>63</sup> Case 17/81 *Pabst & Richard v. Hauptzollamt Oldenburg* [1982] ECR 1331; Case 270/89 *Polydor v. Harlequin Record Shops* [1982] ECR 329; *Kupferberg supra* note 20.

<sup>64</sup> *Kupferberg supra* note 20 at 3674.

<sup>65</sup> *Ibid.* at para. 18.

<sup>66</sup> FIND it; Kuilwik, Pescatore etc.

<sup>67</sup> Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.

<sup>68</sup> Piet Eeckhout, “Judicial Enforcement of WTO Law in the European Union – Some Further Reflections” (2002) 5 JIEL 91 at 95.

obligations they both undertook towards developing countries. Asymmetry therefore, as an argument within the context of reciprocity is a valid one.

It has been suggested however that the principle of reciprocity is not abstract.<sup>69</sup> In order to maintain its validity there is a precondition that an impairment of the balance of rights and obligations of the EC must be demonstrated before direct effect is denied to a clear, precise and unconditional provision of the WTO Agreements. This encompasses the equilibrium principle advocated by *Montana i Mora*<sup>70</sup> who, for the assessment of the balance of rights and obligations, proposes that the application of a particular provision by the Community's major trading partners should be examined. Bourgeois suggests that, in proceedings before the Court of Justice the Council or the Commission should state why granting direct effect to a particular provision will upset the balance of rights and obligations of the Community.<sup>71</sup> Apart from the huge logistics that the implementation of such a test would require, the argument underpinning it is, with all respect, misguided. The equilibrium principle puts the cart before the horse and it implicitly assumes that a clear, precise and unconditional obligation of the WTO Agreement has direct effect. The principle of reciprocity applies in a much broader sense and should not be limited to the specific provisions of the WTO Agreement. On the contrary, it reflects the balance struck on the systemic relationship between two systems of law, two legal orders. Upsetting the balance of rights and obligations is the result of direct and immediate action only but also indirect and prospective action of institutional players whose interests and practices are often unpredictable and most probably uncontrollable. In this respect, granting the rights to private companies to invoke certain provisions of the WTO Agreement and covered Agreements in national courts and the Court of Justice and thereby, potentially challenging national and Community legislation may seem plausible, under the equilibrium test, in the circumstances of a particular case. In the broader picture however, national courts when faced with a WTO provision in the future will have two options, either to refer to the Court of Justice and allow the Council and the Commission to apply the proposed test or apply the test themselves or grant direct effect to the WTO provisions without distinction. The Court of Justice's adoption of the equilibrium test would essentially compromise its denial of direct effect on grounds of reciprocity.

### ***Freedom of political institutions***

*Portugal v. Council*'s second pillar for the denial of direct effect is the freedom of the political institutions within the WTO system that the grant of direct effect would compromise. There are two aspects on the freedom of the political institutions: first, the external aspect, where the grant of direct effect is destined to weaken the negotiating strength of the institutions within the WTO and in relation to the most important trading partners and second, the internal aspect, the shift of the institutional balance in external trade matters from the Council and the Commission to the Court. The consequence of grant of direct effect would be that any Community legislative measure could be challenged in the Court of Justice either in proceedings for annulment brought under Article 230 or in preliminary references on validity under Article 234.

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<sup>69</sup> Bourgeois, *op. cit. supra* note 17 at 118-119.

<sup>70</sup> *Montana i Mora*, "Equilibrium: A Rediscovered Basis for the Court of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?" (1996) 30 *JWT* 43.

<sup>71</sup> Bourgeois, *op. cit. supra* note 17 at p. 119.

In this respect, the considerations of the enlargement and *locus standi* of private parties in annulment proceedings become crucial. After the *UPA* case,<sup>72</sup> the restrictive interpretation of direct and individual concern suggests that the number of private applicants who satisfy the standing requirements for the challenge of Community legislation under WTO law will remain small. The impact of preliminary references on validity will be more significant as one should expect national courts to seek guidance on questions of WTO law, the specialised and complex nature of which is unlikely to encourage them to tackle themselves. Direct challenges brought by Member State on the other hand are likely to increase because of the enlargement. Under the qualified majority voting rules agreed in the draft Constitutional Treaty as many as 10 Member States could form a minority in WTO-related acts adopted by the Council.<sup>73</sup> This makes increased litigation probable with national governments bringing annulment proceedings against WTO-related acts which they failed to block in the Council under pressure from powerful economic and political lobbies and NGOs.

The freedom of political institutions should also be examined within a WTO context. For example, the Community import regime for Bananas was obviously – and for a long time – in violation of certain provisions of the WTO Agreement. Unavoidably, one of the many challenges brought against it in Community courts would have succeeded and the Community would have been stripped off the possibility to apply a preferential regime on imports from certain ACP countries, a practice which is central in the Community’s development policy. Assuming that the Community purports to apply WTO-consistent policies,<sup>74</sup> this is not, in principle, undesirable. However, at the same time, the Community would have forfeited the facility to obtain a waiver from the WTO Membership under Article XXV:5 of the GATT<sup>75</sup> and maintain its current regime, the escape clause which the Community has indeed availed itself in *Bananas*, and is expected to use in the future for the *GSP*. Giving away such an important WTO-legitimate option is like shooting oneself in the foot. Unlike the argument in *Kupferberg* where the Court dismissed the importance of the safeguard clauses in the Free Trade Agreement with Portugal as being too specific,<sup>76</sup> Article XXV:5 represents a possibility for waiving an obligation under the GATT, broadly so conceived. Had the Court granted WTO law with direct effect, the political institutions arms could be tied, their margin for consultations and negotiations with other WTO member as well as participation in WTO dispute settlement would have been dispensed. By contrast, the locus where Community legislation would be challenged would be the Court of Justice. This represents a disruption not only of the institutional balance between the institutions of the Community but also of the institutional framework established by the WTO.

## **Direct effect of Panel and Appellate Body rulings**

The conclusion to the previous section clearly hints that the Court of Justice did not want to replace the WTO bodies at the interpretation of WTO law and the review of

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<sup>72</sup> Case C-50/00 P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677 at para. 44

<sup>73</sup> Draft Constitutional Treaty (final draft agreed on 19 June 2004).

<sup>74</sup> See below.

<sup>75</sup> “In exceptional circumstances not elsewhere provided for in this agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half the contracting parties. ...”

<sup>76</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at para. 21.

Community acts against its provisions. Would the Court of Justice however be prepared to change its position if it is faced with a case where a WTO Panel and Appellate Body ruling establishes the violation of WTO law by a Community measure and consider itself bound by such ruling? Before answering this question it would be useful to analyse the nature and legal force of Panels and the Appellate Body rulings from a WTO perspective, namely whether they form *res judicata* between the parties or develop a *stare decisis* function within the WTO legal system. The Appellate Body, already in its early jurisprudence, was called upon to provide an answer to this question. In *Japan – Taxes on Alcoholic Beverages*, at the examination of the bindingness of adopted GATT panel reports, it held:

“Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”<sup>77</sup>

Before analysing the practice of the Court regarding to rulings from the Panels and Appellate Body an account of the obligations incumbent on the Community from those rulings should precede. The question raised is whether, from a WTO perspective, the Panel and Appellate Body rulings create an obligation to perform in a traditional international law sense or whether domestic courts are bound by the rulings.<sup>78</sup> At the finding of a violation the Panel or Appellate Body shall “recommend the Member concerned bring the measure into conformity with the agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”<sup>79</sup> The Panels and Appellate Body have hardly recommended specific ways for implementation, showing deference to the national margin of manoeuvre at the implementation of their recommendations.<sup>80</sup> In this respect, it is valid to state that compliance and effectiveness of WTO law comes in all sorts and frames. From a public international law perspective, the possibilities for settlement of a dispute between two or more WTO members are unlimited. In the proper interpretation of the DSU terms, compliance with the WTO obligation maybe seen as unequivocal, compensation and suspension of concessions being only temporary alternatives,<sup>81</sup> however it is clear that compliance itself may have several variants. While Article 22.1 provides that “neither compensation nor the suspension of concessions or other obligation is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements”, Article 22.2 DSU provides that “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or **otherwise comply with the recommendations and rulings...**”<sup>82</sup> allows the interpretation that several variants for compliance are possible.<sup>83</sup> Not all commentators however, are convinced by this argument. Mengozzi, for instance, suggests that after the Panel ruling in *US – Section 301-310* it is clear that the compensation or

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<sup>77</sup> Appellate Body Report in WT/DS8/AB/R *Japan – Taxes on Alcoholic Beverages* (complaint brought by the EC), at p. 13

<sup>78</sup> Jackson, *op. cit. supra* note 87 at p. 74.

<sup>79</sup> Article 19.1 DSU.

<sup>80</sup> Allan Rosas, “Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective” (2001) 4 JIEL 131 at p. 134.

<sup>81</sup> Jackson, *op. cit. supra* note 87.

<sup>82</sup> Emphasis added.

<sup>83</sup> Eeckhout, *op. cit. supra* note 68 at p. 93; Rosas *op. cit. supra* note 80 at pp. 135-136.

retaliation alternatives under the DSU are only temporary and full compliance is necessary.<sup>84</sup> In his view, after the content of the WTO provisions is made clear and the inconsistency of Community measures established the only remaining ground for denial of direct effect of the rulings by the Court, following *Portugal v. Council*, is the asymmetry of obligations. In order to avoid this “uncomfortable consequence” the Court should grant direct effect to the WTO Agreements.<sup>85</sup> Similarly, Zonnekeyn takes a more supportive stance of bindingness beyond the traditional sense and militates in favour of the full effect of those rulings in the Community legal order.<sup>86</sup> John Jackson, in a seminal article,<sup>87</sup> argues that despite their linguistic shortcomings there are several provisions in the DSU which point towards the direction of bindingness.<sup>88</sup> He does however acknowledge that the US Courts will not treat them as such but indicates that these rulings may affect the US jurisprudence as well as those of other WTO Members.

The realisation that rulings from the WTO may go beyond bindingness in the traditional sense raises a final introductory point from the Court of Justice’s perspective; that is whether, with view of the fact that there are significant powers granted on the WTO dispute settlement system, the system established under this system is compatible with the principles of the Community constitutional order.<sup>89</sup> Unlike Opinions 1/76<sup>90</sup> and 1/91<sup>91</sup> the Court, in Opinion 1/94, did not broach the possibility of incompatibility. The question was not asked since the emphasis was put on the allocation of competences between the Community and its Member States for the conclusion of the WTO Agreement, the Dispute Settlement Understanding being annexed to it. The wording of Article 300(6) and the general purpose of the provision repeatedly recognised by the Court,<sup>92</sup> allow the contention that the Court could have examined the issue. It is difficult to surmise whether the Court, pragmatically reasoning, assumed the responsibility to uphold the outcome of the Uruguay Round Agreements as consistent with the Treaty, or, whether those considerations escaped its attention. In both cases, it should be argued that the Court was not justified not to bring up the issue. Put in context, the Court was aware that the WTO Agreement represented the most significant achievement in multilateral treaty-making since the foundation of the United Nations system while the Dispute Settlement Understanding annexed to it should be treated as a welcome market access instrument made available to the Community. In addition, the DSU, unlike the circumstances prevailing in Opinions 1/76 and 1/91, provides for a multilateral system of compliance administered by the DSB whose recommendations create a traditional international law obligation which should be deemed compatible with the Treaty. As such it presents no

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<sup>84</sup> Paolo Mengozzi, “Le Relazioni Esterne della Comunità Europea, il Principio di Sussidiarietà e le Esigenze de Cooperazione Poste dalla Globalizzazione dell’ Economia” in Luigi Daniele (ed.), *Le Relazioni Esterne della Unione European Nel Nuovo Millennio*, (Giuffre Milano, 2001) p. 5 at pp. 23-27.

<sup>85</sup> *Ibid.* at p. 27.

<sup>86</sup> Geert A. Zonnekeyn, “The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance – The Banana Experience” (2000) 34 *JWT* 93; Geert A. Zonnekeyn, “The Bed Linen Case and its Aftermath: Some Comments on the European Community’s “World Trade Organization Enabling Regulation”” (2002) 36 *JWT* 993.

<sup>87</sup> John H. Jackson, “The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation” in James Cameron & Karen Campbell (eds.), *Dispute Resolution in the World Trade Organisation*, (Cameron May, London, 1998) pp. 69-74 also available in (1997) 91 *AJIL* 60.

<sup>88</sup> McNelis arrives at the same conclusion on the basis of the principle of good faith. See, Natalie McNelis, “What Obligations Are Created by World Trade Organization Dispute Settlement Reports?” (2003) 37 *JWT* 647 at pp. 657-659.

<sup>89</sup> *Ibid.* at 16.

<sup>90</sup> Opinion 1/76 (*Laying-Up Fund*) [1977] *ECR*

<sup>91</sup> Opinion 1/91 (*First Opinion on the EEA Agreement*) [1991] *ECR* I-6079

<sup>92</sup> See the case law analysed in Eeckhout, *op. cit. supra* note 33 at pp. 227-232.

threat towards the constitutional position of the Court of Justice within the system established by the Community Treaties.<sup>93</sup>

Moving onto the question of direct effect of WTO rulings in the Community legal order, the Court was presented with the issue on several occasions. One of the first attempts to invoke the Report of the WTO Appellate Body in order to have a Community act annulled was in the framework of claims brought by traders in bananas in the Court of First Instance. In *Chemnitz* the CFI without even mentioning the issue of direct effect simply stated that

“It must be made clear that the Standing Appellate Body's report of 9 September 1997, adopted by the Dispute Settlement Body on 25 September 1997, does not call into question the tariff quota system as such. That report concluded that there were certain discriminatory elements in the arrangements introduced by Regulation No 404/93, but did not find the arrangements as a whole to be incompatible with GATT or with the General Agreement on Trade in Services (GATS). The Commission accordingly adopted amendments to the arrangements introduced by Regulation No 404/93 with a view to bringing them into compliance with that report and with the decision of the Dispute Settlement Body [see Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28)].”<sup>94</sup>

The question the CFI raised by this statement is whether, where the Community adopts a legislative measure in response to an adverse Panel and Appellate Body report, the implementation exception applies and those rulings contained in those reports be treated as directly effective. There have been several cases on the matter and there are some forthcoming.<sup>95</sup> The most characteristic example in case law regards the *Bananas* litigation. In fact, in *Cordis, Bocchi* and *T.Port* the applicants requested from the CFI to examine the provisions of Regulation 2362/98 in the light of the WTO Agreement and in particular, those provisions that the Council Regulation 404/93 on the Common Market Organisation was found to violate. The CFI denied to apply the implementation exception declaring that “neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the Dispute Settlement Body on 25 September 1997 included any special obligations which the Commission “intended to implement”, within the meaning of the case-law, in Regulation No 2632/98[...] The regulation does not make express reference either to any specific provisions of the agreements contained in the annexes to the WTO Agreement”.<sup>96</sup> This judgment attracted criticism by Eeckhout as a missed opportunity to extend the implementation principle to its proper scope.<sup>97</sup> It should be pointed out that this criticism does not do justice to the CFI. Implementation of the WTO Agreement and covered

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<sup>93</sup> The Court indicated that this is not a sacrosanct either but this should probably be limited to the Strasbourg Court. Also, Mengozzi, *op. cit. supra* note 84 at p. 17.

<sup>94</sup> Case T-254/97 *Fruchthandelsgesellschaft mbH Chemnitz v Commission* [1999] ECR II-2743 at para. 26.

<sup>95</sup> Case C-317/99 *Kloosterboer Rotterdam BV v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-9863; Case T-18/99 *Cordis Obst und Gemüse Grosshandel v. Commission* [2001] ECR II-913; Case T-30/99 *Bocchi Food Trade International v. Commission* [2001] ECR.II-943; Case T-52/99 *T.Port v. Commission* [2001] ECR II-981; Case C-307/99 *OGT Fruchthandelsgesellschaft v. Hauptzollamt Hamburg-St. Annen* [2001] ECR I-3159;

<sup>96</sup> Case T-18/99 *Cordis Obst und Gemüse Grosshandel v. Commission* [2001] ECR II-913 at para. 59; Case T-30/99 *Bocchi Food Trade International v. Commission* [2001] ECR.II-943 at para 64; Case T-52/99 *T.Port v. Commission* [2001] ECR II-981 at para. 59.

<sup>97</sup> See also Eeckhout, *op. cit. supra* note 68 at p. 107.

agreements should be seen only as a policy choice after a careful study of the circumstances and the legal consequences. As such, the implementation exception should remain narrow. The findings by a Panel or the Appellate Body that a certain Community act is inconsistent with the covered agreements create an obligation which is hardly different to the obligations of the WTO Members under the provisions of those agreements and in particular, Article XVI:4.<sup>98</sup> This general obligation, if taken literally would mean that all new measures taken by WTO members falling within the scope of the WTO and covered agreement should be taken in implementation of those agreement.

When the Court of Justice was faced with the issue in *Atlanta* where the Court held that

“There is in this regard an inescapable and direct link between the WTO decision and the plea of breach of the provisions of GATT, raised by the appellant before the Court of First Instance and not repeated by it in its pleas on appeal. Such a decision could only be taken into consideration if the Court of Justice had found GATT to have direct effect in the context of a plea alleging the invalidity of the common organisation of the market.”<sup>99</sup>

This statement at the time was taken to mean that the rulings of the DSB had not direct effect.<sup>100</sup> In *Biret*,<sup>101</sup> a recent case which concerned the claim for non-contractual liability of the Community for damages suffered by Biret because of the Community’s import ban on hormone treated beef despite the founding of its inconsistency with Articles 3(3) and 5(1) of the SPS Agreement by the Dispute Settlement Body of the WTO,<sup>102</sup> the Court seems to indicate that its readiness to transfer the legislation adopted in order to comply with a Panel and Appellate Body ruling to the *Nakajima* category of cases. While it confirmed that the WTO rules are not among those rules in the light of which the Court is to review the legality of measures adopted by the Community institutions,<sup>103</sup> it rejected the interpretation of its ruling in *Atlanta*<sup>104</sup> by the CFI in the contested judgment,<sup>105</sup> and by providing an authentic interpretation of that judgment,<sup>106</sup> it distinguished the circumstances of that case. It then stated

“In that regard, the dispute settlement procedure which culminated in the DSB decision of 13 February 1998 was instigated in 1996. Since the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the Understanding it was granted a period of 15 months for that purpose, which expired on 13 May 1999. Accordingly, for the period prior to May 1999, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 178 of the Treaty, without rendering ineffective the grant of a reasonable

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<sup>98</sup> “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”

<sup>99</sup> Case C-104/97P *Atlanta v. European Community* [1999] ECR I-6983 at paras. 19-20.

<sup>100</sup> This statement was followed by the CFI in several Bananas judgments. See the criticism launched by Snyder *op. cit. supra* note 1 at p. 338.

<sup>101</sup> Cases C-93/02 & 94/02 *Biret International & Etablissements Biret et Sie*, judgment of 30 September 2003, not yet reported.

<sup>102</sup> WT/DS26 *European Communities – Measures concerning meat and meat products (hormones) (complaint brought by US)*; WT/DS48 *European Communities – Measures concerning meat and meat products (hormones) (complaint brought by Canada)*.

<sup>103</sup> *Biret, op. cit. supra* note 101 at para. 52.

<sup>104</sup> Case C-104/97P *Atlanta v. European Community* [1999] ECR I-6983.

<sup>105</sup> Case T-174/00 *Biret International v. Council* [2002] ECR II-17 at para. 67.

<sup>106</sup> *Biret, op. cit. supra* note 101 at paras. 55-60.

period for compliance with the DSB recommendations or decisions, as provided for in the dispute settlement system put in place by the WTO agreements.”<sup>107</sup>

While this confirms the freedom of political institutions as a ground for denying direct effect to WTO law, it has the potential of restricting its temporal application until the deadline for implementation of the DSB recommendations granted by the Panel established under Article 21(3) DSU elapses. It implies that after this deadline the Community measures shall be subject to a challenge of their legality and confirms the theory that the obligations created by the Panel and Appellate Body can only be escaped temporarily. The Court also opens the issue of Community liability,<sup>108</sup> which raises however additional considerations.

## **Community liability**

As an introductory remark it should be pointed out that while the Community is bound in international law by the norms relating to state liability,<sup>109</sup> the focus of this analysis is the non-contractual liability of the Community for damages suffered in violation of WTO law. This question is inextricably linked with the issue of direct effect and the Community courts have consistently denied any right for damages in such cases. The WTO having been found to lack direct effect has the consequence of denial of all claims by private traders against the Community in damages.<sup>110</sup> There are arguments favouring this stance in Community as well as WTO law.

From a Community law perspective, according to the *Schöppenstedt* formula, the conditions for triggering liability are the breach of a superior rule of law granting a right to an individual and the existence of a causal link between the breach and the damage suffered.<sup>111</sup> When direct effect is lacking damages cannot be awarded. It has been supported, making the analogy with *Francovich*, that the existence of direct effect is not necessary for the award of damages.<sup>112</sup> This argument reveals the problem of the definition of direct effect and it being treated as synonymous to the creation of rights for individuals. In *Francovich*, the directive at issue which was in principle capable of conferring rights on individuals but could not be enforced in national courts because the Member State concerned, not having transposed it within the deadline, failed to adopt the necessary implementing measures.<sup>113</sup> Because, however, the directive was capable of granting rights to individuals and the rest of the conditions were fulfilled, damages were awarded. By contrast, the Court’s decision to deny liability to the “affected traders” for damages suffered in violation of WTO law makes perfect sense. The Court’s analysis on direct effect of WTO law makes clear that the WTO Agreement does not grant any rights to individuals and therefore individuals cannot have an entitlement to a certain level of tariff or quota treatment by any WTO Member.<sup>114</sup>

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<sup>107</sup> *Ibid.* at paras. 61-62.

<sup>108</sup> *Ibid.*, in a combined reading of paras. 51 and 64.

<sup>109</sup> Case 327/91 *France v. Commission* [1994] ECR I-3666 at para. 25

<sup>110</sup> Case C-104/97P *Atlanta AG and others v Commission and Council* [1999] ECR I-6983; Cases C-93/02 & 94/02 *Biret International & Etablissements Biret et Sie*, judgment of 30 September 2003, not yet reported.

<sup>111</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

<sup>112</sup> Birgit Schoißwohl, *The ECJ’s Atlanta Judgment: Establishing a Principle of Non-Liability?* in Fritz Breuss, Stefan Griller and Erich Vranes (eds.), *The Banana Dispute: An Economic and Legal Analysis*, (Research Institute for European Affairs, SpringerWienNewYork, 2003) p. 309.

<sup>113</sup> Case C-6/90 *Francovich and others v. Italian Republic* [1991] ECR I-5357 at para. 27.

<sup>114</sup> Rosas, *op. cit. supra* note 80 at p. 140.

From a WTO perspective, remedies under the WTO DSU are prospective.<sup>115</sup> That is to say that WTO Members whose laws and practices have been found inconsistent with the WTO Agreement must bring those in conformity without any requirement to remedy their previous misconduct.<sup>116</sup> The crucial time from the WTO perspective is the expiry of the deadline for implementation under Article 21.3 DSU. This was acknowledged also in *Biret*<sup>117</sup> but as pointed out by Eeckhout it may not always be the case when the annulment of a WTO-inconsistent Community act is sought.<sup>118</sup> However, what the Court implied in *Biret*<sup>119</sup> was that had damages been suffered at the crucial time after the expiry of deadline for implementation could be recovered by the Community. Although the question still remains open,<sup>120</sup> it is difficult to agree with this position. The Court should maintain its position that there are no rights conferred on individuals by the WTO Agreement, the time-limit set to the Community for compliance with the Panel and Appellate Body considerations being irrelevant. All this however, changes when the discussion enters the coercive approach where WTO law is communitarised by virtue of Community legislation and rights on individuals are granted by virtue of this communitarisation – it should be argued however, that the existence of a Panel and Appellate Body ruling does not communitarise the dispute as such. According to this reasoning Community liability should also be possible in these cases, the existence and timing of a WTO dispute notwithstanding.

Apart from those traders who have been affected by a WTO-inconsistent Community measure there are also those who may be targeted by another WTO member at the stage of suspension of concessions. Are those traders entitled to any compensation?<sup>121</sup> In WTO law, the Community cannot voluntarily reimburse them for the damages suffered as this would amount to a subsidy.<sup>122</sup> Regarding their right for resort to a non-contractual liability claim against the Community the same considerations analysed above should apply. In addition, it should be pointed out that the issue of calculation of damages suffered and causation present us with additional considerations. Accordingly, what constitutes damages in this context? It is the damages actually suffered. This should not be interpreted as the amount by which the tariffs at the imports of Community products have increased owing to other WTO member's suspension of concessions but the actual effect this raise had in the competitive position of the affected traders.<sup>123</sup> On the issue of causation, the fact that Community legislation has been found inconsistent with the WTO Agreements does not necessarily attribute the raise of tariffs to the Community institutions. On the

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<sup>115</sup> Eeckhout, *op. cit. supra* note 68 at pp. 93-4.

<sup>116</sup> WT/DS126/RW *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather (Recourse to Article 21.5 DSU by the United States)*

<sup>117</sup> *Biret*, *op. cit. supra* note 101 at para. 63.

<sup>118</sup> Eeckhout, *op. cit. supra* note 68 at pp. 93-4.

<sup>119</sup> See above.

<sup>120</sup> Judge Melchior Wathelet, “Du concept de l’effet direct à celui de l’invocabilité au regard de la jurisprudence récente de la Cour de justice” in Mark Hoskins & William Robinson (eds.), *A True European: Essays for Judge David Edward*, (Hart Publishing, Oxford and Portland, 2003), 367 at 389.

<sup>121</sup> The Court of First Instance will be called upon to decide on the matter in Joined Cases T-69/00, T-301/00, T-320/00, T-383/00 and T-135/01 *FIAMM and FIAMM Technologies v. Council and Commission*, hearing of 26 May 2004.

<sup>122</sup> WT/DS217 *United States – Continued Dumping and Subsidy Offset Act of 2000 ‘Byrd Amendment’ (complaint brought by the European Communities)*

<sup>123</sup> In this respect, as is rumoured to have happened as a result of the US retaliation in the Bananas case, the raise in tariffs on Louis Vuitton leather handbags had an opposite effect to that expected in that the particular handbags became expensive enough to be considered as luxury items by American consumers and their sales soared.

contrary, there are several intervening steps between the breach of WTO law by the Community and the suspension of concessions which may lead to damages suffered by individual traders. In WTO terms, there has to be an authorisation by the DSB and more importantly, the freedom of the WTO Member awarded the authorization to enforce it or seek other ways to achieve compliance with the ruling, the suspension of concessions being the final resort.<sup>124</sup>

## The political institutions

In the reactive approach, both the political institutions and the ECJ have acted against WTO law. The most important instance whereby the Council took a reactive approach towards WTO law is the very inclusion in the preamble to its decision concluding the WTO Agreement of a clause stating that “Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts,”<sup>125</sup> This is a right of the Community institutions recognised to them by the Court.<sup>126</sup> This relates to the preceding discussion and while this recital has been dismissed by Advocate General Saggio in *Portugal v. Council*,<sup>127</sup> its *ex post facto* importance should be considered cardinal.

The reactive approach also includes those cases where the institutions chose to maintain measures reflecting fundamental policy choices despite adverse Panel and Appellate Body rulings. This has been the institutional practice of the Community in the foundational years when important policies were brought to the fore in WTO Dispute Settlement.<sup>128</sup>

## Coactive approach

### Court of Justice

The denial of direct effect to WTO law does not mean that WTO law has no significant role to play within the Community legal order. On the contrary, its application and enforcement are necessary not only for the purposes of fulfilling the Community’s and Member States’ international commitments towards their trading partners but because WTO law forms a significant tool within the Community legal order. Indeed, when the Commission formulates Community policies, WTO law is taken into account. Some pieces of trade legislation specifically refer to the international trade rules agreed under the WTO. In some other cases, Community law transposes WTO law *in integrum*. As briefly mentioned in the context of the analysis of *Portugal v. Council* the Court has been responsive to these realisations. What follows is a systematic analysis of the Court’s

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<sup>124</sup> Article 3.7 DSU. Rosas, *op. cit. supra* note 80 at p. 140.

<sup>125</sup> Council Decision 94/800 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), O.J. L 336, 23/12/1994, p. 1.

<sup>126</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at para. 17.

<sup>127</sup> AG Saggio Opinion in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 20.

<sup>128</sup> Antonis Antoniadis, “The Participation of the European Community in the World Trade Organisation: An External Look at European Union Constitution-Building” in Tridimas & Nebbia (eds.), *EU Law for the 21<sup>st</sup> Century: Rethinking the New Legal Order*, Vol. I (Hart Publishing, 2004), p. 321 at 343-344.

rulings and the political institutions' practice which demonstrate a notable deviation from lack of direct effect doctrine. The taxonomy of the coercive approach includes the legality standard, the clear reference, the transposition and the consistent interpretation aspects.<sup>129</sup>

## **Legality standard**

As stated in *Kupferberg*

“In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in case 181/73 Haegeman (1974) ECR 449, form an integral part of the Community legal system.”<sup>130</sup>

This quotation from the judgment underlines the functional considerations present in the fulfilment of the international obligations of the Community and the aim to avoid incurring international liability.<sup>131</sup> Premised upon the need to establish a unified front which should not be undermined by the recalcitrant Member States' breach of the Community's international commitments and supported by the principle of cooperation and Article 300(7), the Community can coerce Member States to fulfil their obligations under the international agreements. There is no issue of direct effect here, simply an unconditional obligation incumbent on Member States every time the Community concludes an international agreement. It flows from the unique position of the Community assuming its own obligations on the international plane, a consequence of the fact that it has been granted with legal personality to be able to invoke the mechanisms available at Community level in order to ensure that the Member States observe their obligations under those Treaties.

Accordingly, it is logical for the Community in those cases to be able to invoke the proceedings enshrined in Article 226 EC Treaty in order to bring recalcitrant Member States back to order. Member States' failure to fulfil their obligations under the Treaty includes also obligations assumed by the Community in the WTO. In those cases it is used as the Community legal standard to which Member States must abide. Such an obligation stems from the nature of the Community as a Customs Union under the GATT. It is stated therein that each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.<sup>132</sup> Given that the Community, during the GATT was perceived as a single Contracting Party,<sup>133</sup> the whole meaning of regional integration arrangements within the international trading system would be

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<sup>129</sup> I prefer the terms “clear reference” and “transposition” adopted by Snyder in Snyder, *op. cit. supra* note 1 at p. 342 over the “indirect effect” terminology proposed by Eeckhout in Eeckhout, *op. cit. supra* note 32 at p. 40. The reasons for this are that first, the legal construction underpinning these exceptions are so dissociated with the considerations of direct effect and second, they differ between themselves so fundamentally that they should not be put under the same heading.

<sup>130</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at para. 13.

<sup>131</sup> Klabbers, *op. cit. supra* note 3 at p. 281.

<sup>132</sup> Article XXIV:12 GATT.

<sup>133</sup> Article XXIV:1 GATT.

frustrated should the Community be unable to use the means available to it in order to enforce compliance with the GATT provisions.<sup>134</sup>

The case often quoted with regard to the WTO law in this respect is the *IDA* case.<sup>135</sup> In those proceedings the Commission requested the Court to declare that by authorizing the importation of dairy products at a customs value lower than the minimum price provided by the International Dairy Agreement, an agreement annexed to the Tokyo Round of Multilateral trade negotiations conducted under the GATT, Germany failed to fulfil its obligations under the Treaty. The Court obviated the examination of whether the Commission had the right to bring proceedings against a Member State under the GATT and in the facts of the case it had little difficulty in concluding that Germany was in violation of the Annexes to the IDA. In order to arrive at this conclusion the Court had to overcome difficult hurdles. The most important was the claim by Germany, taken up by Advocate General Tesouro in his Opinion<sup>136</sup> that the Community legislation on inward processing relief was in violation of the IDA too. The Court asserted the duty of consistent interpretation and held that the relevant Council Regulation could be interpreted in conformity with the IDA.<sup>137</sup> Had the Court not avoided the conflict between Community legislation and the IDA it would declare the pertinent Community legislation inapplicable. This does not indicate a reversal of the well established doctrine that the Member States cannot challenge the legality of Community legislation against WTO law.<sup>138</sup> It rather means that, in the facts of this case, Council Decision 80/271 concluding the IDA on behalf of the Community entails an intention for its implementation in the Community legal order.<sup>139</sup>

This rationale also assists in order to rebut any criticism that the Court could have attracted as this judgment seemingly promotes inconsistency and maybe also an imbalance between rights and obligations of the Member States. It was argued that allowing the Commission to challenge a Member State measure for violation of the GATT while at the same time prohibiting a Member State the corollary right of challenge in annulment proceedings “is on balance not satisfactory, if one considers that the two situations are comparable”.<sup>140</sup> However, as Bourgeois notes, there are several ways wherewith the rulings in *Bananas* and *IDA* may be reconciled. It can be argued that the former entails the enforcement of an obligation of the EC *vis-à-vis* the GATT while the latter an obligation of a Member State *vis-à-vis* the EC. It can also be argued that in both cases the Community upholds EC law rather than international law which, the advisability of the approach notwithstanding, does remedy the alleged inconsistency.<sup>141</sup> This raises the question of the supremacy of the Community legal order which will be dealt with below.

More recently, the Court condemned Ireland for failing to adhere to the 1971 Berne Convention for the Protection of Literary and Artistic Works.<sup>142</sup> Unlike *IDA* which concerned compliance with an agreement concluded by the Community, it is not

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<sup>134</sup> In this case Article 226 EC Treaty.

<sup>135</sup> Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989.

<sup>136</sup> AG Tesouro’s Opinion in Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989 at para. 24.

<sup>137</sup> Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989 at para 57.

<sup>138</sup> Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

<sup>139</sup> This realisation draws a parallel with the *Nakajima* doctrine as will be elaborated below.

<sup>140</sup> Bourgeois, *op. cit. supra* note 17 at p. 112. See also, AG Tesouro’s Opinion in Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989 at paras. 23-24.

<sup>141</sup> *Ibid.* at pp. 112-113.

<sup>142</sup> Case C-13/00 *Commission v. Ireland* [2002] ECR I-2943

Community membership which provides the cause of action in this case, since the Community is not a party to the Berne Convention. The Berne Convention is, in principle, binding on the Community indirectly by virtue of Article 9 of the TRIPs Agreement in accordance with which the Community, as a WTO Member bound by all covered agreements, is obliged to afford the level of copyright protection enshrined in the Convention to all other WTO Members. Curiously, the TRIPs Agreement is not mentioned at all but instead Article 5 of Protocol 28 to the EEA Agreement which obliges the parties to the EEA to adhere to the Berne Convention.<sup>143</sup>

### **Clear reference**

In the analysis of the clear reference exception, the dominant case on the matter is *Fediol*.<sup>144</sup> In that case, an association of Seed Crushers and Oil Processors brought a complaint before the Commission requesting the latter to initiate, on the basis of the New Common Commercial Policy Instrument,<sup>145</sup> proceedings against certain alleged illicit commercial practices employed by Argentina. *Fediol* claimed that those practices were in violation of certain provisions of the GATT. Following an investigation the Commission concluded that there was no violation and *Fediol* applied to the Court for the annulment of the Commission's decision. The Commission based its defence of inadmissibility on the argument that there is no direct effect of the GATT. The Court however held that it cannot from the lack of direct effect be inferred that "citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that Regulation."<sup>146</sup> The gist of the ruling is that, the lack of direct effect notwithstanding, at the exercise of its discretion on whether to pursue a complaint under the GATT Dispute Settlement, the Commission interprets the relevant GATT provisions. This should not preclude the private parties involved in this institutionalised procedure and having vested interest therein to request the judicial review of the Commission's judgement. In essence, since the Commission possesses the prerogative of interpretation of the GATT for the purposes of initiating a GATT/WTO complaint it should not then hide behind the lack of direct effect of the GATT.<sup>147</sup> By contrast, it should allow the review of its judgement by interested parties.

The *Fediol* judgment has been confirmed by the Court of Justice in its case law relating to the WTO Agreement<sup>148</sup> and the Trade Barriers Regulation adopted by the Council for the Community to exercise its rights under the Agreement succeeding the New Common Commercial Policy Instrument.<sup>149</sup> Its significance can hardly be overstated. Unlike the transposition exception, GATT/WTO law here is not interpreted *qua* Community law but on its own merits. What is more important is that, in the "clear reference" cases, the

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<sup>143</sup> *Ibid.* at para. 20.

<sup>144</sup> Case 70/87 *Fediol v. Commission* [1989] ECR 1825.

<sup>145</sup> Council Regulation 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices O.J. L252, 20/09/1984, p. 1.

<sup>146</sup> Case 70/87 *Fediol v. Commission* [1989] ECR 1825 at para. 19.

<sup>147</sup> See the Commission's arguments in paragraph 18 of the judgment.

<sup>148</sup> Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at para. 49; Cases C-93/02 & 94/02 *Biret International & Etablissements Biret et Sie*, judgment of 30 September 2003, not yet reported, at para. 53.

<sup>149</sup> Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization O.J. L 349, 31/12/1994, p. 71.

challenge of a Community act regardless, it is, in fact, not Community legislation tested against WTO law but the legislation of another WTO Member. The consequent application of WTO law by the Court in these cases is not such as to have any further effects in the Community legal order. Conversely, the interpretation given is limited within the facts of “the **given** case” and “certain **specific** commercial practices”.<sup>150</sup>

## Transposition

In the following aspect of the coercive approach, the Community is required to act in conformity with WTO law in so far as it has adopted measures intended to implement certain of its provisions. This is the so-called transposition exception in accordance with which individuals may invoke those WTO provisions in order to challenge incompatible Community acts.<sup>151</sup> The foundational case for this exception is *Nakajima*.<sup>152</sup> In that case, *Nakajima*, a Japanese company importing serial-impact dot matrix printers into the Community, applied for the annulment of Regulation 3651/88 imposing definitive anti-dumping duties on its imported products. *Nakajima* claimed that the duties were in violation of certain provision of the GATT Anti-dumping Code on whose provisions it sought to rely in order to achieve the annulment of the Regulation. The Council argued that, as with the GATT, the Anti-Dumping Code could not have direct effect. The Court held that *Nakajima* was not relying on the direct effect of the Code and accepted that at the adoption of Council Regulation 2423/88 (the Basic Antidumping Regulation) the Community intended to implement the international commitments stemming from the GATT Anti-Dumping Code. Therefore, the legality of Regulations imposing Anti-dumping duties could be contested against the provisions of the GATT Anti-Dumping Code.

In *Petrotub*,<sup>153</sup> a case which concerned the imposition of anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Romania, the Court of Justice confirmed the validity of the *Nakajima* doctrine. It explained, again in the context of Anti-dumping, that since the Community pursuant to the Basic Anti-Dumping Regulation intended to transpose the WTO Anti-Dumping Agreement,<sup>154</sup> the Court may review the legality of Community measures in the field of anti-dumping under the ADA. The Court went even further to explain that those rules being subsumed within the Community legal system attract the application of an additional layer of protection prescribed by this system, in that case Article 253 EC Treaty on the obligation to provide reasons. The implication which flows is that the ADA provisions in question shall be treated *qua* Community law. The Court then laid down an additional implication. The requirement to state reasons in that particular case should be interpreted in the context of anti-dumping, namely the procedure provided in Article 2.4.2 ADA and the Commission’s commitments within the WTO Committee on Anti-Dumping practices.

The *Nakajima* doctrine makes clear in this case that the Court may review the legality of Community legislation against the ADA. What if parallel proceedings were instituted against the same Regulation both in the Court of Justice and the Panel and Appellate Body

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<sup>150</sup> Paraphrasing paragraph 20 of the judgment. Emphasis added.

<sup>151</sup> Eeckhout *op. cit. supra* note 32 at p. 56 uses the term ‘implementation’ instead of ‘transposition’. Those terms shall be used interchangeably here.

<sup>152</sup> Case C-69/89 *Nakajima All Precision Co. Ltd v. Council* [1991] ECR I-2069.

<sup>153</sup> Case C-76/00P *Petrotub SA and Republica SA v. Council* [2003] ECR I-79 at paras. 54-60.

<sup>154</sup> Hereafter, ADA.

of the WTO? In the *EC - Bed Linen* case,<sup>155</sup> the Panel and Appellate Body of the WTO had the opportunity to examine the conformity of Council Regulation 2398/97 imposing definitive anti-dumping duties on cotton bed linen originating in India with the ADA. In its Report, the Panel concluded that the said Regulation violated certain provisions of the ADA.<sup>156</sup> The Community appealed the Panel findings and while the Appellate Body reversed several of those it maintained that the “zeroing” methodology<sup>157</sup> applied by the EC is inconsistent with Article 2.4.2. ADA.<sup>158</sup> These findings, important as they are in themselves, raise important questions regarding their impact in the Community legal order in connection with the preceding discussion of direct effect of Panel and Appellate Body rulings.<sup>159</sup> Following the fact of the *EC – Bed Linen* case, what will the Court of Justice do when faced with a complaint against the “zeroing” methodology’s inconsistency with Article 2.4.2 ADA? In principle, the Court had jurisdiction to decide the issue anyway, nonetheless, the timing of the parallel proceedings raises several possibilities. If the dispute is still pending in the WTO, the Court could deprive those proceedings of their subject matter by annulling the Regulation. Equally, it may decide that the “zeroing” methodology is consistent with the ADA. In both cases it can also stay its proceedings in anticipation of the Panel and Appellate Body rulings.<sup>160</sup> Staying the proceedings should be the least preferred option. Since the Court has been granted jurisdiction to judge the legality of Anti-Dumping Regulations against the ADA it should exercise it.

Should the Court decide that the “zeroing” methodology is consistent with the ADA and in all cases of asynchronous complaints – the WTO proceedings having been concluded before the Court of Justice proceedings, how would the Panel and Appellate Body Report be treated by the Court of Justice? It should be conceded in this respect that once the DSB adopts the legal interpretations of the Panel Report, in the case of an appeal, as confirmed, modified or reversed by the Report of the Appellate Body, the Court of Justice should accept the legal interpretations contained therein. It is not because it is strictly speaking bound by those interpretations as it is difficult to challenge the supremacy of the Court of Justice within the Community legal system.<sup>161</sup> Within the WTO system, the interpretations given by the Panels and Appellate Body are not binding precedents either.<sup>162</sup> As a result, it is most unlikely that the Court should treat them as such. They do however create legitimate expectations and it should be expected that traders and WTO Members will tune their practices and policies accordingly. In addition, common sense dictates that while there is no hierarchical relationship between the WTO dispute settlement bodies and the Court of Justice, the former are better equipped to answer questions of WTO law.<sup>163</sup>

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<sup>155</sup> WT/DS141 *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (complaint by India)*.

<sup>156</sup> WT/DS141/R.

<sup>157</sup> In the calculation of the dumping margin the Community applied the following methodology: First, it divided the Indian bedlinen into several categories. In some, the export price was lower than the normal price and in some it was higher, the later being called a “negative dumping margin”. Then, it calculated the average dumping margin calculating the negative dumping margins as zero. Obviously, the “zeroing” methodology resulted into a higher dumping margin.

<sup>158</sup> WT/DS141/AB/R

<sup>159</sup> See, Natalie McNelis, “What Obligations Are Created by World Trade Organization Dispute Settlement Reports?” (2003) 37 *JWT* 647.

<sup>160</sup> Bourgeois, *op. cit. supra* note 17 at 121 citing K.P.E. Lasok, *The European Court of Justice, Practice and Procedure*, 2<sup>nd</sup> edition, (Butterworth, London, 1994) at p. 72.

<sup>161</sup> McNelis, *op. cit. supra* note 159 at pp. 669-670.

<sup>162</sup> See above.

<sup>163</sup> Reminiscent of the opinion of Sir Thomas Bingham MR on the relationship between the Court of Justice and national courts in *R v. Stock Exchange, ex parte Else (1982) Ltd.* [1993] 2 *WLR* 70 “In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of

That said could Panel and Appellate Body Reports be considered directly effective within the subject-matter covered by the *Nakajima* doctrine? One should concede that they are. Is there an additional source of inconsistency if some Panel and Appellate Body rulings are granted direct effect while others are not? On the contrary, the argument that some WTO provisions may be directly effective in the Community legal order once transposed necessitates that the interpretations given by the bodies entrusted with the task of providing security and predictability to the system should follow.

In the aftermath of the *EC – Bed Linen*, the Council adopted the Enabling Regulation<sup>164</sup> whose provisions shall be analysed below. Suffice it so say here that it requires the Council to take the necessary measures to bring Community acts in conformity with the rulings enshrined in the DSB report. The Council was faced with the possibility of actions for annulment before the Court of Justice by individual traders against the imports of which the “zeroing” methodology has been applied. In such circumstances, the Court would be expected to apply the interpretations contained in those Reports, annul the Regulations *ex tunc* and require the reimbursement of the collected duties. In response, the Council adopted the Enabling Regulation.<sup>165</sup> The Enabling Regulation provides prospective remedies and expressly states the intention to avoid the reimbursement of the collected duties.<sup>166</sup> The interest of the Council in pre-empting the Court of Justice’s jurisdiction offers strong evidence in favour of the argument that in the subject matter of anti-dumping and subsidies the Panel and Appellate Body Reports are directly effective.

Does the existence of direct effect facilitate a claim for damages? A claim for compensation under Community liability, while legally possible, is unlikely to succeed in the circumstances of the *EC – Bed Linen* case. As far as existing applications of the “zeroing” methodology are concerned, it would be difficult to argue that the Community exceeded the limits of its discretion, especially with view of the fact that “zeroing” is a common practice internationally in the field of anti-dumping.<sup>167</sup> In the future, the Enabling Regulation does not expressly exclude the Community from applying the “zeroing” methodology it is unlikely however that it will do so. If it does, it would be safe to assume that, in the circumstances, the infringement of Community law will readily establish a sufficiently serious breach.<sup>168</sup>

## **Consistent interpretation**

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the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing the Community instruments.”

<sup>164</sup> Council Regulation (EC) No 1515/2001 on the measures that maybe taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidies matters O.J. L 201, 26/07/2001, p. 10. Hereinafter, the Enabling Regulation.

<sup>165</sup> McNelis, *op. cit. supra* note 159 at p. 670.

<sup>166</sup> Article 3 of the Enabling Regulation.

<sup>167</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 at para. 55 ; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, C-190/94 *Dillenkofer and Others v. Germany* [1996] ECR I-4845 at para. 25

<sup>168</sup> Case C-5/94 *R v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553 at para. 28.

The Court of Justice has always made efforts to interpret EC law in conformity with the Community's international obligations.<sup>169</sup> Past practice however, has focussed on international agreements which were found to be directly effective and the Court, in order to avoid striking down conflicting Community legislation, would interpret the pertinent Community provisions accordingly. This is the so-called consistent interpretation doctrine.

In the case law regarding WTO law, the dominant case on the doctrine of consistent interpretation is *Hermès*.<sup>170</sup> *Hermès* was a French company whose trade mark "*Hermès*" was infringed by FHT. In proceedings in Dutch courts the interpretation of Article 50 of the TRIPs Agreement which provides for provisional measures for the protection of intellectual property rights was raised and the Dutch court referred the matter to the Court of Justice. In view of the fact that the Court had found in Opinion 1/94 that the competence under TRIPs Agreement was shared between the Community and the Member States, the Member States probably enjoying the larger part, the issue raised in *Hermès* was not only the application of the doctrine of consistent interpretation but also the extent of the Court's jurisdiction. The Court held that because Regulation 40/94 on the Community trademark provided also for provisional measures for its protection those measures should be taken in the light of the wording and purpose of Article 50 TRIPs.<sup>171</sup> On the issue of jurisdiction it held that

"...where a provision can apply both to situations falling within the scope of national law and situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, ..."<sup>172</sup>

The Court finally avoided to answer the question of direct effect and moved on to interpret Article 50 TRIPs in order to enable the Dutch judge to determine the conformity of Dutch provisional measures with the TRIPs Agreement.

Despite the lack of coherence in this judgment the Court seems to have come up with the right answers. The question of its own jurisdiction to interpret mixed agreements should have come first and answered, as it has, in the positive. Then the question of direct effect of WTO law should have followed and answered in the negative. Finally, the question of consistent interpretation should have come last and answered in the positive. The different sequence followed by the Court and the reluctance to answer to the question of direct effect may be attributed to the fact that it would have been contradictory had the Court found that although it had jurisdiction to interpret provisions of mixed agreements falling within Member State competence it did not have the right to decline its jurisdiction to grant them direct effect.<sup>173</sup>

## The political institutions

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<sup>169</sup> Case C-61/94 *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989 at para 52; Case C-90/92 *Dr Tretter v. Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569 at para. 11; Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019 at para. 9.

<sup>170</sup> Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603.

<sup>171</sup> *Ibid.* at para. 28.

<sup>172</sup> *Ibid.* at para. 32.

<sup>173</sup> More briefly elsewhere, Antoniadis, *op. cit. supra* note 128 at p. 342.

At the examination of direct effect of any international agreement it is important to explore the intention of the parties.<sup>174</sup> It should be argued that what the Court did in its case law under the coercive approach was to give effect to the intention of the Community as demonstrated in the NCPI and TBR,<sup>175</sup> and the Anti-Dumping<sup>176</sup> and Anti-Subsidies Regulations.<sup>177</sup> The political institutions demonstrated strong evidence of their intentions in the legislative acts at stake and the Court responded to the signal which led to the *Nakajima* and *Fediol* judgments. The consistency of this strategy is demonstrated by the subsequent legislative activities of the Community, especially in the field of dumping and subsidies. In the example of the Enabling Regulation, the interaction between the Court and the political institutions of the Community at the application of WTO law becomes manifest.

## **The Enabling Regulation**

As mentioned above, shortly after the adoption by the DSB of the Appellate Body Report in *EC – Bed Linen*, the Council adopted Regulation 1515/2001 laying down the measures to be taken by the EC so as to comply with adverse Panel and Appellate Body Reports.<sup>178</sup> In accordance with the Enabling Regulation, the EC should either amend or repeal the disputed measures or adopt any special measures which are deemed to be appropriate in the circumstances in order to follow the Panel and Appellate Body rulings.<sup>179</sup> The Commission may request all parties to submit all necessary information and it may conduct a review insofar as this is appropriate.<sup>180</sup> The Council may also suspend the application of the measure insofar as this is appropriate but only for a limited period of time.<sup>181</sup> McNelis<sup>182</sup> pointed out that the Council adopted the Enabling Regulation because it provides further options in addition to the interim review provided in the Basic Anti-dumping Regulation.<sup>183</sup> The Council and the Commission may also review measures, not the subject of the dispute, if affected by the legal interpretations made in the Report adopted by the DSB,<sup>184</sup> although clearly in WTO law they are not obliged to.<sup>185</sup> It should be recalled that in *EC - Bedlinen*<sup>186</sup> the Appellate Body found that the practice of

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<sup>174</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719 and especially the Opinion of Advocate General Darmon.

<sup>175</sup> Case 70/87 *Fediol v. Commission* [1989] ECR 1825.

<sup>176</sup> Council Regulation 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1996] OJ L56, 06/03/1996, p. 1.

<sup>177</sup> The *Fediol* doctrine should apply to Anti-subsidies and Countervailing duties *mutatis mutandis*. See, Council Regulation 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community [1997] OJ L288, 21/10/1007, p. 1

<sup>178</sup> Council Regulation (EC) No 1515/2001 on the measures that maybe taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidies matters O.J. L 201, 26/07/2001, p. 10. See, G. Zonnekeyn, “The Bed Linen Case and its Aftermath: Some Comment of the European Community’s “World Trade Organization Enabling Regulation” (2002) 36 *JWT* 993; D. Horowitz, “A Regulated Scope for EU Compliance with WTO Rulings” (2001) 7 *Int.T.L.R.* 153; McNelis, *op. cit. supra* note 159.

<sup>179</sup> Article 1(1) Enabling Regulation.

<sup>180</sup> Article 1(3) Enabling Regulation.

<sup>181</sup> Article 1(4) Enabling Regulation.

<sup>182</sup> McNelis, *op. cit. supra* note 159 at p. 649.

<sup>183</sup> Article 11(3) Council Regulation 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, O.J. L56, 06/03/1996, p. 1.

<sup>184</sup> Article 2 Enabling Regulation.

<sup>185</sup> McNelis, *op. cit. supra* note 159 at pp. 659-661.

<sup>186</sup> WT/DS141 *European Communities - Anti-dumping measures on imports of cotton-type bed-linen from India*

“zeroing” applied by the EC at the determination of dumping margins was incompatible with Article 2.4.2 ADA.<sup>187</sup> In the first instance of application of the Enabling Regulation, the Commission issued a Notice inviting all importers against whom the “zeroing” methodology had been applied at the determination of the anti-dumping duty imposed, to request a review of the anti-dumping duties on the basis of Article 2 of the Enabling Regulation and in the light of the WTO Panel and Appellate Body interpretations.<sup>188</sup>

From a Community law perspective, it must be argued that the Community is not acting as a “good citizen” but in support of its own interests.<sup>189</sup> After all, the Community could still adopt all necessary measures on the basis of Article 133 EC Treaty. The procedure enshrined in the Enabling Regulation however, not only seeks to enhance the transparency, predictability and automaticity of the response to a ruling but, as mentioned above, to deter the Court from drawing inspiration from the interpretations contained in the Panel and Appellate Body rulings in line with the *Nakajima* doctrine, annulling Anti-Dumping Regulations and awarding damages to the affected traders. This mechanism of self-defence has the welcome, from a WTO perspective, repercussions of extending the legal interpretations on the ADA given by the Panels and Appellate Body to sets of facts unrelated to the WTO dispute and beyond the *res judicata* created by the Reports. At the same time, it pre-empts the Community courts from applying those interpretations themselves and reserves this right to the Council and the Commission. Once in control, the political institutions can utilize the WTO Dispute Settlement System in order to coerce other trading partners to comply with the same legal interpretations and establish a level-playing field. For instance, on the issue of “zeroing” methodology, as soon as the dispute with India ended, the EC initiated a dispute against the United States challenging the “zeroing” methodology applied at the implementation of their anti-dumping legislation.<sup>190</sup>

## **Compliance with adverse rulings**

The first few years of operation of the WTO and its Dispute Settlement System were marked by the two major disputes in *Hormones* and *Bananas* and the persistence by the Community institutions to comply with the Panel and Appellate Body rulings. It could be argued that these instances run counter to the Community’s stated policy of compliance with the WTO Agreements. Some years on, it seems that the Community is developing an excellent record of compliance with rulings but also settling most disputes at the diplomatic stage of dispute settlement.<sup>191</sup> Even in the *Bananas*<sup>192</sup> and *Hormones*<sup>193</sup> cases, the Community took those measures which in its opinion complied with the DSB recommendations.

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<sup>187</sup> Paragraph 6.119 of the Panel Report upheld by the Appellate Body in Paragraph 86(1) of its Report.

<sup>188</sup> Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organisation adopted on March 2001 O.J. C 111, 08/05/2002, p. 4.

<sup>189</sup> McNelis, *op. cit. supra* note 159 at p. 666.

<sup>190</sup> WT/DS294 *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)* (complaint brought by the EC) on 19 June 2003.

<sup>191</sup> Elisa Baroncini, “The European Community and the Diplomatic Phase of the WTO Dispute Settlement Understanding” (1998) 18 YEL 157

<sup>192</sup> Council Regulation 216/2001 of 29 January 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, O.J. L 031, 02/02/2001, p. 2; Council Regulation 2587/2001 of 19 December 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, O.J. L 345, 29/12/2001, p. 13.

<sup>193</sup> Directive 2003/74 of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, O.J. L 262, 14/10/2003, p. 17.

## Proactive approach

The Court of Justice's approach towards WTO law has not been directly proactive. Of course, one should qualify this statement with the evidence offered by several Advocates General in their Opinions in the cases analysed above. In any event, the analysis will only examine the practice of the political institutions as this is where evidence of proactivity is particularly strong.

In the proactive approach, the Community actively encourages the application of WTO law. WTO law is set as the normative benchmark not only for the Community's internal policies but also in the external policies and international agreements. Regarding internal policies, the political institutions adopt legislation which purports to be in conformity with WTO law and is always presumed to achieve this objective.<sup>194</sup> Several directives state that their provisions comply with the relevant provisions of the WTO covered agreements. At the formulation of Community policies the Commission not only intends to make them WTO-compliant but it goes to great lengths to develop of full WTO-compliance test at its interaction with the other institutions.<sup>195</sup> The realisation that WTO law is omnipresent in the everyday activities of the Commission's DGs, as well as the services of the Council and EP, clearly indicates that there is an emerging WTO culture which started to dominate the law-making process within the Community.

In external relations, there are different considerations which should be pointed out. The Community inserts direct reference to WTO provisions in international agreements it concludes even with non-members of the WTO.<sup>196</sup> Politically, the Community assists and actively encourages the broadening of the WTO membership by facilitating the accession of its important trading partners.<sup>197</sup> This is a very important mechanism where the Community lays down the minimum standard it expects from its trading partners to fulfil. By doing that, it does not interfere with their domestic policies and needs more than those countries have already committed to doing by acceding to or aspiring to accede to the WTO.

The fact that the WTO is the common standard for international trade is undisputed even in the most fervent of the reactive approaches. What is disputed is the emergence of WTO law as the legitimacy standard for the Community's internal policies. When compliance with an adverse Panel or Appellate Body ruling is sought it is prudent to closely examine the means for Community implementation. Even more so, when the Community act intends to transpose WTO law into the Community legal order as was the case with the Basic Anti-Dumping Regulation. It is difficult to surmise what is the purpose behind institutional insistence, particularly in the Commission, on WTO in all other cases. The importance of observing the Community's international commitments notwithstanding they can only serve as a framework wherein the Community formulates its policies in order to achieve its constitutional objectives which are, in some instances, significantly

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<sup>194</sup> Snyder, *op. cit. supra* note 1 at p. 316.

<sup>195</sup> de Búrca and Scott, *op. cit. supra* note 2.

<sup>196</sup> All post-1995 Association Agreements, Partnership and Cooperation Agreements, Trade and Development Agreements, Stabilisation and Association Agreements have more or less detailed references to WTO law and make its provisions a standard for those agreements.

<sup>197</sup> The EU acted as a catalyst to the Chinese accession and is doing the same with the accession of the Russian Federation to the WTO.

different than those of the WTO. Unless an express reference to the need for compliance with WTO is inserted in the preamble of the EC Treaty the Community should primarily concern itself with the formulation of policies in the interests of the Community and its Member States which may not necessarily coincide with, and are normally more complex than, the rudimentary framework for international trade established by the WTO. Unless a Treaty amendment takes place, which, after all, sounds more consonant with the spirit of Article 300(6) EC Treaty, resort to the WTO as the normative standard should be avoided and limits to the proactive practice of the political institutions set.

## Synthesis and critique

The starting point for the assessment of the application of WTO law in the Community legal order should be the balancing act the Community institutions, including the Court, need to perform between two competing considerations: the supremacy of international law and the supremacy of Community law.<sup>198</sup> While the supremacy of international law has always been appealing to commentators regarding the Community as a *sui generis* legal order founded by international law,<sup>199</sup> the Court has been vigilant at the support of the supremacy of Community law.<sup>200</sup> In fact, the Court in Opinion 1/91 was quick to acknowledge the supremacy of the Community Treaties over provisions of the proposed EEA Agreement. It held that the jurisdiction of the proposed EEA Court affected the allocation of responsibilities as defined by the EC Treaty and therefore, undermined the autonomy of the Community legal order.<sup>201</sup>

The scales in the balancing act could also be represented by the concepts of monism and dualism, monism being inherently prone to accord supremacy to international law and dualism to domestic/Community law. The catalysts for the balancing act in this sense are “compatibility” and “direct effect”. In literature commenting on the relationship between international law and Community law, commentators start their analysis from Article 300(7). The starting point should be Article 300(5) which provides that when an agreement “**calls for**”<sup>202</sup> amendments to the Treaty, those must be adopted first before the agreement is concluded. Further, Article 300(6) which concerns the advisory jurisdiction of the Court provides that where the Court of Justice finds that an envisaged international agreement is incompatible with the Treaty it may enter into force only if the Treaty is amended. These paragraphs represent a definitive statement that the Treaties, as the “Constitution” of the Community, are supreme and cannot be subordinated to provisions of international agreements unless the authors of the Treaty so decide.<sup>203</sup> Article 300(7) states “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on the Member States”; does this presume that those agreements shall be binding in so far as they are compatible with the Treaty? It is safe to assume that this is the case. The obligation of compatibility of international agreements has recently been extended also to the internal rules. Indeed, the Council and the Commission are not charged with the task to ensure this at negotiation of international agreements.<sup>204</sup> While, in WTO law,<sup>205</sup> this amendment is not a novelty as it integrates an

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<sup>198</sup> Klabbers, *op. cit. supra* note 3 at 271

<sup>199</sup> Pescatore, *op. cit. supra* note 36.

<sup>200</sup> Christian Timmermans, “The EU and Public International Law” (1999) 4 EFAR 181.

<sup>201</sup> Opinion 1/91 [1991] ECR I-6079

<sup>202</sup> Emphasis added.

<sup>203</sup> Bourgeois, *op. cit. supra* note 17 at p. 97.

<sup>204</sup> Article 133(3) EC Treaty as amended by the Treaty of Nice.

already existent obligation into the Community treaties, the Council and the Commission will be faced with a considerable task at the conclusion of the Doha Round of multilateral trade negotiations if they are properly to discharge this responsibility. Nonetheless, while the “compatibility” catalyst is relatively unexplored its emergence heralds a notable shift of the Treaty authors to a dualist approach towards WTO law. This will be seen in the future, account being had of the proliferation of studies comparing the substantive law of the WTO and the EU<sup>206</sup> and the building of a body of jurisprudence by the Panels and Appellate Body of the WTO.

Moving on the “direct effect” catalyst,<sup>207</sup> the Court has been unequivocal. Its outright denial of direct effect of the WTO points towards a dualist understanding and the supremacy of Community legal order over the international one. The notable exceptions analysed in the context of the proactive approach prove the rule. Beyond the reasons analysed previously some further considerations and conditions for change of course will follow. The WTO, albeit a special case with its own specific characteristics, belongs in the system of public international law and the balancing act follows the same considerations. The WTO, unlike the Community which created a new legal order whose subjects are not only the Member States but their nationals,<sup>208</sup> does not enjoy such high aspirations. On the contrary, it was designed in the traditional public international law sense where states and international organisations are the main subjects. Despite its ambitious scope, it is clear that its Members never wished it to become a new world legal order comprising also their citizens. Its structure and mechanisms are such so as to exclude the citizens from being part of the system.<sup>209</sup> Further, the WTO is characterised by the absence of a norm-generating mechanism.<sup>210</sup> The rounds of multilateral rounds of trade negotiations strike a delicate balance of rights and concessions which, owing to the intergovernmental nature of deal, confer public law rights belonging to the WTO members rather than the individual traders.

The jewel of this international law structure is the rigorous Dispute Settlement system established by the Dispute Settlement Understanding. The clear and unambiguous nature of its provisions has been deemed as a reason for opening up the Community to the direct effect of WTO law. In this respect, one wonders what purpose such a rigorous dispute settlement serves if the WTO Agreement intended to confer rights on individuals enforceable in WTO Members’ courts.<sup>211</sup> It has been argued that since the old GATT flexibility is gone there is no need to hold back for the direct effect as now there is a binding international adjudication. With respect, this argument is not convincing at all. On the contrary, the bindingness and rigour of the DSU militate against direct effect. As private parties have national avenues to invite their governments to pursue their interests in Geneva and the guarantee that once there, a report creating a binding legal obligation will, sooner or later, serve their interests. This is further strengthened by the fact that at

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<sup>205</sup> Article XIV:4 WTO Agreement

<sup>206</sup> Marise Cremona, “Neutrality or Discrimination? The WTO, the EU and External Trade” in Gráinne de Búrca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*, (Hart Publishing, 2003) p. 151; Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law*, (Hart Publishing, 2004); Joanne Scott, “International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO” (2004) 15 EJIL 307.

<sup>207</sup> Klabbers, *op. cit. supra* note 3 at pp. 292-298.

<sup>208</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1; Opinion 1/91 [1991] ECR I-6079 at para. 21.

<sup>209</sup> With the exception of NGOs in an attempt to embrace civil society, Article V:2 WTO Agreement.

<sup>210</sup> de Búrca and Scott, *op. cit. supra* note 2 at pp. 2-7.

<sup>211</sup> See also AG Lenz’s Opinion in Case C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita* [1995] ECR I-4533 at para. 21.

least in the context of the TBR the Court of Justice has granted private parties a significant avenue of control of the institutions at the exercise of their functions, thus offering a counterbalance for the denial of direct effect.<sup>212</sup> Had the opposite been the case the choice of market access barriers to be challenged would be determined by the interests of private parties and not the WTO members. This transfer of control clearly falls beyond what the parties have agreed on when concluding the Uruguay Round Agreements and establishing the multilateral trading system under the administration of the WTO. From the point of view of encouraging compliance with the WTO, it should be pointed out that enforcement in national and Community courts can only have the effect of repealing the WTO-inconsistent legislation. This hardly resembles the compliance envisaged within the DSU itself.

There is however, a realistic argument which also needs to be made. It is unfair to individual traders, usually uninvolved into an intergovernmental dispute between WTO Members to pay the bill either by being subject to market access barriers or suffering the consequences from the suspension of concessions affecting their trade. Does this in any way mitigate the stance against direct effect of the WTO and in particular, Community liability for breach of WTO law? The answer should be in the negative. What this realisation does is to expose the shortcomings of the WTO system and encourage proposals for its reform instead of challenging the understanding proper of this system by the Court of Justice. Rosas has suggested that the system of suspension of concessions should be abolished in favour of a system of compensation whereby the Arbitrators under Article 22.6 DSU will calculate the amount of nullification or impairment of benefits suffered by a WTO Member and determine the sum of compensation due.<sup>213</sup> This is a proposal which should muster support in the reform of the DSU process.

The problems inherent in the WTO system and the slowness or even the lack of effective mechanisms to integrate societal concerns should not be used to penalise those WTO members which have adopted an added layer of protection for those concerns. Unless the WTO is reformed in order to be able to generate secondary legislation, equivalent to that of its more advanced Members, the privatisation of its provisions would be unwise. If violations of the WTO Agreements are unsustainable due to the rigour of the WTO Dispute Settlement System and the legal obligation created by the rulings of the Panels and Appellate Body - there is a clear indication from practice that WTO Members may not retain legislation found to be WTO-incompatible for ever – then an additional argument in favour of direct effect of WTO law could be rebutted. Whatever happens, the process within WTO Dispute Settlement, including the implementation of the rulings stage, should not be undermined by national or Community courts handling the same legal issues. What should happen when there is a Panel or Appellate Body ruling on the matter, as happened in the bulk of the *Bananas* litigation? That ruling has a dual nature. It is on the one hand a *res judicata* and on the other an interpretation of the given point of WTO law. Are national courts entitled to apply both those aspects? What about Community courts?<sup>214</sup> Further, should the courts of WTO members, including the Court of Justice, interpret and apply WTO law, conflicts not only with the interpretations between the various WTO members' courts will occur but also between those courts and the interpretations offered by the Panels and Appellate Body. This can hardly be advocated to facilitate the dispute settlement system in “providing security and predictability to the multilateral trading

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<sup>212</sup> Case 70/87 *Fediol v. Commission* [1989] ECR 1825.

<sup>213</sup> Rosas, *op. cit. supra* note 80 at p. 144.

<sup>214</sup> Eeckhout, *op. cit. supra* note 32 at pp. 52-53.

system”.<sup>215</sup> In the absence of a preliminary reference system, mirroring the one established under the Community constitutional order,<sup>216</sup> direct effect of WTO law can hardly serve the multilateral trading system.<sup>217</sup>

In addition, the WTOisation of the Community legislative engine internally may jeopardise the achievements of the Community to date as Community policies are either too advanced or too costly to maintain in WTO. Worse even, it seems that the Commission is currently adopting legislative initiatives on the basis of conformity with WTO law rather than whether they represent the indicated policy choice for the European Union. Are we convinced that WTO law is best suited for the European Union than its own law-making processes a result of no little effort, compromise and continuous debate?<sup>218</sup> As pointed out elsewhere, the normative subordination of the Community to the WTO would have very high stakes and put the European social state at risk.<sup>219</sup> There are issues like democracy, legitimacy and accountability which are raised in this context too.<sup>220</sup> The European Union, despite its more developed characteristics in this respect, has still a long way to tread.<sup>221</sup> However, citizens affected in their everyday lives still find it difficult to accept the normative dominance of European Law encapsulated in the principle of direct effect and its concomitant, the principle of supremacy.<sup>222</sup> This is more so within the WTO context. What is increasingly worrying is the impression given by the Commission is that it treats WTO law as *jus supremus*. The substantive falseness of this approach notwithstanding, the fact that the law-making processes whereby this law is brought within the European Union, the absence of any debate at its adoption – instead, the single undertaking procedure is followed in the multilateral rounds of trade negotiations – and the fact that even the judicial proceedings taking place under this system are done behind closed doors, indicate that there is a lesser likelihood for this law to enjoy any enthusiasm at its acceptance.<sup>223</sup> The position of the Commission is inherently paradoxical as the Commission itself has identified the need for increase in legitimacy and accountability within the European Union context.<sup>224</sup>

What would be ideal for the Community institutions to do is to treat WTO law as a benchmark not as the prescriptive norm. This is particularly important in external relations and the conclusion of agreements where the same standard is set for the contracting parties especially with view to opening up the markets of third states and pursuing the common objective of trade liberalisation. Does this represent a “have your cake and eat it” attitude? It depends on the viewpoint. From a humanistic perspective, high level employment conditions, social security cover, positive discrimination in favour of gender and disability, health and safety at work, environmental protection, public health, IP protection and high direct taxation to fund all these are attributes of the European Community legal order. Since the same standard does not apply everywhere on the planet, the European Union is put at a competitive disadvantage. It is unrealistic to expect everyone to abide by the same rules but at least a minimum standard should be attained before the Union fully

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<sup>215</sup> Article 3.2 DSU

<sup>216</sup> Rosas, *op. cit. supra* note 1.

<sup>217</sup> See also Eeckhout, *op. cit. supra* note 68 at p. 99.

<sup>218</sup> *Ibid.* at p. 100.

<sup>219</sup> Antoniadis, *op. cit. supra* note 128 at p. 343.

<sup>220</sup> Eeckhout, *op. cit. supra* note 68 at p. 100.

<sup>221</sup> Arnall & Wincott (eds.), *Accountability and Legitimacy in the European Union*, (OUP, 2003)

<sup>222</sup> Metric martyrs case and of course, the disaffection currently looming in the United Kingdom and elsewhere towards the European Union.

<sup>223</sup> The strong reaction towards the WTO by the majority of NGOs offers a forceful argument to this effect.

<sup>224</sup> White Paper on European Governance, COM(2001)428, 25 July 2001.

liberalises its market to imports from third countries. Can the WTO law accommodate this ambitious plan? In principle, it can, but not always. This is why the Union has to be selective and gradual in opening up to the world. It needs to strengthen its development policy and to broaden the conditions for the grant of preferential treatment to third countries before it does so. A grant of direct effect would be a recipe for disaster and would not only compromise the Union's ability and negotiating room for manoeuvre within the WTO but also the autonomy of its legal order as a whole. Nothing in Europe should be taken for granted and succumbing to the pressures of competitiveness may rescind what has been achieved in the past.

## Conclusions

As Trachtman put it "...the question of direct effect is a political decision."<sup>225</sup> The Community Treaties along with the Council Decision concluding the WTO Agreement, represent the authentic political statement by the Member States on the issue of WTO law. The Court has appropriately responded to the message sent to Luxembourg and dismissed the calls from commentators to undervalue the normative merit of the relevant clause in the Council Decision concluding the WTO Agreement. Consequently, it is not the Court playing a political role as Klabbers has suggested,<sup>226</sup> it simply responded to the political message sent to it by the Council. If the combined interpretation of the case law, the legislative activity and the institutional practice means that the Community legal order is a dualist one for the purposes of the application of WTO law then so be it.<sup>227</sup> In continuation of this thesis, unless the Community transforms WTO law into the Community legal system by means of implementation or clear reference in its own legislative instruments WTO law cannot have *lato sensu* direct effect. Hermeneutically, this means that the Community chose WTO law as second best set of rules. In its internal policy-making, it uses WTO law as a benchmark and accepts its primacy in its commercial policy instruments. Otherwise, it tries to interpret legislation consistently with the WTO Agreements. Apart from those exceptions, which do not, in essence, involve the application of WTO law but its communitarised version, WTO law may not be invoked in the Community and national courts, predominantly so if it is to challenge Community legislation. In the external relations of the Community, WTO may serve as more than a benchmark for those countries where the Community *acquis* could not be transposed until the approximation of legislation provision of the international agreements binding the Community with third countries and the supportive measures contained therein materialise. Until this happens the use of WTO norms in the material provisions of those agreements will facilitate trade liberalisation and will have a positive impact at the establishment of a level-playing international trading field.

In sum, the analysis of the case law and institutional practice leads to the conclusion that the Community possesses a finely tuned system for the application of WTO law which is the result of the interaction between the judiciary and the legislative. It is not as receptive to the WTO law as some commentators prefer but nor as inconsistent as often accused. Until significant changes within the WTO and its law-making mechanism materialise that will enable WTO law to play a more important role the system should be considered as thoroughly satisfactory.

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<sup>225</sup> Joel Trachtman, "Bananas, direct effect and compliance" (1999) 10 EJIL 655 at p. 664.

<sup>226</sup> Klabbers, *op. cit. supra* note 3 at p. 298.

<sup>227</sup> Eeckhout, *op. cit. supra* note 32 at pp. 24-29.