

# The European Union and WTO law: a nexus of reactive, coercive, and proactive approaches

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**Abstract:** Ranging from the denial of direct effect to WTO law by the Court of Justice to a WTO-friendly legislative culture currently booming in the EU's political institutions, different approaches towards WTO law have been adopted within the EU. This article classifies the different approaches into reactive, coercive, and proactive by drawing on their common characteristics. The principal aim is to explore the considerations shaping the development of the different approaches and to argue that these stem from the interaction between the judiciary and the legislature. In doing so, this article purports to provide a comprehensive view of the application of WTO law within the Community legal order.

## 1. Introduction

The discussion concerning the application of WTO law in the Community legal order is not new. While the importance of the issue is undoubted, academic comment has largely focused on the judicial treatment afforded by the Court of Justice towards WTO law, and neglected the multifarious aspects of its application by the Union institutions.<sup>1</sup> This article aims to fill the vacuum by engaging the Community's political institutions alongside the Court of Justice and scrutinizing the interaction between the judiciary and the legislature. It thereby aims to better comprehend the broader ramifications of WTO law in the Community legal order.

In order to achieve its aims, the present analysis will cut across institutional practice, draw the commonalities between the different approaches of the

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<sup>1</sup> Allan Rosas, 'Annotation of Case C-149/96 Portugal v. Council' (2000) 37 *Common Market Law Review* 797; Francis Snyder, 'The Gatekeepers: The European Courts and WTO Law' (2003) 40 *Common Market Law Review* 313. A notable exception can be found in Grainne de Búrca and Joanne Scott, 'The Impact of the WTO on EU Decision-Making' in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2003), p. 1.

institutions towards WTO law, attempt a classification on the basis of these common characteristics, and explore their interdependence. The Court of Justice's approach will remain 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 in the Community and Member States' legal orders. This approach is best described by the term reactive. The Court, however, has not always maintained such an approach and, in certain circumstances, has submitted the Community to the normative control of WTO law. This alternative approach, which is complemented by legislative initiatives taken by the Community's political institutions, shall be called coactive. The main locus of the third, or proactive, approach can be found in the activity of the political institutions and the fact that WTO law has acquired a central role in the shaping of the Union's internal and external policies. The critical examination of the political and legal considerations shaping this categorization will follow, while the impact of the interaction between the legislature and the judiciary will be reviewed.

## 2. Reactive approach

### *The Court of Justice*

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

The question of direct effect of WTO law forms part of the more general debate of the reception of general international law in the Community legal order.<sup>2</sup> From an international law point of view, it is clear that international law will prevail in the case of conflict with domestic law.<sup>3</sup> However, the determination of whether a certain provision is directly effective is a matter for domestic law, unless, of course, the parties to an international agreement have agreed to make its provisions directly effective.<sup>4</sup> Domestic law will also determine the conditions under which a provision of international law can be directly effective.

Clearly not an invention of the Court of Justice, the definition of direct effect is not without controversy. As a preliminary issue, it should be mentioned that direct effect has appeared in international law under several headings ranging from direct applicability and self-executing provisions to direct effect.<sup>5</sup> In some of the original Community Member States, belonging predominantly to the monist legal tradition, international treaties were intended to confer rights on

2 J. M. Prinssen and A. Schrauwen (eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law, 2002).

3 Article 27 of the 1969 Vienna Convention on the Law of Treaties.

4 Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 *Yearbook of European Law* 263; Thomas Cottier, 'A Theory of Direct Effect in Global Law' in A. Von Bogdandy, P. C. Mavroidis and Y. Mény (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus Dieter Ehlermann* (Kluwer Law International, 2002), p. 99 at p. 104.

5 Klabbers, *supra* note 4 at p. 272.

individuals.<sup>6</sup> In fact, within the Community context, the ‘objective’ or ‘classic’ definition of direct effect refers to a legal provision granting rights to individuals which must be upheld by national courts.<sup>7</sup> It has been argued that direct effect not only provides the norm that governs a given case, it provides, in addition, the standard for legal review.<sup>8</sup> The generic use of the concept of direct effect to include the standard of review has been particularly popular in the GATT/WTO context, owing to the participation of Member States in proceedings before the Court for which the classic definition of direct effect would clearly have been inadequate.<sup>9</sup>

Completing the demarcation of the concept of direct effect, one must note the development of the principle by the Court of Justice in so far as Community law is concerned. By holding in *Van Gend en Loos*<sup>10</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>11</sup> the Court recognized the right-conferring qualities of Community norms in the ‘new legal order’ as a result of which rights were conferred upon individuals that national courts were bound to protect. The reference to *Van Gend en Loos*, while seemingly of limited input to the understanding of the concept of direct effect of international/WTO law in the Community and Member States legal orders, is, it is argued here, of cardinal importance to understand the indoctrination of academic comment by a communitarized understanding of the concept.<sup>12</sup>

Generally speaking, several arguments have been brought forward in an attempt to classify the Community legal order as monist or dualist following the traditional distinction in international law.<sup>13</sup> The Court stated in *Haegeman* that an international agreement is an act of the institutions and that the provisions of such an agreement form an integral part of the Community legal order.<sup>14</sup> Immediately received as a confession of monism, it was explained in *Kupferberg*<sup>15</sup> that the meaning attached to the ‘integral part of the Community legal order’ proviso was that the Member States had not only assumed a responsibility for the fulfilment of

6 E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at p. 14.

7 P. Craig and G. de Búrca, *EU Law: Texts, Cases and Materials*, 3rd edition (Oxford University Press, 2002), at p. 180; T. Hartley, *The Foundations of European Community Law*, 4th edition (Oxford University Press, 1998), at p. 187.

8 S. Prechal, *Directives in European Community Law* (Oxford University Press, 1995), at p. 148.

9 The Court was criticized 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 *Common Market Law Review* 401 at p. 421; Fernando Castillo de la Torre, ‘The Status of GATT in EC Law Revisited’ (1995) 29 *Journal of World Trade* 53 at p. 58.

10 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend and Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

11 Klabbers, *supra* note 4 at p. 273.

12 For reasons, it is hoped, that will become clearer towards the end of this analysis.

13 For a general discussion see, I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford University Press, 2003), at pp. 33–34 and 40–45.

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

15 Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at para. 13.

the agreement towards non-Member States but also towards the Community. *Kupferberg* has also been helpful for the elaboration of the criteria laid down by the Court for a provision of international law to develop direct effect. The Court added that the nature and structure of an international agreement may prevent an individual from invoking its provisions before a court in the Community.<sup>16</sup> If this hurdle is overcome, international law provisions are required to be unconditional and sufficiently precise in the context of the agreement they form part of.<sup>17</sup>

Despite the criticism that the criterion concerning the nature and structure of the agreement received from commentators in the early stages,<sup>18</sup> the Court has been consistent in this requirement.<sup>19</sup> The two fundamental cases of *International Fruit* (GATT era) and *Portuguese textiles* (WTO era) will serve to illustrate the Court's understanding of the WTO Agreement's nature and purpose.

### *The GATT crops: from International Fruit to Bananas*

The Court was faced with the GATT for a first time in *International Fruit* in the course of a preliminary ruling on validity.<sup>20</sup> It opined that the Community, not a GATT Contracting Party, was bound by the GATT Agreement;<sup>21</sup> the Court's own jurisdiction, however, depended on whether the GATT provisions were capable of conferring rights on individuals.<sup>22</sup> The Court then found that owing to the great flexibility of the GATT provisions, and, in particular, those conferring the possibility of derogation, including taking safeguard measures 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>23</sup> Accordingly, because of lack of direct effect, the Court was unable to examine the validity of the regulations. The Court maintained its position in subsequent rulings and, despite criticism,<sup>24</sup> extended its findings to preliminary rulings on interpretation.<sup>25</sup>

<sup>16</sup> *Kupferberg* at paras. 10–22.

<sup>17</sup> *Kupferberg* at para. 23.

<sup>18</sup> Henry G. Schermers, 'Community Law and International Law' (1975) 12 *Common Market Law Review* 77 at p. 80.

<sup>19</sup> Case 12/86 *Meryem Demirel v. Stadt Swäbisch Gmünd* [1987] ECR 3719 at para. 14.

<sup>20</sup> Joined Cases 21/72 and 24/72 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>21</sup> The Court refrained from saying that the GATT forms an integral part of the Community legal order. See, *Bourgeois*, *infra* note 153 at p. 103.

<sup>22</sup> *International Fruit Company* at paras. 4–9.

<sup>23</sup> *Ibid.*, at para. 27.

<sup>24</sup> Ernst-Ulrich Petersmann, 'Application of the GATT by the Court of Justice of the European Communities' (1983) 20 *Common Market Law Review* 397; *idem*, 'The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law' in M. Hilf, F. Jacobs and E.-U. 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>25</sup> Case 266/81 *SIOT* [1983] ECR 731; Joined Cases 267/81 and 269/81 *SAMI* [1983] ECR 801; Case C-469/93 *Chiquita Italia* [1995] ECR I-4533.

Member States had a vested interest in the direct applicability of the GATT in annulment proceedings before the Court of Justice because they could, in principle, challenge measures taken by the Council as GATT inconsistent. Viewed against the backdrop of qualified majority voting in the Council in the field of the common commercial policy and taking into account that no individual rights were involved, this appeared to raise a strong claim before the Court. The Court of Justice did not entertain this claim. 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* 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>26</sup>

In sum, 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 and Community institutions invoke GATT law to challenge Community law.<sup>27</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>28</sup> that the Court meant that the same defining features of the GATT preclude its provisions from both being invoked by individuals in national or Community courts *and* serving as a standard for the review of legality of secondary Community law.

### *The WTO advent with Portuguese Textiles*

After the conclusion of the Uruguay Round of Multilateral Trade Negotiations, which led to the transformation of the GATT into the WTO, questions concerning the 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>29</sup> In

<sup>26</sup> Case C-280/93 *Germany v. Council* [1994] ECR I-4973 at para. 109. Emphasis added.

<sup>27</sup> Piet Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 *Common Market Law Review* 11 at pp. 24–29.

<sup>28</sup> *Contra*, Eeckhout who argues that the Court simply extended the principle of direct effect to cover also direct actions for annulment in P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004), p. 249.

<sup>29</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.

most of them, the Court refrained from grasping the nettle<sup>30</sup> despite pressure from academics<sup>31</sup> and the encouragement by Advocate Generals (AG)<sup>32</sup> to revisit its case law on the matter. When Portugal brought an action for the annulment of Council Decision 96/386,<sup>33</sup> alleging that it violated certain provisions of the GATT, the Agreement on Textiles and Clothing, the Agreement on Import Licensing and general principles of Community law,<sup>34</sup> the Court was presented with a prime opportunity for a definitive resolution of the matter in the light of the new developments.

AG Saggio suggested a change in policy. In his Opinion, after a brief overview of the WTO agreements relevant to the dispute, the Court's case law regarding international agreements, generally, and the GATT, in particular, the AG held that only GATT rules must be found directly effective before the legality of Community acts can be tested against their provisions.<sup>35</sup> Faced with the eleventh recital of the preamble to the Council Decision concluding the WTO Agreement, which declares that the Agreement and its annexes are not susceptible to direct invocation in Community or Member States' courts, the AG, in the light of the relevant provisions of the Vienna Convention on the Law of Treaties and the Opinion of Advocate General Tesauo in *Hermès*,<sup>36</sup> dismissed its importance 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 contained in the WTO agreements.<sup>37</sup> Consequently, he went on to analyse the novel characteristics of the WTO system, including the new system for the settlement of disputes, and argued 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>38</sup> The final hurdle, the issue of reciprocity, raised by the

30 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.

31 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.

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

33 Council Decision of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products O.J. L 153, 27/6/1996, p. 47. Notably, Portugal had voted against the conclusion of the Memoranda in the Council; see, Rosas, *supra* note 1 at p. 801.

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

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

36 AG Tesauo in Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603 at para. 24.

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

38 *Ibid.*, at para. 23.

fact that no other major trading partner in the WTO had granted direct effect to WTO law, was dismissed on the basis of the principle *in adimplementi non est adimplendum*.<sup>39</sup> However, he then 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>40</sup>

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>41</sup>

This statement is foundational of the *jurisprudence constante*<sup>42</sup> of the Court of Justice denying GATT/WTO law direct effect. Terminologically, it maintained the broad scope of the concept 'direct effect' to include the effect of WTO law as a standard of review.<sup>43</sup> In order to arrive at this conclusion, the Court started with the statement from *Kupferberg* that the parties to an agreement have the power to determine the effect of the agreement and the means for its implementation within the parties' legal orders; in the absence of an agreement thereon, it is up to the Court to rule on the matter.<sup>44</sup> The Court then 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.<sup>45</sup> 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>46</sup> The Court then laid down the two basic considerations for the denial of direct effect, namely the lack of

39 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.

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

41 *Portugal v. Council* at para. 47.

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

43 See above. In Joined Cases C-300/98 and C392/98 *Dior and Assco* [2000] ECR I-11344 at para. 44 the Court held: 'For the same reasons as those set out by the Court in paragraphs 42 to 46 of the judgment in *Portugal v. Council*, the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.'

44 *Portugal v. Council* at paras. 34–35; cf. *Kupferberg* at paras. 17–18.

45 *Portugal v. Council* at para. 41. Kuijper mentions that a proposal granting direct effect to the WTO Agreement 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 *European Journal of International Law* 222.

46 *Portugal v. Council supra* note 34 at paras. 36–39.

reciprocity,<sup>47</sup> and the freedom of the political institutions.<sup>48</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. It distinguished *Kupferberg* where the principle of reciprocity was dismissed on the premise that, while the WTO system is based on reciprocal and mutually advantageous arrangements, the EEC–Portugal FTA introduced a certain asymmetry of obligations.<sup>49</sup> It further held that the grant of direct effect would lead to disuniform application of WTO rules in the different WTO Members.<sup>50</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 judiciary.<sup>51</sup> The Court finally held that such an interpretation is consonant with the Council’s view enshrined in the last recital of Council Decision 94/800.<sup>52</sup>

*The principle of reciprocity.* With regard to the principle of reciprocity, the Court essentially 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>53</sup> This was the first time that the Court had resort to the lack of reciprocity in order to deny granting direct effect to the provisions of an international agreement. Until that time, the Court referred to the principle in a dismissive manner.<sup>54</sup> For instance, 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, because of the Community’s intention to assist the development of the associated countries by granting privileges to them.<sup>55</sup> Accordingly, the rights that the nationals of the parties to the Yaoundé Convention could invoke in Member States’ courts were not conditional on reciprocal treatment of Community citizens in these countries. By juxtaposing these cases with *Portugal v. Council*, it may be assumed that the principle of reciprocity constitutes a valid justification for the denial of direct effect in relations between equals and is not prone to being invoked in international agreements establishing asymmetric relations.

47 *Portugal v. Council* at paras. 42–45.

48 *Portugal v. Council* at paras. 40 and 46.

49 *Portugal v. Council* at para. 42.

50 *Portugal v. Council* at para. 45.

51 *Portugal v. Council* at para. 46.

52 *Portugal v. Council* at para. 48.

53 *Portugal v. Council* at para. 43.

54 *Kupferberg* at para. 18.

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



The central position of reciprocity in the Court's denial of direct effect in *Portugal v. Council* has not been treated favourably by commentators.<sup>56</sup> Eeckhout pointed out that there are certain inherent asymmetries within the WTO system as well, citing the examples of the Community as a Customs Union and the preferential treatment of developing countries within the WTO system.<sup>57</sup> Given that it is not difficult to justify the Court's position from a pragmatic perspective – the Community would find itself in a particularly disadvantageous position compared with the USA and Japan – the question is whether the Court's position is defensible 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 into the multilateral trading system. In most cases, the substance of the provisions contained in these agreements replicated those of Community law.<sup>58</sup> By contrast, the rights and obligations the Community and its Member States assumed when founding the WTO constitute a delicate balance, the result of mutually satisfactory concessions arrived at after eight years of negotiations. Asymmetric application thereof would disturb that balance and undermine the agreement struck. Accordingly, it was established by the Court in *Portugal v. Council*,<sup>59</sup> and later clarified in *Van Parys*,<sup>60</sup> that it is in the interest of the appropriate interpretation and application of WTO law that the Court makes the grant of direct effect to WTO law subject to the principle of reciprocity.<sup>61</sup>

*The freedom of political institutions.* It was established in *Portugal v. Council* that the grant of direct effect would compromise the freedom of the Community's political institutions within the WTO system. There are two aspects of 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 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 grant of direct effect would have the consequence that any Community legislative measure could be challenged before the Court of Justice as WTO incompatible.

56 *Inter alia*, Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*' (2000) 3 *Journal of International Economic Law* 441.

57 Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections' (2002) 5 *Journal of International Economic Law* 91 at p. 95.

58 Cottier, *supra* note 4 at p. 108.

59 *Portugal v. Council* at para. 45.

60 Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie – en Restitutiebureau (BIRB)* [2005] ECR I-1465 at para. 53.

61 Antonis Antoniadis, 'The *Chiquita* and *Van Parys* Judgments: Rules, Exceptions and the Law' (2005) 32 *Legal Issues of Economic Integration* 460 at p. 467.

In this respect, certain considerations relating to EU enlargement and the *locus standi* of private parties in annulment proceedings under Article 230 EC are raised. After *UPA*,<sup>62</sup> the restrictive interpretation of ‘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 under Article 234 EC will be more significant as it can be expected that national courts will seek guidance on questions of WTO law, the specialized and complex nature of which is unlikely to encourage them to tackle them themselves. Direct challenges brought by Member States, on the other hand, are likely to increase because of EU enlargement. Under the Treaty of Nice rules on qualified majority voting, as many as 12 Member States could form a non-blocking minority against WTO-related acts adopted ultimately by the Council.<sup>63</sup> This makes increased litigation probable with national governments, under pressure from powerful economic and political lobbies and NGOs, forced to bring annulment proceedings against potentially WTO-inconsistent acts which they failed to block in the Council.

The freedom of political institutions should also be examined within the WTO context. There is no better example to illustrate the considerations at issue than the *EC–Bananas* dispute. This dispute, concerning the inconsistency with WTO rules of the Common Market Organization (CMO) in bananas, ran in parallel in the WTO dispute settlement system and the Court of Justice.<sup>64</sup> The CMO in bananas, as amended, contained a complex system of quotas and import licensing procedures favouring traditional and ACP importers of bananas and has been long viewed as an important development tool. It was unavoidable that, but for the lack of direct effect, one of the several challenges brought against the CMO in Community courts would have succeeded and the Community would have been divested of the possibility of applying for a preferential regime on imports from ACP countries, a practice which is central to the Community’s development policy. Assuming that the Community purports to apply WTO-consistent policies, this is not, in principle, undesirable. However, at the same time, the Community would have forfeited the facility to obtain a waiver, a route it actually followed in *EC–Bananas*.<sup>65</sup> 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 FTA with Portugal as being too

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

63 As amended by Article 12 Treaty of Accession. The number will be reduced to ten under the Constitutional Treaty. See Article I-25(1) Treaty establishing a Constitution for Europe.

64 In the WTO, WT/DS27 *European Communities – Regime for the Importation, Sale and Distribution of Bananas*; in the Community, numerous annulment, preliminary rulings and Community liability cases, *supra*.

65 WT/MIN(01)/15 *European Communities – The EC-ACP Partnership Agreement*, Decision of 14 November 2001.

specific,<sup>66</sup> Article IX:3 WTO Agreement represents a possibility for waiving an obligation under the covered agreements, broadly so conceived. Had the Court granted direct effect to WTO law, the political institutions' arms would have been tied and their authority to negotiate with other WTO Members would have been frustrated. The side effect this development would have would be to turn the Court of Justice, rather than the WTO dispute settlement system, into the principal forum where Community legislation would be challenged. 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.<sup>67</sup>

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

The conclusion to the previous section indicates that the Court of Justice did not wish to usurp the function of the WTO bodies to interpret WTO law and review the consistency of Community acts against its provisions. Would the Court of Justice be prepared to change its position were it faced with a case where a Panel and/or the Appellate Body ruled that a Community measure violated WTO law and consider itself bound by such ruling? The question accordingly is whether, from a WTO perspective, the Panel and Appellate Body rulings create an obligation to perform in a traditional international law sense and whether domestic courts are bound by the rulings.<sup>68</sup>

Before answering this question, it would be useful to analyse the nature and legal force of DSB recommendations from a WTO perspective. In *Japan–Taxes on Alcoholic Beverages*, at the examination of the bindingness of adopted GATT panel reports, the Appellate Body 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>69</sup>

At this stage, it would be useful to briefly note how a dispute is resolved between WTO Members under the Dispute Settlement Understanding (DSU). At the finding of a violation, the Panel or the Appellate Body shall 'recommend that the Member concerned bring the measure into conformity with the agreement'. In the proper interpretation of the DSU terms, compliance with the WTO obligation may be

<sup>66</sup> Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641 at para. 21.

<sup>67</sup> Confirmed by the Court in the recent Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465 at para. 53. See, Antoniadis, *supra* note 61.

<sup>68</sup> John H. Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation' in J. Cameron and K. Campbell (eds.), *Dispute Resolution in the World Trade Organisation* (Cameron May, London, 1998), pp. 69–74 at p. 74.

<sup>69</sup> Appellate Body Report in WT/DS8/AB/R *Japan – Taxes on Alcoholic Beverages (complaint brought by the EC)*, at p. 13.

seen as unequivocal, compensation and suspension of concessions being only temporary alternatives.<sup>70</sup> Article 22.1 DSU 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’. In addition to its recommendations, a Panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations.<sup>71</sup> Panels have been reluctant to recommend specific ways for implementation, thereby showing deference to the national margin of manoeuvre at the implementation of their recommendations<sup>72</sup> and illustrating the hypothesis that compliance may have several variants.<sup>73</sup> Commentators, however, support bindingness beyond the traditional sense and militate in favour of the full effect of those rulings in the Community legal order.<sup>74</sup> Jackson argues that despite their linguistic shortcomings there are several provisions in the DSU that point towards the direction of bindingness.<sup>75</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.

Regarding the Community legal order, the question of the effect of WTO Panel and Appellate Body rulings was presented to the Court on several occasions. In the course of the *EC–Bananas* litigation, several actions were brought seeking to annul the CMO in bananas or claim damages invoking the relevant DSB recommendations. The initial approach by the Court of First Instance (CFI) avoided the issue by narrowing the scope of the Panel and Appellate Body’s findings and declining the review of the entire tariff quota system established by the CMO in bananas.<sup>76</sup> The Court of Justice later recognized the link between direct effect of WTO provisions and the DSB recommendations, by explaining that DSB decisions establishing the inconsistency of Community law with the GATT could only have been taken into consideration should the Court have found the GATT to have direct

<sup>70</sup> Jackson, *supra* note 68.

<sup>71</sup> Article 19.1 DSU.

<sup>72</sup> Allan Rosas, ‘Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective’ (2001) 4 *Journal of International Economic Law* 131 at p. 134. See also, Panel Report in WT/DS152/R *United States – Sections 301–310 of the Trade Act of 1974* at para. 7.102.

<sup>73</sup> D. Palmeter and P. C. Mavroidis, *Dispute Settlement in the World Trade Organization, Practice and Procedure*, 2nd edition (CUP, 2004), at pp. 295–300. Eeckhout, *supra* note 57 at p. 93; Rosas *supra* note 72 at pp. 135–136.

<sup>74</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 *Journal of World Trade* 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 *Journal of World Trade* 993; N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States* (Europea Law Publishing, 2004).

<sup>75</sup> Jackson, *supra* note 68. 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 *Journal of World Trade* 647 at pp. 657–659.

<sup>76</sup> Case T-254/97 *Fruchthandelsgesellschaft mbH Chemnitz v. Commission* [1999] ECR II-2743 at para. 26.

effect.<sup>77</sup> In principle, therefore, the effect of DSB recommendations is inextricably linked with the more general question of direct effect of the WTO Agreement. As a result, direct effect of DSB recommendations should be excluded.

The question which logically follows is whether, where the Community adopts a legislative measure in response to adverse DSB recommendations, it could be construed as doing so in order to implement a particular WTO obligation, thereby triggering the so-called *Nakajima* exception, according to which the said legislation can be reviewed against the WTO provisions it is intended to implement.<sup>78</sup> The question was initially broached by the CFI in three more ‘bananas’ cases, *Cordis*, *Bocchi*, and *T. Port*, in which 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 previous Regulation had been found to violate. The CFI declined the application of 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.<sup>79</sup>

The judgments attracted criticism as a missed opportunity to extend the implementation principle to its proper scope.<sup>80</sup> It should be counter-argued however that this represents the logical consequence of the denial of direct effect to WTO law.

The Court revisited the issue in *Biret*,<sup>81</sup> a case concerning 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. The DSB had established the inconsistency of the ban with Articles 3.3 and 5.1 of the SPS Agreement<sup>82</sup> and the Court seemed to respond to the calls from academics and indicate its readiness to trigger the *Nakajima* exception. In this judgment, the Court 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 subject to a temporal limitation.<sup>83</sup> Since the Community had stated that it intended to comply

<sup>77</sup> Case C-104/97P *Atlanta v. European Community* [1999] ECR I-6983 at paras. 19–20. See also, Case C-307/99 *OGT Fruchthandelsgesellschaft v. Hauptzollamt Hamburg-St. Annen* [2001] ECR I-3159.

<sup>78</sup> See below, Section 3.

<sup>79</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>80</sup> Eeckhout, *supra* note 57 at p. 107. See also the criticism launched by Snyder *supra* note 1 at p. 338.

<sup>81</sup> Cases C-93/02 and 94/02 *Biret International and Etablissements Biret et Sie* [2003] ECR I-10497.

<sup>82</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>83</sup> *Biret* at para. 52.

with its WTO obligations but that it needed reasonable time to do so and, in fact, was granted a period of 15 months for that purpose under Article 21.3 DSU, the Community Courts could not review the legality of the Community measures in question without rendering ineffective the grant of a reasonable period for compliance with the DSB recommendations, as provided by the WTO Agreements.<sup>84</sup> This judgment was justifiably perceived as having the potential of introducing the direct effect of DSB recommendations subject to the deadline for their implementation granted under Article 21.3 DSU having elapsed.<sup>85</sup> The implication was that, after the deadline, the legality of Community measures would be subject to challenge. In fact, the CFI in *Chiquita*,<sup>86</sup> following the signal given by the Court in *Biret*, accepted, in principle, the assumption that, in amending the CMO in bananas the Community intended to implement the substantive GATT and GATS obligations it was found to violate.<sup>87</sup>

The *Van Parys* judgment, delivered by the Court of Justice one month after the CFI made its pronouncements in *Chiquita*, put an end to theoretical discussions on the scope of the *Nakajima* exception that would afford direct effect to DSB recommendations in the Community legal order.<sup>88</sup> The question presented to the Court in *Van Parys* was whether the WTO agreements give Community nationals a right to rely on WTO agreements in legal proceedings challenging the validity of Community legislation, where the DSB has held that both that legislation and subsequent legislation adopted by the Community in order, *inter alia*, to comply with the relevant WTO rules, are incompatible with those rules.<sup>89</sup> The Court answered the question in the negative. Faithful to its analysis in *Portuguese Textiles*, analyzed above, it laid down the three basic reasons denying direct effect: first, the freedom of the institutions to reach a mutually acceptable solution;<sup>90</sup> second, the principle of reciprocity;<sup>91</sup> third, the nature of the rules enshrined in the WTO dispute settlement system. The third reason is of particular importance for its self-standing merit and because it informs the first two and provides an additional layer of understanding of the principles analysed above.<sup>92</sup> Using the paradigm of the Community's bananas regime and the forthcoming resolution of the dispute to the satisfaction of the Community, the Court undertook an overview of the dispute and implicitly congratulated the legislature for managing to reconcile the

<sup>84</sup> *Biret* at paras. 61–62.

<sup>85</sup> Jochem Wiers, 'One Day, You're Gonna Pay: The European Court of Justice in *Biret*' (2004) 31 *Legal Issues of Economic Integration* 143 at p. 147.

<sup>86</sup> Case T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities* [2005] ECR II-315.

<sup>87</sup> *Chiquita* at para. 127. For a fuller critique see Antoniadis, *supra* note 61.

<sup>88</sup> Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465.

<sup>89</sup> *Van Parys* at para. 38.

<sup>90</sup> *Van Parys* at paras. 48 and 51.

<sup>91</sup> *Van Parys* at para. 53.

<sup>92</sup> See above.

requirements of the common agricultural policy with the Community's obligations towards the ACP states by taking advantage of the room for manoeuvre provided by the WTO legal system.<sup>93</sup> The freedom of the political institutions has been exercised 'in conformity with those rules' according to the Court.<sup>94</sup> At the same time, disregard to the principle of reciprocity 'would risk introducing an anomaly in the application of the WTO rules'.<sup>95</sup> Accordingly, the freedom of the political institutions and reciprocity are significant, not only from a Community viewpoint but also as principles leading to the correct application of WTO rules and, in particular, those enshrined in the DSU.<sup>96</sup> The nature of the DSU also makes it necessary to overturn the *Biret* judgment in that, even after the lapse of the deadline for compliance, there is still room for negotiation in conformity with the DSU provisions.<sup>97</sup>

In *Van Parys*, the Court did not go into the examination of the *Nakajima* exception in detail. It simply held that the measures taken by the Community institutions cannot be interpreted as measures intended to ensure the enforcement of a particular obligation within the context of the WTO.<sup>98</sup> Implementation/transposition of the WTO Agreements as such should be resorted to after close examination of all legal, political, and economic considerations. As such, the implementation exception should remain narrow. The finding by a Panel or the Appellate Body that a given Community act is inconsistent with the WTO Agreement creates an obligation which is little different to the obligations of the WTO Members under the provisions of those agreements and, in particular, Article XVI:4 of the WTO Agreement.<sup>99</sup> This general obligation, if taken literally, would mean that all measures taken by WTO Members falling within the scope of the WTO and covered agreements should be treated as aiming at the implementation of those agreements. While this idea might sound attractive to some, such a finding would overrule the Court's general position concerning direct effect of the WTO Agreement, and, should the Court wish to maintain consistency in this respect, it must be resisted.

In lieu of a coda to this analysis, it must be pointed out that the Panel and Appellate Body interpretations have developed an increasing significance at the resolution of disputes in Community Courts. The Court of Justice, as is habitually the case in relation to rulings by international courts or tribunals,<sup>100</sup> resorts to the

93 *Van Parys* at paras. 49–50.

94 *Van Parys* at para. 51.

95 *Van Parys* at para. 53.

96 Antoniadis, *supra* note 61 at p. 467.

97 *Van Parys* at para. 51.

98 *Van Parys* at para. 52.

99 'Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements.'

100 Allan Rosas, 'With a Little Help from My Friends: International Case law as a Source of Reference for the EU Courts' (2005) 5 *The Global Community Yearbook of International Law and Jurisprudence* 203.

interpretations granted by the WTO bodies in the exercise of its general duty to interpret Community law as far as possible consistently with international law.<sup>101</sup>

### *Non-contractual liability of the Community*

Several cases have been brought to the Community Courts by affected banana traders requesting compensation from the Community for damages suffered. For the Community to incur liability, a number of conditions must be met. There must be an unlawful act imputable to the Community, damage to the applicant, and the existence of a causal link between the unlawful act and the damage suffered.<sup>102</sup> It is settled case law that, for the unlawful conduct condition, a sufficiently serious breach of a rule of law intended to confer rights on individuals must be established.<sup>103</sup> It is therefore obvious that the question of Community liability is inextricably linked with the issue of direct effect. In the absence of direct effect, the Community courts have consistently denied any right to damages,<sup>104</sup> as for the Community to incur liability all conditions must be met.<sup>105</sup>

It has been suggested, making the analogy with *Francovich*, that direct effect is not necessary for the award of damages.<sup>106</sup> This argument can be sourced to the definition of direct effect and the attempt to treat direct effect and the creation of rights for individuals as non-synonymous concepts,<sup>107</sup> thereby overlooking the defining characteristic of directives which are, in principle, capable of conferring rights on individuals. Those rights can simply not be enforced against other individuals in national courts because of the absence of horizontal effect of directives.<sup>108</sup> In *Francovich*, because the directives at issue were capable of granting rights to individuals and the remaining 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

101 Case C-245/02 *Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik* [2004] ECR I-10989. For a fuller analysis see Section 3.

102 Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

103 Case C-352/98 P *Bergaderm and Goupil v. Commission* [2000] ECR I-5291 at para. 42.

104 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-104/97P *Atlanta AG and others v. Commission and Council* [1999] ECR I-6983; Cases C-93/02 and 94/02 *Biret International and Etablissements Biret et Sie* [2003] ECR I-10497.

105 Case C-146/91 *KYDEP v. Council and Commission* [1994] ECR I-4199; Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrika and Dole Fresh Fruit Europe* [2001] ECR II-1975 at para. 134.

106 Birgit Schoißwohl, 'The ECJ's Atlanta Judgment: Establishing a Principle of Non-Liability?' in F. Breuss, S. Griller and E. Vranes (eds.), *The Banana Dispute: An Economic and Legal Analysis* (Research Institute for European Affairs, Springer, 2003), p. 309.

107 Jochem Wiers, 'One Day, You're Gonna Pay: The European Court of Justice in *Biret*' (2004) 31 *Legal Issues of Economic Integration* 143 at p. 148.

108 See Case C-6/90 *Francovich and others v. Italian Republic* [1991] ECR I-5357 at para. 27, Case 152/84 *Marshall v. Southampton and SW Hampshire Area Health Authority* [1986] ECR 723 at para. 48 and their progeny.



Court's analysis on direct effect of WTO law makes clear that the WTO Agreement is not, in principle, capable of granting any rights to individuals.<sup>109</sup> Therefore, individuals cannot have an entitlement to a certain level of tariff, quota, or any specific treatment by any WTO Member<sup>110</sup> and such treatment cannot cause damage to them.

The established position was put in doubt after *Biret*. In this well-known judgment, the Court opined that a review of legality of Community law cannot be undertaken in the context of an action for damages under Article 235 EC while the deadline for compliance with the DSB recommendations under Article 21.3 had not yet expired.<sup>111</sup> The unavailability of a damages claim against the Community in Community Courts was extended by the CFI in *Chiquita* until the end of the dispute in the WTO, particularly so, when the Community was subject to retaliation under Article 22 DSU.<sup>112</sup> Linked with the preceding analysis on the effect of Panel and Appellate Body rulings, these two judgments read together meant – *Chiquita* more explicitly so – that when the Community adopted legislation so as to comply with adverse DSB recommendations, the affected private parties could claim compensation for damages suffered as a result of the measure at issue subject to the proceeding under WTO dispute settlement having been terminated. This proposition is based on the theoretical assumption that the implementation exception can apply when the WTO has ruled on the matter. Following *Van Parys*, which explained that when the Community amends its legislation in order to comply with adverse DSB recommendations it cannot be presumed to intend to implement any particular obligation under the WTO Agreements, the foundation of this reasoning is overturned.<sup>113</sup> Indeed, since the implementation exception does not apply, the subsequent construction of the Community Courts in *Biret* and *Chiquita* cannot stand.

The ruling in *Van Parys* lessened the anxiety over the long-awaited judgments by the CFI in *FIAMM*.<sup>114</sup> These cases concerned traders who had suffered damages not as a direct result of WTO-incompatible Community legislation but because they were subject to retaliation by another WTO Member. Are those traders entitled to any compensation? The CFI, based on the previous case law, held that the Community cannot, in principle, be held liable by reason of any infringement of

109 For a thoughtful analysis see Armin von Bogdandy, 'Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC' (2005) 39 *Journal of World Trade* 45.

110 Rosas, *supra* note 72 at p. 140. Pieter Jan Kuijper and Marco Bronckers, 'WTO Law in the European Court of Justice' (2005) 42 *Common Market Law Review* 1313 at p. 1332. Also, *Cordis* at para. 51.

111 *Biret* at para. 62.

112 *Chiquita* at para. 166.

113 *Van Parys* at para. 41.

114 Joined Cases T-69/00 T-301/00, T-320/00, T-383/00 and T-135/01 *FIAMM and FIAMM Technologies and others v. Council and Commission*, judgment of 14 December 2005, not yet reported.

WTO rules by the Community institutions.<sup>115</sup> This could only be the case if the Community intended to implement a particular obligation assumed in the context of the WTO or where the Community measure expressly refers to specific provisions of the WTO.<sup>116</sup> Mirroring the substance of *Van Parys*, yet, not citing it, the CFI held that by amending legislation found to be incompatible with WTO rules, the Community did not intend to implement specific obligations arising from those rules.<sup>117</sup> Neither, did the relevant Community legislation make express reference to specific WTO rules.<sup>118</sup>

The seemingly insurmountable insulation of Community law against any challenge under WTO in Community Courts would make the analysis of the other conditions of liability, namely the damage and the causal link between the act of the institutions and damage suffered, redundant. Yet, the CFI in *FIAMM* was faced with a claim to examine the non-contractual liability of the Community for the lawful conduct of the Community institutions drawing on national laws of the Member States. In fact, the CFI found that national laws enable individuals to obtain compensation for damages suffered even in the absence of unlawful conduct by the perpetrator.<sup>119</sup> Following *Dorsch Consult*, the CFI held that the Community could incur liability in the absence of unlawful conduct if actual damage has been sustained, the causal link between that damage and the conduct of Community institutions has been established, and that damage was of unusual and special nature.<sup>120</sup> The claim made by the applicants in *FIAMM* presented a prime opportunity to the CFI to examine the issue of damages and causal link, which, owing to the hurdle of direct effect, was hardly broached in the Court's case law in the area of WTO law.<sup>121</sup>

Starting from the nature and extent of damages, the CFI simply stated that the applicants must have necessarily suffered commercial damage by reason of the incontestable rise in the price of their products, resulting from the imposition of an additional duty of 96.5%.<sup>122</sup> Straightforward as it is, this statement is not convincing. Clearly, damage in this context includes the damage actually suffered plus any lost profits.<sup>123</sup> The emphasis on actually suffered runs counter to the presumption 'must have necessarily suffered'.<sup>124</sup> Accordingly, in this context, damages should not be calculated on the basis of the amount by which the tariffs at the imports of Community products have increased by virtue of the suspension of concessions applied by the complaining WTO Member, but the actual effect the

115 *FIAMM* at para. 113.

116 *FIAMM* at para. 114.

117 *FIAMM* at para. 137.

118 *FIAMM* at para. 144.

119 *FIAMM* at para. 159.

120 *FIAMM* at para. 160.

121 With the exception of the manifest lack of causality in *Biret* at paras. 63–64.

122 *FIAMM* at para. 168.

123 Cases 5, 7, 13-24/66 *Kampffmeyer v. Commission* [1967] ECR 245.

124 *FIAMM* at para. 168.

raise of tariffs has had upon the competitive position of the affected traders. In this respect, the CFI's presumption will be difficult to apply in cases of traders like *Louis Vuitton* whose sales of leather handbags recorded a surge in the US market despite the sanctions.<sup>125</sup>

Going on to the issue of causal link, the CFI, referring to previous case law, established that causality exists when there is a sufficiently direct causal nexus between the conduct of the Community institutions and the damage suffered.<sup>126</sup> While the CFI recognized the option available to the United States to settle the dispute, it nonetheless explained that 'the withdrawal of concessions in relation to the Community results objectively, in accordance with the normal foreseeable operation of the WTO dispute settlement system accepted by the Community'.<sup>127</sup> The unilateral act by the United States to increase the customs duties on imports of batteries does not, in the CFI's view, break the causal link. In the CFI's words, the damage suffered by the applicants 'must be regarded as the immediate cause' of the Community conduct.<sup>128</sup>

Two objections must be raised against the CFI's reasoning in this respect: first, it provided a very broad interpretation of the concept of the 'direct causal link'. In the light of the large number of steps between the Community breach of WTO law and the damage suffered by an individual trader as a result of a WTO Member's suspension of concessions,<sup>129</sup> it ought to be questioned how immediate and direct such a causal relationship is. Extrapolating the *conditio sine qua non* theoretical foundation of causality to other areas of Community law is likely to change the landscape of Community liability as at the moment it sits uncomfortably with it.<sup>130</sup> In fact, it is questionable how the CFI considers the causal link broken in a case in which the Community institutions enjoy no discretion at the adoption of the harmful act,<sup>131</sup> while the opposite is the case for discretionary acts of other WTO Members.<sup>132</sup> Second, the CFI's analysis seems to disregard its previously vigorously advocated thesis on the great flexibility of the WTO DSU provisions. Indeed, there is a logical error here as, if the flexibility of the DSU is as great as the CFI has repeatedly stated, the relationship between the conduct of the Community institutions and the damage suffered by the individual traders could not be

125 While this raise has been attributed to either smart management, see, for instance, Ashok Som, 'Personal touch that built an empire of style and luxury' available at <http://www.ashoksom.com/3-Personal-touch%20.pdf>, at p. 8 or American consumers' increasing demand for luxury products, see, for instance, [http://www.vivavocefashion.com/front\\_page.html/retail\\_news2001\\_04.html](http://www.vivavocefashion.com/front_page.html/retail_news2001_04.html), no study assesses the competitive position of *Louis Vuitton* in the absence of sanctions.

126 *FIAMM* at para. 178 and the case law mentioned there.

127 *FIAMM* at para. 183.

128 *FIAMM* at para. 185.

129 Article 3.7 DSU. Rosas, *supra* note 72 at p. 140.

130 See, inter alia T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities* [1998] ECR II-667 at paras. 70–74.

131 *Dorsch Consult* at para. 72.

132 *FIAMM* at para. 184. See also, Kuijper *supra* note 110 at p.1337 who anticipates the problem.

characterized as either ‘immediate’ or ‘direct’. With regard to the suspension of concessions, it should be pointed out here that in the light of recent disputes, even in the presence of DSB authorization, WTO Members have been reluctant to apply retaliatory measures.<sup>133</sup> Therefore, the imposition of additional duties on products originating in the EC can hardly qualify as ‘the normal foreseeable operation of the WTO dispute settlement system’.<sup>134</sup>

Damage will be of an unusual nature, held the CFI in *FIAMM*, when it exceeds the limits of the economic risks inherent in operating the sector concerned and of special nature when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators.<sup>135</sup> In light of the nature of international trade, the CFI had little difficulty dismissing the claim brought by the applicants that they suffered damage of an unusual nature and exercised judicial economy on the question of special nature.<sup>136</sup>

Whilst a full critique of the *FIAMM* judgment escapes the confines of this contribution, it must be stated here that it sends mixed messages. The CFI correctly followed the established case law ruling out Community liability because of the lack of direct effect. It is submitted, however, that it erred in embarking on the analysis of Community liability for lawful conduct. Even if such a principle can find sufficient support in the cited judgments and national law,<sup>137</sup> its operation could not be seen as an alternative remedy when the unlawfulness of the acts of the Community institutions cannot be established because of the absence of direct effect. In addition, ‘actual damage’ and ‘direct causal link’ do not warrant such broad interpretations. It could be assumed that the CFI’s analysis is revealing of the collective mindset of its members and potential disagreements regarding the continued Community Courts’ reactive approach. In sum, this approach denies liability to private traders for damages suffered as a result of unlawful or lawful Community acts in the WTO domain.

As a precursor to the discussion on the coercive approach, it should be pointed out that the discussion concerning the conditions for Community liability maintains its significance. That is because Community liability may apply in these cases. As will be demonstrated in detail below, the Community applies a communitarized version of WTO law in the context of the coercive approach. It could be argued in this respect that communitarization of, say, the WTO Anti-Dumping Agreement vests this Agreement with the constitutional qualities of

133 WT/DS108 *United States – Tax Treatment for Foreign Sales Corporations*; WT/DS136 *United States – Anti-Dumping Act of 1916*; WT/DS222 *Canada – Export Credits and Loan Guarantees for Regional Aircraft*.

134 *FIAMM* at para. 183.

135 *FIAMM* at para. 202.

136 *FIAMM* at para. 212.

137 *FIAMM* at paras. 158–160. See also, T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities* [1998] ECR II-667 at para. 77.

Community law, including direct effect. By contrast, it could also be argued that since WTO law is not capable of conferring rights on individuals, the content of the exception created by the Court should only be construed to include the incidental review of legality of the Community measures under WTO law in annulment proceedings, but not to establish a claim for Community liability.<sup>138</sup> It must be pointed out however that the Court is not likely to deal with the issue because of the dual avenue available to traders to enforce their rights in Community Courts and the WTO Dispute Settlement and the measures taken by the institutions to minimize such an eventuality.<sup>139</sup>

### *The political institutions*

In the reactive approach, the political institutions showed resistance towards the full effect of WTO law. The most characteristic example of a reactive approach by the Council 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>140</sup> The Council, in this instance, was acting within its powers as duly recognized by the Court<sup>141</sup> and this statement should be considered of cardinal importance, despite the Opinion to the contrary by Advocate General Saggio in *Portuguese Textiles*.<sup>142</sup>

In addition, the political institutions have adopted a reactive approach in specific instances, primarily concerning those cases where they chose to maintain measures reflecting fundamental policy choices despite adverse Panel and Appellate Body rulings. This stance has been particularly important in the foundational years of the WTO and tested the limits of the system. At the same time, it tested the Community’s own limits as an idiosyncratic actor within this system.<sup>143</sup>

## **3. Coactive approach**

### *The Court of Justice*

In the reactive approach towards WTO law, the Court of Justice denied the enforcement of WTO law in national and Community Courts and the review of

138 *Contra*, Wiers, *supra* note 85 at p. 148, who makes a distinction between the conferral of rights on individuals and direct effect.

139 See below, Section 3. Also, Antonis Antoniadis, ‘The Participation of the European Community in the World Trade Organisation: An External Look at European Union Constitution-Building’ in T. Tridimas and P. Nebbia (eds.), *EU Law for the 21st Century: Rethinking the New Legal Order*, Vol. I (Hart Publishing, 2004), p. 321 at pp. 340–343.

140 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.

141 *Kupferberg* at para. 17.

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

143 Antoniadis, *supra* note 139 at pp. 343–344.

secondary Community law against its provisions. However, as already implied in the course of the analysis of the *Portuguese Textiles*, there are clearly defined exceptions recognized by the Court. These exceptions can be classified as: the legality standard, the transposition/implementation, the clear reference, and the consistent interpretation.<sup>144</sup> The exceptions partly reflect the Court's response to action by the Community's political institutions showing inclination to include the application of or reference to WTO law in their activities, and partly the realization that, in some cases, judicial enforcement of WTO rules in the Community and national Courts serves the better application of these rules and furthers the WTO objectives. The term 'coactive' in this sense does not simply represent a notable deviation from the lack of direct effect doctrine, it also signifies the intention of the institutions to use WTO law in their activities alongside Community law.

### *Legality standard*

Under Article 300(7) EC, the conclusion of the WTO Agreement by the Community bears the consequence that both the Community and its Member States must observe its provisions. The legality standard exception aims to enable the Community to hold the Member States to their commitments. 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>145</sup>

The Court underlined here the functional considerations present in the fulfilment of the Community's international obligations and the aim to avoid incurring international responsibility.<sup>146</sup> Premised upon the need to establish a unified front, which should not be undermined by Member States' breach of the Community's international commitments, and supported by the principle of cooperation and Article 300(7) EC, the Community can coerce Member States to fulfil their obligations under 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

<sup>144</sup> I prefer the terms 'transposition' and 'clear reference' adopted by Snyder, *supra* note 1 at p. 342 over the 'indirect effect' terminology proposed by Eeckhout, *supra* note 27 at p. 40.

<sup>145</sup> *Kupferberg* at para. 13.

<sup>146</sup> Klabbers, *supra* note 4 at p. 281.

be able to invoke the mechanisms available at Community level in order to ensure that the Member States observe their obligations under the Treaties.

Accordingly, when the Commission considers that Member States violate their obligations under the WTO Agreement, it may invoke enforcement proceedings in order to bring the recalcitrant Member States back to order. In the ordinary interpretation of Article 226 EC, Member States' failure to fulfil their obligations under the Treaty includes also obligations assumed by the Community in the WTO. WTO rules become the Community legal standard by which Member States must abide. This obligation stems from the nature of the Community as a Customs Union under the GATT, which demands that each Contracting Party shall take such reasonable measures as may be available to it to ensure observance of the provisions of the GATT Agreement by the regional and local governments and authorities within its territories.<sup>147</sup> Given that the Community was perceived as a single Contracting Party in the GATT,<sup>148</sup> the whole meaning of regional integration arrangements within the international trading system would be frustrated should the Community be unable to use the means available to it in order to enforce compliance with the GATT provisions.<sup>149</sup>

The most important case under the legality standard exception is the *International Dairy Agreement (IDA)*.<sup>150</sup> In that case, 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 IDA, 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, on the facts of the case, 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>151</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>152</sup>

This judgment has attracted criticism as it seemingly promotes inconsistency and, possibly, also an imbalance between the 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 denying a Member State the corollary right of challenge in annulment proceedings, 'is on balance not

147 Article XXIV:12 GATT.

148 Article XXIV:1 GATT.

149 In this case Article 226 EC Treaty.

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

151 AG Tesouro's Opinion in *International Dairy Agreement* at para. 24.

152 *International Dairy Agreement* at para. 57.

satisfactory, if one considers that the two situations are comparable'.<sup>153</sup> Clearly, the situations are not comparable. Had the Commission or any other institution been permitted to apply for the annulment of Community legislation, while the Member States had not, it would have been a comparable yet untenable position. However, the different treatment of qualitatively different proceedings (annulment in *Portuguese Textiles* and enforcement in *IDA*) can be reconciled. First, what is at stake in annulment proceedings is the fulfilment of an EC obligation *vis-à-vis* the GATT/WTO whilst in enforcement proceedings the fulfilment of an obligation of a Member State *vis-à-vis* the EC. As a result, in both cases, the Community upholds EC law over international law or national law. This seems to remedy the alleged inconsistency<sup>154</sup> and raises the question of the supremacy of the Community legal order, which will be dealt with below.<sup>155</sup> In addition, the Court's statement in *Haegeman*, regarding international law forming an integral part of the Community legal order,<sup>156</sup> is vindicated in that WTO law will be applied in enforcement proceedings.<sup>157</sup>

More recently, the Court condemned Ireland for failing to adhere to the 1971 Berne Convention for the Protection of Literary and Artistic Works.<sup>158</sup> Unlike *IDA*, which concerned compliance with an agreement concluded by the Community, it is not Community membership that 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>159</sup>

### *Transposition/Implementation*

In the following aspect of the coercive approach, the Community is required to act in conformity with WTO law insofar as it has adopted measures intended to implement certain of its provisions. This is the so-called 'transposition'/'implementation' exception in accordance with which individuals may invoke WTO law in order to challenge incompatible Community

153 Bourgeois, 'The European Court of Justice and the WTO' in Weiler, J. H. H. (eds.), *The EU, The WTO and the NAFTA* (Oxford University Press, 2001), at p. 112. See also, AG Tesaro's Opinion in *International Dairy Agreement* at paras. 23–24. More recently, Bronckers, *supra* note 110 at pp. 1348–1349.

154 *Ibid.* at pp. 112–113.

155 See Section 5.

156 Case 181/73 *Haegeman v. Belgium* [1973] ECR 449 at paras. 4 and 5.

157 See also, Rosas, *supra* note 100 at p. 218.

158 Case C-13/00 *Commission v. Ireland* [2002] ECR I-2943.

159 *Ibid.*, at para. 20.



acts.<sup>160</sup> While, in principle, the transposition exception may apply generally in all areas of Community legislation falling within the scope of WTO law, it must be pointed out that its application has been limited to the field of Anti-Dumping.<sup>161</sup>

The foundational case for this exception is *Nakajima*.<sup>162</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 provisions of the GATT Anti-Dumping Code and sought to rely on those in order to achieve the annulment of the Regulation. The Council argued that, as with the GATT, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly applicable within the Community.<sup>163</sup> The Court accepted that at the adoption of Council Regulation 2423/88 (the Basic Antidumping Regulation at the time) the Community intended to implement the international commitments stemming from the GATT Anti-Dumping Code. The Community must therefore ensure compliance with its international obligations at the adoption of implementing measures. Thus, the legality of Regulations imposing anti-dumping duties should be examined against the provisions of the GATT Anti-Dumping Code.<sup>164</sup>

The Court of Justice confirmed the validity of the *Nakajima* doctrine in the WTO context in *Petrotub*,<sup>165</sup> a case that concerned the imposition of anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Romania. 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 (ADA), 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 undertakings assumed within the WTO Committee on Anti-Dumping,<sup>166</sup> thereby fully fusing the two legal systems in the context of anti-dumping.

160 Eeckhout *supra* note 27 at p. 56 uses the term 'implementation' instead of 'transposition'.

161 *Chiquita* at para. 120.

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

163 *Nakajima* at para. 27.

164 *Nakajima* at paras. 31–32.

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

166 *Petrotub* at para. 59.

The *Nakajima* doctrine establishes that the Court may review the legality of Community legislation against WTO law. The Court's jurisdiction to deal with such matters does not only equip affected parties with substantive arguments stemming from the ADA but also establishes the possibility that parallel proceedings may be instituted challenging the same Community legislation both before the Court of Justice and WTO dispute settlement. In the *EC–Bed Linen* case,<sup>167</sup> a Panel and the Appellate Body 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>168</sup> The Community appealed the Panel findings, and, while the Appellate Body reversed some of the Panel's conclusions, it maintained that the 'zeroing' methodology,<sup>169</sup> applied by the EC, is inconsistent with Article 2.4.2. ADA.<sup>170</sup>

The *EC–Bed Linen* dispute raises important questions regarding the impact of WTO bodies' interpretations in the Community legal order,<sup>171</sup> also in connection with the preceding discussion of direct effect of Panel and Appellate Body rulings.<sup>172</sup> Following the facts of the *EC–Bed Linen* case, what will the Court of Justice do when faced with a complaint against the 'zeroing' methodology inconsistency with Article 2.4.2 ADA? In principle, the Court has 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, if it finds inconsistency with the ADA, 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>173</sup> Staying the proceedings should be the least preferred option; since the Court has jurisdiction to assess the legality of Anti-Dumping Regulations against the ADA, it should exercise it. A finding of consistency by the Court of the 'zeroing' methodology with the ADA, followed by a contrasting finding by the WTO bodies shifts to the Community institutions the responsibility to comply with the DSB recommendations and remedy the situation as they would have done in the absence

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

168 WT/DS141/R.

169 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.

170 WT/DS141/AB/R.

171 See, Natalie McNelis, 'What Obligations Are Created by World Trade Organization Dispute Settlement Reports?' (2003) 37 *Journal of World Trade* 647.

172 Section 2.

173 Bourgeois, *supra* note 153 at 121 citing K. P. E. Lasok, *The European Court of Justice, Practice and Procedure*, 2nd edition (Butterworth, London, 1994), at p. 72.

of a judgment by the Court. When the WTO has dealt with the first issue, it should be conceded that the Court of Justice should accept the legal interpretations found in the DSB recommendations. In this respect, they could be treated as directly effective. The ensuing inconsistency that the direct effect of only certain Panel and Appellate Body rulings is recognized is methodologically sound. The fact that only certain 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 *EC-Bed Linen*, the Council was faced with the possibility of actions for annulment before the Court of Justice by traders against whose imports the same ‘zeroing’ methodology had been applied. As mentioned above, the Court would be expected to apply the interpretations contained in the Panel and Appellate Body Reports, annul the Regulations *ex tunc*, and require the reimbursement of the collected duties. In response, the Council adopted the Enabling Regulation<sup>174</sup> whose provisions shall be analysed below.<sup>175</sup> Suffice it to say here that it requires the Council to take the necessary measures to bring Community acts in conformity with the rulings provided in the DSB recommendations. The Enabling Regulation provides prospective remedies and expressly states the intention to avoid the reimbursement of the collected duties.<sup>176</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 field of Anti-Dumping and Subsidies, the Panel and Appellate Body Reports are directly effective.

The recognition of direct effect in areas falling within the transposition/implementation exception means that the infringement of WTO law will readily establish a sufficiently serious breach that will trigger Community liability.<sup>177</sup> However, in the circumstances of *EC-Bed Linen*, a claim for compensation, while legally possible, is unlikely to succeed. As mentioned above, traders have a dual avenue to enforce their rights under the ADA. In addition, it could be argued that WTO law falling within the scope of the *Nakajima* exception, whilst allowing incidental review of legality, does not grant rights to individuals. Finally, it would be difficult to argue that in, for instance, applying the ‘zeroing’ methodology at the calculation of the dumping margin – a common practice internationally in the field

174 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. McNelis, *supra* note 171 at p. 670.

175 See below.

176 Article 3 Enabling Regulation.

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

of anti-dumping – the Community has manifestly and gravely disregarded the limits of its discretion.<sup>178</sup>

*Clear reference*

The Court confirmed in *Portuguese Textiles* and subsequent cases that, where a Community measure refers expressly to the precise provisions of the WTO agreements, the Court may review the legality of the Community measure in question in the light of those WTO rules.<sup>179</sup> The Court was referring to *Fediol*, a judgment delivered during the GATT era, which established this exception and laid down the conditions for its application.<sup>180</sup> In that case, the 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>181</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 GATT has no direct effect. The Court however held that it cannot be inferred from the lack of direct effect 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>182</sup> The gist of the ruling is that, irrespective of the lack of direct effect, the Commission, at the exercise of its discretion on whether to pursue a complaint under the GATT Dispute Settlement, has to interpret the relevant GATT provisions. This should not preclude the private parties having an interest and being involved in the procedure from requesting the judicial review of the Commission's decision. 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>183</sup> It is preferable that review of its decision be available to interested parties.

178 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.

179 *Portugal v. Council* at para. 49; *Biret* at para. 53.

180 Case 70/87 *Fediol v. Commission* [1989] ECR 1825.

181 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.

182 *Fediol* at para. 19.

183 See the Commission's arguments in paragraph 18 of the judgment.

At the time the Court delivered its ruling on *Portuguese Textiles*, no Commission interpretation taken under the Trade Barriers Regulation, the successor of the New Common Commercial Policy Instrument, which was adopted by the Council for the Community to exercise its rights under the WTO Agreement,<sup>184</sup> had been challenged. The clear reference exception was implicitly confirmed by the CFI in *FICF*.<sup>185</sup>

The significance of the clear reference exception 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 – overlooking for a moment that the challenge involves a Community act – it is, in essence, not the conformity of 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>186</sup>

### *Consistent interpretation*

The previous three instances of the coactive approach concern the application of WTO law by the Court of Justice itself and not the Member States’ courts. The doctrine of consistent interpretation, however, applies in all instances when both the Court of Justice and Member States’ courts are called to interpret otherwise non-directly effective WTO law.

The Court of Justice, as is characteristic of courts of several Member States, primarily those belonging to the dualist tradition,<sup>187</sup> consistently made efforts to interpret EC law in conformity with the Community’s international obligations.<sup>188</sup> Regarding WTO law, the case laying down the foundations of the doctrine of consistent interpretation is *Hermès*.<sup>189</sup> *Hermès* was a French company whose trade mark ‘Hermès’ was infringed by FHT. The interpretation of Article 50(6) of the TRIPs Agreement, which provides for provisional measures for the

184 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. L349, 31/12/1994, p. 71.

185 Case T-317/02 *Fédération des industries condimentaires de France (FICF) and Others v. Commission of the European Communities* [2004] ECR II-4325.

186 Paraphrasing paragraph 20 of the *Fediol* judgment. Emphasis added.

187 Gerrit Betlem and André Nollkaemper, ‘Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation’ (2003) 14 *European Journal of International Law* 569 at pp. 574–575. The principle is well established in the United States *cf.* *Charming Betsy*.

188 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.

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

protection of intellectual property rights, was raised in proceedings before Dutch courts, 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, without any allocation between them,<sup>190</sup> the extent of the Court's jurisdiction was also raised. The Court held that, because Regulation 40/94 on the Community trademark provided for provisional measures and those measures should be taken in the light of the wording and purpose of Article 50(6) TRIPs,<sup>191</sup> the Court had jurisdiction to interpret it, even if the facts of the case did not concern a Community trademark but one registered in the Benelux.<sup>192</sup> This is because it is clearly in the Community interest that, in order to forestall future differences of interpretation, Article 50(6) TRIPs should be interpreted uniformly whatever the circumstances in which it is to apply.<sup>193</sup>

The Court's assumption that national courts were to interpret Article 50(6) TRIPs, read together with Advocate General Tesauro's Opinion favouring direct effect for Article 50(6) TRIPs, raised the question of direct effect. The Court avoided the question and simply extended to national courts the duty to interpret national provisions in the light of international agreements concluded by the Community.<sup>194</sup> The essence of the doctrine of consistent interpretation was later made clear in *Dior* where the Court's reasoning can be summarized, in a general manner, into the following proposition: in areas falling within the subject-matter of the WTO Agreement and the Community has already legislated, courts of the Member States must by virtue of Community law interpret the provisions of national law as far as possible in the light of the otherwise non-directly effective provisions of the WTO Agreement.<sup>195</sup>

Overall, the duty of consistent interpretation provides a satisfactory alternative to the full direct effect of WTO law. While acknowledging that, owing to their special nature, WTO rules are not capable of being enforced in the Community legal order, their undoubted importance at the construction of Community legislation in areas of substantive legislative overlap is thereby restored.<sup>196</sup> The practical implication of these judgments is that WTO law will be interpreted and applied by Community and national Courts on a daily basis save for when it is in conflict with Community law.

<sup>190</sup> *Hermès* at para. 24.

<sup>191</sup> *Hermès* at para. 28.

<sup>192</sup> *Hermès* at para. 30.

<sup>193</sup> *Hermès* at para. 32. See also, Joined Cases C-300/98 and C-392/98 *Dior and Assco* [2000] ECR I-11344 at paras. 35–37.

<sup>194</sup> *Hermès* at para. 35.

<sup>195</sup> *Dior* at para. 49.

<sup>196</sup> P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), at p. 288.

### *The political institutions*

The examination of the intention of the parties is of cardinal importance for the determination of direct effect of any international agreement.<sup>197</sup> Whilst the Court referred to the preambular clause of the Council Decision concluding the WTO Agreement in order to deny, in principle, direct effect to the WTO Agreements, it is argued here that the case law analysed above under the coactive approach was intended to give effect to the intention of the Community institutions as demonstrated in the NCPI and TBR,<sup>198</sup> and the Anti-Dumping<sup>199</sup> and Anti-Subsidies Regulations.<sup>200</sup> The political institutions demonstrated strong evidence of their intentions in the legislative acts under examination, and the Court responded to the signal that 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 in 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 (the Enabling Regulation) laying down the measures to be taken by the EC so as to comply with adverse Panel and Appellate Body Reports.<sup>201</sup> In accordance with the Enabling Regulation, the Community should either amend or repeal the disputed measures or adopt any special measures deemed to be appropriate in the circumstances in order to follow the Panel and Appellate Body rulings.<sup>202</sup> The Commission may request all parties to submit all necessary information and it may conduct a review insofar as this is appropriate.<sup>203</sup> The Council may also suspend the application of the measure but only for a limited period of time.<sup>204</sup> The Council and the Commission may also review measures, not the subject of the dispute, if

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

198 Case 70/87 *Fediol v. Commission* [1989] ECR 1825.

199 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.

200 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, 21/10/1997, p. 1.

201 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, Geert A. Zonnekeyn, 'The Bed Linen Case and its Aftermath: Some Comment of the European Community's "World Trade Organization Enabling Regulation"' (2002) 36 *Journal of World Trade* 993; Dan Horowitz, 'A Regulated Scope for EU Compliance with WTO Rulings' (2001) 7 *International Trade Law and Regulation*. 153; McNelis, *supra* note 171.

202 Article 1(1) Enabling Regulation.

203 Article 1(3) Enabling Regulation.

204 Article 1(4) Enabling Regulation.

affected by the legal interpretations made in the Report adopted by the DSB,<sup>205</sup> although clearly, in WTO law, they are not obliged to.<sup>206</sup> It should be recalled that in *EC–Bed Linen*<sup>207</sup> the Appellate Body found that the practice of ‘zeroing’ applied by the EC at the determination of the dumping margin was incompatible with Article 2.4.2 ADA.<sup>208</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 duties, to request a review on the basis of Article 2 of the Enabling Regulation and in the light of the WTO Panel and Appellate Body interpretations.<sup>209</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>210</sup> After all, the Community could still adopt all necessary measures on the basis of Article 133 EC Treaty. However, as McNelis<sup>211</sup> pointed out, 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>212</sup> Moreover, the procedure enshrined in the Enabling Regulation 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 ordering the reimbursement of the collected duties to the affected traders. This mechanism of self-defence has the welcome, from a WTO perspective, repercussions of extending the legal interpretations 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 these interpretations 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 the Community’s 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

205 Article 2 Enabling Regulation.

206 McNelis, *supra* note 171 at pp. 659–661.

207 WT/DS141 *European Communities – Anti-dumping measures on imports of cotton-type bed-linen from India*.

208 Paragraph 6.119 of the Panel Report upheld by the Appellate Body in Paragraph 86(1) of its Report.

209 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.

210 McNelis, *supra* note 171 at p. 666.

211 *Ibid.*, at p. 649.

212 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.



United States challenging their use of the 'zeroing' methodology at the implementation of their anti-dumping legislation.<sup>213</sup>

### *Compliance with Panel and Appellate Body rulings*

The first few years of operation of the WTO and its Dispute Settlement System were marked by the two major *Hormones* and *Bananas* disputes and the perceived resistance of the Community institutions to comply with the Panel and Appellate Body rulings. It could be argued that these instances were seen as running counter to the Community's stated policy of compliance with the WTO Agreement. Some years on, it seems that the Community is developing an excellent record of compliance with rulings while settling most disputes at the diplomatic stage of dispute settlement.<sup>214</sup> In the *Bananas* dispute, the Community adopted legislation to bring its regime into conformity with the rulings,<sup>215</sup> it requested a waiver to maintain its current regime for a transitional period,<sup>216</sup> and, despite some difficulties,<sup>217</sup> the Community seems to be bringing the matter to a satisfactory conclusion.<sup>218</sup> Similarly, in *Hormones*, the Community not only did it take measures which, in its opinion, complied with the DSB recommendations,<sup>219</sup> but also challenged the continuing retaliation by Canada and United States.<sup>220</sup> In sum, one could describe the coactive approach as the Community playing by the rules.

213 WT/DS294 *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ('Zeroing') complaint brought by the EC on 19 June 2003.

214 Elisa Baroncini, 'The European Community and the Diplomatic Phase of the WTO Dispute Settlement Understanding' (1998) 18 *Yearbook of European Law* 157. Recent examples include Council Regulation 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, O.J. L93, 31/03/2006, p. 12 adopted so as to comply with the DSB recommendations in WT/DS174 *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* and Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences amending the Community's GSP conditions so as to comply with the DSB recommendations in WT/DS246 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*.

215 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. L31, 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. L345, 29/12/2001, p. 13.

216 WT/MIN(01)/16, *European Communities – Transitional Regime for the EC autonomous tariff rate quotas on imports of bananas*, Decision of 14 November 2001, Ministerial Conference, Fourth Session, Doha, 9–14 November 2001.

217 WT/LJ616 *European Communities – The ACP – EC Partnership Agreement – Recourse to Arbitration pursuant to the Decision of 14 November 2001*, Award of the Arbitrator, 1 August 2005.

218 See, in particular, preambular clause (5) of Council Regulation 1964/2005 of 29 November 2005 on the tariff rates for bananas O.J. L316, 2/12/2005, p. 1.

219 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. L262, 14/10/2003, p. 17.

220 WT/DS320 *US – Continued suspension of obligations in the EC – Hormones dispute*; WT/DS321 *Canada – Continued suspension of obligations in the EC – Hormones dispute*.

#### 4. Proactive approach

The term proactive defines the position of the Community institutions which is not limited to the observance of the obligations undertaken by the Community and the Member States under the WTO Agreements but is perceived to promote WTO law as the standard for the conduct of international trade externally and the benchmark for the adoption of internal legislation. In the context of global governance, proactivity has been demonstrated in the full support provided by the Community institutions to the WTO and the confidence entrusted to its dispute settlement system. Among the institutions, the Court's approach towards WTO law cannot be immediately characterized as proactive, a position which is in contrast with the one taken by Advocates General in their Opinions. It is uncontested that the main locus of proactivity towards the WTO has been the practice of the Community's political institutions.

In the proactive approach, the Community actively encourages the application of WTO law. WTO law is set as the normative benchmark for the Community's internal and external policies and international agreements. Regarding internal policies, the political institutions adopt legislation that purports to be in conformity with WTO law and is normally presumed to achieve this objective.<sup>221</sup> Consequently, it is not uncommon for Community legislation to state that its provisions comply with the relevant provisions of the WTO covered agreements.<sup>222</sup> At the formulation of Community policies, the Commission intends to make them WTO compliant and, in fact, goes to great lengths to develop a full WTO-compliance test at its interaction with the other institutions.<sup>223</sup> The realization that WTO law is omnipresent in the everyday activities of the Commission DGs, as well as the services of the Council and the European Parliament, clearly indicates that there is an emerging WTO culture, which started to dominate the law-making process within the Community.

The role of WTO law in the Community's external relations raises several important considerations. The WTO and its legal system have developed into an essential instrument of the Community's trade diplomacy. Politically, the Community assists and actively encourages the broadening of the WTO membership by sponsoring the accession process of its important trading partners.<sup>224</sup> The Community fully engages in the long and cumbersome accession process developing countries and formerly centrally planned economies are faced with, it introduces WTO law by reference in its relations with non-WTO members, and

<sup>221</sup> Snyder, *supra* note 1 at p. 316.

<sup>222</sup> See, Sebastiaan Princen, 'EC Compliance with WTO Law: the Interplay of Law and Politics' (2004) 15 *European Journal of International Law* 555; Sebastiaan Princen, *EU Regulation and Transatlantic Trade* (Kluwer Law International, 2002).

<sup>223</sup> de Búrca and Scott, *supra* note 1.

<sup>224</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.

treats the WTO Agreements as the common vocabulary for the conduct of international trade. For example, international agreements concluded before the entry into force of the WTO Agreement made reference to the forthcoming conclusion of the Uruguay Round, rendering the agreements' provisions subject to amendment in the light of the results of multilateral negotiations.<sup>225</sup> In some cases, agreements concluded by the Community will stipulate the revision of their provisions when accession to the WTO is achieved by the other contracting party.<sup>226</sup>

All in all, it is hard to find any post-1995 Association Agreements, Partnership and Cooperation Agreements, Trade and Development Agreements, Stabilization and Association Agreements concluded by the Community without a detailed reference to WTO law.<sup>227</sup> The relations thus established are instrumental towards the furthering of the objectives of the multilateral system as it becomes clear for WTO and non-WTO Members alike what standard they are expected to follow in their trade relations with the Community and its Member States. In so far as bilateral agreements of a general nature are concerned, turning WTO rules into the applicable standard will inevitably strengthen the culture of WTO compliance in the Community's legislative practice.

In addition, WTO law has been at the forefront of sectoral agreements concluded with developed trading partners, in particular the US. For instance, the preamble of Council Decision 98/258/EC on the conclusion of the Agreement between the European Community and the United States of America on sanitary measures to protect public and animal health in trade in live animals and animal products states, 'Whereas the Agreement between the European Community and the United States of America on sanitary measures to protect public and animal

225 Article 59 of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part O.J. L358, states: 'The provisions of Chapters II, III, and IV of Title IV shall be adjusted by decision of the Association Council in the light of the result of the negotiations on services taking place in the Uruguay Round and in particular to ensure that under any provisions of this Agreement a Party grants to the other Party a treatment no less favourable than that accorded under the provisions of a future GATS Agreement.'

226 See, for instance, Articles 4, 5, 16 and Annex 2 of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, O.J. L327, 28/11/1997, pp. 3–69.

227 Notably, Articles 20, 24, 61, 70, 78, 80, 83, 89, 92, and 103 of the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, O.J. L352, 30/12/2002, pp. 3–1439. The EC – Chile Agreement is particularly interesting in that it not only refers to the WTO generally or the WTO Annexed Agreements specifically, but also to Decisions taken by bodies established under the WTO Agreement, in particular, the TBT Committee (Article 85). More importantly, it subordinates the dispute settlement system established under the Agreement to the WTO DSU should any of the contracting parties chooses to seek redress for a violation of obligations under the EC – Chile in the WTO (Article 189(4)(c)). Also, Articles 6, 15, 29, 65 of the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, O.J. L84, 20/03/2004, pp. 13–81 and in particular Article 69(5) which for the purposes of states aids sets the relevant WTO rules and Community legislation as alternative normative frameworks.

health in trade in live animals and animal products provides an adequate means for putting into practice the provisions of the WTO Agreement on the application of sanitary and phytosanitary measures as regards public and animal health measures.<sup>228</sup> In fact, the agreement establishes a Joint Committee, which is entrusted with the task to guide the activities carried out under the Agreement.<sup>229</sup> At a first glance, such agreement must be interpreted as a bilateral instrument, which seeks to apply and consequentially promote the WTO rules. However, scratching below the surface, one must note that, although the development of mutually acceptable SPS standards must be seen as furthering the objectives and principles of the WTO Agreement, the SPS Agreement in this instance, it may also have the side effect of restricting market access to non-participants to such a bilateral arrangement.<sup>230</sup> This remark notwithstanding, the Community's policy to conclude bilateral mutual recognition agreements with reference to WTO law clearly forms part of its proactive approach.

From the point of view of judicial enforcement, it could be argued that provisions of agreements concluded by the Community containing clear reference to the WTO Agreement could develop direct effect; predominantly so, regarding agreements with states non-members of the WTO, and, therefore, incapable of availing themselves of the WTO DSU. This is reinforced by the requirement inserted in such agreements to be implemented 'in full conformity with the provisions of the WTO'.<sup>231</sup> Importantly, according to the Court's case law, the nature and purpose of these agreements do not preclude individuals from invoking their provisions in national courts.<sup>232</sup> When such provisions refer to WTO rules, the answer to the question of their judicial enforceability depends on whether the specific provisions of the WTO Agreement to which the Community's bilateral agreements refer will be treated as forming part of the latter agreements. If this is the case, they should be analysed in the light of the nature and purpose of the Community's agreements and not the WTO Agreement. Were this to be accepted and should they contain a clear, precise, and unconditional obligation, they will be enforced in national courts in accordance with the established case law.<sup>233</sup> In the alternative, it can be argued that in such cases both the Community and the associated states intended to transpose specific WTO rules in their legal orders.

228 O.J. L118, 21/4/1998, p. 1.

229 Article 14(1) of the Agreement.

230 M. J. Trebilcock and R. Howse, *The Regulation of International Trade*, 3rd edition (Routledge, 2005), at p. 230.

231 *Inter alia*, Article 34 of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, O.J. L317, 15/12/2000, p. 3.

232 Case C-265/03 *Simutenkov* [2005] ECR I-2579 extended this principle to Partnership and Cooperation Agreements. See also, Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135; Case C-18/90 *Kziber* [1991] ECR I-199; Case C-262/96 *Sürül* [1999] ECR I-2685; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049.

233 *Ibid.*

Extending the *Nakajima* doctrine to cover these cases too should not be ruled out.<sup>234</sup>

With reference to the effect of Panel and Appellate Body rulings, Article 85 of the Partnership and Cooperation Agreement (PCA) with Azerbaijan may be relevant in that it states:

When examining any issue arising within the framework of the Agreement in relation to a provision referring to an article of the GATT/WTO, the Cooperation Council shall take into account to the greatest extent possible the interpretation that is generally given to the article of the GATT/WTO in question by the Members of the WTO.<sup>235</sup>

This provision affords the interpretation that institutional bodies set up by international agreements concluded by the Community must apply the interpretations rendered by the Panel and Appellate Body adopted by the DSB. This goes further than the nature of DSB recommendations under the WTO Agreement itself and possibly further than the Enabling Regulation, analysed above. In addition, should the conditions identified in the previous paragraph apply, and WTO rules become directly effective by virtue of reference to them in the Community's international agreements, then Panel and Appellate Body interpretations of these provisions must be taken into account. If the opposite is the case, it will be difficult to argue in favour of direct effect of Panel and Appellate Body rulings for the reasons identified by the Court in the analysis of the reactive approach, in particular after the Court's judgment in *Van Parys*. By contrast, it could be argued that the proviso in the PCA with Azerbaijan may simply extend the general interpretative duty and practice of the Community institutions to employ the interpretations rendered by the WTO bodies<sup>236</sup> to organs established under international agreements concluded by the Community.

The above analysis is illustrative of the emergence of WTO law as a standard at the carrying out of the Community's internal and external policies. The importance of WTO law as the standard for the conduct of international trade regardless, it is difficult to surmise the purpose behind the institutional WTOphilia, particularly evident within the Commission. Clearly, it is the conflict-avoidance – and consequently, WTO dispute avoidance – strategy of the Commission than the suitability of the WTO norms. Observing the Community's international commitments is important; however, they can only serve as a framework wherein the

234 As explained by the CFI in *Chiquita* at para. 124 'The applicant rightly argues that application of the *Nakajima* case law is not, a priori, limited to the area of anti-dumping. It is capable of being applied in other areas governed by the provisions of the WTO Agreements where those agreements and the Community provisions whose legality is in question are comparable in nature and content to those just referred to above concerning the Anti-Dumping Codes of the GATT and the anti-dumping basic regulations which transpose them into Community law.'

235 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, O.J. L246, 17/9/1999, p. 3.

236 Rosas, *supra* note 100.

Community formulates its policies in order to achieve its own constitutional objectives. These are, in some instances, significantly different from those of the WTO. Unless an express reference to the need for compliance with WTO is inserted in the preamble to 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 established by the WTO. While the proactive approach is, in general, welcome, limits to the proactive practice of the Community's political institutions must be set.

## 5. 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>237</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>238</sup> the Court has been vigilant at the support of the supremacy of Community law.<sup>239</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>240</sup> Inevitably, the recognition of direct effect of WTO law would deprive the Court of Justice from the authority to uphold the supremacy of the Community.

The scales in the balancing act could 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'. The starting point for the analysis of the relationship between international law and Community law should be Article 300(5) which provides that when an agreement '*calls for*'<sup>241</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, the agreement may enter into force only if the Treaty is amended. These paragraphs represent a definitive statement

<sup>237</sup> Klabbers, *supra* note 4 at p. 271.

<sup>238</sup> Pescatore, *supra* note 31.

<sup>239</sup> Christian Timmermans, 'The EU and Public International Law' (1999) 4 *European Foreign Affairs Review* 181.

<sup>240</sup> Opinion 1/91 [1991] ECR I-6079.

<sup>241</sup> Emphasis added.

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>242</sup> Article 300(7) states 'Agreements concluded under the conditions set out in this Article – namely, the conditions enshrined in the previous six paragraphs of Article 300, including paragraphs 5 and 6 – shall be binding on the institutions of the Community and on the Member States'; does this presume that those agreements shall be binding insofar as they are compatible with the Treaty? This constitutes a reasonable assumption.

The obligation of compatibility of international agreements has recently been extended also to the internal rules. Indeed, the Council and the Commission are now charged with the task to ensure this at the negotiation of international agreements.<sup>243</sup> While, from a WTO legal perspective,<sup>244</sup> this amendment is not a novelty as it integrates a pre-existing 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 taken of the proliferation of studies comparing the substantive law of the WTO and the EU<sup>245</sup> and the building of a body of jurisprudence by the Panels and Appellate Body of the WTO.

Moving on to the 'direct effect' catalyst,<sup>246</sup> the Court has been unequivocal. Its outright denial of direct effect of WTO law 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 coactive approach prove the rule. Beyond the reasons analysed previously, some further considerations and conditions for change of course will follow. The WTO – unlike the Community, which created a new legal order whose subjects are not only the Member States but also their nationals<sup>247</sup> – does not enjoy such high aspirations.<sup>248</sup> On the contrary, it was designed in the traditional public international law sense in which states and

242 Bourgeois, *supra* note 153 at p. 97.

243 Article 133(3) EC Treaty as amended by the Treaty of Nice.

244 Article XIV:4 WTO Agreement.

245 Marise Cremona, 'Neutrality or Discrimination? The WTO, the EU and External Trade' in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2003) p. 151; F. 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 *European Journal of International Law* 307; M. Slotboom, *A Comparison of WTO and EC Law, Do Different Objects and Purposes Matter for Treaty Interpretation?* (Cameron May, 2006).

246 Klabbers, *supra* note 4 at pp. 292–298.

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

248 'Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.' Panel Report in WT/DS152/R *United States – Sections 301–310 of the Trade Act of 1974* at para. 7.72.

international organizations are the main subjects. Despite its broad 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>249</sup> Further, the WTO is characterized by the absence of a norm-generating mechanism.<sup>250</sup> The rounds of multilateral trade negotiations strike a delicate balance of rights and concessions, which, owing to the intergovernmental nature of the agreement, 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 DSU. The clear and unambiguous nature of its provisions can be advocated 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>251</sup> It has been argued that since the old GATT flexibility is gone, there is no need to insist upon the lack of direct effect, as now there is a binding international adjudication. This argument is not convincing at all. On the contrary, the bindingness and rigour of the DSU militate against direct effect. 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 obligation in international law will, sooner or later, serve their interests. This is further strengthened by the fact that, at 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>252</sup>

Were the opposite 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 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. From a policy point of view, it is in principle undesirable to have the WTO bodies and Community Courts handling the same cases. They are destined

249 With the exception of NGOs in an attempt to embrace civil society (Article V:2 WTO Agreement) and certain procedural rights. See, Steve Charnovitz, 'The WTO and the Rights of the Individual' (2001) 36 *Intereconomics: Review of European Economic Policy* 98.

250 de Búrca and Scott, *supra* note 1 at pp. 2–7.

251 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.

252 Case 70/87 *Fediol v. Commission* [1989] ECR 1825; Case T-317/02 *Fédération des industries condimentaires de France (FICF) and Others v. Commission of the European Communities* [2004] ECR II-4325.



to create conflicts, something that hardly facilitates the objective of the DSU to provide 'security and predictability to the multilateral trading system'.<sup>253</sup> In the absence of a preliminary reference system, mirroring the one established under the Community constitutional order,<sup>254</sup> direct effect of WTO law can hardly serve the multilateral trading system.<sup>255</sup>

A realistic argument however needs to be made. It is unfair for individual traders 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 realization does is to expose the shortcomings of the WTO system and encourage proposals for its reform instead of challenging the proper understanding 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>256</sup> This is a proposal which should muster support in the reform of the DSU process.

Regarding the proactive approach, the WTOization of the Community legislative engine represents a controversial realization and raises issues of both substance and process. Regarding substance, opening up to a legal system with lower standards of environmental protection, public health and labour laws, and a comprehensive global membership represents a cause for concern.<sup>257</sup> Moreover, it has been argued that the normative subordination of the Community to the WTO is destined to put the European social model at risk.<sup>258</sup> The concerns raised are exacerbated by the dramatic change in the European Union's economic and political architecture resulting from its enlargement.<sup>259</sup>

More importantly, regarding process, are we convinced that the WTO is better suited for the European Union than its own law-making processes, a result of no little effort, compromise and continuous debate?<sup>260</sup> Issues of democracy, legitimacy, and accountability are raised in this context too.<sup>261</sup> The European Union despite its more developed characteristics in this respect, still has a long way to

253 Article 3.2 DSU.

254 Rosas, *supra* note 1.

255 See also Eeckhout, *supra* note 57 at p. 99.

256 Rosas, *supra* note 72 at p. 144.

257 But see, Marco M. Slotbloom, 'Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?' (2003) 37 *Journal of World Trade* 553.

258 Antoniadis, *supra* note 143 at p. 343.

259 D. C. Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar, Cheltenham, 2003).

260 Eeckhout, *supra* note 57 at p. 100.

261 *Ibid.*

tread.<sup>262</sup> However, citizens affected in their everyday lives still find it difficult to accept the normative dominance of Community law encapsulated in the principle of direct effect and its concomitant, the principle of supremacy.<sup>263</sup> This is more so within the WTO context. What is increasingly worrying is the impression given by the Commission that it treats WTO law as the 'supreme law'. The substantive falseness of this approach regardless, the absence of any public debate at the formulation of WTO rules – instead, the single undertaking procedure is followed in the multilateral rounds of trade negotiations –, the limited role reserved to the European Parliament at the negotiation and conclusion of the agreement on behalf of the European Union, and the fact that dispute settlement takes place behind closed doors,<sup>264</sup> indicate that there is less likelihood for WTO law to be received with enthusiasm. 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>265</sup>

## Conclusions

As Trachtman put it 'the question of direct effect is a political decision'.<sup>266</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 and dismissed the calls from commentators to undervalue the normative merit of the relevant clause in the Council Decision concluding the WTO Agreement.<sup>267</sup> 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>268</sup> Following from this, unless the Community transforms WTO law into the Community legal system by means of transposition into its own legislative instruments, WTO law cannot have direct effect. Hermeneutically, this means that the Community chose WTO law as a 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. Ordinarily, it tries to interpret legislation consistently with the WTO Agreements.

262 A. Arnall and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2003).

263 The disaffection towards the European Union looming in many Member States and made manifest in the recent French and Dutch referenda is illustrative of this proposition.

264 Which is not reversed by the groundbreaking decision to hold the proceedings in public in WT/DS320 *US – Continued suspension of obligations in the EC – Hormones dispute*; WT/DS321 *Canada – Continued suspension of obligations in the EC – Hormones dispute*.

265 White Paper on European Governance, COM(2001)428, 25 July 2001.

266 Joel Trachtman, 'Bananas, direct effect and compliance' (1999) 10 *European Journal of International Law* 655 at p. 664.

267 Consequently, it is not the Court playing a political role as Klabbers suggested, *supra* note 4 at p. 298.

268 Eeckhout, *supra* note 27 at pp. 24–29.

Apart from those exceptions, which do not, in essence, involve the application of WTO law but its communitarized 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 law may serve as a particularly useful benchmark. The use of WTO norms in the material provisions of the Community's international agreements will facilitate trade liberalization and will have a positive impact on 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 Court and the political institutions. It is not as receptive to WTO law as some commentators would prefer, but neither as inconsistent as often accused. Until significant changes within the WTO and its law-making mechanism materialize to enable WTO law to play a more important role, this elaborate nexus of approaches should be considered as thoroughly satisfactory.

