

## The *Chiquita* and *Van Parys* Judgments: Rules, Exceptions and the Law

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### 1. Introduction

The judgments in *Chiquita*<sup>1</sup> and *Van Parys*<sup>2</sup> are poised between the *jurisprudence constante* denying direct effect to the WTO Agreement<sup>3</sup> and proposals furnished by the academic community<sup>4</sup> and Advocates General<sup>5</sup> to broaden the scope of the so-called *Nakajima* doctrine<sup>6</sup> which provides an exception from the general prohibition. Essentially, the suggestion was that the Court<sup>7</sup> should give effect to Dispute Settlement Body (DSB) recommendations identifying the incompatibility of Community legislation with the WTO Agreement

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1. Case T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported.
2. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported.
3. The term 'WTO Agreement' may be used generically to include both the WTO Agreement and the covered agreements.
4. N. Lavranos, 'The *Chiquita* and *Van Parys* judgments: An exception to the rule of law', in this issue; N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, (Europea Law Publishing, 2004); G. 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; G. 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; P. Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections' (2002) 5 *Journal of International Economic Law* 91; P. Mengozzi, 'Le Relazioni Esterne della Comunità Europea, il Principio di Sussidiarietà e le Esigenze de Cooperazione Poste dalla Globalizzazione dell' Economia' in L. Daniele (ed.), *Le Relazioni Esterne della Unione Europea Nel Nuovo Millennio*, (Giuffrè Milano, 2001) p. 5.
5. Opinion of AG Alber in Case C-93/02 P *Biret International SA & Etablissements Biret et Sie* [2003] ECR I-10497; Opinion of AG Tizzano in Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, on the specific issue of WTO DSB recommendations. For the more general calls for direct effect see, Opinion of AG Tesouro in Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603; Opinion of AG Cosmas in C-183/95 *Affish v. Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315; Opinion of AG Saggio in Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.
6. Case C-69/89 *Nakajima All Precision Co. Ltd v. Council* [1991] ECR I-2069.
7. The term 'Court' will be used generically for both Community courts.

and review the legality of Community acts under WTO law. Both judgments, properly construed, must lead to the conclusion that the Court followed the strict line dating back to *International Fruit*<sup>8</sup> denying direct effect *lato sensu* to WTO law, elaborated its previous case-law and dispelled any expectations raised by the judgment-aberration in *Biret*.<sup>9</sup> The Court has attracted criticism for its position denying direct effect to WTO law and one would expect, in the light of the unequivocal character of the judgments under review, that criticism is destined to continue and probably intensify.<sup>10</sup> This article aims to argue in favour of the Court and contribute to the explanation of the legal and political considerations justifying its position.<sup>11</sup> At the same time, it will attempt to surmise the misunderstandings that gave way to the criticism against the Court and argue against some of the newly-cast polemic thrown at the Court.

## 2. The *Chiquita* Judgment

The facts of this case are well known. Chiquita brought the case before the Court of First Instance (CFI) and requested compensation from the Commission for the loss it allegedly suffered as a result of the latter's adoption and maintaining in force of Commission Regulation (EC) No 2362/98 regarding imports of bananas into the Community.<sup>12</sup> Its claim was not based on the argument of direct effect of WTO law, bound to fail in the light of the Court's case-law, but on the *Nakajima* exception under which the Court may review the legality of Community acts under WTO law when the Community intended to implement a particular obligation assumed in the context of the WTO.<sup>13</sup>

The applicants in this case shifted their rhetoric outside direct effect and

8. Joined Cases 21–24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

9. Cases C-93/02 & 94/02 *Biret International SA & Etablissements Biret et Sie* [2003] ECR I-10497 & 10565 at paragraphs 62–64 & 65–67 respectively.

10. Lavranos characterises the Court's attitude as 'disturbing', *supra* note 4.

11. A. Rosas, 'Annotation of Case C-149/96 Portugal v. Council' (2000) 37 *Common Market Law Review* 797; F. Snyder, 'The Gatekeepers: The European Courts and WTO Law' (2003) 40 *Common Market Law Review* 313; Eeckhout, *supra* note 4; A. Antoniadis, 'The Participation of the European Community in the World Trade Organisation: An External Look at European Union Constitution-Building' in T. Tridimas & P. Nebbia (eds.), *EU Law for the 21st Century: Rethinking the New Legal Order*, Vol. I (Hart Publishing, 2004), p. 321.

12. Referred to throughout the judgment as 'the 1999 regime'.

13. Case T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported, at paragraphs 83–84.

focused instead on implementation – or the intention thereto – of WTO obligations and effective judicial protection.<sup>14</sup> Focussing on the first limb, they attempted, rather unconvincingly, to argue that the conditions of the specific case permitted the interpretation of the *Nakajima* doctrine in such a manner as to vindicate their claim.<sup>15</sup> The Commission rejected Chiquita's arguments by recalling the ruling from *Atlanta* that DSB recommendations could only be taken into account if the underlying obligation were found to have direct effect<sup>16</sup> and that the *Nakajima* conditions were not fulfilled in this case.<sup>17</sup>

The CFI stated that having regard to their nature and general scheme, the WTO agreement and its annexes are not, in principle, among the rules in the light of which the Court will review the legality of acts of the Community institutions and that they do not create in favour of individuals rights which they may use before a court by virtue of Community law.<sup>18</sup> It went on to spell out the *Nakajima* and *Fediol* exceptions,<sup>19</sup> and analyse the scope of the *Nakajima* exception identified by the Court as the only ground in the applicant's case.<sup>20</sup> Making a brief analysis of the previous case-law the Court found that the exception gives an opportunity to private parties not gaining rights by virtue of the Anti-Dumping Agreement (ADA) to launch an indirect challenge against the Community basic regulation for violation of the ADA. As an exceptional rule, it must be interpreted strictly and on the basis of the previous case-law has only been upheld twice by the Community courts.<sup>21</sup>

Had the CFI stopped there it would have been an unproblematic decision. However, obviously influenced by the Court's reprimand in *Biret* to provide a fuller analysis of the impact of DSB recommendations at the determination of infringement of the SPS Agreement in that case,<sup>22</sup> the CFI went on to entertain further findings. While this contribution is primarily concerned with the broader considerations of the judgment, a brief comment on these related findings is appropriate. The CFI attempted to second-guess the Court's reasoning behind the exception provided in the *Nakajima* case by construing in Articles 16(6)(a) of the 1979 Anti-Dumping Code<sup>23</sup> and Article 18(4) of the

14. *Ibid.* at paragraphs 86–88.

15. *Ibid.* at paragraphs 86–103.

16. *Ibid.* at paragraph 104.

17. *Ibid.* at paragraphs 105–113.

18. *Ibid.* at paragraph 114 referring to the *Portugal v. Council* and *Dior* judgments respectively.

19. *Ibid.* at paragraph 115.

20. *Ibid.* at paragraph 116.

21. Case C-76/00 P *Petrotub SA and Republica SA v. Council and Commission* [2003] ECR I-79 at paragraph 52 et seq and Case T-256/97 *BEUC v. Commission* [2000] ECR II-101 at paragraph 52 et seq.

22. Case C-93/02 *Biret International SA* [2003] ECR I-10497 at paragraph 56.

23. 'contracting parties ... take all necessary steps, of general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its law,

1994 Anti-Dumping Agreement (ADA) an obligation to transpose the provisions of these Codes into Community law.<sup>24</sup> The CFI here failed to acknowledge Article XVI:4 of the WTO Agreement which states that 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'. The obligation to conform with the WTO agreements is general and not unique in the ADA. This obligation however does not entail the obligation to transpose the provisions of the WTO agreements in Community law as the CFI suggests.<sup>25</sup> From this erroneous premise the CFI went on to explain that the *Nakajima* doctrine is not limited only to the cases of anti-dumping but may extend to other areas.<sup>26</sup> On this basis it went on to analyse the specifics of the current case under the *Nakajima* principles and arrive at the conclusion that there was no intention to implement a particular obligation assumed in the context of the WTO.<sup>27</sup> This is because Article XIII GATT and Articles II and XVII GATS lay down principles and obligations which by their wording, nature and scope are general in character compared to those in the 1979 and 1994 Anti-Dumping Codes.<sup>28</sup> Because of the general nature of the provisions, the DSB recommendations to bring the Community legislation into conformity therewith are also in the CFI's view general and cannot therefore be relied upon for the purposes of the *Nakajima* doctrine.<sup>29</sup>

While the statement that the WTO dispute settlement system '...does not establish a mechanism for the judicial resolution of international disputes by means of decisions with binding effects comparable with those of a court decision in the internal legal systems of the Member States'<sup>30</sup> can only be accused of simplicity unbecoming the complexity of the subject, the elusive attempt to accommodate the *Atlanta* ruling with the *Biret* reprimand is complemented by an even more contentious statement. The CFI essentially implies that the Community could be held liable under Article 288 EC Treaty for the period after the deadline for implementation under Article 21(3)(c) DSU has passed and until full compliance is achieved subject to not having paid compensation or suffered retaliation.<sup>31</sup> Thereby, the CFI tried to limit the

regulations and administrative procedures with the provisions of this Agreement as they may apply for the Party in question'.

24. Case T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported, at paragraph 121.

25. *Ibid.* at paragraph 122. This is analysed in more detail below.

26. *Ibid.* at paragraph 124.

27. *Ibid.* at paragraph 157.

28. *Ibid.* at paragraph 159.

29. *Ibid.* at paragraph 161.

30. *Ibid.* at paragraph 162.

31. *Ibid.* at paragraph 166.

potential scope of the remarkable *Biret* judgment with an equally remarkable legal construction of alternating public/private dues. Leaving this statement behind as an *obiter*, the CFI returned to its analysis of the *Nakajima* doctrine in the present case to conclude that there are no special obligations which the Community intended to implement and that, as the Community did not transpose any of those, Chiquita could not plead the infringement by the Community of its obligations under the WTO Agreement.<sup>32</sup>

### 3. The *Van Parys* Judgment

The Court of Justice delivered its judgment in *Van Parys*<sup>33</sup> a couple of weeks after the CFI judgment in *Chiquita*. The case arrived at the Court on a request for a preliminary ruling concerning the validity of the Community's bananas import regime and arose when Van Parys, a Belgian bananas importer, was refused an import licence for certain quantities of bananas originating in Ecuador and Panama by the Belgian Intervention and Refund Board (BIRB).<sup>34</sup>

Advocate General Tizzano<sup>35</sup> in his Opinion made an overview of the case-law focussing in particular on *Portugal v. Council*<sup>36</sup> and *Netherlands v. Parliament and Council*<sup>37</sup> where the Court had made clear that the WTO Agreements can neither be invoked by individuals in national courts nor serve as the standard for review.<sup>38</sup> He then made an appraisal of the impact that an adverse ruling adopted by the DSB may have by reference to the operation of the DSB. He then unreservedly endorsed<sup>39</sup> the arguments made by Advocate General Alber in *Biret* and sent a message to the Court that 'in a Community by law DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion'.<sup>40</sup> Going onto the judgment in *Biret*, he condoned the temporal limitation to direct effect of DSB recommendations until the end of the reasonable time for compliance set by Article 21.3 DSU.<sup>41</sup> At the same time he read in the Court's criticism of the CFI for not examining the possible

32. *Ibid.* at paragraphs 167–170.

33. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported.

34. *Ibid.* at paragraphs 31–36.

35. Opinion of Advocate General Tizzano in *Van Parys*, delivered on 18 November 2004.

36. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.

37. Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079.

38. Opinion of Advocate General Tizzano in *Van Parys* at paragraphs 36–45.

39. *Ibid.* at paragraphs 63–73.

40. *Ibid.* at paragraph 73.

41. *Ibid.* at footnote 52.

impact of DSB recommendations on the argument over direct effect that, indeed, in the presence of DSB recommendations there may be room for a different answer to the question of direct effect.<sup>42</sup> Curiously, Advocate General Tizzano leaped to the conclusion that 'the Community regime for the import of bananas based on Regulation No 404/93 as amended and on the regulations adopted to implement that regulation is invalid inasmuch as it is inconsistent with the WTO rules as established by the DSB on 25 September 1997 and confirmed by the same body on 6 May 1999' without any further explanation.<sup>43</sup>

Faithful to its long line of jurisprudence the Court explained that the WTO agreements cannot in principle be invoked by individuals and enable the Court to exercise judicial review of the relevant Community provisions in the light of those rules.<sup>44</sup> Only when the Community intended to implement a particular obligation or 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 the light of WTO rules.<sup>45</sup> The Community did not intend to implement a particular obligation in this sense by amending its bananas import regime.<sup>46</sup> Instead, the Court treated the inconsistency established by the DSB of the Common Market Organisation in Bananas with Articles I and XIII GATT as simply a step in a procedure fully prescribed in the DSU.<sup>47</sup> Had it not been for the denial of direct effect, the legislative and executive organs of the WTO Members could not have taken advantage of the possibility afforded to them by Article 22 DSU in order to reach a negotiated settlement.<sup>48</sup> Offering a procedural overview of the bananas dispute, the Court praised the institutions for exhausting the possibilities under the DSU and achieving an agreement compatible with WTO rules, the Community's obligations towards ACP states and the objectives of the Common Agricultural Policy.<sup>49</sup> The Court could have further elaborated on certain procedural aspects of the bananas dispute which strengthen its argument concerning the availability of options to the Community under WTO rules.<sup>50</sup> Accordingly, the Community was granted a waiver from its obligations under Article XIII:1 and 2 of the GATT by the Doha Ministerial Conference to maintain the transitional regime, agreed between the EC, the US and Ecuador, until

42. *Ibid.* at paragraphs 76–78.

43. *Ibid.* at paragraph 83.

44. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 39.

45. *Ibid.* at paragraph 40.

46. *Ibid.* at paragraph 41.

47. *Ibid.* at paragraphs 42–47.

48. *Ibid.* at paragraph 48.

49. *Ibid.* at paragraphs 49–50.

50. It is hardly a surprise that it is ignored by the Court's critics.

31 December 2005.<sup>51</sup> Despite however, the agreement reached with US and Ecuador<sup>52</sup> and the waiver obtained, it must be noted that both countries objected to the removal of the dispute from the DSB agenda.<sup>53</sup> In their view, this agreement does not qualify as a mutually agreed solution that would bring the dispute to an end.<sup>54</sup> The dispute remains on the DSB agenda and, consequently, under the multilateral surveillance established by the DSU.<sup>55</sup> One cannot therefore contend, for the purposes of direct effect, that the DSU process is over.

Returning back to the judgment, it culminates in paragraph 51 where the Court dismisses the importance of the expiry of the time-limit under Article 21.3(c) DSU, overruling thereby both *Biret* and *Chiquita* to the extent identified above, and takes a stance which is both reprimanding and didactic: 'In those circumstances, to *require* the Community Court, *merely* on the basis that that time-limit has expired, to review the lawfulness of the Community measures concerned in the light of the WTO rules, could have the effect of undermining the Community's position in its attempt to reach a mutually acceptable solution to the dispute *in conformity with those rules*'.<sup>56</sup> This part of the judgment is a revelation. It is made obvious that the autonomy of the institutions and the principle of reciprocity are not the only reasons – important as they are – for denying direct effect. Read together with the last sentence of paragraph 53 'Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules'<sup>57</sup> restate the Court's unequivocal belief that denial of direct effect is not only in the interest of the Community but, more importantly, in the interest of the WTO and the proper interpretation and application of its rules.<sup>58</sup> The strictness of the tone reflects the strictness of its position and signals to all directions that the Court will not waver despite pressure.

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

52. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 49, last indent.

53. *Update of WTO Dispute Settlement Cases*, WT/DS/OV/23, 15 June 2005, at p. 198.

54. Notified to the DSB under Article 3(6) DSU.

55. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 46.

56. Emphasis added.

57. In less peremptory terms, Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paragraph 45.

58. Rosas *supra* note 11 and Eeckhout *supra* note 4 offer an outstanding selection of arguments in this line of reasoning.



#### 4. Comment

The question presented to the Court is effectively summarised in *Van Parys*: whether the WTO agreements give Community nationals a right to rely on those 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>59</sup> Essentially, two questions can be identified: whether WTO law can be directly effective and whether the long-standing negative answer to the question is affected by the existence of DSB recommendations declaring the incompatibility of Community legislation with the WTO agreements.

The Court has been accused of playing a political role in the significant issue of determining the effect the WTO Agreement was intended to have in the internal legal orders of the Community and its Member States.<sup>60</sup> This is an easily rebuttable accusation simply because the Court's answer would have been perceived as politically influenced owing to the wide discretion held at deciding an issue of admittedly constitutional importance.<sup>61</sup> However, given the last preambular clause in the Council Decision concluding the WTO Agreement,<sup>62</sup> it is the granting of direct effect that would have been treated as jurisprudential policy-making rather than a statement to the opposite effect.<sup>63</sup>

The analysis of the Court, however, has always been purely legal. The Court, as is customary for 'national' courts in international law, reserved for itself the right to interpret, in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of the nature and purpose of the obligations undertaken by the Community, whether an international agreement can be directly effective in the Community legal order.<sup>64</sup> Insofar as the WTO Agreement is concerned, in the seminal judgment of *Portugal*, the

59. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 38.

60. J. Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 *Yearbook of European Law* 263 at p. 298.

61. Eeckhout, *supra* note 4 at p. 96.

62. Council Decision 94/800/EC 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. L336, 23.12.1994, p. 1.

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

64. Article 31(1) Vienna Convention on the Law of Treaties; see generally, R. Higgins, 'Integrations of Authority and Control' in M. S. McDougal, M. W. Reisman & B. H. Weston (eds.), *Toward World Order and Human Dignity: Essay in Honor of Myers S. McDougal*, (Free Press, New York, 1976) p. 76 at 85.



Court started its analysis from the intention of the parties.<sup>65</sup> Taking into account the presumed intention of the Community and its Member States to perform in good faith the obligations undertaken under the WTO Agreement,<sup>66</sup> the question emerged, in the absence of clear guidance in this respect, whether the judicial enforcement of the WTO Agreement in the Community and Member States legal orders will facilitate the fulfilment of the Community and Member States' obligations thereunder.

Unlike the new legal order established by the EC Treaty which '... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage',<sup>67</sup> the WTO Agreement is a paradigm of international organisation in the traditional sense.<sup>68</sup> From this perspective, individuals are extremely handicapped.<sup>69</sup> Accordingly, the context of the WTO Agreement is conducive to the interpretation that this is a system based on traditional international law whose actors are states and rights and obligations prescribed therein are owned by states. In order to rebut such presumption evidence must be sought in the WTO Agreement offering powerful indication to the contrary.

From a systemic perspective, it must be pointed out that the Uruguay Round results have been treated as a single undertaking to include not only the substantive obligations included in Annex 1 but also the dispute settlement rules enshrined in Annex 2.<sup>70</sup> In this vein, it has been argued that it is the radical alteration of the dispute settlement brought by the DSU that differentiates between GATT 1947 and the WTO Agreement and necessitates direct effect.<sup>71</sup> In essence, it is the nature of the dispute settlement system established by the DSU that determines whether the WTO Agreement should be directly effective.

The nature of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system, to preserve the rights and obligations under the covered agreements and clarify the existing provisions of those agreements.<sup>72</sup> The nationality-of-claims rule, stemming from traditional international law,<sup>73</sup> is central in the construction of WTO dispute settlement.

65. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paragraph 34.

66. *Ibid.* at paragraph 35. This must also be taken as sufficiently strong argument in order to rebut the claim that there is violation of the *pacta sunt servanda* principle.

67. Case 26/62 *Van Gend en Loos* [1963] ECR 3

68. Panel Report on *United States – Sections 301–310 of the Trade Act of 1974*, adopted on 22 December 1999, WT/DS152/R, para. 7.72.

69. R. Higgins, *Problems & Process: International Law and how we use it*, (OUP, 1994) at p. 51.

70. The single package deal of the WTO agreements is also evidenced by the possibility for cross-retaliation. See further, Rosas, *supra* note 11 at p. 810.

71. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paragraph 31.

72. Article 3(2) DSU.

73. Higgins, *supra* note 69 at p. 51.

If a state considers that benefits accruing from the covered agreements are nullified or impaired, that state may bring a matter before WTO dispute settlement against another state, in many cases in order to resolve an essentially private commercial dispute.<sup>74</sup> The objective is a mutually acceptable resolution of the dispute<sup>75</sup> and the mechanisms available under the DSU include good offices, mediation, conciliation and the ordinary panel and Appellate Body process.<sup>76</sup> Should the Panel and Appellate Body conclude that a measure is inconsistent with a covered agreement, they shall recommend that the state concerned bring the measure into conformity with that agreement.<sup>77</sup> Prompt compliance is required<sup>78</sup> which ordinarily consists into the withdrawal of the measure.<sup>79</sup> Pending full implementation, the full breadth of options, available on an, admittedly, temporary basis, can be employed.<sup>80</sup>

There are two strands of reasoning stemming from this procedural overview of the mechanisms to achieve compliance under the multilateral surveillance system established by the DSU which form a DNA-shaped helix: the first strand forms the procedural constraints imposed by the DSU on the Court's assessment of whether judicial enforcement of the WTO Agreement in the Community shall facilitate the fulfilment of the Community's obligations. The single undertaking assumption mentioned above necessitates that the Community observes not only the substantive but the procedural obligations under the covered agreements. The direct effect would frustrate all options, albeit temporary, provided by the DSU. Is the *ex tunc* annulment of a Community measure resulting from the judicial review by Community courts because of inconsistency with the substantive WTO rules in conformity with the procedural WTO rules enshrined in the DSU? The answer is in the negative because this would both render Articles 21 and 22 redundant and compromise the prospective nature of remedies under the DSU.<sup>81</sup> It is not only the Community institutional balance that is upset and which the Court sought to protect,<sup>82</sup> but also the proper operation of the WTO rules, as can be inferred from the didactic tone in the Court reasoning.<sup>83</sup>

Moving on to the second strand, in an almost circular operation of the

74. The involvement of the US in the Bananas dispute in support of Chiquita is revealing. A recent eminent example is the recent Boeing/Airbus dispute.

75. Article 3(7) DSU.

76. Articles 5 *et seq.* DSU.

77. Hardly has there been any 'ruling' in the sense of Article 19(1) second sentence DSU.

78. Article 21(1) DSU.

79. Article 3(7) DSU.

80. Rosas, *supra* note 11 at p. 811.

81. Eeckhout, *supra* note 4 at p. 94.

82. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paragraph 40.

83. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 51.

helix, the question of individual rights is re-raised. Does the analysis of the DSU indicate that there are rights granted to individuals? It must be restated that since the multilateral trading system is predominantly state-based, unless WTO members have in no unclear terms indicated their intention to grant rights to individuals or provide an alternative/complementary to the DSU method of compliance including judicial review, such measures should be deemed to escape the scrutiny of national and Community courts. The system of compensation and suspension of concessions under Article 22 DSU provides support in the opposite direction. Taking into account that it is the state that has suffered damages because of the violation of provisions of the WTO Agreement by another state, it has the right to seek retribution in a compensation offer or authorisation to retaliate, pending full compliance by the defaulting state. Apart from the understanding that the right to retaliate is owned by the state, the argument that individuals may draw rights from a state's violation of the WTO Agreement could generate implausible results. Had the applicant's claim been upheld in *Chiquita*, the Community would have been subject to damages originating in the same conduct both in the WTO (the US retaliation) and Community (Chiquita's claim for damages) legal orders. As the Commission convincingly argued, after the offer of compensation or the application retaliation the overall balance of concessions is re-established.<sup>84</sup> The absence of retaliation by the state however, should in no way be construed to surrender this right to private parties as the CFI seems to suggest.<sup>85</sup> For the reasons already identified by the Court in *International Fruit*<sup>86</sup> which, it is submitted, are reinforced and not overturned by the adoption of the DSU, the WTO Agreement must not have direct effect in the Community and Member States legal orders.

Having explained that the first question raised by the Court in *Van Parys* is answered in the negative, does the fact that the Community adopted measures to comply with DSB recommendations and which have been declared inconsistent with the covered agreements overturn this finding? In principle, this does not seem to be the case as DSB recommendations only clarify the existing provisions without creating new legal obligations for WTO members; they form part of the agreements annexed to the WTO rather than separate decisions.<sup>87</sup> Therefore, the direct effect analysis applies to those too. That said, can DSB recommendations fall within the *Nakajima* exception proposed by com-

84. T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported, at paragraph 153.

85. *Ibid.* at paragraph 166.

86. Joined Cases 21–24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219 at paragraph 21.

87. Lavranos, *supra* note 4 at pp. 132, 140; Zonnekeyn, *supra* note 4 at p. 98.

mentators?<sup>88</sup> One must first examine the scope of the *Nakajima* exception. Starting the analysis from the original judgment some observations must be made. The Court held in *Nakajima* that the indirect review of secondary Community legislation against otherwise non-directly effective GATT law can take place when a measure was adopted in order to comply with the international obligations of the Community.<sup>89</sup> Ever since *Portugal* however, the wording of the *Nakajima* exception has changed into 'where the Community intended to implement a particular obligation'.<sup>90</sup> Different wordings seem to suggest totally different outcomes. The wording of post-WTO case-law, properly construed, indicates that in the implementation exception the Court does not apply WTO law *qua* WTO law but *qua* Community law. In *Petrotub*,<sup>91</sup> a case concerning the imposition of anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Romania, the Court explained that since the Community pursuant to the Basic Anti-Dumping Regulation intended to transpose the ADA, the Court may review the legality of Community measures in the field of anti-dumping under the ADA. The Court went 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 and the obligation to provide reasons.<sup>92</sup> The implication is that the ADA provisions in question shall be treated *qua* Community law. The communitarization of the ADA by virtue of its transposition had the consequence in the post-WTO era that it attracts the application of the principles and qualities of Community law. This, under its own conditions, includes direct effect.

Does Community legislation intending to implement the DSB recommendations generate direct effect? Plausible as it may be, this argument is not without its difficulties. Article 3(2) DSU explicitly states that 'recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. The assumption that there is a particular obligation to implement stemming from DSB recommendations runs counter to this provision. It is more convincing to argue that legislative activity to comply simply forms part of the general obligation towards prompt compliance under Article 21(1) DSU and the even more general obligation enshrined in Article XVI:4 of the WTO Agreement, informing the entire Agreement and stating that 'Each Member shall ensure the conformity of its laws, regulations and administrative provisions with its obligations as provided

88. *Inter alia*, read the remarkably lucid analysis by Eeckhout, *supra* note 4.

89. Case C-69/89 *Nakajima All Precision Co. Ltd v. Council* [1991] ECR I-2069 at paragraph 31.

90. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at paragraph 49.

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

92. *Ibid.* at paragraph 58.

in the annexed Agreements'. This general obligation should be presumed in the legislative intent of the Community anyway. Were the proposed interpretation to be accepted it would have rendered the entire Community legislation subject to judicial review under the WTO Agreement.

The judgments under review are in contrast regarding the last proposition. It is inherent in the Court's reasoning in *Van Parys* that it accepts that there is no particular obligation to implement.<sup>93</sup> The CFI by contrast went on to analyse the substantive GATT and GATS obligations that, in its view, the Community intended to implement under the *Nakajima* doctrine<sup>94</sup> and found that because they are general in nature they cannot be relied upon under the *Nakajima* case-law.<sup>95</sup> With respect, it is difficult to agree with the reasoning of the CFI. As mentioned above, the CFI simply attempted to follow the signal sent by the Court of Justice in *Biret*. This thesis viewed generally, when the Community attempts to comply with DSB recommendations it risks being construed as having the intention to implement the substantive rules violated. This clearly cannot be the case for many reasons, including the fact that few provisions in WTO law have similar characteristics to the ADA and are therefore prone to direct effect. Importantly however it should also be considered irresponsible, by the most lenient of assessments, to integrate disparate and unsystematic WTO rules into the Community legal order.

Given that the integration of substantive WTO provisions should be deemed missing from the legislative intent of the Community, if it were to be assumed, contrary to what the Court has held in *Van Parys*, that the obligation to comply with an adverse ruling constitutes a particular obligation from a procedural perspective, what would the modalities for the application of the *Nakajima* doctrine be? Even if DSB recommendations can be read to include a particular obligation incumbent on the Community, they would only provide a standard for the review of subsequent Community acts against the assumed obligation and, unlike *Petrofub*, would confer no rights on individuals. Under well established case-law, the resultant unlawfulness of the Community conduct will only generate Community liability if a sufficiently serious breach of a rule of law designed to confer rights on individuals is established.<sup>96</sup> For the reasons analysed above there are no rights conferred on individuals by WTO law and consequently, the application of the *Nakajima* doctrine in

93. Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, not yet reported, at paragraph 52.

94. T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported, at paragraph 127.

95. *Ibid.* at paragraphs 159–161.

96. Case C-352/98 P *Bergaderm and Goupil v. Commission* [2000] ECR I-5291 at paragraphs 40 and 42–44; Case C-312/00 P *Commission v. Camar and Tico* [2002] ECR I-11355 at paragraphs 52–55; Case C472/00 P *Commission v. Fresh Marine* [2003] ECR I-7541 at paragraphs 24–26.

Community liability cases will be fruitless. In sum, it should be conceded that the *Nakajima* doctrine is difficult to apply outside circumstances that informed its genesis. The Court has been correct in *Van Parys* not to entertain this claim.

The analysis provided so far has been predominantly based on the interpretation of the WTO agreements. It should be mentioned that subsequent practice in the application of the WTO agreements<sup>97</sup> confirms the Court's interpretation. The denial of direct effect to the WTO agreements by major jurisdictions, most importantly the US and Japan, confirms what is clear from the text and context of the WTO agreements that they do not confer rights on individuals. The non-conferral of direct effect by the most important jurisdictions does not only serve the principle of reciprocity but also provides guidance, from an international law perspective, towards the correct interpretation of the WTO Agreement.

As a result, the claim that the denial of direct effect is in breach of the principle of *pacta sunt servanda* does not stand to serious criticism. The scope of the obligation enshrined in this principle is that every treaty is binding upon the parties to it and must be performed by it in good faith.<sup>98</sup> The Community did nothing more than use the avenues available to it under the DSU in order to comply with its obligations. The recognition of direct effect of the WTO Agreement and/or DSB recommendations would have precluded the Community from doing so. This would have frustrated the provisions of the WTO Agreement and in particular those of the DSU.

The argument that there is a violation of fundamental rights inherent in the denial of direct effect is puzzling. In fact, the position of the Court of Justice towards WTO law is roughly comparable with the position in English law regarding the European Convention on Human Rights prior to the adoption of the 1998 Human Rights Acts. Until then, the ECHR gave no cause of action in the English Courts let alone the rulings of the ECtHR.<sup>99</sup> By analogy, it is difficult to argue that there is a fundamental right, namely the right of effective judicial protection enshrined in Articles 6 and 13 of the European Convention on Human Rights, violated. The CFI explained that the fact that the applicant has been in a position to use the legal means at its disposal means that there is no infringement of the principle of effective judicial protection.<sup>100</sup>

97. Article 31(3)(c) Vienna Convention of the Law of Treaties.

98. Article 26 Vienna Convention on the Law of Treaties.

99. H. Fenwick, *Civil Liberties and Human Rights*, 3rd edition, (Cavendish Publishing, 2002), Chapters 2 and 3 especially at pp. 112–115 where the author points out judicially constructed exceptions similar to those provided by the Court of Justice.

100. T-19/01 *Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities*, judgment of 3 February 2005, not yet reported, at paragraph 259.

In the light of the recent *Bosphorus* judgment rendered by the ECtHR the opposite argument appears unconvincing.<sup>101</sup>

## 5. Conclusions

There is a tendency in literature, not unsupported by some contradictions in the historical development of the Court's case-law, to entertain a communitarised treatment of WTO law and show little resistance to the lure of direct effect. This position indicates a preference towards a specific approach towards the broader considerations raised by the relationship between interconnecting legal orders, in particular those endowed with some system of dispute settlement. The proliferation of legal orders is marking the development of international law and compartmentalisation must be seen as an unwelcome consequence. Striking the right balance between integration and compartmentalisation, national courts as well as courts established by international law are invited to give effect to rules stemming from several, sectoral or comprehensive, regional or global, legal orders. In principle, these courts must combine reserving for themselves the role of final arbiter of constitutionality within their own order with due deference to the rules stemming from overlapping legal orders. In such a legal construction, the traditional theories of monism and dualism are clearly inadequate.

The case-law of the Court of Justice concerning the treatment of WTO law must be viewed against this backdrop. The question posed to it invited the Court to strike the correct balance between the fulfilment of the Community's obligations in the WTO and the preservation of its own autonomy. The Court struck the current equilibrium on the basis of the terms of the WTO Agreement rather than arbitrary political considerations. There is little support on legal grounds for direct effect. On the contrary, the possibility of waiver from substantive obligations and the facility of negotiated solutions, compensation and suspension of concessions stemming from the DSU militate against such effect. What the WTO Agreement as a whole clearly demonstrates is that it is still rooted in traditional international law, its provisions striking a delicate balance between rights and duties of states. Some exceptions created by the Court should be treated as such and their scope should be duly safeguarded. The balance between rules and exceptions should be deemed as upholding rather than violating the rule of law for the reasons analysed above. The recently ensuing rights discourse raises broader considerations relating to human rights protection in all interconnecting legal orders at a global level, the

101. Case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, (application no. 45036/98, preliminary objections), judgment of 30.06.2005.



emphasis put on the Community legal order. In this respect, it seems that the criticism mounted against the Court on the issue of direct effect is by and large unjustified. This does not mean that a broader discussion on human rights protection in the Community is undesirable; it only suggests that this is the wrong platform.

Going beyond the legal analysis of the WTO Agreements, is the current arrangement desirable in principle? At a time that remarkable steps towards privatisation of international law have been taken it appears unjustified to exclude the entities concerned *par excellence* with international trade, i.e. individuals, from the legal framework regulating it. Philosophically, such a development would have the advantage of rationalising the relationship between actors and process by recognising that in the field of international trade it is essentially private interests involved. The downturn is that by relinquishing control from the state the system is more open to abuse. Whatever happens this should be a result of legislative intervention on a global scale rather than judicial policy-making.