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Effects on The European Union of The WTO and Its Dispute Settlement System

- Is Europe Going Bananas? The Banana Dispute in Aspects of World
Wide Trade

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Table of Abbreviations

ACP	African, Caribbean and Pacific States
AB	Appellate Body
AG	Advocate-General
BFA	Banana Framework Agreement
CMLRev	Common Market Law Review
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EEC	European Economic Community
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECR	European Court Reports
ERTA	Case C-22/70 Commission v. Council (initials of the agreement in English)
ECU	European Currency Unit
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILO	International Labour Organization
JWT	Journal of World Trade
MFN	Most-Favoured-Nation
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal
SEA	Single European Act
TRIPs	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

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1 Introduction

In the process of globalization and liberalisation of trade, the external relations of the European Community play an important role. Being the largest trade player in the world after the United States, the Community's exporters depend on foreign markets just as much as third countries strongly depend on those exporters for their prosperity and internal stability. With the introduction of the World Trade Organization, whose task is to help trade flow as freely as possible by removing obstacles to trade and serve as a forum for trade negotiations, an international institution that provides for the essential foundation and framework of the Community's common commercial policy as well as other policies was established. The new dispute settlement mechanism has made the system more secure and predictable and constitutes today an important tool for the WTO in settling disputes. Arguments that denied the old GATT direct effect may need to be abolished. Granting the WTO Agreements direct effect would have serious and practical effects, effects that may not be altogether positive. The long-standing, not yet settled banana dispute suggests that there is still some work to be done before the Dispute Settlement Body can function as a proper court. Large trade players, such as the EU and the United States still seem to be able to take actions of their own, despite WTO rules telling them not to. Apart from the discussion around the direct effect of the WTO Agreements, the dispute also shed light over other important issues such as the protectionist behaviour of the Community through the preferential treatment in the Lomé Conventions, and the future relationship between the Community and the ACP States.

This thesis tries to analyse the legal consequences of the conclusion of agreements by the Community with an international organization such as the WTO, with a binding mechanism for settling disputes. In this respect there will be a description of the development over the years in the European Court of Justice concerning the granting of direct effect of the GATT 1947, the GATT 1994 and the WTO Agreements as well as a description of the legal and practical effects on the Community of the WTO and the possible direct effect of the WTO Agreements. The fact that the WTO Agreement is a mixed agreement and the complications connected thereof will also be discussed. The Court has unequivocally denied direct effect of the whole WTO agreement as such. However, with the introduction of the WTO and the new dispute settlement system things have changed, which will be illustrated by a comparison between the old and the new GATT as well as a survey of the new DSU. The question is whether the dispute settlement mechanism within the GATT is developing towards an adjudicative system.

The banana dispute serves as an illustration both of the fact that GATT was denied direct effect once more and of the problems connected with large trade players engaging in protectionist behaviour as well as the problems of developing countries having difficulties competing with world-wide trade. The dispute highlighted the co-operation between the Community and the ACP states through the Lomé Convention and the consequence of granting trade preferences to some countries and not to others. The dispute also illustrated the impact of the WTO on world-wide trade by making States, at least theoretically, change their policies if found inconsistent with the WTO rules. However, it is rather apparent from the banana dispute that the WTO system still has some problems with the factual implementation of its rulings, despite the fact that they are binding. Finally some comments will be made on

the recent and future development of the ACP trade and the banana dispute as well as a summary of the discussion among lawyers whether the WTO Agreements should be granted direct effect or not. The WTO Agreement could refer either the Marrakesh Agreement establishing the World Trade Organization or the GATT 1994 and the other Multilateral Agreements that form part of the WTO. In this thesis the latter meaning is used.

2. The European Community's External Relations

1.1 The Conclusion of International Agreements and The Membership of International Organizations of the European Community

The legal personality of the European Community is outlined in Article 210 of the EC-Treaty: "*The Community shall have legal personality*", and Article 211 of the EC-Treaty provides for the legal capacity of the Community in each of the Member States.¹ Various provisions in the EC Treaty outline the Community's possibilities to act as an independent party in external relations. Article 238 permits the Community to *conclude international agreements* with one or more States and Article 228 sets out the procedures for conclusion of agreements between the Community and other States or International Organizations. Article 228 (7) emphasises the binding character of such agreements while Article 229 requires the Commission to ensure the maintenance of all appropriate relations with all international organizations, in particular the United Nations and the GATT. Article 230 and 231 requires the Commission to establish close co-operation with the Council of Europe and the OECD.

There is no express provision in the EC Treaty for the Community to *join international organizations*. However, the Court expressly recognised in Opinion 1/76 that the powers conferred on the Community by the Treaty included the power, within the scope of the competence of the Community, to participate in the establishment of international organizations and to be a member of such organizations.² Thus the Community's powers to enter into international organizations include a power to enter into agreements establishing international organizations. This judgement is also reinforced by Article 228 (3) of the Treaty which envisages the conclusion by the EC of "agreements establishing a specific international framework by organising co-operation procedures".

¹ The leading authority on the international legal status of organisations composed of states is the *Reparations Case* (*Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep.174), commented in I. Macleod, I.D. Hendry and S.Hyett, *The External Relations of the European Communities*, 1996, pp.30-31.

² Opinion 1/76 Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels (1977) ECR 741, 756, commented by J.Sack in "*The European Community's Membership of International Organisations*", CML Rev.32, 1995, no 5, p.1229.

2.2 The Powers of The European Community

The powers of the Community derive from the EC Treaty, which determines the action which the Community can take and the procedures by which the powers can be exercised. The fundamental principle of Community law is the principle that the Community's powers are attributed to the Community by the Member States. This "*principle of the attribution of powers*" appears most clearly in Article 3b of the Treaty which provides that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein". This principle does not mean that the Member States, whenever they feel like it, can decide to "take back" some of the powers attributed to the Community. The transfer of powers is permanent. This was commented in *Costa v. ENEL* where the Court stated that "the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".³

The powers of the Community can either be express or implied. *Express powers* are powers conferred expressly in a provision of the Treaty, such as the power to conclude agreements in Article 238. The *doctrine of implied powers*, developed in the jurisprudence of the Court, ensured that the Community could enter into agreements in other areas within its internal competence. The exact scope of implied powers has been clarified by recent case-law and by amendments by the Maastricht Treaty.⁴ In Opinion 2/91 the Court described the implied powers of the Community as follows: "Authority to enter into international commitments may not only arise from an express attribution by the treaty, but may also flow implicitly from its provisions". There is a parallelism between the Community's internal and external powers. It is not necessary however, to exercise the powers to legislate internally in order to have external powers. The Court has held that the mere existence of an internal power can of itself give rise to a power to enter into agreements.⁵

It must then be examined whether the Community has exclusive competence to act or share this competence with the Member States. The principal consequence of *exclusive Community competence* is that Member States no longer can act in those areas where the Community has shared competence. In Opinion 2/91-the ILO case- the Court summarised the law on the exclusive competence of the Community. The Court said that the competence is exclusive in areas of common commercial policy, the conservation of fisheries, and competition.⁶

³ C-6/64 *Costa v. ENEL* (1964) ECR 585, p.594.

⁴ C- 22/70 *Commission v. Council* (the ERTA case) (1971) ECR 263, Opinion 2/91 Re ILO Convention, (1993) ECR I-1061, Opinion 1/94 Re the WTO Agreement (1995) ECR I-5267 and Opinion 2/92 Re OECD National Treatment Instrument, (1995) ECR 521, commented in Macleod, Hendry and Hyett, 1996, pp.47-53.

⁵ Opinion 1/76 (Rhine Navigation case), Opinion 2/91, Opinion 2/92, Opinion 1/94.

⁶ Article 113 of the EC-Treaty, Article 102 of the Act of Accession in relation to fisheries conservation measures, and Articles 85-90 of the EC Treaty.

Furthermore, each time the Community has decided to implement a common policy envisaged in the Treaty and adopts provisions laying down common rules, the Member States no longer have the right, acting individually or even collectively, to conclude agreements or undertake obligations which affect those rules. (The ERTA principle). The Community also has exclusive competence in cases where the external competence arises from an express power in an internal act or where internal powers can only be effectively exercised at the same time as external powers.⁷ It should be noted that once it has been established that the Community has exclusive competence, it retains this competence whether or not it exercises it. Thus, in case of exclusive Community competence, the Member States cannot act in case the Community fails to do so.⁸

The consequence of *shared competence* is that the Member States still have the power to enter into agreements and to take action in the areas in question. When the competence is shared between the Community and the Member States the Court has said that there is a duty of co-operation between the institutions of the Community and the Member States, both in the process of negotiation and conclusion as well as in the fulfilment of the obligations entered into.⁹ Even though it is a duty, some say it does not oblige the Member State to reach a common position, it only obliges them to use best endeavours to do so.¹⁰

2.2.1 Mixed Agreements

A mixed agreement is "an agreement to which one or more of the Communities and the Member States are, or may become, parties, and which contains provisions some elements of which fall within Community competence, and some of which fall within the competence of the Member States".¹¹ The notion of shared competence "serves to stress that the entire life of a (projected) or mixed agreement is the joint affair of the Community and the Member States".¹² One of the main problems with mixed agreements consists of the co-ordination of a common position by the Member States. The Court's statements in shared powers has not given much guidance and although there has been several attempts to draw up detailed codes of conduct when dealing with mixed agreements this has not led to any satisfactory results.¹³ In some cases of course, the text of the agreement includes a reference to the division of competence. If there is no such reference it is essential for the Community and the Member States to attempt to define their respective competence and to give an appropriate notification. This is necessary for the Community's and the Member States' rights and obligations under the agreement to be distinguished. If the agreement does not provide for a distinction of powers between the Community and the Member States, indirectly or directly, then the Community's and the Member States' rights and obligations are regarded as an "undivided whole" by the other party or parties to the agreement. Consequently there is also a joint

⁷ Opinion 1/94, Opinion 1/76.

⁸ C-804/79 *Commission v. United Kingdom* (1981) ECR 1045, paragraph 20 of the judgement.

⁹ Opinion 2/91, para. 36, and Opinion 1/78 Re Draft International Agreement Natural Rubber (1979) ECR 2871 paras. 34-36.

¹⁰ Macleod, Hendry and Hyett, 1996, p.149.

¹¹ Macleod, Hendry and Hyett, 1996, p.143.

¹² N. A Neuwahl, "Shared powers or combined incompetence? More on mixity", CML Rev. 33, 1996, No 4, p.677, see also Opinion 1/94, para. 108.

¹³ Neuwahl, 1996, p.677-678. Opinion 1/94 raised more problems than it solved.

responsibility, thus reciprocity may be invoked against both the Community and the Member States in such a case.¹⁴

2.3 Legal Effects of Agreements Concluded by The European Community

Agreements concluded by the Community are binding on the Community and form an integral part of the Community. This was concluded by the Court of Justice in *Haegeman v. Belgium*.¹⁵ Because the provisions of an agreement form part of Community law, they may give rise to rights and duties which individuals can invoke directly before national courts. The Community also has a duty to make reparation if it does not fulfil the terms of the agreement since it is responsible in international law for the performance of its obligations and the agreements must be performed in accordance with the principle of *pacta sunt servanda*.¹⁶

¹⁴ G. Gaja, "The European Community's Rights and Obligations under Mixed Agreements", in *Mixed Agreements*, edited by D.O'Keeffe and H. Schermers, 1983, p.137.

¹⁵ *Haegeman v. Belgium* C-181/73 (1974) ECR 449, paras. 4-5 of the judgement. This was later confirmed in C-12/86 *Demirel v. Stadt Schwäbisch Gmund* (1987) ECR 3719, para. 7 of the judgement.

¹⁶ Macleod, Hendry and Hyett, 1996, pp.123 and 127.

3. The Banana Dispute

3.1 Introduction

The legal status and effects of GATT 1947 within the Community was highlighted in *Germany v Council*, the famous "banana-case", where the direct effect of the GATT 1947 was subject to discussion.¹⁷ Also the trade preferences in the Lomé Convention, granted to ACP countries were up to scrutiny. It was not the first time the question of direct effect of the GATT arose, the Court of Justice has in a number of cases over the years been confronted with the question whether international agreements should be granted direct effect. But it was the first time a Member State had brought an action for annulment of an EC legislative provision that was based on a provision of GATT. The background to the banana dispute was the EC banana-regime, in particular Council Regulation 404/93 on the Common Organization of the Market in Bananas.¹⁸

3.2 Regulation of Bananas Before The Common Organization of The Market in Bananas

1.1.1 Introduction

The European Union consumes about 4 million tonnes of bananas annually.¹⁹ There is, however, not much production of bananas in the Community. Traditionally about half of the Community's consumption of bananas is supplied by the ACP-states and by the Community itself. The other half of the bananas, the "dollar" bananas, comes from Latin America. All these bananas used to enter the Community through different regimes. In a number of countries, e.g. France and the United Kingdom the banana market was wholly or partially reserved for home production or imported from ACP-countries or both. The markets in the other countries, e.g. Germany and The Netherlands were essentially supplied by third country bananas.²⁰

3.2.2 Protected Banana Markets

The banana production in the Community has always been protected in the relevant Member States from external competition since under normal market conditions it would be unable to

¹⁷ Case C-280/93 *Federal Republic of Germany v. Council*, (1994) ECR I-4973.

¹⁸ Council Regulation No. 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, O.J. 1993, L 47/1.

¹⁹ "Bananas: Reconciling WTO rules and producers' interest"

<http://www.europarl.eu.int/dg2/acp/en/banana1.htm>

²⁰ as note 17, see Advocate General Gulmann's opinion at pp. 4985-4986.

compete. There are great price- and quality differences between Community bananas and so-called "dollar" bananas. "Dollar" bananas are much cheaper than Community bananas, due in particular to different climate- and geographical conditions. Production of bananas in the Latin American countries have advantageous conditions of soil, climate and terrain and the production takes place in the large plantations often owned by multinational companies. The market in the ACP states suffer from the same disadvantages. Within the framework of the Lomé Conventions however, bananas originating from ACP countries have also been protected. The other Member States who have no production of their own and who do not import from ex-colonies buy their bananas in the dollar zone, where they are cheapest.²¹

3.2.3 The ACP States and The Fourth Lomé Convention

The Lomé Convention is a contractual agreement between the European Union and seventy African, Caribbean and Pacific states. The current agreement, the fourth Lomé Convention took effect from 1990 and lasts ten years. The trade provisions form a significant part of the Lomé Convention and exempt Caribbean and other ACP countries' imports from import duties and also provide for special arrangements for special commodities, such as bananas. Lomé IV and its *Banana Protocol* guaranteed that if a common market regime was introduced for bananas, the traditional benefits would be safeguarded. Because of problems of size, climate and terrain the Caribbean banana producers cannot compete with Latin America, where in many cases North American multinationals, such as Chiquita, Dole, and Del Monte dominate the market. The ACP only account for 20 per cent of the EU market while Latin American bananas still predominate.²² Still, Caribbean States, such as the Windward Islands of Dominica, St. Lucia and St. Vincent, are uniquely dependent on bananas for their economic survival. The European market is particularly important for these small island economies where income from banana exports to Europe contributes to almost half of the economies' total export earnings.²³ Lomé's guarantee of preferential access to the EU banana market remains essential to the Caribbean's economic survival. The Banana protocol, under which the Windward islands enjoy preferential access to the SEM has facilitated the growth of the banana industry and has played a significant role in their economies

3.2.3.1 Trade Preferences in Relation to The GATT

The MFN principle in Article 1 of the GATT is one of the cornerstones of the GATT and WTO Agreement. However, even though some provisions of the Lomé Convention potentially violate this principle, there is in the GATT and WTO Agreements some room for manoeuvre, and there has in practice been an acceptance that developing countries depart from the general MFN principle.²⁴ It was first and foremost the trade preference arrangements in the form of different tariff rates that differed between countries, and the Commodity

²¹ P. Eeckhout, *The European Internal Market and International Trade*, 1994, pp.225, 228.

²² These three companies control over 64 % of the World's banana market share. "The EU Trading Regime - Need for the Regime", <http://www.cbea.org/CBEA/EU/Default.htm>, 981006.

²³ "A future for Caribbean bananas-The importance of Europe's banana market to the Caribbean", <http://www.oxfam.org.uk/policy/papers/bananas.htm>, 981006, p.1.

²⁴ R. Gynberg, " *Negotiating a fait Accompli: The WTO Incompatibility of the Lomé Convention trade Provisions and the ACP-EEC Negotiations*", http://www.oneworld.org/ecdp/pubs/wp38_gb.htm 981006, p.19

Protocols on beef, veal, bananas and sugar that could potentially breach the MFN principle. In order to have this system of preference, the developed countries sought and was granted a waiver from Article 1 provisions. This was under the condition that all developing countries were treated equally.

3.2.4 The Results of Varied Banana Regimes

The varied banana regimes resulted in significant differences as regards prices and consumption in the national markets. This is why the importation of dollar zone bananas was subject to a customs duty of 20% ad valorem, consolidated within the framework of GATT, while the other bananas were imported duty-free, in order to make the Community-and ACP-bananas more competitive. Under Article 168 (1) of the Lomé Convention ACP bananas entered the Community free of customs duties.²⁵ In addition, the Banana Protocol guaranteed that no ACP State was to be placed "as regards access to the market and market advantages, in a less favourable situation than in the past or at present".²⁶ The protocol intended to guarantee ACP producers access to traditional EU markets and improve the production and marketing conditions for their bananas. Germany however had a duty-free quota for imports into Germany. This duty-free scheme was based on a protocol negotiated as part of the Treaty of Rome. This protocol provided for duty-free entry of bananas in Germany up to certain annual quotas. If that quota would prove to be insufficient it could be increased. Some Member States were authorised to impose additional measures upon their banana imports to preserve the preferential access to particular sources. These measures were legitimised by former Article 115 of the Treaty of Rome which allowed individual Member States to maintain some national trade measures subject to Community conditions.²⁷

3.2.5 The Single European Act

The Single European Act in 1987 made new rules on bananas indispensable since the Member States applied different systems with regard to bananas.²⁸ These different banana regimes were clearly incompatible with article 7A in the EC-Treaty where the SEA is outlined. The SEA required the Member States to permit third country imports to circulate freely once put into circulation on the EC market, unhindered by internal barriers.²⁹ That requirement made Article 115 of the Treaty of Rome ineffective. The different banana regimes prevented the free movement of bananas within the Community as well as the implementation of common

²⁵ The Fourth Lomé Convention is published in O.J. L 229/3 of 17 august 1991.

²⁶ There has been a slight change of the wording of this article of the Banana protocol: "...no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present. See Article 1 of the Protocol 5 on Bananas annexed to the Lomé IV which still is in force.

²⁷ C.Stevens, "EU policy for the banana market" in Policy-making in the European Union, eds. H.Wallace and W.Wallace, 1996, p.330.

²⁸ The main effect of the SEA, which came into force in 1987, was to "provide the necessary decision-making processes to enable the Community internal market to be completed", by removing the remaining internal barriers before 31 of December 1992. Macleod, Hendry and Hyett, 1996, p.5.

²⁹ R.Read, "The EC Internal Banana Market: The Issues and the Dilemma", The World Economy, March 1994, Vol. 17, No 2, p.225.

arrangements for trade with third countries. A common organization of the banana market was therefore needed in order to replace the various national banana regimes.³⁰

3.3 The Common Organization of The Market in Bananas

In the implementation of the common organization of the market, which was intended to bring about the free movement within the Community and a common system of trade with third countries, due consideration had to be taken of the interests of the Community and the ACP banana producers. A trading system based on free trade principles would have placed the uncompetitive ACP States in a very unfavourable position. The underlying objective of the Banana Protocol was to avoid that kind of situations. The aim of the common organization of the market was to enable bananas produced in the EU- and ACP States to be sold on the Community market at prices which were fair to the producers and consumers, without affecting imports from other third -country suppliers, while providing sufficient income for producers. The Community was thus faced with a dilemma between its legal obligation towards the SEA and its prior obligations towards the ACP States under the Banana Protocol of the Lomé Convention. However it was agreed that "for the purposes of achievement of the single market, a balanced and flexible common organization of the market for the banana sector must replace the various national arrangements".³¹

3.3.1 Council Regulation 404/93 on The Common Organization of The Market in Bananas

Council Regulation 404/93 was imposed from 1 July 1993 after a number of proposed solutions.³² The Regulation allowed ACP- and Community bananas to enter the Community duty-free while the dollar bananas were to be subject to a two-tier tariff. The quota was by Article 18 (1) set at 2 million tonnes even though a provision for an additional quota to be fixed every year on the basis of the forecast balance existed. For quantities within the quota the duty would be set at 100 ECU per tonne and for those in excess of the quota the duty would be increased to 850 ECU per tonne for imports of third country bananas and 750 ECU per tonne for imports of non-traditional ACP-bananas.³³ Also the rules for the distribution of the quota made a distinction between third country bananas and ACP bananas. Article 19 provides that 66,5% of the quota is open to operators who traditionally marketed third-country and/or non traditional bananas, 30% is open to operators who marketed Community and/or traditional ACP-bananas and finally 3,5%, the rest, is open for operators established in the Community who started marketing bananas other than Community and/or traditional ACP-bananas from 1992. Finally the Regulation provided for licensing procedures for imports of bananas, irrespective of source.³⁴

³⁰ as note 18, Advocate-General Gulmann's opinion at pp. 4986-4987.

³¹ as note 17, p. 5044, para. 3 of the judgement.

³² Stevens, 1996, p.342.

³³ Article 18 (1) and (2) of Regulation 404/93. Note that the article discriminates between dollar bananas and non-traditional bananas.

³⁴ Article 17 and 19(2) of the Regulation.

3.3.2 Change of The Nature of Competition in The EU?

Since the ACP bananas had difficulties performing well in comparison with dollar bananas, the object of the quota was to allow the dollar zone operators to continue to supply their traditional market while at the same time impose a serious barrier to attempts to increase their market share at the expense of the ACP-and Community suppliers. However, while the internal banana market opened up heavily protected Community markets to dollar bananas, better able to compete in terms of both price and quality, the quota and license agreements together with the oligopolistic market still made it possible for the manipulation of prices in the EC, through the further restriction of supply. According to Robert Read this new system created "an incentive for the destruction of bananas, whether unilaterally or through collusion, once they have been imported under the quota". Read was not happy with such an anti-competitive behaviour and said that it "would have obvious adverse consequences for the welfare of EC consumers and could be avoided by an equivalent tariff".³⁵

3.4 Latin American Complaints

Regulation 404/93 clearly distinguished between bananas imported from the ACP countries and those from third countries. It was especially the rules for third country bananas and non-traditional ACP bananas which were controversial and subject to disputes and the rules for the distribution of the quota in particular.³⁶ The dollar zone producers were very critical of the regime. They were concerned by the imposition of a tariff quota on exports to Germany which previously had not existed at all and by the size of the quota. 2 million tonnes net weight, adjusted to 2,1 million, was insufficient, especially since the volume of Latin America's banana exports to the EU was 2,8 million in 1992.³⁷ The punitive nature of the high tariff was also a concern. A complaint was made to the GATT by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, on the basis that the level of the quota was set below the level of imports since 1988.

The GATT panel report found the new import-regime for bananas incompatible with Articles I, II and III of GATT 1947.³⁸ Even though the Community had been granted a waiver under Article I of the GATT for the Lomé agreement, the panel found that EC's non-reciprocal preferential tariff treatment was inconsistent with the most-favoured nation rule in Article I and not covered by the exceptions in Article XXIV on customs union and free-trade areas and Part IV on trade and development.³⁹ Neither were the measures justified by Article XX(h). The EC did not, however, accept the Panel's decision and recommendation and

³⁵ Read, 1994, p.232.

³⁶ U.Everling, University of Bonn, former judge of the European Court of Justice, in "Will Europe slip on Bananas? The banana judgement of the Court of Justice and national courts", 33 CML Rev. 1996, p.405

³⁷ Stevens, 1996, p.346.

³⁸ GATT document DS/38/R of 11 February 1994. Note that even the earlier national import regimes for bananas, before the Common Organization for Bananas and Regulation 404/93, have been criticised and reviewed by a GATT panel, DS/32/R of 3 June 1993. The Panel found some of the national import regimes inconsistent with Article XI:I and Article I. This Panel report, however, was never adopted. R.Grynberg, supra, pp.7-8

³⁹ E-U. Petersmann, "The GATT Dispute Settlement System as an instrument of the Foreign Trade Policy of the EC", in The European Union and World Trade Law, eds.N.Emilou and D.O'Keeffe, 1996, p.273, and Eeckhout, 1994, p.237.

therefore it never became binding.⁴⁰ However as result of the complaint the Community negotiated with four of the Latin American countries concerned and the result reached in mid-1994 was a slightly increased quota; the tariff quota for dollar zone- and non-traditional ACP-exporters was increased by 100,000 tonnes for 1994 and 200.000 tonnes for 1995. ⁴¹ In return for this the four Latin American countries promised not to pursue the adoption of the second Panel Report on Bananas. This special arrangement was part of the *Banana Framework Agreement (BFA)* concluded during the Uruguay Round.⁴²

3.5 Intra-EC Complaints: Germany v. Council - The Banana Judgement

Germany was also unhappy with the new common organization of bananas in the Community. The setting of the quota at 2 million tonnes of third country bananas in 1994 meant a substantial reduction for the banana operators on the German market. German importers disposed of about 840,000 tonnes in comparison with imports of 1,371,000 tonnes in 1992. That gap was nearly a reduction of 40% and it was not filled by third country bananas imported by operators favoured by the 30% clause, nor by Community or additional ACP bananas imported from other Member States. Due in particular to the lack of long term contracts and relationships secured by investments between importers and producers, the overseas territories of the Member States and the ACP States were not able to satisfy demand of the other Member States, neither were the operators favoured by the 30% clause. In practice this meant that trade in bananas between the Member States was limited and that no Community/ACP bananas were offered to the consumers in the German Market.⁴³

Consequently, parallel to the complaint in the GATT by the Latin American countries Germany brought an action under Article 173 of the EC-Treaty for the annulment of Title IV and Article 21(2) of the Council Regulation 404/93. This was the first time a Member State had brought an action for annulment of an EC legislative provision that was based on a provision of GATT.⁴⁴ Germany, supported by interventions from Belgium and the Netherlands, claimed, inter alia, that the EC import-regime for bananas was in breach of basic provisions of the GATT 1947 and that those parts should be declared void. In addition, Germany claimed the discrimination of the operators traditionally importing third country bananas and the violation of their right to property and freedom to pursue trade or business, and finally that the principle of proportionality had been breached.

⁴⁰ Under the old GATT, consensus in favour of the ruling was required in order for the ruling to get adopted, the effect of which was that many rulings never became binding because one, or several of the parties blocked them.

⁴¹ As a result of the accession of Austria, Finland and Sweden the tariff quota was raised to 2.553 million tonnes. This increase was however, not bound. J.A.McMahon "*The EC Banana Regime, the WTO rulings and the ACP-Fighting for Economic Survival?*", JWT, August 1998, Vol. 32, No 4, p.104, note 12.

⁴² McMahon, 1998, p.104.

⁴³ Everling, 1996, pp.405-406.

⁴⁴ F.Castillo De La Torre, "*The Status of GATT in EC Law, revisited, The Consequences of the Judgement on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements*", JWT, February 1995, Vol.29, No 1, p.56.

3.5.1 Principle of Non-Discrimination

The Court, who in large followed the opinion of Advocate General Gulmann, admitted that the Regulation treated the banana operators differently. Operators who traditionally imported and were supplied by third country bananas now found their import restricted in comparison to the ACP- and Community banana operators. To find whether the principle of discrimination had been breached or not it must be examined if the Regulation treated comparable situations differently. The principle of non-discrimination requires that comparable situations are not treated in a different manner unless the difference is objectively justified.⁴⁵ The Court found first of all that the situations of the banana operators, before the regulation was adopted, were not comparable. Furthermore, the difference in treatment of the operators, after the regulation came into force, appeared to be "inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the common organization of the market".⁴⁶ Therefore the complaint of breach of the principle of non-discrimination was rejected by the Court as unfounded.

Also the alleged infringement of the right to property and *right to pursue trade or business* was rejected by the Court. Concerning the right to property the Court stated that since a market share, before the common organization of the market, only constitutes a "momentary economic position exposed to the risks of changing circumstances" no economic operator could claim a right to property in such a market share.⁴⁷ Concerning the right to pursue trade and business, the Court admitted that the introduction of the tariff quota changed the competitive position of banana operators on the German market. However, because of the abolition of the various national import regimes and the disappearance of the protective barriers it was essential that the Community and the ACP bananas were not displaced from the entire market and therefore necessary to limit the volume of imports of third country bananas into the Community. Consequently, the restriction on the traditional operators in third country bananas in their freedom to pursue trade or business corresponded to objectives of general interest and did not "impair the substance of that right".⁴⁸

3.5.2 Infringement of GATT Rules

The German government also submitted to the Court that the Regulation infringed certain basic provisions of the GATT, and that the compliance with GATT law was a condition of the lawfulness of Community acts, regardless of any question as to the direct effect of the GATT. On the opposite side the Council, supported in particular by the Commission, contested that GATT could be relied on to challenge the lawfulness of a Community act.

The Court, which in large followed the opinion of Advocate General Gulmann also in this respect, referred to its previous statements that the GATT had the effect of binding the Community but that to be able to assess the scope of GATT in the Community legal system, the spirit, the general scheme and the terms of GATT had to be considered. It was also settled case-law according to the Court, that the GATT is based on the principle of negotiations

⁴⁵ para. 67 of the judgement.

⁴⁶ para. 74 of the judgement.

⁴⁷ para. 79 of the judgement.

⁴⁸ paras. 82 to 87 of the judgement.

”undertaken on the basis of reciprocal and mutually advantageous arrangements”.⁴⁹ The Court further referred to the great flexibility of the provisions of GATT with express reference to the possibilities of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between parties.⁵⁰ These features of the GATT made it first of all impossible for an individual to invoke GATT in a court, and secondly precluded 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 Article 173, first paragraph of the Treaty.⁵¹

The Court concluded that the rules of GATT were not unconditional and an obligation to recognise them as rules of international law, which are directly applicable in the domestic systems of the contracting parties, could not be based on the spirit, general scheme or terms of the GATT.⁵² The only exception the Court recognised in this respect was on the condition that the Court intended to implement a particular obligation of the GATT, or that the Community act refers expressly to a special provision of the GATT.⁵³ In this respect, the Court referred back to two earlier judgements: *Fediol v Commission*, and *Nakajima v Council*.⁵⁴ Consequently, the German government’s application for the annulment of Title IV and Article 21(2) of Council Regulation 404/93 was dismissed by the Court.

3.6 Comments

The Banana judgement and the Court’s reasoning regarding the direct effect of GATT have been the object of some debate and criticism among lawyers.

Philip Lee and *Brian Kennedy* found it very peculiar that no reference was made to the changes introduced by the Tokyo Round or the subsequent changes to the dispute resolution procedure.⁵⁵ These changes included the 1982 Ministerial Declaration, the 1984 Action and the 1989 Dispute Settlement Procedures Improvements and the 1989 improvements shifted the emphasis from consultation to panel proceedings by establishing strict time-limits for consultation, and introduced standard terms of reference for panels, automatic surveillance of the implementation of panel recommendations or rulings and an optional system of arbitration.⁵⁶ *Ernst-Ulrich Petersmann* were also rather critical of the ruling of the Court. In his view the Court failed to take into account a number of factors: the fact that many provisions of the GATT, such as Articles III and XI:I are more precise and unconditional than the EC Treaty, such as Articles 30 and 90, the fact that the GATT dispute settlement provisions require that all solutions formally raised under the system shall be consistent with

⁴⁹ paras. 105 and 106 of the judgement.

⁵⁰ para. 106 of the judgement.

⁵¹ para. 109 of the judgement.

⁵² para. 110 of the judgement.

⁵³ The fact that GATT could in certain circumstances be invoked, is sometimes referred to as the *indirect effect* of GATT. P.Eeckhout, *”The domestic legal status of the WTO Agreement: Interconnecting legal systems”*, CML Rev. 34, 1997, p.40.

⁵⁴ para. 111 of the judgement. C-70/87 *Fediol v Commission* (1989) ECR 1781, and C-69/89 *Nakajima v Council* (1991) ECR I-2069.

⁵⁵ The Tokyo Round, with 99 countries participating, was initiated in 1973 and concluded in 1979.

⁵⁶ P. Lee and B. Kennedy, *”The potential Direct Effect of GATT 1994 in European Community Law”*, JWT, February 1996, vol. 30, no 1, p.73.

the General Agreement. This is contrary to Advocate General Gulmann's opinion who said that in GATT law it is to a large extent up to the contracting parties involved to solve their disputes by negotiation. According to Petersmann the Court also forgot to mention that the GATT is binding on the institutions of the Community and the Member States, not only in terms of GATT law but also in terms of primary EC law, the obligation laid out in Article 234 as well as the fact that the preamble of the Banana Regulation 404/93 explicitly declared that "the Community can respect...its various international obligations". Moreover, Petersmann questioned the Court's logic in that the Community institutions can disregard the obligations under the GATT but not under the Lomé Convention. To him the Court of Justice "continues to reveal a preference for power politics and a disregard for the rule of law to the detriment of EC citizens.⁵⁷ *Ulf Everling* was perplexed by the Court's and Advocate General's reasoning in the case. He stressed that the GATT were not a "caricature of an international agreement", but obligatory on the Community and the Member States and consequently must be taken seriously by the Court. If the provisions of the GATT are part of the Community legal order, then acts infringing those provisions are illegal. Everling pointed out the necessity of the Member States to object to infringements of GATT in accordance with Article 173 (2), especially since the Member States also are Contracting parties to the GATT.⁵⁸ Together with the Community they are equally responsible for the correct application of GATT, and if they do not have the possibility to object to Community acts infringing the GATT, then they are, according to Everling, confronted with a situation similar to what is often called "déni de justice".⁵⁹ To *Piet Eeckhout* it was obvious that the Court in its reasoning in the Banana-case did not take into account the legalisation process the GATT has gone through since 1947, in particular the improvements in the dispute settlement mechanism in the DSU in 1994 during the Uruguay Round negotiations. Eeckhout pointed, however, to the fact that the Community had concluded an agreement with a number of Latin-American banana exporters, and was trying to get a GATT waiver for the Lomé Convention. In these circumstances he was doubtful whether the Court could have been expected to intervene and state that the GATT could be directly enforced before German courts. He wondered if, on the assumption that the banana regime infringed some of the GATT rules, it was up to the Court to strike it down and prevent a negotiated settlement in the GATT. In his view the Banana case clearly illustrates the difficulties which are associated with the granting of direct effect of the GATT, and the complexity of the GATT rules and mechanism. He doubts whether the Court of Justice and the Member State courts are equipped to deal with the intricate legal questions the WTO/GATT will give rise to.⁶⁰

3.7 The WTO Complaint

The ruling by the Court of Justice in the banana-case did not put an end to the dispute, and a further complaint was made to the WTO by Ecuador, Guatemala, Honduras, Mexico and the United States. A request for the establishment for a panel was made, and in May 1997 the final report of the Panel was issued.⁶¹ The panel decided that the EC's import regime for

⁵⁷ Petersmann, 1996, pp. 275-277.

⁵⁸ The States are no longer CONTRACTING PARTIES to the GATT but Members of the WTO. See note 119.

⁵⁹ Everling, 1996, pp.422-423.

⁶⁰ Eeckhout, 1997, pp.31 and 57.

⁶¹ WT/DS/27/R European Communities-Regime for the Importation, Sale and Distribution of Bananas.

bananas was inconsistent with Articles I:1, III:4, X:3 and XIII:1 of the GATT, Article 1(3) of the Licensing Agreement and Articles II and XVIII of the GATS. In June 1997, the *European Community* appealed against the panel report to the Appellate Body, listing 19 grounds for appeal, alleging errors in law and legal interpretation to be reviewed. The core of the EC's argument concerned the interpretation of the Lomé waiver.⁶² The EC argued that the preferential treatment provided in Protocol 5 was not limited to the provision of tariff preferences, but extended to other advantages. Consequently the treatment accorded to traditional and non-traditional ACP bananas by the regime was covered by the Lomé waiver. To support this the EC argued that previous waivers had referred to "duty-free treatment" which meant that the reference to preferential treatment in the Lomé waiver clearly implied something beyond duty-free treatment.⁶³ The *ACP countries*, who intervened in the dispute, supported in large the EC's arguments. According to them, the banana regime was clearly covered by the terms of the waiver, including potential breaches of Articles I and XIII made by the Community. The *five complaining parties* disputed the parties' interpretation of the waiver, and argued that the waiver only related to those measures strictly required to implement the Banana Protocol. To support their argument, they cited traditional GATT practice of strict interpretation of waivers, and the fact that the waiver was limited to measures "as required by the relevant provisions" of the Convention.⁶⁴ The Banana Protocol did, in their view, not extend to other advantages but simply maintained the existing situation for ACP bananas in the EC market.⁶⁵

The Appellate Body confirmed in large the Panel's conclusions.⁶⁶ It should be noted that both the Panel and Appellate report did not find fault with the principle behind the Lomé Convention that the ACP banana-exporting countries would have preferential access to the EU market until the year of 2000, when the fourth Lomé Convention is due to expire. Still the reports found that a number of elements of the EU's regime for bananas were not in conformity with the WTO rules. The Appellate Body concluded that the European Communities were not required under the Lomé Convention, and its Banana protocol, to allocate tariff quota shares to some traditional ACP states in excess of their pre-1991 best exports volumes.⁶⁷ By assigning country-specific tariff quotas to some countries and not to others and by providing rules for the allocation of quotas within the BFA, the EC had acted inconsistently with Article XIII, which requires a member to treat all imports in a similar manner. Consequently, the banana import system was found to be inconsistent with Article XIII of the GATT. Furthermore, the EC's licensing procedures, which involved the purchase of EC and/or ACP banana in order to obtain rights to import Latin American bananas or those from other countries, were found to be contrary to the non-discrimination provisions of the GATT since they unfairly discriminated against some of the companies importing and marketing Latin American "dollar" bananas. Contrary to the Panel report, the Appellate Body found that the Lomé waiver which had been granted, permitted tariff preferences for ACP countries, but did not extend to all preferential treatment the EC might wish to accord to the

⁶² According to the waiver, Article 1 of the GATT was waived until the expiry of the Convention to the "extent necessary to permit the EC to provide preferential treatment" for ACP products "as required by the relevant provisions" of the Convention, McMahon, 1998, p.105.

⁶³ WT/DS/27/R, para. 4.60.

⁶⁴ *ibid* para. 4.51-4.55.

⁶⁵ *ibid* paras. 4.71-4.73, 4.75-4.81.

⁶⁶ Appellate Body Report: WT/DS27/AB/R European Communities-Regime for the Importation, Sale and Distribution of Bananas, issued 9 September 1997, especially paras. 167-188, paras. 255-257.

⁶⁷ *ibid*, para.178.

ACP. The waiver was limited to that preferential treatment which was required by the Convention and did not permit other inconsistencies.⁶⁸ Finally, through the impact of the system on the service suppliers of the complaining parties, the banana import regime was also found to be inconsistent with Articles II and XVII of the GATS, which concern the MFN- and National treatment principle.⁶⁹

⁶⁸ *ibid*, para.188.

⁶⁹ *ibid*, paras. 240-254.

4. Direct Effect of The GATT Provisions

4.1 The Concept of Direct Effect in The Community Legal Order

The legal effect of granting Community provisions direct effect is that individuals can rely upon those provisions before their national courts. This is essential to natural and legal persons who otherwise would not be able to invoke rights under Community law before national courts. In her article, Nanette Neuwahl also points out the benefit to the Community itself in the capacity of Community provisions to have direct effect.⁷⁰ First of all, it brings Europe closer to the citizen, which was one of the main objectives of the Maastricht Treaty and secondly, it is important for the Community as a whole since Community law becomes more effective.⁷¹ Direct effect secures the observance of the rights and duties conferred or imposed by it, and is according to Neuwahl a much better guarantee that Community law is observed than the principle of the supremacy of Community law, since individuals can invoke Community provisions in situations the Commission and the Member States would not pay attention to. Philip Lee and Brian Kennedy also point out the increase of effectiveness of EC law, in the way national courts can apply directly effective EC law with greater speed and can use their powers, including the award of damages, to enforce their orders. According to them the practical significance of the direct effect of EC law simply cannot be overstated.⁷²

The term direct effect is not mentioned in any of the Community Treaties, but the Court has in its case-law established the principle of direct effect as a general principle underlying the Community Treaties.⁷³ The first case establishing the principle of direct effect was *van Gend en Loos* in 1963. An importer sought, before a Dutch court, to rely directly on Article 12 of the EC-Treaty to have an import duty declared unlawful. The Court stated that:

”Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where there are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individual as well as upon the Member States as upon the institutions of the Community”.⁷⁴

⁷⁰ N. Neuwahl, “*Individuals and the GATT: Direct Effect and Indirect effect of the General Agreement of Tariffs and Trade in Community Law*”, in: *The European Union and World Trade Law*, eds. N.Emilou and D.O’Keeffe, 1996, at pp. 314-315.

⁷¹ Article A states that “This treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as closely as possible to the citizen* (my italics).

⁷² Lee and Kennedy, 1996, p.69.

⁷³ C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1, C-6/64 *Costa v ENEL* and C-57/65 *Lütticke GmbH v. Hauptzollamt Saarlois* (1966) ECR 205.

⁷⁴ page 12 of the judgement.

Furthermore, the Court stated that in order for a Community provision to have direct effect, the provision must be clear and unambiguous, unconditional and must not depend for its operation on further action taken by the Community or national authorities.⁷⁵

4.2 Direct Effect of International Agreements Concluded by The European Community

4.2.1 Direct Effect of GATT 1947

It is not obvious that the GATT should be granted direct effect, the legal and practical results are numerous and could be serious. Although the direct effect is a well established principle within the Community, the question whether the GATT also should have direct effect has been debated by the Court of Justice in a number of cases over the years.

4.2.1.1 The International Fruit Judgement

In 1972, the Court decided in *International Fruit Company* that the GATT did not have direct effect and it has confirmed that ever since.⁷⁶ The case was about a company seeking to have a series of Community regulations declared invalid. The company claimed that the Regulations, which laid down restrictions on the importation of apples, were contrary to Article XI of the GATT, which concerns the general elimination of quantitative restrictions. The Court first examined the purpose, the spirit and the general scheme and terms of the GATT. In this examination the Court noted that the GATT is based on "the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements" and that it is "characterised by the great flexibility of its provisions".⁷⁷

The Court focused in this respect, especially on three provisions of GATT: ⁷⁸

- Article XIX: the safeguards measures which could be taken when domestic producers suffered or were threatened with serious damage. The purpose of this article was to protect losses in a domestic economy. This exception to the bound tariff levels and ban on quotas was originally very vaguely worded.
- Article XXII: the consultation procedure. Negotiations and the resolutions of disputes were (and still are) of great importance to the GATT, which was emphasised by article XXII, which

⁷⁵ page 13 of the judgement. These criteria were summed up by A.G. Mayras in C-2/74 *Reyners v. Belgian State* (1974) ECR 631, p.659-663.

⁷⁶ Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* (1972) ECR 1219, C-9/73 *Schlüter v. Hauptzollamt Lörrach* (1973) ECR, 1135, C-38/75 *Nederlandse Spoorwegen v. Inspecteur der invoerrechten en assijzen* (1975) ECR 1439, C-266/81 *SIOT v. Ministero delle Finanze* (1983) ECR 731, Joined cases 267 to 269/81 *Amministrazione delle Finanze dello Stato v. SPI and SAMI* (1983) ECR 801, Joined cases 290 & 291/81 *Singer and Geigy v. Amministrazione delle finanze dello Stato* (1983) ECR 847, C-280/93 (1994) ECR I-4973 *Germany v. Council*, C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia* (1995) ECR I-4533, C-183/95 *Affish BV v. Rijkdienst voor de Keuring van Vee en Vlees* (1997), Judgement of the Court 17 July 1997, Joined cases C-364/95 and C-365/95 *T.Port GmbH Co. v. Hauptzollamt Hamburg-Jonas*, Judgement of the Court 10 March 1998 and C-53/96 *Hermès International (société en commandite par actions) v. FHT Marketing Choice BV*, Judgement of the Court 16 June 1998.

⁷⁷ para. 21 of the judgement.

⁷⁸ paras. 22-26 of the judgement. Each of these GATT provisions still remain in force but their effect has been modified by the Marrakesh Agreement Establishing the World Trade Organization; see further discussion below.

requires each contracting party to "accord sympathetic consideration" to consultation with other contracting parties on all matters affecting the operation of GATT. The contracting parties are required to "afford adequate opportunity" for such consultation.

- Article XXIII: the dispute resolution procedure. This article lays down the conflict settlement measures to be followed when a contracting party feels that the objectives of the GATT was being breached, or that another contracting party fails to carry out its obligations under the GATT. The parties are first obliged to attempt to find a solution on voluntary basis. If no compromise can be reached the matter can be referred to the contracting parties for a compulsory investigation and issuing of appropriate recommendations or a ruling. Reports will be prepared by independent panels who will issue reasoned opinions, after the presentation of written proceedings by the parties and an oral hearing in front of the panel. The panel report will then be sent to the contracting parties where it will be discussed after thirty days. Only a decision by consensus can be reached by the parties and even though a surveillance mechanism exists to ensure that the panel rulings were carried out, if the contracting parties decide not to adopt the panel ruling, it has no binding force and thus become ineffective. Furthermore Article XIX gave a contracting party the possibility to suspend any obligations or concessions under the GATT. In the event of such suspension the party concerned would be entitled to withdraw from the GATT.

Bearing these factors in mind the Court concluded that Article XI of the GATT did not confer on individuals rights which they could invoke before national courts. Thus Article XI had no direct effect. It is interesting to note that the Court focused on these three other provisions of the GATT, in concluding the non-direct effect of another article of the GATT, namely Article XI, while the conditions required for direct effect of Article XI were not even considered.

4.2.1.2 Subsequent Case-law

The issue of direct effect arose again in two cases that concerned various GATT provisions which individuals sought to invoke in order to contest the validity of a regulation. In *Schlüter*, in which it was alleged that Community agricultural regulations contravened Article II of the GATT, the Court confirmed its reasoning in *International Fruit*, by once again denying the provision direct effect.⁷⁹ It commented once more in particular on the dispute settlement and the safeguards measures. In the Court's opinion these features of the GATT denied it direct effect.⁸⁰ In *Nederlandse Spoorwegen* a Dutch administrative tribunal inquired whether the obligations under the GATT, made by the Netherlands, should be determined and appreciated according to the Dutch constitutional law or according to Community law.⁸¹ The Court stated: "since so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems".⁸²

⁷⁹ C-9/73 *Schlüter v. Hauptzollamt Lörrach* (1973) ECR, 1135.

⁸⁰ paras. 29 and 30 of the judgement.

⁸¹ C-38/75 *Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen* (1975) ECR 1439.

⁸² para. 16 of the judgement.

The Court continued to rely on its principles in *International Fruit* in *SIOT* and *SPI & SAMI*.⁸³ In *SIOT* the Court denied Article V (2) of the GATT, which provided for free transit of goods through the Community, direct effect by simply referring to the reasons given in *International Fruit*, pointing out that these still are valid. The Court stated however, that even though Article V(2) does not have direct effect, that does not in any way affect "the Community's obligation to ensure that the provisions of GATT are observed in its relations with non-Member States which are parties to GATT".⁸⁴ In *SPI & SAMI*, which involved the interpretation of Articles I, III, IV and VIII of the GATT with regard to a duty for administrative services levied in goods imported into Italy, the Court answered in the negative the question concerning the direct effect of the GATT provisions. One recognises the very familiar reasoning in the *International Fruit*-case; the referral to the principle of negotiations and the great flexibility and reciprocity that characterises the GATT.⁸⁵ A reference to the changes introduced by the Tokyo Round or the subsequent changes to the dispute resolution procedure was not made in this case either.⁸⁶ In the *Singer Company* case, two companies challenged the same Italian taxes imposed for administrative services on imports from GATT contracting parties in the period 1963-1971 as being in breach of Article II of the GATT. The Court reached the conclusion that in relation to the period before 1968, the tariff protocols in question did not protect individuals against the imposition by a Member State of a charge on products imported from a non-member country. ⁸⁷

4.2.1.3 Fediol and Nakajima- Possible effects of GATT on Individuals

Although the Court has never given direct effect to provisions of the GATT, the Court has held in two cases that the GATT provisions still can have effects on individuals in the Community legal order. *Fediol* concerned an action brought under Article 173 of the Treaty seeking the annulment of a Commission Decision rejecting the applicant's complaint based on Council Regulation 2641/84.⁸⁸ This Regulation, described as "the new instrument of commercial policy" allowed individuals to file a complaint, alleging that third countries had engaged in illicit commercial practices incompatible with the GATT rules.⁸⁹ Under the Regulation individuals had the possibility to ask for a review of the Commission decision on the merits of their complaint. According to Article 2 (1) of the Regulation the term "illicit commercial practice" is to be interpreted by reference to trade practices which are incompatible with international law, including the GATT. The Court stated that although its earlier case-law consistently has held that the GATT provisions do not have direct effect, the GATT's flexibility does not prevent the Court from interpreting and applying the GATT rules in order to establish the compatibility of certain commercial practices.⁹⁰ The GATT provisions form part of the rules of international law to which Article 2 (1) of the Regulation refers and GATT provisions have "an independent meaning which, for the purposes of their

⁸³ C-266/81 *SIOT v. Ministero delle Finanze* (1983) ECR 731, Joined cases 267 to 269/81 *Amministrazione delle Finanze dello Stato v. SPI and SAMI* (1983) ECR 801.

⁸⁴ para. 28 of the judgement.

⁸⁵ para. 23 of the judgement.

⁸⁶ see above comments on the banana judgement.

⁸⁷ para.7 of the judgement.

⁸⁸ C-70/87 *Fediol v. Commission* (1989) ECR 1781. Council Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, is published in O.J. 1984, L 252, p.1.

⁸⁹ Castillo de la Torre, 1995, p.55, note 12.

⁹⁰ para. 19 of the judgement. See also paras. 10-14 of the opinion of A.G. Van Gerven.

application in specific cases, is to be determined by way of interpretation”.⁹¹ Furthermore the Court referred to *Kupferberg* and stated that the fact that the GATT provides for a special procedure for the settlement of disputes does not preclude its interpretation by the Court.⁹² Consequently, since the Regulation entitled the economic agents concerned to rely on the GATT provisions, these economic agents were entitled to request the Court to review whether the Commission had interpreted the GATT rules in a reasonable manner.⁹³ Thus, even though the GATT rules have no direct effect, in cases where a Community act, such as Regulation 2641/84, expressly refers to specific provisions of the GATT, such a review is possible.

Even though one might be tempted to interpret this judgement as one granting GATT direct effect, the Court in fact did not change its earlier case-law regarding the lack of direct effect of GATT. The Court merely opened up the possibilities of invoking the GATT in very special circumstances and it is only when provisions are not directly applicable, as in the case of the GATT, that these exceptions can be applied.⁹⁴

The Court has also held that GATT provisions can be invoked in examining a Community measure intended to implement a particular GATT obligation. In *Nakajima* a Japanese producer sought to rely on the GATT Anti-Dumping Code to contest the validity of the EC Antidumping Regulation in force at the time, as a plea of inapplicability of Article 184 of the Treaty.⁹⁵ The Council argued that the GATT Anti-Dumping Code was not directly effective. The Court held however that as the recital to the Regulation specifically stated that it had been adopted in accordance with existing international obligations, in particular Article VI and the Anti-Dumping Code, it was necessary to examine whether the Council went beyond the legal framework laid down in adopting the disputed provision.⁹⁶ Since the provisions of the GATT are binding on the Community, the Anti-Dumping Code which was adopted for the purpose of implementing Article VI of the GATT, must also have the effect of binding the Community.⁹⁷ Thus, only if the Community intends to implement a particular obligation entered into within the framework of the GATT, can the Court review the lawfulness of the Community act in question from the point of view of the GATT rules. This was later confirmed in the *Banana*-judgement. However, it is the context of the case which indicates whether the Community intends to implement a GATT obligation or not, and it is not possible for the Community institutions to avoid a review of compatibility with the GATT by simply not referring to the relevant provisions of the GATT which they intend to implement.⁹⁸

4.2.1.4 Subsequent Case-law

⁹¹ para. 20 of the judgement.

⁹² C-104/81 *Hauptzollamt Mainz v CA Kupferberg* (1982) ECR 3641.

⁹³ as note 89, para. 21 of the judgement (Fediol)

⁹⁴ Castillo de la Torre, 1995, p.61.

⁹⁵ C-69/89 *Nakajima All Precision Co. Ltd. v. Council* (1991) ECR I-2069.

⁹⁶ paras. 31-32 of the judgement. In this respect the Court referred to *Kupferberg* and *SIOT*.

⁹⁷ para. 29 of the judgement.

⁹⁸ Castillo de la Torre, 1995, p.60.

As mentioned earlier the Court held in *Germany v. Council* that GATT could not be taken into consideration in an annulment action brought by a Member State under Article 173 of the Treaty, the only exceptions being those laid out in *Fediol* and *Nakajima*. Next in the long line of cases about the direct effect of GATT was *Chiquita Italia*, which concerned the interpretation of both the GATT and the Lomé IV Convention.⁹⁹ Banana importers tried to rely on the GATT and the Lomé IV in order to avoid the obligation to pay the consumer tax on bananas which was introduced in Italy. The judgement of the Court was no different from its earlier case-law; GATT was denied direct effect on the basis of its flexibility and possibility of suspension or modification.¹⁰⁰ The Court held however, that the Lomé IV may be directly effective, since it is not of the same nature as the GATT. The fact that the Convention lays down a special procedure for settling disputes between the contracting parties did not, according to the Court, prevent it from recognising that some of the provisions had direct effect. In addition, Article 1 of Protocol No 5 on bananas, which takes the form of a stand-still obligation, was regarded as clear, precise and unconditional and therefore directly effective.¹⁰¹

4.2.2 Direct Effect of Other International Agreements

The Court has in other areas been more prepared to find international agreements directly effective. At present, GATT is the only agreement which has been denied direct effect by the Court.¹⁰² The need for uniformity and effectivity of Community law has however driven the Court to grant other international agreements, to which the Community is party, direct effect.¹⁰³

4.2.2.1 Kupferberg

The leading case is *Kupferberg*, where it was argued that a German tax in wine could not be applied to imports from Portugal.¹⁰⁴ Portugal had at the time not yet entered the Community but was associated with the Community by a free trade agreement. Since that free trade

⁹⁹ C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia* (1995) ECR I-4533.

¹⁰⁰ paras. 25-29 of the judgement.

¹⁰¹ paras. 36 and 57 of the judgement.

¹⁰² Eeckhout, 1997, p.28.

¹⁰³ e.g. in C-87/75 *Bresciani v. Amministrazione delle finanze* (1976) ECR 129, the Court granted Article 2(1) of the Yaounde Convention of 1963, concluded between the Community and certain associated African States, direct effect, in C-17/81 *Pabst and Richarz v. Hauptzollamt Oldenburg* (1982) ECR 1331 the Court held that Article 53 of the Association Agreement with Greece was directly applicable since it performed the same function as Article 95 of the EC-Treaty, in C-104/81 *Hauptzollamt Mainz v Kupferberg* (1982) ECR 3641, the Court held Article 21(1) of the 1972 Free Trade Agreement between the Community and Portugal to be directly effective (see above), in C-192/89 *Sevince v. Staatssecretaris van Justie* (1990) ECR I-3641, the Court held that certain articles of the Association Council set up under the EC/Turkey Association Agreement were directly effective. (Note that the Court in C-12/86 *Demirel v. Stadt Schwäbisch Gmund*, (1987) ECR 3719, considered that same Agreement not to be directly applicable), in C-18/90 *Office national de l'emploi v. Kziber*, (1991) ECR I-199, the Court held that Article 4(1) of the 1976 Co-Operation Agreement between the EC and Morocco was directly effective, and in C-132/92 *R. v. Minister for Agriculture, Fisheries and Food, ex parte Anastasiou*, the Court found certain provisions of the EC/Cyprus Association Agreement to be directly effective, commented e.g. by K.J.Kuilwijk, *The European Court of Justice and the GATT Dilemma*, 1996, pp.110 f, and Lee and Kennedy, 1996, p.74-78.

¹⁰⁴ C-104/81 *Hauptzollamt Mainz v Kupferberg* (1982) ECR 3641.

agreement prohibited the imposition of import duties on wine, Kupferberg sought to rely on the agreement alleging that German law infringed it. The Court held Article 21 (1) of the free trade agreement, which was very similar to Article 95 of the Treaty, directly effective why the tax on wine could not be applied to imports from Portugal. The Court started by pointing out that according to the Treaty, international agreements are binding on the institutions of the Community and on the Member States. In this respect it is essential to ensure the uniform application of these agreements throughout the Community. As to the direct effect, the Court said that where an agreement itself provides whether it should have direct effect or not that is decisive, according to principles of public international law. If the agreement does not give any guidance, the Court will decide on the matter according to its own criteria, on a case-by-case basis.¹⁰⁵ The fact that the Agreement provided for a "special framework for consultation and negotiations inter se in relation to the implementation of the agreement, is not in itself sufficient to exclude all judicial application of that agreement", and as to the general principle of reciprocity in international law the Court said that the fact that one of the parties did not recognise the direct effect of the agreement was not in itself enough to "constitute a lack of reciprocity".¹⁰⁶ In granting Article 21 (1) of the Agreement direct effect the Court considered it necessary to examine this article in the context of the Agreement of which it forms part. The Court found that the purpose of the free trade agreement was to create a system of free trade in which almost all rules restricting commerce were to be eliminated, in particular by abolishing customs duties and charges having equivalent effect and eliminating quantitative restrictions and measures having equivalent effect.¹⁰⁷ Since Article 21 (1) imposed an unconditional rule against discrimination in taxation it could be directly effective.

The importance of the uniform interpretation of GATT was also stressed in the SPI case.¹⁰⁸ The Court said that any difference in the interpretation and application of provisions binding the Community as regards non-member countries would not only jeopardise the unity of commercial policy, but also create distortions in trade within the Community.

4.2.2.2 Comments

According to N. Neuwahl, the Court's case-law recognising the principle of direct effect of agreements concluded by the Community can be seen as an application of the doctrine of *effet utile*, or the useful effect of Community law itself. She says there could be two reasons why the Court stated that it would decide on the question of direct effect unless the agreement said otherwise: first it could have been a signal to the Community's partners to encourage them to negotiate international agreements with it. Secondly, the Court did not want to create a situation where acts of the Community institutions can be applied differently in the various Member States¹⁰⁹

Examining the Court's statements on the purpose of the free trade agreement one cannot help but noticing the similarities with the GATT. The purpose of GATT is also to eliminate rules that restrict commerce, by abolishing customs duties and quantitative restrictions. It may be that not the whole of the GATT can be granted direct effect, but there are certainly several provisions of the GATT that are sufficiently clear, precise and unconditional in order to be

¹⁰⁵ para. 17 of the judgement.

¹⁰⁶ paras. 20 and 18 of the judgement.

¹⁰⁷ para. 24 of the judgement.

¹⁰⁸ para. 14 of the judgement.

¹⁰⁹ Neuwahl, 1996, pp. 318-319.

directly effective. Some of the basic provisions of the GATT are no less clear or unconditional than some of the basic provisions of Community law, in fact, on some points they are even more clear. ¹¹⁰Castillo de la Torre says in his article that it has been argued that the Court has misunderstood the functioning of the GATT system: "If analysed strictly, much of the features of GATT which have served to deny its direct effect are common to most international agreements".¹¹¹ By granting the EC/Portugal Agreement direct effect in *Kupferberg*, the Court also rejected the opinion of Advocate-General Rozès. When concentrating on the wide scope of the derogating clauses in the agreement, she was of the opinion that the agreement contained the same "great flexibility" as the GATT.¹¹²

¹¹⁰ See C-70/94 *Werner v. Germany* (1995) ECR I-3189, paragraph 23 and C-83/94 *Leifer and Others* (1995) ECR I-3231, paragraph 24, where the Court partly based its interpretation of the rule of free exportation in Article 1 of Council Regulation 2603/69, as including certain measures of equivalent effect to quantitative restrictions, on Article XI of the GATT which was more explicit in that respect, Eeckhout, 1997, pp.26 and 40.

¹¹¹ Castillo de la Torre, 1995, p.59.

¹¹² pp.3674 f. of Advocate-general Rozès's opinion.

5. The Establishment of The World Trade Organization

5.1 The Uruguay Round Negotiations (1986-1994)

On 8 December 1994, after 8 years of negotiations, more than 120 nations agreed to the creation of the World Trade Organization on 1 January 1995.¹¹³ At least 100 of those nations were expected to be members of the new organization whose underlying objective and purpose was the creation and maintenance of open markets, non-discrimination and global competition. The Uruguay Round, which lasted between 1986 and 1994, led to a further liberalisation of international trade, including tariff reductions and elimination of tariffs for certain products, reintegration of agricultural trade and textiles and clothing into the GATT as well as the expansion of GATT disciplines.¹¹⁴

5.2 The Need For a New International Trade Organization

Although the GATT for many years successfully functioned as the principal organization for international trade it did not have many of the essential elements of an international organization and there existed obstacles to an effective and efficient world trading system. These shortcomings, or obstacles concerned *first* of all the decision-making within the GATT. Most of the decisions were taken by consensus, and not voting, which led to endless negotiations and gave the major trading partners a larger share of the power than policy and equity might indicate. *Secondly* the settlement of disputes within the GATT left a lot to be desired for: the application of the consensus rule for the adoption of panel reports, which led to the blocking of many reports, led the parties more often to find compromises or unilateral retaliation measures. Other shortcomings consisted in the length of the panel procedures and long delays for the implementation of an adopted panel report. There was also some confusion because of the different dispute settlement procedures that existed in the GATT-system. A *third* obstacle consisted in the procedure for amending the GATT, which was difficult and impractical. *Other* shortcomings concerned the obscure relationship between GATT-law and national law and the indefinite status of the GATT itself, its Secretariat and its staff. These shortcomings made it obvious that there was a need for new institutional arrangements.¹¹⁵

¹¹³ P.L.H. Van den Bossche, "The Establishment of the World Trade Organization: The Dawn of a New Era in International Trade?", MJ 1 1994, p.396.

¹¹⁴ B.Hoekman, M.Kostecki, The Political Economy of the World Trading System; From GATT to WTO, 1995, p.19.

¹¹⁵ Van den Bossche, 1994, pp.399 f.

5.3 The Marrakesh Agreement Establishing The WTO (The WTO-Agreement)¹¹⁶

The WTO-Agreement concerns the procedural and institutional structure of the organization and contains only 16 articles. The substantive obligations of the WTO members are found in the four annexes to the WTO Agreement. Annexes 1-3, which consist of the Multilateral Agreement of Trade in Goods (Annex 1A), the General Agreement on Trade in Services and Annexes (Annex 1B), the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C), the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2) and the Trade Policy Review Mechanism (Annex 3), are defined as "Multilateral Trade Agreements" and apply to all WTO Members.¹¹⁷ Annex 4, the "Plurilateral Trade Agreements, apply only to those WTO Members that have accepted it.¹¹⁸ Article XVI of the WTO Agreement states that in case of a conflict between the WTO Agreement and any of the Multilateral Trade Agreements, the WTO Agreement prevails. In case of a conflict between the GATT 1994 and any of the Multilateral Trade Agreements, the latter agreements prevail. The GATT 1947 is incorporated by reference in the GATT 1994 and the WTO shall be guided by the decisions, procedures and customary practice followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.¹¹⁹ As to the relation between the WTO Agreement and its Annexes and national law, Article XVI:4 of the WTO-Agreement states that "(e)ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed Agreements".

The WTO Agreement is the most important world-wide Agreement since the UN Charter of 1945, and when considering what impact the WTO can have in world-wide trade, no State can afford to stay outside this new world trading system.¹²⁰ Not only does it constitute a new legal code of conduct in laying down a new legal basis for the movement of goods, services, trade-related investments and intellectual property rights, it is also a new and important forum for negotiations.

¹¹⁶ The texts of the Uruguay Round Agreements are published in The Results of the Uruguay Round of Multilateral Trade Negotiations: Council decision 94/800/EC (1994) O.J. L336/1

¹¹⁷ Article II:2 of the WTO Agreement.

¹¹⁸ Article II:3 of the WTO Agreement.

¹¹⁹ Since the GATT was not formally an international organization there were no Members, but instead CONTRACTING PARTIES.

¹²⁰ E-U. Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948", CML Rev.1994, Vol. 32, No 6, p.1160. Note that, in contrast to the GATT which was an agreement, the WTO is an international organization who has legal personality. See Article VIII of the WTO Agreement.

6. The New Dispute Settlement System - The WTO's Most "Individual Contribution"

6.1 Introduction

When denying the GATT direct effect in the bananas case, the Court mentioned the great flexibility of the GATT, where the exceptions and safeguards are concerned. However, the Court placed particular emphasis on the dispute settlement mechanism as a reason why direct effect was excluded. With the introduction of the DSU, which makes dispute settlement an almost complete judicial system, the Court might want to change its position.¹²¹

"No review of the achievements of the WTO would be complete without mentioning the Dispute Settlement system, in many ways the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy. The new WTO system is at once stronger, more automatic and more credible than its GATT predecessor. This is reflected in the increased diversity of countries using it and in the tendency to resolve cases "out of court" before they get to the final decision.... The system is working as intended- as a means above all for conciliation and for encouraging resolutions of disputes, rather than just for making judgements. By reducing the scope for unilateral actions, it is also an important guarantee of fair trade for (less powerful countries)".¹²²

The prompt settlement of disputes is essential for the proper and effective functioning of the WTO. Even though the old GATT provided for settling disputes it had no fixed timetables and as stated above many cases dragged on for too long. The Uruguay Round Agreement introduced a more structured process with more clearly defined stages in the procedure, and greater discipline for the length of time a case should take to be settled. It also removed the inverted consensus, which means that it is now impossible for the losing country to block the adoption of the rulings. The Dispute Settlement Understanding- the DSU- sets out in great detail the procedures and the timetable to be followed in resolving disputes. It provides for an integrated dispute settlement applicable to all multilateral agreements and constitutes "a central element in providing security and predictability to the multilateral system".¹²³ In clearly defined rules and timetables for completing cases the WTO procedure "underscores the rule of law".¹²⁴ WTO Members have agreed that if they believe that other WTO Members have violated trade rules, they will use this dispute settlement system, instead of taking action unilaterally. This means abiding by the rules and respecting the rulings.

6.2 Characteristics and Essential Legal Features of The

¹²¹ The Understanding on Rules and Procedures governing the Settlement of Disputes-the DSU, is published in O.J. L336 p.234

¹²² Renato Ruggiero- Director General of the WTO Secretariat, 17 April 1997. Brochure: "Trading into the future", chapter 3, p.3.4.

¹²³ Article 3(2) DSU.

¹²⁴ Trading into the future, supra, chapter 3, p. 3.1.

DSU

The DSU is a comprehensive mechanism in the sense that it applies to all disputes arising from any of the Uruguay agreements. In short, the system can be characterised as being a compulsory, integrated and binding system with stringent time-scales. Under the DSU the parties have a right to a panel and, contrary to the GATT, also a right to legal appeal. The system also provides clear rules of implementation of the rulings of panels and the Appellate Body. Furthermore the rules concerning compensation and retaliation have been regulated in more detail.

6.2.1 An Integrated Dispute Settlement System

According to Article II:s of the WTO-Agreement the DSU is an "integral part of this agreement, binding on all Members". The DSU covers all the agreements linked to the WTO-Agreement, which means that disputes concerning different agreements, annexed to the WTO-Agreement can be treated by the same panel.¹²⁵ This was not possible under the old GATT where the GATT and the different codes were separate treaties with different dispute settlement systems. Thus the new DSU will be a unified system with extended scope of jurisdiction. All dispute settlement rules and procedures, except as otherwise provided in one of the Multilateral or Plurilateral Trade Agreements shall be administered by the central *Dispute Settlement Body*.¹²⁶ According to Article II of the DSU, the Dispute Settlement Body (DSB) "shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the covered agreement".

6.2.2 A Compulsory and Binding System

Article 23 (2) of the DSU clearly states that the system shall be compulsory. That means that disputes between WTO Members about violations of the trade rules in any of the multilateral agreements can only, and must be solved according to the rules and procedures of the DSU. The DSU excludes any attempt at unilateral action by the Members. This is something new which did not exist under the old GATT system where it was possible, at least theoretically, to settle a dispute by recourse to means of dispute settlement other than those provided for in the agreement.¹²⁷ Recourse to standard terms of reference for panels has been introduced and the role of the WTO Secretariat and the Director-General has been increased. This makes an unnecessary delay in the beginning of the panel procedure impossible and de facto removes the possibility to block the establishment of panels.¹²⁸ The system is moreover binding on all the WTO members. The parties to the dispute must abide by the final rulings and recommendations given by the panels or the Appellate Body. The inverted consensus has been

¹²⁵ See Appendix 1 of the DSU: Agreements covered by the Understanding.

¹²⁶ It should be observed that many Multilateral Trade Agreements continue to have special rules and procedures for settling disputes and according to Article 1:2 of the DSU these rules and procedures prevail over the DSU in case of a difference between the those and the DSU. See Appendix 2 of the DSU: Special or additional rules and procedures contained in the covered agreements.

¹²⁷ P.J Kuijper, "The New WTO Dispute Settlement System- The Impact on the European Community", JWT, December 1996, Vol.29, No 6, p.50.

¹²⁸ Articles 6, 7 and 8 DSU. Kuijper, 1996, p.50.

removed and now only a consensus to reject the panel or Appellate report will prevent the report from becoming operative.¹²⁹ The review of the panel reports is now exercised by the newly created Dispute Settlement Body- the DSB, and no longer by the GATT Council. This lessens the political character of the review since it will be impossible to reject the panel report.

6.2.3 Tight Time-tables

In the DSU all steps in the procedure are subject to clear deadlines, and the panels and the Appellate Body work under strict time constraints.¹³⁰ Panels have to submit their reports within 6 months, in exceptional circumstances within 9 months. Unless a party to the dispute formally notifies the DSB that it will appeal the report, the report shall be adopted at a DSB meeting within 60 days after the circulation of the report. The appeal proceedings amounts to 30 days and may in no case exceed 90 days and the Appellate Body report shall be adopted within 30 days unless the DSB decides by consensus not to adopt it. The DSB must consider appellate reports within 12 months, subject to extensions.¹³¹ Also the implementation of adopted reports is subject to stringent time-tables. A prompt implementation is essential to ensure effective resolution of disputes. When the compliance cannot be immediate Article 21(3) of the DSU lays down reasonable periods of time in which the parties must comply with the rulings and recommendations. The Article offers three possibilities: the Member concerned can propose the period of time, the period of time can be mutually agreed by the parties or implementation should be reached within 15 months and must not exceed 18 months from the date of the establishment of the panel.¹³²

6.2.4 The Right to The Establishment of A Panel

According to Article 6 of the DSU, WTO Members have a right to the establishment of a panel. However, panel proceedings are always and necessarily preceded by consultation and attempts to reconcile.¹³³ This right to have a panel means that the proceedings no longer can be blocked arbitrarily, since a refusal of a Member to participate in meetings with the panels cannot stop hearings within-and findings of the panel. This implies that also the right to appeal is safely secured, a significant change from the old GATT.¹³⁴

Panels consist of three members unless the parties to the dispute within 10 days of the establishment of the panel, agree to have five panellists.¹³⁵ In contrast to the Appellate Body, the panels are not necessarily composed of persons with a legal education, there is no such requirements in Article 8 of the DSU. The panel members should however be selected with a view to ensure the independence of the members, a sufficiently diverse background and a

¹²⁹ Articles 16(4) and 17(14) DSU. The language in Article 17(14) is very clear on this point: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days".

¹³⁰ See e.g. Articles 12(8) and (9), 16, 17(5), 20 and 21(4) DSU.

¹³¹ Articles 16 (4), 17 (5) and (14), and Article 20 DSU.

¹³² However it must be remembered that the 15 months only serve as a guideline, and there is no right to 15 months, despite what many arbitrators seem to think.

¹³³ Articles 4 and 5 DSU.

¹³⁴ T. Cottier, "Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union", CML. Rev 35, 1998, p.337.

¹³⁵ Article 8(5) DSU.

wide spectrum of experience.¹³⁶ Even occasionally persons from outside the government are called upon to serve. The panellists are usually chosen in consultation with the countries in dispute and this nomination is often up for animated discussion. If the two sides cannot agree the WTO Director General appoints them. Panellists can also for each case be chosen from a permanent list of well-qualified candidates.¹³⁷ The people in the panels tend to have an extensive background in trade diplomacy or in the private sector. Practical experience seems to be an important and even crucial requirement. According to the personal experience of Thomas Cottier the panels are sufficiently independent even though panels have regular links to national governments. Cottier says that outside pressure, and panellists defending interests close to their constituencies is unlikely. According to him "there is a fine unwritten code, and elected panellists do in fact serve in a personal and sufficiently independent capacity, no more and no less than any lawyer serving an ad hoc court of arbitration".¹³⁸

6.2.5 The Right of Appeal

One of most important innovations is the introduction of the right to appeal to the Appellate Body. According to Article 17 of the DSU a standing Appellate Body shall be established by the DSB, and it shall hear appeals from the panel cases. This contributes to what many call the *judicialization* or the *juridification* of the dispute settlement procedure.¹³⁹ This stage of appeal forms an integral part of the dispute settlement system and "reinforces the legal nature and qualities of continuity, consistency, predictability and legal security.¹⁴⁰ The expertise and strict legal function of the Appellate Body are important safeguards against political and legally unconvincing rulings and findings. The Appellate Body shall consist of 7 persons with legal background and experience in law, international trade and the subject matter of the covered agreements generally. These 7 persons are elected for overlapping periods of four years and they serve in rotation, only 3 of them serve on any one case. The members shall be "unaffiliated" with any government and during the four years they are elected they are required to dedicate full priority and time to the assignment and be "available at all times and on short notice".¹⁴¹ The members of the Appellate Body are appointed by the DSB and the membership should broadly represent the membership in the WTO.

6.2.6 Implementation of The Rulings and Recommendations

In contrast with the situation under the old GATT, the DSU lays down detailed rules of how and when implementation of the panel and appellate reports should take place. Article 21 of the DSU introduces detailed rules on surveillance of implementation of panel rulings and recommendations in which the DSB plays an important role, and Article 22 provides for compensation and suspension of concessions. Under the DSU the implementation of decisions is subject to reporting and monitoring and the WTO Members are under pressure from the international community to comply with the rulings and under pressure to justify eventual difficulties and delays in complying with their obligations. Within 30 days of the adoption of

¹³⁶ Article 8(2) DSU.

¹³⁷ Trading into the future, *supra*, p.3.2, see also Article 8 DSU.

¹³⁸ Cottier, 1998, p.348. Thomas Cottier was a Member and chairman of several GATT and WTO panels as well as a Member of the Swiss Delegation to the Uruguay Round with responsibilities including dispute settlement.

¹³⁹ Cottier, 1998, Kuijper, 1995, Petersmann, 1994.

¹⁴⁰ Cottier, *supra*, 1998, p.338.

¹⁴¹ Article 17(3) DSU. In the present Appellate Body the average age of its members is around 70 years old.

the panel and appellate report the losing Member must inform the DSB of its intentions to implement the DSB decision.¹⁴² This is a significant change from the old GATT where the losing party could fulfil its obligations and offer compensation without being obliged to bring its practices and laws in compliance with GATT obligations.¹⁴³

In case of non-implementation of an adopted panel or appellate report there is a possibility for the Member concerned by way of retaliation to request the suspension of concessions or other obligations. Since the rule of inverted consensus applies even in this context, the Member is in practice always reassured of this possibility.¹⁴⁴ However it is clearly laid out in Article 22(1) of the DSU that this possibility only is a temporary measure and does not dispense the losing Member from compliance with the WTO obligations it was found in breach of. While retaliation preferably concerns concessions or obligations under the agreement at issue in the dispute there exists a possibility of cross-retaliation, which means that obligations made under other agreements may be concerned as well. This threat of cross-retaliation is a very important practical aspect of the DSU, since it is an incentive for the Members to comply with the DSB decision in the first place.

6.3 How Are Disputes Settled?

Dispute settlement procedures may be invoked whenever a Member believes that another Member has, directly or indirectly, by action nullified or impaired a benefit originally negotiated, or has breached a WTO rule and hinders the attainment of the GATT objectives.¹⁴⁵ Settling disputes is the responsibility of the DSB which has the sole authority to establish panels and adopt panel reports. It also surveilles the implementation of the rulings and recommendations and has the power to authorise retaliatory if necessary.¹⁴⁶

6.3.1 Types of Complaints

As under the old GATT, complaints take three forms.¹⁴⁷ The "*violation complaint*" is the first, which consists in the violation of one or more of the WTO rules. This is the most common of the complaints and the nullification or impairment are *prima facie* presumed.¹⁴⁸ The second complaint is a "*non-violation complaint*"; although no specific WTO provision has been violated, a measure applied by the government still nullifies a previously granted concession. The third and last type of complaint is the "*situation complaint*". Under this complaint a Member can argue that any other situation has led to the nullification or impairment of a previously negotiated concession.

¹⁴² Article 21(3) DSU.

¹⁴³ Cottier, 1998, p.340.

¹⁴⁴ Article 22(6) DSU.

¹⁴⁵ Article XXIII GATT 1947 and Article 3(3) DSU.

¹⁴⁶ Article 2 DSU.

¹⁴⁷ Article XXIII GATT 1947 and Article 26 DSU.

¹⁴⁸ Article 3(8) DSU.

6.3.2 Procedure¹⁴⁹

First stage: Consultations and Mediations (Articles 4 and 5 DSU)

Although much of the procedure does resemble a court or tribunal the preferred solution for the countries is to discuss their problems and try to settle the dispute by themselves. The first stage of the dispute settlement is therefore consultations between the governments involved. Good offices, conciliation or mediation by the WTO Director-General may also be sought by the parties if consultations fail.

Second stage: Request For A Panel (Article 6 DSU)

As previously stated the parties to a dispute have a right to a panel, and if the parties cannot solve their dispute through consultations within 60 days, the DSB may be required to establish a panel. The creation of a panel is automatic. The country "in the dock" can block the creation of the panel once, but when the DSB meets for a second time the appointment can no longer be blocked, unless there is a consensus against the establishment of the panel.¹⁵⁰

Third stage: The Panel at Work (Article 12-16 DSU)

Before the first hearing the parties to the dispute present facts and arguments in writing to the panel. At the first hearing the parties and third countries (who have announced that they have an interest in the dispute) meet and make their case. At the panel's second meeting the parties involved submit written rebuttals and present oral arguments. If one side raises technical or scientific matters the panel can consult experts, appoint an expert review group or prepare an advisory report. The panel then makes a first draft, in which they only present the facts and arguments, for the parties to comment on. Once the parties have commented on the draft the panel submits an interim report to the two sides, which contains its findings and conclusions. The parties are given one week to ask for a review. If a review is requested it must not exceed two weeks. During this time the panel may hold additional meetings with the two sides. A final report is then submitted to the parties and the DSB, and three weeks later the report is circulated to all WTO Members. The final report should normally be given within 6 months, but in case of urgency the deadline can be shortened to 3 months.¹⁵¹

Fourth stage. Adoption or Appeal of The Decision (Articles 16-20 DSU)

The panel report must in principle be adopted by the DSB within 60 days, unless a consensus decides to reject it. If the report is adopted within 60 days it becomes the DSB's ruling. A party may however appeal the decision if it does not agree with an issue of law or the legal interpretation by the panel. Both sides can appeal the report and in some cases they both do.¹⁵² The appeal, which is dealt with by the Appellate Body, has to be based on points of law and cannot re-examine existing evidence or examine new evidence. The appeal can uphold, modify or reverse the panel's legal findings and conclusions and should not last more than 60 days, with an absolute maximum of 90 days.

Fifth stage: Implementation of The Rulings and Recommendations (Articles 21 and 22 DSU)

In this final stage of the procedure the losing party must comply and bring its policy in line with the rulings and recommendations of the panel and appellate report. Again it must be

¹⁴⁹ B. Hoekman, M.Kostecki, 1995, p.47.

¹⁵⁰ Trading into the future, p.3.3.

¹⁵¹ see also the Working Procedures in Appendix 3 to the DSU.

¹⁵² Trading into the future, p.3.3.

emphasised that prompt compliance is essential for the effective resolution of disputes. The losing party must inform the DSB of its intention to implement and conform with the rulings and recommendations within 30 days of the report's adoption. If the immediate compliance is impracticable the losing party is given a reasonable period of time to do so. If the losing country fails to act within this period it must enter into negotiations to determine a mutually acceptable compensation. If after 20 days no satisfactory compensation is agreed, the winning country can ask the DSB for permission to impose limited trade sanctions against the other side (retaliation measures- suspension of concessions or obligations). In principle these trade sanctions should be imposed in the same sector as the dispute.

6.4 From Negotiation to Adjudication - The Institutional Evolution

6.4.1 Introduction

The dispute settlement in GATT has a long history and has evolved over many years in case law on the basis of Article XXIII of the GATT. The issue whether the system was based on negotiations or an adjudicative system is not novel, and was already debated under the old GATT.¹⁵³ "Pragmatists", who saw the GATT as a forum for negotiations, debated against the "legalists", who viewed the GATT as either an emerging or an established body of laws governing the international trading order. The pragmatists regarded concepts of negotiations and discussions as the basis of resolutions of disputes and relative power as a means to influence the conduct of other countries. The dispute settlement within the GATT was "a natural extension of the negotiation process" and the law at best only formed the background to diplomatic solutions. There was clearly a political nature of the process, with emphasis on conciliation. With flexible procedures, control over the dispute by the disputing parties and the freedom to reject panel rulings and recommendations the dispute settlement of the GATT was simply "a diplomatic forum where parties compromised disagreements rather than a court that settled them". The legalists on the other hand, had a rule-oriented approach and regarded the GATT as a "legal order-in-embryo". The GATT was a legal document and provided for a predictable and stable legal order which avoided ad-hoc solutions based on powers and diplomacy.¹⁵⁴

Unlike other international fora, the mechanism for settling disputes within the GATT was not planned and put down in a legal document but evolved instead in a process of trial and error and was to a large extent based on diplomatic negotiations. However, the system is today far removed from a conciliatory non-judicial instrument of diplomatic dispute settlement, even though elements of negotiation still can be found. Even though the instruments of dispute settlement in WTO cannot be totally separated from negotiations in and outside the WTO the system is today clearly dominated by a legal approach and can no longer be described as a system based on the "principle of negotiations". Indeed some even ranges the dispute

¹⁵³ In this respect see inter alia E.McGovern, "Dispute settlement in the GATT-adjudication or negotiation?", in *The European Community and the GATT*, edited by M.Hilf, F.Jabobs and E-U. Petersmann, 1986, P. Hallström, *The GATT panels and the formation of international trade law*, 1994 and R.Behboodi, "Legal Reasoning and the International Law of Trade- The First Steps of the Appellate Body of the WTO", *JWT*, 1998, Vol. 32, No 4.

¹⁵⁴ R.Behboodi, 1998, p.58-59.

settlement in the WTO among the "most sophisticated and efficient tools on offer on contemporary international law".¹⁵⁵ There are a number of factors that might indicate that the dispute settlement in the WTO today is no longer a negotiation-based system but instead an adjudicative system

6.4.2 Legalisation of The Panel Procedures

Even though both political and legal methods for settling disputes are available under the DSU, the "judicialization" or "legalisation" of the panel procedures have been further strengthened. Panels no longer try to solve trade disputes by compromise. Instead, they make recommendations exclusively based upon a thorough legal analysis of the case. There are concerns that the outcome by the panel reports are strongly influenced by diplomacy and not law. While it is true that the initial step of the panel procedure is consultation, and Article 11 of the DSU reflects the traditional conciliatory role of the panels, the panels do not actively pursue and propose compromise solutions unless so requested by the parties. The function of the panels are strictly related to the WTO and the rules in the DSU. Article 7 of the DSU lays down explicit terms of references of the panels which they must abide with, and Article 3:2 of the DSU underlines that the dispute settlement shall serve to "preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions" and that "recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements". The panel's investigation is moreover limited and defined by the parties through their arguments. The task of the panel is to decide whether the behaviour in an actual case is compatible with WTO rules and in doing so it must interpret and identify the relevant norm. In this respect it must be emphasised that the panel does not apply any other legal sources than those within the framework of the WTO and the GATT. When it comes to interpretation of the WTO norms, customary rules of interpretation of public international law shall be applied.¹⁵⁶ The panels also interpret the WTO Agreement in the light of previous panel-interpretations, and even though these are not binding, the panels seldom deviates from the earlier reports.¹⁵⁷

In consideration of the following, one could say that the activity of the panels can be characterised as a judicial control: the establishment of the panel is automatic, precautions have been made to guarantee the principle of impartiality in that each side appoints one adjudicator, all parties get a fair hearing and the style of the reports follows a legal pattern in comprising factual conclusions, arguments of the parties and legal conclusions, familiar patterns for any lawyer. ¹⁵⁸

6.4.3 Inverted Consensus

The legal and practical advantages of this principle cannot be overestimated. Since both panel and appellate reports are deemed to be adopted unless there is a consensus not to adopt them, and the complainant will not join such an inverted consensus unless the dispute is settled in accordance with WTO law, this "quasi-automatic adoption of the reports", together with the

¹⁵⁵ In Cottier, 1998, p.335.

¹⁵⁶ Article 3:2 DSU. In this respect the binding methods of interpretation in Articles 32 and 32 of the Vienna Convention of 1969 are used.

¹⁵⁷ Hallström, 1994, pp.60 f.

¹⁵⁸ McGovern, 1986, p.77.

independence of the panel- and the Appellate Body Members, implies a judicialization of the dispute settlement process in the WTO, and could be the most significant innovation with the new dispute settlement system.¹⁵⁹

6.4.4 The Appeals Forum - The Appellate Body

The appellate review is a new procedure for the settlement of international trade disputes among governments.¹⁶⁰ With the introduction of the Appellate Body the legally binding force and the compliance of the WTO rules are further strengthened. The strictly legal function and expertise of the Appellate Body can be seen as a safeguard against legally unconvincing judgements, and as a more rule-oriented approach in the WTO. In many aspects the Appellate Body has elements of a proper court: any appeal must be limited to issues of law covered in the panel report and legal interpretation of the panel, members of the Appellate Body must be persons of "recognised authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally", the Appellate Body may only uphold, modify or reverse the legal findings and conclusions of the panel and the Appellate Body, in contrast to the panels, is a standing body with members appointed for a specific period of time.¹⁶¹ In requiring that the appellate members must have an expertise in law, law forms the basis of appellate review. Moreover, by removing the positive consensus, appellate reports are now quasi-automatically adopted, unless of course there is a consensus not to adopt the. That is however not very probable, which means that "de facto, the Appellate Body of the WTO sits at the apex of a sophisticated, complex and comprehensive body of laws and legal institutions".¹⁶²

Article 3(2) of the DSU lays down the objectives of the dispute settlement system in the WTO by stating that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. *Predictability, coherence, consistency and security* are cornerstones of the dispute settlement process, and inherent in any legal process. With the shift from the GATT to the WTO, the legal structure of the WTO are dependent upon consistency and predictability, and security and credibility are essential to any juridical, international dispute settlement mechanism.¹⁶³

6.4.5 Conclusion

According to Edmund McGovern, a system is an adjudicative system if there is "the assumption that there is a correct solution to the dispute which is reached by ascertaining the facts and interpreting and applying the law", and if the issues are determined by an "impartial tribunal before whom the representatives of the parties present their contesting views".¹⁶⁴ Considering what has been demonstrated in the above sections, it seems to me at least, that the

¹⁵⁹ Petersmann, 1994, p.1215, Van den Bossche,1994, p.419.

¹⁶⁰ Petersmann, 1994, p.1216.

¹⁶¹ Article 17 DSU.

¹⁶² Behboodi, 1998, p.61.

¹⁶³ *ibid*, p.62-64.

¹⁶⁴ McGovern, 1986, pp.74-75.

dispute settlement system in the WTO comes very close to fit this description. Even though the panels and the Appellate Body are not formally tribunals, their functions most certainly resemble tribunals. Against this background it is fair to say that the way in which trade disputes now can be resolved comes very close to a system of adjudication.¹⁶⁵

6.5 Will The New Dispute Settlement System Work Better?

The dispute settlement mechanism of the WTO has only been in force for three years. But even though it is difficult to predict the future of the Appellate Body and the WTO there is, according to some lawyers a strong presumption that the dispute settlement mechanism of the WTO will work much better than under the GATT 1947.¹⁶⁶ This is partly because the past experience shows that the GATT dispute settlement mechanism in fact worked better than was generally recognised. Of some 120 complaints under the GATT between 1948 and 1990, sixty disputes led to panel reports, the rest being settled before a report had been issued. Out of those sixty reports only four were not adopted.¹⁶⁷ Despite being novel, the dispute settlement system of the WTO has become the most widely used instrument for settling disputes among sovereign countries States in modern history. As of December 1998 over 150 requests for consultations have been notified to the Secretariat of the WTO, 30 cases have been settled and almost as many has been formally settled, 9 have gone through the appellate process.¹⁶⁸ Even though the United States, European Community, Canada and Japan (the QUAD-group) continues to dominate the number of disputes that formally are brought before the WTO, developing countries increasingly bring, and win cases. But developing countries not only bring cases against developed countries, they also bring cases against each other. Rambod Behboodi explains the relative success of the Appellate Body by its early jurisprudence. Although the early reports were not binding, they formed "a persuasive body of authoritative interpretations within the WTO for future dispute settlement"¹⁶⁹

While disputes settlement procedures have been significantly improved, there are certain shortcomings that can be identified. A problem with tightening the WTO rules and removing the possibility to block the adoption of panel and appellate reports is, apart from the practical problem of an increasing case-load, that if large trade players are unhappy with the reports they simply decide not to implement the reports. This is exactly what has happened in the banana dispute where the European Community did not bring its import regime for bananas in line with the appellate ruling, a fact that made the United States threaten with substantial trade sanctions. Another problem concerns the panellists. The extended scope, short time-limits, automaticity and the quasi-judicialization of the dispute settlement system clearly contrast with the old GATT practice of settling disputes in a more political and diplomatic matter. These contrasts might lead to tensions in the new system. One possibility of reducing this risk is to increase the legal expertise of the panels. There is a clearly a need of professionalism of the panels and of legal staff in the WTO Secretariat to support the panels.¹⁷⁰ According to the Ministerial Declaration 15 April 1994, the Ministerial Conference was requested to, within 4

¹⁶⁵ Eeckhout, 1997, p.34, Cottier, 1998, p.334.

¹⁶⁶ see. e.g. Hoekman, Kosteci, 1995

¹⁶⁷ *ibid*, 1995, p.49.

¹⁶⁸ <http://www.wto.org/wto/dispute/bulletin.htm>, 981210

¹⁶⁹ Behboodi, 1998, p.56.

¹⁷⁰ Petersmann, 1994, pp.1125-1126.

years, conduct a general and thorough overview of the DSU in order to see what changes were necessary. This overview has taken place for some time and has mainly concerned issues such as the professionalism of the panels and the increased transparency of the WTO.¹⁷¹ As the new dispute settlement system likely will be applied to a large number of cases, this might in the long run weaken the authority of first instance panel reports. It might even lead governments to think they can be granted direct access to the Appellate Body instead of being obliged to go through the panel procedure first.¹⁷² According to David Palmetier another problem consists in the lack of power of the Appellate Body to remand cases to the lower instance, the panel, whose decision has been appealed, which can cause problems of credibility and acceptability of the system. A power for the Appellate Body to remand cases back to panels would ensure that no issue is decided in an adopted report without the losing party having an opportunity to appeal that decision to a tribunal other than the one that decided it initially.¹⁷³

¹⁷¹ The Commission of the European Communities has proposed a number of changes of the DSU, inter alia the introduction of a permanent panel instance, the allowance of ad hoc panellists, public panel meetings and increased professionalism of the panels. The Member States have had some problems during the summer to reach a common decision. However they do agree that an increased professionalism of the panels is needed. Reports from the meeting of the 113-Committee, Notes for the attention of the 113-committees- MD 301/98 REV1, MD 301/98 REV 5.

¹⁷² Petersmann, 1994, p.1218.

¹⁷³ D. Palmetier, "The WTO Appellate Body Needs Remand Authority", JWT, February 1998, Vol. 32.

7. Effects on The European Community

The WTO and its new dispute settlement mechanism will have many legal and practical effects on the European Community. The more secure and predictable DSU will not only question the Court of Justice's arguments for denying the WTO Agreement direct effect, it will also affect the EC's dispute management. The DSU is a binding dispute settlement mechanism and can not be ignored by the Members of the WTO. Despite being the biggest trading partner of the WTO, the EC can no longer block panel decisions but must comply with the rulings. Also the fact that the WTO is a mixed agreement will give rise to complications for the EC .

7.1 Dispute Management

The European Community has been a frequent user of the dispute settlement under the GATT.¹⁷⁴ This has led to extensive expertise and experience in settling disputes. However the DSU has brought some new elements to the system which the European Community will have to take into account. Since the defendants no longer can block the establishment of a panel there is a risk of being overwhelmed with cases and a pressure to seek compromises. Furthermore, trade disputes under the DSU have proved to be both legally and factually complex. Disputes often involve technical issues. Panels can only judge on the law and facts submitted to them by the parties, which mean that they to a large extent rely on well structured arguments by the Parties. Taken together, this requires considerable and time-consuming legal research in order for the European Community to successfully and professionally handle the case-load. This suggests close co-operation between the Commission and the Member States and the problems of shared competence will need to be overcome. The cases need to be handled by well structured teams who possess the knowledge and expertise required and who are able to react promptly to questions by the panels and produce evidence in time.¹⁷⁵

7.2 The Problems of Mixed Agreements

Both the European Community and the Member States are parties to the WTO Agreement. Article XIV of the WTO Agreement makes it clear that it is open to acceptance by the "European Communities" and the Member States.¹⁷⁶ Thus, the WTO Agreement is a mixed agreement and the competence is shared between the Community and the Member States. This was illustrated in the *Opinion 1/94* where the Court made it clear that the Community did not have exclusive power for all the commitments under the WTO Agreement.¹⁷⁷ The Commission requested an Opinion of the Court pursuant to Article 228(6) of the EC-Treaty

¹⁷⁴ From 1970-1989, the EC was a defending party in 45 cases and a claimant in 30 cases. Note also that as of 30 July 1998, the European Union has been involved in 4 active panels as defendants and 2 as claimant, Cottier, 1998, p.351.

¹⁷⁵ Cottier, 1998, p.353.

¹⁷⁶ The ECSC and Euroatom however, are not parties to the WTO Agreement.

¹⁷⁷ Opinion 1/94 Re the WTO Agreement (1995) ECR I-5267.

on the competence of the EC and the Member States to conclude the WTO Agreement. The Court came to the conclusion, with regard to both express and implied powers, that the Community had sole competence, pursuant to Article 113 of the EC Treaty (common commercial policy), to conclude the Multilateral Trade in Goods, and that the Community and the Member States were jointly competent to conclude the GATS and the TRIPs.¹⁷⁸

The fact that that the European Community and the Member States have shared competence with regard to the WTO agreement will have both practical and institutional consequences. In areas of shared competence, Members of the WTO may bring complaints against the EC, one or more Member States or both, since they all have individual membership in the WTO. This can lead to some confusion and create practical problems since it is not always clear for non-member countries whom to talk to and who eventually decides. The United States has preferred to bring complaints directly against the Member State of the EC whose law is claimed to be inconsistent with WTO law. Even though this could be advantageous in some aspects, the fact is that the national governments in the Member States do not possess the long and extensive experience that the Commission has acquired over the years on GATT. It is therefore desirable that the Member States seek the advice and co-operation with the Commission in all cases.¹⁷⁹ Confusion and controversy in this area might not only marginalize the Community and undermine its negotiation power, it might also lead to the paralysation of the WTO.¹⁸⁰ In big cases involving broader issues it will be necessary to develop shared European positions and strategies. In fact, the EC and Member States should take advantage of the fact that the EC has the 15 votes of its members. As Jacques Bourgeois puts it: "the European Community should show to the whole world that it is more than a club of states".¹⁸¹

Opinion 1/94 could also have important results for the previous case-law of the Court when it comes to interpretation of the GATT. So far the Court has had the exclusive jurisdiction to interpret GATT, but with the recognition in *Opinion 1/94* that the Uruguay Round Agreements are mixed in nature this could give rise to problems in so far that Member States may reject the Court's jurisdiction for those provisions.¹⁸² In areas of GATS and the TRIPs the Court share the jurisdiction with the Member States, which means that the Member States can argue that the Court can only comply and interpret the provisions in those agreements as regards matters within its competence. This problem was illustrated by Advocate General Tesauro in *Hermès International* where the Court of Justice was asked to interpret Article 50 of the TRIPs Agreement.¹⁸³ Tesauro said that even though he was inclined to agree with the view that the Community only is required to comply and interpret the provisions of the TRIPs Agreement "as regards matters within its competence", he regarded this principle "superficially clear and simple" and pointed to the difficulty to establish precisely whether a given provision falls within the Community's or the Member States' competence, and the effect of a national interpretation in the Community system. Instead Tesauro regarded the

¹⁷⁸ *ibid*, paras. 34, 98 and 105.

¹⁷⁹ Cottier, 1998, p.355.

¹⁸⁰ P. Van den Bossche, " *The European Community and the Uruguay Round Agreements*", in *Implementing the Uruguay Round*, eds. J.H., Jackson and A.Sykes, 1997, p.29.

¹⁸¹ J.H.J. Bourgeois, " *The Uruguay Round of the GATT: Some General Comments from an EC Standpoint*", in *The European Union and World Trade Law*, eds. N.Emilou and D.O'Keeffe, 1996, at p. 86.

¹⁸² In both the SPI and Demirel case, the Court said that it had the exclusive jurisdiction to interpret the GATT.

¹⁸³ C-53/96 *Hermès International (société en commandite par actions) v. FHT Marketing Choice BV*, Judgement of the Court 16 June 1998.

requirement of uniformity in the interpretation and application of all the provision of the agreements in question as fundamental, and emphasised the ensurance of close co-operation both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.¹⁸⁴

Another problem lies in the possibility of *cross-retaliation*. There could be difficulties for the EC and the Member States in implementing panel and appellate reports where cross-retaliation has been authorised; if a Member State who has won a panel in the area of trade in services or TRIPs, where the competence is shared, would be unable to take cross-retaliatory measures in those fields, it would be precluded from taking these measures in the area of trade in goods, since this is within the exclusive competence of the EC. The situation applies conversely where the EC has won a panel.¹⁸⁵ When it comes to *direct effect* of a mixed agreement, it is not yet settled whether the denial of direct effect also applies to the application of mixed agreements by national courts. The Opinion 1/94 did not give any guidance on this subject and neither did the judgements given by the Court so far. Given the importance of direct effect of the WTO this issue of direct effect of mixed agreements will also have to be clarified within the EC.

7.3 Impact on Intra-EC Dispute Settlement- Compliance with The WTO Obligations

It is in the first place the Commission, the Council and the Parliament together with the national authorities that are obliged to comply with the commitments of WTO and the decisions of dispute settlement. Under the new WTO it has become even more important to comply with the WTO rules, especially since the costs of non-compliance are much higher than before. The non-compliance cannot only lead to temporary compensation but also to the imposition of trade sanctions. Under the WTO the stakes are higher and there are higher expectations on the system. The governments can no longer ignore this. Non-compliance may even threaten the consistency of the European Community legal order. A very famous example of non-compliance and the frustration it created is the banana dispute. Not only did the non-compliance result in political tensions, it put at risk the principle of primacy of Community law over national law. This dispute, which is not yet over, has not only made the German courts compensate German importers for the protection denied under WTO rules, by granting protection in the German constitutional law overriding Community regulations, it has also to a large extent damaged the Union's reputation in public opinion. In the long run, also the WTO system as a whole will loose credibility.¹⁸⁶

¹⁸⁴ paras. 15, 20 and 21 of the Advocate General's opinion.

¹⁸⁵ M.E. Footer, "Participation of the European Communities in the World Trade Organization", in *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market*, edited by Stratos Konstadinidis, 1996, pp.88-89.

¹⁸⁶ See *Atlanta Fruchthandelsgesellschaft GmbH et al. v. Bundesanstalt für Landwirtschaft und Ernährung*, Case 1 E 798/95(v), 1 E 2929/93(v), commented by Cottier, 1998, pp.365-366.

7.3.1 Compliance with The Decisions of The DSB

It should again be pointed out that the WTO and the decisions on trade disputes of the DSB are binding on the parties to the dispute. Article 228 of the EC-Treaty emphasises that international agreements concluded by the Community are binding, and Opinion 1/91 on the EEA- Agreement, stressed the binding character of judicial decisions on disputes between the contracting parties to an agreement, where the Court has been called upon to rule on the interpretation of the agreement.¹⁸⁷ The Court found that in principle an international agreement providing for its own dispute settlement system is compatible with EC law, and that its dispute settlement decisions are binding on the EC institutions, including the Court of Justice.¹⁸⁸ This is a significant ruling in that it illustrates that EC membership in an international agreements, such as WTO, implies the submission of the EC to mandatory international dispute settlement systems, whose dispute settlement rulings will be binding on the EC under both international and Community law (Article 228 (7) EC-Treaty) With the introduction of the DSU and the almost automatic adoption of Appellate Body panel reports by the DSU, the EC are now confronted with decisions binding in international law. Furthermore it is widely accepted that national or Community law should to the extent possible, be construed in accordance with international obligations.¹⁸⁹ Thomas Cottier argues that with the changes that the DSU brought to dispute settlement, the attitudes and policies towards disputes settlement decisions should be revisited in the EC and instead based on a principle of compliance. Compliance is in the best interests of the EC, and should provide the basis for developing appropriate judicial policies. A mechanism of dispute prevention internally also becomes important.¹⁹⁰

7.3.2 Direct Effect of GATT 1994

All previous judgements denying the GATT direct effect apply to the GATT 1947. However, as has been illustrated above, the Uruguay Round has changed the scope and degree of institutionalisation of international trade rules by introducing the World Trade Organization. The WTO is a significant upgrade from the old GATT and has significantly reduced the "great flexibility" of the GATT. Most of the features that the Court considered as weaknesses of the GATT system in the leading *International Fruit* case have been reinforced:

i) The WTO agreement introduced a new Agreement on safeguards with more stringent disciplines which provides the Members with greater foreseeability and legal certainty; an investigation before measures can be taken is required, and a detailed definition of serious injury is set out. Time-limits have been laid down for all safeguards measures and provisional measures and a Safeguards Committee has been established in order to oversee and surveille the operation. This new agreement clearly clarifies and reinforces the disciplines of Article XIX, ii) The new WTO Agreement also provides for a new dispute settlement system which in comparison to the old GATT improves and strengthens the mechanism for solving disputes. Thus, the dispute settlement system is no longer a system without "real teeth",¹⁹¹ iii) as regards waivers of GATT in Article XXV, a new understanding lays down new procedures for the granting of waivers from GATT disciplines, for specifying termination dates for any

¹⁸⁷ Opinion 1/91, European Economic Area Agreement 1, (1991) ECR I-6079.

¹⁸⁸ para. 39 and following of the judgement.

¹⁸⁹ The Court explicitly recognised this principle in C-61/94 *Commission v. Germany* (1994) ECR I-3989.

¹⁹⁰ Cottier, 1998, pp 370-378.

¹⁹¹ Eeckhout, 1997, p.30.

waivers to be granted in the future, and for fixing expiry dates for existing waivers,¹⁹² iv) the WTO Agreement also includes new agreements on services and intellectual property rights—the GATS and the TRIPs.¹⁹³ An analysis of these agreements could lead to different conclusions regarding the direct effect, in comparison to the GATT case law. Intellectual property rights, for example, are inherently private rights, which the TRIPs agreement aims to define and it would seem that the agreement would appear to apt for direct effect. In Article 1 (3) of the agreement it is stated that: "Members shall accord the treatment provided for in this Agreement to the nationals of other Members..". This indicates that individuals, and not Members of the WTO, are granted certain rights. The GATS however, resembles the GATT much more. It is modelled on the GATT, and has borrowed its main rules and mechanism from the GATT. Moreover in their Schedule of Commitments under the GATS the Community and its Member States have excluded direct effect.¹⁹⁴ Bearing in mind what the Court stated in *Kupferberg* about the Community institutions' freedom to agree on the direct effect of an agreement concluded with a non-member country, the direct effect of GATS seem to be ruled out on this ground as well. ¹⁹⁵

Consequently, previously laid down principles with regard to the direct effect of the GATT may no longer apply taken the qualitative changes of the old GATT into account. The Commission, who argued against direct effect of GATT 1947 in the *Banana* judgement, seems however to be against direct effect of the WTO Agreement as well. In the recital in the decision for the Council's approval of the Uruguay Round Agreements the Commission stated that it was necessary to ensure that the Agreements, being intergovernmental agreements, were not granted direct effect:

"...it is important for the WTO Agreement and its Annexes not to have direct effect, that is one whereby private individuals who are natural and legal persons could invoke it under national law. It is already known that the United States and many other of our trading partners will explicitly rule out such direct effect. Without an express stipulation of such an exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries."¹⁹⁶

This statement brings us to the *principle of reciprocity*. The fact is that of the major WTO members, the United States and Canada have specifically excluded direct effect in their implementing statutes, and Japan has previously rejected the direct applicability of the GATT.¹⁹⁷ To grant the WTO Agreement direct effect could first of all upset the political balance and secondly, from a practical point of view, be unwise where all the other contracting parties deny the agreement direct effect. The fear of upsetting the political balance could be the reason why the Council stated in the preamble of its decision concerning the conclusion of the WTO Agreement:

"Whereas by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, it is not susceptible to being directly invoked in Community

¹⁹² Understanding on the Interpretation of Article XXVIII of GATT 1994.

¹⁹³ Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs), and General Agreement on Trade in Services and Annexes (GATS).

¹⁹⁴ In the introductory Note to the Schedule it is stated that "The rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and this confer no rights directly to individual persons or juridical persons".

¹⁹⁵ C-104/81 *Hauptzollamt Mainz v Kupferberg* (1982) ECR 3641, para. 17 of the judgement.

¹⁹⁶ Uruguay Round of Multilateral Trade Negotiations, 1994 COM (94) 143, p.50.

¹⁹⁷ Lee and Kennedy, 1996, p.85.

or Member State courts".¹⁹⁸

While Advocate-General Cosmas in the *Affish* case considered the argument of reciprocity irrelevant for the purpose of granting the WTO direct effect or not, Kuijper argues that even though the Court stated in *Kupferberg* that reciprocity should not play a role, the same is not true for an agreement, such as the WTO, which has a such a substantial and wide-ranging economic impact on the national economy.¹⁹⁹ A Party who denies the agreement direct effect would place itself in a favourable position by shielding itself from "the most powerful enforcement mechanism for treaties" and arrives at negotiations with "free hands" in contrast to countries that are tied by the interpretation of the treaty by their national courts. According to him there should be the same internal enforcement of the WTO in each Member country.²⁰⁰ Petersmann does not share this view. He feels that the principle of reciprocity is unworkable in a multilateral Treaty with over one hundred participants, such as the GATT. Moreover, the GATT law has always been based on unconditional "most-favoured-nation" treatment.²⁰¹

This last statement may be true, but one must keep in mind that apart from the principle of non-discrimination, the WTO is based on the principle of reciprocity by a "balance of rights and obligations which are achieved through the reciprocal exchange of market-access commitments".²⁰² The principle of reciprocity is a fundamental element in the establishment of a code of conduct and in the limitation of the scope for free-riding, that may occur because of the most-favoured-nation rule.

How much importance the Court of Justice attaches to the principle of reciprocity is rather unclear. While in *International Fruit* it denied the GATT 1947 direct effect on the basis that GATT was based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements, the argument in *Kupferberg*, that the principle of reciprocity governing the application of free trade agreements should lead to a denial of direct effect to the Agreement, was rejected. It should also be recalled that in those cases where the Court granted international agreements direct effect, those agreements were concluded by the Community on a bilateral basis with either individual European countries, or with less-developed countries to which the Community granted trade concessions.²⁰³

7.3.3 Case-law of GATT 1994

The Court has in three recent cases dealt with the question of direct effect of the WTO Agreement.

¹⁹⁸ 11 th recital of Council Decision 94/800/EC 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), published in O.J. 1994 L 336/1, See also 8 th recital of 1994 COM (94), 143, p.60

¹⁹⁹ C-183/95 *Affish BV v. Rijksdienst voor de Keuring van Vee en Vlees* (1997), para. 127 note 105.

²⁰⁰ Kuijper, 1995, p.64.

²⁰¹ The most-favoured-nation rule in Article I of the GATT requires that at the border, products made in the Members' own countries are treated no less favourably than goods originating from any other country.

²⁰² Hoekman, Kosteki, 1995, p.27.

²⁰³ Lee and Kennedy, 1996, p.83.

7.3.3.1 *Affish* and *T.Port*²⁰⁴

In *Affish*, a private company importing fish products primarily from Japan sought to rely on the WTO Sanitary and Phytosanitary Agreement in the Dutch court. As a consequence of a Commission decision (95/119), whereby it forbade Member States to import fish products from Japan, the Dutch authorities did not authorise the private company's importation of Japanese products. A question was raised by the company, whether the Commission's decision was inconsistent with the Sanitary and Phytosanitary Agreement. Against this background the Administrative Court for Trade and Industry asked the Court for a preliminary ruling under Article 177 of the EC Treaty concerning the validity of the Commission Decision. The Court did not at all refer to the direct effect issue. Since the national court did not ask a question of direct effect, the Court considered it unnecessary to examine that question. The Advocate General Cosmas however, commented on the issue of direct effect in his opinion to the Court. He denied the provisions of the WTO Agreement direct effect on the same reasoning as that of the established case-law on the GATT 1947. His opinion was that the provisions of both the GATT 1994 and the WTO Agreement, still are characterised by great flexibility, and as a consequence cannot be relied on by individuals before the national courts.²⁰⁵ Despite the introduction of a new dispute settlement mechanism, which offers more certainty in the sphere of application of the recommendations and decisions of the Dispute Settlement Body, Cosmas thought that that the spirit of negotiations were not altogether absent from the new GATT. In this respect he pointed to a number of factors: the possibility of compensation or the suspension of concessions or other obligations is still available, the quasi-adjudicative character of the Dispute settlement body is diminished by the fact that the Ministerial Conference and the General Council, which are political bodies, have exclusive authority to adopt interpretations of the WTO Agreements, it is still possible for any Member to modify or withdraw its commitments is maintained, the DSU provides for the possibility to conclude of agreements on mutually acceptable compensation, there is a provision in the Agreement on Safeguards for suspending the application of concessions or other obligations of a similar nature resulting from GATT 1994 to the trade of the Member applying the safeguard measure, and there is still a possibility to adopt provisional measures in exceptional circumstances.²⁰⁶

The Advocate-General also cited the preamble in Council Decision 94/800 and stated that the recital in itself could not preclude the direct effect of the provisions of the WTO Agreement, but it reflects the fact that the reasons which led the Court to deny the GATT 1947 direct effect have not ceased to apply with regard to the WTO Agreement and the GATT 1994. However, Cosmas rejected the argument of reciprocity, put forward by the Commission. To him, reciprocity is irrelevant for the purpose of answering the question whether or not the Agreement has direct effect.²⁰⁷ Consequently the WTO Sanitary and Phytosanitary Agreement was denied direct effect because it was not sufficiently clear and unconditional.²⁰⁸

²⁰⁴ C-183/95 *Affish BV v. Rijksdienst voor de Keuring van Vee en Vlees*, Judgement of the Court 17 July 1997, ,Joined cases C-364/95 and C-365/95 *T.Port GmbH Co. v. Hauptzollamt Hamburg-Jonas*, Judgement of the Court 10 March 1998.

²⁰⁵ Opinion of Advocate General Cosmas, 10 December 1996, para. 119.

²⁰⁶ para. 119 and note 92 of the opinion.

²⁰⁷ para. 127 and note 105 of the opinion.

²⁰⁸ for more details see paras. 120-128.

The question of direct effect of the WTO Agreement, including the GATT 1994, was again raised in *T.Port*. An importer of bananas challenged, before a German court, the lawfulness of the Community Regulation 404/93 on bananas in terms of the GATT/WTO rules. Advocate-General Michael Elmer denied the WTO Agreement direct effect on the basis of previous case-law and on Council decision 94/800. The Court's case-law on the direct effect of GATT 1947 should, according to Elmer, also apply to the WTO Agreement and the GATT 1994.²⁰⁹ Since the Court answered the first question and second part of the second question in the affirmative there was no need to answer the question concerning the direct effect.²¹⁰

7.3.3.2 *Hermès International*²¹¹

In contrast with the above cases, the Advocate-General Tesauro in *Hermès International* admitted a direct effect of the WTO Agreement. The case concerned the interpretation of Article 50(6) of the TRIPs Agreement.

The Advocate-General first commented on the court's case-law on GATT 1947. Apart from mentioning some of the criticism against the Court's arguments in *International Fruit* and subsequent case-law, Tesauro himself pointed out that the Court never really has examined the content of the provisions of the GATT in order to establish whether they are clear, precise and unconditional in order to fulfil the criteria for direct effect.²¹² According to him the Court never went beyond its initial investigation which was concerned with the principal features of the GATT system, with the result that it has always come down against direct effect. Tesauro does not regard the characteristics of GATT very different from other international agreements that the Court has granted direct effect, nor does he find the provisions of the GATT that have been brought to the Court's attention in various cases less clear, precise and unconditional than other provisions of international agreements the Court has granted direct effect. In order to establish whether the characteristics attributed to the GATT system as a whole could be considered obsolete in the context of the WTO, Tesauro next examined the substantial changes in the WTO Agreement. According to him there is no doubt that the WTO system is very different from GATT 1947 and that there are "profound changes" in the factors on which the case-law of GATT 1947 is based: whereas the old GATT was characterised by great flexibility and possibilities of derogation, the derogation system under the WTO, with waivers and exceptional measures, has undergone radical changes.²¹³ Furthermore, a new dispute settlement mechanism, with the introduction of the inverted consensus, has been introduced which has changed the settlement of disputes in both form and substance. ²¹⁴ Finally Tesauro commented on the question of compensation and said that compensation is a purely provisional measure and is not a method of settling disputes. It is simply a temporary measure to prevent that the non-implementation of recommendations within a reasonable time from

²⁰⁹ paras. 27-29 of the opinion.

²¹⁰ paras. 66-67 of the judgement.

²¹¹ 53/96 *Hermès International (société en commandite par actions) v. FHT Marketing Choice BV*, Judgement of the Court 16 June 1998.

²¹² paras. 26-27 and note 43 of the opinion.

²¹³ The Understanding on Balance-of-Payments Provisions of GATT 1994 seeks to ensure that the non-tariff restrictive measures are more strictly regulated, the Agreement on Safeguards (O.J. 1994 L336 p.184) is designed to "re-establish multilateral control over safeguards and eliminate measures that escape such control" (second recital), Articles IX (3) and (4) of the WTO Agreement and the Understanding in Respect of Waivers and Obligations under GATT 1994 have made the substantive and procedural conditions governing the granting of waivers much stricter. Notes 48-49 of the opinion.

²¹⁴ paras. 28-31 of the opinion.

nullifying benefits from other contracting parties, and that cannot be considered a reason for denying the Agreement direct effect.

Based on these reasons the Advocate General concluded that the changes from GATT 1947 to the WTO make the Court's objections hitherto obsolete in the context of the WTO and consequently must lead the Court to change its position on the direct issue. Tesouro stressed that "The WTO..is unanimously agreed to represent a definite change, in the sense of being more open to judicial control and more binding."²¹⁵

However, even though the Advocate General admitted the direct effect of the WTO Agreement he also examined the relationship between the direct effect and the *principle of reciprocity* and came to the conclusion that the recognition of direct effect should be related to the principle of reciprocity in the application of the agreement. He concluded that the direct effect depends on an analogue recognition of direct effect of other Member State courts and since some other contracting states, notably United States, Canada and Japan, have not recognised the direct effect of the WTO this would lead to an imbalance in the fulfilment of the respective and reciprocal commitments undertaken. The result of an absence of reciprocity would be that if the Community recognises the direct effect of the WTO, and other WTO Members do not, Community individuals will be disadvantaged compared to their competitors of third countries since third country competitors can invoke the WTO rules before the EC Member States, but Community individuals cannot invoke the WTO rules in third country courts.²¹⁶ Consequently the Advocate General suggested that the Court follow a principle of reciprocity and that direct effect of the WTO Agreement should be denied on the basis of considerations of reciprocity.

The *Court of Justice* stressed that it was not required to give an answer whether Article 50 (6) of the TRIPs could be directly effective, and no comment was made on the direct effect of the WTO Agreement in general. The Court merely had to answer the question of interpretation submitted to it by the national court so as to enable it to interpret its national rules in the light of Article 50 (6) of the TRIPs.²¹⁷

7.3.4 Should The Court of Justice Change Its Position?

The answer is not obvious. Even though the GATT is an international agreement, which the Community is obliged to respect, the practical implications and effects of granting the GATT direct effect make it a difficult and debated issue. The question is whether all the innovations of the dispute settlement of the WTO Agreement makes it *substantially* different from the old GATT, enough to grant it direct effect. If the Court would recognise the direct effect of the WTO and its Annexes, that would be "one of the most potent instruments of its enforcement" and it is for this reason that many lawyers sometimes strongly encourage such a recognition.²¹⁸

²¹⁵ para. 30 of the opinion, note 55.

²¹⁶ paras. 31-35 of the opinion.

²¹⁷ para. 35 of the judgement.

²¹⁸ Kuijper, *supra*, 1995-1996, pp.63-64. In note 55 Kuijper points out that E-U Petersmann for a long time has pleaded for giving the GATT direct effect, in order to improve the enforcement of its rules.

Regardless of whether the changes are substantial enough to grant the WTO Agreement direct effect, many lawyers share the view that it should not be taken for granted that the Court's rulings on the old GATT can be transposed to the WTO Agreement. Even though the WTO agreement still provides for diplomatic and political settlement, and does not totally remove the flexibility of the old GATT, it is no longer possible to argue along the Court's lines in the banana judgement since the Uruguay Round Agreements introduced significant qualitative changes, especially concerning judicial enforcement where the consequence could be judicial review of acts incompatible with the Agreements.²¹⁹ In fact the DSU may well ensure a much more effective application of the rules than many other international agreements, including those which the Court previously granted direct effect and besides, "no rule of law is absolute in its application, and in many legal orders out-of-court settlements are preferred to court proceedings.²²⁰ There is some concern that if the Court continues to deny the direct effect of the WTO rules and keep the Community acts intact from under the indirect review (Nakajima and Fediol), the WTO Agreement will be useless to individuals and weaken the legal confidence of individuals in the WTO rules. It would also affect the federal structure of Community law.²²¹

Some of the lawyers refer to Opinion 1/91, where the Court emphasised the binding character of judicial decisions on disputes between the contracting parties.²²² Such decisions are binding on the Court where it rules on the interpretation of the agreement. Since the WTO dispute settlement system is an adjudicative system the panel-decisions and the Appellate Body rulings will be binding on the Community. *Piet Eeckhout* thinks that where a violation is established, the binding character of the agreement and the principle of legality "trump any lack of direct effect", and the reasons for not granting the direct effect simply cease to be valid where a violation is established. Apparently Eeckhout considers that the binding character of the WTO Agreement takes precedence over the direct effect in certain circumstances. In addition, by applying the panel and appellate rulings, the Community courts could make it clear that they do not intend to disregard the WTO Agreement which in turn could strengthen the dispute settlement system of the WTO. *Thomas Cottier* also points to the fact that the Community is confronted with decisions binding in international law, through the almost automatic adoption of panel and appellate reports and suggest, against the background of Opinion 1/91, that the Court abide by a principle of compliance.

However, if granting the GATT/WTO Agreement direct effect, there will inevitable arise practical issues which must be considered. *Philip Lee* and *Brian Kennedy* point to the serious practical results of the GATT/WTO Agreement being granted direct effect. Legal certainty and the possibility of successfully concluding negotiations in the future would be greatly diminished and a great number of the EC's basic Common Market Organization Regulations in the agricultural sector might be invalidated which would lead to confusion and uncertainty

²¹⁹ See Eeckhout, 1997, p.32, de la Torre, 1995, p.64, and G. Horlick in an amended transcription of the Panel discussion held at the 6th Geneva Global Arbitration Forum on 3 and 4 December 1997, "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?", JWT, April 1998, Vol. 32, No. 2, pp.164-165.

²²⁰ Eeckhout, 1997, p.35-36.

²²¹ N. Komuro in the amended transcription of the Panel discussion, supra, JWT, 1998, p.162-164 .

²²² Eeckhout, 1997, pp.51 f, Cottier, 1998, pp.371 f, Petersmann, "Proposals for a new constitution for the European Union: Building-blocks for a constitutional theory and constitutional law of the EU", CML.Rev. 1995, Vol.32, No 5, pp.1162 f.

in this sector. To grant GATT direct effect would also have serious repercussions for the Lomé Convention. This Convention has consistently been held directly effective by the Court, and that means that it takes precedence over the GATT in the Community legal order. There could be a direct conflict between the GATT and the Lomé Convention if the Court treats the GATT as directly effective. This could lead to very serious consequences for those ACP States benefiting from the Lomé Convention. 223 Lee and Kennedy consider that despite the fact that the WTO Agreement brought significant changes, it still seems to be based on the principle of negotiations, and they think that in order to avoid the serious practical difficulties the WTO Agreement might lead to, the Court is likely to deny the GATT direct effect on quasi-political grounds in the future. According to them, the Court is not so much concerned with encouraging the integration process through its judgements anymore like it did in *Kupferberg*. "Nowadays....the Court is thought to consider itself more as an arbiter of disputes, rather than as a positive force for integration".224 Another point to be made is the fact that disputes concerned with the implementation of the WTO rules are often legally complex. Legal disputes might best be resolved by the WTO panels and the Appellate Body who possess the specialised knowledge required, in contrast to the Community courts who are unfamiliar with the context and practice of the WTO Agreement.

As to the problem of the principle of reciprocity, *Advocate General Tesauro*, in *Hermès International*, considered the question of direct effect closely linked to the principle of reciprocity and pointed to the fact that other major WTO Members had consistently denied the GATT/WTO direct effect. *Thomas Cottier* on the other hand, does not think that the fact that the United States has denied the WTO direct effect generally exclude self-execution of the WTO rights and obligations. Neither does the fact that the Community has said that the WTO rules are not suitable for direct effect. He gives Switzerland as an example and refers to the policy of the Swiss government: "direct effect is good for the country, whatever the others think about it because it heightens our own competitiveness and it is an instrument to fight unjustified protectionism". Consequently Cottier thinks that it is beneficial to go towards the direct effect of suitable WTO rules from the point of view of competitiveness of a country. 225 This brings us to the problem of monist and dualist states. One must keep in mind, that Switzerland operates under *monism*, which means that courts give direct effect to most treaties. For countries operating under *dualism* things are a little bit different since international law and national law are seen as two completely different systems of law. National courts apply only national law and breaches of international treaties are not for them to solve, that is a matter of politics and diplomacy. The United States could serve as an example to illustrate the problems of having some WTO members granting the WTO Agreement direct effect and some not. The United States operates under dualism which means that it does not allow individuals to invoke provisions of the WTO Agreement in its courts. If all the Community countries would apply the WTO agreement in law, but the Community's contracting parties could not be forced by individuals to apply the agreement, there is a risk that the WTO agreement will be properly applied only in the Community, which would put the Community as well as individuals in a disadvantageous position.

²²³ However, it should be noted that the Lomé Convention is protected under a waiver, granted to the Community under Article I of the GATT.

²²⁴ Lee and Kennedy, 1996, p.83.

²²⁵ T. Cottier in the amended transcription of the Panel discussion, JWT, 1998, p.161 .

8. Recent and Future Development

8.1 Future Relations with The ACP States

Despite the fact that the Appellate Body found the EC banana regime inconsistent with the GATT and WTO Agreement, it still recognised the economic and social effects of the regime. In its ruling it pointed out that "(f)rom a substantive perspective, the fundamental principles of the WTO and WTO rules are designed to foster the development of countries, not impede it.. we concluded that the system is flexible enough to allow.....appropriate policy responses in the wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialisation of bananas."²²⁶ The Panel and Appellate ruling has not only made the EC revise its banana regime, it has also raised important challenges for the future of the Lomé Convention.

There seems to be a common understanding that the Lomé Convention has not been a particularly successful instrument of development policy, especially in the field of trade co-operation. Despite many efforts, the ACP states have failed to develop either as significant exporters or as markets for EU products, and their exports to other markets have not grown significantly.²²⁷ Most ACP States have not been able to make any substantial changes to their trade structures since the first Lomé Convention in 1975. This might suggest that the preferential treatment enjoyed by the ACP states in Europe is not a sufficient condition to develop ACP trade.²²⁸ Even though the Caribbean countries claim that the Lomé's guarantee of preferential access to the EU banana market is essential to their economic survival, there are some suggestions that the ACP states might be better off without the Lomé Convention. By letting the ACP states progressively open up to the whole world at a pace adapted to the need of each state's economy, current market access for the ACP states could be preserved, discrimination between developing countries would end and multilateral trade liberalisation would be supported.²²⁹

Apart from being an unsuccessful trade instrument the Lomé Convention is also inconsistent with the WTO rules. In the year of 2000 the Lomé IV expires and the European Community has recognised that any future Convention must be more consistent with the WTO international trade rules. The banana-dispute clearly proved that the Community no longer can honour its commitments to the ACP states as a whole. As a result of the consultation process in the Green Paper, the Commission proposed, in its latest communication on the future of the Lomé Convention, a number of potential trade arrangements, one of which was new co-operation agreements with the ACP which would take the form of either economic co-operation agreements, with varying degrees of reciprocity, or economic partnership

²²⁶ WT/DS27/AB/R, para. 8.3

²²⁷ McMahon, 1998, p.113 and 1996; "Lomé IV-A Blueprint for the Future or a Relic of the Past" in The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market, ed. S. Konstantinidis, p. 193, Grynberg, supra, pp.1 f, and A.Koning, "Challenges to ACP Trade with Europe after the Uruguay Round", http://www.oneworld.org/ecdpm/pmb/b1f_gb.htm, 981006, pp.1 f.

²²⁸ Koning, supra, pp.2-3.

²²⁹ H.B.S. Lecomte, "Musings from Maastricht, International trade: Would the ACP be better off without Lomé?", http://www.oneworld.org/ecdpm/musing/hs11_gb.htm, 981006, p.1.

agreements.²³⁰ In addition, even though the Appellate ruling might seem disastrous to many ACP states, it might lead to closer co-operation between the Community and those states most affected by the WTO ruling, since the Community more or less are forced to encourage, promote, and make those states more competitive. The amendments proposed by the Commission (see below) would substantially alter the market conditions for the traditional ACP suppliers; by dismantling the import licensing system there will be no "mechanism to bridge the gap between Latin American and ACP bananas".²³¹ Also, under the GATT 1994, waivers are only available on a year to year basis and renewal of the waiver depends upon progress being made by the state receiving the waiver. This could leave the Lomé Convention open to debate every year and in turn be an incentive for the Community to successfully promote trade development in the ACP states, since requesting a waiver every year will lessen their credibility, as well as the WTO's.

8.2 Towards A Trade War?

In order to comply with the Appellate ruling of the WTO, which the EU must do before January 1999, in January this year, the European Commission adopted a proposal to modify the regulation establishing the Common Organisation of the market in bananas. In short it proposed to maintain the tariff quota at 2,2 million tonnes at the rate of duty of ECU 75/tonne, to establish a further autonomous tariff quota of 353,000 tonnes at a duty of ECU 33/tonne taking into account the enlargement of the EU, to abolish the present import licensing arrangements and replace them with a system which is clearly compatible with the WTO, to grant a share of the tariff quota to all suppliers with a substantial interest and therefore not allocate individual countries shares within the total allocation for traditional African, Caribbean and ACP suppliers. In addition the Commission proposed to provide technical and financial assistance to traditional ACP suppliers in order to increase their competitiveness. The EU believes that some guarantee of preferential treatment, in the form of guaranteed access to the EU banana markets is essential if the ACP countries are to preserve their economies. There is also a fear that if the traditional ACP banana producers lose markets, they might start earning a living as drug producers and traffickers instead.²³² The Commission proposal was however rejected by the U.S. who argued that the proposal did not conform completely with all the findings of the WTO panels. According to the Special Ambassador in the Office of the U.S. Trade representative the Commission proposal continues to discriminate against Latin American bananas. Setting up a separate banana regimes runs counter to the WTO ruling and the Latin American tariff quota of 2.2 million tonnes greatly restricts their access in terms of historical shipments and growth rates. The U.S. fears that the EU might allocate the tariff quota in a way that discriminates against Chiquita Brands International. The U.S. also warned the EU against constructing a system that would require derogations from WTO rules through a broad waiver. "Such considerations should be rejected as failing to settle the banana dispute, hurting long-term prospects of Latin American exports, and undermining the credibility of the WTO dispute settlement system".

²³⁰ Green Paper on EU-ACP Relations of the Eve of the 21 st century (Brussels, 1996), pp.63-68, where the Commission offered the ACP states four potential trade arrangements. Also the Communication on the future of the Lomé Convention, COM (97) 537

²³¹ "The Commission proposes to modify the EU's Banana Regime", http://www.oneworld.org/euforic/spp/9828_gb.htm, 14 January 1998, p.1.

²³² "Washington goes bananas over Europe's rules on imports", The Daily Telegraph, November 11, 1998

Instead the EU should establish a tariff-only system, under which the EU would grant tariff preferences to ACP suppliers and impose higher tariffs on Latin American imports. This would give the U.S. banana marketers a chance to sell more bananas in Europe than they would be able to under a tariff quota.²³³

The past few months' development clearly illustrates that the banana dispute is far from settled. The EU did not follow the U.S. proposal, insisting that the changes made to the banana import regulation are in line with the WTO ruling. On November 10 this year, the U.S., pressured by the demands of the multinational company Chiquita Brands International and its powerful chairleader Carl Lindner, threatened to impose punitive tariffs on hundreds of millions of dollars of European exports unless the EU complies with the WTO ruling. The penalties, which hit a vast variety of goods including wine, fruit, juices, cheeses, bread, pastry, clothes, toys and sewing machines would double the price of the European products on the U.S. markets. The EU answered on December 15 this year by challenging the legality of the U.S. sanctions before the WTO, claiming that the U.S. as a WTO Member, has no right to unilaterally judge the compliance of another Member State.²³⁴

²³³ "U.S. Rejects New Plan For Banana Regime As Violating WTO Rules", http://insidetrade.com/swec-cg...SEC_current+B+trade9822#trade9822, 16 January 1998, pp 1-2.

²³⁴ "U.S. Threatens to Hit EU With 100% Tariffs", The International Herald Tribune, November 11, 1998, "Washington goes bananas over Europe's rules on imports", The Daily Telegraph, November 11, 1998, "EU to Turn to WTO to Fight U.S. Threat", The International Herald Tribune, November 12, 1998, "Let's Make Bananas, Not Trade War", The International Herald Tribune November 27, 1998

9. Conclusion

The Uruguay Round clearly illustrates the trend towards increased trade liberalisation and competition and it is clear that substantial changes have been made to the GATT by the introduction of the WTO. The question remains however whether these changes are substantial enough to allow the WTO Agreements direct effect. It is true that the introduction of the DSU removed much of the flexibility and unpredictability of the system, and the fact that the DSU is a binding, integrated system with a right for the parties to the establishment of a panel, a right to appeal with tight timetables to work against, has greatly judicialized the system. However, the banana dispute clearly illustrates that despite these innovations the system still has a long way to go before functioning as a proper judicial system with proper courts. The outcome of the dispute proves what many lawyers feared; that the big trading players will do whatever they want despite the "binding" reports and the threat of retaliation measures. The system apparently has shortcomings regarding the implementation of the panel and appellate findings. Since the DSU does not address cases where an offender claims to have implemented panel findings and the complainant says it has not, this might well lead to a deadlock, as we saw in the banana dispute, where the EU claims to have implemented the Appellate Body report and the U.S. claims it has not. Still, I agree with many of those lawyers saying that the European Court of Justice cannot simply extend its reasoning on the lack of direct effect of GATT to the new agreements. The Court must realise that it is today facing an agreement much more predictable and less flexible which can provide for legal certainty to a much larger extent than the old GATT. The innovations of the old GATT simply make the Court's arguments for denying the GATT direct effect out-of-date.

In my opinion the debate has focused a little too much on the fact that the GATT no longer is a flexible system characterised by negotiations. According to established case-law, an agreement, or provisions in an agreement, must also create rights for individuals, private rights, that they can invoke before national courts, in order for the agreement and its provisions to have direct effect. The WTO is first and foremost an *international* organization which creates rights and obligations between States, not individuals, in contrast to the EU which is a *supranational* organization, which creates rights and obligations for States and its citizens. I believe this fact has been forgotten in the debate and there seems to be a willingness to compare the WTO with the European Community, especially with regards to the judicial proceedings. Comparisons are interesting and important, but unfortunately not very rewarding when not comparing like to like. However, with the introduction of the TRIPs, the WTO Agreement does seem to include also private rights which implies that not the whole of the WTO Agreement should be denied direct effect, only certain parts. The Court's latest case *Hermès International* could have been an important clarification in this respect since it was asked to interpret a provision of the TRIPs Agreement. Unfortunately it did not comment on the direct effect of the TRIPs provision. I believe that it is essential for the Court to also examine whether the WTO Agreement includes private rights, instead of simply referring to the great flexibility and uncertainty of the system. Those arguments are out-of-date.

I think the strongest argument for denying the WTO Agreement direct effect is the principle of reciprocity. However, the fact that the other major trading partners within the WTO have refused to grant the GATT direct effect is not an argument per se for denying the agreement direct effect. Political imbalance should not be the reason the WTO Agreement is denied the powerful instrument of direct effect. But the fact that Community citizens will be placed in a disadvantageous situation in trade disputes if only the EU grants the WTO Agreement is a very strong argument. The consequence of the EU granting the WTO rules direct effect and its other trading partners within the WTO refusing to do so, is that the Community's contracting parties cannot be forced by individuals to apply the Agreement and therefore there is a risk that the WTO Agreement only will be properly applied in the Community. Clearly, that is not the intention of the WTO Agreement.

It remains to be seen what scope *Nakajima* and *Fediol*, if interpreted broadly by the Court of Justice, may offer for applicants to use GATT as a basis for applications to the Court. My guess is that the Court will be very careful in interpreting those judgements too broadly and will consider them as exceptions rather than the rule and therefore limit instead of broaden their enforcement.

The banana dispute is a sad example of big trading players threatening to weaken the WTO and its dispute settlement mechanism over something that neither of them actually grows in any quantity. No one has greater interest in the effectiveness of the WTO than the world's top trading nations and it is regrettable that the U.S. and the EU cannot set the good example they ought to do. Also the fact that they are fighting over the bananas that the hurricane Mitch just managed to miss make them look bad. The U.S. threat of introducing sanctions unilaterally rather than through the approved multilateral procedures will most certainly lessen the WTO's future authority. The attempt to prove to the world that the WTO is a stronger forum for settling trade disputes than the GATT, with a judicialised system with binding rulings and instruments of implementation, has unfortunately failed to large extent. By being very vague about how its ruling against the EU should be implemented, and not being able to force states into compliance the WTO has shown that it is not yet a fully fledged adjudicative system. Although there have been many disputes involving several complainants in the past, the banana dispute is the only GATT/WTO dispute with as many claims, examining as many measures and involving as many WTO Agreements. With 5 complainants, 20 countries reserving their third party rights to intervene or make presentations, four separate panel reports of several hundred pages each, submissions to the panel and the appeal to the Appellate Body the banana dispute has been focus of an enormous activity in the WTO and it is also widely recognised as the most complicated case to date.²³⁵ Director General of the WTO, Renato Ruggiero called the dispute a test case for the WTO. The banana dispute gave the WTO a chance to demonstrate their role as on the world trade arena. It is therefore very regrettable to note that the test failed.

Still, even though the WTO has made mistakes, the banana dispute shows the important role and potential impact of the WTO in the world trading system. Even though the EU seems to be avoiding compliance with the WTO ruling by means of technical and legalistic manoeuvres, the ruling of the Appellate Body has in fact made the EU change its banana regime. The EU is no longer permitted to protect its internal market at all costs, by conducting

²³⁵ The WTO complaint has been commented, inter alia, by Werner, H.P., "*Lomé, The WTO and bananas*", http://www.oneworld.org/euforic/courier/166e_wer.htm, updated January 21 1998, p.1, and McMahon, 1998.

in protectionist measures and the WTO will put more pressure on the ACP states to open their markets and adapt their trade policies. Despite waivers, the Community can no longer protect their market from world-wide competition. In that respect the WTO is, and will be a future authority to count with. This will naturally have effects on intra-EC policies, and the knowledge and respect of WTO rules will have to be increased.

One must not forget that the WTO is a new phenomena with the same problems as other big organizations; politics still playing a major role and big forceful states wanting to have it their way. Still, in order to operate as an adjudicative system the rules for implementation of the rulings and recommendations from the panels and the Appellate Body. As long as there are no powerful instruments of enforcing its rules, the WTO will have difficulties to claim its role as the world's most powerful international trade organization.

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