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The direct effect of GATT/WTO
law in the EC legal order

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Summary

This thesis handles the direct effect of GATT and WTO law in the Community legal order, an intricate matter that is characterised by political considerations and a delicate mix of internal and external community competences.

The current stance of international trade law in the EU can largely be attributed to the evaluations and considerations made by the Community Courts in their voluminous jurisprudence on the subject. These Courts have consistently upheld the denial of direct effect of GATT provisions, a position that has later carried over to cover also WTO law. There are however, certain exceptions to this approach, either concerning provisions of mixed agreements or within the sphere of 'indirect effect'. It seems rather logic that the Court cannot deny direct effect to provisions in mixed agreements such as the TRIPS since they partly fall outside the Community competences and thereby is an issue under the member states jurisdiction. The 'indirect effect' case is less clear cut, but can be considered to flow from the *principle of consistent interpretation* and the *principle of implementation* as developed by the Court in the *Fediol* and *Nakajima* case law. The importance of this indirect effect has however not been as influential as first envisaged by many authors, since the Court has been very reluctant to make use of the doctrine in any large extent.

The criticism of the Court's continuous denial of direct effect has been harsh. Several Advocate Generals, many authors, as well as I, have found the Court's position to be inconsistent and truly unfortunate. The Court has reached its conclusion by employing their own general direct effect test, finding that the 'nature and structure' of the GATT/WTO does not have the characteristics of an agreement that can be given direct effect. The main reasons put forward for this conclusion have been the GATT/WTO Agreements reciprocal nature and flexible dispute settlement mechanism. This reasoning does however fail to take note of the increasing compulsory elements of the WTO's dispute settlement and it is contradicted by the Court's granting of direct effect to other international agreements. Agreement which 'nature and structure' does not seem to differ to much for the ones of the GATT/WTO, opening up for speculation concerning the 'real' motifs behind the Court's reasoning.

This unconvincing reasoning is generally consider to be tainted by political consideration, that the Court has deemed necessary for balancing the Community institutions' interests in regards to the international trade regime. This approach has then meant that the protection of the rights of individuals has had to take the backseat, which is especially regrettable in the case of decisions from the DSB. In regards to which the Court has taken the position that, individuals may not rely on the Community's non-compliance with DSB decisions in claims for damages

This criticism is clearly justified, but one must not neglect the constitutional considerations embedded in the issue. It is otherwise an apparent risk that the democratic legitimacy could be undermined if the judicial institution of the EU would determine such a sensitive issue as the direct effect of GATT/WTO law. This question should instead be left to the discretion of the political branch, and the Council and European Parliament. The granting of direct effect could however be extended to DSB decisions without distorting the *trias politica*, since the question would merely fall under the general *pacta sunt servanda* principle. A stance yet to be taken by the Courts, but one strongly needed in order to give the rights of individuals a stronger position in the external relations of the EU.

Sammanfattning

Denna uppsats avhandlar direkt effekt av GATT och WTO lagstiftning inom gemenskapsrätten, ett komplicerat område som karakteriseras av politiska överväganden och en avvägd blandning av interna och externa kompetenser.

Det rådande rättsläget för internationella handelsreglers position inom EU kan till stor del tillskrivas de överväganden och bedömningar som gjorts av EG-domstolen i en mängd rättsfall inom området. Domstolen har kontinuerligt avvisat direkt effekt av GATT regler, ett ställningstagande som senare även har överförts till WTO lagstiftning. Det finns huruvida vissa undantag till Domstolens avvisande, antingen rörande ”blandade avtal” eller inom begreppet ”indirekt effekt”. Fallet med ”blandade avtal” ter sig logiskt, eftersom Domstolen inte kan avvisa direkt effekt av regler i avtal såsom TRIPS där Gemenskapen och medlemsländerna är gemensamt kompetenta. Vissa regler faller då utanför Gemenskapens behörighet och är därmed en fråga under medlemsländernas jurisdiktion. Undantaget för ”indirekt effekt” är mer svårdefinierat men kan anses flöda från *principen om konsekvent tolkning* och *principen om implementering*, vilken utvecklats av Domstolen i *Fediol* and *Nakajima* rättegångarna. Effekten av dessa båda principer har dock inte blivit så betydelsefull som många författare först förutspådde, eftersom Domstolen har varit ytterst ovilliga av använda sig av undantagen i någon större utsträckning.

Domstolen kontinuerliga vägran att erkänna direkt effekt till GATT/WTO har kritiserat hårt. Flera Generaladvokater, många författare och jag själv har funnit Domstolen ställningstagande både inkonsekvent och olyckligt. Domstolen har tagit ställning genom att använda sitt eget ”direkt effekt test”, och funnit att GATT/WTO inte är av sådan ”natur och struktur” att avtalen kan ges direkt effekt. Det huvudsakliga skälet för detta är uppfattningen att GATT/WTO avtalen karakteriseras en ömsesidig natur och ett flexibelt tvistelösningssystem. Domstolens argumentation misslyckas dock med att uppmärksamma det ökande inslaget av tvång inom WTO:s tvistelösningssystem och sägs även emot av Domstolen beviljande av direkt effekt till andra internationella avtal. Avtal vars ”natur och struktur” inte ter sig olik WTO:s, vilket öppnar upp för spekulation rörande de bakomliggande motiven för Domstolens ståndpunkt.

Domstolen resonemang är inte övertygande och den generella uppfattningen är att dess position är färgad av politiska överväganden, vilket den bedömt vara nödvändigt för att balansera institutionernas intressen i förhållande till det internationella handel systemet. Denna metod har då betytt att skyddet av individuella rättigheter kommit i andra hand, vilket framförallt är fallet rörande direkt effekt av beslut från WTO:s tvistelösnings organ. I förhållande till vilket Domstolen har tagit positionen att; individer kan inte åberopa Gemenskapens vägran att följa WTO beslut i skadeståndsanspråk.

Kritiken mot Domstolens beslut att inte erkänns direkt effekt till GATT/WTO lag är berättigad, men man kan dock inte bortse från de konstitutionella övervägande som är en ofrånkomlig del av varje erkännandet av direkt effekt. Eftersom det annars är en uppenbar risk att den demokratiska legitimiteten undermineras, ifall Gemenskapens dömande makt skulle avgöra ett så känsligt ämne såsom direkt effekt av GATT/WTO lag. Denna fråga bör i stället avgöras av de lagstiftande institutionerna; Rådet och Europaparlamentet. Direkt effekt kan dock utvidgas till beslut från WTO tvistelösnings organ utan att förvrida maktfördelning inom EU eftersom frågan kan anses falla under den civilrättsliga principen *pacta sunt servanda*. Ett sådant beslut har än ej fattat av Domstolen men är starkt eftertraktat för att ge individuella rättigheter ett starkare skydd i EU:s externa relationer.

Abbreviations

ACP	African Caribbean Pacific
ADA	Anti Dumping Agreement
AG	Advocate General
ATC	Agreement on Textile and Clothing
CCP	Common Commercial Policy
CFI	Court of First Instance
CMLR	Common Market Law Review
CU	Customs Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EEC	European Economic Community
ECJ	European Court of Justice
EJIL	European Journal of International Law
EMU	European Monetary Union
EP	European Parliament
EPA	European Partnership Agreement
FAO	Food and Agriculture Organisation
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT 47	General Agreements on Tariffs and Trade 1947
GATT 94	General Agreements on Tariffs and Trade 1994
GPCL	General Principles of Community Law
ICJ	International Court of Justice
ILO	International Labour Organisation
IMF	International Monetary Fund
LDC	Least Developed Country
MS	Member States
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
RTA	Regional Trade Agreement
SPS	Sanitary and Phytosanitary Standards
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1 Introduction

The last half century has meant an increased role for regional co-operations on the international stage. This is especially true for the European Union that during its lifespan has grown from its initial propose of bringing peace and prosperity among a handful of neighbouring countries, to a global actor with a common foreign, security and trade policy. There are a number of interesting areas concerning the relationship between the EU and third parties, but the increasing importance of trade in this day of globalisation, means that the relationship with the World Trade Organisation (WTO) is of special interest. The legal relationship between supra national organisations is usually characterised by political compromises and constitutional restraints. Factors that render these relations somewhat complicated from a legal perspective, while in the same time, more interesting from an academic perspective. This is without doubt the case with the intricate relationship between the EU and WTO legal orders. The relationship started with the WTO predecessor, the General Agreement on Trade and Tariffs (GATT 47) and its relation with the European Communities, and has during recent years been extended to encompass also the rulings of the WTO's dispute settlement body and the standing of these acts in the Community legal order.

Of special interest in these legal relationships, as is the case with most other international agreements, is whether they are to be given direct effect in the EU's legal system. This effect is undoubtedly one of the most important legal effects employed within the EU, especially for the protecting of individual rights. Rights that otherwise tends to be overlooked in international law, were both the protection and direct representation of the individual are scarce.

1.1 Method and Scope

The method chosen for this thesis is a case study of the substantial number of case law in regards to direct effect. The jurisprudence of the Court has been the main source of law within the field, wherefore it make up the major part of this thesis. This jurisprudence has also been extensively discussed and analysed in the academic literature, thereby making this literature an important source of law for this thesis. Due to the large number of these publications, an equally important part of the work process has been to sort out and select the most relevant material among these publications.

In order to fully appreciate the main subject; the first chapters will provide a background to several areas that determines and influences the stance of international trade law within the EU. This background does therefore deal with basic trade law, external EC competences, as well as fundamental principles in the relationship between the EC and other international

organisation. The continued review of the most important case law is made up by a selection of cases from the Community court that has either evolved or reaffirmed the doctrine of direct effect. The concluding part will then handle a review of the academic discussion and both pro's and con's of the *de lege lata*, in other to sum up and to more easily grasp the reasoning behind the current stance of direct effect.

1.2 Disposition and Definitions

The disposition of this paper is as follows.

First, a brief explanation of the GATT and WTO and their relationship to the EU is undertaken. (*Chapter 2*) The next chapter then examines the legal framework of the EC's external competences, since an understanding of the division of competences between the EU and its Member States is needed to understand the Community institutions' roles in the international trade regime. (*Chapter 3*) Then some basic notions concerning the role of international agreements in the EC legal order, such as the legal standing and implementation of these agreements as well as notions like monism and dualism, will be explained. (*Chapter 4*) The next chapter introduces the notion of direct effect and other related legal principles, such as indirect effect, (*Chapter 5*) which is relevant for understanding the following account of the case law on direct effect within the EC legal system. (*Chapter 6*) The concluding chapter then analyses the main arguments put forward in the Courts' jurisprudence and in the academic literature for granting/denying direct effect of GATT/WTO provisions, together with some of the author's own comments and ideas concerning the issue. (*Chapter 7*)

Some clarifications might be need in regards to the terminology used in this paper; *EC* will be used for the cooperation undertaken under the first pillar, whereas *EU* is used when referring to the European cooperation as a whole. The *EC* and the *Community* will be used as synonyms, in order to avoid too much repetition and for linguistic reasons, and the same goes for the use of the *ECJ* and the *Court* and the *CFI* and the *Tribunal*. When referring to the *WTO Agreements*, this is shorthand for referring to the agreements that arose out of the Uruguay Round of negotiations (1986-94).

2 The EU in the GATT/WTO

2.1 EC in the GATT

The relationship between the EC and the GATT is close and has been so since the creation of the EC. The GATT being the older body originates as far back as to the Bretton Woods conference in 1944. The conference meant the establishment of the IMF and the World Bank, but failed to produce any general agreement concerning international trade. Multilateral negotiation on trade did however continue and did three years later result in the General Agreement on Tariffs and Trade (GATT 47). The agreement was ratified by all the European states, which ten years later would form the EC, thus making these countries member of the GATT before they acceded to the EC. Since its creation, the role and obligation of the European member states in regards to the GATT has gradually been taken over by the EC, leading to the present situation where the EC, in all intents and purposes, is assuming the status of a contracting party to the GATT. An example of approach is that the EC since the seventies has acted on behalf of its member states in most agreements that have been negotiated under the GATT.¹ This was also the case under the Uruguay Round of Multilateral Trade Negotiations, where the European Commission handled all negotiations on behalf of both the Community and the member states. All substantive and procedural provisions of the GATT do furthermore treat the EC like a contracting partner,² a role that is also exemplified by the fact that almost all dispute settlements proceedings under the GATT have been addressed towards the EC itself, and not its member states.³ When these facts are read in conjunction, they obviously strengthen the notion that the EC has replaced its member states as the holder of rights and obligations under the GATT.⁴

2.2 EU in the WTO

When the Uruguay Round of Multilateral Trade Negotiations reached an accord, it meant the conclusion of the WTO Agreement, which was signed in Marrakech on April 15 1994. The agreement at Marrakech created the

¹ Bourgeois, *The European Court Of Justice and the WTO: Problems and Challenges*, in *The EU, the WTO and the NAFTA – Towards a Common Law of International Trade*, Weiler J.J.H. (eds.) (Oxford University Press, Oxfors, 2000) p. 71

² Leal-Arcas, *The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court's Problem with Regard to International Agreements*, *Nordic Journal of International Law* 72 (2003) p. 217

³ Petersmann, *European and International Constitutional Law: Time for Promoting 'Cosmopolitan Democracy' in the WTO*, in *The EU and the WTO-Legal and Constitutional Issues*, De Búrca, G & Scott, J. (eds.) (Hart Publishing, Oxford, 2003) p. 38

⁴ Van den Bossche, *The Law of the World Trade Organisation* (Cambridge University Press, Cambridge, 2005) pp. 83-85

World Trade Organisation, which currently has 152 member countries and represents 92 percent of the world population.⁵ In addition, there are also currently more than 25 countries in accession negotiations,⁶ all factors truly making the WTO a global actor.

The objective of the WTO Agreement is usually thought of as ‘market integration’ and ‘free trade’, even if these concepts are not stated in any treaty text.⁷ The general purpose is instead a more pragmatic one, namely ‘expanding the production of and trade in goods and services’.⁸ The Uruguay round added the General Agreement on Trade in Services (GATS) and Trade Related Intellectual Property rights (TRIPS) to the existing agreement on trade in goods (GATT 47), wherefore these agreements are considered as the three substantial pillars of the multilateral trading system. Another important change brought about with the establishment of the WTO was the inclusion of the Rules and Procedures Governing the Settlement of Disputes and Trade Policy Review Mechanism (TPRM). These different agreements are then usually what are meant when referring to the WTO Agreements. The WTO system does moreover contain some plurilateral agreements such as the Agreement of Government Procurement (GPA) and the Agreement in Trade in Civil Aircraft. Membership of these plurilateral agreements does not always follow the membership of the multilateral ones, but all member states of the EU that have joined the multilateral ones had also acceded to the plurilateral.⁹ The WTO agreements do also contain several other differences compared to the GATT 47. The GATT 47 itself was given a much clearer and more precise standing with the entry into force of a number of ‘Understandings on Interpretation’,¹⁰ while agreements aimed at special sectors such as agriculture and textiles also were concluded,¹¹ as well as some new instruments regarding specific measures such as the ones mentioned in the SPS and TBT Agreements. Even if the Uruguay round brought with it many major changes, the most important change was probably the stronger institutional balance in the WTO, as well as its sophisticated and in many regards ‘judicialised’ system of dispute settlement.¹²

The position as one of the four major actors in international trade has meant that the EC has had an important role in the GATT 47.¹³ This role has certainly been retained following the creation of the WTO, an organisation to which the EC in itself has acceded. The legal basis for the EC’s

⁵ <http://www.wto.org>

⁶ Van den Bossche, *supra* note 4, p. 103

⁷ Von Bogdandy, A. – *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, Max Planck Yearbook of United Nations Law Volume 5 (Kluwer Law International, The Hague, 2001) p. 659

⁸ As stated in the third recital of the Preamble to the WTO Agreement

⁹ <http://www.wto.org>

¹⁰ Annex 1a WTO Agreement

¹¹ Agreement on Agriculture & Agreement on Textiles and Clothing

¹² Eeckhout, *The External Relations of the European Union* (Oxford University Press, Oxford, 2005) p. 294

¹³ The others being; U.S., Japan, Canada ; Leal-Arcas, *supra* note 3, p. 216

membership in the WTO is found in the TEC, which stipulates that ‘the Community shall have legal personality’.¹⁴ This personality is however reserved for the EC and an important distinction in this respect is that the European Union is not part of the WTO as it lacks legal personality.¹⁵ Both the EC and its member states are then members of the WTO, a situation that can be largely attributed to political compromises. The time following the conclusion of the Maastricht Treaty was a period characterised by major political intra community conflict, and the Commission at the time was extremely unpopular.¹⁶ The Commissioner for Competition Sir Leon Brittan did therefore not want to upset the Council and the member states and did not push for a sole membership of the EC, which was reflected in the role the Commission was given by the Court in Opinion 1/94, an issue that will be handled in the following chapter.¹⁷ The result of these political considerations is then the current regime where the contracting parties to the GATT 47 (i.e. the MS) and the EC both became original members of the WTO.¹⁸ The effect this has on the functioning of the WTO’s decision-making procedure is sorted out in the WTO Agreement, with the granting of one vote to each member state, while the EC, when choosing to exercise its right to vote, has the number of votes equal to the number of its member states.¹⁹

2.3 Main characteristics of GATT/WTO

The basic framework of rules on trade in goods is found in the original GATT 47, which a part from containing numerous general regulations on global trade, also have certain rules with special implications for EU. One of the most important principles for the EU is the fundamental *most favoured nation* (MFN) clause, found in Article I. (1) of the GATT 47, which provides that:

‘any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the product originating in or destined for the territories of all other contracting parties.’²⁰

This principle is obviously violated by a co-operation such as the EU, which grants preferential treatment to its member states, and the GATT 47 has for this reason provided exceptions from the MFN treatment.²¹ The exception

¹⁴ Article 281 TEC

¹⁵ Even if this will change with the adoption of the Lisbon Treaty. As its Article 46 A reads: ‘The Union shall have legal personality’

¹⁶ Bourgeois, *supra* note 1, pp. 72-73

¹⁷ Billet, *From GATT to WTO: The Internal Struggle for External Competences in the EU*, JCMS 44:5 (2006) p. 903

¹⁸ Article XI of the WTO Agreement

¹⁹ Article IX (1) of the WTO Agreement

²⁰ The MFN obligation for the trade in services is, in similar wording, found in Article II GATS.

²¹ Article XXIV GATT 1947, corresponding for services in Article V GATS.

applies to regional trade agreements (RTAs) such as free trade area (FTA) and customs union (CU), arrangements that both share characteristics with the EU.²² (Even if the EU from an economical integrationist perspective is a developed form of a CU, it does also share the CU's trait with no internal tariffs and common tariffs towards third parties.)²³ According to the exception, the RTAs are allowed since they from an economic efficiency perspective achieve higher trade liberalization and thus greater gains from trade. The beneficial effects for the members of the RTA are therefore considered to outweigh the negative effects on third parties.²⁴ When forming a RTA, one must nevertheless make sure that such an agreement does not give rise to higher customs' or other duties of commerce than before the formation of such cooperation.²⁵ The same duties and regulations must also be applied to other non-members, even if there are some exceptions allowing asymmetric treatment in regards to provisions for e.g. developing countries.²⁶ Thereby characterising the GATT/WTO Agreements as reciprocal in most areas, but clearly not in all, since non-reciprocal concessions are an important aspect in regard to policies aimed at LDCs.

2.4 WTO dispute settlement

The GATT 47 did not provide any elaborate dispute settlement system, wherefore the entry into force of the refined dispute settlement system of the WTO meant a big step forward for the evolution of dispute settlement in international trade.²⁷ The dispute settlement system is made up by the Dispute Settlement Body (DSB), which is a political institution and the judicial type institutions; the dispute settlement Panel and the Appellate Body. The system, in which these bodies interact with each other and the procedural rules for their work, is regulated in the Dispute Settlement Understanding (DSU),²⁸ which stipulates that a party when consultations has failed, may request an establishment of a Panel, which is then formed by a decision by the DSB. The finding of the Panel is presented in a report, which later can be appealed, as in 70 percents of the cases, to the Appellate Body.²⁹ The findings of these two bodies are then adopted by the DSB, meaning that the system, from a formal viewpoint, is non-judicial. The

²² Egelund Olsen et al., *WTO Law - from a European Perspective* (Forlaget Thomson, 1st ed., 2006) p. 95

²³ Senior Nello, *The European Union – Economics, policies and history* (McGraw-Hill Education, 2005) pp. 3-4

²⁴ Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford University Press, Oxford, 2007) p. 32

²⁵ Article XXIV GATT 47 & Article V 1b GATS

²⁶ E.g. *general system of preference & infant-industry-protection exception*; Van den Bossche, *supra* note 4, pp. 676-682

²⁷ Van den Bossche, *supra* note 4, pp. 177 -182

²⁸ Articles 16-22 DSU

²⁹ Van den Bossche, *supra* note 4, p. 270

adoption of the report has however become a mere formality, wherefore it may be considered that the law prevails under the DSU.³⁰

The DSU itself states, that its aim is offering the members of the WTO an efficient and compulsory system for the settlement of trade disputes in a secure and predictable manner.³¹ Which it indeed is more likely to do than its predecessor, due to the increased scope of the dispute settlement system brought with the conclusion of the WTO Agreement.³² The DSU mechanism is compulsory and the consensus role for adoption of panel reports has now been reversed wherefore the DSB will only fail to adopt a report in the case of *negative consensus*.³³ An important change is also that preferential trade agreements now fall under the scope of the DSU, where exceptions to the MFN rule earlier was not fully under the jurisdiction of the Panel system.³⁴ This is believed to create an effective system for peaceful resolutions of trade disputes, while in the same time increasing the possibilities to solve also politically sensitive disputes.³⁵ Leading some authors, like Eeckhout, to characterise the new DSU system and the WTO agreement, with the words:

*'WTO law has stringer bite than many other international agreements.'*³⁶

The need for the WTO members to oblige with Panel and Appellate body decisions as laid out in the DSU, which corresponds with the statement in the WTO Agreement, providing that the multilateral trade agreements are *'binding on all member'*.³⁷ This do in itself follows from the obligation for the members to: *'ensure the conformity of its laws, regulations and administrative procedures with its obligations'*.³⁸ The manner in which the member implements these obligations is however left to their own discretion, and so is as well, the question about legal effect of the WTO Agreement.³⁹

³⁰ Leal-Arcas, *supra* note 3, p. 233

³¹ Article 3(7) DSU

³² The only dispute settlement provisions in GATT 47 are Article XXII & XXIII. This clearly exemplifies the difference in scope after the conclusion of the Uruguay Round.

³³ Article 16 DSU

³⁴ Cottier, *Dispute Settlement in the World Trade Organisation: Characteristics and Structural Implications for the European Union*, CMLR 35 (1998) pp. 332-333

³⁵ Van den Bossche, *supra* note 4, p. 298

³⁶ Eeckhout, *supra* note 12, p. 294

³⁷ Article II:2 WTO Agreement

³⁸ Article XVI:4 WTO Agreement

³⁹ Egelund Olsen *et al.*, *supra* note 22, p. 112

3 External Competences of the EC

The Community law on external relations are not fully laid out in the treaties but have instead been developed through the years in a substantial number of case law. Since this thesis focus is on the relationship between European law and international trade law, the emphasis will be on the first pillar and the competences of the EC. The focus on the EC's external relations has long been on trade related issues, an area that has also been important internally due to its close connection to the four freedoms.⁴⁰

There are three general types of external agreements. *First*, the ones where the Community has the sole treaty-making competence in a certain area and does thus bind both the Community and the member states when entering into agreements with third countries. The *second* type is where the member states have exclusive competences, making the issue fall outside the sphere of EC law. The *third* type is mixed agreements where the community and the member states act jointly on one side, with third countries on the other. The external powers of the Community can furthermore be characterised depending on whether they are explicitly provided for in treaty provisions, *expressed*, or implicitly flowing by way of interpretation, *implied*.

3.1 Expressed competences

In the original EEC Treaty, the references to external competences were limited to the common commercial policy (Article 133) and for the conclusion of association agreements (Article 310).⁴¹ The present regime allows the EC to undertake international activities either autonomously or unilateral and as complement to the legal basis' in Art 133 & Article 310 TEC. There are other expressed competences in Article 302-304 TEC that governs the EC's relations with international organisations, such as the UN and the OECD.⁴² In addition, to these expressed competences there is also the general provision in Article 300 TEC that regulate the procedural aspects of external relations.

3.1.1 Article 300 TEC

The procedural provisions in Article 300 TEC regulated all agreements that are concluded on behalf of the Community, except the EMU and CCP that

⁴⁰ Eeckhout, *supra* note 12, p. 347

⁴¹ Ott & Wessel, *The EU's External Relations Regime: Multilevel Complexity in an Expanding Union*, Working Paper Universiteit Maastricht (2005) p. 5 ff.

⁴² Craig & De Búrca, *EU Law- Text, Cases and Material* (Oxford University Press, Oxford, 3rd edition, 2003) p. 128

has their own special provisions.⁴³ Article 300 further clarifies the division between external and internal competences without being a competence norm in itself; instead, it merely implies competences rather than specifying them.⁴⁴ The division of competences among the institutions is that the Council acts with qualified majority as the treaty-making body and mandates the Commission to handle the negotiation with other states and organisations. The EP's input depends on the content of the agreement but are generally limited to consulting, as under the CCP. While the Courts role is to produce legal opinions, acts of annulment and preliminary rulings in regards to the treaty making powers of the EC. Apart for stipulating the division of competences, the article also provides an important aspect in the 300(7), which states the legally binding effect of international agreements on the EC institutions as well as on declaratory member states. This provision, which is a repetition of the civil law principle *pacta sunt servanda*, has proved to be a cornerstone in the external relations doctrine developed by the Court. The article does then, in combination with Article 133 TEC, make up the main legal basis for when the Community enters into international trade agreements.

3.1.2 Article 133 TEC

The common commercial policy under Article 133 TEC is the only area of exclusive external community competences, outside fisheries conservation. The CCP has been extensively discussed during the lifespan of the EC, and several important intercommunity battles have been fought over its meaning and interpretation. The CCP was first established as a condition for the establishment of the common community market,⁴⁵ since the transfer of member states competences to the EC in the area of commercial policies is needed to achieve a well functioning integrated market. The CCP is not clearly defined in itself, but what it encompasses is laid out in Article 133(1):

'The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.'

The process, in which the community accedes to international agreements under the CCP, starts with that the Commission submits a proposal to the Council for the implementation of the CCP. The Commission then makes its recommendation to the Council, which then authorise the Commission to open up negotiations with third parties. This gives that both the Commission and the Council are responsible for that the negotiated agreement is

⁴³ Article 111 & 133 TEC

⁴⁴ Ott & Wessel, *supra* note 41, p. 10

⁴⁵ Article 3(b) TEC

compatible with EC policies and rules.⁴⁶ It has however not been entirely clear-cut, which trade related issues that may be acceded to under the article, which has then been left for the Court to interpret. The jurisprudence then suggests that the article is not meant as an exhaustive list of common commercial policy issues and what falls under the article must instead be judged from a wider perspective.⁴⁷

3.1.2.1 Earlier development

An important development concerning the external competences of the EC was the delivery in Opinion 1/75,⁴⁸ which concerned the question asked by the Commission whether the Community had the power to conclude the ‘Understanding on a Local Cost Standard’ that had been decided under the OECD cooperation. The opinion marked the first one where the Court had to decide on an international agreement, which had been adopted under the old Article 300(6) TEC. The Understanding concerned grants for exports credits and could thus have been adopted under the Article 132 TEC, but the Court nevertheless chooses to consider Article 133 and stated that the provisions referred to the export policy, and thereby were an important part of the CCP, thus making the ‘Understanding’ within the scope of both Article 132 and 133 TEC.⁴⁹ By sorting the understanding under Article 133, the Court established exclusive community competence, a conclusion that had several underlying reasons. Most important was perhaps the perceived need for the conformity of the Community’s trade policies, as well as to limit the distortions to intercommunity trade within the common market.⁵⁰ The *principle of conformity*, stemming from the wording in Article 133 was then a major factor for determining that trade matters fall under exclusive Community competence. The Court has later upheld the external competence within the area on several occasions, where one of the most important cases was the *Donckerwolcke* case.⁵¹ The case concerned a dispute between a Belgium firm and the French Customs Authorities and whether France was allowed to monitor ‘indirect imports’. During the period of the case, there was an allowance of quotas between member states, which had been adopted under Article 134 TEC and permitted restriction in the free circulation on the internal market if the Commission had previously cleared such a restriction. The Court ruled that this restriction was only to be allowed if these quotas were in ‘accordance with the Treaty’ and that:

‘[A]s full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113(1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.’⁵²

⁴⁶ Article 133(2)-(3) TEC

⁴⁷ Egelund Olsen *et al.*, *supra* note 22, p. 97

⁴⁸ Opinion 1/75 ECR 1355 [1975]

⁴⁹ Eeckhout, *supra* note 12, p. 12

⁵⁰ *Ibid.* p.14

⁵¹ Case 41/76 *Donckerwolcke v. Procureur de la République* [1976] ECR 1921

⁵² *Ibid.* para 32

The judgement then showed that derogation from the principle of uniformity is only possible if explicitly permitted by the Community. It has therefore been accepted that the *principle of conformity* is a cornerstone of the CCP and that instruments and policies of the policy needs to be adapted in the light of the principle.⁵³

The traditional CCP was focused on trade in goods, but with the inclusions of trade in services and intellectual property with the conclusion of the WTO Agreement; the question arose whether trade in services and intellectual property would fall under the scope of Article 133. This issue created a considerable academic debate, which was ‘solved’ by the Court in Opinion 1/94.

3.1.2.2 Opinion 1/94

The Court’s opinion was obtained whether the conclusion of the WTO Agreements was compatible with the provisions of the TEC, and more specifically if the EC had exclusive competence to negotiate and sign the WTO Agreements. The Commission asked this question by the submission of its request on April 6 1994, barely a week before the conclusion of the WTO Agreement on April 15 1994. The Commission relied on Article 133, Article 95, Article 308 TEC and the *ERTA doctrine* when claiming exclusive competence of the EC. While the Council and such member states as Denmark, France and the UK disputed this. The Commissions position met rather stiff opposition and the UK used relatively strong language when describing the Commissions position that all aspects of the WTO Agreements would fall under Article 133, as ‘extravagant’.⁵⁴ The fundamental issue was thus, as stated by the Court:

‘Whether or not the community has exclusive competence to conclude the WTO Agreement and its Annexes?’⁵⁵

The Court conclusion was delivered in record time on November 15 1994, in order to clarify the situation before the approval and ratification of the WTO Agreements, which would enter into force on January 1st 1995.⁵⁶ In their conclusion, the Court ruled that:

- The Community has the exclusive competence to conclude multilateral agreements on trade in goods.
- The Community and its MS are jointly competent to conclude the GATS
- The Community and its MS are jointly competent to conclude the TRIPS

⁵³ Eeckhout, *supra* note 12, p. 350

⁵⁴ Hilf, The ECJ’s Opinion 1/94 in the WTO- No surprise, but wise?, EJIL 6 (1995) p. 1

⁵⁵ Opinion 1/94 ECR I-5267 [1994] para 14

⁵⁶ Eeckhout, *supra* note 12, p. 26

One very important factor for the Court's conclusion was the considerations concerning the different modes of supply.⁵⁷ (The four modes being: *cross frontier supply* (1), *consumption abroad* (2), *commercial presence* (3) and *presences of natural persons* (4))⁵⁸ The Court found that cross-frontier supply of services fell under the competence of Article 133, due to its similarities to trade in goods,⁵⁹ while the other modes did not fall under Article 133 since specific chapters of the TEC covered them.⁶⁰ Concerning the TRIPS, the Court agreed that there indeed was a link between trade and intellectual property rights, as argued by the Commission, but the existence of such a link was not sufficient to bring intellectual property law within the scope of Article 133. The TRIPS was considered to aim primarily at the harmonisation of the intellectual property protection and not at the abolition of barriers to trade. The Court did nevertheless rule that the areas regulated in Section 4 of Part III TRIPS concerning the release of counterfeit goods into circulation on the market fell under the ambit of Article 133 and the Community was furthermore empowered to adopt measures to be undertaken by the customs authorities to counter such activities under Article 133.⁶¹ All other parts of the TRIPS did however, not fall under the Article 133, wherefore the member states retained competence in regards to these parts.⁶² It has however been argued that the Community, and foremost the Commission actually was given more competences than expected. Especially in regards to the TRIPS Agreement where a valid argument can be made that intellectual property issues in their entirety, do not fall under the CCP.⁶³ The conclusion by the Court on the mixed competences in the WTO Agreements did thereby create a unique participation regime in regards to the DSU, where the EC enjoys exclusive competence for trade in goods while being jointly competent regarding disputes in trade in services and trade related intellectual property.⁶⁴

Following the Opinion by the Court, the Council adopted Decision 94/800, which laid out the conclusions reached in Opinion 1/94 and did in effect implement the WTO Agreements in the EC legal order. In the Decision, the Council also took the opportunity to pre-emptively address the possible direct effect of the WTO Agreements, by stating in the preamble to the Decision:

'[B]y its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

Which the Commission justified with:

⁵⁷ Barnard, *supra* note 24, p. 214

⁵⁸ Article I(2) GATS

⁵⁹ Opinion 1/94, *supra* note 55, para 44

⁶⁰ *Ibid.* para 47

⁶¹ *Ibid.* para 55

⁶² *Ibid.* para 56-71

⁶³ Billet, *supra* note 17, p. 907

⁶⁴ Chatháin, *The European Community and the Member States in the Dispute Settlement Understanding of the WTO: United or Divided?*, ELJ 5:4 (1999) p. 462

*'[I]t is important for the WTO Agreement and its annexes not to have a direct effect, that is one whereby private individuals who are natural or 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 any such direct effect. Without an express stipulation of such 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.'*⁶⁵

3.1.2.2.1 Treaty amendments

The result of Opinion 1/94 also meant the inclusion of the fifth paragraph of Article 133 TEC with the Treaty of Amsterdam, which was later modified by the Treaty of Nice.⁶⁶ Article 133(5) now states that paragraph (1)-(4) extends to *'trade in services and the commercial aspects of industrial property'*. The conclusion of Opinion 1/94 is also reflected in the shared competences in Article 133(6) for: *'agreements relating to trade in cultural and audiovisual services, education services and social and human health services'*. The division of competences in the CCP does therefore entail that Article 133 (1)-(4) is under the exclusive competences of the EC, while Article 133(5)-(6) are shared between the EC and the MS. Another consequence of the divided competence, it also the differences in regards to the decisions making, where the Council use qualified majority voting in regard to goods, while unanimity is needed in regards to trade in services and intellectual property, if;⁶⁷

1. Internal legislation required unanimity
2. Internal competence has not yet been exercised
3. Concerning a horizontal agreement
4. Concerning an extension of application to intellectual property in general⁶⁸

The now 'deceased' constitution would have brought with it more clarity about the allocation of powers between the member states and the Union,⁶⁹ but the yet to be ratified Treaty of Lisbon has however much in common with the constitution, in that it codifies case-law and development doctrine. It restates that the CCP is under the exclusive competence of the EC⁷⁰, and the new Article 188(C)(ex. Article 133) now clarify what is encompassed by the CCP:

'The common commercial policy shall be based on uniform principles particularly with regards to changes in tariff rates, the conclusion of tariff

⁶⁵ Explanatory Memorandum to COM (94) 143 Final

⁶⁶ Barnard, *supra* note 24, p. 215

⁶⁷ Article 133(5) TEC

⁶⁸ Article 133(7) TEC

⁶⁹ Egelund Olsen *et al.*, *supra* note 22, p. 101

⁷⁰ Article 2 B (e) Treaty of Lisbon

and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investments...'

The Lisbon Treaty will then change the scope of the CCP in two ways; first by removing the exception concerning *cultural and audiovisual services, education services and social and human health services*; and second by including *foreign direct investments*.

3.1.2.2 Criticism of Opinion 1/94

The conclusions made by the Court, even if taking duly note of the EU's constitutional law as well as its political reality,⁷¹ have been criticised for a number of reasons. The Commission argued that all modes of supply of services fell under the exclusive competence of the EC, while the Court made distinctions between the different modes, depending under whose competence they were regarded to fall under. The Court argued that Article 133 TEC was never intended to include the movement of natural persons because it is regulated in other treaty provisions and since Article 3 TEC clearly makes a distinction between the *common commercial policy* (b) and *the entry and movement of persons* (d).⁷² This is not a completely convincing argument, which has been pointed out in the literature, since the TEC also has different chapters for the free movement of goods, as well as for persons and services. Even if the Court stated that goods: '*is unquestionably covered by the common commercial policy*',⁷³ one might argue that the same differentiation that had been made in regards to services should be made in regards to goods.⁷⁴ Eeckhout agrees in this critic of the inconsistent approach taken by the Court, where it had not trouble reaching the conclusion that GATT falls under the exclusive competence of the EC, even though many GATT provisions are mostly targeted, in the Community context, to the Member States.⁷⁵ An example of this is Art III: 2 GATT which concerns 'the prohibition against discrimination regarding imported products in matter of taxation', and since indirect taxation largely remains under the discretion of the member states, it makes the article mostly concerned with national tax laws and regulations. The Court did not take this fact into account, which has lead Bourgeois to claim that the Court is 'cherry picking' in the GATS and the TRIPS. This would then lead the Court to violate its obligation in Art II: 2 of the WTO Agreement according to which the whole body of agreements should be seen as one entity. Pescatore is also critical and raise several arguments against the conclusions

⁷¹ Van den Bossche, *supra* note 4, p. 106

⁷² Opinion 1/94, *supra* note 55, para 46

⁷³ *Ibid.* para 44

⁷⁴ Cremona, *EC External Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders in The EU, the WTO and the NAFTA – Towards a Common Law of International Trade*, Weiler J.J.H. (eds.) (Oxford University Press, Oxford, 2000) p. 11

⁷⁵ Eeckhout, *supra* note 12, p. 276

reached in the Opinion 1/94, among others the limitation made by the Court to assess the issues solely under the rules governing the internal market.⁷⁶

An acceptance of the argumentation put forward by the Commission would nevertheless have meant a large derogation from the CCP as described in the TEC and would have come close to the general economic policy earlier proposed by the Commission, but rejected by the member states at Maastricht.⁷⁷ The conclusion reached by the Court is however not only a recognition of the member states' opinions but also an effort to stay true to the underlying rationale of the TEC. The unwillingness of the Court to extend the competences of the EC did also signify a shift from earlier ruling where the Court tended to favour the process of integration rather than acknowledging the balance of competences between the institutions. This development did clearly end when the Court reaffirmed the EC's core competences and adhered to the member states' wishes to retain competence, especially in regards to trade in services.⁷⁸ The critic of the ruling has been centred on its lack of boldness and for not being progressive enough, even though Eeckhout while being partly critical does not share this view.⁷⁹ Eeckhout agrees that the exclusive competences could have been extended to more modes of supply under the GATS, in order to achieve a unified external policy and for economic reasons, such as an avoidance of trade deflection and distortions of competition. This mainly economic trade theory argument does however not extend to the TRIPS, since the area of intellectual property cannot just by been given a 'trade label'; fall under the Community's sphere of competence. By acknowledging the constitutional and legitimacy implications of the issue, Eeckhout therefore argues for that the transfer of power from the national to the community level should not be possible just by labelling an international regulation as a subject of economic regulation.⁸⁰

3.2 Implied competences

The general provision on the attribution of competences in the TEC is found in the Article 5 that states:

'The Community shall act within the limits of the power conferred upon it by this Treaty and of the objectives assigned to it therein.'

This definition had then been used to develop a doctrine of external relations competences, which lacks a stated legal basis in any treaty provision. The doctrine originates from a need for the EC to enter into international agreements that consist of both CCP and non-CCP element, which the

⁷⁶ Pescatore, *Opinion 1/94 on "Conclusion of the WTO Agreement: Is there an escape from programmed disaster?", CMLR 36 (1999) p. 391*

⁷⁷ Cremona, *supra* note 74, p. 13

⁷⁸ *Ibid.*

⁷⁹ Eeckhout, *supra* note 12, p. 56

⁸⁰ *Ibid.* p. 276

somewhat limited scope of the CCP sometimes has prohibited.⁸¹ The remedy to this has then been the development of the doctrine of *implied external powers*, meaning that internal competence can parallel certain external issues and thereby give rise to implied external powers concerning these issues.

3.2.1 ERTA

The creation of the doctrine is found in the influential *ERTA* case.⁸² The case clarified that the Community is competent to enter into international agreements with third states, but did more importantly introduced the doctrine of *implicit competences, parallelism* or the simply the *ERTA-doctrine*.⁸³ The case concerned the Community's entry into an international agreement regulating road transports, an area in which the Community lacked expressed external powers. This did however not confine the Court, which states that the EC could have treaty-making capacity even in cases where such competences were not explicitly provided in the Treaty;

'Such authority arises not only from an express conferment by the Treaty...but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions'.⁸⁴

Since the Community prior to the dispute had adopted a regulation that covered the same subject matter as the ERTA Agreement, this led to that the Community could be given external competences that paralleled its internal competences.⁸⁵ The Court did however not stop after it reaches this conclusion, but did also 'dare' to characterise the competence as exclusive.⁸⁶

3.2.2 Kramer

The next step in the development on the doctrine of implied competences was taken with the *Kramer* case.⁸⁷ The case concerned the North-East Atlantic Fisheries Convention and whether the EC had exclusive competence to conclude the convention. The Court considered that the Community could make use of any measures at its disposal to ensure the conservation of biological resources at sea (which was the purpose of the Convention) on the internal level. Using the notion of parallelism the Court then accordingly gave the EC the 'authority to enter into international

⁸¹ Barnard, *supra* note 24, p. 216

⁸² Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263

⁸³ Ott & Wessel, *supra* note 41, Ch. 2

⁸⁴ Case 22/70, *supra* note 82, para 15-16

⁸⁵ Case 22/70, *supra* note 82, para 30-31

⁸⁶ Eeckhout, *supra* note 12, p. 62-63

⁸⁷ Cases 3, 4, and 6/76 (*Kramer*) [1976] ECR 1279

commitments for the conservation of the resources of the sea.’⁸⁸ The *Kramer* judgement further stated, as in the *ERTA* case, that the power to enter into international agreements was not only based on the relevant Treaty provisions but also on Community legislation.⁸⁹

The doctrine of implied powers has since it emerged been an influential addition to the external relations doctrine of the EC, which is signified by the fact that a codified version of the doctrine are found in the Treaty of Lisbon, which reads:

*‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.’*⁹⁰

Another evidence of its importance is that it is often used as an argument in disputes for establishing competence. As such, the doctrine is commonly used together with claims of competence with reference to explicit norms, as the doctrine was used in Opinion 1/94.

3.2.3 Opinion 1/94

In their arguments in Opinion 1/94, the Commission made use of the *ERTA-doctrine* while claiming that exclusive competence:

*‘Flows implicitly from the provisions of the Treaty establishing its internal competences, or from the existence of legislative acts of the institutions giving effect to that internal competence, or else from the need to enter into international commitments with a view to achieving an internal Community objective.’*⁹¹

The Court nevertheless rejected this reasoning, even if such arguments could be based on the *ERTA-doctrine*,⁹² and stated that:

*‘An internal power which has not been exercised in a specific field cannot confer exclusive external competences in that field on the Community.’*⁹³

The Court further noted that:

*‘Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive’*⁹⁴

⁸⁸ Ibid. para 30-33

⁸⁹ Eeckhout, *supra* note 12, p. 65

⁹⁰ Article 2 B. 2 Treaty of Lisbon

⁹¹ Opinion 1/94, *supra* note 55, para 72

⁹² Ibid. para 75

⁹³ Ibid. para 88

Since no existing Community legislation had been adopted in the area, the Court accordingly concluded that no (implied) competences could be used to conclude certain parts of the GATS and the TRIPS.⁹⁵ This conclusion was quite logical because the Court if granting implied competences in Opinion 1/94 would have allowed for exclusive external powers, without the corresponding existence of internal powers.⁹⁶

The external competence to conclude agreements can thus be both expressed and implied. There is however, another important classification to be made in external relations competences, namely exclusive or shared competences.

3.3 Mixed Agreements

When neither the Community nor the Member states have exclusive competence, the powers will be shared in a *mixed agreement*. The situation arises when both the EC and the member states are signing and ratifying an agreement, as in e.g. the WTO and FAO Agreements. This somewhat pragmatic approach has meant a blurring of the competences between the EC and the Member States in many areas, which becomes a recipe for future disputes since there is not clear-cut answer as to the exact division of competences between the parties. The Commission therefore expressed a ‘quite legitimate’ concern in Opinion 1/94 regarding the overall unity of action of the member states and the EC under a mixed agreement.⁹⁷ The Court also referred to the ‘requirement of unity in representation of the Community’ in their Opinion, which increased the importance of the ‘obligation to cooperate’.⁹⁸ This unity in representation has also been considered ‘fundamental’ by some authors, as it will affect the EU credibility in front of third parties.⁹⁹ The Court has itself stated that the cooperation duty flows from the requirement for unity in the international representation of the Community.¹⁰⁰ This obligation is not expressly referred to in any treaty provision but may be traced back to Article 10 TEC,¹⁰¹ which states that the:

‘[M]ember states shall take all appropriate measures...to ensure the fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community.’

⁹⁴ Ibid. para 77

⁹⁵ Barnard, *supra* note 24, p. 220 ; Cremona, *supra* note 74, p. 23

⁹⁶ Eeckhout, *supra* note 12, p. 81

⁹⁷ Hilf, *supra* note 54, p. 11

⁹⁸ Opinion 1/94, *supra* note 55, para 108

⁹⁹ E.g. Von Bogdandy & Makatsch, *Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law*, in the WTO, in *The EU and the WTO-Legal and Constitutional Issues*, De Búrca, G & Scott, J. (eds.) (Hart Publishing, Oxford, 2003) p. 149

¹⁰⁰ Opinion 1/78 ECR 2871 [1979] para 34-36 ; Opinion 1/94, *supra* note 55, para 36

¹⁰¹ Chatháin, *supra* note 64, p. 467

This provision has then formed the legal basis upon which the Court in continuing case law has created the duty of cooperation.¹⁰² The member states are not likely to deter from this duty, since they realise the importance of the EC's bargaining power in international negotiations, and would not want to undermine it by refusing to cooperate.¹⁰³ Its implementation has also led some authors to claim that the principle of cooperation can be seen as a constitutional principle within EC external relations law.¹⁰⁴ The duty becomes particularly relevant when dealing with the dispute settlement system under the WTO, where mixed agreement can create a special situation for third parties. Thus far, the cooperation between member states and the EC has worked rather unproblematic but there may arise problematic situation if the member states, the EC or other WTO members, would insist on targeting individual member states and refuse the EC to co-defend disputes between them. Especially third parties could then be put in a situation where they in practice could choose to bring a complaint concerning an infringement of WTO law either against the EC alone or against the EC and specific member states.¹⁰⁵ In such a situation, the EC might nevertheless have some possibilities to continue cooperation by referring to the Article 169 TEC and thereby preventing non-compliance.¹⁰⁶ The problematic situation with mixed competences in regards to DSU is however, a somewhat theoretical discussion, which in the pragmatic reality that characterise global trade is yet to create any major disputes. It does however serve to show the problems that may arise when dealing mixed agreements.

The described 'duty to co-operate' has also be acknowledged in regards to several other mixed agreement such as on the ILO Convention No. 170,¹⁰⁷ where the fact that several directives had been adopted under Article 118a TEC coincided with the subject matter of the Convention and made the Community implied competent. The competence was nevertheless shared since member states were allowed to adopt more stringent rules under Article 188a (3) TEC, if the Community had decided to adopt rules which was less stringent than the convention.¹⁰⁸ That the competence for the EC to conclude agreement can be either shared or explicit was also reaffirmed by the Court in their Opinion 1/2003 concerning the 'Lugano convention on jurisdiction and the recognition and enforcement on judgements on civil and commercial matters'.¹⁰⁹ In its Opinion, the Court emphasised the unity of

¹⁰² Leal-Arcas, *The EC in GATT/WTO negotiations: From Rome to Nice – Have EC Trade Policy Reforms been Good Enough for a Coherent EC Trade Policy in the WTO?*, European Integration Online Papers 8:1 (2004) p. 5

¹⁰³ Hilf, *supra* note 54, p.12

¹⁰⁴ Koutrakos, *The Elusive Quest for Uniformity in External relations*, Yearbook of European Law 243:4 (2001) p. 258

¹⁰⁵ Cremona, *External Relations of the EU and the Member States: Competences, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper No. 22 (2006) p. 23

¹⁰⁶ Cottier, *supra* note 34, p. 357

¹⁰⁷ Opinion 2/91, para 36

¹⁰⁸ *Ibid.* para 17-18

¹⁰⁹ Opinion 1/2003, para 114-115

the common market, the uniformity and consistent application and the effectiveness of Community law and proper functioning the system, when it applied the *ERTA*-test to examine the competence issue.¹¹⁰

Mixed agreements do also give rise to problems concerning their interpretation, and especially in regards to which provisions the Court is competent to interpret.¹¹¹ The Court has therefore approached this issue on a case-to-case basis and a general clarification of the jurisdiction issue is yet to be given, even if the Court in several cases such as the *Demirel*, *Sevince* and *Kus* cases has touched upon the question.¹¹² Neither of these cases concerned international trade agreement, which nevertheless was handled by the Court in the *Hermès* and *Dior* judgements.¹¹³ These cases did also concern the possible direct effect of TRIPS provisions, wherefore they will be dealt with more elaborately in a later chapter.

¹¹⁰ Ibid. para 122, 128 & 131

¹¹¹ Eeckhout, *supra* note 12, p. 236

¹¹² Case 12/86 *Demirel v. Stadt Schwäbisch* [1987] ECR 3619, para 6-12 ; Case C-192/89 *Sevince* [1990] ECR I-3461, para 8-11 ; Case C-237/91 *Kus* [1992] ECR I-6781, para 9

¹¹³ Case C- 53/96 *Hermès International v FHT* [1998] ECR I-3606; and Case C-300/98 *Parfums Christian Dior* [2000] ECR I-11307

4 International agreements in the EC

The Court has examined the status of international agreements within the EC legal order on a consistent basis during the last decades. These examinations have often concerned complaints by EU citizens, companies or third country nationals who have tried to invoke various legal effects of international obligations in the EC legal order.¹¹⁴

The natural starting point for international agreement is the procedural requirements in the seventh paragraph of Article 300 TEC, which, as described earlier, states that international agreements concluded by the EC are binding on its institutions and member states. This provision does also allow the Community to bind its member states to their commitments in relation to the EC, as stated in the *Kupferberg* case:

*'In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement...'*¹¹⁵

This provision can then be used as a legal basis for the EC to coerce member states to fulfil their obligations under international law,¹¹⁶ allowing the EC to uphold a unified front towards its international commitments and working with the duty of cooperation as discussed in the previous chapter. Since the article binds the member states it is also clear that the article is concerned with the effect of agreement in the EC legal order and not their effects in international law. This does however not bring with it that member states are *prima facie* bound by international agreement concluded by the EC, unless those agreements are mixed, and the member states are contracting partners together with the EC.¹¹⁷ The role that such agreements have in the EC legal order is not provided in any treaty provisions, but has rather been developed by the Court.

4.1 'Integral part'

The question of the legal standing of international agreements in the EC legal system was addressed in the fundamental *Haegeman* case.¹¹⁸ In its

¹¹⁴ Ott & Wessel, *supra* note 41, p. 15

¹¹⁵ Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 03641, para 13

¹¹⁶ Antoniadis, *The European Union and WTO law: a nexus of reactive, coactive and proactive approaches*, World Trade Review 6 (2007) p. 68

¹¹⁷ Eeckhout, *supra* note 12, p. 276

¹¹⁸ Case 181/73 *Haegeman v. Belgium* [1973] ECR 449, para 4-5

judgement, the Court held that international agreements from the date of entry into force ‘forms an integral part of the EC legal system’.¹¹⁹ This finding has later been upheld by the Court in continuing case law¹²⁰ and has generally been approved of in the legal literature.¹²¹ The Court has however never explained why an international agreement form an integral part of EC law, but has solely stated that it follows from Article 300 TEC. Not only are the reasons for reaching to conclusion of ‘integral part’ but also its meaning somewhat unclear. If it is to mean that such provisions are being equivalent to EC law, has somewhat divided legal authors.¹²² The Court shed some light on the issue in the *Polydor* case, concerning the previous Free-Trade Agreement between the EEC and Portugal.¹²³ In the case, the Court found that international agreements mirroring provision in the TEC, while being integral part of EC law, were not subject to the same interpretation procedure. International agreements are instead remaining international in regards to interpretation, wherefore they should be interpreted in the light of the VCLT, creating somewhat of a differentiation between EC law, and international law transformed into EC law.¹²⁴ International agreements do however share the ‘legal destiny’ of EC law, either in the form of primary or secondary law.¹²⁵ In regards to where international agreements rank in the hierarchy of different norms in the EC legal order, the Court stated in the *IATA* judgement, that:

*‘Article 300(7) EC provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. In accordance with the Court’s case-law, those agreements prevail over provisions of secondary Community legislation’*¹²⁶

This should however not be interpreted as that Community agreements take precedence also over primary Community Law, but would rank in between of primary and secondary law.¹²⁷ The extent to which the Court can review the legality of international agreement is closely linked to the question about hierarchy and has been addressed in numerous case law, especially in regard to the controversial terror-list cases.¹²⁸ To enter in a further discussion in this area would however be to venture too far away from the intended scope of this thesis.

¹¹⁹ Ibid. para 4-5

¹²⁰ e.g. Case 12/86, *supra* note 112, para 14; Case C-162/96 *Racke* [1998] ECR I-3655, para 41

¹²¹ *Bourgeois*, *supra* note 1, p. 93

¹²² Ibid. p. 94

¹²³ Case 270/80 *Polydor Ltd v. Harlequin Records* [1982] ECR 329

¹²⁴ *Bourgeois*, *supra* note 1, p. 97

¹²⁵ *Ott & Wessel*, *supra* note 41, p. 16

¹²⁶ Case C- 344/04 *IATA v. Department forTransport* [2006] ECR I-403, para 35

¹²⁷ *Cremona*, *supra* note 105, p. 27

¹²⁸ e.g. Case T-306/01 *Yusuf v. Council & Commission* [2005] ECR II-3522; Case T-315/01 *Kadi v. Council & Commission* [2005] ECR II-3649

Since international agreement form an integral part of EC law, no act of transposition should be needed for an agreement, entered according to the rules in Article 300 TEC, to produce ‘full effect’ in the Community legal order. The implications of such effect are naturally different depending on the type of agreement and should not be confused with the question of implementation.¹²⁹ Whether any implementing act is needed, is however not as obvious as one might think and is linked with the issue whether the EU follows a monist or dualist system.

4.2 Monist v. Dualist

The relationship between international and domestic law, especially in regards to implementation, are usually explain as following either a *monist* or *dualist* approach. This question is also naturally linked with the question of direct effect, since a monist approach mean that international law does not have to be transformed to have legal effect within a legal system.

In a monist regime, international and domestic law are part of the same legal order and there is no need for any implementation procedure as international law becomes part of the domestic legal system with the conclusion of such agreement. Under the dualist approach, international and domestic law are instead considered as two separate systems of law. International law is then seen as an understanding between states, addresses to the states themselves, while domestic law derives from the sovereignty of the state and is subject to the individuals in that state.¹³⁰ These different approaches are utilised by the member states of the EU, where countries like e.g. France and the Netherlands follow a monist system. While countries like e.g. Germany and Italy use a dualist system and some countries like e.g. Denmark and the UK, take a middle ground where the effect is dependent on the transformation process in which national rules incorporates the agreement and thus produces the effect.¹³¹ This third regime-type might be considered as an own category, but might as well just be seen as modification of the dualist approach.

The EU follows neither a strict monist nor dualist approach and the question is yet to be decided by the Court. Some writers in the academic literature propose that EC law fall under a monist approach,¹³² while others suggest that the evidence point to an overwhelming dualist approach.¹³³ According to the proponents of the monist theory, the fact that Article 300(7) TEC establish full direct effect and supremacy of international agreements in the EC legal order, should been seen as support of the idea that the EC adhere to

¹²⁹ Eeckhout, *supra* note 12, p. 278

¹³⁰ Egelund Olsen *et al.*, *supra* note 22, p. 108

¹³¹ Bourgeois, *supra* note 1, p. 91

¹³² Griller, *Judicial Enforcement of WTO law in the European Union; Annotation to Case C-149/96, Portugal v. Council*, JIEL3 (2000) p. 442; Antoniadis, *supra* note 116, p. 47; Craig & De Búrca, *supra* note 42, Ch. 7; Bourgeois, *supra* note 1, p. 93

¹³³ Kuijper & Bronckers, *WTO law in the Court of Justice*, CMLR 42 (2005), p. 1315

a monist approach.¹³⁴ Taking note of the judgement in *Haegeman* and the notion of ‘integral part’ also adds to the position that the EC indeed follow a monist approach.¹³⁵ Other case law also suggests that some international agreements, that have been granted direct effect, could be relied upon without any act of implementation.¹³⁶ Speaking against the monist position is the judgements in some cases like *Nakajima* and *Fediol*,¹³⁷ which contain a clear dualist element.¹³⁸ Another important case, *Kupferberg*, stress the demand for the incorporations of the norms in the EC-Portugal Free Trade Agreement, for these provision to develop direct effect.¹³⁹ Dualistic is also the fact that the EU tends to implement international agreements, especially in regards to trade law, by adopting internal legislative acts, as done with the entering into force of the WTO Agreement in the EU legal order.¹⁴⁰ There is therefore a difference between international agreements, where their content may require different adopting measure to produce full effect of its provisions.¹⁴¹ With this non-consistent approach, the Council is thus making it clear that it considers the type of implementing legal act to be irrelevant for the status of international agreements in the EC legal system.¹⁴²

The prevailing opinion must then be that the EC most likely follows a monist approach, except in politically sensitive cases where a dualist approach is pursued. The mixing of these approaches then becomes a useful tool at the hands of the Court when deciding the effect of the Community’s external relations, especially so concerning the role of WTO law in the Community legal order.¹⁴³

¹³⁴ Eeckhout, *supra* note 12, p. 277

¹³⁵ Bourgeois, *supra* note 1, p. 93

¹³⁶ Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, CMLR 34 (1997) p. 24

¹³⁷ Case 70/87 *Fediol v. Commission* [1989] ECR 1781; Case C-69/89 *Nakajima* [1991] ECR 2069

¹³⁸ Eeckhout, *supra* note 136, p. 57

¹³⁹ Case 104/81, *supra* note 115, para 12 ff.

¹⁴⁰ The practise of adopting international instruments by issuing own act, has also been practised in regards to other organisation, e.g. Council Regulation 990/93 implementing UN Resolutions concerning sanctions, as in the dispute in: Case C-84/95 *Bosphorus* [1996] ECR I-3953

¹⁴¹ Bourgeois, *supra* note 1, pp. 77-78

¹⁴² *Ibid.* p. 94

¹⁴³ Griller, *supra* note 132, p. 442

5 Legal principles in EC external relations

There are a number of legal effects that are important for the impact of international agreements within the EC legal order, one of these is undoubtedly direct effect. The general notion of direct effect of international law is not easily contained to whether private parties can rely on certain international provisions before a Community court, since the direct effect is entangled in, and interacts with, several other legal principles. When examining the direct effects in the EC it is therefore unavoidable not to handle some of these bordering notions. The focus of this chapter is nevertheless the explanation of the direct effect principle as developed by the Court in Luxembourg.

5.1 Principle of direct effect

There is no general definition of, nor limits to, the notion of direct effect. In a constitutional perspective, the effect is concerned with the ‘*separation of powers and the extension of the judicial power to enforce the obligations of the state*’.¹⁴⁴ In the external dimension the principle is therefore largely intertwined with the constitutional conditions between the EC, its member states, and international organisations as well as internally between the Community institutions. The origin of the direct effect is however not a question of external relations of the EC, but one concerning its internal legal order. By going to its original source, and recalling the creation of direct effects (in plural as first stated by the Court) at the hands of the Court in their groundbreaking judgement in the *Van Gend en Loos* case, it means:

‘[T]he capacity of a provision of EC law to be invoked before a national court.’¹⁴⁵

In the *Van Gend en Loos* case the Court ruled that Article 12 of the EEC Treaty produced ‘*direct effect and created individual rights*’, while the Court in the same time set up ‘*a new legal order*’, which made Community law stand apart from other forms of international law.¹⁴⁶ There is somewhat diverging opinions on the exact meaning and definition of the notion of ‘direct effect’.¹⁴⁷ Sometimes ‘direct applicable’¹⁴⁸ is used, as well as

¹⁴⁴ Edward, *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations*, in Scritto in onore di Giuseppe Federico Mancini, Giuffrè A. (eds.) Vol. II (1998) p. 424

¹⁴⁵ Case 26/62 *Van Gend en Loos* [1963] ECR, part B

¹⁴⁶ *Ibid.* point 3 & 5

¹⁴⁷ Craig & De Búrca, *supra* note 42, p. 180

¹⁴⁸ In what seems to be synonyms e.g. Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 639, para 13-15

expressions as ‘self-executing’, which could be seen as the equivalent to direct effect in the words of the ICJ or as used in the American legal system.¹⁴⁹ The reasons for the creation of this effect were very much political, as the Court thereby acknowledged that the community legal system was not only made for states, but also for individuals. According to Pescatore, this gave the result:

*‘[T]hat private individuals are not only liable to burdens and obligations, but that they have also prerogatives and rights which must be legally protected.’*¹⁵⁰

The notion of individual rights has therefore been, as indicated by its definition and noted by Pescatore, inherent in the principle of direct effect since its creation. The notion of ‘rights’ is however quite ambiguous, and it is not obvious what it entails. There has been an academic discussion whether such ‘rights’ involve something more substantive and specific than to invoke a legal provisions, and if it involves the right to a particular remedy or to impose a duty upon a third party. This discussion leads into the relationship of direct effect between private parties or *horizontal direct effect*, which even though being a very interesting subject, is not in need of further examination for the purpose of the thesis.

The creation of the direct effects is not only concerned with the protection of individual rights, but also integrationist motives like the uniform application and effectiveness of EC law made up reasons for its creation. The principle was however, not created by the Court from thin air, but drew support from the spirit and provisions of the Treaties, where the preliminary ruling procedure in Article 234 TEC as well as the fact that citizens played a role through the medium of the European Parliament, provided support for the principle’s right to exist.¹⁵¹ The scope and meaning of direct effect do also differ depending whether given a broad or narrow interpretation, but instead of trying to come up with a general definition that contain all cases with might fall under the notion, it might be wiser to instead focus on the notion’s use. Going back to the founding *Van Gend en Loos* case one can find the determinants for whether direct effect can be awarded, where the Court said that;

*‘[T]he wording of Article 12 contain a clear and unconditional prohibition which is not a positive but a negative obligation...According to the spirit , the General Scheme and the wording of the Treaty, Art 12 must be interpreted as producing direct effect and creating individual right which national court must protect.’*¹⁵²

¹⁴⁹ Brand, *Direct Effect of International Law in the United States and the European Union*, Northwestern Journal of International Law & Business 17:556 (1996-1997) p. 560 ff. ; Bourgeois, *supra* note 1, p. 100

¹⁵⁰ Pescatore, *The doctrine of ‘Direct Effect’: An Infant Disease of Community Law*, European Law Review 8 (1983) p. 155

¹⁵¹ Craig & De Búrca, *supra* note 42, p. 185

¹⁵² Case 26/62, *supra* note 42, para 12

The conditions for granting the effect has then been further developed through case law, wherefore a good summary of the current conditions needed for an EC law provision to be relied upon in front of a member state court could be that it:¹⁵³

1. Contain a clear obligation on the MS
2. Content applicable by a court
3. Must be unconditional
4. MS must not have discretion in the implementation of the obligation
5. No further act by either EC/MS should be required

The direct effect has since its original application on provisions of the Treaties been extended to other community legislation, such as regulations,¹⁵⁴ decisions¹⁵⁵ and to some degree also directives.¹⁵⁶

5.2 Direct effect of International law

The development of direct effect of international law provisions is also a question that has been extensively handled by the Court. In one of its most educative and enlightening reasoning's on the direct effect of international law, the Court examined the effect of a free trade agreement in the earlier referred to *Kupferberg* judgement.¹⁵⁷ The case referred to the findings in the *Haegeman* judgement, and stated that provisions of a Treaty concluded by the EC form an integral part of Community law.¹⁵⁸ The Court then considered it competent to grant direct effect to such an agreement, in the same manner as with any other question of interpretation relating to the application of an international agreement in the EC legal order.¹⁵⁹ The Court's evaluation that then followed has later been used in similar cases when determining whether international agreements should be given direct effect. The basic requisites from the *Van Gend en Loos* judgement, in which's light the agreement is examined, are roughly the same, stating that the provisions should be; *direct, precise, no further implementation necessary, and unconditional*.¹⁶⁰ In addition, the Court clarified that when determining the direct effect of a provision such as the one at hand, the rules of international law play a role for the interpretation that should be carried out in the light of both the *object* and *purpose* of the agreement and of its

¹⁵³ Leal-Arcas, *supra* note 3, p. 239

¹⁵⁴ Case 39/72 *Commission v. Italy* [1973] ECR 101; Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1137

¹⁵⁵ Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825; Case 51/76 *Nederlandse Omdememingen v. Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113

¹⁵⁶ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1137; Case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629

¹⁵⁷ Case 104/81, *supra* note 115

¹⁵⁸ *Ibid.* para 13

¹⁵⁹ *Ibid.* para 15-17

¹⁶⁰ *Ibid.* para 26

context.¹⁶¹ In its reasoning, the Court also rejected, as a principle, a number of arguments against granting direct effect, such as;¹⁶²

- The relationship between various Community institutions
- The lack of reciprocity
- The existence of a quasi-judicial dispute settlement

The judgement and reasoning in the *Kupferberg*, has been criticised as ‘naïve and inconsistent’, since it fails to acknowledge the balance between community institutions and focus too much on the Community institutions’ freedom to reach agreements with third countries.¹⁶³ The direct effect criteria employed by the Court have however been very influential and were used once again in the ruling in the *Demirel* case, which expanded on the nature of the test stating that:

*‘A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.’*¹⁶⁴

The Court has carried out this ‘test’, and given direct effects to provisions of international agreements concerning Association Agreements as in the *Kupferberg*, as well as the Yaoundé Agreement in *Bresciani*.¹⁶⁵ In regards to international trade law the Court has however, on a number of occasions, as the following chapters will examined, denied the direct effects of such provisions.

5.3 Principle of indirect effect

Another important legal principle that has been created by the interpretive hands of the Court is the *principle of indirect effect*.¹⁶⁶ This principle concerns the harmonious interpretation of national law in order to encourage the application and effectiveness of directives, in situations where the Court has ruled out horizontal direct effect. The indirect effect then means that national law is interpreted ‘in the light of’ directives. The principle, which is also known under other names (Harmonious Interpretation, Von Colson Effect, Marleasing Principle etc.), has later been extended to other sources of Community law such as primary law and GPCL. The principle, or at least a similar version of it, has also been used when interpreting secondary EC

¹⁶¹ Ibid. para 23

¹⁶² Ibid. para 17, 18, 20

¹⁶³ Kuijper & Bronckers, *supra* note 133, p. 1320

¹⁶⁴ Case 12/86, *supra* note 112, para 14

¹⁶⁵ Case 87/75 *Bresciani v. Amministrazione Italia delle Finanze* [1976] ECR 129

¹⁶⁶ Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westalen* [1984] ECR 1891, para 26-28

legislation in the light of obligations assumed under international agreements.¹⁶⁷ In regards to international trade law, the principle is usually referred to as the *principle of consistent interpretation* or the ‘obligation of harmonious interpretation’, which to a large extent has the same functioning as the general notion of indirect effect.

5.3.1 Principle of consistent interpretation

The principle of consistent implementation applies in all instances when both the Court and national courts are called upon to interpret otherwise non-directly effective international law, such as WTO-provisions.¹⁶⁸ Even if the Court has been ‘implementing’ WTO-provisions by adopting Community legislative acts, and thereby seems to adopt a dualist approach, the Court has in the same time always accepted that Community law must be interpreted in conformity of GATT and WTO provisions.¹⁶⁹ The principle is thereby clearly linked not only to the binding effect in Article 300(7) TEC but also to the EC’s internal duty of cooperation. The Court made use of the principle when giving its preliminary ruling concerning the interpretation of the GATT in *SPI/SAMI*, where the Court after ruling out direct effect of GATT deemed it necessary to interpret the effect of the contested rules in the light of the common customs tariff.¹⁷⁰ Thus making implicit use of related norms in order to interpret and apply the agreement at hand, true to its intended meaning. This was done, in order to ensure the uniform front of the EC and to make sure that the agreement was ‘interpreted and applied in the same way throughout the community’.¹⁷¹ Even if the *SPI/SAMI* judgement has been both praised and criticised in the literature, it is, as noted by Bourgeois, a rather logical conclusion once the EC has been considered to replace the member states in relation to the GATT. Since the EC then takes over the obligation to comply with GATT, the Court must enforce and oversee such compliance, by the consistent interpretation of these obligations.¹⁷² The function of the principle is perhaps clearer in the Court’s judgement concerning the interpretation of the IDA (International Dairy Arrangement) in *Commission v. Germany*, where it stated that:

*‘[T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.’*¹⁷³

¹⁶⁷ Craig & De Búrca, *supra* note 42, p. 211

¹⁶⁸ Antoniadis, *supra* note 116, p. 73

¹⁶⁹ Kuijper & Bronckers, *supra* note 133, p. 1316

¹⁷⁰ Cases 267 to 269/81 *Amministrazione delle Finanze dello Stato v. SPI and SAMI* [1983] ECR 801, para 26

¹⁷¹ *Ibid.* para 18

¹⁷² Bourgeois, *supra* note 1, p. 84

¹⁷³ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para 52

In the conclusion the Court also referred to its judgement in *Hermès* where the principle of consistent interpretation was employed with the wording:

*'[W]hen called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPS Agreement'*¹⁷⁴

This clear statement of the principle in the *Hermès*, has lead Antoniadis to claim that it was the *Hermès* case that laid down 'the foundations for the doctrine of consistent implementation.'¹⁷⁵ The *Hermès* case is also important since it extends the principle, not only to GATT as in *SPI/SAMI*, but also to the TRIPS, and thus to mixed agreements.¹⁷⁶ It was not clear whether the principle should be extended to cover the TRIPS, and the Commission claimed that no perfect parallelism existed between the EC's power to enter into international agreements and the Court jurisdiction to interpret them.¹⁷⁷ The Court did however not accept this reasoning and since no allocation of competences between the EC and the member states has been done in regards to the TRIPS, the Court had to ensure the uniform interpretation in the EC legal order. This position has been approved by Eeckhout, who consider that the extension of the principle to mixed agreements does not affect the division of competences between the EC and its member states.¹⁷⁸ This approach is indeed quite logical since international agreements that falls under the competence of the EC form an 'integral part of EC legal order'. Legislative acts of the EC must therefore comply with these international agreements, which the Court ensures by applying the principle of consistent interpretation.¹⁷⁹ The use of the principle is then simply an interpretation of a Community instruments in a certain way without leading to of a potential direct effect discussion, wherefore the principle rather stems from principles of EC law than from any international law principle.¹⁸⁰

The principle of consistent interpretation has been employed in many situations concerning the interpretation of GATT/WTO law.¹⁸¹ Even though it does not create a possibility for individuals to rely directly on WTO law, it creates a situation under which the Courts of the member states can make direct use of WTO provisions in their own enforcement of the law. The limitation to the principle is however rather clear and the principle has

¹⁷⁴ C-53/96, *supra* note 113, para 28

¹⁷⁵ Antoniadis, *supra* note 116, p. 73 ; (While other referred to the principle as uniform and not consistent interpretation; Bourgeois, *supra* note 1, p. 85)

¹⁷⁶ Cremona, *supra* note 74, p. 30

¹⁷⁷ Leal-Arcas, *supra* note 3, p. 231

¹⁷⁸ Eeckhout, *supra* note 136, pp. 23-24

¹⁷⁹ Eeckhout, *supra* note 12, p. 315

¹⁸⁰ Snyder, *The Gatekeepers: The European Courts and WTO law*, CMLR 40 (2003) p.355

¹⁸¹ e.g. Case 92/71 *Interfood v. Hauptzollamt Hamburg* [1972] ECR, para 6; Case C-79/89 *Brown Boveri* [1991] ECR I-1853, para 15-19; Cases T-163/94 and T-165/94 *NTN and Koyo Seiko v. Council* [1995] ECR II-1381, para 65

shown to be less effective than direct effect in establishing legal certainty and thereby creating confidence among the EC's trading partners.¹⁸²

5.3.2 Principle of implementation

The Community's responsibility to interpret provisions in consistency with its international obligations is closely linked to the Community's obligation to adopt measures in conformity with these international obligations. The so-called *principle of implementation* is then the obligation resting on the EC to adopt and implement its own measures to comply with obligations stemming from its participation in international organisations. This can be seen as a natural progression of the Court's introduction of dualism in regards to WTO law.¹⁸³ In the academic literature, there is a somewhat different classification of this principle and the name *Nakajima principle* is sometimes used instead, while other prefers to link the *Nakajima* case law with the notion of indirect effect.¹⁸⁴ It is not completely clear why so many commentators chose to mention the *Fediol* and *Nakajima* case in the same breath, since they essentially are concerned with different situations.¹⁸⁵ It is however, an approach adopted by the Court as well as Eeckhout, wherefore it will be used in this thesis.¹⁸⁶

The principle of implementation is especially concerned with international agreements that have been found not to have direct effect in the EC legal order, where the principle might be used as an exception, under which private actors nevertheless can rely on WTO provisions.¹⁸⁷ The principle thus leaves an opening for the direct effect of WTO in areas where the Community intends to implement a particular obligation or when Community instruments expressly refers to provisions of the WTO Agreements.

5.3.2.1 Fediol

In the case, *Fédération de l'industrie de l'huilerie de la CEE* (*Fediol*)¹⁸⁸ challenged a decision by the Commission that rejected its complaint against the New Commercial Policy Instrument.¹⁸⁹ The instrument was a predecessor to the current Trade Barrier Regulation, and *Fediol*'s claims concerned the practise by Argentina, which in *Fediol*'s view constituted a breach of Article III, IX and XXIII of the GATT 47. The Commission rejected this view and stated that the of lack direct effect of the GATT,

¹⁸² Snyder, *supra* note 181, p. 363

¹⁸³ Kuijper Kuijper & Bronckers, *supra* note 133, p. 1316

¹⁸⁴ Antoniadis, *supra* note 116 p. 68 ; Zonnekeyn, *The Latest on Indirect Effect of WTO Law in the EC Legal Order The Nakajima case law misjudged?*, Journal of International Economic Law (2001) p. 597 ff.

¹⁸⁵ Kuijper & Bronckers, *supra* note 133, p. 1324

¹⁸⁶ e.g. Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para 49

¹⁸⁷ Eeckhout, P. *supra* note 136, p. 56

¹⁸⁸ Case 70/87, *supra* note 137

¹⁸⁹ Council Regulation 2641/84

would make it impossible for the claimant to challenge the decision on ground of a misinterpretation of the relevant GATT provisions.¹⁹⁰ Even though acknowledging the lack of direct effect, as confirmed by earlier case law, the Court found that individuals could not be denied to rely on provisions of the GATT when these provisions formed part of the rules of international law to which the disputed Community regulation referred. This did then allow the Court to;

‘[I]nterpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules . The GATT provisions have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation.’¹⁹¹

The Court then proceeded with referring to the *Kupferberg* judgement, stating that just because the contracting partners had established a special institutional framework for consultation and negotiations in relation to the implementation of a free-trade agreement, this was not sufficient to exclude all judicial application of that agreement. From this followed that since economic agents were allowed to rely on GATT provisions referred to in Council Regulation 2641/84, the same economic agents had the right to request that the Court review the legality of the Commissions decision applying those GATT provisions.¹⁹² The Court did therefore dismiss the Commissions inadmissibility claim, and went on to review the specific GATT provisions, finding no infraction of these rules wherefore the applicant submissions were rejected. If a violation had been found, the Court’s approach would however, have lead to that *Fediol*’s complaint had been annulled on ground of wrong implementation of the regulation and non conformity of WTO law.¹⁹³ The case thus meant the establishment of so-called *Fediol principle*, or the *clear reference exception*, which in essence states that the Court may review the legality of a measure in the light of the GATT if that Community measure makes a clear reference to provisions of the GATT.¹⁹⁴

5.3.2.2 Nakajima

The *Nakajima* case¹⁹⁵ draws its name from the complainant company originating in Japan, which challenged a Council Regulation¹⁹⁶ that imposed an anti-dumping duty on printers originating in Japan. Nakajima claimed that Article 2(3)(b)(ii) and Article 19 of the Regulation was in breach of the GATT Anti-Dumping Code, wherefore it should be declared inapplicable. The Council disputed the claim and argued that the Anti-Dumping Code

¹⁹⁰ Case 70/87, *supra* note 137, para 8-12

¹⁹¹ *Ibid.* para 20

¹⁹² *Ibid.* para 20-22

¹⁹³ Eeckhout, *supra* note 12, p. 318

¹⁹⁴ Antoniadis, *supra* note 116, p. 72

¹⁹⁵ Case C-69/89, *supra* note 137

¹⁹⁶ Council Regulation 2423/88

could not be relied upon since it is part of the GATT legal framework, which's provisions lacked direct effect. The Court position was however, that Nakajima did not rely on the direct effect of the disputed provisions and the complainant did instead merely questioned if the regulation was applicable, by invoking the legal review mechanisms under Article 241 TEC. It was thus not a question of direct applicability of GATT provisions but a question of the legality of a Council Regulation implementing GATT provisions. The Court then recalled the binding effect of the GATT on the Community, and concluded that the same was the case with the Anti-Dumping Code. Since the Regulation that had come into question was adopted to conform with these binding international provisions, the Court had an obligation to ensure that the regulation was in compliance with the GATT.¹⁹⁷ The Court was therefore empowered to review whether the regulation was in breach of the GATT, which its examination showed that it was not.¹⁹⁸ The fundamental conclusion in the ruling is therefore that community legislation can be reviewed against the GATT/WTO provisions it intends to implement,¹⁹⁹ an exception known as the *Nakajima principle* or the *transposition exception*. The ruling is then often put in conjunction with the Fediol case, and its clear reference exception, to formulate the *principle of implementation* or *indirect effect* of WTO law.²⁰⁰

5.3.3 Further development

The Fediol and Nakajima cases do when put together make up the only exemption to the denial of direct effect of GATT/WTO provisions, where it is possible to rely on such rules when there is a clear reference to a provision that the EC intends to implement. Even though often merged together, one can argue that the two exceptions operated and aim at somewhat different situations, where the Fediol exception represents a '*minimal attempt to ensure the interpretation of EC law and determination of its validity take account of WTO law.*' While the Nakajima exception signals a deeper integration between the two legal sources, since '*it is meant to ensure that EC law is consistent or at least compatible with WTO law.*'²⁰¹ These exceptions are usually treated as one principle as done by the Court in relation to the WTO Agreement in *Portugal v. Council*, where the Court stated that:

*'It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.'*²⁰²

¹⁹⁷ Case C-69/89, *supra* note 137, para 22-31

¹⁹⁸ *Ibid.* para 100 ff

¹⁹⁹ Antoniadis, *supra* note 116, p. 57

²⁰⁰ Snyder, *supra* note 181, p. 332

²⁰¹ *Ibid.*, p. 363

²⁰² Case C-149/96, *supra* note 188, para 49

The usefulness of these exceptions is not firmly established since it might not always be easy to know in which situation the EC intends to implement a certain obligation undertaken in the framework of the WTO.²⁰³ The principle of implementation has therefore had a rather limited use and as in *Fediol* and *Nakajima*, usually in cases concerned with anti-dumping measures.²⁰⁴ There has however also been other use in the jurisprudence of the Court, as in *Italy v. Council*, where the Court referred to the principle of implementation when deciding on a trade agreement between Austria and Thailand with the help of Article XXIV (6) GATT.²⁰⁵ The use of the principle was also very limited in some of the *Bananas* cases, in front of the Tribunal, where the CFI were extremely reluctant to apply the implementation doctrine (or at least implemented it very narrowly), with reference to that the challenged regulation did not intend to implement any WTO obligations.²⁰⁶ This position has later been criticized since the challenged Regulation 2362/98 indeed was adopted to establish a WTO compatible regime, making expressed references to the Councils desire to comply with WTO Panel and Appellate Body Reports.²⁰⁷

As the law stands there thus seem to be somewhat unclear under which circumstances that the principle of implementation ought to be used. For the principle to apply it seems like an implicit reference to WTO law should suffice,²⁰⁸ and the principle could theoretically be used to render secondary EC law illegal for breach of GATT/WTO law, a position which the Court however, is yet to take.²⁰⁹ This principle does also give a clear dualistic streak to the relationship between EC and WTO law, perhaps making the question of direct effect somewhat less important. Since the situation creates a possibility to rely on WTO norms implemented in the EC legal system by the adoption of community acts, meaning that WTO rules can be relied upon indirectly.²¹⁰

5.4 The principle of reciprocity

The last principle that warrants a further explanation is the *principle of reciprocity*. This principle has been used by the Court in their examination of international agreements on numerous occasions and has been of utmost importance for the Court stance on direct effect of GATT/WTO provisions. There is no reference to a reciprocity condition in any treaty provisions and it cannot be considered to flow from Article 300(7) TEC, wherefore the

²⁰³ Zonnekeyn, *supra* note 186, p. 602

²⁰⁴ Antoniadis, *supra* note 116, p. 69 ff

²⁰⁵ Case C-352/96 *Italy v. Council* [1998] ECR I-6937, para. 20

²⁰⁶ e.g. *Bananas* disputes in front of the CFI; Case T- 18/99 *Cordis* [2001] ECR II-913 ;

Case T-30/99 *Bocchi* [2001] ECR II-943; Case T-52/99 *T. Port* [2001] ECR II-981

²⁰⁷ Eeckhout, *supra* note 12, p.322

²⁰⁸ Zonnekeyn, *supra* note 186, p. 608

²⁰⁹ Leal-Arcas, *supra* note 3, p. 243

²¹⁰ Eeckhout, *supra* note 136, p. 45 ff.

requirement of reciprocity in international agreement instead flows from the specific agreements at hand.²¹¹ The principle has its origin in the political economy doctrine and encompass that; if obligations are reciprocal between the contracting parties, there is a need for the parties to give similar effects to the provisions in order to maintain the balance between the parties in the light of the concluded agreement.²¹² The notion of reciprocity is inherent in many international relations and especially in international trade, where it is used a means of achieving cooperation and as a utility in countries' bargaining strategy.²¹³ The use of reciprocity is particularly important under the GATT, which is considered to be characterised by 'negotiations driven by the spirit of intergovernmental reciprocity'. The fundamental MFN principle and the framework on non-discrimination rules in the GATT are therefore considered nothing but a 'forum for bilateral arm twisting in trade negotiations'.²¹⁴ Reciprocity is also important in relation to the correct implementation of the WTO Agreements, which Mengozzi refers to as the principle of *substantial reciprocity*, where the principle would be a pre-existing condition for the enforcement of the Agreements in both Community and national courts.²¹⁵

The question of reciprocity has often been at the focus point, in the Court history of interpreting international agreements, as in the influential *Kupferberg* judgement. In the case, the Court found that the absence of direct effect in the legal systems of the other contracting parties did not necessarily constitute a lack of reciprocity with effect for the EC's implementation of the agreement.²¹⁶ The *Bresciani* case,²¹⁷ concerning the direct effect of provisions in the Yaounde Convention, did also provide a reference to the principle of reciprocity, which was not yet considered a part of the convention, wherefore it was not an obstacle for the granting of direct effect.

²¹¹ Uerpmann, *International Law as an Element of European Constitutional Law: International Supplementary Constitutions*, Jean Monnet Working Paper 9 (2003) p. 20

²¹² Hillman et al., *Modelling reciprocal trade liberalization: the political economy and national-welfare perspectives*, Swiss Journal of Economics and Statistics 131 (1995) p. 503

²¹³ Rhodes, *Reciprocity on trade: The Utility of a Bargaining Strategy*, International Organisation 43:2 (1989) p. 278

²¹⁴ Weinrichter, *Perspectives on the changing spirit of GATT*, European Integration Online Papers 3:10 (1999) p. 3

²¹⁵ Mengozzi, *The World Trade Organization Law: An analysis of its First Practise*, Rivista di Diritto Europeo 38 (1998), pp. 32-35

²¹⁶ Case 104/81, *supra* note 115, para 18

²¹⁷ Case 87/75, *supra* note 165

6 Case law on direct effect

The following account of jurisprudence serves to illuminate the status of GATT/WTO law in the EC legal order. Being the ‘gatekeepers’²¹⁸ in the EC-WTO relation, the Community Courts have been extremely influential for the internal aspects of the Community’s external trade regime; all the way from the instrumental *International Fruit Company* judgement concerning the GATT 47 to last years ruling in the *Merck* case regarding the TRIPS. The following cases have been chosen either on the merit that they provided something new to the stance on direct effect or a related issue, or because they have reaffirmed the law as it stands. The cases thus deal with direct effect, in regards to the provisions of the GATT, WTO, TRIPS Agreements as well as DSU decisions.

6.1 International Fruit Company

The first cases in which the Court gave a ruling on the direct effect of the provisions of the GATT 47 was in the Joined Cases 21-24/72, *International Fruit Company*.²¹⁹ The cases concerned a preliminary ruling, where a Dutch court asked the ECJ whether the Commission’s regulations, concerning import restrictions of apples from third countries, were contrary to certain GATT 47 provisions.

6.1.1 Judgement of the Court

The Court started by stating that in order for it to examine whether a community measures were incompatible with international law, the Community must first be bound of such provision. It then continued to claim that:

*‘Before invalidity can be relied upon before a [national] court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.’*²²⁰

This connection between the direct effect of EC law (that plays a role in the relationship between the EC and the national legal order of the member states) and the possibility of invoking an international agreement, which refers to the relationship between the international and the EC legal order, has later been substantially criticised.²²¹ The Court did however make this

²¹⁸ Snyder, *supra* note 181, p. 362

²¹⁹ Cases 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219

²²⁰ *Ibid.* para 8

²²¹ Zonnekeyn, *The Status of WTO law in the EC legal order – The Final Curtain?*, Journal of World Trade 34:3 (2000) p. 120

link seemingly effortless and then went on to examine whether GATT provisions had binding effect on the Community and noted that the EC acting through its institutions:

'[H]as appeared as a partner in the tariff negotiations and as a party to the agreements of all types concluded within the framework of the general agreement, in accordance with the provisions of Article 144 of the EEC Treaty which provides that the tariff and trade agreements 'Shall be concluded...on behalf of the Community'.

*It therefore appears that, in so far as under the EEC treaty the Community has assumed the powers previously exercised by member states in the area governed by the General Agreement, the provisions of the agreement have the effect of binding the Community.'*²²²

The Court then continued to analyse *'the spirit, the general scheme and the terms of the General Agreement'* to determine if its provision created such right upon which the citizens of the Community could rely upon in Court.²²³ In their examination, the Court took duly note of the principle of negotiation and reciprocity that the GATT according to its preamble was based on. The *'great flexibility of its provisions'*, as well as *'the possibility of derogation'* in regards to the dispute settlement regime, leaved the Court convinced that:

*'Article XI of the General Agreement is not capable of conferring on citizens of the community rights which they can invoke before the courts.'*²²⁴

The Court did thus make use of the direct effect criteria laid down in earlier case law and found after taking special note of the dispute settlement regime that the provisions were of a too flexible nature, wherefore they could not be given direct effect.

6.1.2 Interim Development

The Court later confirmed its finding from *International Fruit Company* in some cases stemming from Italy.²²⁵ The *SIOT* case did not concern the legality of a Community act, but a dispute regarding the imposed Italian charges on transit of goods. The Court nevertheless reaffirmed its earlier conclusion that the GATT did not have direct effect, wherefore individuals could not rely upon its rules for challenging the imposed national charges.²²⁶ The ruling in *SPI* and *SAMI* once again repeated the Court position, while it in the same time when read in conjunction with *SIOT*,

²²² Case 21-24/72, *supra* note 222, para 17-18

²²³ *Ibid.* para 19-20

²²⁴ *Ibid.* para 21-27

²²⁵ Case 266/81 *SIOT v. Ministero delle Finanze* [1983] ECR 731 ; Cases 267 to 269/81 *Amministrazione delle Finanze dello Stato v. SPI and SAMI* [1983] ECR 801

²²⁶ C-266/81, *supra* note 228, para 28

extended the Court's findings concerning preliminary rulings to cover rulings on interpretation.²²⁷

6.2 Germany v. Council

The next major development on the role of the GATT in the EC legal order came with the Court's ruling in *Germany v. Council*.²²⁸ In the case, Germany brought an action against Council Regulation 404/93, under Article 173 [current 230] TEC, seeking to declare the regulation being void. The regulation concerned the common organisation on the banana market and the preferential treatment of bananas originating in the ACP countries, and meant that Germany had to restrict its previously liberal banana import regime, wherefore they chose to challenge the regulation. In their claim, Germany put forward a number of pleas in law alleging breaches of several international and community rules, among them provisions of the GATT 47.²²⁹

After rejecting the complainant's arguments in regards to a claimed breach of essential procedural requirements, substantive rules of Community law, and the Lomé Convention, the Court commenced to examine whether any GATT rules had been violated.²³⁰ By referring to the judgement in *International Fruit Company* as well as later judgements that had upheld the established stance on direct effect, the Court concluded that individuals could not invoke such provisions in a Court to challenge the lawfulness of a Community act. In reaching the conclusion, the Court echoed earlier statements and referred to the '*flexibility of its provisions*' and the '*possibility of derogation*', as ground for denying direct effect.²³¹ The Court then went on to state that since individuals could not invoke GATT provisions before the Court, this would also preclude the Court from taking such provisions into account when considering the lawfulness of a regulation in a preliminary ruling procedure. The special features of the GATT also gave that its rules were conditional and an obligation to recognise them as directly applicable in the domestic legal order could therefore not be based on the spirit, general scheme and terms of the GATT.²³² The Court then recalled the *principle of implementation* from the *Fediol* and *Nakajima* cases and stated that the Court can only review the lawfulness of Community acts in the light of GATT rules under two circumstances. Either if a Community act expressly refers to specific provisions of GATT, or if the Community intended to implement a particular obligation entered into within the framework of the GATT. None of these exemptions were found to be applicable to the case at hand,

²²⁷ Antoniadis, *supra* note 116, p. 48

²²⁸ Case C-280/93 *Germany v. Council* [1994] ECR I-4873

²²⁹ *Ibid.* para 26

²³⁰ *Ibid.* para 27 ff.

²³¹ *Ibid.* para 106-108

²³² *Ibid.* para 109-110

wherefore Germany could not invoke provisions of the GATT to challenge the lawfulness of the disputed provision.²³³

The main point of interest in the case is not the reaffirmation of the jurisprudence from *International Fruit Company*, but the unwillingness of the Court to employ the *principle of implementation* as well as the fact that the Court extended the direct effect requirement from individuals, to actions brought by member states.²³⁴

6.3 Hermès

The first case in front of the Court that dealt with the eventual changed to the standing of direct effect after the adoption of the WTO Agreements was the *Hermès* case.²³⁵ In the case, the French company *Hermès International* (Hermès) came to believe that the Dutch company *FHT Marketing Choice BV* (FHT) sold neckties under the brand name ‘Hermès’, a name to which Hermès claimed exclusive property rights. The company therefore initiated proceeding against FHT, seeking an interim decision to force the company to cease the infringement of Hermès copyrights and trademarks. Hermès wanted to fix a time limit of three months, during which FHT could request revocation of the interim decision according to Article 50(6) TRIPS. Article 50(6) TRIPS did however not provide for any time limit concerning the defendant right to revocation, and the Court was therefore asked by the Dutch court to provide an interpretation of Article 50(6) TRIPS.²³⁶

6.3.1 Opinion of the Advocate General Tesaro

Advocate General Tesaro’s Opinion provided a thoughtful examination on the relationship between the EC and international trade law, where the remarkable argumentation was not made in regards to the substantial rules or the conclusion of the preliminary ruling, but rather the reasoning concerning the applicability of WTO law in the EC. The AG first started by examining the Court competence to examine the TRIPS Agreement and concluded that its right to give preliminary rulings was confined to interpreting provisions that were within the Community’s sphere of competence.²³⁷ In regards to the question of direct effect of Article 50(6) TRIPS, Tesaro then considered the Court competent to rule on the issue since the question undoubtedly was of great relevance for the outcome of the preliminary ruling and that an answer was needed in order to address the question posed by the national court.²³⁸ This then lead Tesaro into the

²³³ Ibid. para 111-112

²³⁴ Eeckhout, *supra* note 12, p. 293

²³⁵ C-53/96, *supra* note 113

²³⁶ Ibid. para 12-20

²³⁷ Opinion AG Tesaro, Case C- 53/96 *Hermès International v FHT* [1998] ECR I-3606, para 20

²³⁸ Ibid. para 22

substantive assessment whether WTO and TRIPS provisions should be granted direct effect.

The writing in the preamble to the Council's Decision that implemented the WTO Agreement and ruled out any direct applicability of the Agreements was not given much baring by Tesouro, in regard to which the AG cited the *Kupferberg* judgement by adding that:

'...only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.'²³⁹

The statement in the case at hand was however only made in the preamble wherefore it should not be given any weight, thereby leaving the Court free to reach its own conclusion. It was therefore in the role of the Court, and not the other institutions, to interpret international agreement and decide upon possible direct effect. Tesouro then commenced to make his own evaluation of direct applicability, by examining the characteristics of the GATT system and the content of its provisions. He acknowledged the changes brought forward with the Uruguay round in regards to the scope of the multilateral trade system and the mechanisms for the settlement of disputes, which was of special interest since these were crucial factors in the Court's earlier denial of direct effect of GATT provisions. Tesouro considered the WTO system to be very different from the GATT 47, and that the 'great flexibility' supposedly characterising all the provisions of GATT' had changed with the WTO Agreements. This was especially the case in regards to dispute settlement where a negative consensus was now required to reject a Panel report. These changes were then in the mind of the AG, to be consider of such magnitude that the earlier argument put forward by the Court for the denial of direct effect, now appeared obsolete.²⁴⁰ The only viable objection to direct applicability should then be the question of reciprocity and the non recognition of direct effect in the EC's main trading partners. Tesouro did however note that the lack of reciprocity did not prevent the EC from granting direct effect in the *Bresciani* case or in the similar conclusion that was reached in the *Chiquita Italia* case.²⁴¹ These judgements did however provides for, *e contrario*, that the recognition of direct effect of provisions in international agreements could well depend on reciprocity. This was especially the case when such agreements imposed equal obligations on the contracting parties, and they therefore required reciprocity in their implementation. The judgement in *Kupfenberg* did however state that; there is no automatic need for reciprocity when

²³⁹ Case 104/81, *supra* note 115, para 17; cited in Opinion AG Tesouro, *supra* note 240, para 24

²⁴⁰ Opinion AG Tesouro, *supra* note 240, para 28-30

²⁴¹ Case 87/75, *supra* note 165, para 22-23 ; Case C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia* [1995] ECR I-4533, para 32 and 34, cited in Opinion AG Tesouro *supra* note 240, para 32

concluding an international agreement but that the prevailing assumption is that each contracting party is responsible, in good faith, that the commitments undertaken are executed with the legal means needed to attaining their stated end.²⁴² Tesouro did thereby recall the somewhat inconsistent approach taken by the Court in its previous reciprocity evaluations and concluded that the absence of reciprocity could be a deciding factor when determining the possible recognition of direct effect. The most important factor was nevertheless that the commitments undertaken were fulfilled and implemented as to attain their end and thereby striking a balance between the need of reciprocity and the demand for direct applicability. This balance should then be decided in a flexible way that takes note the nature of the disputed provision. In the case of Article 50(6) TRIPS, Tesouro considered that the provision was sufficiently clear and precise and not depending on a subsequent act. This allowed the obligations in the article to be fulfilled even in the absence of reciprocity, wherefore it should be given direct effect.²⁴³ Tesouro then proceed to the substantial evaluation concerning the question submitted by the Court, according to which he concluded that interim measure did indeed fall under the scope of Article 50(6) TRIPS.²⁴⁴

6.3.2 Judgement of the Court

The governments of France, the Netherlands and the UK all submitted their opinions, arguing against the Court's jurisdiction to answer the question, which the Court answered by stating that the provisions relating to:

*'Measures [...] to secure the effective protection of intellectual property rights', such as Article 50, essentially fall within the competence of the Member States and not that of the Community'*²⁴⁵

The Court then stated that the TRIPS Agreements was concluded without any specific allocation of the respective obligations of the EC and the member states, and further recalled that Council Regulation 40/94 concerning Community trademarks was in force before the conclusion of the Marrakesh Agreement. Article 99 of the Regulation regulated the application of national rules to adopt provisional measures as in the disputed case, rules which when applied, should so be done in the light of the wording and purpose of Article 50 TRIPS. In the light of this background and by applying the *principle of consistent interpretation* the Court stated that it had had jurisdiction to interpret Article 50 TRIPS.²⁴⁶ The Court continued with its examination of the question referred for a preliminary

²⁴² Case 104/81, *supra* note 115, para 18, cited in Opinion AG Tesouro, *supra* note 240, para 33

²⁴³ Opinion AG Tesouro, *supra* note 240, para 34-37

²⁴⁴ *Ibid.* para 43

²⁴⁵ C-53/96, *supra* note 113, para 23

²⁴⁶ *Ibid.* para 24-33

ruling, but did not enter into any examination of the direct applicability of the TRIPS. Instead, it stated:

*'It should be stressed at the outset that, although the issue of the direct effect of Article 50 of the TRIPs Agreement has been argued, the Court is not required to give a ruling on that question, but only to answer the question of interpretation submitted to it by the national court so as to enable that court to interpret Netherlands procedural rules in the light of that article.'*²⁴⁷

The Court did thereby avoid the politically sensitive question of direct effect and chose to limit itself to the question of the preliminary ruling. The ECJ would however not be able to escape to question for that much longer time and the *Hermès* case has nonetheless been important, especially with regards to the influential considerations delivered by AG Tesauero, which somewhat revived the proponent of the direct effect of international trade law.

6.4 Portugal v. Council

The next big case in regards to direct effect was one of monumental importance, namely the thereafter-leading case on the direct effect on WTO law, *Portugal v. Council*.²⁴⁸ The case concerns an action under Article 230 TEC, where the Portuguese Republic brought an action for the annulment of a Council Decision that concluded a trade agreement in textiles with Pakistan and India.²⁴⁹ The decision was adopted by qualified majority with Portugal as one of the opposing states, which then lead Portugal to bring forth the action. Portugal claimed that the decision violated certain rules of the WTO Agreement and more exactly the GATT 94, the Agreement on Textile and Clothing (ATC) and the Agreement on Import Licensing Procedures, as well as certain rules and fundamental principles of the Community legal order.²⁵⁰ Portugal did also make use of the principle established by the *Fediol* and *Nakajima* case law and argued that the Court had the competence to review the legality of the decision, since it intended to implement an obligation entered into the framework of the GATT. The Council did consider, on its part, that the previous case law from the Court in regards to the GATT 47 should be extended to cover also to the WTO Agreement. The Council, supported by the French Government, did furthermore oppose Portugal's claims and argued that the GATT 94 did not have direct effect, wherefore it could not be used to create an annulment of the decision.²⁵¹

²⁴⁷ Ibid. para 35

²⁴⁸ Case C-149/96, *supra* note 188

²⁴⁹ Council Decision 96/386/EC

²⁵⁰ Case C-149/96, *supra* note 188, para 24-28

²⁵¹ Ibid. para 30

6.4.1 Opinion of Advocate General Saggio

The Opinion of the Advocate General Saggio provided a number of interesting thoughts. He entered into the discussion on the legal status and nature on the WTO Agreement and continued by referring to the *Haegeman* decision and the notion of ‘integral part’.²⁵² The AG then stated that he did not agree with the present stance of the Court concerning the right of a member state to challenge the legality of a Community act, which should not be subordinated to whether the GATT has direct effect. Since a limitation of such a right to the situations covered by the *Fediol* and *Nakajima* exceptions would then be to limit the intended scope of Article 300(7) TEC.²⁵³ When considering the changed that the Uruguay round brought with it and the difference between the GATT and the WTO, the AG focused on the new DSU system and its effect on the EC legal system. The WTO Agreements and the DSU did not, in the opinion of Saggio, provide for a dispute settlement system that would limit the jurisdiction of the Court. This was not a risk according to the AG since the body created by the DSU was more of a political than of a judicial nature.²⁵⁴ The AG did also examine the preamble to the Council Decision that ruled out the direct effect of the WTO Agreements, in relation to which he stated that such a unilateral interpretation of the agreement could not limit the effect of the agreement. The preamble should instead be seen as a policy statement without any binding effect on the jurisdiction of the Court.²⁵⁵ This goes along the same line as the reasoning by AG Tesouro in *Hermès* while in the same time being somewhat contrary to the conclusions reached by other advocate generals.²⁵⁶ The AG then addressed the reciprocity issue where he noted that the declaration by third states was irrelevant for whether the WTO Agreements would be directly effective or not, since non-compliance by a member, of the WTO Agreements’ provisions (i.e. not the absence of direct effect), would be the only justification for suspending cooperation under these agreements.²⁵⁷ Since Saggio did not believe that the absence of direct effect in the EC’s major trading partners was sufficient evidence for an imbalance, and he went on to conclude that the applicants wish to invoke the WTO Agreement could not be dismissed.²⁵⁸

Concerning the substance of the case, Saggio rejected Portugal’s claim of a violation of WTO rules and did neither find any violations of EC law wherefore he recommended that the application should be dismissed on substantive grounds.

²⁵² Opinion of AG Saggio, Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para 15

²⁵³ *Ibid.* para 18

²⁵⁴ *Ibid.* para 23

²⁵⁵ *Ibid.* para 20 (Further referring to Article 31 & 32 of the VCLT, as well as the Judgement by the ICJ in the case *Libyan Arab Jamahiriya v. Chad.*)

²⁵⁶ Opinion of AG Cosmas, Case C-183/95, *Affish BV* [1997] ECR I-4315, para 27; Opinion of AG Elmer, Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, para 28-29

²⁵⁷ Opinion of A.G. Saggio, *supra* note 255, para 21

²⁵⁸ *Ibid.* para 24

6.4.2 Judgement of the Court

The Court acknowledged that the WTO Agreements significantly differs from the provisions of GATT 47, especially in regards to the systems of safeguards and the refined dispute settlement. In order to appreciate the magnitude of these differences the Court went on to examine some substantial rules of the DSU, especially the ones described in Articles 3(7), 22(1) and 22(2). These articles did, in the mind of the Court, express a ‘*clear preference*’ for the withdrawal of measures in conflict with WTO law. Adding to the perception of the non-judicial nature of the DSU were also factors, such as the fact that; mutual acceptance of compensation was a viable alternative instead of compliance with the DSB decision and that a time-period for negotiations existed between the parties if the DSB decision had not been obliged with in time.²⁵⁹ This did then lead the Court to state that:

*‘[T]he agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to ‘entering into reciprocal and mutually advantageous arrangements’ and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations...’*²⁶⁰

The judgement then continued to recall the *Kupferberg* ruling, holding that the absence of direct effect on the part of other trading partners does not in itself constitute a lack of reciprocity. The lack of reciprocity in relation to the WTO Agreement, which is based on ‘reciprocal and mutually advantageous agreements’, could however not, be compared to the agreement concerned in the *Kupferberg* case, since the lack of reciprocity could lead to disuniform application of the WTO rules. Giving the Community legislature, the role of ensuring that these rules would be in compliance with EC law, would then deprive the legislative and executive organs of the Community the scope of manoeuvre enjoyed by similar organs in the EC’s trading counterparts.²⁶¹ In regards to the basic question, the Court thus disagreed with the conclusion of the AG, and stated that:

*‘...having regards to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality if measures adopted by the Community institutions.’*²⁶²

After having reached this conclusion, the Court referred to the preamble in Decision 94/800:

*‘[T]hat interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800’*²⁶³

²⁵⁹ Case C-149/96, *supra* note 188, para 37-39

²⁶⁰ *Ibid.* para 42

²⁶¹ *Ibid.* para 45-46

²⁶² *Ibid.* para 47

This reasoning thereby showed that the statement in the preamble is relevant but only as a reference after the general conclusion was already made. In relation to the last claim by the complainant, where Portugal tried to invoke the principle of implementation and the *Fediol* and *Nakajima* case law, the Court ruled that the principle could not be used. The reason for this was that the contested decision had approved a memorandum with India and Pakistan, without implying the implementation of a WTO obligation or referring to a WTO rule. The Court did therefore rule that the Portuguese claims were unfounded and that the contested decision was not in breach of any rules or fundamental principles of WTO law.²⁶⁴ Neither the claim concerning a violation of fundamental principles of EC law was given any right by the Court, but it will not earn further evaluation since it is of less importance for the question of direct effect.²⁶⁵

The main points made by the Court were thus made in relation to the nature and structure of the WTO Agreement, which was considered to rule out direct effect of its provisions. This conclusion was then largely contingent on the Courts findings in regards to the DSU and due to the emphasis put on the reciprocity argument and the Courts will not to tie the hands of the Community's political institutions.

6.5 Dior

Due to the Court unwillingness to enter into the direct effect discussion in the *Hermès* case, the ruling left many observers waiting for more clarification. The judgement in *Dior* was therefore highly anticipated since it in many peoples eyes would continue where the Court had left off in the *Hermès* judgement.²⁶⁶ The *Dior* case was joined in front of the Court with the *Assco* case,²⁶⁷ but in the following assessment only the *Dior* ruling will be accounted for. The *Dior* case concerned a reference to the Court from a Dutch court seeking a preliminary ruling on the rather straightforward question whether:

*'Article 50 of the TRIPS Agreement, an in particular, Article 50(6), have direct effect?'*²⁶⁸

6.5.1 Opinion of Advocate General Cosmas

Advocate General Cosmas first agreed with the claim, made by the Council and the Commission, that the reference for a preliminary ruling should be inadmissible since the reference did not indicate why an answer to the

²⁶³ Ibid. para 48

²⁶⁴ Ibid. para 53

²⁶⁵ Ibid. para. 53-94

²⁶⁶ C-300/98, *supra* note 113

²⁶⁷ Case C-392/98 *Assco Gerüste GmbH* [2000] ECR I-11307

²⁶⁸ C-300/98, *supra* note 113, para 27

question of direct effect is necessary to enable the national court to give judgement.²⁶⁹ Turning his attention to the substantive questions, the AG concluded that the extension of the Courts interpretative jurisdiction to TRIPS provisions and areas in which (potential) Community competence has not yet been exercised could risk constituting judge-made law, which would be in obvious conflict with the constitutional logic of the TEC.²⁷⁰ In connection to the direct effect, Cosmas then considered that the Court must follow its position in *Portugal v. Council*, which ruled out the direct effect of all WTO Agreements. Regarding the nature and broad logic of the WTO, he referred to the mechanism for dispute settlement (which also covers TRIPS) and the lack of reciprocity in regards to direct application of the disputed provisions and argued that:

‘[S]ince the nature and broad logic of the WTO agreements prevent their provisions from having direct effect, analysing the specific content of the TRIPS provision at issue is superfluous.’²⁷¹

The AG then ended his general reasoning on direct effect with a reference to *the duty of cooperation* and addressed a warning to the member states courts, when claiming:

‘[T]hat the WTO agreements cannot have direct effect [...] relate to such general characteristics of the agreements that it would be extremely difficult for the national courts to adopt a different solution,[...],without running the risk of infringing their obligation to help ensure unity in the international representation of the Community.’²⁷²

6.5.2 Judgement of the Court

The Court did not share the general opinion of the AG, Council and Commission and saw no interference for it to answer the question posed by the Dutch Court.²⁷³ The Court establishes its right and jurisdiction to interpret Article 50 TRIPS in an argumentation with large similarities with, as well as references to, the reasoning in the *Hermès* judgement.²⁷⁴ The Court then turned to the substance of the asked question and recalled the accepted method in which direct effect is determined, where regards are taken to the *wording, purpose and nature of the agreement*, as well as the need for provisions to contain a *clear, precise and unconditional obligation*.²⁷⁵ The Court recalled the jurisprudence on the issue and stated with a direct reference to paragraphs in the *Portugal v. Council*:

²⁶⁹ Opinion AG Cosmas , Case C-300/98 *Parfums Christian Dior* [2000] ECR I-11307, para 29-30

²⁷⁰ Ibid. para 50

²⁷¹ Ibid. para 78

²⁷² Ibid. para 82

²⁷³ C-300/98, *supra* note 113, para 29-31

²⁷⁴ Ibid. para 32-40

²⁷⁵ Ibid. para 41-42

‘[T]he WTO Agreement and the annexes thereto are not in principle among the rules in the light of which the Court is to review measures of the Community institutions pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC). [...] the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.’²⁷⁶

The Court did however not halt their examination after concluding the lack of direct effect, but continued to specify that this lack was confined to fields under which the Community had already adopted legislative acts. It was thus neither under the discretion of the Court to grant nor forbid direct effect of such provisions. This decision should instead be left for the national court to decide upon since Article 50(6) of the TRIPS fall under the member states’ competence.²⁷⁷ In a mixed agreement such as the TRIPS, the lack of direct effect is therefore only applicable to provisions falling within the Community’s sphere of competence.

6.5.3 Later development

Since the ruling in the *Dior* case, the Court has once more been approached by a preliminary from a Dutch court concerning the direct effect of Article 50(6) TRIPS. The case *Schieving-Nijstad*²⁷⁸ got its ruling less than a year after *Dior*, a ruling that mimicked the one in the *Dior* case. Accordingly, the Court found that the procedural requirements in Art 50(6) are not such as to create rights upon which individuals may rely directly before the Court or the courts of the member states. Then the Court also emphasized that when judicial authorities apply national rules concerning measures for the protection of intellectual property;

‘[T]hey are required to do so as far as possible in the light of the wording and purpose of Article 50(6) of TRIPs, taking account, more particularly, of all the circumstances of the case before them, so as to ensure that a balance is struck between the competing rights and obligations of the right holder and of the defendant.’²⁷⁹

The judgement thus reinforced the Court right to interpret the TRIPS Agreements, while it in the same time reaffirmed the Court’s general stance on the denial of direct effect of the TRIPS and the WTO Agreements. The line of reasoning from the *Dior* judgement thus seem to be the prevailing position of the Court, and the different approach suggested by AG Tesouro in *Hermès* seem to have faded away into obscurity.

²⁷⁶ Ibid. para 43

²⁷⁷ Ibid. para 47-48

²⁷⁸ Case C-89/99 *Schieving-Nijstad* [2001] ECR I-05851

²⁷⁹ Ibid. para 55

6.6 Biret

The next step in the relationship between the WTO and EC legal order came in cases concerning whether decision from the WTO's DSB could be granted direct effect on which individuals could rely upon. The first cases in front of the Community Courts raising the question of the direct effect of such decisions were the *Biret* cases (*Biret* and *Établissements Biret*, both in the CFI and the ECJ).²⁸⁰ The background to the cases was a dispute between the EC on one side, and respectively, the United States and Canada on the other side. The US and Canada initiate proceedings against the EU's prohibition on the use of hormones when raising livestock,²⁸¹ and the WTO Panels found that the EC's legislation was in breach of the SPS Agreement.²⁸² The WTO Appellate Body amended the Panels findings, but upheld the conclusion of breach of the SPS Agreement, since insufficient evidence had been provided to scientifically analyze the cancer risk associated with growth hormones.²⁸³ The DSB then adopted the Appellate Body findings and gave the EC a time period to comply with the SPS Agreement. The EC did however not comply with the decision and refrained from making the needed amendments during the prescribe time frame, wherefore a French trading company, *Biret*, and its major shareholder, *Établissements Biret*, brought actions against the Council before the Tribunal. *Biret* claimed that the Community had violated its non-contractual liability under Article 288 TEC when it maintained an illegal import prohibition of the SPS Agreement, which had been condemned by the DSB. *Biret* also claimed that the Community's breach was not temporary since the EC had stated its intent to maintain the embargo on hormone beef, which would then render the main argument against direct applicability of DSB decisions irrelevant, since the decisions then no longer were categorised by the WTO's flexible nature.²⁸⁴

6.6.1 Judgement of the Tribunal

The CFI did not address the claim of the applicant but rather stated that it relied on well-established case law when ruling out the direct effect of the WTO Agreement and its annexes such as the SPS Agreement.²⁸⁵ In regards to which it also noted that the purpose of the WTO Agreement was to

²⁸⁰ Case T-174/00 *Biret International SA v. Council* [2002] ECR II-17; Case T-210/00 *Établissements Biret & Cie SA v. Council* [2002] ECR II-47; Case C-93/02 P *Biret International v. Council* [2003] ECR I-10497; Case C-94/02 P *Établissements Biret v. Council* [2003] ECR I-10565

²⁸¹ Council Directive 96/22/EC, which maintained the prohibition already in place with Council Directives 81/602/EEC and 88/146/EEC

²⁸² Panel Report, *EC- Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/US & WT/DS48/R/CAN

²⁸³ Appellate Body Report, *EC- Measures Concerning Meat and Meat Products (Hormones)*, WT/DS27/AB/R & WT/DS48/AB/R/

²⁸⁴ Cases T-174/00, *supra* note 283, para 28-30; T-210/00, *supra* note 283, para 30-33

²⁸⁵ *Ibid.* para 59 para 66

govern relations between states or regional organizations in regard to economic integration, and not to protect individuals.²⁸⁶ This led the CFI to conclude that:

‘There is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question.’²⁸⁷

This conclusion, in which reference was made to the *Atlanta* case,²⁸⁸ thus meant that the possibility for invoking a DSB decision was contingent upon the possibility of invoking the whole agreement that the decision had found to be infringing. This reasoning was not to the liking of the applicants, who accordingly appealed the decisions to the Court.

6.6.2 Opinion of Advocate General Alber

Advocate General Alber started his assessments by noting that the Community Courts never before had been faced with the question whether DSB decisions produce direct effect.²⁸⁹ Alber then analysed the substantial rules in the DSU, which provided for that since the EC had not complied with the DSB recommendation within the given timeframe; compensation and concession were indeed available measures, but since these were only temporary measures and not a waiver, they did not remove the obligation to conform with WTO law.²⁹⁰ The ways in which the DSB’s recommendations are implemented are also monitored by the DSB, why it must be regarded that no viable alternative exist then to implement DSB recommendation. After having analysed the WTO’s nature and arguing against the perception of the DSU’s ‘flexible’ provisions, Alber addressed the main argument against direct effect of WTO rules; the need not to limit the discretionary power of the EC institutions and its intertwined absence of reciprocity. The AG considered that the discretionary powers already had been limited, since the suspension of concession must be authorities by the DSB and a mutually satisfactory solution needs to be compatible with WTO rules.²⁹¹ For the issue at hand, where direct effect of DSU decisions is sought after in the framework of an action for damages, this did not mean:

‘[T]hat an individual has a right to require the Community bodies to take a particular course of action. Biret is merely entitled to seek monetary

²⁸⁶ Ibid. para 62 & para 72

²⁸⁷ Ibid. para 67 & para 77

²⁸⁸ Case C-104/97 *Atlanta v. Commission & Council* [1999] ECR I-6983, para 19-20

²⁸⁹ Opinion of AG Alber, Case C-93/02 P *Biret International v. Council* [2003] ECR I-10497, para 39

²⁹⁰ Ibid. para 76-88

²⁹¹ Ibid. para 74 ff.

*compensation from the Community provided that the other conditions are met.*²⁹²

Allowing individuals to rely on DSU decisions as a claim for damages does not aim at a specific action by a WTO member, but is rather a recognition of a non-action by an EC institution for the determination if such non-implementation should give rise to compensation for the individual. Wherefore an acknowledgment of such a right does not risk reducing the discretion of the EC's legislative and executive bodies.²⁹³ With a reference to the *Francovich* case, Alber also recalled the great importance of the protection of individuals, which must take note of the:

*'...full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'*²⁹⁴

In regards to the direct effect, Alber noted as Tesauro and Saggio had done before, that the statement in the preamble to Decision 94/800 had limited relevance and that such writing did not have any weight if in conflict with the general obligation under Article 300(7) TEC.²⁹⁵ The risk of limiting the EC's bargain power was also not a real issue, since the allowance of direct effect in regards to recovery to damages would not undermine the EC's position in relation to other WTO members, leading Alber to state that:

*'It must consequently be concluded that WTO law is directly applicable where DSB recommendations or rulings have found a Community measure to be inconsistent with WTO law and the Community has failed to implement the recommendations or rulings within the prescribed period.'*²⁹⁶

Many authors have praised the conclusion by Alber, and Zonnekyn called it a '*Copernican innovation(s)*',²⁹⁷ but as so many times before in international trade law the Court's opinion diverged.

6.6.3 Judgement of the Court

The Court did not address the extensive argumentation by AG Alber; it did however have some problems with the reasoning of the Tribunal. The Court was especially critical of the line reasoning stating that since decisions of the DSB were linked to the infringement of the SPS Agreement, it meant

²⁹² Ibid para 93

²⁹³ Ibid. para 95

²⁹⁴ Ibid. para 107, referring to Cases C-6/90 & C-9/90 *Francovich* [1991] ECR I-5357

²⁹⁵ Ibid. para 98-100

²⁹⁶ Ibid. para 114

²⁹⁷ Zonnekyn, *EC Liability for the Non Implementation of WTO Dispute Settlement Decisions- Advocate General Alber proposes a 'Copernican innovation' in the case law of the ECJ*, JIEL 6:3 (2003) p. 761

that the pleas alleging infringement of DSB ruling could only be considered if the SPS Agreement, in the first place, would have direct effect. The Court considered this reasoning fraud, since it did not live up to the duty of stating the reasoning behind the ruling, wherefore the Court noted that CFI's position did not 'suffice'.²⁹⁸ The ECJ did also criticise the Tribunal's interpretation of the *Atlanta* case where the Court had found that a DSB decision was 'inescapably and directly' linked with the plea that the GATT 94 had been violated. There was however, an important difference from the present cases where the appeal against the incompatibility between an EC legal act and WTO law where brought *after* the DSB decision had been taken.²⁹⁹ Notwithstanding their criticism of the Tribunal's ruling, the Court found that the alleged damaged for which the claimant sought compensation had occurred well before the expiry of the period during which the EC had to comply with the DSB recommendation. Wherefore the EC could not be held responsible, and the claimants' appeals were dismissed.³⁰⁰ The Court did then in effect use procedural circumstances to once again 'avoid' a ruling on a politically sensitive issue, an approach that would not last long since more cases on the same subject would follow. The most interesting aspect of the ruling was however the Court recognition that the argument relating to the legal effects of a DSB decision was autonomous from that pertaining to the direct effect of WTO law.³⁰¹

6.7 Chiquita

Following the *Biret* judgements, came the *Chiquita* case that also dealt with the legal effects of a DSB decision.³⁰² *Chiquita* claimed that the Commission by adopting and maintain Regulation 2362/98 was in breach of Article XIII GATT 94, as had been affirmed in several decision issued by the DSB. *Chiquita* did therefore consider itself entitled to compensation in respect of the loss it had suffered as a consequence of the EC's actions.³⁰³ The argumentation used by the applicant was largely based on the *Nakajima* principle and was thereby not aimed at invoking an infringement of WTO obligations *per se*.

In their argumentation, the Tribunal dismissed the applicant use of the *Nakajima* case law, and stated that:

'[T]he possible consequences as regards compensating individuals would be of non-implementation by the Community of a DSB ruling finding a

²⁹⁸ Cases C-93/02, *supra* note 283, para 56; C-94/02, *supra* note 283, para 59

²⁹⁹ *Ibid.* para 59 & para 62

³⁰⁰ *Ibid.* para 61 & para 64

³⁰¹ Di Gianni & Antonini, *DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO Systems has come to an end?*, *Journal of World Trade* 40:4 (2006) p. 784

³⁰² Case T-19/01 *Chiquita v. Commission* [2005] ECR II-315

³⁰³ For a summary of the lengthy 'Bananas disputes' under the WTO; see T-19/01, *supra* note 305, para 25 ff.

*Community measure incompatible with WTO rules, a question which the applicant has not expressly raised independently of that concerning the application of the Nakajima case-law.*³⁰⁴

By separating the question of direct effect of the WTO with the direct effect of the DSB, the Tribunal followed the argumentation of the Court in *Biret*, where the basis for the Tribunal's reasoning was the examination of the provisions of the DSU, and especially Articles 21(6) and 22(8) of the DSU. In regards to the later article, the Tribunal emphasised the possibility for each party to reach a mutual satisfactory solution as one of the means to restore legality, which then lead the Tribunal to consider that the effectiveness of the DSU provision would be undermined if the CFI tried to judicially intervene, and added that:

*'[T]he DSU does not establish a mechanism for the judicial resolution of international disputes by means of decisions with binding effects comparable with those of a court decision in the internal legal systems of the Member States.'*³⁰⁵

The Tribunal then addressed the claim for compensation, due to non-compliance by the EC and borrowed from the 'nature and scope' discussion in *Portugal v. Council*, and states that:

*'Even at the expiry of that period and after the introduction of measures under Article 22 of the DSU to make compensation or suspend concessions, that agreement continues to reserve an important place for negotiation between the parties.'*³⁰⁶

The Tribunal therefore concluded that:

*'The Community judicature cannot therefore review the legality of the Community measures in question without depriving Article 21.6 of the DSU of its effectiveness, particularly in the case of an action for compensation under Article 235 EC...'*³⁰⁷

The Tribunal further dismissed the use of the *Nakajima* doctrine, and the fact that the Community intends to comply with a DSB ruling, did not mean than the Community intend to implement obligations assumed in the context of the WTO Agreement within the meaning of the *Nakajima* case law. Since the disputed regulation did not transpose any rules arising from the WTO Agreement, it was thereby not aiming at maintaining any balance of rights and obligations of the parties to that agreement.³⁰⁸ This lead to the dismissal of the application, and the conclusion that:

³⁰⁴ Ibid. para 162

³⁰⁵ Ibid.

³⁰⁶ Ibid. para 164

³⁰⁷ Ibid. para 166

³⁰⁸ Ibid. para 168

*'In the light of the above, the Court holds that, in adopting the 1999 regime, and Regulation No 2362/98 in particular, the Community did not intend to implement a particular obligation assumed in the context of the WTO Agreements within the meaning of the Nakajima case-law. Therefore, the applicant is not in a position to plead infringement by the Community of its obligations under the WTO Agreements.'*³⁰⁹

The Tribunal findings seem to add to the idea that the Community courts are unwilling to extend the *Nakajima principle* to case law outside the anti-dumping sphere, which the Court justified by considering the nature and scope of the GATT provisions, to be of a too general character.³¹⁰

6.8 Van Parys

The disputes concerning DSB decisions in front of the community Courts might have seen its last major dispute when the Grand Chamber delivered its ruling in the *Van Parys v. BIRB* case.³¹¹ The background to the case was similar to the Chiquita case and concerned a dispute stemming from the WTO dispute settlement system regarding the lawfulness of the Council's Regulation 404/95 under the EC's bananas regime. The WTO Panel report had found the Regulation to be inconsistent with GATT 94, which was later endorsed by the WTO Appellate Body.³¹² This led to that the DSB adopted the Appellate Body's report and amended the Panel report, which required the EC to bring its banana regime in compliance with WTO law. The Council then adopted Regulations 1637/98 and 2362/98 to comply with the DSB decision. When Belgian company *Van Parys* was not granted a banana import licence for the quantities for which it had applied, it brought action against the Belgian authority responsible for the allocation of banana import licenses, *Belgisch Interventie- en Restitutiebureau* (BIRB). *Van Parys* claimed that BIRB's decision was unlawful since it was based on the EC Regulations that the Panel had found to be in violation of the WTO Agreements.³¹³ The Belgian Court then asked the ECJ for preliminary ruling on the validity of the EC regulations in light of Article I and XIII GATT 94.³¹⁴

³⁰⁹ Ibid. para 170

³¹⁰ De Mey, *The effect of WTO Dispute Settlement Rulings in the EC legal order*, German Law Journal 6:6 (2005) p. 3

³¹¹ Case C-377/02 *Van Parys v. BIRB* [2005] ECR I-1465

³¹² Panel Report, *EC-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA & Appellate Body Report, *EC-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R

³¹³ Case C-377/02, *supra* note 314, para 31-35

³¹⁴ Ibid. para 36

6.8.1 Opinion of Advocate General Tizzano

Advocate General Tizzano started by analysing the case law on direct effect of the WTO Agreements, recalled the judgement in *Portugal v. Council* and did accordingly consider the provisions of the WTO Agreement not as such as to be directly applicable.³¹⁵ Tizzano continued to examine the interpretation of DSU provisions, agreed with AG Alber, and quoted him stating that; ‘*there is no alternative but to implement the recommendations or rulings of the DSB*’ and that they ‘*cannot be circumvented by negotiation between the parties*’.³¹⁶

Adding to his argumentation, Tizzano continued to look at the *Biret* case and stated:

‘[I]n a ‘Community governed by law’ DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion.’³¹⁷

AG Tizzano then argued that the ruling in *Biret* did not preclude this conclusion since the Court in that case, in effect, refrained from ruling on DSU decision, and just followed the *Portugal v. Council* reasoning concerning WTO rules. He also considered that the reasonable period has elapsed, during which the EC had not brought their legislation into conformity with WTO rules, leading AG Tizzano to propose to the Court that:

‘[T]he Community regime for the import of bananas based on Regulation No 404/93 as amended and on the regulations adopted to implement that regulation is invalid inasmuch as it is inconsistent with the WTO rules as established by the DSB on 25 September 1997 and confirmed by the same body on 6 May 1999.’³¹⁸

6.8.2 Judgement of the Court

Despite the position put forward by the Advocate General, the Court held that a private party could not plea before a national court that, Community law is incompatible with certain WTO rules, even if the DSB has previously stated that such legislation is incompatible with those rules.³¹⁹ In reaching this conclusion, the Court first repeated their basic argument for denying direct effect from *Portugal v. Council*. Then the Court continued to discuss the *principle of implementation* and considered whether the EC’s adoption of measures aimed at implementing the DSB recommendations could be

³¹⁵ Opinion of AG Tizzano, Case C-377/02 Van Parys v. BIRB [2005] ECR I-1465, para 45

³¹⁶ Ibid. para 57; quoting Opinion of AG Alber, *supra* note 283, para 81

³¹⁷ Ibid. para 73

³¹⁸ Ibid. para 83

³¹⁹ Case C-377/02, *supra* note 314, para 54

interpreted as that the EC intended to assume a particular obligation undertaken under the WTO framework. This was however not considered to be the situation in the case at hand, and the *Fediol* and *Nakajima* exceptions did therefore not apply.³²⁰ The Court then analysed the Annex 2 of the Agreement establishing the WTO and its ‘Understanding on rules and procedures governing the settlement of disputes’, which lead the Court to state;

*‘...to require courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis.’*³²¹

In addition, the Court noted, that if the Community Courts were entitled to review the lawfulness of the Community measures in the light of WTO law, it risked interfering with the Community’s other obligations in relations to the ACP countries and the CAP. The expiration of the time limit did furthermore, not mean that the EC had exhausted its possibilities to find a solution to the dispute why;

*‘...to require the Community Courts, merely on the basis that that time-limit has expired, to review the lawfulness of the Community measures concerned in the light of the WTO rules, could have the effect of undermining the Community’s position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.’*³²²

As a last argument against the possibility for individuals to rely on DSU decisions, the Court once again put forward the lack of reciprocity in regards to the main trading partners of the EC, leading to the conclusion already accounted for.³²³ The judgment was also important since it meant a definite end to the theoretical discussion whether the *Nakajima* exception could be used to afford direct effect to DSB recommendation.³²⁴

6.9 Merck

The Court did recently extend its views on the possible direct applicability of Article 33 of the TRIPS. The Court had already ruled out the direct effect of Article 50(6) TRIPS in *Dior* and *Schieving-Nijstad*, but had still left an opening for the member states to decide on the legal effects of certain TRIPS provisions, which due to the mixed competences in the TRIPS fell under the member states discretion. The case concerned a preliminary ruling referred to the Court by the Portuguese Supreme Court (*Supremo Tribunal*

³²⁰ Ibid. para 41-43

³²¹ Ibid. para 48

³²² Ibid. para 51

³²³ Ibid. para 53

³²⁴ Antoniadis, *supra* note 116, p. 58

de Justiça) asking whether the ECJ had justification to interpret Article 33 TRIPS. The background for this was a dispute between *Merck Genéricos* and *Merck & Co*, where the later claimed that the former had violated a patent to which it was the holder. The national dispute was largely centred around the issue if TRIPS had direct effect or not. Merck disputed that Article 33 TRIPS and the time limits it contains had direct effect wherefore the Supreme Court asked the ECJ to clarify the issue.³²⁵

The Grand Chamber of the Court recalled established case law and declared that since TRIPS is a mixed agreement without any declared allocation of obligations between the EC and its MS, it falls under the member states discretion to decide the legal effect of provisions falling under their competences. The determination of under whose competence Article 33 TRIPS falls, is then rather simple since the EC only had provided one legislative act, even coming close to the area of Article 33 TRIPS (i.e. patents). The act, Council Directive 98/44 concerned the specific and isolated case of biotechnological inventions, an objective quite distinct from the one of Article 33 TRIPS. The only other nearby legislative acts were in the areas of plant varieties which neither can be placed under the same footing as the area of patents.³²⁶ The Court therefore considered that no EC legislation had been undertaken within the area, wherefore the posed question was answered with:

‘It must be concluded that, since Article 33 of the TRIPs Agreement forms part of a sphere in which, at this point in the development of Community law, the Member States remain principally competent, they may choose whether or not to give direct effect to that provision....The reply to be given to the questions referred must be that, as Community legislation in the sphere of patents now stands, it is not contrary to Community law for Article 33 of the TRIPs Agreement to be directly applied by a national court subject to the conditions provided for by national law.’³²⁷

The Court did thereby restate the current jurisprudence that ruled out any general direct effect of the WTO Agreement, as well as for the parts of the TRIPS agreement that falls under the Community’s competence.

The number of case law referred to in this chapter has formed the EC’s stance on direct effect of international trade law. Since the cases concerns different international agreement, and in some respect also different questions of legal effect, there is a need for a clearer examination of the most important part of these cases to sort out which requisites that combines them, in order to more easily grasp *de lege lata* on direct effect of GATT/WTO law.

³²⁵ Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, para 12-28

³²⁶ *Ibid.* para 38-42

³²⁷ *Ibid.* para 47-48

7 Analysis of the Court's position

The case law dealt with in the preceding chapter has given rise to a heated legal debate where authors have taken stance both for and against the Court's position. This chapter will deal with the main points in these cases together with arguments from the academic debate.

During the disputes, the Opinions of the Advocate Generals have been included on such frequent basis since they usually have been more educative than the rulings of the Court. Free-spoken AGs like Tesouro and Alber have both provided a number of interesting points in regards to the possible direct effect. The Courts has on the contrary been very reluctant to expand its reasoning outside the core issue, and have instead tried to settle the disputes in as few words as possible. The rationale and reasons behind the position taken are foremost linked with questions concerning intra-community competences and constitutional constraints. The prevailing perception is therefore that the situation has been created by an interaction and weighting of interests between the Court and the political institutions. This clearly makes it easy to agree with Trachtman, who in regards to the banana disputes state that:

*'The grant of direct effect to a legal rule is a political decision.'*³²⁸

In order to analyse the Court stance one might use the same evaluation as the Court does when determining the possible direct effect of an agreement. By examining the 'nature and structure' of the GATT/WTO, one might find an appropriate way of analysing the position taken by the Courts. The Court usually follows its examination of the nature and structure by looking at the provision to determine whether they are 'clear, precise and unconditional' enough to be granted direct effect. This test is no difference from when examining treaty provisions or regulations, but since the Court's reasoning has been focused on the 'nature and structure' part, where the possible direct effect has been ruled out, the second part of the examination has not earned much notice.³²⁹

7.1 Nature and structure

Ever since the Court for the first time was faced by the question of direct effect, in *International Fruit Company*, the focus has been on evaluating the structure and nature of the disputed provisions and agreements. This evaluation has repeatedly found that the GATT as well as the WTO

³²⁸ Trachtman, *Bananas, Direct Effect and Compliance*, EJIL 10 (1999) p. 664

³²⁹ Eeckhout, *supra* note 12, p. 314

Agreements are characterised by ‘*flexible provisions based on negotiations and political reciprocity*’. This conclusion was reached by the Court by referring to the available exceptions and derogations within the dispute settlement system, which lead the Court to consider that the ‘spirit, general scheme and terms’ of the agreements were not such as to be warranted direct effect. The many critics of the Court position and the early proponents for granting direct effect, did however not necessarily base their position on an analysis employing the ‘direct effect test’, but were rather inspired by their ambition to reinforce the legal dimension of the GATT. This in itself is a noble ambition, but also misguided since it not for the Community Courts to lead the way and push the GATT towards a stronger legislation by granting direct effect, but for the involved political bodies.³³⁰

The creation of the WTO and the incorporation for the GATT into this new entity, rendered to discussion of direct effect of the GATT out of time, and the interest was rightly shifted towards the possible direct effect of the WTO Agreements. The most cases in front of the Court have however been concerned with the TRIPS Agreement, while not handling many disputes in connection to the GATS. This might be because of the GATS’s great similarities with the GATT, where the ruling out of direct effect of one renders an examination of the other unnecessary.³³¹ The Community has also rendered out the possible direct effect in their *Schedule of Commitments* under the GATS, which must be considered having more weight than the similar formulation in the preamble of a decision, as with the GATT. The introductory note of the Schedule stated that:

‘The rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons.’³³²

Drawing conclusions from the reasoning of the Court in the cases concerning the direct effect of TRIPS in *Dior*, *Schieving-Nijstad* and *Merck*, one might however imagine an exception to the denial of direct effect of the GATS in areas where the member states have retained competence. The effect of Opinion 1/94, and the somewhat questionable conclusion of the mixed competences in the GATS, might then lead to the granting of direct effect of GATS provisions outside the *cross-frontier supply of services*. Even if GATS is yet to be used this way, it is likely that some member states court will consider that provisions of the GATS could be relied upon before the Court.³³³ The division of competences in regards to mixed agreements also makes it easier to accept the Courts position on direct effect of the TRIPS, since a complete denial of direct effect would clearly infringe on the member states’ competence and right to self-determination in regards to the agreement’s legal effects.

³³⁰ Eeckhout, *supra* note 12, p. 302

³³¹ Eeckhout, *supra* note 136, p.34

³³² Legal Instruments Embodying the Results of the Uruguay Round, p. 23557

³³³ Leal-Arcas, *supra* note 3, p. 244

This means that a ‘provision-to-provision investigation’ approach need to be employed when examining mixed agreements, which has also been proposed in regards to other agreements by the parties in the *Omega* case.³³⁴ What is most interesting with this case is however not necessarily the conclusion of the Court, but the reasoning of AG Alber. Albert rejected the claim of specific provision examination, by referring once again to the reciprocal nature of the WTO Agreements.³³⁵ The AG did however not stop his reasoning with this conclusion and stated that all WTO provisions are subject to a general reservation that leaves the states with different measures when reacting on a breach, and ;

*‘It is therefore not for the Court but for the WTO, or the members of the WTO, to ensure that WTO law is observed in the legal systems concerned. Direct effect of WTO rules is clearly not part of their legislative content. Such content may not be ascribed, at Community level, to WTO law in its original form but at most in the form of transposition measures. In that context WTO law may be (indirectly) significant.’*³³⁶

Albert agreed that the disputed provisions could be considered under the general requirements for rendering direct effect but this fact did not override the fact that these provisions were:

*‘[S]ubject to the general condition of WTO law that the members of the WTO are to comply with their obligations not by direct effect of WTO law in their legal systems but exclusively by specific transposition of those obligations.’*³³⁷

With this, Alber obviously acknowledges the constitutional balance, and tried to remain true to the division of competences, as laid out in the TEC, where the legislative and not the judicial power must be one holding the leading role in external trade relations. The Court did however not state in its judgement whether it accepted this justification for its jurisprudence on direct effect and did instead merely repeat the mantra established in *Portugal v. Council*.³³⁸

The fundamental case for the general direct effect of WTO law was as described, *Portugal v. Council*, which provided a number of observations that has been guiding for the Court’s position in the disputes that followed. The Court’s examination of the DSU rules has been especially influential for the examinations undertaken in the following judgements. The findings in regards to the DSU has also been extensively discussed in the legal doctrine, which has been foremost concerned with the issue whether the rules of the DSU require full compliance, but this is a question, as noted by

³³⁴ Cases C-27 & 122/00 *Omega* [2002] ECR I-2569

³³⁵ Opinion of A.G. Alber in Cases C-27 & 122/00 *Omega* [2002] ECR I-2569, para 92-93

³³⁶ *Ibid.* para 95

³³⁷ *Ibid.* para 96

³³⁸ Cases C-27 & 122/00 *Omega* [2002] ECR I-2569, para 85-97

Eeckhout, which is separated from the question of direct effect.³³⁹ It is in the nature of international agreements, and imbedded with the principle of *pacta sunt servanda*, that such agreements require full compliance by its contracting parties. This does however not necessarily come with the consequence of accompanying direct effect, since a legal mechanism, as the DSU, provide for other alternatives to full compliance such as compensation and retaliation. This had been used by the EC in regards to decisions made by the DSB, which has been seen as too politically sensitive to comply with, as in the *Bananas* and *Hormones* cases. These measures are imbedded in Article 22 DSU and its flexible nature in regards to compliance would therefore come into conflict with the always-present political considerations that characterise international trade.³⁴⁰

At this point one can note that there are no conclusive arguments for either the findings of the Court or its critics. Depending on one's motives, the 'nature and structure' can be given different interpretations. Both the involved institutions and many authors are 'cherry picking' among the WTO provisions to find support for their point of view. Wherefore it is very hard to obtain a fair and balanced perception of the 'nature and structure' of the GATT/WTO Agreements. It is however important to realise the in order to understand the position taken by both proponents and critics, it is necessary to complicate the issue. There is otherwise a risk of failing to grasp the implication on several related issues, if one would focus too much on the classical direct effect examination. The following areas have therefore all been put forward as factors on which the Court has, or should have, based its reasoning.

7.1.1 Comparison with other agreements

The Court has as stated earlier granted direct effect to international agreement such as free trade and association agreements. The main difference between these agreements and the ones denied direct effect, in the mind of the Court, is that the WTO Agreements is a forum for partners who seek to enter into 'reciprocal and mutual advantageous agreements', while agreements that has been given direct effect introduce a 'certain asymmetry of obligations'.³⁴¹ This distinction has however been criticised since the WTO Agreements indeed establish an asymmetry of obligations, as with the favourable and differential treatment of LDCs. It is therefore clear that WTO law have both symmetric and asymmetric obligations that sometimes can be hard to separate, since many are located in the bilateral relations between the EC and other WTO members.³⁴² The importance of the 'asymmetric' characteristics examination for the decision to grant direct effect or not, can be questioned. Since many multilateral agreements, as

³³⁹ Eeckhout, *supra* note 12, p. 304

³⁴⁰ Zonnekeyn, *supra* note 224, p. 120

³⁴¹ Case C-149/96, *supra* note 188, para 42-44

³⁴² Pauwelyn, *The Nature of WTO Obligations*, Jean Monnet Working Paper No. 1 (2002) p. 3 ff.

some human rights conventions, would be excellent candidates for direct effect within the EC legal order, without being of an asymmetric nature.³⁴³ The use of the terms ‘reciprocal’ and ‘asymmetric’ as related notions, is also unfortunate since they in reality can be part of the same agreements, as in the new EPAs between the EU and the ACP countries, which is reciprocal in nature even though containing some asymmetrical obligations.³⁴⁴ The difference in ‘purpose and nature’ between the GATT/WTO agreements and others such as the one in the *Kupferberg* case is clearly not evident, as both agreements seem just as ‘political’.³⁴⁵ The same goes for the dispute settlement system in the Lomé Convention, which seems rather underdeveloped in comparison with the WTO system.³⁴⁶ The notion about the WTO’s lack of asymmetry as stated in *Portugal v. Council* thus seems to be ill founded, which also goes for the notion about the position of foreign traders. The assumption here are that the possible granting of direct effect would put European companies and traders in a disadvantageous position compared to their international counterparts. This argument is usually encompassing the idea that foreign exporters to the European market, with the help of direct effect, would have an instrument for obtaining greater market access, something that their European counterparts then would lack, a line of argumentation leading into the issue of reciprocity.³⁴⁷

7.1.2 The role of reciprocity

The big difference in the mind of the Court for why the GATT/WTO Agreements are lacking direct effect, while some other do not, is the question of reciprocity. Since the EU’s most important trading partners (i.e. the US and Japan³⁴⁸), has not given direct effect to these agreements, a one-sided granting by the EU is perceived to put their traders in a disadvantaged position. This thus gives the reciprocity argument strong economic implications, where one deviates from the classical win-win scenario in global trade. Instead, one rightly acknowledges that there are indeed both winners and losers in global trade, but there is no justification to why the disadvantages of community traders are believed to be greater than the benefits for community individuals. The kind of reasoning put forward by the Court should be backed by an efficiency approach and a cost and benefits analysis, and not merely an acceptance that the positive effects on individual consumers cannot outweigh the effects on community traders and

³⁴³ Rosas, *Case Law: Court of Justice Case C-149/96, Portugal v. Council*, CMLR 37 (2000) p. 813

³⁴⁴ Borrmann et al., *EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites*, *Intereconomics* 40:3 (2005) p. 169

³⁴⁵ Peers, *Fundamental Rights or Political Whim? WTO law and the European Court of Justice in The EU and the WTO-Legal and Constitutional Issues*, De Búrca, G & Scott, J. (eds.) (Hart Publishing, Oxford, 2003) p. 118

³⁴⁶ Kuijper & Bronckers, *supra* note 133, p. 1344

³⁴⁷ Eeckhout, *supra* note 12, p. 312

³⁴⁸ For an account on of the issue in these countries; see Osterhoudt-Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, *European Journal of International Law* 9 (1998) p. 641

producers. Disregarding this clear protectionist and in an economic sense ill funded reasoning, the Court does also disregard from the relationship with other trading partners. The EC bilateral agreements with large trading partners as Switzerland and Norway do confer direct effect, a fact that the Court does not acknowledge in their reasoning.³⁴⁹ The comparison with other legal systems also shows the even if they are a pre-condition of reciprocity, it might be a possibility to override this fact.³⁵⁰ This is the case in French law, where French Courts have started to restrict the application of this the pre-condition on an increasing basis.³⁵¹ From this, it could then follow that the WTO dispute settlement mechanism would not demand the pre-condition of reciprocity when applied in the French legal system. One should of course be cautious when transferring this reasoning to the EC legal system, but it serves to show that it is possible to derogate from the reciprocity condition.

The close relation attributed to direct effect and reciprocity, it also contradicted by the ruling in *Kupferberg*, where the Court stated that the fact that Courts of the other contracting parties do not recognize direct effect, should not in itself be enough to constitute a lack of reciprocity of that agreement.³⁵² This is certainly the case since domestic legal effects of an agreement are determined by domestic rules, and the practise of other jurisdictions, even though possibly indicative for a certain approach, cannot substitute domestic rules and principle governing the internal effect of such an agreement.³⁵³ The statement in *Kupferberg* has not been given any notice by the Court, in the case law on the WTO Agreements. An approach that has been criticism in the literature, where Zonnekyn argues that even if WTO provisions in general contain reciprocal trade concessions, there are some rules like the national treatment provision, which is a general rule of law under the WTO and not a trade concession being exchanged for reciprocal concession from trading collaborates. This do then illustrate that the WTO system should not necessarily be seen as reciprocal concessions but rather an 'international rule based system', which would make the Court persistent reliance on the reciprocity of the WTO Agreements, obsolete. It has also been argued in the literature that a more analytical test should be employed, where the granting of direct effect to a precise and unconditional provision is depended whether this would substantially impair the rights and obligations of the EC.³⁵⁴ The test, even if not easily applied, could then be designed to verify whether the enforcement of a WTO rule would, overall, upset the balance of the EC's rights and obligations, which in the mind of

³⁴⁹ Peers, *supra* note 348, p. 122

³⁵⁰ Uerpmann, *supra* note 214, p.20

³⁵¹ *Ibid.* referring to: Alland, *Le droit international 'sous' la Constitution de la Ve République*, RDP 1649 (1998) pp. 1664-1666

³⁵² Case 104/81, *supra* note 115, para 18

³⁵³ Eeckhout, *supra* note 136, p. 37

³⁵⁴ Montana I Mora, *Equilibrium: A Rediscovered Basis for the Court of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?*, JWT 30:5 (1996) p. 53-54

Bourgeois should not face the Court with ‘insuperable difficulties’, and therefore is a valid alternative.³⁵⁵

The only conclusion that can be drawn from the political bodies’ negative approach to direct effect in regards to the reciprocity argument, is that stricter enforcement of GATT/WTO is perceived as detrimental to the EC’s commercial interests.³⁵⁶ This is a very mercantilist and discouraging point of view,³⁵⁷ when economic theory clearly point to the benefits for less regulations in global trade, but also from a direct democracy perspective where the right of individuals weights lightly compared to the interest of the representative institutions. This line of argument is also put forward by Kuilwijk, who critic the Court who;

*‘For the sake of sacred political balance, has failed to strike an acceptable balance between protection of individual rights and protection of the public interest’.*³⁵⁸

The granting of direct effect by the Court would probably not lead to a similar recognition in the Courts of the EC’s trading partners, but it would however send a signal to other countries, and perhaps encourage a similar process among these partners. To break the current deadlock, someone has to take the first step, and why not the EC? Peers answer this question, with that:

*‘...we cannot send Gandhi forth to do battle with Rambo.’*³⁵⁹

By this, Peers mean that if the Court would allow direct effect of GATT/WTO, one would arm the Community’s trading partners with a powerful economic weapon. In addition, he also acknowledges that this is not purely an economic question but an issue with implications for the fundamental rights discourse.

7.2 Rights of individuals

The Court did already in the founding *International Fruit Company* state that GATT 47 did not confer rights on citizens,³⁶⁰ and that the international trade regime, does not have any imbedded ideal of protecting individual rights. WTO rules has rather framed itself in terms of *‘specific market access concessions negotiated between governments, concerning obligations of negative integrationist nature, such as non-*

³⁵⁵ Bourgeois, *supra* note 1, p. 119

³⁵⁶ *Ibid.* p. 115

³⁵⁷ Even if one might agree on Osterhoudt-Berkey’s assessment that ‘the GATT 47 in itself is mercantilist’; Osterhoudt-Berkey, *supra* note 351, p. 641

³⁵⁸ Kuilwijk, *The European Court of Justice and the GATT Dilemma: public interest versus individual rights?*, EUI PhD thesis (1995) p. 257

³⁵⁹ Peers, *supra* note 348, p. 123

³⁶⁰ Cases 21-24/72, *supra* note 222, para 19 ff.

discrimination'.³⁶¹ This view is shared by WTO bodies where the Panel stated in the *Section 301-310* report, that even if WTO rules surely has an indirect effect on individuals, they do not protect the rights of individuals, let alone their right to trade.³⁶² It is also clear from the differences in stated objective between the EU and the WTO, what the purposes of these agreements are. The EU treaties aim at an '*ever closer union between the European peoples*' in order to further peace, democracy and human rights, while the WTO Agreement deliberately lacks any statements of such nature.³⁶³ The lack of individual rights objectives are however a 'truth' with some modifications, since international trade law has been increasingly involved with non-economic policies, such as the safeguard policies with regards to 'public morals'³⁶⁴ and 'human, animal or plant life or health'.³⁶⁵ There is also a '*universal recognition of human rights as part of modern general national law*', as stated by Petersmann, who largely base his case on a philosophical rights approach, arguing that there should naturally exist a human rights perspective also in WTO law.³⁶⁶ The Court has once referred to '*trade as a fundamental right*', in the *ADBHU* judgement,³⁶⁷ but has since then been reluctant to repeat this statement.³⁶⁸ The Court has also made use of WTO law as support in the interpretation of general principles of law and fundamental rights, in the *Metronome* judgement.³⁶⁹ Here the Court stated that:

*'[T]he general principle of freedom to pursue a trade or profession cannot be interpreted in isolation from the general principles relating to protection of intellectual property rights and international obligations entered into in that sphere by the Community and by the Member States.'*³⁷⁰

If one nevertheless concurs with the assessment that GATT/WTO law is made by states for states, Bourgeois like Petersmann finds something discouraging with a system that:

*'On the one hand generate rules designed to regulate international trade, even it if is to regulate what states are supposed to do or not to do in matters of trade, but, on the other, denies people, affected by what states do or not do in matters of trade, the possibility of relying on these rules to protect their interests.'*³⁷¹

³⁶¹ Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, Cambridge, 2003) p. 73

³⁶² Panel Report *US Section 301-310 of the Trade Act of 1974*, WT/DS/152/R

³⁶³ Von Bogdandy, *supra* note 7, p. 609

³⁶⁴ Article XX(a) GATT 47

³⁶⁵ Article XX(b) GATT 47

³⁶⁶ Petersmann, *supra* note 3, p. 96 ff

³⁶⁷ Case C-240/83, para 9

³⁶⁸ Peers, *supra* note 348, p. 125

³⁶⁹ Case C-200/96 *Metronome* [1998] ECR I-1953

³⁷⁰ *Ibid.* para 26

³⁷¹ Bourgeois, *supra* note 1, p. 113

If one would grant direct effect in order to enable citizens to enforce trade law obligations, one would however neglect the important fact that neither the original GATT members nor the contracting partners of the WTO intended such effects being granted.³⁷² The increased human rights approach in regards to WTO law or the creation of an international ‘right to trade’ is therefore surely desirable but if such development were carried out in the hand of the Court, it would risk constituting judge-made law and lead to a democratic deficit. This is a tricky question that would warrant an own paper in itself, but this author must concur with Peterman that there is a need for greater protection of individual rights as well as more participatory democracy in the WTO.³⁷³ But as Peers points out, there is clear legitimacy problem intertwined in these questions and such development should occur at the hands of the legislative branch in duly democratic order and not by the pen of the judges in the *Palais de Justice*.³⁷⁴

7.3 Constitutional considerations

By adhering to a dualist approach in international trade law and not letting individuals rely upon GATT/WTO law if not implemented in the EC, a substantial policy tool is left in the hands of the political institutions. Since the political institution decides the effect of GATT in the EC legal order, they make use of a ‘sovereignty shield’, which protect them from the GATT.³⁷⁵ This will for the political institutions to enjoy an equivalent discretionary power as its major trading partners, does however not mean that legal control of acts are impossible or ‘an obvious assault to the *trias politica*’.³⁷⁶ The opposite might instead be the case if the judicial branch would infringe on the political branch’s rights and obligations in regard to external relations.

In the intricate division of powers in regards to GATT/WTO law, the interest and position of the member states has somewhat changed over time, but have generally been hostile towards the Court’s possibility to review EC measures against GATT/WTO law, as well as the granting of direct effect to such provisions. The view of members states has instead been that trade policy, as part of foreign relations, should be preserved for the governments and that interference by the Court is to be avoided in order to fully pursue the possibility of resolving disputed by negotiations.³⁷⁷ The Court has nonetheless taken an important position in EC’s external relations that has been described as a ‘*microcosm of international integration*’.³⁷⁸ This position has to balance several conflicting interest stemming from national, European and international actors, which is surely not an easy task. That the

³⁷² Eeckhout, *supra* note 12, p. 313

³⁷³ Petersmann, *supra* note 3, p. 107

³⁷⁴ Peers, *supra* note 348, p. 130

³⁷⁵ Bourgeois, *supra* note 1, p. 107

³⁷⁶ Zonnekyn, *supra* note 224, p. 121

³⁷⁷ Bourgeois, *supra* note 1, p. 114

³⁷⁸ Snyder, *supra* note 181, p. 366

maintenance of such complicated relations give rise to many political considerations is certainly not hard to understand, especially if one keeps in mind, the delicate divisions of competences on the EU's internal level. The divisions of competences in regards to external relations within the EC, as laid out in the CCP, stipulate that the Commission and the Council and to some degree the European Parliament have the responsibility for negotiating and concluding agreements on behalf of the EC. These institutions do also have the mandate to define and accept the substance of the obligations undertaken under these agreements. If the task of political institutions is to determine 'the substance, content and methods of enforcement' of international obligations, one might argue, as Eeckhout do, that there is also for these institutions to determine the internal legal effects of these agreements.³⁷⁹ There is an important point to be made here, and one must recall the division of competences within the EU and the democratic legitimacy when arguing either way in the direct effect question. Even if such legitimacy might not be as strong as would be ideal, due to the limited role of the EP, it is however stronger than if it would be placed in the hands of the judicial branch. The system in place in the EU, as in several other constitutional systems (e.g. UK, Italy, Germany, US), should have a legislative branch that decide the legal effect of a certain agreement, and the judicial branch should then be bound by such decisions. If there however is no clear position taken by the political institutions, as in the case of direct effect of the WTO, the Court would then deter from deciding on the question, with regards to the constitutional balance. This constitutional consideration is also reflected in the Court's statement in *Kupferberg*, where it stated that:

*'Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties.'*³⁸⁰

It is thus for the legislative branch to decide such effect, and not for the judicial branch. Even if Kuijper argues that, the Court invented 'the constitutional legal order' and it could therefore be adapted to fit the changed reality.³⁸¹ The fact that the Court has served as a motor for European integration in the past does however not mean that a granting of direct effect should be done for such purposes. This is especially true for such a controversial area as direct effect where the need for the political branch to retain control, in order not to create a major intra-institutional dispute, is of utmost importance. The importance of the issue also makes one wish for a situation where the legislative institutions would have had the will and means to clearly state the intended effects of the GATT/WTO in a legally binding manner and not just briefly mention it in a preamble.

³⁷⁹ Eeckhout, *supra* note 12, p.310

³⁸⁰ Case 104/81, *supra* note 115, para 17

³⁸¹ Kuijper & Bronckers, *supra* note 133, p. 1323

7.4 Effect of DSU

The effect that the result of the Uruguay Round had for the dispute settlement system cannot be underestimated. The almost automatic adoption of Panel and Appellate Body Reports by the DSB, have left the EC, and the other members, with a decision with binding effect in international law. Such a decision is brought about in due respect of law and process, thus making it equivalent to other judicial settlement of disputes in national or international law.³⁸² Regardless of the drastic changes brought to the dispute settlement, there is however still some flexibility left when the adoption of a decision only means that the conclusion on what is legally right or wrong is final and there is still a remaining flexibility in regards to the remedy. The parties can then after negotiations either; agree to comply with the decisions or to pay with new trade concessions.³⁸³ The big question is then if this means that these decisions are binding and can be judicially enforced. The CFI and ECJ do as seen think that they cannot, since such a regime in their minds would interfere with the EC institutions possibility to manoeuvre. In reaching this conclusion, the Courts have emphasised the provisions under Article 21(6) and 22(8) DSU that point out that the issue of compliance remains on the DSB's agenda as long as there is no agreement on compliance.³⁸⁴ This do then in the Court mind mean that a judicial intervention would interfere with the EC institutions negotiating room within the WTO.³⁸⁵ Some authors like Kuijper stands up for the Courts position, and argues that one cant stare oneself blind on the explicit treaty provisions, since one then fails to appreciate the difference between the 'law on the books' and the 'law in action'.³⁸⁶ As in the Bananas and Hormones cases, where the 'law in action' and the considerations made by the judicial branch has caused a divergence form the 'law on the books'. The Court's reasoning has however been criticised by authors like Eeckhout that prior stood steadily by the side of the Court in their earlier approach concerning direct effect. Eeckhout argue that the DSB decisions are binding international law, which is obligatory to comply and do therefore, contrary to what has been stated by the Court require compliance, since non compliance by a WTO member is indeed, 'quite serious'.³⁸⁷ Despite his reservations above, Kuijper does also argue along the same lines as Eeckhout, in wanting to allow a:

*'certain well-defined group of individuals the possibility to rely upon implemented Panel and AB reports in claims of non-contractual liability for breach of WTO law by Community institutions.'*³⁸⁸

³⁸² Cottier, *supra* note 34, p. 370

³⁸³ Bourgeois, *supra* note 1, p. 115

³⁸⁴ Cases C-377/02, *supra* note 314, para 44-47; T-19/01, *supra* note 305, para 164-166; C-94/02, *supra* note 283, para 64-68

³⁸⁵ Eeckhout, *Does Europe's Constitution Stop at the Water's Edge?* (Europa Law Publishing, Groningen, 2005) p. 16

³⁸⁶ Kuijper & Bronckers, *supra* note 133, p. 1332

³⁸⁷ Eeckhout, *supra* note 388, p. 17

³⁸⁸ Kuijper & Bronckers, *supra* note 133, pp. 1341-42

This is considered important by Kuijper, in order to strike a balance between trade policies and the right of individuals, an insight that is easy to share since a complete denial of compensation for individuals would be to neglect the human rights aspect too much.

7.5 Impact of ‘indirect effect’

Some authors, among them Eeckhout were highly positive regarding the possible use the *principle of consistent interpretation* and the *principle of implementation* in situations where direct effect is ruled out. This could then lead to the extensive use of ‘indirect effect’ of GATT/WTO law, which could prove nearly as effective as direct effect in integrating WTO law into the EC legal order.³⁸⁹ This was considered to be of particular significance for invoking GATS and TRIPS provisions and for the protection of individual rights in such relations.³⁹⁰ The use of the principle as a ‘political filter’ where it would reinforce the EU’s democratic legitimacy has also been proposed.³⁹¹ The principles do also constitute an increased possibility for the European Courts to enhance individual protection and in a larger perspective, promote the rule of law, by more frequently applying the principle of consistent interpretation. This principle is not very useful in itself, but when seen in the light of the increasing number of disputes coming from the WTO dispute settlement system,³⁹² it could indeed become an extremely powerful tool.

The development and use of this ‘indirect effect’ does however seem to have been less influential than first envisaged. The Court has been rather conservative in employing the *principle of implementation*, on any larger scale, outside cases concerning ADAs.³⁹³ The use of the *principle of consistent interpretation* has also been scarce, and it has not been used in any large extent in relation to DSB decisions, which was extensively advocated in the literature. The Tribunal has instead stated (twice) that ADA agreements cannot be compared to the implementation of a Panel report,³⁹⁴ while the Court in *Van Parys* put an effective end to the academic discussion, whether ‘indirect effect’ could be used to render direct effect of DSB recommendation.³⁹⁵ Even if the jury still might be out on the final judgement on the usefulness of these alternative legal effects, they do not seem to have filled the void created by the lack of direct effect, especially in regards to the protection of human rights.

³⁸⁹ Griller, *supra* note 132, p. 465; Eeckhout, *supra* note 12, p. 316; Snyder, *supra* note 18, p. 332

³⁹⁰ Eeckhout, *supra* note 136, p. 40 ff.

³⁹¹ Snyder, *supra* note 181, p. 664

³⁹² Cottier, *supra* note 34, p. 369

³⁹³ Kuijper & Bronckers, *supra* note 133, p. 1328

³⁹⁴ Cases T-19/01, *supra* note 305; T-30/99, *supra* note 209

³⁹⁵ Case C-377/02, *supra* note 314, para 51

8 Conclusion

The Community Courts position on GATT and WTO law has, despite being heavily criticised, actually been quite consistent with a continuous denial of direct effect concerning several aspects of the GATT and WTO Agreements. The general rationale behind this denial has been the perceived flexible nature of GATT/WTO provisions, which is considered to be based on negotiations and political reciprocity. In addition to these general agreements, the question whether direct effect should be given to decision and rulings of the dispute settlement body has been decided by the Courts in a number of cases, where this possibility has been rejected repeatedly. The only general exception to this approach, apply to areas within the WTO Agreement that does not fall under the exclusive competence of the EC, thus making them mixed agreements such as the GATS and the TRIPS. Some of the provisions that fall under the competence of the Member States could then be given direct effect, which however is an issue for each member state to decide upon. The Court has also developed certain principles in relation to the interpretation and implementation of international trade law. The *principle of consistent implementation* and the principle that emerged from the *Fediol* and *Nakajima* case law have been considered to make up a remedy for the lack of direct effect, especially in regards to the protection of individual rights. The only present possibility for individuals to rely on WTO law is therefore if these provisions have been transformed into EC law, by the adoption of an EC legal instrument. This stance does then clearly add to the sensation that the EC follow a dualist approach in regards to WTO law.

The taken approach does however seem rather contradictory when seen in the light of the Courts' position concerning other international agreements. Agreements that have been given direct effect, even though many authors seem to agree on that their nature and structure does not warrant a different treatment compared to the one given to the WTO Agreements. There are a number of other reasons that have been put forward, as to why the current position by the Court is unfortunate. Many critics emphasis the protection of individual right as an argument for the granting of direct effect and there are several other good arguments both for and against the granting of direct effect.³⁹⁶ None of which has had enough importance to outweigh the Courts' apparent determination to comply with the political reality in which it operates. The politicised position taken by the Court is apparent throughout its history, from the initial denial of direct effect of GATT 47 to the division of competences in Opinion 1/94 and the recent denial of direct effect of DSB decisions.

³⁹⁶ For a good summary of the pros & cons; see Cottier et al., *The Relationship between World Trade Organisation Law, National and Regional Law*, Journal of International Economic Law 1 (1998) p. 120

When arguing for or against direct effect one must appreciate the underlying political constraints, not simply get up on one's high horse, and protest for an increased human right approach. Since there is an apparent risk if one would put the determination of direct effect exclusively in the hands of the Court. It is clear that the Court has an obligation to protect the interest of individuals and has rightly given itself the mandate to review international provisions in search for possible *jus cogens* violations. There is however, obvious constitutional power problems if the Court would infringe too much on the political power's area and award effects to agreements that none of the contracting parties have wished for. The constitutional balances of the EC, both internally and externally, are complicated to say the least, wherefore there is a risk if one institution would allow itself too much freedom, that such an initiative could upset the balance of power and in the end endanger the European cooperation as a whole. This does not mean that the importance of 'rule of law' and the democratic legitimacy are neglected but solely that there is a need to take notice of and understand the political environment that surrounds the issue of direct effect of international trade law. In this respect, it is interesting to see how the Council in *Portugal v. Council*, put forward arguments against granting direct effect, claiming that the WTO dispute settlement system would risk interfering with the jurisdiction of the Court, thereby considering the DSU to encompass at least some judicial nature. While as soon as the political nature could add to the reciprocity argument, as manifested in later in the judgement as well as in following case law, then the Council considered the nature to be non-judicial. This sends a clear signal that the issue is not really a judicial one concerning the interpretation of the nature of the GATT/WTO, but clearly a political where the arguments are modified to support the claims allowing for retained competence. The determining factor behind the Court reasoning is therefore, in my humble opinion, the political institutions unwillingness to delegate competences to the individuals, to whom they owe their position in the first place.

The freedom of political institution is however not a very comforting approach in regard to dispute settlement where it instead should be a preference for the superiority of DSB decisions. This would bring forth a mandatory compliance and prevent the current situation where the EC chose non-compliance and compensation, when the decision is too politically sensitive. The EC's stance in both the *Bananas* and *Hormones* cases can be interpreted as following a purely protectionist agenda which diminishes the rule of law in international organisations. This creates a need for an allowance of direct effect that would not only lead to increased rules of law, but arguably also better economic policies for the EU as a whole. The human rights argument for allowing direct effect is also highly convincing, and it is surely unfortunate that 'the right to trade' is not regarded in any higher extent; especially with the increasing importance and effect that trade has on individuals in the globalised world economy of the 21st century.

It is apparent that the Court has tried to reconcile and strike a balance between the need for political considerations and the protection of individuals, but one would nonetheless wish that the emphasis tipped over in favour of the human rights aspect. To achieve this, *de lege ferenda*, the political institution would however need to make an active political decision, since even if the Court could do it, it would endanger the constitutional balance, and in no way do the ends justify the means. I, for one, do then truly hope for a development where the political power would put the perspective of the individual higher on the agenda. This ideal situation might seem naïve, but to paraphrase Barack Obama, the concluding word must be that: *in the unlikely story that is the EU, there has never been anything false about hope.*

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