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# To be or not to be – granting WTO rules direct effect within the EU

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# Summary

For a number of years, the European Court of Justice has had to deal with the potential conflict between the law of the European Union and the law of the World Trade Organization. One issue that has gained particular interest is the question of whether the rules of the WTO give rise to direct effect within the EU legal system, meaning that they can be invoked by individuals in the courts of EU Member States. The ECJ has been consistent with their arguments as to why WTO rules should not be granted direct effect over the board. Although the ECJ has established direct effect in certain cases, the general stance is that neither the GATT nor the WTO rules are sufficiently precise to give rise to direct effect. Another concern is the issue of reciprocity, i.e. the consequences direct effect would have in trade negotiations if one party acknowledges direct effect whereas the other does not. The purpose of the thesis is to explore whether the stance of the ECJ, to deny WTO rules direct effect, is justified.

This thesis provides knowledge of the background to the conflict, in particular the part which resides in the very nature and structure of the EU, such as the supremacy of EU law and the external trade regulation of the EU. It also includes an in-depth look at the WTO dispute settlement, with a focus on negotiations. However, the staunch resistance to granting WTO rules direct effect can be found with the ECJ, and therefore a substantial part of the thesis is dedicated to exploring the reasoning of the ECJ case law in regards to WTO rules and direct effect. Finally, the thesis concludes that the ECJ indeed has a very solid basis for denying WTO rules direct effect, in particular due to policy considerations. Although there are legal and financial arguments in favour of granting direct effect to WTO rules, the conclusion is that to do so would rob the EU of a substantial amount of power within diplomatic negotiations; the very essence of the WTO.

# Sammanfattning

I ett antal år har EU-domstolen fått ta ställning till den potentiella konflikt som existerar mellan EU-rätten och reglerna inom WTO. En särskilt uppmärksammas fråga är huruvida WTO-reglerna kan ge upphov till direkt effekt inom EU:s rättssystem, dvs. att de kan åberopas av individer i medlemsländernas domstolar. EU-domstolen har bedömt att WTO-reglerna generellt inte kan ge upphov till direkt effekt, och har varit konsekvent i sina argument för detta. Även om EU-domstolen har medgivit direkt effekt för WTO-regler i enskilda fall, så är den generella hållningen att varken GATT eller WTO-reglerna är tillräckligt precisa för att ge upphov till direkt effekt. Ett annat skäl för denna återhållsamhet är frågan om ömsesidighet, med andra ord de konsekvenser som direkt effekt skulle kunna ha i handelsförhandlingar om endast den ena parten tillämpar direkt effekt. Syftet med denna uppsats är att utforska huruvida EU-domstolens hållning, att neka WTO-reglerna direkt effekt, är motiverad och rättfärdigad.

Denna uppsats tillhandahåller bakgrundsinformation gällande konflikten, då särskilt vad gäller den del som tillhör själva EU:s struktur och beskaffenhet, som t.ex. att EU-rätten är *lex superior* och hur EU:s externa handel är reglerad. Uppsatsen går även igenom konfliktlösning inom ramen för WTO, då med ett särskilt fokus på förhandlingsmomentet. Det starka motståndet mot att låta WTO-reglerna ge upphov till direkt effekt kan dock hittas hos EU-domstolen, och därför ägnas en avsevärd del av uppsatsen åt att redogöra för EU-domstolens resonemang i relevanta rättsfall. Slutligen konstateras att EU-domstolen har en väldigt solid grund för att neka WTO-reglerna direkt effekt, särskilt med anledning av utrikespolitik. Även om det finns juridiska och ekonomiska argument för att låta WTO-reglerna ge upphov till direkt effekt, så är konklusionen att detta skulle beröva EU en avsevärd makt inom diplomatiska förhandlingar, vilket är själva kärnan i WTO.

# Abbreviations

ATC	Agreement on Textile and Clothing
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding”)
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
EURATOM	European Atomic Energy Community
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1947
NGO	Non-governmental Organisation
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBR	Trade Barriers Regulation
TBT	Agreement on Technical Barriers to Trade
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America
WTO	World Trade Organization

# 1 Introduction

Both the European Union and the World Trade Organization are extensive organizations, encompassing a number of international agreements. Whereas the WTO has 153 Member States<sup>1</sup> and covers the entire world, the EU has 27 Member States<sup>2</sup> and operates in Europe. Regardless of their differences in size and agenda, they are both in their own right large players on the arena of international trade. Since the origin and permeating character of the EU is to cooperate in trade-related matters, it is not surprising that the relationship between the EU and the WTO is complicated. As far as international legal systems go, the WTO can claim an efficient system where breaches and inconsistencies are being met with far-reaching and forceful consequences, such as financial retaliation and compensation. Likewise, the EU has also developed a strong financial legal system, with the supremacy of EU law, as interpreted by the European Court of Justice, at the top of the structure. These two systems have developed side by side over time, and as they have both expanded in size and moved towards a tighter and more consolidated structure, the question of how the WTO Agreements affect the EU has become a very pressing issue. The question is complex, as one can view the EU either as one body, or as a group of several sovereign states, cooperating beneath a system of agreements and jurisprudence that either empowers them or grants the power to the EU. The relationship has an inherent conflict, as the WTO does not tolerate protectionist tendencies, whereas the EU has a decidedly European focus. The question is not simplified by the fact that the division of power between the EU and the Member States in the area of international trade is less than clear, although an attempt to clarify and solidify a structure has recently been made through the Lisbon Treaty.

During the early years of what is now the EU, the ECJ established the principle of direct effect. In short, direct effect occurs when an individual in a national court can directly rely upon an international agreement and claim rights thereof. With this principle, private actors can claim legal rights established by the EU in their national courts without the need for their domestic legalisation to in any way express this right, and sometimes they can even incur state liability. However, with the principle of direct effect now being established and entrenched within the EU legal system, and the EU as well as the Member States being parties to the WTO Agreements, a heavily debated issue is whether direct effect can be applied to the WTO Agreements as well. The ECJ has consistently denied this, a standpoint that has led to both praise and criticism. In effect, this means that neither individuals nor EU Member States can challenge EU or domestic measures directly by appealing to WTO law. Although the Vienna Convention<sup>3</sup> states that international law prevails over national law in international relations,

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<sup>1</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) at December 9th 2010.

<sup>2</sup> [http://europa.eu/about-eu/27-member-countries/index\\_en.htm](http://europa.eu/about-eu/27-member-countries/index_en.htm) at December 9th 2010.

<sup>3</sup> Vienna Convention on the Law of Treaties, entered into force 27 January 1980.

through the principle of *pacta sunt servanda*,<sup>4</sup> the matter remains unresolved and controversial in a domestic and EU context.

## 1.1 Subject and purpose

The purpose of this thesis is to outline the reasoning of the ECJ and the basis for it, and also to analyse the arguments for and against granting the WTO Agreements direct effect within the EU. The ECJ has claimed jurisdiction in terms of interpreting the WTO Agreements and is thereby determining the effect those agreements have within the EU. This thesis will elaborate upon how the ECJ can claim this jurisdiction, which is a matter of EU law and jurisprudence. Once an understanding of that has been reached, one can delve into the question of why the ECJ argues as it does. The thesis will attempt to answer the following questions, though not necessarily in the same order:

- How has the ECJ reasoned regarding the granting of direct effect to the WTO Agreements?
- What is the structural basis for the reasoning and jurisdiction of the ECJ?
- Should the WTO Agreements have direct effect within the EU, or is it correct of the ECJ to restrict this?

To answer these questions, one needs a certain understanding of the division of powers within the EU, as well as the somewhat diplomatic character of the WTO dispute settlement system. Also, the principle of direct effect stands as the source of the issue; without direct effect there would be no need to speculate regarding the consequences of applying it to the WTO Agreements. Therefore, an understanding of this principle is crucial to an analysis of the issue.

## 1.2 Scope and delimitations

This thesis will focus on the subject matters that are directly related to the ECJ's jurisdiction and its grounds for legal reasoning regarding the WTO and direct effect. Apart from an overview of the dispute settlement system of the WTO, this thesis will not delve further into the different WTO Agreements or any of the principles that otherwise are strongly associated with the WTO. Areas such as the most-favoured-nation treatment, the concept of like product, differential treatment for developing countries, tariffs, import and export restrictions and details of the GATT, TRIPS, SPS and TBT etc, are not within the scope of this thesis.

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<sup>4</sup> Ibid, Article 26.



Another issue that is closely linked to the matter of granting direct effect to the WTO Agreements within the EU, is the question of implementation of WTO recommendations and panel reports. Although it can be argued that this issue often overlaps with, or is an aspect of, the thesis subject at hand, this is not a question that will be explored in this thesis due to time and volume restraints.

This thesis is aimed at readers with a certain knowledge of WTO and EU law and the issues concerned. Therefore, a more thorough exposition of the basics of WTO and EU law has been excluded from this thesis.

## **1.3 Methodology and sources**

The purpose of this thesis will be accomplished through the traditional legal dogmatic method, utilizing the case law of the ECJ as the essential source. This case law points towards different issues that are explored and explained through the use of scholarly literature and, in some cases, academic journal articles. In addition to this, international agreements originating both from the EU as well as from the WTO will be analysed. Regarding the discussion and analysis of the thesis subject, comments and opinions from scholars are used to demonstrate the complexity and potential consequences of the subject matter.

## **1.4 Structure**

To fully grasp the reasoning of the ECJ regarding the granting of direct effect to the WTO Agreements, there are certain key elements that must first be understood. Therefore, the thesis will begin with explaining direct effect and the supremacy of EU law over national law, so as to give an understanding of the legal structure of the EU, which grants the ECJ its basis for jurisdiction and interpretation. Also, the impact and use of direct effect is explored. As a natural consequence of this, the next chapter concerns the division of powers within the EU, i.e. between the EU and the Member States, especially in regards to international agreements. The thesis then turns to the WTO, delving into the somewhat diplomatic character of the WTO dispute settlement system, with a focus on the aspect of negotiations. Finally, the thesis reaches the legal jurisdiction and the actual case law of the ECJ regarding the WTO and direct effect, by which time the reader will hopefully have reached an understanding of the background subject areas, so as to fully grasp the reasoning of the ECJ. The thesis is then concluded with an overview of the arguments for and against granting the WTO Agreements direct effect, with the author's analysis and discussion as the final section.

## 2 Direct effect and supremacy of EU law

The WTO Agreements have both the EU and its Member States as parties, so one fundamental question is therefore why the EU should hold all judicial control over the WTO Agreements and their implications within the EU. The legal reasons for this, and what, in essence, grants the ECJ its prominent role in interpreting these Agreements, can be found in the principle of supremacy, which is a principle that has been developed by the ECJ over a long period of time. Both supremacy and direct effect are intrinsic parts of the EU legal system, but direct effect is not formalised in any of the Treaties. Instead, it is yet another strong and crucially important principle that has been developed through the jurisprudence of the ECJ. This section will explain these two principles and how they are applied, which are the base for the ECJ's reasoning and role, particularly in the context of this paper. The ECJ has stated that Community legislation must be construed and interpreted in a manner that is consistent with the international agreement in question, as according to the doctrine of consistent interpretation.<sup>5</sup> However, this stance becomes limited when the wording and purpose of EU law is incompatible with international obligations, and in this situation the use of direct effect becomes crucial.

Both principles date back to the famous *Van Gend en Loos* case from 1962.<sup>6</sup> The Lisbon Treaty does not clarify the issue of supremacy any further, apart from a Declaration concerning primacy, which states that:

“...in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”

This is not a direct expression of supremacy, and therefore, the primacy of Community law is not enshrined in the Lisbon Treaty as such, and makes no significant difference in law, compared to the legal situation under the original Treaties.<sup>7</sup>

It is important to separate the two different concepts of direct effect and direct applicability. The two are closely linked, but whereas direct applicability means that the legal provision itself establishes its validity in the host state (also called self-executing) without any need for the host state to transfer it into national legislation, direct effect means that a provision

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<sup>5</sup> Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación*, [1990] ECR I-4135, para. 52.

<sup>6</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie de Belastinge*, [1963] ECR 1.

<sup>7</sup> Kent, *Law of the European Union*, 88.

gives rise to rights or obligations on which individuals may rely before their national courts.<sup>8</sup>

Direct effect has been claimed to be significantly important for the EU. By giving its citizen rights, the EU will become more meaningful to “the people”, which in turn will increase the interest for the EU’s objectives, aims and policies.<sup>9</sup> It also enhances the effectiveness of Community law by establishing dual vigilance, because not only does the Commission ensure Community law enforcement procedures, this is also done by individuals concerned about their rights.<sup>10</sup>

## 2.1 Supremacy

All international treaties, including the EU treaties, are entered into by sovereign states, who thereby give up a certain part of that sovereignty to gain other benefits. However, international agreements require some form of incorporation into the domestic legal system of the party states.

Incorporation can be done in two ways: 1) through the monist approach, meaning that the treaty is self-executing in the domestic legal system as soon as it has been ratified (as in France, for example), or 2) through the dualist approach, meaning that the international agreement needs to be incorporated by statute to take legal effect in the party state (as, for example, in Sweden).

Although the supremacy of Community law over national law has no specific legal base, it has been argued that it is implied through some of the Treaties.<sup>11</sup> For example, Article 4, para. 3 TEU (ex Article 10 TEC) requires Member States to comply and not hinder the objectives of the Community, but also Articles 18, 288 and 344 TFEU (ex Articles 12, 249 and 292 TEC, respectively) have been said to imply supremacy.

Through the preliminary reference procedure contained in Article 267 TFEU (ex Article 234 TEC), the ECJ can issue rulings on the validity and meaning of Community law, and these rulings are then binding on the Member States. It is through this that the ECJ has been able to develop its own jurisprudence on the supremacy of Community law. This was done to ensure uniform application of EU law throughout the Community and to avoid divergent national approaches.<sup>12</sup>

The ECJ made its first statement regarding the supremacy of Community law in the *Van Gend en Loos* case,<sup>13</sup> which concerned a challenge to a

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<sup>8</sup> Ibid., 101 and Foster, *EU Law*, 163.

<sup>9</sup> Emiliou and O’Keeffe (eds), *The European Union and World Trade Law – after the GATT Uruguay Round*, 314.

<sup>10</sup> Foster, *EU Law*, 142.

<sup>11</sup> Ibid., 115-116.

<sup>12</sup> Kent, *Law of the European Union*, 89.

<sup>13</sup> Case 26/62, *Van Gend en Loos*.

customs duty imposed by the Dutch government. The company claimed that the duty was an infringement of Article 30 TFEU (ex Article 25 TEC), an Article that prohibits Member States from introducing new customs duties between themselves. The significant statement regarding supremacy was worded by the ECJ as follows:

“The Community constitutes a new legal order in international law, for whose benefits the States have limited their sovereign rights, albeit within limited fields...”<sup>14</sup>

The legal order was seen as new in two ways: 1) because it created the EC, an entity that was recognised in international law, and 2) because the EC Treaty created rights and duties, which could be enforced in national courts.<sup>15</sup> The ECJ elaborated upon this reasoning and the supremacy of Community law in the *Costa v. ENEL* case.<sup>16</sup> This case concerned an Italian national who claimed that an Italian statute enabling the nationalisation of an Italian electricity company, in which he was a shareholder, contravened several provisions of the TEC, and the Italian court had subsequently referred the question of priority to the ECJ. The ECJ stated that the Member States, by creating the Community and thereby limiting their sovereign rights, had created a body of law, which binds both their nationals and themselves. The Court went on to say that as a consequence of the integration of Community provisions into the law of the Member States, as well as the terms and spirit of the Treaty, the Member States cannot give priority to a unilateral and subsequent measure over Community law, and such a measure cannot be inconsistent with Community law. The supremacy of Community law was made abundantly clear by the ECJ through the following statement:

“...law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic provisions... ..The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”

The conclusion was that Community law must be supreme over subsequent national law. The supremacy of Community law has been upheld and further elaborated upon by the ECJ in later case law, notably the cases *Simmenthal*,<sup>17</sup> *Factortame*<sup>18</sup> and *Francovich*,<sup>19</sup> the latter in which the ECJ

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<sup>14</sup> Case, 26/62 *Van Gend en Loos*.

<sup>15</sup> Kent, *Law of the European Union*, 90.

<sup>16</sup> Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

<sup>17</sup> Case 106/77, *Amministrazione della Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629.

<sup>18</sup> Case C-213/89, *R. v. Secretary of State for Transport (Factortame No. 1)*, [1990] ECR 2433.

<sup>19</sup> Joint Cases C-6/90 and 9/90, *Francovich & Bonifaci v. Italy*, [1991] ECR I-5357.

established that a Member State incurs liability when it does not give primacy to Community law although it should have done so.

## 2.2 Direct effect

### 2.2.1 Direct applicability

As noted above, it is important to distinguish between direct effect and direct applicability. Direct applicability is a term used in international law to describe how provisions can have legal validity in a party state without any further need for incorporation, and these provisions are also often described as self-executing.<sup>20</sup> Treaty Articles and Community regulations are directly applicable and the Member States are required *not* to transform them into national legislation, except when the regulation makes it necessary.<sup>21</sup> As stated in Article 288 TFEU (ex Article 249 TEC) Directives, on the other hand, leave it up to the Member States to choose the form and method of achieving the result. According to Article 297 TFEU (ex Article 254 TEC) Community legislation, regulations, directives and decisions enter into force twenty days after publication, unless specified otherwise. The ECJ has a monist approach to direct application so that international agreements and Community law form part of a single legal system<sup>22</sup> and has also held that international agreements are supreme over all secondary Community law.<sup>23</sup> However, the ECJ has also stated that similarly worded provisions, contained in both the EU Treaties and international agreements, do not have to be interpreted in the same way.<sup>24</sup>

### 2.2.2 Treaty Articles

Direct effect is when provisions give rise to rights and obligations, which can be upheld by individuals in the courts of the Member States. It was introduced by the ECJ in the same case in which they introduced the supremacy of Community law: the *Van Gend en Loos* case. As mentioned above, this dispute concerned a Dutch customs duty, which was claimed to infringe on Article 30 TFEU (ex Article 25 TEC, then Article 12). The Dutch government argued that since the Treaty Article was addressed to the

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<sup>20</sup> Foster, *EU Law*, 163.

<sup>21</sup> Case 39/72, *Commission v. Italy (Slaughtered Cows)*, [1973] ECR 101 and Case 128/78, *Commission v. UK (Tachographs)*, [1979] ECR 419.

<sup>22</sup> Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] ECR 449, and Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219.

<sup>23</sup> Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. Kga.A.*, [1982] ECR 3641, and Joined Cases 21-24/72, *International Fruit Company*.

<sup>24</sup> Case 270/80, *Polydor Limited and RSO Records Inc v. Harlequin Record Shops Limited and Simons Records Limited*, [1982] ECR 329, and Case 70/87, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL III) v. EC Commission*, [1989] ECR 1781.

Member State, it could not be enforced by individuals against the State, but only by the Commission or by another Member State. The ECJ said:

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

The ECJ found that the Article in question by its nature was such that it produced direct effect, thereby creating rights that the national courts must respect. The Court also noted that by granting direct effect to certain provisions, the vigilance of individuals concerned about their rights would amount to an effective supervision of the Member States, in addition to the official supervision already in place. The criteria for a Treaty Article to be capable of direct effect, repeated and elaborated in later case law, were defined by the ECJ as follows: 1) the provision must be clear, precise and unambiguous, 2) the provision must be unconditional (for example, in regards to time limits), 3) no further action by the Community or by the Member States is needed for the provision to take effect, and 4) the provision must not leave any discretion to Community institutions or to Member States.<sup>25</sup> The *Van Gend en Loos* case was a revolutionary decision, guaranteeing better enforcement of Community law and granting individuals a new source of rights.<sup>26</sup>

Many Treaty Articles have been found to have direct effect in later case law, and often it is not just the State that has an obligation, but also employers. The direct effect that arises between the State and the individual is referred to as vertical direct effect, whereas the relationship between individuals, such as employer and employee, is referred to as horizontal direct effect.<sup>27</sup> The case in which the ECJ confirmed horizontal direct effect was the *Defrenne* case.<sup>28</sup> This case concerned an air hostess who claimed the right to equal pay under Article 157 TFEU (ex Article 141 TEC, then Article 119). The ECJ stated that she indeed had that right, and said:

“Since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements, which are intended to regulate paid labour collectively, as well as to contracts between individuals.”<sup>29</sup>

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<sup>25</sup> Foster, *EU Law*, 164.

<sup>26</sup> Emiliou and O’Keeffe (eds), *The European Union and World Trade Law – after the GATT Uruguay Round*, 316.

<sup>27</sup> Foster, *EU Law*, 165.

<sup>28</sup> Case 43/75, *Defrenne v. Sabena (No. 2)*, [1976] ECR 455.

<sup>29</sup> Case 43/75, *Defrenne*, para. 39.

Hence, employers are obligated to comply with Treaty Articles, and individuals can enforce their rights against a party who has not complied with Community law. Other Treaty Articles that have been found to have direct effect concern citizenship, competition and free movement of persons, goods, establishment and services.<sup>30</sup>

### 2.2.3 Regulations

As stated in Article 288 TFEU (ex Article 249 TEC), Community Regulations are directly applicable in all Member States, and they can therefore be invoked both vertically and horizontally if they are found to have direct effect.<sup>31</sup> However, the Regulation needs to meet the same criteria as Treaty Articles set out in the *Van Gend en Loos* case to be directly effective.<sup>32</sup> If the Regulation is formulated too vaguely, leaving important features to the discretion of the Member States, it will not be regarded as having direct effect. In the case *Leonesio*<sup>33</sup> Italian farmers were successful in enforcing a Regulation against the Italian state, as the ECJ held that the Regulation should not be subject to delays and was immediately enforceable in national courts.

### 2.2.4 Directives

Directives differ from Treaty Articles and Regulations as they are not directly applicable, and only binding on the Member States as to the result to be achieved. Hence, they leave their implementation to the discretion of the Member States, which, initially, was reason to think that Directives were not precise enough to be directly effective since they could not fulfil the criteria set out in *Van Gend en Loos*.<sup>34</sup> However, in the *Grad* case,<sup>35</sup> the ECJ ruled that Directives could be directly effective if they satisfied the criteria for direct effect, granted that the time limit for implementation had expired. The issue of the time limit for implementation was the key point in the *Ratti* case,<sup>36</sup> in which an Italian manufacturer had complied with certain Directives but not with national law. The ECJ held that the only Directive that could be seen as directly effective was the one in which the deadline for implementation had expired. In the case of *Verbond*,<sup>37</sup> the Dutch authorities had failed to implement a Directive in accordance with the requirements set out, although within the time limit for implementation. The ECJ ruled that it would weaken the effectiveness of Community obligations to deny the rights of individuals in such circumstances.

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<sup>30</sup> Kent, *Law of the European Union*, 102.

<sup>31</sup> *Ibid.*, 103.

<sup>32</sup> Foster, *EU Law*, 166.

<sup>33</sup> Case C-93/71, *Leonesio v. Italian Ministry of Agriculture*, [1972] ECR 287.

<sup>34</sup> Foster, *EU Law*, 166.

<sup>35</sup> Case 9/70, *Grad v. Finanzamt Traustein*, [1970] ECR 825.

<sup>36</sup> Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629.

<sup>37</sup> Case 51/76, *Verbond van Nederlandse Ondernemingen*, [1977] ECR 113.

However, not all directives require implementation, and as soon as such a Directive fulfils the *Van Gend en Loos* criteria, it has direct effect. This was established by the ECJ in the *Van Duyn* case.<sup>38</sup> In this case, the ECJ considered that it would weaken the useful effect of Directives if they were denied direct effect, and also that it would be incompatible with the binding effect of directives in accordance with Article 288 TFEU (ex Article 249 TEC).

Since Directives are specifically addressed to the Member States, the question of whether they could produce horizontal direct effect was left unanswered by the ECJ for quite some time. The issue was dealt with by the ECJ in the *Marshall* case.<sup>39</sup> In the case, a woman claimed that the different retirement ages her employer was enforcing were not compatible with the Equal Treatment Directive.<sup>40</sup> The ECJ found that a Directive could have vertical but not horizontal direct effect. The employer was seen as a public body and part of the state, hence the Directive was granted direct effect in this case. However, had the woman's employer been a private enterprise, she would have lost her claim based on the Directive.<sup>41</sup> The question that remains is how broad the term "public body" shall be viewed. A definition was given by the ECJ in the *Foster* case:

“...a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.”<sup>42</sup>

However, the definition has been criticised for not providing enough assistance as to what constitutes a public body.<sup>43</sup>

## 2.2.5 International agreements

There are no statements in the EU Treaties that international agreements that have been concluded by the Community or by the Member States can give rise to direct effect. Despite this, the ECJ has held that certain provisions of such agreements may be granted direct effect if they satisfy the *Van Gend en Loos* criteria. In other words, international agreements are judged by the same criteria as Treaty provisions. However, it shows from the ECJ case law that the criteria may be more strictly applied and interpreted when it

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<sup>38</sup> Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337.

<sup>39</sup> Case 152/84, *Marshall v. Southampton and South West Area Health Authority*, [1986] ECR 723.

<sup>40</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39.

<sup>41</sup> Kent, *Law of the European Union*, 105.

<sup>42</sup> Case C-188/89, *Foster v. British gas*, [1990] ECR I-3313.

<sup>43</sup> Kent, *Law of the European Union*, 106.



comes to international agreements. The ECJ has found some provisions from international agreements to be directly effective, for example in the cases of *Kupferberg*<sup>44</sup> (which concerned a free trade agreement with Portugal and will be discussed further below), *Bresciani*<sup>45</sup> and *Kziber*.<sup>46</sup> However, the agreements that have been granted direct effect are in general seen as being simpler in nature than the WTO Agreements.<sup>47</sup> Whereas the agreements that have been granted direct effect were entered into by the Community, the WTO Agreements are so-called “mixed agreements”, entered into by both the Community as well as the Member States. As will be shown further below, the ECJ has generally not granted direct effect to the WTO Agreements, although it seems to have taken a more open stance as the GATT was replaced by the WTO. However, the ECJ has emphasized that WTO rules do not give rise to direct effect.<sup>48</sup> The general reasoning for that is that although the GATT and the WTO have binding and immediately enforceable rules, breaching those rules will first lead to further negotiation. There is also the issue of reciprocity to consider, whether the Community’s trading partners grant the agreements in question direct effect. The reasoning of the ECJ will be shown in greater detail in a later chapter.

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<sup>44</sup> Case 104/81, *Hauptzollamt Mainz v. C. A. Kupferberg*, [1982] ECR 3641.

<sup>45</sup> Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, [1976] ECR 129.

<sup>46</sup> Case C-18/90, *ONEM v. Kziber*, [1991] ECR I-199.

<sup>47</sup> Foster, *EU Law*, 169.

<sup>48</sup> Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395.

### 3 The EU powers and external trade regulation

Not all political and legal issues are under the EU umbrella. Indeed, a large number of policy areas are still exclusively under the jurisdiction of the Member States, and a separation was intended and shown by the now abolished pillar structure. When such a separation is clear, there are usually no major legal or political debacles. However, prior to the Lisbon Treaty, the areas dealt with in the WTO Agreements, and to whose jurisdiction those areas belonged, were far from obvious. This section will delve into the division of powers within the EU, in an attempt to further illustrate how complex the relationship between the EU and the WTO was, and to a significant extent still is. It will provide an overview of the separation of powers prior to the entry into force of the Treaty of Lisbon, since that is the basis for understanding several arguments made by the ECJ, but will also delve into how those powers may or may not have changed as a result of the new Treaty. This section will mainly focus on the powers relating to the subject in question, i.e. external trade relations.

In the aftermath of the Second World War, economic integration was used as the tool to achieve lasting peace in Europe. Initially, the European Coal and Steel Community (ECSC) was founded in 1951, and following this, the European Economic Community (EEC) was founded in 1957. The purpose of the EEC was to eliminate all trade barriers between the Member States, and when the EEC was replaced by the European Community (EC) at the founding of the EU in 1992, developing an internal market and a common economic policy were still main objectives.<sup>49</sup> The European Community consisted of the ECSC, the EEC and the European Atomic Energy Community (EURATOM), and handled economic, social and environmental policies.<sup>50</sup> Up until the entry into force of the Lisbon Treaty in December 2009, the EC was one of the three pillars of the European Union (EU) and the only pillar with a legal personality, hence also the only entity representing the EU capable of entering into treaties. Now, according to the Treaty of Lisbon, the EU has acquired a legal personality and has therefore replaced the EC in conducting external affairs. The EU currently has 27 Member States, and there are also three countries that have applied for membership.<sup>51</sup>

As will be explored further below, the EU (or the EC) has always been bound by, initially, the GATT and later by the WTO Agreements, and has

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<sup>49</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 233.

<sup>50</sup> Ibid.

<sup>51</sup> [http://europa.eu/about-eu/27-member-countries/index\\_en.htm](http://europa.eu/about-eu/27-member-countries/index_en.htm) at May 11th 2010.

been responsible for the external trade relations with non-Member States.<sup>52</sup> The EC was built up as a customs union in accordance with GATT Article XXIV, characterised by a common tariff schedule and common external trade relations. The external trade regulation is fully subject to international law, unlike the internal market regulations.<sup>53</sup> Although these two areas have been viewed as separate in the past, this is no longer the case. For quite some time now, the EU has been a major actor in the WTO as well as in the world trading system. Foreign economic relations act as a major factor in stimulating internal economic growth, and external relations need to comply with internal market regulations, meaning that there is no longer a clear, if any, boundary between the two.<sup>54</sup>

### 3.1 The EU in the WTO

To fully understand the synergy between the EU and the WTO, and the significance of the issue of direct effect, it is important to have a clear comprehension of the EU's legal position within the WTO. To complicate matters and definitions further, the EU actually did not have a legal position within the WTO until very recently, but the EC did. This is due to the fact that the EU did not have a legal personality prior to the Lisbon Treaty, but was merely an entity made up of a number of treaties and some policy areas, whereas the EC had a legal personality according to Article 281 of the EC Treaty.

When the WTO was founded in 1994, all the EC Member States were already contracting parties to the GATT, but the EC, however, was not.<sup>55</sup> Despite this, the EC was in all practical terms treated like a contracting party to the GATT, negotiating and accepting agreements within the GATT framework without needing acceptance from the EC Member States as such.<sup>56</sup> This status had been acquired over the years, with other contracting parties to the GATT accepting that the EC exercised rights and fulfilled obligations, even in dispute settlement proceedings.<sup>57</sup> In other words, the EC had effectively, with the consent of other GATT contracting parties, replaced its Member States in regards to rights and obligations. The Community had succeeded to the obligations of the Member States under the GATT – based on the exclusive Community competence regarding tariff and commercial policy.<sup>58</sup> During the Uruguay Round, representatives of the European Commission conducted negotiations on behalf of all the EC Member States as well as the EC itself, even though the EC was not a party

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<sup>52</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 233.

<sup>53</sup> *Ibid.*, 234.

<sup>54</sup> *Ibid.*

<sup>55</sup> Olsen, Steinicke and Sørensen, *WTO Law – from a European perspective*, 93.

<sup>56</sup> Weiler, *The EU, the WTO and the NAFTA*, 71-72.

<sup>57</sup> *Ibid.*

<sup>58</sup> Olsen, Steinicke and Sørensen, *WTO Law – from a European perspective*, 110.

to the GATT, due to not formally being a legal person at the time.<sup>59</sup> The uncertainty regarding the EC's legal status in relation to the WTO was settled in Article XIV of the Marrakesh Agreement establishing the World Trade Organization, which states that the contracting parties to the GATT (i.e. including the EC Member States), as well as the European Community, shall become original members of the WTO. Initially, the idea was that the EC should replace the EC Member States in the WTO, but due to a reluctance to create a politically difficult issue, this idea was not pushed forward.<sup>60</sup>

When the Treaty of Lisbon came into effect in December 2009, the EC ceased to exist and the EU was given a legal personality, replacing and succeeding the EC in accordance with Article 1 para. 2 of the Treaty of Lisbon. All 27 Member States of the EU, as well as the EU itself, enjoy full membership of the WTO, meaning that they are obligatory parties to all the WTO multilateral agreements, and have also chosen to be signatories to the two plurilateral agreements within the WTO.<sup>61</sup> In accordance with Article XI of the Marrakesh Agreement establishing the World Trade Organization, the EU now has a number of votes equal to its number of Member States when it chooses to exercise its right to vote, one vote per Member State but none for itself, meaning that either the EU votes as one group or each Member State votes for itself.

## 3.2 Treaty-making powers in the EU

In the context of the EU, there are three options regarding the competence to negotiate and conclude international agreements: 1) the competence belongs exclusively to the institutions of the Community, 2) the competence belongs exclusively to the Member States, or 3) the competence is shared between the Community and the Member States.<sup>62</sup> The powers can also either be explicit or implied. This, as well as the nature of the EU's external competence, has now been made explicit in Article 2 and 3 of the TFEU through the Lisbon Treaty. There is some speculation as to whether this is simply a codification of the existing ECJ case law on the external competences, or whether it goes beyond that.<sup>63</sup> The basic rule is that when the EU wants to act externally, it must be determined whether a competence has been conferred upon it.<sup>64</sup> Prior to the Lisbon Treaty, these external competences had mainly been clarified by ECJ case law, in which the principle of parallelism had been established: if there is an internal competence within the Union, there is also external competence (*in foro*

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<sup>59</sup> Ibid., 93.

<sup>60</sup> Weiler, *The EU, the WTO and the NAFTA*, 72-73.

<sup>61</sup> Olsen, Steinicke and Sørensen, *WTO Law – from a European perspective*, 94.

<sup>62</sup> Ibid., 96-97.

<sup>63</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 167.

<sup>64</sup> Ibid., 168.

*interno, in foro externo*).<sup>65</sup> The case law had set out three different scenarios which would grant external competence: 1) explicit competence to act externally in a certain field of competence is given through the TEC, 2) the explicit internal competence given through the TEC implies an external competence, and 3) explicit internal competence is not given through the TEC, but external action is needed to achieve one of the goals set out in the TEC.<sup>66</sup>

Since the EU in many ways is a constitution in the making, the TFEU (formerly known as the TEC (or the Treaty of Rome), now the Treaty on the Functioning of the European Union) explicitly transfers powers in some areas, but in areas where the treaty is silent, the ECJ developed a doctrine of implied powers.<sup>67</sup> The TEU (the Treaty on European Union, formerly known as the Maastricht Treaty of 1992, which has been amended by the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001) also deals with external action in certain policy areas. This, in combination with the options to separate powers as described above, makes for a complex system in regard to the EU's treaty making powers. Quite recently, the Lisbon Treaty has amended both the TEU and the TFEU. One aim of the Lisbon Treaty is to clarify the division of powers within the EU, and therefore the allocation of powers is now somewhat more explicit, although many questions still remain.

## 3.2.1 Prior to the Lisbon Treaty

### 3.2.1.1 Exclusive and explicit powers

Several Articles of the TEC explicitly dealt with relations with third countries, but although they were explicit, it was not clear to what extent they also established exclusive powers of the Community.<sup>68</sup> In the context of foreign trade, the TEC granted the EC exclusive competence in the operation of the customs union and related treaty-making powers. This specifically concerned trade agreements in Article 133 TEC (now Article 207 TFEU), but also for example development co-operation in Article 177 TEC (now Article 208 TFEU) and association agreements in Article 310 TEC (now Article 217 TFEU). Article 133 TEC covered external agreements in the area of Common Commercial Policy (CCP), meaning that if the agreement fell under the CCP, the external competence was exclusive in nature. The CCP was, and still is, the main instrument governing EU trade relations with third countries, and is used by the EU to shape its interest in the external economic sphere.<sup>69</sup> There was no clear definition of

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<sup>65</sup> *Ibid.* and Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 0263.

<sup>66</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 168.

<sup>67</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 237.

<sup>68</sup> *Ibid.*, 238.

<sup>69</sup> Pollet-Fort, "Implications of the Lisbon Treaty for the European Union External Trade Policy", *EU Centre in Singapore*, Background Brief no 2, March 2010, 5.

the CCP, but Article 133 TEC listed some examples of policy issues. However, this list was not exhaustive and must, according to the ECJ, be judged from a wide perspective.<sup>70</sup>

External competence could also be exclusive in nature if the EC had adopted internal legislation concerning an area of its internal competence,<sup>71</sup> since independent external action by the Member States would affect the common rules established by the EC.<sup>72</sup> It was well established that all trade in goods, as covered by the WTO Agreements, fell under the exclusive competence of the EC.<sup>73</sup> However, this did not preclude the option of partially delegating external trade powers to the Member States.<sup>74</sup> The ECJ denied the Community competence to enter into international agreements when this would result in the Community being able to introduce rules on trade that were not within the Community's internal powers, and also when the voting rules for acceding to an international agreement would be less strict than voting rules for adopting similar measures within the European Community.<sup>75</sup>

### 3.2.1.2 Shared powers

With the creation of the WTO in 1994 and the entry into force of the WTO Agreements, the WTO now covered not only goods, through the GATT, but also services and intellectual property, included in the GATS<sup>76</sup> and the TRIPS<sup>77</sup> Agreements. When the Commission claimed exclusive competence for all matters covered by the WTO, the Member States feared that this would indirectly gradually empower the EC in internal affairs, and argued that this would be contrary to the established limitations of implied powers of the EC (as will be discussed further below).<sup>78</sup> The ECJ clarified the issue in its 1994 WTO Opinion<sup>79</sup>, stating that powers relating to services and intellectual property are shared between the EC and the Member States. The fact that the EC had internal competence in economic matters did not automatically result in an exclusive external competence, and the treaty-making power would only be exclusive once the Community had adopted internal legislation in that particular area.<sup>80</sup> In accordance with Article 133

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<sup>70</sup> *Opinion 1/78 on International Agreement on National Rubber*, [1979] ECR 2871.

<sup>71</sup> Case 22/70, *Commission v. Council (ERTA)*, para. 21.

<sup>72</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 174.

<sup>73</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 238.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property* [1994] ECR 5267, para. 60.

<sup>76</sup> General Agreement on Trade in Services.

<sup>77</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>78</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 239.

<sup>79</sup> *Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*.

<sup>80</sup> Case 22/70, *Commission v. Council (ERTA)*, para. 21.

of the TEC, the Community had exclusive competence to conclude the GATT 1994 and its side agreements, whereas the competence to conclude the GATS and the TRIPS was shared between the Community and the Member States.<sup>81</sup> Only 'Mode 1' of service provision of the GATS was seen to be covered by the explicit external competence with regard to the CCP. Concerning TRIPS, only those commercial aspects of intellectual property that concerned the release of counterfeit goods into free circulation fell within the scope of the CCP, and hence within the exclusive external competence of the Community.<sup>82</sup>

This kind of shared power could obviously lead to conflicts and power struggles between the Community and the Member States; hence they were under the obligation to cooperate, stemming from the requirement for unity in the international representation of the Community.<sup>83</sup> The ECJ also set out certain limits of retaliation within the WTO Agreements, due to exclusive competence.<sup>84</sup>

Despite this allocation of powers, this did not affect the operational procedure of the EC within the WTO, where the Commission still led negotiations. The only formal difference was the process of adoption and ratification, which required the consent by all Member States, so-called "mixed agreements",<sup>85</sup> for example the WTO Agreements. Although the Nice Treaty extended the scope of the CCP to include the negotiation and conclusion of international agreements regarding trade in services and trade-related aspects of intellectual property through Article 133(5) ECT, the nature of the Union's competence was still disputed.<sup>86</sup>

### 3.2.1.3 Implied powers

The implied powers were developed by the ECJ outside the traditional field of the CCP and were seen as having substantially increased the competences of the EC in external economic affairs.<sup>87</sup> As a central element stood the principle of parallelism as mentioned above, which was established through the *ERTA* case: if there is an internal competence within the Union, there is also external competence.<sup>88</sup> This principle was then later confirmed in the *Inland Waterway Vessels* case,<sup>89</sup> which concerned the compatibility of an

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<sup>81</sup> *Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*, paras 44-47.

<sup>82</sup> *Ibid.*, para. 56.

<sup>83</sup> *Opinion 1/78 on International Agreement on National Rubber*, paras 34-36.

<sup>84</sup> *Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*, para. 109.

<sup>85</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 246.

<sup>86</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 170.

<sup>87</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 251.

<sup>88</sup> Case 22/70, *Commission v. Council (ERTA)*, paras 17-19.

<sup>89</sup> *Opinion 1/76 on 'Draft Agreement Establishing European Laying-up Fund for Inland Waterway Vessels'*, [1977] ECR 741.

agreement with Community law, regarding which the ECJ was asked for an opinion. More recently, the ECJ stated that the Member States were no longer empowered to take external action in an area that had already been regulated by the Community, if this would affect a common policy.<sup>90</sup> However, this did not solve the issue of exclusivity, and it was still unclear under which circumstances Member States were blocked from negotiating international agreements in certain policy fields. Hence, the question of when external competence also granted exclusive competence remained controversial. Only in a limited number of cases did the ECJ define those areas, such as the *Open Skies* case,<sup>91</sup> which established that the Community has exclusive external competence in certain areas that are often covered by bilateral air service agreements.

### 3.2.2 The Lisbon Treaty

The division of powers as described above has now changed as a consequence of the Lisbon Treaty. The Lisbon Treaty aims to make the EU more efficient, more democratic internally and present a more unified and coherent international position. In accordance with this, the Lisbon Treaty also presents changes for the CCP, making it more efficient, more democratic and giving greater consistency between the different policies of the EU's external relations.<sup>92</sup> Whereas the various foreign policies and external relations were spread out in the old treaties, the Lisbon Treaty now groups them together under the title "Unions External Action", which includes Title V of the TEU and Part V of the TFEU.

One major change to the EU's role in external affairs is that the EU, through Article 1 TEU, has replaced and succeeded the EC and now has a legal personality according to Article 47 TEU, thereby granting the EU a defined status in international law. The three-pillar structure, introduced by the Maastricht Treaty in 1992, has been abolished. This gives the EU power to negotiate and conclude international agreements in its own name. However, the Member States may not always be willing to cede their voting rights, meaning that the EU may still in the future have a fragmented representation in international forums.<sup>93</sup>

The EU's treaty-making competences are made explicit in Article 216 TFEU. This Article encompasses the three general situations laid down by the ECJ, as mentioned above, under which the EU would have external competence: 1) through the Treaty, 2) implied external competence through explicit internal competence (the principle of parallelism) or 3) external action is needed to achieve a goal of the Treaty, even though the Treaty

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<sup>90</sup> *Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*, para. 77.

<sup>91</sup> Case C-476/98, *Commission v. Germany*, [2002] ECR 9855.

<sup>92</sup> Pollet-Fort, "Implications of the Lisbon Treaty for the European Union External Trade Policy", *EU Centre in Singapore*, Background Brief no 2, March 2010, 5.

<sup>93</sup> *Ibid.*, 6.



itself does not provide explicit internal competence. However, it is unclear whether the nature of the competence provided for in various ways by Article 216 TFEU is overall exclusive.<sup>94</sup> The EU now has explicit competence to conclude international agreements with third countries or international organizations in the area of Common Foreign and Security Policy (CFSP) according to Article 37 TEU, in the field of development cooperation with third countries according to Article 209 and 212 TFEU, and in the field of CCP according to Articles 3 and 207 TFEU. However, there are still areas where the Union does not have competence to act externally. This is the case when no competence has been explicitly given, the Union has not yet acted internally, and external action is not necessary to achieve one of the Union's objectives.<sup>95</sup>

Article 3 TFEU explicitly places the CCP under the exclusive competence of the EU, and extends the scope of the CCP to all key aspects of external trade.<sup>96</sup> Therefore, the EU now has exclusive competence over trade in goods and services, commercial aspects of intellectual property and foreign direct investment, according to Article 207 TFEU, and this is no longer shared between the Union and the Member States. The extension of the CCP will result in a reduced need for mixed agreements, thereby streamlining the EU trade policy and making it more coherent.<sup>97</sup> Article 218 TFEU states that unless the Member States are empowered by the EU, they are not able to conclude their own bilateral investment treaties. The Lisbon Treaty does not define "trade in services", but the intention of the drafters to bring WTO related agreements and negotiations within the Union's exclusive competence means that "trade in services" now should be interpreted as broadly as in the GATS, so that all four modes of supply are included (as opposed to being limited to "Mode 1", as was the case prior to the Lisbon Treaty).<sup>98</sup> The scope of foreign direct investment is not limited by the Lisbon Treaty, which has led to some discussion as to whether Member States can conclude their own bilateral investment treaties; an area in which the ECJ may play a decisive role.<sup>99</sup> However, the scope of the EU's external competence within the CCP area is not limited to concluding international agreements, but also includes other external actions within that area, according to Article 207 TFEU. Article 207(6) TFEU explicitly excludes the possibility of having the Union's external competence confer internal competence, the opposite of the principle of parallelism established in the *ERTA* case. It is important to note that as a consequence of the Lisbon Treaty, all matters dealt with by the WTO now fall within the exclusive competence of the Union.<sup>100</sup>

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<sup>94</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 179.

<sup>95</sup> *Ibid.*, 180.

<sup>96</sup> Pollet-Fort, "Implications of the Lisbon Treaty for the European Union External Trade Policy", *EU Centre in Singapore*, Background Brief no 2, March 2010, 11.

<sup>97</sup> *Ibid.*, 15.

<sup>98</sup> Wouters, Coppens and De Meester, *The European Union's External Relations after the Lisbon Treaty*, 171.

<sup>99</sup> *Ibid.*, 171-173.

<sup>100</sup> *Ibid.*, 180.

The general objectives of the EU's external actions are described in Article 3(5) TEU:

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

This is further elaborated upon in Article 21 TEU, which lists specific objectives that must be respected and pursued when the different areas of the Union's external action is developed and implemented. This means that the Lisbon Treaty gives a legal basis for including, for example, human rights clauses in international trade agreements.<sup>101</sup> In this way, trade agreements can be used to pursue political objectives, which is something that the WTO in certain cases has found to be incompatible with the WTO Agreements.<sup>102</sup>

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<sup>101</sup> Ibid., 149.

<sup>102</sup> See for example Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

## 4 WTO dispute settlement

The WTO Agreements cover a substantial amount of trade-related issues, and they both provide rights and impose obligations upon the parties. When dealing with the realm of international law, there is always the question of how to enforce those rights and duties. Dispute resolution under the GATT was seen as being quite liberal in granting the parties many options outside the traditional judicial methods, and it was considered a weak dispute settlement system.<sup>103</sup> GATT Article XXII establishes procedures for consultation on matters relating to the GATT, and it is notable that it reflects the spirit of dispute settlement prior to the DSU<sup>104</sup>, with an emphasis on negotiation and diplomacy over litigation.<sup>105</sup> However, during the Uruguay Round of negotiations, it was concluded that a more legalistic system was desired, and so the DSU was agreed upon. Despite this, the ECJ has repeatedly stated in its judgments that the emphasis on negotiations embodied in the DSU is one of the main reasons for denying the WTO Agreements direct effect within the EU. Therefore, it is prudent to reserve this section of the paper for a closer look at the system in question and, in particular, the role of negotiations.

### 4.1 The DSU system

The basic institutional and jurisdictional scope of the WTO dispute resolution is set out in GATT Articles XXII and XXIII and within the DSU. The DSU contains a unified and compulsory dispute settlement mechanism for all WTO Agreements and includes both procedural rules as well as guidelines.<sup>106</sup> Systematically, the same principles apply to any dispute, regardless of Agreement or subject-matter, although there are a few exceptions in which *lex specialis* come into play. As mentioned above, unlike the former dispute resolution under the GATT, the DSU emphasises the rule of law and aims to provide security and predictability to the multilateral trading system.<sup>107</sup> However, the close connection to diplomacy and international relations still play a large part. Although the members are free to initiate proceedings under the DSU independently of ongoing negotiations, the political implications may still effect the situation.<sup>108</sup> The DSU run a tight schedule, and there are deadlines for virtually every stage of the process, resulting in disputes generally being solved within one year.<sup>109</sup>

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<sup>103</sup> Bhala, *Modern GATT Law*, 1149.

<sup>104</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>105</sup> *Ibid.*, 1151.

<sup>106</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 143.

<sup>107</sup> *Ibid.* and Gallagher, *Guide to Dispute Settlement*, 20.

<sup>108</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 144.

<sup>109</sup> Bhala, *Modern GATT Law*, 1149.

The system has been praised for providing adjudication with meaningful enforcement mechanisms, unusual if not unheard of previously in the area of international relations.<sup>110</sup>

Only members can become parties to the dispute settlement proceedings, and thus this option is not available to private actors and individuals, such as industries, consumers and NGOs.<sup>111</sup> In general, private actors and individuals are left with the recourse of lobbying the foreign government for changes, or attempting to get help from its domestic government officials, and a WTO complaint will not result in restitution of commercial losses or compensation for the time and effort put into preparing a case.<sup>112</sup> However, the situation in the EU and the US is somewhat different. In the US, Section 301 of the US Trade Act has granted procedural rights to private operators since 1974, and a similar mechanic was introduced in the EU ten years later, in 1984. In the EU, private actors can bring violations of international trade law to the attention of the Commission through the Trade Barriers Regulation (TBR)<sup>113</sup> since 1994. This Regulation replaced the New Commercial Policy Instrument,<sup>114</sup> which was rarely being used due to the risk of incurring large costs as a result of the weakness of the dispute settlement under the GATT.<sup>115</sup> One of the rare cases that invoked the New Commercial Policy Instrument was the case of *Fediol*,<sup>116</sup> in which the Commission's rejection of a complaint was put to question. This case will be discussed in another section, further below. According to the TBR, it is still up to the Commission to determine whether it is necessary or in the interest of the EU to open an investigation.

The dispute resolution process is mainly divided into three stages: 1) consultation stage, 2) panel and, if appealed, Appellate Body proceedings and 3) implementation by the losing party, if a WTO-inconsistency has been found.<sup>117</sup> During the entire process, "good offices, conciliation and mediation" are available to the parties and may be requested, begun and ended at any time as stated in DSU Article 5. According to DSU Article 4, Members shall accord "sympathetic consideration" to another Member during the consultations. If the disputing parties fail to reach an agreement within 60 days, or agree that there is no solution to be found, DSU Article 4

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<sup>110</sup> Ibid.

<sup>111</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 144.

<sup>112</sup> Gallagher, *Guide to Dispute Settlement*, 58-59.

<sup>113</sup> Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ 1994 L 349, p. 71.

<sup>114</sup> Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ 1984 L 252, p. 1.

<sup>115</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 145.

<sup>116</sup> Case C-70/87, *Fediol v. Commission*.

<sup>117</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 151.

grants the complaining party the right to request a panel. If such a request is issued, the Dispute Settlement Body (DSB) will establish a panel. According to DSU Article 11, the role of the panel is to “make an objective assessment of the matter before it”. A panel is usually comprised of three individuals with relevant experience in trade policy, law or economics.<sup>118</sup> Although the panels appear to be tribunals in the adversarial tradition of common law, they also have broad authority to investigate the facts of the case, in line with courts in the civil law system.<sup>119</sup> This was made clear by the Appellate Body in the *US-Shrimp* case, in which it stated:

“It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.”<sup>120</sup>

It has also been made clear by the Appellate Body that Members are obliged to respond to a panel’s request for information, or the “right to seek information” conferred to the panel by DSU Article 13 would be pointless.<sup>121</sup> Once the formal proceedings are over, the panel issues a report, which is then adopted by the DSB, unless there is a consensus not to do so or if a party to the dispute has notified the DSB of its decision to appeal in accordance with DSU Article 16. Unless the losing party can comply with the ruling immediately, it has “a reasonable amount of time” to comply. According to DSU Article 21, “a reasonable amount of time” shall not exceed 15 months unless the parties to the dispute have agreed otherwise. Attitudes and perceptions in the dispute settlement have been fully dedicated to a legal approach, and the findings and reasoning by the Appellate Body set standards and give feedback to the panels.<sup>122</sup> The legal approach is a fundamental ingredient in the dispute settlement system, as it is needed to show Members that results flow from and are consistent with the law, otherwise Members will not be willing to grant the work of the panels such a wide-ranging binding effect.<sup>123</sup>

There are certain features of the WTO dispute settlement that makes it differ from traditional methods of international adjudication. It is intergovernmental dispute settlement, which means that it is an instrument of diplomatic protection, and it does not require the exhaustion of domestic remedies.<sup>124</sup> Other features that distinguish the WTO dispute settlement are the limited third-party intervention, the tight time schedules and the interim review stage. The interim review stage gives the parties and opportunity to

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<sup>118</sup> Gallagher, *Guide to Dispute Settlement*, 27.

<sup>119</sup> Gallagher, *Guide to Dispute Settlement*, 28.

<sup>120</sup> Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para 104.

<sup>121</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R.

<sup>122</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 153.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, 154.

check the accuracy of their arguments and examine the findings, and has been argued to no longer be necessary.<sup>125</sup> A substantial difference from traditional adjudication is that the reports submitted by panels and the Appellate Body are, legally speaking, recommendations and not judgments. The reports are only legally binding if the parties have agreed to binding arbitration.<sup>126</sup> However, the process of transforming a recommendation into an adopted report represents an overall endorsement by Member States, which increases the authority of the report and improves the potential for compliance and implementation.<sup>127</sup>

## 4.2 Negotiations

DSU Article 3(7) clearly states that a mutually agreed solution, consistent with the WTO Agreements, is to be preferred over a dispute resolution process leading to a panel report. This reflects the fact that the WTO Agreements are agreements between sovereign states, and not a code of laws as such. Where one in the context of law would aim to determine if someone had breached an agreement, the focus of the DSU is to find a resolution to the problem on almost any basis that all parties can agree upon.<sup>128</sup> The initial step of consultation and possible conciliation leaves room to argue that the dispute settlement under the WTO is in the realm of overall negotiated settlements.<sup>129</sup> Even when a panel has been established, DSU Article 11 states that the panel should give the parties “adequate opportunity to develop a mutually satisfactory solution”. However, in practice it is rare that the panels actively pursue and propose compromise solutions, unless the parties request it.<sup>130</sup> Instead, negotiations often continue outside the dispute resolution process, without influencing the approach or the work of the panel, or even informing it.<sup>131</sup> If the parties agree upon a resolution, this is merely reported to the panel, which then stops working and limits its report to a brief description of the case and state that a settlement has been reached, in accordance with DSU Article 12(7). In this sense, the WTO dispute resolution is no different from commercial arbitration or international adjudication, both of which has the option to settle out of court and withdraw a complaint.<sup>132</sup>

The option to reach a mutually agreed solution is available at any time up to the circulation of a panel report. In some cases, a party may wish to delay reaching a mutually acceptable solution until they have seen the strength of the other party’s case before a panel.<sup>133</sup> As the process proceeds, the parties

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<sup>125</sup> Ibid., 155.

<sup>126</sup> Ibid., 156.

<sup>127</sup> Ibid.

<sup>128</sup> Gallagher, *Guide to Dispute Settlement*, 20.

<sup>129</sup> Cottier and Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, 156.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Gallagher, *Guide to Dispute Settlement*, 20.

also go deeper into a legal struggle, which may make a mutual agreement less likely.<sup>134</sup> However, there have been a few cases in which the parties have reached a mutually agreed solution, even though a panel report had been circulated and the outcome seemed clear.<sup>135</sup>

Mutually agreed solutions are subject to a few legal conditions in the DSU. Article 3(5) states that the solution must be consistent with the WTO Agreements and “shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements”. In addition to this, mutually agreed solutions must be notified to the DSB according to DSU Article 3(6). This Article also gives other Members the option to object to the mutually accepted agreement, if they feel that the solution impairs their benefits or the achievement of the objectives of the WTO Agreements.

As mentioned above, the diplomatic nature of the dispute resolution under the GATT was the main reason for the creation of the DSU and the shift to a more legal approach. The nature of diplomatic agreements is that they often reflect an understanding between the parties, and are not necessarily drafted with legal precision. Therefore, diplomatic agreements may contain ambiguous language and be open to unintended interpretation, meaning that the agreement may not be capable of withstanding a change in circumstance or an addition of parties.<sup>136</sup> Despite this, there are benefits to diplomatic agreements, which may be part of the reason why mutually agreed solutions are preferred in the DSU.<sup>137</sup> One practical aspect of a diplomatic agreement is that once the parties are willing to “deal”, a solution can be quickly concluded. Another benefit is that a mutually agreed solution is far less costly compared to pursuing an issue through the WTO dispute resolution process. The downsides of a diplomatic agreement, as mentioned above, may not have any impact in a purely bilateral matter. Instead, the agreement may be sufficient despite its diplomatic nature, and instead express aspects of the relationship between the parties or help heal a breach in relationship. An attractive aspect of diplomatic agreements is also that they are more private. Instead of a party being the official “loser” to a dispute, a mutually agreed solution implies that both sides have had to make concessions and avoids the perception of a foreign policy reversal, which may be the case when a solution is imposed via a panel report.<sup>138</sup>

It is important to note that mutually agreed solutions do not bind other Members, and do not imply an interpretation of the WTO Agreements.<sup>139</sup> There is also the option for the parties to reach a mutually agreed solution concerning implementation of an adopted panel report. The parties have the “reasonable amount of time” granted by DSU Article 21 to reach an

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<sup>134</sup> Ibid.

<sup>135</sup> *EC – Butter, WT/DS72, EC – Scallops, WT/DS7, and U.S.A. – DRAM, WT/DS99.*

<sup>136</sup> Gallagher, *Guide to Dispute Settlement*, 21.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid., 22.

agreement on implementation and other details, and such an agreement should also be reported to the DSB.<sup>140</sup>

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<sup>140</sup> Ibid.



# 5 The ECJ and the WTO

## 5.1 The ECJ

### 5.1.1 The role and function of the ECJ

The ECJ used to be a single body institution until the Treaty of Nice divided it into the Court of Justice and the Court of First Instance.<sup>141</sup> However, since the Treaty of Lisbon came into effect in 2009, the ECJ consists of the Court of Justice, the General Court and specialised courts according to Article 19 TEU. Unlike some other international courts, such as the European Court of Human Rights, a party need not exhaust the available domestic remedies to have a case admitted before the ECJ. Instead, the ECJ is an independent court that is not part of a hierarchical relationship with the national courts in a system of appeal.<sup>142</sup> According to Article 19 TEU, the ECJ shall ensure that in the interpretation and application of the Treaties the law is observed. The Court has actively promoted European integration in its judgments and has seized opportunities to clarify Community law, hence with a binding effect on the Member States.<sup>143</sup> One example of the ECJ's progressive statements can be found in the *Van Gend en Loos* case, in which the Court stated that "the Community constitutes a new legal order in international law".<sup>144</sup> As a general rule, the ECJ follows its own judgments, although it does not have a formal doctrine of precedent.<sup>145</sup> If the Court intends to depart from its previous position, this is usually made very clear with phrasings such as "Contrary to what has previously been decided...".<sup>146</sup> In general, the procedure follows the style of civil law, as opposed to common law, with an emphasis on written statements and the inquisitorial method.<sup>147</sup>

The ECJ has no inherent jurisdiction, but only the jurisdiction granted by the Treaties, including implied jurisdiction. Implied jurisdiction exists when there is a need to fill a gap in the system of remedies, for example when this gap is inconsistent with the rule of law in the EU and creates a serious injustice.<sup>148</sup> The factual jurisdiction of the ECJ is laid out in Articles 258-279 TFEU (ex Articles 226-243 TEC). Geographically, the jurisdiction is limited to the area of the Member States, but a judgment may have consequences outside this area.<sup>149</sup> The types of action that are available under Community law to be adjudicated by the ECJ can be divided into

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<sup>141</sup> Foster, *EU Law*, 57.

<sup>142</sup> Ibid.

<sup>143</sup> Kent, *Law of the European Union*, 45.

<sup>144</sup> Case 26/62, *Van Gend en Loos*.

<sup>145</sup> Kent, *Law of the European Union*, 46.

<sup>146</sup> For example Cases C-267-268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6097.

<sup>147</sup> Foster, *EU Law*, 58.

<sup>148</sup> Weiler (ed.), *The EU, the WTO and the NAFTA*, 74.

<sup>149</sup> See for example Case 48/69, *ICI v. Commission (Dyestuffs)*, [1972] ECR 619.

three main categories: 1) actions taken against Member States as stated in Article 258, 2) actions concerned with the review of acts of the Community Institutions as stated in Article 263, and 3) preliminary rulings under Article 267. The Court will either interpret a rule and apply it to the case at hand, or interpret and rule on the validity of a provision, usually at the request of a Member State court.<sup>150</sup>

## 5.1.2 Jurisdiction over international agreements

The function of the ECJ is to be the organ that ensures compliance with Community law. As a consequence, this also applies to all sources of law that have direct effect within the Community legal order. To ensure uniform application throughout the Community, the ECJ has recognized that it has the jurisdiction to give preliminary rulings on the interpretation of international agreements concluded by the Community.<sup>151</sup> This general rule has been consistently claimed by the ECJ, both in regards to the GATT and later the WTO, and is no longer contested in the areas where the Community has exclusive competence, such as the CCP.<sup>152</sup> Some WTO agreements fall partly within Community competence and partly within the competence of the Member States, and although the interpretation made by the ECJ is more controversial in these shared areas, that fact does not exclude interpretation of the provisions of an agreement from the jurisdiction of the ECJ.<sup>153</sup> The ECJ has claimed jurisdiction in these areas based on an aim to “forestall future differences of interpretation.”<sup>154</sup>

According to Article 216 TFEU, agreements concluded by the EU are binding upon the institutions of the Union and on its Member States. However, no more guidance is given by the EU Treaties. Some claim that the practice of the EU Institutions is of a monist nature, whereas others claim it reflects a dualist attitude.<sup>155</sup> In its case law, the ECJ has shown that the type of legal act that has approved the agreement in question, i.e. being used to decide if an agreement has become part of Community law and is directly enforceable, does not necessarily decide the outcome.<sup>156</sup>

If the ECJ has the competence to annul or declare void an act of an EU Institution, it may also interpret such an act,<sup>157</sup> be it through a preliminary ruling under Article 267 TFEU or in a case before the Court. In several cases, the ECJ has taken the view that the international agreement in

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<sup>150</sup> Foster, *EU Law*, 60.

<sup>151</sup> Case 181/73, *Haegemann v. Belgium*, para. 6.

<sup>152</sup> Olsen, Steinicke and Sørensen, *WTO Law – from a European perspective*, 112.

<sup>153</sup> Case C-53/96, *Hermés International v. FHT Marketing Choice BV*, [1998] ECR I-3603 para. 32.

<sup>154</sup> Case C-53/96, *Hermés International v. FHT Marketing Choice BV*, para. 32.

<sup>155</sup> Weiler (ed.), *The EU, the WTO and the NAFTA*, 77.

<sup>156</sup> See for example Case 87/75, *Bresciani*.

<sup>157</sup> Weiler (ed.), *The EU, the WTO and the NAFTA*, 80.

question is “an act of one of the Institutions of the Community”, as stated in Article 267 (b) TFEU, and therefore form an integral part of Community law.<sup>158</sup> However, this has been the case when the EU has entered into the agreement, and the matter is somewhat more complicated when it comes to the type of agreements called “mixed agreements”, to which both the EU and the Member States are parties. As explained above, a “mixed agreement” is needed when the subject matter falls partially within the competence of the Community, and partially within the competence of the Member States. With the coming into effect of the Lisbon Treaty, the areas relevant to the WTO now fall strictly within Community competence in accordance with Article 207 TFEU. However, although the consequences for future and existing agreements, especially on a bilateral level, remain uncertain,<sup>159</sup> that does not change the fact that the WTO Agreements at present are “mixed agreements”. The changes brought by the Lisbon Treaty raise several questions that are outside the scope of this paper, such as the consequences for negotiations within the current Doha round, or whether the EU Member States individually should be party to the WTO Agreements at all.

In regards to “mixed agreements” in general, some take the view that the ECJ may interpret them in their entirety, whereas others are of the opinion that the ECJ’s jurisdiction is limited to the EU’s field of operation.<sup>160</sup> The case of *Demirel*<sup>161</sup> concerned an agreement between the EU and Turkey, in this case focusing on the freedom of movement for workers. The ECJ ruled that the freedom of movement for workers is one of the fields covered by the Treaty (now Article 45 TFEU) and stated that:

“...it follows that commitments regarding freedom of movement fall within the powers conferred upon the Community by Article 238. Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers do not arise.”<sup>162</sup>

However, the situation may be different in regard to interpreting clauses of mixed agreements that fall solely under the competence of the Member States.<sup>163</sup> As will be shown below, the ECJ has developed its jurisdiction in relation to the GATT, and later the WTO, over a long period of time, and the Court’s attempt to justify its jurisdiction over the whole of WTO law has been both challenged and criticized.

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<sup>158</sup> Case 181/73, *Haegemann v. Belgium*, Case 270/80, *Polydor Limited and RSO Records Inc v. Harlequin Record Shops Limited and Simons Records Limited*, Case 104/81 *Hauptzollamt Mainz v. Kupferberg*, Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*, [1987] ECR 3719 and Case 30/88, *Greece v. Commission*, [1989] ECR 3711.

<sup>159</sup> Pollet-Fort, “Implications of the Lisbon Treaty for the European Union External Trade Policy”, *EU Centre in Singapore*, Background Brief no 2, March 2010, 15-16.

<sup>160</sup> Weiler (ed.), *The EU, the WTO and the NAFTA*, 82.

<sup>161</sup> Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*.

<sup>162</sup> *Ibid.*, paras 8-12.

<sup>163</sup> Weiler (ed.), *The EU, the WTO and the NAFTA*, 83.

## 5.2 Case law

The case law below has been divided into two parts. This is because the WTO was founded in 1994, so cases prior to 1994 concern the GATT whereas later cases concern various WTO Agreements. Also, when the WTO was founded, substantial changes were made to the system for settling disputes between the contracting parties, potentially resulting in a change of position by the ECJ.

There is a plethora of cases dealing with the WTO, and the cases below have been selected to demonstrate the development of a jurisprudence regarding the status of the WTO within the EU legal system. There is also case law from the ECJ that grants direct effect to other international agreements, under certain circumstances, and a few of these cases will be mentioned as well for the sake of comparison, since it has often been claimed that the WTO agreements have been treated less favourably than other international agreements.

### 5.2.1 Before 1994: GATT 1947

#### 5.2.1.1 Joined Cases 21-24/72, *International Fruit*

This case was the first in which the ECJ was faced with an alleged conflict between a Community measure and the GATT, and subsequently rejected the direct effect of the GATT. A Dutch company had lodged an application for licenses to import apples from third countries with a Dutch authority, and this application had been refused on the basis of Community Regulations that governed the area. The company then brought proceedings before a Dutch court, seeking to overturn the decision made by the Dutch authority, by claiming that the Community measures were incompatible with Art. XI of the GATT. The Dutch court submitted the case to the ECJ in regards to determining whether it was within the competence of the ECJ to rule on the validity of a Community measure against a measure of international law, and if that was the case, then whether the Community Regulations in question were contrary to the GATT. Hence, the ECJ had to examine whether the validity of the Community measure also referred to its validity under international law.

The ECJ set as requirements for direct effect that a provision of international law need not only be binding on the Community, but also be “capable of conferring rights on citizens of the Community which they can invoke before the courts”<sup>164</sup> and then proceeded to examine whether the GATT satisfied these two conditions. Based on the fact that the Member States had conferred the powers of tariff and trade policy on the Community, and thereby showed their wish that the Community be bound by the GATT, the Community had assumed those powers and subsequently the ECJ concluded

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<sup>164</sup> Joined Cases 21-24/72, *International Fruit*, para. 7-8.

that the Community was bound by the provisions of the GATT. This means that the ECJ admitted that certain provisions of the GATT were binding on the Community even though the Community was not a contracting party.

When moving on to the second criteria for direct effect, the ECJ considered “the spirit, the general scheme and the terms” of the GATT.<sup>165</sup> The ECJ quoted a number of provisions from the GATT so as to show the great flexibility of the provisions, mentioning in particular the possibilities for derogation, measures to be taken when confronted with exceptional difficulties and options for conflict settlement. According to the ECJ, this multitude of flexible options available to the contracting parties showed that Art. XI of the GATT was not capable of conferring rights on citizens of the Community, which they can invoke before the courts, and therefore the Regulations in question could not be affected by said Article in this case.<sup>166</sup> One might say that the GATT was not seen as sufficiently precise, but instead as an instrument of trade diplomacy.

### **5.2.1.2 Case 70/87, *Fediol v. Commission***

This case concerned a complaint lodged with the Commission by the EEC Seed Crushers’ and Oil Processors’ Federation (‘Fediol’) under a Council Regulation.<sup>167</sup> The Regulation in question required the Commission to examine whether the commercial practices of third countries were illegal under international law. Fediol claimed that the commercial practices of Argentina regarding export of soy products were in breach of the GATT, but the Commission had disagreed, saying that the practice in question was not in violation of the GATT. Therefore, the Commission rejected the claim and did not initiate an investigation regarding Argentina’s commercial practices. According to the Regulation, illicit commercial practices were “any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules.”<sup>168</sup>

Fediol claimed that Argentina’s commercial practices were contrary to Articles III, XI, XX, XXIII and XXXVI of the GATT.<sup>169</sup> The Commission relied on previous reasoning by the ECJ, saying that the provisions of the GATT were not sufficiently precise to give rise to rights that could be claimed by individuals, thereby making Fediol’s case inadmissible.<sup>170</sup> However, as the ECJ pointed out, this particular Regulation referred specifically to international law, which the GATT is part of.<sup>171</sup> The Court also stated that its ruling in *International Fruit* did not prevent it from interpreting and applying the rules of the GATT, when determining whether

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<sup>165</sup> Joined Cases 21-24/72, *International Fruit*, para. 20.

<sup>166</sup> *Ibid.*, para. 27-28.

<sup>167</sup> Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices OJ 1984 L 252, p. 1.

<sup>168</sup> Case 70/87, *Fediol v. Commission*, para. 2.

<sup>169</sup> *Ibid.*, para. 8.

<sup>170</sup> *Ibid.*, para. 18.

<sup>171</sup> *Ibid.*, para. 19.

certain commercial practices were incompatible with those rules. According to the ECJ, the fact that the contracting parties had established an institutional framework for implementation of dispute settlements in relation to the GATT was not in itself sufficient to exclude all judicial application of the GATT.<sup>172</sup> The ECJ then proceeded to examine the commercial practices in question, and found that they did not violate the GATT.

The Court had thereby made a clear distinction between lack of direct effect and cases where a Community act referred to the GATT. Therefore, in this case, the ECJ had power to review the legality of the decision by the Commission, since the Regulation in question referred to international law.

### **5.2.1.3 C-69/89, *Nakajima v. Council***

Just like in *Fediol*, this case concerned a Council Regulation.<sup>173</sup> However, this Regulation concerned the imposition of definitive anti-dumping duties, in this case on printers originating in Japan. The Japanese manufacturer ('Nakajima') brought action against the Council, arguing that the duty was illegal and claiming an annulment of the duty in respect to itself. Nakajima claimed that the Regulation was unlawful due to it breaching the Anti-Dumping Code.<sup>174</sup> However, Nakajima did not rely on the direct effect of those provisions, but instead invoked one of the grounds for review of legality under the EC Treaty.

The ECJ referred to its judgment in *International Fruit*, saying that just like the GATT had the effect of binding the Community, "the same conclusion must be reached in the case of the Anti-Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement."<sup>175</sup> The Court also stated that the Regulation in question was adopted in order to comply with the international obligations of the Community, and because of that, it should ensure compliance with the GATT and its implementation measures.<sup>176</sup> Therefore, the ECJ stated, "it is necessary to examine whether the Council went beyond the legal framework" and was in breach of the Anti-Dumping Code. The Court came to the conclusion that the Regulation was not in breach of the Anti-Dumping Code.

Similar to the reasoning in *Fediol*, the ECJ had in this case made a distinction between direct effect and a Community act that was intended to implement a GATT obligation. So now GATT could be used to attack Community acts when those acts either were intended to implement GATT obligations or when they referred to specific GATT provisions. In this way,

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<sup>172</sup> *Ibid.*, para. 21.

<sup>173</sup> Council Regulation (EEC) 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ 1988 L 209.

<sup>174</sup> The Agreement on Anti-Dumping Practices, which clarifies and expands Article VI of the GATT 1947.

<sup>175</sup> Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069, para. 29.

<sup>176</sup> *Ibid.*, para. 31.

the Court had somewhat shifted the burden of enforcing GATT rules from the courts to the legislator.

#### **5.2.1.4 Case C-280/93, *Germany v. Council***

Up until 1993, the EC Member States had different banana import regimes. The various methods used by the Member States ranged from import restrictions to allowing bananas to enter the country duty-free.<sup>177</sup> Because of these different conditions, bananas were not eligible for free circulation within the EC. As a step towards the more general goal of an entirely free internal market, the EC ministers had adopted Regulation 404/93,<sup>178</sup> which replaced the various national regimes in regards to banana imports. This Regulation extended preferential treatment to bananas originating in certain countries, thereby excluding bananas from other countries from operating under the same benefits. One consequence that made the issue even more politically delicate was the fact that the bananas produced and exported by the US, and by US owned companies, were not among those receiving preferential treatment. Although the EC revised their banana regime in 1998<sup>179</sup> and also reached an agreement with some of the countries not receiving preferential treatment, in accordance with GATT Art. XIII para 2(d), this was not possible in regards to some countries, including the US. As a result of this, the US withheld liquidation on EC goods, effective as of March 1999.

Germany had a previously liberal banana import scheme, and chose to challenge Regulation 404/93 in May 1993, because the Regulation imposed restrictions. Whereas the ECJ had previously held that the Regulation in question could not be challenged by private individuals, due to them not being sufficiently individually concerned,<sup>180</sup> Germany sought to distinguish that this did not apply to state governments and that compliance with GATT rules was a condition for the lawfulness of Community acts.<sup>181</sup>

The ECJ pointed out that although the Court had held that GATT provisions were binding on the Community, the spirit and the general scheme as well as the terms of the GATT must be considered.<sup>182</sup> According to the Court, what characterized the GATT was the flexibility of its provisions, especially in terms of derogation, measures to be taken when confronted with

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<sup>177</sup> Joel P. Trachtman, "Bananas, Direct Effect and Compliance", *European Journal of International Law* (1999) Vol. 10 No. 4, 661.

<sup>178</sup> Council Regulation (EEC) 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, OJ 1993 L 47 p. 1.

<sup>179</sup> Council Regulation (EC) No. 1637/98 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, OJ 1998 L 210 and Commission Regulation (EC) 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) 404/93 regarding imports of bananas into the Community, OJ 1998 L 293.

<sup>180</sup> There are several cases, for example C-256/93, *Pacific Fruit Company v. Council and Commission* (not reported), C-276/93, *Chiquita Banana Co. v. Council*, [1993] ECR I-3345 and C-286/93, *Atlanta and Others v. Council and Commission* (not reported).

<sup>181</sup> C-280/93, *Germany v. Council* [1994] ECR I-4973, para. 103.

<sup>182</sup> *Ibid.*, para. 105.

exceptional difficulties, and the possibilities for settling conflicts.<sup>183</sup> The Court also referred to its previous judgment in *International Fruit*, saying that not only the factors mentioned above, but also the unilateral power given to the contracting parties through GATT Art. XIX, barred an individual from using the GATT to challenge a Community act and also precluded the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State.<sup>184</sup> Therefore, the Court concluded, “an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.”<sup>185</sup> Only if the Community intended to implement a particular obligation arising from the GATT, or if the Community act would expressly refer to the GATT, could the Court review the lawfulness of the act from the point of view of GATT rules, which was similar to the reasoning in *Fediol* and *Nakajima*. Thereby, the ECJ had extended the direct effect criteria to an action brought by a Member State. Based on this, Germany’s argument that the GATT should have direct effect in government claims, as well as in Community legislation, was rebutted.

## 5.2.2 After 1994: the WTO

### 5.2.2.1 Case C-149/96, *Portugal v. Council*

This is considered to be the leading case regarding what role WTO rules play within the EU, and as will be seen further below, parts of this judgment have been repeatedly quoted by the ECJ in later cases. The unsolved question at the time was whether the ECJ would treat the WTO Agreements in the same restrictive manner as it had treated the GATT.

When the Marrakesh Agreement establishing the WTO was signed in 1994, the negotiations regarding access to the market in textiles were not yet completed. One among the many agreements annexed to the WTO Agreement was the Agreement on Textiles and Clothing ('the ATC') and the Agreement on Import Licensing Procedures. The EU had signed and become a contracting party to the WTO Agreement, and following this, the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).<sup>186</sup> Later that year, the Commission, together with India and Pakistan, concluded a Memoranda of Understanding between the European Community and India and Pakistan on arrangements in the area of market access for textile products, which was then signed by

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<sup>183</sup> *Ibid.*, para. 106.

<sup>184</sup> *Ibid.*, para. 109.

<sup>185</sup> *Ibid.*, para. 110.

<sup>186</sup> *Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)*, OJ 1994 L 336, p. 1.



the Council and published as a Council Decision.<sup>187</sup> This Decision was then contested by Portugal, who brought an action for annulment of the Decision before the ECJ. Among other things, Portugal argued that the Decision was in breach of WTO rules, including provisions of the GATT. Portugal did not base its claim on direct effect, but rather on “the circumstances in which a Member State may rely on the WTO Agreements before the Court for the purpose of reviewing the legality of a Council measure.”<sup>188</sup>

Although the ECJ confirmed that the WTO Agreements, especially concerning safeguards and dispute resolution, differed significantly from the provisions of the GATT, the Court emphasized the fact that the agreements do not specify the methods for enforcement precisely and still grant considerable importance to negotiation between the contracting parties.<sup>189</sup> The Court pointed out the great flexibility of Article 22 of the WTO Dispute Settlement Understanding (‘the DSU’) and came to the conclusion that “to require the judicial organs to refrain from applying the 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 entering into negotiated arrangements even on a temporary basis.”<sup>190</sup> The ECJ also distinguished the WTO Agreements from other agreements of an asymmetrical and less flexible nature, emphasizing that the purpose of the WTO was to reach mutually beneficial arrangements. According to the Court, other contracting parties did not grant the WTO Agreements direct effect in their domestic legal systems, which in turn may lead to disuniform application of WTO rules. Consequently, the Court concluded that if it was to seize an exclusive power to ensure that Community law would comply with WTO rules, this would deprive the legislative or executive organs of the Community of the scope for maneuver enjoyed by their counterparts in other countries.<sup>191</sup> The Court then stated that, after having taken all this into account, “the WTO Agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community Institutions.”<sup>192</sup> The ECJ referred to its previous judgments in *Nakajima* and *Fediol* regarding the GATT, saying that Community measures would only be reviewed in the light of WTO rules when the measure in question either expressly refers to the WTO agreements or when the Community intended to implement a particular obligation assumed in the context of the WTO. The contested Decision did not fulfill any of those criteria, it was merely an approval of the Memoranda of Understanding negotiated by the Community with

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<sup>187</sup> Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products, OJ 1996 L 153, p. 47.

<sup>188</sup> Case C-149/96, *Portugal v. Council*, para. 32.

<sup>189</sup> *Ibid.*, para. 36.

<sup>190</sup> *Ibid.*, para. 40.

<sup>191</sup> *Ibid.*, para. 46.

<sup>192</sup> *Ibid.*, para. 47.

Pakistan and India, and hence it would not be reviewed in the light of WTO rules.

### **5.2.2.2 Joined Cases C-300/98 and C-392/98, *Dior v. Tuk and Assco & van Dijk v. Wilhelm Layher***

This case concerned the interpretation of the TRIPS Agreement,<sup>193</sup> and also the jurisdiction of the ECJ in regards to interpreting WTO Agreements. In both of the two joined cases, the respective national court had referred to the ECJ the question of whether Article 50 of the TRIPS Agreement has direct effect. The article in question provides for provisional measures against alleged intellectual property infringements.

Dior alleged that Tuk had infringed Dior's trademarks by selling perfume bearing those marks in the European Economic Area (the EEA) without Dior's consent. Although Tuk had acquired some of the goods within the EEA, it had also been proven that some goods had been acquired outside the EEA. The question submitted to the ECJ by the national court was whether the legal consequences in Article 50 of the TRIPS Agreement take effect even in the absence of any corresponding provision of national law.<sup>194</sup>

In the other case, Layher claimed that Assco had violated one of their patents by manufacturing and selling a certain type of scaffolding. In the national court, Layher had applied for, and been granted, interim measures prohibiting Assco from selling or otherwise trading the product in question, allegedly a straightforward imitation of Layher's scaffolding. Assco appealed the decision, and the national court submitted three questions to the ECJ, of which one concerned the jurisdiction of the ECJ in regards to Article 50 of the TRIPS Agreement, and another whether said article has direct effect.

The ECJ had previously in *Hermès*<sup>195</sup> established that it had jurisdiction to interpret Article 50 of the TRIPS Agreement, but the issue here was to ascertain whether this was restricted solely to situations covered by trademark law.<sup>196</sup> The Court claimed jurisdiction on three grounds.<sup>197</sup> Firstly, that it has jurisdiction to define the obligations which the Community has assumed and, for that purpose, to interpret TRIPS. Second, that jurisdiction arose out of an obligation to meet the needs of national courts when they are called upon to apply national rules and potentially order provisional measures for the protection of rights arising under Community legislation falling within the scope of TRIPS. And third, that where a provision can apply both to situations falling within the scope of national law and to situations falling within that of Community law, the

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<sup>193</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>194</sup> Joined Cases C-300/98 and C-392/98, *Dior v. Tuk and Assco & van Dijk v. Wilhelm Layher* [2000] ECR I-1344, para. 19.

<sup>195</sup> Case C-53/96, *Hermès v. FHT*.

<sup>196</sup> Joined Cases C-300/98 and C-392/98, *Dior*, para. 32.

<sup>197</sup> *Ibid.*, paras 33-35.

Court has jurisdiction to interpret it in order to forestall future differences of interpretation. The ECJ stated that it, together with the national courts of the Member States, was under an obligation to give the article in question a uniform interpretation. Hence, the jurisdiction of the ECJ to interpret Article 50 of the TRIPS Agreement was not solely restricted to situations covered by trade-mark law.<sup>198</sup>

Next, the ECJ said that in essence the question of direct effect in the two cases concerned whether, and to what extent, the procedural requirements of Article 50 of the TRIPS Agreement had entered the sphere of Community law so that the national courts were required to apply them.<sup>199</sup> The Court then proceeded to go through the established criteria that would give a provision in an agreement between the Community and third countries direct effect: when in regard to the wording, purpose and nature of the agreement, the obligation of the provision is found to be sufficiently clear, precise and unconditional, and not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>200</sup> The Court referred to its previous statement in *Portugal v. Council*; that the WTO agreements are not among the rules in the light of which the Court is to review measures of the Community institutions. Based on this, the ECJ found that the TRIPS Agreement did not have direct effect. However, since Art. 50 of the TRIPS Agreement is a procedural provision, which should be applied by both Community and national courts, simply concluding that the TRIPS Agreement does not have direct effect did not entirely solve the question raised by the national courts. The ECJ differed between whether it concerned a field within which the Community had already legislated or not. The conclusion of the Court was that when the issue concerned ordering provisional measures to protect a field in which the Community had legislated, the national courts are required to apply national rules as far as possible in the light of the wording and purpose of Article 50 of TRIPS. However, when it concerned a field where there exists no Community legislation, the issue will by default fall within the competence of the Member States. Therefore, in those cases, Community law neither requires nor forbids national courts to grant direct effect to Article 50 of the TRIPS Agreement.<sup>201</sup>

### **5.2.2.3 Case C-317/99, *Kloosterboer v. Minister van Landbouw***

This case concerned the WTO Agreement on Agriculture as well as a Council Regulation regarding the common organisation of the market in poultrymeat.<sup>202</sup> Kloosterboer had initially not been charged with additional

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<sup>198</sup> *Ibid.*, para. 39.

<sup>199</sup> *Ibid.*, para. 41.

<sup>200</sup> *Ibid.*, para. 42.

<sup>201</sup> *Ibid.*, para. 49.

<sup>202</sup> *Council Regulation (EEC) 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat*, OJ 1975 L 282, p. 77, as amended by *Council Regulation (EC) 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required*

customs duty on its imports of poultry from Brazil to the Netherlands. However, during a subsequent check, the customs found that such duty should be charged and therefore sent Kloosterboer notices of post-clearance recovery. Kloosterboer objected to this, but the claim was rejected. In court, Kloosterboer argued that the duty was contrary to the Agreement on Agriculture and to the Council Regulation regarding the common organisation of the market in poultrymeat. The court submitted the question of interpretation to the ECJ.

The ECJ reaffirmed its previous approach, that Community measures would only be reviewed in the light of WTO rules when the measure in question either expressly refers to the WTO agreements or when the Community intended to implement a particular obligation assumed in the context of the WTO, by clearly stating that the Regulation in question had been adopted for the purpose of implementing the agreements concluded during the Uruguay Round. The Court also noted that one of the provisions of the Regulation specifically referred to the Agreement on Agriculture.<sup>203</sup> Therefore, the Agreement on Agriculture was found to have direct effect in this case.

#### **5.2.2.4 Case C-93/02 P, *Biret v. Council***

In 1996, Canada and the US initiated a procedure for WTO dispute settlement against the EC. They considered Community legislation to be in breach of WTO legislation, specifically the SPS Agreement,<sup>204</sup> due to the restrictions the EC put upon imports of meat treated with certain hormones. In 1998, the EC was found to be in breach of certain provisions of the SPS Agreement, and was requested to bring its legislation into conformity with WTO rules. The Community stated that it intended to follow the WTO ruling, but that it needed some time to do so. As a result of this, the EC was granted a respite of fifteen months to bring its legislation to order. However, during this period, new scientific evidence regarding hormone-treated meat came to light, and in 2000 the Council submitted a proposal to maintain the import restrictions at issue.

The French company Biret was in judicial liquidation and filed suit against the EC, claiming compensation for losses suffered as a result of the prohibition on the import into the Community of hormone-treated meat. The Court of First Instance dismissed the claim, and the case was appealed to the ECJ. Biret argued directly that the ECJ should grant direct effect to all WTO agreements<sup>205</sup> within the EC legal order and that individuals were therefore entitled to rely on it to challenge the lawfulness of an EC act and to obtain

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*in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations*, OJ 1994 L 349, p. 105.

<sup>203</sup> Case C-317/99, *Kloosterboer v. Minister van Landbouw* [2001] ECR I-9863, para. 23.

<sup>204</sup> Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>205</sup> Case C-93/02 P, *Biret v. Council* [2003] ECR I-10497, para. 42.

compensation for damages, and also presented several arguments in favor of this.<sup>206</sup>

The ECJ repeated its long-standing arguments regarding the potential direct effect of WTO agreements, saying that they are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions and that this would only be the case where if the Community legislation specifically refers to a WTO provision or was implemented with the purpose of fulfilling a WTO obligation. However, the Court did not delve further into the issue of direct effect, but instead focused on the chain of events, stating that since the EC had been given a fifteen month time-limit for implementation, to review the legality of the measure within that time would make that period of compliance ineffective.<sup>207</sup> Due to Biret being put into judicial liquidation in 1995, i.e. prior to the WTO ruling, the ECJ held that Biret could not have suffered any damage due to the legislation in question.<sup>208</sup>

#### **5.2.2.5 Case C-377/02, *Van Parys***

This case was a result of the EC banana regime, previously at issue in *Germany v. Council*. Van Parys was a company that imported bananas into the EC. To do so, a license was required, and Van Parys applied for a license to import certain quantities of bananas from Ecuador and Panama. However, these licences were limited in accordance with the import quota set out in the Community legislation. Hence, the quantities referred to in the licence applications were subject to a reduction coefficient. Therefore, Van Parys was granted a license, but not equal to the import amount requested. Van Parys claimed that this reduction was unlawful because of the unlawfulness, in the light of the WTO rules, of the regulations governing imports of bananas into the Community on which those decisions are based.<sup>209</sup> The case was referred to the ECJ.

According to the ECJ, the national court in essence asked the ECJ to assess the validity of the regulations in question in the light of WTO rules.<sup>210</sup> The EC banana regime had been declared to be in breach of WTO rules by a WTO tribunal, and the EC had stated its intention to comply with this ruling, seeking to reach agreements with the countries involved. The EC had been given a time limit to comply with the ruling. As in previous cases, the ECJ referred to the fact that the WTO Agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions, and that an intention to implement a particular obligation assumed in the context of the WTO or an express reference is needed to grant direct effect. The ECJ clearly stated that

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<sup>206</sup> Ibid., para. 46.

<sup>207</sup> Ibid., para. 62.

<sup>208</sup> Ibid., para. 63.

<sup>209</sup> Case C-377/02, *Van Parys* [2005] ECR I- 1465, para. 35.

<sup>210</sup> Ibid., para. 39.

although the EC had declared its intention to comply with the WTO ruling, this was not to be viewed as an intention to assume a particular obligation in the context of the WTO.<sup>211</sup> Another often repeated argument was pointed out by the ECJ, namely that the dispute settlement system in the context of the WTO accords considerable importance to negotiation between the parties, and also has the option of compensation and suspension of concessions. Based on this, the Court came to the conclusion that 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 these possibilities.<sup>212</sup> The time limit granted to the EC so as to comply with the WTO ruling had expired, but according to the Court, this did not mean that the Community had exhausted the possibilities of finding a solution to the dispute between it and the other parties. Therefore, the ECJ found that to review the legality of Community measures, simply based on the expiry of the time limit, would potentially undermine the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with WTO rules.<sup>213</sup> The ECJ also pointed out the need for reciprocity; that the Community's legislative and executive organs need to have the discretion that the equivalent bodies of the Community's commercial partners enjoy. Taking all these arguments into account, the ECJ concluded that an operator cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if a WTO ruling has stated that that legislation is incompatible with those rules.<sup>214</sup>

#### **5.2.2.6 Joined Cases C-120-121/06 P, *FIAMM and Fedon v. Council and Commission***

This is another case with its origin in the situation that arose after the case of *Germany v. Council*. The EC refused to revise their bananas regime, even though a WTO tribunal had deemed it to be in breach of WTO rules.<sup>215</sup> As a response to this, the US withheld liquidation on EC goods and also restricted imports of goods from the EU. Naturally, this had an effect on businesses within the EC that traded with the US, such as FIAMM and Fedon.

Both FIAMM and Fedon claimed that the Community was liable for the damage it had caused by not complying with the WTO ruling, that damage being the consequence of the increased customs duty that the US had imposed on FIAMM's and Fedon's products. According to FIAMM and Fedon, the Community had incurred non-contractual liability by reason of

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<sup>211</sup> Ibid., para. 41.

<sup>212</sup> Ibid., para. 48.

<sup>213</sup> Ibid., para. 51.

<sup>214</sup> Ibid., para. 54.

<sup>215</sup> WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WT/DS27/AB/R.

the unlawful conduct of its institutions.<sup>216</sup> The unlawful conduct was seen as the failure of the Council and Commission to change the banana regime so as to bring it into conformity with WTO rules within the timelimit given.

The Court clearly stated that those Community institutions that have the power to negotiate agreements with non-Member States, also have the freedom to conclude what effect that agreement will have within the internal legal order of the parties. When that question is not dealt with in the agreement, it is up to the courts, and in the end the ECJ, to interpret and decide upon the ramifications, such as direct effect.<sup>217</sup> The Court repeated its previous statement, that the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions, unless the measure specifically refers to provisions of the WTO agreements or the purpose of the measure is to implement a WTO obligation. According to the Court, Regulation 404/93 did not fulfil either of these criteria, and following a WTO ruling did not mean that the Community intended to assume a particular obligation in the context of the WTO.<sup>218</sup> As it had done in previous cases, the ECJ emphasized that the WTO dispute resolution is partially based on negotiations, and to remove that possibility, by giving the courts power to ensure compliance with WTO rules, would undermine the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with these rules.<sup>219</sup> Giving this power to the courts would also, according to the Court, result in a lack of reciprocity, since the legislative and executive organs of the Community would not enjoy the same scope of maneuver as enjoyed by their counterparts in the Community's trading partners.<sup>220</sup>

According to the ECJ, FIAMM and Fedon were trying to make a distinction between the direct effect of WTO rules and the direct effect of a WTO ruling. This distinction was, however, seen to have no basis, as a WTO ruling is based on the infringement of those very WTO rules, which the Court had repeatedly declared did not have direct effect. Thus, a WTO ruling could not be fundamentally distinguished from WTO rules.<sup>221</sup>

The Court also added that an economic operator that conducts business with non-Member States must be aware that there exists the possibility that a non-Member State may adopt measures within the framework of WTO rules. Therefore, consequences of such measures cannot be grounds for a liability claim against the Community.<sup>222</sup>

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<sup>216</sup> Joined Cases C-120-121/06 P, *FIAMM and Fedon v. Council and Commission*, [2008] ECR I-6513, para. 31.

<sup>217</sup> *Ibid.*, paras 108-109.

<sup>218</sup> *Ibid.*, paras 113-115.

<sup>219</sup> *Ibid.*, para. 117.

<sup>220</sup> *Ibid.*, para. 119.

<sup>221</sup> *Ibid.*, paras 125-129.

<sup>222</sup> *Ibid.*, paras 186-188.

## 5.2.3 Cases regarding direct effect in relation to other international agreements

### 5.2.3.1 Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*

The case of Bresciani concerned an Italian charge that was imposed on the claimant's import of raw cowhides, according to Italy introduced to offset the costs of the compulsory public health inspection of imported products of animal origin.<sup>223</sup> The overarching question of the case was then whether this charge had "the equivalent effect of a customs duty" as stated both in the EEC Treaty as well as in the Yaounde convention, which was an agreement between the EC and the African states.

One of the questions before the ECJ was whether Article 2(1) of the Yaounde convention has immediate effect so as to confer on community citizens an individual right, which the national courts must protect.<sup>224</sup> The ECJ said that the spirit, the general scheme and the wording of the agreement must be regarded.<sup>225</sup> The agreement was concluded to maintain the special relations that the EC was seen to have with the African states, and to further their development. The Court stated that since the Community as well as the Member States concluded the agreement, they are bound by it.<sup>226</sup>

The ECJ stated that although the convention was not concluded in order to ensure equality in obligations, but rather to promote the African states' development, this did not prevent certain provisions of the agreement from having direct effect within the Community.<sup>227</sup> The Court then concluded that since the Yaounde convention refers expressly to the EC Treaty, and that the obligation in question is specific and not subject to any reservation by the Community, it is capable of conferring on those subject to Community law the right to rely on it before the Courts.<sup>228</sup> Hence, Article 2(1) of the Yaounde convention was found to meet the requirements making it capable of being applied by a court, i.e. having direct effect.

### 5.2.3.2 Case 104/81, *Hauptzollamt Mainz v. Kupferberg*

This case concerned a free trade agreement that the EEC had concluded with Portugal. According to German law, there was a certain customs duty on the import of port wines from Portugal. A German importer contested the legality of such a decision by invoking a provision of the free trade agreement between Portugal and the EEC. The relevant question posed to the ECJ was whether the agreement between Portugal and the EEC was

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<sup>223</sup> Case 87/75, *Bresciani*, para. 3.

<sup>224</sup> *Ibid.*, para. 15.

<sup>225</sup> *Ibid.*, para. 16.

<sup>226</sup> *Ibid.*, para. 18.

<sup>227</sup> *Ibid.*, paras 22-23.

<sup>228</sup> *Ibid.*, para. 25.



directly applicable law, which conferred rights to individual common market citizens.<sup>229</sup>

It was made clear by the ECJ that agreements concluded by the Community form an integral part of the Community legal system, giving the Member States an obligation, both in relation to the Community as well as to the non-Member State that is party to the agreement.<sup>230</sup> Although the application of such provisions may be in the hands of the Community or of the Member States, their effect in the Community may not be allowed to vary. Hence, it was the task of the ECJ to ensure such uniformity.<sup>231</sup> However, each contracting party is free to determine the legal means appropriate to executing the commitments that have been undertaken, unless the agreement specifies those means. Even though one of the parties consider that certain provisions may have direct effect, whereas others do not, this does not constitute a lack of reciprocity in implementing the agreement.<sup>232</sup> The Court found that neither the nature nor the structure of the agreement with Portugal prevented an individual from relying on its provisions. However, to grant direct effect, such a provision must be unconditional and sufficiently precise, and must therefore be analysed in the light of both the object and the purpose of the agreement and of its context.<sup>233</sup> The ECJ found that the purpose of the agreement with Portugal was to eliminate restrictive trade rules, especially in regard to customs duties. The agreement also contained an unconditional rule against discrimination in matters of taxation, which was only dependent on the question of whether the products concerned were of like nature. Hence, the Court found that the free trade agreement with Portugal did have direct effect.<sup>234</sup>

### **5.2.3.3 Case C- 308/06, *Intertanko and Others***

The Intertanko case concerned the United Nations Convention on the Law of the Sea (UNCLOS), which had been approved on behalf of the European Community through a Council Decision.<sup>235</sup> The claimants had applied for judicial review of a Directive,<sup>236</sup> questioning whether it was stricter than UNCLOS. The ECJ stated that the Community was a party to UNCLOS (unlike another international agreement, Marpol 73/78, which was also put

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<sup>229</sup> Case 104/81, *Kupferberg*, para. 7.

<sup>230</sup> *Ibid.*, para. 13.

<sup>231</sup> *Ibid.*, para. 14.

<sup>232</sup> *Ibid.*, para. 18.

<sup>233</sup> *Ibid.*, para. 23.

<sup>234</sup> *Ibid.*, para. 26.

<sup>235</sup> *Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea*, OJ 1998 L 179, p. 1.

<sup>236</sup> *Council Directive 2005/35/EC of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements*, OJ 2005 L 255, p. 11.

forth by the claimants), and that UNCLOS therefore forms an integral part of Community law.<sup>237</sup>

The ECJ stated that although UNCLOS establishes substantive territorial limits to their sovereign rights, it does not in principle grant independent rights and freedoms to individuals.<sup>238</sup> And although UNCLOS appears to attach rights to ships, this does not mean that those rights are conferred upon individuals linked to those ships, such as their owners, since a ship's international legal status is dependant on the flag State.<sup>239</sup> The ECJ also pointed out other areas of UNCLOS that attach rights and obligations upon the flag State, and concluded that the rules of UNCLOS are not intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.<sup>240</sup> The Court then stated that the nature and broad logic of UNCLOS prevent the Court from assessing the validity of a Community measure in the light of that convention.<sup>241</sup> In essence, the ECJ appeared to hereby open up for extending the principles established in case law on the WTO to other major international treaties.

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<sup>237</sup> C-308/06, *Intertanko and Others*, [2008] ECR I-4057, para. 53.

<sup>238</sup> *Ibid.*, paras 58-59.

<sup>239</sup> *Ibid.*, para. 61.

<sup>240</sup> *Ibid.*, para. 64.

<sup>241</sup> *Ibid.*, para. 65.

# 6 Conclusion

With the basic understanding given through the previous chapters, it should be clear that the question of granting direct effect to WTO law within the EU is far from straightforward. This chapter shall attempt to give an overview of the main academic arguments and discussions regarding this question and conclude with the author's analysis of the issue.

## 6.1 The academic discussion

One major consideration when discussing whether to grant certain international legislation direct effect or not, is the fact that direct effect has a fundamental impact on constitutional power relations.<sup>242</sup> The administration can rely directly upon treaty provisions without the need for domestic legislation on the matter, and private actors are given both rights and obligations through the treaty, and the application of direct effect enables them to utilize these provisions to challenge domestic law. The courts can also see their power increase, as they can overrule domestic legislation that is inconsistent with international treaty obligations.

As has been shown through the case law by the ECJ, certain criteria for granting direct effect have been construed by the Court, such as the provision being clear, precise, unambiguous and unconditional. Unlike the provisions under the GATT, it has been argued that the WTO rules are sufficiently precise,<sup>243</sup> but the problem is not solved with that, since it penetrates into matters of national constitutional law and the separation of powers, as briefly described above.

One argument in favour of direct effect is that it can be used against protectionism within domestic law systems by granting the right to trade freely the same status as fundamental human rights.<sup>244</sup> Individuals could then invoke treaty provisions in front of their domestic courts when they perceive that they have been harmed by protectionist national policies. It has also been argued that direct effect of WTO rules is necessary to keep governments from abusing trade policy powers and guarantee freedom and

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<sup>242</sup> Thomas Cottier and Krista Nadakuvakaren Schefer, "The Relationship between World Trade Organization Law, National Law and Regional Law", *Journal of International Economic Law* 1 (1998), 91.

<sup>243</sup> *Ibid.*, 93.

<sup>244</sup> J. Tumlrir, "International Economic Order and Democratic Constitutionalism", *ORDO* 34 (1983), 82.

non-discrimination in relation to international trade.<sup>245</sup> Others argue that granting direct effect to trade provisions will encourage a deeper integration, which in turn will enhance regional wealth and cooperation.<sup>246</sup> Some fear that the ECJ's refusal to grant direct effect to WTO provisions may very well counteract the EU's strive towards deeper integration, and instead divide the Member States and the Union.<sup>247</sup>

One major argument against granting direct effect to WTO provisions is the domestic impact it will have on the institutional balance of government, as described above, and that to let treaty law be superior to domestic legislation is dangerous to the idea of democracy and to the democratic representation of individuals, mainly due to the fact that some constitutions provide for very little democratic participation in the treaty-making process.<sup>248</sup> It is also claimed that although direct effect is granted to all treaties, courts will find ways to avoid applying them in particular cases.<sup>249</sup>

In the context of the EU, the policy argument of reciprocity stands out. This is mainly due to the fact that direct effect is not being applied in most members of the WTO, especially in regards to the United States.<sup>250</sup> The fact that other WTO members do not use the mechanism of direct effect, and even specifically exclude it in some cases, places those members in a very favourable position. Whereas the countries with direct effect are somewhat tied by the interpretation of their courts, countries that have shielded themselves against direct effect have free hands in regards to interpretation and application of the treaty, to such an extent that it becomes unfair to their trading partners.<sup>251</sup> This argument conveys that how WTO law is treated domestically cannot be separated from how it is treated abroad.<sup>252</sup>

Another concern in regards to granting WTO rules direct effect is the issue of consistent interpretation. If multiple national courts interpret the WTO Agreements independently, this may lead to different results and reduce the effectiveness of both the WTO rules and the dispute settlement

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<sup>245</sup> Ernst-Ulrich Petersmann, "The Dispute Settlement System of the World Trade Organization and the evolution of the GATT Dispute Settlement System since 1948", *Common Market Law Review* 31 (1994), 1242.

<sup>246</sup> Frederick M. Abbott, "Regional Integration Mechanisms in the Law of the United States: Starting Over", *Indiana Journal of Global Legal Studies* 1 (1993), 157.

<sup>247</sup> Thomas Cottier and Krista Nadakuvakaren Schefer, "The Relationship between World Trade Organization Law, National Law and Regional Law", *Journal of International Economic Law* 1 (1998), 96 and 106.

<sup>248</sup> John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", *American Journal of International Law* 86 (1992), 323.

<sup>249</sup> *Ibid.*, 327.

<sup>250</sup> Thomas Cottier and Krista Nadakuvakaren Schefer, "The Relationship between World Trade Organization Law, National Law and Regional Law", *Journal of International Economic Law* 1 (1998), 99 and 106.

<sup>251</sup> Jan Peter Kuijper, "The New WTO Dispute Settlement System – The Impact on the European Community", *Journal of World Trade* 29 (1995), 64.

<sup>252</sup> Thomas Cottier and Krista Nadakuvakaren Schefer, "The Relationship between World Trade Organization Law, National Law and Regional Law", *Journal of International Economic Law* 1 (1998), 99.

procedure.<sup>253</sup> Therefore, the legal questions raised by implementing the WTO Agreements are seen to be best solved in the appropriate forum, i.e. the WTO Panels and Appellate Body.

## 6.2 Analysis

Due to being within the international sphere, it is not possible to simply look at the legal issues at hand; additionally, the policy arguments appear to be of great validity and importance. From a legal perspective, the ECJ has developed a relatively clear jurisprudence, with explicit criteria for granting direct effect, although the application and interpretation of these criteria may seem somewhat arbitrary at times. Indeed, there does appear to be some validity behind the claims that the WTO Agreements are treated less favourably than other international agreements. However, although this differential treatment stands out as quite objectionable from a purely legal perspective, the policy viewpoint certainly makes the issue not so black-and-white. One may argue the rule of law, but to do so exclusively appears to be neither realistic nor particularly broad-minded. Neither does it show a greater understanding of the complexity of the issue. There are both legal and policy issues to consider, but they are not easily separated.

Granting the WTO Agreements direct effect would most certainly put constitutional restraints on protectionist behaviour, but is that necessarily a good thing in all situations? The answer would of course depend on your perspective and agenda. Perhaps one presumes that all individuals would approve of and welcome the possibility to invoke WTO trade provisions in their domestic courts, but there are certainly those who benefit from the current protectionist limitations as well. However, what is the point of making law that is designed to protect private parties, if these private parties cannot rely on it? Although this is a valid question, it makes for a very black-and-white argument. More or less all governments have made legislation designed to protect individuals that the individuals in question cannot invoke themselves. This does not mean that the legislation in itself is meaningless or that individuals cannot benefit from it. However, it does mean that the power remains with the government, and is not given to private parties. In that situation, the idea that granting direct effect to the WTO Agreements would work as a way to ensure that governments adhere to their international obligations, is lost. One may also argue that individuals will not have the resources to argue sophisticated WTO law before the court, meaning that direct effect will only benefit large corporations, that most likely already enjoy certain privileges.

If all members of the WTO were to grant its Agreements direct effect, this would most likely be beneficial to smaller trading nations. Instead of having

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<sup>253</sup> Piet Eeckhout, "The Domestic Legal Status of the WTO Agreements: Interconnecting Legal Systems", *Common Market Law Review* 34 (1997), 57-58.

to rely on their negotiating power, or lack thereof, the rule of law would be secured in international economic relations, leaving little room for larger nations or unions to “throw their weight around”. In a sense, this would also lead to greater consistency and unity within the EU Member States. This was certainly the case with the mixed agreements, such as the TRIPS. However, with the Lisbon Treaty bringing all issues of the CCP, as well as all areas covered by the WTO, under the umbrella of the EU, this argument seems somewhat void in the context of the EU.

One may also question whether an international instrument that has been created by means of diplomacy is indeed precise enough to be allowed to trickle down through the legal systems of individual nations. Are the WTO Agreements of such a standard that they would actually promote the rule of law? Granted, this is also how the EU started: through diplomacy. However, as will be mentioned further below, the EU has had a significant development in terms of constitution, judicial power and democratic representation, something that the WTO is far from claiming. Therefore, to accept the judicial supremacy of the EU, as opposed to the WTO, is significantly easier and more justified.

The concern of reciprocity has underlined the ECJ’s main reasons for denying direct effect to the WTO Agreements: the WTO is an instrument of negotiations and the provisions are not sufficiently precise for the purpose of direct effect. This has been particularly true in regards to the US, seeing as the US is one of the EU’s major trading partners. With the WTO still being dependant on diplomatic negotiations, the party whose constitutional and judicial system excludes direct effect is placed in a very favourable position, potentially fundamentally unfair to its trading partners. Whereas the country that is excluding direct effect arrives with “free hands” at the negotiations, the countries that apply direct effect are bound by the interpretation of their courts. Again, this also points out the issue of the constitutional powers shifting from the legislators to the courts. In addition, it touches on another issue, namely that having multiple national courts interpreting the WTO Agreements may lead to large inconsistencies, and one may argue that the complicated legal questions that can arise in a WTO dispute is best solved by the WTO Panels or the Appellate Body. Domestic judges and courts may also not feel equipped to handle these questions.

Within the DSU there is, as mentioned previously, a possibility to reach a mutually agreed solution. Indeed, it is even encouraged. Having domestic courts enforce the WTO rules would remove this option for those countries applying direct effect. The DSU also offers the option to provide adequate compensation in diplomatic negotiations, or for the aggrieved party to enforce sanctions. This is not something that a domestic court applying the WTO rules directly can offer. Instead, when a court finds that a national rule is in breach of a WTO rule, it will have to remedy the inconsistency immediately by refusing to apply national law. This will then lead to the legislator having to take the court’s ruling into account. Thus, the

consequence is that temporary compensation and sanctions are no longer available, and the courts have become the legislators.

In regards to the altered distribution of powers within national or regional governance, one must remember that foreign policy and economic policy are increasingly indistinguishable. For example, giving direct effect to WTO rules in agriculture would shift the powers from the EU Council and Parliament to the Commission and to the European courts.<sup>254</sup> The shift in powers may also hinder foreign policy goals to be achieved through other means, be they diplomatic or military. Without a level playing field, certain nations or unions may even withdraw their WTO membership.

Deeper regional integration, presumably leading to enhanced regional wealth, has often been hailed as one of the largest (if not *the* largest) benefits of the EU, and has stood as an encouragement to proceed on the path towards deeper integration. As has been explained previously in this paper, the Member States have given up a certain amount of sovereignty to enable the EU to be what it is today. Apparently, this sacrificial will does not extend to the WTO. Considering that the EU and the WTO have been founded on the same basis: encouragement of cooperation in trade-related matters, it stands as somewhat of a conundrum that the same effort to compromise does not apply to both organizations, seeing as they in a wide sense wish to achieve the same goal. However, if one takes a closer look, it is clear that there is one major and significant difference between the EU and the WTO: democracy. Whereas the WTO, despite efforts to move towards a more legal type of organization, is still largely made up of diplomatic negotiations, the EU has a solid constitutional structure, with democratically chosen representatives. Yes, the Member States would give up more of their sovereignty if the WTO Agreements were granted direct effect within the EU, but what is even more important is that *the people* would be robbed of their voice in these matters. In a world that is increasingly global, the power already tends to move away from the people, and inviting the WTO wholeheartedly into the EU would most likely move this power yet another step further away. In addition to this, not all countries have an equal amount of democratic participation in the treaty-making process. The negotiations within the WTO are not public, and although the reports by the Panels and the Appellate Body are, the mutually agreed solutions are very rarely divulged.

Although the reasoning of the ECJ may feel somewhat sparse at times, with the same arguments being repeated without further clarification, it is the author's opinion that the position of the ECJ is justified. It would be simple to use legal arguments to penetrate the reasoning of the ECJ, but it is quite clear that the ECJ has realised what was stated above: that you cannot separate foreign policy and economic policy. And you cannot separate the legal issues from the policy issues. International law is established within a

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<sup>254</sup> Thomas Cottier and Krista Nadakuvakaren Schefer, "The Relationship between World Trade Organization Law, National Law and Regional Law", *Journal of International Economic Law* 1 (1998), 111.

significantly different framework than domestic law, and under different conditions. Therefore, you cannot look upon international law in the same way that you would scrutinize domestic law. Countries give up their sovereignty for what appears to be a larger gain, but the entire framework still rests upon goodwill, financial pressure, or the concept of “name and shame”. It appears that to enforce direct effect of the WTO Agreements within the EU would put the EU in a significantly weaker diplomatic position, where the benefits would be sorely outnumbered by the disadvantages. If the WTO Agreements should be granted direct effect, this is something that needs to be done by all the WTO members simultaneously, so as to avoid discrepancies during negotiations. Doing so would also significantly alter the nature of the WTO, and call for attention to solving issues like divergent interpretation, the role of the judiciary, and the transparency and democratic legitimation of the WTO. It is the author’s opinion that these issues cannot be taken lightly, meaning that a one-sided application of direct effect within the EU would have great consequences for the EU and for the cooperation of the Member States. In short, it would create more issues than it would solve.



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