CJEU and WTO Dispute Settlement Mechanism - Convergence or Divergence?

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Abstract

This analysis shows the issue of the relationship between the EU and the WTO and the interactions between European judges and the decisions of the WTO Dispute Settlement Body. The CJEU rejects or uses DSB decisions. In interpreting the fact that the competent Community institutions negotiate and conclude an agreement with third countries, it is considered that the freedom to agree with these third countries on the international effects of the provisions of the agreement is regulated and that the effects on which should produce them in the internal legal order of the Contracting Parties. Currently, the European Commission contributes to improving the procedures for resolving international economic and investment disputes, selects arbitrators and experts who, in the specific institutional organization, will help to implement the chapters on trade and sustainable development of EU trade agreements. Heuristically speaking, the research method used to design this study is a comparative one and concerns a certain methodological principle, in accordance with the object of analysis that will be presented.

Keywords: *World Trade Organization, Court of Justice of the European Union, GATT, international trade law.*

JEL Classification: K22, K33

1. Preliminary explanation

Globalization has progressively "broken" the sovereignty of states, throwing them into an identity crisis. At the same time, the internationalization of exchanges coincided with the diversification of mechanisms and legal means of protection that can be activated by individuals before national courts and supranational jurisdictions. The analysis of the interaction between the legal order of the Union and the law of the World Trade Organization (WTO) would be incomplete without a critical assessment of how European judges and panels and the WTO appellate body contribute to the articulation between the two legal systems.

The WTO is involved in maintaining a regulated, open and fair international trading system by removing barriers to international trade. WTO law - no less than 26,000 pages of agreements and commitments - is a body of rules of public international law and the dispute settlement mechanism is undoubtedly the major success of Uruguay's last round of GATT negotiations.

Can the WTO agreements and the rulings of the Dispute Settlement Body (DSB) be relied on before the judge on the Kirschberg plateau in order to obtain a different result than that which would be achieved by the application of Union law? The answer to the question calls, in advance, to examine **the originality of the WTO dispute settlement system** (2) vis-à-vis Union jurisdiction, **the treatment of the direct effect of WTO law in the jurisprudence of the CJEU** (3), more precisely the refusal to use

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WTO Agreements to control the legality of the acts adopted by the European institutions as well as the temperaments brought to this restrictive conception. The identification of the same area of divergence by **rejecting the direct effect of the DSB recommendations and rulings** (4) will be the subject of particular comments.

2. The originality of the WTO dispute settlement system

Although characterized by a common goal - the liberalization of trade in goods and services, the European Union and the World Trade Organization are two regulatory areas with partially different purposes. The Union is a regional player while the WTO acts globally. WTO law "thrives in the context of economic liberalism where social logic is absent while the Union develops in the logic of economic integration promoted with respect for fundamental rights"[2].

The first international organization with a universal vocation established at the end of the Cold War, the WTO, is the long-delayed successor to the International Trade Organization originally intended to be a successor to the GATT. Benefiting from an original dispute resolution mechanism, the WTO has changed the international institutional map whose matrix was traditionally articulated around the United Nations[3], as an illustrative example of the developments that become possible when states accept the rules of a multilateral forum for the implementation of trade liberalization measures.

The WTO negotiations require efforts to finalize them and the manifestation of unilateralist reflexes becomes a source of blockages; WTO agreements have been criticized for biased trends towards multinational corporations and rich nations as well as environmentalists or opponents of globalization. Instead, most observers have acknowledged in the WTO dispute settlement system the main success of the multilateral trading system stemming from the 1994 Marrakesh Accords. The WTO has a court - the Dispute Settlement Body (the operation of which is governed by the Memorandum of Understanding on Rules and Procedures for Settlement of Disputes) and a procedure that activates steps with precise deadlines.

A true "armed arm" of the WTO, the dispute settlement mechanism is distinguished by its dual nature - quasi-diplomatic and jurisdictional. Unlike the Union's judicial system, the main function of which is to restore legality, the philosophy underlying the dispute settlement system is to maintain trade, avoid the irreversible disruption of the sectors concerned and avoid an imbalance between reciprocal concessions on which the states agreed[4].

The official description is illustrative of the decisive role played by the jurisdictional mechanism in ensuring the effective application of the body of rules applicable to international trade: “the dispute settlement mechanism is the cornerstone of the multilateral trading system and the WTO's unprecedented contribution to world

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[2] See Marilyne Sadowsky, *Droit de l’OMC, droit de l’Union européenne et fiscalité directe*, Larcier, 2013, in Preface.

[3] See Bob Kieffer, Clément Marquet, *L’Organisation Mondiale du Commerce et l’évolution du droit international public*, 2e édition, Bruylant, 2020.

[4] See P. Mengozzi, *Les particularités des accords OMC et le problème de leur invocabilité devant les juges communautaires*, in Jean-Claude Masclet, Hélène Ruiz Fabri, Chahira Boutayeb, Stéphane Rodrigues (coordinators), *L’Union européenne: Union de droit, union des droits, mélanges en l’honneur de Philippe Manin*, Paris, Pedone, 2010, p. 881.

economic stability. Without a means of resolving disputes, the rules-based system would be of no use because the rules could not be applied. The WTO procedure enshrines the legal regime and makes the trading system safer and more predictable."[5] Widely used by WTO members, it has been the most dynamic structure in the functioning of the WTO for 25 years. The DSB judgments have an authority close to the imperium of court judgments, as DSB recommendations and judgments are binding as soon as they are adopted and their implementation mechanisms have been activated. The panels and the Appellate Body gave rise to the formation of a true "jurisprudence" of the DSB[6].

The doctrine noted that precisely this mixed identity - quasi-diplomatic and quasi-jurisdictional of the DSB - becomes the source of problematic consequences when the two autonomous legal orders interact. Of course, we immediately identify the influence of the WTO on Union law when we read art. 216 para. (2) TFEU according to which "agreements concluded by the Union shall be binding on the institutions of the Union and on Member States". Therefore, the CJEU, being an institution of the Union, should implement the decisions of the DSB[7]. And yet, there is a well-established trend, namely a limit on the area of availability of the European legal order to support the influence of the WTO. The CJEU, as the guarantor of Union law, must ensure that its objectives, autonomy and independence are preserved. In other words, it must overcome the risk that the dispute settlement mechanism will call into question its jurisdiction.

In the context created by the coexistence of the two legal orders and the role of the structures vested with jurisdictional powers to participate in the interference between them, we will analyze the case law of the Court on the direct effect of WTO law.

3. Treatment of the direct effect of GATT rules and WTO law in CJEU case law

3.1. Dualism *vs.* legal monism: the impact of the distinction on the direct effect

The Court has traditionally refused to recognize the direct effect of WTO agreements and, more recently, of DSB rulings. In other words, it refused to use WTO agreements and DSB decisions to control the legality of acts of the European institutions. The object of our study is the critical analysis of this jurisprudence and of the corrections that were brought to it.

As a preliminary point, it is welcome to remind the reader of the conditions necessary for the rules of public international law to have direct effect. In a widely accepted sense, direct effect is defined as "the recognized ability of a rule of international law to confer by itself rights on individuals, rights which may be invoked before the courts of the states in which this rule is in force"[8]. Nonetheless, the question of direct

[5] See https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, consulted on 1.10.2020.
[6] For developments on WTO procedures see David Luff, *Le droit de l'Organisation Mondiale du Commerce. Analyse critique*, Bruylant - LGDJ, 2004, p. 769 and following.
[7] See Ninon Forster, *Les usages des décisions de l'Organe de règlement des différends de l'Organisation mondiale du commerce par la Cour de justice de l'Union européenne*, „Geneva Jean Monnet Working Papers" 19/2016, p. 3.
[8] See J. Verhoeven, *La notion d'applicabilité directe en droit international*, „Revue Belge de Droit International", no. 2/1980, p. 243.

effect calls for the theoretical distinction inherent in public international law regarding the monistic or dualistic approach to the relations maintained within a legal order between international law and domestic law. The acceptance of one or the other of these theories will condition the manner in which international law is received in the legal order of a state; the distinction will be implicitly reflected in the significance of the direct effect, and we will see that dualistic systems reject, at least at first sight, the direct effect of international law[9].

We do not claim an exhaustive description of the consequences of this dogmatic distinction. In a reference study, it is shown that, while according to the dualist school, the national and international legal order form distinct and separate ensembles from each other, in the monistic line of thought the two are confused and interact[10].

To put it simply, the system of legal dualism is based on the tightness between the body of rules of international law and those of domestic law (the first regulating relations between states and the other the relations between individuals), while monism embraces the idea of interaction between international and national legal order. Practically, in a state that applies the dualistic theory, individuals cannot invoke the application of international law that does not impose any obligation on them and does not establish any right for their benefit; if the State in question wishes to grant to individuals under its jurisdiction the benefit of a guarantee expressed by a rule of international law which it has ratified (such as the prohibition of the death penalty) and which they invoke before the judge national law, it will have to enact a rule of national law whose content is identical to that provided for in the rule of international law to which it is a party[11]. It is the so-called incorporation of the rule of international origin into a rule of domestic law. The United Kingdom, Ireland, Denmark and legislation belonging to the Commonwealth countries have adopted the dualist system. The philosophy of legal dualism expressed by Jean-Jacques Rousseau in his famous *Social Contract* and, more recently, by Raymond Aron in *Paix et guerre entre les nations* was disturbed by the reasoning conveyed by Hans Kelsen in support of monistic theory.

In essence, it is considered that the rules of domestic and international law are integrated into a single legal order, have the same addressees and apply to identical legal situations[12]. In monistic systems, the application of the international rule can therefore be a priori invoked by individuals as this rule is part of the same legal order as the internal rules that are equally applicable to them. and, in the event of a conflict between the rule of international law and the rule of domestic law, it implicitly raises the issue of establishing a hierarchy between them.[13] The relationship established between the two bodies of rules of national law will be crucial to the issue of the direct applicability of a provision of international law. Some laws give precedence to domestic law, while others give priority to international law. Consequently, it is not enough for a rule of

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[9] See Nicolas Dupont. Philippe Coppens, *L'effet direct du droit de l'OMC*, available at https://dial.uclouvain.be/memoire/ucl/fr/object/thesis:3350/datastream/PDF_01/view, consulted on 1.10. 2020, p. 10.

[10] See Christian Behrendt, *Les notions de monisme et dualisme*, in *Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, p. 868, available at https://orbi.uliege.be/handle/2268/66432, consulted on 1.10.2020.

[11] See C. Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, Bruxelles, Bruylant, 2004, p. 116.

[12] See Christian Behrendt, *op. cit*., p. 873 and the bibliographic references indicated.

[13] *Idem*, p. 873.

international law to "exist" in the legal order of a state (monistic, it is implied because in dualistic systems being different recipients the problem of direct effect does not arise) for an individual to enjoy of its effectiveness. Thus, the issue of direct effect is closely linked to the solution of the priority of international law over domestic law[14]. After the Permanent Court of International Justice in the *Danzig* case gave an advisory opinion in which it provided essential benchmarks for the theory of the direct effect of the rules of international law[15], was the historical merit of the decision of *Van Gend & Loos*[16] to rule on the direct effect of a rule of Community law (Article 12 TEC), on the individual rights it creates for litigants and whose protection national courts are called to insure it; thus, the provisions of the Treaty can be invoked by individuals before national courts as long as they are clear, precise and unconditional.

Moving the discourse towards WTO-Union relations, we recall that the common commercial policy is one of the areas in which the Union has full and exclusive competence[17], with the Commission (and not the Member States) negotiating trade agreements and defending the EU's interests before the Body. WTO dispute settlement on behalf of all 28 Member States[18]. Except for art. 216 para. (2) of the TFEU (cited above), the founding treaties do not contain further details on the relationship between international agreements and Union law. As regards the direct effect of WTO agreements, the issue has most often been raised in actions for annulment of acts of the Union institutions or in actions for damages which have raised the issue of the Union's liability for infringements of WTO rules.

Rather for political reasons and risking an inconsistent position vis-à-vis the legal order of the Union itself, the Court has generally been reluctant to recognize the direct effect of WTO law. Thus, WTO agreements are not, in principle, among the rules in the light of which the Court reviews the legality of acts of the European institutions. Our case-law examination will begin with the Court's early case-law under the GATT rules expressed by the *International Fruit* judgment and, subsequently, the concessions made to this restrictive approach by the exceptions enshrined in the *Fediol* and *Nakajima* judgments. Subsequently, we will extend our observations on the case law of the Court in the period following the Marrakesh Agreements in *Portugal v. The Council*, *Biret International* and *FIAMM* which raise the issue of the direct effect of DSB judgments.

3.2. The direct effect of GATT rules? Refusal by the Court of Justice

***International Fruit* Decision: the resistance of the Community judicature**. It seems at least surprising that the line of thinking on the direct effect of GATT rules

[14] See Nicolas Dupont. Philippe Coppens, *op. cit*., p. 11.
[15] See P.C.I.J., 3 March 1928, Advisory Opinion, Publication of the Permanent Court of International Justice, 1928, Series B, no. 15.
[16] C.J.E.C., 5 February 1963, C-26/62, in the Repertory of Jurisprudence, 1963, p. 7.
[17] According to art. 207 TFEU "the common commercial policy is based on uniform principles, in particular as regards tariff changes, the conclusion of tariff and trade agreements on trade in goods and services and trade aspects of intellectual property, foreign direct investment, standardization of liberalization measures, exports, as well as trade defense measures, including those adopted in the event of dumping and subsidies".
[18] For developments, see the European Union and the World Trade Organization, Fact Sheets on the European Union. European Parliament available at https://www.europarl.europa.eu/factsheets/ro/sheet/161/uniunea-europeana-si-organizatia-mondiala-a-comertului, consulted on 1.10.2020.

promoted by the Court half a century ago in *International Fruit*[19] case law has remained unchanged to date.

The questions referred for a preliminary ruling raise, *inter alia*, the issue of non-compliance with Community regulations no. 459/70, 565/70 with art. XI of the General Agreement on Tariffs and Trade (GATT), according to which quantitative restrictions on imports were prohibited. The assessment of the legality of a Community in relation to GATT rules as a result of the latter being relied on by the Dutch company *International Fruit* raised the issue of the direct effect of the GATT rules.

The reasoning developed and subsequently resumed by the Court in other cases makes *International Fruit* a case law of reference for not recognizing the direct effect of GATT rules. In substantiating its position, the Court starts from the "spirit, economy and conditions of the General Agreement"[20]; it is noted that „this agreement, based (...) on the principle of negotiations "on the basis of reciprocity and mutual benefit", is characterized by **the great flexibility of its provisions** (emphasis added), in particular those concerning the possibilities for derogation, the measures to be taken in the event of exceptional difficulties and the settlement of disputes between the Contracting Parties"[21]. The Court's observations then extend to the specificity of the measures taken in the dispute settlement mechanism, which include written representations or proposals to be "examined with understanding", investigations followed by recommendations, consultations or decisions of the contracting parties, including certain Contracting Parties shall suspend in respect of other Parties the application of any concession or other obligation arising out of the General Agreement and, finally, in the event of such suspension, the power of the Party to terminate the Agreement[22].

The treatment of the situation in which, following a commitment under the Agreement, a concession relating to a preference, some producers bear or risk suffering serious injury, as provided for in art. XIX of the GATT is invoked by the Court to complete its argument against the direct effect of the GATT rules. Thus, the option of the Contracting Party to unilaterally suspend its commitments as well as to withdraw or amend that concession, either after consultation with the other parties and, without the agreement of the parties concerned, in case of urgency and provisionally, without prior consultation in the sense of refusing art. XI of the GATT direct effect.

Consequently, the diplomatic nature of the negotiations and the flexibility of the GATT rules would prevent, according to the Court, the creation for Community litigants of the right to sue them in order to challenge the validity of a Community act and thus gain more favorable treatment from the application of Union law. The difference in the assessment of the criteria of direct effect as regards European law or GATT rules was likely to provoke lawyers and open debates about the soft law treatment that the Court seems to give to GATT rules and, later, even WTO law[23]. The constant application of the reasoning established in *Fruit International* has known over time some nuances,

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[19] C.J.E.C., 12 December 1972, C-21-24/72, in the Repertory of Jurisprudence, 1972, p. 1220 and following.
[20] See Judgment of the Court of 13 May 1971 in NV International Fruit Company and others v Commission of the European Communities, para 20. Joined cases 41 to 44-70. ECLI identifier: ECLI:EU:C:1971:53.
[21] *Idem*, para. 21.
[22] *Ibid*, para. 25.
[23] See Henri Culot, *Soft law et droit de l'OMC*, in „Revue Internationale de Droit Économique", 2005/3 (t. XIX, 3), p. 251 and following.

introduced by the *Fediol*[24] and *Nakajima*[25] judgments.

The corrections recognized by the exceptions in *Fediol* and *Nakajima*. The first dispute arose in the context of the complaint lodged with the Commission by the Federation of the Oil Industry ('Fediol') against Argentina for illicit trade in the export of soybean products. Thus, according to 2 §1 of Regulation no. 2641/84 "any practices attributable to a third country which are incompatible with international trade, either under international law or with generally accepted rules" shall be considered as illicit commercial practices. The Commission's decision (No. 2506 of 22 December 1986) rejecting the complaint was challenged by Fediol, the applicant claiming that Argentine commercial practices had infringed the GATT rules (Articles III, XI and XXIII) by seriously damaging the European oil industry.

After reiterating the traditional view of the flexibility and lack of direct effect of GATT rules, the Court refers to the conclusions expressed in the *Kupferberg*[26] case-law that "the mere fact that the Contracting Parties have created a particular institutional framework for consultations and negotiations on the implementation of the agreement is not sufficient to exclude jurisdictional application of this agreement"[27]. The change of the Court's perspective is even more visible when it notes that "the provisions of the general agreement are part of the rules of international law to which art. 2 para. 1 of the regulation (emphasis added), interpretation confirmed by recitals 2 and 4 of this regulation"[28]. Further, developing its assertions around the idea that the Community act itself refers to the provisions of the General Agreement, the Court recognizes the right of interested operators to avail themselves of the precise provisions of the GATT in order to review the legality of the Commission's decision.

In *Fediol*, the Court's recognition of the possibility for individuals to invoke the GATT rules stems, in practice, from the 'incorporation' of the latter into an act adopted by the European institutions.

The action for annulment brought by the Japanese company Nakajima against Anti-Dumping Regulation (EC) No. 2423/88 recognized the second exception to the rule of no effect of the GATT rules. The applicant alleged that the regulation did not comply with the anti-dumping provisions of the GATT, the regulation being adopted by the Council in order to comply with the obligations assumed by the Commission for the application of Art. VI of the General Agreement and the Anti-Dumping Code. In these circumstances, the Court considers that "it can be verified whether, as Nakajima claims, the Council exceeded the established legal framework and, by the incriminating provision, violated the terms of art. 2 par. 4 and 6 of the anti-dumping code"[29].

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[24] C.J.E.C., 22 June 1989, C-70/87, in the Repertory of Jurisprudence, 1989, p. 1825 and following.
[25] C.J.E.C., 7 May 1991, C-69/89, in the Repertory of Jurisprudence, 1991, p. 2169 and following.
[26] C.J.E.C., 26 October 1982, C-104/81, in the Repertory of Jurisprudence, 1982, p. 3644 and following.
[27] See *Kupferberg*, para. 20. Judgment of the Court of 26 October 1982. Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.. Reference for a preliminary ruling: Bundesfinanzhof - Germany. Free trade agreements - Tax discrimination. Case 104/81. *European Court Reports 1982 -03641*,ECLI identifier: ECLI:EU:C:1982:362.
[28] *Fediol*, para. 19. Judgment of the Court of 22 June 1989. Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities. Common commercial policy - Illicit commercial practices - Regulation Nº 2641/84. Case 70/87. *European Court Reports 1989 -01781*. ECLI identifier: ECLI:EU:C:1989:254.
[29] *Nakajima*, para. 32. Judgment of the Court of 7 May 1991. Nakajima All Precision Co. Ltd v. Council of the European Communities. Dumping - Definitive duty - Imports of serial-impact dot-matrix printers

In other words, the *Nakajima* exception refers to the situation where the Union has fulfilled a specific obligation under the WTO, thus giving individuals the right to invoke the GATT rules when requesting the repeal of the Community act.

After the Marrakesh Accords, the question arose as to whether a mere reference to international agreements or to the Union act must expressly result in a reference to the provisions of the GATT rules (or WTO agreements) in order to activate the *Fediol* exception. Judgment in *Germany v. The Council*[30] relies on a restrictive interpretation of the scope of the exception, the Court refusing to apply *Fediol*'s reasoning to Regulation No. 404/93 on the common organization of the market in bananas. The same strict approach will be promoted later, under the rule of the WTO Agreements, in *Biret International* and *Van Parys*. Only in 2003, in *Petrotub SA*[31], we find the application of the *Fediol* exception, which would translate into a visible option of the Court to pursue a judicial policy rather than to refer exclusively to strictly legal arguments.

Therefore, we can conclude that, despite their existence, the *Fediol* and *Nakajima* temperaments have proved in practice after their introduction, insufficient to allow individuals to invoke WTO law to review the legality of Union acts[32]. If in other areas the Court has fully demonstrated the ability to strike a smart balance between divergent interests (for example when called upon to arbitrate consumer-bank disputes or to weigh the sovereign interests of Member States in defending individual rights in free movement), in litigation the direct effect of WTO law is more concerned with preserving the political freedom of the Union's institutions.

3.3. CJEU case law on the direct effect of the WTO law

The added value introduced by the signing of the Marrakesh Agreement mainly refers to the establishment of the Dispute Settlement Body which meant replacing the diplomatic system based on negotiations with a system closer to a judicial framework. Following complaints from a Contracting State, disputes are submitted to the panel, there is now an Appellate Body and the procedure provides for shorter deadlines.

Were these arrangements sufficient for the Court to overcome its traditional resistance with which it had become accustomed in its classical jurisprudence? Hopes of revision of previous case law will fail as we will see in the case law of *Portugal v. Council and Biret International*[33].

***Portugal v. Council*: a partially changed judicial rhetoric but with an identical result.** In its action for annulment brought by Portugal against a Council decision infringing fundamental principles of the WTO (namely certain provisions of the GATT and the Agreement on Textiles (ATV) and the Agreement on Import Licensing Procedures), the Court of had the opportunity for the first time to rule on the direct effect

originating in Japan. Case C-69/89. *European Court Reports 1991 I-02069*. ECLI identifier: ECLI:EU:C:1991:186.

[30] C.J.E.C., 5 October 1994, C-280/93, in the Repertory of Jurisprudence, 1994, p. 5039 and following.

[31] C.J.E.C, 9 January 2003, C-76/00, in the Repertory of Jurisprudence, 2003, p. 118.

[32] In the sense shown see also I. Zivicnkak, *Effect of WTO law in the EU and the individual's right to damages caused by a breach of WTO law*, „Croatian Yearbook of European Law and Policy", 2012, p. 554.

[33] For further developments see Julie-Enni Zastrow**,** *L'engagement de la responsabilité de l'Union européenne pour réparer les préjudices consécutifs aux mesures de rétorsion autorisées par l'OMC*, available at https://blogs.parisnanterre.fr/content, consulted on 1.10.2020.

of WTO law.

The applicant State's allegations concerning the "significant differences" in the WTO agreements - including the 1994 GATT, the ATV and the Import Licensing Agreement - from the 1947 GATT rules, "in particular those which introduce a profound transformation in the settlement system of litigations"[34] are partly convincing. The Portuguese Government seeks to broaden the debate from a somewhat different perspective when it argues that, in reality, it is not the issue of the direct effect of WTO rules that is at issue, but the question of under what circumstances a Member State may invoke WTO agreements before the Court. to assess the validity of an act of the Council.

Reiterating *Kupferberg'*s reasoning, the Court recalls that, "in accordance with the principles of international law, the Community institutions, which are competent to negotiate and conclude an agreement with third countries, are free to agree with them the effects which the provisions of the agreement are to produce in the internal legal order of the Contracting Parties". In the event of a breach of the provisions of the Agreement, "it shall be for the competent courts, and in particular the Court, within its competence under the EC Treaty ***to rule on the matter and on any matter relating to the application of the Agreement in the Community*** (our emphasis)"[35].

Do we not notice here a rather political tendency of the Court to attenuate the legal character of WTO law? Because this is what art. II.2 of the WTO Agreement: "the agreements and related legal instruments found in Annexes 1, 2 and 3 (...) bind all Members" while according to art. XVI.4 each member is charged with ensuring "the conformity of its laws, rules and administrative procedures with its **obligations** (emphasis added) as set forth in the Agreements"!

The jurisdiction of the WTO dispute settlement system cannot be denied: there is a competence of the Dispute Settlement Body, a procedure as well as sanctions applicable in the event of a breach of WTO law. While acknowledging the progress made by this "judicialisation" of the system, the Court returns to the important place that negotiations between the parties continue to play within the procedure. However, the written report of the panel (including its recommendations) and that of the appellate body are adopted (within a certain timeframe) by the Dispute Settlement Body in the absence of a negative consensus rejecting them. Nonetheless, the finding of a breach of WTO law requires that the national measure be brought into line with WTO law and also establishes a procedure for monitoring the implementation of the DSB's recommendations and rulings.

All these jurisdictional links are not sufficient and do not distract the Court from the "mutually acceptable compensation" referred to in art. 22.2 of the Memorandum of Understanding on Rules and Procedures for Settlement of Disputes (which is Annex 2 to the WTO Agreement, hereinafter referred to as the PSD). According to that provision, a State which does not bring the measure considered incompatible with the agreement concerned under that agreement or does not otherwise comply with the recommendations

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[34] C.J.E.C., 23 November 1999, C-149/96, in the Repertory of Jurisprudence, 1999, p. 8435, para. 31.

[35] *Portugal v. Council*, para. 34. Judgment of the Court of 3 December 1996. Portuguese Republic v. Council of the European Union. Cooperation Agreement between the European Community and the Republic of India - Development cooperation - Respect for human rights and democratic principles - Cooperation in the fields of energy, tourism, culture, drug abuse control and protection of intellectual property - Competence of the Community - Legal basis. Case C-268/94. *European Court Reports 1996 I-06177*. ECLI identifier: ECLI:EU:C:1996:461.

and judgments within a reasonable time may open negotiations with the requesting State in order to find a mutually acceptable compensation. The Court examines the content of this article and the negotiating prerogatives open to the parties in relation to the theory of direct effect: "to impose on the judicial authorities the obligation to remove the application of the rules of domestic law that would be incompatible with WTO agreements would have the consequence of depriving the bodies of the legislative or executive power of the contracting parties of the possibility offered by art. 22 of the memorandum to find, even provisionally, negotiated solutions (emphasis added)"[36]. The Court therefore notes that "WTO agreements, interpreted in the light of their object and purpose, do not determine the legal means necessary to ensure their bona fide execution in the legal order of the Contracting Parties".

The dialectic of rejecting the direct effect of WTO rules is enriched in *Portugal v. The Council* with a new argument, based on the principle of reciprocity.

Also enshrined in the GATT rules, the principle is based on the idea of granting concessions on a reciprocal basis, which will be equivalent and balanced. Reciprocity is invoked to deny any direct effect to WTO rules in an original way, by bringing the idea of reciprocity to the direct effect itself[37]. First of all, the Court finds that „the fact that the jurisdictions of one of the parties would consider that certain provisions of the agreement concluded with the Community are directly applicable while the courts of the other party would not allow such direct applicability is not itself alone, such as to constitute an absence of reciprocity in the implementation of the Agreement"[38]. Furthermore, the Court draws attention to the fact that "however, the lack of reciprocity in this regard risks leading to an imbalance in the application of WTO rules"[39]. At first reading, manipulating the reciprocity argument seems seductive. Some authors criticize its rather economic and political nature to the detriment of its legal character[40]. We cannot fail to notice that precisely the recognition of the direct effect of WTO law would guarantee its uniform application by the Contracting States!

Finally, the last argument completes the Court's true legal "hermeticism" towards the direct effect of WTO law. Having stated that, "taking into account the nature and economics of the WTO agreements, they are not among the rules by which the Court checks the legality of acts of the Community institutions"[41], the Court refers to the fact that "only such an interpretation would be compatible with the last recital in the preamble to Council Decision 94/800 according to which the nature of the agreement establishing the World Trade Organization, including its annexes, is not likely to be relied on directly before the courts of the Community and the Member States"[42].

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[36] *Ibid*, para. 40.
[37] See Nicolas Dupont. Philippe Coppens, *op. cit.,* p. 35.
[38] *Portugal v. Council*, para. 44.
[39] Para. 45.
[40] See Christine Kaddous, *Le statut du droit de l'OMC dans l'ordre juridique communautaire: développements récents*, in *Mélanges en hommage à Jean-Victor Louis*, t. II, Bruylant, Bruxelles, 2003, p. 111.
[41] *Portugal v. Council*, para. 47.
[42] *Idem*, para. 48.

4. Is there a direct effect of the recommendations and rulings of the Dispute Settlement Body?

***Biret International* judgment: dismiss the direct effect (and) of the DSB judgments.** The *Biret International*[43] judgment broadens the perspective of the debates and introduces an element of novelty into the already well-established practice. It is the first in a jurisprudential trio in which several companies will rely on the direct effect of DSB judgments finding incompatibility of Community rules (secondary legislation) with the WTO Agreements in order to obtain compensation for damages suffered by the application of Union acts. Not insignificant is the fact that, at the doctrinal level[44], several voices have spoken in the sense of the need to extend the scope of exceptions to the rule of lack of direct effect of WTO law, arguing the admissibility of reparation as soon as a DSB decision found Union law to be non-compliant with WTO law. In the context shown, the case law of *Biret International* could be a useful opportunity to revise classical case law, following the missed opportunity in *Portugal v. Council*.

Specifically, art. 6 of the Directive 88/146 prohibited Member States from importing hormone-treated animals and animal products derived therefrom from third countries; the Directive was to be transposed by 1 January 1988 at the latest, but its entry into force was postponed to 1 January 1989. Subsequently, this Directive (together with Directives 81/602 and 88/299) was repealed and replaced by Directive 96/22 which maintained the regime of prohibitions resulting from the combined application of those directives. In May and November 1996, the United States and Canada, considering that those Community acts restricted their exports of beef from hormone-treated animals, brought an action against the Community, later known as the Hormone Deal; on 13 February 1998, the Dispute Settlement Body adopted the report of the Appellate Body[45] (and the reports of the Panels as amended by the Appellate Body) finding a breach by the Community of the Agreement on the Application of Sanitary and Phytosanitary Measures[46].

The embargo imposed by the Community regulations had seriously affected *Biret International*'s imports so that, following its bankruptcy, it sought compensation for the damage suffered by the Council being liable for the illegality of its acts. Broadly speaking, the applicant company's argument is as follows: even if the unconditional nature of the *Van Gend & Loos* case-law of the WTO Agreements were accepted when, in the course of adversarial proceedings brought against the Community by a trading partner, the Dispute settlement body has decided to infringe WTO law, recommending

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[43] Court of First Instance, 11 January 2002, T-174/00, in the Repertory of Jurisprudence, 2003, p. 21.

[44] See Piet Eeckout, *The Domestic Legal status of the WTO agreement: Interconnecting Legal Systems*, in „Common Market Law Review", 1997, p. 57 and following; Piet Eeckout, *Judicial enforcement of WTO Law in the European Union: some futher reflections*, „Journal of International Economic Law", 2002, p. 91.

[45] See Appellate Body, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)* – Complaints by the United States and Canada – Communication from the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998.

[46] According to art. 3 par. 3 of the said Agreement (set out in Annex 1 A to the WTO Agreements) "Members shall be able to introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than that which would have been obtained through rules-based measures, relevant international directives or recommendations if there is a scientific justification or if this is a consequence of the level of sanitary or phytosanitary protection that a member deems appropriate in accordance with the relevant provisions of paragraphs 1 to 8 of art. 5".

that Community law be amended according to the report's findings, we are in the presence of an unconditional obligation.

In essence, the Court of First Instance resumes the key line of thinking established by previous case law, invoking stereotypical arguments about the nature and economics of the WTO Agreements; it also states that the circumstances of the case cannot be included in any of the exceptions permitted by the *Fediol* and *Nakajima* case-law. As the directive in question was adopted before the entry into force of the SPS Agreement, we are not in any of the derogating cases - the express reference to a provision of WTO law or the execution of a specific obligation under the WTO. As regards the direct effect of the DSB decision of 13 February 1968, the statement of reasons is rather brief: "This decision is directly and necessarily linked to the alleged ground of infringement of the SPS Agreement, or it could only be that the direct effect of that agreement was established by the Community judicature to censure the illegality of the directives in question"[47].

But what does PSD say about DSB decisions? According to art. 3.2 the DSB decisions and recommendations may neither increase nor restrict the rights and obligations arising from the Agreements. We do not know whether the General Court's reasoning is a particular interpretation of that text. In any event, the idea which, in the Court's view, would justify the denial of the direct effect of the DSB's decisions is that a DSB judgment is neither more binding nor unconditional than the text on which it is based. The only difference would be that the decision is pronounced against one member, while the WTO Agreements are addressed to all members[48]. It is true that in the event that the Member State concerned does not bring the measure in line with WTO agreements, the parties may open negotiations to establish satisfactory compensation for both parties and, in its absence, the complaining Member State may request the DSB to authorize suspend, in respect of the member concerned, the application of concessions or obligations under the agreements in question. The Court infers from this that not only is WTO law too negotiated, but DSB judgments do not have the effect of enforcing judgments, but bear the imprint of "flexibility" of WTO rules as long as the party may not comply with the enforcement measures and prefer to withstand economic sanctions?

Although the Court notes that the Court of First Instance did not state reasons for the absence of direct effect of the DSB's decisions, it does not provide further details of the arguments in favor of maintaining the same solution. In view of the period within which the Community had to bring its secondary legislation into line with WTO rules (more specifically 13 May 1999), it merely states that the legality of the Community act cannot be checked for the period prior to that date. Notes also that the Paris Commercial Court opened bankruptcy proceedings in December 1995, setting the date for cessation of payments on 28 February 1995; it presupposes that the detrimental effects relied on by the applicant by the maintenance in force after 1 January 1995 of the three directives in question could have occurred after 13 February 1998, the date of adoption of the DSB decision and *a fortiori* of 13 May 1999. The Court therefore concludes that, "in the absence of the damage alleged after 13 May 1999, the liability of the Community could

[47] *Biret International*, para. 57. Biret International SA v. Council of the European Union. Case C-93/02 P. 2003 ECR I-10497; Établissements Biret & Cie SA v. Council of the European Union. Case C-94/02 P. 2003 ECR I-10565.

[48] See Henri Culot, *op. cit*., p. § 3.5.

not be incurred"[49].

The guidance promoted in *Biret International* raises serious questions about the legal value of DSB judgments. By denying individuals the opportunity to invoke DSB decisions finding an infringement of the WTO Agreements by the Community, the very legitimacy of the dispute settlement mechanism is called into question. Is WTO law and the dispute settlement system designed only to determine the behavior of Member States in international trade relations and to restore the balance between them? Do they not work for the protection of the economic interests of individuals, more precisely do they not serve to be used and invoked by international trade operators?

***Van Parys*: confirmation of previous case-law.** Nor has the opportunity offered by the questions referred in *Van Parys*[50] been exploited by the Court to change its direction.

In fact, the issue of compliance of the Community regulations on the common organization of the market in bananas and the arrangements for their importation with WTO law has been raised. The Belgian company Van Parys challenged the refusal of the competent authority to issue import licenses for the entire quantity of bananas requested (from Ecuador and Panama) in the context in which, by the DSB decision of 25 September 1997[51], the report of the Appellate Body was adopted and noted that the trade regime with third countries established by Regulation no. 404/93 was incompatible with art. 1(1) and XIII of GATT 1994; following this decision, the Council amended the contested regulation by Regulation no. 1637/98 in order to comply, as is apparent from the second recital in its preamble, with the "international commitments entered into by the Community in the framework of the World Trade Organization" (Regulation which became applicable on 1 January 1999, the date of expiry 15 months obtained by the Community from the DSB to comply with the judgment). Subsequently, following Ecuador's complaint and finding by the DSB decision of 6 May 1999 that the Community trade regime with non-member countries did not comply with the GATT rules, further amendments were introduced by Regulation no. 216/2001.

Do these successive changes not constitute a clear intention of the Community to fulfill an obligation under the WTO within the meaning of the *Nakajima* exception? Nonetheless, the express statement in the recital above supports that interpretation. However, the Court misses, in *Van Parys*, the application of the *Nakajima* exception when, surprisingly, it notes the following: "or, in this case, undertaking, after the adoption of the DSB decision of 25 September 1997, to comply with WTO rules and, in particular, the article 1(1) and XIII of the GATT 1994, the Community did not intend to assume a special obligation within the WTO, capable of justifying an exception to the impossibility of invoking WTO rules before Community courts".

But the "banana war" had just begun!

***FIAMM* judgment: invocation of the DSB judgments for incurring the non-contractual liability of the Community for unforeseeable damages.** At the time the Grand Chamber ruled on the *FIAMM*[52] solution (9 September 2008), the subject of the direct effect of WTO law was already a recurring issue in the case law of the Court. The

[49] *Biret International*, para. 64.
[50] C.J.E.C., 1 March 2005, C-377/02, in the Repertory of Jurisprudence, 2005, p. 1499 and following.
[51] DSB, *EC – Bananes*, WT/DS27/AB/R, 25 September 1997.
[52] C.J.E.U., 9 September 2008, C-120/06 P and C-121/06 P, curia.europa.eu.

novelty was not so much the invocation by the applicant companies of the direct effect of the DSB judgment of 25 September 1997 as its use to incur the non-contractual liability of the Community for its unlawful conduct.

In fact, FIAMM and Fedon sought compensation for the damage suffered by them as a result of retaliatory measures in the form of customs surcharges, the application of which by the United States to imports of products manufactured by the appellants was authorized by the DSB following a finding that the Community regime for banana imports was incompatible with the WTO Agreements.

The applicants considered that the conditions for incurring non-contractual liability on the part of the Community for damage caused by the conduct, even if unlawful, of its bodies, namely the actual nature of the damage suffered, the existence of a causal link between that damage and the conduct of the institutions, the "abnormal" and "special" nature of this damage. The failure of the Council and the Commission to comply with the measures (within 15 months granted by the DSB) to the Community regime for imports of bananas under WTO law, in so far as the incompatibility of that regime with the WTO Agreements had been established by the DSB, constitutes an illegality. to engage the non-contractual liability of the Community. If the WTO Agreements cannot be used to check the validity of acts adopted by the European institutions and are not, according to the settled case-law of the Court, such a direct effect should be recognized in the DSB judgment establishing the Community's liability.

The Court of First Instance, applying the criteria set out in *Dorsch Consult*, considers that the actual and certain nature of the damage is established as a direct causal link between the conduct of the Community institutions and the damage; however, it also refused to acknowledge the '*abnormal*' nature of the damage suffered by the applicants, considering that it did not exceed the limits of the economic risks inherent in their export activity. The suspension of tariff concessions, which is a measure provided for in WTO agreements, could not be seen as foreign to the usual risks of international trade. The Court finds that the General Court erred in law in asserting the existence of the liability of the Community even in the absence of the unlawfulness of the Community institutions. Thus, the case-law of the Court, which, pursuant to the second paragraph of article 288 EC, establishes the existence of a non-contractual liability regime of the Community as a result of the unlawful conduct of its institutions and the conditions for its application. By contrast, the situation is different with regard to a non-contractual liability regime of the Community in the absence of such unlawful conduct[53].

As regards the distinction made by the appellants between the *'direct effect*' of the WTO rules imposing material obligations and the *'direct effect*' of a decision of the DSB, the Court does no more than repeat the leitmotif established by the previous case-law: flexibility of law WTO and the fact that DSB rulings cannot have wider effects than the rules of law under which they were adopted. We wonder whether, by automatically rejecting the direct effect of the WTO Agreements, the Court - when asked by individuals to make good the damage as a result of non-compliance with Union law with DSB decisions - does not remain captive to its own procedure, enduring the boomerang effect of its very approach. More specifically, if it were to accept the direct effect of the DSB judgments, it would have to contradict its own argument for rejecting the direct effect of WTO law.

[53] *FIAMM*, para. 167.

5. Conclusions

The Court's consistent approach to rejecting the direct effect of WTO law seems rather to be a reflection of the Court's judicial policy of maintaining the Union's leading position in international relations. Commonly invoked arguments - flexibility and flexibility of WTO law are likely to reduce the binding force of WTO Agreements and turn them, against their substance, into a *soft law* instrument. Insufficient exploitation of the *Fediol* and *Nakajima* exceptions, even in cases where their application seems plausible, raises questions about the Court's hermetic position and calls for a more objective examination of the rejection of the direct effect, from the point of view of legal arguments than political interests.

The traditional conception of the Court (in the sense of rejecting the direct effect) has also been extended to the rulings of the Dispute Settlement Body to the detriment of the effective judicial protection of injured individuals by applying acts adopted by the European institutions. It is an additional reason for rethinking the foundations of this practice in the name of the coherence of the Union's legal order.

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