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Applicability of WTO Law in the European Union

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Introduction

In April 1994, the ministers of more than a hundred governments signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations achieved after seven and a half years of negotiation. The Act comprises the Agreement Establishing the Multilateral Trade Organization with its important Annexes 1 to 4 in its Part II, Ministerial Decisions and Declarations in its Part III and the Understanding on Commitments in Financial Services in Part IV. The WTO came into effect on 1 January 1995 and has 134 Members presently.[1]

The process of negotiation and conclusion of the WTO agreements on the part of the European Community was marked by the question of which entity should negotiate and sign the agreements, the Community or its Member States or both. Out of practical reasons, it was the Community which took part in the Uruguay negotiations on behalf of its Members whereas both the Community and the Member States signed the agreements and thus became full Members of the WTO.[2] The Member States ratified the agreements by means of their national laws.[3]

Since WTO law deals with the rules of trade between nations and the basic rules for international commerce and for trade policy,[4] the question of its relation to Community law which sets up its own rules for Community commerce is raised.

On the one hand, the compatibility of the EU and other regional arrangements [5] with the WTO comes to question. Those agreements, which involve the abolition or reduction of barriers on trade within the group can benefit countries but can also harm the interests of other countries. They can particularly violate the WTO principle of "most-favoured-nation". However, GATT Art.XXIV allows for regional trading

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[1] As of 10 February 1999; see for the full text of the Agreements http://trading.wmw.com/gatt/; see for a list of all Members http://www.wto.org/wto/about/organsn6.htm.
[2] See below at Part 2. A.
[3] See for example the German law of ratification in Bundesgesetzblatt 1994 Part II p.1438, http://www.jura.uni-sb.de/BGBl/TEIL2/1994/19941438.2.HTML#*);
[4] http://www.wto.org/wto/about/facts0.htm
[5] Such as the North American Free Trade Agreement (NAFTA), the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Common Market of the South (Mercosur), the Australia-New Zealand Closer Economic Relations Agreement, etc.

systems that complement the multilateral trading system instead of threatening it.[6]

Moreover, one has to ask as to what adaptations have to be arranged for the trade relations between the European Union with the African, Caribbean and Pacific ACP) developing countries when the Lomé IV Convention runs out in February 2000 to assure its compatibility with WTO rules.

On the other hand, the inner-European perspective of WTO law and the question of the place of the WTO in the European Union are of high interest. What happens to European legislation that violates WTO rules? Can individual citizens invoke WTO rules in front of the European Court of Justice (problem of "direct effect" of WTO rules)? Can Member States do so or can they be forced to violate WTO rules by European organs?

The following essay deals with this inner-European perspective of the relation between the European Union and the WTO only.[7] First of all, the place of the WTO Agreement within the EU and the European Court's concept of "direct effect" will be examined.[8] Part 2 attempts to find answer the question of which courts are entitled to determine the effect of WTO rules within European law. A brief description of the major changes of the Uruguay Round compared to the old GATT follows in Part 3. Finally, the problem of direct effect of WTO rules within the law of the European Union will be discussed thoroughly.[9]

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[6] GATT Art.XXIV sets up strict criteria that determine when such exceptions to the most-favoured-nation principle can be accepted: duties and other trade barriers should be reduced or removed on *substantially all* of sectors of trade. Moreover, non-members should *not* find trade with the group *any more restrictive* than before the group was established.

[7] See with regard to the other problem for example Rydelski, Michael Sánchez, *The Future of the Lomé Convention and its WTO Compatibility*, in Europäische Zeitschrift für Wirtschaftsrecht 1998, 398ff.

[8] See below Part 1.

[9] See below Part 4.

Part 1: The WTO as an International Agreement in the EC and the Concept of Direct Effect

A. Place of the WTO in the EC as an International Agreement

According to Art.228 (7)[10] of the Treaty Establishing the European Economic Community (the Treaty), international agreements concluded by the Community are binding on the Community and its Member States and become an integral part of Community law.[11] As a consequence, the European Court of Justice[12] has to take their provisions into account when judging upon the validity of secondary Community law since international agreements fall under the expression "law" in terms of Art.164 of the Treaty.[13] Art.228 (7) of the Treaty also tells us that international agreements are situated above the level of secondary Community law in the hierarchy of norms. That means that secondary Community law suspected to infringe an international agreement can generally be challenged by Community organs, by Member States or Individuals under Art.173 of the Treaty[14] or through requests of national courts for preliminary rulings under Art.177.[15] However, the Court has constantly stated that if the international agreement does not produce "direct effect", neither individuals nor Member States can invoke its rules in front of the Court; the consequence is that the Court will not consider the international agreement when examining the Community's measure's legality.[16]

Thus, although the WTO Agreement is positioned above secondary Community law in the hierarchy, it cannot be invoked and thus cannot bar contradictory Community legislation if it does not produce such direct effect.[17] The policy reason behind that restriction is apparently the wish to avoid conflicts in situations where the Community chooses to ignore or evade provisions of the agreement. In international law, there is no such

[10] Art.300 of the Amsterdam Treaty.
[11] See Case 181/73 *Haegeman v. Belgium*, [1974] ECR 449, paras 2 to 6.
[12] subsequently "the Court".
[13] Art. 220 Amsterdam Treaty.
[14] Art. 230 of the Amsterdam Treaty.
[15] Art.234 of the Amsterdam Treaty.
[16] See below at C.
[17] Schroeder, *Die EG, das GATT und die Vollzugslehre*, Juristenzeitung 1998, 344, 345.

thing as an executing authority[18] and thus nations are sometimes tempted to breach their international agreements. If the Community allowed its Member States or Individuals to invoke any provision of any international agreement to dispute Community legislation but other Parties to the Agreement did not do so, the Community's hands would soon be tied and political leisure would scarcely be left. Such reasoning seems particularly convincing with regard to agreements that are not at all designed for the purpose of the protection of Individuals.

B. The European Court of Justice and the Concept of "Direct Effect"

In order to find out whether the new WTO Agreement produces such effect the European Court's concept of direct effect will be examined forthwith.

I. The Court's Approach in Determining "Direct Effect"

1. Development of the Doctrine of Direct Effect (Direct Effect of the Rome Treaty and Community Legislation)

The European Court's direct effect doctrine was developed in cases concerning the invocation of Community law before national courts. This question was first considered in *van Gend en Loos*[19] where a Dutch importer challenged an import duty before a Dutch court arguing that it increased the import duties in violation of Art.12 of the Treaty.[20] The Court deemed it "necessary to consider the spirit, the general scheme and the wording of those provisions" in order to determine whether national courts must protect rights emerging from the EC Treaty.[21]

In regarding the Treaty as a whole, indications for its intention to create rights for individuals as well as for Member States were found in the language of the preamble, the incorporation of Community institutions

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[18] Apart from other means such as retaliation or retorsion.
[19] Case 26/62 *van Gend en Loos v. Nederlandse Administrasie der Belastingen* [1963] ECR 1.
[20] Art.25 of the Amsterdam Treaty.
[21] 1963 ECR at 12.

endowed with sovereign rights and the objective of assuring uniform interpretation of Community law found in Art.177 of the Treaty.[22]

In looking at the specific wording of Art.12 of the Treaty the Court held that it "must be interpreted as producing direct effects and creating individual rights which national courts must protect" since the language of Art.12 was clear and unconditional, required no implementing legislation by the Member States, and offered no leeway of discretion in its application.[23]

Subsequently, the notion of direct effect has been amplified to other Articles of the Treaty,[24] to several disputes between private parties ("horizontal" direct effect)[25] as well as to regulations, directives and decisions promulgated under Art.189.[26] The direct effect notion is further reinforced by the Community concept of primacy, which provides for supremacy of Community law over national law of a Member State.[27] Efficiency of EC law is thus increased since national courts can apply directly effective EC law and enforce their orders, for example, by the award of damages.

2. The Court's Approach in Determining the Effect of International Agreements

After the Court had decided on direct applicability of EC Law, it was soon confronted with a similar question on a parallel level, i.e. the question of direct effect of international agreements in EC law. Similarly to its approach in examining direct effect of EC-law, it repeatedly found that the determination of direct applicability depends on the spirit, general schemes and wording of the agreement and of the provision concerned.[28] That

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[22] *Ibid.*

[23] *Ibid.*, at 13.

[24] For example *Lüttcke v. Hauptzollamt Saarlouis*, [1966] ECR 205, [1971] 10 CMLR 674 (concerning Art. 95), Case 6/64 *Costa v. E.N.E.L.*, [1964] ECR 585, [1964] 3 CMLR 425 (concerning Art. 37 and 53).

[25] for example Case 43/75 *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, [1976] ECR 631, [1976] 2 CMLR 98.

[26] Art.249 of the Amsterdam Treaty; see Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 Journal of World Trade 1996, 67, 69.

[27] *See, e.g.*, case 6/64 *Costa v. E.N.E.L.*, [1964] ECR 585, [1964] 3 CMLR 425.

[28] Joined cases 21 - 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, at 1227; case 87/75 *Bresciani v. Amministrazione Italiana delle Finanze*, [1976]

means that, in order to be directly effective, a provision must contain a sufficiently precise and unconditional obligation, the accomplishment and effects of which do not depend on a further act of implementation.[29]

A closer look to the Court's former decisions on direct effect of international agreements will be taken forthwith.

II. Cases Concerned with Direct Effect of International Agreements

In *Bresciani v. Amministrazione Italiana delle Finanze*,[30] the Court examined direct effect of Art.2 (1) of the Yaounde Convention (1963).[31] In looking at the "spirit, the general scheme and the wording of the Convention and of the provision concerned",[32] it was held that the Convention's conclusion within the framework of Art.228 of the EC Treaty gave strength to its effect. Since it intended to promote the development of the Associated States and since the imbalance of the obligations undertaken by the parties was inherent to the Convention's special nature the lack of reciprocity between the parties' obligations did not prevent direct effect.[33] Because the elimination of charges with a similar effect "must, on the part of the Community, proceed automatically", the inclusion of a dispute settlement framework did not prevent direct effect either.[34] Moreover, the Yaounde Convention specifically mentioned the corresponding Art.13 of the EC Treaty, which lead the Court to the finding that "the Community undertook precisely the same obligation towards the Associated States to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other."[35]

In *Polydor v. Harlequin Record Shops*,[36] Article 14 (2) of the free trade agreement between the Community and Portugal was found not to be

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ECR, 129, at 139; case 270/80 *Polydor Ltd. v. Harlequin Record Shop Ltd.*, [1982] ECR, 329, at 347.

[29] Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd*, [1986] ECR 3719, at 3752.

[30] Case 87/75 *Bresciani v. Amministrazione Italiana delle Finanze*, [1976] ECR 129.

[31] concluded to abolish customs duties on goods originating in the Associated States (Madagascar and certain associated African States).

[32] *Bresciani v. Amministrazione Italiana delle Finanze*, *supra* at 139.

[33] *Ibid.*, at 140.

[34] *Ibid.*, at 141.

[35] *Ibid.*, at 141-42.

[36] Case 270/80 *Polydor v. Harlequin Record Shops*, [1982] ECR 329.

directly effective although its wording was just the same as that of Articles 30[37] and 36[38] of the EC Treaty the two of which had been found to have direct effect in a prior decision.[39] The Court stated that the purpose of the free trade agreement was "expressed in terms (...) similar to those of the EEC Treaty," i.e. "to eliminate progressively the obstacles to substantially all their trade, (...) to liberalize trade in goods between the Community and Portugal" and to eradicate "customs duties and (...) charges having equivalent effect in trade."[40] However, it was determined that identity in language alone was not sufficient to grant the same effect to provisions of free trade agreements that was granted to Community law provisions if the agreements' purposes were similar but distinguishable.[41] In fact, the purpose of the free trade agreement was found to be separable from that in the EC Treaty, because "a prohibition on the importation into the Community of a product originating in Portugal based on the protection of copyright is justified in the framework of the free-trade arrangements established by the Agreements by virtue of the first sentence of Article 23" even "in a situation in which their justification would not be possible within the Community."[42]

In *Pabst and Richarz v. Hauptzollamt Oldenburg,*[43] a plaintiff succeeded in relying on Article 53 of the Association Agreement with Greece in bringing an action against the German customs authority. The Court held that Article 53 fulfilled the same function as Article 95 of the EC Treaty[44] and that the purpose of the agreement was to prepare Greece to eventually become a member of the Community. Since Article 53 also contained a sufficiently clear and precise obligation, it was held to be directly applicable.

Apparently, the Court seems to be more willing to grant direct effect to provisions of association agreements than to trade agreements.

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[37] Article 28 of the Amsterdam Treaty.
[38] Article 30 of the Amsterdam Treaty.
[39] Case 78/70 *Deutsche Grammophon mbH v. Metro-SB-Grossmaerkte GmbH,* [1971] ECR 487.
[40] *Polydor v. Harlequin Record Shops, supra* at 347.
[41] *Ibid.*, at 348.
[42] *Ibid.*, at 394.
[43] *Pabst and Richarz v. Hauptzollamt Oldenburg,* [1982] ECR 1331.
[44] Article 90 of the Amsterdam Treaty.

III. The Court's Decisions on Direct Effect of GATT 1947

1. Denial of Direct Effect of GATT 1947

The question of the invocation of GATT law in European Courts first arose in *International Fruit Company v. Produktschap voor Groenten en Fruit,*[45] where an importer of apples from a non-Member State challenged the denial of import certificates and its underlying Council regulations. In doing so, he relied on GATT Art.XI which provides that "no prohibitions or restrictions other than duties, taxes or other charges...shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party."[46] In order to succeed, the plaintiff had to show that Art.XI GATT constituted rights capable of being asserted by Individuals before courts within the European Union.

In its judgement, the Court first stated that the General Agreement was binding upon the European Community. Although the Community had not existed when GATT was created in 1948, Art. 110,[47] 111, 113 and 234[48] of the Treaty indicated the Member States" clear intention that the Community be bound by the GATT obligations.[49] Furthermore, it was noted that other GATT Contracting Parties recognized the European Community Role in representing the Member States in GATT affairs.[50]

The Court then applied the criteria established in the direct effect test of *Van Gend en Loos* to ascertain whether this binding agreement was also capable of conferring rights on the Community's citizens which they could invoke before European courts. However, in contrast to *Van Gend en Loos,* the Court did not consider Art.XI GATT by itself but paid regard to "the spirit, the general scheme and the terms of the General Agreement" as a whole.[51] It noted that the GATT preamble was "based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually

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[45] Joined Cases 21 - 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit,* [1972] ECR 1219.
[46] Art. XI of the General Agreement on Tariffs and Trade, Oct.30, 1947, 61 Stat. A-11, TIAS No. 1700, 55 UNTS 187 (hereinafter GATT).
[47] Article 110 of the Amsterdam Treaty.
[48] Articles 133 and 307 of the Amsterdam Treaty.
[49] Joined Cases 21 - 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit,* [1972] ECR 1219, at 1227.
[50] *Ibid.*

advantageous arrangements'" and that the GATT was "characterized by the great flexibility of its provisions".[52] The Court based its statement on three provisions of the GATT: the safeguard measures (Art.XIX), the consultation procedure (Art.XXII) and the dispute resolution procedure (Art.XXIII).[53] Having found that GATT itself was too flexible, the Court assumed that Art.XI itself did not create rights capable of enforcement by individuals before European Courts without ever directly examining GATT Art. XI.[54]

The Court merely rephrased the relevant passage of the *International Fruit* decision in *Schlüter v. Hauptzollamt Lörrach*[55] where Community regulations were challenged that allegedly had the consequence of raising import-duties of Swiss cheese above the binding GATT level.[56] Consequently, direct effect of GATT Art.II was denied without paying attention to this particular provision.

In *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen,*[57] the Court was faced with a Community interpretative note to a regulation that had the effect of increasing the tariff on certain machines in the Netherlands' customs law and allegedly violated the tariff concessions agreed to by the Community under GATT Art.II. The issue of direct effect, however, was avoided in the decision since the Court found the provision in question consistent with GATT.[58]

In *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen,*[59] a case concerned with Community quantitative restrictions on apples from Chile, the Court also avoided addressing the direct effect issue when it was required to reflect on the effect of GATT Art. XIII by declaring that no substantial violation had been found.[60]

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[51] *Ibid.*

[52] *Ibid.*, at para 21.

[53] *Ibid.*, at 1228.

[54] *Ibid.*

[55] Case 9/73, [1973] ECR 1135.

[56] Case 9/73 *Schlüter v. Hauptzollamt Lörrach,* [1973] ECR 1135, at 1157-58.

[57] Case 38/75 *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen,* [1975] ECR 1439.

[58] Case 38/75 *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen,* [1975] ECR 1439, at 1450.

[59] Case 112/80 *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen,* [1981] ECR 1095.

[60] *Ibid.*, at 1120.

In later cases, the Court also dealt with national (as opposed to Community) law measures that were challenged as being inconsistent with GATT.[61]

In *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA,* the Court was asked to investigate whether an Italian duty for administrative services was incompatible with GATT Art.II (1) (b) bound concessions. The Court first deemed it "important that the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community." Consequently, it held that the provisions of GATT were exclusively to be interpreted by the European Court of Justice and not by national courts.[62] In both *SIOT* and *SPI,* the Court again relied on *International Fruit* to deny direct effect to several GATT provisions in arguing that, due to its "general scheme", the entire GATT was unable to grant rules on which individuals could rely.[63] The Court never mentioned the alterations inaugurated by the Tokyo Round, e.g. the Understanding on Dispute Settlement.

In *Germany v. Council,*[64] the Court had to deal with Germany's allegation that the Council's Regulation 404/93,[65] which established a common banana market in the Community, infringed certain GATT provisions and was therefore illegal.

Germany argued that compliance with GATT rules was a condition of the lawfulness of Community acts and that, accordingly, the question of direct effect was of no interest in this case.[66]

Without taking into account the difference that in this case, as opposed to the *International Fruit* case, the complainant was a Member State challenging the regulation by means of Art.173 of the EC Treaty and not

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[61] Joined cases 267 to 269/81 *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI),* [1983] ECR 801; case 266/81 *Societa Italiana per L'Oreodotto Transalpino (SIOT) v. Ministero delle Finanze,* [1983] ECR 731; Joined cases 290 to 291/81 *Compagnia Singer SpA v. Amministrazione delle Finanze dello Stato,* [1983] ECR 847.

[62] *supra* at 828.

[63] *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI), supra* at 828; *Societa Italiana per L'Oreodotto Transalpino (SIOT) v. Ministero delle Finanze, supra* at 779f.

[64] Case C-280/93 *Germany v. Council,* [1994] ECR I-4973.

[65] 1993 O.J. (L 47) 1.

[66] *Ibid.*, at I-5071.

an individual, the Court merely repeated that GATT provisions are incapable of having direct effect because it was "based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements,'" and "the possibility of derogation," "the measures to be taken when confronted with exceptional difficulties" and "its provisions dealing with the settlement of conflicts" were too flexible.[67] The Court did not consider the changes introduced by the Tokyo Round or the subsequent changes to the dispute resolution procedure. It further noted that the exceptions for granting "indirect" effect of GATT provisions found in *Fediol*[68] and *Nakijama*,[69] were not applicable here since the Regulation in question neither intended to implement a particular provision of GATT nor expressly referred to them.[70]

Apart from the fact that, for the first time, a case concerned with direct effect was initiated by a Member State under Article 173 of the EC Treaty, a second significant development of the Court's direct effects doctrine can be observed:[71]

By the time the Court decided the case, several GATT panel reports had already been presented stating the clear infringement of the Community's policy on banana imports; the restrictions were found to be inconsistent with the prohibition of quantitative restrictions in GATT Art.I and the most-favoured nation requirements of GATT Art.XI.[72] Furthermore, a panel was set up by the GATT Council to investigate protests by five Latin American nations against the new Regulation 404/93-banana regime.[73] The subsequent report ruled that the regulation was inconsistent with the Community's Article II schedules of concessions and infringements of GATT Articles I (most-favoured-nation requirement) and III (national treatment).[74]

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[67] *Ibid.*, at I-5072-73.
[68] Case 70/87 *Fediol v. Commission*, [1989] ECR 1781.
[69] Case C-69/89 *Nakijama All Precision Co. Ltd. v. Council*, [1991] ECR I-2069.
[70] *Ibid.*, at I-5073-74.
[71] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 596.
[72] *Russia applies for GATT membership: Panel rules against EC members' restrictions of bananas*, 100 GATT Focus, July 1993, at 2.
[73] *Ibid.*, at 4.
[74] *Panel report on EC banana import regime presented*, 108 GATT Focus, June 1994, at 5.

2. "Indirect Effect" of GATT 1947 in Fediol / Nakijama

In *Fediol III*[75] and *Nakijama*[76], the Court did take into account certain provisions of the GATT. These decisions, however, cannot be regarded as a change in the Court's position since the cases were different in their facts. In both of these cases, Community legislation existed as a starting point for exceptional applicability of GATT law within Community law.

In *Fediol III*, a provision of Council Regulation 2641/84[77] expressly referred to the term "illicit commercial practice", a legal term of GATT, and determined that it was to be interpreted as trade practices contrary to international law, including the GATT. The Court found that it was not prevented to interpret and apply more precisely defined GATT rules, neither by the general flexibility of GATT nor by its dispute resolution provisions.[78]

The *Nakijama* decision dealt with a Community measure that intended to implement a particular GATT obligation. Therefore, the Court had to interpret parts of the Antidumping Code to "examine whether the Council went beyond the legal framework thus laid down, as Nakijama claims, and whether, by adopting the disputed provision, it acted in breach of Art. 2 (4) and (6) of the Anti-Dumping Code."[79] The regulation, however, was found to be valid since the regulation was in harmony with the Anti-Dumping Code provisions.

IV. Attempts to Categorize the Cases

In view of the above mentioned decisions one could assume that the question of whether an agreement is directly effective or not depends on the degree of its tie to the EC Treaty: In *Bresciani*, the Court granted direct effect to the Yaounde Convention that made arrangements specifically provided for in the EC Treaty and intended to favour former colonies and related countries. An association agreement arranging the affiliation of a

[75] Case 70/87 *Fediol v. Commission*, [1989] ECR 1781.
[76] Case C-69/89 *Nakijama All Precision Co. Ltd. v. Council*, [1991] ECR I-2069.
[77] Council Regulation 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices [1984] OJ L252/1.
[78] *Fediol III*, supra, at 1831.
[79] *Nakijama All Precision Co. Ltd. v. Council, supra* at I-2178.

non-member country as a member of the Community was the source of a directly effective rule in *Pabst & Richarz*. Conversely, free trade agreements that lacked sufficient connection to the constitutional framework of the EC Treaty were not capable of producing direct effect, as seen in *Polydor* and *International Fruit*.[80] Thus, it could be said that direct effect could be granted to provisions of association agreements, but not to free trade agreements.[81]

Moreover, it might appear decisive to the Court that an international agreement contains an institutional framework for dispute settlement[82] to be granted direct effect.[83] It could also be deemed important that an international agreement might have direct effect only if the other party of the agreement recognizes such an effect, since a party not accepting direct effect of several provisions places itself in a favourable position compared to a country that is bound by an interpretation of the treaty through its own national courts.[84]

However, the Court did not follow that line in its next decision concerned with direct effect of an international agreement: In *Hauptzollamt Mainz v. Kupferberg*,[85] an importer of Portuguese wine asked the Court to declare a German monopoly equalisation duty unlawful alleging that it violated Art.95 of the EC Treaty and Art.21 (1) of the free trade agreement between the Community and Portugal. The Court ruled that Art.21 (1) of the Agreement was directly effective. It held that agreements concluded under Art.228 of the EC Treaty are binding upon both the Community and the Member States. The Court deemed it "incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements."[86] Member State obligations emanating from agreements concluded by the Community institutions

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[80] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law & Business 556, 587f. (1996-97).
[81] *Ibid.*, at 590.
[82] See e.g. the above mentioned cases *International Fruit, Schlüter and Dürbeck.*
[83] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law & Business 556, 588. (1996-97).
[84] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 In European Community Law*, 30 Journal of World Trade 1996, 67, 85.
[85] Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG*, [1982] ECR 3641.
[86] *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG*, [1982] ECR 3641, at 3662.

created rights and obligations to the Community itself "which has assumed responsibility for the due performance of the agreement."[87] Accordingly, the Court described the agreement as a directly effective, essential part of Community law by means of Art.228 of the EC Treaty. The Court also stated that the principal of reciprocity was not necessarily a deciding argument to reject direct effect.[88] Likewise, neither the presence of an institutional framework for dispute settlement[89] nor the presence of a safeguard clause[90] in the agreement alone were held to be determinative factors in considering direct effect.

In *Demirel v. Stadt Schwäbisch Gmünd,*[91] provisions of the Association Agreement with Turkey were found not to be directly applicable. In contrast to its decision in *International Fruit,* the Court considered specific provisions of the Agreement although it held the Agreement in general as being incapable of granting direct effects. The provisions in question, however, were "not sufficiently precise and unconditional to be capable of governing directly the movement of workers."[92]

Other directly effective provisions were found in bilateral trade agreements in *Sevince v. Staatssecretaris van Justitie* [93] - where direct effect was granted to a decision of the Council of Association instituted by the Association Agreement with Turkey - and in *ONEM v. Bahia Kziber,* where national treatment provisions of the Co-operation Agreement between the EC and Morocco were held to be directly applicable.[94]

It can be concluded that the type of the agreement is not the deciding factor for granting direct effect to provisions of international agreements. On the other hand, the Court's differentiation between GATT cases that are examined in a "context-approach" whereas other cases are scrutinized in a "textual approach" [95] seems to make sense.[96] In the GATT cases, the

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[87] *Ibid.*, at 3662.
[88] *Ibid.*, at 3663-64.
[89] *Ibid.*, at 3664.
[90] *Ibid.*
[91] Case 12/86, [1986] ECR 3719, at 3752.
[92] *Ibid*, at 3753.
[93] Case C-192/89, [1990] ECR I-3461.
[94] Case C-18/90, [1991] ECR I-199.
[95] This terminology has been taken over from Pierre Pescatore, *Treaty-Making by the European Communities*, in The Effect of Treaties in Domestic Law, 177, 184 -88 (Francis G. Jacobs & Shelley Roberts eds., 1987; the textual approach has been applied by the Court in *Bresciani* and

Court never examines the specific provision alleged to have direct effect because it finds the whole agreement as being "a forum for commercial negotiations rather than a set of binding rules."[97] In contrast, specific provisions are examined in other, non-GATT cases. This differentiation has been feared to lead to contradictory results because certain stipulations can produce direct effect in some agreements whereas identical provisions cannot produce direct effect in the GATT agreement.[98] However, it has already been said in *Polydor*[99] that identity in language is not sufficient to grant the same effect to provisions because their purpose might differ.

The answer to the question of direct effect of WTO provisions can therefore not be derived from the fact that the WTO Agreement is a free trade agreement. Rather, the "spirit, the general scheme and the wording" of the WTO Agreement has to be examined to find proof for or against its suitability for direct effect.

C. The WTO System in Comparison with the Community's other International Agreements and with EC Law

Whereas in its *Van Gend & Loss* decision, the Court put emphasis on the operational character of individual rules, i.e. whether they are sufficiently clear and unconditional to be applied in a specific dispute, that stage was never reached in GATT. Here, the agreement as such was rejected the capacity to create individual rights enforceable before a court of law. Thus, the Community legal order has to be distinguished from the international legal order. In fact, the Community legal order is "more or less full-grown" and has a much more domestic character than an international one.[100] While in the European Community, Member States have surrendered parts of their sovereignty to the benefit of the Community this cannot be said for the GATT or WTO Agreement. Although Members of

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Kupferberg whereas in the cases concerned with GATT, the Court never investigated the single provision in question.

[96] Pescatore, *ibid.*, at 187, and Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 592, find that analytical distinction problematic.

[97] Pescatore, *ibid.*, at 186-187.

[98] *Ibid.*, at 187.

[99] See above C. II.

the WTO system have signed the Agreements and are subject to a sophisticated dispute settlement system, they are not bound in a way as strong as the Community's Member States are. For instance, in opposite to the Community law system, there is no institution in the WTO that can release entirely new legislation becoming valid in the national law systems of the Members without any act of implementation. Moreover, nationals of the WTO's Members are not asked to vote for the composition of any of the WTO's organs. There are no areas in the WTO's Members' legal systems that are reserved for the WTO's dispute settlement organs' "jurisdiction" only and which prevent national courts from ruling on those subjects (i.e. preliminary rulings). Furthermore, individuals are not entitled to bring complaints in front of a WTO panel, whereas they can do so under Community law. Last but not least, the WTO may contain isolated individual rights as for example in the TRIPS Agreement; it does not, however, have basic individual freedoms as a main feature, which the EC Treaty, in contrast, does have.

It must not be forgotten, however, that provisions of other international agreements have been granted direct effect, which did not have any of those features either.

However, the "spirit and general scheme" of GATT did not suggest its capacity to include directly applicable provisions. Possibly, a clear distinction between the "spirit" of the GATT/WTO and that of the other international agreements that have been granted direct effect by the Court is to be found in the number of its Members. While the WTO has more than 100 Members, the agreements held by the Court to be capable of direct effect have been concluded by the Community on a bilateral basis or with less developed countries where the Community could be regarded as the most powerful party. Under WTO, this power is offset particularly by that of the United States and Japan.[101] As discussed earlier, the Court was more willing to grant direct effect to those agreements that were designed

[100] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11 p. 56.

[101] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 Journal of World Trade 1996, 67, 82f.

to establish closer link between the parties, sometimes with a view to subsequent accession to the EC.

It remains to be seen whether the "spirit and general scheme" of WTO still suggests its general non-ability to provide directly effective rules.

Part 2: The Problem of Jurisdiction

After the conclusion of the WTO Agreement another problem came to stage which had never arisen in connection with GATT 1947 because there the competence had completely been taken over by the Community as an exclusive competence. The problem is the question of which entity will be entitled to rule upon the question of direct effect of WTO provisions; is it the European Court of Justice or national courts of the Community's Member States or both depending on what WTO provision is invoked?

A. The Court's Opinion 1/94: Competence to Conclude the WTO Agreement

The point of departure must be the Court's Opinion 1/94[102] where it was asked to decide whether exclusive competence to conclude the WTO Agreement and its annexed Agreements lay with the Community pursuant to Article 113 of the Treaty.

The Community's right to conclude trade agreements is based on Article 113 of the EC Treaty. The question of what sort of stipulations the Community is entitled to conclude within these tariff and trade agreements, however, has long been a matter of dispute. Whereas the Community's competence is undoubted with respect to provisions concerning the commerce of goods, its competence regarding the exchange of services and the border crossing by citizens has been questioned.

Shortly before the WTO Agreement was about to be ratified, the Commission brought proceedings before the Court under Article 228 (6) of the EC Treaty to give an Opinion as to whether the Community had exclusive competence to conclude the WTO Agreement and its annexed Agreements in terms of Article 113 of the Treaty.

[102] Opinion 1/94 of 15/11/1994, [1994]ECR I-5267.

Whereas the Commission was of the opinion that the Community enjoyed sole competence to conclude the entire agreement, the Member States denied the Community's unshared competence particularly with regard to the General Agreement on Trade in Services (Annex 1 B, GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1 C, TRIPS). Although some scholars demanded the general inclusion of services in the scope of Article 113 of the EC Treaty,[103] the European Court preferred a differentiating approach.[104]

With regard to the GATT, the Court held that agreements concluded under Article 113 of the EC Treaty applied to trade in EURATOM, ECSC and agricultural products.[105] As regards GATS, the Court decided that cross-frontier supplies of services not involving any movement of persons were covered by Article 113 of the Treaty, whereas consumption abroad, commercial presence and the supplier's delegation of a person to the consumer's country did not fall under Article 113 because these modes involved the movement of persons or corporations. Given that separate provisions of the EC Treaty also covered transport it was not subject to the Community's exclusive competence under Article 113 either.[106] The Court then regarded the TRIPS and found that only one provision of the TRIPS was closely related to trade in goods and thus fell under the Community's exclusive competence, namely Article 51, which prohibits the release into free circulation of counterfeit goods. Intellectual property rights did not specifically relate to international trade even though they could affect international trade.[107]

The Court also rejected the Commission's second set of arguments based on the doctrine of parallelism.[108] It ruled that, in the case of GATS and TRIPS, the Community and the Member States were jointly competent;

[103] Bogdandy/ Nettesheim, Europäische Zeitschrift für Wirtschaftsrecht 1993, 465, 466.
[104] It is worth reading the thorough summary of Opinion 1/94 by Hartley, *The Foundations of European Community Law* (4th Edition), pp. 165ff.
[105] See Hartley, *ibid.*, at p. 166.
[106] *Ibid.*, p. 166f.
[107] See paras. 58 – 60 of Opinion 1/94.
[108] See more precisely Hartley, *The Foundations of European Community Law*, fourth edition, p.167f.

with respect to GATT 94, on the other hand, the Community had exclusive competence.

Thus, the WTO Agreement as a mixed agreement was signed by both the Member States of the European Community and the Community itself. However, it is up to the Member States to ratify it.[109]

B. Competence to Interpret WTO Provisions and Their Effect

With regard to the question of jurisdiction, it might immediately be concluded that, in so far as there is national competence, the courts of the Member States have jurisdiction to rule on the question of direct effect whereas it is up to the European Court of Justice to answer this questions in regard to the rest of the WTO Agreement. The result would be that there were not one domestic legal status, but sixteen.[110]

I. Court's Earlier Decisions

Faced with the 1961 association agreement with Greece, another mixed agreement, the Court found that it was an act of an institution of the Community concluded by the Council under Articles 228 and 238[111] of the EEC Treaty. It was held that since the agreement's provisions formed an integral part of Community law, the European Court had jurisdiction to give preliminary rulings regarding their interpretation. The Court made no distinction between provisions falling within the Community's competence and those coming within national competence.[112]

Furthermore, in *Hauptzollamt Mainz v. Kupferberg*, the Court stated with regard to the 1972 free trade agreement with Portugal (which was not a mixed agreement) that "[i]t follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State

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[109] See above Fn. 3.

[110] E.g. Macleod, Heny and Hyett, *The External Relations of the European Community* (Oxford 1996), p. 157.

[111] Art.310 of the Amsterdam Treaty.

[112] Case 181/73 *Haegeman v. Belgium*, [1974] ECR 449, paras. 2 to 6.

which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community."[113]

In *Sevince*, the Court held that "[s]ince the Court has jurisdiction to give preliminary rulings on the Agreement, in so far as it is an act adopted by one of the institutions of the Community (...), it also has jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation".[114] The same passage was mentioned in *Kupferberg* with regards to the requirement of uniform interpretation.[115] When the German Government asked the Court to overthrow its decision in *Sevince* and argued that matters within the competence of the Member States were not acts of the Community, the Court did not even respond to the German argumentation on the problem of competence.[116]

II. WTO as an Agreement Adopted by Community Institutions

Since the Court has stated that it has jurisdiction insofar as the agreement is an act adopted by one of the institutions of the Community, the question remains as to what extent the WTO Agreement is such an act.[117] *Eeckhout*[118] points out three possible answers:

The first possibility envisages that the Council only concluded the agreement in so far as it falls under the *Community's exclusive competence*. Such reasoning could be concluded from the Preamble of the Council's decision where it is said that Article 73 C EC Treaty should not serve as a legal basis for the conclusion of the WTO because no acts have been adopted on its basis.[119] The Council apparently hints at Opinion 1/94,

[113] Case 104/81, [1982] ECR 3641, para 14.
[114] Case C-192/89, [1990] ECR I-3461, para 10.
[115] Case 104/81, [1982] ECR 3641, para 14.
[116] Case C-237/91, [1993] ECR I-6781, para 9.
[117] This question is dealt with in Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11.
[118] *Ibid*, at 17ff.
[119] Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), O.J. 1994, L 336/1.

where it was said that exclusive competence only exists where there is internal Community legislation.[120]

As a second approach, it is arguable that the Community's jurisdiction with regard to WTO-questions in European law extends to *both exclusive and non-exclusive Community competence*. In fact, the heading of the Council's decision reads: "as regards matters within [the Community's] competence." There was no explicit limitation to merely exclusive Community competence.

Thirdly, the entire WTO Agreement is attached to the Council's decision to conclude it that did not specifically point out which parts it aimed to conclude. Thus, it could be said that the *whole WTO Agreement* is an act of one of the Community institutions (the Council with the approval of the European Parliament).

III. Jurisdiction under WTO: The Hermès Case

The Court had to rule upon the question of its jurisdiction for the interpretation of a WTO-Provision that was concluded under the Member States' competence in *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV*.[121]

In that case, the *Arrondissementrechtbank* (District Court) Amsterdam directed to the Court a question concerning the interpretation of Article 50 (6) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS") for a preliminary ruling under Article 177 of the EC Treaty. Part III of the TRIPS contains provisions aiming at the enforcement of intellectual property rights. WTO-Parties have to ensure the inclusion in their legal systems of the procedures provided for in this part of TRIPS in order to enable effective proceedings towards infringements of those rights.

The question of interpretation of Article 50 (6) TRIPS arose in legal proceedings between Hermès and FHT Marketing Choice BV (FHT), a company incorporated under Netherlands law, concerning trademark rights owned by Hermès. Neckties carrying the brand "Hermès" were distributed

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[120] Opinion 1/94, *supra* at paras 95 and 102.

by FHT which lead Hermès to the application to the President of the *Arrondissementsrechtbank* for an interim order requiring FHT to cease infringement of its copyright and trade mark. Hermès also requested the adoption of all steps necessary to bring the infringement definitely to an end. Furthermore, Hermès asked the President to set a period of three months from the date of service of the interim decision as the period within which FHT could, under TRIPS Article 50 (6), request revocation of those provisional measures and a period of 14 days as the period within which Hermès could launch proceedings on the merits of the case, that period to run from the date on which FHT requested revocation. The President of the Arrondissementsrechtbank rejected his ability to grant the last request, since Article 50(6) of the TRIPS Agreement does not place any time limit on the defendant's right to request revocation of provisional measures. He held that the intention of Article 50 (6) was, on the contrary, to allow the defendant to request revocation of a provisional measure at any time prior to delivery of judgement in the main proceedings. The period conceived in that provision for initiation of proceedings on the merits could not therefore be set by reference to a period within which the defendant must request revocation of the provisional measures. Nevertheless, the court speculated whether it was necessary to fix a date for the proceedings on the merits. This was considered to be the case if the measure ordered in the interim proceedings (a measure pursuant to Article 289 of the Netherlands Code of Civil Procedure) was "a provisional measure" in terms of Article 50 of the TRIPS Agreement. Accordingly, the Dutch court referred the question to the European Court for a preliminary ruling whether an interim measure as, for example, provided for in Articles 289ff. of the Netherlands Code of Civil Procedure, fell within the scope of Article 50 of the TRIPS Agreement.

The Court held that it had jurisdiction to interpret Article 50 of the TRIPS Agreement, arguing that

[121] Unpublished case C-53/96, available on the "europa" homepage of http://europa.eu.int/

> "the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties. Equally, without there being any need to determine the extent of the obligations assumed by the Community in concluding the agreement, it should be noted that when the Final Act and the WTO Agreement were signed by the Community and its Member States on 15 April 1994, Regulation No 40/94 had been in force for one month. Article 50 (1) of the TRIPS Agreement requires that judicial authorities of the contracting parties be authorized to order 'provisional measures' to protect the interests of proprietors of trade-mark rights conferred under the laws of those parties. To that end, Article 50 lays down various procedural rules applicable to applications for the adoption of such measures. Under Article 99 of Regulation No 40/94, rights arising from a Community trade mark may be safeguarded by the adoption of 'provisional, including protective, measures'. It is true that the measures envisaged by Article 99 and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade mark. However, since the Community is a party to the TRIPS Agreement and since that agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPS Agreement (...). It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPS Agreement."[122]

The Court first states that its jurisdiction to interpret WTO provisions is not connected to its competence to conclude the agreement, without however explaining why. In its former decisions, the Court merely assumed its jurisdiction "in so far as it is an act adopted by one of the institutions of the Community". The question in *Hermès* was concerned with the problem of the inner-European perspective of jurisdiction concerning a TRIPS provision, not with the international law perspective, from which the allocation of the Community's respective obligation is certainly insignificant because the Community signed the WTO Agreement without any reservation. The Court then argues that national

[122] Paras 24-29 of the judgement.

courts have to interpret Article 99 of Regulation 40/94 in the light of Article 50 TRIPS because the Community is a party to the TRIPS Agreement. Apparently, the Court suggests that the provisions on trademarks in the TRIPS Agreement would cause confusion if their domestic legal status were determined by sixteen different approaches. Since they influence both national law on trade marks and Community trade marks,[123] the consequence of one and the same provision could be divergent, depending on whether national or Community law is tested against it. The provision could for example have direct effect in one jurisdiction but not in another. Such an interconnection between the law in Europe and WTO law appears to be undesirable to the Court. This and probably the fact that it was the Community that took part in the Uruguay negotiations must be the reasoning underlying the Court's conclusion to claim its jurisdiction "in any event" to interpret Article 50 TRIPS.

The Court then continues to argue that

> "[i]t is immaterial that the dispute in the main proceedings concerns trade marks whose international registrations designate the Benelux. First, it is solely for the national court hearing the dispute, which must assume responsibility for the order to be made, to assess the need for a preliminary ruling so as to enable it to give its judgment. Consequently, where the question referred to it concerns a provision which it has jurisdiction to interpret, the Court of Justice is, in principle, bound to give a ruling (...). Second, where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (...). In the present case, as has been pointed out in paragraph 28 above, Article 50 of the TRIPS Agreement applies to Community trade marks as well as to national trade marks. The Court therefore has jurisdiction to rule on the question submitted by the national court."[124]

[123] Council Regulation (EC) No 40/94 on the Community trademark, O.J. 1994, L 11/1.
[124] Paras. 30 to 33 of the judgement.

Here, the Court argues from a practical point of view when it refers to the Community's clear interest to avoid different interpretations. As shall be seen forthwith, there are also legal arguments to come to the Court's conclusion.[125] The Court states that a provision of the WTO Agreement, regardless of whether its comes within the Community's competence or not, can be interpreted by the Court if that provision can apply to situations falling within the scope of both Community and national law. Thus, there is no strict equivalence between the Community's power to conclude an international agreement and the Court's jurisdiction to interpret them.

The Court, however, did not deal with the question of whether its jurisdiction extends to the interpretation of *all* provisions of international agreements, even if they might not apply to situations falling under the scope of Community law. Is it also in the Community's interest, although not as "clear" as in the other situation, to have a uniform interpretation of those provisions?

IV. Discussion

It must be noted that in *Hermès*, the provision under question was concerned with an issue in which the Community had not exercized its internal competence. Thus, the subject generally fell within the Member States' competence. However, it cannot be said that the Community is not a contracting party to the WTO Agreement with regard to those provisions. Although Articles 1 and 2 of Decision 94/800 approve of the Agreements "on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community", both the Community and its Member States have signed the WTO Agreement as a whole, a "single package", and without any reservation towards the other Members. They are thus full Members of the WTO and in like manner responsible for any breach of the Agreement. Obviously, the division of competencies is of internal significance only.[126] In *Hermès*, some Member States and the Council have argued that only those parts of the WTO Agreements were part of Community law that fell within the Community's

[125] See below at IV.

competence and that accordingly the European Court of Justice was competent for the interpretation of those only.[127] The Commission, however, was of a different opinion; it held that there was no total correlation between the competence to conclude an agreement on the one hand and the jurisdiction to interpret provisions of the agreement on the other hand. Its arguments were to a large extent of a practical nature. First, the Community's competence to conclude an agreement was derived from its effective and actual authority, whereas its jurisdiction to interpret provisions could also evolve from "potential" powers. Secondly, since mixed agreements were uniform agreements to which both the Community and its Member States were contracting parties, their interpretation and application had to be uniform as well. Thirdly, the WTO Agreements as a single package presented a uniform whole which demanded an interpretation directed by the same criteria; this was necessary to avoid the risk of dissenting interpretations through the European Court and national courts in important questions like the one of direct effect.[128]

As Advocate General Tesauro points out in his Conclusions, it could certainly be argued that, if there were sections falling within the Member States' exclusive competence, there would not be any need for total harmonisation of interpretation of those provisions of a mixed agreement. It would be very troublesome if the Court had the last word concerning the interpretation of the mixed agreement as a whole, especially with regard to the Member States' unlimited liability.

However, the situation with most mixed agreements is different; areas with separated competence are not "reserved areas" of the Member States and do not stand beyond Community law. Usually, it will not be very easy or even possible to determine whether a provision is of importance either in Community or in national law only. Very likely some of the provisions might be connected.[129] Thus, the situation described above and the

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[126] See *case* C-53/96, Conclusions of attorney General Tesauro, Nov. 13th 1997, at paras 12 and 14.
[127] *Ibid.*, at para. 16.
[128] *Ibid.*
[129] See *case* C-53/96, Conclusions of attorney General Tesauro, Nov. 13th 1997, at paras 19 and 20.

situation envisaged by the Court in *Hermès* is often construction rather than reality. A few examples may assist to depict that allegation.[130]

National treatment of imported products is provided for in Article III of the GATT whereas Article XVII of the GATS is a parallel provision concerning services. The effect of GATT Article III, falling within the Community's competence, would thus be determined by Community law while on the contrary the effect of GATS Article XVII had to be determined by the domestic laws of the Member States in so far as there is national law competence. Notwithstanding, both Articles in their application may concern rules and practices of the Member States much more than those of the Community[131], which makes it hard to understand why one of them should be determined by Community law. Apparently, the competence criterion is not rigorously linked with the type of rules the agreement practically affects.

Furthermore, the following or a similar situation might show the difficulties and arbitrariness of a mixed approach to the domestic status of the WTO Agreement. If the Community and the Member States had committed themselves, for example, to the duty not to put any obstacles in the way of non-Community lawyers providing legal advice to EC citizens in the field of GATS and if that commitment applied to all modes outlined in Article I (2) of GATS,[132] the first mode came within the Community's exclusive competence[133] whereas the others fell, *ex hypothesi*, under national competence. In a mixed approach, the domestic legal status of those commitments would then have to depend on the mode of supply.

It also comes to question which legal order should determine the effect of the general provisions of GATS, such as most-favoured nation treatment, monopolies and transparency. Should they be determined by Community or national law?

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[130] The following examples are indicated in Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, pp. 20-22.

[131] See e.g. case C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia*, [1995] ECR I-4533, with regard to the Italian consumer tax on fresh bananas.

[132] cross border, commercial presence, movement of consumer, movement of personnel.

[133] See Opinion 1/94, *supra* at paras. 36 to 53.

Those examples have shown that a mixed approach to the WTO Agreement's domestic legal status is "undesirable, artificial and perhaps unworkable".[134] Although the arguments seem to be more of a practical nature there are also legal grounds to uphold the finding that one domestic legal status has to be favoured to sixteen in the case of the WTO Agreement. The legal orders of the Community are intertwined and integrated systems. The different parts of the WTO Agreement are inextricably linked.[135] In Opinion 1/94, the Court articulated the duty of co-operation between the Community and its Member States.[136] It can also be said that, similarly, national and Community competences are inextricably linked with the consequence that the Community's legal system could not tolerate a divergent, non-agreeing approach to the domestic legal status of the WTO Agreement.[137] Bearing the duty of co-operation between the Community and its Member States in mind, it appears difficult to maintain discrepancies in the WTO Agreement's interpretation and application.

First of all, legal certainty demands a uniform approach. Otherwise economic operators would encounter a number of difficult problems regarding the division of competence between Community and Member States on the one hand and the possible effects and interpretations of the WTO Agreement in the various national legal systems on the other.[138]

Secondly, it could be derived from Article 5 EC Treaty that Member States must be prevented from permitting diverging interpretations of national courts as these could have negative effects on the legal position of the Community regarding third states being Parties to the mixed agreement.[139]

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[134] This is the formulation *Eeckhout* chooses in *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 11, 20 (1997) with which the author agrees.

[135] Opinion 1/94 of 15 November 1994, paras. 106-110.

[136] *Ibid.*, at para 109.

[137] Castillo de la Torre, *The Status of GATT in EC Law, Revisited*, 29 Journal of World Trade 1995, 53, 67f.; M. Kaniel, *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act* (Kluwer, 1996), pp. 156f.

[138] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR. 11, 23 (1997).

[139] Hilf, *The Application of GATT Within the Member States of the European Community, with Special Reference to the Federal Republic of Germany*, in Hilf, Jacobs and Petersmann, *The European Community and GATT*, Kluwer 1989. p. 166.

Besides, a non-Member State to the Community being a Member to the WTO Agreement could hold the Community liable for the breach of an obligation caused by one of the Member States. The facts that the Community is a Party to the WTO Agreement and that an agreement concluded by the Community under Article 228 of the EC Treaty is binding on both the Community and its Member States can only lead to the conclusion that the Community is responsible for any part of the Agreement. Thus, the failure on the part of one of the Member States to fulfil its obligations under the WTO Agreement can hazardously concern the Community when the Community's and its Member States' obligations are part of an undivided whole, or when there are two distinct, but linked, groups of obligations.[140] It appears to be a legitimate interest on the part of the Community not to be held liable for the failure of a Member State and to claim its authority for a preliminary ruling to preserve a uniform interpretation and application of the particular provisions.

Nevertheless, it must be emphasized that the Community and its Member States are under a duty to co-operate during the conclusion of the agreements as well as in their search for a mutual position in terms of the provisions' interpretation and application.[141] Every result that had been achieved on account of the duty to co-operate in bargaining and concluding an agreement would become a farce if there were no duty to co-operate in interpreting and applying the agreement.[142]

To the author's mind, the Court will even have jurisdiction to give preliminary rulings upon provisions of the GATT that do not yet seem to affect Community situations since Community competence evolves with Community law and will thus change continuously. Although the norms of the Community's legal system are of a different origin - international, Community and national law - the system is required to function and operate homogeneously on the outside.[143]

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[140] Gaja, *The European Community's Rights and Obligations under Mixed Agreements*, in O'Keeffe and Schermers, *Mixed Agreements*, Kluwer, Deventer, 1983, p. 133, at 139f. concerning mixed agreements in general; see also Castillo de la Torre, *The Status of GATT in EC Law, Revisited*, 29 Journal of World Trade 1995, 53, 67f. regarding the WTO Agreement.

[141] see also Conclusions of Attorney General Tesauro, at para 21.

[142] See Conclusions of Attorney General Tesauro, at para 21.

[143] *Ibid.*

C. Conclusion

Thus, the Court has jurisdiction to give preliminary rulings on the interpretation of any provision of the WTO Agreement.[144]

Part 3: The WTO System in Comparison with GATT 1947 and Other International Agreements

A. The WTO-System in Comparison with GATT 1947: Similarities and Differences

In order to decide on the question of the WTO Agreement's effect on Community law one needs to take a closer look at the features of WTO. If WTO's effect differs to that of GATT 1947, the starting point must be an investigation of their conceptional differences.

I. Type of Agreement and Parties to It

The General Agreement on Tariffs and Trade of 1947 had been the only achievement after the failure of the whole Havana Charter, which had intended to establish an "International Trade Organization". GATT 1947 was an agreement only relating to trade in goods. Moreover, the Agreement was regarded as being provisionally applied and was not even ratified by many of its Parties. GATT 1947 was basically a provisional treaty serviced by an ad hoc secretariat; although it maintained a "headquarter" in Geneva, GATT was not a formal organization. Rather, it was a format for discussions between members.[145]

In contrast, the Marrakech Agreement Establishing the World Trade Organization constitutes a full-fledged international organization, headquartered in Geneva. The WTO is not an amendment to previous agreements but an entirely new agreement administering the many agreements contained in the Uruguay Round Agreement (the WTO Agreement with its important four Annexes, Ministerial Decisions and

[144] Attorney General Tesauro comes to the same conclusion with regard to provisions of the TRIPS Agreement, *supra*, at para. 22.

Declarations and the Understanding on Commitments in Financial Services) through various councils and committees and its main organ, the Ministerial Conference. It also supervizes the implementation of tariff cuts and the reduction of non-tariff measures agreed to in the negotiations. The trade regimes of individual Members are constantly examined; Members can indicate proposed or draft measures by others that can provoke trade conflicts. Moreover, Members are asked to update several trade measures and statistics, which are collected by the WTO in a large statistical reference work.

The new set of dispute settlement procedures is also designed to promote an effective implementation of the substantive regulations established in the agreements.[146]

As a consequence of the organisational structure of the new WTO, parties to the agreements are no longer called "Contracting Parties", as was the case in GATT 1947, but "Members". It is noteworthy that the parties are not specified as "Member *States*"; this is due to the fact that other entities can become parties to the Agreement, as for example the European Community or Hong Kong did in 1994.

II. Areas Included in the Agreement

GATT 1947 only subjected trade in goods to international rules. A troublesome sector was textiles and clothing, though falling within trade in goods. A number of "side agreements" establishing a special regime of quotas for trade in textiles and clothing caused non-compliance with GATT in those products since 1961.[147] Moreover, GATT discipline was evaded in agriculture, since the U.S. government sought and obtained a GATT waiver for the legislation of certain import restrictions on several agricultural goods.[148] This caused other governments to engage in similarly protective practices despite the lack of legal cover of a waiver, claiming equal treatment with the United States.

[145] Jackson, however, speaks of a "de facto organization"; See Jackson, *The World Trading System* p. 59.
[146] See for the Dispute Settlement Understanding (DSU) below at V.
[147] Jackson, *The World Trading System* p. 58.
[148] See Jackson, *ibid.*, with footnote 97.

Likewise, GATT 1947 did not contain detailed rules on the question of subsidising, except for the admission of countervailing duties as a response to them. Although negotiations in the Tokyo Round resulted in the 1979 GATT Subsidies Code the language used in this code was considerably ambiguous and "tortured".[149] For instance, it did expressly not "intend to restrict the right of signatories to use such subsidies to achieve [...] policy objectives which they consider desirable", while those objectives were "the promotion of social and economic policy" and others. Similarly, the term "subsidy" was not defined and the signatories' obligation was merely "to seek to avoid [...] serious prejudice to the interests [...] through the use of subsidies".

Furthermore, the Tokyo Round in 1979 failed to achieve an agreement on safeguard and escape-clause measures that would have been necessary to avoid uncontrolled usage of government actions reacting upon imports believed to "harm" the importing country's economy or domestic competing industries, especially the usage of "voluntary export restraints (VER)".[150] On the other hand, it must be said that the Tokyo Round (1973-1979) was a first attempt to reform the system,[151] but it still suffered from the lack of being compulsory to each of the Contracting Parties.

The WTO Agreement, in contrast, deals with trade in goods (GATT 1994) and trade-related investment measures (TRIMS) in its Annex 1A, trade in services (Annex 1B, "GATS") and with trade-related aspects of intellectual property rights (Annex 1C, "TRIPS"). Annex 2 to the WTO Agreement contains the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 3 a Trade Policy Review Mechanism and Annex 4 Plurilateral Trade Agreements, concerning trade in aircraft, government procurement, dairy products and bovine meat. The Plurilateral Agreements, however, do not fall under the compulsory part of the Uruguay Agreements. Members are free to sign them or not.

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[149] *Ibid.*, p. 289.

[150] see below under IV.

[151] See the Tokyo "codes" on Subsidies and Countervailing Measures -interpreting Articles 6, 16 and 23 of GATT, on Technical Barriers to Trade – sometimes called the Standards Code, on Import Licensing Procedures, Government Procurement, Customs Valuation - interpreting Article 7, on Anti-Dumping - interpreting Article 6, replacing the Kennedy Round code, the Bovine Meat Arrangement, the International Dairy Arrangement, and the Trade in Civil Aircraft.

Annex 1 includes an Agreement on Agriculture as well as an Agreement on Textiles and Clothing, both of which, however, will need further attention ahead, as their results are relatively meagre, compared to initial eagerness.[152] In addition, an Agreement on Subsidies and Countervailing Measures has been concluded and inserted into Annex 1, which substantially improves the Tokyo Round Code, but still contains several "exception clauses" that could lead to misuse. Another major achievement of the WTO Agreement is the Agreement on Safeguards in its Annex 1.[153]

III. Interconnection between the Agreements

Another significant characteristic of the Uruguay Agreements is the "single-package" idea. The Tokyo Round resulted in the inclusion of many specific side agreements the ratification of which was non-compulsory ("GATT à la carte"). The Most Favoured Nation (MFN) Principle of GATT was and is still unconditional.[154] Under GATT 1947 however, this meant that "foot-draggers" and "free-riders" were given unreciprocated advantages because all benefits of new specific individual agreements had to be granted to non-agreeing parties who in return could not be forced to grant any of those benefits by themselves. Although the unconditional MFN clause ultimately pursues the enhancement of free trade, it cannot be denied that the disadvantage of "foot-draggers" was an incentive for nations to stay out of new agreements. Moreover, the number of up to 200 Agreements was confusing and badly arranged since it was everything else but clear as to what country was party to which agreement.

This inconvenience has been done away with in the new WTO where every Member must agree to all parts of the Uruguay Round results, except for the Plurilateral Trade Agreements under Annex 4. In other words, all those who want to become Members of the WTO must adhere and accept the entire elaborate text. Thus, foot-draggers who take advantage without making concessions in return are done away with.

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[152] Jackson, *The World Trading System* pp. 2f.
[153] See below under IV.
[154] See Article I of GATT.

IV. Discipline of the Parties and Credibility of the Rules

The lack of discipline of the GATT 1947 Contracting Parties has already been demonstrated above regarding the sector of agriculture, where certain countries evaded GATT rules without being authorized through a waiver.[155] Especially the use of quotas[156] in the area of agricultural products did not cease, even after the establishment of external currency convertibility in the main western European trading countries in 1958.[157]. The Tokyo Round Agreement on Import and Licensing Procedure contains provisions that impose adequate procedures in cases where quotas are used; it is now part of the Uruguay Round compulsory text.

Other areas tolerating elusion under GATT 1947 were the already mentioned safeguard measures. The leading provision in this regard was GATT Article XIX, the "escape-clause", which permitted temporary border barriers to imports when imports were increasing and could be shown to "injure" domestic competing industry. However, the term "injure" was very broad and it was not clear what exactly was understood as "domestic competing industry". As a consequence, safeguard measures under Article XIX could be justified very easily. Moreover, Article XXV GATT provides the possibility to vote waivers. Those measures are labelled as safeguards[158] since they can regularly be used as legal defence for numerous border-import restraints that are inspired by safeguard policies.

Another type of safeguard action is the technique of export restraints that an exporting country imposes on behalf of or at the request of an importing country in the form of "voluntary export restraints" (VER), "orderly marketing agreement" (OMA), "export restraint agreement" (ERA) or "voluntary restraint agreement" (VRA). Those agreements are highly problematic since they are regularly kept secret and are thus intransparent.

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[155] See above under II.

[156] The use of quotas is prohibited by Article XI GATT; the purpose of avoiding quotas is to prevent abusing, corruption of administrative sectors, delay and expense in the government procedure; see Jackson, *The World Trading System* p. 153.

[157] The balance-of payment (BOP) exception had been a regularly used excuse to use quotas instead of tariffs. The currency convertibility made the excuse of the BOP exception unworthy of belief in most of the cases and was quite successful.

[158] See Jackson, *The World Trading System* p. 180.

Hence, neither international nor domestic proceedings can supervise or control them.[159]

In GATT 1947, safeguard measures were a troublesome topic since a safeguard code designed to set limits and definitions to the technique of safeguards did not exist.[160] Similarly, procedures and requirements for the adoption of waivers were not determined which lead to a rather wide and uncontrolled usage of waivers.

The inclusion of an Agreement on Safeguards in the Uruguay Round Agreement is therefore a major achievement. It includes procedural rules, definitions of ambiguous terms such as "serious injury", "threat of serious injury" and "domestic industry", sets limits to the duration of safeguard measures,[161] eases the compensation prerequisites under the former GATT rules and severely prohibits the use of safeguard actions or VERs other than expressly permitted.[162] The WTO Charter also considerably stiffens the rules regarding waivers in empowering the organization to terminate waivers[163] and in its Understanding on the Interpretation of Art.XXV. It can be said that the WTO Agreement completes the evolution of GATT 1947 and especially the changes initiated in its latest years after the Tokyo Round.

V. Dispute Settlement

Another major accomplishment of the Uruguay Round is the provision of a legal text - as opposed to just customary practice - for the procedures of an overall unified dispute-settlement system applicable to all parts of the Uruguay Agreements. Due to the major changes in this regard and the importance for the question of direct effect of WTO rules, the changes will be described more thoroughly.

The most important improvements of the dispute settlement system can be summarized as improvements to the constitution of panels, in the timing of

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[159] See more detailed Jackson, *ibid.*, pp. 203f.

[160] It has already been mentioned above under II. that the objective of the Tokyo Round negotiations to develop a new safeguard code failed.

[161] Normally eight years.

[162] See Section VI of the Agreement Safeguards.

dispute settlement procedures, in the consistency of application of rules by the establishment of appellate review and improvements to procedures concerning non-compliance with decisions.[164]

1. The Provisions for Dispute Resolution

Under GATT 1947, there were only a few Articles dedicated to the subject of dispute settlement procedure due to the fact that the GATT was not intended to be an organization. The basic and formal procedures were described in Articles XXII and XXIII.[165]

In contrast, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and its appendixes contain thirty-five pages with detailed rules concerning the procedures of the settlement of disputes in the areas of goods, services and intellectual property.

2. The Composition of Panels

In early years of GATT, it was up to the semi-annual meeting of the Contracting Parties to sort out disputes.[166] Soon an "international committee" was set up that consisted of representatives of the Contracting Parties. Later, a working party composed of nations was formed to settle disputes under GATT. Then, in the 1950s, the Contracting Parties agreed to shift from the use of a working party composed of nations to referring disputes to a panel of experts. It was decided that members of that panel should not depend on their governments' instructions but should function in their own capacity[167] In this regard, the development displayed a shift from a basically power-oriented and negotiating system to a more rule-oriented, arbitrational one.[168]

Nowadays, the DSB is responsible for the establishment of the panel of experts at its first meeting after the request. Whereas previously panels were composed of trade officials from GATT delegations panellists may

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[163] See Article IX (3) GATT.

[164] See Bartos, *Enforcing the "Rules" of International Trade Law*, http://www.progsoc.uts.edu.au/~alsa-ito/journal/bartos.htm

[165] Articles XXII and XXIII of GATT 1947, amended through the Tokyo Round 28 Nov. 1979.

[166] Jackson, *The World Trading System* p. 115.

[167] *Ibid.*, pp. 115-116.

[168] *Ibid.*, pp. 114 and 116.

now be drawn from a wider range of people; non-governmental individuals can be included. They are impartial and not subject to any instructions.
The shift to legalism has thus been furthered through the Uruguay Round Negotiations.

3. The Procedure

The improvement to the dispute settlement's procedure is another major achievement of the Uruguay Round. The GATT 1947 dispute settlement was largely characterized by informality and pragmatism. In agreement with the Court's opinion, they could not seriously be regarded as fulfilling the *Van Gend &Loos'* "clear and unconditional test".[169] Although the ITO had been intended to provide stronger sources of regulatory authority, this was not the case in GATT, which was regarded to be provisional.[170] The Contracting Parties' lax practice rather diffused the whole procedure, which can, for example, be seen in the legal status of the European Community under GATT. A kind of "wait-and-see" approach was developed which invented a pattern leading to other forms of laxity in areas outside the EC-GATT-legality issue,[171] e.g. the areas of agriculture and international development agreements.[172]

a. Procedure under GATT 1947[173]

The process of dispute resolution started with a legal claim being submitted to a panel of three to five independent persons selected by the GATT Secretariat with the parties' approval.[174] The defending party was able to delay the process and especially the panel's creation.[175] Subsequent to the panel's hearing of oral and written legal arguments submitted by the

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[169] Case C-280/93 *Germany v. Council*, at para 110.
[170] Hudec, Robert E., *The GATT Legal System and World Trade Diplomacy* p. 58 (2d edition 1990).
[171] Chen, *Going Bananas*, 63 Fordham Law Review 1995, 1283, 1322.
[172] Hudec, Robert E., *The GATT Legal System and World Trade Diplomacy* p. 212 (2d edition 1990).
[173] Referring to Articles XXII and XXIII of the General Agreement.
[174] Hudec, Robert E., *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 9 (1993).
[175] *Ibid.*, at 54; nowadays, the DSB can reject the establishment of a panel by negative consensus which is, practically, unachievable because at least the complaining party would object; see Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at Fn. 25.

parties and intervenors, the panel would consider the support of the GATT Secretariat and produced a report containing a legal opinion to settle the dispute. However, the panel report was without legal force if not the Contracting Parties adopted it.[176] Since the report had to be adopted unanimously, the losing party was able to block the adoption of the panel report.[177] Thus, in many cases, the existence of a panel report did not change anything.[178] Moreover, even if the panel report was adopted, its language was often wide and ambitious due to political motives;[179] besides, government actions would originally not be questioned which is why the panel's abilities were limited to a large extent.[180] Panels regularly tried to invent a precedential body of "law" to be used in the future, for example in those cases where they decided on the merits of a case even if the dispute was controversial.[181] Another problem of dispute settlement under GATT was that very often its rules were flexible and troublesome to interpret.

It seems that the GATT dispute resolution procedure aimed not so much at the enforcement of GATT rules but rather at the promotion of dialogue and mutually satisfactory solutions. Many panel cases have never been adopted. The problem of the Community's association agreements' GATT compatibility, for instance, was never resolved; instead, the United States agreed to stop contesting those agreements against Community compromises on the Generalised System of Preferences.[182]

b. The New DSU: Consultations and Panel Report

The Uruguay Agreement contains a Dispute Settlement Understanding (DSU)[183] which formulates rules that partly existed before but not with the

[176] Hudec, *ibid.*, at 9.
[177] *Ibid.*, at p. 201.
[178] *Ibid.*, at p. 54.
[179] *Ibid.*, at p. 12.
[180] *Ibid.*, at p. 259.
[181] *Ibid.*, at p. 262; Jackson, *The World Trading System* p. 114.
[182] Hudec, Robert E., *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, at 39 (1993).
[183] Understanding on Rules and Procedures Governing the Settlement of Members, *reprinted in* Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round of Multilateral Trade Negotiations (1986-94), COM (94) 143 final 353.

same status.[184] It is a compulsory part of the Agreement and its rules apply to any dispute occurring under the WTO, except for commercial policy disputes.[185]

The whole procedure is characterized by continued negotiations between the WTO Members until a panel report is issued.[186] When a Member requests consultation, the defending Member must reply within 10 days after receiving the request and enter into negotiations within 30 days.[187] If the defending party fails to do so or if there is no settlement within 60 days, a panel is established.[188] Thus, in contrast to the old GATT dispute settlement, the new procedure can no longer be delayed or brought to a standstill through one party remaining silent.[189]

A third party can be involved in the consultations if it has a significant interest in the dispute.[190] After the establishment of a panel, arguments will be heard from the parties and also from third parties.[191] The panel then has to objectively estimate the dispute and draw factual, legal and other conclusions to assist the DSB in making the proper recommendation or appropriate ruling.[192] Afterwards, the panel issues an interim report, which the parties have one week's time to comment on. After one week, the interim report becomes final with either the content of the interim report or a summary of the dispute and the statement that a mutual agreement has been reached, depending on whether the parties have found a mutual agreement or not.[193] The final report has to be adopted by the Dispute Settlement Body (DSB) at least 20 days after its distribution to all Members[194] and must be adopted within 60 days, if not a party notifies the DSB of its intention to appeal. In the latter case, the final report will not be

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[184] Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at p. 1.
[185] *Ibid.*, at p. 6.
[186] Article 3 (6) of the DSU.
[187] Article 4 (3) of the DSU.
[188] *Ibid.*
[189] Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at p. 7.
[190] Article 4 (11) of the DSU.
[191] Article 10 (2) of the DSU.
[192] Article 11 of the DSU.
[193] Article 15 (2) of the DSU.
[194] Article 16 (1) of the DSU.

adopted pending the appeal.[195] The DSB adopts the report under the process of the "negative consensus". This means that, in contrast to the former possibility of blocking of panel reports, all Members have to agree otherwise to block the adoption of the report. If they do not do so, the report is adopted. The achievement of such "negative consensus" is very unlikely since at least the favoured party to the dispute will accept the report.[196]

c. The New Appellate Body

Another significant change to the former dispute resolution is the already mentioned creation of an Appellate Body that is described as having all the characteristics of an international tribunal.[197] The Appellate Body is a permanent body with seven completely independent members and appointed for four years.[198] According to Article 17 (6) of the DSU, the Appellate Body only reviews legal aspects of the panel report. Finally, an Appellate Body report is adopted by the DSB unless it decides by consensus not to adopt it within 30 days after its distribution to the Members.

d. New Procedures Concerning Non-Compliance with Decisions

The old GATT dispute settlement process suffered from a lack of definite mandatory requirements regarding compliance with panel rulings. Parties were required to "make suitable efforts with a view to finding an appropriate solution".[199] Those solutions often resulted in compromises tolerating GATT violations by one side. A recent example for the Contracting Parties' ignorance towards the panel findings is the banana trade dispute. Although a panel report found that the EC's banana tariff

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[195] Article 16 (4) of the DSU.

[196] See Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at p. 11.

[197] Chen, *Going Bananas*, 63 Fordham Law Review 1995, 1283, 1329.

[198] Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at p. 11.

[199] Bartos, *Enforcing the "Rules" of International Trade Law*, http://www.progsoc.uts.edu.au/~alsa-ito/journal/bartos.htm , at III.4.

regime violated Articles I, II and III of the General Agreement,[200] the Community blocked the adoption of the report. Subsequently, the majority of the Latin banana exporters entered into the Framework Agreement which was a political solution at the conclusion of the Uruguay Round negotiations.[201]

Although the Contracting Parties could, by majority vote, be empowered to postpone concessions through the instruments of retorsion, retaliation, or "rebalancing" of benefits, they actually did so very seldom.[202] On the other hand, the United States sometimes took such steps without permission.[203] Another method was to put "moral pressure" on the defending Contracting Party.[204]

Under the DSU, there are three options to follow and remedy DSB rulings. The first option of complying with DSB ruling is to terminate or phase out of the challenged measure within a "reasonable period" of time.[205] The second one is for the state in breach to compensate the affected Complainant State[206] and the third one the suspension of concessions or other obligations, subject to DSB approval.[207]

Several provisions of the DSU suggest that the first option, compliance with rulings, is the primary and preferred one and that the other ones are not to be seen as equivalent alternatives. Article 3 (7) regards the withdrawal of the measure concerned as "the first objective of the dispute settlement mechanism". A panel or the Appellate Body "shall recommend that the Member concerned bring the measure into conformity with that agreement"[208] and "[p]rompt compliance with recommendations or rulings of the DSB is essential".[209] The clearest formulation in that regard is to be

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[200] See *EEC-Import Regime for Bananas, Report of the Panel,* GATT Doc. DS 38/R (Jan. 18, 1994) (restricted) 52.

[201] Chen, *Going Bananas,* 63 Fordham Law Review 1995, 1283, 1325.

[202] See dairy products case between the Netherlands and the United States where the Netherlands were allowed to use restrictions against importation of U.S. grain for seven years.; Jackson, *The World Trading System* p. 116.

[203] Jackson, *The World Trading System* p. 116 with footnote 39.

[204] Long, Olivier, *Law and its Limitations in the GATT Multilateral Trade System* 85 (1987).

[205] Articles 3 (7) and 22 (1) of the DSU.

[206] Articles 3 (7) and 22 (1) of the DSU.

[207] Article 22 (8) of the DSU.

[208] Article 19 (1) of the DSU.

[209] Article 21 (1) of the DSU.

found in Article 22 (1) of the DSU: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements." Furthermore, Article 22 (8) DSU provides that "[t]he suspension of concessions or other obligations shall be temporary [...]. [T]he DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, [...] [while] the recommendations to bring a measure into conformity with the covered agreements have not been implemented." Jackson derives from Article 26 (1) (b) of the DSU, which provides for non-violation cases that there is no obligation to withdraw an offending measure, the reverse conclusion that in violation cases there *is* an obligation to perform.[210]

Although the tertiary alternative of suspension of obligations reminds of the traditional system, it has undergone certain changes. Retaliation is required to appear in the same sector as that in which the violation happened. Only if this is not practicable, retaliation can take place with respect to other sectors of the same agreement. If even this measure fails, provisions of an entirely different agreement can be subject to retaliatory measures. The Member concerned with retaliation can object to the level of retaliation.[211]

e. Conclusions

Compared to the former dispute settlement procedures, it can be said that the first stage of the DSU is guided by the purpose of conciliation, and thus is, in this regard, not very different to the former procedures. The DSU, however, provides for time limits and general clarification already in that stage. Economic power can no longer force poorer countries to force negotiations before a panel report is issued because there is no more

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[210] Jackson, John H., *The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation*, 91 American Journal of International Law, 60, 63.

possibility to prolong and postpone the whole procedure. The Appellate stage, in contrast, is much more arbitration orientated and close to a judicial review.[212] Moreover, it has to be appreciated that the possibility of blocking by one of the parties is no longer possible due to the negative consensus approach. The provisions concerning the implementation of DSB findings show that compliance with WTO rules is the very first objective of the DSU. The language in the DSU does establish a preference for exact and prompt performance, although it still recognizes compensation as a possible remedy, which can easily be seen in the wording of DSU Article 22.[213] Nations cannot as a principle bargain out of WTO obligations anymore.

4. Annex: Access to the WTO Dispute Settlement System

Under the WTO, only Members are entitled to initiate the dispute settlement procedure. If citizens have a complaint against a foreign nation, they generally have to require their own governments to commence proceedings. The state, however, is not forced by international law to grant that plea. It is up to the nation's domestic law to endow the individual with recourse.[214]

Council Regulation No. 3286/94,[215] which has replaced the Community's 1984 "New Commercial Policy Instrument"[216] provides for Community procedures to ensure that the Community's rights under international trade rules (and thus under the WTO) are efficiently exercised. The regulation maintains the possibility for Member States and for the Community industry to file a complaint to the European Commission, but additionally includes as its main innovation a third track for individual Community

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[211] See Bartos, *Enforcing the "Rules" of International Trade Law*, http://www.progsoc.uts.edu.au/~alsa-ito/journal/bartos.htm III.4.

[212] Philippe, *World Trade Organisation Dispute Resolution Mechanisms and Jurisprudence*, paper presented at "WTO, law and Development in South Africa", Conference held at the University of the Western Cape on 11 and 12 November 1998 at p. 12.; Chen, *Going Bananas*, 63 Fordham Law Review 1995, 1283, 1330.

[213] See above under d.; DSU Article 22 (2) declares that if a Member "fails to bring the measure found to be inconsistent with a covered agreement into compliance [...] within a reasonable period of time [...] such member shall, if so requested, [...] enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation."

[214] See Jackson, *The World Trading System* p. 128.

[215] Council Regulation No. 3286/94 of 31 December 1992 O.J. No. L 349.

enterprises to file on their own behalf a complaint to the Commission. In order to file such a complaint, the enterprise must have suffered an adverse trade effect in a third country market. It is not necessary for the Community undertaking to prove the "injury" required for complaints filed by a Community industry. Similarly, not only complaints against illicit measures, but also against "legal" but distorting commercial practices can be inaugurated, provided that they create either injury or adverse trade effects and that international rules foresee a right of action concerning such practices (e.g. the WTO Agreement).[217]

Thus, similar to the United States' section 301 of the 1974 Trade Act, European enterprises can now force the Commission to request the establishment of a WTO panel and thus to challenge foreign trade practices. The regulation does, however, by no means assist Individuals or Member States in challenging measures by a European Community's organ itself.

VI. Integration of Developing Countries

Developing countries are more adequately integrated into the WTO system than under GATT 1947 due to all countries' duties to have tariff and service schedules and the constriction of several less developed country exceptions. However, the special status of developing countries is respected, e.g. in the DSU Article 12 (11).

B. Conclusion

The examinations above show that the new WTO system, compared to the old GATT 1947, is a step forward towards a more legalistic approach. Many amendments have been made with regard to insufficiencies of the old GATT. The DSU considerably enhanced and reinforced the GATT 1947 dispute settlement mechanism by presenting deadlines for all procedures, creating an Appellate Body and reversing the former consensus approach. In fact, it is no longer as flexible as the dispute

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[216] Regulation No. 2641/84 of 17 September 1984 O.J. No. L 252.
[217] See more detailed Jackson, *The World Trading System*, pp. 129ff.

mechanism under GATT 1947, since it now closely resembles an actual judicial system.[218]

The Agreement on Safeguards and on the Implementation of GATT Art.XXV prove that the power-oriented negotiation model has been replaced by a rule-oriented model.

It does thus no longer seem appropriate to deny direct effect on a basis of the old line of arguments.

Part 4: Direct Effect of WTO-Provisions?

Having found that the ECJ may give preliminary rulings on the question of direct effect of WTO rules it will be investigated what argumentation the Court could use and how its decision could turn out.

In view of the number of differences between GATT 1947 and the new WTO the question of direct effect has to be reviewed. First, some arguments for a possible recognition of such direct effect shall be enumerated. Arguments against this concept will follow afterwards under section B. The arguments under A. and B. do not necessarily reflect the author's point of view but are to be regarded as a mere enumeration. A discussion on the question of direct effect will follow in section C.

A. Arguments Pro Direct Effect of Certain WTO-Provisions

Especially with regard to the strengthening of certain rules in the new WTO system a lot of arguments seem to suggest the allowance for direct effect of certain WTO provisions.

I. Exclusion of Direct Effect by the Council

In its decision concluding the WTO Agreement, the European Council stated on a proposal from the Commission that

> "by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts".[219]

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[218] Kuilwijk, Kees Jan, *The European Court of Justice and the GATT Dilemma*, 1996, at 342; Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 34.

It has been argued that this statement could be regarded as binding on the Court.[220] The Court has noted in *Kupferberg* that

> "In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the international legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community".[221]

Apart from the statement on the Community's schedule of Commitments in the framework of the GATS that

> "The rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons",[222]

the WTO Agreement does not enclose explicit provisions on its effect in the domestic legal order of its Members.[223] Thus, according to the principle mentioned, it would be up to the Court to decide. However, it has been put forward that, since those Community institutions had the power to negotiate and conclude agreements as well as to determine their domestic legal effect, it might also be possible that the same institutions could decide that question in the act of conclusion.[224] In the United States, for example, the Congress controls the determination of the "self-executing" character of international agreements.

Be that as it may, the Court's finding in *Kupferberg* and the rules in the EC Treaty are clear. Provided that the WTO system can be regarded as a

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[219] Council Decision of 22 Dec. 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), O.J. 1994, L 336/1.

[220] See C. Tomuschat, in Groeben, Thiesing, Ehlermann, *Kommentar zum EWG-Vertrag*, 4th ed. (Nomos 1991), p. 5684.

[221] Case 181/73 *Hauptzollamt Mainz v. Kupferberg*, [1974] ECR 449, at para 17.

[222] See legal instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakech on April 25th 1994, Vol. 28. p. 23557.

[223] *Eeckhout* points out that a Swiss proposal for an express reference in the agreement to direct effect was not accepted; see Eeckhout, *Domestic Legal Status of the WTO Agreement*, 34 CMLRev. 11, 39, at footnote 84 (1997); However, Switzerland is not a Party to the WTO.

[224] Eeckhout, *Domestic Legal Status of the WTO Agreement*, 34 CMLRev. 11, 39 (1997) does not give an answer to this very question he poses.

system of enforceable rules, it is generally up to the national, respectively Community, transformer of those rules to allow for or reject direct effect.[225] For the Community, this is anticipated by primary Community law, i.e. by Art.228 VII of the Treaty, which provides that

> "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States."

Thus, this question is not left to the disposition of institutions responsible for the release of secondary European legislation.[226] From a legal point of view, an act of transformation is not necessary to implement WTO rules in the Community.[227] Some criticize that little of this monistic tendency would be left if the agreement could not create directly effective rights and obligations.[228]

Additionally, the Council's statement only appears in the explanatory notes of the Council's decision but not in its material part which reduces its legal importance.[229]

At the end of the day, the question of whether or not the Council's statement is binding on the Court relates to the problem of drawing the border between executive and judicial competences in Community law. Thus, a binding effect of the Council's statement must at least be rejected where the recognition of direct effect appears to be a minimum constitutional demand, since it is up to the Court to guarantee constitutional demands.[230]

Accordingly, the Council's statement in the decision mentioned above has to be regarded as a mere indication of the Council's political motive.[231]

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[225] See Stein, *"Bananen-Split"?*, Europäische Zeitschrift für Wirtschaftsrecht 1998, 261, 263; see also Conclusion of Advocate General Tesauro in the *Hermès* case, at paras 24 and 25.
[226] See Stein, *ibid.*, at 263.
[227] Schroeder, *Die EG, das GATT und die Vollzugslehre*, Juristenzeitung 1998, 344, 345; Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLRev. 1997, 11, 25.
[228] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 29; however, it can be criticized that refusal of direct effect does not mean that the agreement is not part of Community law.
[229] See Conclusion of Advocate General Tesauro in the *Hermès* case, at para. 24.
[230] Schmid, Christoph, *Immer wieder Bananen: Der Status des GATT/WTO-Systems im Gemeinschaftsrecht*, Neue Juristische Wochenschrift 1998, 190, 195; Weiss, Friedl, *The General Agreement on Trade in Services 1994*, 32 CMLRev. 1177, 1188 at footnote 37 (1995).
[231] See Stein, *"Bananen-Split"?*, Europäische Zeitschrift für Wirtschaftsrecht 1998, 261, 263.

II. No Longer "Diplomatic Arrangement"

According to the Court's reasoning to deny direct effect of the old GATT, it was too flexible to be directly applied. It was in large amounts a diplomatic arrangement between the Contracting Parties rather than a strictly binding agreement. There was always a way to re-negotiate or unilaterally suspend commitments. The dispute settlement mechanism was consensus-based and had thus "no real teeth".[232]

The Court's rulings on the old GATT should not unhesitatingly be transposed to the WTO Agreement as a whole.[233] The new agreements on services and intellectual property law are beyond the range of traditional GATT law. A new analysis of the WTO Agreement's "spirit, general scheme or terms" for the purpose of determining whether or not parts of it produce direct effect seems appropriate.

1. TRIPS and GATS Agreement

Especially the TRIPS agreement appears to be highly apt for direct effect. Article 3 of the Agreement states that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members[...]". Intellectual property rights are essentially private rights, as recognized in the preamble. The TRIPS agreement dictates standards about the availability, scope and use of intellectual property rights (Part II), and it contains provisions of enforcement of intellectual property rights (Part III). It does not appear as a diplomatic arrangement, and some authors find it difficult to find persuasive objections against it having direct effect.[234]

The GATS, in contrast, is shaped similarly to the GATT, and makes use of the GATT's main rules and mechanisms, e.g. most-favoured nation treatment, national treatment, negotiated market opening. However, the Community and its Member States have excluded direct effect in their Schedule of Commitments under the GATS.

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[232] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 30.

[233] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 604.

[234] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 33.

2. Dispute Settlement Understanding

As regards the sophisticated Dispute Settlement Understanding, the Court's argument based on the great flexibility and the primacy of reciprocal and mutually advantageous arrangements of GATT 1947 cannot be upheld in the same intensity for the WTO Agreement. The DSU considerably enhanced the GATT 1947 dispute settlement mechanism by presenting deadlines for all procedures, creating an Appellate Body and reversing the former positive consensus approach.

The power-oriented negotiation model has been replaced by a rule-oriented adjucation model.[235] In contrast to the WTO Dispute Settlement Understanding, the dispute resolution under the EC/Portugal Free Trade Agreement was far less detailed in its provisions; according to its Article 32, the Joint Committee had to administrate and properly implement the agreement. It was entitled to make recommendations and take decisions. However, the Committee had to adopt its own rules of procedure and act by mutual agreement.[236]

Although there remains room for an out-of-court political settlement and the panel-system is not fully judicial, the improvements do eliminate a good deal of the flexibility of the old GATT. As *Eeckhout* points out, "no rule of law is absolute in its application, and in many legal orders out-of-court settlements are preferred to court proceedings."[237]

Since compensation and the suspension of concessions are sanctions provided for only if the DSB report is not implemented or implemented improperly, it has been put forward that those alternatives cannot be regarded as the normal termination of a dispute. Theoretically, every subject of legal sanctions can chose as to which decision is more profitable to it and thus bargain out of its behaviour required by law. Although it has been said that the existence of a Dispute Settlement Understanding was in

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[235] Brand, *Direct Effect of International Economic Law in the United States and the European Union,* 17 Northwestern Journal of International Law and Business (1996-97), 556, 604.

[236] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law,* 30 Journal of World Trade 1996, 67, 81.

[237] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems,* 34 CMLR 1997, 11, 36; however, the possibility of a negotiated settlement is usually subject to a time limit whereas under the DSU, negotiations are possible until a 30-day waiting period after the adoption of an appellate report; see below under C.II.

itself an argument against direct applicability of WTO rules in its Members' courts,[238] *Petersmann* argues that this line of reasoning was of the same value as the allegation, the mere existence of the European Court of Justice spoke against direct applicability of European law in national courts.[239]

3. Safeguard Clauses

One of the Court's arguments to deny direct effect of GATT 1947 was based on the flexibility of GATT 1947 Article XIX safeguard clauses that allowed for suspension of concessions in response to increased imports that "cause or threaten serious injury to domestic producers".[240] It could already be argued with regard to GATT 1947 that the Court's finding was incoherent with other decisions, where it was not upset by similar safeguard clauses when granting direct effect.[241] In view of the new Agreement on Safeguards, this argument no longer appears to be a justification for denying direct effect inasmuch as now grey area trade restrictions are prohibited. Moreover, Article XIX of the GATT clarifies and reinforces the disciplines. Trade agreements regularly leave room for safeguard action, and many of those agreements were acknowledged to have direct effect. As the Court stated in *Kupferberg,* the existence of safeguard clauses "is not sufficient in itself to affect the direct applicability" of the agreement, as they applied only in specific circumstances.[242] GATT safeguard clauses, including waivers (Art. XXV:5 GATT), are only applicable under certain premises. Thus, without their application, the Court's finding in *Kupferberg* must also be valid for GATT/WTO law: The mere existence of safeguard clauses and dispute settlement reglementations does not necessarily preclude direct applicability of precise and unconditional provisions. The procedures under Articles 27 and 30-32 of the EC/Portugal Free Trade Agreement,

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[238] See below at B. IV. And C. II.

[239] Petersmann, Ernst-Ulrich, *GATT/WTO-Recht: Duplik,* in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 651, 653.

[240] E.g. *International Fruit Company, supra,* at 1227.

[241] See Petersmann, Ernst-Ulrich, *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration In GATT,* in: *The New GATT Round of Multilateral Trade Negotiations,* Eds. Meinhard Hilf and Ernst-Ulrich Petersmann, Deventer, The Netherlands: Kluwer, 1991, at 86-92.

however, were far less precise than those of the new WTO. As opposed to the WTO, no public investigation or publication of a detailed analysis was necessary.[243]

4. Reciprocity

In *Kupferberg,* the Court also mentioned that

> "the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement."[244]

Since the domestic legal effect of an agreement is governed by domestic rules, the practices of other jurisdictions could be suggestive with regard to the fitness of an agreement for direct application, but cannot replace the domestic rules and principles governing the internal effect of agreements.[245] Thus, the argument that other WTO Members do not grant direct effect to the agreement either does not appear to be a convincing argument. *Petersmann* argues that the principle of reciprocity was developed in a bilateral context and is impracticable in a multilateral treaty with over one hundred participants and that GATT law has always been based on *unconditional* "most-favoured-nation" treatment. He further contends that to demand reciprocity would make no economic sense from a classical economic point of view, since trade restrictions by one country always results in larger costs than benefits for that country, no matter what the behaviour of any other contracting party.[246]

III. Non-Mercantilism

The allowance for direct effect of WTO rules can also be supported by an objective to enhance global trade through minimization of mercantilist motivations. Indeed, even if other powerful nations like Japan, Canada and

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[242] Case 104/81 *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, at para. 21.
[243] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law,* 30 Journal of World Trade 1996, 67, 80.
[244] Case 104/81 *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, at para. 19.
[245] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems,* 34 CMLR 1997, 11, 37; Brand, *Direct Effect of International Economic Law in the United States and the European Union,* 17 Northwestern Journal of International Law and Business (1996-97), 556, 601.

the United States do not grant direct effect to WTO rules, unilateral granting of such effect through the European Court would guarantee that at least the Community strictly adheres to its obligations under WTO.[247] The European Court of Justice might be seduced to try to allow the Community institutions maximum flexibility in performing foreign trade policy, which might, on the long run, harm not only other Member States but also the Community itself.[248] It has also been argued that the achievement of the WTO/GATT 1947 purposes, namely the reduction of tariffs and other barriers by means of non-discrimination and the enhancement of global trade, would be prevented by the denial of direct effect because the Community could not obtain the full economic welfare benefits possible under the agreement; furthermore, Individuals would be denied the protection of the "fundamental rights" provided by the agreement.[249] Furthermore, it has been said that there cannot be any Community interest that would be promoted through ignorance of WTO law. In contrast, the GATT panel report of 1994 on the Community banana measures emphasized that every aim pursued by those particular Community measures could be achieved in conformity with GATT, "including the objective of promoting the production and commerzialization of bananas from ACP countries".[250]

Certainly, direct effect can intensify multiple party adherence with the terms of a treaty by producing predictabilty in its application. If courts and decision-makers in one state know that the courts of another state grant direct effect to the provisions of a treaty, those courts and decision-makers will be much more comfortable in their own application of the same treaty provisions.[251]

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[246] Petersmann, Ernst-Ulrich, *Application of GATT by the Court of Justice of the European Communities,* CMLRev. 392 (1983), 425.

[247] Petersmann, Ernst-Ulrich, *National Constitutions and International Economic Law*, in: *National Constitutions and International Economic Law*, Eds. Meinhard Hilf and Ernst-Ulrich Petersmann, Deventer, The Netherlands: Kluwer, 1993.

[248] Kuilwijk, Kees Jan, *The European Court of Justice and the GATT Dilemma*, 1996, at 341.

[249] *Ibid.*, at 257f.; Petersmann, Ernst-Ulrich, *National Constitutions and International Economic Law*, in: *National Constitutions and International Economic Law*, Eds. Meinhard Hilf and Ernst-Ulrich Petersmann, Deventer, The Netherlands: Kluwer, 1993.

[250] GATT-Doc. DS38/R, Paragraph 168; see Petersmann, Ernst-Ulrich, *GATT/WTO-Recht: Duplik*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 651, 652.

[251] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 607.

IV. International Constitutionalism

One author has even argued that basic ethical, legal and peace-political principles of an international constitutionalism have to be taken into consideration. As *Immanuel Kant* had already explained in his exposition *Zum politischen Frieden*, those basic principles would require as a political and empirical fact that the individual citizen has to be recognized as a subject of rights of freedom and equality both in foreign and home affairs. Moreover, the rule of law, international law, home affairs and foreign affairs are inseparably linked.[252] The denial of direct effect is suspected to result in "more treaties with no one having the need or incentive to abide by any of them" and "risks the creation of treaties having little or no real impact."[253]

V. Responsibility of the Member States

A very interesting and evident argument for the acknowledgement of direct effect of certain WTO rules at least for Community Member States is the argument of judicial protection of those. Since each Member State is a party to the WTO Agreement itself, each one can be held liable for both its own and the European Community's non-compliance with WTO rules. This is to say that without the Member State's chance to invoke its obligations under the WTO in front of European Courts, it could be forced by the Community to violate an international agreement to which it is a signatory. The best example for this fear is the banana dispute, where Germany was not allowed to invoke certain GATT 1947 provisions to contest parts of the banana-market measures before the European Court of Justice, although its contravention with GATT had been confirmed by a GATT panel before.[254] In the case of the common banana market, for instance, every Member State could be held liable, regardless of whether they have voted for or against the banana measures. It would be quite

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[252] This argument has been put forward by Petersmann, Ernst-Ulrich, *Darf die EG das Völkerrecht ignorieren?*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 325; to the author's mind, it seems to be a bit farfetched to invoke paralegal philosophical arguments based on over 200 years old theories to resolve a concrete and only recent legal and international problem.

[253] Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 606.

unlikely that the Community itself would be held liable because the Community does not really perform trade, but rather *administrates* trade.[255] Thus, market-participants of the Member States would be affected. Due to self-defence reasons, it is stated that Member States must have the right to question Community legislation that infringes the WTO.[256]

VI. Protection of Individual Investors

Moreover, it comes to question why citizens of the European Community who make investments and believe that European politics will be consistent with international law should not be judicially protected. This, for instance, happened to the complaining German importing company of bananas from third countries. After the Council's Regulation No. 404/93 had come into effect, the enterprise was allowed to import no more than 150 t bananas from third countries. That equals less than one hundredth of its average import amount over the past 6 years.[257]

Petersmann concludes that the acknowledgement of WTO guarantees within Community law would strengthen the latter one and the protection of basic European rights of Community citizens.[258]

VII. Individual Rights in GATT/WTO

Petersmann has also put forward that certain guarantees of freedom and non-discrimination in GATT have been recognized for almost 50 years, being "quasi-judicially" enforced as unconditional and actionable provisions through GATT panels.[259] He argues that GATT/WTO rules lay down fundamental rights of freedom of trade, aimed at confining governments' power to tax their citizens and to intervene in their economic

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[254] Petersmann, Ernst-Ulrich, *Darf die EG das Völkerrecht ignorieren?*, in Europäische Zeitschrift für Wirtschaftsrecht 1997, 325, 326.

[255] Stein, Torsten, *"Bananen-Split"?*, in: Europäische Zeitschrift für Wirtschaftsrecht 1998, 261, 263.

[256] Another suggestion of opponents of direct effect is for the Member State to leave the Community legislation unapplied by means of Art.5 EC Treaty. See below C. IV.

[257] See the case in front of the German *Bundesverfassungsgericht* in Neue Juristische Wochenschrift 1995, 950.

[258] Petersmann, Ernst-Ulrich, *GATT/WTO-Recht: Duplik*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 651.

[259] Petersmann, Ernst-Ulrich, *Darf die EG das Völkerrecht ignorieren?*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 325, 327.

freedom. Those rights would need to be of equal value as the fundamental right to free trade within the Community, acknowledged by the Court in *ADBHU*.[260] *Petersmann* states that several GATT/WTO rules guaranteed legal and procedural rights to individual citizens such as Art.X GATT, Art.VI GATS, Art.32, 41-50 TRIPS, Art.13 of the Anti-Dumping Agreement,[261] Art.23 of the Subsidies Agreement[262] and Art.XX of the Agreement on Government Procurement.[263] If the Court left the question of GATT/WTO-compliance with the Council's or Commission's discretion ("political question doctrine"), this would set up an option to violate international law and was incompatible with the Treaty's Art.228-234.

VIII. Precision of GATT/WTO Rules

It can also be said that several provisions of GATT/WTO, especially those dealing with non-tariff barriers, e.g. Art. III and XI GATT, are much more precise than the comparable ones in the EC Treaty, e.g. Art.30, 34,[264] 36, 43[265] and 113.[266] According to *Petersmann*, the WTO guarantees of freedom and the DSU are much more effective than those of the UN Charter or the UN Convention on Human Rights.[267] The allegation GATT/WTO law was characterized by negotiations has been disputed due to the fact that only tariff bindings were subject to negotiations whereas the prohibition of non-tariff barriers had always been compulsory.[268]

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[260] Case 240/83, [1985] ECR 531, para 12 of the judgement. See e.g. Petersmann, Ernst-Ulrich, *National Constitutions and International Economic Law*, in: *National Constitutions and International Economic Law*, Eds. Meinhard Hilf and Ernst-Ulrich Petersmann, Deventer, The Netherlands: Kluwer, 1993, 3ff.

[261] Agreement on the Implementation of Article VI of the GATT 1994 (anti-dumping), Annex 1A of the WTO Agreement.

[262] Agreement on Subsidies and Countervailing Measures, Annex 1A.

[263] Petersmann, Ernst-Ulrich, *Darf die EG das Völkerrecht ignorieren?*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 325, 327.

[264] Art.29 of the Amsterdam Treaty.

[265] Art.37 of the Amsterdam Treaty.

[266] Petersmann, Ernst-Ulrich, *Darf die EG das Völkerrecht ignorieren?*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 325, 327; Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 26.

[267] Petersmann, Ernst-Ulrich, *ibid.*, 331.

[268] Petersmann, Ernst-Ulrich, *GATT/WTO-Recht: Duplik*, in: Europäische Zeitschrift für Wirtschaftsrecht 1997, 651, 653.

B. Arguments Contra Direct Effect of Certain WTO-Provisions

Despite the major changes and improvements of the new WTO Agreements, the validity of several arguments against direct effect of WTO Rules cannot be denied.

I. Reciprocity

One of the most striking arguments against direct effect of WTO-provisions is the "reciprocity-argument". In view of the WTO Agreements' important and wide-ranging consequences for the national economy it is obvious that a Party that accepts the notion of direct effect is in a detrimental position compared to countries that do not grant such effect. It is thus often argued that there should be an equal domestic enforcement of the WTO in each Member Country.[269]

Since neither the United States nor Canada nor Japan as the most powerful nations besides the EC have granted "direct effect" to any of the WTO provisions,[270] it would, from a political and power-oriented point of view, be very unwise of European Courts to tie themselves to a certain interpretation of the Agreement and to warrant Individuals to invoke those rules.

The comprehensive results of the Uruguay Round could only be attained through the single-package approach that ensured both concessions by and benefits to all negotiating countries. From a political point of view, that careful balance would be overturned if only the Community as a major trading partner granted direct effect to WTO rules whereas the others have ruled out direct effect.[271]

In systems where international rules achieve a higher status than municipal legislation - which can particularly be said for the European Union, where primacy is tied with direct effect - the granting of direct effect involves

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[269] Kuijper, P.J., *The New WTO Dispute Settlement System: The Impact on the Community*, in J.H.J. Bourgeois, F. Berrod and E. Gippini Fournier (eds.), *The Uruguay Round Results - A European Lawyers' Perspective*, European Interuniverity Press, Brussels 1995, at 106.

[270] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 Journal of World Trade 1996, 67, 89.

[271] See Sec. 102 (a) and (b) (2) of the Uruguay Round Agreements Act, PL 103-465.

considerable danger.[272] Firstly, international treaties encompass a "democratic deficit" since they are generally negotiated by a few representatives and do not rise from the same democratic procedure as domestic legislation. Secondly, directly effective treaty rules limit the ability of national legal systems in reacting to the needs of their citizens because they force those systems to act and legislate only in coherence with those treaty rules. This must chiefly be said for rules of treaties that have been negotiated in a multilateral where amendments are difficult to achieve and thus rare. Thirdly, direct effect will hinder future treaty making since governments fear constraints for their own national legislation.[273]

II. Practical Consequences

There are several serious practical consequences that have to be considered if the Court granted direct effect to WTO rules. Granting direct effect to the GATT might lead to the invalidation of a great number of the EC's basic Common Market Organization regulations in the agricultural sector and would result in extensive confusion and insecurity throughout this sector. Moreover, it would be "prohibitively expensive" for the Community to pay foreign companies' damages whose imports into the Community have been affected by Community Regulations that violated the GATT.[274]

III. Principle of Negotiation

Although the WTO Dispute Settlement Understanding strengthens former weaknesses in many ways, it appears to some authors that the WTO is still based on the principle of negotiation.[275] As an example, the recent U.S.-Japanese trade dispute over cars and car parts is mentioned, which was the first major dispute since the entry into force of the WTO.[276] WTO Director

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[272] Jackson, John H., *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 American Journal of International Law (1992) 310, 340.
[273] Jackson, John H., *ibid.*, at 315f., 326, 330ff., 338.
[274] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 Journal of World Trade 1996, 67, 88.
[275] *Ibid.*, at 89.
[276] Detailed description of that case in *WTO Spurs U.S. – Japan Agreement on Cars*, WTO Focus, May-June 1995, at p. 1.

General Renato Ruggiero stated about this dispute that "the WTO dispute settlement system has done its job as a deterrent against conflict and a promoter of agreement", and "when required to do so, the system will provide a legal adjucation – more often, as in this case, it will serve as a catalyst for a resolution. That is exactly what it was designed to do..."[277] Thus, the new dispute settlement system seems to draw a new line between legal adjucation and negotiation. According to this statement, the dispute resolution system seems to maintain its flexible nature instead of becoming a strictly legal mechanism and negotiation appears to remain the usual form of conflict resolution.[278] Although the preferable and primary solution of the DSU is the compliance of the losing party with WTO rules it cannot be denied that a Member can chose to pay compensation whenever it wants to.[279]

Additionally, the rights and duties under WTO are at the Members' disposal in the dispute settlement's compulsory first stage of consultation.[280] The possibility of obtaining a waiver is still available, and the Community has obtained a waiver with regard to the Lomé Convention after the second "banana-panel".

It can thus be argued that due to this "open" legal state of affairs the Court must become an "executor" of WTO-duties but leave this role to the WTO-reglementation system itself.[281]

IV. Significance of the WTO Dispute Settlement Mechanism

It has also been doubted that the ensurance of direct effect to WTO rules would lead to a more efficient interconnection between Community and WTO law. According to the multifaceted character of the WTO's rules and mechanisms and the DSU, it is doubtful whether domestic courts should become everyday operators and interpreters of the WTO Agreements. It

[277] *Ibid.*, at p. 2.
[278] Lee/Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law*, 30 Journal of World Trade 1996, 67, 81.
[279] Sack, *Von der Geschlossenheit und den Spannungsfeldern in einer Weltordnung des Rechts*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 650.
[280] *Ibid.*
[281] *Ibid.*

would be undesirable that the Community's courts become the courts of the WTO.[282]

V. No Individual Rights in WTO

Petersmann's arguments concerning individual rights that are allegedly granted by the WTO have been dismissed stating that the WTO is far from guaranteeing individual rights of freedom and equality although, occasionally, the provisions are designed rather precisely.[283] The fact that new WTO rules require Members to guarantee certain means of legal protection is deemed a support not for the notion of direct effect but for exactly the opposite because obviously conversion of those rules is necessary.[284]

C. Discussion

To this author's mind the weight that lays within both the arguments for and against direct effect of GATT/WTO rules calls for a compromise between both notions. However, unrestricted direct effect does not seem to be the perfect solution for the WTO system.

I. Argument of Individual Rights

It is dangerous to argue that direct effect is necessary to protect individual rights. Certainly, the Agreement on Government Procurement intends to create certain rights for third-country companies and several TRIPS provisions aim at the protection of intellectual property. However, one will end up in a viscous circle, i.e. assuming what one wants to prove, if direct effect is claimed to be necessary to protect those rights. The question is rather whether the WTO itself establishes mutual promises or whether it creates rights for Individuals similar to the EC Treaty.[285] It cannot be said that the WTO Agreement grants individual rights in the same intensity and for the same purpose as the EC Treaty does for the European internal

[282] Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 50.
[283] Sack, *Von der Geschlossenheit und den Spannungsfeldern in einer Weltordnung des Rechts*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 650.
[284] *Ibid.*

market. The Community's right to non-discrimination, the principle of proportionality and the principle of undistorted competition are very different to parallel WTO principles.[286] The nature of the WTO Agreement is defined by rights and obligations between its Members, not between individuals. Furthermore, the signatories have never agreed to devote the agreements to individuals as they have certainly done, for example, in Human Rights Treaties. The Preamble to the WTO encompasses macroeconomic rather than microeconomic goals and thus envisages the WTO Members and not individuals as the entity to gain from those goals.[287] Besides, the DSU contains reglementations and procedures concerned with the settlement of disputes between Members, but not Individuals. The fact that direct effect is not acknowledged in the European Communities does not mean that the EC is not bound by the rules of the Agreements.[288]

As regards the TRIPS agreement, it surely ultimately aims at the protection of individuals' property rights. The language in TRIPS, however, implies that individuals are not provided with those rights by the agreement itself but that, again, Members are requested to grant those rights by means of their own law. For example, TRIPS Art.41 (1) states that "Members *shall ensure* that enforcement procedures as specified in this Part are available *under their law* so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement...".[289] In other words, the TRIPS Agreement is not itself regarded as the source to provide individuals with the appropriate rights, but conversion of the suggested aims into national law is deemed necessary. Similarly, TRIPS Art.42 (1) asks *Members* to "*make* available

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[285] Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 4.1, at p. 1.
[286] *Ibid.*, at p. 2.
[287] The WTO preamble states that the Members recognize "that their relations in the field of trade and economic endeavor should be conducted with a view to raising standars of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and anhance the means for doing so in a manenr consistent with their respective needs and concerns at different levels of economic development, [...].".
[288] Sack, *Noch einmal: GATT/WTO und Europäisches Rechtsschutzsystem*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 688.
[289] Emphasis added.

to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement."[290] The following Articles define what level of protection Member States shall grant, and Art.51 again states that "*Members* shall [...] adopt procedures to enable a right holder [...] to lodge an application [...]". In comparison, the European Convention of Human Rights states that "Everyone *has* the right to life, [...]",[291] "[a]ll *are* equal before the law [...]",[292] and so forth.

II. "Spirit" and "General Scheme" of WTO

In the first place, it has to be discussed whether the new WTO system has introduced such changes that reasonably have to lead to a change in the Court's line of argumentation. In other words, the question arises as to whether the features of the old GATT that made the Court deny its direct effect, are still valid for the new WTO system. In this regard the above description of the new system shows that the WTO rules are not as flexible anymore and that the dispute settlement mechanism is at least as detailed as that in other international agreements that have been granted direct effect. It is close to a judicial system. Without any doubt, the new WTO system presents itself in a very different shape than the old GATT 1947 did. The features important to the Court in *International Fruit* have been entirely reconstructed. The WTO is structured as an international organization and the old system of exceptions, safeguards and waivers has been strengthened or reversed. Although waivers and exceptions are still available under the WTO, they are not the rule anymore; their prerequisites and procedures are strictly determined. The basic problem of the dispute settlement procedure, i.e. the possibility of "blocking" of a panel decision, has been altered.

According to those findings, the "spirit" and "general scheme" of the whole WTO system seems to be different to those of GATT 1947.

It is thus no longer appropriate to reject direct effect of the WTO on the ground that its rules are as flexible as they were under GATT 1947.

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[290] Emphasis added.

[291] Article 3 of the Convention; emphasis added.

[292] Article 7 of the Convention; emphasis added.

III. Possibility of Consultations and Reciprocity

However, the conclusion that unlimited direct effect has to be granted to several WTO rules does not follow necessarily. Since the flexibility-criterion is not convincing anymore with regard to WTO, it comes to question as to whether other arguments speak against direct effect of WTO rules.

Berkey has pointed out that "dispute settlement systems do not fall into one of two polar categories, i.e. hard legal or soft political systems, but rather lie along a continuum between the two".[293] Although the new DSU has moved closer towards a more legalistic system, negotiation still plays an important role in the panel procedure. DSU Art.3 (3) shows that the adoption of a panel report is not the only way of resolving a dispute when it requires the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreement are being impaired". Moreover, Art.4 of the DSU calls for consultations between the disputants before the establishment of a panel to hear the dispute. Art.5 adduces alternative mechanisms of solving a dispute, such as the use of good offices, conciliation, and mediation. Negotiations between the parties can take place parallelly to a panel procedure, because "where the parties to the dispute *have failed* to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB".[294] The disputants can also attempt to settle their dispute by negotiated agreement in the 20-day waiting period provided for in Art.16 (1) of the DSU that has to be given before the report can be considered for adoption by the DSB. Even after the Appeals Body has adopted an appellate report, the parties can negotiate a settlement of their dispute until a 30-day waiting period has expired. Although the possibility of out-of-court settlements of disputes is not a new instrument and occurs regularly in law, the peculiarity of the DSU is that such settlement is even possible after the report's adoption by the Appeals Body.

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[293] Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 2.3, at p. 5.

An example for the fact that the WTO DSU might sometimes promote, rather than reduce, the use of political negotiation to resolve disputes is the dispute over the U.S. Helms-Burton Act.[295] When no compromise was achieved between the U.S. and the European Community on the Act which grants U.S. nationals a private right of action against foreign companies that "traffic" in U.S. nationals' property confiscated by the Cuban government, a panel was formed which led the U.S. instantly to the statement that it would refuse any panel decision since it did not "believe anything the WTO says or does can force the U.S. to change its laws".[296] The pressure for a political settlement of the dispute was intensified by the fact that a panel ruling would have either encouraged other Members to defend questionable trade-related policies under the GATT's national security exemption[297] or weakened domestic political support in the U.S. for the WTO and thus slowed down trade liberalisation.[298] Eventually, the Community did suspend its WTO complaint for six months, however reserving its right to reinforce the complaint if no acceptable compromise was reached.

Thus, one should rather call for a change in the attitude of the GATT Member governments before asking courts to grant direct effect of WTO rules. It must also be doubted that direct effect would be beneficial for the WTO system. The nature of the DSU may simply not require direct effect.[299]

The intrinsic feature of the DSU, i.e. the possibility of settlement by negotiation throughout the whole procedure, would be evaded if courts granted direct effect to WTO rules. Direct effect would hinder the operation of the WTO because WTO Members would be tied to their national courts' decisions and could not make use of the choices provided

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[294] See Article 12 (7) DSU (emphasis added).

[295] See Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 2.3 at p.5.

[296] Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, New York Times, Feb. 21, 1997, Section A, at 1.

[297] In the case of a ruling for the U.S.

[298] In the case of a ruling for the Community.

[299] Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 2.3, at p.6.

for in the Agreements.[300] The fact that the possibility to compensate for an infringement is afforded in the WTO suggests that this is what the parties wanted or could not agree upon to be strengthened. It would be wrong to conclude that now national courts have to do the rest for the strengthening of the WTO-system.

For example, the Community would be denied the right to decide on the method of remedying an injury caused by one of its measures if the ECJ called for the removal of that measure due to the fact that it violates WTO provisions, even before a WTO panel has found that the measure actually does infringe the Agreement. Although the DSU certainly does not suggest the compensation alternative as a primary means of dispute settlement, this possibility does in fact exist. Since every Member might in certain situations like to choose this alternative and since direct effect would deny the Community's power to offer compensation as a remedy for its WTO violations, direct effect does not seem desirable from that point of view either.[301] Again, it is up to the WTO's Members governments to change their attitude towards WTO rules before direct effect should be claimed to be the wisest solution.

It can be helpful to regard the recent example of the Beef Hormones dispute under GATT. Both a GATT panel and a WTO Appeals Body affirmed the Community's right to determine the appropriate level of consumer protection under the 1994 Sanitary and Phytosanitary Agreement although they had judged the Community's ban on the sale of hormone-treated beef to infringe the GATT. The Community, in exchange, had to produce sufficient evidence for the ban. It has been suggested that it would have been more appropriate to allow the Community to pay compensation instead of trying to produce debatable scientific evidence by several Community officials and authors.[302] Indeed, by choosing that

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[300] *ibid.*, at p.1.
[301] *ibid.*, at p.2.
[302] Reuters, *France May Ban U.S. Meat Over Hormones*, Los Angeles Times, May 12, 1997, part D, at 2; Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 3.1, at p.3.

alternative, domestic political interests[303] and requirements of the world trade system could be reconciled. As *Berkey* points out, it would seem entirely misappropriate and unfair to force the Community to do away with a complex domestic policy regime when compensation could easily be paid instead, especially if one considers cases similar to the Beef Hormones Case where not the U.S., but an individual small country were the only producer of hormone treated beef.[304] In cases like this, direct effect would become seriously disturbing since the Court would have to order specific performance for a WTO violation. The Community could not choose the method of compensating breaches of the WTO and would thus be in a more detrimental position than if a WTO panel had held that a Community measure infringed the WTO. Furthermore, the Community could be obliged to annul a measure that in reality did not violate the WTO if the Court erroneously decided that a measure did infringe the WTO.[305]

Secondly, the reciprocity criterion is one of the most frequently mentioned arguments to reject direct effect.

The Court's statement in *Kupferberg* regarding the reciprocity-argument must be read very carefully before alleging that a lack of reciprocity cannot by itself be sufficient to deny direct effect of international rules. On the contrary, the very reverse conclusion can be made. In *Kupferberg*, the Court stated that "the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement."[306] Everything the Court says is that a lack of reciprocity in the *acknowledgement* of direct effect does not necessarily lead to a lack of reciprocity in the agreement's *implementation*. That means that, *e contrario*, the lack of reciprocity in the

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[303] It has been disclosed by Community officials that the ban actually aimed at appeasing consumer scepticism about chemical additives in food; see Andrews, *In Victory for U.S., Europe Ban on Treated Beef is Ruled Illegal*, New York Times, May 9, 1997, Section A, at 1.
[304] Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 3.1, at p.3.
[305] *ibid.*, at p.3.
[306] Case 104/81 *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, at para 19.

acknowledgement of direct effect could be a decisive argument in rejecting direct effect if it *does* lead to the lack of reciprocity in the application of the agreement as a whole.[307]

The WTO Agreement is a unique international agreement that attempts to make the most of its environment's "Realpolitik" in offering remedies for violations that remain elastic enough for the maintenance of the agreement's functioning. To this author's mind, the WTO and particularly the DSU offer a choice of remedy in order to maintain thrust for the process of trade liberalisation as their essential objective.[308] *Berkeys* supposition that "[p]ermitting GATT members to preserve domestic legislation that arguably violates GATT provisions, as long as they are willing to pay for them in the form of compensation, may help convince those members to accept other restrictions upon their foreign trade policy autonomy"[309] must be agreed with.

Since neither Canada nor the United States nor Japan grant direct effect and would thus not be forced to annul their WTO-violating measures, the lack of reciprocity in the acknowledgement of direct effect would lead to the lack of reciprocity in the application of the agreement as a whole. In contrast, the Court was faced with an agreement between two parties of unequal strength in *Kupferberg*, i.e. Portugal and the Community. Here, the Community did obviously not have to fear the comparatively small partner Portugal if it granted direct effect to the Agreement. The Agreement took the imbalance between both parties into consideration, which cannot be said for the WTO Agreement (apart from those provisions concerning developing states).

Thus, the *Kupferberg* statement that under certain circumstances the reciprocity argument is not sufficient to deny direct effect does not apply here.

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[307] See also Tesauro at paras 32 and 33.

[308] Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 3.1, at p.3.

[309] *ibid.*, at p.3.

IV. Conclusion

Although most of the flexibility of the old GATT has been done away with direct effect in the sense that private individuals or Member States could invoke WTO rules in front of European Courts should not be granted without limitation. The Court's reasoning, however, should be built upon the reciprocity problem described above and not on a flexibility-criterion.[310]

The danger that the Community could be deprived of its right to choose the compensation-alternative or to withdraw a measure which in fact does not violate the WTO does also exist if Member States can limitlessly invoke WTO provisions in front of the Court. This result seems odd since Member States are also Members to the WTO and the Community seems to be able to force a Member State to infringe the WTO. However, primacy should be granted to the WTO dispute settlement system. A last resort for a Member State to protect itself against sanctions of other WTO Members in case of a breach through the European Community would be its right to refuse the application of the Community's act by means of Art.5 EC Treaty.[311]

On the other hand, direct effect could be granted in those cases where WTO panel and Appeals Body rulings exist.[312] After a DSU panel has made a final ruling, the Community has had its choice to either adjust its law or choose the compensation alternative if permissible.[313] This "limited direct effect" would permit Individuals and Member States to put the Community's WTO obligations in force while precluding them from depriving the Community of its rights under the WTO.[314]

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[310] This has also been suggested as a possible solution to the Court in the *Hermès Case* by Advocate General Tesauro at para. 34; see also Schmid, *Immer wieder Bananen: Der Status des GATT/WTO-Systems im Gemeinschaftsrecht*, Neue Juristische Wochenschrift 1998, 190, 195.

[311] Now Art.10 of the Amsterdam Treaty; see Schmid, *Immer wieder Bananen: Der Status des GATT/WTO-Systems im Gemeinschaftsrecht*, Neue Juristische Wochenschrift 1998, 190, 196.

[312] Agreeing with Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 CMLR 1997, 11, 51 and 58; Schmid, *Immer wieder Bananen: Der Status des GATT/WTO-Systems im Gemeinschaftsrecht*, Neue Juristische Wochenschrift 1998, 190, 196; Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Northwestern Journal of International Law and Business (1996-97), 556, 603; Beneyto, 298f.

[313] See also Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-3-.html, 3.2, at p. 5.

[314] *Ibid.*, at p. 5.

Conclusions

Part 2 illustrates that the European Court of Justice is entitled to rule upon the interpretation and mode of application of WTO rules within the European Union.

The Uruguay Round negotiations have brought major changes to the world's trading system. As shown in Part 3, most of the former flexible rules of GATT have been reinforced. Nevertheless, the Dispute Settlement System provides for a conspicuously broad period of time in which the settlement of a dispute can be negotiated between the parties. It is evident that the acknowledgement of an unlimited direct effect concept needs to happen on a reciprocal basis amongst at least the most powerful Members to assure reciprocity in the WTO rules' application. Otherwise, the attempt to establish reciprocity through the WTO Agreement itself will be evaded.

However, due to major achievements, e.g. on the safeguard sector, the Agreement concerning GATT Art.XXV and the stiffened rules under the DSU (negative consensus approach etc.), the Court should grant "limited direct effect" in cases where a final panel ruling exists. In those cases the Community will not be deprived of its reciprocal rights.