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WHAT FUTURE FOR THE WTO DISPUTE SETTLEMENT SYSTEM? THE EUROPEAN PERSPECTIVE

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ABSTRACT

On the eve of the launch of the first round of multilateral negotiations within the framework of the new WTO system, the so-called Millenium Round – which may be officially opened by the Seattle Ministerial Conference on 30 November 1999 –, the review of the WTO dispute settlement system should deserve the attention of WTO Members as one of the most essential topics to be considered.

Within this context, this thesis raises the question whether the future developments of the WTO dispute settlement system could be influenced by the successful European model.

In an attempt to answer this question, this thesis first highlights the grounds on which the EC approach to the GATT dispute settlement system has changed so that the EC has finally become an active supporter for "judicialization" of the new system (Introductory Part). The impact of the new WTO dispute settlement system on the EC participation in its development is then analysed (Part I). Finally, the last part of this thesis focuses on the reasons of the EC success in order to conclude to its potential influence on the further developments of the WTO dispute settlement system (Part II).

RÉSUMÉ

A la veille de l'ouverture du premier cycle de négociations multilatérales dans le cadre du nouveau système de l'OMC, sous l'appellation de Cycle du Millénium – qui pourrait officiellement être engagé lors de la Conférence Ministérielle de Seattle qui débutera le 30 novembre 1999 –, la révision du système de règlement des litiges de l'OMC mériterait l'attention des Membres de l'OMC comme l'un des sujets à traiter les plus capitaux.

Dans ce cadre, cette thèse soulève la question de savoir si les développements futures du système de règlement des litiges de l'OMC pourraient être valablement influencés par le modèle européen qui jusqu'à présent constitue une réussite.

Afin de répondre à cette question, cette thèse met tout d'abord en lumière les raisons qui ont conduit la Communauté européenne à changer radicalement d'approche envers le système de règlement des litiges du GATT à tel point qu'elle se présente désormais comme un défenseur actif de la "juridicisation" du nouveau système (Partie Introductive). L'impact du nouveau système de règlement des litiges de l'OMC sur la participation de la Communauté à son développement est ensuite analysé (Partie I). Enfin, la dernière partie de cette thèse analyse les raisons du succès communautaire afin d'en extraire les possibles implications pour les développements futures du système de règlement des litiges de l'OMC (Partie II).

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INTRODUCTION

The following study does not aim at being a mere comparison *stricto sensu* between the new WTO dispute settlement system and the EC judicial system, but it will essentially evolve around a major question: could the EC model inspire the WTO dispute settlement system in terms of structure, functioning and general spirit?

At first sight, such a suggestion may appear amazing and even audacious. How, indeed, could one envisage that a regional structure moving day after day towards a deeper and deeper economic, legal and political integration, influence the development of an international organization the main concern of which being to remain as flexible as possible in order to conciliate the unavoidable conflicting interests of all its sovereign members?

The European Community is characterized by a deep level of integration – being as much economic as legal and political – which has never been reached anywhere else in the world up to now. Such a process essentially depends on the willingness of the Member States to sacrifice sovereignty and autonomy in decision-making by granting certain competencies and powers to the Community and its institutions. Thus, this supranational quality of the European Community is the basis for the distinction from usual international organizations like the WTO.

The Uruguay Round negotiating history which has finally led to the creation of the World Trade Organization, was dominated by the fear of supranationalism. It was the then Italian Trade Minister Renato Ruggiero who in February 1990 first suggested the establishment of a new international trade organization for trade. His proposal was supported by the European Community which argued that the GATT needed a sound institutional framework "to ensure the effective implementation of the results of the Uruguay Round, and in particular to adopt dispute settlement procedures in principle

applicable to all separate multilateral agreements."[1] However, the reactions to these proposals were mixed. The United States, as well as most developing countries, were all but enthusiastic. Clearly, fear of supranationalism, the dislike of major trading nations to submit to voting equality and the traditional worry of national leaders about "tying their hands" were thought to inhibit reconstructing GATT into an international organization for trade.[2] In spite of the United States dissuasive efforts, by early 1993 most participants to the Uruguay Round were prepared to finally agree to the establishment of a new international trade organization and the United States became increasingly isolated on this issue. This perhaps explains the turnabout in the US position in the course of 1993 when the new Clinton administration dropped its outspoken opposition to a new international trade organization. The Agreement Establishing the World Trade Organization was signed in Marrakech in April 1994 as part of the Final Act of the Uruguay Round[3] and the World Trade Organization started to operate on 1 January 1995.

One of the most significant changes having accompanied the creation of the World Trade Organization, was the creation of a new centralized procedure for resolving trade-related disputes through the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[4] The new WTO dispute settlement system is characterized by its 'depoliticization', compared to the former system under GATT 1947, since it has greatly diminished the ability of large nations to use their power to derail the dispute resolution process. As a consequence, under the new system, the outcome of trade disputes is less dependent upon the power of the nations involved and more dependent upon a fair and logical application of the trade agreements.

It is actually obvious that in order for trade agreements to achieve maximum benefit, they have to work as intended and this will only be the case if the parties respect the terms of

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[1] *Communication from the European Community*, 1 July 1990, GATT Doc. MTN.GNG/NG14/W/42 at 2.
[2] J.H. Jackson, "Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round 1991" in E.-U. Petersmann & M. Hilf, eds., *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Deventer: Kluwer, 1991) 17 at 21.
[3] *Agreement Establishing the World Trade Organization* [hereinafter WTO Agreement] in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, 33 I.L.M. 1125, online: World Trade Organization <http://www.wto.org/wto/legal/finalact.htm> (date accessed: 5 November 1999) [hereinafter Final Act cited to I.L.M.].

the agreements and act accordingly. But what happens if one contracting country accuses another of adopting a national measure contrary to the agreed terms of the treaty? What if one party did not adapt its law to conform to the agreement? Such concerns underline the importance of an efficient dispute settlement system for any treaty and were therefore in mind of most of the participants to the Uruguay Round negotiations. Indeed, the role of a dispute settlement system "is particularly crucial for a treaty system designed to address today's myriad of complex economic questions [...] and to facilitate the cooperation among nations that is essential to the peaceful and welfare-enhancing aspect of those relations."[5] Arising from this, the success or the failure of the agreement will depend on the question whether disputes are settled in a beneficial way for the parties. In other words, will the parties rely on the institutions and means provided for or will they resort to unilateral action on the national level?[6] This problem is well summarized by the following words:

> A well-designed, contextually responsive [dispute resolution mechanism] can minimize frustration and tension between parties by providing procedures suited to their goals and their internal and external political relationships. An ill-designed [dispute resolution mechanism] can generate friction and actually contribute to vitiation of the trade agreement it was created to preserve.[7]

According to its title, this study will attempt to assess the efficiency of the new WTO dispute settlement system with regard to the European perspective. In order to do so, the so-called "juridicization" of the new WTO dispute settlement system will be first examined through the analysis of how the traditional divergent approaches to the issues of GATT law and dispute settlement have finally converged to the same solution (Introductory Part). As a result of this introductory analysis, the key role of the European Community within the new WTO dispute settlement system will need to be detailed, both

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[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes* [hereinafter DSU cited to I.L.M.] in WTO Agreement in Final Act, *ibid.* at 1226, annex 2.

[5] S.P. Croley & J.H. Jackson, "WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments" (1996) 90 A.J.I.L. 193 at 193.

[6] See J.H. Jackson, "The Uruguay Round and the Launch of the WTO" in T.P. Stewart, ed., *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* (Washington, D.C.: American Bar Association, Section of International Law and Practice, 1996) 17; A.F. Lowenfeld, "Remedies Along With Rights: Institutional Reform in the New GATT" (1994) 88 A.J.I.L. 477 at 487-88.

in terms of activism and activity (Part I). Finally, the main aspect of this study will be the attempt to demonstrate how and to which extent the European Community judicial system could be a model for the new WTO dispute settlement system and its future developments (Part II).

[7] M. Reisman & M. Wiedman, "Contextual Imperatives of Dispute Resolution Mechanisms" (1995) 29 J. World T. 5 at 35.

INTRODUCTORY PART

FROM THE GATT TO THE WTO DISPUTE SETTLEMENT SYSTEM

– *PRAGMATISM VS. LEGALISM, AN UNDERLYING DEBATE* –

Prior to treating in a more detailed way of the role of the European Union or rather the European Community[8] within the new WTO dispute settlement system, it may be useful to make a few preliminary remarks on the contribution of the EC to the development of a more constraining dispute settlement procedure in the framework of the Uruguay Round negotiations. Indeed, the active role played by the EC during the Uruguay Round negotiations in order to achieve a more adequate dispute settlement system with regard to the present needs of the world trading community is especially noteworthy since the EC has for a long time persisted in maintaining a diplomatic approach to settling disputes within the GATT.

Actually, the changes negotiated in the Uruguay Round which have led to a radical transformation of the GATT system are "the result of complex interactions between states at the international level and between private businesses and governments at the domestic level."[9] The United States and the European Union as well as domestic export industries within these two GATT powers were the spearheads of this reform movement. Indeed, the historical disagreement between these two GATT leaders with regard to the need for a strong, binding system of dispute resolution for the GATT and the concern shared by all the GATT contracting parties for solving it in such a way the GATT dispute settlement system be reinforced were in the heart of the Uruguay Round negotiations.

Thus, in the GATT history, the United States and the EC have been for a long time the leaders of two opposite camps: the legalists and the pragmatists.

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[8] The term European Community [hereinafter EC] is preferred, and not European Union [hereinafter EU], because it is the Community which is a party to the WTO.

[9] G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44:5 Duke L.J. 829 at 843 [hereinafter "Trade Legalism"].

On this point, Professor Jackson's analysis is worth being emphasised. Indeed, the terminology he has used to describe this debate make it much clearer and even more meaningful so that several authors have often preferred to rely directly on Jackson's terminology to develop in their turn their own analysis of the debate at issue. Jackson has distinguished between "power-oriented" and "rule-oriented" diplomacy, explaining that large countries have generally a preference for "negotiated dispute settlements" owing to their relative power in bilateral negotiations, while the preference of small countries is given to "rule-oriented dispute settlements" relying on the protection they derive from general rules and from third-party adjudication.[10] This analysis explains why less-developed GATT contracting parties have long since called for "legalising" and "judicialising" GATT dispute settlement procedures. But this does not account for the different positions of the United States, which (*e.g.*, in the Tokyo Round negotiations) likewise attempted to make the GATT dispute settlement process less dependent on the consent of the parties to the dispute, and of the EC, which – until the mid-1980s – categorically opposed proposals, *inter alia*, for a "right to the establishment of a panel" and adoption of panel reports on the basis of "consensus minus two" (*i.e.*, without participation of the parties to the dispute). Actually, in GATT practice, this disagreement between the United States and the EC has long remained one of the basic problems of the dispute settlement procedure, the solution of which has therefore come among the major concerns considered by the participants in the Uruguay Round negotiations.

Behind Jackson, several other authors have looked into the question of the divergent attitudes of the EC and the United States *vis-à-vis* the GATT dispute settlement system and the EC's long-standing view that "GATT is a consensus body, one cannot transform it into a Court of Justice".[11]

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[10] J.H. Jackson, "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT" (1979) 13 J. World T. 1.

[11] EC Commissioner De Clerq, quoted in *Agence Europe* 4243 (22 January 1986) 9.

I. THE US ATTITUDE TOWARDS THE GATT DISPUTE SETTLEMENT SYSTEM: THE UNITED STATES AS THE LEADING PROPONENT OF THE LEGALISTIC APPROACH

Regarding the United States, a number of arguments – combining economic, legal, political and sociological considerations – have been advanced as an attempt to explain its activism within the GATT dispute settlement system – no contracting party in the history of GATT has resorted to it as often as the United States – and especially why it has always appeared as the leading proponent of the legalistic approach towards GATT dispute settlement.

A. THE CULTURAL FACTOR

First, a cultural factor has been put forward, the United States being often perceived as an excessively litigious nation, "sensitive to small insults and eager to convert them into nasty and expensive lawsuits."[12] The United States, comfortable with the notion of a strong legal system serving as a unifying force within its federal system, has viewed the GATT primarily as a "legal" organization.[13] In addition, the United States has tended to be a plaintiff in GATT cases, leading it to favour reforms that would bring more pressure on losing defendants to comply with panel rulings.[14]

B. THE POLITICAL FACTOR

A second factor likely to explain the propensity of the United States to defend a legalistic approach to GATT dispute settlement system as well as its activism within the system is of a political nature. It is directly related to the regulation of international trade affairs in the US Constitution.[15]

As one commentator has noted, an adjudicatory-type process to ensure "'reciprocity', 'fair trade' and avoidance of real trade warfare is *a domestic political necessity for the United States executive*, prescribed by *Section 301 of the Trade Act of 1974* and

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[12] P. Wald, "Litigation in America" (1983) 31 U.C.L.A. L. Rev. 1 at 1.
[13] See M. Montañà i Mora, "A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes" (1993) 31 Colum. J. Transnat'l L. 103 at 129 (noting that the United States has tended to approve a "legalist" view of the GATT) [hereinafter "A GATT With Teeth"].
[14] *Ibid.* at 129 (stating that no State has initiated more GATT dispute procedures than the United States).
[15] See *ibid.* at 130.

politically imperative for demonstrating to Congress the executive's active enforcement of American rights."[16] Actually, according to the US Constitution, the Executive branch has no authority in the field of international trade negotiations except if it is so delegated by Congress.[17] As a direct consequence, the US Executive is responsible to Congress for the effective enforcement of GATT rules and the good functioning of GATT dispute settlement procedures especially with regard to US particular trade interests.[18]

However, on the eve of the opening of the Tokyo Round negotiations in the early 1970's, the attempted demonstration to Congress by the US Executive branch that GATT rules still worked and that the Executive would actively protect US rights under those rules partially failed. Indeed, in order to reach such an objective, the US Executive branch began to search out violations of GATT rules and launched a wave of GATT lawsuits under the Article XXIII adjudication procedure.[19] Overall, the US campaign was moderately successful.[20] The United States had experienced some difficulty, however, in making the GATT adjudication machinery move forward against strong opposition, and this difficulty continued to concern congressional leaders and some members of the

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[16] E.-U. Petersmann, "Strengthening GATT Procedures for Settling Disputes" (1988) 11 World Econ. 55 at 77 [emphasis added].

[17] See U.S. Const. art. I, § 8, cls. 1, 3: "The Congress shall have power to [...] regulate commerce with foreign nations and among the several states." *A Contrario*, this means that the White House only can negotiate trade agreements on the basis of the authority delegated by Congress.

[18] As Hudec has noted, "US Congress has been willing to enact legislation authorizing trade negotiations and to resist most protectionist initiatives, but on each occasion the prive for such liberal policies has been progressively more rigorous undertakings to enforce GATT obligations against other governments": R.E. Hudec, "Legal Issues in US-EC Trade Policy: GATT Litigation 1960-1985" in R.E. Baldwin *et al.*, eds., *Issues in US-EC Trade Relations* (Chicago: University of Chicago Press, 1988) 17 [hereinafter "Legal Issues in US-EC Trade Policy"].

[19] See *United Kingdom – Dollar Area Quotas*, 20th Supp. B.I.S.D. (1973) 230 at Appendix, case 73; *French Import Restrictions*, GATT Doc. L/3744 (1972) at Appendix, case 72; *Netherlands Antilles Tariff Schedule*, GATT Doc. L/3726 (1972) at Appendix, case 70; *EEC – Compensatory Taxes*, GATT Doc. L/3715 (1972) at Appendix, case 69; *Jamaica – Margins of Preference*, 18th Supp. B.I.S.D. (1970) 183 at Appendix, case 68; *Danish Import Restrictions on Grains*, GATT Doc. L/3436 (1970) at Appendix, case 67; *EEC – Associations with Tunisia and Morocco*, GATT Doc. C/M/62 (1970) at Appendix, case 66; *Greek Tariff Preferences*, GATT Doc. L/3384 (1970) at Appendix, case 65.

[20] The cases are discussed in detail in R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger, 1975) at 232-237. The United States won a significant victory in securing the removal of certain French QR's: see *French Import Restrictions*, GATT Doc. L/3744 (1972) at Appendix, case 72, and secured satisfactory improvements in several others: see *United Kingdom – Dollar Area Quotas*, 20th Supp. B.I.S.D. (1973) 230 at Appendix, case 73; *EEC – Compensatory Taxes*, GATT Doc. L/3715 (1972) at Appendix, case 68; *Danish Import Restrictions on Grains*, GATT Doc. L/3436 (1970) at Appendix, case 67.

Executive branch.[21] The main problem was the apparent ability of the EC to mount opposition to GATT adjudicatory procedures due to its wide network of preferential trade agreements with a substantial part of GATT's membership.[22] Strong resistance of developing countries, supported by their voting majority in the GATT, gave rise to similar concerns.[23]

The US Executive deficient strategy was a serious concern in the Congress that the Executive branch was not sufficiently protecting and litigating US trade agreements rights. This growing dissatisfaction led to increasingly stringent statutory directives especially through the Trade Act of 1974, the authorizing legislation for the Tokyo Round negotiations in which GATT institutional reform as a negotiating objective was listed.[24] GATT voting procedures were the foremost target at the time, but the Trade Act of 1974 also listed dispute settlement procedures as an object of reform. The presence of dispute settlement on the statutory list of US objectives ensured that the participants would deal with the subject.

In the meanwhile, the introduction by Congress of Section 301 in the Trade Act of 1974 guaranteed that the United States would continue invoking the existing dispute settlement procedures during the Tokyo Round. This provision required the President to "take all appropriate and feasible steps within his power," including trade retaliation, to obtain the removal of unfair trade measures imposed by foreign governments.[25] It also created a

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[21] See, *e.g.*, H.R. Rep. No. 571, 93d Cong., 1st Sess. 66-67 (1973): "Your commitee is particularly concerned that the decision-making process in the GATT is such as to make it impossible in practice for the United States to obtain a determination with respect to certain practices of our trading partners which appear to be clear violations of the GATT."

[22] US officials felt particularly frustrated by their inability to secure GATT considerations of several EEC association agreements involving the citrus trade. Although the United States eventually obtained an acceptable settlement, a series of efforts to secure formal GATT rulings on the EEC agreements resulted in impasse. See, *e.g.*, GATT Doc. SR. 28/2 (1972) at 19: "[US] delegation considered it a disservice to the GATT for the contracting parties to fail to deal adequately with so flagrant a violation of GATT rules."

[23] See, *e.g.*, the painfully drawn-out proceedings in *United Kingdom – Dollar Area Quotas*, 20th Supp. B.I.S.D. (1973) 230 at Appendix, case 73.

[24] 19 U.S.C.A. § 2131 (West 1980). The 1974 Act calls for "the revision of decisionmaking procedures [...] to more nearly reflectthe balance of economic interests," and "any revisions necessary to establish procedures [...] to adjudicate commercial disputes among [...] countries or instrumentalities." *Ibid.* at § 2121(a)(1), (9).

[25] *Ibid.* at § 2411. See generally J. Bhagwati, "Aggressive Unilateralism: An Overview" in J. Bhagwati & H.T. Patrick, eds., *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*

private complaints procedure that required an investigation by the Administration and a report to the Congress on the disposition of these complaints. In a number of cases, the pressures created by the Section 301 procedures forced the Administration to bring GATT legal actions.[26] The stream of US complaints during the Tokyo Round negotiations served as both a reminder of the various inadequacies of the system, and as a warning that the GATT dispute settlement procedures were likely to come under increasingly heavy pressure in the future.

However, while the filing of GATT complaints was a part of the Section 301 process, there was no requirement that the United States await the final results of GATT dispute resolution proceedings before taking unilateral action.[27] Thus, even if the first decade of experience with Section 301 showed that, in fact, the US Executive respected the outcome of GATT's dispute settlement processes, during the following decades Section 301 was used more and more as a unilateral trade weapon[28] against foreign governments and industries outside the legal framework of the GATT so that it upset many US trading partners[29] and finally became a major issue in the Uruguay Round.[30] Indeed, as it became

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(Ann Harbor: University of Michigan Press, 1990) 1 (discussing the history of Section 301 and US trade policy).

[26] See *Japan – Restraints on Imports of Leather* (*Complaint by the United States*) (1979), GATT Docs. L/4691 (1978), L/4789 (1979) at Appendix, case 87; *Japan – Measures on Imports of Thrown Silk Yarn* (*Complaint by the United States*) (1979), 25th Supp. B.I.S.D. (1978) 107 at Appendix, case 83; *EEC – Measures on Animal Feed Proteins* (*Complaint by the United States*) (1978), 25th Supp. B.I.S.D. (1979) 49 at Appendix, case 81; *EEC – Programme of Minimum Imports Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* (*Complaint by the United States*) (1978), 25th Supp. B.I.S.D. (1979) 68 at Appendix, case 79; *Canadian Import Quotas on Eggs* (*Complaint by the United States*) (1976), 23d Supp. B.I.S.D. (1977) 91 at Appendix, case 78.

[27] Indeed, Section 301 sanctions may be imposed even when the foreign action in question is not a breach of the GATT or any other international obligation. See J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Mass.: MIT Press, 1989) at 105-106 [hereinafter *World Trading System*].

[28] See A.O. Sykes, "Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301" (1991-92) 23 L. & Pol'y Int'l Bus. 263 at 318-30 [hereinafter "Limited Case for Section 301"]: Sykes has analysed nearly 90 Section 301 and related complaints brought between 1975 and 1991. See also W. Maruyama, "Section 301 and the Appearance of Unilateralism" (1990) 11 Mich. J. Int'l L. 394 at 397 (calling Section 301 the "Schwarzenegger of US Trade Law").

[29] See W.W. Leirer, "Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84" (1994) 20 N.C. J. Int'l & Com. Reg. 41 at 44-45 (noting that Europeans were especially upset because nearly one quarter of all Section 301 cases had been aimed at Europe) [hereinafter "Retaliatory Action in US and EU Trade Law"].

[30] See "A GATT With Teeth", *supra* note 13 at 130-31, 134-36; see also "Limited Case for Section 301", *supra* note 28 at 265; see "Transcript of Discussion Following Presentation by Kenneth W. Abbott" [1992] Colum. Bus. L. Rev. 151 at 154 (remarks of Professor Hudec, stating that "the pressure of Section 301" was

clear that Section 301 was a target for foreign trade negotiators, the US Congress let it be known that the weak GATT dispute resolution system made Section 301 a necessity and that no further revisions of Section 301 could be expected unless there were major changes in the dispute resolution process.[31]

C. THE LEGAL FACTOR

Finally, the most convincing explanation of the US legalistic approach to the GATT dispute resolution system has been put forward by Roessler as follows: "the view of the contracting parties towards GATT dispute settlement is a function of their attitude with respect to the substantive norms."[32] Indeed, the legal factor likely to explain the US attitude relates to the key role played by the United States in drafting the General Agreement. As Mora has noted, "[s]ince GATT norms were modeled to suit the needs of US trade policy, the desire of the US administration to enforce the rules through a judicial mechanism is perfectly understandable."[33]

II. THE EC ATTITUDE TOWARDS THE GATT DISPUTE SETTLEMENT SYSTEM: THE EUROPEAN COMMUNITY AS THE LEADING PROPONENT OF THE PRAGMATIST APPROACH

In contrast to the United States, the EC has only recently begun to play an active role in bringing complaints in GATT. Traditionally, it has defended the non-adjudicative character of GATT dispute settlement and the need to resolve disputes through diplomatic

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responsible for the "dramatic" changes in the WTO dispute resolution proposals and that "[w]hat you see in this dispute settlement response in an answer that GATT will do what Section 301 asks to be done").

[31] See R.E. Hudec, "Dispute Settlement" in J.J. Schott, ed., *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations* (Washington, D.C.: Institute for International Economics, 1990) (noting that "Congress is demanding a 'great leap forward' in GATT dispute settlement as the price for correcting Section 301"); see also "Limited Case for Section 301", *supra* note 28 at 267 (stating that the retaliation feature of Section 301 makes strategic sense in light of the "imperfections of dispute resolution under GATT"); see A.O. Sykes, " 'Mandatory Retaliation' for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301" (1990) 8 Boston U. Int'l L.J. 301 at 324.

[32] F. Roessler, "L'Attitude des États-Unis et de la CEE devant le Droit du GATT" in J. Bourrinet, ed., *Les Relations Communauté européenne-États-Unis* (Paris: Economica, 1987) 43 at 46 [hereinafter "Attitude EU-CEE"].

[33] "A GATT With Teeth", *supra* note 13 at 131.

techniques such as negotiation or conciliation.[34] As a consequence, the EC emphasised GATT's function as a framework for "pragmatic negotiations" and downplayed the legally binding force of GATT law. As Roessler put it, the EC's efforts "were generally limited to achieving the *de facto* toleration of its policies, usually by making it clear how pointless it would be to attempt to pursue legal claims to victory and by offering at the same time to discuss the practical consequences of its policies."[35]

As Petersmann has noted[36]:

> [t]ypical manifestations of this 'anti-legal pragmatism' were, for example:
>
> - the 1958 decision of the GATT CONTRACTING PARTIES, after futile debates on the legal consistency of the EC Treaty with GATT law and under pressure from the EC, "that it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with the General Agreement";[37]
>
> - a similar 'GATT pragmatism' in the examinations of the compatibility with Article XXIV of the EC's preferential trade arrangements with the Mediterranean countries and the less-developed member countries of the Yaundé and Lomé Conventions, whose compatibility with GATT law was each time left undecided in view of the diverging view of, on the one side, the EC Member States and their preferential trading partners, which account for the majority in the GATT Council, and, on the other side, adversely affected third GATT member countries;
>
> - the 'blocking' by the EC of GATT Panel findings against central elements of the EC's discriminatory agricultural and preferential trade policy – such as the GATT Panel findings against the EC's production aids on agricultural products[38], the EC's agricultural export subsidies[39], and the EC's non-reciprocal trade preferences[40], – and the negotiation of 'pragmatic' solutions to the trade policy aspects of these disputes;

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[34] See, *e.g.*, "Can GATT Resolve International Trade Disputes?" (1983) 77 Am. Soc'y Int'l L. Proc. 287 at 287-88 (remarks of Sir Roy Denman, Head of Delegation of the European Communities); see also "A GATT With Teeth", *supra* note 13 at 131.

[35] See "Attitude EU-CEE", *supra* note 32 at 49.

[36] E.-U. Petersmann, "The GATT Dispute Settlement System as an Instrument of the Foreign Trade Policy of the EC" in N. Emiliou & D. O'Keeffe, eds., *The European Union and World Trade Law* (Chichester, U.K.: John Wiley & Sons, 1996) 253 at 267-68.

[37] 7th Supp. B.I.S.D. (1958) 70.

[38] See *EEC – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes (Complaint by the United States)* (1985), GATT Doc. L/5778.

[39] See *EEC – Subsidies on Export of Pasta Products (Complaint by the United States)* (1983), GATT Doc. SCM/43.

[40] See *EC – Tariff Treatment on Imports of Citrus Products from Certain Mediterranean Countries (Complaint by the United States)* (1985), GATT Doc. L/5776.

- the strong opposition by the EC to the establishment of a Legal Office in the GATT Secretariat until 1983, when the EC agreed to its establishment on the condition that the Director of the GATT Legal Office be an experienced trade diplomat; and

- the EC's long-standing opposition to a 'legalistic' use of the GATT dispute settlement system because, as stated by the EC representative in a GATT Council meeting, the GATT dispute settlement procedure should not be expected to help resolve conflicts in which 'vital national interests' were at stake.[41]

In order to complete the attempted comparison between the different positions on GATT dispute settlement system traditionally adopted by the United States and the EC, some other explanations may be advanced.

A. THE CULTURAL FACTOR

First, in contrast to the US culture of litigation, the Europeans were rather used to seeking negotiated, power-based solutions to differences among European states, what led them to consider the GATT more as a diplomatic institution. Moreover, as one commentator has noted, the fact that the EC traditionally emphasized the need for conciliation and consensus in seeking a satisfactory solution to trade problems, is based on the view that "the rights and obligations of contracting parties under the General Agreement are the result of a delicate balance of economic interest reached after a process, often lengthy and difficult, of negotiation."[42] Therefore, "[t]his delicate balance between sovereign states [could] not appropriately be dealt with in a formalised legal framework."[43]

B. THE INSTITUTIONAL FACTOR

Second, the fact that the EC neglected to resort to the GATT dispute settlement system in the first decades of its existence could be explained by the efforts that the EC concentrated on its own construction and viability.[44] The passive role played by the EC within GATT in this period was also reinforced by the fact that the disputes concerning trade matters were now resolved by the Court of Justice of the EC.[45] In addition, as Mora

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[41] GATT Doc. C/M/198, 14.
[42] R. Phan van Phi, "A European View of the GATT" (1986) 14 Int'l Bus. Lawyer 150 at 151.
[43] *Ibid.*
[44] See "A GATT With Teeth", *supra* note 13 at 131-32.
[45] *Ibid.* at 132.

has noted, "the EC was not in a position to take a legalistic approach in relation to GATT, because the compatibility of the Treaty of Rome itself with the General Agreement had raised important legal concerns which were avoided due to pragmatic considerations."[46]

C. THE HISTORICAL FACTOR

Third, one must recall that at the time of the negotiations dealing with the provisions of the General Agreement, the EC did not exist yet. As a consequence, when the EC finally came into existence, "it had to take up the obligations which the member states had negotiated in a time when they could hardly foresee the details of a community common commercial policy."[47] Such a circumstance put the EC in the position where "its best interest was not to try to enforce substantive rules which were unsuited to its interest."[48] Moreover, the EC being a mere federation of States and not a federal State like the United States, trade policy decisions as well as the formulation of the EC foreign policy have to accommodate the different interests of all Member States such as defining a more rule-oriented EC position on GATT dispute settlement system would need unanimity or at least a broad majority in the EC Council.[49]

D. THE TRADE POLICY FACTOR

A fourth explanation advanced to explain the reluctance of the EC to bring complaints within GATT is related to its traditional restraint in using some trade policy instruments. Indeed, unlike the US which, for instance, has made extensive use of Section 301 since its adoption in 1974, the EC has scarcely used its counterpart - Council Regulation 2641/84 on the "Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices"[50] – adopted in 1984.[51]

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[46] *Ibid.*
[47] "Attitude EU-CEE", *supra* note 32 at 47.
[48] "A GATT With Teeth", *supra* note 13 at 132.
[49] See EC Treaty, arts. 113 *et seq.* See "A GATT With Teeth", *supra* note 13 at 132; see also M. Hilf, "EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures" in R. Rode, ed., *GATT and Conflict Management: A Transatlantic Strategy for a Stronger Regime* (Boulder: Westview Press, 1990) 63 at 66 [hereinafter "EC and GATT"].
[50] EC, *Council Regulation 2641/84 on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices* [1984] O.J. L. 252/1 [hereinafter NCPI].
[51] See "A GATT With Teeth", *supra* note 13 at 132-33.

E. THE STRATEGIC FACTOR

Finally, the emphasis laid by the EC on the case-by-case negotiation had the effect of minimizing its most vulnerable policy – rampant non-compliance due to the Common Agricultural Program (CAP) and other subsidy arrangements. This also made use of the EC's greatest strength – its considerable economic and political power.

III. THE EC CHANGING ATTITUDE TOWARDS THE GATT DISPUTE SETTLEMENT SYSTEM: THE EUROPEAN COMMUNITY AS AN ACTIVE SUPPORTER OF "JUDICIALIZATION" IN THE URUGUAY ROUND NEGOTIATIONS

The EC's position towards the GATT dispute settlement procedure has evolved since 1981 in such a way that the EC finally appeared, during the Uruguay Round negotiations, as an active supporter of "judicialising" the GATT dispute settlement system. Several reasons may be advanced in order to explain such a reversal.

A. AN INCREASING ACTIVISIM

First, the shift in EC's approach may directly arise from its increasing activism in GATT in the past few decades. Indeed, contrary to the period between 1958 and 1980 when the EC availed itself of the possibility of initiating Article XXIII GATT dispute settlement proceedings in only two cases,[52] as of 1982 the EC launched a large number of Article XXIII dispute settlement proceedings against trade measures of other GATT contracting parties which, in most cases, led to dispute settlement rulings in favour of the EC.[53] Hudec has suggested that "these legal activities have simply been a more vigorous form of defense against the more vigorous US litigation policies of the early 1980s."[54]

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[52] The 1973 complaint against the US tax legislation (DISC) led to the adoption of a Panel Report (*United States – Income Tax Legislation (Complaint by EEC)* (1981), 23d Supp. B.I.S.D. 98, 28th Supp. B.I.S.D. 114) which found that the DISC legislation had resulted in export subsidies inconsistent with Article XVI:4. The 1976 complaint against Canada gave rise to a Panel Report (*Canada – Withdrawal of Tariff Concessions (Complaint by EEC)* (1978), 25th Supp. B.I.S.D. 42) which found, *inter alia*, that the withdrawal by Canada of tariff concessions under Article XXVIII:3 had been excessive.

[53] See J.H. Jackson, *Restructuring the GATT System* (London: Royal Institute of International Affairs, 1990) at 49, 66 [hereinafter *Restructuring the GATT System*]; see also "A GATT With Teeth", *supra* note 13 at 134; E.-U. Petersmann, "International and European Foreign Trade Law: GATT Dispute Settlement Proceedings against the EEC" (1985) 22 C.M.L. Rev. 441 at 473; "Legal Issues in US-EC Trade Policy", *supra* note 18 at 46-51.

[54] *Ibid.* at 43-44.

However, as Mora has noted, the growing litigiousness of the EC was not only directed against the United States but also against such countries as Canada, Chile, Japan, Switzerland, or Finland such as "the growing litigiousness of the EC seems to lie in a more deep change of perception."[55] Instead, Hilf has pointed out that "the EC, particularly in recent years, has begun to accept DS arrangements, including binding arbitration[56] and in one exceptional case even judicial procedures before a permanent court."[57],[58]

B. A Strengthened GATT Dispute Settlement System in Response to Increasing Unilateral Actions

Second, the EC's reversal of attitude towards GATT dispute settlement system seems to coincide with "the general desire by all nations to stem the growing reliance on unilateral threats and trade sanctions and replace this free-for-all with a stable dispute resolution system that could be relied on to eliminate protectionist trade rules."[59] As Mora has noted, "it was said that the EC might consent to a more judicial dispute settlement system as a way to force the US to change its attitude towards unilateral measures."[60] Indeed, "[a] strengthened GATT regime for dispute settlement and an adequate solution of the problem of [intellectual property rights] protection will increase the pressure on the

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[55] "A GATT With Teeth", *supra* note 13 at 134. See also "Legal Issues in US-EC Trade Policy", *supra* note 18 at Annex.

[56] For references, see M. Hilf, "Europäische Gemeinschaften und internationale Streitbeitlegung" in R. Bernhardt *et al.*, eds., *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler* (Berlin, 1983) 387 at 402-12.

[57] *Ibid.* at 412-17. The EC and Switzerland have agreed, in principle, to establish a tribunal to interpret a projected agreement over the Laying-Up Fund for the Navigation on the Rhine ([1976] O.J. C. 208/3). The ECJ has ruled that this projected agreement is not in conformity with the EC Treaty: see E.C.J., *Opinion 1/76*, [1977] E.C.R. I-741 at I-762. The ECJ agreed with the idea of creating a specific court under the agreement, but it had reservations as to the particular structure of the court to be created.

[58] "EC and GATT", *supra* note 49 at 68. There are some forty international agreements, ranging from fisheries agreements to environmental protection, the latest example being the Law of the Sea Convention, "in which the EC has consented to arbitration and other forms of judicial settlement": *Ibid* at 68.

[59] "Trade Legalism", *supra* note 9 at 845. Referring further to Article 23 of the DSU, one of the most important innovations of the WTO legal system, Shell has stated that the plain language of this provision sets forth "a pledge by WTO members to refrain from unilateral action in the global trade arena": *ibid.* at 852. Drawing largely upon the plain language of Article 23, European officials have determined that "[the] GATT does not allow for [...] unilateral action by any one of the contracting parties aimed at inducing another contracting party to bring its trade policies in conformity with [the] GATT [...]. Accordingly, for the United States, this means that section 301 and its hybrids will have to undergo revision in order to ensure compliance with the new dispute settlement structure": 140 Cong. Rec. S15, 329 (daily ed. Dec. 1, 1994) (statement of Sen. Hollings, quoting from a European Commission document).

[60] "A GATT With Teeth", *supra* note 13 at 134.

United States to refrain from unilateral action such as 'super 301'[61] and to accept a multilateral dispute-settlement regime."[62] In other words, "[a] binding dispute settlement mechanism would deprive the US of the arguments traditionally made to defend the maintenance of Section 301. In addition, a tough dispute settlement procedure would help to appease the growing protectionism of the US".[63]

Actually, until now, for issues covered by the WTO, the US has generally refrained from unilateral action, with the notable exception of the bananas case. There, in order to comply with the time limits imposed by the Section 301 legislation, the US did not use the obligatory procedure provided by the DSU[64] to solve its disagreement with the EC over whether the new EC banana regime was in conformity with WTO rules. Instead, the US directly requested the WTO to authorise it to suspend concessions against the EC, in violation of normal WTO procedures. Then, even before the correct level of concessions had been determined, let alone WTO authorisation had been given to take any measures, the US, on 3 March 1999, commenced withholding liquidation on $520 million worth of EC imports, subjecting those imports to a conditional liability of 100 percent customs duties. As a result, imports from the EC in the products concerned stopped almost completely. It was only on 19 April 1999 that the US received WTO authorisation to suspend concessions, and then only for an amount of $191.4 million as determined by the

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[61] See *European Commission, Report on United States Barriers to Trade and Investment*, 1999, online: Europa <http://www.europa.eu.int/comm/dg01/usrbt99.pdf> (date accessed: 10 November 1999) at 9 *et seq.* (listing the three main provisions of which the US unilateral trade policy arsenal is composed): "The 'Section 301' family of legislation provides a striking example of unilateral trade legislation which has been used on numerous occasions against the EU. Section 301 of the 1974 Trade Act as amended by the Omnibus Trade and Competitiveness Act of 1988 authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce. [...] The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called 'Super 301' provision. 'Super 301' is the name given to a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. [...] Furthermore, the 1988 Omnibus Trade and Competitiveness Act introduced a 'Special 301' procedure targeting intellectual property rights protection outside the US."

[62] B. Zepter, "Prospects for the Uruguay Round: The Declaration of Punta del Este" in R. Rode, ed., *GATT and Conflict Management: A Transatlantic Strategy for a Stronger Regime* (Boulder: Westview Press, 1990) 103 at 115.

[63] "A GATT With Teeth", *supra* note 13 at 134-35.

[64] DSU, *supra* note 4.

Arbitrator Report issued on 6 April 1999.[65] The US persisted in its unilateral action, however, by making the suspension of concessions retroactively applicable to EC imports as of 3 March 1999, again in flagrant violation of WTO rules.

The reaction of the EC has been firm, but in full compliance with WTO rules. The EC has initiated two dispute settlement actions before the WTO, one against the specific US measures described above,[66] and one against Sections 301 to 310 of the 1974 Trade Act.[67] The reason for challenging the legislation itself is that this legislation mandates the United States Trade Representative to take this kind of unilateral action within time frames that in certain cases cannot possibly comply with WTO rules. This is true, in particular, for cases where the US should follow the procedure of Article 21.5 of the DSU to resolve disagreements over the WTO compatibility of measures taken by other members to implement panel rulings. The Section 301 legislation simply does not permit the US Trade Representative to follow this multilateral, obligatory route.

Finally, under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation. But world trade should not be solved through forced settlements based on a unilateral determination of unfairness, unilateral timetables, and the threat of unilateral trade action if no agreement is reached. Here is clearly expressed the main concern of the EC with regard to the objectives of the WTO dispute settlement system.

C. A Way to Ensure the EC Trade Interests

A third explanation advanced to explain the EC move towards a more legalistic approach to the GATT dispute settlement system is based on almost the same considerations as those described above. Thus, the sudden activism of the EC within the GATT as of the 1980s mostly arose from the discovery that the GATT dispute resolution machinery could

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[65] *EC – Regime for the Importation, Sale and Distribution of Bananas* (*Complaint by the United States*) (1999), WTO Doc. WT/DS27/ARB (Arbitrator Report).
[66] *United States – Measures on Certain Products from the European Communities* (*Complaint by EC*), WTO Doc. WT/DS165/1.
[67] *United States – Sections 301-310 of the Trade Act of 1974* (*Complaint by EC*), WTO Doc. WT/DS152/1.

be used to advance the EC trade interests. In this view, responding to aggressive use of the GATT dispute resolution system by the United States and others, the EC changed its litigation strategy within the GATT and filed a series of claims as a GATT plaintiff, acquiring a new appreciation for the plaintiff's perspective within the GATT system. The EC followed this move with a change in its bargaining position on dispute resolution, throwing its weight in favour of the proposal for a binding system, provided that the United States would curtail its use of Section 301 in trade disputes. With the Dunkel Draft's strong recommendations for strengthening the GATT dispute resolution system on the table,[68] the EC also realised that the traditional US legalist orientation would make it difficult for the United States to oppose these reforms and insist on maintaining its unilateral right to use Section 301.[69] As the EC had correctly anticipated, the United States found it impossible to credibly withdraw from its legalist position just because it found itself being a defendant in an increasing number of GATT cases. The most the United States could do was argue for reform of the existing closed nature of GATT panel proceedings[70] and insist on language prohibiting WTO dispute resolution tribunals from

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[68] *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 20 December 1991, GATT Doc. MTN.TNC/W/FA [hereinafter *Dunkel Draft Final Act*]. See T.P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Deventer: Kluwer, 1993) at 125-36 [hereinafter *GATT Negotiating History*]. The Dunkel Draft is so called because of Arthur Dunkel, the GATT Chaiman who issued this Draft Final Act to the Uruguay Round participants to serve as a focal point for final negotiations in an ultimate effort to move them to a conclusion. Based on proposals floated by the United States, the Negotiating Group on Dispute Resolution, Professor John H. Jackson (see *Restructuring the GATT System*, *supra* note 53), and others, the Dunkel Draft contained a series of recommendations addressing nearly all the negotiating group. Regarding more particularly dispute settlement, the Dunkel Draft contained two draft agreements: (1) "Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade" (*Dunkel Draft Final Act* at S.1-S.23 [hereinafter *Dunkel Draft Understanding*]) and (2) "Elements of an Integrated Dispute Settlement System" (*Dunkel Draft Final Act* at T.1-T.6). The recommendations contained in these two draft agreements turned the old GATT voting system on its head by making all decisions of dispute resolution panels binding unless the GATT Council voted unanimously to overrule them (*Dunkel Draft Understanding* at 14.4). Such a rule effectively meant that all GATT dispute resolution panels would be binding, because winning plaintiffs would have to vote to overturn their own victories. To add a measure of assurance that these binding decisions would be carefully considered and consistent, the Negotiating Group also recommended the establishment of a permanent trade court to hear appeals from dispute resolution panel decisions.

[69] See G. Patterson & E. Patterson, "The Road from GATT to MTO" (1994) 3 Minn. J. Global T. 35 at 53 (commenting, based on information from US trade negotiators, that Europe's support for the WTO was "based on its belief that the [W]TO would do away with section 301").

[70] The United States were not successul in opening up the GATT dispute resolution process to public scrutiny, but the US Trade Representative has testified in Congress that he is continuing to press in this area. See "Hearings on General Agreement on Tariffs and Trade (GATT) Before the Senate Committee on Commerce, Science and Transportation" *Federal News Service* (16 June 1994), online: LEXIS (Legis, Fednew) (testimony of US Trade Representative Michael Kantor, stating that one of the major issues for the

adding to or diminishing the substantive rights of signatory states.[71] In other words, the United States, in order to protect its unrestricted use of Section 301, would argue that any panel or appellate decision constraining the use of Section 301 diminishes the substantive

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United States *vis-à-vis* the GATT dispute resolution system "is the lack of transparency in GATT panel proceedings, the failure to make briefs public, the not allowing these proceedings to be held in public, not allowing non-governmental organizations to participate under proper circumstances" and noting that "[w]e're trying to change that [and] have been very aggressive in pursuing that").

[71] See "Trade Legalism", *supra* note 9 at 852-3. This last argument advanced by the United States contends that any WTO restriction upon Section 301 "add[s] to or diminish[es] the rights and obligations" of the United States in violation of Articles 3 and 19 of the DSU: Article 3(2) of the DSU states: "The dispute settlement system of the WTO is a central element in providing security and predicatability to the multilateral trading system. The Members [of the WTO] recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of intepretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*": DSU, art. 3(2), *supra* note 4 at 1227 [emphasis added]; Article 19(2) further states that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement": DSU, art. 19(2), *ibid.* at 1237. As a consequence, under these provisions, neither the Dispute Settlement Body functioning as an institution, nor the panel or the Appellate Body, may alter the substantive rights and obligations of the parties: see J.R. Silverman, "Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO" (1996) 17:1 U. Pa. J. Int'l Econ. L. 233 at 278-9, note 212 and accompanying text [hereinafter "Adjudicating Section 301"] (observing that the ambiguity inherent in the "add to or diminish" clause leads to a range of statutory interpretations for which the Appellate Body will have to provide future guidance. First, a literal interpretation concludes that since the clause reads "add to or diminish the rights *and* obligations", the WTO may require the alteration of *both* a right *and* an obligation. Following the literal interpretation, the United States, in order to obtain the protection of Artice 19 of the DSU, would have to argue that any added or diminished US obligation accompanies a commensurately added or diminished US right. For example, the United States would argue that a restriction on the right to use Section 301 diminishes its right to use domestic trade laws and increases its obligation to bring all disputes before the WTO. Second, a looser construction and an easier argument to make could interpet "rights *and* obligations" as rights *or* obligations, thus requiring the United States only to show that a WTO action either adds to or diminishes any US right or obligation. Under this construction, the United States only would have to demonstrate a restriction on domestic trade rights without addressing a commensurately added or diminished obligation or *vice versa*. A third construction ties the rights and obligations in question to those "provided in the covered agreements." Thus, the United States, in order to assert the defense, would have to point to a specific right or obligation in the covered agreement that either is added to or diminished. Such a construction surely will send a defendant scouring through every covered agreement for the golden right or obligation that is added to or diminished by any WTO action.). Article 9 of the Final Act directs the WTO signatories to act by consensus if a WTO action substantively alters the rights and obligations of signatories: Final Act, art. 9(1), *supra* note 3 at 1148 ("The WTO shall continue the practice of decision [...] making by consensus followed under GATT 1947."); see also *Message from the President of the United States Transmitting The Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 1 (1994) at 659 (stating that "there can be no change in US substantive rights and obligations without the agreement of the United States"). Thus, if a panel or Appellate Body decision adds to or diminishes the rights or obligations of a signatory, the affected signatory first must approve such an alteration before the ruling can acquire the force of law: see "Adjudicating Section 301", *ibid.* at 279, note 214 (noting that if the substantive alteration in rights or obligations is profound, such as the prohibition on the use of a domestic legal tool like Section 301, it is unlikely that there would be a consensus, as the affected nation is unlikely to repeal voluntarily a national law and in the process sacrifice its sovereignty.).

rights of the United States in an unacceptable manner by foreclosing access to legitimately adopted domestic trade laws. In joining the WTO, the United States could not possibly have granted the WTO an ability to dictate the scope of its domestic trade laws. However, in response to this defense, it could be argued that the "add to or diminish" clause is limited, solely designed to address systematic, repeated instances where a panel or appellate decision either imposes additional obligations or diminishes rights of a substantive nature.

D. THE EC UNILATERAL TRADE WEAPON

A fourth contribution to the changing attitude of the EC *vis-à-vis* the GATT dispute settlement system took the form of the Council Regulation 2641/84,[72] which was adopted essentially in response to Section 301 of the US Trade Act of 1974. Indeed, in the early 1980s it was becoming obvious that the EC needed to strengthen its commercial policy arsenal. The existing antidumping, countervailing duty and escape-clause measures, that were based on the GATT rules, were not sufficient to protect the Community's interests and ensure the exercise of its rights.[73] The reason was that these measures deal only with imports and specific import practices and cases and thus are limited in their scope (*e.g.*, they do not directly open foreign markets for European exporters). Subsequently, in 1984, having been inspired by the US instrument of Section 301 of the Trade Act of 1974, the EC adopted Regulation 2641/84, also known as the New Commercial Policy Instrument,[74] in order to "defend vigorously the legitimate interests of the Community in the appropriate bodies."[75] However, the NCPI of 1984 has not been invoked very often.[76]

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[72] NCPI, *supra* note 50.

[73] See F. Schoneveld, "The European Community Reaction to the 'Illicit' Commercial Practices of Other Countries" (1992) 26:2 J. World T. 2 at 17.

[74] Hereinafter NCPI.

[75] NCPI, *supra* note 50 at Preamble.

[76] In spite of the very scarce use of the NCPI during the ten years since it was enacted, the experience has not been all negative. Retaliation has not been necessary in order to reach the desired results. In one of the cases, the EC obtained a favourable GATT decision: see C.de la Torre, "The EEC New Instrument of Trade Policy: Some Comments in the Light of the Latest Developments" (1993) 30 C.M.L. Rev. 687 at 689 [hereinafter "The EEC New Instrument of Trade Policy"]. In December 1985, Akzo N.V., a Dutch chemical company, lodged a complaint under the NCPI against the United States, in response to an import ban issued by the International Trade Commission (ITC) with respect to Akzo's aramid fibre, in application of Section 337 of the US Tariff Act of 1930. The procedures which the ITC had followed under this section were, according to Akzo, different from the procedures governing patent litigation in federal court, and constituted a denial of national treatment. After a thorough investigation, the Commission took up the claim

Even if until 1993 EC producers launched only six complaints – what is not very much and hardly indicates the actual number of "illicit practices" that Community companies have encountered in the world –, the NCPI has been found, however, to be quite useful for creating pressure to be put on third countries as well as a means of promoting recourse to the GATT dispute settlement procedures for settling international trade disputes. Overall, judging by the results (*i.e.*, whether the contested practice has ceased to exist), it has also been fairly effective. In addition, the fact that four of the complaints related to intellectual property rights[77] suggests that, under the new dispute settlement system of the WTO and the Agreement on Trade-Related Intellectual Property Rights (TRIPs), the NCPI might in future trigger many more invocations of the GATT/WTO dispute settlement procedures by the EC. Actually, it must be noted that on 22 December 1994, the Council adopted the revisions to the NCPI in order to improve its effectiveness and

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in the GATT dispute settlement system, and the GATT panel reported in favour of the Community: see EC, *Notice of Initiation*, [1986] O.J. C. 25/2; EC, *Commission Decision on the Initiation of an International Consultation and Dispute Settlement Procedure*, [1987] O.J. L. 117/18; *United States - Section 337 of the Tariff Act of 1930 (Complaint by EEC)* (1989), 36th Supp. B.I.S.D. (1988-89) 345. Actually, the Panel Report never led to any action by the United States. The private parties to the case, Akzo of the Netherlands and Du Pont de Nemours & Co. of the United States, had already settled their dispute in May 1988. In two other cases, in which the examination procedure was initiated, the Commission suspended and ultimately terminated the procedure after the foreign country concerned agreed to abandon the disputed practice: see "The EEC New Instrument of Trade Policy", *ibid.* at 690. In March 1987, the International Federation of Phonogram Industries (IFPI), in this case representing the Community's record producers, filed a complaint against Indonesia. The complaint alleged that Indonesia failed to provide adequate protection to Community's record producers. The dispute was eventually settled by an arrangement: EC, *Unauthorized Reproduction of Sound Recordings in Indonesia, Notice of Initiation*, [1987] O.J. C. 136/3; EC, *Decision of Suspension*, [1987] O.J. L. 335/22; EC, *Decision to Terminate the Procedure*, [1988] O.J. L. 123/51. The other procedure concerned the charge or fee introduced in November 1989 by the Japanese Harbour Transport Association (JHTA), and whose revenue was used for the creation of a so-called Harbour Management Fund, for the intended purpose of ensuring a stable and regular supply of dock labour and of updating and modernizing a Japanese import distribution system. The charge was imposed on all cargoes moving through Japanese ports, although the fee had a lower level for coastal cabotage traders. The EC Shipowners Association lodged a complaint under the New Instrument. The Commission has suspended the procedure after a formal commitment of the Fund not to renew the system after March 1992: EC, *Notice of Initiation*, [1991] O.J. C. 40/18; EC, *Commission Decision 92/169*, [1992] O.J. L. 74/47. Finally, in another case, the allegedly unfair practice was discontinued even before the initiation of the procedure, after the Community industry representatives notified that they were considering lodging a complaint. In this case indeed, soon after the NCPI's adoption in 1984, the Community producers of Scotch Whisky let it be known that they were considering filing petition against Bulgaria, for permitting the sale and export of a local liquor under the designation "Scotch Whisky". The Bulgarian authorities reportedly intervened, and the controversial sales designation was dropped.

[77] See, for a complete survey of EC complaints and actions under the NCPI, "The EEC New Instrument of Trade Policy", *supra* note 76 at 689-90.

adapt it to the new WTO.[78] On a political level, this new Trade Barriers Regulation[79] shows the willingness of the EC to implement the Marrakech Agreements and their integrated system for dispute settlement. On a practical level, after an initial 18 month period during which the new TBR was not used by trading parties, the new mechanism became operational, thus giving the EC Commission the opportunity to launch ten or so enquiries into the various trade barriers to which European industry has drawn attention.[80] The mechanism is however likely to be difficult to use in the future in view of competence sharing between the EC and its Member States in the WTO. In fact, in as far as the TBR is established solely on Article 113 of the EC Treaty, it may be disputed as to whether it can be applied in cases of breach of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which affect trade other than cross-border services and imitation goods.

The EC's changing attitude in favour of a more "rule-oriented" GATT policy and active use of the GATT dispute settlement system, especially since the beginning of the Uruguay Round negotiations in which the EC assumed a key role in strengthening international and European foreign trade law, can be seen as a turning point in the foreign trade policy of the EC with regard to the new WTO dispute settlement system as it will be demonstrated in the following parts of this study.

[78] EC, *Council Regulation 3286/94 of 22 December 1994 Laying down Community Procedures in the Field of the Common Commercial Policy in Order to Ensure the Exercise of the Community's Rights under International Trade Rules, in Particular Those Established Under the Auspices of the World Trade Organization*, [1994] O.J. L. 349/71 [hereinafter TBR].
[79] Hereinafter TBR.
[80] See, *e.g.*, the TBR procedure on the US Antidumping Act of 1916: *Agence Europe* 7210 (29 April 1998) 6.

PART I

THE EUROPEAN COMMUNITY, ONE OF THE MOST ACTIVE PARTICIPANTS IN THE DEVELOPMENT OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM

CHAPTER I

IMPLEMENTATION OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM BY THE EUROPEAN COMMUNITY

On the eve of the conclusion of the Uruguay Round negotiations, the GATT dispute settlement system was almost neglected due to a significant decline in the use of the GATT dispute settlement procedures in general. This reduction in complaints just before the agreement setting up the WTO came into force can largely be explained by the fact that the contracting parties preferred to wait "until 1 January 1995 in order to fall under the new rules and in particular, to benefit from the system of automatic adoption of reports."[81] As from its first year of existence, the WTO dispute settlement system has indeed benefited from a renewal of interest of the contracting parties, what has led to a continuous increase of the number of complaints lodged before the WTO from 1995 until today. For its part, the European Community is currently participating in a number of consultations and panel proceedings under the WTO, to the extent that it appears today as one of the main users of the new WTO dispute settlement system.

[81] G. Burdeau, "Aspects Juridiques de la Mise en Œuvre des Accords de Marrakech" in *La Réorganisation Mondiale des Échanges (Problèmes Juridiques)* (Paris: Pedone, 1996) 203, esp. at 238.

I. THE EUROPEAN COMMUNITY, ONE OF THE MAIN USERS OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM: OVERVIEW OF THE CURRENT WTO DISPUTES INVOLVING THE EUROPEAN COMMUNITY

Amongst the numerous disputes in which the European Community is currently involved, it is possible to distinguish those which arose under the former GATT 1947 and which have today been extended to the WTO from the really new cases. However, the following developments do not aim at providing an exhaustive survey of the current disputes in which the EC is involved, but they will rather focus on certain significant examples of such disputes in an attempt to show the key role played by the EC within the new WTO dispute settlement system.[82]

A. PRE-WTO DISPUTES TODAY 'REACTIVATED'

Cases concerning alcoholic beverages, bananas and hormones, are cases that have been 'reactivated' under the WTO and which have taken on a special importance because of what is at stake here, both on a legal and commercial level.

1. The Alcoholic Beverage Case

Despite the adoption in 1987 of a Panel Report condemning Japan's levying of taxes on alcoholic beverages[83] and the EC's repeated requests that Japan implement the recommendations that had been made, the EC Commission continued to claim that the Japanese liquor tax system still discriminated against spirits exported to Japan: tax levied on foreign liquor was six times higher than tax on domestic liquor. This is why in June 1995, along with Canada and the United States, the EC officially requested consultations with Japan, and subsequently the establishment of a joint panel for these three complaints in September 1995. The Panel Report, which was circulated to Members on 11 July 1996, found the Japanese tax system to be inconsistent with GATT Article III:2. Following the filing of an appeal by Japan on 8 August 1996, the Appellate Body Report, which was

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[82] For further details on the current disputes in which the EC is involved, see *Overview of the State-of-play of WTO Disputes*, online: World Trade Organization <http://www.wto.org/wto/dispute/bulletin.htm> (last modified: 9 November 1999).

[83] *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (Complaint by EEC)* (1987), 34th Supp. B.I.S.D. (1987) 83.

circulated to Members on 4 October 1996, affirmed the Panel's conclusion that the Japanese Liquor Tax Law was inconsistent with GATT Article III:2, but pointed out several areas where the Panel had erred in its legal reasoning. The Appellate Report, together with the Panel Report as modified by the Appellate Report, was adopted on 1 November 1996.[84] On 24 December 1996, the US, pursuant to Article 21.3(c) of the DSU applied for binding arbitration to determine the reasonable period of time for implementation by Japan of the recommendations of the Appellate Body. The Arbitrator Report, which was circulated to Members on 14 February 1997, found the reasonable period for implementation of the recommendations to be 15 months from the date of adoption of the reports, *i.e.*, it expired on 1 February 1998.[85] Japan presented modalities for implementation which were accepted, after intense negotiations, by the complainants before the end of the period of implementation as established by the Arbitrator.

Besides this case which was finally won by the EC, it is the EC itself that has been attacked and reprimanded for its policy on banana imports and for its health policy with regard to hormone treated meat.

2. The Bananas Case

The EC's policy on banana imports, which was already controversial under the former GATT 1947, continued to be disputed in the new WTO. In September 1995, Guatemala, Honduras, Mexico and the United States had requested consultations with the EC on this issue. After Ecuador's accession to the WTO, the current complainants again requested consultations with the EC in February 1996, alleging that the EC's regime for importation, sale and distribution of bananas was inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS. The complainants finally requested the establishment of a panel in May 1996. The Panel Report, which was circulated to Members on 22 May 1997, found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, were inconsistent

[84] *Japan – Taxes on Alcoholic Beverages (Complaint by the EC, Canada and the United States)* (1996), WTO Doc. WT/DS8,10,11/AB/R (Appellate Body Report).

with GATT. It further found that the Lomé waiver waived the inconsistency with GATT Article XIII, but not inconsistencies arising from the licensing system.

This 'condemnation' of the system organizing the banana market in the EC was the first reprimand of the EC under the new WTO dispute settlement system. In june 1997, it resulted in EC's lodging an appeal against the Panel Report, with regard to the economic and also the social interests of the African, Caribbean and Pacific countries (ACP countries) involved in this case. However, the Appellate Report, which was circulated to Members on 9 September 1997, mostly upheld the Panel's findings, but reversed the Panel's findings that the inconsistency with GATT Article XIII was waived by the Lomé waiver, and that certain aspects of the licensing regime violated Article X of GATT and the Import Licensing Agreement. The Appellate Report and the Panel Report, as modified by the Appellate Body, were adopted by the DSB on 25 September 1997.[86] Following a request of the complainants for the reasonable period of time for implementation of the recommendations and rulings to be determined by binding arbitration pursuant to Article 21.3(c) of the DSU, the period for implementation was set by the Arbitrator Report at 15 months and one week from the date of the adoption of the reports, *i.e.*, it expired on 1 January 1999.[87]

However, the manner in which the EC modified its banana regime with regard to the 'guilty' verdict pronounced against it, was considered by the complaining parties as not permitting this dispute to conclude at the time prescribed by the Arbitrator on the basis of a solution that is acceptable to their governments. As a result, jointly and severally, they requested on 20 January 1999 consultations with the EC concerning the EC banana regime as established by EC Regulation 404/93, as amended and implemented by Council Regulation 1637/98 of 20 July 1998 and Commission Regulation 2362/98 of 28 October

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[85] *Japan – Taxes on Alcoholic Beverages* (*Complaint by the EC, Canada and the United States*) (1997), WTO Doc. WT/DS8,10,11/ARB (Arbitrator Report).

[86] *EC – Regime for the Importation, Sale and Distribution of Bananas* (*Complaints by Ecuador et al.*) (1997), WTO Doc. WT/DS27/AB/R (Appellate Body Report) [hereinafter *EC – Bananas* (Appellate Body Report)].

[87] *EC – Regime for the Importation, Sale and Distribution of Bananas* (*Complaints by Ecuador et al.*) (1997), WTO Doc. WT/DS27/ARB (Arbitrator Report).

1998.[88] The complainants contended that their objective is to clarify and discuss in detail with the EC the various aspects of the EC's modified banana regime, including their effect on the market, their concerns about their WTO-consistency, and ways that the EC might modify its regime in order to produce a satisfactory settlement of this dispute.

In addition, the United States were authorized on 19 April 1999 to suspend concessions to the EC up to a level equivalent to that of nullification and impairment suffered as a result of the EC's new banana regime not being fully compatible with the WTO, *i.e.*, $191.4 million as determined by the Arbitrator Report issued on 6 April 1999.[89]

Thus, the settlement of the banana dispute is still far from reaching an acceptable end for all the involved parties. According to a recent Communication to the Commission, "[t]he extensive contacts have shown that there continues to be wide divergence not only as to what solution would best suit the interests of the various parties, but also as to which solutions would be compatible with WTO rules, in spite of the successive interpretations of these rules by WTO panels and the Appellate Body."[90]

3. The Hormones Case

The case concerning the introduction of hormones to meat and meat products had already given rise to a wrestling match in commercial and scientific fields between the EC and the United States at the end of the 1980s. The issue reemerged in the framework of the new WTO.

For several years, the US had been demanding the cancellation of an EC Directive, in force since 1 January 1989, banning the sale and import of hormone treated meat.[91]

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[88] *EC – Regime for the Importation, Sale and Distribution of Bananas EC – Regime for the Importation, Sale and Distribution of Bananas II* (*Complaints by Guatemala et alii*), WTO Doc. WT/DS158/1.

[89] *EC – Regime for the Importation, Sale and Distribution of Bananas* (*Complaints by the United States*) (1999), WTO Doc. WT/DS27/ARB (Arbitrator Report).

[90] *Communication to the Commission: Settlement of the banana dispute*, Brussels, 13 September 1999, online: Europa <http://europa.eu.int/comm/dg01/1309bana.htm> (date accessed: 5 October 1999).

[91] EC, *Council Directive 88/146*, [1988] O.J. L. 70/16, extending the prohibition imposed by *Council Directive 81/602 Prohibiting the Administering to Animals of Substances Having a Hormonal or Thyrostatic Action*, [1981] O.J. L. 222/32. The *Council Directive 96/22 Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action*, [1996] O.J. L. 125/3, has replaced these two directives. For further details on the legal background of the *Hormones* Case, see M.M. Slotboom, "The

Confronted with US claims that these EC provisions were in fact protective measures, the EC authorities maintained that the directive did in fact respond to real public health concerns. After unproductive consultations on this issue held with the EC at the beginning of 1996, the United States succeeded in having a panel established on 20 May 1996. The Panel Report, which was circulated to Members on 18 August 1997, condemned the EC ban on hormone treated meat on the grounds that it was inconsistent with several provisions of the SPS Agreement.[92] Generally, the Panel's standpoint was based on the conclusion that the evidence of health risks presented by hormone treated meat was not convincing.

Here again, the EC appealed for this case to be reassessed before the Appellate Body with regard to certain issues of law and legal interpretations developped by the Panel. The Appellate Body upheld the main part of the Panel's findings. The Appellate Body Report and the Panel Report, as modified by the Appellate Body, were adopted on 13 February 1998.[93] The period of implementation was set by arbitration at 15 months from this date, *i.e.*, it expired on 13 May 1999.[94] However, on 28 April 1999, the EC informed the DSB that it would consider offering compensation, essentially in the form of reductions on import duties, in view of the likelihood that it may not be able to comply with the recommendations and rulings by the prescribed deadline. As a result, the United States and Canada were authorized on 26 July 1999 to suspend concessions to the EC in the respective amounts determined by the arbitrators as being equivalent to the level of nullification suffered by them.[95]

Hormones Case: An Increased Risk of Illegality of Sanitary and Phytosanitary Measures" (1999) 36 C.M.L. Rev. 471 at 472-75.

[92] *Agreement on the Application of Sanitary and Phytosanitary Measures*, GATT Doc. MTN/FA II-A1A-4.

[93] *EC – Measures Affecting Meat and Meat Products (Hormones)* (*Complaints by the United States and Canada*) (1998), WTO Doc. WT/DS26,48/AB/R (Appellate Body Report) [hereinafter *EC – Hormones* (Appellate Body Report)].

[94] *EC – Measures Affecting Meat and Meat Products (Hormones)* (*Complaints by the United States and Canada*) (1998), WTO Doc. WT/DS26,48/ARB (Arbitrator Report).

[95] *EC – Measures Affecting Meat and Meat Products (Hormones)* (*Complaints by the United States and Canada*) (1999), WTO Doc. WT/DS26,48/ARB (Arbitrator Report).

B. NEW WTO DISPUTES

Over and above these major disputes, several new cases involving the EC have arisen under the WTO since 1 January 1995. Amongst them, it is worth mentioning the dispute concerning the US Helms-Burton and d'Amato-Kenedy Acts which is certainly the most interesting from a legal point of view.

The signing into law of the Cuban Liberty and Democratic Solidarity (Libertad) Act,[96] better known as the Helms-Burton Act,[97] by President Clinton on 12 March 1996 was considered as being a direct consequence of the shooting incident which took place one month earlier over the Florida Straits.[98] The Iran and Lybia Sanctions Act,[99] also known as the d'Amato-Kennedy Act, signed into law on 5 August 1996 pursues a declared goal of a political nature really similar to that pursued by the Helms-Burton Act. Indeed, the Helms-Burton Act aims at imposing an international embargo on Cuba by cutting off its international contacts in order to encourage the advent of a democratic regime while the goal of the d'Amato-Kennedy Act is to deprive Iran and Lybia from the money necessary to finance the international terrorism as well as the development of their arms industry. Thus, such measures are in the same line as most of the unilateral economic sanctions used by the United States in the last few years. Usually, the US "economic sanctions are applied over a long period against a country in the hope that depriving its people of basic needs will result in increased pressure on their governement to either relinquish power or comply wih US demands."[100]

The major problem with the Helms-Burton Act is not that it continues to expand upon a general US policy approach towards Cuba that is regarded as outdated in many policy

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[96] *Cuban Liberty and Democratic Solidarity (Libertad) Act*, 22 U.S.C.A. 6021(28) (1996) [hereinafter Helms-Burton Act]. This is the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620(a) of the Foreign Assistance Act of 1961, further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992).

[97] The principal sponsors of the Helms-Burton Act were Senator Jesse Helms and Congressman Dan Burton.

[98] For further details on the tragedy over Florida Straits, see K.W. Alexander, "The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception" (1997) 11 Fla. J. Int'l L. 559 at 562-63 [hereinafter "Helms-Burton Act and WTO Challenge"].

[99] *Iran and Lybia Sanctions Act*, 50 U.S.C.A. 1701 (1996) [hereinafter ILSA].

[100] "Helms-Burton Act and WTO Challenge", *supra* note 98 at 560.

circles,[101] but that it has led to increased tension between the United States and its European and NAFTA trading partners. Indeed, the EC reaction against the Helms-Burton Act was immediate, objecting to its provisions as an improper extraterritorial assertion of US law in breach of international law principles.[102] As a domestic countermeasure, the EC Commission enacted on 22 November 1996 Regulation 2271/96, prohibiting nationals or business entities of the EC from complying with the Helms-Burton Act.[103] The Regulation also authorizes EC nationals or companies that have suffered damages resulting from US sanctions to countersue the responsible US party in any Member State of the EC.[104] With regard to ILSA, the EC Regulation has been extended to cover EC nationals and companies who are penalized by the United States for engaging in business activities with Iran or Lybia.

In addition to taking domestic countermeasures, the EC filed a complaint against the United States with the WTO shortly after the Helms-Burton Act's enactment, *i.e.* on 3 May 1996, requesting a panel to determine whether the Act is consistent with US treaty obligations under the WTO Agreements.[105] Following this request, the WTO established on 20 February 1997 a three-judge panel to hear the EC complaint and determine whether the Helms-Burton Act was in violation with WTO law.[106] But the EC suspended this action in order to give President Clinton more time to consult with Congress about the possibility of suspending US action under the Act.

On 11 April 1997, an Understanding was reached with the US concerning the Helms-Burton Act, the ILSA and the EC's WTO case regarding the former. The Understanding

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[101] See *ibid.* at 562-63.
[102] See P.K. Chudzicki, "Comment: The European Union's Response to the Libertad Act and the Iran-Lybia Act: Extraterritoriality Without Boundaries" (1997) 28 Loy. U. Chi. L.J. 505 at 505-6 [hereinafter "EU's Response"].
[103] EC, *Council Regulation 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country*, [1996] O.J. L. 309/1 [hereinafter *Council Regulation 2271/96*]. See J. Huber, "The Helms-Burton Blocking Statute of the European Union" (1997) 20 Fordham Int'l L.J. 699 (analysing the EC blocking statute).
[104] *Council Regulation 2271/96*, art. 6, *ibid.* at 2-3.
[105] See "EU's Response", *supra* note 102 at 538. It must be noted that the complaint before the WTO panel aims at the Helms-Burton Act concerning Cuba, but the EC has not shown any intent to file a WTO complaint against the d'Amato-Kennedy Act whereas both Acts are simultaneously aimed at by the 'Blocking Statute'.
[106] WTO Doc. WT/DS38.

charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. As regards ILSA, the Understanding stipulated that "the US will continue to work with the EU toward the objectives of meeting the terms" under the legislation which would permit the US President to waive the application of sanctions for EC Member States and companies. The EC agreed to suspend its WTO case, but reserved the right to restart or to re-establish the panel if action is taken against EC companies or individuals under the Helms-Burton Act or ILSA, or waivers as described in the Understanding were not granted, or were withdrawn.

On 18 May 1998, at a Summit in London, the EC and the US reached an agreement on a package of measures to resolve a dispute regarding the Helms-Burton Act and ILSA. The Summit deal offers the real prospect for a permanent solution - but still depends on acceptance by the US Congressional before full implementation may take place. The three main elements of the Summit deal are:

- first, an agreement on disciplines for investments into illegally expropriated property;
- second, a US commitment to self-restraint on future extraterritorial legislation expressed in an agreement on Transatlantic Partnership on Political Co-operation;
- third, an assurance for waivers for the EC and for EC companies under both Acts.

The agreement reached at the Summit in no way softens the EC's position that the Helms-Burton and ILSA Acts are contrary to international law. At no point in time did the EC acknowledge the legitimacy of these Acts. The EC has fully reserved its right to resume the WTO case against the Helms-Burton Act in the event of action being taken against EC persons or companies under either this Act or ILSA or the waivers would not materialise. The agreements are of a political nature and do not in any way lend any sort of validity to the illegal provisions of the US laws in question.

Full implementation depends on Congressional support, which the Administration has undertaken to do all it can to deliver. But the EC and its Member States can only fulfil the

European side of the deal once the presidential waiver authority under Title IV of the Helms-Burton Act has been adopted and exercised.

On this point, Sir Leon Brittan has stated:

> I welcome the agreements and the constructive, intensive efforts of the United States Administration to reach them. The European Union stands ready to implement these agreements, including the disciplines on future investment in property which has been illegally expropriated, when Congress authorises the President to grant a waiver to the European Union under Title IV of the Helms-Burton Act, and when that waiver is granted.
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> Yet I am sad that so much of the effort of those of us whose responsibility and ambition is to promote EU/US relations, has been diverted in the last two years into solving this totally unnecessary problem. Legislation of this sort is clearly counter-productive. What on earth is the point, when you are trying to deal with a country like Iran or Libya or Burma, of passing a law which creates a confrontation with precisely those partners who are your closest allies in dealing with countries of that sort, even if they do not always agree 100 per cent with your policy prescription?

WTO disputes involving the EC do not however only include struggles with the United States. For instance, following a complaint filed by the EC against Argentina in respect of provisional and definitive safeguard measures imposed by Argentina on imports of footwear, a Panel was established in July 1998 and found that Argentina's measure was inconsistent with certain provisions of the Agreement on Safeguards.[107] As a consequence, Argentina notified on 15 September 1999 its intention to appeal certain issues of law and legal interpretations developped by the Panel. A Panel is currently active with regard to a complaint filed by the EC against certain measures taken by Argentina on the export of bovine hides and the import of finished leather.[108] With regard to a complaint filed by the EC against Chile's internal tax regime for alcoholic beverages, the Panel, established on 25 March 1998, found it to be inconsistent with GATT 1994.[109] On 13 September 1999, Chile notified its intention to appeal certain issues of law and legal interpretations developped by the Panel. These cases are only a few examples of the

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[107] *Argentina – Safeguard Measures on Import of Footwear (Complaint by theEC)* (1999), WTO Doc. WT/DS121/R (Panel Report).
[108] WTO Doc. WT/DS155.
[109] *Chile – Taxes on Alcoholic Beverages (Complaints by the EC and the United States)* (1999), WTO Doc. WT/DS87,109,110/R (Panel Report).

current involvement of the EC in the WTO dispute settlement procedure which is continuously increasing day after day.

II. The ECJ Opinion 1/94: A Duty for the Member States and the EC Institutions to Cooperate with Each Other in the Area of WTO Disputes

Although, as seen above, the EC has already participated in a large number of proceedings within the WTO dispute settlement system, there has not really been an opportunity until now to test the efficiency of the internal sharing of competencies between the EC and its Member States – as established by the Court of Justice in its *Opinion 1/94*[110] – in the area of WTO disputes. This issue does however raise certain questions with regard to its concrete implementation.

Prior to dissecting *Opinion 1/94* of the ECJ and establishing more particularly its consequences on the involvement of the EC and its Member States within the WTO system, it may be first useful to envisage the question of the membership of the EC and its Member States within the new WTO system.

Indeed, the establishment of the WTO should have been the occasion for the European Community to present itself as a true entity. But instead, partly as a result of the dispute between the Commission and several Member States on the question whether all matters negotiated in the Uruguay Round come within the EC's exclusive powers under Article 113 of the EC Treaty, the EC insisted itself that non only the EC but also its Member States be considered as members of the WTO. It would be therefore interesting first to consider the actual status of the European Community in the WTO system before studying in a more detailed way the ECJ's *Opinion 1/94* on the question of the competence sharing between the Community and its Member States with regard to the WTO Agreements.

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[110] E.C.J., *Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228(6) of the EC Treaty*, [1994] E.C.R. I-5267, [1995] 1 C.M.L.R. 205 [hereinafter *Opinion 1/94* cited to E.C.R.].

A. THE STATUS OF THE EUROPEAN COMMUNITY IN THE WTO SYSTEM

The history of the European Community finally becoming a contracting party of the WTO has consisted, as Hilf has observed[111], of "a gradual process of 'substituting' its Member States according to the evolving Common Commercial Policy under Articles 110ss of the [EC Treaty]". Actually, the appropriateness of the term 'substitution' may be discussed, Hilf having added that "it was neither a substitution nor a succession of its Member States within the framework of GATT as the EC did not formally become a contracting party under GATT."[112]

But, now, with the entry into force of the Agreement Establishing the World Trade Organisation, signed at Marrakesh on 15 April 1994, its Article XI provides as follows:

> *Original Membership*
>
> 1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original members of the WTO.[113]

Such a provision should bring to an end the anomalies whereby GATT, one of the most influential and effective rule-making systems in the world, was not an international organisation, and the European Communities never became contracting parties to the GATT. For the European Community, this is an important step forward in its struggle to win full acceptance as an international legal personality and so to achieve what the European Court of Justice has described as "the requirement of unity in the international representation of the Community".

The GATT was in fact originally intended to be an interim arrangement, pending establishment of an International Trade Organisation by the Havana Charter. After the failure of the United States to ratify the Havana Charter, the GATT continued as a multilateral agreement. In 1955, there was a further attempt to establish an Organisation

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[111] M. Hilf, "The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise? –" (1995) 6 Eur. J. Int'l L. 245 at 247 [hereinafter "ECJ's Opinion 1/94 on the WTO"].
[112] *Ibid.*
[113] WTO Agreement, art. XI, *supra* note 3.

for Trade Cooperation, with an assembly, an executive committee and a secretariat as well as powers to supervise the Agreement, but this was also rejected by the US Senate. Since the GATT had neither international legal personality nor members, the question of membership for the European Community never arose. The original contracting parties were governments and accession was only open to governments. The contracting parties administered the GATT, and the Community never became a contracting party.

However, with the establishment of the European Community as a customs union, the Community as such became responsible for the rights and obligations conferred by the GATT and was *de facto* given the right to participate fully in sessions of the contracting parties, working groups and committees for matters within Community competence. In practice, the Commission acted for the Community in most areas of GATT business, although the Member States retained competence over budgetary matters. International agreements concluded under GATT auspices were always open to conclusion by the Community, leaving the Community's internal procedures to settle any dispute as to whether the Community should sign and conclude them alone, or together with the Member States. The situation was described by the European Commission in its 1988 pamphlet, *The European Community in the world*, in the following, somewhat provocative terms: "[i]n the GATT and in the North Atlantic Fisheries Organisation, the Community, through the European Commission, takes the place of Member States and speaks on their behalf".

But the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations[114] finally begins the process which should convert the European Community into a full member of the new WTO. The European Communities are listed among the members of the Trade Negotiations Committee which drew up the Agreement Establishing the WTO with its accompanying Declarations, Decisions and Understandings. The representatives agree to submit the WTO Agreement "for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures". This wording will of course leave it to the Community institutions to determine the extent to which Community conclusion of

the Agreement should be accompanied by national ratifications and the legal base or bases for Community participation. Actually, the task of enabling the EC institutions to fulfil their appropriate role in the ratification process has come to the ECJ which, in *Opinion 1/94* given in reply to the request of the Commission on the competence of the European Community to conclude the Agreement Establishing the World Trade Organization, has provided an extensive analysis of the respective powers of the EC institutions in regard to ratification of the GATT Uruguay Round Agreements.

Hilf has clearly underlined the difficulty of the task allocated to the ECJ,[115] as follows:

> It certainly was not an easy decision for the Court. On the one hand, the Court's case-law as to the scope and evolving dimension of the powers under the Common Commercial Policy (CCP) offered at least the possibility of covering all the agreements to be concluded under the WTO. Even the contracting parties outside the EC would have understood and probably accepted the EC becoming the sole contracting party under the WTO. Were not the agreements under the WTO considered to be a 'single undertaking'? Was not the extension of the GATT to the areas of services and TRIPs well justified if not necessary due to modern trends within the international economy? One internal market and one common commercial policy? Was not Article B(1) 2nd indent, of the Treaty on the European Union (TEU) aimed at the assertion of the 'international identity' of the EU? Did not the preamble of the TEU underline the reinforcement of the 'European identity'?[116]
>
> On the other hand, the Council and eight Member States stood against the Commission having requested the Advisory Opinion. In their written observations with respect to this procedure some of the Member Sates have used rather strong language by qualifying the Commission's position as 'extravagant'.[117] During the entire history of the GATT the Member States of the EC had always been contracting parties, in recent times alongside with the EC – at least with respect to some particular agreements. Should the mere fact that the GATT was being extended to the areas of services (GATS) and of intellectual property (TRIPs) mean that from now on the membership of the EC Member States should come to an end by formally recognizing the exclusive competence of the EC with regard to the conclusion of the WTO?

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[114] Final Act, *supra* note 3.
[115] "ECJ's Opinion 1/94 on the WTO", *supra* note 111 at 246.
[116] TEU, Preamble TEU, 9th indent: "Resolved to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world [...]"; and TEU, art. B, 2nd indent: "The Union shall set itself the following objectives: [...] – to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence."
[117] See *Opinion 1/94, supra* note 110 at I-5337.

Thus the ECJ was set to arbitrate between the Commission and the EC Member States.

B. OPINION 1/94[118]

The Council and the Member States of the European Community broadened the Commission's mandate after approving the Punta del Este Ministerial Declaration of 20 September 1986,[119] the document that launched the Uruguay Round. They decided that "in order to ensure the maximum consistency in the conduct of the negotiations, [...] the Commission would act as the sole negotiator on behalf of the Community and the Member States." The minutes of the meeting contain a notation that the Council's "decision [did] not prejudge the question of the competence of the Community or the Member States on particular issues." Thus, the issue of competence was present from the very beginning of the negotiations.

At its meeting on 7 and 8 March 1994, the EC Council authorized the President of the Council and Sir Leon Brittan, the Commissioner for foreign trade relations of the Community, to sign the Final Act and the WTO Agreement on behalf of the Council. Although certain Member States argued that those acts "also covered matters of national competence", they agreed to sign the Final Act and WTO Agreement. The Commission, however, recorded in the minutes of the meeting that "the Final Act [...] and the agreements annexed thereto fall exclusively within the competence of the European Community." On 6 April 1994, the Commission submitted its request for an Advisory Opinion to the ECJ with a view to obtaining a definitive ruling on the matter, seeking more especially resolution of the following questions:[120]

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[118] *Opinion 1/94* has led to a flurry of comments in the literature. See, *e.g.*, J. Auvret-Finck, "Avis 1/94 de la Cour du 15 novembre 1994 (1995) 31 Rev. trim. dr. eur. 322; J.H.J. Bourgeois, "The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession" (1995) 32 C.M.L. Rev. 763; J.H.J. Bourgeois, "External Relations Powers of the European Community" (1999) 22 Fordham Int'l L.J. 149 [hereinafter "External Relations Powers of the EC"]; J.J. Callaghan, "Analysis of the European Court of Justice's Decision on Competence in the World Trade Organization: Who Will Call the Shots in the Areas of Services and Intellectual Property in the European Union?" (1996) 18 Loy. L.A. Int'l & Comp. L.J. 497; A. Dashwood, "The Limits of European Community Powers" (1996) 21 Eur. L. Rev. 113; N. Emiliou, "The Death of Exclusive Competence?" (1996) 21 Eur. L. Rev. 294; T. Flory & F.-P. Martin, "Remarques à propos des Avis 1/94 et 2/92 de la Cour de Justice des Communautés européennes au regard de l'Évolution de la Notion de Politique Commerciale Commune" (1996) 32 Cah. dr. eur. 379; "ECJ's Opinion 1/94 on the WTO", *supra* note 111.

[119] *Ministerial Declaration on the Uruguay Round*, 20 September 1986, GATT Doc. MIN/6, 33d Supp. B.I.S.D. (1986) 19 [hereinafter *1986 Ministerial Declaration* cited to B.I.S.D.].

[120] See *Opinion 1/94*, *supra* note 110 at I-5282.

(1) Does the European Community have the competence to conclude all parts of the Agreement Establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPs) on the basis of the EC Treaty, more particularly on the basis of Article 113 of the EC Treaty alone, or in combination with Article 100a EC and/or Article 235 EC?

(2) Does the European Community have the competence to conclude alone also those parts of the WTO Agreement which concern products and/or services falling exclusively within the scope of application of the ECSC (European Coal and Steel Community) and the EAEC (European Atomic Energy Community) Treaties?[121]

(3) If the answer to the above two questions is in the affirmative, does this affect the ability of Member States to conclude the WTO Agreement, in the light of the agreement already reached that they will be original Members of the WTO?

1. As to the Admissibility of the Commission's Request

Before addressing the main issues raised by the Commission, the Court dealt first with the question of the admissibility of the Commission's request pursuant to Article 228(6) of the EC Treaty.[122]

With regard to Article 228(6) of the EC Treaty, it may be observed that it does not expressly provide for the Court's Opinion to be requested on the extent to which an agreement falls within the competence of the Community.[123] According to Article 107(2) of the Court's Rules of Procedure,[124] however, "[t]he Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EC

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[121] Because this question assumed that the Community had exclusive competence in all of the areas stated above, the Court found it unnecessary to answer it, finding that the Community did not have exclusive competence in GATS or TRIPs.

[122] *Opinion 1/94*, *supra* note 110 at I-5391.

[123] EC Treaty, art. 228(6) providing as follows: "The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union."

[124] See K.P.E. Lasok, *The European Court of Justice: Practice and Procedure*, 2d ed. (London: Butterworths, 1994) at 590-92 [hereinafter *ECJ Practice and Procedure*]; L.N. Brown & T. Kennedy, *The Court of Justice of the European Communities*, 4th ed. (London: Sweet & Maxwell, 1994) at 240-43 [hereinafter *CJEC*].

Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement." The Rules of Procedure evidently cannot alter the scope of the jurisdiction conferred on the Court by the Treaty, but the Court pointed out[125] that it had consistently held that the extent of the Community's power to enter into an agreement may be considered under Article 228(6).

Actually, there were two issues of admissibility. France thought that the Commission was acting against the principle of good cooperation by introducing its requests only at the very last moment of the negotiating process thus creating a situation under which the Member States have to fulfil their ratification procedures without any definite resolution of the dispute on competencies.[126] The ECJ did not address this issue and dealt only briefly with the second admissibility issue raised by Spain.[127]

Spain objected to the admissibility of the Commission's request for the Opinion because "the procedure for requesting an Opinion can only be initiated where the Community has not yet entered into any international commitment."[128] Spain argued that the signing of the Final Act served to "authenticate the texts which were the outcome of the negotiations and entailed an obligation [on the part of the signatories] to submit them for the approval of [their] respective authorities."[129] The Council and the Government of the Netherlands also expressed doubts about whether a signed agreement could be subject to Article 228(6) given the language of the Article.[130]

The Court did not share these doubts, holding that:

> [t]he Court may be called upon to state its opinion pursuant to Article 228(6) of the Treaty at any time before the Community's consent to be bound by the agreement is finally expressed. Unless and until that consent is given, the agreement remains an envisaged agreement. Consequently, there is nothing to render this request inadmissible.[131]

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[125] *Opinion 1/94*, *supra* note 110 at I-5391, para. 9.
[126] *Ibid.* at I-5284.
[127] *Ibid.* at I-5392, para. 10.
[128] *Ibid.* at I-5283.
[129] *Ibid.* at I-5284.
[130] *Ibid.* at I-5283.
[131] *Ibid.* at I-5382, para. 12.

2. As to the Wording of the Questions

The Council also criticized the Commission's wording of the questions. The Council argued that, because the agreement already had been signed by the Community and the Member States pursuant to their respective powers, the Commission should not limit the question to whether the Community may sign and conclude that agreement. According to the Council, the proper question is whether "the joint conclusion by the Community and the Member States of the agreements resulting from the Uruguay Round is compatible with the division of powers laid down by the Treaties establishing the European Communities."[132] The ECJ rejected both formulations of the questions and stated that the "fundamental issue is whether or not the Community has exclusive competence to conclude the WTO Agreement and its annexes."[133]

3. As to the Court's Ruling

The Court replied to the Commission's questions as follows:

- the EC has exclusive competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods,[134] including the Agreement on Agriculture;[135] this competence also extends to goods subject to the Euratom Treaty[136] or to the ECSC Treaty;[137]

- cross-frontier supplies of services are covered by Article 113 of the EC Treaty and international agreements in the field of transport are excluded from it;[138]

- apart from those of its provisions which concern the prohibition of the release into free circulation of counterfeit goods, the TRIPs Agreement does not fall within the scope of the Common Commercial Policy;[139]

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[132] *Ibid.* at I-5284.
[133] *Ibid.* at I-5393, para. 14.
[134] *Ibid.* at I-5399, para. 34.
[135] *Ibid.* at I-5397, para. 29.
[136] *Ibid.* at I-5396, para. 24.
[137] *Ibid.* at I-5396, para. 27.
[138] *Ibid.* at I-5404, para. 53.
[139] *Ibid.* at I-5409, para. 71.

- the competence to conclude GATS is shared between the EC and the Member States;[140]

- the EC and its Member States are jointly competent to conclude the TRIPs Agreement.[141]

Clearly, the Court ruled by declaring the Community exclusively competent to conclude the Multilateral Agreements on Trade in Goods, and jointly competent with its Member States to conclude the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), establishing islands of exclusivity for the Community within these two Annexes to the WTO Agreement.

The exclusivity of the Community competence as far as it applies to Euratom products is clear: "[s]ince the Euratom Treaty contains no provision relating to external trade, there is nothing to prevent agreements concluded pursuant to Article 113 of the EC Treaty from extending to international trade in Euratom products."[142]

It is otherwise for coal and steel, for Article 71 of the ECSC Treaty preserved States powers "in matters of commercial policy." The Court ruled out its applicability quoting *Opinion 1/75*[143] and stated the precedence of the EC Treaty whose common commercial policy cannot be rendered inoperative by Article 71.[144]

The Court also concluded that the Community has exclusive competence for both agricultural products[145] and the Agreement on Sanitary and Phytosanitary Measures,[146] applying an ancillary principal test. The objective being trade and not agricultural policy,

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[140] *Ibid.* at I-5417, para. 98.
[141] *Ibid.* at I-5419, para. 105.
[142] *Ibid.* at I-5396, para. 24.
[143] E.C.J., *Opinion 1/75 (Local Costs)*, [1975] E.C.R. I-1362.
[144] *Opinion 1/94, supra* note 110 at I-5396, para. 27.
[145] *Ibid.* at I-5397, para. 29.
[146] *Ibid.* at I-5398, para. 31.

Agreements on Trade in Goods fall entirely under Article 113 of the EC Treaty. This *rationale* also holds goods for the Agreement on Technical Barriers to Trade.[147]

These pronouncements are based on the preambles to the agreements. However, legal argument based on preambles is weak, for preambles are not the law – neither binding nor a key to measure the competence – and can only help to determine what the law is. It seems therefore that the Court wanted to settle these false questions in an expeditious way, in order to pass to the true ones.

4. As to the Court's Reasoning on Common Commercial Policy, GATS and TRIPs

Prior to approaching the detailed analysis of the core of the ECJ's *Opinion 1/94*, it may be useful and even necessary to examine the provisions of Article 113 of the EC Treaty on which the Opinion is essentially based.

4.1. *Article 113 and the Common Commercial Policy*

The following developments will be essentially based on the analysis provided by Bourgeois, dealing with Article 113 of the EC Treaty and its successive amendments as well as their consequences on the actual division of powers between the EC and its Member States regarding the common commercial policy.[148]

Most commentators agree that Article 113 of the Treaty establishing the European Economic Community,[149] which was and still is the key common commercial policy provision, has been poorly drafted. Article 113 of the EEC Treaty did not, and Article 113 of the EC Treaty, as amended,[150] still does not define what is meant by commercial policy

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[147] *Ibid.* at I-5398, para. 33.

[148] "External Relations Powers of the EC", *supra* note 118 at 151-55.

[149] *Treaty establishing the European Economic Community*, 25 March 1957, art. 113, 298 U.N.T.S. 11 at 60.

[150] EC Treaty, art. 113 reading as follows:

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

and it does not generally define or exhaustively enumerate the instruments to which the Community may have recourse to implement this policy. Like other EC Treaty provisions granting powers to the Community, Article 113 does not say anything about the relationship between these powers and Member States' powers: are they parallel, concurrent, or exclusive? On the occasion of successive amendments to the EC Treaty, the European Commission and the European Parliament put forward amendments to Article 113, which however failed to be adopted.

The Maastricht Treaty introduced two changes, which relate to the exercise by the Community of its foreign trade policy powers, but do not deal with the scope of these powers. First, Article 113 of the EC Treaty now expressly refers to the amended Article 228,[151] which deals with the conclusion of international agreements. Article 228(3) provides for consultation of the European Parliament, except for agreements referred to in Article 113(3), *i.e.*, agreements in the field of foreign trade.[152] Member States obviously wanted, through the Council, to keep exclusive control over such agreements.[153] A foreign trade agreement "establishing a specific institutional framework by organizing cooperation procedures" or "having important budgetary implications for the Community," however, requires the assent of the European Parliament.[154] For instance, the conclusion of the World Trade Organization Agreement[155] required the assent of the European Parliament. Second, as a result of the new Article 228a, economic sanctions taking the form of trade policy measures can only be taken after a common position or a

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3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.
   The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue it.
   The relevant provisions of Article 228 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.

See *Treaty establishing the European Community*, 7 February 1992, art. 113, [1992] O.J. C. 224/1 at 44, [1992] 1 C.M.L.R. 573 at 656.

[151] EC Treaty, art. 228, [1992] O.J. C. 224/1 at 77, [1992] 1 C.M.L.R. 573 at 714-15.

[152] EC Treaty, art. 228(3), [1992] O.J. C. 224/1 at 77, [1992] 1 C.M.L.R. 573 at 714.

[153] See A. Dashwood, "Community Legislative Procedures in the Era of the Treaty on European Union" (1994) 19 Eur. L. Rev. 343 at 344.

[154] EC Treaty, art. 228(3), *supra* note 151.

[155] WTO Agreement, *supra* note 3.

joint action has been adopted to that effect within the framework of the common foreign and security policy, which means in effect that unanimity is required.[156]

In the course of the Intergovernmental Conference that produced the Amsterdam Treaty, several proposals were put on the table. At some point the amendments discussed took the form of an amendment to Article 113 and a protocol to which delegations wanted to add declarations. As negotiations progressed, the set of texts was the subject of so many compromises and concessions for about every delegation that the amendment was finally withdrawn. There remains only an additional paragraph five.[157]

The wording of this additional paragraph to Article 113 of the EC Treaty can only be read as recognizing that international agreements on services and intellectual property come within the scope of the common commercial policy. There are several arguments to support this view. First, this provision is a new paragraph to Article 113 of the EC Treaty, which itself appears under the title "Common Commercial Policy".[158] Its only effect is to require a unanimous decision of the Council for the other parts of Article 113 to apply. Second, had the contracting parties considered similar agreements to be outside the scope of the common commercial policy, they could hardly have left it to the Council, even acting by unanimity, to extend the scope of EC power. Third, had they taken that view, Article 113(5),[159] added by the Amsterdam Treaty, was not necessary to allow the

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[156] EC Treaty, art. 228a, [1992] O.J. C. 224/1 at 78, [1992] 1 C.M.L.R. 573 at 715. This formalizes a procedure that has been followed in the past. See, *e.g.*, EC, *Council Regulation 877/82 Establishing Trade Sanctions Against Argentina in Falklands War*, [1982] O.J. L. 102/1.

[157] *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, art. 2(20) (adding art. 113(5) to the EC Treaty), [1997] O.J. C. 340/1 at 35 (providing as follows: "The Council , acting unanimously on a proposal from the Commission and after consultation with the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property as far as they are not covered by these paragraphs."); *Consolidated Version of the Treaty Establishing the European Community*, art. 113(5), [1997] O.J. C. 340/3 at 238, 37 I.L.M. 79 at 99 (incorporating changes made by the Treaty of Amsterdam). By virtue of the Treaty of Amsterdam, articles of the EC Treaty will be renumbered in the Consolidated version of the EC Treaty: see Treaty of Amsterdam, art. 12, [1997] O.J. C. 340/1 at 78-79.

[158] EC Treaty, Title VII, [1992] O.J. C. 224/1 at 44, [1992] 1 C.M.L.R. 573 at 655-57.

[159] Treaty of Amsterdam, art. 2(20) (adding art. 113(5) to the EC Treaty), *supra* note 156; Consolidated EC Treaty, art. 113(5), *supra* note 156.

Community to enter into such agreements, recourse to Article 235[160] of the EC Treaty would have done the trick.

Two points should be noted. First, Article 113(5) only refers to negotiations and agreements. Autonomous action in the field of trade in services and international protection of intellectual property rights remains subject to other EC Treaty provisions. This requirement probably means that the new so-called Trade Barriers Regulation[161] enacted under Article 113 still cannot be applied in the field of trade in services and international protection of intellectual property rights beyond the limits within which Article 113 currently applies, as interpreted by the ECJ in its *Opinion 1/94* on the results of the Uruguay Round.[162] Second, it might be argued that the extension may be made on an *ad hoc* basis only to certain types of services and intellectual property rights, as opposed to their permanent subjection to Article 113. It may well be that certain Member States had this argument in mind, but this interpretation does not find support in the wording. If this interpretation had been the intention of the Intergovernmental Conference, a wording similar to Article 235 would have been used along the lines of: "[i]f, however, certain negotiations and agreements appear necessary [...]."[163]

In constitutional terms as regards the relationship between the Community and its Member States, Article 113(5) means that the power to enter into international agreements in the field of services and protection of intellectual property has been transferred to the Community and forms part of the Community's foreign trade policy powers. No further amendment to the EC Treaty is required if the Community wants to act in these fields. This transfer, however, is subject to a condition precedent, *i.e.*, a unanimous vote of the Member States in the Council. Member States opposing the effective extension of the foreign trade policy powers to these fields have the right and the political possibility to do so. They can, however, no longer use the legal argument that

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[160] EC Treaty, art. 235, [1992] O.J. C. 224/1 at 78, [1992] 1 C.M.L.R. 573 at 716.
[161] TBR, *supra* note 78. Interestingly, the European Commission accepted complaints and initiated investigations in relation to alleged obstacles to trade taking the form of intellectual property measures. See, *e.g.*, [1997] O.J. C. 177/5 (IMRO complaint about licensing of musical works in the United States).
[162] *Opinion 1/94*, *supra* note 110.
[163] EC Treaty, art. 235.

these matters do not come within EC powers and that EC measures in these field would be opened to legal challenge under national constitutional law.

There have been several occasions in which conflicting views about the interpretation of Article 113 arose between the Council, or at least a number of Member States in the Council, and the Commission. There were diverging views concerning the sort of measures that could be taken under that provision. Whether Article 113 also covers trade in services and intellectual property became a real issue at the end of the Uruguay Round.

Finally, two theories arose from these endless debates in an attempt to put an end to them. The Council lawyers developed what came to be called the "finalist theory", according to which any measure that aims to influence the volume or flow of trade is to be considered as a measure coming within the scope of Article 113. The Commission objected to this theory on the ground that it is not easy to determine what is meant by the aims and that the aim pursued by those responsible for the measure cannot be a proper criterion to define the scope of their powers. The Commission developed its own theory according to which a measure of commercial policy must be assessed, primarily by reference to its specific character as an instrument regulating international trade. This theory came to be called the "instrumentalist theory". The respective theories of the Commission and Council are set out in *Opinion 1/78* of the ECJ.[164] However, in this opinion and in subsequent opinions and judgments, the ECJ refrained from endorsing either theory.

As a result of these last remarks on the conflicting views of the EC institutions and the ECJ's necessary interpretation of the scope of the Community's foreign trade policy powers under Article 113 of the EC Treaty, it seems now logical first to survey the ECJ's case-law on this issue prior to finally approaching the analysis of *Opinion 1/94* which is the core of all the present developments.

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[164] E.C.J., *Opinion 1/78, Draft International Agreement on Natural Rubber*, [1979] E.C.R. I-2871 at I-2880-94, [1979] 3 C.M.L.R. 639 at 646-61 [hereinafter *Opinion 1/78* or *Natural Rubber Agreement* cited to E.C.R.]. For a critique of both theories, see C.-D. Ehlermann, "The Scope of Article 113 of the EEC Treaty" in *Études de Droit des Communautés Européennes: Mélanges offerts a Pierre-Henri Teitgen* (Paris: Pedone, 1984) 145.

4.2. *ECJ's Case-Law before Opinion 1/94*

ECJ has already had several occasions to precise the scope of Article 113 of the EC Treaty, either in the framework of Article 177 proceedings, that is, when private parties involved in litigation in national courts used arguments about the interpretation of Article 113 that led these courts to refer questions of interpretation to the ECJ in order to obtain a preliminary ruling, or in the framework of Article 228 proceedings, that is, as in the case of *Opinion 1/94*, when disputes between the Commission and the Council about the interpretation of Article 113 finally ended up in the ECJ in the form of requests for Advisory Opinions, or even in the framework of Article 173 proceedings which consist of applications for the annulment of Council legal actions brought by the Commission.

As already indicated, the ECJ has avoided espousing the Commission or the Council theory and has not developed a theory of its own. In the period prior to *Opinion 1/94*, during which, it should be stressed, the ECJ was only asked to interpret Article 113 with respect to trade in goods, the ECJ took a broad view of the scope of EC powers. In doing so, the ECJ has significantly contributed to defining the scope of Article 113.

But the present survey of the ECJ's case-law regarding the interpretation of Article 113 of the EC Treaty will be limited essentially to Advisory Opinions given by the ECJ under Article 228(6) of the EC Treaty. Indeed, in the framework of Article 228 proceedings, the ECJ has had to consider the scope of Article 113, whether the proposed agreement was within the terms of the common commercial policy of the Community and whether the Member States had or did not have concurrent powers with those of the Community institutions.

Thus, the first case of this kind to come before the ECJ, the *Local Cost Standard* Case,[165] concerned the negotiation in the OECD of an agreement to limit the amount of aid or support national authorities could give to the production or supply of goods for export. The Court concluded that this agreement came within the common commercial policy and consequently within the external competence of the Community.

[165] E.C.J., *Opinion 1/75*, [1975] E.C.R. I-1355, [1976] 1 C.M.L.R. 85.

As to the *Natural Rubber Agreement* Case,[166] it concerned the negotiation of a commodity agreement to regulate international trade in natural rubber. The Court recognized that although the Community's competence in external matters dealt with tariffs and customs duties, it was possible for it to include the stabilisation of trade in particular commodities. It had to be considered within the context of the overall aims of the common commercial policy. However, the Court also decided that Article 113 did not apply to matters such as the establishment, storage and financing of buffer stocks which were matters for Member States. This case is an example of frequent "mixed agreements" which contain provisions within Community competence but also those which remain within the competence of Member States and for which they retain sole responsibility.

The express powers granted to the Community under Articles 113 and 238 of the EC Treaty have been influenced and extended through the case-law of the ECJ. Indeed, in addition to the external powers expressly granted to the Community by the EC Treaty, the other way to enable the Community to act in the international sphere is to deduce from the power to deal with a given subject matter in intra-Community trade, the power to deal with that matter in extra-Community trade. This implied external powers doctrine was developed by the ECJ in two leading cases: *ERTA*[167] and *Opinion 1/76.*[168]

First, in *ERTA*, the issue submitted to the ECJ was whether the European Economic Community or the Member States had the power to conclude an international agreement called the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport. The ECJ held that where the Treaties contain powers to regulate specific matters internally, even where internal rules have not been adopted, the Community may have competence to conclude international agreements. In this case, the Commission claimed exclusive Community competence on the ground that Article 75 of the EEC Treaty gave the Community power to regulate internally corresponding matters.

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[166] *Opinion 1/78, supra* note 164.
[167] E.C.J., *Commission v. Council (ERTA)*, C-22/70, [1971] E.C.R. I-263.
[168] E.C.J., *Opinion 1/76, Laying-Up Fund for the Rhine*, [1977] E.C.R. I-741 [hereinafter *Opinion 1/76* cited to E.C.R.].

Second, in *Opinion 1/76* relating to a draft international agreement establishing a laying-up fund for inland waterway vessels, the ECJ held that every internal power implies a power on the international plane, the Treaty thereby establishing the principle of parallelism. The international commitment must, however, be necessary for the attainment of a specific object. Whether an international commitment is necessary is for the Council to decide and where there is an unresolved conflict between the Council and the Commission, resort may be had for the opinion of the ECJ under Article 228(6) of the EC Treaty. Furthermore, where the Community has not exercised its internal powers a residual power is retained by Member States to assume international commitments essential to achieve a Community objective. Such action does not prevent the Community from taking action in the same sphere in the future.

4.3. *Opinion 1/94*

In its request for an ECJ Advisory Opinion, the Commission first contended that the language of Article 113(1) of the EC Treaty[169] is broad enough to encompass the new areas of GATS and TRIPs. The Council, various Member States, and the European Parliament[170] vigorously disputed this interpretation.

Although the language of Article 113 appears sufficiently broad to encompass trade in services and trade related intellectual property, the ECJ had to examine the Treaty as a whole to determine whether granting exclusive competence to the Community would ensure compliance with the Treaty.[171] Thus, the issue to examine is whether the ECJ could have interpreted Article 113 to cover GATS and TRIPs in their entirety.

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[169] EC Treaty, art. 113(1).

[170] The procedure followed by the Court under Article 228(6) is the subject of Articles 107 and 108 of its Rules of Procedure (see *ECJ Practice and Procedure*, *supra* note 124; *CJCE*, *supra* note 124). Where a request is presented by the Commission, the Council and the Member States have the right to submit observations. That right was exercised by the Council and the Governments of Denmark, Germany, Greece, Spain, France, the Netherlands, Portugal and the United Kingdom. The Rules make no express provision for observations to be submitted by the European Parliament but, at the Parliament's request, the Court allowed it to do so, following the precedent set in the proceedings which led to the Court's second Opinion on the draft EEA Agreement (E.C.J., *Opinion 1/92*, [1992] E.C.R. I-2821). It may be noted that the third countries or international organizations with which the Community intends to conclude the agreement concerned have no right to take part in the proceedings.

[171] EC Treaty, art. 164: "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed".

4.3.1. Does Article 113 Cover GATS?

The Court in *Natural Rubber Agreement* Case stated:

> It would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation of the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade [...] to the exclusion of more highly developed mechanisms [...]. A commercial policy understood in that sense would be destined to become nugatory in the course of time.[172]

As this excerpt indicates, the language of Article 113 is purposely broad to allow for areas other than traditional trade in goods to fall within its purview.

In *Natural Rubber*, the Court further stated that:

> the enumeration in Article 113 of the subjects covered by commercial policy [...] is conceived as a non-exhaustive enumeration which must not [...] close the door to the application in a Community context of any other process [...] intended to regulate external trade.[173]

The Commission, noting the global economy's dominant trend of trade in services, argued that the open nature of Article 113, as held by the Court in *Natural Rubber*, prevented the exclusion of trade in services from the scope of Article 113 of the EC Treaty.[174]

The categorization of the different modes of trade in services under Article I(2) of GATS becomes crucial at this point. Actually, GATS, included by the Marrakech Agreement establishing the WTO as Annex 1B of the Final Act,[175] attempts to transpose the principles of GATT into the area of services by lowering the trade barriers which take the form of rules relating to both market access and qualifications of those providing the

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[172] *Opinion 1/78*, *supra* note 164 at I-2912.
[173] *Ibid.*
[174] *Opinion 1/94*, *supra* note 110 at I-5401, para. 41.
[175] Final Act, Annex 1B, *supra* note 3.

services.[176] Article I of GATS provides its scope and states: "[t]his Agreement applies to measures by Members affecting trade in services."[177] Article I(2)[178] continues:

> For the purposes of this Agreement, trade in services is defined as the supply of a service:
> (a) from the territory of one Member into the territory of any other Member;
> (b) in the territory of one Member to the service consumer of any other Member;
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
> (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

This concept of services is very broad. In effect, it encompasses "any service in any sector except services supplied in the exercise of governmental authority."

In *Opinion 1/94*, the ECJ noted that with regard to the first category – cross-frontier supplies – a supplier established in one country renders the service to a consumer residing in another.[179] In this scenario, "the supplier does not move to the consumer's country; nor, conversely, does the consumer move to the supplier's country."[180] Such a situation is difficult to distinguish from traditional trade in goods and should therefore be included within the realm of Article 113 of the EC Treaty.[181] The ECJ thus found that the Community has exclusive competence over cross-frontier supplies since there is no movement of persons involved and it is consequently "not unlike trade in goods."[182]

Regarding the other categories covered under Article I(2) of GATS, the ECJ refused to apply the latitude that the Commission argued it had used in the past. The ECJ stated:

> As regards natural persons, it is clear from Article 3 of the Treaty, which distinguishes between 'a common commercial policy' in paragraph (b) and 'measures concerning the entry and movement of persons' in paragraph (d), that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy.[183]

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[176] *Ibid.*
[177] *Ibid.*, art. I(1).
[178] *Ibid.*, art. I(2).
[179] *Opinion 1/94*, *supra* note 110 at I-5401, para. 44.
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.* at I-5402, para. 46.

The ECJ concluded that "the modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy."[184]

The ECJ's reasoning in *Opinion 1/94* does not do justice to the importance of achieving the goals of GATS. Instead, it will fragment policy-making in the areas of GATS involving the movement of third-country nationals across Member States' borders. Although Member States are understandably concerned about immigration, the importance of achieving liberalization of trade in services outweighs such concerns.

4.3.2. Does Article 113 of the EC Treaty Cover TRIPs?

The Commission argued that the Community has exclusive competence for TRIPs under Article 113 of the EC Treaty. The Commission stated that "the rules concerning intellectual property rights are closely linked to trade in the products and services to which they apply."[185]

The ECJ in answer first noted that Section 4 of Part III of TRIPs,[186] concerning the means of enforcing intellectual property rights, "contains specific rules as to measures to be applied at border crossing points."[187] This section of TRIPs has a counterpart in the provisions of Council Regulation 3842/86 in the EC.[188] This Regulation provides measures for prohibiting the release of counterfeit goods into free circulation.[189] This Regulation falls under the purview of Article 113 of the EC Treaty because it relates to measures that customs authorities take in prohibiting the release of counterfeit goods into free circulation at the external frontiers.[190] Thus, the ECJ held that because "measures of that type can be adopted autonomously by the Community institutions on the basis of

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[184] *Ibid.* at I-5402, para. 47.
[185] *Ibid.* at I-5404, para. 54.
[186] Final Act, Annex 1C, *supra* note 3.
[187] *Opinion 1/94*, *supra* note 110 at I-5404, para. 55.
[188] EC, *Council Regulation 3842/86 of 1 December 1986 Laying Down Measures to Prohibit the Release for Free Circulation of Counterfeit Goods*, [1986] O.J. L 357/1.
[189] *Ibid.*
[190] *Opinion 1/94*, *supra* note 110 at I-5404, para. 55.

Article 113 of the EC Treaty, it is for the Community alone to conclude international agreements on such matters."[191]

Less clear, however, was the ECJ's reasoning on intellectual property matters not relating to the release of counterfeit goods into free circulation. The ECJ acknowledged a connection between intellectual property and trade in goods.[192] It noted that "intellectual property rights enable those holding them to prevent third parties from carrying out certain acts."[193] These acts include prohibiting use of a trademark, the manufacturing of a product, and the copying of a design.[194] The Court held, however, that this alone would not bring intellectual property rights within the scope of Article 113: "[i]ntellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade."[195]

What is troubling is that the ECJ did not explain its *rationale* for singling out internal trade as a justification for holding that TRIPs involves areas of Member States' competence. Arguably, Article 36 provides an exception to Article 30's prohibition against "quantitative restrictions on imports and all measures having equivalent effect" between Member States.[196] On the one hand, Article 30 lays down the fundamental principle of the free movements of goods. On the other hand, Article 36 safeguards intellectual property rights, which, owning to their territorial nature, inevitably create obstacles to the free movement of goods.[197] The EC Directive on the Legal Protection of Computer Programs has further limited the ability to use an Article 36 exception in the area of intellectual property.[198] Nevertheless, subsequent case-law has limited the Article

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[191] *Ibid.*
[192] *Ibid.* at I-5405, para. 57.
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] Notably, "the authors of the [EC] Treaty were clearly aware of the provisions of [...][GATT] when they drafted Articles 30 to 36": see E.L. White, "In Search of the Limits to Article 30 of the EEC Treaty" (1989) 26 C.M.L. Rev. 235 at 239. Article XI, paragraph 1 of GATT is entitled "General Elimination of Quantitative Restrictions," and the language is similar to that of Article 30 of the EC Treaty: *Ibid.* at 239-40. Similarly, paragraph 2 of Article XI of GATT provides for certain exceptions, which are listed in Article XX: *Ibid.* at 240. "This latter provision contains remarkable similarities to Article 36 [of the EC Treaty]": *Ibid.*
[197] *Ibid.*
[198] EC, *Council Directive 91/250 of 14 May 1991 on the Legal Protection of Computer Programs*, [1991] O.J. L 122/42 17 [hereinafter *Directive 91/250*].

36 exception with the recognition that Articles 30 and 36 articulate a conflict between two competing interests.[199] The Directive harmonizes the laws protecting computer programs Community-wide.

The ECJ stated that the Commission itself had conceded that no Community harmonization measures exist in some of the fields laid down by TRIPs.[200] The above discussion on the Directive, however, would tend to dispute the absence of Community harmonization measures in the area of TRIPs. In fact, the legal basis of the Directive, as stated in the Directive's Appendix I, is Article 100(a) of the EC Treaty.[201] The Community is competent to harmonize Member States' laws in the area of intellectual property pursuant to Articles 100 and 100(a) of the EC Treaty.[202]

Article 235 of the EC Treaty also may be used to superimpose new rights on national rights, as it was the case in the Council Regulation of 20 December 1993 on Community Trademark.[203] Exclusive competence on an internal level would allow the Community to exercise exclusive competence in external matters, such as the WTO. The ECJ, however, made clear that the processes set out in the EC Treaty, under which these powers are granted to the Community, cannot be usurped merely because the act would benefit the common market. The ECJ stated:

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[199] See E.C.J., *SA CNL-SUCAL NV v. Hag GF AG*, C-10/89, [1990] E.C.R. I-3711, [1990] 3 C.M.L.R. 571.
[200] *Opinion 1/94*, *supra* note 110 at I-5405, para. 58.
[201] *Directive 91/250*, *supra* note 197 at App. I, providing that: "the [Directive] will favour the free circulation of computer programs in so far as industry in those countries with clear and established protection of computer programs is currently in a more favorable position than that in countries where protection is uncertain; such differences in legal protection distort the conditions of establishment and of competition in Member States for firms which engage in activities concerned with computer programs [...]. In addition, by harmonizing the conditions under which the results of research and development in the computer program field are legally protected on a uniform basis in the Member States, innovation and technical progress throughout the Community will be encouraged": *ibid.* at para. 5.4.
[202] EC Treaty, art. 100, stating that the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations, or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. Article 100(a) provides other procedural guidelines for the approximation of laws.
[203] EC, *Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark*, [1994] O.J. L. 11/1. See *Opinion 1/94*, *supra* note 110 at I-5405, para. 59. Article 235 of the EC Treaty states that "if action by the Community should prove necessary to attain [...] one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take appropriate measures."

> [i]f the Community were to be recognized as having exclusive competence to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.[204]

This stance appears consistent with some commentators' views of the ECJ's current role in the Community.[205] Although the ECJ played a crucial role in shaping the Community with some of its early decisions, other organs of the Community have now taken from the ECJ the constitution-building role.[206] The ECJ's *Opinion 1/94* appears in stark contrast to these earlier opinions, and perhaps needlessly so, because the EC Treaty contains adequate grounds for finding exclusive competence for the Community.

4.3.3. Implied Powers, GATS and TRIPs[207]

The Commission argued that, even if the Community did not enjoy exclusive competence by virtue of Article 113, such a competence derived from either the provisions of the EC Treaty giving the Community internal competence, or the existence of legislation adopted by the institutions intended to implement those provisions, or the need to conclude international agreements in order to achieve an objective for which the Community was responsible internally.

Thus, in its request for an ECJ Advisory Opinion, the Commission put the implied external powers doctrine of *ERTA* and *Opinion 1/76* forward as an alternative authority for the Community to conclude on its own GATS and TRIPs. The ECJ was of the view

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[204] *Opinion 1/94*, *supra* note 110 at I-5406, para. 60.

[205] See M. Shapiro, "The European Court of Justice" in A.M. Sbragia, ed., *Euro-Politics: Institutions and Policy Making in the "New" European Community* (Washington, D.C.: Brookings, 1992) at 123.

[206] *Ibid.* See also E.C.J., *Flaminio Costa v. ENEL*, C-6/64, [1964] E.C.R. I-585, [1964] 3 C.M.L.R. 425 (establishing the doctrine of supremacy of EC law) [hereinafter *Costa v. ENEL* cited to E.C.R.]; *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] E.C.R. I-1, [1963] 3 C.M.L.R. 105 (establishing the principle of direct effect, which allows individuals in the Member States to rely on EC law) [hereinafter *Van Gend en Loos* cited to E.C.R.]; *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, C-120/78, [1979] E.C.R. I-649, [1978] 3 C.M.L.R. 494 (holding that a product lawfully marketed in one Member State could not be banned in another State, except for limited exceptions articulated in Article 36).

[207] In Community law, implied powers are not a means to enlarge the Community competence *ratione materiae*, but a technique to allow it to conclude international agreements in fields where it already had internal competence – exercised or latent. See K. Lenaerts, *Le juge et la constitution aux États-Unis et dans l'ordre juridique européen* (Bruxelles: Bruylant, 1988) at paras. 401-4.

that the application of *Opinion 1/76* to GATS cannot be accepted.[208] Instead, the ECJ interpreted its *Opinion 1/76* by distinguishing it on the facts from the GATS case:

> [t]hat is not the situation in the sphere of services: attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.[209]

As to the TRIPs Agreement, the ECJ also dismissed the Commission's argument based on *Opinion 1/76*:

> [t]he relevance of the reference to Opinion 1/76 is just as disputable in the case of TRIPs as in the case of GATS: unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective.[210]

Most commentators think that *Opinion 1/94* is a step back from the implied external powers doctrine as defined in *Opinion 1/76*.[211] The "necessity test" in *Opinion 1/76* meant in *Opinion 1/94* that the attainment of an objective of the EC Treaty in the internal sphere must be inextricably linked to the external action. Even then, in reply to Commission arguments tending to show that this was the case in the transport sector, the ECJ added a "proportionality test":

> [t]here is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relations to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings.[212]

As far as the *ERTA* doctrine is concerned, the ECJ recalled that notwithstanding the absence of an express reference to that effect in the EC Treaty, the Community may use the powers conferred to it with respect to the right of establishment and the freedom to

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[208] *Opinion 1/94*, *supra* note 110 at I-5413, para. 84.
[209] *Ibid.* at I-5414, para. 86.
[210] *Ibid.* at I-5417, para. 100.
[211] See *Opinion 1/76*, *supra* note 168. Advocate General G. Tesauro referred in his opinion in *Hermes International v. FHT Marketing Choice BV* to "the new reading of Opinion 1/76, reducing its scope to the specificity of the case at hand, without however offering many explanations": [1998] E.C.R. I-3603 at I-3606.
[212] *Opinion 1/94*, *supra* note 110 at I-5411-12, para. 79.

provide services to specify the treatment that is to be accorded to nationals of non-member countries.[213] It should be noted, however, that the ECJ, perhaps as a result of the Commission's argument about exclusive power, did not treat two distinct issues separately, *i.e.*, whether the Community has the power to enter into GATS and TRIPs and whether that power is exclusive.[214] The Court concluded that "competence to conclude GATS is shared between the Community and the Member States"[215] and that "the Community and its Member States are jointly competent to conclude TRIPs."[216]

It is unclear what the ECJ exactly meant by this formula. It could mean that the Community and the Member States have concurrent powers. But it could also mean that the Community only has power if the power is exclusive under the *ERTA* doctrine. If the latter interpretation is correct, then the ECJ would have further reduced the scope of its earlier case-law.

The ECJ reiterated the requirement that in order to acquire exclusive external power, common rules could be affected within the meaning of *ERTA* if Member States retained freedom to negotiate with non-member countries. The ECJ, however, tightened the *ERTA* doctrine by adding that this requirement implies that the Community has achieved complete harmonization, which was only the case for the rules governing access to a self-employed activity.[217] The ECJ came to a similar conclusion with respect to the TRIPs Agreement.[218] Actually, as "complete harmonization" amounts to legal unification of a certain area, the use of such expression by the ECJ restricts again the scope of the Community's exclusive power, for complete harmonization is very unlikely – a minimalist approach having been pursued on the whole since the *nouvelle approche*.

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[213] *Ibid.* at I-5415, para. 90.
[214] See E.C.J., *Opinion 2/91, International Labour Organization Convention 170 on Chemicals at Work*, [1993] E.C.R. I-1061 at I-1079, paras. 13 *et seq.*, [1993] 3 C.M.L.R. 800 at 805 [hereinafter *Opinion 2/91* cited to E.C.R.].
[215] *Opinion 1/94*, *supra* note 110 at I-5417, para. 98.
[216] *Ibid.* at I-5419, para. 105.
[217] *Ibid.* at I-5416-17, paras. 96-97.
[218] *Ibid.* at I-5418, para. 103.

4.3.4. The Duty of Cooperation

The Court concluded its Opinion with some remarks on the duty of the Member States and the Community institutions to cooperate with each other in the framework of the Uruguay Round Agreements. The Commission had emphasized the practical difficulties which would inevitably arise in the implementation of those Agreements if the Court found that competence to conclude them was shared. The Court acknowledged that that concern was a legitimate one, but refused to accept that difficulties of that nature could have the effect of altering the answer to be given on the question of competence, "that being a prior issue."[219]

The Court recognized that it was important to ensure that there was close cooperation between the institutions of the Community and the Member States in giving effect to international agreements for which competence was shared. The duty to cooperate was "all the more imperative"[220] in the present case in view of the inextricable link between the Agreements annexed to the WTO Agreements and of the system of cross-retaliation for which provision was made in the DSU. In the absence of such cooperation, the Community and the Member States might not be able to take advantage of that system: if the Community obtained the right to retaliate in the goods sector but was unable to exercise it, it would not have the power to retaliate in the fields covered by GATS or TRIPs, since those fell within the competence of the Member States. Conversely, if a Member State, having been authorised to retaliate in the fields covered by GATS or TRIPs, wished to do so in the field of trade in goods, it might be unable to do so since the latter fell within the exclusive competence of the Community. The Court did not, however, offer any practical suggestions as to how the necessary cooperation might be ensured,[221] presumably taking the view that that issue fell within the competence of the political institutions and the Member States.

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[219] *Ibid.* at I-5420, para. 107.
[220] *Ibid.* at I-5420-21, para. 109.
[221] Although this was the subject of one of a series of questions put by the Court to those who took part in the proceedings.

5. What Effect Will the ECJ's Opinion 1/94 Have on the European Union's Ability to Participate in the WTO?

At the hearing for the determination of competencies under the WTO, the Commission called the ECJ's attention to problems that would arise with the administration of agreements if the Community and the Member States shared competence in GATS and TRIPs.[222] The second paragraph of Article C of the EC Treaty stipulates:

> The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its prospective powers.[223]

Undoubtedly, the decision of the ECJ on the issue of competence under the WTO will make ensuring consistency in external activities a difficult task.

The Committee of Permanent Representatives[224] requested that the Council prepare a working document containing a preliminary analysis of the detailed arrangements for participation of the Community and the Member States in the WTO.[225] The Council's Legal Service predicted some form of shared competence before the ECJ's Opinion on competence. The Council identified some of the problems and solutions in its report. The Commission, on the other hand, identified problems that would occur if the Community was not granted exclusive competence.

5.1. *External Cohesion*

Article J.1(4) of the EC Treaty states that the Member States "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness

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[222] *Opinion 1/94, supra* note 110 at I-5419-20, para. 106.
[223] EC Treaty, art. C, para. 2.
[224] The Committee of Permanent Representatives (COREPER) is composed of senior civil servants from the Member States who assist in preparing and managing the work of the Council. See B.G. Peters, "Bureaucratic Politics and the Institutions of the European Community" in A.M. Sbragia, ed., *Euro-Politics: Institutions and Policy Making in the "New" European Community* (Washington, D.C.: Brookings, 1992) at 79-85.
[225] EC, *Council Legal Service Note 10779/93 on Detailed Arrangements for the Participation of Community and the Member States in the MTO [WTO]*, [1993] O.J. C. 1 [hereinafter *Legal Service Note*].

as a cohesive force in international relations."[226] The participation of fifteen Member States, each concerned with its own national interests, would seriously impair the effectiveness of the European Union as a cohesive force in the WTO. This self-interest would undermine the *rationale* of Article 113 of the EC Treaty. The European Union must act as a union in order to be effective in the international arena.

The Council, however, maintained that the question of Member State competence, particularly in the area of intellectual property, was not in dispute until the Commission raised it with regard to the WTO. The Council further stated that the Member States have consistently exercised their competence at the international level, for example in the WIPO.[227] This involvement allegedly "has not prevented the progressive development of internal Community law and of international action by the Community." In its own Legal Service Note, the Council refers to the ECJ's *International Labour Organization Opinion*, which stressed:

> [Agreement may be concluded in an area where] competence is shared between the Community and the Member States. In such a case, negotiation and implementation of the agreement require joint action by the Community and the Member States [...].[228] [...][W]hen it appears that the subject matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is close association between institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into. This duty of co-operation [...] results from the requirement of unity in the international representation of the Community.[229]

This language creates a legal obligation to find formulae that "ensure 'consistency' of the EU's external action, while ensuring 'joint action' by the Community and the Member States and 'close association' between the Member States and the Community institutions."[230]

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[226] EC Treaty, art. J.1(4).
[227] *Convention Establishing the World Intellectual Property Organization*, 14 July 1967, T.I.A.S. No. 6932 (as amended 1979).
[228] *Opinion 2/91*, *supra* note 214 at I-1077, para. 12.
[229] *Ibid.* at I-1083, para. 36.
[230] *Legal Service Note*, *supra* note 225 at 6.

Significant problems in the Community's negotiating procedures under the old GATT, however, posed considerable constraints on the negotiators and caused enormous confusion. An example is an incident that involved the French representative in the oil-seeds dispute under GATT. During the discussions on the establishment of a panel, the representative for the Community asked the Chairman of the proceedings to allow France to express its views on the oil-seeds issue.[231] The French representative stated:

> In the present circumstances [...] where important measures in the agricultural sector had recently been taken by big trading partners, [the French government] would want to make an overall assessment of the agricultural disputes connected to the Uruguay Round negotiations. Accordingly, France could not agree at the present meeting to the establishment of a panel as requested by the United States.[232]

The French delegation then requested that the Community take note that contracting parties lacked consensus and therefore could not establish a panel.[233]

The EC representative responded that although France was a contracting party to the EC Treaty, France no longer had competence on matters of trade policy. He further explained that the Community had exclusive competence in this area and the Commission of the EC represented the Community in the Council of GATT. "The issue of representation had arisen from the very outset, and it was in that way that the Community had assumed the competence that the Member States no longer assumed on a national basis."[234]

According to the Council, "[i]t would be a most unwise course to introduce an element of insecurity into what had been accomplished in this institution in the past [...]. The Community had assumed responsibility for trade policy on behalf of the Member States; that was the guarantee and the security for other contracting parties. To take the French views into consideration would put into question all the current Community's obligations and rights."[235]

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[231] *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, (1988), GATT Doc. C/M/222 at 10.
[232] *Ibid.*
[233] *Ibid.* at 11.
[234] *Ibid.* at 13.
[235] *Legal Service Note*, *supra* note 225 at 14.

The growing complexity of the WTO increases the areas covered and will undoubtedly cause further confusion, thereby making the European Union a very difficult partner to deal with in the WTO.

5.1.1. 'Spokesperson' for the Community and the Member States

Given the problems mentioned above, the importance of the European Union presenting a united front is clear. The Community must devise a method of speaking with one voice – even in matters involving GATS and TRIPs. The Council proposed that the best and simplest formula for instituting a single spokesperson would be to retain the Commission in its traditional role. From the beginning of the Uruguay Round, the Commission was indeed the single spokesperson for issues within the Community's competence and issues falling within the competence of the Member States.[236] The Council noted that it would be desirable for the Commission to continue to act as the spokesperson in matters relating to the WTO as a whole, in particular *vis-à-vis* the European Union's external partners.[237] This formula does not require a significant conceptual leap because the Commission merely carries out the predetermined mandate of the Council, which is composed of representatives of the Member States governments. In fact, the Council carefully distinguished the question of the role of the 'spokesperson' from that of internal procedures within the European Union. This distinction of roles is necessary for deciding what the spokesperson should express, negotiate or possibly agree.[238]

5.1.2. Internal Procedures for Defining the Positions to Be Adopted within the WTO

As already mentioned above, the ECJ recognized in *Opinion 1/94* that where it is apparent that the subject matter of an agreement or convention falls within the competence of the Community and partly within that of the Member States, "it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into."[239] However, the ECJ did not provide any structure for the

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[236] *Ibid.*
[237] *Ibid.*
[238] *Ibid.* at 7.
[239] *Opinion 1/94*, *supra* note 110 at I-5420, para. 108.

effective implementation of this duty of cooperation between the Member States and the Community, leaving therefore the institutional mechanisms provided in the EC Treaty to ultimately resolve this matter. Already in *ILO Opinion*, the ECJ had stipulated that the Community institutions and the Member States must take all measures necessary to ensure cooperation between the two in areas involving shared competencies.[240]

In its Legal Service Note, the Council suggested an overall political solution for voting procedures to be applied to decision-making in the areas of GATS and TRIPs.[241] The suggested solution would apply qualified majority voting in areas where the Community has competence and the EC Treaty provides for such voting in articles such as 113.[242] The suggested solution requires unanimity where the Member States have competence. The Council, however, recognized that the latter solution would run into difficulties for two reasons:

(i) owing to the possible divergence of views among Member States and between the Member States and the Community institutions with regard, in each instance, to the allocation of powers between the Community and the Member States; and
(ii) because, in a field in which powers are shared between the Community and the Member States, a single issue could fall simultaneously within the competence of the Community and that of the Member States.[243]

The Legal Service Note distinguished between cases where Member States jointly exercised their powers with those of the Community and cases where Member States exercised their powers separately. The Legal Service Note also suggested that the most expedient solution is for there to be one procedure for administering GATS and another for administering TRIPs.[244]

The above discussion hints at the difficulty of establishing a coherent method of coordinating the positions of the Member States and the Community in the areas of GATS and TRIPs. The confusion that served as the basis for the Commission's argument to be granted exclusive competence is very likely to ultimately hamper the Community's

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[240] *Opinion 2/91*, *supra* note 214.
[241] *Legal Service Note*, *supra* note 225 at 7.
[242] *Ibid.* at 8.
[243] *Ibid.*
[244] *Ibid.* at 9.

ability to participate effectively in the WTO. Such threat is notably likely to strike the Community within the WTO dispute settlement system.

5.2. *The Issue of Dispute Settlement*

In the absence of a formal political agreement between the Commission and the Member States on methods for managing the competence of the Community and of the Member States within the WTO, the WTO dispute settlement procedure is likely to create problems for the European Community, both with regard to the lodging of complaints and to the use of the cross-retaliation device.

As far as the lodging of complaints is concerned, under the old GATT, only the European Community itself was party to disputes with third countries whenever the Community's interest were involved, either as an applicant or a defendant. This situation made sense in view of the EC's exclusive competence in the goods trade sector managed by the now defunct GATT. In the WTO, however the situation is somewhat different due to the coexistence of this exclusive EC competence and competence which is shared with its Member States, a situation which stems directly from the ECJ's *Opinion 1/94* and which concerns mainly trade in services and intellectual property rights, as exposed above.

The issue of dispute settlement in the WTO, where GATS and TRIPs are involved, has two aspects: (1) third-countries bringing actions against either the Community or individual Member States, depending on who has competence in a particular area; and (2) the Community or a Member State bringing an action against third parties, again depending on the division of competence. Shared competence between the Community and the Member States makes it difficult for third parties wishing to bring an action for a violation of GATS or TRIPs to determine who the appropriate parties are, causing confusion in the dispute settlement system of the WTO. In many cases, the boundaries of competence are blurred and may involve both the Member States and the Community.

The Legal Service Note of the Council was unhelpful in outlining a solution for this problem, except to state that the Community "cannot impose on third-countries which are our partners in the [WTO] the burden of analyzing the respective powers of the

Community and its Member States."[245] Furthermore, it states that "[a] formal undertaking in the [WTO] on the part of the Community and its Member States not to oppose acceptance of a complaint for reasons of 'powers' (distribution of powers between the Community and its Member States) therefore seems necessary."[246] This ensures that issues of distribution of competencies remain an internal matter for the Community and the Member States, and does not hamper the implementation of the dispute settlement machinery by third parties.[247]

The possibility of referring cases to national court was however advanced by France and Spain in particular. This would be justified due to the fact that in areas of shared competence, if a Member State is not authorized to act alone, the unanimous agreement of Member States is currently required to start an action. In practice, thus, the Member States could well find it difficult to lodge complaints in areas of shared competence. On the other hand, in areas of Community's competence, only a qualified majority is require for Member States to oppose a proposal by the Commission to lodge a complaint before the WTO. It would therefore be easier for Member States to block a complaint by the Commission on an issue which in fact falls under EC's exclusive competence than to exercise their rights by lodging a complaint before the WTO on an issue in the area of shared competence.

Despite this paradox, the Commission is firmly opposed to any possibility of referring cases to a national court. Thus, the draft code of conduct presented to Member States in 1995 but which failed to be adopted, set down that the Commission would act alone in matters of dispute settlement, including issues falling under shared competence: the Commission would automatically start proceedings against a third country at the request of a Member State, unless a majority of Member States was opposed thereto, and if proceedings were brought against the EC, the Commission would defend the positions of its Members States.

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[245] *Ibid.* at 9-10.
[246] *Ibid.*
[247] *Ibid.*

As things currently stand, the Commission continues to manage the WTO dispute settlement procedure on behalf of its Members States, thus ensuring that for the moment, there is an apparent coherence of the EC participation in the running of the World Trade Organization.

As to the case of the introduction of a cross-retaliation mechanism provided for in Article 22.3(c) of the DSU, this would also appear to be slightly problematic for the EC. Should a Member of the WTO fail to implement the conclusions reached by a panel or by the Appellate Body after a dispute, the complainant could be authorized to bring proceedings to obtain compensation as a first step, and subsequently to bring proceedings in order to suspend concessions as a second step while waiting for the measure which has been ruled to be incompatible to be withdrawn or for a mutually satisfactory solution to be found. In this case, it would be possible to suspend or to withdraw concessions under a WTO subsidiary agreement which is different from that at issue in the disputed case, in other words, to resort to cross-retaliation.

However, cross-retaliation may prove difficult in the European Community because:

> in the absence of close cooperation, where a Member State, duly authorized within its sphere of competence to take cross-retaliation measures, considered that they would be ineffective if taken in the fields covered by GATS or TRIPs, it would not, under Community law, be empowered to retaliate in the area of trade in goods, since that is an area which on any view falls within the exclusive competence of the Community under Article 113 of the [EC] Treaty.[248]

For example, if a GATT panel authorized France to cross-retaliate against the United States for a violation of GATS, France would not be able to cross-retaliate in areas outside the limited competence that the ECJ has granted it. In such a case, the Member State would have to request the Community to retaliate on its behalf, which further complicates matters both within the European Community and for its trading partners.

It appears, however, that the EC need not fear the use of this mechanism for two main reasons. First, the GATT experience showed "[...] on-going hostility to the practice of a contracting party which had breached substantial rules [...] granting compensation to the

aggrieved contracting party or contracting parties."[249] And in this area, the new Uruguay Round rules do not appear to have created a climate which is more favourable to this practice.[250] Second, resorting to cross-retaliation is only a last step under the new WTO dispute settlement procedure and on condition that "the circumstances are sufficiently serious."[251] From this point of view, the European Commissioner Sir Leon Brittan appeared to sum up the general feeling when he stated that the European Community wished to make as little use as possible of the WTO's cross-retaliation device.

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[248] *Opinion 1/94*, *supra* note 110 at I-5421, para. 109.
[249] P.-N. Stangos, "La Communauté européenne et le nouveau régime du commerce international des marchandises issu de l'Uruguay Round" in T. Flory, ed., *La Place de l'Europe dans le Commerce Mondial* (Luxembourg: Institut Universitaire International de Luxembourg, 1995) 261 at 292.
[250] DSU, art. 22.1, *supra* note 4.
[251] DSU, art. 22.3(c), *ibid.*

CHAPTER II

THE IMPACT OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM ON THE EUROPEAN COMMUNITY'S ACTIVITY

I. PRIOR CONSIDERATION OF THE CHARACTERISTICS OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM

The above developments have drawn the background of the participation of the European Community within the WTO system in general and of its role within the new WTO dispute settlement system in particular. Now, it is essential to treat of the impact of the new WTO dispute settlement system on the European Community's activity. In this view, it seems however unavoidable first to describe the main characteristics of the new WTO dispute settlement system in order, then, to analyse its effective consequences on the European Community's activity.

A. INTRODUCTION

On the eve of the Uruguay Round negotiations, the GATT dispute resolution mechanism came under increasing strain. The major powers often ignored GATT dispute settlement decisions which did not conform to their economic interests. This situation undermined the credibility of the GATT and threatened the system's framework. If dispute settlement under the GATT continued to be ineffective as it had been through much of the 1980s and early 1990s, GATT Member States might well lose faith in the system, began reimposing the tariffs that were present before the GATT, thereby risking world wide war and possibly consequences as serious as the Great Depression.[252] In such circumstances, one of the primary purposes of the Uruguay Round negotiations was revision of the GATT dispute settlement system.

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[252] See R.E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N.H.: Butterworths, 1993) at 238 [hereinafter *Enforcing International Trade Law*].

Indeed, gathering in Punta del Este in 1986, the representatives of the GATT Member States were particularly aware of these problems when they declared the goal of the negotiations to be the improvement and strengthening of the dispute settlement system since it would have been meaningless to negotiate further rules if at the end it still remained no confidence that the new rules would have been effectively implemented and applied. The system therefore needed "more effective and enforceable GATT rules and disciplines," and the development of "adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."[253] Thus, this Declaration expressed one common understanding of all contracting parties: the enforceable character of agreed rules depended on an effective dispute settlement system and the effectiveness of the dispute settlement system depended on the clarity of the negotiated rules.

Two main stages characterize the process that finally led to the approval of the Understanding on Rules and Procedures Governing the Settlement of Disputes[254] in 1994.[255] In the first stage, the Mid-Term Review Conference of the Uruguay Round, which met in December 1988 in Montréal, introduced important measures adopted in a wide-ranging text called Improvements of the GATT Controversies, Settlement Rules and Procedures.[256] This text became applicable on 12 April 1989, and was the basis for the Negotiation Group on the Dispute Settlement in the first two years of the Uruguay Round.[257] The Montréal Reform measures were meant to be temporary, being applicable from 1 May 1989 up to the conclusion of the Uruguay Round. Nevertheless, many of the provisions set forth in the Montréal Reform have been almost completely reproduced in the DSU.

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[253] *1986 Ministerial Declaration*, *supra* note 119 at 25.
[254] DSU, *supra* note 4.
[255] For a detailed history of the Uruguay Round, see *GATT Negotiating History*, *supra* note 68.
[256] *Trade Negotiations Committee Meeting at Ministerial Level, Montréal*, 9 December 1988, GATT Doc. MTN.TNC/7. See E.-U. Petersmann, "The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Resolution Settlement Procedures" (1989) 32 German Y.B. Int'l L. 280 at 300.
[257] *Improvements to the GATT Dispute Settlement Rules and Procedures*, 12 April 1989, GATT Doc. L/6489, 36th Supp. B.I.S.D. (1990) 61.

In the second stage, further improvements were introduced by the Dunkel Draft, written by the General Director of the GATT, Arthur Dunkel, on 20 December 1991.[258] The Dunkel Draft contained specific provisions for dispute settlement, including the Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the GATT[259] and the Elements of an Integrated Dispute Settlement System.[260] The Dunkel Draft absorbed all of the earlier GATT agreements on dispute settlement, setting forth provisions for previously unaddressed issues. Both the Dunkel Draft and the Montréal Reform played an important role in the transitional period and both may be considered as the basis of the DSU.

The DSU is now the main source of regulation of dispute resolution, together with the principles laid down in Articles XXII and XXIII of the GATT,[261] which remain the central articles on GATT dispute settlement, as expressed in Article 3.1 of the DSU.[262]

Thus, the major improvements introduced by the Uruguay Round to the dispute resolution system can be summarized as follows:

- the creation of an "integrated" system which allows Member States to apply the rules and procedures of the DSU to disputes which may arise in relation with one of the multilateral agreements listed in Appendix 1 of the DSU;[263]

- the creation of a "right to the Panel" with the introduction of the rule of "negative consensus" for the rejection of the request for the establishment of a panel and with the provision of precise time limits for the establishment of the panel;[264]

- the establishment of a Dispute Settlement Body, responsible for administration of the rules and procedures of dispute settlement, for the establishment of panels, for the adoption of panel reports and Appellate Body reports, for the implementation of

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[258] *Dunkel Draft Final Act*, *supra* note 68.
[259] *Ibid.* at S.1-S.23.
[260] *Ibid.* at T.1-T.6.
[261] *GATT*, 30 October 1947, T.I.A.S. 1700, 55 U.N.T.S. 194, arts. XXII-XXIII.
[262] DSU, art. 3.1, *supra* note 4.
[263] *Ibid.*, art. 1 & app. 1.
[264] *Ibid.*, arts. 11-12.

rulings and recommendations, and for disciplinary action against Member States which do not comply with the rulings and recommendations;[265]

- the provision of a precise timetable for all procedural phases of dispute settlement;[266]

- the possibility for the parties to the dispute to participate in the reporting process and to ask for a revision of the interim report prior to circulation of the final report to the Member States (more commonly known as the Interim Review Stage);[267]

- the possibility of appellate review and the provision of a standing Appellate Body;[268]

- the introduction of the principle of "negative" consensus of all DSB Member States for the rejection of a panel or Appellate Body report.[269] This represents a substantial modification of the former consensus rule, which required consensus to adopt a report. The modification of the consensus rule represents the main success and the most radical innovation introduced in the GATT dispute settlement system by the Uruguay Round;

- the introduction of a detailed regulation of the implementation stage, with specific procedures to be followed after a persistent lack of implementation;[270]

- the introduction of the possibility to resort to arbitration as an alternative means of dispute settlement at both the decision and implementation stages.[271]

In order to grasp in a more detailed way the main improvements of the new WTO dispute settlement system, a preliminary comparison with the former GATT 1947 dispute settlement system is necessary.

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[265] *Ibid.*, art. 2.
[266] *Ibid.*, art. 2.2.
[267] *Ibid.*, art. 15.
[268] *Ibid.*, art. 17.
[269] *Ibid.*, arts. 16.4 & 17.14.
[270] *Ibid.*, art. 21.
[271] *Ibid.*, art. 25.

B. DISPUTE SETTLEMENT PRIOR TO THE GATT/WTO 1994[272]

1. GATT Articles XXII and XXIII

In his attempt to provide an adequate analysis of GATT dispute settlement in the past, Mora has come up against a primary problem, that of the absence of any official definition of a 'GATT dispute' or even of a 'GATT dispute settlement procedure'.[273] He has then referred to international law[274] in which a concept was provided by the Permanent Court of International Justice in the *Mavrommattis* Case where a dispute was defined as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[275] Using this broad concept, Mora has mentioned the fact that more than thirty articles in the GATT provide for different procedures to settle diverse types of disputes.[276] Thus, "one could fit within the concept of 'dispute settlement' activities ranging from consultations related to different issues to the waiver procedures of Article XXV:5."[277] However, GATT Articles XXII and XXIII have traditionally been considered the central articles on GATT dispute settlement, on the basis of which GATT practice evolved despite the fact that they do not explicitly mention the words 'dispute settlement'.[278]

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[272] Except where otherwise noted, the following developments on this issue relies heavily on Komuro's article: N. Komuro, "The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding" (1995) 12 J. Int'l Arb. 81 [hereinafter "WTO Dispute Settlement Mechanism"].

[273] "A GATT With Teeth", *supra* note 13 at 115.

[274] *Ibid.*

[275] *Mavrommattis Palestine Concessions Case (Greece v. United Kingdom)* (1924), P.C.I.J. (Ser. A) No. 2 at 11-12. A narrower concept is provided by J.G. Merrills: "A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with a refusal, counter-claim or denial by another. In the broadest sense, an international dispute can be said to exist whenever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different part of the world": J.G. Merrills, *International Dispute Settlement* (Cambridge: Grotius, 1991) at 1. See also Behrens, "Alternative Methods of Dispute Settlement in International Economic Relations" in D.C. Dicke, ed., *Adjudication of International Trade Disputes in International and Economic Law* (Fribourg, Switzerland: Fribourg University Press, 1992) 1 at 5-9.

[276] "A GATT With Teeth", *supra* note 13 at 115.

[277] *Ibid.*

[278] See E.U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer, 1997) 70.

1.1. *The Text*

As McLarty has put,[279] "[u]nder GATT 1947, the dispute settlement consists of two general stages: (1) diplomatic consultations directly between the disputing parties, and (2) institutional processes before a GATT panel."

With regard to the first phase, Article XXII provides for bilateral consultations "with respect to any matter affecting the operation of this Agreement" and, at the request of a contracting party, for subsequent multilateral consultations "in respect of any matter for which it has not been possible to find a satisfactory solution through consultations under paragraph 1."

The second phase finds its ultimate legal basis in Article XXIII on "Nullification or Impairment" which states:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
> (a) the failure of another contracting party to carry out its obligations under this Agreement; or
> (a) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement; or
> (a) the existence of any other situation,
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
> 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they considered to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other

[279] T. McLarty, "GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System" (1994) 9 Florida J. Int'l L. 241 at 258 [hereinafter "GATT 1994 Dispute Settlement"].

> obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effects upon the sixtieth day following the day on which such notice is received by him.[280]

Thus, Article XXIII of the GATT appears as the most important Article devoted to dispute settlement in the former GATT 1947, permitting the 'CONTRACTING PARTIES' to make rulings on complaints by States. It also authorizes suspension of GATT obligations whenever a State is determined to have caused 'nullification or impairment' of benefits under the treaty through its trade policies or actions.

In the early years of the GATT, the contracting parties handled disputes by acting jointly or by setting up working groups of diplomatic representatives to investigate complaints. In 1955, however, the GATT Secretariat established dispute resolution panels of three to five experts to act as independent arbitrators to facilitate dispute resolution. The GATT used this general arbitration framework for disputes until the WTO came into existence in 1995. Between 1955 and 1995, the GATT system gradually grew more 'legalistic' and professional, but it remained formally nonbinding.

Since the Kennedy and Tokyo Rounds of multilateral trade negotiations in GATT, Articles XXII and XXIII of the former GATT 1947, which are too succinct to establish clear dispute settlement procedures on their own, have been progressively codified and supplemented by a number of decisions and understandings adopted by the GATT Contracting Parties. These are:

- the Decision of 5 April 1966 on Procedures under Article XXIII, applying to disputes between a developing country contracting party and a developed country contracting party;

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[280] As regards the use of the term CONTRACTING PARTIES in capital letters, see GATT, art. XXV:1: "Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES."

- the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 and its annexed Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, as agreed in the Tokyo Round.[281] Paragraph 7 of the 1979 Understanding states that "the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future with the improvements set out below";

- the Decision of 29 November 1982 on Dispute Settlement Procedures, adopted at the Tirty-Eighth Session;[282]

- the Decision of 30 November 1984 on Dispute Settlement Procedures, adopted at the Fortieth Session;[283] and

- the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, negotiated at the December 1988 Meeting of the Trade Negotiations Committee of the Uruguay Round.[284]

Of the above-mentioned Decisions, the 1989 Decision was kept in effect until the entry into force of the WTO Understanding by the Contracting Parties' Decision of 22 February 1994.[285]

Articles XXII and XXIII should be interpreted in light of these supplementary instruments.

1.2. *Article XXII and Article XXIII:1 on Consultations: The Consultation Phase*

As already briefly stated above, Article XXII provides for consultation procedures for issues regarding "any matter affecting the operation of this Agreement." Each contracting party "shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting

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[281] GATT Doc. L/4907, 26th Supp. B.I.S.D. (1979) 210 [hereinafter 1979 Understanding].
[282] GATT Doc. L/5424, 29th Supp. B.I.S.D. (1982) 9, 13-16 [hereinafter 1982 Decision].
[283] GATT Doc. L/5752, 31st Supp. B.I.S.D. (1984) 9-10 [hereinafter 1984 Decision].
[284] 36th Supp. B.I.S.D. (1989) 61 [hereinafter 1989 Decision].

party" with respect to any GATT matter. If the consultation does not lead to "a satisfactory solution", the Contracting Parties "may, at the request of a contracting party, consult with any contracting party or parties."

As to Article XXIII:1 consultation, it can be used when a party believes that its benefit under GATT is being nullified or impaired, or a GATT objective is being impeded. Either the general consultation provision of Article XXII or an alternative provision[286] must be used before proceeding to dispute resolution under Article XXIII:2. Some of the pivotal developments in the area of consultations concern the ability of parties to expedite consultations and to proceed to dispute settlement if the consultations prove fruitless.

The interpretation of Article XXII, which allows for bilateral and multilateral consultations, has become more defined. The 1979 Understanding added some interpretive provisions, but many of the additions regarding expediting consultations and time restraints were laudatory and undefinable:

> Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connection, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions.[287]

These relative time suggestions were later given more of a definitive context. The 1989 Decision provides:

> If a request is made under Article XXII:1 [...] the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request [...].[288]

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[285] GATT Doc. L/7416.
[286] The following GATT Articles and paragraphs require contracting parties to consult on certain occasions: arts. II:5; VI:7; VII:1; VIII:2; IX:6; XII:4; XIII:4; XVI:4; XVIII:7, 12, 16, 21, 22; XIX:2; XXIII; XXIV:7; XXV:1; XXVII; XXVIII:1, 4; XXXVII:2.
[287] 1979 Understanding, *supra* note 281.
[288] 1989 Decision, *supra* note 284 at 62, para. C.1.

In February 1994, the Contracting Parties decided to maintain these limitations until the entry into force of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes.[289]

In addition to the more definitive rules on time, the rules have become stricter about not allowing one party to block progression past conciliation. The 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, with regard to the relationship between Article XXII and Article XXIII consultations, provides:

> If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute.[290]

Thus, the 1989 Decision made it clear that consultations under Article XXIII:1 may be replaced with those under Article XXII:1. This reflects the practice before 1960 of proceeding from consultations under Article XXII:1 to the referral to the Contracting Parties (*i.e.*, establishment of a panel) under Article XXIII:2.[291] As provided for in the 1960 Procedures for Consultation on Residual Import Restrictions,[292] parties to disputes may proceed directly form Article XXII consultations to Article XXIII:2 without resorting to Article XXIII:1 consultations, "it being understood that [Article XXII] consultation(s) would be considered by the Contracting Parties as fulfilling the conditions [for Article XXIII:1 consultations]."

However, the language of 1989 Decision as stated above, appears to allow one party to block the formation of a panel by deciding that the consultations, at the time that the panel is requested by the opposite party, are not final. In the *Japanese Taxes on Imported Alcoholic Beverage* Case, the Legal Adviser to the Director-General addressed this issue

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[289] DSU, *supra* note 4.
[290] 1989 Decision, *supra* note 284 at 62.
[291] The Panel on *France – Assistance to Exports of Wheat and Wheat Flour* (*Complaint by Australia*) (1958), 7th Supp. B.I.S.D. (1958) 22, was established after consultations under Article XXII:1 between Australia and France. The same applied to dispute between the EC and Japan: *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (*Complaint by the EEC*) (1987), 34th Supp. B.I.S.D. (1987) 83.
[292] 9th Supp. B.I.S.D. (1960) 18 at 19-20, para. 9.

(that is, more exactly, whether parties to disputes must agree that Article XXII consultations fulfil the conditions for Article XXIII consultations before referral to the Contracting Parties) by saying that, in his view, it is "not necessary that both parties so agree before moving to set up a panel under Article XXIII:2; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated."[293]

1.3. *Article XXIII on Nullification or Impairment: The Panel Phase*

Whereas Article XXII offers '*amica fora*'[294] for consultation on any GATT matter irrespective of whether a benefit under the GATT is denied, Article XXIII provides dispute resolution – leading to the submission of disputes to the Contracting Parties – in cases where a benefit accruing to a contracting party under the GATT is nullified or impaired, or the attainment or any objective under the GATT is impeded.

1.3.1. Article XXIII:1: Nullification or Impairment

Under Article XXIII:1 of the GATT, nullification or impairment of a benefit under the GATT may flow from the following actions of a contracting party:

- the failure to carry out its obligations under the GATT by infringing specific provisions of the GATT;[295] or
- the application of any measure, whether or not it conflicts with the GATT provisions;[296] or
- the existence of any other situation.[297]

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[293] *Analytical Index: Guide to GATT Law and Practice*, 6th ed. (GATT, 1994) 571; GATT Doc. C/M/215, 34th Supp. B.I.S.D. 83. The representative of Japan stated that Article XXII:1 consultations had not been exhausted between the EC and Japan and it was premature to move on Article XXIII:2. In the dispute concerning *Canada – Administration of the Foreign Investment Review Act*, the parties had moved directly from Article XXII:1 to Article XXIII:2, since both the United States and Canada had agreed that the requirement in Article XXIII:1 had been fulfilled, according to Japan: GATT Doc. C/M/205 at 9.
[294] See "WTO Dispute Settlement Mechanism", *supra* note 272 at 94.
[295] GATT, art. XXIII:1(a).
[296] GATT, art. XXIII:1(b).
[297] GATT, art. XXIII:1(c).

In cases where a contracting party's benefit under the GATT is nullified or impaired by infringement of the GATT provisions by another contracting party,[298] the first party may bring a 'violation complaint' against the second party before the Contracting Parties.[299] With regard to impairment that does not conflict with the GATT[300] and that arising from any other situation,[301] an impaired party may also bring a 'non-violation complaint' or a 'situation complaint' before the Contracting Parties.[302] Complaints before the Contracting Parties should, however, be preceded by consultations, either under Article XXIII:1 or under Article XXII:1 as seen above.

1.3.2. Article XXIII:2: Referral to the Contracting Parties and the Panel Process

After failure of diplomatic consultation and negotiations carried out under either Article XXII:1 or Article XXIII:1, the aggrieved party may refer the matter to the Contracting Parties under Article XXIII:2. The Contracting Parties, then, "shall promptly investigate" the matter and "shall make appropriate recommendations [...] or give a ruling on the matter." However, the brevity of Article XXIII:2 made the practice evolve towards a rule-oriented procedure, in which a panel, composed of three or five individuals not being nationals of any of the disputing States, assists the Contracting Parties by making findings and formulating draft recommendations for consideration by the Contracting Parties.

Nevertheless, under GATT 1947, there was no absolute right to such a panel because the responding party had the opportunity to put forth evidence that such a panel would be premature or inequitable under the circumstances, and because the contracting parties might consider formation of the panel fruitless.[303] Furthermore, under GATT 1947, a party could block the establishment of a panel, because although a party might request "the establishment of a panel to assist the Contracting Parties to deal with the matter, the Contracting Parties [...] decide[d] on its establishment in accordance with standing

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[298] GATT, art. XXIII:1(a).
[299] GATT, art. XXIII:2.
[300] GATT, art. XXIII:1(b).
[301] GATT, art. XXIII:1(c).
[302] GATT, art. XXIII:2.
[303] 1979 Understanding, *supra* note 281 at 210, annex, para. 4 (stating that "[b]efore bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful").

practice."[304] Its practice was to take action by consensus. However, under the auspices of GATT 1947, panels were almost always formed.[305]

Thus, once formed, the function of the panel "is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2."[306] The panel does so by issuing a report which consists of an assessment of the facts and applicable GATT provisions.[307] Prior to such an issuance, however, the parties submit written statements or briefs, followed by oral hearings, for the panel to consider. On this point, it must be noted that during the panel process, the burden of proof placed on parties to the disputes varies depending on whether or not the complaint alleges violation of GATT obligations. As noted in the Annex to the 1979 Understanding, in violation complaints[308] it is up to the offending respondent to rebut the charge, *i.e.*, to establish that no nullification or impairment has occurred, since a breach of GATT obligations is *prima facie* evidence of nullification or impairment requiring counter-evidence from the offender. The same holds true in cases where the offending party invokes an exception such as Article VI (anti-dumping duties, countervailing duties), XI:2(c) (import restrictions on agricultural or fisheries products), or XX (general exception).[309] By contrast, in non-violation

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[304] *Ibid.* at 212, para. 10.
[305] See W.J. Davey, "Dispute Settlement in GATT" (1987) 11 Fordham Int'l L.J. 51 at 92.
[306] 1979 Understanding, *supra* note 281 at 213, para. 16.
[307] *Ibid.*
[308] Presumption of *prima facie* nullification or impairment is well established. The Annex to the 1979 Understanding provides, in its paragraph 5: "In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. A *prima facie* case of nullification or impairment would, *ipso facto*, require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the [offending respondent] to rebut the charge": 1979 Understanding, *supra* note 281 at annex, para. 5. See also *Uruguayan Recourse to Article XXIII* (*Complaint by Uruguay*) (1962), GATT Doc. L/1923, 11th Supp. B.I.S.D. 95 at 99-100, para. 15, stating that: "[...] in cases where there is a clear infringement of the provisions of the General Agreement, the action would *prima facie* constitute a case of nullification or impairment."
[309] See *Swedish Anti-dumping Duties* (*Complaint by Italy*) (1955), GATT Doc. L/328, 3d Supp. B.I.S.D. 81 at 85-86, para. 15, noting that: "[...] it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that contracting party should establish the existence of these facts when its action is challenged." Likewise, see *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* (*Complaint by Canada*) (1991), GATT Doc. DS7/R, 38th Supp. B.I.S.D. 30 at 44, stating that "Article VI:3, as an exception to the basic principles of the General Agreement, had to be interpreted narrowly and [...] it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3." With

complaints, nullification or impairment must be established by the complainant, who is called upon to provide detailed proof of nullification or impairment.[310]

As to the final reports issued by the panels, although panel reports will vary in their degree of involvement, analysis of the issues, and amount of remedial provisions, the reports are authorized to contain recommendations about: how the offending measures should be eliminated (in either case, panels have traditionally recommended that competition be restored, either through withdrawal of the given measure or some other method); whether any amount of compensation is necessary; and, whether retaliation is warranted.[311] The panel report is then submitted to the parties in the action and to the Contracting Parties. However, the report is only given consideration, unless adopted by consensus of the Contracting Parties convening as the Council.[312] Panel reports are, therefore, not ultimately binding.[313] In addition, it must be noted that panel reports, if

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regard to Article XI:2(c), see *Japan – Restrictions on Imports of Certain Agricultural Products* (*Complaint by the United States*) (1988), GATT Doc. L/6253, 35th Supp. B.I.S.D. (1989) 163 at 227, noting that the Panel "considered [...] that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision." With regard to Article XX, see *Canada – Administration of the Foreign Investment Review Act* (*Complaint by the United States*) (1984), GATT Doc. L/5504, 30th Supp. B.I.S.D. 140 at 164, para. 5.20, stating that "[s]ince Article XX(d) is an exception to the General Agreement, it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act." See also *United States – Section 337 of the Tariff Act of 1930* (*Complaint by EEC*) (1989), GATT Doc. L/6439, 36th Supp. B.I.S.D. 345 at 393, para. 5.27; *United States – Restrictions on Imports of Tuna* (*Complaint by Mexico*) (1991), 39th Supp. B.I.S.D. 155; *EEC – Regulation on Imports of Parts and Components* (*Complaint by Japan*) (1990), GATT Doc. L/6657, 37th Supp. B.I.S.D. 132; *United States – Measures Affecting Alcoholic and Malt Beverages* (*Complaint by Canada*) (1992), GATT Doc. DS23/R, 39th Supp. B.I.S.D. 206 at 283, para. 5.42.

[310] J.H. Jackson, *World and the Law of GATT: Treatise on a Legal Analysis of the General Agreement on Tariffs and Trade* (New York: Bobbs-Merrill, 1969) at 182; *World Trading System*, *supra* note 27 at 95: Professor Jackson says that *prima facie* nullification or impairment is found not only in the case of a breach of GATT obligations but also in the case of the use of quantitative restrictions or domestic subsidies. In one case (GATT Doc. L/1222), the quantitative restriction itself, even if justified by Article XII (balance-of-payments justification) or XIV (exceptions to the rule of non-discrimination), was found to constitute a *prima facie* nullification or impairment. In another case (3d Supp. B.I.S.D. (1955) 224), the position on subsidies, as taken by the Ninth Session Working Group Report adopted by the Contracting Parties, "seems to establish what in effect can be called a *prima facie* nullification", according to Professor Jackson. Certain critics, however, note that the quantitative restrictions justified by the GATT exceptions and the subsidies that were not prohibited in principle by the GATT constitute non-violation nullification or impairment, rather than a *prima facie* nullification or impairment. In addition, the Ninth Session Working Group Report refers to a "reasonable expectation [...] that the value of the concession will not be nullified or impaired by the subsequent introduction of a domestic subsidy on the product concerned." This suggests a criterion for establishing non-violation nullification or impairment.

[311] GATT, 55 U.N.T.S. 188, art. XXIII:2; 1979 Understanding, *supra* note 281 at 210, annex, para. 4.

[312] *Ibid.* at 214, para. 21.

[313] *Ibid.*

approved by the Council, must be adopted in their entirety. Partial adoption of a panel report is prohibited.[314] Moreover, there is no appeal against formally adopted panel reports.[315]

1.3.3. Article XXIII:2: Recommendations of the Contracting Parties

In approving panel reports, the Council makes "appropriate recommendations" the content of which depends on the complaint or, instead, "gives a ruling on the matter."[316]

In violation complaints, the Contracting Parties recommend that the losing party bring the administrative measures found to be inconsistent with the GATT provisions into conformity with the GATT. The consistency of legislative measures is more complex. Legislation mandatorily requiring the Executive to take GATT-inconsistent measures is GATT-illegal, whereas legislation merely giving the Executive the authority to act inconsistently with the GATT cannot, by itself, constitute a violation of the GATT.[317] In contrast, in non-violation complaints, the Contracting Parties recommend that the losing

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[314] Partial adoption of a Panel Report is not permitted. In *Japan – Restrictions on Imports of Certain Agricultural Products*, *supra* note 308, the representative of Japan in 1987 expressed objections to some parts of the Panel Report, requesting its partial adoption. Other contracting parties supported adoption of the Report in its entirety. Partial adoption of a report was unprecedented in GATT, said the United States. The Panel Report was adopted at the next Council meeting in February 1988. The representative of Japan noted that: "Regrettably, many contracting parties had opposed Japan's position on the grounds that partial adoption of a panel report should not be established as a precedent [...]. Japan would not oppose a consensus to adopt the Report in its entirety at the present meeting, provided the Council took note of and put on record his statement in its entirety." (GATT Docs. C/M/217 at 17, C/W/538).

[315] However, there was a case in which a poorly reasoned panel report was reviewed and a second panel report overruling the first report was issued. See *United States – Imports of Certain Automotive Spring Assemblies* (*Complaint by Canada*) (1983), GATT Docs. L/5192, L/5333, C/M/168, 28th Supp. B.I.S.D. 114. The understanding in this case states: "[Adoption of the Panel Report] shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement." Section 337 was later examined by the 1989 Panel Report, which overruled the former Report.

[316] See *Uruguayan Recourse*, *supra* note 307, noting that "whilst a ruling is called for only when there is a point of contention on fact or law, recommendations should always be appropriate whenever, in the view of the Contracting Parties, they would lead to a satisfactory adjustment of the matter." A large number of recommendations were taken under Article XXIII:2, but, up until now, no ruling has been issued.

[317] See *EEC – Regulation on Imports of Parts and Components*, *supra* note 309 at para. 5.25. The Panel found that the EEC's anti-circumvention provision, Article 13.10 of the basic anti-dumping regulation, merely authorizing the Commission and the Council to impose discriminatory measures inconsistent with Article III:2 of the GATT, is not inconsistent with the GATT. The EEC would meet its obligations under the GATT if it were to cease to take measures on the basis of the provision, according to the panel. See also 34th Supp. B.I.S.D. 160.

party consider ways to eliminate the impairment of benefits to the complaining party with a view to reinstating the balance of benefits.[318]

With regard to timing, the 1979 Understanding indicates that recommendations under Article XXIII:2 are to be implemented "within a reasonable period of time."[319]

Compensation is permitted under strict conditions, according to the Annex to the 1979 Understanding, which provides:

> The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.[320]

Implementation of recommendations is subject to multilateral surveillance. Paragraph 22 of the 1979 Understanding requires the Contracting Parties to "keep under surveillance any matter on which they have made recommendations."[321] In furtherance of the provisions of the 1979 Understanding, paragraph (viii) of the 1982 Decision provided that the Council must periodically review action taken pursuant to recommendations.[322] It also required that the concerned party report within a reasonable specified period on action taken, or report on its reasons for not implementing the recommendation.[323]

Paragraph I.3 of the 1989 Decision brought about further improvements:

> The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings

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[318] See *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins (Complaint by the United States)* (1990), GATT Doc. L/6627, 37th Supp. B.I.S.D. (1990) 86.
[319] 1979 Understanding, *supra* note 281 at para. 22.
[320] *Ibid.* at annex, para. 4. See *United States – Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver (Complaint by EEC)* (1990), GATT Doc. L/6631, 37th Supp. B.I.S.D. 228 at 262, stating that: "[...] there is no provision in the General Agreement obliging contracting parties to provide compensation [see *EEC – Restrictions on imports of apples (Complaint by the United States)* (1989), GATT Doc. L/6491, 36th Supp. B.I.S.D. 135]. Paragraph 4 of the Annex to the Understanding on Dispute Settlement which the EEC invokes as a basis for its claim gives contracting parties the possibility to offer compensation as a temporary measure when the immediate withdrawal of a measure found to be inconsistent with the General Agreement is impracticable. A contracting party might, in conformity with that provision, choose to grant compensation to forestall a request for an authorization of retaliatory measures under Article XXIII:2, but the Understanding does not oblige it to do so."
[321] 1979 Understanding, *supra* note 281 at para. 22.
[322] 1982 Decision, *supra* note 282 at para. viii.
[323] *Ibid.*

> may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council's agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings.[324]

In cases where the recommendations are not followed, the complainant can ask the Contracting Parties to make suitable efforts to find a different solution.[325] Although, the alternative solution, just like the panel's initial findings, is not binding.[326]

2. Dispute Settlement Weaknesses under GATT 1947

As Komuro has pointed out, "criticisms of pre-WTO dispute settlement procedures centered around the adjudicative phases of the mechanisms, ranging from complaints about the establishment of a panel to implementation of recommendations."[327] Indeed, sharing the same view, McLarty has described the main defect in the 1947 dispute settlement procedures as the fact "that one member can block formation of a panel, adoption of a report, and authorization for retaliatory action."[328]

2.1. *Establishment of a Panel*

Until 1989, establishment of a panel was sometimes delayed because of resistance by the respondent party, as a reluctant party could block the Council decision to establish a panel. To accelerate the establishment of a panel, the 1989 Decision affirmed the right of a complaining party to have a panel process initiated, stating:

> If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute.
> If the complaining party so request, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request

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[324] 1989 Decision, *supra* note 284 at para. I.3.
[325] 1979 Understanding, *supra* note 281 at 214, paras. 21-22.
[326] *Ibid.* at 214, para. 22.
[327] "WTO Dispute Settlement Mechanism", *supra* note 272 at 102.
[328] "GATT 1994 Dispute Settlement", *supra* note 279 at 261-62.

first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise.[329]

Moreover, in order to avoid considerable delay in the formation of a panel due to the right of consultation which the disputing parties have in the selection of panel members, the 1989 Decision also permitted the Director-General to form the panel by appointing panelists he considers appropriate in cases where there is no agreement on panelists within twenty days after the establishment of a panel.[330]

2.2. *The Panel Process*

2.2.1. Procedural Weaknesses

The panel process has been criticized for lacking transparency since panel deliberations are confidential and no records are made. Furthermore, panels often experience procedural delays due to difficulties in establishing panels, selecting panelists, negotiating special terms of reference (the standards by which findings are made), interpreting GATT law and adopting panel reports. Nevertheless, a review of panel reports from 1979 to 1986 showed that on average, panel reports have been adopted within thirteen months from the establishment of a panel, and within fourteen and a half months from the date of the complaint under Article XXIII:2 of the GATT.

The 1989 Decision attempted to eliminate delays in the panel process, stating, *inter alia*:

> In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agrees upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties within three months.
> When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the Council in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months.

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[329] 1989 Decision, *supra* note 284 at 62, paras. C.2 and F(a).
[330] *Ibid.* at para. F(c)5.

> The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months.[331]

2.2.2. Substantive Weaknesses

Panel reports were sometimes open to the charge of bias inherent in the use of governmental officials as panelists.[332] The Annex to the 1979 Understanding refers to the customary practice that members of panels were usually selected "from permanent delegations or, less frequently, from the national administration in the capitals amongst delegates who participate in GATT activities on a regular basis."[333] Non-governmental experts had been designated as panelists "in a few cases, in view of the nature and complexity of the matter."[334] Members of panels were "expected to act impartially without instructions from their governments."[335]

Allegations of bias seemed to disappear, however, as the appointment of non-governmental experts as panelists increased. The 1984 Decision introduced the concept of a roster of non-governmental panelists, these panelists were suggested by the disputing parties and agreed to by the Contracting Parties in consultation with the Director-General.[336] The 1989 Decision stressed an expansion and improvement of the roster of non-governmental panelists and stated that, to this end, contracting parties "may nominate individuals to serve on panels and shall provide relevant information on their nominee's knowledge of international trade and of the GATT."[337] Mention was also made of the practice that panelists are proposed to the Council by the Director-General and not by the parties. Unlike arbitrators nominated by parties to the dispute, GATT panelists are appointed by the institution mainly from the non-governmental roster.

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[331] 1989 Decision, *supra* note 284.
[332] See W.J. Davey, "An Overview of the General Agreement on Tariffs and Trade" in P. Pescatore, W.J. Davey & A.F. Lowenfeld, *Handbook of GATT Dispute Settlement* (Deventer: Kluwer, 1991) at 73 [hereinafter *GATT Handbook*].
[333] 1979 Understanding, *supra* note 281 at annex.
[334] *Ibid.*
[335] *Ibid.*
[336] 1984 Decision, *supra* note 283 at para. 2. A preference was maintained, however, for panels composed of governmental representatives.
[337] 1989 Decision, *supra* note 284 at para. F(c)3.

As to the critics regarding the quality of panel reports on the ground of the poor reasoning or the inconsistencies in certain reports, they have proved to be not so convincing. Indeed, only few panel reports have been criticized by contracting parties. Moreover, the few reports which were poorly reasoned and therefore opposed by a number of contracting parties, were either taken note of by the Council without being adopted, or adopted by the Council subject to understandings providing for future re-examination of panel findings.[338] In addition, the GATT Legal Office, established in 1983, has intervened in the panel process to assist panelists in drafting panel reports, ensuring therefore the consistency of panel case-law, and providing panelists with customary rules on treaty interpretation and GATT principles.

2.3. *Adoption of Panel Reports and the Consensus Rule*

Panel reports are adopted by a consensus of the Council acting for the Contracting Parties. Most panel reports have been adopted by the Council without a substantial delay. Several reports were shelved, however, either because of an objection by the disputing parties under the consensus rule, or for other political or technical reasons (*e.g.*, defects of reports). This fact speaks eloquently to the reason that critics rightly deemed the consensus rule in the Council under the auspices of GATT 1947 one of the foremost defects in the former GATT dispute settlement mechanism.

Actually, consensus is not defined in the GATT 1947 and has been developed for political and practical reasons, for example, to avoid voting. Consensus differs from unanimity in that it is not prevented by an absence or abstention, but is similar to unanimity in that both are subject to a veto by any Member present at the meeting.[339] Thus, in the GATT 1947 context, parties to the dispute are customarily endowed with the right to participate in the

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[338] See *Spain – Measures Concerning the Domestic Sales of Soyabean Oil (Complaint by the United States)* (1981), GATT Docs. L/5142, C/M/152: many contracting parties, including the complaining party, criticized the legal findings of the Panel Report and its implications for future interpretation of Article III. The United States had not agreed to adoption of the Report and its opinion was shared by many other contracting parties. See also *United States – Imports on Certain Automotive Spring Assemblies*, *supra* note 315.

[339] See P. Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects" (1993) 27 J. World T. 1 at 13 [hereinafter "GATT Dispute Settlement Mechanism"], stating that: "[c]onsensus comes close to unanimity or mutual agreement; but it is not simply unanimity. It is, rather, a

Council's decision-making process and may, therefore, block the adoption of panel reports by consensus. In other words, the consensus rule, in conjunction with the right of the parties to the dispute to attend the Council, conferred a veto power on disputing parties and considerably delayed the procedures.

From a legal and political point of view, as Komuro has underlined:[340]

> the practice of blocking, as distinct from the practice of non-adoption, considerably weakened the functioning of GATT dispute settlement mechanisms. The GATT was unable to overcome the shortcomings of consensus rule, although Article XXV:4 permitted the Council to adopt panel reports by a majority vote, as provided in the footnote of the 1982 Decision.[341]

The 1989 Decision hence confined itself to confirming the practice as follows:

> The parties to the dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However the delaying of the process of dispute settlement shall be avoided.[342]

2.4. *Implementation of Recommendations*

Recommendations, which are made by the Council that approves panel reports, are more than simple recommendations, in that non-compliance with them triggers an authorization of retaliation.[343] With a few exceptions,[344] they lack a binding force. In addition, the

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state of non-objection, a resigned let-it-go. Objections and misgivings may be freely expressed, but the final assent mops up any reservations which may have been previously expressed."

[340] "WTO Dispute Settlement Mechanism", *supra* note 271 at 108.

[341] See 1982 Decision, *supra* note 282 at para. (x), providing that: "the Contracting Parties reaffirmed that consensus will continue to be the traditional method of resolving disputes", but the footnote to this sentence noted that: "[...] this does not prejudice the provisions on decision-making in the General Agreement." This means that adoption of panel reports may be subject to Article XXV:4 on decision-making, which provides as follows: "Except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast." However, there were no cases where Article XXV:4 was applied in adopting panel reports.

[342] 1989 Decision, *supra* note 284 at para. G.3.

[343] See P. Pescatore, "Drafting and Analysing Decisions on Dispute Settlement" in *GATT Handbook*, *supra* note 332 at 6 [hereinafter "Drafting and Analysing Decisions on Dispute Settlement"], stating that: "[...] recommendations issued under the provisions on dispute settlement mean much more than the word 'recommendation' might seem to imply. In fact, recommendations may come close to what a ruling could be, as they might result in retaliatory measures if they are disregarded by those concerned."

GATT does not have an effective enforcement mechanism, although the multilateral surveillance of the implementation of the Council's recommendations, as introduced by supplementary Decisions (*i.e.*, 1979 Understanding and 1989 Decision), has functioned since 1989.

Consequently, the implementation of recommendations was sometimes delayed or considered unsatisfactory by a winning party, or did not take place. The delay in implementing recommendations stemmed from political motivations or the stagnation of negotiations between parties over how to secure compliance.

2.5. *Retaliation*

Another level of the consensus problem exists in the area of retaliation. Although couched in assorted terms and often discouraged because it is believed to harm other GATT principles such as non-discrimination, the sanction of arguably greatest utility for a GATT member is retaliation. At least two problems are related hereto. First, retaliation is seen as viable only to great powers. Second, Article XXIII, which along with Article XXII, provides the basis for GATT 1947 dispute settlement, allows only multilateral retaliation (an euphemism for the consensus requirement). Of course, the consensus requirement allows easy subversion of retaliation by the defendant's veto. In this regard, it is noteworthy that, though the Council may recommend retaliation, it has been formally authorized only once in GATT history.

In the case concerning *US import restrictions on dairy products*, the Contracting Parties decided that the import restrictions on dairy products maintained by the United States under Section 104 of the Defense Production Act were inconsistent with the GATT provisions and, under the circumstances, were sufficiently serious to justify retaliation by the contracting party affected. The Netherlands requested the Contracting Parties to authorize a retaliation against the United States. In 1952, the Contracting Parties auhorized the Netherlands to:

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[344] In the famous *U.S./EEC Negotiations on Poultry* Case, the GATT Panel directly rendered "advisory opinions" to the disputing parties, which accepted the opinions as legally binding: *United States – Negotiation on Poultry (Complaint by EEC)* (1963), 12th Supp. B.I.S.D. 65.

> [...] suspend the application to the United States of their obligations under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953.[345]

The decision emphasised the appropriateness of retaliation with regard to crucial elements: the value of the trade involved, the impairment suffered by the Netherlands, and the Netherlands' statement that one principal objective of retaliation is to contribute to the eventual solution of the matter in accordance with the objectives and spirit of the GATT. It was adopted with the United States and Netherlands abstaining. The US representative stated that his "delegation was prepared to accept the decision but, in view of its nature, wished to be recorded as abstaining on the taking of the decision." The Netherlands also abstained from voting on the decision "for the same reasons as the United States delegation."[346]

In a few extreme cases, unilateral retaliation was taken by the United States without the Council's authorization.[347] In the *EEC Citrus products* Case,[348] the EC refused to accept the 1985 Panel Report because it was inconsistent with precedent case-law on the non-violation nullification or impairment. Consequently, in June 1985, the United States unilaterally introduced a retaliation against imports of EC pasta by increasing duties.[349] The application of increased duties was suspended until 1 November 1985 as bilateral discussions continued, but the duties were effective until a settlement was reached on 21 August 1986.[350]

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[345] *United States – Restrictions on Dairy Products (Complaint by the Netherlands)* (1952), 1st Supp. B.I.S.D. 31 at 33. The Contracting Parties adopted the Report of the Working Party (1st Supp. B.I.S.D. 62). In fact, the Netherlands never acted on the authorization of retaliation against the United States. Accordingly, the authorization of retaliation had no effect on US exporters. The reason why the Netherlands never enforced the quota is arguably because of the ineffectiveness of removing the US quota on dairy products. See R.E. Hudec, "Retaliation against Unreasonable Foreign Trade Practices" (1975) 59 Min. L. Rev. 46.

[346] GATT Doc. SR. 7/16, at 4-5.

[347] The US Trade Representative had decided to resort to retaliatory measures under Section 301 and Special 301 in eleven cases up until 1993.

[348] *EEC – Tariff Treatment of Citrus Products from Certain Mediterranean Countries, supra* note 40.

[349] *Proclamation 5354 of 21 June 1985*, Fed. Reg. 50,26143 (1985).

[350] Fed. Reg. 51,30146 (1986).

Three observations have been made by Komuro regarding retaliation taken by a winning party:[351]

> First, as far as retaliation within the framework of Article XXIII:2 is concerned, retaliation without authorization of the Council in itself constitutes a *prima facie* nullification or impairment.[352] Inaction by the GATT with respect to the US unilateral retaliation, even though occurring in a short time-span, seemed to demonstrate the limit of the adjudicative role of the GATT.
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> Second, a difficult question remains regarding the extent of retaliation to be authorized. In the *United States superfund* case,[353] the Legal Adviser to the Director-General pointed out a difference between the withdrawal of concession under Articles XIX and XXVIII on the one hand, and Article XXIII on the other. Under the former, the withdrawal of concessions must be substantially equivalent, but under the latter, as the wording – "measures determined to be appropriate in the circumstances" – is broader, there is "a wider leeway in calculating the retaliatory measures", according to the Legal Adviser.[354]
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> Third, as in the adoption of panel reports, a question of whether parties to the dispute should be deprived of the right to assist the Council may be posed in the case of authorization of retaliation. There is no discussion regarding this issue in the GATT documents.

At the end of this very detailed but necessary analysis of the major weaknesses encountered by the GATT 1947 dispute settlement mechanism, one is now better-armed to enter into the examination of the main characteristics of the new WTO dispute settlement system as outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes. Indeed, one can easily suspect that these characteristics consist mainly in an attempt to resolve the defects of the former GATT 1947 dispute

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[351] "WTO Dispute Settlement Mechanism", *supra* note 272 at 112.

[352] See "GATT Dispute Settlement Mechanism", *supra* note 339 at 6-7: Pescatore pointed out, however that "[t]he real problem, as yet unresolved, is whether a contracting party may resort to unilateral retaliatory action if the Contracting Parties fail to take collective action, according to Article XXIII, by refusing to open a procedure, or by not allowing retaliatory action under Article XXIII:2, fourth phrase, after a contracting party's liability has been duly established. If the multilateral system fails to play its role, it cannot be said that unilateral action is illegitimate under general international law." Pescatore moreover said that "if in a contentious process, the defendant prevents consensus being attained, unilateral action becomes legitimate, as a last resort under general international law. This surely is the one point where general international law intervenes forcefully and inescapably in the GATT system": *ibid.* at 15. This observation seems, however, somewhat faded under the DSU, which excluded blocking of the procedure by the defendant by introducing the negative consensus rule.

[353] *United States – Taxes on Petroleum and Certain Imported Substances (Superfund) (Complaints by Canada, EEC & Mexico)* (1987), 34th Supp. B.I.S.D. 136, GATT Doc. C/M/211.

[354] GATT Doc. C/M/220 at 36.

settlement mechanism as previously emphasised. Thus, the following developments will envisage the unavoidable changes carried out by the DSU in order to restore the credibility of the system as a whole.

C. Characteristics of the New WTO Dispute Settlement System

The Uruguay Round represented an attempt to rectify many of the previously discussed problems. The changes in the dispute settlement area address many of the more important defects, albeit to varying degrees. One observer believes the changes create a "more legalistic dispute settlement mechanism" that discourages violations of GATT rules, increases predictability, creates a more precise timetable, and thus "encourages parties to rely more heavily on panel actions rather than respond to perceived trade infringements by resorting to unilateral measures."[355]

Thus, in order to assess the veracity of the above statement, it is now essential to identify the general nature of changes in the system as outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes, agreed in the Uruguay Round as Annex 2 of the WTO Agreement and applied since its entry into force on 1 January 1995.[356] Actually, Kuijper has characterized the new dispute settlement system as follows:

> a compulsory and binding system with a stringent time-scale, according to which, deadlines have been set for all the major steps in the procedure. It is a system that, contrary to its predecessor, provides for legal appeal and for clear rules of implementation of the rulings of panels and the Appellate Body. Possible compensation and retaliation have also been regulated in greater detail than before. Finally, it is an integrated system.[357]

Generally, as Komuro has noted, "[the DSU] took over rules and principles of pre-WTO regimes and, at the same time, introduced innovations mainly intended to overcome the pre-WTO regimes' deficiencies."

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[355] E. Vermulst, "A European Practitioner's View of the GATT System" (1993) 27 J. World T. 69.
[356] DSU, *supra* note 4.
[357] P.J. Kuijper, "The New WTO Dispute Settlement System: The Impact on the European Community" (1995) 29:6 J. World T. 49 at 50 [hereinafter "Impact of the New WTO Dispute Settlement System on the EC"].

1. Adherence to the Rules and Principles of pre-WTO Regimes

1.1. *Basic Adherence*

Article 3.1 of the DSU acknowledges the continued application of Articles XXII and XXIII, their supplementing instruments and related case-law, stating that:

> Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

Thus, most rules contained in supplementary instruments (*inter alia*, the 1979 Understanding and 1989 Decision) have been faithfully transposed into the DSU. Annex 1A of the WTO Agreement defines the "GATT 1994" as including not only the provisions in the GATT 1947, but also, *inter alia*:

> the provisions of the legal instruments set forth below that have entered in force under GATT 1947 before the date of entry into force of the WTO Agreement:
>
> (i) protocol and certifications relating to tariff concessions;
>
> (i) protocols of accession [...];
>
> (i) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;
>
> (i) other decisions of the CONTRACTING PARTIES to GATT 1947.

The GATT 1994 thus also includes the decisions of the GATT Contracting Parties on the adoption of dispute settlement reports, which therefore become a sort of 'acquis' of GATT law and subsequent GATT treaty practice.

The relevant jurisprudence built up by a series of panel rulings will continue to be useful even in the framework of the WTO dispute settlement mechanism. This is corroborated by Article XVI.1 of the WTO Agreement, which provides:

> Except as otherwise provided for under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decision, procedures and the customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

1.2. *Adherence to General Principles*

The DSU enshrines well-established principles that have been referred to in supplementary instruments. Article 3.2. of the DSU states:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[358]

It should be noted that the Dispute Settlement Body rulings "cannot add to or diminish the rights and obligations provided in the covered agreements", which originates in the 1982 Decision.[359] It is understood that the scope of Members' rights and obligations under the covered agreements should be determined or modified by negotiations between concerned parties, but not by the DSB's adjudication. The intention of Article 3.2. is "to hamstring the panels in their freedom of interpretation and to prevent any dynamic or constructive development of GATT law", according to Pescatore.[360]

The DSU, following the previous principle restraining adjudicative interpretation by panels, introduced a new principle "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The new principle would encourage the development of panel adjudication in the sense that it

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[358] This provision was based on paragraph A(1) of the 1989 Decision, *supra* note 284, which provides: "Contracting Parties recognize that the dispute settlement system of the GATT serves to preserve the rights and obligations of the contracting parties under the General Agreement and to clarify the existing provision of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system."

[359] 1982 Decision, *supra* note 282. Paragraph 3 of the 1979 Understanding Annex, *supra* note 281 at annex, para. 3, provided: "The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters." In contrast, paragraph (x) of the 1982 Ministerial Decision, *supra* note 281, stated: "It is understood that decisions in this process [of dispute settlement] cannot add to or diminish the rights and obligations provided in the General Agreement."

[360] "Drafting and Analysing Decisions on Dispute Settlement", *supra* note 343 at 6. He also states that "the authorship of this provision is attributed to the European Community."

represents a "significant drift away"[361] from the pre-WTO traditional approach seeking pragmatic, mutually acceptable solutions.

2. Innovation of the DSU

2.1. *An Integrated System of Dispute Settlement*

As Kuijper has explained, "the new dispute settlement system is an integrated system, in the sense that disputes which touch upon different instruments annexed to the WTO Agreement can be treated by the same panel."[362] Indeed, the WTO Agreement establishes "an umbrella organization that will apply institutional rules to all of the multilateral trade agreements"[363] whereas under the old GATT system, the GATT and the different Tokyo Round Codes were separate treaties, each with its own dispute settlement mechanism so that a panel established under the GATT could not interpret one of the Codes and, conversely, a panel established under one Code could not express itself on another.[364]

Under the WTO Agreement, the Dispute Settlement Body will settle disputes for all of the agreements under a fully integrated dispute settlement system, that is once again, the same procedures will apply to all the provisions negotiated in the Uruguay Round, subject to any special provisions. This will therefore prevent forum shopping between agreements as it happened in at least one well-known case which indeed led to rather mischievous forum shopping.[365] The United States brought the *Airbus* case under the Subsidies Code and the EC was incapable of bringing any defence arguments which were based on the Aircraft Code. The panel established under the Subsidies Code was not in a position to hear any arguments on a different Code, and bringing a case as defendant under the Aircraft Code obviously was not a realistic possibility. In the WTO, which links all the different agreements to one treaty, it was however logical to have one dispute settlement mechanism covering all agreements.

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[361] P.T.B. Kohona, "Dispute Resolution under the World Trade Organization: An Overview" (1994) 28:2 J. World T. 23 at 29 [hereinafter "Overview of WTO Dispute Resolution"].
[362] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 52.
[363] "GATT 1994 Dispute Settlement", *supra* note 279 at 264.
[364] See generally J.H. Jackson, *GATT Machinery and the Tokyo Round Agreements* (1983).
[365] See *EEC – German Exchange Rate Scheme for Deutsche Airbus (Complaint by the United States)* (1992), GATT Doc. SCM/142 [hereinafter *Airbus*].

2.2. *A Compulsory and Binding System*

Such characteristics of the new WTO dispute settlement system has been emphasised by Kuijper.[366]

According to Kuijper,[367] "[i]t is clearly laid down in Article 23(1) of the DSU that the system shall be compulsory":

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements[368] or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[369]

This is a new feature that did not exist in the previous system, in which it was at least theoretically possible to settle a dispute under the GATT by recourse to means of dispute settlement other than those provided for under that Treaty. Moreover, until the Montréal Conference of 1989, a contracting party was always in a position to evade dispute settlement altogether by blocking, through recourse to the consensus system of decision-making, the establishment or the terms of reference of a panel, or to delay the composition of the panel virtually endlessly by opposing candidates for membership of the panel. The possibility to block the establishment of panels has been *de facto* removed, recourse to standard terms of reference for panels has been introduced and the role of the WTO Secretariat and the Director-General has been increased so as to make any unnecessary delay in the beginning of the panel procedure impossible.[370]

Again, contrary to the earlier system of dispute settlement, the final rulings and recommendations, whether rendered by the panel or the Appellate Body, are binding on the parties. The review of panel reports by the political organs of the GATT, in the past exercised by the GATT Council, will now be in the hands of the Dispute Settlement Body

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[366] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 50-51.
[367] *Ibid.* at 50.
[368] Those agreements listed in Appendix 1 to the DSU, *supra* note 4.
[369] DSU, art. 23.1, *supra* note 4.
[370] See DSU, arts. 6, 7 & 8, *ibid.* A minor possibility for delay may be exploited, when the agenda for the meeting of the Dispute Settlement Body, where a panel is to be established, has to be agreed by consensus. So far, however, protests over the agenda have been raised only when there were serious reasons to argue that the sixty-day consultation period had not been respected.

and will lose much of its character of a true political review, as it will, in fact, be impossible to reject the panel report. Only a consensus to reject the panel or Appellate report will prevent the latter from becoming operative.[371] Blocking the adoption of panel and Appellate reports by the losing party, even in a case where the losing party might mobilize a majority of the Members, is therefore no longer possible. This is unequivocally confirmed by the language of Article 17.14 of the DSU to the effect that Appellate reports shall be "unconditionally accepted" by the parties to the dispute.

2.3. *Improvements in Adoption of Panel Reports*

Under the auspices of the GATT 1947 dispute settlement mechanism, a relatively large number of reports were not implemented, and some were implemented with less than full compliance with the panel decision. The new understanding seeks to improve this serious imperfection by laying down clearly what steps are to be followed if the party concerned does not abide by the panel report. This has been achieved in a number of ways. First, the DSU includes time deadlines to reduce delay.[372] Second, there is also a surveillance period during which the DSB monitors compliance with the reports' recommendations.[373] Third, there are distinct penalties (such as compensation and suspension of concessions) for those parties who still refuse to adopt a report and its recommendations.[374]

But, perhaps the most important change for increasing the number of adopted reports relates to the voting rules of the DSU.[375] Indeed, under GATT 1947, the consensus requirement (which actually required unanimity) allowed reports to be delayed or vetoed by defendants. A major "practical improvement in the Dunkel text is that a panel report would now have to be adopted unless it is decided by consensus not to adopt the report."[376] The issue of consensus voting (or more accurately, rejection by consensus, or

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[371] DSU, arts. 16(4) and 17(14), *supra* note 4.
[372] DSU, art. 20, *ibid.*
[373] DSU, art. 21, *ibid.*
[374] DSU, art. 22, *ibid.*
[375] See DSU, art. 2.4, *ibid.*
[376] E.-U. Petersmann, "International Competition Rules for the GATT – MTO World Trade and Legal System" (1993) 27:6 J. World T. 35 at 67. It must be noted that the definition of 'consensus' has not changed. A consensus still requires no objection by any Member (see footnote 1 to art. 2.4 of the DSU, *supra* note 4). What has changed is how consensus is used in the DSU. Rather than requiring a consensus to approve a ruling, which has proved difficult to achieve, the DSU now requires a consensus to reject any

even negative/inverse consensus rule)[377] has broader application than the adoption of reports.

2.4. *The Negative Consensus Rule and Automaticity*

As seen just above, considering the inconvenience of the existing consensus rule as well as the veto power of parties to a dispute, the DSU instituted the so-called 'negative consensus rule' for decision-making be a newly created DSB, which replaced the existing Council. In this view, Article 2.4 of the DSU provides:

> Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.

The footnote to this provision foresees that:

> The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

This definition is in accord with the generally accepted concept of the term 'consensus', as far as the consensus to adopt decisions, *i.e.*, positive consensus, is concerned. The DSU, however, does not have an inclination towards positive consensus, but to a consensus not to adopt decisions, *i.e.*, negative or inverse consensus. This conceptual reversal is one of the major innovations achieved by the DSU.

The new concept of rejection by consensus has application throughout the dispute settlement process. Relevant provisions of the DSU indeed provide that each stage of

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decision made by a lower body, thus making easier to approve dispute settlement decisions: a subtle change with major implications.

[377] In the course of the Uruguay Round negotiations, a hard confrontation arose between countries arguing for the negative consensus rule and those persisting in the traditional consensus rule. The United States argued in favour of the negative consensus rule, but the EC and Japan supported the positive consensus rule. The EC added that, without positive consensus, the Council may take note of the panel report, taking into consideration the past practice on *Spain – Measures Concerning the Domestic Sale of Soyabean Oil*, *supra* note 337. Japan asserted that parties may submit written explanations of their objections. Canada argued for the automatic adoption of panel reports within an interim review stage in which parties may review and comment on the panel report before release to the Contracting Parties. Mexico supported the positive consensus rule, stating that disputing parties may choose whether or not to join the consensus. Among developing countries, Argentina proposed the positive rule with the removal of disputing parties from the decision. See *GATT Negotiating History*, *supra* note 68 at 60-61. The Dunkel Draft ultimately chose the negative consensus rule, which was faithfully incorporated in the DSU.

dispute settlement procedures – from the establishment of a panel to the auhorization of retaliation – should be decided, without a negative consensus by the DSB:

> *Article 6*
> *Establishment of Panels*
> 1. If the complaining party so requests, a panel shall be established [...] unless at that meeting the DSB decides by consensus not to establish a panel.
>
> *Article 16*
> *Adoption of Panel Reports*
> 4. [...] the report shall be adopted at a DSB meeting unless [...] the DSB decides by consensus not to adopt the report [...].
>
> *Article 17*
> *Appellate Review – Adoption of Appellate Body Reports*
> 14. An Appellate Body report shall be adopted by the DSB [...] unless the DSB decides by consensus not to adopt the Appellate Body report [...].
>
> *Article 21*
> *Surveillance of Implementation of Recommendations and Rulings*
> 6. [...] Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting [...] and shall remain on the DSB's agenda until the issue is resolved [...].
>
> *Article 22*
> *Compensation and the Suspension of Concessions*
> 6. [...] the DSB, upon request, shall grant authorization to suspend concessions or other obligations [...] unless the DSB decides by consensus to reject the request [...].

Decisions of the DSB are thus automatically adopted without unanimous opposition (*i.e.*, negative consensus). *A Contrario*, unanimous opposition would be required to block the DSB's decisions. Each decision will be taken without a veto of the offending party if at least one Member supports it. Such a negative consensus contrasts sharply with a traditional consensus, which may be qualified as 'positive' because of decisions being adopted by unanimous support.

To be more concrete, once a panel is established by the DSB in accordance with the negative consensus rule, panel procedures, up to the adoption of the panel or Appellate Body report, will not be interrupted by a veto of disputing parties unless a mutually agreed-upon solution is reached half way, or conciliation or good offices are resorted to

on the way by disputing parties. Moreover, the panel or Appellate Body ruling, once adopted, would be implemented thoroughly. The issue of implementation of the panel or Appellate Body rulings is placed on the agenda of the DSB in accordance with the negative consensus rule and continues to be subject to multilateral surveillance. In case of failure by the defendant to implement rulings, retaliations would be automatically decided under the negative consensus rule.

It is thus clear why the consensus issue is so important. Indeed, the advantage of negative consensus rule consists in securing the automaticity of dispute settlement procedures by excluding a veto by the defendant, such veto provoking the procedural delay and blocking. Consequently, an offending party, rather than having the ability to frustrate the GATT dispute settlement process at every turn by simply vetoing decisions, is now in the position of having policy dictated. It can, to be sure, still refuse to follow such dictate, notably in the name of sovereignty. But it will then open itself to the loss of concession, a serious threat in today's interdependent economic world.

However, Komuro has posed the question as to "whether disputing parties are entitled to take part in DSB final decision-making."[378]

On this point, the provision of Article 16.3 of the DSU must be taken into consideration:

> The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

Komuro has proposed the following analysis of this provision:[379]

> If this provision is interpreted to the effect that the wish of the disputing parties is taken into account in the final decision (*i.e.* negative consensus or not) of the DSB,[380] a negative consensus would appear unlikely to ever take place. Indeed, one of the disputing parties, *i.e.* the winner, will always support the panel or Appellate Body's conclusion as well as draft retaliation, thereby preventing the DSB from reaching a negative consensus. This results in the winning party being able to enforce retaliation by request and in the DSB being at the mercy of the winner. Moreover, in cases where

[378] "WTO Dispute Settlement Mechanism", *supra* note 271 at 116.
[379] *Ibid.* at 116-117.
[380] Komuro thinks that this interpretation is natural.

the panel or Appellate Body's ruling is objected to by a majority of Members, retaliation taken by the winner in the teeth of a majority would be inadmissible.

Two remarks should be made. First, the hypothesis that a majority of DSB Members (except one of disputing parties) would oppose the panel or Appellate Body's conclusion sounds more like an intellectual curiosity than a politically realistic circumstance.[381] In normal circumstances, panel reports are sufficiently balanced and reasoned to prevent unanimous opposition (negative consensus); the difficulty in reaching negative consensus would thus exist, even if the disputing parties are not permitted to take part in the DSB's final decision-making. Consequently, whether disputing parties participate in the DSB or not would scarcely influence the decision-making of the DSB under the negative consensus rule.[382]

Second, the WTO Understanding provides for the procedural guarantee against a possible 'running-alone' of the complaining party. A vexatious litigation such as legal harassment is precluded, since parties are required by Article 3.7 to examine whether an action would be "fruitful". A losing party, even though unable to oppose the panel's conclusions due to the impossibility of reaching a negative consensus, has the right, under Article 17.4, to appeal against panel conclusions before the Appellate Body. If the winning party requests retaliation, the losing party may still object to the level of suspension proposed and, under Article 22.6, have the matter referred to an arbitration. Such a triple layer of procedural guarantee (panel, Appellate Body, arbitrator) would protect the losing party from undergoing the quasi-unilateral retaliation of the winning party.[383]

2.5. *Reduction in Delay*

As indicated above, delay was a major problem under the GATT 1947 dispute settlement system. Thus, the DSU reduced delay by subjecting all the major steps in the procedure to clear deadlines, from the beginning of the actual recourse to dispute settlement after a certain period of consultation (sixty days)[384] to the maximum suggested "reasonable period of time for implementation" of the panel's or Appellate Body's rulings and recommendations.[385]

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[381] In a case where the panel or Appellate Body's report is opposed by all DSB Members except the winning party, the latter may prevent the DSB from reaching a negative consensus. The negative consensus would be blocked by a veto of the winning party. It is unlikely that this situation will occur in the future.

[382] This does not, however, exclude a review of the legitimacy of the interested parties' right to participate in the WTO Council that takes decisions by vote.

[383] Some critics question whether the negative consensus rule substantially approves the unilateral retaliation, as provided for in US Section 301. This criticism, however, may not be totally supported in the light of the procedural guarantees of the WTO Understanding.

[384] DSU, art. 4.7, *supra* note 4.

[385] DSU, art. 21.3(c), *ibid.*

Ample evidence of this trend is provided by reviewing the DSU. For example, Article 1.2 regarding *Coverage and Application* holds that the parties to any dispute shall have 20 days from the time of the establishment of the panel to determine any special rules and procedures governing that panel. Should this prove impossible, the Chairman of the DSB shall set forth such special rules within 10 days of a request made by either party. Regarding the operation of the panel, Article 12 of the DSU (*Panel Procedures*) and Appendix 3 of the DSU (*Working Procedures*) provide deadlines on most panel functions. For example, a panel has one week after its composition and terms of reference have been agreed upon to set its own timetable. This timetable is subject to numerous suggested constraints set forth in the DSU. Generally, a panel must provide an interim report to the parties for review within six months of the panel's formation.

Once the panel submits the interim report of its findings to the parties, the parties may submit comments to the panel. The panel shall hold further meetings with the parties to discuss the comments. Unfortunately, there is no time limit on this comment stage. It appears possible for the offending party to offer piecemeal comments again and again at this stage, thereby delaying the production of the final report. A solid panel, however, should make it clear that all comments must be offered at one time, and that new issues will not be accepted after the initial comment period for the interim report. After these comments are accepted and discussed with the parties, the final report shall be issued to all Members. Within 60 days of the report's issuance, it shall be adopted, unless rejected by consensus or appealed. The dispute settlement appellate process under the DSU is similarly time limited, that is, the appellate procedure shall not exceed 60 days – or 90 days in exceptional circumstances – from the date of a party's decision to appeal to the date of circulation of the Appellate Body's report to the Members.[386] Then, the Appellate Body's report shall be adopted within 30 days following its circulation, unless rejected by consensus.[387]

Once the decision is rendered, the Member has 30 days to inform the DSB of how it will implement the recommendations of the report. The issue of implementation shall remain

[386] DSU, art. 17.5, *ibid.*
[387] DSU, art. 17.14, *ibid.*

on the DSB's agenda until the recommendations are fully complied with to the DSB's satisfaction. The offending party shall provide status reports every six months. If the recommendations are not implemented within the reasonable period of time, the aggrieved party may seek compensation or even suspension of concessions to the offending party (*i.e.*, retaliation).

In total, under Article 20 of the DSU regarding *Time-frame for DSB Decisions*, DSB decisions should be rendered within 9 to 12 months, depending on whether panel decisions are appealed or not. Thus, combined with the 15 months suggested as a maximum for the reasonable period of time for implementation under Article 21.4 of the DSU, this would ensure that a complaint, if it is successful, should lead to implementation within two-and-a-half years.

Thus, the time-frame, coupled with the negative consensus rule, is likely to accelerate the WTO dispute settlement procedure.

2.6. *Addition of Appellate Body*

As previously alluded to in the introduction to the present developments, an Appellate Body is now also an integral part of the new WTO dispute settlement system. Its addition appears, in part, to be a *quid pro quo* to those States who were worried about the loss of sovereignty implicit in the rejection by consensus voting system. Consequently, even though it is now much easier to force compliance with the WTO rules through dispute settlement, losing States gained a right of appeal. Another incentive to create the Appellate Body arose from the situation of both the United States and the European Community at the time of the Uruguay Round negotiations. These two major partners were both exposed during the negotiations to a few panel decisions which they regarded – rightly or wrongly – not only as politically unpalatable, but in some cases also as serious legal errors. For the United States, the two *Tuna/Dolphin* panel reports and some reports on anti-dumping and countervailing duties fell into these categories.[388] For the EC, the

[388] The *Tuna/Dolphin* reports (*United States – Restrictions on Imports of Tuna (Complaints by EEC and the Netherlands)* (1994), GATT Docs. DS 21/R & DS 29/R) were politically unpalatable to the United States: some anti-dumping reports, in so far as they required paying back anti-dumping duties, were considered legally in error.

Oilseeds panels and the *Airbus* panel could be classified in either or both of these categories.[389] These perceived major legal errors made the EC and the United States wary of a one-phase procedure, and hence they both became proponents of an appellate procedure limited to the legal issues. It has been pointed out by various writers that, in the past, the EC has always displayed more of a political or negotiations approach to GATT dispute settlement than has the United States.[390] It is obvious that the EC has profoundly changed its view in this respect.

Moreover, as Kuijper has put forward, "[t]he creation of the [Appellate] Body and the possibility of a review of panel reports strictly for legal errors will further contribute to what one may call the *judicialization of the dispute settlement procedure*."[391] Indeed, the appellate procedure should enhance building a body of precedents such that some predictive nature can evolve in the new WTO dispute settlement procedure. In other words, a body of WTO law on which panels may rely is now likely to evolve, in part, through the decisions of the Appellate Body.

Some aspects of the appellate procedure are particularly worthwhile in respect to its potential contribution to the more adjudicative flavour conveyed to the new WTO dispute settlement procedure. First, is the composition of the Appellate Body. The first instance panels are composed on a somewhat *ad hoc* basis. Even though their members may be taken from a roster of panelists maintained by the WTO Secretariat, the members of each panel will normally be different. By contrast, the Appellate Body members will number only seven people, three of which will serve on a case. They will be nominated for a

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[389] For the EC, the *Oilseeds* (*EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins* (*Complaint by the United States*) (1990), 37th Supp. B.I.S.D. 86 & 39th Supp. B.I.S.D. 91) and *Bananas* (*EEC – Member States' Import Regimes for Bananas* (*Complaint by Colombia et al.*) (1993), GATT Doc. DS32/R; *EEC – Import Regime for Bananas* (*Complaint by Colombia et al.*) (1994), GATT Doc. DS38/R) panels were primarily politically difficult to accept, and the *Airbus* panel, *supra* note 365, was seen as both major political and legal error.

[390] See, *inter alia*, E. McGovern, "Dispute Settlement in the GATT: Adjudication or Negotiation?" in M. Hilf, F.G. Jacobs & E.-U. Petersmann, eds., *The European Community and the GATT* (Deventer: Kluwer, 1986) 73; J.H. Jackson, "The Legal Meaning of a GATT Dispute Settlement Report" in N. Blokker & S. Muller, eds., *Towards More Effective Supervision by International Organizations: Essays in Honour of G. Schermers*, vol. 1 (Dordrecht: Martinus Nijhoff, 1994) 151.

[391] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 51[emphasis added].

period of four years and may be reappointed once. As a result, the accumulated memory of the Appellate Body will be far greater than that of the panels.

Second, the panel procedure will be further enhanced by the limitation of the Appellate Body's competence to legal issues. This will, on the one hand, prevent an exact re-run of the arguments presented to the panel and, on the other hand, enable the Appellate Body to concentrate on improving the coherence of panel reports. The *imprimatur* of an authoritative appeals body, in turn, should exert a positive influence on the quality of panel reports.

2.7. *Clear Rules on Implementation*

One of the major improvements of the new dispute settlement system over the old is the introduction of detailed rules on surveillance of implementation of panel recommendations under Article 21 of the DSU and precise and binding prescriptions on compensation and suspension of concessions under Article 22 of the DSU.

The losing party will be given a "reasonable period of time" to implement the panel recommendations.[392] "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[393] If they are not implemented within this time, the winning party can further negotiate an amount of compensation pending full implementation, or if there is not an agreement within twenty days, the party can request that the DSB authorize suspension of concessions or other retaliation.[394]

As to compensation and retaliation, they consist of temporary measures available if recommendations in a violation complaint case are not implemented within a reasonable period of time. Neither compensation nor retaliation is preferred to full implementation to bring a measure into conformity with the covered agreements. Under Article 22.1 of the DSU, compensation is voluntary and, if granted, shall be in accord with the covered agreement. Under the DSU, it is clear that full implementation is the primary objective of

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[392] DSU, art. 22.1, *supra* note 4.
[393] DSU, art. 21.1, *ibid.*
[394] DSU, art.22.1, *ibid.*

the WTO dispute settlement mechanism. Indeed, compensation or retaliation may not be resorted to until the losing party fails to implement the recommendations within a reasonable period of time. Moreover, even if compensation or suspension of concessions have been granted, the surveillance role of the DSB continues, since these are considered only temporary remedies which, in the end, should result in compliance with the panel recommendations.

Finally, it must be noted that, under Articles 22.2 to 9, retaliation, although it is automatically authorized, is subject to strict conditions, principles and to arbitration.[395] Briefly, the authorization for cross-retaliation constitutes a significant addition to the DSU. Under GATT 1947, the Multilateral Trade Agreements were distinct, and in order to be bound by each one, a country had to accede to each one. With the 1994 changes, the Multilateral Trade Agreements have been 'packaged' and a member that accede to the General Agreement will knowingly accede to each agreement. The preferred retaliatory action is within the same agreement and the same sector. If that is not possible, then retaliation may be affected within the same agreement, but in a different sector. That was all that the 1947 arrangement would allow. But, under the WTO Agreement, if those two alternatives are not possible, then retaliation can be authorized within a different agreement.

However, if the losing member objects to the retaliation, it can proceed to arbitration. The arbitration procedure is conducted by the original panel members or by an arbitrator appointed by the WTO Director-General.[396] The findings of arbitration are to be adopted by the DSB and implemented, unless rejected by consensus.[397] The arbitration procedure is available only for the issue of when a party must comply with panel and DSB recommendations. It is not for the issue of whether the party is ultimately liable to comply with the recommendations because 'liability' – or non-compliance with the terms of the WTO Agreement – is locked in by adoption of a disfavorable panel or appellate report.

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[395] For more details on the retaliation rules provided by the DSU, see "WTO Dispute Settlement Mechanism", *supra* note 272 at 135 *et seq.*
[396] DSU, art. 22.6, *supra* note 4.
[397] DSU, art. 22.7, *ibid.*

At the end of this analysis of the major characteristics of the new WTO dispute settlement system carried out in the light of the previous observations on the weaknesses of the former GATT 1947 dispute settlement mechanism, one question arises: which aspects of this system will affect the European Community in particular?

On this point, Kuijper has advanced that:

> [w]ithout doubt, the binding and very legal character will be an important new departure for the EC which [...] traditionally had a tendency to regard the GATT dispute settlement system rather as a negotiation process. For the EC, the acceptance of a compulsory and binding legal system of dispute settlement is somewhat of a leap forward. Although complaining loudly about it, many trade policy officials of the Community were secretly envious of Sections 301 of the [1974] US Trade Act and the leverage that the United States obtained by brandishing and occasionally using it. In particular, the detailed rules about compensation and retaliation in the DSU serve, on the one hand, as a restraint on unfettered use of Section 301 by the US government, but on the other hand as a kind of enabling legislation for the Council of the Community to act in a similar manner. By the 'internationalization' of Section 301, the United States and the EC would be on a more even footing in international trade conflicts.[398]

I. IMPACT OF THE NEW WTO DISPUTE SETTLEMENT SYSTEM ON THE EUROPEAN COMMUNITY

A. THE EUROPEAN COMMUNITY IN SEARCH OF A MORE EFFECTIVE SYSTEM FOR MANAGING WTO DISPUTES

Given that the new WTO dispute settlement system is intended to be more binding and more predictable than that of the former GATT 1947, as shown above, it should logically lead to a change in the behaviour of States which were formerly signatories of the 1947 General Agreement on Tariffs and Trade. Indeed, under the GATT 1947 dispute settlement system, a State could allow itself to lose a panel as it had the opportunity either to oppose its adoption or to fail to implement it through the use of delaying tactics which were without consequence from a legal perspective. Under the DSU which came out of the Uruguay Round negotiations, a State against which a ruling has been made under the WTO Agreement will now have less room for manœuvre due to the way in which reports drawn up by panels are adopted more or less automatically and due to the reinforcement

of the ways in which they are implemented. States must therefore take this new situation into account in order to attempt to avoid the establishment of panels which find against them, in as far as this is possible, by endeavouring to adopt legislation which complies with the provisions of the 1994 Marrakech Agreements.

With regard to the European Community in particular, the impact of the new WTO dispute settlement system has resulted in the adoption of an improved procedure for commercial defence, more or less in the same line as the United States trade policy instrument. However, as it will be now envisaged, the EC is still seeking a strategy for better managing disputes with which it has to deal under the WTO system.

Generally, the best way to avoid being 'condemned' by a WTO panel is to introduce legislation which does not run contrary to the Uruguay Round Agreements. However, this challenge is an ambitious one for the EC which continues to introduce more and more increasingly complex measures. This is why, a few years ago, an attempt was made at a Community level to introduce a kind of system which would ensure that measures adopted complied with the GATT. A small cell of GATT legal experts was set up as part of the team in charge of external relations within the Legal Service of the Commission. Since all proposals for Council and Parliament legislation and all secondary legislation directly adopted by the Commission in principle must obtain the approval of the Commission Legal Service, such a structure would today be a useful instrument for reducing the risk of measures introduced failing to comply with the standards of the World Trade Organization. Hence, at the end of 1997, a think group composed of legal scholars focusing on WTO law, was set up by the Commission, in order to assess the impact of the regulations defined under the World Trade Organization on EC legislation, and as far as possible to restrict any legal inconsistencies between these standards.

Despite all of these efforts, measures introduced by the EC could, however, prove to still conflict with WTO law.[399] Arising from this, two scenarios may then arise: either the

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[398] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 53.

[399] See *ibid.*, *supra* note 356 at 60: "Human frailty being what it is, however, lawyers may not signal infringements of WTO law that may seem self-evident later, in less hectic circumstances, and politicians in

incompatibility or non-conformity may be so blatant that, from the start of consultations preceding dispute settlement, the EC's position may appear to be untenable, or the breach may not be so obvious but the panel's conclusions cannot be guaranteed.[400]

1. Anticipation of an Unavoidable 'Guilty Verdict' through Reforming Legislation while not yet Legally Obliged to Do So

As an example of a more constructive attitude, it would be worth examining the position taken by the EC in the 1980s, during the course of a dispute with Chile over apples. The Commission put forward an amendment to the EC import regime of apples to the Council, following an agreement with Chile on this regime. The agreement was concluded and the relevant amendment of the import regime adopted. It appears that the adoption of the amendment in question would have spared the EC from a probable unfavourable outcome to any third panel on Chilean apples that might have been held.[401] This is one of the rare situations in which the EC anticipated a 'guilty verdict' from the GATT and reformed legislation when it was not yet legally obliged to do so.

On this point, Kuijper has put forward the following comments:[402]

> It is to be hoped that Community legislators will learn from this precedent and may be willing to follow it in future. It cannot be excluded, however, that Community legislators will be just as stubborn as US legislators recently proved to be when, in face of repeated warnings from the US Trade Representative (USTR), they nevertheless adopted a mixing requirement for US tobacco production which was so blatantly contrary to Article III:5 of GATT that a panel on the issue was lost in record time.[403]

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the Commission, the Council and in the Parliament may choose not to heed the lawyers' advice, even when it is sound."

[400] *Ibid.* at 61: "Even in the first case, in the past it was often necessary to lose a panel before anyone at the legislative level of the Community was prepared to think about adapting the legislation in question so as to make it conform to GATT requirements."

[401] The Agreement with Chile is to be found in EC, *Decision 94/294*, [1994] O.J. L. 130/35. See also the first and the second Chilean panels: *EEC – Restrictions on Imports of Apples from Chile (I)* (*Complaint by Chile*) (1980), 27th Supp. B.I.S.D. 98; *EEC – Restrictions on Imports of Dessert Apples* (*Complaint by Chile*) (1989), 36th Supp. B.I.S.D. 93.

[402] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 61.

[403] See *United States – Measures Affecting the Importation and Internal Sale of Tobacco* (*Complaints by Argentina et alii*) (1994), GATT Doc. DS44/R.

2. Waiting for an Uncertain 'Guilty Verdict' before Adopting Appropriate Legislation in Conformity with the Relevant WTO Provisions

The change in behaviour emphasised above is even more necessary for the European Community since procedures for drawing up measures are long and complex and the modification of legislation is just as difficult. In a case where the EC loses a panel under the WTO, it will be called on to ensure that EC legislation complies with that of the WTO. The Council and the Parliament should then be able to amend the offending measures, which would not appear to be easy, both technically and politically. The steps taken by the EC to amend its 'banana' regime, following a WTO decision which criticized the way in which banana market is organized in the EC,[404] are evidence of this. Whatever the case, it has not been established that the EC has the time required for amending its legislation within the "reasonable period of time" referred to in Article 21.3 of the DSU.[405] In practice, the EC would prefer to pay compensation rather than get involved in a long process for adopting provisions, the outcome of which still remains uncertain. The Commission should be authorized by the Council to negotiate this compensation with applicant States. However, this solution could give rise to problems, both in terms of competence sharing between the EC and its Member States in the WTO system and due to the short period of time allowed for negotiating compensation (20 days). The Commission's offer must then be endorsed by the Council. Should Member States fail to be united on the issue, the EC may well be faced with retaliation. On this point, it may be recalled that the United States were authorized by the DSB on 19 April 1999 to suspend concessions to the EC up to a level equivalent to that of nullification and impairment suffered as a result of the EC's new banana regime not being fully compatible with the WTO.

Since the prevention of panels and the management of cases – whether they are lost or won – by the EC under the WTO plays an important role in defending the commercial interests of the Fifteen Members in this arena, it would have made sense to define some of the methods used for doing so. Thus, Kuijper has suggested that the new EC

[404] See *EC – Bananas* (Appellate Body Report), *supra* note 86.

mechanism for commercial defence, the New Trade Barriers Regulation, should include a chapter which deals with the procedure to be followed if a panel is lost. It would also provide for granting the Commission general authorization enabling it to negotiate compensation, the possibility of a Member State to refer to the Council on this matter, and the requirement of a qualified majority for amending the proposal drawn up by the Commission. An identical procedure has been also put forward for establishing compensation or retaliation authorized in cases where the EC wins a panel.[406]

Unfortunately, the EC decided not to act on these suggestions during the drafting of its new legal arsenal which was made necessary by the results of the Uruguay Round negotiations.

B. Adoption by the European Community of an Improved Mechanism for Trade Defence

The impact of the WTO dispute settlement system on the EC has finally resulted in the adoption of an improved mechanism for trade defence. Indeed, as part of a legislative package implementing the Uruguay Round, the EC created a new trade remedy to enforce its rights under the various WTO Agreements as well as certain other international agreements. The Trade Barriers Regulation or TBR, adopted by the Council on 22 December 1994, establishes rights for private parties to complain about illegal trade practices of third countries, and to request the EC authorities to intervene swiftly and effectively.[407] This trade remedy replaced the so-called New Commercial Policy Instrument or NCPI, which was introduced in 1984 to deal with foreign unfair trade practices but rarely applied.[408]

In order to show why this new regulation is likely to offer a more forceful remedy to European industries to combat foreign unfair trade practices compared to its predecessor, it is worthwhile first to survey the genesis of such a private complaint procedure and its

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[405] *EC – Regime for the Importation, Sale and Distribution of Bananas EC – Regime for the Importation, Sale and Distribution of Bananas II (Complaints by Guatemala et alii)*, WTO Doc. WT/DS158/1.
[406] "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 62.
[407] TBR, *supra* note 78.
[408] NCPI, *supra* note 50.

exercise through the former New Commercial Policy Instrument prior to assess the effective improvements carried out to the new Trade Barriers Regulation.

1. Genesis of the New Trade Barriers Regulation: Its Predecessor, the New Commercial Policy Instrument

Bronckers has developed the history of the TBR as follows:[409]

> The origin of the Trade Barriers Regulation goes back to the early 1960s, when the Commission published a first proposal for a Community mechanism to respond to foreign unfair practices.
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> This proposal was inspired in part by a new procedure in US trade law, *i.e.* Section 252 of the Trade Expansion Act of 1962. This provision reflected the frustration of the US Congress that, out of concern for general foreign policy considerations, the Executive failed to enforce aggressively the rights the United States derived from international trade agreements. On Congressional initiative, therefore, the 1962 Trade Act instructed the Executive for the first time to hold public hearings regarding foreign trade barriers at the request of private parties.[410] In contrast, the EC Commission's proposal did not envisage a right of private parties to request the EC authorities to investigate complaints about foreign unfair trade practices.
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> In practice, these differences between the US and the EC did not matter very much. No hearings were ever held under the 1962 Act in the United States, and the EC Commission proposal was never adopted.
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> In 1974 the United States introduced Section 301 in its trade legislation. The rights of private parties were strengthened, as well as the authority of the Executive to take action against foreign unfair trade practices. This time, private parties did use the complaint procedure. Furthermore, the US Executive showed a willingness to ignore GATT obligations and take aggressive action to protect US interests.
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> Being a frequent target, the EC very quickly voiced considerable discontent about Section 301 complaints. The Community argued that private complaints disrupted traditional diplomatic means of resolving international trade disputes.[411] The United States ignored these complaints of its trading partners, and continued to refine and sharpen Section 301 in subsequent trade legislation of 1979 and 1984.[412]

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[409] M.C.E.J. Bronckers, "Private Participation in the Enforcement of WTO Law: the New EC Trade Barriers Regulation" (1996) 33 C.M.L. Rev. 299 at 300-2.
[410] See M.C.E.J. Bronckers, "Private Response to Foreign Unfair Trade Practices: United States and EEC Complaint Procedures" (1984) 6 Nw. J. Int'l L. & Bus. 651 at 671-74 [hereinafter "Foreign Unfair Trade Practices"].
[411] *Ibid.* at 674-77.
[412] *Ibid.* at 677-86.

> In the early 1980s attitudes in the EC about Section 301 and about private involvement in trade policy proceedings changed. Following suggestions by the European Parliament, France submitted a proposal in 1982 for a procedure similar to Section 301 in the context of a "relance européenne". France laid particular emphasis on the need for a new commercial policy instrument to protect the internal market.
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> Yet after some time, in 1983, the Commission turned around and submitted its own proposal for a new commercial policy instrument. In its proposal the Commission emphasized the potential application of the instrument regarding the protection of Community exports to third countries that ran into unfair trade barriers. The Commission also made provision for private complaints.[413]
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> When adopting the Commission proposal, the Council took great care to distance the New Commercial Policy Instrument from Section 301 in a variety of ways, notably by providing that all actions taken by the Community would have to be compatible with international obligations. The final regulation still allowed private complaints.[414]
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> To understand the continuing discomfort of the liberal member states, such as Germany and the Netherlands, with the New Commercial Policy Instrument and subsequently the Trade Barriers Regulation, it is important to keep in mind the French, more or less protectionist, origin of this trade law remedy.[415]

When the memorandum of agreement on the rules and procedures governing the settlement of disputes and the various agreements which came out of the Uruguay Round came into force, the EC took the opportunity to improve its policy instrument and adapt it to the characteristics of the new system. Thus, after the conclusion of the Uruguay Round negotiations, and even before the signature in April 1994 of the WTO Agreement and its Annexes in Marrakech, the new commercial policy instrument was transformed by the Council in March 1994, through a few simple amendments, into the instrument for the conduct of "offensive" dispute settlement cases in the new integrated dispute settlement mechanism of the WTO.[416] As the amended Article 1 now puts it,[417] the new commercial

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[413] *Ibid.* at 716-21.

[414] See NCPI, arts. 10(2) & (3), *supra* note 50. See J. Steenbergen, "The New Commercial Policy Instrument" (1985) 22 C.M.L. Rev. 421; "Foreign Unfair Trade Practices", *supra* note 410 at 723-51.

[415] See "Foreign Unfair Trade Practices", *supra* note 410 at 722: "A number of Member States (notably Denmark, Germany and the Netherlands) did not take kindly to the new instrument proposed by the Commission. They associated the new instrument with French insistence on broad-ranging protection of the Common Market against allegedly unfair imports. Indeed, despite its balances explanatory statement which also focused on foreign restrictions affecting EEC exports, the Commission drafted the instrument along the lines of the Community's antidumping and countervailing duty regulation. Thus, the structure of the instrument revealed that the Commission was most concerned with defensive measures."

[416] EC, *Council Regulation 522/94 of 7 March 1994*, [1994] O.J. L. 66/10.

policy instrument will be used, in particular, for initiating, pursuing and terminating international dispute settlement procedures in the field of the common commercial policy.[418]

2. The Improved Trade Barriers Regulation

2.1. *The 'Third Track'*

Among the improvements carried out by the new TBR to the former NCPI, the main one to be worth being emphasised is the so-called "third track" or "third way" which aims at making the new TBR even better adapted to its new function as a pre-dispute settlement instrument. So far, the former NCPI had opened two procedures: one for the Member States aimed at responding to "illicit commercial practices" and/or at ensuring the full exercise of the Community's rights under international trade agreements, and another for natural or legal persons or associations acting on behalf of a Community industry in order to defend themselves against injury suffered as result of "illicit commercial practices". The new TBR now includes a third procedure, derived from the second one, but which tries to remedy certain of its shortcomings.

One of these shortcomings was that the complaint procedure was limited to natural or legal persons on behalf of a Community industry. The choice of the term "Community

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[417] TBR, art. 1, *supra* note 78, the so-called "Trade Barriers Regulation" which formed part of the overall Uruguay Round implementation package and has finally replaced the former so-called "New Commercial Policy Instrument" (NCPI, *supra* note 50).

[418] See "Impact of the New WTO Dispute Settlement System on the EC", *supra* note 357 at 56, note 30: Now that the ECJ has given a clearer indication of what is covered by the common commercial policy, namely all trade in goods, trade direct trans-boundary services, and trade in counterfeit goods, the recourse to this notion should cause fewer problems. It is interesting to note that, in reply to the Commission argument that the instrument had been used for imposing sanctions in relation to inadequate intellectual property protection and in threatening measures in response to illicit practices related to shipping services, the Court seemed to say that the measures taken were commercial policy measures, and that the nature of the interests protected by such measures could not be the determining factor in deciding the legal base; see *Opinion 1/94*, *supra* note 110 at I-5297, paras. 62-64. On that logic, the NCPI, *supra* note 50, even if it is based on Article 113 of the EC Treaty alone, can continue to be used as an instrument for the defence of services and trade-related aspects of intellectual property rights (TRIPs) interests, as long as the countermeasures fall in the Court's definition of common commercial policy: in GATT terms the Community would need to have recourse to cross-retaliation every time it was authorized to take countermeasures in the areas of most services and of TRIPs. This would be a handicap for the Community, as it cannot be sure that the conditions for taking cross-retaliation under Article 22(3) of the DSU would be fulfilled every time. Hence, an extension of the legal base to include Articles on services (*e.g.*, arts. 57, 66 & 100A) is probably inevitable in the long term.

industry" was comprehensible in the light of the fact that the NCPI had been inspired by instruments defending the Community market. But in situations involving the protection of foreign markets by illicit measures, the "Community industry" in a specific branch will only exceptionally be touched as a whole. Often only specific niche exporters will be touched by illicit measures that keep foreign markets closed. They must also be placed in a position where they have a legal right to complain, and not only of "injury", but of any adverse trade effect. In order to launch or even to conclude a panel procedure successfully, no injury needs to be demonstrated. An infringement of a GATT provision need not result in identifiable trade injury. Such an infringement in and of itself is sufficient to constitute a "*prima facie* nullification and impairment". This is because the GATT does not protect trade flows as such, but competitive opportunities for trade.[419] Similarly, even the new WTO Subsidy Agreement does not require injury to a domestic industry, this is merely one of three possible types of adverse effects on trade.[420] Finally, a measure need not be contrary to the GATT in order to be successfully attacked before a panel: there can be a so-called "non-violation" nullification or impairment. If the NCPI is to be turned into an effective instrument for the initiation of panel procedures under the WTO integrated dispute settlement system, it needs to provide for all these possibilities, and it must henceforth take account of the fact that trade litigation may include trade in services as well as trade in goods.

Consequently, the Commission proposed to the Council that the aims of the former NCPI be extended to include "responding to any commercial practice (whether or not illicit) with a view to removing the adverse trade effects resulting therefrom." Article 1(b) of the new TBR, while not taking up this exact wording, achieves substantially the same result when read in combination with the definitions of "adverse trade effects" and "the Community's rights" in Article 2.[421] Such adverse trade effects are defined as those that are felt in respect of trade in goods or services in non-Member States of the EC and which have a material impact, actual or potential, on the economy of the Community or of one

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[419] See, *e.g.*, *United States – Taxes on Petroleum and Certain Imported Substances (Superfund) (Complaint by Canada, EEC and Mexico)* (1987), 34th Supp. B.I.S.D. 136 at para. 5.1.9.
[420] See *WTO Agreement on Subsidies and Countervailing Measures*, art. 5.1 in WTO Agreement, *supra* note 3 at annex 1A.
[421] The Article numbers used in the following are those of the new TBR, *supra* note 78.

of its regions, or on a sector of economic activity therein. In the definition of the "Community's rights", reference is made to the international trade rights of which the Community may avail itself under international trade rules, such as those laid down in the Annexes to the WTO Agreement and in other trade agreements of the Community. Clearly no distinction is made here between violations of these trade rules and the non-violation rights of which the Community may possibly avail itself under GATT Article XXIII:1(b). On the other hand, the notion of "illicit practices" that are not illegal, but contrary to "generally accepted rules", existed under the former NCPI, but has now been given up.[422] This is probably no great loss, as this notion has always been unclear and never fully applied.

In a new Article 4, the so-called "third track" of the new TBR is opened to any Community enterprise, but its complaint must contain sufficient evidence of "actionable" commercial practices and of adverse trade effects resulting therefrom. It is interesting to note that the Commission proposes that the Member States should also discharge a heavier burden of providing "sufficient evidence" of effects of illicit practices or of adverse trade effects. The Commission clearly feels a need to be provided with better evidence before it can start a panel procedure on behalf of the Community with any chance of success.

These new aspects of the TBR were required to make it into an effective vehicle for initiating procedures under the new dispute settlement system against "actionable" commercial practices of third States which impede access to their markets, and for obtaining the necessary evidence, essential for a successful panel procedure. As a matter of fact, it seemed that the Council, through its amendments of March 1994, had turned Regulation 2641/84, the NCPI, into the exclusive vehicle for initiating WTO panel procedures. It looked as though the somewhat informal procedures of the 113-Committee[423], applied in the past, were no longer to be applied, and following them after

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[422] See NCPI, art. 2, *supra* note 50.

[423] Besides the use of the TBR, the procedures for dispute settlement adopted by in WTO may also have their origins in informal complaints from industry, one or several Member States, or directly from the Commission. These cases are examined by the competent division of the Commission's Directorate General of Foreign Relationships, before being discussed at Committee level, as provided for in Article 113 of the EC Treaty concerning trade policy. The Commission will make a final decision on the case, and will then

the entry into force of the WTO would actually be illegal. If that had been correct, the March amendments would have had a stultifying effect on initiating offensive panel cases for the Community, as important categories of cases could not be brought at all. The new provisions of the TBR are absolutely necessary in order to equip the Community fully for the new era of dispute settlement in the WTO. In particular, the requirement to produce the necessary evidence to substantiate a complaint is of great importance for the Community's capability to bring cases, because the measures restricting opportunities for importation into third countries are often best known and documented by economic operators, and without serious supporting evidence it is hardly possible to bring a case before a WTO panel with any chance of success.[424] On the other hand, the Council, in December 1994, showed that it believed it had gone too far in March of that year in excluding virtually any other way of bringing a dispute before a WTO panel. Hence, it is now specifically provided in Article 15 that the TBR not only is without prejudice to other measures that may be taken under Article 113, but also to other procedures to be followed under that Article. This means that the informal procedures, as applied in the past, remain available alongside the formal procedures of the TBR.

2.2. *The Trade Barriers Regulation in Practice*

As already mentioned above, on a practical level, after an initial 18 month period, during which the TBR was not used by trading parties, the new mechanism became operational, thus giving the EC Commission the opportunity to launch ten or so enquiries into the various trade barriers to which European industry has drawn attention. Amongst them, it is worth mentioning the TBR procedure on the US Antidumping Act of 1916 which was initiated on 25 February 1997 further to a complaint by Eurofer (European Steel Industry). This complaint referred to the maintaining in force by the United States of its 1916 Antidumping Act, which prohibits the import and sale of products "at a price substantially less than the actual market value in the principal markets of the country of

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be competent to hold talks and will officially request, on behalf of the EC, that a panel be set up if this proves to be necessary. Finally, the Commission will "plead" before the panel in liaison with specialists from its Legal Department and the States' competent authorities or industries involved in the case.

[424] Recently, not just anti-dumping and countervailing duty cases, but nearly all GATT cases have become highly "facts intensive": see, *e.g.*, the various *Alcoholic beverages* Cases (*United States – Measures Affecting Alcoholic and Malt Beverages*, *supra* note 309).

their production." With regard to the complaint, the investigations conducted by the EC Commission confirmed that the US authorities' failure to repeal the 1916 Act is in several respects not in conformity with the obligations of the US under the WTO Agreement, the GATT 1994 and the WTO Antidumping Agreement. Infringements relate notably to the type of remedies available, the lack of procedural rules and of standing requirements, the definition and qualification of the injury concept, the criteria for the calculation of the normal value, and the absence of the requirement to introduce products into the commerce of another country as a prerequisite for dumping to take place.

In addition to a still pending Court action in Utah, there are substantiated indications that further Court actions under the 1916 Act could be brought against several steel importers including at the occasion of imports of EC products, thus transforming the 1916 Act into an alternative to the conventional and WTO-compatible antidumping rules for use by the US industry.

Despite numerous offers made by the EC Commission services, the US authorities did not appear willing to reach an amicable settlement. Under these circumstances, a Commission decision to request formal WTO consultations was published in the Official Journal of 28 April 1998. At the occasion of the consultations of 29 July 1998, the Commission reiterated its concern to resolve the case on an amicable basis. The US promised to examine the matter further, but has not come forward with a new proposal. Meanwhile, in November 1998, a new Court action under the 1916 Act, involving steel imports from Russia and Japan by subsidiaries of EC companies, was initiated before the Ohio District Court (in which part of the defendants made an out-of-court settlement with the plaintiffs in early 1999).

A panel was established on 1 February 1999.[425] The EC Commission filed a first written submission with the panel on 6 May 1999. The panel report is expected by mid-November 1999.

[425] *United States – Anti-Dumping Act of 1916 (Complaint by EC)*, WTO Doc. WT/DS136.

Finally, the use of the TBR procedure in the future is likely to be difficult in view of competence sharing between the EC and its Member States in the WTO. Indeed, the difficulty may arise from the fact that the TBR is established solely on Article 113 of the EC Treaty. As a consequence, it may be disputed as to whether it can be applied in cases of breach of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, which affect trade other than cross-border services and imitation goods, since in these fields, the ECJ has established in *Opinion 1/94*[426] that competence is shared between the Community and its Member States, but the Court has not offered any practical solution as to how the necessary duty of cooperation resulting from such a situation must be ensured.

[426] *Opinion 1/94*, *supra* note 110.

PART II

THE EUROPEAN COMMUNITY: A MODEL FOR THE WTO?

– *THE DISPUTE SETTLEMENT PERSPECTIVE* –

Comparing the European Community with the new WTO reveals a blatant difference: the opposition between supranationality and sovereignty. Indeed, regarding the EC, the term 'Community' itself reveals the specific nature of EC law. The EC constituent States have become involved in a dynamic construction and have granted certain competencies and powers – which they previously exercised in the framework of their sole sovereignty – to the Community and its institutions. But such an allocation of powers to the Community would not have been possible if the Community had not disposed, from its inception, of legal personality. This legal personality was granted to the Community by Article 210 of the Treaty of Rome.[427] Thus, this supranational quality or even state-similar character of the EC is the basis for the distinction from usual international organizations like the WTO, and also explains the original character of EC law itself.

By contrast, the WTO – though disposing now of legal personality under Article VIII of the WTO Agreement[428] – still lacks of such a supranational quality. The Uruguay Round negotiations, the last multilateral negotiations held under the auspices of the GATT, has consisted in seven years of hard bargaining, showing once again how it is difficult to conciliate the national trade interests of so many sovereign States at a universal level. On this point, the objectives of the European Community are easier to reach in a regional framework being more restricted with regard to its number of Member States and to its territorial scope than the universal framework of the WTO. In addition, the fact that the EC can be considered as being a homogeneous community of States leads to a high level of acceptance of regulations.

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[427] EC Treaty, art. 210: "The Community shall have legal personality."
[428] WTO Agreement, art. VIII (*Status of the WTO*), *supra* note 3: "1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions."

Finally, compared to the WTO which remains a merely trade-oriented organization, the EC benefits from the advantage to cover a wider range of areas, the negotiations on which are more likely to be brought to a successful agreement. However, the possibilities for package deals still remains more limited within the WTO – though improved after the Uruguay Round – than in the EC. Furthermore, the variety of subjects and the sophisticated system of decision-making in the EC grants much influence to smaller Members. To a higher degree than in the WTO, major EC States may need support from time to time from other Members to achieve favourable political decisions. Political pressure on EC Members in order to avoid serious conflicts is therefore stronger.

Lodge has described the European integration as a fully supranational process as follows:

> European integration differs markedly from other attempts to create a common market, or, more commonly, a free trade area. Its goal is political. Its instruments may be economic. But its essence, its *raison d'être* is cemented by the *acquis communautaire*; by the supremacy of binding supranational legislation over national legislation; and by the decision-making authority of supranational institutions and their rules.[429]

As to Weiler, he has termed normative supranationality the relationship and hierarchy which exists between Community policies and measures on the one hand, and competing policies and legal measures of the Member States on the other.[430] As already pointed out by Lodge, the tools which mediate this relationship include the doctrine of direct effect, the principle of supremacy of Community law and pre-emption. Indeed, these conceptual tools have proved to be valuable devices through which areas of Community law could continue to be developed by the European Court of Justice.

Thus, the role of the ECJ appears decisive in order to stress the unique character of Community law. As a consequence, within the framework of the EC, being a 'Community of law', it is essential that Member States as well as individuals pay attention to the law of the Community and recognize the exclusive authority of the Court as provided under Articles 171, 174 and 219 of the EC Treaty. Indeed, as the Community has only few powers of enforcement, the acceptance of the ECJ's judgments by the

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[429] J. Lodge, ed., *The European Community and the Challenge for the Future*, 2d ed. (Pinter, 1993) at 382.
[430] J. Weiler, "The Community System: The Dual Character of Supranationalism" (1981) 1 Y.B. Eur. L. 267; see also J. Weiler, "The Transformation of Europe" (1991) 100 Yale L.J. 2403 at 2412-31.

Member States is of vital importance. Though, the Maastricht Treaty introduced an improvement with regard to enforceability of the ECJ's decisions by granting the Court the power to impose fines upon reluctant Member States through the provisions of Article 171, paragraph 2 of the EC Treaty.

Since its establishment, the ECJ has tried to foster European integration by its case-law although, recently, in its *Opinion 1/94*, the Court has seemed to operate a more moderate role as honest mediator between Member States and the Community. It is clear, however, that in any case, a high degree of acceptance of the judgments by all Member States is essential for the future of the Community. Indeed, without enforcement of the judgments through the Member States, the existence of the European Union would be jeopardized.

Thus, as Oppermann and Cascante have clearly emphasised:

> both EC law as well as GATT/WTO law, are characterized by a continuous interplay between national law and EC law or GATT/WTO law. The kind of relationship between the supranational or international legal system and the [M]ember [S]tates law strongly influences the effectiveness of dispute settlement. A law system with an inferior grade of acceptance and applicability, as well as dispute settlement unit, which, in the last instance, may be overruled by national courts, remains deficient.[431]

The ECJ's case-law has enabled to clarify the state of relationship between the Community and national law as well as the character of Community law in general. Actually, the Court has succeeded in implementing the rules of Community law within the national legal orders by developing the major doctrines of direct effect and of supremacy of Community law, according to which individuals have therefore been enabled to invoke "sufficiently clear and unconditional" provisions in the Community treaties and in the Community regulations and even directives. Thus, it could be advanced that by securing the rights granted to individuals by Community law, the ECJ contributed and still contributes to the firm establishment of the Community legal order.

According to the Court's case-law, national courts are obliged to interpret the national law they wish to apply in conformity with a Community directive. Furthermore, the Court

developed the principle of State liability for failure to transpose a directive into national law within the period prescribed. This doctrine not only contributed to the effectiveness of judicial protection in the EC, but also forced national courts to apply identically legal acts of the EC in all Member States and thereby to enforce the unification of the European legal order. Effective judicial protection has also been promoted by the ECJ in the field of interim relief, holding that a national law rule should be set aside if it were the only obstacle precluding a national court from granting interim relief in a case before it concerning Community law. Besides which, the ECJ stipulated uniform conditions for the granting of interim relief in all Member States.

The Court, due to its case-law, has not only put individuals into the position of being able to invoke their rights in court, and thereby strengthened the enforceability of Community law, but has also assured the uniform application of Community law. In order to reach these aims, the ECJ has contributed by its case-law to the definition of the exact scope of the rights conferred by Community law, to the provision of adequate sanctions guaranteeing the enforcement of those rights and to the availability of legal remedies to secure those rights. Furthermore, the ECJ developed the important doctrine of 'effet utile' in order to ensure in a given situation the most effective interpretation and application of EC law. These examples not only evidence the outstanding role the ECJ has played in promoting European integration, but also show its active role in the shaping of the European legal order.

The principles governing the Community legal order are worth being described in a more detailed way in order to justify the specificity of EC law.

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[431] T. Oppermann & J.C. Cascante, "Dispute Settlement in the EC: Lessons for the GATT/WTO Dispute Settlement System?" in E.-U. Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer, 1997) 469 at 471 [hereinafter "EC Lessons for the WTO"].

CHAPTER I

THE EC DISPUTE SETTLEMENT SYSTEM: OVERVIEW OF THE MAIN CHARACTERISTICS OF ITS SUCCESS

I. THE SPECIFICITY OF THE COMMUNITY LEGAL ORDER

The original nature of the Community reveals at the same time the particular characters of the Community law itself. Thus, in the famous *Van Gend en Loos* Case,[432] the European Court of Justice underlined that the Community, which was more than a mere free trade area, was also "more than an agreement which merely creates mutual obligations between the contracting parties",[433] and that it constituted "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".[434] In the same case, the Court carried on, pointing out that:

> [i]ndependtly of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[435]

Pescatore, a former judge of the Court, has commented on the judgment as follows:

> It appears from these considerations that in the opinion of the Court, the Treaty has created a Community not only of States but also of peoples and persons and that therefore not only Member States but also individuals must be visualised as being subjects of Community law. This is the consequence of a democratic ideal, meaning that in the Community, as well as in a modern constitutional State, Governments may not say any more what they are used to doing in international law: *L'État, c'est moi*. Far from it; the Community calls for participation of everybody, with the result that private individuals are not only liable to burdens and obligations, but that they have also prerogatives and rights which must be legally protected. It was thus a highly

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[432] *Van Gend en Loos*, *supra* note 206.
[433] *Ibid.* at I-12.
[434] *Ibid.*
[435] *Ibid.*

> political idea, drawn from a perception of the constitutional system of the Community, which is at the basis of *Van Gend en Loos* and which continues to inspire the whole doctrine flowing from it.[436]

One year later, the Court clarified its position in *Costa v. ENEL*, stating that the legal integration which derived from the Treaty excluded any contrary measure since:

> the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overriden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[437]

The primacy of Community law over national laws is today well established. It was asserted with a particular emphasis in *Simmenthal*, where the ECJ pointed out that:

> in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions [...]. [Therefore] a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[438]

Simmenthal is an interesting and an important case, since it spells out quite starkly the practical implications for the Community legal order of the principles of supremacy and direct effect. All national courts must directly and immediately enforce a clear and

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[436] P. Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law" (1983) 8 Eur. L. Rev. 155 at 158.
[437] *Costa v. ENEL*, *supra* note 206 at I-594.
[438] ECJ, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, C-106/77 [1978] E.C.R. I-629 at I-643-44, paras. 17 & 24, [1978] 3 C.M.L. Rev. 263 [hereinafter *Simmenthal* cited to E.C.R.].

unconditional provision of Community law, even where there is a directly conflicting national law.

A. SUPREMACY OF COMMUNITY LAW

An explicit reference to the principle of primacy or supremacy of Community law over national law being absent from the original Treaties, it was first established by the European Court of Justice in *Van Gend en Loos*.[439] Thus, according to the Court's reasoning, if the far-reaching Treaty goals of creating a common market and "ever closer union" among the Member States were to be realized, then the laws of this single Community would have to apply to the same extent and with equal force in each Member State. As a consequence, States could not introduce unilateral change, and Community measures could not be made subject to or conditional upon the varying requirements of the respective national laws of each Member State.[440]

Since *Van Gend en Loos*, the Court has consistently and unequivocally asserted the supremacy of Community law.[441] The provisions of directly effective Community law take precedence over any conflicting national law automatically inapplicable. This includes provisions of national legislation, whether that legislation was adopted prior or subsequent to the relevant provisions of Community law.[442] Furthermore, the Member States cannot adopt any new legislative measures where these would be incompatible with Community law.[443] Similarly, administrative measures based on national law which is incompatible with Community law, or which themselves conflict with Community law, must be set aside. A criminal conviction based on a national law that is incompatible with Community law is also contrary to Community and cannot be sustained.[444] Another direct consequence of the supremacy principle is the duty on the national courts to give

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[439] *Van Gend en Loos*, *supra* note 206.
[440] This view is starkly put in E.C.J., *Hauer v. Land Rheinland-Pfalz*, C-44/79, [1979] E.C.R. I-3727 at I-3744, para. 14, in which the ECJ ruled that if the validity of EC law could be assessed by reference to the constitutional law of particular Member States, this would "lead inevitably to the destruction of the unity of the Common Market."
[441] See, *e.g.*, E.C.J., *R. v. Secretary of State for Transport, ex parte Factortame Ltd. & others (Factortame I)*, C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1 [hereinafter *Factortame I* cited to E.C.R.].
[442] *Simmenthal*, *supra* note 438 at I-643-44, paras. 17 & 22.
[443] *Ibid.* at I-643, para. 17.
[444] E.C.J., *Minister for Fisheries v. Schonenberg*, C-88/77, [1978] E.C.R. I-473 at I-491, para. 16.

immediate precedence to Community law and to set aside or disapply conflicting provisions of national law.[445]

The justification for the supremacy of Community law is in part theoretical and in part practical. The theoretical justification stems from the fact that Community law is a separate source of law distinct from and not subordinate to national law.[446] Its operation cannot therefore be subordinated to or dependent upon national law. The practical justification is that the effectiveness of Community law, and the concept that it is to be uniformly applied and enforced throughout the Community, would be gravely undermined if a Member State could unilaterally nullify the effects of Community law by adopting a national law which prevailed over the Community law.[447]

A. DIRECT EFFECT OF COMMUNITY LAW

The concept of direct effect is one of the fundamental constitutional principles underlying Community law. By direct effect, the European Court of Justice means that a provision of Community law may confer rights or impose obligations upon individuals which may be enforced in the national courts or tribunals.

The language used by the ECJ to describe the test for direct effect has varied over the years. At present, the formulation used most frequently by the Court is to ask whether the provision of Community law creates an unconditional and sufficiently precise obligation.[448] In the past, the Court tended to expand on the wording of the test by asking whether an obligation was clear and unconditional and not subject in its implementation or effects to the taking of any measure by a Community institution or Member State.[449]

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[445] The scope of this obligation is well set out in *Simmenthal*, *supra* note 438 at I-644, para. 24. See also E.C.J., *Commission v. Italy*, C-168/85, [1986] E.C.R. I-2949 at I-2969-71, paras. 11-14; *Commission v. France*, C-167/73, [1974] E.C.R. I-359.

[446] *Costa v. ENEL*, *supra* note 206 at I-594.

[447] *Ibid.*

[448] See, *e.g.*, E.C.J., *Becker v. Finanzamt Munster-Innenstadt*, C-8/81, [1982] E.C.R. I-53 at I-71, para. 25; *Francovich v. Italy*, C-6-9/90, [1991] E.C.R. I-5357 at I-5408, para. 11 [hereinafter *Francovich* cited to E.C.R.]; *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia*, C-236/92, [1994] E.C.R. I-483 at I-502, para. 8 [hereinafter *Comitato* cited to E.C.R.].

[449] See, *e.g.*, E.C.J., *Lütticke GmbH v. Hauptzollamt Saarlouis*, C-57/65, [1966] E.C.R. I-205 at I-210.

The principle underlying the test is clear, although it may be a difficult test to apply in practice.[450] The Court seeks to ascertain whether the obligation is capable as it stands of enforcement in the national courts. For that, the obligation must be clearly, precisely and unequivocally worded, so that the content of the rights conferred by the Community measure is apparent thereby enabling a national court to identify and enforce the obligation.[451] Further, the obligation must be unconditional. That requirement reflects a number of factors. In essence, the content of the obligation must be capable of identification without further defining or implementing measures. Further, it must not be contingent on the adoption of specific legislative or other measures before it is intended to have effect. Furthermore, where the provision is subject to a time-limit before it comes into force, the time-limit must have expired before the provision can be relied upon in the national court.[452]

II. AN ADEQUATE SYSTEM OF JUDICIAL PROTECTION FOR EUROPEAN CITIZENS

The concepts of direct effect and supremacy ensure that Community law rights are recognized in the national legal system and that they prevail over inconsistent national law. However, they do not of themselves indicate what remedies are available to guarantee those rights. The EC Treaty itself is silent on the matter. In the early years of the development of the Community law, the ECJ was largely prepared to leave the question of remedies to the individual legal systems,[453] subject to certain obligations such as ensuring that Community law rights were treated no less favourably than comparable

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[450] In one case, the English High Court found the "concept a somewhat elusive one", *per* J. Blackburne in *Griffin v. South West Water Services Ltd* [1995] I.R.L.R. 15 at 30, para. 126.

[451] See, *e.g.*, E.C.J., *Karella v. Minister of Energy and Technology*, C-19-29/90, [1991] E.C.R. I-2691 at I-2716, para. 19; *Comitato*, *supra* note 448 at I-502, para. 10.

[452] This is particularly important in the case of directives where Member States are given a period of time precisely so that they may implement the directive. It was also true of a number of provisions in the EC Treaty which only came into force after a transitional period (the same occurs with the accession of new Member States who may be given a transitional period when certain provisions of Community law will not apply in order to give the new Member State time to adapt to the requirements of Community membership).

[453] According to the ECJ's traditional approach, Community law did not of itself create new remedies in the national courts to ensure the observance of Community law. Rather, the national courts were to make use of the remedies already available under national law. See E.C.J., *Rewe-handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel*, C-158/80, [1981] E.C.R. I-1805 at I-1838, para. 42.

domestic law rights and that national law did not make it impossible in practice to enforce Community law rights.[454]

More recently, the ECJ has turned its attention to the remedies required to protect Community law rights. It has ruled that national courts are under an obligation to ensure the effective protection of Community law rights.[455] Using the concept of the need for effective protection, the Court has begun to evolve specific requirements as to the types of remedies that must be available to guarantee Community law rights and to impose restrictions on national substantive and procedural rules that might restrict the enforcement of Community law rights.

A. Brief Survey of the Remedies Available in the European Court of Justice

In addition to remedies before the national courts, there is the possibility of seeking remedies before the European Court of Justice.[456] Thus, the ECJ has a judicial review jurisdiction to determine whether the Community institutions have acted unlawfully or failed to act[457] and a jurisdiction to consider claims for damages against Community institutions.[458] An individual may need to consider pursuing remedies directly before the ECJ instead of, or in addition to, seeking remedies in the national courts. In addition, the ECJ has jurisdiction in direct actions brought by the Commission or, extremely rarely by another Member State alleging that a Member State is in breach of its Community law obligations.[459]

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[454] See E.C.J., *Comet BV v. Produktschap voor Siergeswassen*, C-45/76, [1976] E.C.R. I-2043; *Rewe-Zentralfinanz eG and Rewe-Zentral EG v. Landwirtschaftskammer für das Saarland*, C-33/76, [1976] E.C.R. I-1898.

[455] In particular, the ECJ has laid considerable emphasis upon the essential obligation of national courts to ensure the full and effective protection of directly effective Community law rights. See *Francovich*, *supra* note 448 at I-5357, esp. paras. 31-33; *Factortame I*, *supra* note 441. These cases build on the judgment in *Simmenthal*, *supra* note 438 at I-643-44, paras. 14-17.

[456] The Court of First Instance, attached to the European Court of Justice pursuant to Article 168a of the EC Treaty, exercises the jurisdiction in actions brought by individuals. The role of the European Court of First Instance and the consequences of its establishment within the EC judicial system will be examined in a more detailed way in the following Chapter in which it will be attempted to answer the question whether lessons for the WTO may be drawn from EC experience in the field of dispute settlement: see *infra* at 144 *et seq.*

[457] EC Treaty, arts. 173 & 175.

[458] EC Treaty, arts. 178 & 215.

[459] EC Treaty, art. 169.

B. REFERENCES TO THE EUROPEAN COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EC TREATY

Article 177 of the EC Treaty provides for an original mechanism of cooperation between national courts and the ECJ whereby national courts and tribunals may, and in some instances must, refer certain questions of Community law to the European Court for a preliminary ruling before the national court proceeds to give judgment. However, it must be noted that a reference is not a remedy in itself but a step in the proceedings leading to the final determination of the case by the national court. The primary purpose behind Article 177 is to ensure that one supranational body, the European Court of Justice, has jurisdiction to provide definitive interpretations of Community law. This is designed to ensure a uniform interpretation of Community law throughout the Community and to prevent divergences between national courts on matters of Community law.

CHAPTER II

THE EC DISPUTE SETTLEMENT SYSTEM: A MODEL FOR THE NEW WTO DISPUTE SETTLEMENT SYSTEM?

– *TRANSFORMATION OR ADAPTATION?* –

Jackson has portrayed the expectations which a dispute settlement should fulfil to be really effective, as follows:

> A valid and improved system should encourage settlement by the disputants, giving them assistance in the process of settlement, but it should encourage that settlement primarily with reference to the existing agreed rules rather than simply with reference to the relative economic or other power which the disputant possesses. The mechanism should be designed so that as time goes on, greater and greater confidence will be placed in the system, so that it will more often be utilised.[460]

However, as Oppermann and Cascante have pointed out:

> [e]ven if these criteria seem to be widely recognised, one has to keep in mind when comparing EC and the WTO dispute settlement that there are differences between the two organizations which do not allow for simple transformation into the other sphere, but only for careful reasoning about the possibility of adapting experiences in the EC, based on the WTO structure.[461]

As seen above, the specificity of the Community legal order as well as the recognized efficiency of the EC judicial system essentially relies on the major doctrines of direct effect and supremacy of Community law as firmly established by the ECJ over the years. Are these principles applicable to the WTO legal system or, at least, transferable to it? Here is the first essential question to which the following developments will attempt to answer.

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[460] *World Trading System*, *supra* note 27 at 109.
[461] "EC Lessons for the WTO", *supra* note 431 at 478.

I. DIRECT EFFECT OF WTO LAW?

It has been briefly exposed above that to a certain extent, Community law grants individuals a private right of action. This situation, in which private persons as well as companies may enforce the law even against their own government and the Community, is the strongest form of enforceability of obligations. Indeed, Community law actions brought before national courts by individuals have always been considered a powerful tool to force Member States to comply with their EC obligations.[462] Furthermore, in the 1960s, *Van Gend en Loos* and *Costa v. ENEL* paved the way for the doctrine of direct effect and supremacy of Community law which the ECJ has since that time constantly referred to and reinforced in its subsequent case-law.

However, WTO law contrasts with this situation as it may only be invoked by individuals if and as long as national or Community law recognises such a private right of action.[463] Fundamentally, individuals and companies have no direct recourse under international law.[464] If national law does not grant a private right of action, the only opportunity for individuals to rely on WTO law is to influence their own government to act, either by applying political pressure or within a number of procedures which have institutionalized the filing of petitions for action, *e.g.*, the US Section 301 or the New Trade Barriers Regulation – formerly the New Commercial Policy Instrument – of the EC.[465] Thus, recognition of the direct effect of WTO law within national legal orders might be the key point for promoting effectiveness of WTO law in future, and EC dispute settlement may offer some experience to this issue.

A. DIRECT EFFECT OF WTO LAW IN THE EC?

The analysis of the question of the direct effect of WTO law in the EC does not aim at taking the ECJ case-law on this issue merely as an example to be followed, but also and especially at drawing certain conclusions from the statements of the Court which might

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[462] See R. Caranta, "Judicial Protection Against Member States: A New *Jus Commune* Takes Shape" (1995) 32 C.M.L. Rev. 703 at 710.
[463] See J. Tumlir, "GATT Rules and Community Law – A Comparison of Economic and Legal Functions" in M. Hilf, F.G. Jacobs & E.-U. Petersmann, eds., *The European Community and GATT* (Deventer, The Netherlands: Kluwer, 1986) 1 at 10.
[464] See *World Trading System*, *supra* note 27 at 103.

help to strengthen the impact of the WTO law within the national legal systems of the contracting parties, particularly in the EC.

Prior to delving into the question of the direct effect of the WTO law in the EC, it may be useful to consider the international authority of the WTO legal system as perceived in the ECJ's case-law. In this view, it is first necessary to identify the constitutional functions of GATT law.

1. The WTO Authority: Is It Limited to a Mere Persuasive Role?

The GATT treaty may be viewed as a set of economic policy commitments exchanged among governments. Many GATT provisions have the character of general prohibitive rules which aim to prevent the Members of the WTO from formulating domestic policies which have detrimental economic effects. When properly enforced, these international norms impose constraints on the domestic political process, reduce the risk of government interventions into private transactions, and thus perform a function which is analogous to domestic constitutional law.[466] If the main purpose of GATT law is to provide a solution in situations in which the self-interest of politicians leads them to take actions harmful to national economic welfare and harmful to the interest of the greater part of their citizens, it only seems logical to include basic principles of GATT law in domestic constitutions.[467] GATT rules pursue not only important foreign policy objectives. They are essentially aimed at settling conflicts, not among States, but indeed within States between the interests of domestic traders, producers, consumers, administrators and politicians. Therefore, GATT law may be perceived as "an agreed extension of liberal constitutional principles to the government powers to tax and regulate foreign trade".[468]

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[465] See *ibid.* at 105 & 107.

[466] See H. Hauser, "Foreign Trade Policy and the Function of Rules for Trade Policy Making" in D.C. Dicke & E.-U. Petersmann, eds., *Foreign Trade in the Present and a New International Economic Order* (Fribourg: Fribourg University Press, 1988) 18 at 28. See generally E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: Fribourg University Press, 1991) at 221-44.

[467] See F. Roessler, "Competition and Trade Policies. The Constitutional Function of International Economic Law" (1986) 41 Aussenwirtschaft 467 at 471.

[468] See E.-U. Petersmann, "Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems" in E.-U.

The GATT provisions are a means to protect property rights and to protect the individual liberty to buy and sell goods in the best international markets. Inclusion of GATT's fundamental principles in the European Community for example would ensure the protection of these rights throughout the Community and thereby provide for the highly necessary constitutional revision.

However, seen from the legal viewpoint, the European Community's policy quite openly consists in playing down the legal substance of GATT. That follows from the concordant behaviour of the Community executives and the European Court of Justice. In its well-known judgment of 12 December 1972, *International Fruit Company*,[469] the Court gave preference to a political reading of GATT over a legal interpretation. GATT is accordingly treated by the Community as a flexible instrument of negotiation in the field of commercial policy and not as a system of binding legal rules. That view finds a natural basis in the fact that GATT 1947 was created as a provisional instrument and even now has not recovered from this. At the same time, however, it should not be forgotten that public international law – unlike national law and even Community law – often develops formlessly and establishes itself imperceptibly. An excessively formalistic view of the doctrine of the sources of law thus inhibits progress in international law. Notwithstanding its weaknesses, GATT, too, has reached such a degree of legal density that it can no longer dismissed as nothing more than a political entity.

To be more precise, the Court has in its decisions ruled on GATT in two respects. First, it has, under the influence of the doctrine of State succession, pointed with some firmness to the transfer of the Member States' rights and duties in GATT to the Community and has also given compelling reasons for the need for that process. In so doing, it has made it easier for the Community to present itself in GATT as a uniform economic area, the Commission was consequently able to appear as a legitimate, and not merely as a tolerated, interlocutor. At the same time, however, the Court, as if to apologise for its bold doctrine of substitution, declined to recognise the provisions of GATT as having any

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Petersmann & M. Hilf, eds., *The New GATT Round of Multilateral Trade Negotiations*, 2d ed. (Deventer: Kluwer, 1991) 33 at 44.

[469] E.C.J., *International Fruit Company v. Produktschap voor Groenten en* Fruit, C-21-24/72, [1972] E.C.R. I-1219, [1975] 2 C.M.L.R. 1 [hereinafter *Third International Fruit* cited to E.C.R.].

direct effect and accordingly laid the rules of GATT to rest both within the Community itself and within all the Member States. This view which stands in contrast to the Court's attitude in the matter of the protection of individual rights, has given rise to fierce criticism both in GATT and Community circles. It has been regretted that by these decisions, which circumvent any serious analysis of the real problems in the field of commercial policy, the Court has needlessly weakened the GATT system.

There is therefore unquestionably a crisis in the relations between the European Community and GATT which is discernible not only at the level of commercial policy but also at the legal level. GATT is of course a highly complex and flexible system of benefits and counter-benefits in which the concept of mutuality cannot be ignored. At the same time, however, it also contains numerous fixed points, which it would be unwise to make the subject of negotiations and concessions, these points include, to name but a few, the respect of consolidated trade advantages, the most favoured nation rule, and more generally, the principle of non-discrimination, equal treatment in matters of taxation and freedom of transit. Rules of this kind constitute unconditional duties and, as such, are inviolable and consequently also amenable to judicial determination. That is a premise which might also provide the Community institutions with a basis for an examination of the present, truly unsatisfactory, situation.

2. The Status of WTO Law in Community Law: The Problems of the Direct Application and of the Direct Effect of WTO Law in Community Law

GATT 1947 is not an agreement binding on the Community by virtue of Article 228 of the EC Treaty. However, at the time when the 'original Six' concluded the Treaty of Rome, they were all contracting parties to GATT 1947.[470] Therefore, the GATT had to be respected by the Community under Article 234 of the EC Treaty. The European Court of Justice, however, preferred the Community itself to be bound by the GATT Agreement.

[470] Belgium, The Netherlands, Luxembourg and France were among the founding fathers of GATT and have thus applied the General Agreement since 1 January 1948. Italy applies the GATT since the entry into force of the Annecy Protocol of Terms of Accession to GATT in 1950, and Germany on the basis of the Torquay Protocol which entered into force in 1951. See E.-U. Petersmann, "The EEC as a GATT Member – Legal Conflicts Between GATT Law and European Community Law" in M. Hilf, F.G. Jacobs & E.-U.

The *Third International Fruit Company* Case,[471] explains why the provisions of GATT 1947 were applicable in the Community and could consequently have been interpreted by the Court of Justice under Article 177 of the EC Treaty providing for the preliminary ruling procedure. In this case, indeed, the Court came to the conclusion that, as the Community assumed the functions inherent in the tariff and trade policy progressively during the transitional period by virtue of Articles 111 and 113 of the EC Treaty and as its active participation in trade negotiations and agreements concluded within GATT reflected the recognition by the other GATT contracting parties of this transfer of powers in the relations between the Community and its Member States, "in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement on Tariffs and Trade, the provisions of that agreement have the effect of binding the Community".[472]

The Court reconfirmed its view that GATT 1947 was legally binding on the Community itself in the *Nederlandse Spoorwegen* Case.[473] In this case, one of the questions was whether a Dutch court was required to apply certain GATT provisions, even though it might thereby come into conflict with Community law. The Court reaffirmed its opinion as regards the substitution of the Community for the Member States, clarified its consequences, and extended its reasoning to the Brussels Convention of 1950 on Nomenclature for the Classification of Goods in Customs Tariffs, by stating:

> [S]ince so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal systems.[474]

Petersmann, eds., *The European Community and GATT* (Deventer, The Netherlands: Kluwer, 1986) 23 at 32 [hereinafter "EEC as a GATT Member"].

[471] *Third International Fruit*, *supra* note 469.

[472] *Ibid.* at I-1227, para. 18.

[473] E.C.J., *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten*, C-38/75, [1975] E.C.R. I-1439, [1976] 1 C.M.L.R. 167 [hereinafter *Nederlandse Spoorwegen* cited to E.C.R.].

[474] *Ibid.* at I-1450, para. 16.

> Just as, in the case of commitments arising from GATT, the Community had replaced the Member States in commitments arising from the Convention [...], and is bound by the said commitments.[475]

The view of the Court that GATT 1947 was a legally binding agreement for the Community itself was again reaffirmed in three decisions delivered on March 16, 1983, especially the *Societá Petrolifera Italiana* Case[476] in which the Court specified the precise scope of its jurisdiction to construe the GATT Agreement as follows:

> Since the Community has been substituted for the Member States in relation to the fulfilment of the commitments laid down in the General Agreement on Tariffs and Trade with effect from 1 July 1968, the date on which the Common Customs Tariff came into force, the provisions of that Agreement fall from that date within the provisions on the interpretation of which the Court of Justice has jurisdiction to give a preliminary ruling under Article 177 of the EEC Treaty, regardless of the purpose of such interpretation. In respect of the period before that date, such interpretation is a matter exclusively for the courts of the Member States.[477]

Furthermore, the Court clarified in the same case that it is of vital importance that the GATT provisions, like the provisions of all other agreements binding the Community, are uniformly applied throughout the Community:

> [A]ny difference in the interpretation and application of provisions binding the Community as regards non-member countries would not only jeopardise the unity of the commercial policy, which according to Article 113 of the Treaty must be based on uniform principles, but also create distortions in trade within the Community, as a result of differences in the manner in which the agreements in force between the Community and non-member countries were applied in the various Member States.[478]

Regarding now the question whether the GATT Agreement may be considered as an integral part of Community law, reference can be made again to the *Third International Fruit* Case in which the Court stated that its jurisdiction cannot be limited by the grounds on which the validity of those measures may be contested. Therefore, since its jurisdiction extends to all grounds capable of invalidating those measures, the Court was obliged to examine whether their validity may be affected by reason of the fact that they are contrary

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[475] *Ibid.* at I-1450, para. 21.
[476] E.C.J., *Amministrazione delle Finanze dello Stato v. Societá Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, C-267-269/81, [1983] E.C.R. I-801 [hereinafter *SPI/SAMI* cited to E.C.R.].
[477] *Ibid.* at I-829, para. 19.
[478] *Ibid.* at I-828, para. 14.

to a rule of international law. It follows from this ruling, in connection namely with the above-mentioned *SPI/SAMI* Case, that the Court's interpretation of Article 164 of the EC Treaty – which provides that it is the task of the Court of Justice to ensure that in the interpretation and application of the Treaty the law is observed – is broad. This law to be observed thus includes norms of international law deriving from international agreements which bind the Community and are therefore a part of the Community legal system.[479] The provisions of GATT 1947 formed an integral part of Community law, as norms of international agreements concluded by the Community, alone or together with the Member States.[480] The common commercial policy indeed requires that the GATT has the same potential impact in all the Member States. If the Court of Justice had not recognised this fact, the different methods of incorporation in the Member States could have led to serious deviations.

The direct application of GATT 1994 is different from the direct application of GATT 1947. The WTO Agreement has been accepted by the Council under Article 228(7) of the EC Treaty and is therefore binding on the Community and the Member States and on that basis an integral part of the Community legal system without the need for transformation. The Community is entirely responsible for the proper performance by the Community and the Member States of the Agreements on Trade in Goods, GATT 1994 and the new side-agreements. Under Article XVI:4 of the WTO Agreement, "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". The laws, regulations and administrative procedures of the Community and its Member States will have to be brought into conformity with all the Agreements on Trade in Goods, including GATT 1994. This is a responsibility of the Community. By virtue of the fact that these agreements are binding on the Community and its Member States under Article 228(7) of the EC Treaty, the provisions of these agreements form an integral part of the Community legal system. They are therefore part of the legal rules under which the European Court of Justice

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[479] See P. Pescatore, "Treaty-making by the European Communities" in F.G. Jacobs & S. Roberts, eds., *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987) 171 at 182.

[480] *Ibid.* at 182. See also E.-U. Petersmann, "Application of GATT by the Court of Justice of the European Communities" (1983) 20 C.M.L. Rev. 397 at 418 & 436; implicitly G. Bebr, "Agreements Concluded by

exercises its control over the actions of Member States and Community institutions. Obligations arising from international agreements binding the Community are 'obligations under the Treaty' in the sense of, for example, Article 169 of the EC Treaty. Non-compliance with these obligations justifies an action by the Commission against a Member State for violations of Community obligations. In *SIOT* Case, the Court explicitly held that the Community is under the "obligation to ensure that the provisions of GATT are observed in its relations with non-member States which are parties to GATT".[481] This observation is also valid for GATT 1994 and the new side-agreements.

Therefore, there is no doubt that GATT 1994 imposes obligations on the Community and the Member States, but does this mean that, in principle, it cannot be denied direct effect? Returning then to the *Third International Fruit* Case, the Court felt that it was obliged to examine whether the validity of acts of the Community institutions could be affected because of incompatibility with a rule of international law.[482] However, in order for international norms to have such force, two conditions must be met under the Court's opinion. First, before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must be bound by that provision.[483] Second, before invalidity can be relied upon before a national court, the provision of international law must be capable of conferring rights on citizens of the Community which they can invoke before the courts,[484] in other words, the provision must be directly effective. In order to determine whether GATT provisions are capable of conferring rights on individuals of which they may avail themselves in court, the Court examined the spirit, general scheme and terms of the General Agreement.[485] It subsequently denied direct effect to GATT on the following grounds:

> This agreement which, according to its preamble, is based on the principles of negotiations undertaken on the basis of 'reciprocal and mutually advantageous

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the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg" (1983) 20 C.M.L. Rev. 35 at 43.

[481] E.C.J., *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze et alii*, C-266/81, [1983] E.C.R. I-731 at I-780, para. 28.

[482] *Third International Fruit*, *supra* note 469 at I-1226, para. 6.

[483] *Ibid.* at I-1226, para. 7.

[484] *Ibid.* at I-1226, para. 8.

[485] *Ibid.* at I-1227, para. 20.

> arrangements' is characterised by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.[486]

This ruling was constantly reaffirmed by the Court in subsequent decisions such as the *Schlüter* Case[487] for example.

As to the preambular paragraph of EC's implementation document on the Uruguay Round results, it clearly states that the "WTO Agreement by its nature [...] is not susceptible to being directly invoked in Community or Member States courts."[488] Although such an official declaration possesses weight, it remains a unilateral opinion. The effect of WTO law in the internal legal order of the Community after the Uruguay Round has not finally been decided by the ECJ.[489] A few years ago, the ECJ decided again on this question, albeit under the angle of the old GATT 1947, reemphasizing that GATT law is binding for the EC, but that it cannot be invoked directly before the ECJ.[490] On this occasion, the action for annulment of an EC legislative provision had been founded on GATT law with a Member State bringing the action to court. The EC banana regime – the subject-matter of the judgment – had previously been declared by a GATT panel, in a tentative way, to be contrary to GATT obligations of the EC. The Court, however, upheld the validity of the regime, *inter alia*, maintaining that not only an individual within the Community is precluded from invoking GATT law in a court to challenge the lawfulness of a Community act, but that the court also is precluded from taking provisions of GATT into consideration in order to assess the lawfulness of a regulation in an action brought by a Member State under Article 173, paragraph 1 of the EC Treaty. With reference to its previous decisions *Nakajima* and *Fediol III*,[491] an exception is only admitted by the ECJ in cases where "the Community intended to implement a particular obligation entered into within the framework of GATT or if the Community act expressly refers to specific

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[486] *Ibid.* at I-1227, para. 21.
[487] E.C.J., *Schlüter v. Hauptzollamt Lörrach*, C-9/73, [1973] E.C.R. I-1135.
[488] See P. Kuijper, "The Conclusion and Implementation of the Uruguay Round's Results by the EC" (1995) 6 Eur. J. Int'l L. 222 at 236 ["Conclusion and Implementation of the UR Results by the EC"].
[489] See F.C. de La Torre, "The Status of the GATT in EC Law Revisited" (1995) 29 J. World T. 65; see also "Conclusion and Implementation of the UR Results by the EC", *supra* note 488 at 236.
[490] E.C.J., *Germany v. Commission*, C-280/93, [1994] E.C.R. I-4873 [hereinafter *Banana*].

provisions of GATT." As basis for its decision, the Court stated – in a rather doubtful conclusion – that GATT law was not "hard law" of an unconditional character. In a similar way, already the Advocate-General had denied the enforceability of GATT law, because of the GATT's system and structure.

However, as far as these arguments against the direct effect of GATT law concern the character of GATT regulations, the ECJ's opinion meets strong opposition, as many GATT regulations are supposed to be detailed and precise enough to be applied directly.[492] Nevertheless, the critical remarks on the lacking enforceability of GATT law, due to the weakness of dispute settlement procedures, may become obsolete if the new DSU proves to have teeth. Indeed, since the new GATT 1994 and the establishment of the WTO, it has been argued by academic commentators and before the ECJ itself that with the changed provisions and the more effective means of dispute settlement and enforcement, the premise on which the GATT 1947 was held to lack direct effect may no longer exist.[493] How the ECJ will rule on this matter remains to be seen.[494] Not only the

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[491] E.C.J., *Nakajima v. Council*, C-69/89, [1991] E.C.R. I-2069; *FEDIOL v. Commission*, C-70/87, [1989] E.C.R. I-1781.

[492] See E.-U. Petersmann, "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization" (1995) 6 Eur. J. Int'l L. 161 at 168 ["Transformation of the World Trading System"]; see also "EEC as a GATT Member", *supra* note 470 at 49 *et seq.*

[493] See C.F.I., *S. Lehrfreund Ltd. v. Council & Commission*, T-228/95 R, [1996] E.C.R. II-111, para. 28. See J. Scott, "The GATT and Community Law: Rethinking the Regulatory Gap" in J. Shaw & G. More, eds., *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995); P. Lee & B. Kennedy, "The Potential Direct Effect of GATT 1994 in EC Law" (1996) 30 J. World T. 67.

[494] In *Affish BV v. Rijksdienst voor de Keuring van Vee en Vlees*, C-183/95, [1997] E.C.R. I-4315, it was argued, amongst other things, that a Commission decision on marketing fish products contravened part of the WTO Agreement and that either the Agreement should be regarded as having direct effect or Community law should be interpreted in its light. The Advocate General George Cosmas in his opinion dated 10 December 1996 denied direct effect of provisions of the WTO Agreement based on the same reasoning as that of the established case-law on the GATT 1947. He stated that the provision of the WTO Agreement remain characterised by a great flexibility which does not permit recognition of their direct effect. According to the Advocate General, although the WTO Agreement contains a new dispute settlement mechanism, the spirit of negotiations is not totally excluded from that Agreement. Furthermore, he stated that the relevant provisions of the WTO Agreement are not sufficiently precise and concrete to be directly effective. However, since the case came before the ECJ on a preliminary ruling, and the national court did not specifically raise the question of infringement of the WTO Agreement, the Court declined to address the issue. See also E.C.J., *T. Port GmbH v. Hauptzollamt Hamburg-Jonas*, C-364-5/95, [1998] E.C.R. I-1023: In his opinion dated 24 June 1997, the Advocate General Michael Elmer denied a direct effect of the WTO Agreement by referring to the Council decision concluding the WTO Agreement. The Council stated in the preamble of the decision that "by its nature, the WTO Agreement is not susceptible to being directly invoked in Community or Member State courts." However, the ECJ again declined the rule on the direct effect of GATT 1994. Finally, see E.C.J., *Hermès International v. FHT Marketing Choice BV*, C-53/96, [1998] E.C.R. I-3603.

new rules, but also the future practice of the DSU will probably decide whether the former arguments of the ECJ lose weight. It might well again be the EC banana regime which may force such a decision, after the United States have decided to challenge the EC banana regime, using the DSU opportunities.

Until a change in EC case-law occurs – and also with regard to the prevailing legal opinion in other important States of the WTO[495] – the situation remains that WTO law may be set aside to the disadvantage of individuals, even where the States have agreed to comply with these obligations. Or, as Petersmann has put it, with regard to the judgment of the ECJ in the *Banana* Case,[496] "[t]he ECJ [...] leaves it essentially to the EC Council whether it wants to comply with or disregard, the GATT and WTO guarantees of freedom and non-discrimination."[497] This unsatisfactory situation can only be overcome by eventually promoting the direct effect of WTO law. Naturally, this cannot be achieved by the ECJ alone – even if somebody has to take the lead one day – but needs sufficient consensus inside the WTO membership in general.

B. How to Achieve Direct Effect of WTO Law?

The concluding remarks of Oppermann and Cascante with regard to the lessons which could be drawn from EC dispute settlement on how to achieve direct effect of WTO law, are worth being underlined here:

> Notwithstanding the fact that the ECJ has often been criticized because of its law-making judgments, its achievements in the development of European integration are indisputable and its courage has led to a long story of success. The main reason for this has been that, by contrast to the WTO situation, the EC [M]ember [S]tates with their historical regional experience voluntarily passed sovereignty to supranational institutions after World War II. Considering this very fact, some possible lessons for the WTO dispute settlement may be drawn as follows:
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> (1) GATT/WTO law does not prescribe the national application of the World Trade rules. It leaves the question open to the contracting parties. Normally, the question of direct effect had therefore to be answered by national law. The WTO/GATT law, nevertheless, could explicitly prescribe such direct effect in the future if the members agree.

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[495] See J.H. Jackson, Testimony of June 14, 1994 before the US Senate Committee on Foreign Relations.
[496] *Banana*, *supra* note 490.
[497] "Transformation of the World Trading System", *supra* note 492 at 170.

(1) The implementation of direct effect by agreement of all contracting parties would possibly be the ideal solution. However, as this meets many difficulties on a universal level, such as existent at the WTO, the DSU bodies could take a look at the history of dispute settlement in the EC and learn how far law can be influenced in its development over the decades by dispute settlement. Possibly, direct effect of WTO law could be fostered in a cautious manner by 'judge-made law'.

(1) As many [M]ember [S]tates and their courts have emphasized the lack of enforceability and the flexibility of GATT law as arguments against the direct effect of GATT law in the past, it is up to the WTO to prove by its legal activities that changes take place. The very character of secondary WTO law will be an essential factor in future judicial proceedings in the WTO, EC and national [M]ember [S]tates with regard to decisions on the question of direct applicability.

Direct effect of WTO/GATT law might enhance the stability of the international trade order. The rule of international law would be strengthened considerably and hidden bilateralism, *e.g.* by voluntarily export restraints, would become more and more difficult to realise.

Given the reluctance in many national and regional circles *vis-à-vis* the doctrine of direct effect, an approach annulling a few fears would be to foster direct effect of WTO law in the national legal orders of the contracting parties, but still excluding an individual's right to directly invoke the world trade law before an international dispute settlement unit – reserving that possibility only for member states. The WTO legal order would thereby be strengthened without the contracting parties having to pass jurisdictional powers to a full-scale international judiciary. This alternative might not yet be universally acceptable, as individual states belonging to the international Community still have many different historical roots and varying cultural backgrounds that create major obstacles to their willingness to surrender unconditionally to the legal will of an independent transnational body.[498]

II. THE WTO APPELLATE BODY

A. LESSONS FROM THE EXPERIENCE WITH THE EC COURT OF FIRST INSTANCE

1. The EC Court of First Instance

The EC Court of First Instance, established on 1 September 1989, following Article 168 of the EC Treaty, has had jurisdiction over various types of cases since 31 October 1989.[499] A wide range of jurisdiction has since then been passed from the ECJ to the newly established tribunal. The categories of cases transferred included, since the beginning, cases concerning disputes between the Communities and their servants,

[498] "EC Lessons for the WTO", *supra* note 431 at 485.

competition cases, and certain cases under the European Community of Steel and Coal Treaty, as well as actions for compensation in respect of these three categories. Since 1994, the Court of First Instance has become competent for most cases put forth by natural or legal persons, including the anti-dumping and subsidies sector.[500]

With the establishment of the EC Court of First Instance, an opportunity for appealing was created within the judicial system of the EC for the first time.[501] Thus, as Article 17 of the DSU also intends to establish a "standing Appellate Body", the EC experiences in this field might be of particular interest.

Appeals under EC law are not functioning as an automatic stay and can be decided by a formal judgment (*arrêt*) or by a reasoned order (*ordonnance*), the latter being a more simplified procedure for appeals which are clearly inadmissible or unfounded.[502] As to the right of appeal, it is unrestricted, that is, not dependent on a leave to appeal.

However, an appeal in EC law is limited to "points of law"[503] in the same way as an appeal in the WTO.[504] Arising from this, the answer to the following question is required both in EC law and WTO law: what does the term 'points of law' exactly cover? Article 51 of the Statute of the ECJ answers by permitting appeal only on the following three grounds: (i) lack of competence of the Court of First Instance; (ii) breach of procedure before that Court which adversely affects the interest of the appellant; or (iii) infringement of Community law by the lower court. The latter ground includes all the questions of law which do not fall under (i) and (ii). An exact answer to the decisive question ('what are questions of law?') has therefore not yet been given, but has been left for the competent courts to decide. In its first years of operation as a court of appeal, the ECJ had to draw the line between law and fact. In doing so, it has decided not to expand

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[499] See A. Barav, "The Court of First Instance of the EC" (1989) 139 New L.J. 1298.
[500] See L. N. Brown, "The First Five Years of the Court of First Instance and Appeals to the Court of Justice: Assessment and Statistics" (1995) 32 C.M.L. Rev. 743 [hereinafter "Court of First Instance"].
[501] See, generally, S. Sonelli, "Appeal on Points of Law in the Community System – A Review" (1998) 35 C.M.L. Rev. 871.
[502] *Ibid.* at 745.
[503] See EC Treaty, art. 168a; Statute of ECJ, art. 51.
[504] See DSU, art. 17.6, *supra* note 4.

the interpretation of what constitutes a point of law, but rather to adopt a restrictive approach, thus granting the CFI a wider range of acceptance of its fact findings.[505]

Furthermore, under Article 54 of the Statute of the ECJ, following a successful appeal, the ECJ will not only quash the decision of the CFI, but will then either decide the substance of the case (*révision*) or refer the case back (*cassation*) to the CFI.

After a few years in operation (almost a decade), it seems that the intended effects of the creation of a lower court within the EC judicial system have been achieved. First of all, this means better legal protection by improved examination of the facts and circumstances, and relief of the pressure on the ECJ by reducing the case-overload.[506] The improvement of the fact-finding procedure at the CFI level is, at least, recognized. Having two instances has also contributed to better discussion and elaboration of questions of law.[507]

2. The WTO Appellate Body in the Light of the EC Experience with Two Dispute Settlement Instances

As in the case of the EC Court of First Instance, the creation of the Appellate Body within the WTO dispute settlement system has resulted essentially from the concern of managing the higher work-load due to the stronger judicialization of the WTO dispute settlement system compared to its predecessor in GATT 1947 as well as the increasing scope of possible disputes with regard to each new member and each new domain (*e.g.* intellectual property, services) covered by the law of the WTO and the DSU.

With regard to the EC experience in this field, a possible approach to improve the functioning of the WTO dispute settlement system and more particularly the functioning

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[505] See "Court of First Instance", *supra* note 500 at 746 & 752. Probably the most illustrating decision so far has been *Hilti* (E.C.J., *Hilti AG v. Commission*, C-53/92 P, [1994] E.C.R. I-667, [1994] 4 C.M.L.R. 410). In this competition case, the ECJ confirmed its previous rulings that an appeal can only be based on grounds which concern a violation of law and which exclude any assessment of facts. It further held that the assessment of means of evidence, where those means have not been falsified, is not a point of law and is therefore not subject to an appeal before the ECJ. The ECJ thereby chose a narrow interpretation of the term "points of law".

[506] See B. Vesterdorf, "The Court of First Instance of the European Communities after two full years of operation" (1992) 29 C.M.L. Rev. 897 at 901, 903.

of the Appellate Body concerns the right of appeal itself. Should it be limited, *e.g.*, by the necessity of a leave of appeal? The reference to the EC experience after a few years of EC appeal seems to show that the right of appeal should better not be restricted. The acceptance of the more legalistic approach inside the WTO in general and of the newly established Appellate Body in particular, depends among other criteria on the frequency with which the right of appeal is used. Indeed, a restriction of the right of appeal would only lead to a lower level of acceptance and, therefore, should not be taken into consideration.

As to the jurisdiction of the Appellate Body, it is limited under Article 17.6 of the DSU to issues of law covered in the panel report and legal interpretations developed by the panel.[508] However, the same difficulty as in EC law arises, that is, the problem of drawing the line between a question of fact and a question of law. Yet, following the EC practice, the Appellate Body should establish guidelines on the interpretation of the term 'issues of law' in order to ensure security in the cooperation of the two WTO instances and to facilitate the decision of a party whether to appeal a panel report or not.[509]

With regard to the decision of the Appellate Body, Article 17.13 of the DSU empowers the Appellate Body to uphold, modify or reverse the legal findings and conclusions of the panel,[510] whereas there is no provision providing for the possibility that the Appellate

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[507] See "Court of First Instance", *supra* note 500 at 750.

[508] See "Transformation of the World Trading System", *supra* note 492 at 210. See also P. Lichtenbaum, "Procedural Issues in WTO Dispute Resolution" (1998) 19 Mich. J. Int'l L. 1195 at 1266-70 [hereinafter "WTO Procedural Issues"], citing namely *EC – Hormones* (Appellate Body Report), *supra* note 93, in which the Appellate Body provided an extensive discussion of the law/fact distinction issue as follows: "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review."

[509] See R. Behboodi, "Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO" (1998) 32:4 J. World T. 55 at 62-69.

[510] See "Overview of WTO Dispute Resolution", *supra* note 361 at 40.

Body might remand the case to the panel[511] by contrast to Article 54 of the Statute of the ECJ which provides for such a possibility of referring back the case to the lower court.[512]

In order to illustrate the problem arising from the lack of remand authority of the Appellate Body, Palmeter has referred to third cases brought before it.[513] In the first case to be appealed, *United States – Standards for Reformulated and Conventional Gasoline*,[514] the Appellate Body reversed the panel's conclusion that a rule prescribing quality standards for gasoline was not a measure "relating to" an exhaustible natural resource within the meaning of Article XX(g) of GATT. In so deciding, the panel found it unnecessary to consider the remaining claims. However, due to its lack of remand authority, the Appellate Body, when it reversed the panel's decision on "relating to", had limited choices with regard to the remaining claims. As Palmeter has observed, "[either] [i]t could tell Brazil and Venezuela to start again and to ask for a new panel to consider the remaining claims[,] [or,] [a]lternatively, it could decided the necessary undecided issues itself, *de novo*."[515] Finally, the Appellate Body chose to do the latter and upheld the panel's conclusion that the Gasoline Rule was not justified by Article XX(g), albeit for different reasons. According to Palmeter, "[i]t could hardly have done otherwise. [Indeed,] [t]o have sent Brazil and Venezuela back to the starting line a year after they had begun the process, simply because the panel – reasonably practising judicial economy – chose not to decide all of their claims, would have been an unacceptable result to most WTO Members, particularly in the first matter to proceed through the new dispute settlement process."[516]

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[511] See D. Palmeter, "The WTO Appellate Body Needs Remand Authority" (1998) 32:1 J. World T. 41 at 41 [hereinafter "Appellate Body Remand Authority"]: "[The Appellate Body] lacks one of the most important powers of an Appellate Body, namely the power to remand cases to the lower tribunal – in this instance, the panel – whose decision has been appealed. This deficiency is not trivial. It has been a factor in at least two of the first eight appeals decided thus far, and has led one small area of the Appellate Body's jurisprudence into a state of some confusion. More important, the lack of remand authority is dangerous, because it risks avoidable error – error that could cause serious problems for the credibility, and hence the acceptability, of the entire WTO dispute settlement process."

[512] Under Article 54 of the Statute of the ECJ, the ECJ "may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment."

[513] "Appellate Body Remand Authority", *supra* note 511.

[514] *United States – Standards for Reformulated and Conventional Gasoline* (*Complaint by Venezuela*) (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report) [hereinafter *Gasoline*].

[515] "Appellate Body Remand Authority", *supra* note 511 at 42.

[516] *Ibid.*

In *Canada – Certain Measures Concerning Periodicals*,[517] the Appellate Body decided again an issue *de novo*. Actually, in *Gasoline*, its formulation for claiming authority to consider issues *de novo* was somewhat strange, holding that the panel had "erred in law in failing to decide" the remaining Article XX issues. In *Periodicals*, however, the Appellate Body abandoned this terminology. Indeed, instead of finding the panel in error for not reaching the second sentence of Article III:1 of GATT, the Appellate Body simply said that it "would be remiss in not completing the analysis" begun by the panel.

The Appellate Body's apparent change from charging panels with error for not reaching issues to simply taking on the responsibility of "completing the analysis" has been interpreted by Palmeter as directly stemming from its intervening decision in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*[518] [519]. Indeed, Palmeter has underlined that in this case, the Appellate Body "endorsed the practice of judicial economy by panels,"[520] holding that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." According to Palmeter, "[t]he earlier language of the *Gasoline* report, that the panel "erred" by not reaching an issue, certainly clashed with this sensible conclusion. However, if panels may continue to exercise judicial economy – and there are good reasons why they should[521] – then the problem of the Appellate Body's "completing the analysis" will remain."[522]

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[517] *Canada – Certain Measures Concerning Periodicals* (*Complaint by the United States*) (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report) [hereinafter *Canada - Periodicals*].

[518] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses* (*Complaint by India*) (1997), WTO Doc. WT/DS33/AB/R (Appellate Body Report).

[519] "Appellate Body Remand Authority", *supra* note 511 at 42.

[520] *Ibid.*

[521] The principle of judicial economy not only economizes on judicial resources, it also avoids deciding issues that do not have to be decided in order to reach a conclusion on the dispute before the panel. It is, therefore, a less expansive approach which seems appropriate to bodies reviewing the programmes and actions of sovereign governments. One recent panel, however, anticipated possible reversal and decided an issue it apparently would not have decided otherwise: *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (*Complaint by the United States*) (1997), WTO Doc. WT/DS50/R (Panel Report): "[W]e believe it necessary to make our findings clear on the issue of transparency in order to avoid a legal vacuum in the event that, upon appeal, the Appellate Body were to reverse our findings on Article 70.8." See also *Enforcing International Trade Law*, *supra* note 252 at 262: "If a measure is found to be GATT-illegal and must be removed in its entirety, panels will normally not decide whether the measure is also discriminatory, or whether it is also illegal under some other rule." One such instance is *Canada – Import Restrictions on Ice Cream and Yoghurt* (*Complaint by the United States*) (1989), 36th Supp. B.I.S.D. (1990) 68, declining to rule on whether products were "perishable" under Article XI:2(c), on the ground

Palmeter has identified the problem of the Appellate Body's "completing the analysis" as follows:

> It is a problem because it is the equivalent of *de novo* review, and *de novo* decisions of the Appellate Body do not themselves benefit from appeal. They are effectively unreviewed and unreviewable, since the prevailing party will rarely, if ever, join in the consensus required for the Dispute Settlement Body not to adopt a report of the Appellate Body. *De novo* decisions of the Appellate Body lack the primary benefit of appellate review which is a second, more focused look at a contentious issue by a group of individuals other than those who made the initial decision. The members of the Appellate Body are experienced and distinguished international lawyers or trade diplomats, but there is no reason to believe that they are any less fallible than the many equally distinguished panelists who consider issues initially.[523] Certainly in proceedings that are even more time-constrained than those facing panels, the Appellate Body cannot be said to be any less likely than panels to err in deciding issues of first impression.[524]

Thus, if the Appellate Body had the possibility to refer the case back rather than decide on the substance itself, the result would be better judicial protection essentially by review of the legal arguments over two instances. However, the disadvantage of this approach would be the foreseeable inconsistency with the strict time limits provided for by Article 17.5 of the DSU.

As Oppermann and Cascante have put:

> The arguments presented in favour of the creation of a European Court of First Instance apply *mutatis mutandis* to the establishment of the Appellate Body in the DSU. This means better protection by improved examination of facts and

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that decision of the issue was not necessary given the panel's rulings that the Canadian restrictions violated Article XI for other reasons. However, Hudec has pointed out that panels did depart from the normal practice of declinig to decide the unnecessary issues where a broader ruling would serve some purpose, such as providing guidance on the panel's review of the meaning of an important GATT provision: *Enforcing International Trade Law*, *supra* note 252 at 262-63 (citing *Japan – Restrictions on Imports of Certain Agricultural Products*, *supra* note 308; *United States – Customs User Fee (Complaint by Canada and EEC)* (1988), 35th Supp. B.I.S.D. (1989) 245; *United States – Section 337 of the Tariff Act of 1930*, *supra* note 309. For further details, see "WTO Procedural Issues", *supra* note 508 at 1231-33.

[522] "Appellate Body Remand Authority", *supra* note 511 at 42-43.

[523] The words of former US Supreme Court Associate Justice Robert H. Jackson are appropriate: "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done [...]. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

[524] "Appellate Body Remand Authority", *supra* note 511 at 43.

circumstances on the panel level and strengthened legal interpretation over two instances, as well as relief of pressure on only one dispute settlement unit by reducing the case-overload. Fears that the two instances might scatter the given judicial protection instead of increasing it do not seem reasonable and contradict European experience. However, a striking difference between the structures established under the new GATT and the appeal system under EC Law with the ECJ as "Appellate Body" is that the reviewing instance in the WTO framework has to work under a strict time limit.[525] It remains to be seen if this kind of time pressure will, on the whole, turn out to be a disadvantage for the parties to a dispute or the contrary.[526]

A. PRELIMINARY RULINGS IN WTO LAW?

According to the EC practice, the preliminary ruling as provided for by Article 177 of the EC Treaty has been revealed over the years as being one of the most important instruments in EC law in order to guarantee the uniformity of understanding and application of Community law throughout the Community. The importance of preliminary rules is underlined by the fact that many landmark ECJ's decisions like *Van Gend en Loos*, *Costa v. ENEL* and others were all taken *via* preliminary rulings.

The EC experience in the field of preliminary ruling implies that before applying a rule, its meaning must be clearly defined. However, in the WTO framework, if the interpretation of the WTO law is left to the contracting parties, the danger of a differing understanding remains great. In order to avoid this effect, Article IX:2 of the WTO Agreement prescribes that the interpretation of the WTO provisions and those of all multilateral agreements falls under the exclusive responsibility of the Ministerial Conference and the General Council.[527] But a judicial procedure similar to the preliminary ruling in EC law is still missing within the WTO framework. Such a judicial procedure might improve the rule of WTO law. Goals might be the definition of the precise scope of rights conferred by the WTO Agreement, the uniform interpretation of the law, and the establishment of recognized links between the WTO law and regional and national law of contracting parties. However, two major questions at least arise from such a scenario: would the Appellate Body be able to fulfil this far-reaching judicial task? which national courts and tribunals should be empowered to ask for a preliminary ruling?

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[525] See E.-U. Petersmann, "The Dispute Settlement System of the WTO and the Evolution of the GATT Dispute Settlement since 1948" (1994) 31 C.M.L. Rev. 1218.
[526] "EC Lessons for the WTO", *supra* note 431 at 479-80.

Nevertheless, the success of EC's preliminary rulings since the 1960s is encouraging enough to put this subject on the table of the next WTO revision conference.

III. PREPARATION OF THE DSB DECISION

This section is based on the suggestion made by Oppermann and Cascante considering the opportunity of establishing an institution like the Advocate-General into the WTO dispute settlement system.[528] Indeed, in the framework of the ECJ, the Advocate-General fulfils a major task, appearing as "an independent person who prepares and presents factual findings, examines the factual and legal situation from differing points of view, thereafter presents the result – in a Community spirit – to the deciding gremium."[529] Therefore, by comparing the state of law in different EC Member States concerning the disputed question, the Advocate-General considerably contributes to the preparation of an accepted decision by the ECJ. Within the EC jurisdiction, the 'Opinion' of the Advocate-General is often more enlightening than the judgments of the Court.

Nevertheless, as Oppermann & Cascante have observed, "it is doubtful whether the time has come to propose Advocates-General for the WTO dispute settlement", the addition of such an institution appearing indeed premature "[a]s long as the Appellate Body of the DSU still has to find its way to develop judicial authority".[530] They have finally argued that "[i]f, one day, in the WTO a court-like institution, composed of independent judges were to be established, Advocates-General might then be a useful supplement for better preparation of the dispute material in the spirit of the [WTO] rule of law."[531]

IV. STANDARDS OF REVIEW: THE RELATIONSHIP OF SOVEREIGNTY CONCEPT TO THE WTO RULE SYSTEM

The standard of review issue is whether a WTO panel should make a strictly objective determination of whether a member's action is consistent with its WTO obligations, or whether a WTO panel should grant some deference to the factual findings and

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[527] See "Overview of WTO Dispute Resolution", *supra* note 361 at 30.
[528] "EC Lessons for the WTO", *supra* note 431 at 481.
[529] *Ibid.*
[530] *Ibid.*

interpretations of WTO obligations made by a member in the course of deciding to take the challenged action. A separate standard of review issue arises with respect to Appellate Body's review of panel decisions: is the Appellate Body charged with a *de novo* review of the panel's legal conclusions, or is any deference due to the panel's more in-depth review of the record and arguments?

A. STANDARD OF REVIEW VS. SOVEREIGNTY

Croley and Jackson have introduced the delicate issue of the determination of standards of review within the new WTO dispute settlement system as follows:

> Even if one recognizes that some concepts of "sovereignty" are out of date or unrealistic in today's interdependent world,[532] the word still raises important questions about the relationship of international rules and institutions to national governments, and about the appropriate roles of each in such matters as regulating economic behavior that crosses national borders. The GATT dispute settlement procedures have increasingly confronted these questions, including the degree to which, in a GATT (and now WTO) dispute settlement procedure, an international body should "second-guess" a decision of a national government agency concerning economic regulations that are allegedly inconsistent with an international rule.
>
> To pose a concrete example: Suppose that a government applies certain domestic products standards, perhaps for reasons of domestic environmental policy, in a manner that causes some citizens (or foreign exporters) to argue that the government action is inconsistent with certain WTO norms (such as rules in the WTO Technical Barriers to Trade Agreement). Suppose also, however, that a national government agency (or court) determines that the national action is *not* inconsistent with WTO rules, and another nation decides to challenge that determination in a WTO proceedings. It would seem clear that the international agreement does not permit a national government's determination *always* to prevail (otherwise the international rules could be easily evaded or rendered ineffective). But should the international body approach the issues involved (including factual determinations) *de novo*, without any deference to the national government? Certainly, it has been argued in GATT proceedings (especially those relating to antidumping measures)[533] that panels should respect national government determinations, up to some point. That "point" is the crucial issue that has sometimes been labeled the "standard of review"[534].[535]

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[531] *Ibid.*

[532] See, *e.g.*, L. Henkin, "The Mythology of Sovereignty" ASIL Newsletter (March-May 1993) 1.

[533] See S.P. Croley & J.H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 A.J.I.L. 193 at 195-98 [hereinafter "WTO Dispute Procedures Standard of Review"].

[534] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6, in WTO Agreement, Annex 1A, *supra* note 3 [hereinafter Anti-Dumping Agreement].

Actually, the same commentators have considered the standard-of-review question as being deeply connected with the large concept of sovereignty, stating that "the standard-of-review question is faced at least implicitly whenever sovereign members of a treaty yield interpretive and dispute settlement powers to international panels and tribunals."[536] Thus, the difficulty of the standard-of-review question arises, on the one hand, from the fact that "effective international cooperation depends in part upon the willingness of sovereign states to constrain themselves by relinquishing to international tribunals at least minimum power to interpret treaties and articulate international obligation. [...] On the other hand, nations and their citizens – and particularly those particular interests within nation-states that are reasonably successful at influencing their national political actors – will want to maintain control of the government decisions."[537]

B. Standard of Review in the Conduct of Panel Proceedings

There is no specific provision in the DSU specifying a general standard of review which would conciliate the conflicting interests as identified above, except, to some extent, Article 11.[538] With regard to the terms of Article 11, Lichtenbaum has noted that they "raise a question whether panels should be influenced by the challenged Member's determinations on questions of either fact or law because a panel must take an "objective assessment" as to both "the facts of the case", *i.e.*, factual issues, and the "applicability of and conformity with the relevant covered agreements," *i.e.* legal issues."[539] He has then concluded that "[t]he requirement of an "objective assessment" arguably would not permit a panel to alter the factual or legal determinations that the panel would have

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[535] "WTO Dispute Procedures Standard of Review", *supra* note 533 at 194.
[536] *Ibid.* at 211.
[537] *Ibid.*
[538] See *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (Complaint by India)* (1997), WTO Doc. WT/DS33/R (Panel Report) at para. 7.16, stating that "although the DSU does not contain any specific references to standards of review, we consider that Article 11 of the DSU which prescribes the parameters of the functions of panels, is relevant here." DSU, art. 11: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the disputes and give them adequate opportunity to develop a mutually satisfactory solution."
[539] "WTO Procedural Issues", *supra* note 508 at 1234.

reached independently solely because the Member whose action is challenged has made certain factual or legal determinations[,]" adding that "[t]he standard of review provision in the WTO Antidumping Agreement[540] could support this interpretation of Article 11 by inference."[541] According to the terms of review provided for by Article 17.6(i) of the Antidumping Agreement, a panel, in principle, only may consider whether the interpretation of the fact allowed a certain outcome – the one chosen by the relevant authority – even if different results would have been possible. In this way, the scope of the panel's legal activity has been considerably diminished. In addition, the second limitation for the legal interpretation of the panel provided for by Article 17.6(ii) of the Antidumping Agreement further narrows its field of action.[542]

C. Standard of Review of Panel Decisions

As already mentioned above, a separate standard of review issue arises with respect to Appellate Body's review of panel decisions. Here, the difficulty lies in the question whether the Appellate Body is charged with a *de novo* review of the panel's legal conclusions, or whether any deference is due to the panel's more in-depth review of the record and arguments. In cases that have come before it, the Appellate Body has essentially applied *de novo* review, modifying panel legal reasoning with which it disagreed.

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[540] Anti-Dumping Agreement, *supra* note 534. Article 17.6. of the Antidumping Agreement provides that: "In examining the matter in paragraph 5 [*i.e.*, the claim of violation]: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

[541] "WTO Procedural Issues", *supra* note 508 at 1234.

[542] See P. Pescatore, "Drafting and Analysing Decisions on Dispute Settlement" in P. Pescatore *et al.*, eds., *Handbook of WTO/GATT Dispute Settlement* (1997) at 38: the antidumping standard of review "quite evidently runs counter [to] the idea of an objective assessment of facts by independent panels, as this particular 'standard of review' serves no other purpose than to superimpose the assessment of the facts by the administration of the defendant Member to the assessment at which a panel might on its own judgment arrive." For a detailed analysis of the provisions of Article 17.6 of the Antidumping Agreement, see "WTO Dispute Procedures Standard of Review", *supra* note 533.

In *Canada – Periodicals*, the Appellate Body reversed a panel conclusion that had been reached without proper legal reasoning and on inadequate factual analysis, noting that the panel "did not base its findings on the exhibits and evidence before it."[543] In *EC – Beef Hormones*, the Appellate Body reversed a panel's finding as "unjustified and erroneous as a matter of law."[544]

However, a more lenient standard of review applies with respect to review of procedural decisions by the panel. The Appellate Body will require a showing of "prejudice" before reversing a panel's decision on "matters of procedures", *i.e.*, maters relating to the panel's own proceedings.[545] On such procedural matters, an appellant's demonstration that the panel made an error of law apparently will not be sufficient, the appellant will also have to demonstrate that the error caused "prejudice" to the appellant's case.

An interesting question arises as to whether there is a standard of review for a panel's factual findings. As mentioned earlier, the Appellate Body's jurisdiction is strictly limited to issues of law and legal interpretations by the panel. However, it appears that at least to some degree, the Appellate Body could review a panel's factual findings albeit under a quite deferential standard of review. Article 12.7 of the DSU provides that "the report of a panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations" that the panel makes.[546] The requirement for a "basic rationale" behind the panel's factual findings may provide an implicit standard of review, in conjunction with the requirement that a panel conduct an "objective assessment" of the facts, under Article 11 of the DSU. Taken together, these provisions suggest that a panel must act reasonably in making factual findings. For example, as argued by the EC in *EC – Beef Hormones*, the Appellate Body could find that a panel's findings were not made in good faith and therefore were not reasonable. However, the requirement for a "basic rationale" and an "objective assessment" could be

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[543] *Canada – Periodicals*, *supra* note 517.
[544] *EC – Hormones* (Appellate Body Report), *supra* note 93 at para. 246.
[545] *Ibid.* at para. 152, reasoning that the DSU "leaves panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."
[546] DSU, art. 12.7, cited in *EC – Bananas* (Appellate Body Report), *supra* note 86 at para. 251, stating that a panel is required to provide a "basic rationale" for its decision.

violated even where the panel acts in good faith, if the panel ignored relevant facts or used incorrect reasoning.[547] Conversely, it would be inappropriate for the Appellate Body itself to conduct an "objective assessment" of the facts to determine whether the panel was correct or not, rather than simply determining whether the panel acted reasonably.[548]

McRae has argued that the Appellate Body should develop "some concept of a "standard of review"[549] and "might adopt a less intrusive, more deferential standard of review."[550] He has pointed out that such deference to panel decisions is warranted given the many new provisions in the WTO Agreements that "need honing and refining over time,"[551] and that interpretation "is not an exact science."[552] So far, the issue is a difficult one, as it requires the Appellate Body to balance the value of early, clear statements of law, against the value of permitting the gradual evolution of jurisprudence in a complex area.

By contrast, the ECJ may not only examine the discretionary decisions taken by the investigating authorities, but also replace them albeit within certain limits. On the whole, the study of the ECJ approach, which is to grant strong judicial protection but to subject Community acts only to limited review, might be of value to the WTO dispute settlement system. Thus, the legal order of the WTO might be strengthened while an ample margin of discretion would be reserved to Member States, making judicial control by an international body acceptable, even for sovereign-conscious Members.

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[547] See M. Lugard, "Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law" (1998) 1 J. Int'l Econ. L. 323, criticizing the *EC – Hormones* (Appellate Body Report), *supra* note 93, for limiting review of panel factual findings to whether the panel acted in bad faith, and noting that this approach appears to mandate an inquiry into the panelists' subjective intent.

[548] See P. Rosenthal, "Comments on Scope for National Regulation" (1998) 32 Int'l Lawyer, arguing that "[a] review of how the Appellate Body applied this standard to the facts of *Beef Hormone* [...] indicates that the standard was not applied in a particularly deferential way. The Appellate Body engaged in a thorough and searching inquiry, adopting some factual findings of the Panel and rejected others."

[549] D. McRae, "The Emerging Appellate Jurisdiction in International Trade Law" in J. Cameron & K. Campbell, eds., *Dispute Resolution in the World Trade Organisation* (London: Cameron May, 1998) 98 at 109.

[550] *Ibid.* at 110.

[551] *Ibid.*

[552] *Ibid.*

V. ENFORCEMENT OF DECISIONS

With the Maastricht Treaty, a new way of ensuring the enforcement of the ECJ's decisions has been provided for in Article 171 of the EC Treaty. According to this provision, Member States not following a final decision from the ECJ, thus frankly violating the Treaty, may now be punished by financial sanctions, proposed by the EC Commission and decided upon by the ECJ. For the European Union this means another step towards EC jurisdiction in a full nation-like sense.

As to the WTO, it is still standing far from similar ambitions. Indeed, such reluctance is easily understandable on the universal level of trade law where the national conflicting interests still remain difficult to conciliate. However, the Uruguay Round negotiations have successfully contributed to the 'quasi-automatic adoption' of panel and Appellate Body reports through the adoption of Articles 16.4 and 17.13 of the DSU. This constitutes a considerable improvement compared with the law of the former GATT 1947. Adoption, though, does not mean enforcement even if the compliance with and implementation of panel or Appellate Body decisions are also much more supervised than under the old GATT 1947. In the near future, a step in the direction of a strict enforcement might be to tackle the problems of direct effect of the WTO.

VI. POWER TO THE PEOPLE: ALLOWING PRIVATE PARTIES TO RAISE CLAIMS BEFORE THE WTO DISPUTE RESOLUTION SYSTEM[553]

The question of the direct participation of private parties to the new WTO dispute settlement procedure seems to be of a major importance. However, it will be shown in the following developments on this issue that it is not necessarily considered as such by the contracting parties which are eager to protect their sovereignty rights above all.

It must be first recalled that international trade law as regulated under the WTO Agreement does not only concern the signatory States but also their citizens "[s]ince trade

[553] See G.T. Schleyer, "Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System" (1997) 65 Fordham L. Rev. 2275 [hereinafter "Private Parties and the WTO"].

between nations is primarily trade between individuals or companies."[554] However, the following question still arises: why should individuals be allowed to participate in the decision-making of the WTO which appears as an international economic organization designed to develop and enforce the rules of trade relations among States? Indeed, as Lukas has observed, individuals' participation in the WTO decision-making seems to contradict well-settled doctrines of international law:

> First, relations with foreign nations are to be administered by the government.[555] If an individual asserts a breach of international law by a foreign nation, it is in the discretion of the individual's government to represent its citizens in the appropriate international forum – after considering the diplomatic, political and economic implications of this action.[556] Furthermore, the involvement of private parties in the enforcement of this regulatory framework could jeopardize the delicate balance of rights and obligations in international trade relations,[557] finally agreed upon after a lengthy bargaining process.[558]

With regard to the question whether the existing regime of diplomatic protection works, Davey has considered that:

> [f]irst, it is certainly true that governments when they decide whether or not to bring a case, they look at their overall general interests. As a result, whether or not a particular private party has a valid claim under WTO rules in the sense that its exports have been kept out of another market, that may not be the major consideration that a government is going to look at. [...] Second, governments have to consider not only whether or not a rule is being broken but whether or not they want a clear decision that something violates a rule. They may be doing the same thing in another area and so some areas may just not be of interest to governments to test in the WTO, simply because they are not sure if they want clear answers to the question of what is or is not consistent with WTO rules. And finally there is a problem that exists whenever you have a system of diplomatic protection: governments have to make choices and those choices may reflect the political strength of the various complaining parties. So a case that may not be all that significant or all that clear may be brought simply because of the political

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[554] M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29:5 J. World T. 181 [hereinafter "Role of Private Parties in UR Agreements"].

[555] The doctrine of "diplomatic protection" or "citizen representation" follows the theory formulated by Vattel in 1758. See W. Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) at 237.

[556] *Ibid.* at 238.

[557] See *Restructuring the GATT System*, *supra* note 53 at 60.

[558] As already noted, the Uruguay Round negotiations lasted seven years.

clout of the industry or company involved, whereas a better case may not be brought simply because that entity does not have that clout.[559]

Arising from the above considerations, it clearly appears that actions taken exclusively by governments before the WTO do not fully take into account private parties' interests. One way to overcome such a deficiency is, of course, to achieve direct effect of WTO rules as previously emphasised.[560] The other way is to open up the WTO to private parties. Actually, although the Uruguay Round Agreements do not grant individuals the right to initiate or participate in the dispute settlement mechanism even if they are directly affected by the dispute at issue, several forms of indirect access to the dispute settlement procedures under the WTO are envisaged. It is therefore useful to give an overview of the present role of private parties in the decision-making process of the WTO before envisaging – essentially in the light of the EC experience – how direct access to the WTO dispute settlement system could be effectively granted to individuals.

A. Forms of Private Participation Available in the WTO Dispute Resolution System

To illustrate the options available to a company to enforce the WTO rules, the example of an exporter facing trade restrictions in violation of the WTO Agreements may be used. Private parties can then envisage at least two ways to reach the goal of eliminating trade barriers. First, the exporter can initiate the dispute resolution procedure of the WTO through his government. Some countries have established legal rights for individuals and companies to start administrative proceedings which may result in the initiation of the dispute resolution mechanism of the WTO. Second, there are nevertheless certain ways of participating directly in the proceedings of the WTO.

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[559] "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?" (1998) 32:2 J. World T. 147 at 148 (remarks of W. Davey). See also remarks of G. Horlick, *ibid.* at 151, labelling the problem to which Davey has referred "the glass-house problem" in that "[g]overnments in glass-houses do not throw stones[,] [*i.e.*,] [they] will not challenge each other if they feel vulnerable." The following consequence arises in terms of private parties: "you, a private party in a WTO member could have a perfectly good legal case, an important case, a case of importance to you, that could be crucial to you and your government won't take it because it does the same thing, or thinks it might do the same thing or want to preserve its ability to do the same thing."

[560] See *supra* at 133 *et seq.*

1. Indirect Access to WTO Dispute Resolution

1.1. *United States: Section 301 of the Trade Act of 1974*

A US-based company faced with a trade restriction in another country it considers in violation of WTO Agreements can initiate an administrative procedure pursuant to Section 301 of the Trade Act of 1974.[561] Section 301, as amended by the Omnibus Trade and Competitiveness Act of 1988,[562] empowers the United States Trade Representative[563] to investigate "unfair" foreign trade practices and to take retaliatory action.[564] During a Section 301 investigation, the USTR is required to consult with the petitioner.[565] If the USTR decides to commence a Section 301 investigation, it must ask the foreign government concerned for consultations on the date of the initiation of the investigation.[566] If no solution of the dispute arising under the trade agreement is reached within the prescribed time-frame of Section 301, the USTR must initiate the formal dispute settlement procedure provided for by the trade agreement.[567] A Section 301 investigation may be initiated after a petition of an "interested person".[568] The threshold to initiate the Section 301 proceedings is comparably low such as most petitioners have little difficulty meeting this standard.[569]

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[561] For the relationship between a unilateral instrument such as Section 301 and the WTO system, see generally A.F. Lowenfeld, "Remedies Along With Rights: Institutional Reform in the New GATT" (1994) 88 A.J.I.L. 477; J.H. Bello & A.F. Holmer, "U.S. Trade Law and Policy Series No. 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?" (1992) 26 Int'l Lawyer 795.

[562] 19 U.S.C.A. §2411 (1988).

[563] Hereinafter USTR.

[564] The USTR must take retaliatory action where it determines that a foreign country's act, policy or practice: (a) violates or is inconsistent with or denies US benefits or rights under a trade agreement; or (b) is unjustifiable and burdens or restricts US commerce. The USTR is not obliged to take action if a GATT panel determines that there is no violation of or denial of US rights under a trade agreement: 19 U.S.C. §2411(a)(1)(A) (1994).

[565] *Ibid.* at §2414(b)(1)(B).

[566] *Ibid.* at §2413(a)(1). This request may be delayed for up to ninety days: *ibid.* at §2413(b)(1)(A).

[567] *Ibid.* at §2413(a)(2).

[568] All exporters, importers and investors affected by the foreign practice, trade unions of a negatively affected industry, representatives of consumer interests and every other party representing a significant economic interest affected fall under this definition: *ibid.* at §2411(d)(1); 15 C.F.R. §2006 (1994).

[569] See "Retaliatory Action in US and EU Trade Law", *supra* note 29 at 46-47, esp. at note 33.

1.2. *European Community: The New Commercial Policy Instrument*

As a detailed analysis of both the old and new EC New Commercial Policy Instrument has already been given in the two previous parts of this work, only a brief recall of their main characteristics will be made here.

1.0.0. The old New Commercial Policy Instrument: Regulation 2641/84

In 1984, the EC Council adopted Regulation 2641/84 to "defend vigorously the legitimate interests of the Community [...] in particular in GATT."[570] A private party acting on behalf of a "Community industry"[571] can file a complaint with the EC Commission[572] if it can prove that it has suffered injury resulting from an illicit foreign trade practice. Then it is up to the Commission to decide whether the initiation of the examination procedure is "necessary in the interest of the Community."[573] These requirements are difficult to meet. A European exporter has to prove that the foreign trade practice constitutes a GATT violation[574] and that there is an injury to a "Community industry."[575] The admissibility standards for private complaints are therefore much higher than for Section 301 complaints under US law, because there is no injury determination required to initiate Section 301 proceedings.[576]

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[570] NCPI, *supra* note 50 at Preamble.

[571] *Ibid.* at art. 1(a). The language of the NCPI ("act on behalf of") indicates clearly that not only the complainant but a "Community industry" has to be injured.

[572] The second track of the initiation of the examination procedure is by request of one of the EC Member States: *Ibid.* at art. 4. This procedure has never been used.

[573] *Ibid.*, art. 3(1).

[574] A GATT violation is an "illicit" trade practice: E.C.J., *EEC Seed Crushers and Oil Processors' Federation v. Commission*, C-70/87, [1989] E.C.R. I-1825 at 1831 [hereinafter *Fediol III*].

[575] A "Community industry" means all procedures of identical or similar products in the EC or all producers whose combined output constitutes a major proportion of the total production: NCPI, art. 2(4), *supra* note 50.

[576] This is one of the reasons why there have been many fewer successful complaints under Regulation 2641/84 than under Section 301. See M. Hilf, "International Trade Disputes and the Individual: Private Party Involvement in National and International Procedures Regarding Unfair Foreign Trade Practices" (1986) 41 Aussenwirtschaft 441 at 450. See also M.C.E.J. Bronckers, "National Trade Law Policy Instruments and the GATT: An EC Lawyer's Perspective" in S.J. Rubin & M.L. Jones, eds., *Conflict and Resolution in US-EC Trade Relations at the Opening of the Uruguay Round* (New York: Oceana Publications, 1989) 143.

1.2.2. The new New Commercial Policy Instrument: Regulation 3286/94

On 1 January 1995, Regulation 3286/94[577] replaced Regulation 2641/84.[578] Its major feature is the introduction of a third track for the initiation of an examination procedure against foreign unfair trade practices. Article 4(1) grants the right to complain on behalf[579] of Community enterprises. This provision does not contain the high standard of "injury to a Community industry", but the lower standard of "adverse trade effects".[580] Hence, indirect access of private citizens to the WTO dispute settlement process is now easier to obtain. However, the threshold of Regulation 3286/94 is still higher than the "interested party" standard of Section 301. The fact that only one Community enterprise is adversely affected by the trade restriction is insufficient to qualify for the right to petition the Commission where it would be sufficient for the Section 301 petitioner.[581] Whether a European company can petition the EC Commission to initiate proceedings under the WTO depends on its ability to prove the existence of a "material impact on the economy" and an "obstacle to trade to Community enterprises". The likelihood of success in meeting this standard is determined by the EC Commission's interpretation of these terms.

2. Direct Participation of Private Parties in WTO Dispute Resolution Procedures

Although the drafters of the Charter of the International Trade Organization, the still-born ancestor of the WTO, briefly discussed the possibility of a private citizen complaint and a right of private citizens and organizations to be heard, this option was considered a threat

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[577] TBR, *supra* note 78.

[578] The original version of the Regulation stated in Article 16 that it would enter into force by 1 January 1996. Council Regulation 356/95 of 20 February 1995 amended Regulation 3286/94 by applying it to all investigations initiated after and also pending at 1 January 1995.

[579] The ambiguous language of the Regulation ("Any Community enterprise [...] acting on behalf of one [...] Community enterprise") could be interpreted as not requiring proof of injury to a *Community industry* but only the existence of obstacles to trade to *Community enterprises* as the new standard for the petitioner. See TBR, art. 4(1), *supra* note 78.

[580] This term is defined in Article 2(4): "For the purposes of this Regulation, 'adverse trade effects' shall be those which an *obstacle to trade* causes or threatens to cause, in respect of a product or service, to *Community enterprises* on the market of any third country, and which have a *material impact* on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. The fact that a complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, that the Community institutions proceed with any action."[emphasis added].

[581] See TBR, art. 2(4), 2d sentence, *supra* note 78.

to the theory of governmental sovereignty[582] and was therefore never put in the Charter of the ITO.

Nevertheless, there has always been substantial input by private parties in dispute resolution proceedings under the GATT 1947, and this will not change under the WTO. The US implementing legislation of the Uruguay Round results, for instance, expressly grants certain rights of consultation and information to interested parties before and during panel proceedings.[583] Indeed, if a complaint filed by an "interested person" under Section 301 results in the initiation of the WTO dispute settlement process, the USTR shall, at each stage of the proceeding before the panel or the Appellate Body, consult with the petitioner and shall consider the view of representatives of appropriate interested private sector and non-governmental organizations concerning the matter.[584] The occurrence of any proceedings regarding the establishment of a panel must be published and written comments of the public concerning the issues shall be taken into account by the USTR.[585]

A bill introduced in 1995 in the US Senate goes even further.[586] It established that:

> a private United States person that is supportive of the United States government's position [...] and that has a direct economic interest in the [...] resolution of the matters in dispute shall be permitted to participate in consultations and panel proceedings.[587]

The private party may ask to be consulted in advance by the USTR regarding written submissions from the United States to the WTO panel and to be included, where

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[582] The drafters wanted to avoid the "danger that private persons or organizations would be allowed the right of direct complaints in matters affecting the jurisdiction and legislation of sovereign States": E/PC/T/C.6/37 at 5. See also E/PC/T/C.6/W.54: "The lodging of complaints by affected business entities, even with the permission of the Member in whose jurisdiction they are, raises objections of a juridical and practical nature."

[583] See H.R. 5110, 103d Cong., 2d Sess. §127 (1994).

[584] *Ibid.* at §127(a).

[585] *Ibid.* at §127(b). Other provisions are intended to improve the transparency of the proceedings: all submissions to the panel by the United States shall be made public except where they contain confidential information. The USTR shall request that the other party to the dispute receive permission for the written submissions to be made available to the public: *ibid.* at §127(c).

[586] S. 16, 104th Cong., 1st Sess. (1995).

[587] *Ibid.* at §7(a).

appropriate, "as an advisory member of the delegation in sessions of the dispute settlement panel".[588] The USTR:

> shall allow such special delegation member, where such member would bring special knowledge to the proceeding, to appear before the panel, directly or through counsel, under the supervision of responsible United States government officials; and in proceedings involving confidential information, allow appearance of such person only through counsel as a member of the special delegation.[589]

The ultimate right to determine the course of the proceedings, however, remains in the hands of the government.[590] Even the ability of an individual to attend hearings before the DSB depends on the status of a government official, which has to be granted by a party to the dispute. This option is frequently used to allow private counsel to appear in a hearing and to rely on her knowledge of the issues in the particular case and her expertise of domestic and international trade law in general.[591]

B. How to Achieve Direct Access of Individuals to the WTO Dispute Resolution System?

The benefits of private participation in the WTO dispute settlement system have been often discussed and recognized by many commentators.[592] Amongst them, Shell has

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[588] *Ibid.* at §7(c).
[589] *Ibid.*
[590] See *World Trading System*, *supra* note 27 at 103.
[591] The need to involve private counsel depends on the level of experience of trade officials in these areas, which differs significantly from country to country.
[592] See "Role of Private Parties in UR Agreements", *supra* note 554 at 202-3; *World Trading System*, *supra* note 27 at 111 *et seq.*; R.A. Brand, "GATT and the Evolution of United States Trade Law" (1992) 18 Brook. J. Int'l L. 101 at 139; "Private Parties and the WTO", *supra* note 553 at 2293-96; J.M. Waincymer, "GATT Dispute Settlement: An Agenda for Evaluation and Reform" (1989) 14 N.C. J. Int'l L. & Com. Reg. 81 at 113; "Foreign Unfair Trade Practices", *supra* note 410 at 752; G.R. Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization" (1996) 17:1 U. Pa. J. Int'l Econ. L. 359, esp. at 377-78, stating that "broader participation by nonstate parties, not monopolization by states, will give the WTO the credibility it will need to make effective, legitimate pronouncements on trade and trade-related issues". See *contra* P.M. Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernment Parties" (1996) 17:1 U. Pa. J. Int'l Econ. L. 295; J.-G. Castel, "The Settlement of Disputes Under the 1988 Canada-United States Free Trade Agreement" (1989) 83 A.J.I.L. 118 at 123; R.A. Brand, "Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930" (1990) 24:3 J. World T. 5 at 25; L.S. Klaiman, "Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution" (1990) 11 U. Pa. J. Int'l Bus. L. 657 at 660, arguing that the WTO dispute settlement mechanism is designed to bring an end to the particular dispute, not to apply the law to a set of facts as in a domestic judicial proceeding.

suggested that the EC experience serves as a possible source of inspiration for what the WTO can become in terms of private participation, referring to what he has labeled the "Trade Stakeholders Model".[593] According to him, "the Trade Stakeholders Model emphasizes direct participation in trade disputes not only by states and businesses, but also by groups that are broadly representative of diverse citizen interests."[594] He has characterized this model as follows:

> In summary, the Trade Stakeholders Model [...] seeks to break the monopoly of states on international dispute resolution machinery and to extend the power to enforce international legal norms beyond states to individuals. As a corollary to this emphasis on the individual as the proper subject of international law, the Trade Stakeholders Model also envisions direct applicability of some international legal standards in domestic courts as well as in international tribunals.[595]

He has then proposed the European Community as the most comprehensive example of such a model since the EC "has transformed itself from a simple trade alliance [...] into a socially responsive confederation of fifteen states that permits individuals as well as states to assert a wide array of transnational standards in legal disputes at both the regional and the domestic level."[596] Following this view, scholars have summarized the rights of individuals to assert EC norms as follows:

> Until 1963 the enforcement of the Rome Treaty, like that of any other international treaty, depended entirely on action by the national legislatures of the member states of the community. By 1965, a citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with self-executing provisions of community secondary legislation, the "directives" to national governments passed by the EC Council of Ministers. And by 1990, community citizens could ask their national courts to interpret national legislation consistently with community legislation in the face of undue delay in passing directives on the part of national legislatures.[597]

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[593] "Trade Legalism", *supra* note 9 at 907 *et seq.*
[594] *Ibid.* at 910.
[595] *Ibid.* at 915.
[596] *Ibid.* at 917-18.
[597] A.-M. Burley & W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org. 41 at 42. Citizens of EC Member States enjoy the protection of EC law in two distinct ways. First, certain EC laws are directly applicable to Member States without any legislative action by the State. Second, and more importantly for purposes of the argument in the text, the ECJ has held that both regulations and directives of the EC may have "direct effect" within the legal systems of Member States

Shell has concluded on the potential influence that the ECJ's case-law could have on the WTO future evolution as follows:

> While it is perhaps risky to put too much weight on a comparison between a regional legal system among European democracies and the WTO, there is at least significant potential as the WTO matures for the WTO Appellate Body to assume a role similar to that of the ECJ. Both courts are strategically located at the legal epicenter of their respective governance systems. As scholars have noted, the ECJ has periodically stepped in to render legal rulings advancing the cause of economic and social integration when [EC] countries have been "unwilling to stick to their treaty obligations" and "policymaking leadership [has been needed] to prevent the rapid erosion of the community."[598] The Appellate Body, like the ECJ, is positioned to be the "keeper of the norms" in the WTO's turbulent political environment and may therefore eventually be in a position to advance a Trade Stakeholders Model vision of trade governance. Such a development would hold [considerable] promise [...] [since] the range of parties able to have their voices heard would extend beyond those of the "global business civilization" [...].[599]

The idea expressed by Shell seems to be clear: it is up to the Appellate Body, considering the ECJ's case-law as a model to follow, to impose the concept of direct effect of WTO rules such that individuals can finally avail themselves of these rules both at the international and national levels.

In conclusion, the objectives of the legal framework of international trade can only be achieved if the economic actors in the area of trade – individuals and companies – also have access to the body of law which regulates trade. The present forms of private participation do not provide for a uniform and efficient private role in the enforcement of international trade law. However, the likelihood of the introduction of a private right to access the WTO dispute resolution system as such is minimal. Indeed, this instrument has only been proposed by scholars, as seen above, and no major trading nation has put it on the agenda of the next negotiations likely to be launched in Seattle on 30 November 1999. It is unlikely that governments themselves advocate it because it would inherently circumvent their power. They could also be the target of privately initiated procedures, which cannot be as easily resolved by negotiation as disputes between governments.

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such that individuals can assert EC law as a source of rights in their own domestic courts against their own governments and, in some instances, in disputes with other private parties.

[598] *Ibid.* at 46.

[599] "Trade Legalism", *supra* note 9 at 921-22.

Thus, a direct right of private participation in the WTO will only have a future if its value for the facilitation of international trade is recognized and if it finally becomes the subject of public interest beyond academic discussion.

CONCLUSION

The so-called Millenium Round – which will be shortly launched on the occasion of the Seattle Ministerial Conference opening on next 30 November 1999 – will give WTO Members the really first opportunity, since its entry into force in 1995, to assess the functioning of the system as a whole and to pursue thereby their efforts aimed at strenghtening and improving it. The review of the dispute settlement system in particular will certainly have a significant part in the debate.

Actually, the present study has consisted in an attempt to highlight the advantages and improvements brought to the new WTO dispute settlement system by the Uruguay Round negotiations, but also the remaining essential defects of the system which could be discussed in the new Round with regard in particular to the EC experience on the matter. Indeed, it has been demonstrated that it could be helpful for the further developments of the WTO dispute settlement system to be based, to some extent, on the EC model, in that the Community legal order benefits from a degree of acceptance of Community law never reached in any other similar organization as well as a very elaborate system of judicial protection. The recognized success of the European Community has always depended, from its inception until today, upon the ECJ's case-law which enables a constant development and reinforcement of Community law.

The establishment of the new WTO dispute settlement system has been the result of a major shift from a power-oriented to a rule-oriented world trade order, at least in theory. But this still needs be confirmed in practice, that is, this was only the first step towards the complete recognition of WTO rule of law and it must be pursued. However, one of the major obstacles to this is the fear of the loss of national sovereignty, still great within the world trade community. As a consequence, the promotion of WTO law within its Member States' national legal orders will still take time and effort to be achieved.

As mentioned above, the Millenium Round could constitute a further significant step in the development of a strengthened WTO legal order. In this view, WTO Members have

conscientiously prepared the negotiations. With regard to the WTO dispute settlement system, it could be noteworthy to refer to the EC proposals which were submitted to the WTO in October 1998 and July 1999 in the framework of the general review of the dispute settlement system which could be finally concluded on the occasion of the Millenium Round negotiations. However, some of the reforms suggested by the EC "may not be ripe for agreement to be reached [...]. This does not mean, [though], that they should be excluded *a priori*, or that discussion of them would not be useful."[600]

In October 1998, the EC submitted 24 suggestions aimed at strenghtening and improving the dispute settlement system.[601] Amongst them, key proposals include creating a standing body of professional panellists, improving transparency, giving greater weight to consultations and speeding up procedures. First, with regard to the EC proposal concerning the creation of a standing body of professional panellists, it would enable the future panels to be conducted by members having a strong background in international trade law, being geographically representative but operating independently. Second, the proposal advanced for greater transparency relies on the necessity to make dispute settlement rulings more acceptable to the general public. Third, the EC wants greater weight to be given to consultations owing to the fact that many disputes are amicably settled at this stage. Finally, the EC believes that the rights of third parties need to be strengthened both at the consultation stage and before the panel and Appellate Body in order to avoid loss of considerable time. In July 1999, the EC added some other proposals to its initial submission in the form of guiding principles for the clarification and elaboration of Articles 21, 22 and 23 of the DSU focusing on implementation issues.[602]

With regard to these proposals, the EC appears not as audacious as it could be. Indeed, as this study has attempted to show, the EC could constitute a successful model on which the future developments of the WTO legal system could be based. But the EC itself has not

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[600] See *Discussion Paper from the European Communitites. Subject: Review of the Dispute Settlement Understanding (DSU)*, 21 October 1998, online: Europa <http://europa.eu.int/comm/dg01/0212dstl.htm> (date accessed: 5 October 1999).

[601] See *Ibid.*

[602] For further details on these new proposals, see *DSU Review: Discussion Paper from the European Communities*, 23 July 1999, online: Europa <http://europa.eu.int/comm/dg01/dsurev.htm> (date accessed: 5 October 1999).

decided to put such a suggestion on the table although it is in the best position to do so. Instead, it prefers to adopt, at least for the moment, an approach which, in respect of the necessary further improvements of the WTO legal system, remains minimalist in a certain sense. It is obvious that one way to ensure a high level of acceptance of WTO rule of law could be, as it is the case in the Community legal order, to allow an effective judicial protection of 'WTO citizens', which implies the recognition of WTO Members' citizens as being themselves subjects of the WTO legal order in addition to contracting States. Such a goal could be reached essentially by introducing a direct right of private participation in the WTO legal system. However, as it has been already pointed out in the previous developments on this issue, such proposals have remained until now at the mere stage of academic discussion and they would need to be supported by much greater public interest in order to be put one day on the negotiating table.

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