

THE ENFORCEMENT OF THE WTO DISPUTE SETTLEMENT DECISIONS ACCORDING TO THE ECJ

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ABSTRACT: *Our article deals with the enforcement of WTO Dispute Settlement Decisions according to the European Court of Justice (ECJ). Bearing in mind the singular nature of the European Community (due to its political and legal structure), it is important to study first the relationship between the WTO and the EC and then the status of WTO Decisions in the case of Dispute Settlement between one of European Community Member States and another State. To understand the legal effects of WTO Dispute Settlement Decisions on ECJ, we had to study practical Cases laws that exemplify the position of ECJ towards WTO Decisions. The analytical and practical study of this topic allowed us to come up with some criticism on the ECJ's approach on the WTO Dispute Settlement system.*

KEY-WORDS: WTO, Dispute Settlement Decisions, the ECJ, the GATT, law cases, Trade Law, International Law, direct effect.

Questions:

- What are the relationship between WTO and ECJ?
- What is the legal competence of the WTO to enforce regulations on the EC?
- Which organs are responsible for the enforcement of WTO Decisions on the EC?
- What are the legal effects of WTO Dispute Settlement Decisions on the EC?
- What is the ECJ's position towards the Decisions enforced by the WTO in the Dispute Settlement system?

Research Methodology: Firstly, we have analyzed our subject using a descriptive approach to set up the contextual factors (historical and politico-legal factors) of the problematic. Secondly, the practical study of Law Cases pertaining to the WTO Dispute Settlement Decisions has helped us to analyze the legal mechanisms of the procedure. Thirdly, the study highlights the inconsistency of the ECJ's approach on the WTO Dispute Settlement Decisions under a critical point of view based on official documents and literature from legal scholars.

Abbreviations:

WTO: World Trade Organization

EC: European Community

ECJ: European Court of Justice

GATT: General Agreement on Tariffs and Trade.

INTRODUCTION

The enforcement of Decisions by the WTO on the EC raises issues concerning the relationship between the WTO and the ECJ. Indeed, it is important to remind that the GATT Ratification has led to the genesis of the WTO and thereby the ECJ might discuss the legal competence of the WTO to enforce decisions on the EC Member States. The ECJ may also question whether it is out of its exclusive competence under the EC Treaty to conclude WTO Agreements. In this context, it is necessary to identify the Institutions within the EC liable to define the status of WTO Decisions on the Dispute Settlement System, while most jurisprudence has shown that the ECJ is the main one. The direct effect of WTO Dispute Settlement Decisions has been often discussed by the ECJ itself. Practical Cases law study exemplifies the challenging status of the ECJ regulations towards WTO Decisions. Two exceptions, however, exist for whom the ECJ admitted the effect of WTO law within the EC. Therefore, the ECJ position towards the GATT/WTO law and decisions in the Dispute Settlement System has brought up a lot of criticism based on legal and constitutional grounds. We emphasize on the legal ground arguing the ECJ's inconsistency on denying WTO Decisions' direct effect as well as its lack of lucidity when it comes to the issue of reciprocity.

The WTO and the EC

In order to understand the impact of WTO laws and its decisions enforced upon the EC, our study present first of all the constitutional basis of the relationship between the WTO and the EC.

The singularity of the identity of the EC: a subtle balance between States sovereignty and European common policy.

Although legal definition of concepts poses challenges, the ECJ can be defined appropriately as a unique hybrid of a political and legal system, possessing attributes of a federal State, while preserving the sovereignty of its Member States¹. Basically, it preserves the rights of its Member States in specific issues, while the entity itself regulates and deals on behalf of these States on defined cases on the basis of the States' Treaty-Agreement. Article 133 EC Treaty provides that competence to determine a common commercial policy falls with the Commission and with respect to Agreements with third States and/or International Organizations. The Commission, after recommendations to and the authorization by the European Council shall enter into negotiations in respect to such Agreements. The ECJ has, through its interpretation of the Treaty of the European Union (TEU) pursuant to Article 300 (6), delineated that regarding economic relations with third parties, there is a need for 'common' EC policy and the competence inheres in the EC to negotiate and conclude economic and commercial Treaties on behalf of the Member States². This is on the basis of the so-called 'Common Commercial Policy' of the EC.

¹ Kaczorowska, A. *European Union Law*, USA and Canada, Routledge-Cavendish, 2009, p. 128.

² See *Opinion 1/75 re-Understanding on a local Cost Standard*, (1975), ECR 1355; *Opinion 1/78 re International Agreement on Natural Rubber*, (1979), ECR 2871.

There is, however, with respect to external relations, a distinction of competence between the EC and its Member States whereby the EC may have 'exclusive' and share 'non-exclusive' (concurrent and parallel) power regarding negotiation, conclusion and accession to International Treaties or Organizations affecting certain subjects and matters¹. Consequently, International Agreements or accession to International Organizations in the context of this politico-economic and legal system either falls within the competence of the EC or the competence of the Member States.

Whilst the Treaty itself lacks a general basis for substantive external relations action of the EC, what has been achieved is a general procedural legal basis for the conclusion of International Agreements² contained under Article 300³ of the Treaty establishing the European Community⁴. This Article deals with the issues of negotiation, signature, conclusion, implementation, suspension, and termination of International Agreements entered into by the EC on behalf of its Member States and the institutional powers and the role of each of the political bodies of the EC, namely the Commission, the Council, and the European Parliament in this regard.

The relationship between the WTO and the EC.

The relation between the EC, its Member States, and the WTO is an interesting construct under International Law. Firstly because the relationship between the 1947 GATT and the 1994 GATT, and more precisely, because the renegotiated terms of the GATT 1947 have paved the way to the conclusion of the body of Agreements annexed to, and ultimately resulted in the foundation of the WTO. It is then arguable that the two bodies are after all the same ones, since the former has been merely modified, 'perfected' and expanded by the latter. The argument that can thus be made is that before the coming into force of the EC (then EEC), the EC Member States were signatories to the GATT, owing obligations and conferring rights on third States/parties to that Organization. In this regard, questions have been raised on whether the GATT/WTO is binding on Member States as an International Agreement in force prior to the entry in force of the EC Treaties, and whether in situations of conflicting commitments, the provisions of Article 307 EC would apply to resolve these incompatibilities. The European Court of First Instance (CFI) considered these questions in *Case T-2/99 T Port Council*⁵ and *Case T-3/99 Banana trading vs. Council*⁶ and concluded that both Agreements were legally distinct⁷, citing with approval the reasoning of Advocate General Elmer in *Joined-Cases T-2/99 T Port vs. Hauptzollamt Hamburg-Jonas*⁸ where the AG considered that by virtue of Article 59 (1) of the VCLT, the 1994 GATT had replaced the 1947 GATT. Thus, it followed that the WTO Agreement was not in force prior to the TEU or the EC Treaty; for that matter, there was no question of conflict with prior International Agreements of Member States.

¹ For a general overview of the competences regarding external relations of the EC, see Eeckhout, P., (2004), *External Relations of the European Union Legal and Constitutional Foundations*, Oxford, Oxford University Press, pp. 191-206.

² De Baere, G., (2008), *Constitutional Principles of EU External Relations*, Oxford, Oxford University Press, p. 77.

³ Formerly Article 228 EC.

⁴ Consolidated version of the Treaty establishing the European Community OJ/C 325, 24/12/2002.

⁵ (2001), ECR II-2093.

⁶ (2001), ECR II-2123.

⁷ Referring to Article II (4) of the WTO Agreement.

⁸ (1998), ECR I-1023, para. 16.

Secondly, like most International ‘economic’ Treaties and Organizations, the GATT Uruguay Round of Negotiations which culminated in the formation of the WTO, by its nature seems to be one of such a body of Agreements characterized by what is referred to as ‘mixture’- namely Agreements which, under the EU framework, comprise parts or aspects that do not come within the Community’s ‘exclusive’ competence, i.e. commercial policy aspects in the strict sense, but covers aspects of joint competence between the Commission and the Member States. Then, one may contend that the negotiation and conclusion of WTO Agreements or membership of that Organization *ordinarily*¹ required joint action by the Community and its Member States.² The issue arose at the end of the Uruguay Round of negotiations³, concerning the competence and basis of the accession to the WTO. In *Opinion 1/94*⁴, the European Court of Justice (ECJ) put forward questions amongst others: whether the EC essentially had the exclusive competence to conclude all parts of the Agreement establishing the WTO concerning trade in services (GATS) and trade-related aspects of intellectual property rights, including trade of counterfeit goods (TRIPS)⁵ on the basis of the EC Treaty alone, i.e. the Article 113 EC⁶ alone, or in combination with Articles 100a EC⁷ and/or 235 EC⁸; and if the EC had actually this competence, that may affect the ability of Member States to conclude the WTO Agreement, and in the light of the Agreement already reached whether they will be original Members of the WTO⁹. As the Marrakesh Agreement had already been signed at the time of submission, the Court further analyzed the competencies of the Commission and the Member States with regard to GATS¹⁰ and TRIPS¹¹. It concluded that the competence to conclude the GATS and TRIPS aspects of the Uruguay Round of Negotiations is shared between the Community and Member States. The Court opined that the Community neither had expressed nor implied the exclusive competence under the EC Treaty to negotiate and conclude the WTO Agreements. It then went further to emphasize the need for ‘close cooperation’ between Member States and the Community Institutions in the process of negotiation, conclusion, and fulfillment of the commitments entered into under the WTO Agreement and its Annexure¹². By this decision, the accepted wisdom is that regarding WTO matters-membership, negotiation, etc., the basis of any relationship may be acknowledged as being a joint or a shared competence between the EC and its Member States¹³. Therefore, the question raised is to know if EC Member States or individual citizens may invoke a violation of WTO obligation by the EC, in a manner akin to the invocation of a violation by a Member State for violation of EC law by another Member State and WTO law or decisions of its dispute settlement systems can violate rights for Member States or EU citizens.

¹ Emphasis added.

² Eeckhout, P., *infra*, p. 190.

³ Eeckhout, P. *op. cit.*

⁴ *Opinion on the Competence of the Community to conclude Agreements concerning Services and the Protection of Intellectual Property*, (1994), ECR I-5267, pursuant to Article 228 (6) of the EC Treaty.

⁵ The covered Agreements of the WTO extend beyond those two aspects. However, the issues have been raised regarding these two, because Article 113 External Trade (GATT) relations falls within the exclusive commercial policy sphere of the Community.

⁶ Currently Article 133 EC.

⁷ Currently Article 95 EC.

⁸ Currently Article 308 EC.

⁹ (1994), ECR I-5283.

¹⁰ (1994), ECR I-5417.

¹¹ (1994), ECR I-5418.

¹² (1994), ECR I-5420, para. 108-109.

¹³ Eeckhout, *op. cit.*, who concludes that ‘(...) at least as regards WTO matters and negotiations, competence, not in a legal but in a material sense, already lies with the EU institutions.’, pp. 56-57.

In respect to the questions raised, our analysis must concentrate then on the status and effect of the WTO law and by extension the WTO decisions on the EC¹. **The status of WTO Dispute Settlement Decisions² in the EC Dispensation**

Before concentrating on the status of WTO decisions on the EC, we are interested in determining the Institutions or Organs which have thereby the competence to determine the status of WTO law and/or decisions in the dispute settlement system. We shall also look at the position and significance of WTO decisions within and on the EC and subsequent sections will concentrate on the effect of such decisions on the EC.

Organs responsible in WTO law and decisions in the dispute settlement system.

In the process of the dispute settlement system, it must be a clear and defined organ responsible for determining the status of WTO decisions: the EC itself or the Member States. This issue is relevant since the determination of an organ responsible will focus our analysis and argument towards the approach of the relevant authority to the WTO. Following the opinion on the ‘joint’ and ‘shared’ competence, the affirmation may be made that rather than one status of WTO Agreement, each Member State may individually determine the status of the Agreement with the relevant principles of their legal systems³. EECKHOUT⁴ concludes, after an analysis of the ECJ’s case law and with regard to the WTO Agreement, the Court has not been clear on whether community law or national law shall determine their domestic legal status. He argues that it is legally justified in the case of WTO that one domestic legal status determined by Community law is preferred to a ‘differentiated non-uniform approach’⁵. It appears that the ECJ’s position is that with respect to mixed agreements or areas of shared competence between the community and the Member States, it has the jurisdiction to interpret such law⁶. The Court has also established that ‘(...) Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties’. However, that question has not been settled by the Agreement, then it falls ‘(...) for the decision by the Courts having jurisdiction in the matter, and in particular by the Court of Justice⁷’. It is thus the ECJ who determines the status of WTO law and decisions of the dispute settlement system. The much touted Council Decision 94/800⁸ that is submitted is not legally authoritative of the effect of the provisions of the WTO Agreement⁹.

¹ Most of the Law cases and literature on the status and effects centers generally on WTO law; however, the arguments for or against and the criticism made for one may be applied to the other. Thus, in this chapter, we shall use the terms WTO law and decisions interchangeably. This approach will include our use of direct quotations and wherever appropriate, we shall substitute by inserting the change in square brackets.

² Our analysis is with regard to adopted decisions of the DSB as it logically follows from our earlier analysis, that unadopted reports are not *strictu sensu* decisions of the WTO dispute settlement system.

³ Eeckhout, P., (1997), ‘The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems’, *CML Rev.*, 34, pp. 11-58, citing Schemers, ‘The Internal Effect of Community Treaty-making’, pp. 14-15.

⁴ *Op. cit.*, pp. 15-17.

⁵ *Op. cit.*, p. 22.

⁶ Case C-53/96, *Hermes International vs. FHT Marketing Choice BV*, (1998), ECR I-3603; also joined Cases C-300/98, *Parfums Dior S.A. vs. Tuk Consultancy BV*, and Case C-392/98, *Assco Geruste GmbH, Rob Van Dijk vs. Wilhem Layher GmbH & Co. KG, Layher BV*, (2000), ECR I-11307.

⁷ Case 253/83, *Sekikellerei C.A. Kupferberg & Cie KG a.A vs. Hauptzollamt Mainz*, (1985), ECR 157-17.

⁸ Decision on the conclusion on behalf of the European Community, as regards matters within its competence of the agreements reached in the Uruguay Round of Multilateral Negotiations, (1986-1994), (1994), OJL 336/1, 23th December 1994.

⁹ Per Cosmas AG, in *Hermes*, para. 127, Tesauro AG, in Portugal.

According to the ECJ, then, we must question the nature of the status of the WTO Law on the EC and if this status may extend to the decisions of the WTO dispute settlement system. The analysis of these two problematic is pivotal to our discussion on the effects to and within the EC. In *Case C-104/97 Atlanta AG vs. Council and Commission*¹, the Advocate General opined that the status in EC law and decisions of judicial bodies established under the auspices of an International Agreement, would depend on the status and effect of the particular International Agreement in the EC legal system² as agreed or determined by the relevant negotiating authority. However, it may be argued that this does not seem to be conclusive of the position of the ECJ's jurisprudence on the matter³. In *Opinion 1/91*⁴, the ECJ declared that a proposed jurisdiction given to the EEA Court- a body proposed to be established under an EEA Agreement for the settlement of disputes under that system- would be incompatible with the EC Treaty. The Court reasoned that since the EEA Court would have the incompetence to interpret the EEA Agreement, of which provisions were similar to the corresponding provisions of the EC Treaty, there was a risk that the EEA Court and the ECJ would make different interpretations, especially in the light of the different objectives of the Agreements. Interpretations made by the EEA Court were capable of affecting EC law and, subsequently, the EEA Court system would be in conflict with the role of the ECJ under the Articles 164 (currently 220) and 219 (currently 292) of the EC Treaty⁵ and hence., conflict with the very foundations of the EC. The Court, however, went on to state that there were conditions under which it would be bound by the decisions of another Court or Tribunal, to wit; whenever a Court has been set up under an International Agreement (under which the EC is a signatory) with jurisdiction to settle disputes between Contracting Parties to the Agreement and as a result, to interpret its decisions, the decisions of that Court would be binding on the Community Institutions, including the ECJ. Moreover, those decisions will be binding whenever the ECJ is called upon to rule, either by way of preliminary ruling or in a direct action, on the interpretation of the International Agreement, in so far as that Agreement is an integral part of the Community legal order⁶. Following this decision, one may conclude that the binding character or legal status of decisions from judicial entities established within the framework of an International Agreement does not depend on the nature and effect of that Agreement within the EC. Thus, it appears that the status of WTO dispute settlement mechanism to and within the EC is not 'necessarily' dependent on the status of the underlying WTO Treaty. Consequently in *Biret*⁷, the ECJ Court found that the reasoning of the CFI denying direct effect to WTO dispute settlement decisions by simply linking it to the lack of direct effect of the underlying WTO rules⁸ was legally defective. We can then argue that the practical result of the ECJ case law as regards to decisions of the WTO disputes settlement system⁹ or that *Biret* seems to be an anomaly that evidences a tension in the EC jurisprudence. It is our contention

¹ (1999), ECR I-6983.

² *Ibid.*, para. 20.

³ Zonnekeyn, G., (2000), 'The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance, *The Banana Experience*', JWT (34), (2), 93-108, p.97.

⁴ *Re-opinion on the Draft Agreement relating to the Creation of the European Economic Area*, (1991), ECR I-6079.

⁵ 1957 Treaty of Rome.

⁶ *Re Opinion on the Draft Agreement*, para. 39-40.

⁷ *Case T-174/00, Biret*, (2002), ECR II-17, para. 61-9.

⁸ *Case C-94/02, P. Biret*, (2003), ECR I-10565, para. 56-9.

⁹ Gianni, F., Antonini, R., (2006), 'DSB Decisions and Direct Effect of WTO Law: should the EC Courts be more flexible when the flexibility of the WTO system has come to an end?', JWT 40 (4), 777-793, p. 790.

that the approach by the ECJ towards the WTO rules is not and would not be different from its treatment of the decisions of the WTO dispute settlement system¹.

In the following section, we will look at the practical approach through the study of ECJ law case to evaluate the effect of WTO law and decisions on the EC.

The enforcement of WTO decisions on the EC

As previously noted, there are various frameworks for the enforcement of Treaty Agreements, e.g. through political, legislative, or executive acts. However, whenever the political Institutions have failed to determine the means of enforcement, it falls on the judiciary to determine the 'effects' or means of enforcement of the provisions or rules of a Treaty. This is termed as a judicial enforcement. In the EC, the issue in terms of the judicial enforcement of WTO law and decisions of the latter's dispute settlement system is usually cast in the context of its 'direct effect' on and within the EC. In this view, without attempting to define legal concepts, it is important to put forward that the concept of 'direct effect' bears on the 'legal relevance of a law or norm' on and within a system. In this respect, after an interesting historical account and analysis, David EDWARD² concludes that in the EC, '[d]irect effect (...) provides us with criteria for selecting or rejecting the norms to be applied and for clarifying the scope of judicial competence.' It is an analysis of the obligation imposed by a law or norm on whom the obligation is placed, the purposes to be reached, and the procedures to be followed. It seeks to answer whether the individual has the right to sue for performance of an obligation, and whether the Community has the right to enforce an obligation³.

Regarding the question of the judicial enforcement of WTO law and decisions on the dispute settlement system, three sub-questions need to be analyzed and resolved. Indeed, it is necessary to determine three main elements: firstly, whether the rules of the WTO form a part of the Community legal order; secondly, whether the rules are ranked higher in the hierarchy *vis à vis* the contested Community Acts; thirdly, whether the rules and decisions are evocable in order to contest the legality of a Community Act⁴. Concerning the first question, the ECJ law case has established⁵, and then consistently maintained⁶, that International Agreements concluded

¹ In support of this contention, see Snyder, F., (2003), 'The Gatekeepers: the European Courts and WTO Law', *C.M.L. Rev.* 40, 313-367, pp. 335-9, where he cites as authority the ECJ's decisions in *Case T-230/97 ComAfrica SpA and Dole Fresh Fruit Europe Ltd & Co. vs. Commission*, (1997), ECR II-3031 and *Case T-252/97 Anton Durbeck vs. Commission*, (2000), ECR II-3031 on lack of direct effect of Panel Reports and in respect to Appellate Body Reports, the authority of *Case T-254/97 Fruchthandelgesellschaft mbH Chemnitz vs. Commission*, (1999), ECR II-2743; *Case c-104/97P Atlanta AG and Others vs. Council and Commission*, (1999), ECR II-1707; *Case T-2/99 T Port vs. Council*, (2001), ECR II-2093, and *Banana trading vs. Council*, (2001), ECR II-2123; also Peers, S., 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice' in De Burca, G., Scott, J., (eds), *The EU and the WTO Legal and Constitutional Issues*, n.8, p. 116. Cf. Some commentators on the basis of a few, actually, one rare case, are of the opinion that the approach of the ECJ to the status and effect of WTO decisions is different from its approach towards WTO Law. In this regard, see *Ibid*.

² Edward, D., (2002), 'Direct effect: myth, mess or mystery', in Prinssen, J., Schrauwen, A., (eds), *Direct effect: Rethinking a Classic of EC Legal Doctrine*, Europa Law Publishing Law, p. 13.

³ *Ibid*.

⁴ Wouters, J., Eeckhout, D., 'Giving effect to Customary International Law through European Community Law', in Prinssen, J., Schrauwen, A., (eds), *Direct Effect Rethinking a classic of EC Legal Doctrine*, n. 160, p. 215.

⁵ *Case 181/73 Haegeman*, (1974), ECR 449, para. 5.

⁶ *Opinion I/78 Draft Convention of the IAEA*, (1978), ECR 2151, PARA. 36; *Kupferberg*, n. 147, para. 11-13; *Case 12/86 Demirel*, (1987), ECR 3719, para. 7; *Case 30/88 Greece vs. Commission*, (1989), ECR 3719, para. 12.

by the Council in accordance with Article 300 of the EC Treaty¹, are an integral part of the Community legal system. Concerning the legal hierarchy, the legal rank of the WTO rules within the EC legal order is exposed as such by EECKHOUT: '[i]t is settled case law² that agreements binding on the Community prevail over Community and National legislation even if the latter are later in time, without there being any need for transformation³.' These are allusions to and attributes of the well-established principle of International Law which obliges States to observe and be bound by their National Agreements and the obligations arising therefrom, otherwise known as the principles of *pacta sunt servanda* understood that Article 300 (7) confers 'primacy' to International Treaty Law over secondary domestic law and as a necessary consequence of the principles behind Article 300 (7), the ECJ has often declared that it will interpret EC secondary legislation and national measures consistently with International Law. This is generally the position with respect to the 1947 GATT, and since 1995, also the case for WTO Law. For the last element, the ECJ has held that the rules (or decisions of the Institutions) of an International Treaty can be invoked by an individual claimant if the rules are capable of conferring rights on citizens which can be invoked before National Courts⁴. Thus the requirement is that such rules or provisions must have a 'direct effect' to be invoked.

Considering the status of International Law highlighted above, the ECJ has, with respect to some treaties, accepted that their provisions and, consequently, the decisions of their Institutions can have a 'direct effect', and may be invoked by private litigants to invalidate EC secondary legislation or Member State laws that are in conflict with such International rules. In this regard, the ECJ case law has established⁵ that to determine whether a rule in an International Agreement has a direct effect, it is necessary to fathom two components- objective and subjective⁶. The 'objective' component is an analysis of whether the parties have the expressed or implied intention of giving direct effect to the provisions of the Treaty. It is said to comprise of a two 'limb test for direct effect' which seeks '(...) first to ascertain whether the content of a rule is clear, precise, and unconditional, and then to evaluate the content in light of the aims and context of the agreement (...)'.⁷ Thus in *Case C-192/89 Sevince*⁸, the Court crystallized the formula for direct effect in the following words: '

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

¹ Article 300 (7), Consolidated version of the Treaty establishing the European Community, OJ/C 325/151, signed in 24/12/2002.

² See *International Fruit*, n. 5, para. 6, and *Kupferberg*, n. 147, para. 14.

³ Eeckhout, P., *op. cit.*, p. 24.

⁴ See *International Fruit*, *op. cit.*

⁵ See *Kupferberg*, *op. cit.*

⁶ Wouters, J., Eeckhout, D., *op. cit.*

⁷ De Angelis, E., (2009), 'The Effects of WTO law and rulings on the EC domestic legal order; a critical review of the most recent development of the ECJ case law: part 1, *Int.T.L.R.*, 15 (3), pp. 88-99.

⁸ ECR I-3461, (1990), para. 15.

As noted, most-if not all- International Agreements entered into by the Community are given direct effect by the EC. The WTO law and decisions, however, it would seem, are the exception to this generally monist approach towards International Law.

The effect of WTO Dispute Settlement Decisions

The question we seek to answer under this section is centered around the position of the ECJ regarding two issues; first, whether Member States can challenge the validity of an EC secondary legislation relying on the provisions of WTO law or decisions of its Institutions (Article 230 EC Treaty); secondly, whether private interests can benefit within the EC domestic legal order from rights enshrined in the GATT/WTO, i.e. whether an individual can seek to recover damages from EC Institutions pursuant to Article 288 (2), and/or challenge the validity of EC secondary legislation pursuant to Article 230 EC Treaty. By way of a synoptic guide, it is clear from ECJ case law that, while accepting that WTO law forms an integral part of the Community legal system, and that it ranks higher than Community secondary legislation, the position of the ECJ *generally*¹ is that '[t]he WTO Agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community Institutions²', neither does it confer rights on individuals which can enable them to invoke its provisions before the National Courts. There are, however, two exhaustive grounds for direct application of WTO law (the so-called 'indirect effect') as accepted under EC jurisprudence.

The following is a brief factual report of what is, in our view, the *locus classicus* of the ECJ case law, the basis of the Court's reasoning, and the exceptions admitted with respect to the direct effect, as applied in practice.

Practical study of ECJ case law

Very famous cases that will exemplify our practical study are *Joined Cases 21 to 24/72 International Fruit Company vs. Produktschap voor Groenten en Fruit*³, where the applicants sought an annulment of a decision by the Commission pursuant to Community Regulations 459/70, 565/70, and 686/70 whereby the Commission refused to grant the company licenses to import dessert apples from third countries. The applicants contended that these regulations lay down by way of protective measures, restrictions on the importation of apples from third countries and were invalid as being contrary to Article XI of the GATT. On reference to the ECJ, the Court asserted that before the incompatibility of a Community measure with the provision of International law can affect the validity of that measure. The Community must first be bound by that provision; and before the invalidity can be relied upon before a National Court that provision of International law must also be capable of conferring rights on citizens of the Community which they can invoke before the Courts⁴. This Case was followed by a long series of cases until 1995⁵, after the entry into force of the WTO Agreements. Following to this, the most contested of the ECJ's approach to WTO law and decisions was the application of an annulment of a Council decision by Portugal. Indeed, in *Case C-149/96 Portugal vs. Council*⁶, Portugal challenged a Council decision which concluded in two Memoranda of Understanding

¹ Emphasis added.

² *Case C-149/96 Portugal vs. Council*, n.6, para. 47.

³ *Op. cit.*

⁴ *International Fruit*, *op. cit.*, para. 7-8.

⁵ Notably *Case C-280/93 Germany vs. Council*, (1994), ECR I-4973.

⁶ *Op. cit.*

between the EC and Pakistan and the EC and India on market access for textile products. Portugal's argument was that these Memoranda were inconsistent with the WTO law, especially the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures under 1994 GATT. While noting that WTO differs from GATT¹, the Court concluded however that: '(...) the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions².' As regards to decisions of the WTO Dispute Settlement System, the ECJ issued a decision in the relatively *Case of Van Parys*³. This case raised questions in proceedings between Leon Van Parys NV, an importer of bananas from Canada and the Belgian Authorities (BIRB); the BIRB refused to issue Van Parys import licenses for certain quantity of bananas originating from Ecuador to Panama. The Belgian Court referred to the ECJ to rule on the validity of the EC Regulation establishing the common organization of the EU banana market. In his actions before the Belgian Court, Van Parys-the claimant-argued that the BIRB's refusals, which were based on the EC Regulation on the banana market, were unlawful, because of the unlawfulness, in the light of WTO rules, of regulations importing import of bananas into the EC. The claimant also reiterated the unlawfulness of this regulation in the light of WTO Dispute Settlement System Decision which found the regulations unlawful and had recommended that the EU amend its regulation accordingly. They, thus, asked the Court to declare that the EC Regulation was unlawful.

In contrast with that, the ECJ reiterated that the claimants had no right to plead before the Belgian Court that Community legislation is incompatible with certain WTO rules, even if the DSB had stated that the legislation is incompatible with those rules. In doing this, the Court relied on the ruling in *Portugal* and analyzed whether the present case fell within the two exceptions identified in that case. The Court concluded that there was nothing to show that the ECJ intended to implement the decision of the DSB to enable the operation of the implementation principles.

The basis of the EC approach

The cases aforementioned are key cases since they established and maintained the position of the ECJ that WTO law and decisions of its Dispute Settlement System do not have a direct effect to and within the EC. Alongside more has to be clarified on the bases of the Court's reasoning to reach this conclusion. The lines of reasoning may be divided into two epochs, the first referred to as *The Fruit or GATT* line and the second as *The Portuguese or WTO*.

The Fruit or GATT approach

This line of reasoning centered upon the defects in the nature and general scheme of the GATT. The GATT system was said to be too flexible to be applied in the EC directly; it was too much of a diplomatic arrangement between States, with commitments which could always, in one way or another, be re-negotiated or even suspended unilaterally. The system was consequently considered to be a non-justiciable International Agreement and, as such, could not confer rights on individuals⁴. In this regard, the ECJ stated⁵ that the GATT: ‘

¹ *Ibid.*, para. 36.

² *Ibid.*, para. 47.

³ *Case C-377/02, Leon Van Pary NV vs, Belgisch Interventie-en Restitutiebureau (BIRB)*, (2005), ECR I-1465.

⁴ Eeckhout, D., *op. cit.*, p. 30.

⁵ *Joined Cases 21 to 24/72, op. cit.*, para. 21.

According to its preamble, is based on the principle of negotiations undertaken on the basis of ‘reciprocal and mutual advantageous arrangements’ is characterized 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.’

In this quotation, the Court was referring to the Dispute Settlement procedure under Articles XXII and XXIII and Article XIX of the GATT; in the Court’s view, the procedure grant a contracting party a one-sided power to suspend obligations and to suspend and modify concessions¹.

In *Case C-280-93 Germany vs. Council*², the Court further reiterated this reasoning and state that the features of the GATT show that its rules are not ‘unconditional and that an obligation to recognize them as rules of International law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of the GATT.’

The Portuguese or WTO approach

This approach centers on two main premises: firstly, the nature and features of the WTO Dispute Settlement and secondly, the interface between politics and International trade law. In this perspective, the Court reasoned that it would be detrimental to the ability of the political organs of the EC to manoeuvre in negotiations on the implementation of WTO rules and decisions if it were accept the direct effect of WTO law. It is thus stated that: ‘

(...) to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility by Article 22 of that memorandum of entering into negotiated agreements even on a temporary basis.³

The need to maintain a ‘constitutional; balance’ among the Institutions of the EC was prevalent on the Court’s mind in coming to this conclusion. Adding to that, the direct effect would affect the standing of the EC *vis a vis* its major trading partners bearing in mind the absence of ‘reciprocity’ of direct effect of WTO law in those countries ‘judicial system. It is also stated: ‘

The lack of reciprocity in that regard [direct effect] on the part of the Community’s trading partners, in relation to the WTO agreements which are based on ‘reciprocal and mutually advantageous arrangements’ and which must *ipso facto* be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present

¹ *Joined Cases 21 to 24/72, op. cit.*, para. 26.

² *Op. cit.*, para. 106-9.

³ *Portugal vs. Council, op. cit.*, para. 40.

judgment, may lead to disuniform application to the WTO rules. To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.'

These are the 'usual' arguments developed by the Court either in the context of GATT or WTO and the two major cases evoked beforehand have ended up to these conclusions regarding the direct effect of WTO law. However, there are also exceptional points of divergence that are admitted by the Court itself to its conclusions exemplified in both *Fediol* and *Nakajima* cases.

The *Fediol* and *Nakajima* exceptions

The decisions of the ECJ on the enforcement of WTO law and decisions are qualified by two decisions. These are the so-called 'Implementation Principles'¹. On the basis of these principles, the ECJ Court will consider the direct effect of the WTO law and decisions whenever a Community measure refers expressly to provisions of the GATT (in the case of the *Fediol* exception), or whenever the Community intended to implement a particular obligation assumed in the context of the GATT (*Nakajima* exception). The study of these two particular cases shall help to grasp the principles put into practice thereby.

The *Fediol* exception and the 'New Commercial Policy Instrument'

Concerning *Fediol*², the EEC Seed Crusher and oil Processors' Federation pursuant to the 'New Commercial Policy Instrument' of the EEC, sought to move the Commission to adopt common measures which would apply sanctions against Argentina in the light of the latter's practices regarding the export of soya cake which allegedly violated Articles III, IX, and XXIII of GATT. The Commission rejected this complaint stating that in its view those provisions of the GATT had not been violated by Argentina. The Federation then sought an order of annulment before the ECJ of the Commission's decision. The basis for their contention was the Commission's decision was based interpretation of the said provisions of the GATT. The Commission contended that, in view of the lack of direct effect of GATT, the Federation claimants could not challenge its decision rejecting their complaint on the grounds of wrong interpretation of the relevant GATT provisions. The Court, following the AG's opinion³ distinguished the lack of direct effect of GATT from cases where a Community Act referred to GATT, as it was the case with the 'New Commercial Policy Instrument'. While admitting that ordinarily, GATT had no direct effect min the EEC entitling citizens to rely on its provisions in order to obtain a ruling on the conduct of the Commission; it concluded⁴ that since the regulation in question entitled the citizens affected to rely on GATT provisions in the complaint lodged with the Commission in order to establish the illicit nature of the commercial conduct of third parties which they consider to have harmed them, those citizens, such as the claimant Federation, were entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those principles.

¹ As coined by Eckhout, P. *op. cit.*, p. 56.

² *Op. cit.*

³ The main crux of which is contained in *Fediol*, n. 5, para. 11-13.

⁴ *Op. cit.*, para. 19-22.

The *Nakajima* exception and the GATT anti-dumping Code

In *Nakajima*¹ case, the applicant applied for a Declaration under Article 184 of the EU Treaty that a new Council regulation imposing a definitive anti-dumping duty on imports of serial-impact dot matrix printers originating in Japan, was in breach of the EC's obligation under the Agreement on Implementation of Article VI of the GATT. The Council argued before the ECJ that, like the GATT, the anti-dumping code lacked direct effect². In rejecting the Council's argument, the Court reasoned that *Nakajima* was not relying on direct effect of the provisions, the Court was questioning in an incidental manner under Article 184 the applicability of the basic regulation by invoking one of the grounds for review of legality as referred to under Article 173 EC Treaty, i.e. the infringement of the Treaty or of any rule of law relating to its application. The Court then observed that the GATT and its anti-dumping Code were binding on the Community. It also observed that in the Preamble to the basic anti-dumping regulation the EC had adopted the regulation in accordance and pursuant to existing International obligations arising from GATT Article VI³. It further continued that, since the new basic anti-dumping regulation, which the applicant has called in question, was adopted in order to comply with the International obligations of the Community, and as it has consistently held, the Community would be under an obligation to ensure compliance to, in this case, the General Agreement and its implementing measures. The ECJ thus concluded that in those circumstances, it is necessary to examine whether the Council went beyond the legal framework as laid down and alleged by *Nakajima*, and whether by adopting the disputed provisions, it acted in breach of Article 2 (4) and (6) of the anti-dumping Code⁴. These are the only and rarely applied exceptions in which the ECJ admits the effect of WTO Law to and within the EC.

Criticism on the ECJ's approach to the GATT/WTO law on the dispute settlement system.

Criticism leveled against the ECJ's approach towards the GATT/WTO law and decisions in the dispute settlement system generally are said to be based on either legal or constitutional grounds; the former focuses mainly on the deficiencies in the ECJ's characterization of the WTO rules in its judgments, along with the inconsistency between the Court's case law on the general effect of Association and free-trade Agreements which the ECJ has agreed, and the case law on the WTO. The latter -Constitutional criticism- focuses on the Court's failure to pay due regard to the fundamental importance of liberal trading rules within modern economies⁵. The perspective of our criticism, though, will focus on the legal aspect

This section will highlight the *raison d'être* of the ECJ's case law. The ECJ's approach is less than satisfactory in the light of the near systemic and structural overhaul in the current WTO law and dispute settlement mechanism.

DE ANGELIS⁶ notes that: '[f]rom a legal standpoint, the reasoning of the ECJ for closing the door to the recognition of direct effect to WTO law seems weak and not too clear. In fact, to leave it up to the executive and the legislature to decide what effects have to be granted to WTO law seems to be in contrast with a basic consideration: the non-judicial EC institutions already

¹ Case C-69/89, *Nakajima all Precision Co. Ltd vs. Council of the European Community*, n. 10.

² *Ibid.*, para. 27.

³ *Ibid.*, para. 30.

⁴ *Ibid.*, para. 31-2.

⁵ Peers. S., *op. cit.*, pp. 111-2.

⁶ De Angelis, E., (...), 'The effects of the WTO law and rulings on the EC domestic legal order; a critical review of the most recent development of the ECJ case law', Part. I, n. 172, p. 91.

had the opportunity to decide whether to grant direct effect or not to the international agreements, during its drafting and conclusion. Their decision would have been subject to the formalities imposed by the EC Treaty.’ He concludes that it would be a valid argument to say that: ‘(...) the ECJ, by leaving full power to the Commission and the Council, is effectively encouraging the EC political institutions to violate WTO law¹.’ A second argument bothers on the inconsistency of the approach of the law to other treaties under International Law and the approach towards WTO law. It is submitted in this regard that the Court has not been consistently monist or consistently dualist². Thus, DE ANGELIS³ pointedly and forcibly argues that: ‘

(...) the European Courts end up treating WTO law differently from other international agreements: the position does not seem fully coherent and, furthermore, the courts did not articulate clear reasons for their policy. In fact, the ECJ has granted direct effect to other international agreements (so-called ‘asymmetric agreements’) concerning trading partners with which the EU had close historical ties, such as the parties to the Yaoundé Convention in *Bresciani*, traditionally in a weaker bargaining position than the EU. In *Portugal*, by contrast, the ECJ drew a distinction between the WTO Agreement and “agreements concluded between the EC and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the EC”, these latter having given direct effect. This distinction is uncomfortable: as Griller notes, the ECJ drew no clear borderline between “asymmetric” and “reciprocal and mutually advantageous” agreements, and it may as a result be very difficult to apply these simple labels to complex international trade agreements in which commitments may appear to be even balanced, but in fact are asymmetric when implemented to the relevant markets. For example, economic opportunities for the vast majority of WTO members in the EC market are much greater than could be offered to the EC in return. The court runs the risk of being seen to recognize the direct effects of agreements of which the EC is clearly the dominant contracting party, and not to recognize such effects for agreements where there is real political reciprocity or multilateralism⁴.’

Another point usually raised is that the ECJ is not true to its test for direct applicability when it comes to the WTO. This is because under the objective test for direct effect as established by the Court itself, a second limb recognizes that a consideration be made of the ‘provisions of the agreement in order to establish whether they create rights which can be enforceable by

¹ *Ibid.*, p. 92.

² Peers, S., *op. cit.*, p. 119.

³ *Ibid.*

⁴ *op. cit.*, p. 92.

individuals'. In this regard, the provisions of the TRIPS Agreement atypically create rights for individuals¹, define the scope, lay down the standards, and provide for enforcement, and is said to be one such International Agreement apt for direct effect². Therefore, it is a need to understand the basis of the denial of direct effect to the substance of this Agreement. Another argument focuses on the less than satisfactory extension of the GATT reasoning to the WTO dispensation. It is generally adjudged that the WTO dispute settlement mechanism has undergone substantial improvements and a general overhaul which, as we have already noted, has progressively become more 'judicial'; diplomatic and political resolutions of disputes now have appeared to be more exceptions under the system. It is thus no longer wholly plausible to argue that the GATT/WTO rules are not unconditional and that an obligation to recognize them as rules of International law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme, or on the terms of the Agreements³.

Another criticism relates to on the ECJ's reasoning on the issue of reciprocity. Indeed, the Case of the ECJ itself shows some tension or contradiction in the reasoning of the Court. For example, the Court, in *Portugal*, while admitting '(...) the fact that the courts of one of the parties [to the WTO Agreement] consider that some of the provisions of the Agreement concluded by the Community are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (...)'⁴. Similarly to the earlier reasoning in *Kupferberg*⁵, for which the Court held the principle that direct effect must be excluded.

The bases of the ECJ's implementation principles, i.e. the exceptions wherein effect may be assumed by the WTO law, are often questioned on the ground that if the argument against direct effect is the non-reciprocity of other major trading partners, it leaves the fact that these trading partners may not condone a practice of accepting these exceptions in their own jurisdictions⁶. This practice and reasoning of the Court will exemplify its inconsistency. PEERS notes that several of the Community's largest trading partners, namely Switzerland and Norway, already have bilateral agreements which confer direct effect. Then, he questions the reasons for which this lack of guaranteed reciprocity of enforcement bilateral Agreements does not bother the Court at all⁷. Still, the reasoning of reciprocity and the 'skewed consequence of direct effect' on the EC political Institutions – as compared to other major trading partners of the EC, needs a strategy of 'peer pressure'. The success of that approached may not be guaranteed; but, in regard to reciprocity, it is worth noting that some of major trading partners of the EC have, not only in the field of economic cooperation, but in many and most perversely issues related to global cooperation on the environment, taken the stance, against all logic and reason, denying a common global approach. Therefore, hinging the condition for judicial enforcement or compliance with International Law on the attitude of such players in world affairs is not only unsupportable on 'legal principles'⁸ but it is a drawback on global cooperation and a return to 'tit for tat' approaches in International economic relations.

¹ Article 1 (3), Annex.

² Eckhout, P., *op. cit.*, p. 33.

³ *Ibid.*, pp. 35-36.

⁴ *op. cit.*, para. 44.

⁵ *op. cit.*, para. 18.

⁶ Peers, S., *op. cit.*, p. 121.

⁷ Peers, S., *op. cit.*, p. 122.

⁸ De Angelis, *op. cit.*, p. 91.

Those who criticize the approach of the ECJ on ‘constitutional’ ground argue that based on an approach praising ‘human rights’, there is within the EC ‘(...) either a pre-existing fundamental right to trade with third countries which the Court has refused to recognize or, at least that such a right should be recognized¹’. A recognition of such a right would not only obviate the question of leaving the application of WTO law to politicians, but would increase the status of WTO law as human rights are regarded as part of the fundamental and general principles of Community law. This state of dissatisfaction with the ECJ’s approach has excited a plethora of literature on possible alternatives to the denial of direct effect to WTO law and decisions of the Dispute Settlement System.

CONCLUSION

In the context of the WTO Dispute Settlement System, the ECJ has generally questioned the direct effect of the WTO Decisions on the EC, and this denial appeared clearly in the study of practical cases law; even though it is clearly supported through official documents issued by the EC and the writings of jurists in trade law and international law that International Agreements (as GATT/WTO Agreements) are an integral part of the Community legal corpus and may also prevail over Community and Member States legislation. Along with this problematic, more had to be learnt on the effect of WTO Decisions on the EC in the context of Dispute Settlement. Studying the GATT and the present WTO approaches has shed light on the arguments put forward by the ECJ to contest WTO direct effect. We have furthermore clarified the two exceptions whereby the ECJ has admitted the direct effect of WTO. Therefore, most of ECJ approach towards WTO law has to be criticized concerning the implementation of Agreements with EC trading partners.

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