

ON THE ABSENCE OF DIRECT EFFECT OF THE WTO DISPUTE SETTLEMENT BODY'S DECISIONS IN THE EU LEGAL ORDER

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1. THE DOMESTIC VALIDITY AND RANK OF DECISIONS ADOPTED BY THE DSB IN THE EU LEGAL ORDER

Notwithstanding the quasi-judicial character of the WTO dispute settlement procedure, the WTO Dispute Settlement Body's (hereinafter DSB) rulings may be considered as binding decisions of International Organizations, at least between the parties to the dispute.¹

This being premised, it is well known that the EC Treaty did not explicitly regulate the legal status and effect of binding decisions of International Organizations within the Community legal order.² As for DSB rulings, they provide no exception to the general rule, established by the EU Courts,³ according to which the decisions taken by bodies or Courts created on the basis of agreements concluded by the EC/EU, insofar as they have a direct link with the underlying agreement, are an integral part of the EU legal system. In this respect, in *Biret*, the Court of First Instance spoke of "an inescapable and direct link" between the DSB rulings and WTO covered agreements.⁴ In *FIAMM* and *Fedon*, the ECJ held that "a DSB decision [...] cannot in principle be fundamentally distinguished from the substantive rules which

¹ Thus the WTO Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Taxes on Alcoholic Beverages*, p. 13. For a different view, denying the binding judicial character of WTO DSB rulings, see the Opinion delivered by AG Léger in ECJ, Case C-351/04 *Ikea Wholesale Ltd. v. Commissioners of Customs and Excise* [2007] ECR I-7723, para. 94.

² For further discussion, see N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law*, Groningen: Europe Law Publishing, 2004, p. 139.

³ ECJ, Case C-192/89 *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461, para. 9; ECJ, Opinion 1/91 [1991] ECR I-6079, paras 39 and 40.

⁴ CFI, Case T-210/00 *Établissements Biret et Cie SA v. Council* [2000] ECR II-47, para. 67.

convey such obligations”.⁵ From this perspective, then, DSB rulings may be considered as enjoying the same legal status as the WTO agreement (for this reason, we will sometimes make reference to ‘WTO law’ without further specification). All the more so, since the DSB adopted reports are interpretative in nature (pursuant to Articles 3, paragraph 2 and 19, paragraph 2 of the WTO Dispute Settlement Understanding (hereinafter DSU), in fact, they cannot add to or diminish the rights and obligations provided in the WTO covered agreements), while, for instance, the decisions taken by the Association Councils are law-creating.

As a consequence, DSB rulings are binding upon EU institutions and Member States under Article 216 (2) TFEU (former Art. 300 (7) TEC) and enjoy superiority on conflicting acts of secondary legislation and all domestic law of the EU Member States. On the other hand, they rank below the EU Treaty and other sources of EU primary law.

2. THEIR INTERNAL EFFECTS

One would expect that the superiority of international obligations entails the automatic invalidity of conflicting EU secondary legislation. This is not the case. According to established case law, while the binding character of international agreements is sufficient to use WTO law as a standard for reviewing the legality of Member States’ legislation (in order to preserve the uniform implementation of international duties in the Union’s normative space),⁶ the same does not hold true for EU normative acts.⁷ In this instance, indeed, direct effect is an additional precondition for using international norms as a yardstick of judicial review in all types of actions (preliminary rulings, annulment proceedings,

⁵ ECJ, Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. v. Council and Commission* [2008] ECR I-6513, para. 128. For a critical view on the assimilation between DSB rulings and WTO substantial rules, see F. Snyder, ‘Constructing Relations Between Sites of Governance: the European Courts and WTO Law’, in F. Snyder (Ed.), *The EU, the WTO and China. Legal Pluralism and International Trade Regulation*, Oxford/Portland: Hart Publishing, 2010, p. 153, at 177–178.

⁶ ECJ, Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 15.

⁷ ECJ, Joined cases 21 to 24/72 *International Fruit Company NV v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, para. 8.

claims for compensation), independently of the applicants (i.e., whether they are individuals or Member States).⁸

If this condition seems somehow justified for damage claims brought by private parties, since a requisite for this type of action is the breach of a protective norm⁹ (i.e., a norm which is intended to protect individual rights), it is less persuasive to make the objective control of legality conditional upon direct effect, especially when it is triggered by Member States. The reason is that, firstly, Article 216 TFEU (former Art. 300 (7) TEC) draws no distinction between international agreements, since they are all equally binding on the Union bodies as well as on Member States.¹⁰ Secondly, direct effect deals with the subjective rights of individuals, which may be invoked before the Courts, and is therefore alien to the position of the Member States. Thirdly, any distinction between ordinary and privileged applicants gets blurred.

Provided that WTO agreements do not dictate what effect the provisions of the agreements are to have in the legal orders of the contracting parties, it is established case law (from *Portugal* to *Fiamm*) that in view of their nature and structure, the WTO Agreement, its annexes, as well as the adjudicated recommendations of panels and the Appellate Body upon adoption by the Dispute Settlement Body,¹¹ do not form part of the criteria by which the ECJ and the Court of First Instance (today, the General Court) review the legality of acts adopted by Union institutions. Accordingly, these rules may not be relied upon by individuals (and Member States) in order to challenge the legality/validity of acts of secondary legislation. The result is that the absence of the direct effect of WTO law protects the validity of Union acts

⁸ ECJ, Case C-280/93 *Germany v. Council* [1994] ECR I-4973, para. 109.

⁹ ECJ, Case 352/98 P *Laboratoires pharmaceutiques Bergaderm and Goupil v. Commission* [2000] ECR I-5291, paras 41–42.

¹⁰ See the Opinion of AG Saggio in ECJ, Case C-149/96 *Portugal v. Council*, *infra* note 20, paras 21–22. In the legal scholarship, see G. Gaja, 'Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements', in E. Cannizzaro (Ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer Law International, 2002, p. 117, at 129.

¹¹ Accordingly, DSB adopted reports as well as WTO substantive rules are not capable "of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed", see the ECJ's judgement in ECJ, Joined cases C-120/06 P and C-121/06 P *FIAMM*, *supra* note 5, para. 129. For an overview of the relevant case-law (*Biret*, *Chiquita*, *Van Parys*) concerning the status of DSB rulings in the EU legal order, see O. Tsymbrivska, 'WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts', in *Legal Issues of Economic Integration*, 2010, p. 185.

which are inconsistent with the WTO. Therefore, an EU act of secondary legislation, while unlawful, remains valid as it is immune from judicial review.

Moreover, as already stated, neither WTO substantial rules nor DSB rulings may be invoked to support an action for damages on grounds of the extra-contractual liability of the EU. In *FIAMM*, in fact, the ECJ held that “any determination by the Community courts that a measure is unlawful, even when made in an action for compensation, has the force of *res judicata* and accordingly compels the institution concerned to take the necessary measures to remedy that illegality”, which is exactly what the denial of direct effect is aimed at preventing.¹² On the other side, the Council and Commission could not be liable in damages also in the absence of illegality on their part when they act in their legislative capacity.

Finally, the lack of direct invocability of WTO law by private parties before the EU Courts admits only qualified exceptions such as where the Union intended to implement a particular obligation assumed in the context of the WTO (the *Nakajima* exception),¹³ or where the Union measures expressly refers to the precise provisions of the WTO agreements (the *Fediol* exception).¹⁴ It is important to note that the *Nakajima* exception is subject to a restrictive interpretation. Accordingly, the CFI in *Chiquita*,¹⁵ held that it cannot be invoked when the EU has amended its legislation in order to comply with DSB decisions, as the obligation to bring legislation in line with WTO law represents a “general” not a “particular obligation” to be implemented in the sense of *Nakajima*.

The only adjunctive type of ‘indirect’ effect which the EU Courts recognize in relation to the WTO rules is linked to the principle of consistent interpretation, itself a consequence of “[...] the primacy of international agreements concluded by the Community over provisions of secondary Community legislation”.¹⁶

¹² ECJ, Joined cases C-120/06 P and C-121/06 P *FIAMM*, *supra* note 5, para. 124.

¹³ ECJ, Case C-69/89 *Nakajima All Precision Co. Ltd. v. Council* [1991] ECR I-2069, paras 29–31.

¹⁴ ECJ, Case 70/87 *Fediol v. Commission* [1989] ECR 1781, para. 19.

¹⁵ CFI, Case T-19/01 *Chiquita Brands Int., Chiquita Banana Co. BV and Chiquita Italia SpA v. Commission* [2005] ECR II-315, paras 157–161.

¹⁶ ECJ, Case C-61/94 *Commission v. Germany*, *supra* note 6, para. 52. On the growing relevance of the principle of consistent interpretation, see M. Bronckers, “From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the European Courts’

3. THE 'SCOPE FOR MANOEUVRE' ARGUMENT: AN ASSESSMENT FROM THE PERSPECTIVE OF THE WTO LEGAL SYSTEM

This is not the place to go deeply into the wide-ranging debate regarding the persuasiveness of the reasons given by the Luxembourg's judges to justify the absence of the direct effect of WTO law in the EU legal order. To put it briefly, the reasoning developed by the Luxembourg judges is based on the role still played by negotiations in the WTO dispute settlement procedure and on the argument of reciprocity. It follows that it is up to the Luxembourg's judges – as the ultimate guarantor of the balance of powers in the EU legal context – to deny direct effect in order to preserve the negotiating and legislative powers enjoyed by the EU political bodies. The annulment of a Union act, indeed, would tie the hands of the Union negotiators, and this would entail a bargaining disparity *vis-à-vis* other WTO Member parties.¹⁷

This premised, and contrary to what many commentators have observed,¹⁸ in my view the matter raised by the 'scope for manoeuvre' argument is not the binding nature of WTO law or whether there is freedom to comply or not with an adverse DSB ruling, but rather how to implement it.¹⁹ The ECJ has never doubted that "[...] according to general rules of international law there must be bona fide performance of every agreement".²⁰ The issue at stake here is, that the WTO agreements "do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties".²¹ This is not tantamount to saying that compensation and

Case Law on the WTO and Beyond", in *Journal of International Economic Law*, 2008, p. 885. On the same issue, see the contribution of G. Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order?', in this volume.

¹⁷ For further considerations on this case-law, see the contributions of E. Cannizzaro, 'The Neo-Monism of the European Legal Order', and B. Bonafé, 'Direct Effect of International Agreements in the EU Legal Order: Does it Depend on the Existence of an International Dispute Settlement Mechanism?', in this volume.

¹⁸ See S. Griller, 'Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council', in *Journal of International Economic Law*, 2000, p. 441. In the same vein, see G. Zonnekeyn, 'The Status of WTO law in the EC Legal Order. The Final Curtain?', in *Journal of World Trade*, 2000, p. 111, at 122; K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', in *European Law Review*, 2006, p. 287, at 299.

¹⁹ In this same vein, see also P. Koutrakos, *EU International Relations Law*, Oxford/Portland: Hart Publishing, 2006, p. 274.

²⁰ ECJ, Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 35.

²¹ *Ibid.*, para. 41.

retaliation are *suitable alternatives* to full compliance. Obviously, they are not. The *real* question to be answered is when the space to settle a WTO dispute must be deemed exhausted under the DSU.

This question has received different answers. Advocate General Alber in *Biret*,²² and Advocate General Tizzano in *Van Parys*,²³ for instance, have upheld the mandatory nature – and therefore the direct applicability – of DSB rulings when the reasonable period of time assigned for their implementation has expired. Once a case has reached that stage – so the argument goes – the implementation of the DSB decisions could not any longer be circumvented by negotiations between the parties.

Other commentators have maintained that only a total absence of action of the EU after the expiry of the reasonable period of time could justify the recognition of the direct effect of WTO law by the EU judiciary.²⁴

To assess the persuasiveness of these views, we will ask ourselves: a). whether States may resort to negotiations when deciding how to comply with the DSB ruling and b). for how long they can seek a negotiated solution. And, even a cursory glance at the WTO practice will show that *de facto* WTO Member States can negotiate implementation even after the expiry of the reasonable period of time, if they are prepared to pay compensation or suffer from retaliation.

The reasons are the following. Firstly, as is well known, Article 19 of the DSU posits an obligation of result. In addition, the panel or the Appellate Body “may suggest ways” in which the Member concerned could implement the recommendations. This has been interpreted in the WTO case law as meaning that panels have discretion to suggest ways, but they are not required to do so.²⁵ Accordingly, in several instances, the Panels have declined to suggest ways to implement,

²² ECJ, Case C-93/02 P *Biret International v. Council* [2005] ECR I-10497, para. 81 of the Opinion.

²³ ECJ, Case C-377/02 *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutie-bureau* [2005] ECR I-1465, para. 57 of the Opinion.

²⁴ See G. Gattinara, ‘On Dice and Doors: WTO Dispute Settlement Decisions in the System of Judicial Protection of the European Union’, in A. Del Vecchio (Ed.), *New International Tribunals and New International Proceedings*, Milano: Giuffrè, 2006, p. 233, at 264–269; and M. Dani, ‘Remedying European Legal Pluralism. The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders’, in *European Journal of International Law*, 2010, p. 303, at 328.

²⁵ WT/DS264/R, *United States – Final Dumping Determination on Softwood Lumber from Canada*, para. 8.6. See also WT/DS241/R, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 8.5 and WT/DS219/R, *European Communities –*

because there was more than one way to comply or a request for a waiver was still pending.²⁶ Moreover, even if the panel suggests ways of implementing, its recommendation is not strictly binding, given that “the choice of means of implementation is decided, in the first instance, by the member concerned”.²⁷ Of course, it may be possible that the winning party is not satisfied with the implementation. It may then ask for a compliance review under Article 21, paragraph 5 of the DSU. Just to avoid further recourse to litigation, in some cases parties decide to conclude agreements on implementation.²⁸ In this respect, in *Brazil – Aircraft (Article 21.5 – Canada)*, the compliance panel stated that “[...] any agreement that WTO Members might reach among themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged”.²⁹ Provided that these agreements have to be consistent with WTO law (pursuant to Article 3 (5) of the DSU), their conclusion, generally speaking, is just another consensual way to implement DSB rulings (as pointed out by AG Tizzano in *Van Parys*).³⁰

Nonetheless, it may be noted that occasionally the ‘big players’ of the WTO system have gone so far as to ‘contract out’ of the obligations arising under the WTO covered agreements or the DSU. To this end, they have concluded out-of court *agreements*, which were not fully consistent with WTO law and/or DSB reports.

This has happened, in particular, in the two long-standing WTO disputes that have been at the origin of many of the cases brought before the EU Courts – *Bananas* and *Beef Hormones*.

In the *Bananas* case, on 15 December 2009 after more than 12 successive GATT and WTO panel reports, the Appellate Body report, and arbitration awards since 1993 on GATT and WTO inconsistencies

Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para. 8.11.

²⁶ WT/DS246/R, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, para. 8.3.

²⁷ WT/DS206/R, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, para. 8.8.

²⁸ See, for example, the mutually agreed solutions on modalities for implementation concluded in WT/DS8/17, *Japan – Taxes on Alcoholic Beverages* (Japan/EC), WT/DS10/20 (Japan/Canada), WT/DS11/17 (Japan/United States), and in WT/DS27/58, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*.

²⁹ WT/DS46/RW, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, para. 7.3.

³⁰ ECJ, Case C-377/02 *Van Parys*, *supra* note 23, para. 57.

concerning import restrictions on bananas, two agreements setting the conditions for the final settlement of the dispute were initialled by the EU and Latin American countries and by the EU and the US.³¹ Accordingly, the EU will cut its import tariff on bananas from Latin America in eight stages, starting in 2017 at the earliest. This so-called MFN duty, therefore, will fall only gradually, over at least eight years. This means that, for the time being, ACP bananas will continue to enjoy a competitive advantage.

Another recent example is provided by the provisional agreement concluded on 6 May 2009 by the US and the EC,³² which allows the Community (Union) to maintain its ban on imports of hormone-treated beef from the US. In exchange, US beef that is free of hormones will be granted additional duty-free access to the EU market. Although, today, there is no final word on the accordance with WTO obligations of the measures adopted by the European Union to comply with the DSB rulings in the *Hormones* case, it should be pointed out that in the last paragraph of the report issued in *US – Continued Suspension of Obligations in the EC-Hormones Dispute*,³³ the Appellate Body confirmed that the recommendations and decisions adopted in the dispute over hormones remain fully ‘operative’. If this is true, then the agreement of 2009 allows the EU to keep in place measures that are still in contrast with primary and secondary obligations of the EU.

Even admitting that these agreements might prove to be unlawful vis-à-vis third States under Article 41 (1)(b) of the Vienna Convention on the Law of Treaties, they are valid as between the contracting parties³⁴ as they deal with obligations which may be regarded as non-peremptory and, therefore, ‘disposable’ in nature.³⁵

In the light of this narrative, it seems, therefore, clear how sometimes, especially for long-standing disputes between the big stakeholders of the WTO system, the overall settlement of the dispute becomes the result of a complex process, made up of the adjudicative process,

³¹ For further details, see www.europa-eu-un.org/articles/en/article_9342_en.htm.

³² See WT/DS26/28.

³³ WT/DS320/AB/R, para. 737.

³⁴ As it was remarked by AG Saggio in ECJ, Case C-149/96 *Portugal v. Council*, *supra* note 20, para. 29 of his Opinion.

³⁵ On this see J. Pauwelyn, ‘A Typology of Multilateral Legal Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, in *European Journal of International Law*, 2003, p. 907. See also WT/DS10/AB/2, WT/DS11/AB/R, *Japan-Taxes on Alcoholic Beverages*, p. 15.

plus (possibly) an intermediate, provisional, *modus vivendi* agreement between the parties, plus eventually, a final agreement on the modalities of implementation. It could be argued that such evolution of the system was neither originally intended by the parties nor is complying with the WTO dispute settlement system. I beg to disagree with both observations. A final, WTO-consistent, mutually agreed solution is exactly what is envisaged by Article 22 (8) of the Dispute Settlement Understanding. So, for example, the agreements of 15 December 2009 on *Bananas* have been promptly submitted to the WTO General Council for review.³⁶

Secondly, is negotiation subject to a chronological term? In my view the ECJ in *Van Parys* made a realistic assessment of the WTO implementation process by noting that negotiation may even last after the expiry of the reasonable period of time, provided that the offending party is prepared to pay the costs.³⁷ To confirm, one should remember that, firstly, the reasonable period of time that postpones compliance³⁸ may always be extended if all the parties to the dispute agree to it.³⁹ Secondly, the DSU does not regulate the time-frame for compensation or countermeasures.⁴⁰ They are temporary, but often of a *provisoire qui dure*.⁴¹ Thirdly, even after an adverse ruling has been adopted and the reasonable period of time has elapsed, it is still possible to obtain a waiver (as happened to the Community in the *Bananas* dispute). Fourthly, Article 22 (8) of the DSU, which is often invoked as providing the legal basis for agreements on implementation, authorizes *de facto* their conclusion at any time.

These remarks show that: a). the WTO dispute settlement mechanism is a living instrument; b). that, since its functioning is not

³⁶ WT/DS27/97.

³⁷ To avoid increasing the damage suffered by the offended party, provided that DSU remedies have only prospective effects.

³⁸ Since during the reasonable period of time, the WTO-inconsistent measure may be maintained (WT/DS221/R, *US-Section 129 (c)(1) URAA*, p. 21).

³⁹ WT/DS103/13 and WT/DS113/13, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*; WT/DS108/11, *United States – Tax Treatment for “Foreign Sales Corporations”*; WT/DS184/18, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.

⁴⁰ See T. Cottier, ‘Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union’, in *Common Market Law Review*, 1998, p. 325, at 374.

⁴¹ C. Timmermans, ‘The Implementation of the Uruguay Round by the EC’, in J. Bourgeois, F. Berrod and E. Gippini-Fournier (Eds.), *The Uruguay Round Results. A European Lawyer’s Perspective*, Bruges: Collège d’Europe, 1995, p. 501, at 504.

completely regulated by the DSU, the parties to the dispute often conclude agreements in order to fill its lacunae; and, therefore, c). due regard must be paid to the practice of its implementation. And the practice shows that, even if the reading of the WTO dispute settlement mechanism given by the EU Courts may be partly unsatisfactory, there is always scope for manoeuvre to be enjoyed by the EU political bodies, within the WTO dispute settlement system or even outside it.

On the other hand, the “scope for manoeuvre” argument cannot be meant to absorb or exhaust the entire debate on the direct effect of WTO law in the EU legal system. Indeed, if one brings to its extreme consequences the explanation offered by the Court to deny direct effect to WTO law, namely that “the decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties”,⁴² it follows that the “scope for manoeuvre” argument, strictly speaking, should not be relied upon *both* when the procedures for settling disputes in the WTO have been exhausted, or when the opposite case occurs (i.e., if the procedures were not activated at all). Indeed, if the argument used by the EU Courts to justify their self-restraint is based on the need to keep open the room for the negotiation allowed by the WTO dispute settlement system, it is all too logical to think that this argument can not operate when the DSU procedures have not been activated or have been already exhausted with regard to a specific dispute.⁴³ Formally, this latter instance takes place when the case is removed from the DSB agenda, which means that, under DSU Article 21 (6), “the issue is resolved” and, therefore, the DSB does not continue to keep the implementation of adopted recommendations or rulings under surveillance. It is rather difficult, however, to determine precisely when the issue is resolved and the dispute may be removed from the agenda of the DSB. In this regard, all that can be said is that the space for negotia-

⁴² ECJ, Joined cases C-27/00 and C-122/00 *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd. and Omega Air Ltd., Aero Engines Ireland Ltd. and Omega Aviation Services Ltd. v. Irish Aviation Authority* [2002] ECR I-2569, para. 89.

⁴³ This latter solution, for instance, is sketched in a footnote to the report issued by the WTO panel on *United States – Sections 301–310 of the Trade Act of 1974*, where the panel observed that “[...] whether there are circumstances where obligations in any of the WTO agreements addressed to members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute” (WT/DS152/R, paragraph 7.72, footnote 661, emphasis added).

tion is exhausted either when the parties have mutually expressed their willingness to consider the dispute settled in a definitive way (in this respect, the agreements of December 2009 on *Bananas* provide a good example), or the Union has adopted in good faith such measures as to *finally* and *permanently* bring its legal system into compliance with the covered agreements.⁴⁴ In these cases, the implementing measures should then be regarded as aimed at the performance of a *particular* WTO obligation (a case which resembles the rationale underlying the *Nakajima* exception). The reason is that – unlike the hypothesis in which the mechanism of dispute settlement has not been activated at all – the scope and content of these obligations (and of the principles from which they derive), after having been interpreted and applied in the decision adopted by the DSB, would be *definitively specified* (which implies renunciation of any further room for manoeuvre) under the mutually agreed solution reached by the parties in dispute or the measures adopted to finally bring the legislation into conformity with WTO rules. Once this stage has been reached, there is a clear, precise and unconditional obligation,⁴⁵ which is very likely to lend itself to enforcement by domestic courts at the behest of individuals (albeit, in practice, individuals would probably have no reason to directly invoke WTO rules before domestic courts, because – *but also provided that* – the protection in which they are interested would then be guaranteed by the internal rules of implementation of WTO obligations).

4. THE ‘SCOPE FOR MANOEUVRE’ ARGUMENT: AN ASSESSMENT FROM THE PERSPECTIVE OF THE EU LEGAL SYSTEM

The position taken by the judges in Luxembourg on the judicial unenforceability of the WTO agreements has been mostly – and harshly – attacked in legal literature. At the very least, the Court has been accused of violating the guarantee of the “complete system of legal remedies”

⁴⁴ In this latter case, the issue could be deemed “resolved”, for instance, if the compliance proceedings possibly triggered under art. 21.5 DSU were completed without a finding of non-compliance.

⁴⁵ In other words, the Luxembourg judges could no longer claim – as the Court of First Instance did in the *Chiquita* case, with reference to Article XIII of the GATT and Articles II and XVII of the GATS – that the relevant WTO rules “lay down principles and obligations which, by their wording, their nature, and their scope are general in character” (CFI, Case T-19/01 *Chiquita Brands Int., Chiquita Banana Co. BV and Chiquita Italia SpA v. Commission* [2005] ECR II-315, para. 159).

established by the Treaty, notoriously conceived by the same Court as the foundation of a Community “based on the rule of law”.⁴⁶

However, this criticism seem to be based on a reading of the rule of law which essentially tends to reduce the scope of this principle to the judicial protection of individuals’ rights or to the idea of obedience to the law,⁴⁷ largely neglecting its institutional dimension. The rule of law not only implies that individuals have the opportunity to claim their rights in judicial proceedings, it also implies that decisions are taken in accordance with the institutional balance designed by the treaties.⁴⁸

The present writer, following a rather consolidated view,⁴⁹ has already pointed out that the whole problem of direct effect – that is, the deference shown by the EU judicature to the negotiating and legislative powers of the political organs in the implementation of WTO obligations – is, essentially, a matter of institutional balance between the judiciary and the EU political bodies.⁵⁰ Today, it is widely recognized that the principle of institutional balancing has close ties with

⁴⁶ ECJ, Case 294/83 *Parti écologiste “Les Verts” v. European Parliament* [1986] ECR 1339, para. 23. In the legal scholarship, see for instance N. Lavranos, ‘The Chiquita and Van Parys Judgments: An Exception to the Rule of Law’, in *Legal Issues of Economic Integration*, 2005, p. 449, at 453–454. In the same vein, see also the critical remarks of AG Tizzano in ECJ, Case C-377/02 *Van Parys*, *supra* note 23, para. 73 of the Opinion.

⁴⁷ For a critical view, see A. Watts, ‘The International Rule of Law’, in *German Yearbook of International Law*, 2003, p. 15, at 33 (“[...] the rule of law has to be distinguished from observance of the law, so the rule of law cannot require that States never break the law”).

⁴⁸ Here I rely on the works of G. Palombella, ‘The Rule of Law Beyond the State: Failures, Promises, and Theory’, in *International Journal of Constitutional Law*, 2009, p. 442; and more recently, *Id.*, ‘The Rule of Law and Its Core’, in G. Palombella and N. Walker (Eds.), *Relocating the Rule of Law*, Oxford/Portland: Hart Publishing, 2009, p. 16. This author, also moving from a historical perspective, identifies in the balanced relation between *gubernaculum* (sovereignty/government) and *jurisdictio* (justice) the core of the concept of the rule of law, emphasizing its institutional dimension.

⁴⁹ See S. Prechal, ‘Does Direct Effect Still Matter?’, in *Common Market Law Review*, 2000, p. 1047, at 1065; and T. Cottier, ‘A Theory of Direct Effect in Global Law’, in A. Von Bogdandy, P. Mavroidis and Y. Mény (Eds.), *European Integration and International Coordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, The Hague/London/New York: Kluwer Law International, 2002, p. 99. In the same vein, more recently, see K. Lenaerts, ‘Droit international et autonomie constitutionnelle de l’ordre juridique de l’Union’, in *Diritto dell’Unione Europea*, 2010, p. 555, at 567.

⁵⁰ A. Tancredi, ‘EC Practice in the WTO: How Wide is the “Scope for Manoeuvre”’, in *European Journal of International Law*, 2004, p. 933, at 942.

the rule of law,⁵¹ the noose, so to say, with which the WTO case-law of the EU Courts has traditionally been hanged. Despite the fact that the Courts have never clarified the nature of institutional balance, speaking at most of a “fundamental guarantee” or “interest”, it has been argued that it should be classified among the general principles of EU law.⁵² On the other hand, the constitutional nature of this principle has been endorsed by those authors who note that this balance cannot be modified except by an amendment of the Treaties.⁵³ Whatever solution is accepted, any assessment concerning the compliance of a Union’s doctrine of judicial self-restraint with principles or values, such as democracy, rule of law, human rights etc.,⁵⁴ must take into account the principle at issue here, to capture the richness of the interaction between each of these constitutional milestones.

For the purposes of such analysis, it must be firstly remembered that according to a doctrinal view, the content and function of the principle of institutional balance would be to ensure the representation of all interests in the shaping of political decisions, so as to encourage a higher degree of democracy in the EU. More precisely, the principle in question “[...] requires the makers of the European constitution to shape institutions and the interactions between them in such a manner that each interest and constituency present in the Union is duly represented and co-operates with others in the frame of an institutionalized debate towards the formulation of the *common good*”.⁵⁵ The functional link between institutional balancing and the pursuit of the public good is also emphasized by Craig, who suggests that the roots

⁵¹ See, on this regard, the Opinion of AG Tesouro delivered on 13 December 1994 in ECJ, Case C-65/93 *European Parliament v. Council* [1995] ECR I-643, para. 20 (institutional balance “[...] is a natural consequence of the fact, recognized by the Court, that ‘the European Economic community is a Community based on the rule law’”), and, in legal scholarship, R. Barents, ‘The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation’, in *Common Market Law Review*, 1993, p. 85, at 92.

⁵² H. Goeters, *Das institutionelle Gleichgewicht – seine Funktion und Ausgestaltung im Europäischen Gemeinschaftsrecht*, Berlin: Duncker & Humblot, 2008, *passim*.

⁵³ J.-P. Jacqué, ‘The Principle of Institutional Balance’, in *Common Market Law Review*, 2004, p. 383.

⁵⁴ See Articles 2 and 21 TEU establishing the same principles as a guide for the Union’s action on the international scene.

⁵⁵ K. Lenaerts and A. Verhoeven, ‘Institutional Balance As a Guarantee for Democracy in EU Governance’, in C. Joerges and R. Dehousse (Eds.), *Good Governance in Europe’s Integrated Market*, Oxford: Oxford University Press, 2002, p. 35, at 44 (emphasis added).

of this democratic model are in the tradition of the republican conception of democratic ordering.⁵⁶

Turning, now, to the legal significance of WTO rulings in the EU legal system, the interaction between a fair representation of all interests and democratic deliberations aimed at the attainment of the common good seems to be particularly useful in order to shed light, for instance, on the rationale lying behind the *FIAMM* judgment. I refer here in particular to one of the justifications given by the ECJ to deny the existence of an extra-contractual liability of the EU even in the absence of unlawful conduct. In this regard, in fact, the contention can be made that it was precisely the representation of all interests aimed at the pursuance of the general interest of the Community what the Grand Chamber of the Court of Justice had in mind in *FIAMM*, when – by rejecting the possibility of an action for damages brought by private companies, following the EU’s protracted non-compliance with the WTO’s DSB rulings in the *Bananas* case – the Luxembourg judges recalled that “the prospect of actions for damages is liable to hinder the exercise of the powers of the legislative authority whenever it has occasion to adopt, *in the public interest*, legislative measures which may adversely affect the interests of individuals”.⁵⁷ In this passage, the Court – relying on a well-known strand of its case-law⁵⁸ – seems to imply that its decision is also aimed at preserving a space for public debate and political confrontation in which decisions for the common good may be taken. A space that would not exist if EU Courts should decide to apply automatically the regulatory model established at international level,⁵⁹ especially given the fact that WTO rules – unlike other international agreements – touch a large number of non-trade issues

⁵⁶ P. Craig, ‘The Nature of the Community: Integration, Democracy, and Legitimacy’, in P. Craig and G. De Burca (Eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 3, at 37–38.

⁵⁷ ECJ, Joined cases C-120/06 and C-121/06 *FIAMM*, *supra* note 5, para. 121 (emphasis added).

⁵⁸ According to which if the act or conduct that caused the damage was adopted in the general economic interest of *society as a whole* and not in order to favour particular interests, any compensation would be precluded. See ECJ, Joined cases 9 and 11/71 *Compagnie d’approvisionnement, de transport et de crédit and Grands Moulins de Paris v. Commission* [1972] ECR 391, paras 45–46; CFI, Case T-170/00 *Förde-Reederei GmbH v. Council and Commission* [2002] ECR II-515, para. 56; CFI, Joined cases T-64 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchthandels-Gesellschaft Weichert v. Council and Commission* [2004] ECR II-521, para. 151.

⁵⁹ See, on this, J. Scott, ‘GATT and the Community Law: Rethinking the “Regulatory Gap”’, in J. Shaw and G. More (Eds.), *New Legal Dynamics of European Union*,

traditionally governed by domestic law. For this reason, the impact of WTO norms “[...] is best left to majoritarian institutions rather than being dependent on individual *ad hoc* claims”.⁶⁰ The same collective and institutional dimension emerges again when, in the case in point, the ECJ points out that “the conduct which the appellants allege to have caused them damage comes within the context of establishment of a common organisation of the market and clearly falls within the sphere of legislative activity of the Community legislature”,⁶¹ or observes that the denial of direct effect is also meant to preserve the possibility “to reconcile EC obligations [...] with the requirements inherent in the implementation of the common agricultural policy”.⁶²

To sum up, what may be inferred from *FIAMM* is that any decision regarding the direct effect of a WTO adjudicative body’s ruling and/or the possibility to invoke it as a ground for claiming EU’s liability must depend also on considerations of institutional balancing oriented towards the adoption of democratic decisions and the respect for the rule of law. The protection of these principles requires the fair representation of all interests in the political and legislative decision-making process regarding the domestic implementation of WTO obligations. This achievement would prevent unqualified attribution of direct effect to WTO rules and rulings by the EU judiciary.⁶³ If, therefore, the institutional and legislative practice should prove – as in fact some studies indicate⁶⁴ – that the denial of direct effect has ended up having a positive impact on the democratic quality of decisions on trade issues

Oxford: Clarendon Press, 1995, p. 147; and D.C. Esty, ‘The World Trade Organization’s Legitimacy Crisis’, in *World Trade Review*, 2002, p. 7.

⁶⁰ F. Snyder, *op. cit.*, at 172.

⁶¹ ECJ, Joined cases C-120/06 P and C-121/06 P *FIAMM*, *supra* note 5, para. 177.

⁶² *Ibid.*, para. 118.

⁶³ See, *mutatis mutandis*, the Opinion of AG Lenz delivered on 9 February 1994 in ECJ, Case C-91/92 *Paola Faccini Dori v. Recreb Srl* [1994] ECR I-3325, para. 68; and E. Stein, ‘International Integration and Democracy: No Love at First Sight’, in *American Journal of International Law*, 2001, p. 489, at 491 (according to whom, generally speaking, the problem of democratic deficit increases when the law of an international organization “is enforced directly in the domestic legal order without the national parliament’s imprimatur”).

⁶⁴ See, for instance, G. de Búrca and J. Scott, ‘The Impact of the WTO on EU Decision-Making’, in G. de Búrca and J. Scott (Eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford/Portland: Hart Publishing, 2001, p. 3; J. Bourgeois and O. Lynskey, ‘The Extent to Which the EC Legislature Takes Account of WTO Obligations: Jousting Lessons from the European Parliament’, in A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 202; and S. Princen, ‘EC Compliance with WTO

by ensuring a greater degree of representation of all the interests at stake (including those of consumers, environment, workers), through, for example, a higher level of involvement of the European Parliament (which is the “natural” representative of the peoples of Europe and the most likely representative of non-trade interests), the principle of institutional balancing might then be called to heal the gap of legitimacy for which the WTO case-law of the Luxembourg judges has always been reproached.

On the other hand, the pursuance of the general interest should be proportionally balanced with the protection of other principles having a constitutional status, such as those protecting fundamental individual rights (a matter which will be dealt with in the last paragraph).

5. THE PRAGMATIC ROLE PLAYED BY DIRECT EFFECT IN THE PROTECTION OF THE AUTONOMY OF THE EU LEGAL ORDER AND ITS COSTS

It has been observed that the centrality of direct effect in European legal discourse is mainly due to the fact that, while being a tool of monism, it is used to reach the same results as dualism.⁶⁵ Accordingly, in practice, the superiority of international norms is not automatic, but finally decided by the EU Courts.

By managing the domestic effects of international treaty obligations, EU Courts may guarantee the internal balance of powers; they may also grant the political bodies the space to balance international trade duties *vis-à-vis* other international obligations, within the margin of “political decision” granted in these cases from international law;⁶⁶ and, finally, they may ensure protection of internal legal priorities.⁶⁷

Law: The Interplay of Law and Politics’, in *European Journal of International Law*, 2004, p. 555.

⁶⁵ J. Klabbers, ‘International Law in Community Law: The Law and Politics of Direct Effect’, in *Yearbook of European Law*, 2002, p. 263, at 295.

⁶⁶ M. Zuleeg, ‘Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten’, in *German Yearbook of International Law*, 1977, p. 246, at 267–268. See also Mus, ‘Conflict Between Treaties in International Law’, in *Netherlands International Law Review*, 1998, p. 208, at 227–231.

⁶⁷ See, on this, A. Rosas, ‘Annotation to Case C-149/96, *Portugal v. Council*’, in *Common Market Law Review*, 2000, p. 797, at 816.

This is what has been called the “constitutional function” of the doctrine of direct effect.⁶⁸

To challenge this reconstruction, it might obviously be argued that the protection of the Union’s constitutional principles is already safeguarded by their hierarchical superiority on international treaties in the EU legal order (as may be inferred from the ECJ’s ruling in *Kadi*).⁶⁹ Nonetheless, following this approach, the Union ends up being held liable for the breach of international obligations – since “an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty” (Article 27 of the 1986 Vienna Convention on the Law of Treaties) – while agreements on implementation are more likely to be, and actually, they should be, compatible with WTO norms/DSB rulings.

It follows from this reasoning that the aim of preserving “the allocation of powers fixed in the treaty or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC”⁷⁰ (now replaced, in substance, by Article 19 TEU) may be attained through different legal techniques (the formal control of legality as well as the denial of direct effect), and may, in turn, result in judicial activism (*Kadi*) or, more subtly, in judicial self-restraint (as happened for the WTO or UNCLOS, following the *Intertanko* judgement,⁷¹ or in the *Medellin* judgment by the US Supreme Court).⁷² The two

⁶⁸ On this, see A. Von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’, in *International Journal of Constitutional Law*, 2008, p. 397, at 398.

⁶⁹ ECJ, Joined cases C-402/05 P and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council* [2008] ECR I-6351. On this particular issue, see T. Tridimas and J.A. Gutierrez-Fons, ‘EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?’, in *Fordham Journal of International Law*, 2009, p. 660, who speak of a “constitutional hegemony” of the EU (at 684). See also the contribution of P. Palchetti, ‘Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice’, in this volume.

⁷⁰ ECJ, Joined cases C-402/05 P and 415/05 P *Kadi and Al Barakaat*, *supra* note 69, para. 282.

⁷¹ ECJ, Case 308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057. For comments, see M. Mendez, ‘The Legal Effect of Community Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques’, in *European Journal of International Law*, 2010, p. 83, at 99.

⁷² 552 U.S. 491 (2008). See on this G. De Burca, *The European Court of Justice and the International Legal Order After Kadi*, Jean Monnet Working Paper 01/09, p. 6.

techniques are different in kind, but may perform the same function, that is to defend the autonomy of the EU legal order.⁷³ Accordingly, they may be both considered as aspects of the same pluralist approach to international law. Furthermore, notwithstanding views to the contrary, the stand taken by the EU Courts does not represent a pure exercise in judicial policy-making, but has its firm legal basis in Article 19 TEU (formerly in Article 220 TEC).

In a broader perspective then, such reconstruction is in line with the more general contention that as the European Union is now a forceful player in international relations, it has learned from the United States not to surrender to international law too easily.⁷⁴ Accordingly, openness and fidelity to international law (as in the *Haegeman* and *Kupferberg* case-law)⁷⁵ were a “sin of youth”, possible while the EC was a weak international actor.⁷⁶ On the other hand, the EU’s growth in political terms must be accompanied by an even greater responsibility to contribute to “the strict observance and the development of international law”, as is provided today by Article 3 (5) TEU.

Obviously, the preservation of EU autonomy, *vis-à-vis* the WTO regulatory framework, involves a cost to be paid. Not only, and perhaps, not mainly, in terms of deficiency in the legal protection of individual rights. In this regard, indeed, it must be remembered that both a WTO panel⁷⁷ and the CFI⁷⁸ have held that WTO law only governs relations among States and does not aim to create rights for individuals. This is so because, as maintained by AG Leger in the *Ikea* case,

⁷³ The concept of autonomy normally includes what the Courts refer to as “very foundations of the EC legal order” or “fundamental” or “constitutional” elements of the EU legal order (ECJ, Opinion 2/94 (*Adhesion to the European Convention on Human Rights*) [1996] ECR I-1759, paras 28–30; ECJ, Opinion 1/91, *supra* note 3, paras 45–46; ECJ, Joined cases C-402/05 P and 415/05 P *Kadi and Al Barakaat*, *supra* note 69, para. 303 ff.) On this concept, see N. Lavranos, ‘Protecting European Law from International Law’, in *European Foreign Affairs Review*, 2010, p. 265.

⁷⁴ Thus, M. Bronckers, ‘The Effect of the WTO in European Court Litigation’, in *Texas International Law Journal*, 2005, p. 443, at 446.

⁷⁵ ECJ, Case 181/73 *Haegeman v. Belgium* [1974] ECR 459, para. 5; ECJ, Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641, *passim*.

⁷⁶ See J. Kuijper and M. Bronckers, ‘WTO Law in the European Court of Justice’, in *Common Market Law Review*, 2005, p. 1313, at 1320–1321.

⁷⁷ “Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals” (WT/DS152/R, *United States – Sections 301–310 of the Trade Act of 1974*, para. 7.72).

⁷⁸ CFI, Case T-210/00 *Biret*, *supra* note 4, para. 72.

the WTO system's main purpose is not "to create [...] a single market similar to that developed within the European Community. Far more modestly, it forms a common institutional framework within which the Contracting Parties negotiate".⁷⁹ If, then, the existence of a protective norm, and consequently the possibility for individuals to claim compensation for the unlawful conduct of the EU directly invoking WTO law, are excluded, there are, in principle, only two other ways to alleviate the financial burden placed upon 'collateral victims' (i.e., private operators) because of the EU's failure to comply with WTO obligations. The first is to claim the non-contractual liability of the EU also in the absence of unlawful conduct; the second is to provide certain forms of compensation through the adoption of *ad hoc* legislative measures.⁸⁰ And if in *FIAMM* the claim of liability without fault has been rejected by the ECJ because of the precedence given to the pursuit of a general interest by the legislator and the fact that the suspension of trade concessions must be deemed a normal risk for those economic operators who decide to sell their products on the market of another WTO Member Party, the adoption, on an *ad hoc* or general basis, of legislative measures aimed at ensuring compensation remains an open possibility. This is particularly true in the light of what has been further noted by the ECJ in *FIAMM*, namely that "a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a *disproportionate* and intolerable manner, perhaps precisely *because no provision has been made for compensation* calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community".⁸¹

Finally, it is equally burdensome, at the institutional level, to hinder the objective control of legality triggered by direct actions lodged by EU Member States, as privileged applicants and at the same time,

⁷⁹ ECJ, Case C-351/04 *Ikea Wholesale*, *supra* note 1, para. 84 of the Opinion. For a similar view, see A. Von Bogdandy, 'Legal Effects of World Trade Organization Decisions Within the European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288 (2) EC', in *Journal of World Trade*, 2005, p. 45, at 54.

⁸⁰ See on this M. Dani, *op. cit.*, *passim*.

⁸¹ ECJ, Joined cases C-120/06 P and C-121/06 P *FIAMM*, *supra* note 5, para. 184 (emphasis added).

original Members of the WTO.⁸² As was observed by AG Jacobs in the *Biotechnology* case, the EU Member States “may be subject to conflicting obligations with no means of resolving them”⁸³ (as happened to Germany in the *Bananas* case). The limitation of Member States’ direct action against EU measures deprives the system of an important element of checks and balances within the EU; it infringes upon the “complete system of legal remedies” principle established in the *Les Vertes* judgment;⁸⁴ it creates an institutional imbalance (since the Commission is permitted to carry out its supervisory role on Member States’ measures); and, lastly, it is not warranted by the very notion of direct effect.

⁸² On this see C. Kaddous, ‘Le statut du droit de l’OMC dans l’ordre juridique communautaire: développements récents’, in *Mélanges en hommage à Jean-Victor Louis*, Bruxelles: Bruylant, 2003, p. 107, at 115.

⁸³ ECJ, Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 147 of the Opinion.

⁸⁴ ECJ, Case 294/83 *Les Verts*, *supra* note 46, para. 23.