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The Role of WTO Law in Litigation before European Courts

I) The Law of the WTO – A very short overview

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(Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm)

1) Trade in Goods

a) Basic Obligations under the GATT

(1) Non-Discrimination Principle
- Most Favoured Nation Principle (Art. I GATT)
- National Treatment Principle (Art. III GATT)
(2) Market Access
- Negotiated bound tariffs (Art. II GATT, Schedule of Commitments)
- Prohibition of Quantitative Restrictions

b) Other Agreements on Trade in Goods
- Agriculture
- Sanitary and Phytosanitary Measures
- Textiles and Clothing
- Technical Barriers to Trade
- Trade-Related Investment Measures
- Anti-dumping
- Customs valuation
- Preshipment Inspection
- Rules of Origin
- Import Licensing
- Subsidies and Countervailing Measures
- Safeguards

2) The GATS

a) Non-Discrimination
- Most Favoured Nation Principle (Art. II GATS)
- National Treatment (Art. XVII, Schedule of Commitments)

b) Market Access
- Prohibition of restrictions of the quantity of service suppliers, service transactions, service operations/output, service providers (natural persons), of the corporate structure, and of the participation of foreign capital (Art. XVI GATS, Schedule of Commitments)

3) TRIPS

The protection of Intellectual Property is made binding through the importation of provisions of the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property. The Most Favoured Nation and National Treatment Principles also apply.
4) Dispute Settlement

Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm
II) Conflicts between WTO and EU Law – Prominent examples

1) Bananas

Eliza Patterson, The US-EU Banana Dispute, ASIL Insights February 2001
http://www.asil.org/insights/insigh63.htm

2) Hormones

http://www.ejil.org/journal/Vol9/No1/sr1g.html

3) Biotech Products

http://www.asil.org/insights/2006/10/insights061026.html

III) International Agreements in the EU Legal Order

1) Treaty Law

Article 300 EC (ex Art. 228)

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

(…)

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. (…)  

By way of derogation from the previous subparagraph, agreements referred to in Article 310, other agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure
referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained.

(…)

6. The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

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

2) Secondary Law: The Trade Barrier Regulation

COUNCIL REGULATION (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

3) Case-law of the ECJ and CFI

a) The basic doctrine under the GATT


4 ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY " THE COURT OF JUSTICE SHALL HAVE JURISDICTION TO GIVE PRELIMINARY RULINGS CONCERNING ... THE VALIDITY ... OF ACTS OF THE INSTITUTIONS OF THE COMMUNITY ".


6 SINCE SUCH JURISDICTION EXTENDS TO ALL GROUNDS CAPABLE OF INVALIDATING THOSE MEASURES, THE COURT IS OBLIGED TO EXAMINE WHETHER THEIR VALIDITY MAY BE AFFECTED BY REASON OF THE FACT THAT THEY ARE CONTRARY TO A RULE OF INTERNATIONAL LAW .


8 BEFORE 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 COURTS .

9 IT IS THEREFORE NECESSARY TO EXAMINE WHETHER THE GENERAL AGREEMENT SATISFIES THESE TWO CONDITIONS .

5
19 IT IS ALSO NECESSARY TO EXAMINE WHETHER THE PROVISIONS OF THE GENERAL AGREEMENT CONFER RIGHTS ON CITIZENS OF THE COMMUNITY ON WHICH THEY CAN RELY BEFORE THE COURTS IN CONTESTING THE VALIDITY OF A COMMUNITY MEASURE.
21 THIS AGREEMENT WHICH, ACCORDING TO ITS PREAMBLE, IS BASED ON THE PRINCIPLE OF NEGOTIATIONS UNDERTAKEN ON THE BASIS OF "RECIPROCAL AND MUTUALLY 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.
22 CONSEQUENTLY, ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE XXII "EACH CONTRACTING PARTY SHALL ACCORD SYMPATHETIC CONSIDERATION TO, AND SHALL AFFORD ADEQUATE OPPORTUNITY FOR CONSULTATION REGARDING, SUCH REPRESENTATIONS AS MAY BE MADE BY ANY OTHER CONTRACTING PARTY WITH RESPECT TO... ALL MATTERS AFFECTING THE OPERATION OF THIS AGREEMENT".
23 ACCORDING TO THE SECOND PARAGRAPH OF THE SAME ARTICLE, "THE CONTRACTING PARTIES" - THIS NAME DESIGNATING "THE CONTRACTING PARTIES ACTING JOINTLY" AS IS STATED IN THE FIRST PARAGRAPH OF ARTICLE XXV - "MAY CONSULT WITH ONE OR MORE CONTRACTING PARTIES ON ANY QUESTION TO WHICH A SATISFACTORY SOLUTION CANNOT BE FOUND THROUGH THE CONSULTATIONS PROVIDED UNDER PARAGRAPH (1)".
24 IF ANY CONTRACTING PARTY SHOULD CONSIDER "THAT ANY BENEFIT ACCRUING TO IT DIRECTLY OR INDIRECTLY UNDER THIS AGREEMENT IS BEING NULLIFIED OR IMPAIRED OR THAT THE ATTAINMENT OF ANY OBJECTIVE OF THE AGREEMENT IS BEING IMPEDED AS A RESULT OF", INTER ALIA, "THE FAILURE OF ANOTHER CONTRACTING PARTY TO CARRY OUT ITS OBLIGATIONS UNDER THIS AGREEMENT", ARTICLE XXIII LAYS DOWN IN DETAIL THE MEASURES WHICH THE PARTIES CONCERNED, OR THE CONTRACTING PARTIES ACTING JOINTLY, MAY OR MUST TAKE IN REGARD TO SUCH A SITUATION.
25 THOSE MEASURES INCLUDE, FOR THE SETTLEMENT OF CONFLICTS, WRITTEN RECOMMENDATIONS OR PROPOSALS WHICH ARE TO BE "GIVEN SYMPATHETIC CONSIDERATION", INVESTIGATIONS POSSIBLY FOLLOWED BY RECOMMENDATIONS, CONSULTATIONS BETWEEN OR DECISIONS OF THE CONTRACTING PARTIES, INCLUDING THAT OF AUTHORIZING CERTAIN CONTRACTING PARTIES TO SUSPEND THE APPLICATION TO ANY OTHERS OF ANY OBLIGATIONS OR CONCESSIONS UNDER THE GENERAL AGREEMENT AND, FINALLY, IN THE EVENT OF SUCH SUSPENSION, THE POWER OF THE PARTY CONCERNED TO WITHDRAW FROM THAT AGREEMENT.
26 FINALLY, WHERE BY REASON OF AN OBLIGATION ASSUMED UNDER THE GENERAL AGREEMENT OR OF A CONCESSION RELATING TO A BENEFIT, SOME PRODUCERS SUFFER OR ARE THREATENED WITH SERIOUS DAMAGE, ARTICLE XIX GIVES A CONTRACTING PARTY POWER UNILATERALLY TO SUSPEND THE OBLIGATION AND TO WITHDRAW OR MODIFY THE CONCESSION, EITHER AFTER CONSULTING THE CONTRACTING PARTIES JOINTLY AND FAILING AGREEMENT BETWEEN THE CONTRACTING PARTIES CONCERNED, OR EVEN, IF THE MATTER IS URGENT AND ON A TEMPORARY BASIS, WITHOUT PRIOR CONSULTATION.
27 THOSE FACTORS ARE SUFFICIENT TO SHOW THAT, WHEN EXAMINED IN SUCH A CONTEXT, ARTICLE XI OF THE GENERAL AGREEMENT IS NOT CAPABLE OF CONFERRING
ON CITIZENS OF THE COMMUNITY RIGHTS WHICH THEY CAN INVOKE BEFORE THE COURTS.

(2) Case 104/81 (Kupferberg), Judgement of 26.10.1982

11 THE TREATY ESTABLISHING THE COMMUNITY HAS CONFERRED UPON THE INSTITUTIONS THE POWER NOT ONLY OF ADOPTING MEASURES APPLICABLE IN THE COMMUNITY BUT ALSO OF MAKING AGREEMENTS WITH NON-MEMBER COUNTRIES AND INTERNATIONAL ORGANIZATIONS IN ACCORDANCE WITH THE PROVISIONS OF THE TREATY. ACCORDING TO ARTICLE 228 (2) THESE AGREEMENTS ARE BINDING ON THE INSTITUTIONS OF THE COMMUNITY AND ON MEMBER STATES. CONSEQUENTLY, IT IS INCUMBENT UPON THE COMMUNITY INSTITUTIONS, AS WELL AS UPON THE MEMBER STATES, TO ENSURE COMPLIANCE WITH THE OBLIGATIONS ARISING FROM SUCH AGREEMENTS.

...
22 IT FOLLOWS FROM ALL THE FOREGOING CONSIDERATIONS THAT NEITHER THE
NATURE NOR THE STRUCTURE OF THE AGREEMENT CONCLUDED WITH PORTUGAL MAY
PREVENT A TRADER FROM RELYING ON THE PROVISIONS OF THE SAID AGREEMENT
BEFORE A COURT IN THE COMMUNITY.

23 NEVERTHELESS THE QUESTION WHETHER SUCH A STIPULATION IS UNCONDITIONAL
AND SUFFICIENTLY PRECISE TO HAVE DIRECT EFFECT MUST BE CONSIDERED IN THE
CONTEXT OF THE AGREEMENT OF WHICH IT FORMS PART. IN ORDER TO REPLY TO THE
QUESTION ON THE DIRECT EFFECT OF THE FIRST PARAGRAPH OF ARTICLE 21 OF THE
AGREEMENT BETWEEN THE COMMUNITY AND PORTUGAL IT IS NECESSARY TO ANALYSE
THE PROVISION IN THE LIGHT OF BOTH THE OBJECT AND PURPOSE OF THE AGREEMENT
AND OF ITS CONTEXT.

24 THE PURPOSE OF THE AGREEMENT IS TO CREATE A SYSTEM OF FREE TRADE IN
WHICH RULES RESTRICTING COMMERCE ARE ELIMINATED IN RESPECT OF VIRTUALLY
ALL TRADE IN PRODUCTS ORIGINATING IN THE TERRITORY OF THE PARTIES, IN
PARTICULAR BY ABOLISHING CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT
EFFECT AND ELIMINATING QUANTITATIVE RESTRICTIONS AND MEASURES HAVING
EQUIVALENT EFFECT.

25 SEEN IN THAT CONTEXT THE FIRST PARAGRAPH OF ARTICLE 21 OF THE AGREEMENT
SEEKS TO PREVENT THE LIBERALIZATION OF THE TRADE IN GOODS THROUGH THE
ABOLITION OF CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT AND
QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT FROM
BEING RENDERED NUGATORY BY FISCAL PRACTICES OF THE CONTRACTING PARTIES.
THAT WOULD BE SO IF THE PRODUCT IMPORTED OF ONE PARTY WERE TAXED MORE
HEAVILY THAN THE SIMILAR DOMESTIC PRODUCTS WHICH IT ENCOUNTERS ON THE
MARKET OF THE OTHER PARTY.

26 IT APPEARS FROM THE FOREGOING THAT THE FIRST PARAGRAPH OF ARTICLE 21 OF
THE AGREEMENT IMPOSES ON THE CONTRACTING PARTIES AN UNCONDITIONAL RULE
AGAINST DISCRIMINATION IN MATTERS OF TAXATION, WHICH IS DEPENDENT ONLY ON
A FINDING THAT THE PRODUCTS AFFECTED BY A PARTICULAR SYSTEM OF TAXATION ARE
OF LIKE NATURE, AND THE LIMITS OF WHICH ARE THE DIRECT CONSEQUENCE OF THE
PURPOSE OF THE AGREEMENT. AS SUCH THIS PROVISION MAY BE APPLIED BY A COURT
AND THUS PRODUCE DIRECT EFFECTS THROUGHOUT THE COMMUNITY.

(3) Case C-280/93 (Germany ./. Council), Judgment of 05.10.1994

103 The Federal Republic of Germany submits that compliance with GATT rules is a
condition of the lawfulness of Community acts, regardless of any question as to the direct
effect of GATT, and that the Regulation infringes certain basic provisions of GATT.

... 

109 Those features of GATT, from which the Court concluded that an individual within the
Community cannot invoke it in a court to challenge the lawfulness of a Community act, also
preclude the Court from taking provisions of GATT into consideration to assess the
lawfulness of a regulation in an action brought by a Member State under the first paragraph
of Article 173 of the Treaty.
b) Case-Law under the WTO

Case C-149/96 (Portugal / Council), Judgment of 23.11.1999

34 It should be noted at the outset that in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 17).

35 It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (Kupferberg, paragraph 18).

36 While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

37 Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

38 According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.

39 However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40 Consequently, 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 afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41 It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.
42 As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to ‘entering into reciprocal and mutually advantageous arrangements’ and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.

43 It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

44 Admittedly, the fact that the courts of one of the parties 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 recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18).

45 However, the lack of reciprocity in that regard 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 judgment, may lead to disuniform application of the WTO rules.

46 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 of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.

47 It follows from all those considerations that, having regard to their nature and structure, 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 institutions.

48 That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which ‘by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts’.

b) Exceptions

(1) Case 70/87 (Fediol), Judgment of 22.06.1989

22 It follows that, since Regulation No 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying those provisions.
(2) Case C-69/89 (Nakajima), Judgment of 07.05.1991

26 Nakajima submits in this regard that Article 2(3)(b)(ii) of the new basic regulation cannot be applied in the present case because it is at variance with a number of the provisions in the Anti-Dumping Code. In particular, the applicant argues that Article 2(3)(b)(ii) is incompatible with Article 2(4) and (6) of the Anti-Dumping Code.

27 The Council takes the view that, as is the case with the General Agreement, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly applicable within the Community. From this the Council concludes that Nakajima cannot place in question the validity of the new basic regulation on the ground that it may be in breach of certain provisions in the Anti-Dumping Code.

28 It should, however, be pointed out that Nakajima is not relying on the direct effect of those provisions in the present case. In making this plea in law, the applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application.

29 It ought to be noted in this regard that, in its judgment in Joined Cases 21 to 24/72 International Fruit Company NV and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219, the Court ruled (at paragraph 18) that the provisions of the General Agreement had the effect of binding the Community. The same conclusion must be reached in the case of the Anti-Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement and the recitals in the preamble to which specify that it is designed to "interpret the provisions of ... the General Agreement" and to "elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".

30 According to the second and third recitals in the preamble to the new basic regulation, it was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code.

31 It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures (see the judgments in Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, at paragraph 11, and in Case 266/81 SIOT v Ministero delle Finanze and Others [1983] ECR 731, at paragraph 28).

32 In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.

d) Indirect Effect


42 It is settled case-law that a provision of an agreement entered into by the Community with non-member countries must be regarded as being directly applicable when, regard being had to the wording, purpose and nature of the agreement, it may be concluded that the provision contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in that

43 The Court has already held that, having regard to their nature and structure, the WTO Agreement and the annexes thereto are not in principle among the rules in the light of which the Court is to review measures of the Community institutions pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) (see Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47).

44 For the same reasons as those set out by the Court in paragraphs 42 to 46 of the judgment in Portugal v Council, the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.

45 However, the finding that the provisions of TRIPs do not have direct effect in that sense does not fully resolve the problem raised by the national courts.

46 Article 50(6) of TRIPs is a procedural provision intended to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States.

47 In a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in Hermès, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.

48 On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.

49 The answer to the second question in Case C-392/98 and the only question in Case C-300/98 must therefore be that:

in a field to which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs, but

in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.
e) Direct Effect of WTO Dispute Settlement Reports and Liability of the Community for Breach of WTO Law

(1) Case C-94/02 P (Biret), Judgment of 30.09.2003

According to settled case-law (see, inter alia, Atlanta v European Community, paragraph 65), non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the illegality of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of.

In that regard, the dispute settlement procedure which culminated in the DSB decision of 13 February 1998 was instigated in 1996. Since the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the Understanding it was granted a period of 15 months for that purpose, which expired on 13 May 1999.

Accordingly, for the period prior to 13 May 1999, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 178 of the Treaty, without rendering ineffective the grant of a reasonable period for compliance with the DSB recommendations or rulings, as provided for in the dispute settlement system put in place by the WTO agreements.

(2) Case C-377/02 (Van Parys), Judgement of 01.03.2005

It is settled case-law in that regard that, given their nature and structure, 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 institutions (Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47; order of 2 May 2001 in Case C-307/99 OGT Fruchthandelgesellschaft [2001] ECR I-3159, paragraph 24; Joined Cases C-27/00 and C-122/00 Omega Air and Others [2002] ECR I-2569, paragraph 93; Case C-76/00 P Petrotub and Republica v Council [2003] ECR I-79, paragraph 53 and Case C-93/02 P Biret International v Council [2003] ECR I-10497, paragraph 52).

It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Case 70/87 Fediol v Commission [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 Nakajima v Council [1991] ECR I-2069, paragraph 31, and, as regards the WTO agreements, Portugal v Council, paragraph 49, and Biret International v Council, paragraph 53).

In the present case, by undertaking after the adoption of the decision of the DSB of 25 September 1997 to comply with the WTO rules and, in particular, with Articles I(1) and XIII of GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on
WTO rules before the Community Courts and enabling the Community Courts to exercise judicial review of the relevant Community provisions in the light of those rules.

First, it should be noted that even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with the WTO rules, as the Court has already held, the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties (Portugal v Council, paragraphs 36 to 40).

Thus, although, in the absence of a resolution mutually agreed between the parties and compatible with the agreements in question, the main purpose of the dispute settlement system is in principle, according to Article 3(7) of the understanding, to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that provision provides, however, that where the immediate withdrawal of the measures is impracticable, compensation may be granted or the application of concessions or the enforcement of other obligations may be suspended on an interim basis pending the withdrawal of the inconsistent measure (see, to that effect, Portugal v Council, paragraph 37).

It is true that, according to Articles 3(7) and 22(1) of the understanding, compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings of the DSB are not implemented within a reasonable period of time, the latter of those provisions showing a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question (Portugal v Council, paragraph 38).

However, Article 22(2) provides that, if the Member concerned fails to enforce those recommendations and decisions within a reasonable period, if so requested, and within a reasonable period of time, it is to enter into negotiations with any party having invoked the dispute settlement procedures with a view to agreeing compensation. If no satisfactory compensation has been agreed within 20 days after the expiry of the reasonable period, the complainant may request authorisation from the DSB to suspend, in respect of that member, the application of concessions or other obligations under the WTO agreements.

Furthermore, Article 22(8) of the understanding provides that the dispute remains on the agenda of the DSB, pursuant to Article 21(6) of the understanding, until it is resolved, that is until the measure found to be inconsistent has been ‘removed’ or the parties reach a ‘mutually satisfactory solution’.

Where there is no agreement as to the compatibility of the measures taken to comply with the DSB’s recommendations and decisions, Article 21(5) of the understanding provides that the dispute shall be decided ‘through recourse to these dispute settlement procedures’, including an attempt by the parties to reach a negotiated solution.

In those circumstances, to require courts to refrain from applying 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 afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis (Portugal v Commission, paragraph 40).

In the dispute in the main proceedings, it is apparent from the file that:
after declaring to the DSB its intention to comply with the DSB’s decision of 25 September 1997, the Community amended its system for imports of bananas upon the expiry of the period allocated to it for that purpose;
– as a result of the challenge by the Republic of Ecuador to the compatibility with the WTO rules of the new system of trade with third States arising from Regulation No 1637/98, the matter was referred to an ad hoc panel pursuant to Article 21(5) of the understanding and that panel held in a report adopted by the DSB on 6 May 1999 that that system continued to infringe Articles I(1) and XIII of GATT 1994;
– in particular, the United States of America was authorised, in 1999, pursuant to Article 22(2) of the understanding and following an arbitration procedure, to suspend concessions to the Community up to a certain level;
– the Community system was the subject of further amendments introduced by Regulation No 216/2001, applicable with effect from 1 April 2001 pursuant to the second paragraph of Article 2;
– agreements were negotiated with the United States of America on 11 April 2001 and with the Republic of Ecuador on 30 April 2001, with a view to bringing the Community legislation into conformity with the WTO rules.

Such an outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy, could be compromised if the Community Courts were entitled to judicially review the lawfulness of the Community measures in question in light of the WTO rules upon the expiry of the time-limit, in January 1999, granted by the DSB within which to implement its decision of 25 September 1997.

The expiry of that time-limit does not imply that the Community had exhausted the possibilities under the understanding of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community Courts, merely on the basis that that time-limit has expired, to review the lawfulness of the Community measures concerned in the light of the WTO rules, could have the effect of undermining the Community’s position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.

It follows from the foregoing considerations that Regulation No 1637/98 and the regulations in issue in the main proceedings adopted to apply it, cannot be interpreted as measures intended to ensure the enforcement within the Community legal order of a particular obligation assumed in the context of the WTO. Neither do those measures expressly refer to specific provisions of the WTO agreements.

Second, as the Court held in paragraphs 43 and 44 of its judgment in Portugal v Council, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community’s legislative or executive bodies of the discretion which the equivalent bodies of the Community’s commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules.
of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules.

It follows from all of the foregoing that an operator, in circumstances such as those in the main proceedings, cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules.

(3) Joined Cases T-69/00, T-301-00, T-320/00, T-383/00 and T-135/01 (FIAMM), Judgment of 14.12.2005

69 As is apparent from their arguments, the applicants contend that they have suffered damage because the defendant institutions did not amend the Community regime governing the import of bananas so as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB.

85 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: the institutions’ conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 Oleifici Mediterranei v EEC [1982] ECR 3057, paragraph 16, Case T-175/94 International Procurement Services v Commission [1996] ECR II-729, paragraph 44, Case T-336/94 Efisol v Commission [1996] ECR II-1343, paragraph 30, and Case T-267/94 Oleifici Italiani v Commission [1997] ECR II-1239, paragraph 20).

108 Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules.

109 The applicants rely in this connection on the principle pacta sunt servanda, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 Racke [1998] ECR I-3655, paragraph 49).

110 However, the principle pacta sunt servanda cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions (judgment in Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47; order in Case C-307/99 OGT Fruchthandelsgesellschaft [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 Omega Air and Others [2002] ECR I-2569, paragraph 93, Case C-76/00 P Petrotub and Republica v Council [2003] ECR I-79, paragraph 53, and Case C-93/02 P Biret International v Council [2003] ECR I-10497, paragraph 52).

111 First, the Agreement establishing the WTO is founded on reciprocal and mutually advantageous arrangements which distinguish it from those agreements concluded between the Community and non-member States that introduce a certain asymmetry of obligations. It is common ground that some of the most important commercial partners of the Community do not
include the WTO agreements among the rules by reference to which their courts review the legality of their rules of domestic law. To review the legality of actions of the Community institutions in the light of those rules could therefore lead to an unequal application of the WTO rules depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners (Portugal v Council, cited in paragraph 110 above, paragraphs 42 to 46).

112 Second, to require the courts to refrain from applying rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU of entering into negotiated arrangements, even on a temporary basis, in order to arrive at mutually acceptable compensation (Portugal v Council, cited in paragraph 110 above, paragraphs 39 and 40).


114 It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Court can review the legality of the conduct of the defendant institutions in the light of the WTO rules (see, as regards the GATT 1947, Case 70/87 Fediol v Commission [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 Nakajima v Council [1991] ECR I-2069, paragraph 31, and, as regards the WTO agreements, Portugal v Council, cited in paragraph 110 above, paragraph 49, and Biret International v Council, cited in paragraph 110 above, paragraph 53).

115 However, notwithstanding the existence of a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules, neither of those exceptions is applicable in this instance.

116 In undertaking, after the adoption of the DSB decision of 25 September 1997, to comply with the WTO rules, the Community did not intend to assume a specific obligation in the context of the WTO capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and of allowing the latter to review the legality of the conduct of the Community institutions by reference to those rules.

117 It is true that, compared with the GATT 1947, the DSU has strengthened the dispute settlement mechanism, in particular in respect of the adoption of panel reports.

118 Thus, Article 3(7) of the DSU makes it clear that the first objective of the dispute settlement mechanism is usually the withdrawal of measures which have been found to be incompatible with the WTO agreements. Similarly, Article 22(1) of the DSU favours full implementation of a recommendation to bring a measure into conformity with the WTO agreements.
119 Furthermore, as provided in Article 17(14) of the DSU, an Appellate Body report adopted, as in the present case, by the DSB is to be unconditionally accepted by the parties to the dispute. Finally, Article 22(7) states that the parties are to accept as final the arbitrator’s decision determining the level of the suspension of concessions.

120 None the less, the DSU in any event accords considerable importance to negotiation between WTO members which are parties to a dispute (Portugal v Council, cited in paragraph 110 above, paragraphs 36 to 40).

121 The DSU thus allows the WTO member involved several methods of implementing a recommendation or ruling of the DSB finding a measure incompatible with WTO rules.

122 Where immediate withdrawal of the incompatible measure is impracticable, the DSU envisages, in Article 3(7), that the member harmed may be granted compensation or may be authorised to suspend the application of concessions or other obligations on an interim basis pending the withdrawal of the incompatible measure (see Portugal v Council, cited in paragraph 110 above, paragraph 37).

123 Under Article 22(2) of the DSU, if the impugned WTO member fails to comply with its obligation to implement the recommendations and rulings of the DSB within the period of time that it has been set, it is, if so requested and no later than the expiry of that period, to enter into negotiations with the complaining party with a view to arriving at mutually acceptable compensation.

124 If no satisfactory compensation has been agreed within 20 days after the expiry of the reasonable period of time provided for in Article 21(3) of the DSU for complying with WTO rules, the complaining party may request authorisation from the DSB to suspend the application to that member of concessions or other obligations under the WTO agreements.

125 Even on expiry of the period of time set for bringing the measure declared incompatible into conformity with WTO rules and after authorisation and adoption of measures granting compensation or suspending concessions under Article 22(6) of the DSU, considerable importance is still accorded to negotiation between the parties to the dispute.

126 Article 22(8) of the DSU thus makes it clear that the suspension of concessions or other obligations is temporary in nature and states that the suspension is only to be applied ‘until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached’.

127 Article 22(8) further provides that, in accordance with Article 21(6), the DSB is to continue to keep the implementation of adopted recommendations or rulings under surveillance.

128 In the event of disagreement as to the compatibility with a WTO agreement of measures taken to comply with the DSB’s recommendations and rulings, Article 21(5) of the DSU provides that the dispute is to be decided ‘through recourse to these dispute settlement procedures’, which include pursuit by the parties of a negotiated solution.

129 Neither the expiry of the period set by the DSB for the Community to bring its banana import regime into conformity with the DSB’s decision of 25 September 1997 nor the decision of 9 April 1999, by which the DSB arbitrators expressly found that the new mechanism for banana
imports established by Regulations No 1637/98 and No 2362/98 was incompatible with WTO rules, resulted in exhaustion of the methods for settling disputes made available by the DSU.

130 To that extent, review by the Community courts of the legality of the conduct of the defendant institutions by reference to WTO rules could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute that is consistent with WTO rules.

131 In those circumstances, to require courts to refrain from applying the rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis (Portugal v Council, cited in paragraph 110 above, paragraph 40).

132 The applicants are therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

133 Moreover, in again amending, by Regulation No 216/2001, the banana import regime, the Council sought to reconcile various divergent objectives. The preamble to Regulation No 216/2001 thus states, in the first recital, that there were numerous close contacts in order, in particular, ‘to take account of the conclusions of the [panel]’ and, in the second recital, that the new import system envisaged provides the best guarantees both ‘of achieving the objectives of the [COM for bananas] as regards Community production and consumer demand’ and ‘of complying with the rules on international trade’.

134 It was, ultimately, in return for the Community’s undertaking to establish a tariff-only regime for imports of bananas before 1 January 2006 that the United States of America agreed, as set out in the memorandum of understanding concluded on 11 April 2001, to suspend provisionally the imposition of the increased customs duty.

135 Such an outcome could have been jeopardised by intervention of the Community courts in reviewing the legality by reference to WTO rules of the conduct of the defendant institutions in the present case with a view to awarding compensation for the loss sustained by the applicants.

136 The Court notes in this regard that, as the United States of America has expressly stated, the memorandum of understanding of 11 April 2001 does not in itself constitute a mutually agreed solution for the purposes of Article 3(6) of the DSU and that the question of implementation by the Community of the DSB’s recommendations and rulings was still included on 12 July 2001, that is to say after the present action had been brought, on the agenda of the meeting of the DSB.

137 It follows that the defendant institutions did not intend, by amending the Community regime at issue governing the import of bananas, to implement specific obligations arising from the WTO rules and in the light of which the DSB had found that regime to be incompatible with those rules.

…

157 Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of
economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community’s non-contractual liability (see, to this effect, Case 81/86 De Boer Buizen v Council and Commission [1987] ECR 3677, paragraph 17).

158 The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the ‘general principles common to the laws of the Member States’ and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual Community liability for unlawful conduct of those institutions.

159 National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage.

160 When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P Dorsch Consult v Council and Commission, cited in paragraph 155 above, paragraph 19).

161 It is necessary therefore to examine whether those three conditions are met here.

...
207 In addition, it is clear from Article 22(3)(b) and (c) of the DSU, an international instrument which was publicised appropriately so as to ensure that Community operators were aware of it, that the complaining member of the WTO may seek to suspend concessions or other obligations in sectors other than that in which the panel or Appellate Body has found a violation by the member concerned, whether under the same agreement or another WTO agreement.

208 The applicants are therefore wrong in contending that the possibility of retaliatory measures being implemented by a non-member State as a result of a dispute which has arisen in a sector quite different from theirs cannot be considered to be a normal risk.

209 It follows that the risks to which the marketing by the applicants of their batteries on the United States market could thereby be exposed are not to be regarded as beyond the normal hazards of international trade as currently organised.

Further Reading:


Textbooks on WTO Law: