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### **REVISITING VAN GEND EN LOOS**

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**Is There a Case – Legally and Politically –  
For Direct Effect of WTO Obligations?**

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Prologue:  
**Revisiting *Van Gend En Loos***

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor Hélène Ruiz Fabri, Director of the UMR de droit comparé de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

## **IS THERE A CASE – LEGALLY AND POLITICALLY – FOR DIRECT EFFECT OF WTO OBLIGATIONS?**

By Hélène Ruiz Fabri\*

### **Abstract**

WTO law does not require its direct effect in domestic legal orders. Whilst the stances taken in these are diverse, showing that direct effect is not denied on the whole to WTO law, all the major trading members of the WTO deny it. The fact that, in a case where a WTO member does not comply and is targeted by trade sanctions, the economic actors who in practice bear the burden of these sanctions are deprived of any recourse can be considered as unfair enough to question again the denial of direct effect. The analysis focuses notably on the EU where the debate has expanded more than anywhere else and concludes that direct effect should even in the name of fairness or justice be handled with caution.

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In many respects, the question that gives this article its title looks rhetorical in the sense that it includes at least part of the answer. As many studies have accurately shown, the issue of direct effect always becomes a political question<sup>1</sup> and the situation of WTO law is very topical in this regard. It is therefore plausible that most of the arguments which can be put forward to re-examine the issue of direct effect of WTO obligations in order to determine whether the lines should be moved will be political. It nevertheless remains true that the discourse supporting either the recognition or the denial of direct effect is most of the time worded in legal terms, primarily because it is most of the time formulated by judges/courts who are as such bound to provide some sort of legal rationale. But it may be that this mere statement leads to the core of the matter, namely, who decides and for what purpose(s)?

International law does not carry direct effect in its DNA<sup>2</sup> and direct effect of international treaties is not generally and proportionally widespread. It is commonly acknowledged that an international treaty can be granted direct effect only in accordance with the intention of its parties.<sup>3</sup> However, this intention usually remains unformulated. International conventions are usually mute regarding the issue or limited, when they do include something, to a provision stating that the parties should bring their domestic law in line with the international obligations they entail. This silence, which makes direct effect a matter of treaty interpretation, is commonly analysed as referring the issue of direct effect to domestic laws which provide diverse answers. It is often considered that the issue occurs only in monist systems, for dualist systems would seem, at least on a strict understanding, to exclude direct effect, since international law and domestic law are separate legal orders. Even in domestic systems

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<sup>1</sup> Jan Klabbers speaks of ‘its intensely political nature’ and submits that ‘the notion of direct effect cannot just be used for certain political purposes, but is itself inherently political, in the sense that its meaning, in any given case, is contested, and is indeed bound to be contested’: Klabbers, ‘International Law in Community Law: The Law and Politics of Direct Effect’, 21 *Yearbook of European Law* (2001) 263, at 264.

<sup>2</sup> To paraphrase the formula by Weiler, ‘Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay’, in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 137.

<sup>3</sup> See the classical statement by the PCIJ in *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15, at 17–18: ‘[t]he very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts’.

that appear to be monist, there are hardly any general positive answers, but instead legal possibilities and openness, sometimes although not often, through constitutional law.<sup>4</sup> Their implementation falls for the most part within the scope of case-by-case judgments delivered by domestic judges. This is logical if one relies on the idea that, even if conceivable, direct effect depends on features that not all norms automatically have. After all, this is the most common definition of direct effect, that is to say direct effect in its substantive meaning, relating to the content of the norm whose degree of precision and unconditionality, if properly introduced in domestic law, allows for its application and therefore its invocability before the domestic judge without any further implementation measure. But at the end of the day, given that direct effect has been granted to very open-textured provisions, especially in the field of human rights,<sup>5</sup> and without insisting on the fact that this argument of the structure and precision of the norm leaves a noticeable margin of appreciation, it does not appear to be the most decisive, while other considerations which are external to the norm invoked, such as reciprocity or institutional balance, play their part. In such a context, the general situation can be qualified as bearing a rebuttable presumption of lack of direct effect.

WTO law<sup>6</sup> seems to be in no way original in this regard. What makes it interesting to look at more closely is that it is a big treaty regime in an area where circumstances can evolve very quickly. Significantly, it was usual, at least before the WTO was established, to point out the flexibility and pragmatism of the norms belonging to the GATT legal area, a premise which could appear to be making a denial of direct effect all the more logical. These features were perceived as ways of ensuring adaptability to changing circumstances. But they also have their downsides, and the WTO system has been conceived as well to remedy at least some of these defects. The WTO is far more rule-based than its predecessor, something which was probably all the more necessary as the membership was expanding. It also encompasses a strong dispute settlement mechanism which includes an implementation phase where compliance is closely

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<sup>4</sup> The Dutch Constitution is commonly cited, which is also an indication that there are not many examples to cite.

<sup>5</sup> Cottier, ‘International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law’, NCCR Trade Regulation Working Paper No. 2009/18, at 9, available online at <http://phase1.nccr-trade.org/images/stories/publications/IP1/upload%20Direct%20effect%20EC%20cottier%20revised%20final%200209.pdf> (last accessed 9 January 2014).

<sup>6</sup> Understood here as covering the Agreements signed in Marrakech in 1994 and all their annexes.

monitored. While being under the same constraint of accommodating changing economic circumstances, WTO law has also become more intrusive, in the sense that it frames the regulatory margin of the members<sup>7</sup> more than did the GATT, and touches upon many fields where states are called upon to develop public policies, such as in health, the environment, social protection, culture, etc. All these features have to be kept in mind when considering the issue of the direct effect of WTO law, because such consideration does not equate to reflecting on the direct effect of human rights law, although some have been tempted to draw parallels and lean on the idea that WTO law contains economic liberties which deserve to be protected against states.

This being said, a brief consideration of concrete situations shows that beyond clear-cut positions in favour of or against the direct effect of WTO obligations, it is possible to detect some nuances and a grey area where things move softly from a total lack of direct effect to indirect effect or limited exceptions to the denial of direct effect. This diversity can be explained not only because domestic legal systems are diverse but because the stakes can be very different from one WTO member to another, and also due to the features not so much of the WTO obligations as such than of the WTO system. But it does not mean that the current state of affairs (section 1) should not be questioned. The mere fact that a norm could be granted direct effect in one domestic legal order and not in another attests, as already mentioned above, to the fact that not only does such a decision rely on its structure and precision but that other arguments are at play. They have been especially debated in the European Union (EU) where the European Court of Justice (ECJ, now CJEU) has taken a very strong stance, which should be understood better in order to assess whether it should be mitigated (section 2).

## **1. State of Affairs**

The state of affairs can be considered from both sides: that of the WTO as well as the domestic side.

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<sup>7</sup> ‘The inclusion of services and intellectual property, but also the agreements on agriculture and sanitary and phytosanitary measures brought about enhanced legislative standards to which the body of domestic or regional law has to live up and which frames the conditions for domestic legislation’: Cottier, ‘A Theory of Direct Effect in Global Law’, in A. von Bogdandy, P. Mavroidis, and Y. Mény (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002), 99, at 100.

## **A. The WTO Viewpoint**

Like the GATT, the WTO agreements are mute about their possible direct effect. But it is known that a proposal by Switzerland expressly to require direct effect was rejected during the Uruguay Round.<sup>8</sup> This could be interpreted as evidence of a dominant will against direct effect, but the lack of any formal provision makes it more plausible that the WTO agreements have to be looked at as leaving the matter open and referring the issue to domestic legal orders. Thus, direct effect is not imposed as a basic feature of WTO law, which therefore belongs in this regard to the mainstream of international law.

Interestingly, the notion of ‘direct effect’ does not appear among the listed terms either in the *WTO Analytical Index*<sup>9</sup> or in the *WTO Appellate Body Repertory of Reports and Awards 1995–2010*.<sup>10</sup> In fact, the only report which, to our knowledge, mentions the issue is the Panel report in *United States – Sections 301–310 of the Trade Act of 1974*. But, it may be that it was not necessary to deal further with the issue for the sake of building the following reasoning, and thus the panel does not extend it and sticks to a rather orthodox statement according to which:

Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.<sup>11</sup> Following this approach, the GATT/WTO did *not* create a new legal

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<sup>8</sup> Ehlermann, ‘On the Direct Effect of the WTO Agreements’, in T. Einhorn (ed.), *Spontaneous Order, Organization and the Law: Liber Amicorum E.-J. Mestmäcker* (2003) 413, at 414.

<sup>9</sup> Available online at [www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/analytic\\_index\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm) (last accessed 9 January 2014).

<sup>10</sup> Available online at [www.wto.org/english/tratop\\_e/dispu\\_e/reports\\_e/reports\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/reports_e/reports_e.htm) (last accessed 9 January Sept. 2014).

<sup>11</sup> Footnote no. 661 in the original: ‘[w]e make this statement as a matter of fact, without implying any judgment on the issue. We note 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 (see Eeckhout, P., *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, Common Market Law Review, 1997, p. 11; Berkey, J., *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, European Journal of International Law, 1998, p. 626). The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue.’

order the subjects of which comprise both contracting parties or Members and their nationals.<sup>12</sup>

Nevertheless, as the panel notes in a footnote, nothing prevents some domestic laws from acknowledging direct effect to some provisions of WTO law.

### ***B. Domestic Laws' Viewpoint***

For lack of an exhaustive survey, an empirical one shows that the responses of domestic legal systems regarding the direct effect of WTO law are diverse. Thus, direct effect is not denied on the whole to WTO law, although it is difficult to assess whether the case law is in line with the principled position in the countries where direct effect is granted or at least possible.<sup>13</sup> One knows that domestic judges are, generally speaking, reluctant even in monist systems, which appear at first glance structurally more open to direct effect, inasmuch as they accept direct applicability of international treaties with their nature of international norms, while dualist systems require incorporation through acts of transformation. However, it is not possible to draw a consistent analysis along the lines of a classification of domestic systems between monism and dualism, these two being ideal types which never end up in a pure state in real life.<sup>14</sup> It has already been demonstrated at length that 'in practice, states seem to have opted generally for some compromise method of giving effect to international law in their domestic legal orders'.<sup>15</sup>

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<sup>12</sup> Report of the Panel of 22 December 1999, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, at para. 7.72. The panel then notes that '[h]owever, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix' (at para. 7.73). All to the contrary and the panel concludes its reasoning by stating that '[i]t may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect' (at para. 7.78), a mention which could be seen as a reference to the doctrine of consistent interpretation. The panel then adds that '[a]part from this name-of-convenience, there is nothing novel or radical in our analysis. We have already seen that it is rooted in the language of the WTO itself. It also represents a GATT/WTO orthodoxy confirmed in a variety of ways over the years including panel and Appellate Body reports as well as the practice of Members' (at para. 7.79).

<sup>13</sup> The situations are mainly known through information provided by WTO Trade policy reviews: see Zhang, 'Direct Effect of the WTO Agreements: National Survey', 9 *International Trade Law Review* (Int'l Trade L Rev) (2003) 35; Cottier, 'The Role of Domestic Courts in the Implementation of WTO Law: The Political Economy of Separation of Powers and Checks and Balances in International Trade Regulation', in A. Narlikar, M. Daunton, and R.M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (2009) 607, at 616–619.

<sup>14</sup> See (classical and still accurate) Virally, 'Sur un pont aux ânes: les rapports entre droit international et droits internes', in *Mélanges offerts à Henri Rolin : Problèmes de droit des gens* (1964) 488.

<sup>15</sup> Klabbers, *supra* note 1, at 274–275.

Nonetheless, it remains true that it is more difficult for monist systems – or, at least, systems which appear mainly monist – to adopt and keep a consistent approach when denial of direct effect to WTO agreements is at stake, as the example of the EU shows. But this may give another deciphering key.

Indeed, it appears that among the countries that, as a matter of principle, deny direct effect to WTO Agreements are all the major trading members of the WTO, namely the US, the EU, Canada, Japan, China, and so on. And yet they represent roughly 70 to 75 per cent of world trade. Through this lens, the denial of direct effect to the WTO agreements becomes more massive. At the same time, this approach evidences that the reasons cannot be exclusively legal. It is all the more true that some of these WTO members, such as the EU, could, according to the structure of their legal systems, easily accommodate direct effect, at least for some provisions of WTO law, meeting the usual substantive requirements for granting direct effect. From then on, it becomes interesting to consider the reasons put forward to justify this position and to focus on the biggest players, mainly by comparing the US and the EU. This analysis is not meant to give way to generalizations, but the situation of these big gamers appears to be typical regarding the main issues raised by direct effect, notably because they have been the ones which have pointedly resisted compliance in adjudicated cases. The situation of the EU is all the more interesting, not only because the creation of a new layer of governance has added to the complexity of the topic, but because the long lasting resistance to compliance in two major cases, the *Bananas*<sup>16</sup> and the *Hormones* cases,<sup>17</sup> and the

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<sup>16</sup> The *Bananas* case, which had begun long before the birth of the WTO, in the early 1990s, set the EU against Guatemala, Ecuador, Honduras, Mexico, and the US. The EU, having been hit since 1999 by trade sanctions following an unsatisfactory implementation, negotiated two agreements with the US and Ecuador respectively, with the effect that trade sanctions were suspended. In parallel, two waivers for these understandings were requested, which were given to the EC by the Doha Ministerial Conference, each decision having an Annex providing for a special arbitration procedure aimed at reviewing whether the EC was keeping its commitments. The arbitrator concluded twice, in 2005, that the EC measures did not fully implement the EC's commitments. Good offices by the Director General opened negotiations which failed after 18 months and the measures adopted by the EC following the two arbitrations under the Doha Waiver were subject to a procedure under Art. 21(5) DSU, with an outcome of non-compliance in 2008. Then, following new claims, new fruitless good offices, the negotiations went on until the conclusion of two agreements, made public in 2009, but formally notified on 8 November 2012: see *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27 (summary available online at [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm) (last accessed 9 January 2014)).

<sup>17</sup> The *Hormones* case has set the US and Canada against the EU before the WTO judge for over a decade. When its ban on imports of beef containing hormones was ruled to be inconsistent with WTO law in 1998, the EU decided not to modify or reimpose it, but to undertake a new risk assessment aimed at justifying the ban, in virtue of a sanitary policy that WTO law seems to grant by proclaiming the freedom of choice

fruitless attempts to adjudicate it at the EU level to overturn the decision or reduce its side effects have fed the debate like nothing else.<sup>18</sup>

The position in the US is rather straightforward. The Uruguay Round Agreements Act 1994 denies both direct applicability and direct invocability of the WTO agreements in the US, stating that '[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect', and that no subject of law other than the US 'shall have any cause of action or defence under any of the Uruguay Round Agreements' or challenge 'any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement'. Although it has been argued that US courts could nonetheless use the WTO agreements, including their authoritative interpretations and the decisions taken by the dispute settlement bodies, to interpret statutes on the basis of the theory of consistent interpretation (*Charming Betsy*),<sup>19</sup> nothing indicates that it has ever been the case in US courts.<sup>20</sup> On the contrary, they have, in the field of trade remedies where the issue has surfaced, opted for the doctrine of interpretation deriving from the *Chevron* case which implies that they defer to an agency interpretation which is reasonable if the statute implemented in the case is ambiguous or incomplete. This approach helped them to find that the zeroing method was not incompatible with the WTO Antidumping agreement,

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of the level of sanitary protection (Art. 3(3) of the Agreement on Sanitary and Phytosanitary Measures). But the period of time for implementing the AB report according to which the initial ban did not meet the required conditions prevented the EU from complying with the *res judicata* while making a new risk assessment, inasmuch as the period of time for implementation was far shorter than the necessary time for a new risk assessment. The EU has therefore been hit by trade sanctions. Considering that it had implemented, but faced the refusal of Canada and the US to withdraw their sanctions, the EU claimed against them but did not fully win the case. The following stages were negotiations, with a public outcome of success in 2009 but an official notification to the DSB only on 17 March 2011: see *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 (summary available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm) (last accessed 9 January 2014)) and *US – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320 (summary available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds320\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm) (last accessed 9 January 2014)).

<sup>18</sup> Although there has been some debate about the long lasting resistance of the US regarding the zeroing method in antidumping: see Barcelo III, 'The Status of WTO Rules in U.S. Law', Cornell Law School research paper No. 06-004, at 11, available online at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lsrp\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lsrp_papers) (last accessed 9 January 2014).

<sup>19</sup> J. Jackson and A. Sykes (eds), *Implementing the Uruguay Round* (1997), at 212.

<sup>20</sup> See Barcelo III, *supra* note 18, at 8 ff.

despite the repeated decisions to the contrary by the WTO Appellate Body.<sup>21</sup> The official reason for this straightforward position is itself straightforward: to maintain US sovereignty, especially in terms of legislature, and to prevent its erosion by the WTO agreements (and more generally any trade agreement). There is no doubt that this very restrictive position influences the position taken by other WTO members, although their circumstances could be more complicated.

This is obviously the case for the EU, where the WTO agreements share the status of a ‘mixed agreement’ because their subject-matter ‘falls in part within the competence of the Community and part with that of the Member States’,<sup>22</sup> the first part being composed of trade in goods whereas the second part includes trade in services and trade-related aspects of intellectual property. It means that the issue of direct effect, and notably direct invocability, can arise at both the European and the Member States’ domestic level. Although the situation within the Member States will not be considered further, it is worth noting that there are discrepancies between the European case law and some domestic case law, and that this confirms once more, if needed, that the structure and precision of the norm at stake are not decisive.<sup>23</sup>

As is well known, the ECJ had already met the issue of direct effect at the time of the GATT and in the *International Fruit Company* case had stated that ‘[t]his 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’.<sup>24</sup> It therefore held that the GATT, although being an integral part of the Community legal order and having binding effect, did not generate subjective rights for individuals which they could invoke. And although the WTO is more rule-based and its dispute settlement mechanism is far more juridical, the ECJ has not changed its view and, regardless of the

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<sup>21</sup> Cottier, *supra* note 13, at 614.

<sup>22</sup> ECJ, *Opinion 1/91*, [1993] ECR I-1061, at para. 36.

<sup>23</sup> See Cottier, *supra* note 7, at 108.

<sup>24</sup> Case 21/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, at para. 21. See also Case C-280/93, *Germany v. Council* (the *Bananas* case), [1994] ECR I-4973, at para. 105, where the ECJ applies a test based on ‘the spirit, the general scheme and the terms of the GATT’ to exclude direct effect.

recent changes, denied direct invocability to the WTO agreements at the EC level, in *Portugal v. Council*,<sup>25</sup> at the same time confirming that the condition for direct effect was not limited to direct actions brought by private actors, but extended to direct actions brought by Member States.<sup>26</sup>

Among the reasons given by the Court for its views, there are notably two reasons. First, the changes brought by the WTO have not altered the significant room left for negotiation with a view to ‘entering into reciprocal and mutually advantageous arrangements’.<sup>27</sup> In this context, direct effect would engender a lack of reciprocity towards the other WTO members and result in the non-uniform application of WTO law. Secondly, ‘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’.<sup>28</sup>

Despite – or within – this strong denial of direct effect, the ECJ has developed two escape routes. One concerns the scope of indirect effect and is based on a consistent interpretation approach according to which, when EC secondary law is open to more than one interpretation, the one to be chosen is that consistent with the international agreements which are part of EC law.<sup>29</sup> This principle has been applied several times in relation to international trade law.<sup>30</sup> This calls for three remarks. First, it echoes the mention made by the *Section 301* WTO panel of the principle of indirect effect. Secondly, this doctrine also appears to be applicable in the US, a country in which the legislature has expressly banned direct effect, although a closer look at the case law shows that the doctrine is muted in relation to the WTO.<sup>31</sup> Thirdly, it can be argued that this doctrine is a mere consequence of the principle of good faith, which also applies to

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<sup>25</sup> Case C-149/96, *Portuguese Republic v. Council of the European Union*, [1999] ECR I-8395, at paras 34–46.

<sup>26</sup> This position was notably taken, for the GATT, in Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I-04973, at paras 109–111.

<sup>27</sup> Case C-149/96, *supra* note 25, at para. 42.

<sup>28</sup> *Ibid.*, at para. 46.

<sup>29</sup> Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, at para. 17.

<sup>30</sup> For the GATT, see Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany*, [1995] ECR I-03189, at para. 23. For the WTO, see Case C-53/96, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV*, [1998] ECR I-03603, at paras 34–44.

<sup>31</sup> See Barcelo III, *supra* note 18, at 2.

the interpretation of provisions that some treaties entail, as do the WTO agreements,<sup>32</sup> requiring that domestic law be in line with international obligations.

The other mitigation comes from what is commonly presented as two exceptions constituting the *Nakajima/Fediol* doctrine, held in relation to the GATT and considered as extending to WTO law. According to this doctrine, first, where the EC measure at stake expressly refers to specific and precise provisions of the GATT (for example, the regulation at stake ‘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’), then 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’ (the *Fediol* exception).<sup>33</sup> Secondly, where the EC measure at stake aims to implement a basic EC regulation enacted to give effect to a specific obligation undertaken by the EC in the context of the GATT, then an economic agent subject to such an individual measure, for the sake of complaining against it, can ask the Court to investigate whether the Council by adopting the basic regulation has acted in breach of the EC’s international commitments (the *Nakajima* exception).<sup>34</sup> However, not only are these exceptions very narrowly interpreted,<sup>35</sup> but one can also wonder whether they are accurately analysed as exceptions. In fact, it has to be pointed out that these were not cases where the Court granted direct effect to some GATT provisions, but where it decided not to look for direct effect and relied on other grounds, and reasoned more according to a logic of an act of transformation. Therefore, if they are exceptions, it is not to the denial of direct effect but to the judicial policy of the Court consisting in making international law enter Community (EU) law through the intermediary of direct effect. The best explanation

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<sup>32</sup> Art. XVI(4) of the Marrakesh Agreement Establishing the World Trade Organization: ‘[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’.

<sup>33</sup> Case 70/97, *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission of the European Communities*, [1989] ECR 1781, at para. 22.

<sup>34</sup> Case 69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, [1991] ECR I-02069, at paras 27–32.

<sup>35</sup> Case T-19/01, *Chiquita Brands Int., Chiquita Banana Co. BV and Chiquita Italia SpA v. Commission*, [2005] ECR II-315, at paras 157–161. The Nakajima exception ‘cannot be invoked when the EU has amended its legislation in order to comply with DSB decisions’: Tancredi, ‘On the Absence of Direct Effect of the WTO Dispute Settlement Body’s Decisions in the EU Legal Order’, in E. Cannizzaro, P. Palchetti, and R.A. Wessel (eds), *International Law as Law of the European Union* (2012) 249, at 252.

provided is that, in these cases, ‘international law [was] somehow already incorporated in Community law’.<sup>36</sup>

This approach also applies to the rulings issued by the WTO dispute settlement bodies, the rationale being that there is ‘a direct and inescapable link’<sup>37</sup> between the DSB rulings and the WTO Agreements, and that a DSB decision ‘cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations’<sup>38</sup> and is ‘no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts’.<sup>39</sup> ‘After such a ruling or recommendation has been adopted and after the reasonable period of time allowed for its implementation has expired ... the Community institutions continue in particular to have an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved’,<sup>40</sup> and inasmuch as ‘recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements concerned ... . [I]t follows in particular that a decision of the DSB finding an infringement of such an obligation cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision’.<sup>41</sup> The ECJ leans on the fact that the DSB rulings are not supposed to be law-creating, as explicitly stated in Article 3(2) of the WTO Dispute Settlement Understanding.<sup>42</sup>

The results of the denial of direct effect are that not only is the validity of EU acts which are inconsistent with WTO obligations protected (except for the *Fediol/Nakajima* doctrine), but also that ‘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

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<sup>36</sup> Klabbers, *supra* note 1, at 298.

<sup>37</sup> Case C-94/02P, *Etablissements Biret et Cie SA v. Council of the European Union*, [2003] ECR I-10565, at para. 77. See Mann, ‘Beefing Up the Direct Effect of WTO Agreements within the European Community’, 9 *Int'l Trade L Rev* (2003) 133.

<sup>38</sup> Cases C-120/06P and 121/06P, *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 of the European Union and Commission of the European Communities*, [2008] ECR I-06513, at paras 128 ff.

<sup>39</sup> *Ibid.*, at para. 129.

<sup>40</sup> *Ibid.*, at para. 130.

<sup>41</sup> *Ibid.*, at para. 131.

<sup>42</sup> ‘Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’.

EU'.<sup>43</sup> It has been pointed out that 'the evolution of WTO-related case law in the fields of EU competence contrasts with a strong tradition of direct effect granted to preferential trade agreements'<sup>44</sup> and even that WTO agreements could stand as an exception within the ECJ case law in relation to international agreements in general.<sup>45</sup> This observation makes the ECJ stance look even stronger and leads one to investigate its rationale more closely.

## **2. Balance of Arguments/Dialectic Intertwining**

The position held within the EU has been subject to serious debate. It is true that the EU situation is especially complex due to the additional layer of governance that it constitutes. But the complexity also comes from the fact that, where the US legislature by excluding direct effect 'by means of statutory language'<sup>46</sup> has made explicit choices which both restrain and protect domestic judges, there is no such explicit and constraining political stance at the European level. For lack of it, the European judicature is at the forefront of the decision, and if one maintains the opinion that 'the question of direct effect is not a question for scholars or even, in the first instance, judges. Rather, it is a political question to be answered in political terms',<sup>47</sup> then it is no surprise that 'the potential application of ... the WTO into EU jurisprudence has been one of the major perplexities for [the ECJ]'.<sup>48</sup> Therefore, the questions of who decides and for what purpose(s) cannot be avoided, and they lead one to approach the matter from two main perspectives. One consists of focusing on the object of the decision, namely WTO law and more specifically WTO obligations, which will lead one to understand better why direct effect is, or more plausibly is not, a desirable option, whatever inconsistencies or unfairness such a choice would seem to engender. The other perspective consists of focusing on the author of the decision, namely, most of the time

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<sup>43</sup> Tancredi, *supra* note 35, at 251–252; Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond', 11 *Journal of International Economic Law* (2008) 885.

<sup>44</sup> Cottier, *supra* note 13, at 617.

<sup>45</sup> Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals', in A. Arnulf and P. Eeckhout (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (2008) 361, at 377; Cottier speaks of a 'dual standard', *supra* note 5, at 9.

<sup>46</sup> Cottier, *supra* note 7, at 105.

<sup>47</sup> Trachtman, 'Bananas, Direct Effect and Compliance', 10 *EJIL* (1999) 667.

<sup>48</sup> Jackson, *supra* note 45, at 362.

and in any event in the EU, the judge, which will lead him to consider his position within the system in which he operates and his choice in the light of the question of his empowerment/and of institutional balance, inasmuch as it is acknowledged that, due to the role assigned to judges, direct effect can affect the balance of powers between constitutional institutions.<sup>49</sup>

#### **A. Who Decides: Judicial Empowerment at Stake**

The debate is not new, even though it is more developed in the US than elsewhere, especially the EU where the judge tends to be considered as an unqualified good for the rule of law. However, the debate has been renewed over the last decade at the international level where courts and tribunals have multiplied and face the issue of their legitimacy,<sup>50</sup> as well as at the domestic level, notably with regard to supreme and constitutional courts – a category to which the ECJ can be considered to belong.<sup>51</sup> The rise of the debate is all the more logical as not only are these courts used to meeting political issues and having to decide them in legal terms, but the expansion of the rule of law increasingly confronts them with sensitive cases where various interests are to be balanced. In this context, their way of going about their task is often assessed by referring to a scale going from full deference to judicial activism or '*gouvernement des juges*', this expression referring through its oxymoric character to something the judge is not meant to do by virtue of the separation of powers. In the way in which it is commonly approached, the issue is mostly one of institutional balance between the judiciary on the one hand and the executive and legislative branches on the other hand. In the EU, institutional balance is even more complex, inasmuch as a vertical dimension implying the relationship between Member States and European institutions adds to the horizontal dimension of the relationship between the European Courts and the Council, Commission, and Parliament. In other words, when the ECJ has to think about institutional balance – as the cases referred to above show it does – it has to consider it

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<sup>49</sup> For an analysis see Vauchez, “Integration through Law” – Contribution to a Socio-History of EU Political Commonsense’, EUI Working Papers, RCAS 2008/10, available online at [http://www.eui.eu/RSCAS/WP-Texts/08\\_10.pdf](http://www.eui.eu/RSCAS/WP-Texts/08_10.pdf) (last accessed 9 January 2014).

<sup>50</sup> Von Bogdandy and Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’, 23 *EJIL* (2012) 7.

<sup>51</sup> For the purposes of this article.

both ways (and, in fact, has to consider it in relation to especially sensitive cases, thereby reinforcing its caution).

Regarding the direct effect of WTO law, the stance taken by the ECJ calls for two remarks. First, the ECJ has chosen not to lean on the strong positions that the executive branches had earlier taken against the direct effect of WTO law.<sup>52</sup> Thus, following the Commission's proposal for its decision on the conclusion of the Uruguay Round Agreements, the Council stated in the last paragraph of the preamble that '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'.<sup>53</sup> Certainly, the ECJ considers that only primary law can solve this issue and that it is not legally bound to follow the position of the other institutions the acts of which it is in charge of reviewing but, inasmuch as the treaties remain silent on the issue, it has to give an answer and to give reasons for its stance. Moreover, the Court is probably jealous of its prerogatives in this field, a hypothesis evidenced by history and the quasi-sacralization of the Court which resulted from it. This leads to the second remark, more focused on the issue of direct effect. In *International Fruit*, the Advocate-General asserted that 'the unity and, it can be said, the very existence of Community law require that the Court is alone empowered to say, with the force of law, whether an agreement binding the Community or all the Member States is or is not directly applicable within the territory of the Community and, if it is, whether or not a measure emanating from a Community institution conforms to that external agreement'.<sup>54</sup> This lonely and exclusive empowerment has to be considered in conjunction with what Klabbers calls the 'heuristic value' of *International Fruit* which 'firmly locked into place the idea that the working of international agreements in Community law is to be looked at as a matter of direct effect'.<sup>55</sup> If the line of argument is to be followed, then it appears that the ECJ is locked in its own reasoning about direct effect, cannot renounce its power, but just restrain itself on an *ad hoc* basis and therefore remain ambivalent in its reasoning and at risk of being criticized as inconsistent or activist. If this is so, it is because, as has been

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<sup>52</sup> P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2011), at 294 ff.

<sup>53</sup> Council Decision 94/800/EC, OJ 1994 L 336/1.

<sup>54</sup> Opinion of Mayras AG, *supra* note 24, at 1234.

<sup>55</sup> Klabbers, *supra* note 1, at 275.

shown, direct effect is itself an ambivalent tool which can be used either as a sword to open legal orders or as a shield to keep them closed,<sup>56</sup> and the Court uses it both ways.

Regarding WTO law, the Court does probably keep in mind that any direct effect granted to WTO law would not come with the related mechanisms it has in EU law, notably the preliminary ruling mechanism which implies that once the ECJ has ruled on the direct effect of a provision or interpreted it, this ruling is imposed homogeneously on all Member States. Therefore the argument of the lack of reciprocity which underlies the ECJ's stance regarding any direct effect of WTO law has no relevance. On the contrary, it is relevant for WTO law and comes with the idea that it could result in an asymmetry of obligations, or at least an asymmetry in the level of constraint resulting from the same obligations, in comparison with traditional trade partners. The EU could look especially vulnerable after the ECJ explicitly stated, in the *FIAMM* case, 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'.<sup>57</sup> Significantly, this reciprocity argument was added to the ECJ's rationale in *Portugal v. Council*<sup>58</sup> in 1999, i.e., after the WTO had replaced the GATT. One cannot but link this reinforcement of the rationale to this change. It could appear to be in contradiction with the legal shift of the trade system but it is not. Although the mere existence of a dispute settlement system does not as such mitigate against granting direct effect, its features are taken into account, with the ECJ focusing 'on the nature of the agreement and the existence of a dispute settlement mechanism showing that the parties did not intend to require the recognition of domestic legal effects'.<sup>59</sup> This view is reinforced by that fact that, although Article 19 DSU gives the WTO dispute settlement bodies the ability to indicate ways of implementing their recommendations,<sup>60</sup> these are mere suggestions which are not supposed to impede the freedom of choice the WTO members enjoy

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<sup>56</sup> Prechal, 'Does Direct Effect Still Matter?', 37 *Common Market Law Review* (2000) 1047.

<sup>57</sup> Cases C-120/06P and 121/06P, *supra* note 38, at para. 124.

<sup>58</sup> Case C-149/96, *supra* note 25.

<sup>59</sup> Bonafé, 'Direct Effect of International Agreements in the EU Legal Order: Does It Depend on the Existence of an International Dispute Settlement Mechanism?', in Cannizzaro, Palchetti, and Wessel, *supra* note 35, 229, at 245.

<sup>60</sup> Except in the field of subsidies where the measures to be taken (always a withdrawal) have to be indicated, as well as the period for implementation.

regarding the means of implementation and, moreover, the dispute settlement bodies abstain most of the time from making such suggestions. The ECJ undoubtedly shares the view that the recognition of domestic effect to WTO rulings is not expected, and it therefore uses direct effect as a shield in the sharpest way, granting the European executive and legislative branches the margin of manoeuvre they want to keep in the implementation of international commitments while denying the invocability of those commitments by private parties or Members States, although they would obtain from it a right of which they are otherwise deprived. The way in which the Court has even resorted to direct effect in direct actions brought by Member States and denied it to WTO law while it has accepted it for other EU preferential trade agreements even in case of imbalance<sup>61</sup> sheds light on its understanding of the institutional balance factor. This apparent contradiction is no longer one if one accepts a twofold explanation. First, ‘the Court maximized the effect of international agreements in relationship to member states, and minimized the impact when it was called upon to review EU legislation’.<sup>62</sup> Secondly, ‘regional agreements reflect the predominance of EU law and do not run the risk of producing results contrary to internal EU legislation, unlike under WTO law’.<sup>63</sup> In other words, ‘free trade agreements and association agreements... belong to the realm of community law... They may be termed hegemonic agreements.’<sup>64</sup> From this perspective, the judicial policy developed by the ECJ seems to serve the autonomy of the EU legal order as well as EU empowerment. The sharp stance towards Member States regarding their direct actions brought against EU institutions’ acts, a stance which seems even sharper considering that ‘the binding character of international agreements is sufficient to use WTO law as a standard for reviewing the legality of Member states’ legislation’,<sup>65</sup> sends them back to the place where they are supposed to exert their influence, through the political institutions, and it is especially true in a field of common policy as it is international trade. Inasmuch as direct effect turns out to be the tool, the

<sup>61</sup> The ECJ considered, in the *Bresciani* case, that the imbalance in the Yaoundé Convention which mainly provided privileges granted by the Community to the associated countries in order to help their development ‘does not prevent recognition by the Community that some of its provisions have direct effect’. But the ECJ also pointed out the special nature of the agreement. See Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, [1976] ECR 129, at para. 23.

<sup>62</sup> Cottier, *supra* note 18, at 617.

<sup>63</sup> *Ibid.*

<sup>64</sup> Cottier, *supra* note 5, at 11.

<sup>65</sup> Tancredi, *supra* note 35, at 250.

Court's answer comes through it, however inappropriate it could look. In a way this is coincidental but increases 'the constitutional function'<sup>66</sup> of direct effect.

The situation is slightly different for private actors who can feel at a loss, as was the case in the *Hormones* case where, while some exporters had to bear the economic consequences of the trade sanctions endured by the EU, they were denied direct actions against EU acts as well as actions for damages on grounds of the extra-contractual liability of the EU, including in the absence of unlawful conduct. What arise here are arguments of democracy and justice (which are part of the rule of law as well as institutional balance). Of course, inasmuch as states – or the EU – are complex entities whose decisions result from the balancing of diverse interests which cannot all be satisfied at the same time, one cannot assume that they undertake all their international commitments for the sake of all citizens, all the more as they are supposed to consider not only the various individual interests but also the public interest. Thus, the ECJ points out that legislative measures adopted 'in the public interest... may adversely affect the interests of individuals',<sup>67</sup> and obviously chooses to give precedence to the former. But the following question is whether the adverse impact that some individuals, in fact economic actors, mainly exporters, bearing the burden of trade sanctions imposed in the form of suspension of trade concessions, suffer 'must be deemed a normal risk'.<sup>68</sup> There are two levels of answer.

One is about democracy and the extent to which their interests are effectively taken into account and balanced in the decision-making process. Because, if one can share the view that this kind of decision 'is best left to majoritarian institutions rather than being dependent on individual *ad hoc* claims',<sup>69</sup> it is under the reservation that there is enough 'space for public debate and political confrontation in which decisions for the common good may be taken'.<sup>70</sup> And yet, international commitments, such as any political decision, can be undertaken under the pressure of lobbies, and in any event 'it

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<sup>66</sup> *Ibid.*, at 266. See also Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) 397, at 398.

<sup>67</sup> FIAMM, *supra* note 38, at para. 121.

<sup>68</sup> Tancredi, *supra* note 35, at 267.

<sup>69</sup> F. Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (2010), at 172.

<sup>70</sup> Tancredi, *supra* note 35, at 262.

is fair to say that producer interests are generally better organized and represented in the political process than consumer and importer's [*sic*] interests' and that this process shows 'an in-built bias in favour of protecting domestic production'.<sup>71</sup> All this is also true for the decision to breach an international commitment, although it can also result from a more democratic choice than the decision to take on such commitment. Thus, in many countries and in the EU there has been a development of legislative control over treaty ratification and application,<sup>72</sup> and this is supposed to guarantee a better representation of all interests, but it nonetheless remains – and it would be naïve not to acknowledge it – that the way by which decisions are made at the European level goes on feeding the feeling of democratic deficit. This is a matter of legitimacy, and the quasi-immunity of international trade affairs from judicial review can only add to it.

This makes all the more important the second level of answer, which is about justice. Although it seems logical to give precedence to the common good over individual interests, this logic, understood in the framework of the rule of law, implies that the burden carried by individuals is not disproportionate inasmuch as they can be deemed 'innocent victims'. This issue is left, for the time being, to *ad hoc* decisions to be made by the political bodies if they feel the need, account being taken of the fact that any decision on compensation would make the situation twice as costly since the internal compensation would be added to international trade sanctions. This black hole in fairness leaves open the question whether granting direct effect could not bring some good, at least in these kinds of cases, thus having a 'compensatory function'.<sup>73</sup> This implies that one must consider the object of the decision, namely WTO law.

### **B. WTO Law at Stake: (Non-)direct Effect as 'a Shield'<sup>74</sup>**

The issue is especially intriguing because, although the reasoning supporting it can be questioned or criticized, the denial of direct effect to WTO law as a matter of principle is not, except for requiring minor adjustments, as if this law deserves mistrust. This also

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<sup>71</sup> Cottier, *supra* note 7, at 113.

<sup>72</sup> For the US example see Jackson, *supra* note 45, at 379.

<sup>73</sup> Cottier, *supra* note 5, at 23.

<sup>74</sup> Prechal, *supra* note 56.

proves true for the EU, despite its prevailing legal culture,<sup>75</sup> very fond of respecting law with a quasi-sacralization, almost a ‘political theology’<sup>76</sup> which can easily be linked to the fact that law has been and remains a preferential tool in the building of European integration. This generates a European temptation to export this conception of law which has so far been successful for Europe and which translates into a strong preference for a rule-based system as opposed to a power-based system, an attachment to the virtues of multilateralism which comes together with a strong stance in favour of universalism, notably when values considered as fundamental – such as peace, human rights, adherence to the idea of hierarchy of norms, of international community – and to the role of the judicial are at stake.<sup>77</sup> Such a context would seem favourable to the promotion of direct effect, with the idea that expanding direct effect would be a way of taking international law seriously and of being consistent with international commitments while increasing their effectiveness.<sup>78</sup> It would also increase the rights of individuals – or private persons inasmuch as each citizen could become a private general attorney or ‘a policeman of his or her country’s compliance with their obligations’,<sup>79</sup> able to urge on the European legal order where the will to comply is lacking,<sup>80</sup> whatever the reasons – be it a lack of interest or, on the contrary, an interest in not complying with international commitments. But this only shows that nearly all arguments can be reversed, and that they should be reversed inasmuch as there is a teleological question which should not be avoided: what are the aims to be pursued?

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<sup>75</sup> Wood, ‘A European Vision of International Law: For What Purpose?’, in H. Ruiz Fabri, E. Jouannet, and V. Tomkiewicz (eds), *Proceedings of the Second Biennial Conference of the European Society of International Law* (2007) 151; Ruiz Fabri, ‘Nécessité d’une approche européenne du droit international ? Ni oui, ni non, ni blanc, ni noir’, in SFDI/Société allemande de droit international, *Droit international et diversité des cultures juridiques* (2008), at 223.

<sup>76</sup> Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’, 16 *EJIL* (2005) 120.

<sup>77</sup> Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’, 16 *EJIL* (2005) 137.

<sup>78</sup> Slaughter and Burke-White, ‘The Future of International Law is Domestic (or, The European Way of Law)’, 47 *Harvard Journal of International Law* (2006) 327.

<sup>79</sup> Weiler, ‘The WTO: Already the Promised Land?’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 418, at 423.

<sup>80</sup> This idea is close to the statement by the ECJ in *Van Gend en Loos* according to which ‘the vigilance of individuals concerned to protect their right amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States’: Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen*, [1963] ECR 1.

What is the political project which could justify the fact that WTO law deserves direct effect in the face of an EU decision which is suspected to breach it?

### *1. Democracy*

Could it be for the sake of democracy? But which democracy is it about? Because it cannot be pretended that international rules have a democratic dimension that domestic decisions would not have. If the reproach directed at the decision not to respect an international commitment is that it suffers from democratic deficit, it should not be forgotten that the fabric of international law does not prove to be less democratically flawed.<sup>81</sup> It could be ‘stressed that negotiators act upon the instructions of their governments and no rules are adopted without consent’.<sup>82</sup> Nevertheless, negotiations remain purely intergovernmental ‘without an elaborate organic integration of national parliaments and civil society’,<sup>83</sup> and in any event negotiations are not about democracy but about power. The history of negotiations under the GATT, then in the WTO, is one of green rooms where compromises were reached among small groups of powerful countries and then generalized through consensus. The individual undertaking even increases this trend by interlinking compromises and leaving no possibility of opting out. There is nothing democratic in it; it is only that entities like the US or the EU have long had more power than other Members to promote their interests. But things are changing in this regard; the balance of powers is shifting, which also explains why current negotiations have fallen into a coma and why big gamers are running for regional trade agreements. However, the current set of rules is still there and its multilateral dimension and the structure of commitments make it excessively difficult and costly to renegotiate them. And yet, equilibria can change through time, just as can the impact of international commitments, at the internal as well at the international level. At the domestic level, it could come from democratic changes and from the rise of new concerns, for example social or environmental. At the international level, it can be

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<sup>81</sup> Weiler, *supra* note 79, at 424.

<sup>82</sup> Cottier, *supra* note 13, at 619.

<sup>83</sup> Cottier, *supra* note 7, at 115.

due to the enlargement of the commitments following the enlargement of the WTO or to the interpretation of the rules and commitments.<sup>84</sup>

This raises interesting questions in relation to the margin for manoeuvre that states – or the EU – have for implementing their international commitments at a time of international law when it is no longer exclusively devoted to regulating interstate relationships but is more and more oriented towards framing the normative freedom – or regulatory margin – of its subjects (states as well as international organizations). In short, the use of direct effect as a lever to increase efficiency would affect an international law more oriented towards the modelling of domestic laws. But while the use of this modelling effect is perfectly understandable – and instrumental – for European law in accordance with the underlying project of integration, its occurrence for international law gives rise to some perplexity. The international political project, if it exists – and one could for instance point out that WTO plays its role ‘in preserving peace and stability and long-term growth, in particular of developing countries’<sup>85</sup> – is far from being as homogeneous as the European project, and even varies substantially from one conventional system to another, coherence not being the guiding line of international law – as well as of states’ legal policies. This can explain why the issue of states’ normative freedom – or, to mention closely related ideas, policy space, regulatory space, national margin of appreciation – is highly debated in international law in general, and in WTO law and case law in particular, because the strictness of the commitments undertaken makes it difficult to develop public policies addressing concerns as progressive as those related to the environment, health, social protection, or human rights. And yet these policies correspond to value choices. These values may not be unanimously shared at the domestic level, and they most certainly are not commonly shared at the international level. But WTO law touches upon many of these so-called non-trade concerns. Having become ‘more constitutional than functional’, its task is no longer, as was the case for the GATT, ‘a matter of functionally reducing trade barriers,

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<sup>84</sup> Although the WTO dispute settlement bodies are not supposed to add to or diminish the rights and obligations of WTO members, and as mentioned above the ECJ leans on it to deny any specific effect to their decisions beyond the obligations they implement, there are well known cases where the judicial interpretation has resulted in increasing the burden imposed by the obligations at stake or in reducing the discretion of members in their implementation. See the case law relating to Art. 17(6) or Art. 3(2) Antidumping Agreement.

<sup>85</sup> Cottier, *supra* note 13, at 619.

but to provide an overall framework of trade regulation which is fully capable of absorbing other, but equally legitimate policy goals'. But 'as long as WTO law has not achieved the potential to fully integrate these concerns – either by way of case law or legislation – full and prompt effect of WTO law may threaten such policies domestically'.<sup>86</sup>

In this context, the interest in respecting – or not – WTO obligations and commitments can evolve accordingly, under the reservation that it is an option which leads one to focus on the features of WTO law and on situations where such an option can arise.

## 2. Law

Regarding the nature of the WTO agreements, the issue is less the structure and precision of the norms to see whether they fit the requirements for direct effect – it is obvious that all of them cannot fit but some of them do<sup>87</sup> – than an overall assessment which points out that, due to the role devoted to negotiations in the implementation of WTO law with the aim of achieving 'reciprocal and mutually advantageous arrangements', the margin for manoeuvre of the negotiating bodies, i.e., the political bodies, has to be preserved. The argument does not mean denying binding effect either to WTO rules or to dispute settlement bodies' decisions, although there are opinions to this effect, but they are irrelevant here inasmuch as WTO members do not deny that they are bound to comply. The discussion is much more about how to comply. This is where the argument of the scope for manoeuvre comes into play.

Denying direct effect to WTO law rests upon the idea that this law does not settle the ways in which it is implemented. Not only can this be discussed for some rules but, as a matter of principle, one can wonder whether it remains true once WTO dispute settlement proceedings have taken place, which have provided an interpretation of one or several obligations making them more precise and have moreover established – if issuing an adverse ruling – that the defendant is not complying with these obligations. Does the exhaustion of these international remedies change the situation in any way?

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<sup>86</sup> Cottier, *supra* note 7, at 114–115.

<sup>87</sup> Cottier, *supra* note 13, at 613, gives the example of Art. XX of the Government Procurement Agreement or some provisions of the TRIPS Agreement.

This is a very controversial issue. According to some views, which follow the efficient breach theory,<sup>88</sup> a full choice exists between modifying or retrieving the condemned measure and granting compensation or suffering retaliation. In other words, paying damages in one way or another is a suitable alternative. Under this perspective, the dispute settlement proceedings do no more than put pressure on the defendant to negotiate, and only as long as reaching a mutually satisfactory solution is more interesting than taking on compensation or retaliation. In any event, this gives what is most useful for negotiations, that is time.

Of course, this is not what the ECJ says. It would be downplaying the rules as stated by the WTO Dispute Settlement Understanding. And yet, one can wonder whether the denial of direct effect as explained by the ECJ does not hark back to a softer version of the efficient breach theory.<sup>89</sup> In fact, the turning point in the reasoning seems to be the expiry of the reasonable period of time.<sup>90</sup> There are opposing views about its legal effect. Thus, it could be considered that international remedies having been exhausted, international obligations having been interpreted and made clear after the parties have had the opportunity to argue about their interpretation, and they should therefore be granted direct effect. It does not forbid further negotiations in order to lighten these obligations but would give full effect to the law in force, while helping to avoid both a violation of WTO agreements and a violation of *res judicata*. Several arguments support this view. Beside an argument of justice towards those who would otherwise unfairly bear the burden of compensation or retaliation inasmuch as the corresponding trade measures target economic actors other than the ones benefiting from the retained measure, legal views can be put forward regarding notably the nature of WTO obligations.<sup>91</sup> The most common point of view is that these obligations are

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<sup>88</sup> Sykes, ‘The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance?’, in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (2000), at 347.

<sup>89</sup> And, in this perspective, the refusal of EU liability, even for unlawful conduct, makes full sense by avoiding resistance to implementation becoming twice as costly.

<sup>90</sup> Art. 21.3 DSU.

<sup>91</sup> For enlightening developments see the outstanding PhD thesis by A. Hamann, *Le contentieux de l'exécution dans le règlement des différends de l'OMC* (2012), Prix SFDI 2013, at 234 ff (on file at Paris 1, to be published by Brill).

bilateral and ‘disposable’<sup>92</sup> or non-peremptory. This view takes one side in the distinction drawn by the International Court of Justice between ‘the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State’,<sup>93</sup> the first ones being obligations *erga omnes* while the second are bilateral even if incorporated in a multilateral treaty. The notion of obligation *erga omnes* is underlain by the idea of common interests which are distinct from individual interests and represent more than the sum of individual interests. If one admits that a common interest can be shared by a group of states narrower than the international community as a whole, and a multilateral but non-universal treaty can serve such interests, then one should also admit that that treaty can contain multilateral obligations concerning these common interests, and even that ‘[l]aw does not only serve to protect common goods, but can also create them’.<sup>94</sup> From this perspective, it is possible to argue that WTO members not only have individual trade interests to protect and promote within the trade system, but also have a common interest in defending the system itself, an interest which follows the one they had in building it. The common interests as understood here are not international trade and its liberalization, but that ‘a functioning legal system which creates security and predictability in international trade relations may... itself be regarded as a common good’.<sup>95</sup> The WTO members can be considered as constituting a distinctive community, a functional community of states in the same meaning as in Article 42 of the International Law Commission’s Articles on State Responsibility,<sup>96</sup> and what logically comes with it is the idea of obligations *erga omnes partes* which incorporate the common interests and have as a feature that they are integral obligations in the respect of which each and all parties have an interest. The corroborating arguments are that both the individual undertaking and most-favoured nation (MFN) treatment are meant to secure the indivisibility of obligations, but also that all WTO members are entitled to claim for any breach of WTO law by any other

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<sup>92</sup> Pauwelyn, ‘A Typology of Multilateral Legal Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, 14 *EJIL* (2003) 907, at 907.

<sup>93</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)*, ICJ Reports (1970) 32, at para. 33.

<sup>94</sup> Feichtner, ‘Community Interest’, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (2007), at para. 18.

<sup>95</sup> *Ibid.*

<sup>96</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 255.

member without having to prove individual interest in the matter – a kind of *actio popularis*. Moreover, even if the suspension of concessions is formally a counter-measure, i.e., a measure between states in a horizontal relationship, the mechanism of suspension of concessions is rooted in the organization and, with it, the power to sanction gives it an objective dimension. The organization empowers its members to suspend. Through this framing, the use of trade sanctions is under the control of a third body, the DSB. From this perspective, suspension of concessions is a coercive tool by which, through actions taken by a state, the organization pursues its own goals as stated by the DSU, i.e., security and predictability through legality.<sup>97</sup> No need to insist on the fact that the systemic interest pushes for this approach.

At the same time, this view does not obviously prevail in practice, however strong it is legally speaking, and WTO law bears part of the responsibility for that, inasmuch as it is not fully consistent, staying in midstream. If the reasonable period of time binds the member in charge of implementing and its breach not only is a violation of the treaty but can have legal consequences, such as retaliation, its expiry does not end up exclusively as a unilateral obligation of full implementation but leaves the door open to a mutually agreed solution. The preference for amicable settlement as stated in Article 3(7) DSU ('A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred') is so strong that it remains legally possible to negotiate, after the expiry of the reasonable period of time and while trade sanctions are implemented, an approach which is all the more in line with 'the aim of the dispute settlement mechanism... to secure a positive solution to a dispute' that it will end up as trade openness, whereas trade sanctions are leading to restrictions. Thus, Article 22(8) DSU states that '[t]he suspension of concessions or other obligations shall be temporary and shall only 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*'.<sup>98</sup> Strictly speaking, it is therefore possible to argue that international remedies have not been exhausted as long as negotiations, which are means of dispute settlement, remain

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<sup>97</sup> Hamann, *supra* note 91, at 677 ff.

<sup>98</sup> Emphasis added.

possible.<sup>99</sup>

But the subsequent question is what can be negotiated, and this question is tricky. In principle, any mutually agreed solution has to be consistent with the WTO agreements, which means that WTO law is in no way considered auxiliary and cannot be moved aside or waived as a result of the common will of the parties.<sup>100</sup> Moreover, there is a *res judicata* to be complied with, which is binding not only on the defendant but on all the parties to the dispute which are also plausibly the ones involved in the negotiations. And any agreement has to be notified to the whole membership, and that allows for legal control of the content, which should prevent the parties from doing what they want. But, to put it in a short and even abrupt way, what would be the interest of the defendant in negotiating instead of unilaterally implementing – an implementation which can be acknowledged by the DSB<sup>101</sup> – if he did not expect an outcome which does not respect the *res judicata*, be it regarding the merits or the period for implementing? And this is what happens. The corresponding practice has to be taken into account for the sake of realism, but also because it can amount to ‘subsequent practice’ within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).

Any mutually agreed solution notified to the DSB (and the relevant Councils and Committees) is subject to a debate which can be based on legal arguments in relation to the consistency with WTO law and during which other WTO members can express their possible concerns. This of course should not be underestimated, notably because it could give rise to new claims brought by other interested members. But the only formal outcome is that the case is removed from the DSB agenda, a withdrawal which not only ends multilateral monitoring but also any possibility for the claimant to have recourse to the remedies provided by the implementation phase of the DSU. The fact is that the parties to the dispute only notify very late, when they do at all,<sup>102</sup> notably because the initial claimant wants to keep the case open as long as there is no certainty about the

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<sup>99</sup> Ruiz Fabri, ‘The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with Emphasis on the EC–Bananas Dispute’, in L. Boisson de Chazournes, M. Kohen, and J.E. Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (2012) 87.

<sup>100</sup> Although, according to some views based on Art. 41 VCLT but also on the assumption that WTO rules are disposable, the agreement would remain valid between the parties: see Tancredi, *supra* note 45, at 256.

<sup>101</sup> If necessary by having recourse to Art. 21(5) DSU.

<sup>102</sup> The obligation of notification is not accompanied by any sanction.

effective implementation of the agreement, with the result that most of the notified agreements have already been implemented. No doubt in such a context any interested member who would like to exert any influence has to be aware of the negotiations and their outcome long before the notification. This practice of *fait accompli* only gives weight to the argument of the scope for manoeuvre, all the more considering that the endorsement by the DSB can be deemed to create a presumption that the agreement is in line with the WTO agreements or is accepted as such by the membership, however shocking this situation may seem to the extent that *res judicata* is circumvented and the violations of various obligations covered. One can wonder what could happen if the measures following such an agreement were challenged at the WTO. The mantra of the member-driven organization, which goes hand in hand with the scope for manoeuvre, would probably play its role, which leads back to politics.

### ***3. Back to Politics***

The withdrawal of a case from the DSB agenda is the moment at which international remedies can undoubtedly be considered to be exhausted. It seems that, in the EU the agreement closing the case could be granted direct effect or, at least, be considered as falling within the scope of the *Fediol/Nakajima* doctrine. But, provided that such an agreement is assimilated to WTO law, inasmuch as it would end the international trade sanctions, it is unlikely that its implementation measures would be challenged by economic actors. So, the matter could look settled, at least for some time.

But it remains for us to assess whether this situation is detrimental to the WTO. Some arguments make a strong case against direct effect of WTO law viewed from the WTO's perspective. The consequences which are feared are first that the member which is subject to direct effect of its international commitments and whose responsibility is likely to be engaged both at the international and the domestic level will tend to become more demanding towards the other parties, and will in particular 'become an aggressive partner in the context of dispute settlement between States, if it wishes to uphold the balance of rights and duties that flow from the agreement'.<sup>103</sup> At the same time, there could be a shift of power in the WTO in favour of the judicial branch, since there could

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<sup>103</sup> Ehlermann, *supra* note 8, at 415.

be even more cases, be it due to claims brought by the party subject to direct effect in order to level the playing field or by other parties in order to benefit from what can appear as a vulnerability. According to some views, this is not desirable at all in a context where a strong imbalance between the political and judicial branches already exists in this regard in the WTO,<sup>104</sup> the judicial branch now even having gained the reputation of being the only dynamic part of the WTO. In addition, the party subject to direct effect of its international commitments could become more reluctant to conclude new agreements in a general context where multilateral agreements have become very difficult to reach, while it is confronted with the quasi-impossibility of renegotiating the existing rules. As to the unfairness of the trade sanctions, it is deliberate, taking the view that the ‘innocent victims’ will put some pressure on their government, if only to negotiate.

Beyond these arguments lies the reality of power. All depends on the ability to resist and bargain over implementation. Significantly, the concrete cases have hitherto involved (and opposed) the big gamers, namely the US and the EU, and are not, it is true, very numerous. Moreover, they touch upon issues which are especially sensitive (antidumping for the US, agriculture for the EU) with the plausible effect of a disproportionate resistance to implementation. This is not meant to minimize their impact, the issue being that such situations put the WTO system under pressure and undermine its credibility. Nevertheless, an optimistic view would underline that even the most difficult cases have been positively settled and that even the most powerful players cannot afford not to negotiate, so much so that the main issue turns out to be time. But this time also allows other members to learn. Moreover, for the time being, the WTO does not seem mature enough to bear the consequences of direct effect. Neither is it ready to push for an increased acknowledgement of the objective dimensions pointed out above. Thus, members restrain themselves from suing each other when they do not hold an individual interest. But it should be underlined that this trend is not specific to WTO law, but proves true in any system where the logic of *actio popularis* has been introduced, especially human rights treaties.

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<sup>104</sup> *Ibid.*, at 416.

The comparison, already quickly mentioned above, is all the more interesting considering that human rights treaties are precisely those for which direct effect has been promoted and developed in order to increase their efficiency, beside allowing private persons to claim at the international level and states to sue each other, although they are not keen to do so – even less than in trade matters. When comparing one finds two differing features which are especially striking: the fact that human rights treaties are specifically designed to protect individuals against their state's measures, and the fact that combining the pressure by an international institution and the possibility, granted by direct effect, of a domestic remedy 'prevents the conflicting interests of the government officials from preventing redress', a feature which has also to be related to 'the degree to which a given society has confidence in its own human rights protections'.<sup>105</sup> Interestingly, this can be related to the fact that the development of human rights systems is articulated on the reduction of the national margin of appreciation. It echoes the argument of the scope for manoeuvre. The subject-matter of the treaty more than its wording or institutional functioning is at stake. Regarding treaties involving complex economic matters which often involve rapid change, moreover among large groups of very diverse countries, and towards which the undertaken commitments could be considered as resulting from 'two sets of flawed political processes of bargaining among unequals'<sup>106</sup> – the process of the WTO as well as the internal process by which negotiating positions are crafted – it is generally felt inappropriate to reduce the margin for manoeuvre of governments and legislatures which should keep the ability to (re)balance interests at the implementation stage. In such a context, there is no doubt that direct effect should, even in the name of fairness or justice, be handled with caution.

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<sup>105</sup> Jackson, *supra* note 45, at 369.

<sup>106</sup> Weiler, *supra* note 79, at 424.