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**The EU and Dispute Settlement within the WTO:
a strategy for the protection of the Union's autonomy
in the domestic regulation of goods?**

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INTRODUCTION

The purpose of the present research is to enquire as to the position of the European Union vis-à-vis trade disputes concerning non-tariff barriers to trade within the World Trade Organisation. Non-tariff barriers are generally construed as obstacles which produce their trade-restrictive effects beyond borders and customs and, more precisely, when the product is marketed into the importing country. Against this background, the research aims at exploring the hypothesis of the existence of a EU strategy on trade disputes falling within the scope of the relevant WTO agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT).

The concept of strategy refers to the adoption of measures aiming to continue one or more predefined objectives. The demonstration of a relation between instruments and objectives allows to assert the existence of a Union's strategy in facing disputes in the SPS and TBT domains.

The notion of strategy implies the need to structure the research plan along its constitutive lines. The first part of the research aims to identify the objectives of the strategy, while the second part puts forth an understanding of the means chosen to implement such strategy and put them in relation with the above-identified objectives. The resulting structure shows the existence of an EU strategy on SPS and TBT disputes and defines the latter's content.

The first part of the research deals therefore with the objectives of the EU. In this context, the challenge represented by the defense of the EU's regulatory autonomy is crucial. In relation to that, the research deals with the practice of the Union to prevent the rise of disputes through the conclusion of bilateral Mutual Recognition Agreements (MRA). The analysis of five disputes concerning violations, alleged or established, of SPS and TBT provisions represents the core of research.

The second part aims at identifying the means by which the EU's strategy is concretely implemented. This is done through the analysis of the status of WTO rules within the Union legal order, including the issue effects of the decisions of the Dispute Settlement Body (DSB) and of the EU responsibility for breach of WTO law.

The present research raises scientific interest under many profiles. First, the scholarship lacks a systematic study linking, on one side, the Union's position in the disputes within the WTO, namely the interpretation of multilateral trade agreements and in particular of SPS and TBT provisions that the EU puts forward during a dispute and, on the other, the internal dimension that WTO dispute settlement implies, namely the issue of the

effects which the reports issued by Panels or the Appellate Body produce within the EU legal order after adoption by the DSB. Irrespectively of whether or not the said relation allows to affirm the existence of an EU strategy on trade disputes on SPS and TBT provision, this study aims to fill in the existing gap. Second, the analysis of the objectives of the strategy, namely the defense of the EU regulatory power, and the means used for this purpose, including the ECJ case-law regarding the effects of WTO law *largo sensu*, led to further reflections about the openness of the Union's legal order vis-à-vis one of the legal system potentially more invasive of the Union's autonomy, namely the one established by the WTO agreements. Finally, the analysis of the Union's strategy might be considered necessary in the light of consequences regarding the legal position of individuals through the balance - or imbalance - that the strategy implies between the EU and fundamental rights recognized in the Union's legal order. In this regard, the issue of EU responsibility for breach of WTO becomes relevant.

Details on the methodology are needed due before broach the subject. First, it is worth noting that the choice to analyse SPS and TBT disputes is justified in light of the interest raised by the concept of EU regulatory independence. Second, the analysis in Chapter II is confined to disputes, on the one hand, concerning the Union as such and not individual member states and, on the other, making the object of a decision by the DSB. This criterion has brought five disputes under the spotlight, namely the ones that have concerned hormones, asbestos, sardines, geographical indications and GMOs. The circumstance whereby disputes analysed saw the European Community as a party, what makes the use of a pre-Lisbon Treaty jargon necessary, this does not preclude that the conclusions of the present research also apply to the Union as the Community's successor within the meaning of public international law.

CHAPTER I

The European quest for regulatory autonomy within the SPS and TBT regime

SUMMARY: *Section I* – National regulatory autonomy as a counterbalance to the liberalisation and integration of marketplaces **1.1** Defining the issue of regulatory autonomy **1.2** The distinction between market access and domestic regulation under GATT 1994 *1.2.a* Measures restricting market access versus domestic regulations under the GATT *1.2.b* Comparison with the EU Treaty and the US Dormant Commerce Clause **1.3** Interaction between GATT market access and domestic regulation disciplines *1.3.a* Domestic regulation that applies to both domestic and imported products is subject to GATT article III *1.3.b* Mutually exclusive scope of articles III and XI **1.4** Abating tariff barriers within the EU and WTO **1.6** Legal versus political considerations *Section II* - The defence of regulatory autonomy in the EU and WTO **2.1** The EU approach to national regulatory autonomy and the free movement of goods *2.1.a* The proportionality test **2.2** National regulatory autonomy and the GATT *2.2.a* Justifying a breach **2.3** Balancing national regulatory autonomy and trade liberalisation **2.4** Final considerations *Section III* – Mutual Recognition Agreements **3.1** Defining mutual recognition as a way out from the “liberalization-domestic regulation” dichotomy and an alternative to litigation **3.2** Relevant WTO rules *3.2.a* In the SPS Agreement *3.2.b* In the TBT Agreement *3.2.c* Preliminary observations concerning the SPS and TBT discipline on mutual recognition **3.3** The evolving EU’s approach to harmonization and mutual recognition **3.4** Mutual Recognition Agreements *3.4.a* The relation between mutual recognition activities and general GATT principles **3.5** Overview of EU’s Mutual Recognition Agreements *3.5.a* Extent of mutual recognition *3.5.b* Basic structure and sectoral coverage **3.6** The EU-US Mutual Recognition Agreement *Concluding remarks*

Section I - National regulatory autonomy as a counterbalance to the liberalisation and integration of marketplaces

1.1 Defining the issue of regulatory autonomy

Leading to closer interdependence during the last decades, recent economic dynamics have also caused policies and regulations once thought of as domestic to become subject to international trade negotiations and rules. One of the very reasons for the creation of the WTO was to extend the domain of trade rules behind the border with a view to ensure that internal regulations, such as health and safety rules, would not become a substitute for tariffs and quotas. Particularly after the conclusion of the Agreements on Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT)

as an integral part of the multilateral regime on trade in goods, the remit of the trade agreements extended beyond trade itself and is currently touching on the core areas of states' regulatory sovereignty.

There is in fact an inevitable trade-off between national regulatory autonomy and market opening, left alone market integration: the stricter the discipline on 'barriers to trade'¹, the greater the danger that perfectly reasonable measures are caught by rules meant to counter disguised protectionist purposes². The interface between trade and domestic policy is therefore necessarily controversial since it results in the imperative to balance sovereignty and liberalisation.

WTO non-discrimination-related principles can be applied to domestic regulations in order to minimize their impact on trade in goods. The basic GATT most-favoured-nation (MFN) principle applies not only to custom duties but also to domestic rules³.

¹ For the purpose of the present analysis, the term 'barrier to trade' will be preferred to 'trade barriers'. The reason lies in that, as it is known, barriers to commercial exchanges can be devised, not only as properly commercial measures, but also as non-commercial (non-trade) ones.

² Holmes, P., Young, A.R., "European lessons for multilateral economic integration: a cautionary tale", in Drabek, Z. (ed.), *Globalisation under Threat: The Stability of Trade Policy and International Agreements*, Cheltenham, Edward Elgar, p. 203-226. See also Holmes, P., "Trade and domestic policies: the European mix", in *Journal of European Public Policy*, vol. 13, n. 6, September 2006, p. 815-831, p. 816.

³ GATT article I extends the scope of the MFN principle 'to all rules and formalities in connection with importation and exportation, and [...] to all matters referred to in paragraphs 2 and 4 of article III'. The object and purpose of GATT article I has been cleared up in *Canada — Autos*. In support of its interpretation of provisions contained therein, the Appellate Body maintained that: "Th[e] object and purpose [of article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."; see Appellate Body Report on *Canada — Autos*, WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, para. 84.

As far as the scope of application of art. I is concerned, still in *Canada — Autos*, the AB reviewed the Panel's finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with art. I:1. The Appellate Body found the prohibition of discrimination under the latter provision to include both *de jure* and *de facto* discrimination, by stating that "In approaching this question, we observe first that the words of article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words '*de jure*' nor '*de facto*' appear in article I:1. Nevertheless, we observe that article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, article I:1 covers also 'in fact', or *de facto*, discrimination. [...] Like the Panel, we cannot accept Canada's argument that article I:1 does not apply to measures which, on their face, are 'originneutral'."; see *Canada — Autos*, above, para. 78. Moreover, in *EC — Bananas III*, in support of the proposition that GATS article II prohibits *de facto* discrimination as well as *de jure* discrimination, the Appellate Body noted that, in past practice, GATT article I applied to *de facto* discrimination. This case concerned the European Communities appeal against the Panel's finding on the GATT compatibility of the EC bananas import regime. The appeal was grounded, *inter alia*, on the consideration that the Panel erred in concluding that the European Communities violated article I:1 by maintaining the so-called activity function rules. Under these rules, importers of bananas from certain countries qualified for allocation of the tariff quota only if they fulfilled requirements which differed from those imposed on importers of bananas from other countries. The Appellate Body stated that "[...] the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term 'advantage' in article I:1 of the GATT 1994 by the panel in *United States — Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the

Applied at the border, the MFN rule allows a WTO member to implement any rule it wishes but requires that, while the content of domestic regulation may discriminate against foreigners, it must treat the latter all in the same fashion, in other words domestic provisions must apply to all foreigners indistinctly. On the other hand, national treatment (NT) requires that, however different national rules and regulations may be from those of the trading partners, they cannot be applied so as to discriminate between domestic and foreign suppliers with a view to affording shelter to national producers vis-à-vis international competitors. Of course, the threat of discriminations is not altogether defused by the NT principle to the extent that, while prohibiting *de iure* (facial) discriminations, such rule cannot counter *de facto* (non-facial) differential treatments. However, if the principle is intended to ban any regulatory difference that in practice makes sales harder for foreigners, it risks becoming potentially intrusive of national sovereignty⁴. This puts the above mentioned trade-off back into the spotlight.

The evolution of the EU was based on different premises in that obstacles to trade are not simply confined to traditional border barriers, such as tariffs or quotas. The founding Treaty recognises the need for harmonisation of national rules where regulatory differences could hinder trade⁵. Therefore, for several decades, a major driving force of the EU has been the attempt to minimize, via a rich legislative activity, the extent to which domestic regulations could be used as a way to hamper the establishment of the internal market⁶. Nevertheless, progress in this direction was and remains slow when the domestic regulations in question are politically sensitive. Moreover, in case of legislative stalemates, the ECJ tended to step in.

The political difficulties of securing agreement, especially under the unanimity requirement, led to the development of the mutual recognition principle⁷. The difficulty with mutual recognition is that, unless full confidence in all partners' regulatory regimens is granted, it can lead to worries about loss of control over what is sold on the domestic market. An obvious compromise is the *new approach* of harmonised minimum standards⁸ and mutual recognition of different rules that conform to these

activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with article I:1 of the GATT 1994."; see Appellate Body Report on *EC — Bananas III*, WT/DS27/AB/R, 25 September 1997, para. 206.

⁴ Holmes, P., *op. cit.*, p. 817.

⁵ See articles 26(1) and 114(1) TFEU.

⁶ Examples of harmonisation are the 'old approach cars' and the 'euro-sausages' Directives.

⁷ ECJ, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon'), judgment of 20 February 1979, [1979] ECR 00649, para 14. The Court thereby states that the sale on the German market of a spirit originating from France could not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules. The ECJ considered that, since the product at stake had been lawfully produced and marketed in one of the Member States (France) and being there no other valid reasons to justify the German trade-restricting measure, the product itself had to be allowed into any other Member State, including Germany.

⁸ Set out in the Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (OJ C 136, 4.6.1985, p. 1), the EU *new approach* consists in the agreement on minimum requirements plus reference to standards. For a comprehensive analysis of the new approach, see further

benchmarks. Nonetheless, even agreement on minimum standards can be hard to achieve where regulatory approaches are fundamentally different⁹.

More recently the pendulum has therefore swung a little in the direction of hesitation towards deregulation both within the EU and externally. From the internal point of view, it is so because more sensitive areas of national sovereignty are involved as a result of the increased degree of sensitiveness of national regulations under “attack”, which depends in turn on the progressive EU enlargement and consequent diversification. The EU has therefore started to question the balance between national regulatory sovereignty and the goal of trade liberalisation within the single market. Consistently with such developments, the ECJ also seems to show greater awareness of national sensitivities.

Externally, the core difference between the EU and the GATT 1947 was that, whilst the latter stressed non-discrimination as the core principle, the EU went further in treating any regulatory difference, even if non-discriminatory, as potential obstacles to trade. Within the European single market even indistinctly applicable measures came to be considered harmful to intra-Community trade when analysed according to an obstacle-oriented approach. However, the Uruguay Round agreements and the way the DSB has interpreted rules contained therein have pushed the WTO closer to the EU approach. This has come about through the introduction of certain specific obligations, notably in the SPS and TBT Agreements. Although not going as far as to require harmonisation, these Agreements have contributed to moving the GATT philosophy from negative integration to WTO more positive integration, while at the same time leaving basically untouched the old rule-making process.

Although the EU single market philosophy has been advocated as a model for the global trading system¹⁰, the transferral of its evolving trends to the WTO is not to be seen without side-effect, particularly insofar as, just as it was the case for the obstacle-oriented approach to the creation of the EU single market, also the multilateral trade regime runs into the ambiguity that even most sensitive barriers to trade have both protections and protective aspects.

If the failure of the EU to secure agreement in the WTO to even start negotiations on all but one of the so-called “Singapore issues”¹¹ reveals the limits of projecting the EU’s

in this Chapter, section III. An example is the Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ L 187, 16.7.1988, p. 1), which set out only the essential safety requirements with regard to toys as adopted by the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (Cenelec) in accordance with Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37). Conformity with harmonised standards so set provided a presumption of conformity with the requirements of Directive 88/378/EEC. Although by July 2013 Directive 88/378/EEC will be entirely repealed by DIRECTIVE 2009/48/EC of 29 June 2009, its above basic principles will be maintained nonetheless.

⁹ Holmes, P., *ibid.*

¹⁰ See in this sense Evans, D., Holmes, P., Rollo, J., Young, A.R., Zahariadis, Y., *Global norms creation and norms competition*, Report for DG Trade, Brussels: European Commission, 2001; Nicolaidis, K., *Mutual recognition of regulatory regimes: some lessons and prospects*, Jean Monnet Working Paper, 1997/07.

¹¹ Named after the 1996 Singapore Ministerial Conference during which they have been inscribed into the

own visions of the link between internal and external policies outside its borders, the global trading system has nonetheless at least recognised that domestic regulation can affect trade. Whilst it has made rules to address the issue, it remains debatable whether these rules are complete and precise. Standing the almost absence of legislative action within the WTO, it has been left to the intervention of the DSB to fill the gaps. However, from the legitimacy viewpoint, the WTO as a whole, including the DSB, lacks the legitimacy to fill the blanks in the same way the ECJ did. This is the reason why leaving it to judges has not depoliticised the issue of the balance between regulatory autonomy and trade liberalisation. Nonetheless, by telling WTO members what they cannot do, the DSB has in practice begun to create case-law to the extent that the indication of prohibitions sometimes narrows down the range of options of what is lawful.

1.2 The distinction between market access and domestic regulation under GATT 1994

Unlike more integrated trade liberalisation schemes such as the EU or the US, the degree of flexibility of trade liberalization under the GATT depends on how measures operating market interventions are classified. In this respect, the most relevant distinction is the one between governmental interventions labelled as “market access restrictions” and those defined as “domestic regulation”. To construe trade-related policies as market access restrictions, whilst they are in fact domestic regulations, has major legal consequences in so far as the GATT provides for different applicable disciplines.

Taking the form of quota or tariffs higher than those foreseen in the relevant schedules of concessions, market access restrictions are in principle prohibited by the GATT regime. In contrast, domestic regulation, such as internal taxes, health standards and safety requirements, is treated with more deference. They are subject to broad regulatory autonomy and result in a violation of GATT norms only when they entail discrimination against imports or when they are deemed to be more trade restrictive than necessary. Depending solely on how a government measure is categorized, the measure at stake may be therefore permitted or prohibited under GATT law.

Notwithstanding these major legal consequences, the distinction between the two categories of measures remains largely blurred¹². The crux of the issue lies precisely in

world trade agenda with the consequent establishment of new working groups, the so-called “Singapore issues” include four subjects: trade and investment, competition policy, transparency in government procurement and trade facilitation, namely the simplification of trade procedures.

¹² Pauwelyn, J., “Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS”, in *World Trade Review*, vol. 4, n. 2, 2005, p. 131-170, p. 132-133. The author also highlights the consequences of such distinction for negotiations, particularly in relation to trade in services. If the scope of market access restrictions is defined too broadly, as Pauwelyn maintains it has been the case in *US-Gambling (US-Measures affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005)*, scores of domestic regulations would already be prohibited and the ongoing negotiations would lose much of their purpose. Although trade in services is not encompassed in the scope of the present work, it is nonetheless worth noting that similar consequences might equally affect negotiations relating to trade in goods.

the criteria to operate the distinction between these two sets of measures. The importance of a correct classification of trade policy instruments under GATT law lies in the wide spectrum of market interventions, ranging from health to national security, whose WTO-compatibility depends precisely on such distinction. Misinterpreting and misapplying such distinction entails the risk that GATT violations are established where the drafters of the Agreement intended to endow members of broad regulatory autonomy. In this respect, some have observed that a domestic regulation should not be regarded as a market access restriction simply because it has the effect of banning certain imports¹³, on the ground that to do otherwise risks seriously to undermine the regulatory autonomy of WTO members beyond the intentions of the drafters of the Agreements¹⁴.

1.2.a Measures restricting market access versus domestic regulations under the GATT

Under the GATT the crucial dividing line amongst policy instruments that have trade-restrictive potential is between, on the one hand, measures imposed at the border or upon importation and, on the other, measures affecting imports only after they have cleared customs. The first – usually referred to as “border measures” or “market access restrictions” – are covered by GATT articles II and XI, addressing respectively custom duties and other duties or charges imposed on or in connection with importation¹⁵ and quantitative import prohibitions or restrictions¹⁶. The second – commonly referred to as “behind the border measures” or “domestic regulation” – are dealt with in article III addressing internal taxation (such as VAT or sale taxes) and other internal regulations (such as safety requirements or sales regulations)¹⁷.

When a measure is found to be a border measure subject to art. XI, it is *prima facie* prohibited whereas, when it is qualified as a domestic regulation under art. III, it can

¹³ This coincides with the ECJ obstacle-oriented approach in the context of the single market.

¹⁴ Pauwelyn, J., *op. cit.*, p. 133.

¹⁵ GATT art. II:1(b) provides that “The [...] products of territories of other contracting parties, shall [...] be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation [...]”. Such exemptions apply to product-lines that are enlisted, and under the conditions specified, in the country-specific schedules of concessions, which are disciplined by GATT art. II:1(a).

¹⁶ GATT art. XI:1 provides that “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”.

¹⁷ GATT art. III:1 and 2 respectively state that “1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. [...] 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product”.

only be found afoul of GATT rules when it is discriminatory¹⁸. By this distinction GATT parties meant to spare their sovereign prerogative to autonomously set domestic regulation, on the sole condition that such regulation does not favour domestic products over imports. Besides, as it is known, violations of both XI and III can be justified under specific GATT exceptions. Significantly though, the list of exceptions available under art. XI is longer than the one under art. III. The former include in fact not only general and security exceptions, respectively under art. XX and XXI, but also those enlisted in XI:2, those related to the safeguard of the balance of payments under art. XII and exceptions referring to discriminatory and non-discriminatory quotas under artt. XIII-XIV. In this respect, it has been maintained that to construe a measure as an art. XI restriction not only benefits the complainant insofar as the more sovereignty-deferent art. III does not apply. It also offers more leeway for the party enacting the measure in that, although an art. XI measure is *prima facie* prohibited, the list of potential justifications which are applicable is broader¹⁹.

The distinction operated within the GATT between art. XI and art. III measures is grounded on both economic and political considerations. In economic terms, border or market access measures by definition only apply to imports and can therefore be presumed to be imposed for protectionist purposes. The economic wastefulness of protectionist measures²⁰ is a strong incentive to prohibit them, as in the case of quantitative restrictions such as quotas, or at least to gradually reduce them, as it is the case for tariff barriers which, according to art. II, are subject to progressive reduction according to the relevant schedules of concessions. On the other hand, domestic regulations most often serve legitimate, non-protectionist purposes, such as consumer protection, safety or health. As a result, in the midst of the GATT drafting it appeared convenient to foresee the overruling of such measures only when they are proven to be protectionist, notably when they discriminate against imports by imposing so-called deadweight costs on foreign firms that are not equally imposed on domestic firms²¹.

As for the political reasons, whilst most border measures serve purely economic interests, in particular the protection of national industries, much domestic regulation goes to the social and political core of a country's sovereignty, addressing sensitive areas such as health and consumer protection, environmental concerns and income redistribution through taxation. Consequently, WTO members felt more at ease committing to the elimination or reduction of tariffs and quantitative import restrictions than tying their hands in the politically more sensitive field of domestic regulation. As market access restrictions can be seen as pure trade measures, they fall squarely within the mandate of the GATT remit. The WTO, in turn, has little to say about how nations assess domestic market failure as long as they do so in a non-discriminatory fashion²².

¹⁸ Discrimination is the final implication of affording protection to domestic products, as of art. III:1.

¹⁹ Pauwelyn, *op. cit.*, p. 134.

²⁰ International economic theory shows that protectionism is harmful to both foreign producers, which are prevented from selling on stranger market, and domestic consumers, whose option range both in terms of products' features and prices is narrowed to domestically manufactured products.

²¹ Pauwelyn, *op. cit.*, p. 134-135.

²² *Ibid.*

Only with the conclusion of the 1994 WTO Agreements on SPS and TBT did the multilateral trade discipline on domestic regulation move beyond the non-discrimination rule, going even further than the EU discipline on *de facto* discrimination. Under the SPS and TBT Agreements, even a measure that is not discriminatory, that is a measure that treats imports and domestic products alike both *de iure* and *de facto*, can still be found WTO-incompatible if it is, for example, not based on a risk assessment²³ or if it is more trade-restrictive than necessary to protect human health²⁴ or to fulfil any other legitimate, non-protectionist objective²⁵. However, as GATT continues to apply in tandem with SPS and TBT Agreements and enjoys a broader scope than the latter, the distinction between market access and domestic regulation remains crucial²⁶.

1.2.b Comparison with the EU Treaty and the US Dormant Commerce Clause

The GATT distinction between market access and domestic regulation stands in sharp contrast to the more uniform liberalization of trade in farther integrated regimes such as the EU and the United States.

The TFEU does not have a separate provision dealing with domestic regulation which is be comparable to GATT art. III:4. In contrast to GATT art. II, which only prohibits tariffs that exceed a country's bindings, the TFEU bans customs duties and "all changes having equivalent effect" altogether²⁷ so that clearing customs at the EU external border means that imported manufactures are put into free circulation without, in principle, any further formality to be carried out within the territory of the importing Member State. The Treaty also prohibits the discrimination of imports, both direct and indirect, through internal taxation²⁸. However, it lumps together the distinction made in the GATT between quantitative import restrictions (art. XI) and domestic regulations affecting trade (art. III). It does so through the formula of art. 34 TFEU that prohibits "quantitative restrictions on imports and all measures having equivalent effect". The latter notion has been broadly interpreted and the ECJ crystalized such interpretation into a formula including "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"²⁹. The *Dassonville* formula therefore came to include also trade-restricting domestic regulation into the prohibition laid down in art. 34 TFEU.

²³ Article 5.1 SPS.

²⁴ Article 5.6 SPS.

²⁵ Article 2.2 TBT.

²⁶ Pauwelyn, J., "Cross-agreement complaints before the Appellate Body: a case study of the EC-Asbestos dispute", in *World Trade Review*, vol. 1, n. 1, 2002, p. 63–87, p. 63.

²⁷ Art. 34 TFEU, under which "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

²⁸ Art. 110 TFEU states that "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products".

²⁹ ECJ, Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville*, judgment of 11 July 1974, [1974] ECR 00837, pnt. 5.

Similarly, the so-called ‘Dormant Commerce Clause’ in the US Constitution³⁰ can, in principle, cover all state measures that hamper the flow of interstate commerce, whether they take the form of border measures or internal regulation. If the measure facially discriminates against interstate commerce, it is deemed ‘virtually *per se* invalid’³¹. However, even when there is no facial discrimination, the measure can be struck down if the burden imposed on inter-state commerce is clearly excessive in relation to the putative local benefit³².

The reason why the EU and US internal market laws do not give much weight to the difference between market access and domestic regulations lies in that these are much more integrated systems than the WTO. In those contexts, the remit to strike down domestic regulation based on its trade effect is less controversial precisely because, contrary to the WTO, both the EU and the US founding norms include the harmonization of domestic regulation amongst the tasks they are entrusted with.

1.3 Interaction between GATT market access and domestic regulation disciplines

Since the qualification of a measure as either a market access restriction or a domestic regulation can determine its consistency with WTO rules, it is of utmost importance to circumscribe the scope of the two relevant sets of GATT provisions. Whereas there is no doubt that certain measures belong to one or the other of the two above categories³³, for a considerable number of trade instruments classification difficulties do arise³⁴.

In order to overcome such difficulties, issues of interaction between GATT articles XI and III are to be analysed.

³⁰ US Constitution article I, § 8, clause 3, which expressly grants the Congress the power to regulate commerce among the several states.

³¹ *Oregon Waste Sys., Inc. v. Dep’t of Environmental Quality*, 511 US 93, 99 (1994), as reported by Pauwelyn, J., “Rien ne Va Plus?”, *op. cit.*, p. 140.

³² *Pike v. Bruce Church*, 397 US at 142. Because of their broad coverage – including market access restrictions and domestic regulation, discriminatory and non-discriminatory measures – the exceptions available under EU and US law to justify facially *prima facie* measures are much broader than those in the exhaustive lists of GATT articles XX and XXI. In the EU, measures that are not discriminatory do not violate art. 30 TFEU if they are necessary in order to satisfy mandatory requirements, essentially any legitimate policy objective, under the sole condition of proportionality. Case law under the US Dormant Clause refers to any legitimate local public interest. The additional disciplines for domestic regulation under the TBT Agreement have an equally open list of justifiable policy objectives (TBT article 2.2). Crucially, however, if WTO panels were to make domestic regulation subject to the *per se* prohibition of quantitative restriction in GATT article XI, the limited list of justifiable policy objectives would be vastly inappropriate, much more so than it currently is. Moreover, unlike the ECJ or the US Supreme Court, the WTO Appellate Body would find particularly hard to widen the list of article XX exceptions though case-law without legislative input from WTO members themselves. This makes the scope of available exceptions another important factor to consider before blurring the line between market access and domestic regulation.

³³ As it is the case for custom duties or value-added tax on sold goods, of which specific mention is made respectively in GATT art. II and III:2.

³⁴ It is worth noting that, to further complicate the picture, one and the same measure may fall under both GATT and GATS and be classified differently under each of those Agreements. See in this regard, Pauwelyn, J., *Conflict of Norms in Public International Law*, Cambridge University Press, 2003, p. 399-405.

1.3.a Domestic regulation that applies to both domestic and imported products is subject to GATT article III

The relationship between GATT articles XI and III is partially clarified by the *Ad Note* to the latter provision, under which:

‘Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 *which applies to an imported product and to the like domestic product* and is collected or enforced in the case of the imported product *at the time or point of importation*, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.’³⁵

The Note clarifies that even a trade restrictive measure that is applied at the time or point of importation and which could therefore be classified as a border measure subject to art. XI, must nonetheless be analysed as a domestic regulation under art. III whenever the measure is designed to be applied to both imports and *like* domestic products. This means that, for measures applied to both imports and domestic manufactures³⁶, art. III is granted preference over art. XI.

The rationale is that the objectives behind domestic regulation apply to all products put on the market, be they domestically produced or imported. The sole fact that, in relation to imports, the regulation is enforced when the manufacture crosses the border, which is the only or most efficient time to do so, should not transform the domestic regulation as it applied to imports into a border measure that under art. XI is, in principle, banned. Otherwise, all domestic regulations, when applied at the border, risk being transformed into prohibited market access restrictions, irrespectively of whether they do or do not pursue protectionist purposes.

In other words, the mere fact that a qualitative measure also has the effect of restricting the quantity of imports does not make that measure a quantitative import restriction. If the measure at stake is to be applied indistinctly, it would rather be subject to art. III GATT and, consequently, it can be found in breach of the latter provision only if applied so as to afford protection to domestic production. Because of the *Ad Note* to art. III, the prohibition of art. XI only prevents quantitative restrictions which are solely imposed on imports. Allowing for a broader application of such prohibition, including to domestic regulations on the sole ground that they have the effect of restricting imports, would be out of kilter with the presumption in favour of the regulatory autonomy of the members contained in art. III GATT and would deprive the latter of its *effet utile*³⁷.

1.3.b Mutually exclusive scope of articles III and XI

³⁵ Text of *Ad Note* to GATT article III, emphasis is added.

³⁶ In the ECJ’s jargon these would be indistinctly applicable measures.

³⁷ Pauwelyn, J., “Rien ne Va Plus?”, *op. cit.*, p. 143-144.

Although the *Ad Note* does not explicitly state so, it not only gives way to the application of art. III to measures in relation to which art. XI could be deemed relevant in the first place³⁸. Pauwelyn asserts that, by implication, it must be read as also doing so at the exclusion of art. XI³⁹. In other words, when the *Ad Note* applies to the benefit of art. III application, the measure at issue cannot be at the same time also subject to art. XI. In this sense, the scope of application of articles III and XI does not overlap. Quite to the contrary, at least to this extent, it is mutually exclusive in favour of art. III⁴⁰.

When a trade-related instrument can be qualified as a domestic regulation in the sense of art. III and is non-discriminatory both *de jure* and *de facto*, to find that it violates art. XI simply because it has the effect of restricting imports (albeit as much as domestic products) would indeed nullify the basic distinction made in GATT between border measures, which are strictly regulated, and domestic regulation, where broad regulatory autonomy was reserved to WTO members.

1.4 Abating tariff barriers within the EU and WTO

Non-tariff barriers to trade can disguise protectionist policies. Historically, this label was applied to manifestly discriminatory regulations, as for instance the 1980 Japanese ban on the imports of foreign skis, which was based on the alleged peculiarity of the Japanese snow. In recent years it has become clear that the biggest problems do not lie in the realm of blatantly protectionist measures but rather in measures having both legitimate and protectionist effects. Although not conceived with a view to restricting trade and thereby to protecting local producers at the expenses of consumers, such domestic measures may nonetheless adversely affect trade. These negative side-effects caused domestic regulation to be a concern whom the EU has been struggling against since the 1960s and the multilateral trade system has been addressing since 1995, namely with the entry into force of the SPS and TBT Agreements.

Any product standard or regulation may be a barrier to trade if it is set in such a way as to be easier for local firms to comply with than for foreign ones. In order to avoid manifest breaches of the national treatment principle, it is common for governments to avoid *explicit* discrimination by adopting rules that are *in practice* easier for domestic firms to comply with. The art of non-tariff protectionism lies in setting regulations that are not *de jure* discriminatory but which nevertheless make it harder for foreign

³⁸ On the ground that the measure itself is enforced at the time or point of importation.

³⁹ Pauwelyn, J., “Rien ne Va Plus?”, *op. cit.*, p. 145 and 168.

⁴⁰ This reading of the interaction between the two GATT provisions would apply irrespectively of whether the measure at stake relates to the physical characteristics of the product or its process or production method, as demonstrated by the GATT’s Council putting aside the *Tuna-Dolphins* reports (*United States – Restrictions on Imports of Tuna*, DS21/R, unadopted, 3 September 1991 and DS29/R, unadopted, 16 June 1994). In that case, the panels found that the Ad Note to article III, and hence article III itself, only applies to domestic measures that regulate the physical characteristics of the restricted product as such; in view of those panels, the Ad Note does not apply however to measures that regulate the way in which the product was processed or produced. In fact, the AB, in particular in its report on *EC-Asbestos*, has made it clear that even regulations that distinguish between products based on factors other than physical characteristics can be justified under art. III (*EC-Asbestos*, WT/DS135/AB/R, 12 March 2001, para. 101).

substitutes to compete or even to access the alien market. Thus the crux of the issue lies in the definition of ‘likeness’ and in the exceptions to the non-discrimination rule.

In order to ensure the effectiveness of a ban on discrimination, which can be described as the lowest degree of impingement on national regulatory autonomy, three things are required: first, a body that can decide what are like products and if they have been treated differently; second, a body that can judge whether there is a legitimate reason for such discrimination; third, a mechanism that can enforce its judgments. Before 1995, the GATT was very limited in its capacity to enforce anti-discrimination rules since the adoption of panel decisions was subject to the consensus rule and, in any case, there was no mechanism to ensure compliance. The GATT system had rules that impinged on national sovereignty, but it had no credible means of enforcing those rules⁴¹.

Quite to the contrary, the Rome Treaty endowed the Community with more effective means to deal with technical barriers to trade in goods, in terms of both legislative harmonization and dispute adjudication⁴². Within the single market, the European Commission and the ECJ are able to assess the discriminatory character of Member States’ measures and to possibly impose a tougher test than discrimination as such. The distinction between technical standards, technical regulation and conformity assessment is crucial for understanding the EU assault on technical barriers to trade in goods in the making of the single market as well as, more generally, the issue of non-tariff barriers resulting from domestic regulations.

Technical standards are in principle simply standardized technical specifications and are intended to facilitate business inasmuch as divergences in technical standards may require recognition procedures and therefore slow down commercial exchanges. In fact, since adherence to standardized technical specifications by producers is generally voluntary, standards only become a trade problem when they are associated with some form of binding compliance requirement in the form of regulations. Regulations may specify certain testing and certification procedures to prove conformity with the mandated standards, which might be costly. It is sometimes the case that even after agreement has been reached on standards, testing and certification procedures generate further negotiation problems⁴³.

In the EU, the original impetus for the link between domestic regulation and trade policy came via the issue of technical standards and regulation for trade in goods. Designed to cope with the traditional difficulties in harmonizing regulations, the EU ‘new approach’ created a presumption that goods would be acceptable throughout the EU if they conformed to standards that incorporated politically agreed objectives⁴⁴. This

⁴¹ Holmes, P., “Trade and ‘domestic’ policies”, *op. cit.*, p. 820.

⁴² Such means include judicially developed EU law fundamental principles such as supremacy and direct effect, in addition to more single market-related ones. Moreover, at the decision-making end of the governance spectrum, by exercising its harmonisation powers, the Council has the capacity to fill the legal gap that may arise if national measures are struck down, and perhaps more importantly in cases where a national law is held valid in the absence of EU legislation, notwithstanding its non-sizeable negative potential upon the single market.

⁴³ Holmes, P., *op. cit.*, p. 821.

⁴⁴ Pelkmans, J., *Mutual Recognition in Goods and Services: An Economic Perspective*, ENEPRI Working Paper n. 16, 2003.

lightened the burden on the executive/legislature and divided responsibility between the political and technical authorities. Reference to standards meant that technicalities did not have to be discussed in political *fora* and the European standards bodies did not have the task of drawing up technical specifications, also referred to as ‘harmonized standards’, while at the same time meeting the essential requirements of political directives.

The WTO as an organization, however, could not possibly be a legislative or technical body that decided on either technical matters or on social values that should underlie the former. Hence the simple solution of broadly laying down principles which should govern the relationship between national rules and international standards within the WTO, as in the TBT and SPS Agreements. If products are made to standards emanating from recognized international standard bodies, there is a “rebuttable presumption”⁴⁵ that such goods are suitable for sale in all WTO members. Furthermore, WTO members are requested to base their regulations on such standards, albeit with certain qualifications. Nonetheless, members of the WTO do enjoy some right – whose boundaries are still quite uncertain – to use different standards from those set by international standard bodies.

However, WTO members are freer than EU Member States to choose independently what objectives they seek to achieve. In the EU, in those fields where no harmonisation has yet occurred, the ECJ has the sole authority to assess whether exceptional circumstances allow for departures from the EU single market discipline. The freedom of manoeuvre with regard to regulatory objectives embedded in WTO rules represents precisely the leeway used by the Union – just as by all other members – within the international trade regime.

The TBT and SPS Agreements require that international standards must be used *where possible*. The SPS Agreement is somewhat more specific in stating that WTO members may have a different base for their regulations, if they have scientific evidence to show that a more restrictive standard or regulation can increase the level of food safety above that implied by international standards⁴⁶. The TBT Agreement is less precise in stating

⁴⁵ Rebuttable presumptions of compatibility of domestic regulation with WTO law are embedded in TBT article 2.5, according to which “Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 [such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.], and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade”. The same presumption is made by SPS article 3.2, which states that “Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”

⁴⁶ SPS article 3.3 allows “Members [to] introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of article 5”. A note to this provision clarifies that “For the purposes of paragraph 3 of article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or

that members shall base regulations on international standards unless this is inappropriate⁴⁷. The lack of accuracy affecting these Agreements lies precisely in that they leave the question open as to what is inappropriate, which ultimately invests the Dispute Settlement Body of the responsibility to decide on the adequacy of international standards to achieve national objectives, which are in turn *per se* unquestionable.

The structure of these agreements clearly parallels the EU regime and its exceptions as laid down articles 34 and 36 TFEU⁴⁸ on disciplines and exceptions. However, as it has been underlined several times, differences between the EU and the WTO are more conspicuous than similarities. In addition to the very nature of the obligation and to the burden of proof, which in the WTO context lies on the member challenging the regulation, one of the most remarkable differences is the nature of standard setting procedures.

Within the EU, the Council of Ministers can set the regulatory objectives before leaving the technical issues to national standards agencies and bodies such as the European Committee for Standardization (CEN) or the European Committee for Electrotechnical Standards (CENELEC). These are private bodies, but they are subject to political and legal pressures from within the EU. Thus EU and national standards bodies have reasonably effective representation from consumer groups and their deliberations can be monitored⁴⁹.

The WTO Agreements recognize the right of certain international standards bodies to set standards, which WTO members are enjoined to accept. The food standards body, the *Codex Alimentarius Commission*, is an agency of the United Nations' Food and Agriculture Organization (FAO) and of the World Health Organization (WHO) and has a formal consumer accreditation procedure. The international product standard bodies – the International Organization for Standards (ISO) and the International Electrical Commission (IEC) – are international non-governmental organizations answerable only to their members, the national standards bodies, but not to national governments. In all cases national representation is likely to be dominated by producers interests. The ISO has an active consumer consultative body, the ISO Consumer Policy Committee (COPOLCO), but consumer representatives have no right of access to national delegations participating in stakeholder meetings. Also, the policy-setting and governance bodies of the ISO are closed to the public. The IEC Council and Boards are equally closed, documents are not publicly available and there is no specific provision or consumer participation. This makes WTO standard setting procedures less transparent than EU ones.

phytosanitary protection”.

⁴⁷ As far as the TBT Agreement is concerned, article 2.4 thereof requires members to use relevant international standards as a basis for their technical regulations “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued”.

⁴⁸ Article 34 forbids all quantitative restrictions on trade between member states and ‘measure having equivalent effect’, i.e. any domestic regulation that restrict trade. Article 36 however provides a brief list of exceptions which may be invoked to justify such measures as long as they are not ‘arbitrary discrimination or a disguised restriction to trade’.

⁴⁹ Holmes, P., *op. cit.*, p. 822.

Standards bodies cannot make law for their members⁵⁰, nor can the WTO directly make laws or set standards. As mentioned, however, the principle of rebuttable presumption creates a curious system under which WTO rules give implicit legislative power to standard bodies, without there being any intermediary political decision-making system.

1.5 Legal versus political considerations

A decision-making process which is arguably more integrated than the WTO intergovernmental one has not awarded the Union an infallible capacity to resolve all of its conflicts over trade and regulation by political means. Quite to the contrary and as it will be shown in section II, for many years it was the ECJ, rather than the Commission or the Council, to set the agenda in determining the balance between market opening and national regulatory sovereignty. A similar process can be observed within the WTO, where the constraints of unanimity have been even tighter than in the early years of the EU⁵¹, but where a powerful DSB has sometimes been able to act in the absence of a political consensus, with the risk that the judicial process be itself politicised. Thus, in both the EU and WTO, clarification of the rules has come about as a result of litigation, namely economic agents or other governments challenging alleged trade-restricting measures before the competent judicial authorities⁵².

The process of European integration was strongly affected by the ECJ's 1979 *Cassis de Dijon* judgment⁵³, which sorted out two problems. First, the political, legislative process to remove national rules that were directly or indirectly discriminatory against foreign goods was excessively slow. So there was a need for something like mutual recognition to accelerate the creation of a single market in goods. Moreover, there was a need for a broader class of legitimate exceptions to the sweeping ban on all trade-restricting measures as art. 30 TCE (now art. 36 TFEU), drafted in 1957 did, not include a number of important public policy objectives, such as protecting consumer health and the environment⁵⁴.

The ECJ developed an 'obstacle-based' approach as opposed to the 'discrimination-based' one⁵⁵. Accordingly, *any* differences in regulations, even if facially non-discriminatory, may in fact constitute obstacles to trade. In a series of judgements the ECJ thus created a very fine net that potentially catches any domestic measure by assessing, first, if it affects trade (whether in a discriminatory fashion or not) and then, in case hindrance is proven, whether the trade-restricting measure can be justified. The Court put the onus on the Member States adopting the measure to show that, where

⁵⁰ *Ibid.*

⁵¹ The difficulties linked to the WTO procedural requirements add to the incapacity of the Uruguay Round negotiators to decide on the relationship between trade liberalisation and regulatory autonomy in the first place.

⁵² Shaffer, G., "What's new in EU trade dispute settlement? Judicialization, public-private networks and the WTO legal order", in Peterson, J., Young, R.Y. (guest eds.), *The European Union and the new trade politics*, special issue of *Journal of European Public Policy*, vol. 13, n. 6, 2006, p. 815 ff.

⁵³ ECJ, Case 120/78, above.

⁵⁴ Weiler, J.J.H., "The constitution of the common marketplace", in Craig, P., de Búrca, G. (eds.), *The Evolution of EU Law*, Oxford: OUP, 1999, p. 349-376.

⁵⁵ *Ibid.*

differences in regulations could obstruct trade, there is a good reason for national differences. If the ECJ upholds the national government's reason, because the EU has a harmonising agenda, it creates presumption for some need of harmonisation⁵⁶, i.e. devising a common solution to the problem that the national policy addresses⁵⁷.

The most relevant element of the ECJ's approach is, however, the formulation of the mutual recognition principle. However, while mutual recognition was an intellectual breakthrough, in practice it was a market failure because, in order for the common market to be created, there had to be a period during which the ECJ judged 'guilty till proved innocent' every national measure capable of interfering with trade⁵⁸. Weiler considers that this tough approach has largely done its job. In fact, more recently, the ECJ, most notably in the *Keck* case⁵⁹, has shown greater acceptance of national rules even if they did create obstacles to trade.

Weiler draws some sharable conclusions concerning similarities between the evolution of obligations and exceptions in the EU and in the WTO, although there are also major differences. The GATT's approach to policy measures was effectively based on the idea of non-discrimination (art. III), which does not require rules to be the same everywhere, but merely apply equally to domestic and foreign goods. As the WTO has developed, however, we have witnessed a shift towards an 'obstacle-based' approach. Elements of the Uruguay Round (the SPS Agreement, for instance) go beyond the requirement of non-discrimination. Moreover, thank to the reformed DSM, it has become possible to effectively challenge a variety of domestic rules on the grounds that they amount to obstacles, and the AB has proven its inclination to undertake this kind of judicial review of domestic measures.

Yet there is no place in the WTO for a legislative harmonisation process other than recognition of the work of international standards bodies. If a measure is acceptable under GATT's general exception clause contained in art. XX, the challenge against it must end there. Legitimate national rules which fragment markets must continue to be allowed even if they obstruct trade because the WTO does not legislate common rules – although its SPS and TBT provisions require acceptance of international standards. The absence of a legislative follow-up to a judicial decision on a national measure is the key difference between the GATT and the EU regime.

Until recently, where there was a legitimate justification for their implementation, the AB has been quite cautious in establishing the unlawfulness of regulatory measures which represented actual barriers to trade. In the *Asbestos* case, the Appellate Body deliberately stepped back from a ruling by the Panel that construed a wide interpretation of a 'like-product' which, if accepted, would have caused a very broad class of domestic regulations to be judged as trade barriers, hence subject to scrutiny as to whether they fell under the legitimate exceptions clause. In the *Beef Hormones* case, the AB struck

⁵⁶ *Ibid.*

⁵⁷ Howse, R., Nicolaïdis, K., "Legitimacy and global governance: why constitutionalizing the WTO is a step too far", in Porter, R., et al. (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Washington DC: Brookings Institution Press, 2001, p. 227-252.

⁵⁸ Weiler, *op. cit.*, p. 371.

⁵⁹ ECJ, Joined cases C-267/91 e C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, judgment of 24 November 1993, [1993] ECR I-0609.

down the EU's ban on the sale of all beef (wherever produced) that had been treated with certain growth-promoting hormones, which however had been approved earlier by the *Codex Alimentarius*. The AB, however, stressed that the EU had the right to set tougher safety standards than the *Codex* one. The crux of the legal dispute was whether, as prescribed by SPS rules, the EU had any evidence that food safety was improved by the ban on such hormones. Precisely on this ground, namely the lack of any scientific evidence supporting the EU thesis, the AB based the establishment of the SPS breach by the Union.

The jurisprudence of the AB has been evolving, particularly in the way the recent case law subtly differs as between the more general case of rules and exceptions in art. III and XX, and the slightly different structures of the TBT and SPS Agreements that apply to measures that contain no explicit discrimination elements. The AB has been gradually clarifying the 'gateways' that allow countries to set regulations which are not based on international standards or which otherwise create barriers to trade in the name of domestic regulatory aims. For example, the SPS Agreement provides that food standards that are different from those agreed by the *Codex* may be justified by showing that there is some scientific evidence that their use will reduce risk to health, in which case they are acceptable even if they restrict trade. The TBT Agreement lays down certain general procedural requirements for rules deemed to fall under its scope. When applying such rules, the AB has in fact shown sensitiveness to national regulatory objectives⁶⁰. Where it is recognised that there is a legitimate goal, the AB has never asked a member state to trade off trade restrictiveness against effectiveness of a measure. This contrasts with the ECJ's use of proportionality. Yet the AB is on occasion called upon to decide what constitutes a 'legitimate' regulatory goal in terms of what is permitted under the exception clauses of GATT art. XX and of the TBT and SPS Agreements.

Many observers have argued that the AB had broadly got it right in that it has allowed states fairly generous leeway to derogate from the obligations to base their domestic regulations on international standards, when they can show that they have a moderately reasonable case for doing so and have used rational procedures for setting the rules. But where a country has not merely different but also discriminatory rules, a tougher standard of justification must be met.

The WTO jurisprudence letting down domestic regulation have been said to demonstrate the degree to which trade law is about reinforcing the commercial logic at the expenses of the wider socio-political and cultural logics. Such a stance however overlooks the Panels and AB's stress on the need that trade law does not stand alone and must, instead, be read in the context of public international law in general and that domestic non-trade concerns must be duly taken into account when applying it. They have carefully explored the escape clauses allowing trade restrictive measures to be

⁶⁰ Marceau. G., Trachtman, J.P., "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A map of the World Trade Organisation Law of Domestic Regulation of Goods", in *Journal of World Trade*, vol. 35, n. 5, 2002, p. 811-881.

adopted for domestic regulatory purposes. The question then is: are these escape clauses adequate to afford the flexibility needed to cope with the overlapping scope and potentially contradictory effects of national regulatory autonomy and international trade law?

In 2004, then Trade Commissioner and now WTO Director-General, Pascal Lamy, expressed concerns that despite the deference the AB was consistently showing to legitimate national objectives, problems could still arise. He called for a ‘safeguard clause’ whereby states could introduce regulations which have no objective basis but which reflect powerful, albeit sometimes irrational, public concerns (‘collective preferences’). The proposed safeguard clause would encompass two provisions: first, it would be necessary to demonstrate that there really was a coherent underlying social demand and that the measure adopted was consistent with that demand in order to avoid that legal responses misrepresent the social demand; second, it would be necessary to demonstrate that the measures adopted did not restrict trade more than other measures capable of satisfying the same underlying demand.

However laudable, this proposal has been soon labelled as unrealistic at least in two respects. On the one hand, the consequence of the application of the first provision would be to entrust the WTO judicature with the assessment of the internal political legitimacy of the social demand at stake, which significantly differs from its present mandate to assess national measures in the light of WTO provisions. Furthermore, more generally, a safeguard clause so designed would open the Pandora’s box of – often ill-founded – public concerns, what would hamper the functionality of rules such as the one requiring scientific evidence in view of the broader objective to make international trade subject to the rule of law.

There are three ways to deal with the tension between trade and regulatory objectives: negotiation, legislation and litigation. The failure of the EU to secure agreement in the WTO to even start negotiations on all but one of the ‘Singapore issues’ indicates either very poor bargaining tactics on the part of the EU, or the limits of projecting the EU’s own vision of the link between internal and external policies to the rest of the world. There have been very few decisions in the WTO that correspond to legislative action thus leading to a heavy reliance on case-law. Signalling problems of global regulatory governance without being able to resolve them, the AB’s evolving jurisprudence is confronted with the manifest unwillingness of the WTO members to sign new commitments that explicitly constrain domestic regulations which might affect trade. These ‘new trade issues’ are an unavoidable part of the new trade diplomacy. Moreover, leaving it to judges has not depoliticised the issue.

The global trading system has recognised that domestic regulations can affect trade. It has designed rules to address this but they are incomplete and imprecise, hence the intervention of the DSB. However, the latter lacks the political legitimacy to fill the gap just the way the ECJ did. The DSB case-law so far only tells countries what not to do, but sometimes by implication this narrows down the range of options of what can be done. As it will be shown in Chapter II, the EU has invested much in WTO litigations

concerning non-tariff barriers to trade with a view to safeguarding its regulatory autonomy.

Section II - The defence of regulatory autonomy in the EU and WTO

As discussed in the previous section, in order to define and defend the limits of national regulatory autonomy the key question is how to distinguish between unlawful barriers to trade and legitimate national regulation. Such distinction has preoccupied the EU for decades, particularly since the *Dassonville* case in 1974. It is an issue which has also posed significant challenges within the WTO, manifesting itself under GATT law in, *inter alia*, *Tuna-Dolphin*, *Us-Shrimp* and *Brazil-Retreated Tyres*. However, the EU and the WTO have so far applied different approaches, which arguably represent the outcome of different integration profiles. Reviewing the latter will shed light on the reason why drawing the line between legitimate national regulation and economic liberalisation may not always be a smooth operation.

2.1 The EU approach to national regulatory autonomy and the free movement of goods

The free movement of goods and services in the EU is carried out with a view to the creation of an ‘internal market’, described in art. 26 TFEU. The key provision concerning free movement of goods and national regulations are artt. 34 and 36 TFEU (ex artt. 28 and 30). art. 34 prohibits national regulations which imposes quantitative restrictions on imports and measures having equivalent effect to the former. Art. 36 provides an exhaustive list of grounds of exceptions, on the basis of which, subject to the requirement of proportionality, a Member State can justify a restricting measure.

Whereas defining ‘quantitative restrictions’ has proved relatively straightforward, the definition of ‘measures having equivalent effect’ became crucial for determining the scope of art. 34 TFEU. The broad definition given in *Dassonville* came to include national regulatory measures that treat domestically produced goods and imported products in the same way. Underlying this is the recognition that even indistinctly applicable measures, i.e. those applying without distinction to both domestically produced and imported goods, may hinder imports. This indicates that art. 34 TFEU provides for the removal not just of discriminatory measures but more generally of any measure potentially posing an obstacle to trade which cannot be justified, i.e. both distinctly and indistinctly applicable measures. However, that any measure which may potentially hinder trade is within the scope of art. 34 TFEU, and therefore *prima facie* prohibited, poses serious questions as to the remaining extent of Member States’ regulatory autonomy.

A mitigation of *Dassonville* wide reach, the *Cassis de Dijon* ruling reinforced national regulatory autonomy through the introduction of the ‘rule of reason’ and of the concept of mandatory requirements. Under the rule of reason, where there is no Union

harmonisation, a Member State can set its own regulatory standards, protecting interests of particular concern (mandatory requirements). The onus falls upon the regulating state to demonstrate both that the particular measure is introduced in pursuit of a mandatory requirement and that it is a proportionate means by which to achieve that end. If a measure can be justified with reference to a mandatory requirement, it falls outside the scope of art. 34 TFEU. Thus, there is no breach and no question of justification by reference to art. 36 derogations. If the measure cannot be justified by a mandatory requirement, it would breach art. 34 unless it can be justified under art. 36 TFEU. The rule of reason is itself balanced by the principle of mutual recognition: that a product which is lawfully manufactured and marketed in one Member State should be accepted and permitted to be marketed in all other Member States.

Significantly, in introducing the concept of mandatory requirement the Court distinguished the treatment of distinctly (overtly discriminatory) and indistinctly (facially neutral) applicable measures. While the former could only be justified by reference to the derogations listed in art. 36, the latter are justifiable by a broader range of objectives (namely derogations plus mandatory requirements), reflecting individual States' priorities. In developing the rule of reason and the concept of mandatory requirements the Court reinforced national regulatory autonomy.

Following the *Dassonville* and *Cassis* rulings, the scope of art. 34 TFEU remained very wide and, in a number of cases, traders invoked it in order to challenge domestic measures of market regulation which only had an indirect effect of reducing imports. A classic example concerns the English Sunday Trading series of cases. In accepting the premise that measures such as a ban on Sunday opening were within the scope of art. 34, the Court permitted the latter provision to be used to challenge national regulatory legislation with a view at enhancing access to other member states' marketplaces rather than specifically as a tool of market integration.

In *Keck*, however, frustrated with 'the increasing tendency of traders to invoke article 30 of the Treaty (now art. 34 TFEU) as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court explicitly over-ruled its previous approach. Consequently, the Court developed a distinction between measures affecting the product as such, which are within the scope of art. 34 TFEU and measures concerning 'certain selling arrangements', which were held to fall outside the scope of art. 34 prohibition, subject to the proviso that these affect imported and domestically produced goods in the same manner in law and in fact. In doing so the Court reined in the use of art. 34 as a deregulatory instrument by which to pursue market freedom. The distinction established between selling arrangements and measures concerning product characteristics can be characterized as a distinction between measures regulating the operation of the market and measures affecting access to the market. The former were to be taken outside the scope of art. 34 TFEU.

Following *Keck*, however, a series of cases has demonstrated that measures concerning 'selling arrangements' can, like regulation of product standards, affect access to the market. *Keck* itself recognises and allows for this, in the emphasis placed upon

discrimination within the proviso. Those selling arrangements which affect market access and are discriminatory in their effect (in law or in fact) are within the scope of art. 34 TFEU and will fall under art. 34 TFEU unless they can be justified by reference to a mandatory requirement or to art. 36.

The fundamental question that emerges through the pre-*Keck* case law, *Keck* itself and the aftermath is whether art. 34 TFEU should be seen as a tool for market integration or an instrument guaranteeing free and unfettered access to market. This tension finds its origins in *Dassonville* and manifests itself in particular in relation to genuinely non-discriminatory measures, which nonetheless affect market access. If art. 34 is an instrument by which to gain unfettered access to a market, then any measure affecting market access should be within its scope, regardless of discriminatory effects. If however art. 34 is a tool for market integration, for the removal of nationality-based barriers to trade, then it is arguable that any non-discriminatory measures which affect, but do not prevent, market access should not come within its scope.

In his Opinion in *Alfa Vita*, Maduro AG concludes that the central issue in finding a breach of art. 34 TFEU is the existence of discrimination against the exercise of freedom of movement. Maduro's characterisation of discrimination includes both direct and indirect discrimination and measures which have a differential impact upon access to the market. Discrimination undoubtedly plays a role in the operation of art. 34. A distinctly applicable measure breaches art. 34 unless it can be justified by one of the derogations laid down in art. 36. In contrast, an indistinctly applicable measure may be justified by one of the broader range of mandatory requirements.

Maduro also characterised as discriminatory those indistinctly applicable measures which impose additional costs on imported goods, without taking into account the different position of those imported goods compared with domestically produced goods, notably that imported goods already comply with rules applying in the state of origin. In contrast, some commentators argue that in *Dassonville* and *Cassis* the ECJ has gone beyond discrimination, applying a market access or 'obstacle-based' approach. While Maduro's characterisation of such measures as discriminatory holds some appeal, the difficulty of applying a discrimination-based analysis lies in the need to find a like or similar domestically produced good against which to compare the imported product in order to establish the discrimination.

Although the Court has explicitly established an approach based upon both discrimination and market access in cases such as *Gourmet International*, it has been criticised for the loose nature of its analysis, particularly for the failure to rigorously identify likeness criteria and for the consequent incapacity to establish actual discrimination. Moreover, the Court did not establish a test of 'substantial hindrance to market access'.

In any case, the key norm with regard to indistinctly applicable measures is thus proportionality, since if the measure is deemed proportionate to the declared objective it will not breach art. 36 TFEU. Consequently, the question whether there is discrimination may appear largely superfluous. However, if the underlying purpose of the Treat rules relating to free movement of goods is indeed to remove nationality-based

barriers to trade, discrimination should be the key norm. In contrast, if the purpose of the rules is to provide unrestricted access to the market, discrimination has little relevance, the question rather being whether there is an obstacle to such access. Thus, any obstacle to market access must be justified, including with regard to its proportionality. If the key test was one of discrimination, a State would not be required to demonstrate the proportionality of its regulatory measures unless that measures was found to be discriminatory in its effect. Thus, it is undoubtedly the case that market access approach restrains national regulatory autonomy to a greater extent than a discrimination-based approach.

2.1.a The proportionality test

Measures which directly discriminate on the ground of nationality may only be justified by reference to the derogations set out in art. 36 TFEU. Measures which do not directly discriminate, but which may breach art. 34, can be justified by reference to mandatory requirements in the context of the same provision. To be successful, any justification, be it pursuant to express derogations or mandatory requirements, must be proportionate to the end pursued. The definition and application of ‘proportionality’ are thus central to the extent to which national regulatory autonomy is preserved.

Proportionality is traditionally conceived of as a three-part test comprising, first, the suitability of the measure to achieve the objective; second, the necessity of the measure, namely that it is the least restrictive means by which to achieve the stated objective; third, the proportionality *strictu sensu*, which requires that the measure does not have an excessively restrictive effect. Curiously, in applying the proportionality test, the Court generally avoids engaging with the third element, i.e. proportionality *strictu sensu*, but applies and rules upon the basis of the first two elements, appropriateness and least trade restrictiveness.

Particularly in relation to indistinctly applicable measures proportionality has become the determining criterion of compatibility with Community law. As such, proportionality is seen to be both an instrument of integration and, at the same time, a weapon in the protection of individual rights, in that it can strike down restrictions on the enjoyment of the fundamental freedoms. More recently, in *Schidberger* and *Omega*, the potential of proportionality as a toll in the protection of individual rights can be seen to operate in two directions: both in preventing disproportionate restrictions on the fundamental freedoms and also in ensuring that exercise of the fundamental freedom does not disproportionately encroach upon the protection of fundamental rights.

In contrast, in relation to distinctly applicable measures, the fundamental norm is the ban on discrimination: unless the measure is found to be justifiable by reference to a stated derogation and proportionate to achieve that end, it will breach art. 34 TFEU.

The application of the principle of proportionality is clearly of crucial importance in the EU inasmuch as it constitutes both a tool in the protection of individual rights and a tool of market integration. That being the case, it is significant that the application of proportionality is relatively lacking in transparency or consistency. When the Court

engages in a balancing exercise between the objectives pursued by the national measure and the adverse effects of that measure upon market integration or upon individuals' enjoyment of their fundamental freedoms, it essentially reviews a Member States' regulatory choices. Since this raises legitimacy questions, the Court tends to base its decisions upon the first significances of the proportionality test, the suitability and the necessity test. These two elements are indeed more objective than proportionality strictu sensu, which introduces a rather more subjective element. While the Court has been reluctant to strike out a trade restricting national measure on the basis of its lack of proportionality, it has been willing to engage in a balancing of interests, proportionality strictu sensu, in certain cases where it has ultimately upheld the trade restrictive national regulatory measure, notably in *Schmidbeger*.

Between legitimate national regulation and unacceptable restrictions to trade the Court has thus drawn a line that, thank to an obstacle-based approach grounded on the inclusion of indistinctly applicable measures within the scope of art. 34 prohibition, would in principle give preference to market integration. The development of the concept of 'mandatory requirements' has softened the Court tough obstacle-based approach. Absent such possibility to justify indistinctly applicable measures, art. 34 TFEU would pose major a restriction to national regulatory autonomy.

2.2 National regulatory autonomy and the GATT

Unlike the TFEU, the GATT does not provide a right of free movement. It rather pursues the progressive reduction or removal of tariffs and other border measures. Consequently, since WTO members' policies that affect trade are not subject to any general norm of free market access, it is relatively easy for a member to undermine, or reduce the value of, its concessions to others by subsequently adopting a substitute policy that has trade-restricting effects comparable to the tariff rates that it had legally bound itself to reduce.

One response to cope with this challenge is the requirement of national treatment embedded in GATT art. III, whose first paragraph sets out a principle of non-protectionism, which informs the remaining provisions of the article. In particular, art. III:4 applies national treatment to internal laws, regulations and requirements. The application provides that imported products must be treated no less favourably than domestically produced like products as regards all laws. Regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. It is worth noting that GATT art. XI prohibits quantitative restrictions on imports, taking the form of quotas, import or export licenses or other measures. While this provision might at first glance appear to be the relevant provision for present purposes, the *Note Ad Article III* indicates that national regulatory measures, which apply to domestic products and like imported products and which are enforced at the border for imported products should be dealt with under art. III. Thus, the latter provision is the key one for drawing the line between national regulatory autonomy and market access.

Pursuant to art. III the key issue to be considered in determining whether national regulation is GATT-compliant is whether the measure treats imported goods no less favourably than *like* domestic products. Therefore, focusing upon a comparison of the treatment of like products, the provision puts discrimination at its heart, what stands in sharp contrast to the EU approach. Whereas the ECJ has been criticised for the loose nature of its discrimination analysis, in particular, the failure to identify products that are actually the subject of discrimination effect in the market place, the WTO Panels and Appellate Body have put considerable effort into the development of a criteria for the determination of likeness.

By virtue of joined provisions of art. III paragraphs 1 and 4, a measure challenges under art. III:4 must affect domestic and imported goods in a protectionist manner. For this to be the case, the domestic and imported goods must be in a competitive relationship of such a nature that protectionism could arise. Thus, in *EC-Asbestos*, the AB held that a competitive relationship is central to a finding of ‘likeness’. Regan noticed that they seem to treat it as necessary and sufficient. In exploring the criteria for likeness in this case, the AB noted that this was the first case in which it had considered the definition of ‘likeness’ in the context of art. III:4, although it noted that it had of course previously considered it in many other contexts, including in relation to different provisions of art. III:2. The AB repeated its pivotal assertion on likeness:

[T]here can be no one precise and absolute definition of what is ‘like’. The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

The AB turns first to the ordinary meaning of ‘like’, which indicates shares characteristics or qualities. However, the AB goes on to note that this does not divulge which characteristics should be taken into account or the degree of similarity required to indicate likeness. On this point, the AB upheld an approach based upon the criteria laid down in the Report of the Working Party on Border Tax Adjustments and in subsequent case law, that is, the properties, nature and quality of the products; the end-uses of the products: consumers’ tastes and habits; and the tariff classification of the products. Further, and crucially, whereas the Panel had held that health concerns and risks were a matter only under GATT art. XX, the AB held that these do fall for consideration under art. III:4.

The approach of the AB has been labelled as heavily relying upon a market analysis of the relationship between the products under comparison. The essential question raised by this case is what weight of economic evidence could overturn the very marked differences between the products in terms of their impact on health, namely the carcinogenic nature of chrysotile asbestos fibres, which PCG fibres seemed not to produce. In future cases, what weight of other, e.g. health related, evidence could outweigh evidence of a comparative relationship between products.

Some scholars have maintained that regulatory intents should be considered as part of the likeness analysis. Since the purpose of art. III is to prevent protectionism, when considering the likeness of two products, the purpose of the very regulation which distinguishes them should be considered and must be given preference even over considerations of market substitutability. Beside, since the GATT imposes major restrictions upon members' regulatory autonomy, which go beyond economic related regulatory powers, it is implausible that the parties would have intended the scope of interference with their regulatory powers to be solely determined by economic criteria limited to notions like competitive relationship.

The effects of such an approach bear a fairly strong resemblance to the recognition and role of the rule of reason in the EU context, namely that in the absence of harmonisation Member States are free to regulate and where such regulation risks hindering the free movement of goods it may nonetheless be justified by reference to a mandatory requirement, subject to satisfaction of the proportionality test.

One obvious objection to a test that incorporates consideration of regulatory purposes is that it can be difficult to establish what they are meant to be. However, in the EU context for instance, the burden of proof lying on the regulating Member State discourages the latter from abusing the invocation of mandatory requirements. Furthermore, proportionality provides a safety net in evaluating the legitimacy of mandatory requirements. Should such an approach be accepted, it would thus be desirable to incorporate such a requirement with regard to regulatory purpose considerations in the determination of likeness under GATT art. III.

2.2.a Justifying a breach

A measure that breaches GATT art. III can only be saved by general exceptions set out in art. XX, or the security exceptions provided for in art. XXI, subject to the *chapeau* requirement that it is not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

Article XX exceptions variously require that measures must either be 'necessary for' or 'relate to' the objective pursued. Thus, art. XX(b) provides an exception for measures 'necessary for the protection of human, animal or plant life or health', and letter (g) provides for exceptions for measures 'relating to the conservation of exhaustible natural resources'. The interpretation of these requirements is crucial to the balance struck between national regulatory autonomy and economic liberalisation, and the related jurisprudence has been the subject of considerable academic comment.

One question concerns the extent to which proportionality plays a role in relation to art. XX exceptions. This depends to some extent upon what is meant by proportionality. As seen above, the proportionality test applied by the ECJ is generally confined to the review of the appropriateness of the measure to pursue the stated objective and of its least trade restrictiveness, and does not go into an exam of proportionality *strictu sensu*.

As regard appropriateness, in the context of GATT art. XX, the AB has explicitly held that it is for the members to determine their chosen level of protection. The requirement of necessity has been interpreted as essentially requiring that the measures can contribute to the achievement of the objective pursued, that no alternative exists which the member can resort to with a view to the same aim and that it is not inconsistent (or entails the least possible inconsistency) with other GATT provisions.

The question of reasonable availability of alternatives has proven contentious: in Korea-Beef both the Panel and the AB held that WTO law ‘could well entail higher enforcement costs for national budget’. The AB further adjusted the test slightly by stating that:

determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighting and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

[...] In our view, the weighting and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available’.

Significantly, whilst the weighting and balancing applies to both the necessity analysis and the availability of reasonable alternatives, the chosen level of protection is entirely up to the members and is not questioned, so that it is not to be weighted against the trade restrictiveness of degree of GATT inconsistency. However, the contribution of the measure to the desired objective is explicitly to be considered.

It is therefore apparent that necessity does not require that the Panel or AB engage in the balancing the objective pursued and its trade restrictive effects, that is in a proportionality review *stricto sensu*. Rather, it resembles the second limb of EU-fashion proportionality review: whether the measure is the least trade restrictive means by which to pursue the objective, although clearly focusing in this case upon the GATT-inconsistent means as opposed to least trade restrictive. Thus, just like in the EU context, also within the WTO there is some reluctance to engage in a review of the proportionality *stricto sensu*.

In *Brazil-Retreated Tyres*, the AB stated that:

the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. [...] To be characterised as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighted against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it.

Consequently, even an unknown but presumed positive and material contribution to an objective like health, such as in the case at issue, was sufficient to render the measure necessary. In this context therefore there is no balancing of the measure and its effects. Brown and Trachtman observe that, whilst the AB found it necessary to consider less trade-restricting alternatives providing an equivalent contribution to the achievement of the objective, the lack of evaluation of the measure contribution makes such application of the least GATT-inconsistent reasonably available alternative test impossible which would require an evaluation of equivalence of the contribution offered respectively by the challenged measure and by the reasonably available alternatives.

The relationship requirement (*'relating to'* as under art. XX(g)) has been more straightforwardly interpreted as involving a different sort of connection, namely there must be some causal relationship between the measure adopted and the objective pursued. This unquestionably amounts to a very soft review of the exercise of its regulatory autonomy by a WTO member.

Should the necessity and the relationship requirements be fulfilled, the additional test prescribed by the *chapeau* of art. XX must nonetheless be satisfied. Desmedt has highlighted the consequent distinction between the legitimacy of the measure itself, regulated by the subparagraphs of art. XX, and the manner of its application, which is regulated by the *chapeau*. Still in the *Brazil-Retreated Tyres* report, the AB held that

there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner 'between countries where the same conditions prevail', and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of Article XX.

However, in the context of the 'relating to' requirement, the AB has examined under the *chapeau* whether less trade-restrictive alternatives were available as well as whether the restrictiveness was 'disproportionate' in view of the costs imposed by the measures which were not imposed upon domestic producers. Thus, a 'necessity' test appeared to be imposed by the *chapeau*, where it had not been imposed by art. XX(g). This blurs the above mentioned line between the legitimacy of the substance of the measure and the manner of its application. Further, in *US-Shrimp* the AB referred explicitly to the *chapeau* as a 'balancing' requirement 'between the right of a Member to invoke one or another of the exceptions of article XX [...] on the one hand, and the substantive rights of the other Members under GATT 1994, on the other hand'. However, such a requirement necessitates the review of a member's policy preferences by an external body, in this instance the DSB, which poses no few difficulties in that such review is difficult to accord with the prerogative of the members to choose their own level of protection.

Article XX exceptions play a similar role to those under art. 36 TFEU so that parallels can be drawn. In this respect, Reid maintains that the necessity and relationship requirements in the WTO context equate to what in the EU is applied as a proportionality test in relation to art. 34 TFEU, both in respect of the mandatory requirements and in the justification of a breach.

In the GATT context, however, such review only comes into play in respect of measures that do not satisfy the requirement in national treatment. De facto discrimination, whereby a measure which is facially neutral has the effect of treating imported products less favourably, is recognised in the WTO context, just as indirect discrimination or the dual burden of indistinctly applicable measures are in the EU context. However, the AB has emphasised that ‘less favourable treatment’ relates to the competitive relationship between the imported and domestic ‘like’ products rather than where ‘the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product’. Crucially, a non-discriminatory regulatory measure will not breach art. III, notwithstanding its impact upon access to the market. National regulatory autonomy thus remains relatively free, subject to the limitations in the definition of ‘likeness’. The definition of like products is therefore key to both the scope of art. III and the corollary extent of national regulatory autonomy. In the light of this, it is not surprising that the WTO legal system has not experienced the introduction of concepts like mandatory requirements. However, this turns upon the approach taken to likeness. As noted above, it may be desirable to introduce considerations relating to the regulatory purpose of the measures into this determination. The effect of such development would in fact be similar to the effect of recognition of mandatory requirement.

2.3 Balancing national regulatory autonomy and trade liberalisation

In both the EU and the WTO, the balance between economic liberalisation and national regulatory autonomy must reflect the context and the objective of the rules. Are these organisations pursuing simply the removal of national-based barriers to trade, or are they seeking to eradicate regulatory heterogeneity? The latter aim requires removal of all measures constituting restrictions to market access. There is little in the text of the WTO Agreement, including in the GATT and in the other Agreements on trade in goods, to suggest that such a task was entrusted to the Organisation by its members.

In turn, the EU, whose final aim is a deeper integration, might be more likely to pursue this end. It is not a case that, whereas in the WTO liberalisation is achieved through mutual concessions with no individual rights being created to such aim, the EU common market consists of fundamental freedoms. Furthermore, the EU has the possibility to adopt harmonisation measures to fill the *vacatio legis* caused by deregulation. Yet, the EU’s legislative history reveals that achieving harmonisation can be a protracted process and the prevalence of minimum harmonisation, leaving Member States discretion to impose higher standards has posed problems for the EU in respect of its international obligation. Furthermore, while the EU pursues deeper integration, it is also committed to non-economic objectives, such as environmental and consumer protection. On occasion, such concerns have led the ECJ to justify *prima facie* discriminatory national measures by virtue of the invocation of relevant mandatory requirements or to avoid the issue of the discriminatory nature of the measure. The outcome, namely allowing partitioning of the market along national lines, demonstrates

the dangers inherent in abandoning consideration of discrimination in this context. Both cases suffer from inadequate reasoning arising from the Court's reluctance to condemn national measures pursuing a 'legitimate' objective which was, however, not provided for in art. 36 TFEU. The diversity of the EU objectives requires a nuanced approach facilitating the balancing of interests, which would be allowed by a proportionality test *strictu sensu*, which is however seldom applied. Thus, it has been noted that while the deeper level of integration pursued in the EU might appear to merit stricter review of national regulation than might be appropriate in the WTO context, this difficulty coexists with the breadth of objectives pursued by the Union.

2.4 Final considerations

Exclusive reliance on market access risks catching otherwise legitimate market regulation which has an indirect effect upon market access and would produce essentially deregulatory outcomes.

In the EU context, mandatory requirements mitigate the deregulatory effects of the market access approach, notwithstanding a burden is imposed upon the MS to justify national regulatory measures. In the WTO context, where there is no possibility of mandatory requirement-type justification, and where the market analysis necessary to effectively apply the discrimination test is well established, the reasons to retain discrimination analysis and, in so doing, protect national regulatory autonomy are compelling.

The key question, in both the WTO and EU context, concerns the purpose of economic liberalisation. It is to remove any barriers to market access or trade and therefore to remove any heterogeneity of standards, or is it to remove nationality-based barriers to trade? If it is indeed the removal of any barrier to market access, the broad approach to market access restrictions would be appropriate. However, in view of its impact upon national regulatory autonomy, such an approach would surely require explicit expression to ensure its accountability and legitimacy. In the absence of this, it appears appropriate to draw the line between national regulatory autonomy and economic liberalisation rather less intrusively, pursuing primarily the removal of measures which discriminate against trade or free movement, thus adopting a discrimination-based analysis.

Section III - Mutual Recognition Agreements

3.1 Defining mutual recognition as a way out from the "liberalization-domestic regulation" dichotomy and an alternative to litigation

Previous sections have shown how progressive removal of traditional tariff-barriers to international trade resulted in domestic regulatory policies, generally not bound by commitments to tariff-lowering, coming to the forefront as the most relevant obstacles

to the free flow of goods⁶¹ and a source of distortion of international competition. The proliferation of different standards and regulatory requirements, accompanied by different conformity assessment procedures, constitutes one of the most serious constraints to international trade in goods.

The most used standards of international treatment, namely the most-favoured-nation (MFN) and the national treatment (NT) principles, have revealed their inadequacy to cope with the issue of non-tariff barriers, i.e. domestic measures which, intentionally or not, do affect international trade. Such inadequacy of MFN and NT standards to ensure further effective liberalization in the current situation of low tariffs have prompted the use of other concepts and methods, such as harmonization, transparency and mutual recognition, in order to fill in the gaps between divergent domestic policies and multilateral trade liberalization. In turn, the Agreements on Technical Barriers to Trade and the Sanitary and Phytosanitary Measures have reinforced, clarified and extended the scope and coverage of multilateral rules and procedures on standards and conformity assessment. However, the amount of disputes in which SPS and TBT rules have been invoked so far to challenge or justify domestic measures unequivocally disclose the limits of such Agreements in containing the adverse effects of domestic regulations on international trade.

As Sacerdoti underlines, there is a compelling need to distinguish between, first, regulations potentially or actually affecting foreign goods more severely than domestic ones and, secondly, between those that are objectively justified by the need to protect paramount general interests and objectives from those whose discriminatory effects are not balanced by those needs. Furthermore, one should consider whether those interests and objectives are internationally shared, if they are properly relevant from an individual country point of view and if the means to achieve those objectives are not unduly restrictive⁶².

National measures' conformity to international technical yardsticks, where existing, or the elaboration of such standards – namely through harmonization - may offer a solution in some domains. However, in a world of sovereign states, having different policies, priorities and interests, the elaboration of common standards for trade liberalization purposes to be applied in the regulation of domestic economy, when these regulations are meant to protect other interests and concerns, can only be the result of negotiations based on shared values and aims. Difficulties in reaching this goal increase when the negotiation of requirements and conditions concerns areas where trade considerations, or the hindrance thereof, are deemed of minor importance if compared to other domestic policies that national regulation making the object of bargaining are

⁶¹ It is worth recalling that the scope of this research does not go beyond trade in goods, this being the reason why issues relating to non-tariff barriers to trade in services, however significant, are not herein considered.

⁶² Sacerdoti, G., "Standards of Treatment, Harmonisation and Mutual Recognition: A Comparison between Regional Areas and the Global Trading System", in Demaret, P., Bellis, J.F., García Iménez, G. (eds.), *Regionalism and multilateralism after the Uruguay Round – Convergence, Divergence and Interaction*, Brussels, 1997, p. 613, at 620.

designed to pursue or that, more generally, would be affected by change and possibly loosened.

On the other hand, increasing reciprocal interferences of uncoordinated domestic policies and their negative impact on global welfare have to be faced. The ensuing tensions and diseconomies indeed justify the view that minimal harmonization of such policies is appropriate whenever national regulations cause distortions in foreign markets and in international investments patterns.

Methods such as harmonization, transparency and mutual recognition can be conceived as preventive - rather than alternative - options to litigation before the WTO Dispute Settlement Body insofar as they set a legal framework whose purpose is precisely to enhance compliance with WTO rules. This being so, mentioning the above preventive options in the present research seems justified and even necessary in order to outline the underlying principles of a EU's strategy towards the management of commercial disputes falling within the scope of the SPS and TBT Agreements. Along with the determination to face litigation as such, the choice to prevent disputes in the first place can well be a component of a coherent strategy.

Neither harmonization nor mutual recognition are however generally within the scope of the WTO Agreements. In contrast to the EU, the WTO is not directly involved in standard setting and harmonization, and many discretionary escape clauses are included in the Agreements. Harmonization in the WTO system is limited to measures directly concerning trade in goods and it does not concern domestic policies that may indirectly affect it. In this respect, the institutional framework to ensure compliance is also relevant. On the one hand, the inherent absence of a cohesive institutional structure, i.e. of organs endowed with the competence to push ahead a harmonization process, makes it cumbersome to pursue such an objective. On the other hand, the DSB does not match the compulsory and exclusive jurisdiction with binding effects which characterises the European Court of Justice.

Transparency arrangements, which account to unilateral autonomous harmonization of technical standards or adoption of such standards as developed by the producing countries and industries, is also a reality and a method. This approach does not however entail international obligations and controls. It lacks therefore stability and predictability.

The very narrow mandate that the WTO has received with regards to harmonization and the inherent limits of transparency related methods leave us with only one viable option to prevent disputes related to non-tariff barriers, namely reliance on mutual recognition. Although unlike the ECJ jurisprudence, the WTO system does not feature recognition of national standards as a binding judicial principle which operates alongside MNF and NT, both the SPS and TBT Agreements encourage WTO members to autonomously or mutually recognize the equivalence of domestic regulations and conformity assessment procedures of other members, where they can be relied upon by trade operators.

Whereas unconditional trust towards alien domestic regulations is the precondition for autonomous recognition, political – i.e. bilaterally negotiated – mutual recognition

has got potential with regard to the equalization of the legal requirements of domestic markets. The contractual element inherent in Mutual Recognition Agreements (MRAs), whereby a product compliance with the importing country's regulations or standards can be assessed in the country of export, addresses the challenge confronting political leaders wishing to cope with non-tariff barriers to trade, namely to reduce redundant regulatory barriers, *where possible*, without sacrificing democratic choices regarding the appropriate allocation of risks and the appropriate procedure for addressing them. Although limits deriving from mutual trust and possible lack thereof also act in relation to such agreements, they can be more easily overcome precisely through mutual concessions. This makes MRAs key tools to facilitate international trade insofar as they establish the economic, legal and technical conditions necessary to enhance market access, promote trade liberalization efforts on a bilateral, regional or plurilateral basis and set a framework for improvements in future multilateral rounds.

Recognizing the potential benefits of moving beyond the WTO framework at a faster pace than other signatories, the EU has tried to extend its mutual recognition activity from the single market to its trade relations with third countries, by concluding MRAs in circumscribed production sectors with seven third countries. In this respect, the case of the 1997 EU-US MRA is emblematic since such Agreement represents the first non-litigation attempt at addressing, at least in *selected domains*, transatlantic trade issues which had meanwhile increasingly become regulatory ones.

Divergent regulatory cultures and procedures not only restrain trade and thus competition, but they can also do so in an asymmetrical discriminatory manner. Assessing the EU's practice with regard to MRAs constitutes a variation on the broader question of how to reconcile the Union's trade and regulatory objectives, that is how to reduce or eliminate the trade impact of differences in national regulations without sacrificing legitimate regulatory objectives. A central question facing national legislators, executives and administrative officials is therefore how to govern bilateral economic interdependence while maintaining social standards responsive to their respective constituencies' demands, in other words how to ease the tension between the goal of domestic regulatory protection and liberalized trade. In this context, although obviously unique, the model of the European internal market has offered a benchmark as it has favoured the convergence of the Union's partners towards European regulatory practices.

This section is organized as follows. First, relevant WTO rules concerning mutual recognition will be analysed in order to see what is the legal background MRAs are concluded against. The section will then deal with the evolution of the EU approach towards domestic regulation within the internal market. In the third part account will be given of the MRAs as a peculiar category of international contractual obligation. Finally, an overview of MRAs concluded by the European Union will be offered. In this context, particular attention is paid to the 1997 EU-US Agreement.

3.2 Relevant WTO rules

Earlier in this Chapter, it has been recalled earlier⁶³ that the GATT 1994 provisions affecting product standards are article I relating to the MFN treatment and III on national treatment, together with the general exceptions concerning, on the one hand, health, welfare, public morals (article XX) and, on the other, national security (article XXI). These provisions are complemented by the two specific Agreements on SPS measures and TBT which, in spite of the different scope, enshrine the same basic principles.

MRAs concluded to date by the EU only fall within the scope of the TBT Agreement, more precisely to conformity assessment procedures⁶⁴. So far, the EU has indeed never negotiated mutual recognition with regard to sanitary and phytosanitary issues. This circumstance raises questions as to the very feasibility of mutual recognition in this field, questions that will be dealt with at a later stage in the present section. Yet, although the lack of empirical data forces to put an emphasis upon TBT provisions in order to define the legal framework of MRAs in force, a parallel survey of the SPS norms is nonetheless possible by virtue of the similarities between TBT provisions and SPS ones.

The two Agreements lay down a set of rules intended to discipline the effects of WTO members regulatory autonomy on international free trade. As such, they do not deprive members of their regulatory competence in areas of legitimate public interest, such as public health and consumer protection. Nevertheless they pose limits on the exercise of this competence, in order to prevent an abusive, because unnecessary, use of regulatory power⁶⁵. Therefore, the responsibility for legislating on products and production requirements rests with the members, and the limits posed by WTO rules will come into play only when states' regulations create unnecessary barriers to trade⁶⁶.

As for the scope, the TBT Agreement deals with all types of product regulations and standards, adopted for reasons such as national security, prevention of fraud, public health or the protection of the environment, and therefore has got a general scope. The concept of product specification includes not only requirements referring to the product

⁶³ Cfr. para. 1.2, 1.3 and 1.5 in this Chapter.

⁶⁴ See *infra*, paragraph 3.5.

⁶⁵ This is clearly expressed in the first Report issued by the Appellate Body in which, after condemning some aspects of the US rules on gasoline for their inconsistency with art. III.4 and XX GATT, it stated that this does not mean “that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue”, and added “WTO Members have a large measure of autonomy to determine their own policies on the environment – including its relationship with trade – their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements”. WTO, Appellate Body - *United States - Standards for Reformulated and Conventional Gasoline*, AB-1996-1, Report of the Appellate Body, WT/DS2/AB/R, 29/04/1996, part V, last paragraph.

⁶⁶ For an analysis of the balance between national regulatory objectives and WTO's purpose to establish a legal framework respecting the legitimate exercise of domestic regulatory autonomy whilst minimizing regulatory differences between members, see Roessler, F., “Increasing Market Access under Regulatory Heterogeneity: The Strategies of the World Trade Organisation”, in OECD, *Regulatory Reform and International Market Openness*, 1996, p. 117-129.

as such, but also those relating to processes and production methods. Apart from governmental regulations, the Agreement also covers voluntary standards issued by public or private standardisation bodies. By contrast, the SPS Agreement is limited to governmental sanitary and phytosanitary measures specifically intended to protect human and animal life and the preservation of plants.

As previously reviewed, notwithstanding the difference in scope, the basic rules embodied in these Agreements are quite the same: when adopting and implementing product regulations, members must respect non-discrimination and proportionality. The non-discrimination requirements should be understood in the light of GATT article III.4 which prescribes national treatment for imported goods in the application of internal regulations, and article XX allowing for general exceptions to the NT principles, subject to the condition that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to international trade. In turn, the proportionality requirement aims at encouraging the adoption of the least trade-obstructing measures capable of attaining the desired level of protection.

Technical and scientific regulations should be based on available scientific evidence and states must be able to justify the content of their domestic regulations, particularly when they negatively affect trade with other countries. Members have the right to demand explanations about other members' regulations. In addition the Appellate Body has confirmed that the burden to prove that a discriminatory measure can be justified under one of the exceptions afforded by art. XX(b) GATT rests on the Party invoking the exception.

The TBT and SPS Agreements acknowledge a significant role to international harmonisation, which is intended as a means of reducing technical obstacles to trade in goods. This is done by "encouraging" members to base their product regulations on existing international models insofar as this does not hamper the attainment of the legitimate domestic policy which the measure is designed to pursue. A presumption of reasonableness of the measure and of the latter's conformity with the Agreements' prescriptions is associated with the adoption of international standards, guidelines and recommendations.

Regulations being neutral and in conformity with international rules is not a sufficient guarantee that they will not be applied in an arbitrary or unfair manner. Hence, the importance of national rules governing the practical implementation of domestic regulations by setting up assessment and control procedures. For this reason, the SPS and TBT Agreements also deal with conformity assessment activities, such as testing, inspection, type approval or certification. WTO members are asked to comply with the general rules of non-discrimination and proportionality also when operating conformity assessment procedures. In addition, they must ensure procedural guarantees in favour of traders and importers in order to avoid arbitrary or protectionist attitudes. The latter include, *inter alia*, the prohibition of unjustified delays or excessive fees, the duty of confidentiality, the applicants' right to be informed of any details of the procedure and the right to lodge appeals.

Finally, although it should be clarified that rules laid down in the Agreements only bind central government authorities, they indirectly affect local authorities nonetheless since the former are obliged to take all possible measures to ensure that the latter comply with the requirements of the Agreements.

It is unlikely that, just as it was the case within the European internal market, the above set of WTO rules would evolve to generate a recognition principle, notwithstanding two developments could be raised to suggest otherwise. First, the TBT and SPS Agreements now press members to use applicable international standards when setting domestic regulations and provides for a presumption of validity of the latter vis-à-vis the Agreements when they do so. However, the harmonisation intent enshrined in articles 2.4 to 2.6 TBT and 3 SPS should not be seen to provide a basis for recognition. Although a balancing test may determine which measure poses unnecessary obstacles to trade, this does not create a presumption of invalidity for the non-harmonised measures when legislative objectives are legitimate and the means provided are indistinct⁶⁷.

Secondly, the GATT's obligation to accord national treatment to imported products may also have been given a more lucid basis to challenge indistinct protectionist measures. This follows from the *Japan-Alcoholic Beverages* appellate report finding that GATT art. III:1, requiring measures not to be applied "so as to afford protection", shall also "inform" the balance of article III's provisions. Thus, GATT art. III:4, requiring no less favourable treatment may be implicitly interpreted in this larger context. Although this would suggest that a panel will examine factors beyond the indistinct treatment accorded to products in order to determine a protectionist design or application, this possibility does not mean that indistinct measures will now be invalidated when a protectionist application is not apparent⁶⁸.

For the GATT to take a step towards mutual recognition, the notion of NT would seem to require an overall interpretation that protection has been afforded solely because foreign producers have incurred an additional expense to modify or test their product for qualification abroad. It is questionable that such a proposition could or should be drawn from the GATT provisions and its panel interpretations⁶⁹. The comparison required for the purposes of indistinct product measures is likely to remain more centred upon the actual treatment accorded between products rather than as between producers looking at the GATT for a mandate for international level playing field⁷⁰. Restraint remains likely where a legitimate domestic objective is acknowledged. It is true indeed that in the end, GATT is merely the sum of its members and they are unlikely to countenance incursions on their legitimate regulatory powers⁷¹. GATT national treatment should therefore not be pushed into an interpretative frame that would mandate recognition.

⁶⁷ Farber, D.A., Hudec, R.E., "GATT Legal Restraints on Domestic Environmental Regulations", in Bhagwati, J., Hudec, R. (eds.), *Fair Trade and Harmonisation, Vol. 2, Legal Analysis*, Cambridge: MIT Press, p. 59-93, at 79.

⁶⁸ Mathis, J.H., "Mutual Recognition Agreements. Transatlantic Parties and the Limits to Non-tariff Barrier Regionalism in the WTO", in *Journal of World Trade*, vol. 32, n. 6, 1998, p. 5-31, at 9-10.

⁶⁹ *Ibid.*, at 10.

⁷⁰ *Ibid.*

⁷¹ Farber, D.A., Hudec, R.E., "GATT Legal Restraints...", at 80.

This being so, recognition practices are to be expected within the limits of the TBT and SPS requirements. Relevant provisions of both Agreements do not bind members to recognise other Members' technical and sanitary regulations or conformity assessment procedures. Whereas autonomous and mutual recognition are encouraged, the Agreements acknowledge at the same time members' regulatory autonomy by explicitly conceding that confidence in other members' regulations is a pre-condition for recognition. All in all, if recognition were unconditionally mandated, or if GATT provisions could be interpreted so as to make it so, no disputes related to non-tariff barriers would have arisen and, even if so, those would have smoothly be settled.

3.2.a In the SPS Agreement

(i) Autonomous recognition

Starting with the SPS Agreement, article 4.1 requires members to accept foreign sanitary and phytosanitary regulations, however different from their own, only if the exporting members whose regulations are at stake demonstrates that its measures do guarantee the achievement of the level of protection set by the importing member. Autonomous recognition of foreign sanitary measures, i.e. unilateral acceptance thereof, is thus made conditional to the acknowledgment of equivalence with own regulations and such acknowledgement is for the importing country to make, account being taken of its desired level of protection. Recognition of equivalence may therefore depend both on the objective demonstration of the measures' potential for achievement of the importing country's level of protection and on the confidence that the latter puts in the exporting country's capacity to implement domestic regulation so as to achieve its desired level of protection.

At its meeting of 26 October 2001, the SPS Committee adopted a Decision on the Implementation of article 4, hereinafter "Decision on Equivalence"⁷². The Preamble of the Decision on Equivalence notes that the concept of equivalence requires acceptance of alternative measures that meet an importing member's appropriate level of sanitary or phytosanitary protection, but not duplication or sameness of measures. Paragraph 1 of the Decision provides:

"1. Equivalence can be accepted for a specific measure or measures related to a certain product or categories of products, or on a systems-wide basis. Members shall, when so requested, seek to accept the equivalence of a measure related to a certain product or category of products. An evaluation of the product-related infrastructure and programmes within which the measure is being applied may also be necessary [⁷³]. Members may further, where necessary and appropriate, seek more comprehensive and broad-ranging agreements on equivalence. The acceptance of the equivalence of a measure related to a single product may not require the development of a systems-wide equivalence

⁷² WTO, Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SPS/19, 26 October 2001.

⁷³ Product-related infrastructures and programmes refer to testing, inspection and other relevant requirements specific to product safety.

agreement.”

In order to demonstrate the equivalence of its own measures, the exporting member must be allowed to collect all relevant information concerning the level of protection required by the importing member. Thus, in order to facilitate the implementation of the provisions of article 4, the Decision describes the elements to be included in an explanation of the sanitary and phytosanitary measures taken by an importing member, when so requested by an exporting member:

“2. [T]he importing Member should explain the objective and rationale of the sanitary or phytosanitary measure and identify clearly the risks that the relevant measure is intended to address. The importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve [74]. The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation. The importing Member should also provide any additional information which may assist the exporting Member to provide an objective demonstration of the equivalence of its own measure.”

The Decision on Equivalence provides a list of requirements and recommendations regarding the procedure to be followed for recognition. First, importing members are required to timely respond to any application for recognition of equivalence. To this aim, the Decision sets a reasonable period of six-month time⁷⁵. In turn, to support an objective demonstration of equivalent protection, the exporting member is required to provide appropriate science-based and technical information. This information may include, *inter alia*, reference to relevant international standards, or to relevant risk assessments undertaken by the importing member or by another member. In addition, the exporting member shall provide reasonable access to the importing member for inspection, testing and other relevant procedures for assessing equivalence⁷⁶.

Paragraph 5 of the Decision establishes an accelerated procedure for the determination of equivalence that the importing member are requested to apply with respect to those products which it has historically imported from the exporting member. As clarified in the Addendum 1 to the Decision⁷⁷, the rationale behind such procedure is that

⁷⁴ In doing so, members should take into account the *Guidelines to Further the Practical Implementation of Article 5.5* adopted by the SPS Committee at its meetings of 21-22 June 2000. See WTO, Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5*, G/SPS/15, 18 July 2000.

⁷⁵ WTO, G/SPS/19, para. 3, which states that a timely response to a request for consideration of equivalence should be issued “normally within a six-month period of time”. Such wording clearly leaves some leeway with respect to the six-month deadline.

⁷⁶ *Ibid.*, para. 4. Para 7 of the Decision complete the requirement list with regard to the procedure for the recognition of equivalence by stating that: “When considering a request for recognition of equivalence, the importing Member should analyse the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures”.

⁷⁷ Paragraph 13 of the Decision on Equivalence asks the SPS Committee to develop a specific programme to further the implementation of article 4. At the Doha Ministerial Conference, members also instructed the SPS Committee to develop the same specific programme (see WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001, para. 3.3). At its meeting of 21 March 2002, the

information already available to the importing member should not be sought again as this may result in an unnecessary obstacle to trade⁷⁸.

The Decision on Equivalence also governs the interim period between the request of recognition and the decision on equivalence. A duty for the importing state not to interrupt or suspend ongoing imports of a specific product, pending a decision on equivalence, is clearly established at Paragraph 6. Nevertheless, Addendum 1 clarifies the provision by striking a balance between the right of the exporting member not to see its exports cut and that of the importing one to achieve its desired level of protection. On the one hand, since a request for recognition of equivalence does not in itself alter the way in which trade is occurring, there is no justification to disrupt or suspend trade. If an importing member were to do so solely because it had received a request for an equivalence determination, it would be in apparent violation of its obligations under the SPS Agreement, particularly of the principle of necessity and the prohibition of use of SPS measures as disguised restrictions of international trade under SPS article 2⁷⁹. However, on the other hand, a request for recognition of equivalence does not preclude an importing member from taking any measure it may deem necessary to achieve its appropriate level of protection, including in response to an emergency situation. This being said, if the decision to impose some additional control measure were to coincide with consideration by the same member of a request for recognition of equivalence, this might lead an exporting member whose trade is affected to suspect that the two events were linked. To avoid any misinterpretation of this kind, the Committee recommends that the importing member should give an immediate and comprehensive explanation of the reasons for its action in restricting trade to any other member affected, and that it should also follow the routine or emergency notification procedures established at paragraphs 5 to 10 of Annex B to the SPS Agreement⁸⁰.

SPS Committee thus adopted a specific Programme for Further Implementation of Article 4. The programme established the timetable and the agendas of the meetings for the discussion of the Decision on Equivalence; see WTO, Committee on Sanitary and Phytosanitary Measures, Equivalence - Programme for Further Work, Decision by the Committee, G/SPS/20, 21 March 2002.

As foresees by the Programme and in order to clarify paragraph 5 - and paragraph 6 - of the Decision on Equivalence, the SPS Committee adopted another Decision at its meeting on 7–8 November 2002, hereinafter Addendum 1 to the Decision on Equivalence. See WTO, Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Addendum 1, G/SPS/19/Add.1, 15 November 2002. A second addendum of was agreed upon by the SPS Committee at its 24–25 June 2003 meeting for the purpose of clarifying paragraph 7 of the Decision on Equivalence. See WTO, G/SPS/19/Add.2, 15 July 2003. A further clarification of paragraph 5 on the accelerate procedure for recognition of equivalence was agreed by the Committee at its meeting of 17–18 March 2004; see WTO, Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Addendum 3, G/SPS/19/Add.3, 26 March 2004.

⁷⁸ In Addendum 1, para. 2, the SPS Committee notes that the importance of knowledge based on historic trade reasons has been fully recognized by other international organizations and international agencies: “This information and experience, if directly relevant to the product and measure under consideration, should be taken into account in the recognition of equivalence of measures proposed by the exporting Member. In particular, information already available to the importing Member should not be sought again with respect to procedures to determine the equivalence of measures proposed by the exporting Member”.

⁷⁹ G/SPS/19/Add.1, para. 5.

⁸⁰ *Ibid.*, para. 6. Paragraph 8 of the Decision on Equivalence provides further that, in line with article 9 of the SPS Agreement, members shall give full consideration to requests for appropriate technical assistance

(ii) Mutual recognition

If article 4.1 SPS deals with the autonomous recognition of equivalence, paragraph 2 of the same provision encourages members to conclude bilateral and multilateral agreements on recognition of equivalence of specific SPS measures. More specifically, the provision encourages to enter into consultation to this aim. This reiterates the reference to confidence as a pre-condition for any sort of recognition that has already been seen with reference to unilateral recognition.

The Decision on Equivalence does not extensively deal with MRAs, which are only mentioned by two provisions. First, in accordance with paragraph 12, members should regularly inform the SPS Committee of their experiences concerning the implementation of article 4, including in particular of the successful conclusion of any such equivalence agreements. Second, in relation to notification procedures, at its meeting of 26 October 2001, the SPS Committee adopted the following provision relating to the notification of the conclusion of equivalence agreements between members:

“The Committee on Sanitary and Phytosanitary Measures shall revise its recommended notification procedures to provide for the notification of the conclusion of agreements between Members which recognize the equivalence of sanitary and phytosanitary measures [original footnote to WTO, Committee on Sanitary and Phytosanitary Measures, Revision of Recommended Notification Procedures, G/SPS/7/Rev.1, 26 November 1999]. Furthermore, the procedures shall reinforce the existing obligation in [paragraph 3\(d\) of Annex B](#) of the Agreement on the Application of Sanitary and Phytosanitary Measures for national Enquiry Points to provide information, upon request, on the participation in any bilateral or multilateral equivalence agreements of the Member concerned”⁸¹.

In both provisions, the focus is ensuring that concluded MRAs are made public rather than on the very content thereof. This can be explained by taking into account that the

to facilitate the implementation of article 4, especially when those requests come from developing countries: “[...] This assistance may, *inter alia*, be to help an exporting Member identify and implement measures which can be recognized as equivalent, or to otherwise enhance market access opportunities. Such assistance may also be with regard to the development and provision of the appropriate science-based and technical information referred to in paragraph 4, above”.

Moreover, In order to improve international cooperation in this sphere outside the WTO, paragraph 9 of the Decision on Equivalence advises active participation of members in the ongoing work in the Codex Alimentarius Commission and in any work related to equivalence undertaken by the Office International des Epizooties and in the framework of the International Plant Protection Convention.

Paragraph 10 of the Decision on Equivalence outlines a number of actions to be taken by the SPS Committee in this regard: “10. The Committee on Sanitary and Phytosanitary Measures recognizes the urgency for the development of guidance on the judgement of equivalence and shall formally encourage the Codex Alimentarius Commission to complete its work with regard to equivalence as expeditiously as possible. The Committee on Sanitary and Phytosanitary Measures shall also formally encourage the Office International des Epizooties and the Interim Commission on Phytosanitary Measures to elaborate guidelines, as appropriate, on equivalence of sanitary and phytosanitary measures and equivalence agreements in the animal health and plant protection areas. The Codex Alimentarius Commission, the Office International des Epizooties and the Interim Commission on Phytosanitary Measures shall be invited to keep the Committee on Sanitary and Phytosanitary Measures regularly informed regarding their activities relating to equivalence”.

⁸¹ WTO, G/SPS/19, para. 11.

reminder of the Decision already interprets the concept of equivalence, which in turn applies to MRAs. As regard procedures for recognition, they represent the crucial difference between autonomous and mutual recognition. Whereas autonomous recognition is granted through the detailed procedures mentioned above, mutual recognition is the result of negotiations, typically not bound by procedural requirements. Nevertheless, the limits affecting a procedure for autonomous recognition, namely the objective demonstration of the equivalence of regulations by the exporting member in view of the achievement of the designed level of protection of the importing country, are not alien to the conclusion of a MRA. Quite to the contrary, whereas the issue of confidence operates in just one direction in the first case since the importing country is solely in the position to trust the exporting one and then grant recognition, in case of MRAs it does so in both directions, in that all the parties to the prospected agreement are importing and exporting countries at the same time.

3.2.b In the TBT Agreement

In terms of dedicated provisions, the TBT Agreement devotes much more attention to the issue of recognition than the SPS Agreement does. However, the record of jurisprudence or decisions by the TBT Committee in this respect is in fact less conspicuous than the one relating to art. 4 SPS. It is surprisingly so account being taken of the number of MRAs concluded in relation to technical regulations and, conversely, of the almost complete absence of such agreements in the sanitary field.

Equivalence related provisions of the TBT Agreement can be grouped in three categories: recognition of technical regulation, recognition of conformity assessment procedures (CAPs) and inclusiveness of previously concluded MRAs. It is worth noting that, just as it is the case in the SPS field, also the TBT Agreement distinguishes between autonomous and mutual recognition and imposes different obligations accordingly.

Firstly, reference to recognition of technical regulations is solely expressed as an encouragement to give positive consideration to accepting as equivalent regulations in force in other members, however different from one country's own. Article 2.7 thus establishes an exhortation to autonomous recognition of technical standards, which is however made conditional to the fulfilment of the usual confidence precondition. Positive consideration shall be accorded to foreign regulations as long as the importing country is persuaded that these regulations are capable to achieve the same objectives for which comparable national regulations have been designed. This is equivalent to demanding the fulfilment of the criterion of capability to attain the level of protection chosen by the importing country under art. 4 SPS.

Secondly, art. 6 TBT provides that conformity assessment procedures can be the object of both autonomous and mutual recognition by central government bodies. Consistently with articles 2.7 TBT and 4 SPS, the first paragraph of the provision confirms the conditionality of unilateral recognition of exporting member's CAPs on the assurance of the latter's conformity "with applicable technical regulations and

standards equivalent to [the importing country's] own procedures". Furthermore, the provision recognises that prior consultations may be necessary to achieve a mutually satisfying understanding⁸². In this context, the issue of confidence in the reliability of foreign conformity assessment results is explicitly mentioned. In particular, such consultations might indeed regard, on the one hand, adequate and enduring technical competence of the relevant conformity assessment bodies (CABs) in the exporting country⁸³ and, on the other, limitation of the acceptance of conformity assessment results to those produced by designated - that is accredited bodies - in the exporting country⁸⁴.

The encouragement to conclude agreements for the mutual recognition of results of national CAPs is contained in paragraph 3. Unlike art. 4.2 SPS, which remains silent on the matter of mutual confidence, art. 6.3 TBT explicitly admits that such agreements must fulfil the criterion of the assurance of conformity and give mutual satisfaction with regard to their potential for trade facilitation. Moreover, members are encouraged to grant a MFN treatment in relation to participation in their conformity assessment procedures to CABs of members which are not party to a given MRA⁸⁵. Finally, art. 10.7 TBT governs the existence of MRAs by prescribing notification to other members through the WTO Secretariat⁸⁶ and by encouraging members that are already part of such an agreement to favour the extension of the participation thereto or the conclusion of analogous agreements through consultation with other non-concerned WTO members.

3.2.c Preliminary observations concerning the SPS and TBT discipline on mutual recognition

Some remarks can be made in relation to the SPS and TBT discipline on equivalence recognition.

First, autonomous recognition always requires confidence in the other's technical and sanitary regulations and conformity assessment procedures thereto.

Second, mutual recognition is negotiated. Therefore, even though mutual trust is also crucial to the conclusion MRAs and even more so since it operates bi-directionally, this option is reasonably perceived by States as less risky than autonomous recognition. The mutual character of recognition indicates that the reallocation of regulatory authority is reciprocal and simultaneous⁸⁷. This is due to the contractual nature of the

⁸² Art. 6.1 SPS.

⁸³ Art. 6.1.1 SPS.

⁸⁴ Art. 6.1.2 SPS.

⁸⁵ Art. 6.3 SPS.

⁸⁶ The TBT Committee agreed on a notification format concerning MRAs on issues related to technical regulations, standards or conformity assessment procedures. The format requires indication of: the notifying member; the title of the bilateral or plurilateral agreement; the parties thereto; the date of entry into force; the products covered; the subject matter covered by the agreement, be it technical regulations, standards or conformity assessment procedures; a brief description of the agreement. See WTO, Committee on Technical Barriers to Trade, Decisions And Recommendations Adopted By The Committee Since 1 January 1995 - Note by the Secretariat, G/TBT/1/Rev.8, 23 May 2002, p. 24.

⁸⁷ Nicolaïdis, K., *Mutual recognition of regulatory regimes: some lessons and prospects*, Jean Monnet

perspective obligations which are to be entered into, which affords viable walk-away options for the parties to the negotiation and thus turn mutual recognition from its “pure” EU-style form, entailing full unhindered rights of access to other parties’ markets reflecting full allocation of regulatory authority from the importing to the exporting country, into “managed mutual recognition”, which is applicable to specific goods and includes more or less restrictive constraints and caveats⁸⁸.

Finally, whereas the dichotomy autonomous versus mutual recognition is present in relation to both sanitary measures and procedures for assessment of conformity with technical regulations, no trace can be detected of references to mutual recognition in relation to technical regulations as such. Articles 2.7 only encourages unilateral recognition. Does this apparent contradiction suggest anything? Some have construed relevant TBT provisions so as to consider MRAs lawful to the extent that they only govern CAPs and do not also touch upon technical regulations and standards. However, first, since MRAs in this field are not expressly forbidden, they must be considered WTO-compatible; second, art. 10.7 requires notification of, *inter alia*, MRAs concerning technical regulations and standards. This is confirmed in the notification format agreed upon by the TBT Committee.

3.3 The evolving EU’s approach to harmonization and mutual recognition

There exist three primary options for easing regulatory barriers to trade: harmonisation, mutual recognition and national treatment. Conceptually these can be considered as alternative approaches to trade liberalisation⁸⁹. Under a policy of harmonisation, regulators in separate jurisdictions agree to adopt identical substantive standards and procedures. Such policy facilitates both cross-border trade and further regulatory cooperation because of regulators’ greater comfort with uniform standards. Under a policy of mutual recognition, regulators retain own regulations and standards for internally-manufactured products, but agree to recognise the other jurisdictions’ regulations and standards for imported products, albeit – as said – subject to significant conditions and sometimes control due to the regulator’s unfamiliarity and unease with divergent foreign regulations. Under a policy of national treatment, each jurisdiction maintains its own standards and is proscribed only from applying more stringent standards to foreign products with a view not to unduly hamper trade. As such, a national treatment regime, as it was the one resulting from the original GATT 1947, removes fewer regulatory barriers particularly since it is not able to affect those which are *prima facie* non-discriminatory.

Working Paper, 1997/07, retrieved at www.jeanmonnetprogram.org/papers/97/97-07.html, para. 1.

⁸⁸ *Ibid.* Nicolaïdis further describes the managed nature of mutual recognition as enshrined in MRAs by referring to the fact that the latter vary in their regulatory scope, they usually leave residual powers to the importing state, they involve mutual monitoring between regulatory authorities well as enhanced cooperation and require stringent ex-ante and ex-post conditions.

⁸⁹ Nicolaïdis, K., *Mutual recognition of regulatory regimes...*, *op. cit.*, at para. 8. See also same author, “Regulatory Cooperation and Managed Mutual Recognition: Developing a Strategic Model”, in Bermann, G., *Transatlantic Regulatory Cooperation*, 2001, p. 596.

Historically, however, mutual recognition has come about as a residual alternative to either of the other two, as it is best illustrated by the history of its progressive emergence in the EU. To support this assertion, Nicolaïdis recalls the traditional distinction between negative economic integration, consisting in the removal of discriminatory elements, and positive economic integration, under which different polities resort to the transfer of public market-rule-making and policy-making powers to the supranational level. Trade liberalisation in Europe rather quickly came to be seen as requiring a mix between national treatment and harmonisation as the operative norms corresponding to negative and positive integration respectively. For a long time, under the so-called *old approach*, approximation of laws was seen as requiring detailed harmonisation and, pending such harmonisation, national treatment was policed by the Commission and the European Court of Justice in an increasingly constraining manner, namely in the form of mutual recognition principle as stated in the 1979 *Cassis de Dijon* ruling.

Judicial mutual recognition is one of the cornerstones of the EU *new approach* to technical regulations and standards. If it operated as a stimulus to cope with the shortcomings of the old approach⁹⁰, it caused at the same time preoccupation amongst Member States about the potential loss of control on domestic markets. In fact, by setting a course which led to a mandated recognition of other Member States' regulations, the Court of Justice made it incumbent upon them to agree on the minimum regulatory requirements than could be reasonably imposed on trade, and to likewise enunciate positively a criterion for qualifying systems of certification. Court action was translated into legislative action and, since 1985, the internal market has therefore developed as a result of what are termed the *new* and the *global approach* to technical regulation⁹¹. Such approaches constitute both an alternative to the former methods of harmonisation and a tool for the containment of mutual recognition potentially invasive effects vis-à-vis national regulatory autonomy.

Under the *new approach to technical harmonisation*, EU institutions only mandate essential requirement for manufactures, delegating the determination of more-detailed standards to quasi-public European standards organizations. Under the *global approach to conformity assessment*, the EU coordinates quasi-public national certification bodies

⁹⁰ Mathis, J.H., "Mutual Recognition Agreements", *op. cit.*, at 11. The old approach to harmonisation proved slow and inadequate. For some products it took more than a decade to lay down harmonised rules, which were sometimes outdated by the time they entered into force. In the vast majority of cases, detailed harmonisation was hindered by the applicable unanimity rule. Furthermore, the problem of divergent industrial standards, which are of private and voluntary nature, but are nonetheless able to operate as barriers to trade, was left largely unaddressed. See also Beynon, P., "Community mutual recognition agreements, technical barriers to trade and the WTO's most favoured nation principle", in *European Law Review*, vol. 28, n. 2, 2003, p. 231-249, at 233, where the author maintains that the *Cassis* judgment of the ECJ was the legal basis for the new approach; Eeckhout, P., *The European Internal Market and International Trade: A Legal Analysis*, Oxford: OUP, 1994, p. 265 and 270-275 as referenced to in Jiménez García, G., Gardeñes Santiago, M., "Technical Standards in a Context of Regional Integration Agreements", in Demaret, P., Bellis, J.F., García Iménez, G. (eds.), *Regionalism and multilateralism after the Uruguay Round – Convergence, Divergence and Interaction*, Brussels, 1997, p. 631, at 641.

⁹¹ See European Commission, Guide to the Implementation of Directive Based on the New and Global Approach, 2000, retrieved at http://ec.europa.eu/enterprise/policies/single-market-goods/documents/blue-guide/index_en.htm, last visited in August 2011.

to certify products manufactured in any of the Member States for sale throughout the internal market.

In 1985, the European Commission issued a Communication setting forth its *new approach* to technical harmonisation in response to the market-distorting and market-segregating impact of multiple national standards and the difficulty to appropriately overcome those at the European level solely through the obsolete old approach⁹². Under the new approach, the Council enacts framework directives for technical standards covering essential requirements to which products have to conform. Accordingly, harmonisation is no longer aimed at completeness and approximation of national laws is confined to these essential requirements. The combination of qualified majority rule, introduced by the 1987 single European Act as the ordinary voting procedure for the adoption of internal market legislation, and the reduction of EC-prescribed standards to essential requirements, together with the highly publicised push to complete the internal market by 1992, lead to the adoption of a series of EC harmonisation directives⁹³.

The new approach entails delegation of the task to draw up more detailed standards to industrial standardisation bodies operating under the umbrella of three European standards organisations: CEN, CENELEC and ETSI⁹⁴. These organisations are comprised of national standards bodies that, in turn, include representatives from national governments, industries and other social groups. The simple majority voting procedure in use within such bodies facilitates the adoption of non-essential technical standards, which are however not internally binding on Member States, so that the latter retain some *de jure* autonomy. Nonetheless, agreed standards have become *de facto* harmonised requirement for selling products within the EU marketplace by virtue of the presumption of conformity - to the essential requirements laid down in the relevant directives - which the new approach affords to products manufactured in accordance with harmonised standards set by the above private bodies⁹⁵.

⁹² European Commission, Technical Harmonisation and Standardisation: a New Approach, COM(1985)19 final, Bull. EC-1-1985, not published in the Official Journal and Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 4.6.1985, p. 1–9.

⁹³ Egan notes the adoption of 21 “new approach” harmonisation directives between 1985-2000 covering a wide range of manufacturing fields and giving rise to 2905 standardisation acts ratified or in the process of preparation or approval by standards organisations as of June 1997. See Egan, M., *Constructing a European Market: Standards, Regulation and Governance*, Oxford: OUP, 2001, p. 166-167. The EC’s 1988 Toy Safety Directive is a good example of the application of the new and global approaches. See note 9 to this Chapter. See also Majone, G., “Market and Regulatory Competition in the European Union: Lessons for the Integrating World Economy”, in Moravcsik, A. (ed.), *Centralisation or Fragmentation? Europe facing the Challenges of Deepening, Diversity and Democracy*, Council of Foreign Relations, 1998, p. 94, at 107-108. At present, Commission DG Enterprise and Industry website lists some 30 new approach-related directives, whose subject matters range from low voltage to energy efficiency requirements for ballasts for fluorescent lighting. These directives are either new approach directives providing for EC marking, or directives based on the principles of the new approach or the global approach, but which do not provide for CE marking, or finally directives simply based on *some* principles of the new approach and the global approach. See <http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/#h2-4> (last visited Aug. 23, 2011).

⁹⁴ The Comité Européen de Normalisation (CEN) was founded in 1961; the Comité Européen de Normalisation Electrotechnique (CENELEC) in 1959 and the European Telecommunications and Standards Institute (ETSI) in 1988.

⁹⁵ This is confirmed by the Council Guidelines for a New Approach to Technical Harmonisation and Standards, where the Council outlines the four fundamental principles on which the new approach is

The new approach did little to solve obstacles associated with conformity assessment because, even when the underlying product requirements were the same, there was the typical lack of confidence in testing and certification mentioned above. This led the European Commission to start a new system under the EC's *global approach to conformity assessment*⁹⁶, aimed at developing homogeneous certification structures throughout Europe and at creating legal marks to prove conformity with EC – now EU - directives⁹⁷. Under the global approach products may be tested and certified within any of the Member States in order to receive a “CE” – now “UE” - marking, which indicates that they comply with Community norms. All Members must recognise these certifications as required by mandatory mutual recognition, so that certified products may circulate freely throughout the EU market. Such approach is termed global precisely because once a competent notified body⁹⁸ certifies that a product meets EU standards, the product may be marketed in all other Member States. In 1990, the EC Member States founded the European Organisation for Testing and Certification (EOTC) to coordinate national bodies engaged in the certification process and thereby help assuring national authorities of the reliability of tests concluded in other Member States⁹⁹. Each Member State must approve and its responsible for overseeing the certification bodies within its jurisdiction and must notify its approvals to the Commission DG Enterprise and Industry. These testing and certification laboratories are consequently referred to as “notified bodies”. Member States authorities periodically meet and exchange information about process' operation through working groups and committees created pursuant to the relevant directives. They thereby attempt to build

based: first, legislative harmonization is limited to the adoption, by means of Directives, of the essential safety requirements (or other requirements in the general interest) with which products put on the market must conform, and which should therefore enjoy free movement throughout the Community; second, the task of drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements established by the Directives, while taking into account the current stage of technology, is entrusted to organizations competent in the standardization area; third, these technical specifications are not mandatory and maintain their status of voluntary standards; finally at the same time, national authorities are obliged to recognize that products manufactured in conformity with harmonized standards are presumed to conform to the essential requirements established by the Directive. This signifies that the producer has the choice of not manufacturing in conformity with the standards but that in this event he has an obligation to prove that his products conform to the essential requirements of the Directive. See Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, *cit.*, Annex II.

⁹⁶ European Commission, A Global Approach To Certification And Testing Quality Measures For Industrial Products, COM/89/209FINAL - SYN 208, OJ C 267, 19.10.1989, p. 3.

⁹⁷ See Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits), OJ L 220, 30.8.1993, p. 1–22. See also Council Decision 93/465/EEC of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedures and the rules for the affixing and use of the CE conformity marking, which are intended to be used in the technical harmonization directives, OJ L 220, 30.8.1993, p. 23–39.

⁹⁸ For a definition of notified body see further in this paragraph.

⁹⁹ Shaffer, G., “Reconciling Trade and Regulatory Goals: The prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbour Agreements”, in *Columbia Journal of European Law*, vol. 9, Fall 2002, p. 29-77, at 6.

and retain confidence in the system¹⁰⁰. The EU system can therefore be characterised as governance by coordinated cross-border public-private networks¹⁰¹.

Moves to extend the Community's mutual recognition activity, broadly conceived, to its relations with third countries began in the late 80s. In 1989, the Commission announced it would allow conformity assessment bodies of third countries to participate in the European system of conformity assessment on the same basis as European bodies, in an effort to promote the elaboration of mutual recognition agreements with its trading partners. In 1992, the Council concretised what can be defined as the *beyond internal market approach* by adopting a Decision authorising the Commission to negotiate MRAs concerning conformity assessment. Subsequent negotiating directives in 1994 and 1998 authorised negotiations on a bilateral basis. Talks were opened first between the Commission and the US, Canada, Australia and New Zealand, and further negotiations followed with Switzerland, Japan and Israel.

The suggestion at the core of this approach is that the EU recognition techniques have sufficient evolved internally to be considered as a viable instrument for external application and as a basis for international agreements which would serve to exchange the benefits of internal free movement for the like-treatment of EU goods within the counterparts' territory¹⁰². In so doing, the need for the EU and other low-tariff territories to cope with indistinct internal measures is addressed and the European choice of an instrument to advance this goal in international trade is precisely that of MRAs. In this context, two questions should be considered. First, how the WTO law might accommodate such agreements as they develop on a bilateral basis. Secondly, to what extent the EU succeeded in exporting its own substantial and procedural product requirements thank to the conclusion of agreements carrying a nuanced – because negotiated – version of the mutual recognition principle.

3.4 Mutual Recognition Agreements

Whereas in the regional integration context the EU represents the most developed scenario of harmonisation as opposed to other regional organisations which are still falling behind, at the multilateral level the TBT and SPS Agreements require WTO members to participate actively in international standardisation bodies and to make use of available international standards and conformity assessments systems, unless there is a reasonable justification not to do so. This forces the parties to articulate why international standards would either be irrelevant or inadequate in relation to domestic objectives. As it has been seen, a second best solution is put forward at art. 2.7 TBT and 4.1 SPS where both Agreements encourage WTO members to recognise the equivalence

¹⁰⁰ Shaffer notes that firms and laboratories remain subject to post-marketing members' regulatory controls as well as market reputational constraints. See *ibid.*, note 23.

¹⁰¹ Dehousse, R., "Regulation by networks in the European Community: the role of European agencies", in *Journal of European Public Policy*, n. 4, 1997, p. 246. See also Egan, *op. cit.*, at 12 and, with regard to the significance of mutual recognition in terms of transnational governance, Nicolaïdis, K., Shaffer, G., "Transnational Mutual Recognition Regimes: Governance without Global Government", in *Law and Contemporary Problems*, vol. 68, 2005, p. 263 ff.

¹⁰² Mathis, J.H., "Mutual Recognition Agreements", *loc. cit.*

of technical regulations of other members, irrespectively of the differences that might be existing as to the substance but nonetheless provided that each acknowledging member is sufficiently satisfied concerning whether and how foreign regulation are such as to achieve the objectives pursued by its own regulatory measures. Furthermore, art. 4.2 SPS and 6.3 TBT encourage members to conclude bilateral and plurilateral mutual recognition agreements regarding, respectively, each other's measures and the outcomes of national conformity assessment procedures. Therefore, the TBT and SPS Agreements encourage harmonisation when it is possible and mutual recognition when the former is not.

It has been argued that mutual recognition agreements (MRAs) would have been at the heart of the trade diplomacy in the first decade of the XI century¹⁰³, on the ground that they do represent not only an effective approach to trade-restricting consequences of differences in national regulatory systems but also a powerful impetus for coordinating and improving such systems through regulatory cooperation. More than a decade after its rise to fame in the European context with *Cassis* and with the above recalled provisions having been enshrined in relevant WTO legal texts, mutual recognition proved contagious. MRAs have been negotiated or at least considered on both a bilateral, plurilateral¹⁰⁴ and regional basis¹⁰⁵. The results of the negotiations for a bilateral MRA between the EU and the US were particularly awaited as a possible model in this regard.

Mutual recognition can be defined as a contractual norm between governments whereby they agree to the transfer of regulatory authority from the host jurisdiction where a transaction takes place, to the home jurisdiction from which a product originates¹⁰⁶. This in turn embodies the general principle underlying mutual recognition whereby if a product can be lawfully commercialised in one jurisdiction, it can also be commercialised in any other participating jurisdiction without having to comply with the regulations of the latter. The recognition involved here is of the equivalence, compatibility or at least acceptability of the counterparts' regulatory system, whereas the mutual nature of recognition indicates that the reallocation of authority is reciprocal and simultaneous¹⁰⁷. Finally, MRAs are specific instances of application of this general

¹⁰³ Nicolaïdis, K., *Mutual recognition of regulatory regimes: some lessons and prospects*, para. I.

¹⁰⁴ Consideration was given to the conclusion of an MRA among the Quad countries. In the WTO jargon, the latter term is employed to describe the four major industrialised-country markets, i.e. the US, Canada, the European Union and Japan.

¹⁰⁵ Within APEC, ASEAN, NAFTA and the FTAA.

¹⁰⁶ Nicolaïdis, K., *loc. cit.*

¹⁰⁷ On the relation between harmonisation, national treatment and mutual recognition, Nicolaïdis put forward an argument reversing the usual perspective and proposing mutual recognition as the core paradigm for trade liberalisation. She maintains that: "contrary to the traditional view that mutual recognition should be turned to as a residual option if policed national treatment is not enough and full harmonisation not feasible, commercial diplomacy should adopt mutual recognition as the core paradigm for dealing with regulatory barriers to trade. The creation of transnational jurisdictions is the only way to provide transnational actors with a single authority of control or conformity assessment. Liberalisation exercises need to adopt mutual recognition as their starting assumption, even while some degree of residual host country control or prior harmonisation may be deemed necessary. Such a transversal perspective implies that it is policed national treatment and harmonisation that ought to be considered as deviations from the core MR paradigm", *ibid.*, para II.2.

scheme between specific parties, applying to specific goods and including more or less restrictive constraints and caveats.

The negotiation and implementation of these agreements are in fact bound to be a source of tensions and even conflict between states in so far as differences of view may arise on their desirable scope and on the best way in which they can accommodate long lasting differences in regulatory traditions that such agreements are not in any case designed to eradicate. As a matter of fact, MRAs in force do not generally apply mutual recognition in its pure form, namely consisting in unhindered rights of access reflecting full reallocation of authority from the host to the home jurisdiction. Instead, they operate a principle that has been referred to as “managed mutual recognition”¹⁰⁸. As it will be shown, MRAs usually leave residual powers to the host state, involve mutual monitoring between regulatory authorities as well as enhanced cooperation and require stringent *ex-ante* and *ex-post* conditions.

So far, MRAs have been envisaged by the Union in the field of conformity assessment procedures for industrial products. These agreements are based on the premise that if the product of a sector covered by the agreement is successfully tested in one country, the results of the test should also be acknowledged by the other parties to the agreement, thus establishing a “once tested, accepted everywhere” principle¹⁰⁹. A key element is therefore that acceptance of tests and certificates from the other party is granted irrespective of whether the two parties have or not equivalent regulations governing the product concerned¹¹⁰. The crux of the issue lies precisely in that, however desirable, it is not necessary for countries to have harmonised their respective regulatory requirements prior to the conclusion of a MRA. This is why mutual recognition agreements are considered as a viable alternative to the achievement of harmonisation of regulatory requirements. In fact, given both the practical limits to harmonisation and the political imperative of subsidiarity at the world level, the fundamental choice is not between regulatory heterogeneity and regulatory homogeneity across states. Quite to the contrary, the key point lays in taking for granted regulatory heterogeneity and focus on the extent to which mutual recognition should be introduced or, as Nicolaïdis puts it, to what extent should a decentralised approach to regulation be accompanied by a reallocation of jurisdiction authority operated through a MRA¹¹¹.

Benefits resulting from the conclusion of MRAs are at first sight undisputable and all account for improvements of market access and trade facilitation. First, participating states agree to recognise the result of each other’s product inspection, testing or certification procedures issued by agreed bodies in the country of origin, thus eliminating double testing and certification in the importing countries. By eliminating the costs and delays connected to double inspections, market access is improved. Second, the importing country will not dispose of any margin for applying domestic

¹⁰⁸ *Ibid.*

¹⁰⁹ Jiménez García, G., Gardeñes Santiago, M., “Technical Standards in a Context of Regional Integration Agreements”, *op. cit.*, p. 652.

¹¹⁰ See Clarke, J., “Mutual Recognition Agreements”, in *International Trade Law and Regulation*, n. 2, 1996, p. 31-36.

¹¹¹ Nicolaïdis, K., *loc. cit.*

testing and certification procedure in a protectionist or discriminatory manner. As a result, trade is facilitated and competition and efficiency are stimulated. Also, exporters avoid the risks of an importing country carrying out reverse engineering, infringing in intellectual property rights and engaging in unauthorised technology transfer through the process of evaluating the performance of imports. Finally, MRAs contribute to enhance transparency and promote harmonisation of standards and regulatory systems. Such potential benefits vary with the actual compliance costs, themselves a function of differences in applicable national regulations. An assessment of the judicial enforceability of mutual recognition or of the political desirability of a MRA involves weighting regulatory costs against trade benefits. Even if for trade purposes the case in favour of mutual recognition can be made effortlessly, positions need to be more nuanced when we turn to regulatory and political implications of mutual recognition. From the regulatory point of view, three broad arguments can be invoked in favour of mutual recognition. First, MRAs introduce freedom of choice for consumers, extending the traditional argument in favour of free trade to the freedom to choose amongst rules. Some consumers will derive greater benefits from stringent regulations even at higher costs while others will favour lower price/lesser quality packages. Second, regulatory competition introduced by mutual recognition is likely to increase the efficiency of regulations by acting as means of discovery and even lead to convergence towards optimal outcome through the arbitrages of consumers and firms rather than bureaucracies. Third, mutual recognition can improve regulatory practices directly through better division of labour and enhanced cooperation between regulators or private regulatory bodies¹¹².

Nevertheless, it would be difficult to deny that pure mutual recognition does have regulatory costs. At a minimum, the primary rationale for domestic regulation, e.g. to correct market failures which include externalities such as asymmetric information, is put into question. First, because states hold very different notions of what markets failures are and how they should be corrected. Second, market failures may actually be magnified under a mutual recognition regime: information asymmetries may be greater between consumers and suppliers from different countries. Third, home state regulatory and conformity assessment bodies alone may not have the capacity to effectively enforce the counterpart's regulation or their own across jurisdictions. Fourth, mutual recognition risks introducing a new basis for "unfair competition"¹¹³. Fifth, mutual recognition may create incentives for deregulatory competition and a race-to-the-bottom between regulators.

The extent to which these arguments justify limiting the adoption of MR has been extensively debated, in particular in European circles. The outcome of these debates and deals between regulators and bodies with delegated authority have formed the basis for the "managed" character of mutual recognition in the EU context, including various

¹¹² *Ibid.*, para. III.2.

¹¹³ The strength of this argument is nuanced if consideration is given to the negotiated and therefore managed nature of MRAs. Unfair competition would be the outcome of recognising the equivalence of permissive conformity assessment procedures. The negotiated nature of MRAs allows choosing what to include into the agreement's scope and with whom concluding it.

degrees of prior harmonisation, reduction in regulatory scope and progressive expansion of such scope, safeguard clauses for the host state and provisions for mutual oversight between regulatory bodies.

The ultimate argument in favour of mutual recognition is political. It is a way to ensure subsidiarity at the world level in an era when citizens feel increasingly alienated by the economic forces of globalisation and homogenisation. Subsidiarity here is a synonym of the protection of state sovereignty and of the diversity of local and national traditions¹¹⁴. While the argument is valid, it is crucial to stress its limits. If mutual recognition falls short of a *supranational* transfer of power, it nevertheless constitutes a *transnational* transfer of power that may with time come to be seen as much of an infringement on sovereignty. Furthermore, a horizontal rather than vertical transfer affords less control over the delegated authority. In turn, mutual recognition puts into question democratic models of representation, as citizens will not necessarily perceive it as an instance of “nearness”. In fact, should a citizen be harmed by a drug or a machine approved by a foreign regulatory authority recognised as competent by the home state, who is to be held ultimately accountable? Political accountability may be better guaranteed by overlapping jurisdictions through harmonisation than by extraterritorial jurisdiction. Hence the paradox whereby mutual recognition can be both advocated and contested in the name of subsidiarity.

3.4.a The relation between mutual recognition activities and general GATT principles

A preliminary issue to be dealt with before offering an overview of MRAs concluded by the Union is the one of compatibility of such agreements with WTO provisions at large. It has been seen that mutual recognition is actually encouraged by the SPS and TBT Agreements. The latter are nonetheless subject to general principles such as enshrined in the GATT, namely NT and MFN. This being so, the question seems to be how much latitude is granted to the parties to the negotiations of an MRA under WTO obligations and according to what conditions, if any, should other WTO members have a basis to claim the benefits resulting from such agreements. For the sake of answering this question, an overview of how the above general GATT principles relate to recognition activities in order to identify the position of third parties must be provided.

Starting with national treatment (NT), this principle operates to compare imported products to domestic ones in regard to the treatment provided. However, such a comparison is not at stake in the case of MRAs. Instead, each contracting party should be understood to be granting a waiver from the application of a domestic requirement that would otherwise be lawful to impose. Thus, if jurisdiction A waives an internal requirement to the benefits of goods originating from B, but yet continues to impose its requirements upon its own goods, then there has not been a denial of NT to the goods originating from a third jurisdiction C. The latter indeed continues to receive NT after the conclusion of a MRA between A and B as their relationship to domestic treatment has not been altered in any way.

¹¹⁴ *Ibid.*, para. III.3.

Recognition can however be construed as preference inasmuch as it does infer that some kind of benefit has been accorded, what brings the MFN principle under the spot light as enshrined in article I GATT, which in turn relate to NT as expressed in article III. In this respect, article I GATT should be construed to apply: first, to any advantage or favour in connection with importation; second, to extend NT to all WTO members; and third, in connection with any treatment that is accorded *after* importation in respect to the imposition or non-imposition of any internal public requirement. The latter point is to say that the granting recognition to only one party amounts to according a preference and, without reference to some exception to be found in the GATT or WTO Agreement, it is controlled by the MFN obligation.

Two consequences can be drawn. First, if the grantor determines not to extend recognition through MFN, an exception to the principle should be identified and invoked in order to avoid a challenge of nullification or impairment under GATT article XXIII. Second, the control of MFN should serve to provide the context by which provisions affording recognition may be interpreted by panels, as exceptions to the general GATT obligations tend to be narrowly interpreted. Thus, where the excepting provision does not clearly delineate between favouring a multilateral rather than a plurilateral/conditional approach, or a plurilateral rather than a bilateral approach, the MFN contractual obligation should operate in favour of the more participatory regime. In the excepting provision is unclear in the manner in which it limits the rights of third parties, panels may not choose to assign these rights to the narrower context solely on the ground that the provision affords or perhaps encourage recognition, or because the parties to the MRA have chosen to make a bilateral and reciprocal exchange.

Against this background, it is worth recalling the TBT provisions referring to recognition of conformity assessment procedures in order to ascertain whether and to what extent, by affording the above mentioned exceptions, they do accord WTO members latitude to form MRA without incurring potential challenges by third parties. In particular, consideration must be given to how article 5.1.1 TBT applies to the rights of WTO members in the case where an existing domestic assessment requirement has been waived as to the goods originating from another party. Where domestic goods remain subject to the home country procedure, MFN should also apply as, account being taken of its wording, article 5.1.1 TBT also relates to all matters covered by article III GATT. Therefore, MFN must be afforded not only on the basis of NT but also in relation to any other benefit that has been afforded internally.

With regard to autonomous recognition, the “whenever possible” condition foreseen at article 6.1 TBT is noted as a qualification to the MFN obligation based on the idea that conformity assessment recognition related directly to the receipt of verifiable assurance that another country’s procedures are adequate to insure legitimate domestic requirements for health and safety. A primary conceptual distinction is hereby introduced between the waiver of an internal requirement and the granting of an external preference: the waiving of an internal assessment procedure in favour of another’s procedure suggests that a capacity to do so depends significantly upon the above-mentioned assurances as to the quality of the counterpart’s procedures. This is to

say that the nature of recognition is conceived to be necessarily individualised and therefore may appear to proceed on a member-by-member basis.

Concerning mutual recognition, article 6.3 TBT is the primary provision that must be raised to accord an MFN exception which would permit, and not only encourage, parties to form MRAs. However, it is not clear from the provision itself whether MRAs may be formed in the most restrictive sense, without requiring benefits to be extended to any other member under any circumstance; or less restrictively, by requiring the MRA parties to provide a basis for conditional participation upon the request of other members; or least restrictively, by an application of unconditional MFN. As to the most restrictive scenario, it would appear possible only if art. 6.3 TBT could be divorced from other terms of art. 6.1 and from the MFN requirement in art. 5.1.1. For article 6.1 TBT, this possibility is admitted as the provision for autonomous recognition are designed to be without prejudice to the provisions of paragraphs 3 and 4. In addition, article 6.3 provides that members may require that MRAs fulfil the criteria of paragraph 1 but does not state that they are required to do so.

In conclusion, although it is arguable that MRAs could act to serve the goals expressed by article 6.1 TBT, if they do not operate as to exclude other parties from participation, such participation, although clearly encourages, cannot appear to be compelled¹¹⁵.

3.5 Overview of EU's Mutual Recognition Agreements

In its memorandum on the global approach to certification and testing, the European Commission declared its intention to conclude agreements for mutual recognition of test, reports, certificates and marks with third countries. In its subsequent resolution on the global approach, the Council announced its willingness to allow third country CABs to participate in the European system on the same basis as European bodies¹¹⁶.

The Union's campaign in favour of extending its internal mutual recognition activities to its commercial relations got started when exploratory talks with the United States on mutual recognition of conformity assessment began in 1992. The final objective was to facilitate reciprocal access to markets for private business through the mutual

¹¹⁵ Mathis opines that WTO members should designate art. XI GATT as the legal basis for recognition as this is the provision which contains the GATT's general prohibition against the use of measures other than duties, taxes and charges on the import and export of goods. In his view, other measures would encompass internal indistinct requirements as well, where they had the effect of hindering trade. This would have the effect of invalidating an indistinct measure and then subjecting such a measure to justification either according to GATT general and security exceptions under respectively article XX and XXI GATT, or by other designated requirements as determined within the context of a framework agreement. On this ground he closes up by proposing an "Article XI Understanding". Cf. Mathis, J.H., "Mutual Recognition Agreements", *op. cit.*, at 28 and 30

¹¹⁶ Council Resolution of 21 December 1989 on a global approach to conformity assessment, OJ C 10, 16.1.1990, p. 1–2. For the Community's competence to conclude such agreements, their relationship with existing agreements providing for mutual recognition of certification and testing concluded by individual Member States with third countries and the proposed content of these agreements, see Eeckhout, P., *The European Internal Market and International Trade: A Legal Analysis*, Oxford: OUP, 1994, p. 265 and 270–275 as referenced to in Jiménez García, G., Gardeñes Santiago, M., "Technical Standards in a Context of Regional Integration Agreements", in Demaret, P., Bellis, J.F., García Jiménez, G. (eds.), *Regionalism and multilateralism after the Uruguay Round – Convergence, Divergence and Interaction*, Brussels, 1997, p. 631, at 653.

acceptance of the counterpart's product test results, inspections and product certifications. In 1994 negotiations officially begun during which both parties assessed in which cases mutual recognition would apply unconditionally and in which ones it would be subject to further regulatory convergence. The prospected MRA with the US was estimated to remove barriers to bilateral trade worth \$40 billions and was expected to eliminate up to 80% of compliance and testing costs. Despite certain obstacles, due mainly to differences over the transition period on pharmaceutical products and medical equipment, the two sides early reached agreement in principle on standards for telecommunications terminal equipment, information technology, electoral products requirements, veterinary biologics and pleasure boats.

In 1994 negotiations on MRAs were also launched with Canada, Australia and New Zealand. Negotiations with Switzerland and Japan followed in 1995 and similar negotiations for MRAs with other countries in Asia, Central Europe and Latin America – namely with Mercosur, Chile and Mexico – may follow in the future depending on the fulfilment of a number of preliminary conditions¹¹⁷.

Priority given to standards and TBT issues in bilateral trade relations thus became a major component of the New Market Access Strategy¹¹⁸, which, together with the strengthening of the multilateral trading system and the consolidation of WTO rules, proposes the use of the bilateral level in certain areas to achieve quicker results in market opening and set the starting point for further liberalisation on a global basis. To date, bilateral MRAs have entered into force between the EU on the one hand and seven different commercial partners, namely Australia¹¹⁹, New Zealand¹²⁰, Canada¹²¹, the US¹²², Israel¹²³, Japan¹²⁴ and the Switzerland¹²⁵, on the other.

¹¹⁷ These conditions mainly refer to: membership to the TBT Agreement; obtaining guarantees that the competence of conformity assessment bodies in the partner country are on a par with those in the EU; confining the extent of mutual recognition to tests, certificates and marks of conformity; the agreements presenting a balanced situation concerning all aspects of conformity assessment; and the agreements having the status of formal treaties concluded between governments. See European Commission, *A guide to European Community Negotiations with third Countries concerning the Mutual Recognition of Conformity Assessment*, Brussels, 1996.

¹¹⁸ European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The Global Challenge of International Trade: A Market Access Strategy for the European Union*, COM/96/0053 Final.

¹¹⁹ Agreement on mutual recognition in relation to conformity assessment, certificates and markings between the European Community and Australia, OJ L 229 of 17.8.1998, p. 3; entered into force on January 1, 1999.

¹²⁰ Agreement on mutual recognition in relation to conformity assessment between the European Community and New Zealand, OJ L 229 of 17.8.1998, p. 62; entered into force on January 1, 1999.

¹²¹ Agreement on mutual recognition between the European Community and Canada, OJ L 280 of 16 October 1998, p. 3; entered into force on January 1, 1999.

¹²² Agreement on mutual recognition between the European Community and the United States of America, OJ L 31 of 4 February 1999, p. 3; entered into force on December 1, 1999.

¹²³ Agreement on mutual recognition of OECD principles of good laboratory practice (GLP) and compliance monitoring programmes between the European Community and the State of Israel, OJ L 263 of 09 October 1999, p. 7; entered into force on May 1, 2000.

¹²⁴ Agreement on mutual recognition between the European Community and Japan, OJ L 284 of 29 October 2001, p. 3; entered into force on January 1, 2002.

¹²⁵ Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ L 114 of 30 April 2002, p. 369; entered into force on June 1, 2002.

The preambles of the above MRAs mention various, though not always identical, public policy objectives that are pertinent to the adoption of technical trade measures. Also expressly mentioned, except in the MRA concluded with Israel, is the market access objective as well as those obligations under the TBT Agreement that the parties are called to abide by as WTO members. These provisions capture the triangular dynamic between national regulatory systems, market access and WTO obligations. First, the adoption *per se* of technical regulations affects the degree of market access granted by one country or trading block to another. Under art. 2.2 TBT, these regulations cannot be more trade-restrictive than necessary. Secondly, access for producers of a particular country's market depends on the level of technical regulation applying in its territory, and on the restraining provisions of the TBT Agreement. Third, as already stated in section I and II of the present Chapter, the WTO tries to strike a balance between international trade liberalisation and the right of its members to implement public policy through regulation.

3.5.a Extent of mutual recognition

Mutual recognition agreements concluded by the EC - currently binding the EU after the international succession triggered by the entry into force of the Lisbon Treaty and the consequent inheritance of the EC's obligations by the Union - do not extend to recognising substantive regulations and standards. Instead, they have been limited to conformity assessment procedures. These are defined generally in Annex 1 to the TBT Agreement as:

“any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled”.

The nature of MRAs in the area of conformity assessment is such that two independent parties agree to recognise the inspection results, test reports and/or certificates of conformity issued by the agreed and accredited bodies located in the territory of the other party, in respect of the products and sectors covered under such agreement. The products are tested and certified before export and, therefore, can be placed on the market of the importing country directly, without having to undergo further controls.

With the exception of the EU-Israel MRA, the scope of the agreements is limited, from the Union's point of view, to accepting designated CABs of the other party as being competent to test, certify and mark in accordance with Union's legislative requirements, and for the nominated bodies within the EU to do the same according to the legislative requirements in force within the jurisdiction of the other contracting party (and vice versa). The agreements do not extend therefore to the mutual recognition of products for sale in the Union, which have been tested, certified and marked to the third country's requirements.

The EU-Israel MRA differs from the other in that the parties do not recognise conformity assessment results in accordance with each other's regulations and standards. Instead, the parties have agreed to recognise the equivalence of each other's Good Laboratory Practices (GLPs) compliance monitoring programmes, and in turn to

accept studies and data produced by testing facilities participating in the Good Laboratory Practices compliance programme of the other party¹²⁶. The GLPs principles of both parties must be based on those adopted by the OECD.

Union's MRAs generally provide that designating authorities must be given the necessary power and competence to designate, monitor, suspend, remove suspension and withdraw designation of conformity assessment bodies. Moreover, such agreements contain provisions on mutual monitoring of authorities involved, as well as "reversibility clauses" whereby one party can take back regulatory power if it is not satisfied by the other's performance under the MRA. The EU- Canada and EU-US MRAs provide that the relevant regulatory authority of each party retains all power under their applicable laws to interpret and, subject to certain conditions, enforce their respective legislative and regulatory provisions¹²⁷. Similarly, the EU-Japan MRA reserves the right to the parties to take appropriate measures for protecting health, safety, the environment or preventing deceptive practices¹²⁸.

3.5.b Basic structure and sectoral coverage

The basic structure of each MRA consists of a Framework Agreement and various Sectoral Annexes. The former establishes the principles and procedures governing mutual recognition whereas the latter detail, for each sector covered, the scope in terms of products and operations, the respective legislation involved, any specific procedures, designated CABs, the procedures and authorities responsible for designating these bodies and, if applicable, transitional periods¹²⁹.

There is a variation in the sectors covered by the different MRAs concluded by the Union, which can be explained on the ground of the divergent interests underlying their negotiations. Nonetheless, further Sectoral Annexes can be added progressively to a given MRA, as and when appropriate. At present the sectors covered range from automotive products to electromagnetic compatibility, low voltage equipment, machinery, medical devices, pressure equipment, radio and telecommunication terminal equipment, electrical safety, recreational aircraft, Good Manufacturing Practices (GMPs) and Good Laboratory Practices (GLPs) requirements¹³⁰.

¹²⁶ EU-Israel MRA, article 2.

¹²⁷ EU-Canada MRA, article XIV; EU-US MRA, article 15.

¹²⁸ EU-Japan MAR, article 10.

¹²⁹ The EU-Israel MRA's Sectoral Annexes are limited to the products, legislation of the parties and monitoring bodies covered. Transitional periods are provided for in the MRAs with Canada, US and Israel. They are intended to allow the relevant authorities of the parties to establish confidence and understanding of each other's procedures for designated conformity assessment bodies and to evaluate the ability of conformity assessment bodies to carry out their duties. In the case of the EU-Israel MRA, the transitional period was required especially due to the lack of a Good Laboratory Practice monitoring authority in Israel. The mutual recognition obligations were intended to apply only after successful completion of the respective transitional periods.

¹³⁰ The MRA between the EU and Australia is operational for the following sectors: automotive products, EMC, low voltage equipment, machinery, medical device, pressure equipment, TTE. The MRA between the EU and New Zealand is operational for the following sectors: EMC, low voltage equipment, machinery, medical devices, pressure equipment, TTE. In the MRA between the EU and Canada, a transitional period was established for exchange of information between the parties, and to build

With regard to the implementation of each MRA, a Joint Committee has been set up to oversee its functioning. In practice, mutual recognition becomes operational when proposed CABs are confirmed by the respective Joint Committee.

3.6 The EU-US Mutual Recognition Agreement

By the mid-90s, the issue of technical obstacles to transatlantic trade became increasingly important to firms engaged in exchanges of goods between the two sides of the Atlantic for two primary reasons. First, as transatlantic tariffs barriers decreased, firms became more concerned with duplicative regulatory compliance costs and so they started to lobby for their removal. Second, when the EC achieved to the completion of the single market, US firms started to claim that the EC was erecting a fortress Europe in which Member States would use common EC standards and certification procedures to prejudice US competitors. For instance, US firms feared that they would be disadvantaged because, under the EC's global approach, only notified bodies located within the Community could test and certify products for marketing within the common market. Whereas prior to the global approach US-based laboratories acted as subcontractors for the testing of products under EC's Member States standards, firms feared this option might be foreclosed once the global approach was implemented.

Already prior to the conclusion of the MRAs between then EC and the US, firms and laboratories had in fact adapted to differing regulatory requirements through entering into sub-contracting arrangements and many businesses continue to operate under the latter. Still today, private testing bodies often test products in the manufacturer's place of production on one side of the Atlantic in accordance with requirement set on the other, and then have these test results certified by an accredited body in the importing jurisdiction. The domestic testing body operates under a sub-contracting arrangement with the responsible certification body in the importing jurisdiction¹³¹. Consequently, the Sectoral Annexes to the bilateral MRA do not represent a significant change for many businesses but rather a slight extension of sub-contracting practices that had already stemmed from regulatory and commercial developments. In fact, subcontracting is specifically contemplated in some of the MRA's Annexes such as the one on

confidence and understanding of each other's procedures for designation of CABs and evaluate the ability of the CABs to carry out their duties. Passage from the transitional to the operational phase has taken place for the following sectors: EMC, Electrical Safety, Recreational Craft and R&TTE as from 01/10/2001, GMP as from 01/02/2003. In the MRA between the EU and the USA, a transitional period was also established for the same purposes. Passage from the transitional to the operational phase has taken place for the following sectors: recreational craft as of 01/06/2000, EMC and telecom as of 14/12/2000. The MRA between the EU and Japan is operational for the following sectors: electrical products and R&TTE. The MRA between the EU and Switzerland is operational for the following sectors: machinery, personal protective equipment, toys medical devices, gas appliances and boilers (hot water boilers), pressure vessels, equipment and protective systems intended for use in potentially explosive atmospheres, electrical equipment, measuring instruments and pre-packages, motor vehicles, agricultural and forestry tractors, Good Laboratory Practice – GLP, medicinal products, Good Manufacturing Practice (GMP), inspection batch and certification, construction products.

¹³¹ Egan, M, "Mutual Recognition and Standard Setting: Public and Private Strategies for Governing Markets", in Pollack, M., Shaffer, G., *Transatlantic Governance in the Global Economy*, 2001, p. 179 ff, at 187-188.

telecommunications equipment, which provides that CABs in one jurisdiction may subcontract testing to laboratories in the other¹³².

EC-US negotiators initially discussed negotiating mutual recognition in eleven sectors but ultimately whittled this down to six, namely telecommunication equipment, electromagnetic compatibility, electrical safety, recreational crafts, medical devices and pharmaceutical GMPs¹³³. As with all negotiations, the EC and the US were both concerned that the final results either favour their own export industries or be balanced. The US wished therefore to conclude an agreement on telecommunication equipment first, but the EC refused because it felt that US firms would have benefitted more if the agreement had only covered this sector. The EC thus used its political leverage by threatening not to sign any MRA involving telecommunication equipment had the US not agreed to also include medical devices and pharmaceutical GMPs to the Framework Agreement.

The concluded MRA thus consists of a Framework Agreement and six Annexes, each of which is in fact a separate agreement for a separate sector covering defined categories and lists of products. The Agreement does not cover recognition of the adequacy or equivalency of transatlantic standards, but is rather much less ambitious. First, no negotiation has been carried out with regard to the harmonisation of transatlantic standards for the sectors concerned¹³⁴. Second, although every Annex is unique, each of those only addresses mutual recognition by CABs located in the exporting jurisdiction in accordance with the importing party's requirements and procedures. Since none of the contracting parties relinquished sovereign control over the substance of their standards, transatlantic trading firms still must meet the separate requirements of the world's two largest markets. Third, even these assessment evaluations are subject to varying pre-approval and post-approval conditions¹³⁵. For example, in the case of

¹³² See Section VII of the Telecommunications Equipment Annex.

¹³³ Given the amount of Annexes to the Framework Agreement, the negotiation of the MRA required the involvement of multiple executive agencies on both sides. The Office of the US Trade Representative and the Commission DG Trade led the negotiations of the Framework Agreement. Each of the Annexes however was negotiated by the regulatory agency responsible for the sector concerned. On the European side this was a simpler process because of the centralisation of the responsible agency officials within the Commission's DG Enterprise and these officials' long experience with coordinating the twin goals of regulatory protection and free trade within the single market. On the US side, in contrast, separate independent federal agencies negotiated the annexes, who traditionally have focused only on protecting public health and safety and thus were less receptive to arguments concerning trade facilitation. The involvement of both trade officials and regulatory officials resulted in *intra*-US agency conflicts, as well as transatlantic ones. Trade officials more aggressively pushed for an agreement and US regulatory officials, in particular the Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA), were reticent about accepting foreign certification of safety standards. In this respect, the relative independence of US agencies such as the FDA and OSHA have arguably not facilitated but rather hindered a coordinated partnership amongst transatlantic authorities.

¹³⁴ The sole minor exception to date is the MRA on marine equipment whose article 4(1) on "Equivalence of technical regulation" reads as follows: "The mutual recognition obligations [of certificates of conformity issued by each party] are based on the determination by the Parties that the technical regulations applicable to each product listed in Annex II are equivalent"; see, Agreement between the European Community and the United States of America on the Mutual Recognition of Certificates of Conformity for Marine Equipment, OJ L 150 of 30.4.2004, p. 46.

¹³⁵ For example, Section VII.2 of the Telecommunication equipment Annex provides for post-market surveillance (including via labelling and numbering requirements) and border and internal checks,

medical devices, the relevant agencies need not accept the tests from foreign certification bodies if they find the reports deficient and delineate why, thus reducing businesses' incentives to use these bodies. In the case of pharmaceutical GMP, tests are performed by regulatory bodies and not private laboratories, and again the agency in the importing jurisdiction may reject reports where it deems they are deficient.

The MRA sets up a new transatlantic structure for overseeing its implementation. First, it creates a Joint Committee, which consists of US and EU trade officials who meet twice annually. Second, the Annexes create Joint Sectoral Committees to oversee the annexes' implementation. The former are of the greatest importance for implementing the MRA since they consist of the actual regulatory authorities that must oversee the protection of health and safety on each side of the Atlantic. On occasions, however, those authorities are not effectively collaborating, such as in the domains of electrical safety, medical devices and pharmaceutical GMPs.

As of September 2011, only the three Annexes of greatest interest to the US negotiators were fully operational, namely those covering telecommunications equipment, electromagnetic compatibility and recreational crafts¹³⁶. In contrast, implementation of the Annexes for electrical safety equipment¹³⁷, medical devices¹³⁸ and pharmaceutical GMPs¹³⁹ remain in dispute. The transitional period for the medical devices Annex was further extended for two years¹⁴⁰ but actual implementation never came about. Regarding the pharmaceutical Annex, the US FDA maintained that it was willing to recognise the equivalency of only two EU Member States regulatory systems, namely the UK and Ireland's ones, by the end of the 2001 transitional period, and it set no fixed date for reviewing the others. The EC, which had to act on behalf of all then fifteen Member States, rejected the offer because it would have prejudiced manufacturers of the thirteen other Member States who would have still been subject to duplicative EC and FDA inspections. The Commission, displeased that the unimplemented Annex were those that the EC initially imposed as conditions for the MRA, had been reviewing its options, including the termination of the entire MRA or suspension or withdrawal from certain Sectoral Annexes. The EC actually suspended its obligations under the electrical safety Annex, with effect from January 2003, claiming the OSHA's continuing failure to comply with its terms¹⁴¹.

The significant institutional asymmetries between the US's and the EU's respective regulatory systems and cultures create a major challenge for transatlantic regulatory

provided that the latter are not done in a discriminatory manner.

¹³⁶ For updates concerning the sectors covered by each MRA, see http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/mutual-recognition-agreement/index_en.htm (last visited in February 2012).

¹³⁷ Shaffer, G., "Reconciling Trade and Regulatory Goals", *op. cit.*, at 15-16.

¹³⁸ *Ibid.*, at 17-18.

¹³⁹ *Ibid.*, at 18-19.

¹⁴⁰ Decision No 16/2002 of 16 April 2002 of the Joint Committee established under the Agreement on mutual recognition between the European Community and the United States of America on amending the Sectoral Annex on Medical Devices, OJ L 302, 6.11.2002, p. 30.

¹⁴¹ Council Decision on suspending the Community obligations under the Sectoral Annex for Electrical Safety of the Agreement on Mutual Recognition between the European Community and the United States of America, OJ C 20E of 28.1.2003, p. 359-363.

cooperation and the implementation of the MRA. Where regulators adopt similar regulatory structures and systems, and enact similar substantive standards, they more easily understand and accept each other's regulatory determination. Regulatory symmetries facilitate trust and confidence, enabling regulatory cooperation to occur. For example, US and the EC regulatory authorities each have supported a more decentralised process for pre-marketing approvals of telecommunications equipment, which explains the relative ease of this annex's implementation.

Although the US system is often characterised as fragmented and decentralised, its actual nature varies by sector. At times, the US system is relatively highly decentralised, as when the Congress delegates regulatory authority to an independent federal regulatory body, such as the FDA. At other times, the US system is more fragmented, with regulation consisting of a patchwork of federal, state and private voluntary standards with no overarching framework. Significant to the implementation of the MRA, US private standard-setting bodies remain highly fragmented, since the American National Standards Institute (ANSI), which is the closest to a national standards body, does not serve as an administrator or coordinator of private standard-setting¹⁴².

Moreover, the challenge of implementation also stems from the US and the EU regulators working in different regulatory cultures, which resulted in the European institutions showing a greater adaptation attitude. EU institutions and European national regulators operate under the dual mission of ensuring free circulation of goods within the internal market and at the same time granting public safety. They are thus quite accustomed to interacting with foreign regulators and testing bodies. In contrast, the US FDA for instance traditionally has defined its role solely as that of protecting US public health and does not operate under a dual mission of also facilitating market exchanges, which resulted in the Administration's relative isolation from other regulators. This accounts for both the FDA considering its practices as superior and for its anxiety to protect its regulatory autonomy, an aspiration which is therefore not peculiar to the EU regulatory bodies.

It is worth noting that, beside difficulties related to the implementation of the Annexes which the EU cares more about, a bright side does exist in terms of trends inaugurated by the MRA with the US. Although transatlantic regulatory adaptation has been only partial and in any case particularly slow, where it occurred it has been in fact rather unidirectional in that it has been the US who made most of the changes. In particular, the US have done so by adopting international standards that mirror EU ones, by delegating testing and certification responsibilities to private laboratories thus reflecting the EU's global approach and by coordinating and overseeing these laboratories under a new US national program analogous to those operating in the EU for over a decade. In this sense, the EU institution's and European regulatory bodies' experience in working under the above dual mission of ensuring at the same time the functioning of the

¹⁴² Shaffer, G., "Reconciling Trade and Regulatory Goals", *op. cit.*, at 23.

internal market and public safety did offer a model to be considered and adapted for the transatlantic context¹⁴³.

Concluding remarks

Consciously or not, the EU has been exporting its system globally. What is more, this has occurred regardless to the appropriateness of the EU's model to bilateral regulatory governance and on account of the significant market leverages that the EU is able to exercise due to the size of its single market. As in the case of the MRA with the US, firms that desire access to the European market can pressure their national officials to adapt their national regulatory systems to accommodate a reciprocal trading arrangement. As the EU entered into MRAs with other common trading partners and as these countries adapt to their systems to interact with the European governance structures, a domino effect has been ignited to the benefit of the EU model and the pressure on the US to adapt its own regulatory structures augmented.

However, the analysis of seven MRAs concluded by the EU so far also allows to submit that, notwithstanding the prospected advantages in terms of socialisation amongst CABs and the potential with regard to the diffusion of the EU model, the negotiation of mutual recognition remains affected by several limits that undermine the ability of such tool to prevent disputes.

First, it has been noted from an early stage that MRAs have been concluded by the EU only in the domain of technical barriers to trade. Sanitary and phytosanitary regulations and standards are thus left aside, and not even applicable conformity assessment procedures made the object of negotiations with a view to achieve mutual recognition. The differential treatment of TBT and SPS measures vis-à-vis recognition might be explained by the different weight in terms of public sensitiveness that the two sets of measures do bear. Stated otherwise, whereas EU institutions are in a position to envisage a cautious opening to negotiated mutual recognition in the field of electric or automotive equipment, the managed nature of mutual recognition is still not a sufficient reassurance when it comes to recognising even only conformity assessment procedures for plants and foodstuff.

Secondly and more specifically, within the TBT domain, mutual recognition obligations have been established only with regard to conformity assessment procedures, thus leaving the mutual recognition of internal standards and regulations unspoken. This shows in turn that both the EU and its partners are not willing to surrender their own substantive regulations and standards. This is all the more true if the mechanisms of equivalence recognition is taken into account, whereby the two parties to one of the above MRAs do not even recognise each other's conformity assessment procedures but limit themselves to *landing* their own to the CABs operating in the counterpart's jurisdiction with a view to have them applied by the latter. In this respect, mutual recognition as devised so far only serves the cause of easing obstacles to market

¹⁴³ Egan, M., *Constructing a European Market*, *op. cit.*, at 255-256.

access but has been unable to truly favour convergence towards shared technical regimes. This of course limits the benefits in terms of dispute prevention that MRAs are able to produce inasmuch as substantive regulation can still make the object of litigation.

Finally, a survey of the Union's counterparts in MRAs shows that the EU tends to negotiate such agreements only with commercial partners whose CABs afford high guarantees with regards to their ability to perform their duties under the terms of the agreement, i.e. to correctly apply EU technical regulation and standards. Being it as such guarantees are more likely afforded by partners whose own standards and regulations show a high degree of similarity with those of the EU, the conclusion of MRAs by the Union with countries other than developed ones is just improbable.

The above limits affecting the practice of MRAs negotiation leave room to litigation as an alternative – not to say the only - means for the EU to preserve its regulatory autonomy.

CHAPTER II

The European Union as respondent in SPS and TBT related disputes: five trade wars on domestic regulatory autonomy

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Section I – Measures Affecting Livestocks, Meat and Meat Products (Hormones)

1.1 Introduction to the dispute

As it is well known, the dispute opposing Argentina, Canada and the US to the EC concerned a number of EC directives affecting the marketing of hormones grown meat

on the Community market, namely Directive 81/602/EEC¹, Council Directive 88/146/EEC² and Council Directive 88/299/EEC³.

Directive 81/602/EEC prohibited the administering to farm animals of substances having a thyrostatic action or substances having an oestrogenic, androgenic or gestagenic action; the placing on the market or slaughtering of farm animals to which these substances have been administered; the placing on the market of meat from such animals; the processing of meat from such animals and the placing on the market of meat products prepared from or with such meat. The Directive provided two exceptions to the prohibition: one for substances with an oestrogenic, androgenic or gestagenic action when they are used for therapeutic purposes and administered by a veterinarian, other exception for five growth promoting hormones⁴ when they were used for growth promotion purposes and their use was governed according to the individual regulatory schemes maintained by member States. This exception was made pending an examination of the effects of these hormones on the health of consumers and the adoption of an EC rule.

Directive 88/146/EEC extended the prohibition imposed by Directive 81/602/EEC to the administration to farm animals of two of the above five hormones for any purpose, and of the remaining three for fattening purposes. However, the Directive maintained the permission to administer these three natural hormones to animals for therapeutic and zootechnical purposes under prescribed conditions. In particular, therapeutic treatment was defined to mean the administering to an individual animal of any of the substances which are authorized to treat a fertility problem diagnosed on examination by a veterinarian.

The importation from third countries of animals and meat from animals to which have been administered substances with thyrostatic, oestrogenic, androgenic or gestagenic action was prohibited. However, under certain conditions, article 7 of Directive 88/146/EEC allowed trade in those animals and meat from those animals treated for therapeutic or zootechnical purposes, including imports from third countries. Article 4 of Directive 88/146/EEC explicitly required that undertakings in the EC Member States producing the prohibited hormones, those companies authorized to market these hormones for whatever purposes and undertakings producing pharmaceutical and veterinary products based on those substances, kept a detailed register recording the quantities produced or acquired and those sold or used for the production of pharmaceutical and veterinary products.

Directive 88/299/EEC laid down the conditions for applying the derogations, provided for in article 7 of Directive 88/146/EEC, from the prohibition on trade in certain categories of animals and their meat. The first derogation of the Directive required

¹ Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action OJ L 222 du 7.8.1981, p. 32–33.

² Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action, OJ L 70 du 16.3.1988, p. 16–18.

³ Council Directive 88/299/EEC of 17 May 1988 on trade in animals treated with certain substances having a hormonal action and their meat, as referred to in Article 7 of Directive 88/146/EEC, OJ L 128 du 21.5.1988, p. 36–38.

⁴ Oestradiol-17 β , progesterone, testosterone, trenbolone acetate and zeranol.

Member States to authorize trade in animals intended for reproduction and reproductive animals at the end of their career (and of meat of such animals) which, during their reproductive career, had undergone one of two categories of treatments involving the use of the banned hormones.

Directive 96/22/EC⁵ would have replaced Directives 81/602/EEC, 88/146/EEC and 88/299/EEC as from 1 July 1997. It would maintain the prohibition on the use of hormones for growth promotion purposes; extend the prohibition on the use of beta-agonists; restrict the use of the hormones at issue for therapeutic or zootechnical purposes, reinforcing in particular the role of the veterinarian and reinforce the provisions on control and testing. Penalties and sanctions in case of violations were to be increased where checks detected the presence of prohibited substances or products or residues of substances administered illegally. Such substances or products would be confiscated and any treated animals or meat placed under official supervision until penalties had been applied.

1.2 Article 2.2 SPS: the appropriate level of protection and the definition of sufficient scientific evidence

The EC noted that article 2.2 required that SPS measures must be based on *scientific* principles, as opposed to non-scientific ones. If a measure was aimed at reducing or eliminating a risk to health, then it must actually address that risk in a manner which could be scientifically justified. Canada had not shown that the measures complained against were not based on scientific principles. A logical consequence of the requirement for measures to be based on scientific principles was that they must not be *maintained* without scientific *evidence*. The EC claimed that all WTO members had measures in place before the SPS Agreement was drawn up, and in the absence of this requirement it could have been argued that the requirement for basing measures on scientific principles could not be applied retrospectively.

The EC noted that the SPS Agreement had not defined the term “scientific evidence” since its content was relative in terms of time and was dependent on the principles, methods, experiments and data used. What might be an acceptable scientific method for one scientist might not satisfy another, who might be more interested in certain other scientific principles or aspects totally neglected or partially examined by the first scientist. For that reason the SPS only required “sufficient”, not clear or certain, scientific evidence, the former term “sufficient” being also nowhere defined in the SPS Agreement. The EC argued that it was generally agreed that sufficient could not mean other than the minimal level of scientific evidence required.

Moreover, the EC noted that the SPS Agreement also required WTO members, in their risk assessment, to take into account “*available* scientific evidence” and argued that from the “available” scientific evidence, a Member was entitled to rely on that which its

⁵ Council Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of β -agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC, OJ L 125 of 23.5.1996, p. 3–9.

own scientists said was appropriate and sufficient and disregard other available evidence. Against this background, the EC concluded that neither the Panel nor any other member might judge the adequacy of the scientific evidence upon which a member based its measure in order to achieve its level of sanitary or phytosanitary protection. In other words, if the weight of available scientific evidence indicated that a substance was not dangerous to human health, but another part of available scientific evidence indicated that there might be potential hazards to human or animal health, a member would be entitled under the SPS Agreement to take a precautionary approach and base its measure on the latter part of the available scientific evidence. It was sufficient if the government maintaining the measure had a, read any, scientific basis for it. However, the EC stressed that this did not mean that members were obliged to demonstrate a scientifically confirmed adverse effect from a particular hazard before they might take measures. The SPS Agreement could not have been intended to operate in such a way that members must wait until people were actually sick or dying before being allowed to take measures.

The EC noted that the closest the SPS Agreement came to defining sufficient scientific evidence was in the footnote to Article 3.3, where the concept of a scientific justification was defined as follows:

For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

It followed that scientific justification required an examination and evaluation of available scientific information, based on scientific principles. However, at the end it is still the prerogative of the member in question to decide whether the international standard, guideline or recommendation is sufficient to achieve its appropriate level of sanitary protection. The level of protection is decided by the member alone and it was not a judgment that must be based on scientific principles or scientific evidence.

1.3 Claims under articles 5.1 and 5.2 of the SPS Agreement: the assessment of the risk

The EC observed that Canada did not appear to argue that the challenged measures had no scientific basis, but that they were not based on an appropriate risk assessment for the maintenance of a higher level of protection than that afforded by a Codex standard such as explicitly allowed by article 3.3 SPS.

The EC responded that the SPS Agreement requires Members to take into account risk assessment techniques developed by relevant international organizations. However, in the EC's view, back then the Codex Alimentarius Commission was far from developing any such techniques as it was still trying to agree on definitions. A WTO member was, therefore, free to make an assessment of the risk as it thought correct and as was appropriate to the circumstances prevailing in its territory. Article 5.2 laid down the

elements a WTO member should take into account in an assessment of the risk: available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases, etc. For the EC, each of the three words "available scientific evidence" has a distinct meaning: the evidence a member took into account for its risk assessment had to be scientific, i.e. it must have the minimal attributes of scientific inquiry, and it should be part of the body of scientific knowledge in the area of concern, even if it was not the prevailing view among scientists

The EC recalled that "assessment of the risk" was defined in Annex A to the SPS Agreement as follows:

"the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease causing organisms in food, beverages or feedstuffs"

The EC noted that there were, therefore, three different concepts to distinguish: the "adverse effect", the "risk" and its "assessment". The EC argued that the concept of "risk assessment" in the SPS Agreement is predominantly a scientific process, whose purpose was to establish *the strictly scientific basis* for the regulatory measure the WTO member would take. In the view of the EC, the concept of risk assessment was composed of two parts: the *scientific assessment of the risk* and the *management of that risk*. The approach of the SPS Agreement was also conformity with democratic regulatory procedures, where frequently a dichotomy was operated in the decision making process between *risk assessment* and *risk management*. The first established strictly the scientific basis for regulatory action. The second (risk management) was the process by which the competent authority of a Member decided what action to take in the face on the assessment submitted to it by the scientists. Such action was based on factors such as public health and environmental protection, relevant legislation and legal precedent, application of social, economic and political values and consumer concerns. In a democratic legislative system, the risk management phase, therefore, expressly recognized the importance of social value choices. In the management of the risk therefore elements other than strict science entered into consideration.

Moreover, the SPS Agreement did not prescribe a quantitative risk assessment. The EC considered that there must exist "a potential risk for adverse effects", i.e. it was implicit that in order to need a level of protection there must be some hazard against which a member needs to protect. However, this only implies the *identification* of a hazard, not an assessment of the probability that it would cause damage. The SPS Agreement left members free to define *the level of probability* they wanted to assume: this might range from zero to infinite; it also left them free to decide the *type of measure* they might choose to ensure that the level of protection they considered to be appropriate was achieved. A risk assessment might help in setting a standard designed to limit the probability that a human developed cancer after a lifetime of exposure to a particular chemical substance to no more than one chance in a million. By contrast, the choice of defining a threshold as opposed to relying on statistic chance was a choice of public policy, as such not of scientific nature.

The EC claimed that the competent institutions had performed a risk assessment in the sense of articles 5.1 to 5.6 SPS by taking into account the available scientific evidence of risks to humans and animals; relevant processes and production methods; and relevant inspection, sampling and testing methods. These latter two elements confirmed that risk assessment for the purposes of the SPS Agreement was not a purely scientific matter; the practicalities of actual application must also be taken into account. The EC observed that *none* of the available scientific reports had concluded in favour of an unqualified use of these hormones for animal growth promotion. Based on such assessment, the EC institutions had been concluded that a ban on the use of hormones for growth promotion would be less trade-restrictive than the imposition of the control system which would otherwise be required. The EC argued that, therefore, it had based its measures on the risk assessment it had conducted for that purpose.

The phrase “as appropriate to the circumstances” in art. 5.1 SPS in the EC view must be referred to the circumstances of the Member carrying out the risk assessment. In the case of the EC, assessment of risk was part of the complex EC legislative process, with its comprehensive consultations, checks and balances involving a proposal by the EC Commission, the opinions of the Economic and Social Committee and the European Parliament, and the adoption by the Council of Ministers. According to the EC’s, if these words meant “the state of scientific and technical knowledge in the area of concern”, the remaining phrase in article 5.1 “taking into account risk assessment techniques developed by the relevant international organizations” would serve no useful purpose. For the EC, the phrase "as appropriate to the circumstances" is usually required, as here, to bring close to the concrete circumstances of application the concept under examination. In this case, the risk assessment should take into account the nature of the substances and the type of risks they posed to human and animal health in the territory of each WTO member. A substance might not be viewed as posing very serious risks in a country, whereas the same substance might be viewed as posing a serious risk to humans in the EC.

Moreover, the EC stressed that there did not exist yet risk assessment techniques developed by the relevant international organizations. Codex was still discussing different concepts, but there was no agreement yet on these techniques. A Member was, therefore, free to make an assessment of the risk as it thought correct and as was appropriate to the circumstances prevailing in its territory. Canada's definition of the phrase "as appropriate to the circumstances" would devoid it of any useful meaning. Article 5.2 laid down the elements a Member should take into account in an assessment of the risk: available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases, etc. Each of the three words "available scientific evidence" had a distinct meaning: the evidence a Member took into account for its risk assessment had to be scientific, i.e. it must have the minimal attributes of scientific inquiry, and it should be part of the body of scientific knowledge in the area of concern, even if it was not the prevailing view among scientists.

1.4 The precautionary principle

The EC stressed that the difference in degree of regulation with respect to the complaining parties was due to the greater attachment of the EC to the precautionary principle, which reflected the different levels of consumer protection. Where there existed a doubt over the safety of a product, the EC had given the benefit of doubt to the consumer, especially in cases where the potential risks might affect very large parts of the population, whereas in the EC's view the complainants had, in the case of growth hormones, given it to the producer.

The so-called precautionary principle inscribed in the EC Treaty itself, of which then article 130R on the protection of the environment provided, *inter alia*:

Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on *the precautionary principle* and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies [...]

The EC contended that the essential features of the principle or approach were well known and widely accepted so as to say that it had reached the status of a generally accepted principle of international law, particularly in the area of prevention of risks to human or animal health or the environment. The hazard having been identified in this case, the lack of scientific knowledge on the exact mechanisms by which it operated was not a sufficient excuse for failing to take strict measures to prevent it.

The EC observed that there was a wider angle from which these risks might be examined and within a broader regulatory context. Whereas the EC used science in their regulatory process and promoted its role internationally, such use of science had its limitations. Scientific certainty in a regulatory process being difficult to achieve and regulation having to be done in this context of uncertainty, the question was how much of that uncertainty a legal system was prepared to accept. The EC precautionary approach was required to avoid situations as those portrayed by many cases of health hazards which only became apparent long after substances or products had been assumed to be safe.

Section II - Measures Affecting Asbestos and Asbestos-containing Products

2.1 Introduction to the dispute: the contested French ban

The asbestos dispute⁶, particularly the AB report, is better known for the interpretation therein given to the concept of likeness under art. III:4 GATT, than for the

⁶ WTO, DS135, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*; request for the establishment of a Panel by Canada WT/DS135/3 of 9 October 1998; Panel report WT/DS135/R of 18 September 2000; AB report WT/DS135/AB/R of 12 March 2001.

interpretation of TBT requirements. XXX mentions indeed the disappointment of academia due to the lack of the long awaited ever first report on interpreting key issues of the TBT agreement, such as the definition of technical regulation and of relevant international standards, as well as the putting forward of a necessity test under art. 2.2 TBT. Such hopes were frustrated because the Panel did not consider the French provision at the origin of the dispute as a technical regulation in the first place, thus excluding it from the scope of application of the agreement and avoiding analysing claims thereunder. On appeal, the Appellate Body was therefore not in position to decide on the TBT-related claims made by Canada, notwithstanding the AB reversed the Panel's finding in considering the measure at stake as a technical regulation. Irrespectively of the final findings, the asbestos dispute is essential to the reconstruction of the EU objectives in dispute settlement as long as submissions by the EC put forward a wide range of TBT-related legal arguments.

The measure at the origin of the dispute between Canada and the EC is French Decree 96-1133 of 24 December 1996 implemented pursuant to the Labour Code and the Consumer Code, banning asbestos in all of its forms without distinguishing between the different varieties of it and providing for temporary exceptions to such ban⁷.

On the one hand, article 1 of the Decree establishes a general ban in that it prohibits the manufacture, processing, sale, import, exportation, placing on the domestic market, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices, thus prohibiting also any product containing asbestos fibres⁸.

On the other hand, the Decree provides for temporary exceptions at article 2. Subject to an administrative procedure set forth at article 3 of the Decree⁹, article 2 which excludes

⁷ Official Journal of the French Republic of 26 December 1996. The Decree entered into force on 1 January 1997.

⁸ Article 1 of the Decree reads as follows:

“I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.

III. The bans instituted under Articles I and II shall not prevent fulfilment of the obligations arising from legislation on the elimination of wastes.”

⁹ Article 3 provides that:

“I. The manufacture, processing, importation and domestic marketing of any of the materials, products or devices falling into one of the categories mentioned on the list envisaged under Article 2 shall be subject to a statement, signed, as appropriate, by the head of the business establishment, the importer or the party responsible for domestic marketing, which should be addressed to the Minister for Labour. This statement shall be filed in January of each year or, as appropriate, three months before the start of a new activity or the alteration of an existing production activity, by means of a form decreed by the Ministers for Labour, Consumption, Industry and Agriculture.

The statement shall be accompanied by all the supporting documents in the possession of the declaring party making it possible, considering the state of scientific and technological progress, to determine that as of the date of signature of the statement, the activity covered by the statement meets the conditions set

from the general ban existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which, considering the state of scientific and technological progress, poses a lesser occupational health risk than chrysotile fibre to workers and provides all technical guarantees of safety for users¹⁰.

2.2 Main claims by the parties

A manufacturer and exporter of chrysotile asbestos fibres and of products containing these fibres, such as asbestos cement, Canada first requested consultations with the EC under the DSU and subsequently requested the establishment of a Panel. Canada demanded that the Panel address recommendation to France to make the Decree compatible with a number of its obligations under the TBT agreement and the GATT 1994¹¹.

In its request for the establishment of the Panel, Canada claimed, firstly, that the Decree was a technical regulation covered by the TBT agreement and that, as such, it was incompatible with paras. 1, 2, 4 and 8 of article 2 thereof. I Canada requested the Panel to find that the French Decree banning asbestos was incompatible with the TBT agreement insofar as it was a technical regulation that created an unnecessary obstacle to international trade (contrary to the provisions of article 2.2 TBT); it was not based on effective and appropriate international standards nor was it in compliance with them (contrary to the provisions of article 2.4 TBT); it was not based on orders relating to chrysotile and chrysotile-containing products with respect to the product performance of

forth in Article 2.I.

II. Activities that have not been the subject of a full statement submitted within the set time-frame may not benefit from the exception granted under Article 2.

III. The Minister for Labour may at all times convey to the author of the statement such information as may seem to him to establish that the material, product or device in question, although falling into one of the categories on the list mentioned in Article 2, does not meet the conditions laid down in paragraph I of that same Article. After requesting comments from the declaring party, he may serve notice to said party to cease manufacture, processing, importation or domestic marketing and to observe the ban instituted under Article 1. He may make such notification public.”

¹⁰ Article 2 reads as follows:

“I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- on the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

II. The scope of application of paragraph I of this Article shall cover only the materials, products or devices falling within the categories shown in an exhaustive list decreed by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. To ascertain the justification for maintaining these exceptions, the list shall be re-examined on an annual basis, after which the Senior Council for the Prevention of Occupational Hazards and the National Commission for Occupational Health and Safety in Agriculture shall be consulted.”

¹¹ In its request for the establishment of a panel, Canada also claimed that the Decree was inconsistent with the EC (and therefore France) obligations of the under articles 2 and 5 of the SPS agreement. However, Canada did not pursue this claim in its written or oral arguments before the Panel.

chrysotile (contrary to the provisions of article 2.8 TBT); and it violated the national treatment disciplines and the most-favoured-nation clause of article 2.1 TBT.

Moreover, the complaining party claimed that the Decree was incompatible with Articles XI and III:4 of the GATT 1994 in that it created a prohibition or a restriction on the import of chrysotile and chrysotile-containing products (contrary to the provisions of article XI.1) and favoured the national industry of products like chrysotile fibre and chrysotile-cement products (contrary to the national treatment disciplines of article III:4).

Lastly, Canada requested that, should the Panel have been unable to find a violation of Article XXIII:1(a) of the GATT 1994 resulting from the respondent failure to carry out its obligations under the said agreement, it nevertheless found that the provisions of Article XXIII:1(b) GATT applied and so that, irrespectively of the its compatibility with GATT, the application the Decree by France nullified or impaired advantage accruing to Canada from the WTO agreement or impeded the attainment of an objective thereof.

Acting as respondent in the place of France, the European Community reject all the arguments put forward by Canada. In particular, it asked the Panel to find that the Decree was not a technical regulation, therefore not covered by TBT provisions and that, in any case, it complied with those provisions.

With regard to the GATT 1994, the EC maintained that the Decree was not to be considered as a quantitative restriction to the importation or exportation of asbestos and related products. Accordingly, it asked the Panel not to examine the measure in relation to the scope of article XI GATT.

It also demanded the Panel to confirm that either the Decree did not establish less favourable treatment for Canadian chrysotile fibres than for domestically produced asbestos, within the meaning of Article III:4, or that, in any event, it was necessary to protect human health within the meaning of Article XX(b). Should not be examined in relation to the scope of Article XI of the GATT 1994.

Lastly, the EC asked the Panel to establish that no non-violation nullification or impairment of Canada's rights under the WTO agreement occurred Article XXIII:1(b) GATT.

2.3 The EC defence on TBT-related claims

The EC tried to subtract the Decree from the application of TBT provisions by limiting the scope of the agreement through a narrow interpretation of the definition of technical regulation contained in Annex 1 thereto¹². Furthermore, should the Decree be actually considered a technical regulation for the purpose of the applicability of the TBT agreement, the EC argued that the French measure abided by the latter's provisions by asserting WTO members' freedom to chose the level of protection of human health they

¹² The ensuing considerations on the EC line of defence are partially based on the comparative analysis of the following documents presented by the EC before the AB, and available on the website of the Commission DG Trade: European Communities – measures Affecting Asbestos and Asbestos-Containing Products (WT/DS135/R) (AB-2000-11), *Appellee Submission by the European Communities pursuant to Rule 22 of the Working Procedures for Appellate Reviews*, Geneva, 1 December 2000.

deem appropriate and by distinguishing their obligation to based domestic technical regulations in relevant international standards from their faculty to make them comply with those.

2.3.a Non applicability of the TBT agreement to general prohibitions such as the one contained in the Decree

The European Communities maintained that the TBT agreement did not apply to the Decree on account of the argument that the French measures could not be qualified as a technical regulation. The EC pointed at the general nature of the measure in order to support its argument. The Decree could not be construed as a technical regulation within the meaning of the TBT agreement because the latter does not cover general prohibitions, such as the one contained in the Decree, on the use of a product for reasons that have to do with the protection of human health.

After recalling that treaty interpretation must be carried out in the light of customary rules of interpretation of public international law, in particular those arising from the 1969 Vienna Convention on the Law of Treaties¹³, the EC contended that TBT agreement does not cover general prohibitions by arguing that its fundamental objective is to monitor the adoption and application of the standards and technical regulations that cover the detailed characteristics of products or their methods of production. In the EC's view, this follows from the third and fifth paragraphs of the preamble, from the background to the agreement and from the actual wording of several of its provisions. On the other hand, it is not the object and purpose of the TBT agreement to deal with general prohibitions such as that applied by the Decree. This would mean shifting the purpose of the agreement from dealing with technical regulations and standards to market access problems. The EC based this assertion on the wording of Annex 1 to the agreement, which gives the definition of what should be understood by "technical regulation" as a document which lays down the characteristics or processes and production methods with which a specific, identified product must comply, in particular if it is to be released for free circulation on a given market. A measure cannot fall within the TBT Agreement unless it satisfies, in particular, the definition of "technical regulation" contained in Annex 1 to the Agreement. The definition means that the TBT Agreement cannot apply to the Decree in that the latter consists of a prohibition measure that cover *all products of that kind*. In the EC's view, however, this does not result in a legal vacuum for measures of this type since they continue to be covered by the GATT alone. To adopt any other approach would be equivalent to nullifying the

¹³ As it is well known, those rules call for an examination of the ordinary meaning of the terms of a treaty, read in their context and in the light of the object and purpose of the treaty considered. The Appellate Body has indicated in this regard that "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought", *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB Report, WT/DS58/AB/R, 6 November 1998, para. 114. Therefore, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility, *United States - Standards for Reformulated and Conventional Gasoline*, AB and Panel Report WT/DS2/9, 20 May 1996.

effect of certain provisions thereof, in particular articles I and III, which are applicable in cases of general prohibitions.

The EC therefore interpreted the TBT agreement as the specific application of the principles of the GATT 1994 to technical regulations. In its view, negotiators of the TBT agreement did not wish it to apply in every case to Members' regulatory measures affecting products, and in particular to general prohibition measures¹⁴. Therefore the EC distinguishes between regulatory measures and technical regulation and establishes a univocal relation between the two: whereas a technical regulation is always a regulatory measure, the contrary is not necessarily so depending on the very content of it.

Proving that the Decree was not a technical regulations, the general scope of the ban therein established was in turn demonstrated, according to the EC, by the circumstance whereby the purpose and the effect of the Decree was to specify neither the characteristics nor the production processes and methods for asbestos fibres and asbestos-containing products nor the products exempted from the prohibition.

With regard to product characteristics, whilst Canada maintained that the fundamental characteristic laid down by the Decree was the absence of asbestos fibres and that the products covered were materials, products and devices that were placed on the French market, the EC rejected the argument that the words "the absence of asbestos fibres" served to characterize products placed on the French market. The absence of asbestos fibres did not constitute a characteristic, much less the characteristic of products placed on the French market. In other words, the EC denounced a critical weakness of Canada's argument laying in the fact that the latter failed to link "the characteristics" and "a product" through the possessive connective "of". For the Decree to be able to lay down the characteristics of a product, it would have had in one way or another to designate the product(s) to which the said characteristics related. However, the Decree did not spell out any specific product but limited itself to lay down the principle of prohibition that has a general scope. Therefore, insofar as it simply prohibited their use on French territory, neither did the Decree lay down the characteristics of asbestos fibres nor did it specify those of asbestos-containing products.

Furthermore, the EC asserted that the Decree did not lay down production processes¹⁵ and methods¹⁶ relating to a product. The Decree did not indeed lay down any means or

¹⁴ The EC supported its reasoning with the position taken by referring to the Panel report on *United States - Gasoline*, which noted that "The United States argued that the TBT Agreement had been designed to elaborate on the disciplines of Article III of the General Agreement for a very specific subset of measures (technical regulations, standards and conformity assessment procedures). The fact that a measure was in writing, mandatory and applied to products did not make it a technical regulation. Excise taxes, for instance, met all these criteria but were not 'technical regulations'. Similarly, the term 'technical regulation' was not so broad as to cover all government regulatory actions affecting products. For example, government regulations requiring factory smokestacks to have devices to reduce emissions were not technical regulations, though they were in writing, mandatory and specified 'characteristics'. [...] The United States concluded that the complainants were interpreting the term 'technical regulation' out of context and such an interpretation, if accepted, would introduce into the TBT Agreement many measures which were in fact not intended to be covered", *United States - Gasoline*, AB and Panel Report, WT/DS2/9, adopted on 20 May 1996, para. 3.77.

¹⁵ Account being taken of the fact French was the original language of the proceeding, the EC referred to the definition of process given by the Larousse French dictionary, whereby process is defined as "means, a practical method of doing something, of obtaining a result".

ordered set of rules governing the production, i.e. the extraction and processing, of asbestos fibres. The prohibition applying to asbestos fibres, it was in fact not possible to determine how they should have been produced because they may no longer be produced. The same was true of asbestos-containing products.

The EC also emphasized that, contrary to what is required by the definition of technical regulation given by Annex 1 to the TBT agreement, the Decree did not identify the products that must not contain asbestos. All products, without more precise identification, were subject to the ban. Whereas a technical regulation presupposes that the product concerned can always be supplied on the market, the general prohibition contained in the Decree eliminated targeted products from the French market. Consequently, it could not be maintained that the Decree laid down the characteristics of a product which no longer existed on the market. The same applied to the production processes and methods for the product, which are linked to its characteristics.

The EC reaffirmed its conclusions that the TBT Agreement is not applicable also in relation to the provisions of the Decree concerning exemptions from the ban. The EC maintained that the Decree did not define the technical characteristics of the products that may enjoy an exemption from the general prohibition inasmuch as such products may or may not contain asbestos. In addition, the EC pointed out that this very limited number of products would anyhow be phased out as soon as substitute products that can ensure a lower level of risk and guarantee the same security for users would become technically available. Nor did the Decree define, in the EC's view, the production processes and methods for the products that may be exempted from the general ban for the very same reason that such products may or may not contain asbestos.

Finally the EC rejected any relevance of notifications to the determination of whether a given measure falls within the scope of the TBT agreement. The fact that France had notified the Decree to the Committee on Technical Barriers to Trade in no way prejudged, in the EC's view, the applicability of the agreement. Whereas the French notification was made in good faith and for the sake of transparency, a wide-ranging interpretation of such practice would create additional obligations for WTO members and would induce them to discontinue, or at least reduce, notifications of their general legislation to WTO Committees.

2.3.b Article 2.1 TBT as a specific application of articles I and III GATT

The EC pointed out that Article 2.1 of the TBT agreement may be considered as a specific application to technical regulations of articles I and III of the GATT 1994. As the EC show in the section relating to the application of Article III:4 of the GATT, the Decree does not discriminate between imported products and like national products.

¹⁶ According to the same dictionary source, method is a “logically ordered set of principles, rules or stages making it possible to reach a result”.

2.3.c Contentions under article 2.2 TBT

According to the EC, the Decree met the two basic criteria enabling a WTO member to adopt a restrictive technical regulation under article 2.2 TBT. First, there must first be a legitimate objective, such as the protection of human health. Second, the member's technical regulation must not be more trade-restrictive than is necessary to fulfil this legitimate objective, taking account of the risks that non-fulfilment would create. In this context, a strong similarity between article 2.2 TBT and XX(b) was asserted by the EC, particularly in regard to the necessity test required under both provisions.

(i) Legitimate objective

The EC claimed that, as it emphasized in connection with article XX(b) of the GATT, the aim of the French measure was to halt the spread of the risks associated with the use of asbestos fibres and asbestos-containing products and thus to reduce the number of deaths among the French population. The Decree is therefore perfectly in keeping with policies designed to protect human health.

In the view of the EC, each member of the WTO benefits from a large measure of autonomy in establish the level of health protection it deems appropriate in its territory¹⁷. The question might nonetheless arise whether this appropriate level is limited by the word “necessary” or by the fact that the measure must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. In this respect, the EC made a distinction between the *level* deemed appropriate by the Member and the *measure* taken to achieve the chosen level. The EC noted that, in the context of article XX(b) GATT which it equates to article 2.2 TBT with respect to the test of necessity, all the panels which have examined the concept of necessity have concluded that it was not the necessity of the objective pursued by the measure concerned that should be examined but whether or not it was necessary to submit the imported products to the measure contested in order to achieve the chosen level of protection¹⁸.

¹⁷ In this connection, the EC pointed out that, for example, the sixth paragraph of the preamble to the TBT agreement states that members are free to choose the level of health protection they deem appropriate. This principle was also noted by the Appellate Body, which pointed out that “WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements”, WT/DS2, *United States – Gasoline*, AB Report, 20 May 1996, WT/DS2/AB/R, in particular pp.30 and 31.

¹⁸ In US-Gasoline, the Panel noted that “[...] the term ‘necessary’ had been interpreted in the context of Article XX(d) by the panel in the *Section 337* case which had stated that: a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions”, WT/DS2, *United States – Gasoline*, AB and Panel Report, 20 May 1996, WT/DS2/9, paras. 6.22-6.24, in particular 6.24. In this connection, the Panel on *United States - Restrictions on Imports of*

In other words, the EC maintained that the chosen level of protection cannot be questioned. Only the measure adopted to achieve that level of protection can. More specifically, whereas the trade measure that makes it possible to achieve the desired objective must satisfy certain conditions, there is no restriction on the level of protection chosen. Accordingly, the EC considered that France was free to choose the level of protection it deemed appropriate, i.e. in the instance at issue to halt the spread of the risk linked with the use of asbestos fibres and products containing such fibres.

Finally, the EC pointed out that, irrespectively of the correspondence of the tests of necessity under article 2.2 TBT and article XX(b) GATT, and even though the latter provision places it on the respondent, the burden of proof within the context of the TBT agreement remains with the party which invokes a specific provision of the agreement to establish the inconsistency.

(ii) *Necessity test*

On the issue of necessity, Canada made a distinction between, on the one hand, the need to determine whether the Decree permitted the fulfilment of the objective cited by France and, on the other, whether the effects of the technical regulation were necessary, taking account of the risks that non-fulfilment would create.

The EC, in turn, responded by asserting once again the correspondence between articles 2.2. TBT and XX GATT. The concept of necessity under article XX(b) GATT is similar to that in Article 2.2 TBT. The criterion of necessity under the latter provision is also based on whether or not the measure adopted is more restrictive than necessary to fulfil a legitimate objective. In this sense, article 2.2 echoes the test of necessity in article XX(b) GATT which involves, *inter alia*, examining whether a measure consistent or less inconsistent with the GATT, and hence less trade-restrictive, is available and could be employed to fulfil the member's objective.

As for the second sentence of article 2.2 TBT, concerning the risks non-fulfilment would create, the EC considered that, here again, this is an integral part of the implementation of the test of necessity under Article XX(b) GATT. In fact, according to the EC, a restrictive measure is “necessary” only if there are risks associated with the non-adoption of the measure in question.

Thus, in the Community's view, the wording of article 2.2 shows that the necessity test laid down therein is in line with that used in connection with Article XX of the GATT¹⁹ and developed by Panel practice, according to which a dual examination has to be carried out: first, to determine whether the measure is the only one that allows the

Tuna had already stated, in relation to GATT 1947, that “[...] Article XX(b) allows each contracting party to set its own human, animal or plant life or health standards. The conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be ‘necessary’ and not ‘constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’, refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the contracting party”, *United States – Restrictions on Imports of Tuna*, report circulated on 3 September 1991, not adopted, BISD 39S/155, para. 5.27. See also, *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, para. 5.26; *Thailand – Import Restrictions and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200, para. 75;

¹⁹ As it will be shown in Section IV of this Chapter, the EC an opposite stance in the *EC-Sardines* dispute.

objective set by the member to be attained, or whether there is a less restrictive measure whereby this objective can also be achieved; second, to assess the risks which a failure to take the measure concerned would create, account duly being taken of available scientific and technical information or end-uses of products.

The EC claimed that, applied to the Decree, these two criteria showed that the measure is compatible with article 2.2. On the one hand, the prohibition of asbestos and asbestos-containing products altogether was the sole measure that would enable the objective set by the French authorities to be achieved. Less trade restrictive measures pointed out by Canada, namely the safe use of asbestos, were insufficient²⁰ and ineffective²¹ to halt to spread of risks associated to exposure to asbestos in both productive and non-productive environments²². In other words, according to the Community, once products are placed on the market, there is no longer any realistic means of monitoring the use of asbestos, and in particular the everyday operations, such as cutting, sawing, etc. in which many persons may be engaged. The EC maintained that the safe use principle advocated by Canada was therefore not inapplicable and did not enable the legitimate objective set by France to be achieved.

Moreover, in the light of the available scientific and technical information and of the end-uses of asbestos and asbestos-containing products, risks resulting from the non-implementing the measure concerned, i.e. the failure to ban the items at issues, consisted in creating risks for human health. The EC assert that Canada, who bore the burden of the proof in this respect, failed to that the replacement of the horizontal prohibition by “safe” use would not create risks to human health. Nor could the complaining party discharge the said burden by trying to justify the safe use of asbestos by reference to out-dated texts²³ which did not guarantee an adequate level of protection, given the health objectives adopted by the vast majority of countries. The EC emphasized in this connection that recent texts, not quoted by Canada, confirmed the ineffectiveness of such safe use²⁴.

²⁰ According to the EC, safe use would be insufficient to halt the spread of the risks linked to exposure to asbestos in the production and processing industries because, even though the number of workers in those industries were limited and they were therefore, in principle, easy to supervise and monitor, safe use would not guarantee a decrease in the excess of mesotheliomas affecting workers.

²¹ The ineffectiveness of the principle of safe use was particularly referred to occasional and unwitting exposures to asbestos, in relation to which it was impossible to ensure and monitor safe use among do-it-yourself enthusiasts and those exposed to para-occupational risks. The principle, the Community maintained, could not apply where the risks affect a range of very varied occupations operating in a wide variety of situations.

²² The EC noted that, in their written and oral replies, the scientific experts all agreed that banning the use of all types of asbestos, including high-density asbestos-containing cement products, was in fact the only real option available to France to achieve its legitimate objective of protecting human health.

²³ Such as ISO 7337:1984, *Asbestos reinforced cement products - Guidelines for on-site work practices*.

²⁴ The EC contented that in the mining and processing industries, in principle the easiest to monitor, the limits to the safe use of asbestos were apparent. To support this argument, it quoted the 1996 study of the British HSE, finding a significant excess of deaths due to mesothelioma among workers who began working in asbestos mines after the introduction of safe use. In the para-occupational and domestic context as well hundreds of thousands of persons were exposed, very often unwittingly, to asbestos and might even have been subject to exposure levels greatly in excess of the foreseen limit values for asbestos dust. The EC pointed out that a 1992 study by the Quebec CSST showed that the risk of mesothelioma had been rising steadily in Canada since 1967, chiefly among repair and maintenance workers. This finding was even more relevant to those persons exposed to asbestos inhalation in a non-occupational

Finally, also with regard to the necessity test, the EC pointed out that, albeit the test should be applied in the same way in article 2.2 TBT and XX(b) GATT, the distribution of the burden of proof is not the same under each of these provisions. As opposed to article XX(b) GATT, within the context of article 2.2 TBT, the burden is on the complaining party to first establish a violation. Article 2.2 cannot be understood as an exception to another provision of the TBT Agreement. In this respect, the EC considered it appropriate, in view of the structure and context of the TBT agreement, to mention the Report of the Appellate Body in the *Hormones*²⁵. In fact, the complaining member must first demonstrate the availability of a consistent or less inconsistent alternative measure that can be employed to achieve the level of protection deemed appropriate by the defending member²⁶. The EC considered that, for the reasons above, Canada had not shown that the French measure was not necessary, within the meaning of Article 2.2 TBT, to protect human health in accordance with the level of protection deemed appropriate by France.

2.3.d Contentions under article 2.4 TBT

In relation to the alleged inconsistencies between the Decree and relevant international standards, the European Community contended that international texts referred to by Canada (the ILO, WHO, ISO texts) do not meet the definition of the term “standards” given in Annex 1 to the TBT agreement in the first place. Furthermore, by arguing that art. 2.4 does not impose conformity to international standards, the EC considered that, in any event, the French authorities used the texts referred to by Canada “as a basis” for their Decree, within the meaning of the said provision.

After recalling that the object and purpose of the TBT agreement are to monitor the adoption and application of “standards” and “technical regulations” which cover the detailed characteristics of products or their methods of production, the EC considered that such object and specific purpose are bound to have an impact on the meaning to be given to the term “standards” mentioned in article 2.4 TBT, this impact being moreover recognized by the agreement itself at article 1.1 and 1.2. As Annex 1 contains a definition of “standard”, according to the EC, the drafters of the TBT Agreement must have wished to use a specific definition of “standard” for the purposes of the Agreement's application. This specific definition appears in Annex 1 and it follows

context. Academic publications were mentioned which demonstrated a net excess of mesotheliomas in women living near chrysotile asbestos mines in Quebec, seven times higher than the level found among other women in Quebec. According to the Community, all these scientific findings were taken into account in the France's INSERM (Institut National de la Santé et de la Recherche Médicale) report “*Effects on Health of the Main Types of Exposures to Asbestos*”, issued in June 1996, which precluded to the adoption of the Decree.

²⁵ WT/DS26, *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/DS48/AB/R, adopted on 13 February 1998, in particular para. 99-109.

²⁶ The EC indicate that equally relevant, by analogy, is the position of the Appellate Body in WT/DS76, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 19 March 1999, para. 126, according to which the complaining member must show that the contested measure is more trade-restrictive than necessary to fulfil a legitimate objective taking into account the risk which non-fulfilment would create.

from this definition that the TBT Agreement encourages the use of international standards, but solely those which can provide rules, guidelines or characteristics for products or related processes and production methods. In the asbestos dispute, international texts referred to by Canada²⁷ did not satisfy the definition contained in Annex 1 and could not therefore be used “as a basis” for technical regulations. More precisely, consistently with its previous reasoning on the definition of technical regulation on which ground it claimed the exclusion of the Decree from the scope of the TBT agreement, the EC considered that neither the ILO and WHO documents nor the ISO standards could be considered as laying down the characteristics of asbestos fibres or an ordered set of rules for the manufacture of this product. Even less could they have been considered as laying down the characteristics of asbestos-containing products or an orderly set of rules for the manufacture of those products²⁸. At best, they could be treated as assessments of the risks created by asbestos and asbestos-containing products rather than as establishing international technical standards or conformity assessment procedures.

In the alternative, should the Panel have considered that the texts cited by Canada are standards within the meaning of the TBT agreement, the Community demanded the Panel to recognise that these texts were used “as a basis” for the adoption of the Decree. The EC’s line of reasoning consisted in pointing at the different legal implications of the terms “based on” as opposed to “conform to”. The Community opposed that the phrase “as a basis for” could be compared with the term “on the basis of” used in the SPS agreement, a term for which the Appellate Body (*Hormones*) indicated:

“ [...] we disagree with the Panel’s interpretation that ‘based on’ means the same thing as ‘conform to’ [...] A thing is commonly said to be ‘based on’ another thing when the former ‘stands’ or is ‘founded’ or ‘built’ upon or ‘is supported by’ the latter”.²⁹

The EC concluded that this definition entails that international texts quoted by Canada served “as a basis” for the Decree³⁰. The EC concluded in fact from these texts that:

²⁷ ILO, *Convention concerning Safety in the Use of Asbestos* (Convention 162), 24 June 1986, International Labour Conference; ILO, *Recommendation concerning Safety in the Use of Asbestos* (Recommendation 172), 24 June 1986, International Labour Conference, Geneva; International Labour Conference, *IPCS Environmental Health Criteria (203) on Chrysotile*, WHO, Geneva, 1998.

²⁸ The EC’s assertion that the ILO and ISO texts are not relevant standards within the meaning of Article 2.4 of the TBT Agreement was based on the analysis of the object and purpose, as well as of the actual content, of these international texts. The EC point out, for example, that the preamble to the Constitution of the ILO specifically provides for “the protection of the worker against sickness, disease and injury arising out of his employment”. As for the Philadelphia Declaration concerning the aims and objectives of the ILO, article III-g provides for “adequate protection for the life and health of workers in all occupations”. The ISO texts are conceived in the same spirit. Similarly, article 3 of ILO Convention 162 of 1986 states that “National laws or regulations shall prescribe the measures to be taken for the prevention and control of, and protection of workers against, health hazards due to occupational exposure to asbestos”. According to point 1(i) of the scope and definitions of ILO recommendation 172 of 1986, “The provisions of the Asbestos Convention, 1986, and of this Recommendation should be applied to all activities involving a risk of exposure of workers to asbestos in the course of work”.

²⁹ WT/DS26 and WT/DS48, *EC-Measures concerning Meat and Meat Products (Hormones)*, AB report, WT/DS26/AB/R and WT/DS48/AB/R, 13 February 1998, para. 166 and 163 respectively.

³⁰ The EC indicated that, as early as 1986, ILO Convention 162 stated: “Where necessary to protect the health of workers and technically practicable, national laws or regulations shall provide for one or more of the following measures: (a) replacement of asbestos or of certain types of asbestos or products

first, the banning or replacement of asbestos fibres or asbestos-containing products may be decided in cases where this is necessary to protect the health of workers and is technically feasible; second, where substitute materials are considered safer, they must be used to replace asbestos; third, control of the use of asbestos, including chrysotile, in the construction industry is difficult to introduce. According to the EC, this conclusion by the WHO contradicted Canada's statements that the "safe" use of asbestos would avoid any risk connected with its use.

A further point in support of the claim that the Decree was actually compatible with article 2.4 TBT stemmed from the EC's understanding that the said provision foresees that international standards must be ignored when they are "ineffective or inappropriate" and that this was the case in relation to the Decree. The ISO standard provides a perfect illustration of this point. At the time it was published in 1984, this standard represented a major step forward in relation to the arrangements prior to that date, but it did not guarantee sufficient levels of protection in the light of the health objective adopted by the vast majority of countries, and by France in particular.

Spelling out the circumstances in which a standard might be considered ineffective or inappropriate within the meaning of this provision, the EC considered that the level of protection deemed appropriate by the member could be a factor in making international standards ineffective or inappropriate. An international standard is only effective or appropriate if it enables the member to achieve the legitimate objective it has set. Moreover, advances in scientific knowledge can also lead to the application of obsolete standards being ruled out. The Community put forward a systematic comparison between the TBT and the NAFTA agreement, which also deal with trade-related effects of technical regulations, to support the argument of the ineffectiveness and inappropriateness of international standards that became obsolete as a result of advances in scientific knowledge³¹.

containing asbestos by other materials or products or the use of alternative technology, scientifically evaluated by the competent authority as harmless or less harmful, whenever this is possible. (b) total or partial prohibition of the use of asbestos or of certain types of asbestos or products containing asbestos in certain work processes"; ILO, *Convention concerning Safety in the Use of Asbestos* (Convention 162), 24 June 1986, International Labour Conference. Similarly, ILO Recommendation 172 also indicated in 1986 that: "[...] asbestos should be used only when its risks can be prevented or controlled; otherwise, it should be replaced, when technically feasible, by other materials or the use of alternative technologies, scientifically evaluated as harmless or less harmful." *Recommendation concerning Safety in the Use of Asbestos* (Recommendation 172), 24 June 1986, International Labour Conference. The EC noted that, more recently, a WHO report specifically dealing with chrysotile was even more categorical in stating "Exposure to chrysotile asbestos poses increased risks for asbestosis, lung cancer and mesothelioma in a dose dependent manner. No threshold has been identified for carcinogenic risks. [...] Where safer substitute materials are available for chrysotile, they should be considered for use. [...] Some asbestos containing products pose particular concern and chrysotile use in those circumstances is not recommended. These uses include friable products with high exposure potential. Construction materials are of particular concern for several reasons. The construction industry work force is large and measures to control asbestos are difficult to institute. In-place building materials may also pose risk control to those doing alterations, maintenance and demolition. Minerals in place have the potential to deteriorate and create exposures"; *IPCS Environmental Health Criteria (203) on Chrysotile*, WHO, 1998, p. 144.

³¹ The NAFTA Agreement provides as follows:

"1. Each Party shall use, as a basis for its standards-related measures, relevant international standards or international standards whose completion is imminent, except where such standards would be an ineffective or inappropriate means to fulfil its legitimate objectives, for example because of

The EC therefore interpreted article 2.4 TBT so as to allow scientific reasons or the level of protection deemed appropriate by the member to affect the effectiveness and appropriateness of an international standard. In the case at issue, the EC considered indeed that the standards cited by Canada did not make it possible to achieve the level of protection deemed appropriate by France insofar as: first, chrysotile asbestos was a proven carcinogen; second, there was no exposure threshold for chrysotile asbestos and asbestos-containing products under which exposure can be considered safe; third, the so-called “safe” use was not applicable in all circumstances nor to every type of person who may come in contact with asbestos or asbestos-containing products and, moreover, did not eliminate every risk; finally, there were substitute products that are at least safer than chrysotile asbestos.

France having chosen, as the level of protection deemed appropriate, to halt the spread of the risk associated with the use of asbestos, the ISO standard and the ILO texts did not make it possible to achieve such legitimate objective precisely for the above-mentioned reasons. According to the EC, the only texts that might have been relevant are those of the WHO and the IARC but only to the extent that they may be defined as assessments of the risks posed by asbestos and asbestos-containing products. All in all, France was complying fully with the WHO rules and had chosen to make no further use of asbestos and to replace such products with substitutes. Moreover, the ban provided for waivers that make it possible to take into account certain specific situations in which the use of asbestos remained necessary because there was no substitute that would ensure equivalent performance while being less of a threat to health.

2.3.e Contentions under article 2.8 TBT

Finally, with regard to Canada’s claim of violation of article 2.8 TBT, beside restating the denial of the technical regulation nature of the Decree, which entails the inapplicability of the provision thereto, the Community contended that the said provision applies to a sub-category of technical regulations, namely technical regulations based on product requirements. According to the EC, the purpose of the provision is to ensure that technical rules that aim to ensure a given quality or minimum performance are, as far as possible, technically neutral and do not therefore prescribe a particular process or technology but simply set objectives to be achieved. In other words, the Community interpreted article 2.8 TBT as meaning that, wherever appropriate, the technical regulation shall be based on the performance of the product in question (i.e. based on requirements connected with the performance of the product, for example, “the product must be safe, watertight and non-flammable”), and not based on the design or on descriptive characteristics of the product (i.e. not specify in detail how

fundamental climatic, geographical, technological or infrastructural factors, scientific justification or the level of protection that the Party considers appropriate.

2. A Party's standards-related measure that conforms to an international standard shall be presumed to be consistent with Article 904(3) and (4).

3. Paragraph 1 shall not be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if such measure were based on an international standard”.

these requirements of safety, water-tightness and non-flammability are to be attained). The EC considered that, even if the Decree were considered to be a technical regulation, under the instances of the asbestos dispute, a technical regulation that aims to prohibit the “use” of a product cannot set out the circumstances or conditions in which asbestos or asbestos-containing products are to be used, let alone pointing out what the product expected performances are.

Section III – Trade Description of Sardines

3.1 Introduction to the dispute: EC Regulation 2136/98 and Codex Stan 94

An almost unstudied case involving the EC and Peru, this dispute³² concerns the trade description of two species of fish scientifically known as *Sardina pilchardus Walbaum* (*Sardina pilchardus*) and *Sardinops sagax sagax* (*Sardinops sagax*), which respectively are found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, and in the Eastern Pacific along the coasts of Peru and Chile. Despite various morphological differences³³, the two species display similar characteristics and living habits³⁴. Above all both fish, as well as other species of the *Clupeidae* family, are used in the preparation of preserved and canned fish products. The measure in relation to which Peru, a producer and manufacturer of *Sardinops sagax*, claimed the nullification or impairment of its right under the WTO agreement is Regulation (EEC) 2136/89 laying down common marketing standards for preserved sardines, adopted on 21 June 1989³⁵. Such Regulation defines the standards governing the marketing of preserved sardines in the European Communities, now Union. The contested provision was in particular article 2 of the EC Regulation providing that only products prepared from *Sardina pilchardus* may be marketed as preserved sardines³⁶

³² WT/DS231, European Communities – Trade Description of Sardines; Panel report, WT/DS231/R, 29 May 2002, and WT/DS231/R/Corr.1, 10 June 2002; AB report, WT/DS231/R/AB, 26 September 2002.

³³ Differences concern the head and length, the type and number of gillrakes or bone striae and size and weight.

³⁴ They both live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons.

³⁵ Council Regulation (EEC) No 2136/89 of 21 June 1989 laying down common marketing standards for preserved sardines, OJ L 212, 22.7.1989, p. 79–81, subsequently amended by Commission Regulation (EC) No 1181/2003 of 2 July 2003 amending Council Regulation (EEC) No 2136/89 laying down common marketing standards for preserved sardines, OJ L 165, 3.7.2003, p. 17–18, and by Commission Regulation (EC) No 1345/2008 of 23 December 2008 amending Council Regulation (EEC) No 2136/89 laying down common marketing standards for preserved sardines and trade descriptions for preserved sardines and sardine-type products, OJ L 348, 24.12.2008, p. 76–78.

³⁶ Article 2 reads as follows:

“Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from the fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;

and therefore not allowing any other product, including those made out of *Sardinops sagax*, to be named and marketed under a description containing a reference to preserves sardines. For instance, the Regulation prohibited, although not explicitly, the use of the term "sardines" combined with the name of the country of origin ("Peruvian Sardines"), the geographical area in which the species is found ("Pacific Sardines"), the species ("Sardines — *Sardinops sagax*") or the common name of the species *Sardinops sagax* customarily used in the language of the EC member State in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German).

Concerning also the very same issue of sardines naming, in 1978 the FAO and the WHO Codex Alimentarius Commission had adopted a standard, named Codex Stan 94, for canned sardines and sardine-type products³⁷. Article 1 of Codex Stan 94 stated that this standard applied to canned sardines and sardine-type products packed in water or oil or other suitable packing medium and that it did not apply to speciality products where fish content constitutes less than 50% m/m of the net contents of the can. Article 2.1 Codex Stan 94 provided that canned sardines or sardine-type products were prepared from fresh or frozen fish from a list of 21 species, amongst them *Sardina pilchardus* and *Sardinops sagax*. With regard to the issue of labelling, article 6 Codex Stan 94 specifies that the name of the products shall be "sardines" to be reserved exclusively for products containing *Sardina pilchardus*³⁸. For the remaining 20 species to which it applied, the standard established the name "X sardines", where X stands for a country, a geographic area, the species, or in the alternative the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

3.2 Main claims by the parties

The complaining party, Peru claimed in the first instance the inconsistency between the EC Regulation prohibiting the use of the term "sardines" in relation to species other than *Sardinas pilchardus* and article 2.4 TBT on the ground that the EC did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.

– they must be sterilized by appropriate treatment.”

³⁷ Codex Alimentarius Commission, Codex Stan 94 –1981 rev.1 – 1995. Codex Stan 94 was amended in 1979 and 1989 by adding more species and revised in 1995. A further revision occurred in 2007, when the dispute at issue had long been decided.

7.1 ³⁸ Article 6 of Codex Stan 94 reads as follows:

“6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:

6.1 NAME OF THE FOOD

The name of the products shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.”

A number of alternative claims were submitted by Peru. If the Panel were to find that the Regulation was consistent with article 2.4 TBT, Peru requested it to find that the Regulation was inconsistent with article 2.2 TBT because it was more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the EC claimed to pursue.

In the alternative, if the Panel were to find that the EC Regulation were consistent with articles 2.2 and 2.4 TBT, Peru requested the Panel to find that the measure is inconsistent with article 2.1 TBT because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* a less favourable treatment than that accorded to like European products made from fish of the species *Sardina pilchardus*.

As the very last resort, if the Panel were to find that the measure at issue were consistent with the TBT agreement, Peru alleged the inconsistency of the measure with article III:4 GATT on the ground that it put forward a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* a less favourable treatment than that accorded to like European products made from fish of the species *Sardina pilchardus*.

As for it, the Community rejected Peru's claims altogether.

3.3 The EC defence on TBT-related claims³⁹

3.3.a Allocation of the burden of proof

The Community rejected Peru's interpretation of article 2.5 TBT agreement intended to make it relevant for the allocation of the burden of the proof. It did so by comparing article 2.5 TBT with article parallel article 5.8 SPS and relevant case-law⁴⁰ thus contending that the scope of article 2.5 is solely to enhance the transparency that a central government body has to follow when preparing, adopting and applying a technical regulation and that therefore the provision is not intended, as Peru alleged, to establish a higher threshold of explanation.

Also, the EC contended that the burden of proving that article 2 of the EC Regulation was not in conformity with paragraphs 4, 2 and 1 of article 2 TBT and with article III:4

³⁹ The ensuing considerations on the EC line of defence are partially based on the comparative analysis of the following documents presented by the EC before the AB, and available on the website of the Commission DG Trade: European Communities – Trade Descriptions of Sardines (WT/DS231), *First Written Submission by the EC*, Geneva, 12 November 2001; *Second Written Submission by the EC*, Geneva, 11 January 2002; European Communities – Trade Descriptions of Sardines (AB-2002-3), *Appellant's Submission of the EC pursuant to Rule 21 of the Working Procedure for Appellate Review*, Geneva, 8 July 2002.

⁴⁰ In particular, the EC used the interpretation of art.5.8 SPS given by the AB in *EC — Hormones*: “Article 5.8 of the SPS Agreement does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry out the burden of proving on a prima face basis that the measure involved is not consistent with the SPS Agreement.”

GATT rested entirely with Peru. Accordingly, the complaining party had to present all the elements of article 2.4 TBT that must be demonstrated to establish a *prima facie* case, which are, first, that a technical regulation has been prepared; second, that a relevant international standard was in existence or that its adoption was imminent; and finally, that the defender did not use such relevant standard as a basis for the technical regulation⁴¹.

Moreover, according to article 2.2 TBT, Peru had to demonstrate trade-restrictive effects; identify correctly the legitimate objectives pursued; and finally, establish that these restrictive effects had been more trade-restrictive than necessary.

With regard to article 2.1 TBT and article III:4 GATT 1994, reiterating the similitude between those provisions already put forward in its submission during *EC-Asbestos*, the Community claimed that, in line with the consolidated WTO jurisprudence on the matter, Peru was required to present evidence and argument sufficient to establish a presumption that article 2 of the EC Regulation is inconsistent with its obligations under those articles. More specifically, Peru must prove that, first, EC Regulation was a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use; second, that the imported and domestic products affected by it are "like"; finally, that the treatment accorded to the imported products is less favourable.

3.3.b Whether the EC Regulation is a technical regulation

This time the EC had not mangle to argue on the measure not falling within the scope of the TBT agreement. The Community accepted indeed that its Regulation was a technical regulation for the purposes of the TBT agreement and that it laid down marketing standards for preserved *Sardina pilchardus*⁴². Referring to the Appellate Body's statement in *EC — Asbestos* that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole", the Community however did not accept that article 2 of the Regulation, taken in isolation, was a technical regulation and argued that the said provision could only be interpreted in the context of the entire Regulation. The European Communities supported this claim by stating that the Regulation provided that the name specified for preserved *Sardina pilchardus* cannot be used for other products but that this did not mean that it laid down mandatory labelling requirements for products other than preserved *Sardina pilchardus* and therefore it was not to be considered as a technical regulation for preserved *Sardinops sagax* or any other product except *Sardina pilchardus*.

The European Communities further submitted that article 2 of the Regulation was not a technical regulation because the definition thereof refers only to labelling, not naming.

⁴¹ Curiously, the EC mentioned as a fourth component of the demonstration of the disregard had for relevant international standards that the use of the standard was ineffective or inappropriate for the fulfilment of the legitimate objectives pursued. This appears not to be an element necessary for the demonstration of a violation of article 2.4 but rather one that is functional to the justification of such a violation. As such it would be for the defendant, not for the complainant to bring to the attention of the Panel.

⁴² The EC notified the Regulation at issue in 1989 under the Tokyo Round Agreement on Technical Barriers to Trade (the "Tokyo Round Standards Code").

The names of the products of interest to Peru were set out in various measures of the EC Member States which had not been identified by Peru. In particular, it was EC Directive 2000/13⁴³, in conjunction with the various Member States' measures that constituted the technical regulation for the products against which Peru should have addressed its complain.

3.3.c Application of the TBT Agreement to measures adopted before 1 January 1995

An interesting but poorly devised argument of the EC defence, the Community argued against the retroactive application of article 2.4 TBT in general and against its application to the maintenance of technical regulations which entered into force prior to the adoption of relevant international standards. Criticisms can be raised with regard to the confusion operated by the EC on such two distinct components of the non-retroactivity argument: the non-retroactivity of article 2.4 TBT, which is a matter to be decided under the law of the Treaties, and the non-retroactivity of adopted international standards, which in turn solely depends on the interpretation given to article 2.4 TBT. The EC claimed first that article 2.4 TBT is not applicable to measures that were drawn up before its entry into force. The provision requires WTO Members to use *existing* relevant international standards as a basis for drawing up their technical regulations. The EC therefore concluded that the obligation exists prior to the adoption of the measure, but not afterwards.

In the EC's view, the language of article 2.4 TBT makes clear that it does not apply to the *existence or maintenance* of technical regulations. In support of this argument, it opposed article 2.4 TBT to the relevant provision of the SPS Agreement such as considered by the Appellate Body in *EC — Hormones*. In that case, the AB based its view on the wording of articles 2.2, 3.3 and 5.6 SPS agreement, all of which include the word "maintain" which is absent from article 2.4 TBT.

The EC therefore based its defence bottom line on the argument that article 2.4 TBT only applies to the *preparation and adoption* of technical regulations because, in contrast to the maintenance, preparation and adoption are "acts or facts which took place, or situations which ceased to exist, before the date of [the] entry into force" of the TBT Agreement within the meaning of article 28 of the Vienna Convention on the Law of Treaties, on "Non-Retroactivity of Treaties"⁴⁴.

Going back to the non-retroactivity of international standards, the Community further argued that it is only possible to use relevant international standards as a basis for the

⁴³ The system of rules concerning the labelling of foodstuffs in the European Communities is established by Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109 of 6.5.2000, p. 29-42. EC Directive 2000/13 sets out the basic framework and is designed to be complemented by more detailed European Communities rules or, in their absence, more detailed member States rules.

⁴⁴ Article 28 reads as follows:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

technical regulation when the technical regulation is being drafted or when it is amended. However, this particular question was not before the Panel because the EC Regulation had not been amended. In its view, the question was whether, after the WTO Agreement entered into force, WTO members are under an obligation to revise their existing technical regulations to ensure that they could be considered to have used international standards “as a basis”. From the text of article 2.4, especially the words “where technical regulations are required”, it was clear to the EC that such an obligation had not been created.

Again on the non retroactivity of international standards, the EC argued that article XVI:4 WTO created an obligation to ensure that WTO obligations are complied with, but the precise scope of the obligations depends on the language of each specific provision under the covered agreements. In the Community’s view, article XVI:4 does not render WTO obligations applicable to acts performed before the entry into force of the WTO Agreement where this does not result from the terms of the provision itself. In an quite obscure synopsis in which it tried to link the two component of the argument, the EC concluded that there must be an obligation somewhere in the covered agreements before article XVI:4 can have effect and the wording of article 2.4 TBT makes clear that there is no obligation to revise existing technical regulations to bring them into conformity with international standards. Although it is still possible to divorce the two components of the argument, better would have been to treat them separately from the beginning on charge to weaken the respective relevance.

3.3.d Article 2.4 of the TBT agreement

(i) *Whether Codex Stan 94 is a relevant international standard*

On the relevance of Codex Stan 94, the EC made the preliminary observation that this standard contains 20 very different “sardine-type” species belonging to 11 genera, the common name for some of these species not being sardines and other species that are called “sardines” in other parts of the world not being included in Codex Stan 94. In its view, the policy of species inclusion within Codex Stan 94 was influenced by the concern that the list set out therein would end up including a too high number of species, the consequence being that the Codex standard would include so many “sardine-type” species that it would be more misleading than informative for the consumer. To illustrate the difficulties involved in determining the coverage of the species under Codex Stan 94, the EC referred to the fact that Peru was exporting *Sardinops sagax* to more than 20 countries under the trade description of “sardines” rather than “Pacific sardines” even though Codex Stan 94 does not permit *Sardinops sagax* to be called “sardines” without any further qualification.

With regard to the relevance of Codex Stan 94 as an international standard, the European Communities contended against it in the first place by using yet again the argument of the non-retroactivity of international standards. The obligation contained in Article 2.4 is to *use* relevant international standards as a basis for the technical regulation where they already *exist* or their completion is *imminent*. Hence, Codex Stan

94 was not a relevant international standard within the meaning of article 2.4 TBT because it did not exist and its adoption was not imminent when the EC Regulation was adopted. It was obvious, in the EC's understanding of the TBT provision at issue, that a 1994 standard cannot be a relevant standard for a Regulation adopted in 1989

Being there no obligation to use a draft international standard as a basis for a technical regulation if its adoption is not imminent, drafters of the TBT agreement cannot have intended that an already existing technical regulation could become inconsistent with article 2.4 thereof when the adoption of the draft international standard becomes imminent or when it is actually adopted and becomes existing. Peru would have had to invoke non-conformity with the predecessor standard in order to make its case. In any case, the European Communities points out that it did comply with the requirements of the Tokyo Round Standards Code when it adopted its Regulation and notified it to the GATT.

The second argument put forward by the EC to counter the alleged relevance of Codex Stan 94 concerned the modalities of its adoption, which failed to feature consensus. Codex Stan 94 was not adopted in accordance with the principle of consensus set out by the TBT Committee⁴⁵. In support of its claim, the EC submitted that according to rule VI:2 of the Rules of Procedure of the Codex Alimentarius Commission, decisions can be taken by a majority of the votes cast. Even if it is not recorded whether Codex Stan 94 was elaborated and adopted by means of a formal vote, it is clear – the Community contended - that it was adopted in circumstances in which dissenting members could have been outvoted and, therefore, may have decided not to express their disagreement, i.e., by not insisting on a vote. This is especially so, in the EC's view, since the General Principles of the Codex Alimentarius make clear that Codex standards are recommendations that need to be accepted by governments and that their acceptance can be unconditional, conditional or with deviations. Secondly, Codex Stan 94 had been accepted by only 18 countries, of which only four accepted it fully, whereas none of the EC member States, and not even Peru, had accepted it. Finally, to the EC, the available records of the discussions relating to Codex Stan 94 demonstrated that members held diverging views on the appropriate names for preserved sardines and sardine-type products.

Moreover, with regard to the elaboration procedure of Codex Stan 94, Community submitted that an editorial change, and not a substantive one, had occurred at step 8 of the procedure. If a substantive amendment had been made at this stage, it would have been necessary to refer the text back to the relevant committee for comments before its adoption. However, if a substantive change had nevertheless been made at step 8 of the Codex elaboration procedure, the European Communities claims that Codex Stan 94 would, in this case, be rendered invalid and could not, therefore, be considered a relevant international standard within the meaning of article 2.4 TBT.

Finally, European Communities contended that paragraph 6.1.1(ii) Codex Stan 94 is was not relevant since the EC Regulation did not regulate products other than preserved

⁴⁵ Decision of the Committee on Principles for the Development of the International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement

Sardina Pilchardus, for whose name the relevant part of Codex Stan 94 is paragraph 6.1.1(i).

(ii) *Whether Codex Stan 94 was used “as a basis” for the EC Regulation*

In order to counter the allegation that EC Regulation was not based on Codex Stan 94, the EC pointed out that it affords quite some flexibility. To start with, in the EC’s view, under paragraph 6.1.1(ii) thereof, each country has the option of choosing between “X sardines” and the common name of the species. It argues that “the common name of the species in accordance with the law and customs of the country in which the product is sold” is intended to be a self-standing option independent of the formula “X sardines”⁴⁶. The European Communities was of the view that the French⁴⁷ and Spanish⁴⁸ versions of Codex Stan 94 made it clear that there was no choice to be made but that there was an express indication that, irrespective of the formula used, accordance should have been granted with the law and custom of the importing country and in a way that did not mislead the consumer.

In the Community’s view under paragraph 6.1.1(ii) of Codex Stan 94 importing Members can choose between “X sardines” or the common name of the species⁴⁹. The

⁴⁶ According to the EC, this interpretation is evidenced by the fact that the phrase “the common name of the species in accordance with the law and customs of the country in which the product is sold” is found between commas, whereas there is no comma between “species” and “in accordance with”, and there is a comma before “and in a manner not to mislead the consumer”.

⁴⁷ The French text reads:

“6.1.1 (ii) “Sardines X”, “X” désignant un pays, une zone géographique, l’espèce ou le nom commun de l’espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.”

⁴⁸ The Spanish text reads:

“6.1.1(ii) “Sardina X” de un país o una zona geográfica, con indicación de la especie o el nombre común de la misma, en conformidad con la legislación y la costumbre del país en que se venda el producto, expresado de manera que no induzca a engaño al consumidor.”

⁴⁹ In support of its interpretation that Codex Stan 94 allows Members to choose between “X sardines” and the common name of the species in accordance with the law and custom the country in which the product is sold, the Community referred to the negotiating history of Codex Stan 94, where the text of paragraph 6.1.1 submitted to the Codex Alimentarius Commission by the technical Committee was divided into three paragraphs, with “the common name of the species” being a third and separate option, and also with the phrase “in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer” separate from the three paragraphs. The text of paragraph 6.1.1 submitted to the Commission by the technical Committee reads:

“The name of the product shall be:

(i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
(ii) "X sardines", where "X" is the name of a country, a geographic area, or the species; or
(iii) the common name of the species;

in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.”

The minutes of the meeting of the Codex Alimentarius Commission at which Codex Stan 94 was definitively adopted show that the text of paragraph 6.1.1, prepared and discussed in steps 1 to 7 of the elaboration procedure, was amended editorially at the meeting. This change is described in the minutes as "editorial". Thus, the EC claimed that it was not intended to change the substance of the provision but to reconcile the fact that the word “sardines” by itself was reserved exclusively for *Sardina pilchardus* with the last paragraph requiring that any name must be in accordance with the law and custom of the country in which the product is sold. The EC therefore concluded that the text as proposed to the Codex Alimentarius Commission is a good guide to the intended meaning of the standard.

The European Communities added that interpretative criteria contained in the Vienna Convention were

fact that the name for products other than *Sardina pilchardus* could not be harmonized and had to defer to each country is reflected in the language “in accordance with the law and customs of the country in which the product is sold”. The EC noted that there is an additional element contained in Codex Stan 94 that is not applicable to *Sardina pilchardus* but applicable to other species, namely that the trade description of the latter group of species must not mislead the consumer in the country in which the product is sold.

The Community argued that Article 2 of its Regulation followed the guidance provided by Codex Stan 94 in that the use of the word “sardines” for products other than preserved *Sardina pilchardus* would not be in accordance with the law and customs of the EC Member States and would mislead European consumers in so far as the term “sardines” has historically been known as referring to *Sardina pilchardus*. Moreover, the EC asserted that there was a uniform consumer expectation throughout the EC the term “sardines” refers only to preserved *Sardina pilchardus*⁵⁰.

Whereas the first argument used by the EC with regard to the compatibility to the Regulation with the codex standard pertains to the interpretation of the latter, a second argument used by the EC is more general and concerns the interpretation of article 2.4 TBT as such. The Community argued that even if Peru's interpretation were valid in that the term “sardines” must be used with a qualification for species other than *Sardina pilchardus*, article 2.4 TBT would still not require that such name be used on the ground that the said provision requires a relevant international standard to be used as a basis for drawing up members’ technical regulations when they decide that these are required and not as *the* basis for the technical regulation⁵¹. In other words, according to the EC’s view, article 2.4 does not require members to follow these standards or comply with them, an interpretation that the Community had already tried to put forward in the asbestos dispute but which was not confirmed not rejected because no decision was taken on the merit of TBT-related claims⁵². Furthermore, the EC argued that article 2.4 allows a selective use of international standards in that it expressly states that a member may

not applicable to the interpretation of Codex standards. The relatively low importance attached to preparatory documents under the Vienna Convention is due to the fact that treaties are legal texts which are considered and adopted by formal ratification procedures and preparatory documents are not. This rationale does not apply to Codex standards. Should the Panel have had any doubt on the interpretation of paragraph 6.1.1(ii) of the Codex Stan 94, the Panel should have asked – in the EC’s view - the Codex Alimentarius Commission to provide its view of the meaning of this text.

⁵⁰ The names for preserved *Sardinops sagax* that are in accordance with the law and custom of the United Kingdom and Germany are Pacific pilchard and Sardinops or pilchard, respectively.

⁵¹ Just as in its submission in the asbestos dispute, the EC recalled the Appellate Body’s decision, in the context of the SPS agreement, that “based on” cannot be interpreted as meaning “conform to” and therefore reversed a panel ruling that was based on such an interpretation and that found that a European Communities’ measure was not “based on” a Codex standard because it did not conform to it. The AB reasoned in particular that “specific and compelling language” would be needed to demonstrate that sovereign countries had intended to vest Codex standards, which were “recommendatory in form and language”, with obligatory force. According to the EC, there is no such intention expressed in article 2.4 TBT. In fact, the text of this provision indicates an even weaker requirement to take a standard into account than was the case with the SPS Agreement.

⁵² See section II in this chapter.

only use the *relevant* parts of the international standard, that is the parts that are related to the objective pursued by the required technical regulation.

Therefore, the European Communities claimed that it has “complied with” the text of the Codex Stan 94, because article 2 of the EC Regulation follows the guidance it provided. According to the EC, Article 2.4 TBT allows in fact WTO members flexibility and requiring preserved sardine-type products to use the names under which they are known in the Member States falls within this margin of flexibility.

(iii) *Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation*

a. Whether the EC Regulation fulfils a legitimate objective

The EC argued that the separate but interdependent objectives pursued by article 2 of the Regulation are consumer protection, market transparency and fair competition. It further explained that the legitimate objectives of the entire EC Regulation are the following: first, to keep products of unsatisfactory quality off the market; second, to facilitate trade relations based on fair competition; third, to ensure transparency of the market; fourth, to ensure good market presentation of the product; and finally to provide appropriate information to consumers⁵³. According to the European Communities, the first objective only relates to preserved *Sardina pilchardus* and it is pursued through the prohibition of the marketing of products of substandard quality.

The European Communities argues that all objectives of WTO Members can be presumed to be legitimate and that this is a corollary of the principle that States must be presumed to act in good faith. As in the asbestos dispute, the EC underlined that, as long as the objective is legitimate, WTO members have the right to choose the level of protection they consider appropriate⁵⁴.

Concerning the objective of market transparency for instance, the European Community contended that, contrary to Peru's argument, it was obvious that there is a “rational connection” between the legitimate objective of market transparency (and that of consumer protection) and the need to ensure that products are sold under their correct trade descriptions. The Community argued that the provisions of its Regulation laying

⁵³ The EC argued that its Regulation must be examined in the framework of its own system of rules concerning labelling of foodstuffs. The objectives of EC Directive 2000/13 are to protect consumers and prevent distortions of competition. These objectives are fulfilled by laying down detailed and precise requirements as to how products should be labelled. The European Community pointed out that EC Directive 2000/13 states that labelling must not mislead purchasers and establishes the principle that there should be a single correct name for a given foodstuff. The hierarchy of rules for determining the correct name for a foodstuff is therefore: the name laid down in EC legislation; the name provided for in the laws, regulations and administrative provisions applicable in the member States in which the product is sold; the name customary in the Member State in which the product is sold; and a description of the foodstuff, and if necessary, of its use which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused.

⁵⁴ Quoting a passage in the preamble to the SPS agreement similar to that in the TBT agreement, the Community reiterated the example that the Appellate Body interpretation in *EC — Hormones*, according to which “this right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right”. The Appellate Body made similar statements in *EC — Asbestos*, *Korea — Various Measures on Beef*, and *Australia — Salmon*.

down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products and that this is particularly true of the name.

According to the EC, Peru misinterpreted the second recital of the preamble to the Regulation at stake by reading a protectionist objective therein. While the objectives of the Regulation are expressed in clear terms by using the expression “in order to ...”, the second recital simply indicates what the legislator thought could be one of the consequences of the Regulation (“...is likely to...”). In the view of the EC, it seemed obvious that, as regards preserved sardine products, a law that ensures market transparency and fair competition, that guarantees the quality of the products and that appropriately informs the consumer of this, will most likely result in an improvement of the profitability of sardine production in the European Community.

b. Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation

Even if deemed relevant, the EC considered that the use of Codex Stan 94 would be inappropriate to fulfil the legitimate objectives pursued by its Regulation. The prohibition on the use of the term “sardines” for species other than *Sardina pilchardus* was necessary to allow different products to be distinguished. In this regard, the EC noted that one of the legitimate objectives recognized by article 2.2 TBT is the prevention of deceptive practices. Furthermore, the need to prevent deceptive practices is also a requirement of the Codex Stan 94, which requires that whichever formula is used for sardine-type products, it has to be drafted in such a way so as not to mislead the consumer. The Community therefore argued that, quite to the contrary, the use of the term “X Sardines” where X indicates the name of a country or geographic area would not achieve these objectives since the use of the word “sardines” would suggest to the EC consumer that the products are the same but simply originate from different geographic areas.

In most parts of the European Communities, especially in the producer countries, the term “sardines” has historically made reference only to *Sardina pilchardus*. Therefore, the European Communities claims that the use of the term “sardine-type” demonstrates that “sardines” is not considered a generic term.

The European Communities contended that the Regulation at issue does not exist in a vacuum, but is part of its legitimate policy to ensure precision in the names of foodstuffs so as to preserve quality, product diversity and consumer protection. This is a system in which each food product must bear a precise trade description on which the consumer can rely as a guarantee of the nature and characteristics of the product. One result of its legitimate policy is to prevent the names of foodstuffs becoming generic, that being why “sardines” cannot be used as a generic term in the European Community. This framework, in the EC’s view, has now created uniform consumer expectations throughout the European market, the term “sardines” referring only to a preserved product prepared from *Sardina pilchardus*. Therefore, the EC argued that an

unrestricted use of the term "sardines" would create confusion as to the nature of the product being sold⁵⁵.

Moreover the EC maintained that under a system where names are more flexible and a greater range of foodstuffs can be sold under each name, there is a natural tendency for all producers to use the cheapest ingredients that qualify for the name and allow the associated reputation to be exploited. This would lead to a levelling down of both quality and choice.

The EC also recalled that, even before the EC Regulation entered into force, relevant European legislation law required the products to be sold under the trade names determined by the laws of the relevant Member States, and these laws did not allow the use of the trade description "prepared sardines" to be used for what Peru terms "all species of sardines"⁵⁶. The European Communities refers to Council Directive 79/112/EEC of 18 December 1978, the predecessor to EC Directive 2000/13 which states. In conclusion, the EC argued that any name for what are considered "sardine-type products" that contains the word "sardines" would not be in accordance with the law and the custom of its member States and would mislead the European consumers.

3.3.e Article 2.2 of the TBT Agreement

(i) Whether the EC Regulation is "more trade restrictive than necessary"

a. Trade-restrictive effects

The EC claimed the inexistence of trade restrictive effects resulting from the Regulation. It submitted that, in order to establish that article 2 of the EC Regulation violates article 2.2 TBT, the complaining party limited itself to analysing one of the many recitals of the EC Regulation and to asserting that this Regulation, having a clear protectionist intent, constitutes an obstacle to trade. The EC deemed this unacceptable

⁵⁵ The EC maintained that consumers in most of its Member States have always associated the word "sardines" exclusively with *Sardina pilchardus*. They have also come to know canned *Sardinops sagax* under trade descriptions such as "Pacific pilchards" (in the UK) or "Sardinops Pilchard" (in Belgium). The EC therefore rejected Peru's assertion that European consumers associate *Sardinops sagax* with the trade description "sardines" and claimed, to the contrary, that its consumers associate *Sardinops sagax* with trade descriptions such as "Pacific pilchards" and changing these trade descriptions would have cause disruption and confusion. This would have not been an effective or appropriate means for the fulfilment of the three legitimate objectives mentioned above.

⁵⁶ The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the member state where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused. In France for instance, article 1 of the "Arrêté Ministériel du 16 mars 1982 pour les poissons marins" prescribed the name "Sardine commune" for the *Sardina pilchardus*, and the name "Sardinops du Chili" or "Sardinops" for the *Sardinops sagax*. Similarly, in Spain, the name "Sardina" has been reserved for *Sardina pilchardus* since at least 1964. In 1984, Article 30.1 of "Real Decreto 1521/1984" of 1 August 1984, in combination with its Annex I, reiterates the attribution of the name "Sardina" to the *Sardina pilchardus*. Moreover, the European Communities notes that UK's regulations have required the name "Pacific pilchards" for *Sardinops sagax* since at least 1980, well before the adoption of the EC Regulation.

in a legal proceedings where the complainant has the burden of proving a *prima facie* case. In order to establish that article 2 of the EC Regulation is applied "with a view to or with the effect of creating unnecessary obstacles to international trade", according to the EC, Peru would have to demonstrate trade-restrictive effects, identify correctly the legitimate objectives pursued and, finally, establish that these restrictive effects were more trade-restrictive than necessary, taking into account the benefits to be expected from the realisation of the legitimate objectives. The European Communities claimed that Peru failed to establish any of these requirements.

According to the European Communities, contrary to Peru claims that article 2.2 is concerned with conditions of competition rather than unnecessary restrictions on trade, it is not possible to derive from the decisions of the AB a principle "under GATT and WTO jurisprudence that the basic provisions governing international trade protect expectations on conditions of competition, not on export volumes".

In *India — Patents*, the case cited by Peru in support of its original contention, the Appellate Body chided the panel for pronouncing a "general interpretative principle" according to which "legitimate expectations" concerning in particular the protection of conditions of competition must be taken into account in interpreting the TRIPS agreement. The European Communities referred to the AB's statement that "[t]he legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself" and notes that, just as in the case of the TRIPS, there is no basis for importing into the TBT regime concepts that are not there. The Community recalled that the TBT agreement expressly recognises the right of WTO members to adopt the standards they consider appropriate to protect, for example, human, animal or plant life or health, the environment, or to meet other consumer interests. It therefore argued that all technical regulations inevitably affect conditions of competition and claimed that if such an effect were sufficient to establish an "obstacle to trade" contrary to article 2.2 TBT, there would have been no need for the members to refer, in the TBT agreement, to *unnecessary* obstacles to trade.

b. More trade-restrictive than necessary

The Community reasoned that even if Peru were to demonstrate that the Regulation was trade restrictive, it would still have to show that it is more trade restrictive than necessary in the light of the risks addressed by article 2 of the EC Regulation.

With regard to the concept of necessity, the EC made here a step back in comparison to the interpretation put forward in *EC-Asbestos*, in that it maintained that necessity is not used in the same context under article 2.2 TBT and under article XX(d) GATT. First, it argued that article XX(d) GATT defines an exception and article 2.2 TBT an obligation and, second, article XX(d) GATT requires the measure to be "necessary to secure compliance" and article 2.2 TBT, on the other hand, provides that the effects of the measure shall be "not more trade-restrictive than necessary". According to the EC, article 2.2 does not strictly require that the measure is "necessary" to fulfil the legitimate objective – only that its effects not be more trade restrictive than necessary. Such a measure could be merely a helpful measure that helps in achieving the objective

that the government pursues, even if possibly this objective could as well be accomplished in other ways. Accordingly, the only requirement in its view is that the measure should not be more trade restrictive than necessary, meaning that between two equally effective measures, the less trade restrictive should be chosen.

The European Communities consequently submitted that the first criterion set by the Appellate Body in *Korea — Various Measures on Beef* for Article XX(d), namely the contribution made by the measure to the realisation of the end pursued, is not relevant for the analysis under article 2.2 TBT, except that, if one measure is more effective in achieving the objective than another measure, it can be chosen, even if the less effective measure is less trade-restrictive.

With regard to the second criterion, namely the importance of the common interest, the EC suggested that the degree of permissible trade restriction would vary according to the importance of the objective pursued. According to the EC, however, this criterion is used by the AB to determine whether the measure is “indispensable” to fulfil the objective or whether it is simply “making a contribution”. The Community considers that this does not seem relevant for an analysis under article 2.2 since this provision simply requires a comparison of the trade effect of one measure with that of an alternative one that also achieves the same objective, at least at the same level of protection. In providing a non-exhaustive list of legitimate objectives, the TBT agreement deliberately refrains –in the EC’s view- from setting out any choices as to the relative importance of one objective compared to another.

The EC argued that it was only the third criterion of the AB in *Korea — Various Measures on Beef*, namely the impact of the measure on imports or exports, that could be relevant to the analysis under article 2.2. In its view, this follows from the very concept of not more trade restrictive than necessary. However, the AB uses this criterion for a purpose that it is not relevant under article 2.2 for the reasons seen above. The European Communities argued that under article 2.2, one has to compare the trade effects of two measures, not the necessity of one measure.

The European Communities disagreed with Peru's assertion that a less restrictive measure would be to provide that preserved *Sardinops sagax* be called Peruvian or South American sardines. The European Communities considered that there was no answer to its argument that such a provision would not achieve its legitimate objective at the level of protection that the it sought and that the EC Regulation, including its rules on names, did not create an obstacle to trade.

(ii) *Taking account of the risks non-fulfilment would create*

The European Communities considered that, under the words “taking account of the risks non-fulfilment would create”, the question of whether measures are alternatives or not can only be assessed once it has been established whether the alternative, allegedly less trade-restrictive measure, achieves the legitimate objectives of a level of protection at least as high as that achieved by the contested measure. In its view, the downside of not meeting the chosen level of protection is clearly an essential element in this consideration. It argued that the quoted words are thus an integral part of the test set out

in article 2.2 TBT, which it considers to be more a “comparison test” than a “necessity test” and that they were intended to preserve, not reduce, the right of WTO Members to determine their appropriate level of protection. The EC submits that the reason why these words do not occur in article XX(b) or (d) GATT is the fact that the tests to be applied in article XX(b) or (d) 1994 are not the same as in article 2.2 TBT.

3.3.f *Article 2.1 TBT and article III:4 GATT 1994*

(i) *The relationship between article 2.1 TBT and article III:4 GATT 1994*

The European Communities contended that Peru's arguments under article 2.1 TBT refer to its arguments under Article III:4 GATT 1994. It explained that it would therefore deal with them in its discussion of Peru's claim under article III:4.

(ii) *Whether domestic products prepared from *Sardina pilchardus* and imported products prepared from *Sardinops sagax* are "like" products*

The European Communities submitted that, account being taken of the AB's interpretation of the procedure for the establishment of likeness in *EC-Asbestos*⁵⁷, with regard to living organisms, different species cannot be regarded as “like” for the purposes of being granted the same name because species represent the basic units of biological classifications outside which organisms cannot interbreed and produce viable offspring. European consumers do not consider different species to be so "like" that they should bear the same name. It also submitted that from a scientific and biological point of view there is currently only one species of the genus *Sardina*, which is *Sardina pilchardus*, and *Sardinops sagax* belongs to another genus, the genus *Sardinops*. According to the European Communities, both genera belong to the same family *Clupeidae* as do other genera. Therefore, all of these species belong to the same family but to different genera.

The European Communities also contested Peru's argument that consumers' tastes and habits can be inferred from the fact that two products are “similar”. If this were the case, the Appellate Body would indeed not have considered this as a separate criterion. Consumers' tastes and habits need to be proved with reference to the market concerned, namely the European market. The EC was of the opinion that, although not bearing the burden of proof, it had provided the Panel with evidence that European consumers do have the habit of choosing among different, although similar products to satisfy their varied tastes. If Peru's logic was adopted, namely that two fish can be considered “like” on the basis that they are “physically very similar” and that they are capable of serving

⁵⁷ The AB pointed out that the determination of “likeness” has to be made on a case-by-case basis, employing four criteria: first, the properties, nature and quality of the products; second, the end-uses of the products; third, consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and finally, the tariff classification of the products. The AB noted that these four criteria comprise four categories of “characteristics” that the products involved might share: first, the physical properties of the products; second, the extent to which the products are capable of serving the same or similar end-uses; third, the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and fourth, the international classification of the products for tariff purposes.

the same or similar end-uses, then, not only the 216 fish belonging to the family *Clupeidae* could be called sardines, but also all preserved sea food.

Finally, the Community considered that the “likeness” required of products for the purposes of naming them is much more stringent than it would be for the same products for the purposes of, for example, taxation. For the purposes of naming a product, not all products which are in a competitive relationship are “like” under article III GATT. In other words, identical products can have the same name, like products must not.

*(iii) Whether the prohibition to market products prepared from *Sardinops sagax* under the name "sardines" accords a less favourable treatment*

The European Communities argued that within its territory, each different fish of the family *Clupeidae* is sold under its proper correct name, thus benefiting from the specific market and reputation that each of them has developed. It stated that it did not understand how this could amount to a measure that accords to the group of like imported products a treatment less favourable than the one it accords to the group of like domestic products. The EC submitted that the product canned sardines has to meet the standards contained in the EC Regulation whether imported or domestically prepared. Similarly, all other prepared fishes are subject to the same rule whether imported or domestically produced.

The European Communities argued in particular that according national treatment means according a product its correct name, not granting to a different product a competitive opportunity represented by the use of another product's name.

Section IV – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff

4.1 The contested 1992 EC Regulation on geographical indications and the parties' allegations

The measure at issue in the dispute raised by both the United States and Australia⁵⁸ was EC Regulation n. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs⁵⁹, any amendments thereto and related implementing and enforcement measures. Whereas the main claims

⁵⁸ WTO, DS290, *European Communities - Protection of trademarks and geographical indications for agricultural products and foodstuffs*; request for the Establishment of a Panel by Australia, WT/DS290/18 of 19 August 2003; report of the Panel, WT/DS290/R of 15 March 2005.

⁵⁹ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 208 of 24.7.1992, p. 1, amended by Council Regulation (EC) n. 535/97 of 17 March 1997, OJ L 83 of 25.3.1997, p. 3; Commission Regulation n. 1068/97 of 12 June 1997, OJ L 156 10 of 13.6.1997; Commission Regulation n. 2796/2000 of 20 December 2000, OJ L 324 of 21.12.2000, p. 26; Council Regulation n. 692/2003 of 8 April 2003, OJ L 99 of 17.4.2003, p. 1; Council Regulation n. 806/2003 of 14 April 2003, OJ L 122 of 16.5.2003, p. 1, and repealed by Council Regulation (EC) n. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 93, 31.3.2006, p. 12.

by both complainants concerned the violation of specific obligations under the TRIPS Agreement, only Australia raised two claims under the TBT Agreement, what brings the dispute within the sample of those that must be analysed for the purpose of the present study.

In particular, according to Australia, on the one hand, article 12(2)⁶⁰ of the Regulation was incompatible with article 2.1 TBT Agreement and, on the other, articles 4⁶¹ and 10⁶² thereof were incompatible with article 2.2 TBT. Australia requests, *inter alia* on

⁶⁰ Article 12(2) of the contested Regulation reads as follows: “If a protected name of a third country is identical to a Community protected name, registration shall be granted with due regard for local and traditional usage and the practical risks of confusion. Use of such names shall be authorized only if the country of origin of the product is clearly and visibly indicated on the label.”

⁶¹ Article 4 of the contested Regulations reads as follows: “1. To be eligible to use a protected designation of origin (PDO) or a protected geographical indication (PGI) an agricultural product or foodstuff must comply with a specification.

2. The product specification shall include at least:

(a) the name of the agricultural product or foodstuffs, including the designation of origin or the geographical indication;

(b) a description of the agricultural product or foodstuff including the raw materials, if appropriate, and principal physical, chemical, microbiological and/or organoleptic characteristics of the product or the foodstuff;

(c) the definition of the geographical area and, if appropriate, details indicating compliance with the requirements in Article 2 (4);

(d) evidence that the agricultural product or the foodstuff originates in the geographical area, within the meaning of Article 2 (2) (a) or (b), whichever is applicable;

(e) a description of the method of obtaining the agricultural product or foodstuff and, if appropriate, the authentic and unvarying local methods;

(f) the details bearing out the link with the geographical environment or the geographical origin within the meaning of Article 2 (2) (a) or (b), whichever is applicable;

(g) details of the inspection structures provided for in Article 10;

(h) the specific labelling details relating to the indication PDO or PGI, whichever is applicable, or the equivalent traditional national indications;

(i) any requirements laid down by Community and/or national provisions.”

⁶² Article 10 of the contested Regulation read as follows: “1. Member States shall ensure that not later than six months after the entry into force of this Regulation inspection structures are in place, the function of which shall be to ensure that agricultural products and foodstuffs bearing a protected name meet the requirements laid down in the specifications.

2. An inspection structure may comprise one or more designated inspection authorities and/or private bodies approved for that purpose by the Member State. Member States shall send the Commission lists of the authorities and/or bodies approved and their respective powers. The Commission shall publish those particulars in the Official Journal of the European Communities.

3. Designated inspection authorities and/or approved private bodies must offer adequate guarantees of objectivity and impartiality with regard to all producers or processors subject to their control and have permanently at their disposal the qualified staff and resources necessary to carry out inspection of agricultural products and foodstuffs bearing a protected name.

If an inspection structure uses the services of another body for some inspections, that body must offer the same guarantees. In that event the designated inspection authorities and/or approved private bodies shall, however, continue to be responsible vis-à-vis the Member State for all inspections.

As from 1 January 1998, in order to be approved by the Member States for the purpose of this Regulation, private bodies must fulfil the requirements laid down in standard EN 45011 of 26 June 1989.

4. If a designated inspection authority and/or private body in a Member State establishes that an agricultural product or a foodstuff bearing a protected name of origin in that Member State does not meet the criteria of the specification, they shall take the steps necessary to ensure that this Regulation is complied with. They shall inform the Member State of the measures taken in carrying out their inspections. The parties concerned must be notified of all decisions taken.

5. A Member State must withdraw approval from an inspection body where the criteria referred to in paragraphs 2 and 3 are no longer fulfilled. It shall inform the Commission, which shall publish in the

such grounds, that the Panel recommend that the EC brought its measures into conformity with its obligations under the WTO Agreement, including in respect of the TBT Agreement. The EC in turn requested the Panel to reject all claims within its terms of reference, including those related to the TBT provisions.

4.2 The EC defence on TBT-related claims

Much as in the *Asbestos* case, the EC legal strategy in *Geographical indications* was aimed at rejecting the applicability of the TBT Agreement altogether by denying the technical nature of the contested Regulation on the ground that the contested provisions did not meet the requirements previously set forth by the AB for a technical regulation qualification, namely the identification of the specific product concerned, the specification of the latter's characteristics and the mandatory nature of compliance with those⁶³. Also consistently with previously adopted stances, in case of failure of such attempt, the EC aimed at demonstrating that the measure at issue abided by article 2.1 and 2.2 TBT by showing that it did not deny national treatment to products originating from other WTO members and that it was not more trade-restrictive than necessary in view of the achievement of its objective to protect geographical indications.

4.2.a *The denial of the technical nature of Regulation 2081/92*

Australia argued that Regulation 2081/92 was in part a technical regulation within the meaning of Annex 1 to the TBT Agreement. In this respect, it referred on the one hand to Article 12(2) of Regulation 2081/92, and on the other hand to Article 4, in particular 4 (2) (g), and 10 thereof. In this respect, the EC tried to demonstrate that none of these provisions constituted a technical regulation within the meaning of the TBT Agreement. Articles 2.1 and 2.2 of the TBT Agreement imposing obligations on WTO members with respect to their technical regulations, the EC recalled on the one hand what the Appellate Body had affirmed in the *Asbestos* report, i.e. that whether the measure is a technical regulation is a threshold issue which determines whether the obligations contained in article 2 TBT are applicable⁶⁴ and, on the other, that Annex 1 to the TBT Agreement defines a technical regulation as a:

Official Journal of the European Communities a revised list of approved bodies.

6. The Member States shall adopt the measures necessary to ensure that a producer who complies with this Regulation has access to the inspection system.

7. The costs of inspections provided for under this Regulation shall be borne by the producers using the protected name.”

⁶³ The ensuing considerations on the EC line of defence are partially based on the comparative analysis of the following documents presented by the EC before the AB, and available on the website of the Commission DG Trade: European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174 and WT/DS290), *First Written Submission of the European Communities*, Geneva, 25 May 2004; *Oral Statement of the European Communities*, Geneva, 23 June 2004; *Second Written Submission of the European Communities*, Geneva, 22 July 2004; *Second Oral Statement of the European Communities*, Geneva, 12 August 2004.

⁶⁴ Appellate Body report, *EC – Asbestos*, para. 59; similarly Appellate Body report, *EC – Sardines*, para. 175.

“Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”

Furthermore, the EC recalled the interpretation of the above definition given by the Appellate Body in *EC-Asbestos* and subsequently applied in *EC – Sardines*, whereby it affirmed the three criteria that must be fulfilled cumulatively in order for a measure to be considered a technical regulation:

We interpreted this definition in *EC – Asbestos*. In doing so, we set out *three criteria* that a document must meet to fall within the definition of "technical regulation" in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory.⁶⁵

(i) *Article 12(2) of Regulation 2081/92 is not a technical regulation*

In the EC’s view, article 12(2) was not a technical regulation within the meaning of the TBT Agreement because, first of all, it did not apply to identifiable products; secondly, it did not lay down product characteristics and, finally, it did not impose mandatory requirements.

The EC replied to Australia’s assertion that Regulation 2081/92 applied to agricultural products and foodstuffs and that these are identifiable product by recalling that the requirement to indicate the country of origin contained in the second subparagraph of article 12(2) only applied to the names in the situation referred to in the first subparagraph of article 12(2), i.e. if a protected name of a third country is identical to a Community protected name. The above requirement would therefore not apply to all agricultural products and foodstuffs for which a registration is obtained under the Regulation, but only to cases of homonymous protected names from the EC and a third country. Moreover, as the EC also explained, the requirement in article 12(2) could apply both to geographical indications from a third country or from the EC, depending on which name has been protected earlier.

The EC thus concluded that, since the Regulation itself did not allow to identify the products which might be affected by this requirement, article 12(2) did not apply to identifiable products.

Second, in the EC’s view, article 12(2) did not lay down product characteristics. Whereas Australia’s assertion that the provision did set out a specific labelling requirement falling within the meaning of a technical regulation as defined in Annex 1, the EC pointed out that the complainant overlooked that the provision at stake did not contain a specific labelling requirement for any specific product but merely set out the

⁶⁵ Appellate Body Report, *EC – Sardines*, para. 176.

conditions under which a geographical indication would be registered in a situation where there are homonyms from the EC and a third country. The requirement to indicate the country of origin was a condition for the registration of the geographical indication for which protection would be sought later.

However, in the EC's view, it was not article 12(2) itself which imposed a labelling requirement. The application for the registration of any geographical indication, whether from the EC or a third country, must be accompanied by a product specification. In accordance with article 4(2)(h) of the contested Regulation, the product specification was meant to contain the specific labelling details relating to the geographical indication. In the situation envisaged by article 12(2), the requirement to indicate the country of origin would be among the labelling details which must be indicated in the product specification.

Moreover, the EC noted that the definition of technical regulation in Annex 1 encompasses labelling requirements only as they apply to a product, process or production method and that, in the discussed case, the labelling requirement did not relate to any such element but merely to its geographic origin.

The EC therefore set out that this question of origin marking was covered by the special disciplines of article IX GATT and consequently concluded that article 12(2) did not lay down product characteristics within the meaning of the definition of a technical regulation.

Finally, article 12(2) did not impose a mandatory requirement. Regulation 2081/92 established in fact a system for the registration and protection of geographical indications whereby the possibility to apply for registration of a geographical indication was a right and not an obligation. In particular, registration under Regulation 2081/92 was not a precondition for the marketing of products.

With regard to article 4(1) providing that, in order to be eligible to use a geographical indication, a product must comply with a specification, the EC argued that this compliance referred only to the specifications in article 4(2) and not to the Regulation itself. Similarly, article 12(2) was a condition for the registration of a geographical indication but, since the registration process was voluntary, compliance with article 12(2) was not a mandatory condition for the placing of products on the market.

(ii) Articles 4 and 10 of Regulation 2081/92 are not a technical regulation

The EC requested the Panel to dismiss the Australia's claims concerning article 4 and 10 of Regulation 2081/92 partially on account of the same reasoning applied to article 12(2), i.e. that the provisions at issue did not fulfil the requirement of a technical regulation within the meaning of the TBT Agreement since they did not lay down product characteristics.

According to the Community, article 4(g), to which Australia had referred specifically, merely provided that the product specification shall include the details of the inspection procedures provided for in article 10, whereas the latter provided in turn the basic criteria with which such inspection structures must comply. These provisions could not therefore be regarded as laying down product characteristics.

First, article 10(1) defined that the function of inspection structures was to ensure that agricultural products and foodstuffs bearing a protected name met the requirements laid down in the specifications. Accordingly, the purpose of article 4(g) in conjunction with article 10 was not to lay down product characteristics, but to ensure conformity with the product specification.

In the EC's view, the TBT Agreement makes a clear distinction between measures laying down product characteristics, and measures ensuring conformity with technical regulations. Namely, articles 2 to 4 TBT deal with technical regulations and standards, whereas articles 5 to 9 TBT are concerned with the assessment of conformity with technical regulations and standards. In this respect, point 3 of Annex 1 to the TBT Agreement defines a conformity assessment procedure as follows:

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Even if the product specification were to be considered a technical regulation, the inspection structure ensuring conformity with the specification would not be a technical regulation, but a conformity assessment procedure. Accordingly, Australia's claim regarding the inspection procedure did not concern a technical regulation and did not fall under article 2 TBT⁶⁶.

Secondly, article 4 of the contested Regulation did not lay down product characteristics in that it simply set out the requirements with which a product specification must comply in order to permit the registration of a geographical indication. Not did article 4(2) itself set out the product characteristics for specific products. Rather, these characteristics were contained in the application for registration of a geographical indication in accordance with article 5(3) of the Regulation.

The Community further pointed out that it was not exceptional that the definition of product characteristics was required as a condition for the acquisition of certain intellectual property rights. In particular, the system of certification marks which was used by certain countries required that products bearing the mark comply with certain product characteristics⁶⁷. However, such trade mark laws had not to date been considered as falling under the TBT Agreement.

Finally, the EC recalled the above reasoning concerning the non-mandatory nature of the system for the registration and protection of geographical indications established by the Regulation. The requirement that inspection structures must exist was in fact a necessary requirement for the registration of geographical indications but the registration itself was not a precondition for the placing of products on the market.

⁶⁶ The EC added that Australia's claim would rather fall under articles 5 to 9 TBT but also underlined that since Australia did not refer to these provisions in its Panel request, any such claim would have been outside the terms of reference of the Panel.

⁶⁷ Cf. e.g. US Trademark Act, 15 US para. 1127.

4.2.b The compatibility of article 12(2) of Regulation 2081/92 with article 2.1 TBT

In case the Panel had opined in favour of the applicability of the invoked TBT provisions on account of the ascertained technical nature of the article 12(2) of the Regulation, the EC put forward, in the alternative, that the contested provision was fully compatible with article 2.1 TBT, containing a national treatment provision applicable to goods in respect of technical regulations.

Recollecting the absence of WTO jurisprudence on this provision, the EC did not consider it necessary to define the meaning of each of the elements of article 2.1 TBT. Nonetheless, the EC did recall the systematic criteria for the interpretation of provisions contained in international agreements and, on this ground, it rejected the Australian claim that the jurisprudence concerning article III GATT could be transposed to article 2.1 TBT, for instance with respect to the likeness of products. In the EC's view, such an approach would have overlooked important structural differences between the GATT and the TBT Agreement, in particular, the absence of a provision corresponding to article XX GATT in the latter Agreement. The EC argued that such structural differences between the two agreements must be taken into account when interpreting the requirements of article 2.1 TBT.

With regard to this very point, it is worth noting that, just as it had done in its submission during the sardines' case, the EC continued to operate a *revirement* with respect to the line of reasoning proposed in the asbestos case, whereby it claimed that, in the absence of WTO jurisprudence on the point, the necessity test under art. 2.2 TBT was to be deemed equivalent to that one provided for in art. XX GATT and thus had to be interpreted accordingly. In the submission in exam, the EC went even further in affirming the absence in the TBT Agreement of a provision equivalent to art. XX GATT, thus entirely disavowing the claim made in the asbestos case.

Nonetheless, the EC reasoned around the compatibility of art. 12(2) with TBT prescription by, first, setting out that the said provision merely defined the conditions under which a geographical indication would be registered in a situation where there were homonyms from the EC and a third country and did not therefore apply to all geographical indications. The requirement to indicate the country of origin would be a condition for the registration of the geographical indication for which protection is sought later. Accordingly, art. 12(2) did not treat foreign and EC geographical indications differently. On the contrary, it treated them exactly alike.

The EC further claimed that Australia's allegation that a less favourable treatment existed to the extent that a requirement to indicate the country of origin did not exist in the case of two homonyms from the EC was equally unfounded. The EC contended that in fact such a difference of treatment would also affect EC geographical indications, which were equally covered by article 12(2) and that therefore no issue of national treatment could arise in this respect⁶⁸. Moreover, article 6(6) of Regulation 2081/92 required a clear distinction in practice also where conflicts between homonyms arose

⁶⁸ In this respect, the EC also added that the relevant point of comparison would have been the treatment of two homonyms within Australia, this however not being a question falling within its responsibility.

within the EC. Where the two homonyms were from different Member States, this may in practice have required the indication of the country of origin. The only reason why the last indent of article 6(6) did not explicitly require the indication of the country of origin was that this provision dealt with a wider set of conflicts than article 12(2). In particular, article 6(6) also applied to conflicts between homonyms from the same EC Member State. In such a situation, in the EC's view, the indication of the country of origin would not have been a meaningful way of achieving the necessary clear distinction.

Finally, the EC claimed for the non-incompatibility of art. 12(2) with the NT provision contained in the TBT Agreement by contending that national treatment obligations do not apply to requirements to mark the country of origin. In this respect, it recalled that marks of origin are specifically dealt with in article IX:1 GATT, which excludes the applicability of the national treatment obligation under article III:4 thereof. According to the EC, should article 12(2) of be considered as a technical regulation, then this should not have the effect of rendering the specific provision of article IX:1 GATT useless. Accordingly, in this case, the national treatment obligation contained in Article 2.1 TBT Agreement could not have been applied to origin marking requirements.

4.2.c The compatibility of articles 4, 10, and 12(1) of Regulation 2081/92 with article 2.2 TBT

Whereas Australia had explicitly recognised that Regulation 2081/92 pursued a legitimate objective, namely the protection of geographical indications⁶⁹, it however argued that articles 4, 10 and 12(1) of Regulation 2081/92 are incompatible with article 2.2 TBT, which forbids technical regulations whose effect is creating unnecessary obstacles to international trade and prescribes that the former shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Australia contended that the contested provisions, when read together, required that another WTO member have in place inspection arrangements equivalent to those laid down in the Regulation and that this was more trade-restrictive than necessary to fulfil the legitimate objective. Based on a three-fold reasoning, the EC considered instead that the requirements regarding inspection structures were not more trade-restrictive than necessary.

First of all, the EC explained that article 12(1) was not applicable to WTO Members and that the registration of a geographical indication from another WTO country did not require the existence of equivalent inspection structures for all products in that country. Rather, articles 12(1), 10 and 4(2)(g) required the existence of equivalent inspection structures only with respect to the specific product for which protection was sought.

Secondly, the EC rejected Australia's allegations that article 10(1) of the Regulation set out detailed requirements for the inspection structures and therefore provided no leeway

⁶⁹ Geographical indications within the meaning of article 22.1 TRIPS relate to goods that have "a given quality, reputation or other characteristic" essentially attributable to their geographical origin.

for regard to be had to the existing arrangements of another WTO Member instead imposing an EC model and ruling out the acceptability of other types of inspection mechanisms. The EC explained that article 10 provided considerable flexibility as to the specific design of inspection structures insofar as it limited itself to setting out the basic functions and principles applicable to inspection bodies, without regulating their design in detail. Moreover, in the EC's view, articles 10(2) specifically allowed a choice between public and private elements in the design of the inspection bodies. Finally, for bodies outside the EC, article 10 did not mandate compliance with EC standards, but also allowed³ compliance with equivalent international standards.

Finally, the EC maintained that, even in the event that trade-restrictive effects were to be recognised to the Regulation, those effects as produced by the existence of inspection structures were to be deemed necessary in the light of the legitimate objectives pursued by the Regulation, in that the requirements regarding inspection structure are an indispensable part of the EC system for the protection of geographical indications.

The objective of the inspection procedures foreseen in Regulation 2081/92 was indeed to ensure that products using a protected geographical indication did comply with the product specifications, and therefore have the "quality, reputation or other characteristic" justifying this protection, just as prescribed by the TRIPS Agreement⁷⁰. In this respect, the EC maintained that even where there is only one producer, the expectations of consumers should still be protected and that a monopolistic situation might in fact require even more stringent control than where several producers produce a good protected by a geographical indication.

Finally, the EC countered Australia's argument that other systems of protection of geographical indications might have achieved the same objective, in particular the application of unfair competition law. By establishing a specific system for the protection of geographical indications, the EC intended to establish a system which granted more extensive protection, in respect of geographical indications, both to consumers and producers. It argued that such discretion as it is left to the WTO members under article 1.1 TRIPS cannot be limited on the basis of article 2.2 TBT.

⁷⁰ The EC noted that, as regards certification marks, also the United States had recognised that some form of control of the proper use of the name may be necessary, and that this cannot be simply left to the user of the mark: "When a geographic term is used as a certification mark, two elements are of basic concern: first, preserving the freedom of all persons in the region to use the term and, second, preventing abuses or illegal uses of the mark which would be detrimental to all those entitled to use the mark. Normally a private individual is not in the best position to fulfil these objectives satisfactorily. The government of a region would be the logical authority to control the use of the name of the region. The government, either directly or through a body to which it has given authority, would have power to preserve the right of all persons and to prevent abuse or illegal use of the mark"; cfr. IP/C/W/117/Add.3, p. 10, 1 December 1998.

Section V – Measures Affecting the Approval and Marketing of Biotech Products (GMOs)

5.1 The contested EC regime for approval of biotech products and the Member States' safeguard measures restricting the marketing of biotech products

The biotech dispute⁷¹ concerned two distinct matters: on the one hand, the operation and application by the EC of its regime for approval of biotech products and, on the other, certain measures adopted and maintained by EC Member States prohibiting or restricting the marketing of biotech products. Argentina, Canada and the United States initiated a dispute settlement procedure with a view to challenge what they allege to be a general moratorium in the EC concerning the approval of genetically modified organisms (GMOs) and products derived therefrom, the alleged failure to approve a number of specific applications for the placing on the market of certain GMOs, and certain temporary measures adopted by six EC Member States concerning GMOs that have already been authorized by the EC.

In the midst of the dispute, the very basic assumption put forward by the EC was that it was not plausible to argue that GM products are or should be treated as equivalent to non-GM products. Since the first commercialisation of GMOs in the early nineties, governments around the world have in fact started to address the question of how to regulate GMOs. Regulatory approaches range from complete bans to regulatory inaction. Most, however, consist in setting up an approval system specific to GMOs, based on a case-by-case detailed risk assessment. Often such systems are based on a precautionary approach, and decisions are sometimes made dependent on considerations other than scientific factors, such as, for instance, socio-economic considerations.

With a view to seeking international consensus governments have also addressed the issue in various international *fora*. In 2000, they came to adopt the Cartagena Protocol on Biosafety⁷², whose 103 signatory parties include Canada and Argentina. The Protocol addresses the safe transfer, handling and use of living modified organisms that may have adverse effect on biodiversity and, what was particularly important in the EC's view. Based on the understanding that the inherent characteristics of GMOs require them to be subject to rigorous scrutiny so as to ensure that they do not cause harm to the environment or human health, or cause socio-economic disruptions, the Protocol does incorporate the precautionary principle. In addition, work on specific issues related to GMOs is still on-going in specialized agencies and other international bodies or organisations such as Codex Alimentarius, FAO, WHO, UN, OECD, ASEAN and the African Union. The guidance documents established by these *fora*, in particular,

⁷¹ WTO, DS291, DS292 and DS293, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*; requests for the establishment of a Panel by the United States, WT/DS291/23, Canada, WT/DS292/17, and Argentina, WT/DS293/17, of 8 August 2003; Panel report WT/DS291/R, WT/DS292/R, WT/DS293/R of 29 September 2006.

⁷² Cartagena protocol on biosafety to the convention on biological diversity, reported in OJ L 201, 31.7.2002, p. 50.

recognize the need for a case-by-case decision on individual GMOs based on a scientific risk assessment and on risk management considerations.

The EC's regime for approval of biotech products consisted of two primary legal instruments: Directive 2001/18⁷³ (and its predecessor, Directive 90/220⁷⁴) governing the deliberate release into the environment of genetically modified organisms and Regulation 258/97⁷⁵ regulating novel foods and novel food ingredients. The objective of the EC regime was to protect human health and the environment, for whose achievement the above legislation required the European institutions to conduct a case-by-case evaluation of the potential risks biotech products could pose. On the basis of that evaluation, the marketing of a particular biotech product was either approved or not. The contested EC measures outlined the administrative procedure to be conducted in the event a company sought to obtain approval to place a biotech product on the market and the standards by which an application for approval was to be evaluated⁷⁶.

The measures maintained by EC member States were linked to the EC regime in that the above EC legislation under certain conditions allowed Member States to adopt safeguard measures in respect of biotech products that had obtained approval for EC-wide marketing. More particularly, individual Member States may provisionally restrict or prohibit the use and/or sale of an approved biotech product in their own territory if they had detailed grounds for considering, based on new or additional information or scientific knowledge, that the particular product posed a risk to human health or the environment. In cases where a member State adopted such a safeguard measure, it had to inform other Member States and the Commission and a decision on the adopted safeguard measure had then be taken at Community level within a prescribed time period.

⁷³ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ L 106 of 17.4.2001, p. 1–39.

⁷⁴ Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, OJ L 117 of 8.5.1990, p. 15–27, preamble, as amended by Commission Directive 94/15/EC of 15 April 1994 adapting to technical progress for the first time Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms, OJ L 103 of 22.4.1994, p. 20–27, and Commission Directive 97/35/EC of 18 June 1997 adapting to technical progress for the second time Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms, OJ L 169 of 27.6.1997, p. 72–73.

⁷⁵ Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, OJ L 43 of 14.2.1997, p. 1–6.

⁷⁶ An assessment procedure was foreseen which took place at two levels and in two stages. Once an application was lodged in an EC Member State, its authorities made an initial assessment. If it was positive, the dossier was sent up to the Community level from where it was circulated to all other Member States. If all agree with the initial assessment, the lead Member State granted final consent. If objections were raised, and no agreement could be found, a decision had to be taken at Community level. The Commission consulted a scientific committee, nowadays the European Food Safety Authority, before presenting a proposal for a decision to the Council Regulatory Committee. If the proposal did not get a qualified majority in this Committee, the Commission presented a proposal to the Council of Ministers for adoption (or rejection) by qualified majority. If the Council did not act within three months the Commission adopted the decision. While approval was valid throughout the European Union, the legislation provided for the possibility for member States to adopt safeguard measures prohibiting the release and marketing in their own territory.

US, Canada and Argentina in their request for establishment of a panel, requested the Panel to find that the measures at issue were inconsistent with a number of WTO provisions. First, the complainant parties claimed the violation of the SPS provisions concerning the prohibition to adopt unnecessary SPS measures which are not based on scientific evidence and produce unduly restrictive effects on international trade⁷⁷; of provisions concerning the assessment of the risk and the determination of the appropriate level of protection⁷⁸; of provisions concerning transparency⁷⁹ and control, inspection and approval procedures⁸⁰; finally, of provisions contained respectively in Annex B⁸¹ and C⁸² to the SPS Agreement. Secondly, the complaining parties lamented the breach of TBT provisions concerning the preparation, adoption and application of technical regulations⁸³ and the procedures for conformity assessment⁸⁴. Moreover, they also maintained that EC and Member State's adopted measures were in breach of articles I:1, III:4, X:1 and XI:1 GATT and of article 4.2 of the Agreement on Agriculture.

The EC in turn requested the Panel to reject the complaining parties' claims and to find that, first of all, the delays in the examination of the applications as well as the Member States' national measures were not in violation of the SPS Agreement, the TBT Agreement or the GATT and that there was no general suspension of the process of authorizing GMOs and GM products on the part of the Community.

5.2 The EC defence on SPS and TBT-related claims

The European Communities sought to underline from the very beginning that it had not adopted any general position either in favour or against GMOs⁸⁵. Whereas not seeking to impose its prudent approach on other countries, the final aim of the EC's defense was to shield its regulatory autonomy from external incursions by impeding the complaining parties to impose their own approach on the European marketplace. Moreover, the EC tried to stress the whole socio-political, legal, factual and scientific complexity of the case, including the process that led to the conclusion of the Cartagena Protocol on Biosafety. In this respect, the EC underlined that the aims of its policies on GMOs was

⁷⁷ Articles 2.2 and 2.3 SPS.

⁷⁸ Articles 5.1, 5.2, 5.5 and 5.6 SPS.

⁷⁹ Article 7 SPS.

⁸⁰ Article 8 SPS.

⁸¹ Paragraphs 1, 2 and 5.

⁸² Paragraphs 1(a), 1(b), 1(c) and 1(e).

⁸³ Articles 2.1, 2.2, 2.8, 2.9, 2.11 and 2.12 TBT.

⁸⁴ Articles 5.1, 5.2.1, 5.2.2, 5.2.3, 5.6 and 5.8 TBT.

⁸⁵ The ensuing considerations on the EC line of defence are based on the comparative analysis of the following documents presented by the EC before the Panel, and available on the website of the Commission DG Trade: European Communities – Measures Affecting the Approval and Marketing of Biotech Products (DS291, DS292, DS293) *First Written Submission by the EC*, Geneva, 17 May 2004; *Oral Statement by the EC at the First Meeting of the Panel with the Parties*, Geneva, 2 June 2004; *Second Written Submission by the EC*, Geneva, 19 July 2004; *Final Position of the EC on the Need to Seek Scientific or Technical Expert Advice*, Geneva, 22 July 2004; *Supplementary Rebuttal Submission by the EC*, Geneva, 15 November 2004; *First and Second Oral Statements of the EC at the Second Meeting of the Panel with the Parties*, Geneva, 22 February 2005.

reaching further beyond the protection against the specific risks covered by the SPS Agreement.

More specifically, the EC's overall approach to the biotech dispute consisted of six macro arguments. First, GMOs do display characteristics which were recognized by the international community to pose potential threats to human health and the environment, and they could not be treated as like or equivalent to their non-GMO counterparts. Second, the Community regulatory framework for the marketing of GMOs operated on a case-by-case basis and there had been no *de jure* or *de facto* moratorium in respect of the authorization process. Third, the EC's approach to the identification, assessment and prevention of risks to human health and the environment had been fully consistent with applicable international standards. Fourth, the measures which had been taken to protect the environment and to conserve biodiversity were reasonable and legitimate, were not necessarily sanitary or phytosanitary in character, and fell in whole or in part outside the scope of the SPS Agreement. Fifth, to the extent that any such measure could be said to be subject to the SPS Agreement, there had been no undue delay or breach of any part of that Agreement on the part of the EC or of the Member States, and in any event such measures were provisionally justified on the basis of the insufficiency of scientific evidence. Finally, all measures taken by the EC and its Member States were also consistent with the TBT Agreement and the GATT, and in any event were justified in accordance with article XX GATT.

5.2.a Preliminary and horizontal issues

The EC's defence was based on certain preliminary remarks that are directly related to the macro arguments just outlined. As regards the identification of the contested measures, whereas the three complaining parties alleged the existence of a general moratorium affecting *all* GMOs, as well as the existence of a separate measure consisting in the suspension of approval procedures affecting certain *specific* GMOs, the EC maintained not to have imposed any moratorium, let alone a ban.

As the complaining parties' case concerned the conduct of approval procedures, namely the delay in completing such procedures, the EC considered that the relevant WTO rules should be those obligations that concern procedural aspects rather than those that deal with the adoption of substantive measures.

As regards the applicable law, the EC did not agree that the SPS Agreement was the only relevant applicable law inasmuch as its scope is limited to measures adopted to prevent an exhaustive list of narrowly defined risks. In the EC's view, to the extent that a domestic measure is aimed at the protection against other risks, or that it pursues other different objectives, the SPS Agreement is not applicable.

Finally and in connection to the latter point, the EC underlined that issues arising from the existence of GMOs go far beyond the risks envisaged and regulated by the SPS Agreement. Since the EC aimed at the fulfilment of objectives that go beyond the specific situations determining the applicability of the SPS Agreement, such Agreement did not provide, in its view, a sufficient legal framework for the examination of the

EC's behaviour. The EC was of the view that the SPS Agreement is relevant in relation to some of the issues that are examined by EC authorities in the course of GMO approval procedures. However, it cannot exclude the applicability of other WTO rules to different non-SPS aspects of the challenged measures. GATT 1994 and, where relevant, the TBT Agreement, could be used to examine those other aspects of the EC's behaviour. In this regard, the EC noted that the effect of article 1.5 TBT is to exclude the cumulative application of the TBT and the SPS Agreements to measures that squarely fit in the definitions of Annex A.1 of the SPS Agreement. In its view, in the case of a composite measure that is only partly pursuing SPS aims, article 1.5 certainly does not imply that the TBT Agreement is entirely irrelevant and that a narrow examination of one single element of the measure under the SPS Agreement can lead to a conclusion on the WTO-consistency of the measure as a whole. Quite to the contrary, any measure or part of any measure adopted for reasons that fall outside the scope of the SPS Agreement cannot be inconsistent with that agreement. The EC therefore claimed that the contested measures had to be revised separately under more than one WTO agreement, according to their nature and aims, before reaching a conclusion on their overall consistency with WTO obligations. Furthermore, the EC claimed that the general exceptions contained in articles XX and XXI GATT also apply to the TBT Agreement.

(i) *The issue of party bearing the burden of proof*

In the EC's view, a correct allocation of the burden of proof was fundamental for the dispute and the EC itself was not to be expected to bear it. In turn, it is asserted that the complaining parties had to prove for each application that the absence of risk had been established and that no useful further investigation into the risks was underway. The EC assertion was based on what it considered a consistent case-law on the burden of proof under the WTO Agreements, whereby the party invoking the existence of a certain situation bears the burden of proving it and, in order to shift the burden, a *prima facie* case must be established. The establishment of the *prima facie* case could not however, according to the Community, be reduced to a mere assertion, standing the absence of supporting evidence. In its view, the Panel first had to verify if the complainants had established a *prima facie* case in relation to each of their claims, before ascertaining whether the EC had refuted it.

(ii) *Risk assessment and the role of scientific opinion*

In the EC's view, the term "risk assessment" in the SPS Agreement had to be understood in the broad sense of "risk analysis" as defined by the Codex Alimentarius and other international instruments. Based on the definition of risk assessment given in paragraph 4 of Annex A as well, risk assessment encompasses three different aspects: first, the risk assessment in the narrow sense, i.e. as a "scientifically based process"; second, the management of risk; and, thirdly, the communication thereof. The interpretation purported by the EC was also based on paragraphs 2 and 3 of article 5 SPS, which makes clear that in making an assessment of the risks, WTO members must

take into account not only scientific but also economic and regulatory considerations, where such list of factors to be taken into account was not, in the EC's view, to be considered as exhaustive.

The EC disagreed in particular with Canada's position that management considerations may only apply with regard to risks that are identified based on relevant scientific evidence. Particular risks can only be assessed and potentially identified in the risk assessment process on the basis of the available scientific information *at the time of the assessment* as scientific knowledge may not be sufficient to clearly identify the risks and the latter may become known or relevant at a later stage. Against this background, the precautionary approach adopted by the Community becomes highly relevant: prudent governments as risk managers and regulators are entitled to develop and apply appropriate safeguards to protect citizens and the environment. They are entitled to adopt risk management options, such as an appropriate general surveillance scheme, which are able to detect and identify any negative impact that was unforeseen or unidentified in the initial process of risk assessment.

Moreover, the EC countered the complaining parties' argument that the Community was bound to authorize GMOs for which scientific committees had issued favourable scientific opinions on three different grounds.

First, in the EC' view, scientific opinions are only part of the risk assessment in a narrow sense, i.e. the scientifically based process of hazard identification, hazard characterisation, exposure assessment and risk characterisation. On the other hand, contrary to the usual practices in North America, risk management and risk communication considerations are assessed by the regulator itself and not by those who deliver a scientific opinion. A complete risk assessment, within the meaning of the SPS Agreement, includes also these latter aspects.

Second, the scientific opinions by EC committees are not binding. There are several scientific committees with different mandates and at different levels in the European Communities and, in case of scientific disagreement, the opinions of the European Communities' scientific committees do not overrule other scientific opinions, such as those issued by member States' scientific bodies. The EC saw no obligation in SPS law or indeed in any WTO law for a regulatory power to effectively delegate to a single scientific committee only.

Third, scientific opinions are limited in scope and, therefore, often do not conclude the risk assessment process, even in a narrow sense. The science on GMOs being in constant evolution, new risk considerations sometimes arise spontaneously and change the scope of the risk assessment, as in this case. The process of addressing risk and scientific issues which are unresolved, may require the authorities to go back for a further assessment by an independent scientific body that had issued an earlier positive opinion, much later in the process of analysing a particular application.

(iii) The SPS Agreement

Concerning the scope of the SPS Agreement, the EC tried to contrast the complainants' attempt at stretching it by pointing out that the list of risks or matters subject to the

SPS Agreement is exhaustive, as it is clear from the text of Annex A.1⁸⁶. In determining the material scope of the *SPS Agreement*, the EC deemed it necessary to rely on internationally accepted definitions of the terms in Annex A.1. It also maintained that the “common and ordinary” meaning approach advocated by complaining parties, to the exclusion of the international definitions, would not be sufficient since the common language definitions of SPS terms are often so vague and broad as to deprive of any meaning the categories and distinctions set out in Annex A.1⁸⁷.

A measure can only fall within Annex A.1 if it is applied to protect human, animal or plant life or health⁸⁸. Therefore, the effects of the relevant GMO on non-living components in the environment clearly fall outside the scope of the SPS Agreement. The same comment may be made with respect to micro-organisms or micro-flora which do not affect human, animal or plant life or health, but which are nevertheless part of the ecological equilibrium. The negotiating history confirms that the SPS Agreement was intended to have a precisely limited scope. Of particular note are the discussions that took place on whether environmental risks should be covered. Those that opposed this stressed that environmental risks were of a different nature and that rules designed for SPS measures would not necessarily be appropriate for environmental risks. This view ultimately prevailed, and consequently the SPS Agreement does not cover measures for the protection of the environment as such or based on consumer concerns, moral grounds etc.).

Throughout its submissions, the EC attached great importance to the issue of how to deal with mixed acts, i.e. measures that protect against the risks defined in the SPS Agreement but that also pursue other legitimate objectives not covered thereby, which it deemed to be a relevant threshold issue. According to the Community, nothing obliges WTO members to refrain from adopting single indivisible acts, incorporating two or more measures pursuing multiple legitimate objectives and therefore regulated by more than one WTO Agreement or provision. In such case, the member adopting the

⁸⁶ In turn, a more flexible approach taken with regard to the form of the measures subject to the agreement is put forwards at Annex A.1, second paragraph, which contains the word “includes”, absent in turn from the first paragraph.

⁸⁷ The EC’s position with regard to the reliance on internationally accepted definitions was also based on the strong relationship between the SPS Agreement and the texts of specialised international organisations and bodies. Article 3 contains obligations on Members with regard to international standards, guidelines or recommendations. Some of the key terms in Annex A.1 are themselves international standards (the Codex definition of contaminant is a “standard”, namely Codex Standard 193, rev 1, 1995). Furthermore, article 12(3) refers to the objective of securing from the relevant international organisations the best available scientific and technical advice for the administration of the SPS Agreement. In the EC’s opinion, this must include advice on the technical concepts that those organisations have developed and that were adopted by the drafters of the SPS Agreement.

⁸⁸ The Community lamented that in their attempt to stretch the scope of the SPS Agreement, complaining parties also paid little attention to the literal wording of Annex A.1, which defines the specific circumstances in which the Agreement is to be applied. For instance, complaining parties assumed that it would be sufficient for them to establish that a measure concerned a “toxin” or an “additive” or a “contaminant” for that measure to fall within the scope of the SPS Agreement, whereas the EC considered this assumption to be wrong as a matter of law. According to the EC, Annex A.1(b) referring to toxins “in foods, beverages and feedstuffs”, the toxic characteristics of seeds or crops do not therefore fall within that provision, just as the GMOs does not fall within the concept of “food, beverage or feedstuff”.

contested act cannot be directed to withdraw or revise its measure unless it is found to be inconsistent with *all* relevant agreements.

In the case of a mixed act, the challenged act is not itself an SPS measure *tout court*, insofar as it contains an SPS measure but also, for instance, a TBT measure. According to the EC, to find that the TBT measure, because it is in the same act as an SPS measure, is itself transformed into an SPS measure, would be an error of reasoning and of law. Nor does article 1.5 TBT change this conclusion. It is a jurisdictional conflict rule. Since a “technical regulation” could fall within the SPS Agreement, article 1.5 means that such a measure needs to be examined only under the said Agreement, to the exclusion of the application of the TBT one. This situation is however different, in the EC’s view, from the case in which a “technical regulation” pursues not only SPS objectives, but also other types of legitimate objectives.

Concerning another aspect of the application of the SPS agreement, namely the relation between invoked articles 2.2 and 5.7 SPS, the EC read the cross-reference to latter contained in the former as implying that the text in article 5.7 sets out basic rights and obligations of equivalent status to the other basic rights and obligations set out in article 2 and that, in this way, the drafters saw article 5.7 as excluding the application of the substantive obligations in article 2.2⁸⁹. In the EC’s view, a concept of “necessity” is already referred to in article 2.1 and is in any event built into the text of article 5.7, because a WTO member may only act on the basis of available pertinent information, and only provisionally in order to allow sufficient time for sufficient scientific evidence to be collected.

According to the EC, the relationship between article 2.2 and 5.7 SPS is therefore one of exclusion, not of exception. *If it were true* that there is sufficient scientific evidence, as the complainants sustained, the provisional measure would be inconsistent with article 5.7, not fall within the scope of article 2.2. The exclusionary demarcation line between articles 2.2 and 5.7 is based on whether or not the measure is provisional. The provisional nature of the measures must be motivated by the insufficiency of the scientific evidence, but an article 5.7 measure is still provisional.

Provisional measures in turn continue to be subject to the requirements of article 2.3. They may not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, including between their own territory and that of other members; and they may not be applied in a manner that would constitute a disguised restriction on international trade.

Concerning the relation between article 5.7 as special regime applying to provisional measures and the rest of article 5 SPS, the EC claimed for the irrelevance of the remainder of the article once the applicability of art. 5.7 has been established. In the EC’s view, provisional measures are still subject to a full set of controls under the SPS Agreement since they must comply with the requirements of article 5.7, as well as with articles 2.1, 2.3 and 2.4. These provisions contain rules and obligations that are analogous to those set out in articles 5.1 to 5.6, adapted appropriately to the provisional

⁸⁹ From the textual view-point, the EC came to this conclusions by considering that the comma after the word “evidence” means that the words that follow exclude all the words up to the word “evidence”.

measures scenario. Thus, articles 5.1 to 5.6 are irrelevant: provisional or temporary measures, whether the Member States' measures or the alleged temporary moratoria, fell therefore to be considered under article 5.7, and product specific delays were to be considered in accordance with Annex C. Even if Article 5.1 would have been considered relevant, the words "as appropriate to the circumstances" enshrine, in the view of the Community, an important degree of flexibility, whether in relation to the Member States' measures or in relation to the alleged product specific delays. The obligation under article 5.1 is only that measures be "based on" an assessment. This does not mean that the assessment itself necessarily automatically dictates the terms of the legislative measure to be adopted.

More specifically on art. 5.7 SPS, the EC disagreed with the plaintiff's argument that there was no relationship between the acceptable level of risk – or the analogous concept in the context of provisional measures – on the one hand, and the question of whether or not relevant scientific evidence was insufficient on the other. In the context of provisional measures, a full risk assessment has yet to be completed and the level of acceptable risk may yet to be finally determined by the legislator. However, for the Community, the concept of sufficiency in article 5.7 is relational, and must therefore refer to the matters of concern to the legislator. Members may not necessarily react identically with regard to potential risks and uncertainty. Depending on the specific circumstances prevailing in each country, scientific information may or may not be deemed sufficient to decide appropriate measures. Nor is there for the EC a predetermined moment at which the available science becomes sufficient for *all purposes*. Rather, the actions of a legislator, whether definitive or provisional, in response to the available science, are a function of what that legislator is concerned about.

Finally, the EC rejected the relevance of article 2.3 altogether not only in relation to any consideration of alleged delay since the provision applies to measures, but also on the ground that GMOs were being dealt with in an even-handed way, without discrimination and that the dispute concerned the on-going discussions within the EC about how to respond to the risks posed by GMOs, whatever their origin, this being a basic right of the EC under the SPS Agreement, any trade effects being entirely incidental.

5.2.b The product-specific delays

In relation to the SPS Agreement, the EC construed the SPS Agreement as containing two types of provisions, those disciplining the development of the sanitary or phytosanitary measures and those dealing with their application. Against this background, the Community contended that challenging the way in which applications for authorization are dealt with is a challenge against the application of a sanitary or phytosanitary measure.

The EC submitted therefore that among the various provisions which the complaining parties alleged to have been violated under the SPS Agreement only article 8 thereof

together with Annex C thereto could be applied to the biotech dispute. Articles 2.2, 2.3, 5.1, 5.5 and 5.6, on the contrary, all contain obligations concerning the development of a sanitary or phytosanitary measure (i.e. the SPS measure itself).

The distinction between provisions on development and on application of measures addresses two different regulatory needs arising at two different points in time: the need to ensure the creation of procedures which respect certain parameters and the need to ensure the management of these procedures according to other parameters. In the EC's view, this was confirmed by article 8, which contains two distinct legal provisions. In its first part, it submits "the operation of control, inspection and approval procedures" to the provisions of Annex C. In the second part, it provides that the procedures themselves must be in conformity with all other provisions of the SPS Agreement.

The alleged failure to deal with certain product applications was in fact not an SPS measure, the nature of the latter as defined in Annex A point 1 requiring the existence of an act, however formal or informal. The EC maintained that the alleged failure to reach a final decision on certain product applications, therefore, could only be challenged as the application of an SPS measure, but not as an SPS measure itself, with the latter being in turn the approval system as established by the EC's GMO legislation. All other alleged violations relating to an SPS measure as such and given that the alleged failure to act does not constitute an SPS measure, most of the provisions invoked by the complaining parties were not applicable, to the exclusion of article 8 and Annex C SPS which solely address issues of application of an SPS measure.

In this respect, the EC maintained that there was no violation of article 8 and of the various provisions of Annex C and, in particular, there had been no any "undue delays" within the meaning of Annex C point 1(a). The EC rejected Argentina's and the United States' argument that undue delays within the meaning of the above provisions could be inferred from the fact that procedural delays set out in the EC legislation had possibly not been respected. According to the EC, the concept of undue delays as set forth in the SPS regime is to be interpreted in accordance with the general rules of international law on treaty interpretation and can be understood to be referring to a period of time lost by inaction or inability to proceed which is unjustifiable. In this light, the meaning of the words undue delay could in no case be inferred from the domestic legislation of WTO members.

Moreover, the EC claimed that the approval process for individual GMOs applications had not been generally suspended, as the complaining parties alleged and that, where delays have occurred in individual instances due to requests for additional information, such delays were justified by the nature of such requests. On a level of principle, the European Communities submitted that it was legitimate to request additional information necessary for the completion of a risk assessment, risk management or risk communication as they have been established by a regulator. That principle applies generally to any product that goes through an approval or inspection procedure designed to ensure that this product is safe and it applies *a fortiori* when the product in issue is based on a new technology which is generally untried and untested and which is recognized by the international Community to have characteristics which inherently

require prudence and caution. In the EC's view, such requests do not become "illegitimate" if and because they are not expressly set out in the legislation applicable at the time of the application nor do they become "illegitimate" where they are put in the form of a legislative requirement to re-submit an up-dated dossier, a requirement that had not however been challenged by the three complaining parties.

5.2.c The general suspension (moratorium)

The EC countered the complaining parties allegation that the EC had been operating a practice of suspending the consideration of applications and approvals by maintaining that such an alleged practice was not proved by the existence of any document, even informal or non-binding in nature.

The EC claimed instead that there had not been any general suspension and that there was no consistent practice in respect of all the applications, each having been taken into account on its own merits. First, the EC dismissed the evidence put forward by the complaining parties regarding the absence of final approvals in the previous five years as incorrect, inconclusive and inconsistent⁹⁰. Moreover, the evidence of various statements from different sources presented by the complaining parties was mostly irrelevant and otherwise inconclusive. On the basis of WTO jurisprudence on statements as evidence, only official EC statements could at all be relevant. Those EC statements which come closest to being official ones did not however announce nor confirm a suspension of the approval processes.

Even assuming that on the basis of that evidence and in spite of the actual facts, it could be said that there was in the past a systematic suspension of the approval process, according to the Community such a pattern or practice would not as such constitute a challengeable measure under the WTO Agreement.

In the EC's view, if it was to assess the consistency with WTO rules of the so-called moratorium, the Panel needed first to define with absolute precision what the moratorium consisted of and what the measure at issue was. A measure that is a "moratorium" must therefore have been shown to be a plan or course of action to suspend a procedure, or a decision not to decide. On the other hand, the EC contended that the absence of a decision, such as the one occurred in the case at issue, is not the same thing as a decision not to decide. There may have been expressions of individual opinion associated with specific persons, or views of individual Member States. But the European Communities itself has not taken any such decision.

Finally, if the Panel was to take the view that there was a measure, the EC underlined that it would have had to consider the following issues: first, whether the measure

⁹⁰ According to the EC, evidence presented by the complainants was incorrect because GM products had been authorized to be put on the market during the previous 5 years. It was inconclusive because the absence of an approval did not mean that an approval process had been suspended. It was inconsistent because, on the one hand, the United States only referred to a limited number of products instead of all and only to an alleged situation in the past and not to the current circumstances of the case and, on the other, Canada could not reconcile its presentation of processes being stalled with the plain fact that dossiers were moving through the different instances of the approval process.

existed when the Panel was established and if so, whether it still existed at the time of proceedings; second, to what extent that measure came within the scope of the SPS Agreement; third, whether the measure was inconsistent with article 5.7, as the measure would have had to be considered to be of a provisional nature applied for reasons of insufficiency of scientific evidence; fourth, to the extent that the measure did not fall under the SPS Agreement, whether it was a technical regulation falling under the TBT Agreement or whether article III:4 GATT 1994 would have been applicable; and finally, the possible justifications under article XX GATT.

5.2.d The EC member State safeguard measures

As regards the measures taken by the EC Member States which affected GMOs already authorized in by the EC, these were provisional measures pending a full assessment at the EC's level which would eventually have lead either to a modification of the Community-wide authorization or to a termination of the national safeguard measures. The safeguard measures were therefore provisionally and temporary in their character. This was confirmed by the measures themselves, by the explicit terms of the legal provisions on which they were based⁹¹ and finally by the ECJ⁹².

Consequently, according to the EC, to the extent that they were falling under the SPS Agreement, these measures should have been reviewed under article 5.7 SPS, the latter provisions being specifically designed to discipline temporary SPS measures to the exclusion of other SPS provisions, such as article 5.1, which the complaining parties had wrongly invoked. All three complaining parties having failed to assert the inconsistency of the Member States' measures with article 5.7 SPS, however, the EC opined that their claims on the safeguard measures should have been dismissed.

Moreover, even if there was no burden of proof on the EC concerning the four conditions set forth in article 5.7, the European Communities nonetheless pointed out that the latter were met in that, first, the scientific evidence was insufficient; second, the Member States based their measures on available pertinent information; third, Member States and the EC were engaged in an process aimed at obtaining the additional information necessary for a more objective assessment of the risk; and fourth, the measures were subject to a review within a reasonable period of time.

In the alternative, the EC contended that, should article 5.1 SPS be considered relevant, the importance of the terms "appropriate to the circumstances" that qualify the obligation to base measures on a risk assessment should have been taken into due consideration. For the Community, those terms implied a certain degree of flexibility, especially under circumstances where scientific knowledge was still developing and the potential risks being assessed were important.

Furthermore, the EC resorted to its classic argument of SPS (and TBT) measures needing to be "based on" and not "conform to" a risk assessment. On this ground the

⁹¹ Article 16 of Directive 2001/18 and article 12 of Regulation 258/97.

⁹² ECJ, case C-236/01, *Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others*, judgment of the Court of 9 September 2003, [2003] ECR I-08105, para. 107-109.

EC concluded that there is no obligation for WTO members to follow mainstream scientific opinions.

The EC also rejected under articles 5.6 and 5.5 SPS. As regards the former article, the complaining parties' arguments were based only on a wrong assumption about the appropriate level of protection that the Member States' measures sought. Furthermore, in the EC's view, the necessity of those measures had to be judged by reference to the insufficiency of scientific evidence and the reasonable period of time necessary. As regards article 5.5, its application was excluded by article 5.7 SPS and, in any event, the EC maintained that Member States had not behaved in an arbitrary manner or made unjustifiable distinctions in that the alleged differences in treatment were between entirely different GMOs or between GMOs and conventional products.

Finally, the EC also asked for the dismissal of the complainants' claims under articles 2.2 and 2.3 SPS since the latter derived from their claims under articles 5.6 and 5.5.

With regard to the alleged TBT violations, here again resorting to a classic argument, the EC considered that the Member States' measures could not be qualified as technical regulations within the meaning of the TBT Agreement. Each safeguard measure was in fact an individual administrative - and not normative - act relating to a specific product from a specific applicant or manufacturer – and not to a generality thereof. Each of those measures amounted to a simple ban on a product in its natural state, and they did not therefore contain product characteristics in the general and abstract sense in which that term is used in point 1 of Annex 1 to TBT Agreement.

In any event, according to the Community, neither article 2.1 nor article 2.2 TBT as invoked by the complainants would have provided support to the latter's case. On the one hand, even in the implausible event that non-GM products could have been considered to be "like" a GM products, article 2.1 TBT can only apply to differences in treatment between products that are, by their nature, susceptible of being covered by the technical regulation in question. On the other hand, the assertion that the Member States' measures did not contribute to achieving their objectives was for the EC not sufficiently substantiated and it failed to take into account the review of the relevant EC legislation and the parallel review of the EC authorizations concerning the products affected by the safeguards measures.

5.2.e Article XX of the GATT 1994

Last but not least, the EC submitted that, had any of the challenged measures to be found inconsistent with any of the provisions invoked by the complaining parties, those measures had to be found to be justified under article XX GATT because, first, they came under one of the particular exceptions of paragraphs (b), (d) or (g) and, second, they did not constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or disguised restrictions on international trade.

Concluding remarks

The analyse of the above five disputes wich saw the EC acting as respondent before the DSB allows to identify some coherent patterns amongst the respective defence strategies which univocally point at the defence of the regulatory autonomy of the EC, now EU, as final target of the adopted course of action.

With the exception of the hormones and sardines cases, the EC has tried to subtract the contested measure from the scope of the SPS or TBT agreement by using one or several of the following arguments: first, denying the technical or sanitary and phytosanitary nature of the measure itself; second, putting forth the non applicability of the said agreement to general prohibitions, as in the asbestos case; third, resorting to the argument concerning the non retroactivity of the invoked provisions.

In all of the disputes analysed, the EC stood for the defence of its freedom to choose the appropriate level of protection. Moreover, it asserted that all contested measures aimed at a legitimate objective and satisfied the necessity test, albeit differently interpreted in respect to its GATT equivalent (art. XX GATT), on the one hand, in the asbestos case and, on the other, in the sardines and geographical indications cases.

On occasions the Community put forward the argument of the irrelevance of international standards, on the ground of a non retroactivity argument such as in the sardines case, or of the inappropriateness of those to achieve the legitimate objective pursued. In respect of international standards, one of the recurring defensive arguments concerned the interpretation of relevant SPS and TBT provisions as requiring the use of such standards as *a* basis as opposed to *the* basis for the adoption of domestic regulatory measures. In other words, the EC consistently rejected the counterparts' claims whereby the two Agreements require domestic measures adopted by WTO members to conform to adopted international standards.

Last but certainly not least is the Community reliance of the principle of precaution as first put forwards in the hormones case and again invoked, albeit in a more nuanced version, in the GMOs case. With regard to the latter cases, in view of the reconstruction of the Union's strategy, it is worth underlying once again the importance of the arguments put forward by the EC in relation, on the one hand, to mixed measures and, on the other, to the concept of sufficient scientific evidence.

Having regard to the former, the EC claimed that any measure or part of any measure adopted for reasons that fall outside the scope of the SPS Agreement cannot be judged inconsistent with that agreement. The same for measures partially falling outside the scope of the TBT Agreement. With respect to the concept of sufficiency as enshrined in article 5.7 SPS, the EC claimed for its relational nature, whereby different WTO members may not necessarily react identically with regard to potential risks and uncertainty. Depending on the specific circumstances prevailing in each country, scientific information may or may not be deemed sufficient to decide appropriate measures and must therefore be considered as matters of concern to the national legislator.

CHAPTER III

Effects of multilateral trade rules and DSB decisions within the EU legal order and the Union's liability for breach of WTO law

SUMMARY: *Section I* - ECJ case-law denying direct effect to GATT 1947 and to WTO Agreements **1.1** Issues of ECJ jurisdiction *1.1.a* Overview *1.1.b* The ECJ jurisdiction in relation to WTO law *1.1.c* The mandate of article 19 TEU and WTO obligations **1.2** Direct effect of international agreements under EU law **1.3** Effects of multilateral trade rules in the EU legal order *1.3.a* The “rule”: the ECJ case-law denying direct effect to GATT 1947 *1.3.b* The confirmation of the ECJ's GATT 1947 case-law after the entry into force of the Agreement establishing the World Trade Organisation *1.3.c* WTO rules and judicial review of EU law *1.3.d* The exceptions to the denial of direct effect *1.3.e* Towards further elaboration? *Section II* - Legal status and effects of decisions adopted by international organisations and bodies in the EU legal order *Section III* – Legal nature of WTO adopted Panels and Appellate Body reports **3.1** Judicial nature of WTO Panels and Appellate Body **3.2** The absence of direct effect of DSB decisions **3.3** The relevance of DSB decisions for the EU *Section IV* – DSB decisions and judicial review of EU law **4.1** The doctrine of limited judicial enforceability of WTO law as applied to DSB decisions: the *Van Parrys* case-law *Section V* – DSB decisions and actions for damages **5.1** DSB decisions and the EU courts' case-law: the *Biret* cases and their precedents **5.2** The *Chiquita Brands International* case **5.3** EU non-contractual liability for lawful acts

The purpose of the present chapter is to review, first of all, the issue of the status conferred upon multilateral trade rules within the European Union legal order. Such a conferral has taken place throughout the years in the midst of the judicial activity of the ECJ, the result being that both GATT 1947 and WTO Agreements have been acknowledged a specific legal status *vis-à-vis* the wide majority of other international agreements concluded by the EU. The unique position of the GATT and of WTO Agreements emerges from a case law that consistently denies direct effect to those norms, rules out the possibility of ordinary judicial review of Community acts on the basis of the latter, exception being made for peculiar cases, and consequently states the necessity of transposition of those rules via internal legislative measures. The stance of the ECJ on the enforcement of multilateral trade law in the EU continues to nourish a lively debate in legal writing between, on the one hand, scholars who uphold its judicial interpretation of the value of the aforementioned agreements and, on the other, those

who consider such interpretation as “a wave of mutilation”¹ or “an exception to the rule of law”².

To ascertain the status of multilateral trade rules in the EC legal order is of the utmost importance with a view to discussing the position of the Union with regard to trade disputes, which amounts to the very focus of this thesis. Conclusions achieved in the present chapter will serve the task of outlining the legal context in which the analysis of the value of the DSB reports, on the one hand, and of EU’s extra-contractual liability for breach of multilateral trade rules, on the other, will be framed later on in this work.

Similarly to the issue of the domestic status of WTO rules, the issue of the status and effects of decisions adopted by the WTO Dispute Settlement Body (DSB) within the EU legal order has been the object of fierce doctrinal debates. In fact, the two issues, however different, are intimately connected in terms of both substance and consequences and cannot be divorced. After some important judgements of the ECJ, many have wondered whether the dice were cast on the lack of direct effect of GATT/WTO law³ or, as far as actions for non-contractual liability under art. 235 and 288(2) EC are concerned, whether it could be considered that a door had been opened to actions for breach of WTO law⁴. After the release of the *FIAMM* judgement though, the conclusion has been reached that at the end of the tunnel there was nothing but darkness⁵.

This chapter therefore also aims to address the position expressed by the European judiciary on the issue of status and effects of the reports issued by the WTO panels and by the Appellate Body (AB) and adopted by the DSB, which has grown relevant for the EU from both the legal and the political point of view.

The structure of the present Chapter is as follows. In the following pages a review of the relevant case law will first be presented (section I), followed by some reflections on a certain recent case-law showing the contagious potential that the Court doctrine on the absence of direct effect of WTO law could have towards other thematic branches of EU external relations law (section II). The discussion will then turn to the rank and effects of acts of internationally established organisations and bodies thereof within the EU legal order (section III) and will subsequently turn to the peculiarities of the DSB decisions of the WTO (section IV). It will then examine the relevance of adopted reports in the EU system of judicial protection, namely on the one hand in the

¹ De Mey, D., Ibáñez Colomo, P., “Recent developments on the invocability of WTO law in the EC: a wave of mutilation”, in *European Foreign Affairs Review*, vol. 11, n. 1, Spring 2006, p. 63-86.

² Lavranos, N., “The communitarization of WTO dispute settlement reports: an exception to the rule of law”, in *European Foreign Affairs Review*, vol. 10, n. 3, Autumn 2005, p. 313-338.

³ “EC Liability for Non-Implementation of WTO Dispute Settlement Decisions – Are the dice cast?”, in *Journal of International Economic Law*, 2004, p. 483-490.

⁴ Kaddous, C., “The “Biret” cases: an open door to EC liability for the non-implementation of a WTO dispute settlement decision? (Case C-93/02 “P. Biret International v Council” and Case 94/02 “Etablissements Biret & Cie SA v Council”, judgments of the European Court of Justice of 30 September 2003”, in *European Law Reporter*, n. 2, February 2004, p. 54-59.

⁵ Alemanno, A., Schmauch, M., “At the end of the tunnel there is ... darkness: the ECJ denies EC liability for WTO non-compliance (“Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and others v. Council and Commission”, ECJ of 9 September 2008, joined cases C-120/06P and C-121/06P)”, in *European Law Reporter*, n. 10, October 2008, p. 347-355.

framework of judicial remedies aiming at the legality review of secondary legislation (section V), and on the other, in relation to action for damages (section VI).

Section I – The ECJ case law denying direct effect to GATT 1947 and to WTO Agreements

The ECJ consistently turned down the possibility of acknowledging direct effect to GATT 1947 on the basis of the very features of the normative system outlined therein. In the view of the ECJ, elements characterising GATT rules made them unsuitable to create rights and obligations upon individuals. These early case-law was already targeted by harsh criticisms mainly addressing the laconic nature of the Court's arguments and the resulting misleading distinction between the internationally binding character of the General Agreement and its lack of internal effects. The latter in particular would result in a dualist attitude, which was considered to be strangely in contrast, on the one hand, with the attitude the Court usually adopted as regard the relation between Community and international law and, on the other, with the approach the Court itself has consistently recommended to the national courts on the question of the relationship between Community law and international law⁶.

Following the reform of the GATT and the creation of the WTO, the Court did not modify its approach and lived on the denial of direct effect to multilateral trade rules. Critics of the relevant case-law came to the conclusion that the Court did not duly take into account the reform that the multilateral trade system had undergone. By choosing blindness towards those significant changes, the ECJ failed to modify its approach to the issue of invocability of WTO rules before European jurisdictions accordingly, so as to preserve the – already widely questioned - coherence of its legal reasoning.

The belief underlying these critiques points at the fact that, starting from 1995, the Court should have fine-tuned its subsequent case law to the consequences proceeding from the reform of the multilateral trade regime enacted by the Marrakesh Agreement. This reform had in fact touched upon those very issues upon which the ECJ based its judicial reasoning, the latter encompassing both legal and political considerations. In other words, the debate between defenders and detractors of the Court's approach builds upon the topic of how, if at all, to assess the features of the multilateral trade system such as enshrined first in the GATT and then in the WTO Agreements for the purpose of understanding the latter's effects in the EU legal order.

TO this aim, it is essential to first present the ECJ case-law relating to GATT 1947 and to WTO Agreements. This section first addresses the issues of the Court's jurisdiction on and the direct effect under EU law of international treaties. It then turns to the analysis of the aforementioned case law, whereby the ECJ applied general principles on the invocability of international law to multilateral trade rules.

⁶ Waelbroeck, M., "Effects of GATT within the legal order of the EEC", in *Journal of World Trade Law*, 1974, p. 614 ff, p. 623.

1.1 Issues of ECJ jurisdiction

EU-specific challenges in relation to WTO law are related on the one hand to the status of the Union in the Organisation, particularly insofar as dispute settlement is concerned, and on the other to the ECJ's jurisdiction as it is organised by the Treaties. The first issue having been exhaustively addressed in Chapter I, some room is still to be devoted to the second. Only those aspects of the ECJ's jurisdiction that are particularly relevant for the purpose of the present work are hereafter assessed. The analysis is therefore necessarily selective.

1.1.a Overview

(i) *The principle of limited jurisdiction*

The ECJ has no inherent jurisdiction. Its competence exists only to the extent that the TFEU, and previously the TEC, and similar instruments confer jurisdiction upon it, as results from article 19 TEU and relevant TFEU provisions (art. 251 to 281). Such jurisdiction may be implied, what is the case where there is a prevailing need for it in order to fill a lacuna in the system of judicial remedies expressly provided for, such as where the complete absence of any other form of legal redress creates a serious injustice and is inconsistent with the principle of a law-ruled European Union⁷.

The ECJ relies on the concept of rule of law to develop a general theory on which it based such implied jurisdiction. In *Les Verts* the ECJ stated that:

“[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty [...]”

and that

“[...] the Treaty establishes a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions”⁸

In a subsequent case, the ECJ was of the view that in order to perform the task of ensuring that law is observed in the interpretation and application of the Treaties, it was to be able to guarantee the maintenance of the institutional balance and the respect for the European Parliament's prerogatives. Although the action for annulment as foreseen in the TEC did not provide for an application for annulment by the European Parliament, the ECJ concluded that it had jurisdiction in an annulment proceeding

⁷ Bourgeois, J.H.J., “The European Court of Justice and the WTO: Problems and Challenges”, in Weiler, J.H.H. (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, Oxford, 2000, p. 71 ff, at 71.

⁸ ECJ, Case 294/83, *Les Verts v European Parliament*, judgement of 23 April 1986, [1986] ECR 1339, para 23.

brought by the European Parliament to the extent that the purpose of the proceeding was to protect the latter's prerogatives⁹.

This freedom of the ECJ to intervene in the absence of express authority allows the correction of shortcomings in the system of remedies created by the Treaties¹⁰. Whereas in the former consideration lies the justification of the ECJ implicit jurisdiction, there it also find its limits.

(ii) Acts susceptible of judicial review by the ECJ

Article 263 TFEU provides for an action of annulment against legislative acts, acts of the Council, of the Commission and the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties¹¹.

In the era of external relations two developments in the case law are noteworthy in this respect.

The first one relates to a decision of the Council to leave it to the Member States to negotiate an international agreement. In the ERTA case, the Commission had recommended to the Council that it be authorised to re-negotiate on behalf of the EC the European Road Transport Agreement to be entered into with third countries in the framework of the United Nations. The Council resolved that the then six EC Member States should negotiate on the own behalf and become parties to the ERTA on their own national capacities. The Commission challenged the Council proceedings before the ECJ, which considered that the Commission application was admissible. Referring to the wording of art. 173 TEC (now art. 263 TFEU), the ECJ asserted that

“Since the only matter excluded from the scope of the action for annulment [...] are recommendations or opinions – which by the final paragraph of Article 189 [TEC] are declared to have no binding force – Article 173 treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.”¹²

The ECJ went on to analyse the content and purpose of the Council proceedings and expressed the view that

“ It [...] seems that in so far as they concerned the objective of the negotiations as defined by the Council, the proceedings of 20 march 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the [EC] regulation [that would have to be amended following the conclusion of the ERTA].

⁹ ECJ, Case C-70/88, *European Parliament v Council*, “Chernobyl case”, judgement of 22 May 1990, [1990] ECR I-2041.

¹⁰ Arnall, A., “Does the Court of Justice have inherent jurisdiction?”, in *Common Market Law Review*, vol. 27, 1990, p. 683 ff., at 701.

¹¹ The *ius standi* of natural and legal persons in such action for annulment is limited to acts addressed to that person or which are of direct and individual concern to it, and regulatory acts of direct and individual concern which do not entail implementing measures.

¹² ECJ, Case 22/70, *Commission v. Council*, “ERTA Case”, judgement of 31 March 1971, [1971] ECR 263, para 39.

In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of derogating in certain circumstances from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements.

Hence, the proceedings of 20 March 1970 [i.e. the position taken by the Council] had definite legal effects both on relations between the Community and the Member States and on the relationship between institutions.”¹³

In the same vein, in *Commission v Council* (FAO Case) the ECJ considered that a Council decision according to which the EC Member States rather than the EC should vote in the FAO for the adoption of an agreement on fisheries conservation measures had legal effects. The ECJ consequently held that the Commission application for annulment of that decision was admissible¹⁴.

The second development concerns international agreements. Once the text of a treaty has been initiated or authenticated in some form by the Commission, the Council concludes the agreement following either a simplified procedure or a more complex one entailing two or three stages. In so doing, the Council approves the content therein and decides on such steps as are required to express the Union’s consent to be bound by the agreement by whatever means are applicable.

The practice shows that the term “conclusion” in the meaning of the Treaties provisions simultaneously cover two different kinds of measures: the measure whereby the internal procedure to conclude an agreement is completed and the measure whereby the EC binds itself internationally. The final act of the Council takes the form of a decision or a regulation, to which the international agreement is appended and which is published in the Official Journal. A notice announcing the agreement’s international entry into effect may also subsequently appear in the same means.

Article 218 TFEU procedure for the conclusion of international agreements does not offer much guidance on the status and effects of international agreements in the EU legal system. The only indication in this respect is to be found in art. 216 TFEU, which states that agreements concluded by the Union are binding upon the institutions and the Member States.

Treaties provisions are therefore silent as to whether and how an international agreement concluded under the above conditions becomes part of EU law. They do not contain any hint on the drafters’ views on the dichotomy between ‘monist’ and the ‘dualist’ approach. The practice offered by the institution does not suggest much either, in that it inconsistently drifts from a dualist to a monist approach and back.

The choice of a regulation, which is by definition directly applicable, rather than a decision for the purpose of approving an international agreement, suggests that the Council intends the agreement to be self-executing. It can thus be seen as the expression of a dualist attitude. However, that choice may also be influenced by other

¹³ *Ibid.*, para 53-55.

¹⁴ ECJ, Case C-25/94, *Commission v Council*, “FAO Agreement”, judgement of 19 March 1996, [1996] ECR I- 1469.

considerations, such as the need to adopt simultaneously complementary provisions requiring the use of a regulation. In turn, the ECJ has shown not to attach much importance to the type of legal act for the purpose of determining the effect that an agreement is to have in the EU legal order¹⁵.

On the other hand, in EU practice, legislation implementing an international agreement is considered necessary only where the agreement both entails precise legal obligations and requires changes of, or addition to, rules internally in force, or where the provisions of the agreement, in order to be implemented in a clear and effective manner, call for special measures of internal law.

The question thus arises whether an international agreement concluded by the EC is an act of a EU institution within the meaning of art. 263 TFEU, therefore susceptible of legality challenges, or whether only the decision to conclude such agreement can be the object of a legality review by the ECJ.

The 1994 *France v. Commission* case related to the 1991 Agreement on the application of their respective competition laws entered into by the Commission and the US government¹⁶. France brought an action under then art. 173 EEC to have the Court declaring the said agreement void on the ground of the Commission's lack of competence to conclude. In its defence, the Commission raises the question whether the French Government should have challenged the decision whereby it authorized its Vice-President to sign the Agreement with the United States on its behalf, rather than challenging the Agreement itself.

On the admissibility of the action the ECJ took the view that in order for an action to be admissible under the first paragraph of then art. 173 EEC Treaty, the contested act must be an act of an institution which produces legal effects, as affirmed in the *ERTA* case. The Commission had argued that under art. 173 EEC the Court may review only acts of the institutions, which clearly cannot encompass an Agreement that, being an act that has come into being with the participation of a non-member country, is not nor can it be considered a unilateral act of a Community institution. Moreover, in the Commission's view, the case-law in which the Court affirmed that it has jurisdiction to also interpret agreements by way of a preliminary ruling confirms that only the decision to conclude an agreement and not the agreement itself can be the subject of a review of legality.

Apparently overlooking the distinction between the decision and the agreement proposed by the Commission for the purpose of admitting a demand for legality review, the Court concluded that, standing its wording, the Agreement at issue was intended to produce legal effects. Consequently, the act whereby the Commission sought to conclude the Agreement must be susceptible to an action for annulment. The exercise of the powers delegated to the Community institutions in international matters cannot indeed escape judicial review of the legality of the acts adopted thereby. The French

¹⁵ This is apparent in the *Bresciani* case, where the Court allowed the applicant in the main proceeding to rely on the Yaoundé Convention even though it had been concluded by the ECC institutions via a decision and not a regulation. See ECJ, Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze*, judgement of 5 February 1976, [1976] ECR 129.

¹⁶ ECJ, C-327/91, *France v. Commission*, judgement of 9 August 1994, [1994] ECR I-3641.

government's action was to be understood precisely as being directed against the act whereby the Commission sought to conclude the Agreement. Consequently, the action was to be declared admissible¹⁷.

The Court's understanding of the admissibility issue is better appreciated when read in the light of Tesouro AG's opinion, where he disregards the Commission's position on the ground that the relevant case-law of the Court does not by any means rule out the possibility of challenging an agreement directly. In fact, quite the opposite is true.

In justifying its jurisdiction to interpret by way of a preliminary ruling agreements concluded by the Commission with non-member countries, the Court has equated such agreements with acts of the institutions. In its judgment in *Haegeman*, the Court expressly stated, first, that an agreement concluded under then art. 228 of the Treaty constitutes, to the extent that the Community is concerned, an act of the institutions within the above provision and, second, that the provisions of the agreement, since the coming into force thereof, form an integral part of Community law.

Since in the same judgment the Court referred to the Council decision relating to the conclusion of the agreement in question, the aforesaid statement has been interpreted as meaning that the Court's jurisdiction to interpret provisions of international agreements can be exercised only because of the existence of an executive act. The fact remains, however, that, even in subsequent judgments, the Court reiterated, for purposes of interpretation, that agreements are to be treated as acts of the institutions.

In the view of Tesouro AG, still more important in the case at issue was the fact that the Court's jurisdiction to carry out an *a posteriori* review of legality in relation to international agreements concluded by the Communities had already been unequivocally affirmed by the Court, albeit in an *obiter dictum*, in Opinion 1/75. In that context, the Court stated that "the question whether the conclusion of a given agreement is within the power of the Community and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice, either directly, under Article 169 or Article 173 of the Treaty, or in accordance with the preliminary procedure".

Tesouro AG, therefore, concluded that, first of all, the possibility of legality review also arises from the exercise of the Community's external powers being subject to compliance with the procedural and substantive rules laid down by the Treaty, and secondly, that the possibility of direct review of the agreements concluded by the Community is by no means excluded since the Court has expressly stated that it can review whether the power to conclude an agreement has been exercised in accordance with the provisions of the Treaty.

Once admitted the possibility to exercise an *a posteriori* review, the question remained whether such review is permissible only indirectly, i.e. where it is carried out as a result of an action challenging the regulation or decision relating to the conclusion of the agreement, or also where the agreement is challenged directly. In this respect, Tesouro AG took the view that under the Community, now Union, legal system, which affords the possibility to judicially review, without exception, of all the acts and practices of the

¹⁷ *Ibid.*, para 13-17.

institutions, of individuals and of the Member States, which affect the system itself, it would not be reasonable to rule out the legality review of the procedure for concluding an agreement with a non-member country. The possibility of doing so on the basis of a complaint expressly directed at the agreement as such, or at the act connected therewith, was therefore labeled by the AG as an issue of mere form, as such secondary and irrelevant¹⁸.

The ECJ however adhered to the more formalistic approach and did not annul the agreement but declared void the act whereby the Commission sought to conclude it. It is doubtful whether this proves a dualistic approach by the Court, what could nonetheless been conceived since it distinguished between the agreement as such and the decision to conclude it. Under the monist approach the domestic effect of an international agreement depends on the approval of the conclusion act by the competent national authorities. As a matter of fact, the ECJ limited itself to review the legality of such approval¹⁹.

(iii) Acts susceptible of being interpreted by the ECJ

Where the ECJ has jurisdiction to review the legality of an act of the institutions, it also may interpret such act by means of preliminary ruling, pursuant to art. 267 TFEU.

In *Haegeman*, a Belgian company importing Greek wines sought repayment of countervailing charges exacted by it at the request of Belgian authorities²⁰. It argued before a Belgian court that the imposition of those charges was unlawful having regard to the provision of the then Association Agreement between the EEC and Greece. The Belgian court stopped proceedings and referred to the ECJ for the interpretation of the afore mentioned agreement.

When examining its jurisdiction under then art. 177 EEC, the Court maintained that the Agreement was to be considered an act of the institutions within the meaning of art. 177 EEC, first paragraph, letter (b), whose provisions formed an integral part of Community law right since its entry into force. The Court concluded that, within the Community legal order, it had therefore jurisdiction to give preliminary rulings concerning the interpretation of the Agreement at issue²¹.

The provision whose interpretation was sought by the Belgian court was contained in the agreement itself, and not in the decision approving its conclusion on the Community side. Agreements as such are not amongst the acts covered by the Court jurisdiction to deliver preliminary rulings. The ECJ therefore assimilated the Association Agreement to an act of the institutions, and considered that its provisions form integral part of Community law, on the ground that the Council through its Decision had approved it.

The Court confirmed such approach also in relation to mixed agreements, to which the EU and Member states have long resorted to conclude agreement falling partially within the Community competence and partially on that of the Member States. The advantage of such device is that it allows fudging the issue of demarcation of EU competence,

¹⁸ Opinion of Advocate General Tesauro of 16 December 1993, in Case C-327/91, *France v Commission*.

¹⁹ Bourgeois, J.H.J., “The European Court of Justice and the WTO [...]”, *op.cit.*, at 80.

²⁰ ECJ, Case 181/73, *R. & V. Haegeman v Belgian State*, judgement of 30 April 1974, [1974] ECR 449.

²¹ *Ibid.*, para. 3-6.

whose resolution upon the conclusion of each international agreement would have endlessly postponed the very end of the procedure²². Nor does the reformed Treaty put an end to the question, being as the inclusion of lists of exclusive and shared competences respectively in art. 3 and 4 TFEU does not really help clarifying the boundary between EU and Member States competences in so far as shared competences are concerned.

Concerning the scope of the ECJ's jurisdiction with respect to mixed agreements, various doctrinal views have been put forward. According to some the ECJ may interpret mixed agreements in their entirety, whereas others take the view that the Court's jurisdiction is limited to the provisions covered by the EU competence.

The ECJ faced this issue in *Demirel*, in which a Turkish national challenged her expulsion which was ordered on the grounds that her visa, which was only valid for a visit, had expired²³. Mrs Demirel wanted to remain in Germany with her husband who there resided. In order to challenge the measure ordering the expulsion, Mrs Demirel relied on certain provisions of the Association Agreement between the EEC and Turkey. The German and British governments intervened in the proceedings before the Court and challenged the latter's competence to interpret the agreement. They took the view that in the case of mixed agreements, the Court's interpretative jurisdiction does not extend to provisions whereby Member States have entered into commitments with regard to the third state in the exercise of their own powers, which was the case of the provisions on freedom of movement for workers in the *Demirel* dispute.

The Court rejected such argument by stating that in the instance at stake the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers simply did not arise. Since the agreement in question was an Association Agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, then article 238 EEC must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is one of the fields covered by Treaty, the Court concluded that commitments regarding freedom of movement fall within the preliminary review conferred on the Community by then art. 238 EEC.

Furthermore, the Court ruled out the possibility to call its jurisdiction into question on the ground that in the field of freedom of movement for workers, as Community law stood at the time, it was for the Member States to lay down the rules which were necessary to give effect in their territory to the provisions of the Agreement or to the decisions of the Association Council²⁴.

²² Dashwood, A., "Why continue to have Mixed Agreements at all?", in Bourgeois, Dewost, Gaiffe (eds), *La Communauté européenne et les accords mixtes. Quelles perspectives?*, P.I.E., Bruxelles, 1997, p. 93-98, at 94.

²³ ECJ, Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, judgement of 30 September 1987, [1987] ECR 3719.

²⁴ *Ibid.*, para. 8-10.

Recalling the position previously expressed in *Kupferberg*²⁵, the Court finally held that in ensuring the respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfill an obligation in relation to the Community, which has assumed responsibility for the bona fide performance of the agreement. Consequently, the Court stated that it had jurisdiction to interpret the provisions on the freedom of movement for workers contained in the EEC-Turkey Association Agreement and in the annexed Protocol²⁶.

Again on the issue of the scope of the ECJ's competence to interpret mixed agreements, Bourgeois' scepticism in relation to an overstretched jurisdiction is sharable in that, as he notes, in *Demirel* the clauses of the agreement for whose interpretation the Court claimed jurisdiction came within the competence of the EC anyway. The situation would be arguably different with respect to the interpretation of those provisions of mixed agreements falling squarely within the competence of the Member States²⁷.

1.1.b The Court's jurisdiction in relation to WTO law

(i) Jurisdiction in relation to the GATT

The question on whether the ECJ has jurisdiction to deliver preliminary rulings on the interpretation of the GATT 1947 was first raised by the Corte Suprema di Cassazione in *SPI and SAMI*, a dispute between several importers and the Italian Treasury concerning duties for administrative services levied on imports from GATT contracting parties²⁸. Under Italian law the provisions of the GATT were held to create subjective rights for private parties. However, being aware of the previous case-law by which the ECJ had interpreted EC law in the light of the GATT, the Corte Suprema di Cassazione wanted to avoid a conflict between its own interpretation and that of the ECJ. Therefore, it made a reference for a preliminary ruling demanding the ECJ to clarify whether the latter had the final say in the interpretation of the GATT provisions also where the Member States courts were asked to rule on the compatibility of national measures with the GATT. In other words, the Italian court asked the ECJ as to what consequences for the interpretative jurisdiction were to be drawn from the substitution of the Community for the Member States in relation to the fulfilment of GATT obligations with effect from the entry into force of the common customs tariff (1 July 1968)²⁹.

Being as differences in the interpretation and application of GATT provisions, which bind the Community vis-à-vis non-member countries, would not only jeopardize the unity of the commercial policy but also create distortions in trade within the Community, the Court underlined the importance that GATT provisions receive uniform interpretation and application. The jurisdiction conferred upon the Court in order to ensure the uniform interpretation of Community law must therefore include a

²⁵ ECJ, Case 104/81, *Hauptzollamt Mainz v Kupferberg*, judgement of 26 October 1982, [1982] ECR 3641, para. 13 and 14.

²⁶ ECJ, Case 12/86, *Demirel*, cit., para. 11 and 12.

²⁷ Bourgeois, J.H.J., "The European Court of Justice and the WTO [...]", *op.cit.*, at 83.

²⁸ ECJ, Joint Cases 267 to 269/81, *SPI and SAMI*, judgements of 16 March 1983, [1983] ECR 801.

²⁹ *Ibid.*, para. 11.

determination of the scope and effect of the rules of GATT within the Community. In conclusion, the answer given by the Court was that, being as in relation to the fulfillment of commitments laid down in GATT the Community has been substituted for the Member States, starting from the moment of such substitution the provisions therein have been amongst those which the Court of justice has jurisdiction to interpret by way of a preliminary ruling. With regard to the period prior to the substitution, such interpretation was a matter exclusively for the national courts to cope with.

Whilst confirming the admissibility of the request and thus its competence to give interpretation to GATT provisions, the ECJ did not qualify the Agreement as an act of the Community institutions within the meaning of then art. 177 EEC conferring the Court a preliminary competence. It rather relied on the purpose of the latter Treaty provision, which is to ensure the uniform application of Community law, and on the substitution of the EC for its Member States in relation to GATT commitments.

The Court's approach received positive reviews but was also harshly criticised. The ECJ could in fact hardly have come to a different conclusion in *SPI and SAMI*, given the proved assumption of the substitution of the EC for the Member States within the GATT regime. Nor does any loophole result from the Court failing to qualify the GATT as an act of the Community institutions, what is confirmed from the extensive construction of the Court's jurisdiction to interpret international obligations binding upon the Community which has been mentioned above.

(ii) Jurisdiction in relation to the WTO

Issues of shared competences confer a peculiar character to the question of the ECJ's jurisdiction in relation to the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In its Opinion 1/94 on the EC competence to conclude the GATS and the TRIPS Agreements, the ECJ rejected the European Commission view that the EC had exclusive competence to conclude these agreements. The Court also rejected the view of Member states that a number of clauses of the TRIPS Agreement (i.e. those relating to judicial remedies) fell within their exclusive competence. The ECJ expressed the opinion that the EC and its Member States are jointly competent to conclude both the GATS and the TRIPS Agreements³⁰.

The issue of the ECJ's jurisdiction has been put to the ECJ in *Hermès International*, a request for preliminary ruling concerning article 50, paragraph 6, TRIPS dealing with procedural rules applying to judicial remedies afforded by the Agreement.

In his opinion, Tesauro AG concluded that the ECJ had jurisdiction to interpret the above provision of the TRIPS. He relied on the fundamental requirement of a uniform interpretation and application of all provisions of mixed agreements, on the EC's international responsibility, the duty of the EC and the Member States to co-operate implying the duty to endeavour to adopt a common position, and the EC legal system that seeks to function and to represent itself to the outside world as a unified system³¹.

³⁰ ECJ, Opinion 1/94, [1994] ECR I-5267, para. 105.

³¹ Opinion of Mr Advocate General Tesauro of 13 November 1997, in Case C-53/96, *Hermès*

When adjudicating the matter, the Court pointed out that the WTO Agreement was concluded by the EC and its Member States without any clear-cut allocation of competences, if not in terms of macro-policy areas. In other words, no distribution occurred between them with regard to their respective obligations towards the other contracting parties. When the Agreement was signed an EC Regulation on the Community trade mark, which contained provisions on the safeguard of such trade mark by means of the adoption of provisional measures, had been in force for one month already. Being as the EC is a party to the TRIPS, the latter agreement also applied to the Community trade mark policy. Therefore, national courts are required, when applying the remedies contained in the EC Regulation on Community trade mark, to do so in the light of the wording and purpose of art. 50 TRIPS, to the extent that this proves possible. From this argument the conclusion has been drawn that it is for the ECJ to interpret art. 50 TRIPS.

In *Hermès* the ECJ thus managed to elude the thorniest issues connected to jurisdiction. It is however bound to face sooner or later such matter with respect to clauses of mixed agreements that cannot be regarded as coming within the EC's powers. The consequences that would result from the absence of a uniform interpretation throughout the Union of GATS and TRIPS provisions are undoubtedly undesirable, artificial and perhaps unworkable³². One might add that if the EU or, in the absence of guidance by political institution, the ECJ fails to rule on whether and how GATS and TRIPS provisions are to be interpreted uniformly within the EC, a WTO panel or the Appellate Body might very well be called upon to do so.

The challenge of the ECJ is to devise a theory to justify its jurisdiction to interpret the whole of WTO law and not just those provisions that can be regarded as coming within the EC's powers. It seems fairly obvious that such clauses can hardly be assimilated to an act of the institutions within the meaning of current art. 267 TFEU.

In *Hermès*, Tesauro AG noted that the EC was a party to the TRIPS Agreement vis-à-vis the other WTO members and that an international agreement concluded by the EC was, pursuant to then art. 228 EC, binding on both the EC institutions and its Member States. This holds true after the Lisbon reform. From this, Tesauro AG concluded that the EC is responsible for each part of the agreement in question. He inferred the ECJ's jurisdiction to give a preliminary ruling in order, on the one hand, to ensure the uniform interpretation and application of the international obligations at issue within the EC and, on the other, to protect the Community interest not to be held internationally liable for breaches caused by one or several of the EC Member States.

In the relations with third countries, Tesauro's concerns are very well founded. The EC, now EU, is a rather anomalous phenomenon in international law, being as it displays all the features of an international actor without however possessing the entirety of the external powers that traditional international actors, namely states, usually enjoy. Except where upon the conclusion of a mixed agreement third parties have insisted on,

International, para. 20 and 21.

³² Eeckhout, P., "The Domestic Legal Status of the WTO Agreement: Interconnecting legal systems", in *Common Market Law Review*, 1997, p. 11 ff, at 20.

and the EU has accepted to include, some declaration clarifying the allocation of obligations between the EU and its Member States, third parties will be in a position to call to account the EU, rather than one or more Member States. Being in part responsible for the uncertainty surrounding who had the power to bind itself for which parts of the mixed agreement, in line with art. 46 of the Vienna Convention on the Law of the Treaties, the EU would be probably estopped from claiming that under its “constitution” Member States rather than itself are bound by a given clause of a mixed agreement³³.

In the relation between the EU and its Member States, the ECJ’s jurisdiction over provisions of a mixed agreement that fall outside the scope of the Union’s competence is more difficult to justify.

In *Hermès* the Commission had argued that there is no perfect and necessary parallelism between the EC’s power to enter into an international agreement and the ECJ’s jurisdiction over the latter’s interpretation. Whereas this assertion seems to be well founded, it is also subject to limitations. While recourse to current art. 19 TEU³⁴ may justify the ECJ’s jurisdiction to interpret an international agreement, or provisions thereof, that is not binding on the EU³⁵, such jurisdiction would be anyway not more than incidental in that it depends whether such agreement or clauses are relevant for the sake of the Court’s answer to a question of interpretation or validity of a EU law provision.

Such jurisdiction would not be incidental where a national court requests a preliminary ruling by the ECJ on a clause of a mixed agreement that is squarely outside the scope of the EU competence in a case in which no EU law provision is at issue³⁶. This case would rather raise the issue of the legal basis of the Court’s competence.

Rosas distinguishes between different types of mixed agreements. He differentiates between *parallel* and *shared* competences of the EC and the Member States. The first term refers to cases where the EC may adhere to an international agreement with full rights and obligations as any other contracting parties, alongside its Member States. An example would be the Agreement establishing the European Bank of reconstruction and Development, open to the States and to the EC alike and obliging each contracting party

³³ Article 46 on *Provisions of internal law regarding competence to conclude treaties* of the 1969 Vienna Convention on the Law of the Treaties reads as follows:

“1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

³⁴ Art. 19 TEU draws on ex art. 220 TEC and provides that the Court of Justice is entrusted with the task to ensure that in the interpretation and application of the Treaties the law is observed.

³⁵ This was the case in *Burgoa* and in *Poulsen and Diva Navigations*. Cfr. ECJ, Case 812/79, *Attorney General v Juan C. Burgoa*, judgement of 14 October 1980, [1980] ECR 02787; ECJ, Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, judgement of 24 November 1992, [1992] ECR I-06019.

³⁶ Eeckhout does not rule out this hypothesis, but specifies that the extension of the Court’s jurisdiction to such non-EU law related cases could in no way affect the allocation of competences between the EC and the Member States. See Eeckhout, P., “The Domestic Legal Status of the WTO Agreement [...]”, *op. cit.*, at 23-24.

to provide financial assistance to third States or international funds. Shared competence refers to some necessary division of rights and obligations, resulting from an international agreement, between the EC and the Member States. Rosas cites as an example of this category an agreement containing one chapter on trade in goods and another on military defence. One can further distinguish between mixed agreements built on *coexistent* competences, i.e. containing clauses that fall under the exclusive competence of Member States, or on *concurrent* competences, entailing that the agreement as a whole cannot be separated into parts covered alternatively on the EC's or on the Member States' competence. According to Rosas, the ECJ could claim jurisdiction to interpret the agreement to the extent that it relates to either parallel or concurrent competences³⁷.

Bourgeois expressed the view that difficulties are likely to arise in relation to agreements built on the latter competence category in so far as Member States might insist on the identification of those parts of the agreement that are covered by the EC competence or, alternatively, as the EC accepts request of third countries to that effect³⁸. The absence of identification of the parts of the agreement that are covered respectively by the EC and the Member States competence may indicate that the latter's participation is more symbolic than real. In that event no serious objections to the ECJ's jurisdiction seem to stand. Alternatively such omission may indicate that the Council could not agree on where to draw the line between Community and national power, which would arguably mean that ultimately it is incumbent on the Court to resolve this issue and by the same token to define on a case by case basis whether it has jurisdiction.

The author suggests that quite to the contrary, whereas the different sections of the agreement to be ascribed to either the Community or the national competence are clearly identified, the ECJ could conceivably justify its jurisdiction to interpret the parts of the agreement covered by Member States via the duty of loyal cooperation. It would not be unconceivable to infer from such duty that Member States are required to apply provisions of mixed agreements consistently in view of the consequences which would result from ununiformed national interpretations and that, to favour the attainment of such end, the Court is to be granted interpretative jurisdiction over all clauses of the agreement³⁹.

Bourgeois' reasoning to some extent contradicts its very assumptions, in that the clear identification of the agreement sections pertaining to either the Community or the Member States entails that a content-related distinction is actually possible and that therefore the mixity underpinning the agreement displays a shared - rather than concurrent - nature.

Classifications and terminology aside, Bourgeois' opinion that the duty of loyalty can play a significant role in backing up the Court's allegations of interpretative jurisdiction over non-Community sections of a mixed agreement is a sharable one. However, the

³⁷ Rosas, A., "Mixed Union – Mixed Agreements", in Koskenniemi, M. (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998, p. 125 ff, at 129-131.

³⁸ Bourgeois, J.H.J., "The European Court of Justice and the WTO [...]", *op.cit.*, at 88.

³⁹ *Ibid.*

main reason seems to rest not so much in the above loyalty requirement but rather in the Court's role as guarding of the rule of law within the EU.

1.1.c The mandate of article 19 EU Treaty and WTO obligations

In *International Fruit*, the first case in which it was called upon to rule on an alleged conflict between an EC measure and the GATT, the ECJ had to examine whether the validity of the said measure was to be assessed, pursuant to then art. 177 EEC, also in the light of international law.

Whilst Mayras AG had referred to then art. 164 EEC (now art. 19 TEU) in his opinion, the Court failed not to mention the task to ensure that in the interpretation and application of the Treaties the law is observed which is entrusted upon it. Rather, it declared that the ground for annulment consisting of the infringement of any rule of law relating to the application of the Treaty extends to all grounds capable of invalidating a EC measure. The Court thus declared to be obliged to examine whether the validity of the Community measure at issue was affected by reason of incompatibility with a rule of international law, provided that the EC was bound by that rule.

Kapteyn maintains that there is an implicit assumption in the reasoning of the Court, which is that the rule of international law is part of EU law and may thus be interpreted and applied by the ECJ as a parameter of legality or validity⁴⁰. What in the end makes possible the review of EU measures in the light of such rule, without this being at odd with the provision of art. 263 TFEU.

Another interpretation is however possible in the light of current art. 19 TEU. When interpreting and applying EU law, the Court is called upon to review it by reference to “the law” *latu sensu*. This law may be the EU Treaty itself or general principles common to the laws of the Member States, which are considered by the ECJ to integrated the European legal system. In other words, the law to be observed may not necessarily coincide with the Treaty. Art. 19 TEU does not in fact require that the law to which it refers be part of EU law in order to be relied upon by the Court when interpreting and applying EU law provisions.

The above reasoning is corroborated by the fact that in certain judgements the Court interpreted EC law by reference to international law and reviewed EC measures against international law as a matter of course without examining whether the international provisions taken into account were incorporated in EC law⁴¹. This interpretation holds

⁴⁰ Kapteyn, P.J.G., “Quelques réflexion sur les effets des accords internationaux liant la Communauté dans l'ordre juridique communautaire”, in González, P., *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al Profesor Don Manuel Díez de Velasco*, Technos, Madrid, 1993, 1007-1016, at 1009.

⁴¹ In the *Radio Tubes* case, for the purpose of interpreting then art. 234 TEC (now art. 351 TFEU), the ECJ referred to principles concerning the application of successive treaties relating to the same subject matter, such as codified in art. 30 of the 1969 Vienna Convention on the Law of the Treaties; see ECJ, Case 10/61, *Commission v Italian Republic*, judgement of 27 February 1962, [1962] ECR 00001. In the *Woodpulp* case, the Court relied on the territoriality principle as universally recognized in public international law to assess the territorial scope for the application of Community competition rules; see ECJ, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission*, judgement of 27 September 1988, [1988] ECR 05193. Finally, in *Opel Austria*, the Court of

true all the more in relation to international obligations the Union chose to subscribe to, such as those contained in the WTO legal corpus.

1.2 Direct effect of international agreements under EU law

When used in relation to a rule of international law, the notion of direct effect refers to the quality of a provision that allows parties to a judicial dispute to invoke it in court for the purpose of backing up alleged pleads⁴². Direct effectiveness is one of the possible consequences resulting from the conclusion of an international agreement and should therefore not be confused with the most immediate effect of the entry into force of the latter, which is binding its contracting parties and having them to be held internationally responsible vis-à-vis other contracting parties to the same agreement. From the point of view of signatory states, direct effect of international rules pertains to the domestic reflection of the agreement and is therefore a consequence of the binding force of the latter. Direct effect, compliance and international liability are nonetheless related insofar as the first favours the second, thus allowing to avoid the third.

However, the acknowledgment of direct effect to international agreements and provisions contained therein is not to be taken for granted. It depends on whether the agreement contains express provisions as to its direct effectiveness, on contracting parties' domestic rules concerning the status of international rules under national law and, possibly, on the very nature of the agreement at issue.

The notion of direct effect is deemed one of the most distinctive features of the Union legal system, whose origin can be traced back to the judicial courage showed by the ECJ in the early stages of its jurisdiction as regard the relation between Community and Member States law. In fact direct effect significantly contributed to the evolution of EU law and to the vertical integration of the EU and national legal orders by allowing parties to a national judicial proceeding to invoke Community rules before Member States' jurisdictions. The legality of national legislation can thus be reviewed against Community law. Should the former be declared incompatible with the latter, it is set aside to the advantage of the application of EC law. However, the notion of direct effect is not exclusively applicable to EU domestic law, be it primary or secondary legislation. Also provisions of international agreements to which the EU is a contracting party can be granted direct effect.

As previously mentioned, the question whether or not a conventional rule is directly effective can be settled by the treaty itself, namely by means of a provision that expressly acknowledges direct effect to the norms contained therein or at least to some of them. In this case, parties to the agreement are bound to recognise the invocability of the norm within their national legal systems. The reverse holds equally true. Should the

First Instance considered that the principle of good faith, a rule of customary international law, was binding on the Community and may be relied upon by private parties; see ECJ, Case T-115/94, *Opel Austria GmbH v Council*, judgement of 22 January 1997, [1997] ECR II-00039.

⁴² Manin, P., "A propos de l'accord instituant l'Organisation mondiale du commerce et de l'accord sur les marchés publics: la question de l'invocabilité des accords internationaux conclus par la Communauté européenne", in *Revue Trimestrielle de Droit Européen*, n. 3, 1997, p. 399 ss, p. 401, where the terms «direct effect» and «invocability» are used as synonyms, just as they are in the present work.

treaty not lay down any explicit attribution of direct effect, contracting parties are not obliged to allow for the invocation of conventional norms before national jurisdictions. In this case, each State is entitled to autonomously determine the internal status of those international provisions. They may explicitly grant or deny direct effect to the international norm they are bound to, for instance through an act of secondary legislation.

However, States may not express themselves on the matter. In case of State inaction, a judicial appraisal becomes the sole way to sort out the matter of the domestic effects of supranational norms. It is thus for national judges to ascertain whether or not a treaty provision can be invoked in court. In other words, in the absence of express treaty provisions and legislative clarifications, national jurisdictions are entitled to interpret an international agreement so as to confer or deny direct effect to provisions contained therein.

It is worth emphasising here the relevance of the issue for the State. In the vast majority of national legal orders international norms are reserved a top-ranked placement in the hierarchy of legal sources. Where no such obligation is foreseen in an international agreement, States that voluntarily acknowledge direct effect to a given provision submit national legislation to the possibility of legality review in the lights of those international rules. As a consequence, they run the risk to see their own legislation repealed following a declaration of illegality on the ground of incompatibility with the provisions of the agreement that had been declared directly effective. It has therefore been observed that the issue of invocability of conventional rules represents a sort of “Pandora box”, a self-executing treaty being an element of potential destabilisation for the national legal system⁴³. This accounts for the reluctance shown by States when confronted with the choice on whether to grant direct effect to international rules under their national law.

Faced to the dilemma concerning judicial recognition of direct effect of conventional rules within the Union legal order, in the vast majority of cases the ECJ had no difficulties admitting the invocability of an international agreement. The reasoning of the Court mirrors the aforementioned scheme and is based on the assumption that, if in principle an international agreement is not designed to directly confer rights and impose obligations upon individuals, this can nonetheless occur should the contracting parties – including the EU- decide to derogate from such general principle. In this case, the willingness of the parties must be clearly expressed.

Should this not be the case, the judicial appraisal of the agreement comes into play. In the *Kupferberg* case, the ECJ expressed precisely this view by ruling 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 for decision by the courts having jurisdiction in the matter,

⁴³ Licková, M., *La Communauté européenne et le système GATT/OMC. Perspectives croisées*, Paris, 2005, p. 113-114.

and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community»⁴⁴.

The Court bases its assessment of the invocability of an agreement on the ground of its very features. The ECJ did so when ruling in cases such as *International Fruit Company*⁴⁵, *Bresciani*⁴⁶, *Kupferberg* and further confirmed it *Chiquita Italia*⁴⁷. In these cases the Court came to different conclusion by applying the same reasoning scheme.

In *International Fruit Company*, the Court was asked to deliver a preliminary ruling as to the validity of certain Community Regulations in the light of GATT 1947 provisions. Prior to that, and in order to justify the deliverance of such a validity ruling, the Court had to settle two preliminary issues, closely related to each other and both essential for the purpose of ascertaining what effects international agreements produce within the EU legal order.

The first problem is of procedural nature insofar as it concerns the admissibility of the referred question of validity. The Court had to consider its own jurisdiction under art. 177 TEC (now art. 267 TFEU) and ascertain whether international law comes within the grounds of invalidity of Community secondary law. In this respect, the Court affirmed that its power to decide on the validity of acts of the institutions is not limited as to the grounds upon which such validity may be challenged under the above mentioned article. Since its jurisdiction extends to *all* grounds of invalidity which may vitiate such acts, the Court is obliged to examine whether their validity may be affected by reason of contradiction with a rule of international law.

Secondly, the Court had to take a stand on the substantial issue of when to admit the review of validity of EC measures under international law. In other words, in which circumstances can Community measures be reviewed in the light of international rules? The Court thus fixed the conditions under which international provisions are to be considered a parameter of legality of EC secondary law.

Two are the conditions for validity review that are pointed out in *International Fruit Company*. First, the review of validity of EC measures in the light of the provisions of an international agreement is possible insofar as the Community is bound by those provisions in the first place⁴⁸. Agreements signed and ratified by the Community become an integral part of its legal system, as stated by the Court in *Haegeman*⁴⁹. Consequently, the Community must fulfil international obligations contained therein also through the adoption of secondary law which is compatible with the provisions of the agreement at issue.

⁴⁴ ECJ, Case 104/81, *Hauptzollamt Mainz v Kupferberg*, 26 October 1982, [1982] ECR 3641, para 17, confirmed in subsequent ECJ, Case C-280/93, *Germany v Council*, 5 October 1994, [1994] ECR, para 110.

⁴⁵ ECJ, Joined Cases 21 to 24/72, *International Fruit NV and others v Produktschap voor Groenten en Fruit*, 12 December 1972, [1972] ECR 1219, para 21.

⁴⁶ ECJ, Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze*, 5 February 1976, [1976] ECR 129, para 15.

⁴⁷ ECJ, Case C- 469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*, 12 December 1995, [1995] ECR I-04533, para 24 ff.

⁴⁸ ECJ, Case *International Fruit NV, cit.*, para 7.

⁴⁹ ECJ, Case 181/73, *Haegeman v. Belgian State*, [1974] ECR 449.

Second, when the invalidity is invoked before a national court, before invalidity can be relied before the national court, that provision of international law must be capable of conferring rights on citizens of the Community which they can assert in court⁵⁰. This means that the provision of an agreement must be directly effective, in order for individuals to invoke it before national courts for the purpose of having the validity of an EC measure reviewed in the light of its content. It is appropriate to note that, at an early stage of the Court's case law, this condition must be fulfilled in case of indirect proceedings before the Court, namely in case of preliminary rulings whereby the national judge asks for a review of validity at the request of one of the parties to a domestic proceeding. The possibility of review the EC measures are under these circumstances depends on the capability of the provision invoked to demonstrate the alleged invalidity to directly create rights upon the party to the proceeding that pleads for the invalidity. As it will be discussed, direct effect loses ceases to be a requirement in case of direct proceedings before the Court, namely in case of actions for annulment.

The Court developed a two-tier approach to the analysis of the direct effectiveness of international agreements. It first considers the features that globally characterise the agreement. Should they demonstrate that contracting parties intended the agreement suitable to produce direct effects, the Court then proceeds with the analysis of the specific provisions supposedly capable to affect the juridical position of the individual. This second step is not only chronologically follows the first but is also logically subsequent. As a result, the Court may give up to undertake the second tier of the analysis as the fulfilment of this second requirement depends in the first place by the fact that the first one is met, as the Court made clear in the *International Fruit Company* case. Following this scheme, the Court concluded in this judgement that the recognition of direct effect to GATT 1947 was hampered by the principles of reciprocity and mutual advantage upon which the agreement itself was based. The "general features" test having turned negative, the Court rejected *in toto* the direct effectiveness of the whole Agreement and did not undertake the analysis of the single GATT provisions invoked in the proceeding⁵¹.

The contrary occurred when ruling on the *Bresciani* case, even though the reasoning applied was exactly the same. The Italian judge referred the question as to whether Art. 2(1) of the Yaoundé Convention conferred on Community citizens an individual right, which the national courts must protect, not to pay a charge having equivalent effect on importations from non-EU Members parties to the Convention, so that citizens may rely on this provision to challenge the Italian legislation imposing such duty⁵². Contrary to

⁵⁰ *Idid.*, para 8. Someone has found it was worth noting that in more recent cases the ECJ has developed its reasoning by first looking at the specific provision. The global analysis only comes thereafter in order to see whether it prevents the provision from having direct effect. See Castillo de la Torre, F., "The status of Gatt in the EEC law: some new developments", in *Journal of World Trade*, 1992, p. 35 ff., p. 37. However this inversion in the sequence of the stages does not change the ration behind the reasoning of the Court, which is to make the analysis of the general scheme, spirit and wording of the agreement globally considered as a substantial condition for the acknowledgement of direct effect to specific norms contained therein.

⁵¹ See para. 1.2.a for a more detailed appraisal of the reasoning carried out by the Court in the case at issue.

⁵² ECJ, *Bresciani*, *cit.*, para 15-16.

International Fruit Company, the *Bresciani* case was not a preliminary ruling for validity but one for interpretation, aiming at clarifying the content of the norms of the Convention to be subsequently applied by the national judge to assess the compatibility of the Italian law with the EC law. The Court ascertained that the Yaoundé Convention is indeed binding upon the Community, being the latter a party to it, and that, after *Haegeman*, it came to be an integral part of Community law and thus a parameter for legality of Member States' legislation. Therefore, in this judgement, the Court included also preliminary rulings for interpretation amongst those cases in which the direct effect of the norm to be interpreted is a substantial requirement that the norm must fulfil in order to be invoked as a ground of incompatibility of the national law with EU law before national judges⁵³.

The ECJ thus addressed the issue of the effects produced by the Convention upon the legal sphere of individuals under Community law. It first paid regard to the spirit, the general scheme and the wording of the Convention. It excluded that its peculiar feature consisting in the unbalance of obligations between the Community and the other parties to the agreement could justify the denial of direct effect. As a consequence, the Court went on to verify whether the specific provision at stake, separately considered, was suitable to produce direct effects. During this stage of the analysis the Court applies the same criteria used to ascertain whether provisions of Union law have direct effect in the legal systems of the Member States. Therefore, exigencies of clearness and precision come to the fore and serve as the litmus paper for the Court to assess whether parties can invoke a specific norm.

In this paragraph an attempt has been tried to give account of the reasoning applied by the Court in relation to the invocability of conventional provisions under EU law. The next step is to consider how the aforementioned reasoning scheme has progressively been applied to GATT 1947 first and to WTO Agreements afterward. On occasions, comparisons between the GATT or WTO case law and other rulings concerning the invocability of different international treaty rules will serve the purpose of understanding the stance of the ECJ and other EU institutions towards the application of multilateral trade rules in the Union legal order.

1.3 Effects of multilateral trade rules in the EU legal order

Individuals have most frequently argued that WTO has direct effect and, more recently, that it provides criteria for evaluating the legality or validity of EC, now EU, law. They have also sought to use WTO law to control EC breaches of WTO law.

Notwithstanding such attempts, the increasing normative integration of WTO law into EU law has not resulted in a greater empowerment of individuals, whose position may

⁵³ Whereas at the beginning the Court deemed direct effect to be a substantial requirement of the international norm only in the context of indirect cases, namely preliminary rulings be them for validity or interpretation, it will later discussed that, starting with *Germany v. Council*, the ECJ subsequently came to assume the same attitude also in the context of direct cases, such as actions for annulment. This stance prompted the critics of many scholars, who contested the betrayal of the very notion of direct , both in its scope and purpose, by the Court.

have been weakened vis-à-vis the one of the European institutions. Since its early case-law, the ECJ has steadfastly maintained that GATT 1947 first and WTO Agreements afterwards do not have direct effect in EU law. No legal action has ever been successful on this ground. Though the case law remains controversial, European courts have consistently decided that the issue of direct effect was not relevant to the case before it or have expressly rejected the direct effect of the above agreements.

The ECJ has however tried to elaborate a more convincing and coherent justification of its long-standing position. As case-law stands, the position of individuals towards WTO law in the EU legal system thus consists a rule of denial of direct effect, which however comes alongside two exceptions and a further duty of consistent interpretation.

1.3.a The “rule”: the ECJ case-law denying direct effect to GATT 1947

In 1972 the ECJ was for first time enquired as on the issue of invocability of the GATT 1947. By ruling in the aforementioned case *International Fruit Company*, the Court started a judicial course whereby GATT was systematically denied direct effect under Community law. Ever since, principles expressed in the relevant case law followed the same course, even after the creation of the WTO and the subsequent reform of the general scheme of multilateral trade commitments.

In *International Fruit Company* the ECJ was demanded to deliver a preliminary ruling on the domestic effect of rules of international law within the European legal system and, incidentally, on the issue of direct effect of GATT rules. The first question posed by the Dutch judge concerned the interpretation of the art. 177 EEC. The judge asked whether that article was to be read in such a way as to allow for the review of Community measures also in the light of international law provisions. The Court stated that its jurisdiction extends under art. 177 EEC to all grounds capable of invalidating Community legislation, including provisions contained in international agreements. It thus declared itself obliged to examine the validity of Community measures in the light of rules on international law. It thus clarified that international norms represent a further parameter of legality for Community measures, alongside primary law and general principles of law⁵⁴.

That being the case, the Court went on to answer the second preliminary question, whereby the national judge enquired as on to the compatibility of three Commission regulations, laying down measures of trade protection in the form of restrictions to apple importation from third countries, with art. XI GATT. For the purpose of reviewing the legality of a Community act in the light of an international norm, the Court mentioned two conditions which must be fulfilled. First, The Community must be bound by the conventional provision under which the review of the measure is to be carried out. Second, before invalidity can be relied on before a national court, the conventional provision must be capable of conferring rights upon individuals, which

⁵⁴ ECJ, Case *International Fruit Company*, cited, para 6.

they may invoke before courts. In other words, the international norm must have direct effect⁵⁵.

In the case at issue, the Court considered that the Community was bound by GATT provisions. Although from the formal point of view the EC was never a contracting party to the Agreement, art. 111 and 113 EEC operated a transfer of powers from the Member States towards the Community in the field of tariff and trade policy. As a consequence, the Community took up the role played by Member States in relation to the GATT regime, even though within the boundaries of powers conferred upon it by the TEC. It then started to act as a proper GATT party on the basis of then art. 114 EEC -subsequently repealed- under which commercial agreements had to be concluded on behalf of the Community⁵⁶. GATT provisions thus bind the Community insofar as such a willingness was made clear by the Member States in the relevant provision of the EEC Treaty and was mirrored in the subsequent behaviour of the Community in trade related matters.

The second condition makes the viability of legality review in the light of international law subject to the circumstance that relevant conventional provisions enjoy direct effect. The Court assessed therefore «whether the provisions of the [...] agreement confer rights on citizens of the community on which they can rely before the courts in contesting the validity of a Community measure»⁵⁷. To this end, the Court maintains, attention must be paid to the purpose, spirit, general schemes and terms of the agreement⁵⁸. The Court finally considered that GATT provisions did not meet the requirement of direct effect. It then concluded that the validity of the Commission regulations on restrictions to apple importations was not affected by the General Agreement.

It is apparent from the wording of the ruling that the main argument in favour of the denial of direct effect resided in the weak nature of the General Agreement. The ECJ qualifies the latter as an «agreement [...] based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements", [...] characterized by the great flexibility of its provisions»⁵⁹. Such flexibility results from three elements featuring the Agreement and explicitly mentioned in the ruling: the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties. These characteristics made the GATT a far too supple agreement, whose provision lacked both clearness and precision and did leave a margin of discretion to the authorities by whom they were to be applied. Following these considerations, GATT provisions were therefore deemed unreliable for the purpose of challenging –and assessing– the validity of Community legislation.

⁵⁵ *Ibid.*, para 7-8.

⁵⁶ *Ibid.*, para 14-18.

⁵⁷ *Ibid.*, para 19.

⁵⁸ *Ibid.*, para 20.

⁵⁹ *Ibid.*, para 21.

This reasoning has been subsequently confirmed in the Schlüter⁶⁰, SPI and SAMI⁶¹ and SIOT⁶² cases

1.3.b The confirmation of the ECJ's GATT 1947 case-law after the entry into force of the Agreement establishing the World Trade Organisation

The *jurisprudence constante* of the Court remains such after the entry into force of the WTO agreement, which occurred on the 1st of January 1995. Right from the start, the ECJ dismissed as irrelevant the argument that WTO provisions had direct effect in two subsequent cases. The 1995 *T. Port*⁶³ case concerned post-clearance recovery of customs duties payable on bananas imported from Ecuador. The applicant relied on the Framework Agreement on Bananas. However, Ecuador was not a contracting party to GATT 1947 and did not become a member of the WTO, and therefore a party to GATT 1994, until 1996. Consequently, without taking into account possible issues of direct effect, the ECJ simply concluded that then art. 235 TEC did not apply to cases involving imports of bananas from a third country that was not a party to an international agreement concluded by the Member States before the entry into force of the Treaty. Similarly, in *Hermès*⁶⁴ the Court recognised that the direct effect of art. 50 TRIPS had been argued. However, it stated that it was not required to give a ruling on that question, but only to answer the question of interpretation submitted to it by the Dutch court so as to enable the latter to interpret Netherlands procedural rules in the light of that article.

Forcefully but indirectly, the ECJ affirmed this position, against the Opinion of its Advocate General, in the leading case *Portugal v Council*⁶⁵. This was an action for annulment of a Council decision concerning the conclusion of Memoranda of understanding between the EC and respectively Pakistan and India on market access for textile products. Portugal argued that the Council Decision was in breach of WTO law, especially of GATT 1994, of the Agreement on Textiles and Clothing and the one on Import Licensing Procedures. Its argument was not based on the claim that the WTO Agreements had direct effect. In fact, it sought to distinguish the issue of direct effect from its main point, namely that a Member State should be permitted to assert WTO law as a criterion for evaluating the validity of EC law. Rejecting this argument, the Court did not state expressly that WTO law did not have direct effect in EC law. However this conclusion emerged very clearly, albeit implicitly, from the way in which the ECJ uses the same or similar language as in its previous judgements concerning direct effect, as well as from the grounds on which it rejects WTO law as a criterion for validity.

⁶⁰ ECJ, Case 9/73, *Carl Schlüter v Hauptzollamt Lörrach*, 24 October 1973, [1973] ECR 1135, para 27-31.

⁶¹ ECJ, Joint Cases 267 to 269/81, *SPI and SAMI*, 16 March 1983, [1983] ECR 801, para 14 and 23.

⁶² ECJ, Case 266/81, *SIOT v Ministero delle Finanze*, 16 March 1983, [1983] ECR 731, para 28.

⁶³ ECJ, Joined cases C-364/95 and C-365/95, *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*, judgement of 10 March 1998, [1998] ECR I-01023.

⁶⁴ ECJ, Case C-53/96, *Hermès*, cited.

⁶⁵ ECJ, Case C-149/96, *Portuguese Republic v Council of the European Union*, judgement of 23 November 1999, [1999] ECR I-08395.

The European courts have expressly rejected the direct effect of TRIPS. In *Dior*⁶⁶, the ECJ stated that TRIPS does not have direct effect in Community law. Similarly, in *Groeneveld*⁶⁷, the Court followed its longstanding case law and Jacobs AG by holding that the procedural requirements of art. 50 TRIPS, and in particular art. 50(6), are not such as to create rights upon which individuals may rely directly before the Community and the national courts.

Case T-52/99 *T.Port*⁶⁸ concerned the potential direct effect of GATT, GATS and the Agreement on Import Licensing Procedures. One of the many banana cases and also one of the several brought by T. Port, it was an action for damages allegedly resulting from the allocation of annual import quantities. The CFI rejected the argument that WTO rules were directly effective. It reached the same result in *Bocchi*⁶⁹ and *Cordis*⁷⁰, both decided on the same day. *OGT*⁷¹ was another banana case decided less than two months later. A reference for a preliminary ruling, it concerned the interpretation of art. I and XIII GATT regarding the levy of customs duty on importation of bananas from Ecuador. A WTO panel set up at the request of Ecuador had already found that the new system of trade with third countries under Regulation 1637/98 continued to infringe the above GATT provisions⁷². By making reference to the existing case-law⁷³, the Court held that the latter were not directly effective.

1.3.c WTO law and the legality of EU law

Related to the issue of direct effect of WTO law is the one concerning its possible function as parameter of legality for EU secondary legislation. Litigants have increasingly argued that WTO law provides criteria for the assessment of the legality of EU law. However, exception being made for specific circumstances which will be dealt with in the following paragraph, the European courts have consistently rejected this claim by stating the general principle whereby WTO provisions are not apt to provide criteria for assessing the lawfulness of EU legislation.

⁶⁶ ECJ, Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, judgement of 20 December 2000, [2000] ECR I-11307.

⁶⁷ ECJ, Case C-89/99, *Schieving-Nijstad vof and Others v Robert Groeneveld*, judgement of 13 September 2001, [2001] ECR I-05851.

⁶⁸ CFI, Case T-52/99, *T. Port GmbH & Co. KG v Commission of the European Communities*, judgement of 20 March 2001, [2001] ECR II-00981.

⁶⁹ CFI, Case T-30/99, *Bocchi Food Trade International GmbH v Commission of the European Communities*, Judgement of 20 March 2001, [2001] ECR II-00943.

⁷⁰ CFI, Case T-18/99, *Cordis Obst und Gemüse Großhandel GmbH v Commission of the European Communities*, judgement of 20 March 2001, [2001] ECR II-00913.

⁷¹ ECJ, Case C-307/99, *OGT Fruchthandels-gesellschaft mbH v Hauptzollamt Hamburg-St. Annen*, Order of 2 May 2001, [2001] ECR I-03159.

⁷² *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (Recourse to Article 21.5 by Ecuador), Report of the Panel, WT/DS27/RW/ECU, circulated on 6 May 1999, DSR 1999: II at 803.

⁷³ *Ibid.*, para 23.

The European courts have done so only sparingly being as they did not address the issue unless absolutely necessary, preferring to rely exclusively on the general denial of direct effect whenever possible.

As mentioned, a litigant cannot normally challenge the legality of Union legislation on the ground that it is contrary to WTO law. This was first stated also in relation of action for annulment brought by Member States in *Germany v Council*, with regard to GATT 1947 provisions, and further confirmed in *Portugal v Council* and in *Netherlands v Council*, with reference to WTO law.

Usually referred to as the - first - bananas case, the action brought by Germany sought the annulment of Title IV and of art. 12(2) of EEC Council Regulation 404/93 of 13 February 1993 on the common organisation of the market in bananas. The German government challenged the legality of the said Regulation on the ground that it allegedly infringed certain basic provisions of the GATT 1947. German arguments relied on the assumption, which the government submitted to the Court, that compliance with GATT rules was a condition of lawfulness of EEC legislation irrespectively of any question as to the direct effect of the agreement at issue⁷⁴.

The reasoning was based on the understanding, on the one hand, of the German government's position as privileged applicant in an action for annulment and, on the other, of the principle of direct effect as a judicial devise aimed at directly connecting EU law provisions and legal and natural persons, thereby overcoming the limitation to these subjects' capability to rely on such provisions before national and European courts. According to such understanding direct effect should not come to the fore for the purpose of admitting a challenge of legality bought by a Member State.

Nonetheless, in its judgement, the Court based its argument on the confirmation of the previous case-law on the denial of direct effect of GATT provision. It took the view that, in order to challenge EEC measures, GATT provisions should have direct effect. It is interesting to see how the ECJ did not explicitly mention the issue of direct effect of a given provision as a requirement for legality review right from the start. The Court jumped to direct effect suddenly and, given the above understanding of such principle, rather unexpectedly. The appropriateness of the Court's choice to divert the matter to one of direct effect was at best questionable and, actually, very debated by scholars.

Once the issue of direct effect introduced, the Court simply restated its traditional analysis of the scheme and general terms of the GATT. It thus inevitably came to the conclusion that features such as the principle of negotiation and the imbedded flexibility of the agreement, from which the Court had already concluded that an individual within the Community could not invoke provisions contained therein to challenge the validity of a Community act, would also preclude the Court from taking GATT provisions into consideration in order to decide on an action for annulment. The special features mentioned above precisely show that GATT rules lack an unconditional character and that an obligation to recognise them as rule of international law which are directly applicable could not result from the spirit, general scheme and terms of the agreement

⁷⁴ ECJ, Case C-280/93, *Germany v Council*, judgement of 5 May 1994, [1994] ECR I-4973, para. 103.

as it stood. In the absence of such an obligation following from GATT itself, the Court concluded that it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that it can review the lawfulness of the Community act in question from the point of view of the GATT rules, as stated in cases *Fediol* and *Nakajima*⁷⁵. Accordingly, the Court refused Germany the possibility to invoke the provisions of GATT to challenge the lawfulness of certain provisions of the Council Regulation on the common market in bananas⁷⁶.

In the second of the above actions for annulment, the ECJ justified the rejection of Portugal's claim *inter alia* on the basis that, here again, having regard to their nature and structure, the WTO Agreements are not in principle amongst the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions⁷⁷.

Building on the principles expressed in the *Kupferberg* case-law, the Court pointed at three main elements which made WTO provisions unsuitable to be taken into account as parameter of legality: first, the WTO system is mainly based on negotiation; second, allowing the legality review of EC secondary legislation in the light of WTO law would amount to a deprivation of the political institutions of their scope for manoeuvre; third, the lack of reciprocity on the part of the Community's trading partners with regard to the domestic effects of WTO law is such as to result in a disuniform application of WTO rules.

It is evident that the Court reaffirmed, although in a more complex and articulated fashion, its earlier position with regard to GATT 1947, specifically concerning the two instances in which GATT/WTO law could be used as a criterion for legality review. Reiterating the position taken in the 1994 *Germany v Council* judgement, the ECJ stated that "it is only where the Community 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 measures in question in the light of the WTO rules".

However, the lack of clear reasoning in the judgement and the sharp difference between the latter and the opinion of Saggio AG⁷⁸ suggest the existence of differences of opinion within the Court itself. Besides criticisms and divergent view, and however ill-founded in terms of legal logic, the basic reasons of the Court's decisions are straightforward. From the legal point of view, the European judiciary stressed the idea of reciprocity and the EC constitutional principle of institutional balance. From the political standpoint, the issue was ensuring the defence of the Community position in international trade negotiations.

⁷⁵ For an analysis of the exceptions to the rule of denial of direct effect see following paragraph 1.3.d.

⁷⁶ *Ibid.*, para. 105-112.

⁷⁷ ECJ, Case C-149/96, *Portuguese Republic v Council of the European Union*, judgement of 23 November 1999, [1999] ECR I-08395, para 47.

⁷⁸ *Ibid.*, opinion of Advocate General Saggio, delivered on 25 February 1999, para. 14-35.

As a matter of fact, the ECJ took a judicial *realpolitik* approach to the relationship between EC and WTO law⁷⁹. More directly than ever before, it confronted the international political context, in which WTO law potentially has a wide variety of effects *vis-à-vis* the legal system of the members of the Organisation. From this perspective, the issue of the criterion of legality review simultaneously involves the normative relation between EC - now EU - law and WTO law, the institutional balance within the EC – now EU – and the relation between the EU and its major trading partners. As mentioned, the judgement can easily be criticised on logical positivist foundations, in particular because it failed to distinguish clearly between direct effect and invocability⁸⁰, and between an action brought by an individual and one brought by a Member State⁸¹. Nonetheless, it represents a striking effort on the part of the European courts to balance the requirement of deciding individual cases with the necessity of taking account of the wider context in which they operate. Whether such effort was for the European judiciary to make, whether it rested in its very provinces or whether by doing so the Court has jeopardised the institutional balance it intended to protect is debateable.

Still a plea for illegality was the 1997 action brought by the Dutch government against EC Council Regulation 1036/97 of 2 June of the same year, introducing safeguard measures in respect of imports of rice originating from Overseas Countries and Territories (OCT)⁸². The Netherlands demanded the annulment of the said measure on the ground of *inter alia* the breach of certain provisions contained both in the WTO Agreement of Safeguards and in the EC Treaty.

The Dutch government claimed that in adopting the contested Regulation a few months after the expiry of the previous one (Regulation 304/97) imposing safeguard measures on rice imports, the Council failed to comply with both art. 7(5) of the WTO Agreement on Safeguards, which imposes a two year break between two subsequent sets of safeguard measures, and consequently with art. 228(7) of the EC Treaty concerning the binding nature of concluded agreements upon both the European institutions and the Member States. The applicant tried to overcome the obstacle of the lack of direct effect as put forward by the Court in *Portugal v Council*, by maintaining that, since the obligation laid down in art. 7(5) Safeguard Agreement was clear, precise and unconditional, it was for the Court to review compliance with it on the part of the challenged Regulation.

⁷⁹ Peers, S., “Fundamental Right or Political Whim? WTO Law and the European Court of Justice”, in De Búrca, G., Scott, J., *The EU and the WTO. Legal and Constitutional Issues*, Oxford-Portland Oregon, 2001, p. 111 ff, at 123..

⁸⁰ Manin, P., “A propos de l’accord instituant l’Organisation mondiale du commerce et de l’accord sur les marchés publics: la question de l’invocabilité des accords internationaux conclus par la Communauté européenne”, in *Revue Trimestrelle de Droit Européen*, n. 3, 1997, p. 399-428; Zonnekeyn, G.A., “The Status of WTO Law in the EC Legal Order. The Final Curtain”, in *Journal of World Trade*, 2000, p. 111-125, at 120.

⁸¹ van den Broek, N., “Legal Persuasion, Political Realism, and Legitimacy: the European Court’s Recent Treatment of the Effect of WTO Agreements in the EC Legal Order”, in *Journal of International Economic Law*, 2001, pp. 411-440.

⁸² ECJ, Case 301/97, *Kingdom of the Netherlands v Council of the European Union*, judgement of 22 October 2001, [2001] ECR I-08853

The Court upheld the Commission and the Council's rebuff and ruled again along the lines of the 1999 judgement. Provided that neither the *Fediol* nor the *Nakajima* case law could be applied in order to have the Regulation reviewed in the light of the Safeguards Agreement⁸³, the Court concluded that the Netherlands could not rely on the latter's provisions to demand a declaration of illegality of Regulation 1036/97 and rejected the Dutch plea accordingly.

It has been noted that the European courts did their best to avoid the issue of legality and addressed it only sparingly and when absolutely necessary⁸⁴. This stems partly from the practice of economy in judicial decision-making. It also forms part of a sensible judicial strategy, which signals to potential litigants that arguments about legality must be solidly based and essential to the case if they are to be taken seriously. In this way, the Courts can concentrate in cases where the point is of fundamental importance, both in articulating the basic principle and in dealing with its exceptions.

In preliminary rulings, on occasions it was the national judge who decided not to refer the question of legality to the Court. In *DADI*, for instance, the plaintiff argued that certain provisions of an EC directive laying down health rules for milk products were contrary to the SPS Agreement⁸⁵. The national court however did not refer the issue to the ECJ, which then concluded that it was not necessary to examine the validity of the EC legislation in the light of the SPS.

Nor do the ECJ address the issue of legality if no breach of WTO law has previously been established. In *CEFS*⁸⁶, the applicant sought interim measures in an action for annulment and suspension of a Council Regulation fixing intervention prices and compensation for storage costs in the sugar sector. The CFI found that there was no evidence of a breach of the Community's WTO obligations and that the sugar export ceiling had not been reached. A similar result was reached in *Chemnitz*⁸⁷.

A third situation in which the European courts do not address the issue of legality concerns the effects of time. Joined cases C-364 and 365/95, *T. Port*⁸⁸, were action for post-clearance recovery of customs duties payable on bananas imported from Ecuador

⁸³ The Court affirmed that Regulation 1036/97 neither was intended to implement nor explicitly referred to WTO obligations. Its purpose was only, by pursuing to art. 109 of the "OCT Decision" (the Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, OJ 1991 L 263, p. 1), to introduce safeguard measures in respect of imports of rice originating in the OCT in order to eliminate serious disturbance to the Community market in rice or the risk thereof. See *ibid.*, para. 55. Besides, the Council and the Commission had argued that the Agreement on Safeguards could not have been breached simply because it did not apply to relations between the Community and the OCT, which are instead covered by the derogation afforded by art. XXIV WTO concerning free trade areas.

⁸⁴ Snyder, F., "The Gatekeepers: The European Courts and WTO Law", in *Common Market Law Review*, vol. 40, 2003, p. 313 ff, p. 341.

⁸⁵ ECJ, Case C-106/97, *Dutch Antillian Dairy Industry Inc. and Verenigde Douane-Agenten BV v Rijksdienst voor de keuring van Vee en Vlees*, judgment of 21 September 1999, [1999] ECR I-05983, para. 57-58.

⁸⁶ CFI, Case T-229/97 R, *Comité européen des fabricants de sucre v Council of the European Union*, order of the President of 8 October 1997, [1997] ECR II-01649.

⁸⁷ CFI, Case T-254/97, *Fruchthandelsgesellschaft mbH Chemnitz v Commission of the European Communities*, judgment of 28 September 1999, [1999] ECR II-02743.

⁸⁸ ECJ, Joined cases C-364/95 and C-365/95, *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*, judgment of 10 March 1998, [1998] ECR I-01023.

in 1995, before Ecuador, which was not a party to GATT 1947, joined the WTO. The applicants pleaded the issue of legality but the ECJ decided the case only on the bases on the EC principle of non-discrimination. Similarly, in *Acme*⁸⁹, an action for annulment of definitive anti-dumping duties on microwaves ovens from China, the CFI maintained that the legality of the contested Regulation could not be challenged *inter alia* in the light of the WTO Anti-Dumping Agreement, but it was to discuss primarily in the light of the basic Regulation, of general principles and all relevant rules in force at the time when the facts of the case occurred. Finally, in *Atlanta* the ECJ excluded a plea of invalidity on the ground that

“to admit the plea based on the WTO decision would be tantamount to allowing the appellant to challenge for the first time at the stage of the reply the dismissal by the Court of First Instance of a plea which it had raised before that court, whereas nothing prevented it from submitting such a plea at the time of its application to the Court of Justice”⁹⁰.

1.3.d *The exceptions to the denial of direct effect*

Rulings issued in cases *FEDIOL*⁹¹ and *Nakajima*⁹² slightly softened the case law presented so far, inasmuch as the Court therein allowed for the legality check of EC secondary legislation in the light of the GATT.

In *FEDIOL*, the plaintiff contested the legality of a Commission decision whereby the latter rejected a request to open an inquiry procedure aimed at verifying the lawfulness of commercial practices put in place by Argentina. In the view of the plaintiff, such decision was incompatible with Council regulation n. 2641/84 on the strengthening of the common commercial policy. To back up its allegations, the *FEDIOL* insisted on a particular aspect, namely on the fact that Argentinean commercial practices were to be deemed contrary to several GATT provisions. The Commission in turn rebuff such thesis by sustaining that the counterpart’s argument deriving from the alleged violation of the GATT was not receivable on the ground that the said agreement did not confer rights directly upon individuals, as the Court had previously stated in the *International Fruit Company* case law. Betraying expectations, the ECJ did not follow the reasoning of the Commission. On the contrary, it first observed that regulation n. 2641/84 in its function of legal basis of the challenged decision contained itself an explicit reference to relevant GATT provisions. By doing so, the regulation did confer upon « the economic agents concerned [the right] 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, [therefore] those same economic

⁸⁹ CFI, Case T-48/96, *Acme Industry & Co. Ltd v Council of the European Union*, judgment of 12 October 1999, [1999] ECR II-03089.

⁹⁰ ECJ, Case C-104/97 P, *Atlanta AG and others v Commission of the European Communities and Council of the European Union*, judgment of 14 October 1999, [1999] ECR I-06983, para. 22.

⁹¹ ECJ, Case 70/87, *Fédération de l’industrie de l’huilerie de la CEE (FEDIOL) v Commission*, judgement of 14 July 1988, [1988] ECR 1781, para 19 to 22.

⁹² ECJ, Case 69/89, *Nakajima v Council*, judgement of 7 May 1991, [1991] ECR I-2069, para 28 to 31.

agents are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions»⁹³. In other words, the review of the challenged decision in the light of the GATT was possible by virtue of the reference to the GATT contained in the regulation, whereby the Council had somehow transposed a GATT provision in the Community legal order.

In *Nakajima*, the Court was confronted with the issue of declaring inapplicable several provisions of the Council anti-dumping and anti-subsidies regulation on the ground that the latter was allegedly incompatible with some provisions contained in the GATT anti-dumping code. The Council expressed the view that the anti-dumping code was not apt to entitle individuals with rights to be called upon in court. Once again, the ECJ did not follow the institution. It ruled that, since the Community regulation was designed to implement provisions of the GATT which amounted to international obligations for the Community, the Court was obliged to « assurer le respect des dispositions de l'Accord general et de ses mesures d'exécution » as well as to verify whether the Council had possibly exceeded the legal framework set forth therein⁹⁴.

The *FEDIOL* and *Nakajima* rulings nourished the belief that the Court had somehow opened the door to a more wide interpretation of the theory on invocability such as stated in the *International Fruit Company* case law. In truth, what the Court had allowed for was in fact the review of Community acts in the light of GATT provisions in just two cases: either when the act contains an unambiguous reference to a GATT provision, or when it is designed to implement one within the Community legal order.

In fact, the above belief turned wrong when the Court ruled in the subsequent *Germany v. Council* case⁹⁵. On that occasion, Germany asked for the annulment of a part of the Council regulation on the organization of the bananas common market on the ground of, *inter alia*, a violation of the GATT. Basing its reasoning on the model solution offered by the Court in *Nakajima*, Germany considered the issue of direct effect of the GATT as already worked out and directly asked for a legality test of the Community act in the light of the General Agreement. The Council opposed Germany's allegations by affirming that the use of GATT provisions as a parameter of legality to test a Community act was not to be allowed but under the very narrow circumstances described above. In this case, the Court upheld the Council's argument by ruling that «[i]n the absence of [an obligation to acknowledge direct effect] following from GATT itself, it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules»⁹⁶.

In the light of these judicial developments, it would have been easy to conclude that, in order to avoid triggering the mechanism of legality review, European institutions just had to refrain from mentioning any reference to the GATT or - from 1995 on - to WTO Agreements while drafting Community legislation. However, the issue turned to be

⁹³ ECJ, Case *FEDIOL*, cited, para 22.

⁹⁴ ECJ, Case *Nakajima*, cited, para 29.

⁹⁵ ECJ, Case C-280/93, *Germany v Council*, cited.

⁹⁶ *Ibidem*, para 109.

more complicated than it appeared. Under article 253 CE, regulations, directives and decisions must contain a motivation justifying their adoption. The Council recently adopted a regulation imposing a restrictive legal regime to be applied to aircrafts deemed noisy. Following the strategy mentioned above, in drafting the act the Council omitted any reference to the two relevant international agreements, namely the Chicago Convention on international civil aviation and the WTO agreement on technical obstacles to trade. Asked for a preliminary ruling by a British jurisdiction, the Court found itself in the position to ascertain whether the regulation at stake was to be declared void under then article 253 EC for lack of motivation⁹⁷. The Court found itself in an awkward position since it had to shield Community legislation from two interconnected risks: on the one hand, in case of express reference, the risk of annulment of the Community act due to incompatibility with trade rules on the ground of what decided in the *FEDIOL* case; on the other, in case of omission of such reference, the risk of a declaration of invalidity due the lack of motivation. The Court eventually found a way-out, thus allowing for the preservation of its earlier case-law, by ruling that «It is not necessary for details of all relevant factual and legal aspects to be given. The question whether the statement of the grounds for an act meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made. The statement of reasons in a regulation of general application cannot be required to specify the various facts, frequently very numerous and complex, on the basis of which the regulation was adopted, nor *a fortiori* to provide a more or less complete technical evaluation of those facts. That is particularly the case where the relevant factual and technical elements are well known to the circles concerned»⁹⁸.

To sum up, the reasoning developed by the Court in its case law denying direct effect to multilateral trade rules entails the following conclusion as to the effect of such rules in the EU legal order. The circumstance whereby a treaty is acknowledged direct effect does not represent a *conditio sine qua non* for the Court to be able to interpret such an agreement. Nonetheless, the above condition must be fulfilled in order for the Court to review the legality of Community acts in the light of the provisions contained in the agreement. This requirement must be met in every case, be the plaintiff either an individual or a Member State or a European institution. Generally speaking, in the absence of direct effect of the whole agreement or of the specific relevant provision no legality check is possible, unless the Community act explicitly refers to the General Agreement or is designed to implement it.

⁹⁷ ECJ, Case C-27/00, *Omega Air and others*, 12 March 2002, [2002] ECR I-2569.

⁹⁸ *Ibidem*, point 1 of the summary.

1.3.e Towards further elaboration?

More recently the European courts have begun to articulate a more coherent rationale for their position that, as a matter of principle, the WTO Agreements do not have direct effect in EC law. *Portugal v Council* was a deeply unsatisfactory judgement, because of the inconsistency of argument, gaps in reasoning and the ECJ's failure to come to grips with a strong opinion by Saggio AG. Nevertheless, compared to the previous cases, it did articulate a view of the relationship between WTO law and EC law which was less legalistic, more politically cognisant and therefore more realistic vis-à-vis both the current international setting and the objectives whose pursuance it imposes. It began to point the way towards a much more coherent conception of the relation between the two sites, notably with regard to who should make the basic decisions about the impact of WTO law in the EC legal order and how such decisions should be made.

Recent cases have been more an elaboration than a proper reorientation. Making use of their special judicial role in the EC judicial system, the advocates general have taken the lead, starting precisely from Saggio AG opinion in *Portugal v. Council*⁹⁹. The AG provided a stimulating analysis of direct effect and criterion of legality, though the ECJ did not fall his opinion on either points. In *Netherlands v European Parliament and Council*¹⁰⁰, AG Jacobs argued that, as a matter of policy, it was desirable for the Court to review the legality of Community secondary legislation in the light of WTO law. Finally, in *Omega Air*¹⁰¹, AG Alber placed the earlier case law about the direct effect of GATT and WTO law in a new context, what could represent the way out from the current *empasse*.

Omega Air was a reference for a preliminary ruling on an EC regulation concerning noise emissions from airplanes. Omega claimed that the Regulation was invalid, inter alia because, contrary to the Agreement on Technical Barriers to Trade (ATBT), it replaced existing international standards by a new criterion. It argued that the ECJ, even excluding direct effect in principle, should review specific provisions of WTO law to see if they met the EC law tests for direct effect.

This argument seems to be based on a distinction between the general principle that WTO law does not usually have direct effect and the possibility that specific WTO law provisions may exceptionally be acknowledged direct effect on a case-by-case basis.

Rejecting this argument the AG stated that the decisive point is that legal disputes on the content of WTO law are based on negotiations between the Governments. In his view, the Community's position in those negotiations would be seriously affected if Community law recognised a unilateral direct effect of obligations resulting from WTO law¹⁰². Thus he drew on two strands in the analysis of GATT/WTO law in previous ECJ case law: first, the importance of negotiation and reciprocity in GATT/WTO dispute

⁹⁹ ECJ, Case C-149/96, *Portuguese Republic v Council of the European Union*, cited, opinion of AG Saggio.

¹⁰⁰ ECJ, Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, judgement of 9 October 2001, [2001] ECR I-07079, and opinion of AG Jacobs.

¹⁰¹ ECJ, Case C-27/00, *Omega Air and others*, judgement of 12 March 2002, [2002] ECR I-2569, and opinion of AG Alber.

¹⁰² *Ibid.*, opinion of AG Alber, para. 93-95.

settlement, and second, ideas about how to maintain the balance among EC institutions so as to preserve and possibly strengthen the role of the EU on the international scene, especially concerning foreign trade.

The AG went further by making two most original contributions to the debate on direct effect. First, he broadened the terms of the debate beyond the EC sphere by expressly taking account of the standpoint of the WTO. He argued that direct reliance on rules of WTO law as against measures taken by WTO members appears inappropriate from the point of view of WTO law as well. Regardless of their wording, all provisions of WTO law are subject to a general reservation which accords the States concerned various possibilities of reacting to breach. The substantive point is not new: it merely repeats the long-standing ECJ view about the flexibility of the GATT/WTO system. What is important is that, in analysing the relation between the EU and the WTO, the Advocate General purports to express the perspective of the other side. Whether this conception of the WTO perspective is accurate, whether there is in fact any single WTO perspective, or whether the perspective of the two sides are commensurate, is beside the point here. The views of highly respected scholars in the field of international trade, as seen below, replicate the same controversy.

Second, Alber AG suggested that the basic decision about the possible direct effect of WTO law in the legal system of WTO members should be taken, not by each member unilaterally, but instead on a multilateral basis. He argued that:

“ It is therefore not for the Court but for the WTO, or the members of the WTO, to ensure that WTO law is observed in the legal systems concerned. Direct effect of WTO rules is clearly not part of their legislative content. Such content may not be ascribed, at Community level, to WTO law in its original form but at most in the form of transposition measures. In that context WTO law may be (indirectly) significant.”¹⁰³

The AG admitted that the relevant provisions of the ATBT were perhaps sufficiently precise and unconditional in their wording to be amenable to direct application. However, this did not mean that they were directly effective, or that they provide criteria for evaluating the legality of Community law. On the contrary, the AG argued that they are subject to the general condition of WTO law that the members of the Organisation are to comply with the obligations thereof not by direct effect of WTO provisions in their legal systems but exclusively by specific transposition of those obligations¹⁰⁴.

This represents an important clarification of the view of the European courts in four different respects¹⁰⁵. First, it explicitly recognises the international political and economic context, in which the United States in particular do not recognise WTO law as having direct effect. EC law operates in this context, which informs the judgements of the European courts. While it is true that EC law also helps to shape the international setting, and potentially change it, an ECJ judgement recognising the direct effect of

¹⁰³ *Ibid.*, para 95.

¹⁰⁴ *Ibid.*, para 96.

¹⁰⁵ Snyder, F., “The Gatekeepers: The European Courts and WTO Law”, in *Common Market Law Review*, vol. 40, 2003, p. 313 ff, at 331.

WTO law in EC law might have unpredictable and unintended consequences, both within the EU and outside it.

Second, it recognises that the consequences for EC's institutional balance and thus balance of powers¹⁰⁶ constitute one of the criteria for deciding whether WTO law has direct effect in EU law. Akin to a political question doctrine¹⁰⁷, it is based on the premise that the executive and the legislature, not the judiciary, must play the dominant roles on the field of international trade. Direct effect empowers courts, the administration and private actors. The basic strategy of the EU, as of its main trading partners, is one of "combining the utmost effect of WTO law abroad with a view to foster market access rights while leaving traditional constitutional allocations of power at home as unimpaired as possible"¹⁰⁸. This concern is explicit in the AG's discussion of the importance of maintaining the EC's position in international negotiations. It is implicit in his concern as to who should decide whether WTO law has direct effect in EU law, as distinct from the explicit discussion of this point by the Court in *Portugal v Council*. Both these issues embody important constitutional arrangements. Seen from this standpoint, AG Alber's opinion is a plea for judicial restraint.

Third, the opinion at issue places the issue of institutional choice on another level by focusing not merely on EC institutions *inter se* but also on relations between sites. It identified the key issue of whether a single site or legal system, acting unilaterally, or the totality of WTO members acting on a multilateral basis, should decide whether WTO law has direct effect. The AG's opinion represent a plea for multilateralism, instead of unilateralism or even bilateralism, as for example if the EU and the United States, or the EU and China, were to decide on a bilateral basis that they would recognise WTO law as directly effective in their respective legal orders.

Fourth, the opinion contributes to changing the terms of the debate about what impact WTO law should have in EU law and how. More specifically, by referring to transposition measures, it aims at posing the basic issue in terms of the *Fediol* clear reference exception, the *Nakajima* transposition or implementation exception and the indirect effect made possible via consistent interpretation, instead of in terms of direct effect. In other words, various types of indirect effect might prove to be more significant than direct effect itself.

Whereas the analysis put forward in the AG Alber's opinion is a contribution to a clearer articulation of European judicial policy, the Court overlooked the points made therein and simply restated the views expressed in *Portugal v Council*.

¹⁰⁶ Cf. Cheyne, I., "International agreements and the European Community legal system", in *European Law Review*, vol. 19, 1994, p. 581-598; Cottier Cottier, T., "International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law", in *European Constitutional Law Review*, vol. 5, n. 2, 2009, p. 307-326.

¹⁰⁷ Cf. Mengozzi, P., "I diritti e gli interessi delle imprese, il diritto dell'Organizzazione Mondiale del Commercio e le prerogative delle Istituzioni dell'Unione europea: verso una dottrina comunitaria delle *political questions*?", in *Contratto e impresa/Europa*, 2006, p. 150 ff.

¹⁰⁸ Cottier, T., Schefer, K., "The relationship between World Trade Organisation law, national and regional law", in *Journal of International Economic Law*, n. 1, 1998, p. 83-122, at 111.

Section II – Legal status and effect of decisions adopted by international organisations and bodies in the EU legal order

Some international agreements concluded by the EU establish bodies endowed with the power to adopt legally binding decisions. This circumstance raises the question of the internal effects that such decisions are to have in the EU legal system. Generally speaking, depending on the respective constitutional rules of the parties of the agreement, these decisions can produce their effects either without a specific act of reception or through a specific internal act of reception.

As regard the European Union, the EC Treaty first and now the Treaty on the Functioning deal with the decisions of bodies established by international agreement only in relation to the procedural aspects of their adoption and not with regard to the domestic effects they are to produce once adopted. More precisely, the TFEU lays down a specific internal procedure with reference only to cases where a position has to be adopted by a body set up by international agreement binding upon the Union, and where there is a need to act on behalf of the EU. This procedure is however not related to the adoption of internal acts of approval or transposition of the decision taken by the international body in the EU legal order. Rather, it defines the rules the Council and the Commission are to follow when declaring the position of the Community in the midst of debates within the body at issue¹⁰⁹.

Accordingly, as there is no specific provision on the domestic status and effects of acts adopted by internationally established bodies, it has been concluded that the provisions of art. 216 TFEU para 2, whereby agreements concluded by the Union are binding upon the institutions of the Union and on its Member States, can be extended to decisions of bodies therein established¹¹⁰.

Nevertheless, the ECJ has developed an extensive case-law on such issue, mainly with reference to decisions issued by the Council of Association established by the Association Agreement between the EC and Turkey, which is tasked with the implementation of the Agreement and with the attainment of objectives and goals contained therein.

As to the moment when the decisions of the EC-Turkey Council of Association enter the EC legal order, the Court, called upon to rule on the legality of a Commission decision implementing decision 2/80 of the above Council on financial aid for Turkey in case *Greece v. Commission*, stated that “since it is directly connected with the Association Agreement, Decision 2/80 forms, from its entry into force, an integral part

¹⁰⁹ Art. 218 TFEU para 7 and 9 provide respectively that “ [...] 7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6, and 9, authorise the negotiator to approve on the Union’s behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. [...] 9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement. [...]”.

¹¹⁰ Timmermans, C.W.A., “EU and Public International Law”, in *European Foreign Affairs Review*, 1999, p. 181-194, at 189.

of the Community legal system”¹¹¹. It has been pointed out that the words “directly connected” relate to the fulfilment of the substantive and procedural requirement laid down in the agreement with regard to the adoption of decisions¹¹².

Having regard to the internal effects of such decisions, the EC analysed the issue in the *Sevince* case, concerning the interpretation of certain decisions of the EC-Turkish Association Council, particularly decisions 2/77 and 2/80¹¹³.

The court took the view that the Council’s decisions can be declared to have direct effect if meeting the same requirements indicated by the ECJ itself in its case-law on the direct effect of international agreements. More precisely, the Court stated that “in order to be recognised as having direct effect, the provisions of a decision of the Council of Association must satisfy the same conditions as those applicable to the provisions of the agreement itself”¹¹⁴. Accordingly, the Court recalled what stated in *Demirel*, namely that a provision of an international agreement binding upon the Community is directly effective when, regard being had to its wording and to the purpose and the nature of the agreement it self, the provision at issue contains a clear and precise obligation, not subject, in its implementation or effects, to the adoption of any subsequent measure¹¹⁵. In the *Sevince* case, the Court confirm that the same criteria apply in the determination of whether the provisions of a decision of the Council of Association can have direct effect¹¹⁶.

Coming to the judicial application of the view expressed in *Sevince*, the Court recognised the direct effect to various provisions of the EC-Turkey Association Council, particularly some conferring the right to legitimately expect an act or a concrete behaviour from the national administration, to the renewal of a work permit¹¹⁷, to respond to any employment offer in the host country¹¹⁸, to social security benefits¹¹⁹

¹¹¹ ECJ, Case 30/88, *Hellenic Republic v Commission of the European Communities*, judgment of 14 November 1989, [1989] ECR 03711, para 13. The first case on the matter was however ECJ, Case 204/86, *Hellenic Republic v Council of the European Communities*, judgment of 27 September 1988, [1988] ECR 05323.

¹¹² Martennczuk, B., “Decisions of Bodies Established by International Agreements and the Community Legal Order”, in Kronenberger, V. (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, Cambridge, 2001, p. 141 ff, at 157. See also Gilsdorf, P., “Les organs institués par les accords communautaires: effets juridiques de leur decisions”, in *Revue du marché commun*, 1992, p. 328 ff.

¹¹³ ECJ, Case C-192/89, *S. Z. Sevince v Staatssecretaris van Justitie*, judgment of 20 September 1990, [1990] ECR I-03461.

¹¹⁴ *Ibid.*, para. 14. Cf. ECJ, Case C-277/94, *Z. Taflan-Met, S. Altun-Baser, E. Andal-Bugdayci v Bestuur van de Sociale Verzekeringsbank and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, judgment of 10 September 1996, [1996] ECR I-04085.

¹¹⁵ ECJ, Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*, judgement of 30 September 1987, [1987] ECR 3719, para. 14.

¹¹⁶ ECJ, Case C-192/89, *Sevince*, cited, para. 15. See also ECJ, Case C-171/01, *Wählergruppe Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG and Others*, judgment of 8 May 2003, [2003] ECR I-4301, paras. 54 and 55.

¹¹⁷ ECJ, Case C-237/91, *Kazim Kus v Landeshauptstadt Wiesbaden*, judgment of 16 December 1992, [1992] ECR I-06781, para 27.

¹¹⁸ ECJ, Case C-355/93, *Hayriye Eroglu v Land Baden-Württemberg*, judgment of 5 October 1994, [1994] ECR I-05113, para. 17.

¹¹⁹ ECJ, Case C-262/96, *Sema Sürül v Bundesanstalt für Arbeit*, judgment of 4 May 1999, [1999] ECR I-02685, para. 55.

and to see one's residence granted for the purpose of allowing the recently unemployed worker to see a new paid occupation¹²⁰.

Section III – Legal nature of WTO Panels or Appellate Body reports

3.1 Judicial nature of WTO Panels and Appellate Body

Amongst the annexes to the Agreement establishing the World Trade Organisation, Annex 2 contains the understanding on the rules and procedures regulating the settlement of disputes. The Dispute Settlement Understanding (DSU) established a litigation resolution-oriented system whose core element is represented by the Dispute Settlement Body (DSB). The latter consists of the WTO General Council which, acting as DSB as prescribed by art. IV(3) WTO, can adopt the reports issued by the panels and by a standing body, the Appellate Body (AB), both charged with the task of adjudicating alleged violations of WTO law committed by the members of the organisation.

The panels and the AB are both conceived as independent organs. As regards panel, members have to be qualified individuals, who cannot be nationals of the member countries whose government are party to the litigation¹²¹ and who shall serve in their individual capacities and not as government agents, nor as representative of any other organization¹²².

A standing body made of seven members, the Appellate Body is competent to judge appealed panels decisions but only to the extent that issues of law and of legal interpretations contained therein are raised¹²³. This is why AB members cannot participate in the adjudication of any dispute at the panel level, what would obviously generate a direct or indirect conflict of interests¹²⁴.

The procedure before the panel and, possibly, the AB consists of a few stages. The panel is established at the request of a complaining party, unless the DSB decides by consensus not to establish the panel¹²⁵. Once produced, the panel report is adopted by the DSB, unless a party to the dispute appeals¹²⁶. Should the dispute get to the appealing phase, the AB report is in turn adopted by the DSB, unless it decides by consensus not to adopt it, and it shall be unconditionally accepted by the parties to the dispute¹²⁷.

¹²⁰ ECJ, Case C-171/95, *Recep Tetik v Land Berlin*, judgment of 23 January 1997, [1997] ECR I-00329, para. 48. As this kind of acts adopted by bodies established by international agreements bear considerable importance for individuals, art. 17(5) of the Rules of Procedure of the Council provides for the possibility for the institution to affirm, at the moment of the conclusion of an agreement, the principle of publication of the acts adopted by the bodies established by the concluded agreement. See Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325/35 of 11.12.2009.

¹²¹ Art. 8(1) and (3) DSU.

¹²² Art. 8(9) DSU.

¹²³ Art. 17(1)(2) and (6) DSU.

¹²⁴ Art. 17(3) DSU.

¹²⁵ Art. 6(1) DSU.

¹²⁶ Art. 16(4) DSU.

¹²⁷ Art. 17(14) DSU. Adinolfi noted that the fact that the DSU does not use the word “unconditionally”

Throughout the procedure a negative blockage by the DSB consisting in a decision not to either establish the panel or adopt the latter's or the AB report, is highly unlikely since, under the rule of consensus, such decision would anyway require the approval of the plaintiff or of the party which won the case before the panel or the AB.

The panels and, above all, the AB are ultimately responsible of the interpretation of WTO provisions. Nor do art. IX(2) WTO and 3(9) DSU contradict such assertion in that the power to give authoritative interpretation of the WTO Agreement and of the Multilateral Trade Agreements that they confer upon the General Council and the Ministerial Conference is nothing but a peculiar form of interpretative power, which does not derogate to the general competence of the panels and AB. It does not indeed cover the object of the mandate of the latter, which expressly consists in interpreting WTO provisions, pursuant to art. 3(2) and 17(6) DSU¹²⁸. The minor relevance of the competence conferred by art. IX(2) WTO is further apparent when taking into account the circumstance, however procedural, that the exercise of it is contingent upon a positive deliberation of the three-fourths of the members, which is in any case an uneasy threshold to reach¹²⁹.

As to the rules of procedure to be followed by the AB, they have standing and objective nature. Together with the financial autonomy of the organ, all the elements considered so far are considered to point to the jurisdictional nature of an international body, in this case of the WTO DSB¹³⁰. It has thus been concluded that the dispute settlement proceedings laid down in the DSU have *almost* a judicial nature¹³¹. This is confirmed

for the adopted panel reports does not mean that they are not binding. In fact, their binding nature is confirmed not only by the practice under art. XXIII GATT 1947, but also by the very existence of procedure before the AB, which allows the parties to ask for a revision of a panel report that would otherwise become binding upon them. Adinolfi, G., "La soluzione delle controversie nell'OMC e il contenzioso euro-statunitense", in Venturini G. (a cura di), *L'Organizzazione Mondiale del Commercio*, Milano, 2004, p. 191 ff, at 204.

¹²⁸ Lester, S., "WTO Panel and Appellate Body Interpretations of WTO Agreement in US law", in *Journal of World Trade*, 2001, p. 521 ff., at 528.

¹²⁹ With the consequence that recourse to this interpretative power is rather difficult. Cf. Picone, P., Ligustro, A., *Diritto dell'Organizzazione mondiale del commercio*, Padova, 2002, at 582.

¹³⁰ See Del Vecchio, A., *Giurisdizione Internazionale e Globalizzazione. I tribunali internazionali tra globalizzazione e frammentazione*, Milano, 2003, at 193-193; Mosler, H., "Supra-National Judicial Decisions and National Courts", in *Hastings International Law Review*, 1981, p. 425 ff., at 434; Sacerdoti, G., "Il sistema di risoluzione delle controversie dell'Organizzazione Mondiale del Commercio a dieci anni dalla sua istituzione", in Sciso, E. (a cura di), *L'OMC 1995-2005. Bilanci e Prospettive*, Roma, 2006, p. 203 ff. The AB also established its own rules of procedure according to art. 17(19) DSU, rules recently modified by the 7 October 2004 communication from the Appellate Body WT/AB/WP/W/9. On the AB see Ehlermann, C.D., "Six years on the Bench of the "World Trade Court": some personal experiences as member of the Appellate Body of the World Trade Organization", in *Journal of World Trade*, 2002, p. 605 ff; Id., "Reflections on the Appellate Body of the WTO", in *Journal of International Economic Law*, 2003, p. 695 ff.; Vellano, *L'Organo di Appello dell'OMC*, Napoli, 2001; Andrianarivony, M.K., "L'Organ d'appel de l'OMC une institution originale invstie d'une mission constituionelle et normative (ou de la structuration d'un droit international de la concurrence)", in *Revue belge de droit international*, 2000, p. 276 ff., who at 281 underlines the exclusion of a power of referral of the AB to the lower panel, thereby highlighting the judicial nature of the AB. On the practice of the DSB, see Mengozzi, P., "The World Trade Organisation Law: an Analysis of the First Practice", in Mengozzi, P. (ed.), *International Trade Law in the 50th Anniversary of the Multilateral Trade System*, Milan, 1999, p. 3 ff.

¹³¹ Eeckhout, P., "The Domestic Legal Status of the WTO Agreement: Interconnecting legal systems", in *Common Market Law Review*, 1997, p. 11 ff., at 35; Cottier, T., "Dispute Settlement in the World Trade

inter alia by the fact that it is uncommon in international litigations to give a right of appeal against decisions of a judicial or quasi-judicial body¹³².

The above consideration, namely the determination of the judicial nature of the DSB decisions, is essential for the purpose of understanding what kind of effects the adopted WTO reports can have in the EU legal system and whether and how they can be relied upon by individuals having recourse to the judicial remedies afforded by the EU Treaties.

3.2 The absence of direct effect of DSB decisions

As pointed out by Von Bogdandy, however judicial in nature, international bodies' decisions are usually not directly effective. This is because, although they entail a general obligation of compliance, it is up to the respondent state to decide how to implement the decision of the international judicial body¹³³. In other words, with some exceptions¹³⁴, decisions of international judicial bodies contain nothing more than an obligation of result¹³⁵.

Adopted reports issued by WTO panels and AB do not contain the kind of clear and precise obligations which is required by the ECJ in the *Demirel* and *Sevince* case-law for the purpose of ascertaining whether provisions contained in the decision issued by an internationally established body confer rights and obligations directly upon individuals¹³⁶.

Accordingly, WTO adopted reports do not share the internal status which the Court acknowledged to the decisions adopted by, for instance, the EC-Turkey Council of Association and, consequently, they cannot be relied upon by individuals in order to ask the EU institutions to adopt an act or to issue a decisions whose content mirrors the one of the adopted report.

However, notwithstanding the lack of direct effect, WTO adopted reports entail an unquestionable obligation of compliance, by virtue of which they are binding upon the parties to the dispute¹³⁷. This is confirmed by both the WTO Agreement and the DSU

Organisation. Characteristics and structural implications for the European Union”, in *Common Market Law Review*, 1998, p. 325 ff., at 370. In *Chiquita*, the CFI did not share this conclusion, see CFI, Case T-19/01, *Chiquita Brand International and others v Commission of the European Communities*, judgement of 3 February 2005, [2005] ECR II-00315, para. 162.

¹³² Picone, P., Ligustro, A., *op.cit.*, at 596. See also Sacerdoti, G., “Il doppio grado di giurisdizione nelle giurisdizioni nazionali”, in *Comunicazioni e Studi*, 1997, p. 151 ff.

¹³³ Von Bogdandy, A., “Legal Effects of World Trade Organisation Decisions Within European Union Law: A Contribution To the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288 (2) EC”, in *Journal of World Trade*, 2005, p. 45 ff., at 60.

¹³⁴ See art. 68(2) of the America Convention on Human Rights, 54(1) of the ICSID Convention and 39 of the Statute of the International Tribunal for the Law of the Seas for the enforcement of the decisions of the Seabed Disputes Chamber, quoted in Von Bogdandy, *ibid.*, at 59 and 60.

¹³⁵ This is indicated as the traditional opinion on the effects of these acts by Giardina, “La mise en oeuvre au niveau national des arrest et des decisions internationaux”, in *Recueil des Cours*, vol. 165, 1979-IV, p. 248 ff.

¹³⁶ For a different position see Lavranos, N., *Decisions of International Organisations in the European and Domestic Legal Orders of Selected EU Member States*, Maastricht, 2004, at 146 and 147.

¹³⁷ See the AB report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Taxes on Alcoholic Beverages* of 4 October 1996.

which, as cleared by Jackson¹³⁸, show an evident preference for compliance with panels and AB reports. Art.3(5) DSU specifically provides that all the settlements reached by the litigant parties which are related to compensation and suspension of concessions or of other obligations under the WTO regime, however still possible when the adopted reports are not complied with by the losing party¹³⁹, must nonetheless comply with WTO agreements. Pursuant to art. 22(1) DSU, compensations and suspensions are sure enough nothing but temporary measures. In this respect, the GATT jurisprudence offered guidance also for WTO matters. According to the former, once the General Council adopted a panel report, there was an international law obligation to respect this report, as confirmed by art. XVI(1) WTO. Each member country has to ensure the compatibility of its relevant legal apparatus with its obligations (art. XVI(4) WTO). Furthermore, it is precisely by virtue of the binding nature of the outcome therein produced that the Organisation's dispute settlement system is a central element in providing security and predictability to the multilateral trading system.

Finally, according to the ECJ, in order for decisions of international jurisdictional bodies to be binding upon the EU there is no need to prove that they are also directly effective. In Opinion 1/91, the Court stated that the Community's duty to comply with decisions of internationally established bodies stems from the legal capacity of the EC to enter into international agreement and from the choice to do so, thereby consenting to be bound by the whole range of provisions therein contained¹⁴⁰. The Court did not make the obligatory nature of the decisions at issue depend on their direct effect¹⁴¹.

Therefore, WTO adopted reports are binding upon the European Union and they represent an integral part of its legal order since their adoption by the DSB¹⁴².

¹³⁸ Jackson, J.H., "International law status of WTO dispute settlement reports: obligation to comply or option to "buy-out"?", in *American Journal of Internal Law*, 2004, p. 109 ff.

¹³⁹ Within the reasonable period of time possibly fixed under art. 21(3) DSU.

¹⁴⁰ ECJ, Opinion 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, opinion of 14 December 1991, [1991] ECR I-06079, para 39 and 40.

¹⁴¹ Zonnekeyn, G.A., "The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European court of First Instance – The Banana Experience", in *Journal of World Trade*, 2000, p. 93 ff, at 101.

¹⁴² A different solution has been proposed after considering Council Regulation (EC) n. 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ L 201/10 of 26.7.2001, by Blanchard, D., "Les effets des rapports de l'organe de règlement des différends de l'OMC à la lumière du règlement (CE) 1515/2001 du Conseil de l'Union européenne", in *Revue du Marché commun et de l'Union européenne*, n. 464, janvier 2003, p. 37-48; Zonnekeyn, G.A., "The "Bed Linen" case and its aftermath: some comments on the European Community's "World Trade Organization Enabling Regulation" ", in *Journal of World Trade*, Vol. 36, No. 5, October 2002, p. 993-1003; Mengozzi, P., "L'invocabilità in giudizio delle regole dell'Organizzazione Mondiale del Commercio e la giurisprudenza comunitaria", in Francioni, F., Lenzerini, F., Montini, M. (a cura di), *Organizzazione Mondiale del Commercio e Diritto della Comunità Europea nella prospettiva della risoluzione delle controversie*, Milano, 2005, p. 155 ff.

3.3 The relevance for the EU of DSB decisions

The divorce of the concept of legal compulsoriness from the one of direct effect operated by the ECJ in Opinion 1/91 and, perhaps more significantly, lessons learned from the Court case-law on the internal effects of GATT 1947 and WTO provisions allow the scholar to get to understand that from the obligatory nature of the DSB reports does not automatically result their domestic enforceability. It is therefore essential to understand what are the consequences of the binding force of such decisions before the European courts.

First, as pointed out by the CFI in the *Shanghai* case¹⁴³, the lack of direct effect of WTO adopted reports does not prevent the applicant from relying on the interpretation and clarification of the Agreements provisions contained therein. Hence, the CFI, or the ECJ, can interpret and thus apply WTO rules at least in the light of what the panel of the AB found in the adopted report.

Secondly, applying the reasoning of the ECJ in the *Sevince* and *Deutsche Shell* cases, measures emanating from bodies which have been established by an international agreement, and which have been entrusted with responsibility for its implementation, are directly linked to the agreement which they implement, form part of the Community legal order¹⁴⁴. Since the DSB reports are to be regarded as measures required for the application of the WTO Agreement, they are directly linked to the said accord, which is why they form part of Community law. Furthermore, it is settled case-law that the fact that a measure of Community or Union law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling¹⁴⁵. Although the DSB reports cannot confer rights upon individuals which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, they are of relevance in interpreting the WTO provisions¹⁴⁶.

The issue of spelling out the effects and relevance of the DSB decisions in the EU legal order had grown important after the issue of several reports that found the EC in breach of WTO rules. The adopted panels and AB reports have subsequently been invoked in many domestic judicial proceedings before the ECJ and the CFI, now General Tribunal. The first WTO dispute concerned the common regime for trade in bananas with third countries as laid down in EC Regulations n. 404/93¹⁴⁷ and 1442/93¹⁴⁸. This regime was

¹⁴³ CFI, Case T-35/01, *Shanghai Teraoka Electronic Co. Ltd v Council of the European Union*, judgment of 28 October 2004, [2004] ECR II-03663, para. 140 and 165. For a diversification of the forms of internal relevance of WTO law within the EC legal system beyond issue of direct effect, see Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, 2004, at 275.

¹⁴⁴ See ECJ, Case C-192/89, *Sevince*, *cit.*, para. 10.

¹⁴⁵ See ECJ, Case 113/75, *Giordano Frecassetti v Amministrazione delle Finanze dello Stato*, judgement of 15 June 1976, [1976] ECR 983; Case 90/76, *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)*, judgment of 9 June 1977, [1977] ECR 1091; and Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles*, judgement of 13 December 1989, [1989] ECR 4407, paragraph 9.

¹⁴⁶ ECJ, Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, judgment of 21 January 1993, [1993] ECR I-00363, para. 17 and 18.

¹⁴⁷ Council Regulation (EEC) n. 404/93 of 13 February 1993 on the common organization of the market

based, *inter alia*, on an allocation of tariff quotas shares from the importation into the European Community of bananas and on an allocation to different categories of operators of an amount of licences allowing this importation limited for each category. On 25 September 1997, the DSB adopted the AB report of 9 September 1997¹⁴⁹ and the panel reports, as modified by the AB, of 22 May 1997¹⁵⁰. In its report, the AB found some provisions of the above Community Regulations incompatible with artt. I(1), XIII(1) and (2) GATT 1994 and with artt. II and XVII GATS.

In order to comply with the DSB decision, the Community modified Regulation n. 404/93 by adopting Regulation n. 1637/98¹⁵¹ and the implementing Regulation n. 2362/98¹⁵², which set up a new tariff quota scheme based on an evaluation of the interests of the principal supplier countries with a consideration of traditional trade flows (“traditional/newcomers” system).

The United States took the view that changes foreseen in the 1998 Regulations did not remove the incompatibility of the EC common market in bananas with WTO obligations. Accordingly, the US were granted the authorisation to suspend concessions through higher duties on Community imports by an arbitrators’ ruling of 9 April 1999, i.e. once the reasonable period of time granted to the EC for letting it comply with the DSB decisions had elapsed.

On 6 May 1999, the DSB adopted a panel report issued at the end of a proceeding requested by Ecuador pursuant to art. 21(5) DSU and regarding the alleged lack of implementation by the EC of the previous DSB decisions. In such report, the panel had found, *inter alia*, that the incompatibilities of the EC measures with art. XIII(1) and (2) GATT and with art. II and XVII GATS persisted¹⁵³. Ecuador was accordingly authorised to suspend concessions under GATT 1994, GATS and TRIPs, up to the amount fixed by the arbitrators.

In 1999 and 2001, in order to comply with the panel report, the EC once more modified Regulation n. 404/93, by adopting Regulations n. 102/99¹⁵⁴ and 608/99¹⁵⁵, and subsequently Regulation n. 216/2001¹⁵⁶ and its implementing Regulation n.

in bananas, OJ L 47/1 of 25.2.1993.

¹⁴⁸ Commission Regulation (EEC) n. 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, OJ L 142/6 of 12.6.1993.

¹⁴⁹ WT/DS27/AB/R

¹⁵⁰ WT/DS27/R/USA

¹⁵¹ Council Regulation (EC) n. 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, OJ L 210/28 of 28.7.1998.

¹⁵² Commission Regulation (EC) n. 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (Text with EEA relevance), OJ L 293/32 of 31.10.1998.

¹⁵³ WT/DS27/RW/ECU of 6 April 1999.

¹⁵⁴ Commission Regulation (EC) n. 102/1999 of 15 January 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 (second period) (Text with EEA relevance), OJ L 11/16 of 16.01.1999.

¹⁵⁵ Commission Regulation (EC) n. 608/1999 of 19 March 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the second quarter of 1999 and on the submission of new applications, OJ L 75/18 of 20.03.1999.

¹⁵⁶ Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation (EEC) n. 404/93 on the common organisation of the market in bananas, OJ L 31/2 of 2.2.2001.

896/2001¹⁵⁷. Finally, on 11 April 2001, the EC concluded a memorandum of understanding on bananas with the US, whereby the two parties identified the means by which the long-standing dispute over the EC's banana import regime could be resolved. Such means included the introduction by the Community of a tariff-only regime for imports of bananas no later than on 1 January 2006 and the provisional suspension of the authorised imposition of higher duty by the US. Nevertheless, the United States declared to the DSB that this memorandum did not in itself constitute a mutually agreed solution pursuant to art. 3(6) DSU and that it would be premature to take the item off the DSB agenda¹⁵⁸. On 30 April 2001 the EC also concluded an *extra-legem* agreement with the Republic of Ecuador.

The second WTO dispute ending up with an adverse ruling for the EC concerned the prohibition of importing hormone treated meat into the Community market, as will be discussed in more details in the second part of the present work. The Council had adopted the prohibition to import and to use of certain substances having a hormonal component in livestock farming through two Directives, 81/602 and 88/146¹⁵⁹. On the basis of Directive 96/22¹⁶⁰, the import ban was maintained even after the entry into force, on 1 January 1995, of the WTO Agreement and its annexes, including the Agreement on Sanitary and Phytosanitary Measures (SPS).

On 18 August 1997 two panels, set upon request of Canada and the US, issued their respective reports¹⁶¹, which ascertained the EC's breach of the SPS Agreement and which the Community appealed against. On 16 January 1998, the AB delivered its report, ruling that the EC had enacted the import ban on hormones inconsistently with art. 3(3) and 5(1) SPS, on the ground that it had not given evidence of cancer risks associated with the use of certain hormones resulting from sufficiently precise scientific analysis¹⁶². On 13 February 1998, the DSB adopted the AB report and those of the two panels, as amended by the AB.

At the EC request to be granted a reasonable period with a view to comply with WTO obligations as interpreted in the DSB decisions, a period of 15 months was approved¹⁶³. Such period expired on 13 May 1999. Only on 3 July 2000, the Commission submitted a proposal for amendment of Directive 96/22 to the European Parliament and to the

¹⁵⁷ Commission Regulation (EC) n. 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) n. 404/93 as regards the arrangements for importing bananas into the Community, OJ L 126/6 of 8.5.2001.

¹⁵⁸ WT/DS27/59-G/C/W/270 of 2 July 2001.

¹⁵⁹ Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, OJ L 222/32 of 7.8.1981 and Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action, OJ L 70/16 of 16.3.1988.

¹⁶⁰ Council Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of β -agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC, OJ L 125/3 of 23.5.1996.

¹⁶¹ WT/DS26/R/USA and WT/DS48/R/CAN, European Communities – Measures Concerning Meat and Meat Products (Hormones).

¹⁶² WT/DS26/AB/R and WT/DS48/AB/R, European Communities – Measures Concerning Meat and Meat Products (Hormones).

¹⁶³ WT/DS26/15, EC– Measures Concerning Meat and Meat Products (Hormones), Arbitration under art. 21(3)(c) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator of 29 May 1998.

Council¹⁶⁴, proposal that was subsequently adopted in September 2003 as Directive 2003/74¹⁶⁵.

Section IV – DSB decisions and the judicial control of legality of EU law

4.1 The doctrine of limited judicial enforceability of WTO law applied to DSB decisions: the *Van Parys* case

The analysis of the leading cases carried out in the second chapter has showed the ECJ diehard position on the domestic legal status of WTO law. The denial of direct effect of such rules before European and national courts and the exclusion of legality review of EU measures in the light of those – also in case of direct action before the ECJ - are the core outcomes of a reasoning based on the flexible nature of the WTO provisions, including those regarding dispute settlement. However, according to the same case-law, this rule of judicial unenforceability has two exceptions, because the ECJ can review the legality of EU law in the light of WTO rules if, by the challenged measures, the Union intended to implement a particular WTO obligation or if the legal basis of the challenged EU measure contains expressed reference to a WTO rule.

The lack of judicial enforceability of WTO law has thus generated a sort of “internal immunity” of European law that is inconsistent with WTO law¹⁶⁶. Since *Portugal v Council*, the ECJ has also followed the above reasoning in cases where the applicant raised the issue of incompatibility of EU measures with TRIPS provisions, regardless of the reference therein contained to several rights, often procedural, afforded to private parties¹⁶⁷. However, the Court has developed a useful tool in order to ensure that EU secondary law respects WTO law, that is the principle of interpreting EU measures in light of the wording and purpose of WTO provisions¹⁶⁸.

¹⁶⁴ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, COM/2000/0320 final, OJ C 337E/163 of 28.11.2000.

¹⁶⁵ Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, OJ L 262/17 of 14.10.2003.

¹⁶⁶ Beneyto, J.H., “The EU and the New WTO: Direct Effect of the New Dispute Settlement System”, in *Europäische zeitschrift Für Wirtschaftsrecht*, vol. 7, n. 10, 24 Mai 1996, p. 295 ff, at 298.

¹⁶⁷ ECJ, Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, judgement of 20 December 2000, [2000] ECR I-11307, and Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, judgement of 9 October 2001, [2001] ECR I-07079. On these rights cf. Picone, P., Ligustro, A., *op. cit.*, at. 564.

¹⁶⁸ See ECJ, Case C-76/00 P, *Petrotub SA and Republica SA v Council of the European Union*, judgement of 9 January 2003, [2003] ECR I-79, para. 57, commented by Mengozzi, P., “The Relationship Between EU Law and WTO Law in Light of the Recent Developments of European Case-Law”, in *The global community. Yearbook of international law and jurisprudence*, 2003, p. 733 ff; Zonnekeyn, G.A., “The ECJ’s Petrotub Judgement: towards a Revival of the “Nakajima Doctrine”?”, in *Legal Issues of Economic Integration*, 2003, p. 249 ff; Case C-61/94, *Commission of the European Communities v Federal Republic of Germany*, judgment of 10 September 1996, [1996] ECR I-03989, para. 52, with a note by Eeckhout, in *Common Market Law Review*, 1998, p. 557 ff; Case C-286/02, *Bellio F. Ili Srl v Prefettura*

The chance to clarify the issue of direct effectiveness in relation to DSB decisions came from a reference for preliminary ruling on the validity of some EC Regulations in the *Van Parys* case¹⁶⁹. In this case a Belgian banana importer challenged before the national administrative court (Raad van State) certain domestic acts, by which competent national authorities had refused to grant him import licenses beyond the limits permitted under Regulation n. 404/03, as amended. Van Parys also claimed that the latter Regulation was invalid. The Raad van State referred the question to the ECJ, demanding to review the validity of the Regulation in the light of art. XIII:1 and 2(d) GATT 1994, the principle of protection of legitimate expectations and the principle of good faith in international public law and international customary law. This inasmuch as, in the applicant's view, the Community did not fulfil its obligations under GATT 1994 and, inter alia, did not take account the outcome of the international dispute settlement proceeding before the DSB on the incompatibility of the EC banana trade regime with WTO rules.

To start with, the Court ruled that, despite the modifications to the EC banana regime undertaken in 1998, after the DSB decision declaring the inconsistency of the EC measures establishing such regime with WTO law, these measures did not reveal that the Community intended to implement a particular obligation assumed in the context of the WTO in the meaning of the *Nakajima* doctrine¹⁷⁰. Moreover, despite the divergent opinion of Tizzano AG¹⁷¹, the Court also referred to the Portugal v Council and to art. 21(6) and 22(8) DSU in order to point out that the issue of implementation of its decisions remains on the agenda of the DSB until it is resolved through the removal of the EC measures concerned or by a mutually satisfactory solution, which is the reason why the settlement of the dispute could not be considered concluded as asserted by the applicant¹⁷². The ECJ also emphasised that, where no agreement on the compatibility of the EC measures with WTO is reached, the dispute shall be decided precisely through recourse to the dispute settlement procedures pursuant to art. 21(5) DSU, including by attempts by the parties to reach negotiated solutions¹⁷³.

According to the ECJ, if the Community judicature refrained from applying its domestic law due to alleged - but not yet established – inconsistency with WTO law, the Court

di Treviso, judgement of 1 April 2004, [2004] ECR I-3465, para 33; Case C-49/02, *Proceedings brought by Heidelberger Bauchemie GmbH*, judgement of 24 June 2004, [2004] ECR I-6129, para 20; Case C-245/02, *Anheuser-Busch Inc. v Budějovický Budvar, národní podnik*, judgement of 16 November 2004, [2004] ECR I- 10989, para. 45; CFI, Case T- 35/01, *Shanghai*, cit., para. 138. On this principle see Lauwaars, R.H., “Interpretations of International Agreements by National Courts: An EC View”, in Bronkers, M., Quick, R. (eds.), *New Directions in International Economic Law. Essays in Honor of John J. Jackson*, The Hague, London, Boston, 2000, p. 509 ff., at 514.

¹⁶⁹ ECJ, Case C-377/02, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, judgment of 1 March 2005, [2005] ECR I-01465.

¹⁷⁰ *Ibid.*, para. 40 and 41.

¹⁷¹ Who had followed the opinion of AG Alber in the *Biret* cases, analysed *infra*; Opinion of Mr Advocate General Tizzano delivered on 18 November 2004, Case C-377/02, *Léon Van Parys NV v Belgisch*, [2005] ECR I-01465.

¹⁷² ECJ, Case C-377/02, *Van Parys*, judgement, cit., para. 42 and 46.

¹⁷³ *Ibid.*, para. 47.

would then deprive the legislative or executive organs of the possibility afforded by art. 22 DSU to reach a negotiated settlement, if nothing else, on a temporary basis¹⁷⁴.

The ECJ then mentioned all the legislative changes made by the EC in order to bring the relevant domestic legislation into conformity with WTO provisions, as well as the memoranda of understanding concluded with the US and Ecuador¹⁷⁵. In the view of the Court, the effort of the Community

“to reconcile its obligations under WTO law 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 the light of the WTO rules upon the expiry of the time-limit.”¹⁷⁶

Still on the same note and consistently with the *Portugal v Council* ruling, the Court stated that the expiry of the reasonable period of time for compliance

“does not imply that the Community had exhausted the possibilities under the Understanding of finding a solution to the dispute between it and other parties. In those circumstances, to require the Community courts, merely on the basis that the 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 positions in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules”.¹⁷⁷

Consequently, even after the expiration of the reasonable period of time provided by art. 21(3) DSU for implementation, the contested EC Regulations could not yet be considered by the ECJ as measures intended to ensure the enforcement within the Community legal order of a particular obligation assumed in the context of the WTO agreements within the meaning of the *Nakajima* exception¹⁷⁸. Therefore, no legality review in the light of those obligations would be possible.

Furthermore, the Court restated the argument concerning the lack of reciprocity by maintained that the direct responsibility of the Community courts for ensuring compliance of EC legislation with the WTO law would lead to an anomaly in the application of WTO rules primarily caused by the judicial authorities of the Community’s commercial partners not applying WTO law to review the legality of their domestic legislation.

Finally, the Court excluded the possibility for Van Parys to plead before the national court for a declaration of invalidity of EC legislation on the ground of the inconsistency of the latter with certain WTO rules, even if the DSB has stated that the legislation at issue is incompatible with WTO rules¹⁷⁹.

¹⁷⁴ *Ibid.*, para. 48.

¹⁷⁵ *Ibid.*, para. 49.

¹⁷⁶ *Ibid.*, para 50.

¹⁷⁷ *Ibid.*, para 51.

¹⁷⁸ *Ibid.*, para 52.

¹⁷⁹ *Ibid.*, para. 53 and 54.

Section V – DSB decisions and actions for damages

5.1 DSB decisions and the EU courts’ case-law: the *Biret* cases and their precedents

As far as an action for damages under article 268 TFEU is concerned, attention must be devoted to the conditions for obtaining reparation. The latter are three: an unlawful act or omission performed by the Community institutions, a damage suffered by the applicant and a causal link between the unlawful act or omission and the damage¹⁸⁰. However, as to first condition, namely the unlawful act or omission, the case-law of the ECJ and of the CFI required that a sufficiently serious breach of a rule intended to confer rights on individual is established¹⁸¹. Moreover, as regards the requirement that the breach be sufficiently serious, the decisive test is whether the Community institution concerned manifestly and gravely disregarded the limits of its discretion¹⁸². Finally, where that institution has only a considerably reduced or even no discretion at all, the mere infringement of Community law may be still sufficient to establish the existence of a sufficiently serious breach.

As regards EU non-contractual liability for breach of WTO law, the CFI established two further elements. First, it has interpreted the condition of the “rule of law intended to confer rights on individuals” as meaning that such rule has to be directly effective. Second, the CFI has applied the *Nakajima* doctrine since it has held that the reasoning of the ECJ in *Portugal v Council* was not only applicable to case of legality review of EC secondary legislation, but also to actions for damages.

In particular, in *Cordis, Bocchi* and *T. Port*, the CFI rejected applications for compensation of losses suffered by the introduction of Regulation 2362/98 on the banana import regime. The Tribunal took the view that, even when dealing with an action for damages, the principle of the lack of direct judicial enforceability carved out by the ECJ in *Portugal v Council* had to be applied. Being as the Court has several times ruled out that WTO agreements are such in nature and purpose as to confer rights upon individuals which they can rely upon before European and national courts, the Tribunal saw no reason to divorce the two circumstances of potential invocation of WTO law, namely judicial review of EC measures and action for damages.

¹⁸⁰ ECJ, Case 26/81, *SA Oleifici Mediterranei v European Economic Community*, judgment of 29 September 1982, [1982] ECR 03057, para. 16; CFI, Case T-113/96, *Edouard Dubois et Fils SA v Council of the European Union and Commission of the European Communities*, judgment of 29 January 1998, [1998] ECR 1998 Page II-00125, para. 54.

¹⁸¹ ECJ, Case C-352/98 P, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities*, judgment of the Court of 4 July 2000, [2000] ECR I-05291, para 42; CFI, Case T-139/01, *Comafrika SpA and Dole Fresh Fruit Europe Ltd & Co. v Commission of the European Communities*, judgement of 3 February 2005, [2005] ECR II-00409, para. 142; ECJ, Case C-234/02 P, *European Ombudsman v Frank Lamberts*, judgement of 23 March 2004, [2004] ECR I-02803, para. 49; ECJ, Case C-472/00 P, *Commission of the European Communities v Fresh Marine Company A/S*, judgement of 10 July 2003, [2003] ECR I-07541, para. 25 and 26.

¹⁸² ECJ, Case C-352/98 P, *Bergaderm*, cit., para. 43; ECJ, Case C-312/00 P, *Commission of the European Communities v Camar Srl and Tico Srl*, judgement of 10 December 2002, [2002] ECR I-11355, para 54.

In the three cases mentioned above, the adopted AB report establishing the incompatibility of the Community Regulation with WTO law was brought about by the applicants in order to back up their demands for compensation. However, again by virtue of the application of the *Nakajima* doctrine, the CFI rejected the relevance of it as well, on the ground that it did not create particular obligations that the EC intended to implement through the adoption of the contested Regulation.

In the *Chemnitz* case, the CFI dealt with the internal relevance of the same adopted AD report at issue in *Bocchi*, *Cordis* and *T. Port*, which was invoked by the applicant in order to prove that Regulation 404/93, allowing the applicant to import bananas into the Community market only up to a certain quota, was inconsistent with WTO law and consequently unlawful. The CFI ruled that the application should be rejected because the DSB decision has not direct effect.

The same AB report had been invoked in *Atlanta*, an appeal against the judgement of the CFI which rejected the application on an individual demanding compensation of damages allegedly suffered because of the introduction and application of Regulation 404/93. The Court declared the plea non admissible, on the ground that it was inescapably linked with the issue of direct effect of GATT, which the applicant had raised before the CFI but which it had conveniently not maintained in the argument brought before the Court of Justice.

It was however only in the *Biret* cases that the CFI was clearly faced with the issue of non-contractual liability of the European Community for perpetuating a breach of WTO law after the expiry of the reasonable period of time set up by art. 21(3) DSU. The *Biret* companies, that is *Établissement Biret et Cie* and its subsidiary *Biret International*, active in trade of various agri-foodstuffs (particularly meat) claimed damages allegedly suffered by the import ban established by the Council on beef and veal treated with hormone products. In order to give evidence of the unlawfulness of the Council's behaviour, the applicants argued that the institution acted in breach of WTO law since it omitted to adopt whatsoever measure with a view to comply with the DSB decisions, despite the expiry of the reasonable period of time afforded by the DSU.

The CFI held that WTO Agreements could not be interpreted as rules having direct effect and, consequently, individuals could not invoke them in an action for damages before Community courts. It also pointed out that the purpose of those agreements is to govern relations between sovereign states and, possibly, regional organisations for economic integration, and not to protect individuals. The Court finally referred to *Portugal v Council* to underline that WTO law was grounded on the principle of mutual advantageous negotiations. The Court then turned to the issue of the relevance of adopted panels and AB reports and stated that no different conclusion could have been drawn with regard to the DSB ruling being as the latter had an inescapable and direct link with the plea regarding the alleged breach of the WTO rules at issue, namely those contained in the SPS Agreement. Consequently it could have been taken into consideration by the CFI only if the direct effect of this Agreement had previously been established.

In the appeal proceedings before the ECJ, AG Alber questioned the holding of the well established case-law denying direct effect to WTO rules by noting that the restatement of principles expressed therein also in relation to domestic effects of DSB decisions would prevent an individual from invoking the those even after their formalisation via the adoption of the relevant reports by the DSB. The Advocate General observed first that the possibility to invoke the DSB decisions had to be considered as a distinct issue from that of direct effect of WTO law. He also argued that the expiry of the reasonable period of time marks the point at which the obligation which stems from the relevant WTO obligation become concrete. He consequently concluded that WTO law is directly applicable where DSB recommendations or rulings have found a Community measure to be inconsistent with WTO law and the Community has failed to implement the recommendations or rulings within the prescribed period. He arrived at this conclusion after a thorough analysis of the dispute settlement mechanism of the WTO, where he considered the nature of the procedure before the panels and the AB, the only temporary nature of compensations and countermeasures provided by art. 22 DSU as well as the fact that they are less preferable than the prompt compliance to the DSB decisions, and the binding force of those for the parties to the disputes. Finally, the AG considered the need to ensure a uniform application of the WTO Agreements, referred to by the Court in *Portugal v Council* in order to justify the lack of direct judicial enforceability, as an argument more of trade policy nature than a legal one, and he drew a parallel between the principle affirmed by the Court in the *Francovich* case as to Member States liability for breach of EC law and the EC non-contractual liability for breach of EC law and the EC non-contractual for breach of WTO law. He observed that if non-contractual liability of Member States was necessary to supersede their non-compliance with EC obligations, which entailed the impossibility for the individuals to exercise the rights conferred upon them by the EC legal order, then the same reasoning should apply to the European Community, because its non-compliance with WTO law entailed the impossibility for the applicant to fully exercise its right to the pursuing of an economic activity.

In turn, the ECJ upheld the two judgments of the CFI thus rejecting the action for damages for breach of the SPS Agreement. The Court, however, stated that the CFI should have analyzed how the DSB decisions could have called into question the conclusions concerning the denial of direct effect. Nonetheless, according to the Court, the appealed judgement of the CFI could not be annulled. This was because a judicial liquidation in favor of the applicant has been open and a consequent cessation of payments had been set up long before the adoption of the reports by the DSB and the expiry of the reasonable period of time for compliance with the DSB decisions. *A contrario*, it would then be possible to lodge an application for damages occurred after the expiry of the reasonable period of time, where granted.

The *Biret* cases gave the clear impression that it was still possible to overcome the hurdles related to the reasoning of *Portugal v Council* in order to affirm the judicial enforceability of WTO rules through DSB decisions in the framework of an action for

damages. Nevertheless, the CFI followed a different position the subsequent *Chiquita Brand International* case.

5.2 The *Chiquita Brand International* case

In *Chiquita Brands International* three companies belonging to the Chiquita group, producers and distributor of bananas, lodged an application for compensation in respect to the loss allegedly suffered because of the adoption and maintenance in force of Regulation 2362/98, which they claimed to be in violation of WTO rules and, inter alia, of the principle of good faith and of the protection of legitimate expectations in international law.

The CFI first clarified in a very succinct fashion the meaning of the *Nakajima* doctrine. It focused on the particular context in which it had been applied by the Community courts, namely the indirect judicial review of antidumping basic Regulation in the light of 1979 and 1994 WTO Antidumping Codes, that is the agreements respectively adopted within the GATT and WTO regimes in order to implement art. VI GATT. According to the CFI, in the field of antidumping, there is a direct obligation on the WTO members to fine-tune their domestic legislation with a view to comply with WTO law that stems from artt. 16(6) of the 1979 Antidumping Code and 18(4) of the 1994 Antidumping Code.

However, the CFI has admitted that, even though outside the particular context of antidumping the CJ and the CFI generally ruled out the application of the *Nakajima* doctrine, the latter could still be applied to other fields of WTO law, provided that both the WTO rules and the Community provisions have the same nature and that of the WTO and EC rules involved in the field of antidumping law, and the relevant EC measures transpose the prescriptions arising from the WTO agreements into Community law. According to the CFI, this would be confirmed by the “Rice case”, where an EC Regulation, adopted pursuant to bilateral agreements concluded with third countries following negotiations on the basis of art. XXIV(6) GATT, was considered by the ECJ to fall within the scope of the *Nakajima* doctrine.

The CFI stated that it would not enquire as to what consequences on compensating individuals would possibly result from non-implementation by the EC of adverse DSB decisions, a question not raised by the applicant, but it made some important points on the issue.

The CFI first of all pointed out that the WTO dispute settlement mechanism cannot be compared with the judicial activity carried out by national courts of the EC Member States. It then referred to the ECJ *Portugal v Council* judgement, where the ECJ indicated inter alia that the DSU gives WTO members which become parties to a dispute the opportunity of pursuing negotiations in order to reach an acceptable compensation where the opposing party fails to fulfil its obligations to implement recommendations and rulings of the DSB within a reasonable period of time.

According to the CFI, this scope for manoeuvre still exists after the end of the reasonable period of time foreseen in art. 21(3) DSU. In the view of the Court, this

would follow from artt. 21(6) and 22(8) DSU. Consequently, the CFI held that, as the dispute was still pending, i.e. was on the agenda of the DSB when the action by Chiquita Brands International was brought, the Community judicature could not review the legality of the EC measures without depriving art. 21(6) DSU of its effectiveness. This as long as the question of implementation of DSB decisions and recommendations remains unsolved, including where compensation has been provided or concessions or other obligations have been suspended without implementation of the DSB rulings. In light of this on-going negotiation, the CFI considered that EC Regulation 2362/98, despite its preamble, had been adopted by the EC to comply with its WT obligations but not to implement them within the meaning of the *Nakajima* doctrine.

5.3 EU non-contractual liability for lawful acts

It is still to be pointed out that, as far as actions for damages are concerned, the Community courts have held admissible an action for damages for non-fault liability. The conditions to condemn the EC to make good of damages under this type of action are particularly restrictive. The EC may incur liability for a lawful act inly if the damage alleged, if still deemed to constitute a still subsisting injury, affects a particular circle of economic operators in a disproportionate manner by comparison with others (unusual damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (special damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest.

Notwithstanding the restrictive conditions of application, this particular form of action for non-contractual liability has the great value if allowing compensation for damages despite the lawfulness of the Community conduct.

In this regard, such form of liability has been invoked in some cases related to damages allegedly suffered by economic operators fro breach of WTO law by the European Community. In particular, it has been invoked in the *FIAMM* case, as well as in other proceedings, all related to the non-contractual liability of the EC for the countermeasures adopted by the US in the framework of the banana litigation within the WTO.

In the *FIAMM* case, the CFI rejected the action for damages for non-contractual liability in the absence of unlawful conduct on the ground that the damage suffered by the applicants was not unusual, because the possibility of retaliatory measures had to be considered as a normal risk, due to the provisions of the WTO agreements related to the suspension of concessions as well as to the normal hazards of international trade as currently organised.

CONCLUDING REMARKS AND FUTURE DEVELOPMENTS

SUMMARY: 1 - A EU strategy towards SPS and TBT disputes? 2 - The CCP in the broader framework of the Union's external action 2.1 CCP principles and objectives under the Community Treaty 2.1.1 The uniformity principle 2.1.2 The objective of liberalising trade and non-trade aims 2.2 CCP principles and objectives under the reformed EU Treaty 2.2.1 Uniformity principle 2.2.2 The reformed objective of liberalisation 2.2.3 The CCP under a common constitutional framework of EU external relations 2.2.4 Legal consequences 3 - Commercial disputes and fundamental rights: a real constraint? 4 - The impact of the External Relations institutional reform on the strategic management of commercial disputes and the need for coordination 4.1 The HR/VP, the EEAS and the need for coordination 4.2 The European Parliament 4.3 The Court of Justice 5 - Concluding remarks

1. A EU strategy towards SPS and TBT disputes?¹

The aim of the present study was to investigate the nature of the EU's stance vis-à-vis the settlement of WTO disputes relating to sanitary and phytosanitary measures and technical barriers to trade. Based on the notion of strategy as a set of decisions, actions and means put in place in order to pursue one or more predetermined objectives as well as on the state of the art concerning the relationship between EU and WTO law, an initial hypothesis has been put forward that the course of action taken by EU institutions in this regard formed part of a coherent EU strategy towards commercial litigation. Such strategy would apply particularly – although not exclusively – when the EC, now EU, acted as defendant, with a view to, first, protecting vested Union interests and, second, insulating the EU commercial policy and legal order from the influence of WTO law by avoiding actual compliance with WTO obligations.

Findings presented so far allow to partially correct the above assertion and to present a thesis whereby the Union's policy and judicial decisions in relation to SPS and TBT disputes respond to a *ratio* that goes beyond the immediate objective of avoiding that the CCP and the functioning of the Union's legal system be over-constrained by WTO

¹ This conclusion has been presented within the following publication: Bonavita, V., "The EU Strategy Towards WTO Commercial Disputes After the Lisbon Reform", in Moraru, M., Larik, J. (eds.), *Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Paper Law 2011/10, p. 41.

obligations. This rationale concerns in part the protection of vested Union interests and, most importantly, the issue of internal and international standard setting. The latter relates in particular to the preservation of the EU regulatory autonomy.

In part I a comparison between the EU and the WTO approach to the regulatory autonomy of the respective member states highlighted the concept of mutual recognition as the gateway to the preservation of such autonomy. However, whereas it represents the cornerstone of the Union's internal market, mutual recognition is not a principle under the WTO legal order. Nor dared the DSB go as far as to affirm it, just as the ECJ had done. This being the case, the EU is left with two viable options to defend its regulatory autonomy in the multilateral commercial forum: either bilateral negotiation of mutual recognition with trade partners or litigation on the compatibility of Union's internal measures with SPS and TBT obligations.

The analysis of seven agreements concluded by the EU has shown that the negotiation of mutual recognition is affected by several limits. First, MRAs have been concluded only in relation to technical barriers to trade, leaving SPS measures aside. Second, mutual recognition obligations have been established only with regard to conformity assessment procedures, thus leaving the mutual recognition of internal standards and regulations unspoken. Finally, a survey of the Union's counterparts shows that the EU tends to negotiate MRAs only with commercial partners who afford high guarantees with regards to their own standards and regulations or in any case a high degree of similarity with those of the EU. This excludes the conclusion of MRAs with countries other than developed ones.

Limits inherent to the practice of concluding MRAs leave room to litigation as an alternative means for the EU to preserve its regulatory autonomy. In order to establish a connection between dispute settlement and the defence of the EU regulatory power, submissions presented by the Union in relation to five SPS and TBT disputes which saw the EU acting as defendant have been analysed. It turned out that legal arguments put forward by the Union served the purpose of regulatory autonomy, first, by excluding the applicability of the SPS and TBT provisions invoked by the applicant; second, by affirming the existence of a legitimate objective that the contested EU measure was meant to pursue and the satisfaction of the necessity test by the latter; third, by excluding the invocability of relevant international standards on the ground of the inappropriateness of those or of the lack of a legal obligation to conform to those. A high degree of coherence has been found in the EU approach to such disputes inasmuch as submissions presented in different cases can be ascribed to either one or more than one of the above three categories of argumentations.

Is this enough to claim for the existence of a proper EU strategy in SPS and TBT disputes? This might not necessarily be the case. The coherence of legal argumentations only points at the existence of a single objective, namely the defence of the EU regulatory autonomy. Against this background however, and coupled with it, the prove

of a strategy lies in the way in which the EU manages its role of defendant and the aftermath of such disputes.

In part II, the internal means that the Union has put forwards to defend its regulatory autonomy in the midst of WTO litigation have been pointed out. Such means amount first of all to the procedural circumstance whereby the Union advocates the right to set up a course of action also in cases where party to the dispute is not the UE as such but one of the member states. With regard to the aftermath to the disputes that have been taken into account and to the effects of relevant DSB decisions, the ECJ's case-law denying direct effect to the latter and excluding EU extra-contractual liability for breach of WTO law is not necessarily a way to escape abidance by WTO obligations. Instead, it can be read as a means for the Union to defend its prerogative to set its own standards in relation to the characteristics of traded products in the sanitary and technical domain.

Having had regard to the practice established so far, it can be concluded that a EU strategy towards SPS and TBT disputes does exist in so far as the objective to preserve the Union's regulatory autonomy is served by the above-mentioned internal means. The idea of the EU strategically planning its response to challenges brought about by other WTO members vis-à-vis its internal regulation certainly owes to the theory of the political question inasmuch as it represents yet another example of deference towards political objectives, to the ultimate detriment of legal obligations. In this light, further research efforts are to be foreseen with a view to either exhaustively enquire as to the role that the idea of a strategy thinking of SPS and TBT disputes could play within the theory of the political question as applicable to the EU external action and thus to the CCP, or to further elaborate the thesis presented herein in order to possibly acknowledge it the dignity of an autonomous theoretical contribution to the study of the relation between the legal order of the European Union and the international obligations which it is bound to.

This being so, it is moreover worth spending the very last section of this research work by looking at possible future developments of such strategy. An overhaul of a given course of action is needed when one of the following circumstances arises: first, the previous strategy becomes obsolete as result of a change in the background conditions; secondly, a reshuffle of the objectives that the strategy was designed to pursue occurs, so that a swift adjustment of the means becomes necessary; thirdly, means employed prove to be unsuitable to achieve the final aims or, more generally, the cost/benefit ratio of the strategy proves to be unbearable. Will the Lisbon reform lead to a revision of the EU strategy towards commercial disputes in the SPS and TBT domains by inducing a rethinking of the relation between objectives and means? What follows aims to verify whether at least one of the above three conditions which may prompt a strategy revision has been met following the recent changes undergone by the EU's trade policy and more generally by the Union external relations.

For the purpose of answering this question, one is forced to tackle the issue from a broader perspective. In fact, no specific mention of dispute settlement in the WTO can

be found in the reformed Treaty at all, just as it was the case in the previous Treaty regime. The lack of direct connections requires that the analysis focus, on the one hand, on the ways in which the Lisbon reform indirectly impacts on the Union's strategy in the settlement of commercial disputes and, on the other, on commercial disputes in general, not limited to the SPS and TBT domains. To this end, three issues must be taken into account: firstly, the broader framework of objectives that the Lisbon Treaty sets for the CCP²; secondly, the role of fundamental rights following the acknowledgment of binding force to the EU Charter of Fundamental Rights (CFR) and the Union's prospective accession to the European Convention of Human Rights and Fundamental Freedoms; thirdly, the subsidiary element of discussion represented by the possible creation of mechanisms for coordination between the CCP and other EU external policies. It is submitted that both the first and the second element might have a significant impact on the EU strategy in commercial disputes since, even if to different extents, they will both affect the context and the objectives of CCP policy-making, eventually influencing the cost/benefit ratio of adhering to the strategy devised so far. The need to coordinate trade and other external policies, which appears to be more pressing than before Lisbon, will equally play a crucial role in developing the EU's strategy towards commercial disputes.

2. The CCP in the broader framework of the Union's external action

The CCP is now placed under the overall heading "External Action" and its objectives, as laid down in art. 206 TFEU, artt. 205 TFEU and Art. 3(5) TEU and 21(2) TEU, particularly points (d) to (f) and (h), appear to be broader than in the past. Will this new set of CCP objectives place any real constraint on the considerably wide scope for manoeuvre so far enjoyed by the institutions in the conduct of the CCP, particularly insofar as compliance with WTO is concerned? For the purpose of this study the term 'objective' has been employed in relation to different contexts, which should however not induce any ambiguity as to the argument presented hereinafter. It is therefore appropriate to clarify that the term 'objective' points at both the aims that the Union's strategy towards commercial disputes is designed to pursue and the goals that the CCP as such is intended to achieve according to the relevant Treaty provisions. Whereas the Lisbon reform touches upon CCP goals, particularly by changing their nature, the same cannot be said with regard to the aims of the Union's strategy. The latter, which have been identified earlier as the protection of European key economic interests and of the Union's regulatory autonomy, remain in fact largely unmodified. It is interesting to note that the two sets of objectives, those of the EU strategy on the one hand and of the CCP on the other, do not necessarily point in the same direction and are not easy to organise

² On the necessity to make a distinction between the objectives of the CCP and those of the Union's strategy towards WTO disputes, see *infra*, para. 1..

in a consistent course of action, in that often the objectives of protecting economic interests and regulatory autonomy can only be pursued at the expenses of further liberalisation.

2.1 CCP principles and objectives under the Community Treaty

2.1.1 The uniformity principle

Aiming to protecting the uniformity of the common market by avoiding distortions in competition and risks of trade deflection that could arise if Member States pursued their individual external trade policies³, the principle of uniformity required the adoption of common rules throughout the EC in the field of the CCP⁴. Besides the need to accommodate internal market concerns also beyond Community frontiers, the ECJ considered that uniformity was necessary to preserve the unity of the EC's position with respect to third countries in order to enhance the Community's ability to defend common interests⁵.

The *a priori* exclusive nature of the Community competence in the field of trade arose as a result of the application of the principle of uniformity. However, uniformity comes to the fore only in areas of the internal market where full harmonisation has already been achieved, so that common external rules are necessary for the functioning of the market itself. The fact that the need for uniformity results from internal harmonisation is clearly apparent in areas such as trade in services and trade related aspects of intellectual property rights, where internal harmonisation existed to a limited extend. Uniformity not being an imperative, such trade areas fell within shared EC-Member States competence for the purpose of concluding the Marrakech agreement establishing the WTO.

The relation between internal harmonisation and the need to ensure uniformity of external trade policies did not entail that the CCP was meant to pursue externally the same objectives of the internal market, namely non-discrimination and elimination of all trade barriers. The Court clearly recognised the lack of a community obligation under EC law to grant non-Member States equal treatment in all respects. As a consequence, the Community was allowed to discriminate, firstly, between domestic and third country products, producers and service providers; secondly, between products coming from different third countries. Although the latter kind of discrimination was to be driven by the Community interest⁶, its application by the EC was nonetheless subject to

³ Opinion 1/78 [1979] ECR 2871, para. 45 ff. See also Joined Cases 37 and 38/73, *Social Fonds voor de Diamantarbeiders v. NV Indiamex et Association de fait De Belder* [1973] ECR 1609.

⁴ M Cremona 'The External Dimension of the Internal Market' in C Barbard and J Scott (eds), *The Law of the Single European Market* (Oxford: Hart Publishing 2002) 354.

⁵ A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review* 153, 154.

⁶ M Cremona, 'Neutrality or Discrimination? The WTO, the EU and External Trade' in G de Búrca J

the requirements enshrined in WTO and other international obligations applicable to the Community.

Therefore, the principle of uniformity had only instrumental value, since the uniformity of trade policies was only required for the sake of protecting internal harmonisation. Where this was not the case, uniformity was only an additional tool for Community institutions (see shared trade competences)⁷.

Finally, the instrumental nature of such a principle is also highlighted by its neutrality in terms of content⁸. Uniformity explains how the EC trade policy should be but not what it should include. It did not provide any substantial orientation to the CCP, thus leaving the Community institutions with a quasi-absolute discretion for shaping trade policy so as to best serve the Community interest.

2.1.2 The objective of liberalising trade and non-trade aims

Art. 131 TEC contained the only substantive objective to be ascribed to EC trade policy and, therefore, capable of affecting CCP policy making, namely the liberalization of world trade through the progressive abolition of restrictions to international commerce. Although substantial, such aim was also nothing more than aspirational in nature⁹. In fact, the Court stated the non-binding character of the liberalization objective, emphasizing that the provision at issue should be confined to establishing an objective rather than imposing an obligation¹⁰. In other words, the EC might adopt trade measures pursuing liberalisation but it was not compelled to do it: trade measures adversely affecting such objective were not to be deemed incompatible with art. 131 TEC.

That being so, the concept of the Community interest has long been pivotal in shaping the CCP. Whereas liberalization represented a guideline to Community institutions in charge of trade policy-making, they enjoyed considerable discretion in assessing whether a liberalising policy would be suitable to advance the Community interest. Should the Community interest not coincide with the prospected outcomes of liberalisation, the former would nonetheless take precedence over the latter. This allowed policy objectives other than liberalisation as such to influence the content of the CCP.

From an international point of view, while pursuing non-trade objectives, CCP-related actions occasionally resulted in restrictions of international trade, thus openly contradicting the aim of liberalisation and possibly giving rise to commercial disputes.

Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (Oxford-Portland: Hart Publishing 2001) 165 ff.

⁷ Cremona, 'The External Dimension', 374.

⁸ Dimopoulos, 'The Effects of the Lisbon Treaty', 156.

⁹ Dimopoulos, 'The Effects of the Lisbon Treaty', 156.

¹⁰ Case C-150/94 *United Kingdom v. Council (Chinese Toys)*, [1998] ECR I-7235, para. 67; Case C-112/80 *Dürbeck v. Hauptzollamt Frankfurt* [1982] ECR 1251, para. 10 ff; see also Case C-51/75 *EMI v. CBS United Kingdom Ltd* [1976] ECR-811.

Internally, the Treaty lacking a clear-cut definition of the content of the CCP, the circumstance whereby trade measures pursued objectives other than trade liberalisation gave rise to numerous disagreements regarding the scope of such a policy and the types of measures that could fall under the Community trade competence. As a matter of fact, when a more specific legal basis was lacking in the Treaty, the CCP has been used for the adoption of trade measures which pursued objectives other than regulation of trade flows and trade restrictions, which were linked for example to environmental protection and development cooperation.

When specific legal bases allowing the Community to undertake external actions in the above-mentioned fields were eventually inserted into the Treaty, legal battles concerning the choice of the most appropriate legal basis ensued. The Court reaffirmed in most instances the role of the CCP in the adoption of measures pursuing non-trade objectives, particularly in cases where Community measures had more than one purpose or a twofold component. As it is well known, the choice of the legal bases upon which to found a prospected policy measure profoundly affects the exercise of the relevant competence. Within this framework, the Court recognised the possibility to adopt trade measures pursuing other objectives without however clarifying the interaction between trade and non-trade objectives, their respective legal value and criteria for prioritisation. In this way, the Court avoided interfering with the substantive policy choices made by legislative and executive Community institutions.

2.2 CCP principles and objectives under the reformed EU Treaty

The Lisbon Treaty has modified the scope and nature of the CCP and has reformed the principles and objectives governing it. To start with, the Lisbon Treaty groups all EU external policies, including the CCP, under a common heading (arts. 3(5) and 21 TEU) containing principles and objectives of general application. Moreover, specific attention being paid to the CCP, the reform touches upon the nature and the role of the objective of liberalisation, as shown in art. 206 TFEU (ex art. 131 TEC).

Will such changes also affect the EU's strategy towards commercial disputes within the WTO? Various considerations can be advanced in this respect, particularly concerning a possible narrowing of the scope for manoeuvre enjoyed by EU institutions. The different nature of the objective of liberalisation and the broader framework of CCP goals will make EU positions regarding, first, the effect of DSB and AB reports and, second, the EU extra-contractual liability for breach of WTO law more difficult to bear.

2.2.1 *Uniformity principle*

The principle of uniformity remains of utmost importance for the nature and exercise of the EU competence in external trade and has undergone no substantial modifications. Art. 207 TFEU reiterates that ‘the CCP shall be based on uniform principles’.

Moreover, uniformity seems to continue having a mere instrumental interest for trade policy-makers. In fact, it has correctly been noted that the extension of the Union’s exclusive competence to all areas of the CCP, including trade in services, trade aspects of IP and FDI, somehow diminished the instrumental function of the principle of uniformity and its role as a link between internal harmonisation and the nature of the external competence¹¹. As a matter of fact, not all aspects of trade in services, trade aspects of IP and FDI have already been subject to harmonisation. Whereas in the past this would have led to the maintenance of a shared competence, the extension of the EU’s exclusive competence to cover such trade sectors softens the link between harmonisation in the internal market and the nature of the trade competence. It follows that the uniformity principle may be vested with more than a mere instrumental function.

However, such rethinking must be balanced by further considerations. Even though the EU becomes a single trade actor in the abovementioned fields, different national interests remain sheltered from undesired policy actions. When deciding on issues concerning trade in services, commercial aspects of intellectual property rights and FDI, the Council will continue acting according to the unanimity rule as long as unanimous actions are still required for the adoption of internal rules¹². Unanimous decision-making is also required for the adoption of trade measures pertaining to trade in cultural and audio-visual services, on the one hand, and trade in social, education and health services, on the other¹³. The lasting pivotal role played by Member States in these trade areas is probably not sufficient to bring the instrumental role of uniformity back into the spotlight, as in fact Member States can no longer adopt different approaches to trade with third countries in such areas¹⁴, but surely makes the assessment of the new degree of exclusivity of the EU’s trade competence more nuanced.

¹¹ Dimopoulos, ‘The Effects of the Lisbon Treaty’, 159.

¹² Art. 207(4) TFEU, second alinea.

¹³ Art. 207(4) TFEU, third alinea. Provisions contained in both the second and third alinea justify the need for unanimous action in the respective trade fields in the light of the imperative to defuse any risk of prejudicing Member States’ cultural and linguistic identities on the one hand, and national peculiarities with regard to the organisation of social, education and health services, which Member States are solely responsible to deliver, on the other.

¹⁴ Dimopoulos, ‘The Effects of the Lisbon Treaty’, 159.

2.2.2 *The reformed objective of liberalisation*

The Lisbon Treaty alters the role of liberalisation as an objective of the CCP. In terms of scope, art. 206 TFEU adds a reference to *foreign direct investments* (FDI) and to *other barriers* to trade in order to mirror the substantive expansion of the EU's exclusive trade competence.

The main change, however, stems from the new wording of the provision. Whereas prior to the Lisbon reform liberalisation enjoyed just an aspirational value on the ground that, according to art. 131 TEC, the Member States only *aimed to* contribute to such objective, art. 206 TFEU uses a more assertive language and states that the EU as such, not just its Members, *shall* now contribute to the liberalisation of international trade, namely to the harmonious development of world trade, the progressive abolition of restrictions to international trade and on FDI, and the lowering of customs and other barriers.

What used to be an option now seems to have turned into a proper legal obligation. In fact, the drafters of the Lisbon Treaty did not reiterate the qualification of liberalisation as a non-binding objective of the reformed Treaty, whose pursuance lies in the hands of the EU institutions and depends on their assessment of the Community interest¹⁵. On the contrary, they have opted to upgrade the objective of trade and FDI liberalisation to the rank of compulsory aims, as the true and main target of all CCP measures, to which other – both commercial and non-commercial – objectives must give way.

The mandatory nature of the objective of liberalisation becomes even more apparent if art. 206 TFEU is compared to other provisions having a similar wording and which the Court has already interpreted. In *Portugal v. Council*¹⁶, for example, the ECJ confirmed the compulsory nature of the objective of promoting democracy and the rule of law in the Community competence in the field of development cooperation (as enshrined in then art. 177(2) TEC). The binding character of the relevant provision was acknowledged based precisely on its wording¹⁷. Applying such reasoning to art. 206 TFEU, would make it difficult to deny the mandatory nature of the objective of liberalisation. Consequently, proven incompatibilities of EU trade measures with such an objective may compromise their very lawfulness and could result in them being declared void.

Nor does the commitment to a *gradual* liberalisation of international trade lessen the binding nature of the obligation contained in art. 206 TFEU. On the contrary, such a

¹⁵ M Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (2006) 30 *EUI Working Paper Law*, 29. See also Dimopoulos, 'The Effects of the Lisbon Treaty', 160.

¹⁶ Case C-268/96 *Portugal v. Council* [1996] ECR I-6177, para. 23.

¹⁷ The Court interpreted the expression "shall contribute" contained in art. 177(2) TEC as conferring binding force upon the objectives at issue, the result being that the Treaty would compel EU institutions and Member States to their attainment. See case C-268/96 above.

commitment may be interpreted as precluding any step back from the achieved level of liberalisation and as prohibiting the adoption of restrictive measures¹⁸, which would in practice disregard the mandatory objective of pursuing progresses, however gradual, in liberalisation.

It should be noted that EU institutions retain discretion as regards the determination of the timeframe and means for fostering liberalisation. However, the Lisbon Treaty narrows their margin of appreciation as it forbids the adoption of commercial measures that might hamper the aim of further reducing barriers to trade and, possibly, that negatively affect the existing levels of liberalisation.

2.2.3 The CCP under a common constitutional framework of EU external relations

Previously placed under different and autonomous headings of the Community Treaty,¹⁹ external policies are now found under a single framework of principles and objectives governing EU external action as a whole. Mainly consisting of arts. 3(5)²⁰ and 21 TEU²¹ and later reiterated in art. 205 TFEU,²² such a single framework encompasses a set of common rules which are intended to provide guidance in the exercise of EU external competences, irrespectively of their nature and of whether they have been conferred by the TEU or the TFEU.

¹⁸ Dimopoulos, 'The Effects of the Lisbon Treaty', 161.

¹⁹ Cremona has noticed that the current list of principles and objectives of EU external action incorporates principles and objectives that were found in specific policy fields under the TEC. See Cremona, 'A Constitutional Basis', 5.

²⁰ While providing an overall glimpse at the final aims of the European integration process, Art. 3 TEU acknowledges an autonomous role to some general external goals. Paragraph 5 thereof points at 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights [...] as well as [...] the strict observance and the development of international law' as the objectives that the Union is called upon to pursue while acting on the international scene.

²¹ Art. 21 TEU complements and further specifies Art. 3(5) TEU by indicating both the principles inspiring EU external action (para. 1) and the specific objectives it is intended to pursue (para. 2).

²² Art. 205 TFEU creates a functional linkage between the General Provisions on the Union's External Action contained in the TEU and the specific external competences laid down in the TFEU in that it prescribes that the Union's action on the international scene shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Art. 21 TEU. Moreover, it is to be noted that the drafters of the Treaty took care of establishing a one-to-one functional linkage between the relevant provisions of the two Treaties. The requirement that the development and implementation of the different areas of the Union's external action covered both by the CFSP, by Part Five of the TFEU and by the external aspects of its other policies respect the principles and pursue the objectives contained in the first two paragraphs of Art. 21 TEU can already be detected in the third paragraph of the same provisions. Finally, the reference to external aspects of the Union's internal policies extends the scope of Art. 21 TEU principles and objectives to yet another dimension of EU governance, not touched upon by the Treaty provisions on external action but certainly relevant for the definition of the overall EU international conduct. In particular, in the light of the practice whereby virtually all EU policies have acquired an external dimension, it could be inferred that Art. 21 has a significantly wider scope than expected. Decision and treaty-making practice - and possibly judicial control operated by the ECJ - will tell to which extent EU institutions and Member States will be willing to acknowledge such a scope.

The Union's trade policy is henceforth to be conducted according to the principles and objectives of the EU's external action. On the one hand, this raises the question as to whether there will be any increased tendency for the EU to use trade policy as an instrument for the achievement of other external policy objectives, such as the ones inherent to the CFSP, environmental or development policy.²³ On the other hand, one might wonder if such broader range of objectives, besides offering new opportunities to enhance the consistency of external relations, will also pose major legal constraints to trade policy-making as such.

Art. 3(5) TEU mentions free and fair trade as one of the basic objectives of the Union's international action. Therefore, the creation of a single constitutional framework for EU external relations affects the CCP given that the latter is not only bound by the principles and objectives expressed in trade-related provisions of the Treaty but also by the general ones applicable to the Union's external actions, as enshrined in art. 21 TEU. In other words, the new normative setting indirectly imposes a general need to coordinate the CCP with other external policies, whilst at the same time formally allowing the pursuit of non-trade objectives through the adoption of CCP measures²⁴. The new framework determines what can and what cannot be painted on the canvas, by imposing additional constraints to the exercise of the EU trade competence, while at the same time affording previously unexpressed opportunities for the employment of CCP measures. The legal logic enshrined in such provisions is hardly questionable, particularly if looked at from the point of view of consistency advocates.

Whereas art. 3(5) TEU gives a glimpse of the principles governing the Union's external action, art. 21 TEU contains a detailed list of principles and objectives that are relevant for the exercise of the Union's external competences, including the CCP.

The Treaty emphasizes the application of those general principles in the field of the CCP more than once. The connection between art. 21 TEU and the CCP is reaffirmed in the TFEU, particularly in arts. 205 and 207, with the former providing a functional link between art. 21 TEU and the external policies under the TFEU and the latter explicitly incorporating the general principles and objectives of art. 21 into the CCP²⁵.

In other words, under the Lisbon Treaty, objectives and means previously applicable to more distinct external competences become of general and interchangeable application. Specifically referring to trade concerns, they are to be extended to all areas of EU external action, so that trade objectives are to be duly taken into account when drafting both CCP and non-CCP measures. Similarly, CCP measures are to be designed with a view to serve, or at least not to hamper, both trade and non-trade objectives.

²³ S Woolcock, *The Treaty of Lisbon and the European Union as an actor in international trade*, ECIPE Working Paper No. 01/2010, at 13. For an assessment of the recent practice of concluding bilateral Free Trade Agreements (FTAs), concluding that this focus on trade liberalization leaves other objectives on the sidelines, see the contribution by Boris Rigod in this volume.

²⁴ Dimopoulos, 'The Effects of the Lisbon Treaty', 161.

²⁵ The last sentence of Art. 207(1) TFEU provides that 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

Arts. 3(5) and 21 TEU emphasise that general trade objectives such as liberalisation of international commerce, which art. 206 TFEU defines as being the only CCP aim, are not to be served only by the Union's commercial policy but must be taken into account also when other competences are exercised. In other words, also non-trade policies are to contribute to the achievement of trade-related objectives.

In art. 3(5) TEU, free trade is identified as a general objective of the EU external action alongside with fair trade. Social concerns therefore become part of European trade policy, and apply in parallel to the more obvious economic ones.

This is confirmed by a close reading of Art. 21(2)(e) TEU, which explicitly recognises the progressive abolition of restrictions to trade as an objective of EU external action, but also puts the aim of commercial liberalisation in perspective, making it instrumental to the promotion of international economic development. The constitutional relevance of liberalisation comes to the fore insofar as such a goal is designed to be the basic tool for the achievement of the broader objective of integrating third countries into the world economy.

As mentioned earlier, EU external action principles and objectives incorporate values and goals that were previously ascribed to specific Community policies. Following the Lisbon reform, these principles and objectives not only apply to their specific policy field of origin but also to all other fields of the Union's external action, including the CCP. Therefore, both trade and non-trade related aims guide the exercise of the Union's trade-related powers. Although the use of CCP measures in order to achieve non-trade objectives was practiced by EU institutions and recognised by the ECJ prior to the Lisbon Treaty²⁶, art. 21 TEU represents nonetheless an important legal innovation as it provides the legal foundations for the non-commercial use of CCP measures.

More specifically, the operative value of this provision lies in the clarification it provides that the orientation of the CCP will now also depend on non-trade principles and objectives, such as the promotion of democracy, rule of law, respect of human rights, the Union's security and the preservation of international peace and security. Art. 21 TEU thus legitimises the practice of inserting conditionality clauses in trade agreements and granting trade preferences to virtuous third countries which show deference to such values.²⁷ Besides the objectives mentioned above, art. 21 TEU also recalls the preservation and improvement of the quality of the environment and the sustainable management of natural resources. This reference enhances the role of environmental goals as non-trade objectives, with which trade measures are nonetheless required to comply. Moreover, the Union's contribution to the achievement of

²⁶ See L Bartels, 'The Trade and Development Policy of the European Union' in M Cremona (ed), *New Developments in the EU's External Relations Law*, (Oxford: Oxford University Press 2008), 128-171; J Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in P Koutrakos and M Evans (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing 2011), 13-46.

²⁷ On the practice see L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005).

sustainable economic, social and environmental development of third countries is also meant to occur, *inter alia*, via EU trade policy. Finally, the CCP must be conceived and implemented so as to favour the advancement of multilateralism and good governance. The Union shall therefore be committed to multilateral trade negotiations and shall actively play a role in organisations such as the WTO, also by promoting the enhancement of their effectiveness. In this respect, the Union will need to abide by international commercial rules and to avoid unfair trade practices.

2.2.4 *Legal consequences*

The teleological scope of the EU's trade policy has undergone a twofold reform. On the one hand, the specific goal of liberalisation has gained strength by shedding its aspirational nature and acquiring the character of a legal obligation. On the other hand, the Lisbon Treaty has placed the CCP eventually under the single heading on EU external action, thus including non-commercial concerns in the range of purposes and principles that the Union's trade policy is to serve. The reformed Treaty affects the Union's management of commercial disputes by narrowing the array of CCP policy-options at the disposal of EU political institutions. As a result, a strategy based on the adoption of measures which does not comply with the new CCP constraints becomes internally unbearable, because unconstitutional, in the first place.

Whereas it is apparent that the objective of liberalisation will herein act as a proper constraint on the formulation of the CCP content, the assessment of the legal implications of the reshuffle and 'generalisation' of external action principles and objectives is not so straightforward.

There is indeed no doubt that the strong language used in arts. 3 and 21 TEU suggests that the values and goals therein contained oblige the Union to implement its external action within the framework they create. Moreover art. 206 TFEU, if read in conjunction with art. 205, which in turn refers to the afore-mentioned general provisions, also confirms that the CCP should not only serve the specific objective of liberalisation but should also aim to achieve the general objectives of the EU external action, i.e. political, social and economic development, environmental protection and the promotion of multilateralism. Undoubtedly these are all justiciable obligations which measures adopted by the EU must comply with, on pain of incurring in annulment procedures should they fail to do so.

However, it has been noted that the mandatory nature of the provisions contained in arts. 3 and 21 TEU, and therefore of the obligations deriving therefrom, is somehow softened by their broad formulation²⁸. Both articles leave a great deal of discretion to policy-making institutions, which therefore still enjoy a considerable leeway in

²⁸ Dimopoulos, 'The Effects of the Lisbon Treaty', 165. See also Cremona, 'A Constitutional Basis', 5-6.

choosing the appropriate course of action, both in terms of means and content, to pursue the prescribed objectives.

Moreover, consistency problems may arise from interactions between the trade and non-trade objectives which the reformed CCP is bound by. The reason lies in the absence of a prioritisation rule which could be applied whenever different objectives point in opposite directions as regards the content of a trade measure. As mentioned, the aim of liberalisation as redefined in the Lisbon Treaty contains a no-step-back obligation regarding the abolishment of commercial and non-commercial barriers to trade. Therefore, conflicts between trade and non-trade objectives could arise should the latter be pursued by means of restrictive measures. Such a scenario is perfectly conceivable. For instance, restrictive measures could be used on the ground that they serve the objective of fair trade – i.e. equitable trade as opposed to lawful trade – contained in art. 3(5) TEU. The promotion of equitable trade conditions could be used to justify the adoption of protectionist measures. Whereas this would not be compatible with the prohibition of adoption of new restrictions resulting from the liberalisation objective, it is arguable that the pursuance of other and more general objectives makes trade restrictions a viable policy option. The contrary would entail that the acknowledgement of the EU external action general objectives be *de facto* disregarded to the extent that the pursuance of them would be severely limited when it comes to commerce²⁹.

Of course, the limit of such use of trade restrictions lies in the demonstration, on the basis of elements amenable to justice, of the functional connection between the restrictive trade measure and the general objective that it is intended to pursue. In this respect, the requirements of a two-tier test must be fulfilled in order for a protectionist measure to be justified and declared lawful: it must not only pursue a general – and forcibly legitimate – objective but also be proportional to the achievement of the declared aim³⁰. In the case of equitable trade, the EU can adopt protectionist measures insofar as the link with the goal of promoting socio-economic development is sufficiently proven and the proportionality test is satisfied.

3. Commercial disputes and fundamental rights: a real constraint?

In the *FIAMM* judgment³¹, the ECJ suggested the possible contrast between non-compliance with WTO obligations and the respect of fundamental rights related to private business. With a fully binding Charter of Fundamental Rights in force, the

²⁹ Dimopoulos, ‘The Effects of the Lisbon Treaty’, 167.

³⁰ Dimopoulos, ‘The Effects of the Lisbon Treaty’, 167.

³¹ Joined cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council of the European Union and Commission of the European Communities*, (2008) ECR I-06513.

respect of rights such as the freedom to conduct a business (art. 16 CFR) and the right to property (art. 17 CFR) bind EU institutions in the conduct of the CCP, including the shaping of the EU's strategic approach to commercial disputes. How and to what extent will this affect the EU's approach to inter alia direct effect of DSB and AB reports and to EU liability for breach of WTO obligations?

In the *FIAMM* case the Court was confronted with the need to balance the scope for manoeuvre of the EC institutions in the settlement of commercial disputes within the WTO with the protection of fundamental rights, such as the right to property and the right to pursue a trade or profession, as general principles of law applicable within the EU legal order. Having been victims of the retaliation enacted by the United States following EC non-compliance with the WTO DSB adverse ruling in the *Hormones* case, FIAMM and others asked the Court to declare the EC liable for the losses they had incurred and demanded compensations thereof on the ground of, *inter alia*, an alleged breach of certain general principles of EC law. In the 2008 judgment issued on a request for the cross-appeal, the Court affirmed that a Community measure whose application leads to restrictions that impair the substance of the right to property and the freedom to pursue a trade or profession in a disproportionate and intolerable manner, could give rise to non-contractual liability on the part of the Community³². The ruling of the Court in this case is on the fact that no provision has been made for compensation to avoid or remedy the aforementioned impairment. In other words, a right to compensation might arise if the omission of the Community to balance the loss incurred by individuals as a consequence of the EC's continued WTO infringement was in breach of general principles, including property-related rights³³.

The Court recalled its previous case-law whereby property-related rights do not constitute absolute entitlements, but must be viewed in relation to their social function³⁴. It thus held that the exercise of the right to property and to pursue a trade or profession freely may be restricted on condition that those restrictions correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they do not constitute a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed³⁵. Called upon to assess FIAMM's request, the Court would have needed to address the questions as to whether the temporary acceptance of retaliation was in the general interest and whether the resulting restriction of trade for retaliation victims constituted a proportionate and tolerable interference.

³² *FIAMM* (C-120/06 P and C-121/06 P), para. 184.

³³ A Thies, 'The impact of general principles of EC law on its liability regime towards retaliation victims after *FIAMM*' (2009) 34 *European Law Review* 889, 899.

³⁴ Case 4-73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, pt. 2 and 3 of the summary; Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 17-20; Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, pt. 3 of the summary.

³⁵ *FIAMM* (C-120/06 P and C-121/06 P), para. 183 and, *inter alia*, Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, para. 15; Case C-295/03 *P Alessandrini and Others v Commission*, [2005] ECR I-5673, para. 86

Earlier in its judgment, the Court did recognise the potential right to compensation where no provision has been made for compensation to avoid or remedy the impairment of the very substance of those rights in a disproportionate and intolerable manner. However, it concluded that Community law as it stood did not provide for a regime enabling the liability of the Community for its legislative conduct to found an action in a situation where, account being taken of the denial of direct effect to WTO rules within the EU legal order, any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts³⁶. Besides the analysis of the existence and applicability of the liability regime³⁷, the Court based its founding on settled case-law whereby an economic operator cannot claim a right to property in a market share which he may have held at any given time, since such a market share constitutes only a momentary economic position which is exposed to the risks of changing circumstances³⁸. Moreover, the guarantees accorded by property-related rights cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity³⁹. The Court stated that an economic operator whose business mainly consists in exporting goods to the markets of non-Member States must be aware that the commercial position which he has at a given time may be affected and altered by various circumstances, including the possibility that one of the EU's trading partners may adopt measures suspending concessions within the framework of the WTO as a result of EU non-compliance with WTO decisions and may for this purpose select in its discretion the goods to be subject to those retaliatory measures, as provided for in arts. 22(3)(a) and (f) of the DSU⁴⁰.

Some time after the much debated *FIAMM* judgment, the European Charter of Fundamental Rights entered into force, thus allowing for a possible change in the Court's attitude *vis-à-vis* the possibility to rely on fundamental rights when challenging the Union's conduct in the context of international trade disputes and when demanding compensation in case of losses resulting therefrom.

Art. 6(1) of the reformed Treaty confers upon the CFR the same legal value as the founding Treaties. With the entry into force of the Lisbon Treaty, the rights codified in the Charter therefore acquire constitutional value within the European legal order. Even though the Court of Justice had consistently stated that fundamental rights form an integral part of the general principles of Community law whose observance the Court must ensure already before the entry into force of a binding Charter⁴¹, the provision above entails the obligation for European institutions to respect the rights, freedoms and prohibitions contained therein. A breach of such obligations will in turn result in the

³⁶ *FIAMM* (C-120/06 P and C-121/06 P), para. 188.

³⁷ *FIAMM* (C-120/06 P and C-121/06 P), para. 162-176.

³⁸ *FIAMM* (C-120/06 P and C-121/06 P), para. 185.

³⁹ *FIAMM* (C-120/06 P and C-121/06 P), para.185; see also *Nold* (case 4/73), para. 14.

⁴⁰ *FIAMM* (C-120/06 P and C-121/06 P), para. 186.

⁴¹ *FIAMM* (C-120/06 P and C-121/06 P), para. 182.

annulment of the relevant acts by the Court⁴². Therefore, the Charter acts as a parameter of legality also in relation to measures adopted under the CCP⁴³.

Art. 17 CFR recognises the right for everyone to own, use, dispose of and bequeath his or her lawfully acquired possessions. Deprivations of possessions are prohibited, except if operated in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. This article is based on art. 1 of the First Protocol to the European Convention on Human Rights. Notwithstanding the slightly updated wording, in accordance with art. 52(3) CFR, the meaning and scope of the right are the same as those guaranteed by the ECHR and the limitations may not exceed those provided for therein. Moreover, this is a fundamental right common to all Member States' constitutions which has been recognised on numerous occasions and which is part of settled ECJ case-law having its origins in the *Hauer* judgment⁴⁴.

Whereas art. 17 CFR specifically protects the right to peaceful enjoyment of one's possessions, it nonetheless affords Member States – and EU institutions - considerable scope to interfere with individual property rights, as resulting from the aforementioned conditions for a lawful State-operated deprivation of a person's possession. Moreover, States are responsible only for interferences affecting the economic value of property⁴⁵.

A 'fair balance test' will be applied in order to determine whether a fair balance has been struck between the demands stemming from the general interest of the Community and the need to protect individual's fundamental rights⁴⁶. The level of justification required will depend on the extent of the interference on the individual's enjoyment of the right in each case. The precise weight to be given to the different interests will, in most cases, involve a wide range of policy considerations and, indeed, matters of political judgment. Accordingly, courts are likely to afford States and institutions a wide margin of appreciation⁴⁷ when determining whether the Community interest outweighs individual interests in any particular case involving the right to property.

As it should be recalled, the State is required to demonstrate that the deprivation of property under art. 17 CFR is in the public interest. In particular, the State must identify the interest in question, how the deprivation is rationally connected to it, and show that the interference is proportionate. However, it seems difficult to conceive circumstances in which the Court would dispute the purpose alleged by the government or contest its

⁴² LS Rossi, 'Il Rapporto tra Trattato di Lisbona e Carta dei Diritti Fondamentali dell'UE' in G Bronzin, F Guarriello, V Piccon (eds), *Le Scommesse dell'Europa. Istituzioni, diritti, politiche* (Rome: Ediesse 2009).

⁴³ V Bonavita, 'The EU Charter of Fundamental Rights and the social dimension of international trade' in G Di Federico (ed), *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument* (Berlin: Springer 2011).

⁴⁴ *Hauer* (case 44/79), para. 17-20.

⁴⁵ *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52, (1983) 5 EHRR 35.

⁴⁶ *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52 (1983) 5 EHRR 35; *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECHR Series A no. 301-B, (1994) 19 EHRR 293.

⁴⁷ *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52 (1983) 5 EHRR 35; *James and Others v. United Kingdom*, Series A no. 98, (1986) 8 EHRR 123; *Edoardo Palumbo v. Italy* (2000) ECHR 640.

assertion that a measure pursued a public interest. Moreover, the requirement that conditions provided by law must be respected means that the State must have a basis in national law for its act of deprivation and that the law concerned must be both accessible and sufficiently certain. In particular, the law should contain sufficient safeguards against arbitrariness. Finally, art. 17 CFR clearly states that individuals are entitled to fair compensation in good time for their loss, except when the deprivation is in the public interest and in the cases and under the conditions provided for by law. The payment of compensation will be a highly relevant factor determining whether a ‘fair balance’ has been struck between the community at large⁴⁸ and the rights of the individual in question⁴⁹.

Art. 16 CFR acknowledges the freedom to conduct a business in accordance with Community law and national laws and practices. This provision is based *inter alia* on the ECJ case-law recognizing the freedom to exercise an economic or commercial activity⁵⁰. In line with such case-law, the enjoyment of such right is subject to the limitations provided for in art. 52(1) of the Charter. In particular, the freedom to run a business includes protection for one of the essential principles of free-market economics, which is the freedom of competition. This requirement means that the activities of the EU should include a system ensuring that competition in the internal market is not distorted. On this basis, art. 16 CFR protects the right of each person within the EU to start-up or continue a business without being subject to either discrimination or unnecessary restriction.

Besides the restrictions to the above rights provided by the Charter itself, the impact of such provisions on the *FIAMM* case-law is to also be considered in the light of their very nature and origin. The issue is whether acknowledging a legally binding value for the Charter makes a substantial difference. CFR rights are mainly a codification of obligations previously recognised by the ECJ as being part of the EU legal order and/or derived from the ECHR. From the start, the Charter has been conceived as a catalogue that formally recognises rights *de facto* already in force through different sources of the Union’s legal order, such as international law, the constitutional traditions common to all Member States, the European Convention on Human Rights, Community and Union acts and judgements of the Court of Justice, rather than an instrument codifying new rights and prohibitions⁵¹. Therefore, it is debatable whether the Charter will be a real watershed⁵² *vis-à-vis* the ECJ’s approach to the relation between the protection of

⁴⁸ *Holy Monasteries v. Greece*, ECHR Series A no. 301 (1994) 20 EHRR 1; *Stran Greek Refineries and Stratis Andreadis v. Greece*, Series A no. 301-B (1995) 19 EHRR 293; Joined cases C-20 and 64/00, *Booker Aquacultur Ltd. and Hydro Seafood GSP Ltd. v The Scottish Ministers*, [2003] ECR Page I-7411.

⁴⁹ *Jahn and Others v. Germany*, ECHR, 22 January 2004.

⁵⁰ *Nold* (case 4/73), para. 14; Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l’Industria degli Zuccheri v. Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECR 2749, para. 20 and 31.

⁵¹ Rossi, ‘Il Rapporto’. See also P Craig, ‘Rights, Legality, and Legitimacy’ in P Craig (ed.), *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010).

⁵² Bonavita, ‘The EU Charter’.

fundamental property rights and the Union's scope for manoeuvre in the management of commercial disputes.

Although it adds further pieces to the puzzle of fundamental rights protection within the EU, the Union's prospected accession to the ECHR does not clarify the issues in so far as the protection of property-related rights under the Convention suffers from the same constraints highlighted in relation to the CFR given that, as mentioned above, the latter is inspired to the former.

4. The impact of the External Relations institutional reform on the strategic management of commercial disputes and the need for coordination

The extent to which the Lisbon reform will affect the management of the CCP and of trade disputes will also depend on what use the institutions and institutional figures directly – or indirectly – involved will make of the new opportunities afforded by the Treaty itself. Are organisational arrangements in the management of the CCP and trade disputes foreseen in order to better accommodate the institutional reform that EU external relations has undergone? Is there a need to establish a mechanism of coordination with the HRVP and the EEAS?

On the one hand, from the point of view of specific trade-related provisions, art. 207 TFEU confirms the consolidated practice whereby, in relation to trade, the core of EU policy-making has been the relation between the Commission and Member States, sitting either in the Council or in its 'Article 133 Committee', now renamed as 'Trade Policy Committee'⁵³. The latter institution remains formally charged with the legislative responsibility in the field of trade. However, one of the main novelties put forth by the recent reform consists in the fact that the Council is now joined by the Parliament, which, as co-legislator in the ordinary legislative procedure, for the first time enjoys equal decision-making powers in trade-related matters.

On the other hand, and more in general, the inclusion of trade policy under the common heading of EU external action and the applicability to the CCP of the general objectives and principles contained therein, raises questions as to the role that other institutions and bodies may play in relation to trade matters.

First and foremost, there is room for a possible involvement of the High Representative/Vice-President in his/her dual role of head of European diplomacy (High Representative for the CFSP), assisted by the European External Action Service, and coordinator of European external policies (Commission Vice-President in charge of the extended "relex" portfolio).

Moreover, given the acknowledged instrumental value of commercial measures for the attainment of non-trade objectives, a role in the management of the CCP, however

⁵³ S Woolcock, 'EU Trade and Investment Policymaking After the Lisbon Treaty' (2010) 1 *Intereconomics* 22, 24.

non-pivotal, can be envisaged also for the EEAS. The need for the EU to be represented either in multilateral *fora* or in bilateral negotiations *inter alia* for the sake of dispute settlement may result in coordination issues arising.

Finally, looking at the judicial aspect of EU governance, it is submitted that both the Union's renewed commitment to fundamental rights and the broader orientation of the CCP towards general objectives create new parameters for the ECJ to apply when reviewing the legality of trade measures.

4.1 *The HR/VP, the EEAS and the need for coordination*

The HRVP is in a position to influence the conduct of the CCP by virtue of his/her institutional ubiquity. The dual function of Vice President of the Commission charged of external affairs and of the institutional figure responsible for the conduct of the CFSP enables the HRVP to influence policy making in trade-related matters both by participating in the work of the Commission and by taking autonomous actions.

It has been maintained that Art. 18(4) TEU prioritises between the two roles of the HRVP so that, in case of conflict of interests, his/her role as head of the Union's diplomacy and director of the CFSP must prevail. The question could therefore be raised as to whether this may cause the CCP to be more CFSP-oriented because of the HRVP's influence. In this respect, a reasonable position is that the High Representative should not be expected to affect the focus of the CCP more than is necessary for the sake of ensuring coherence with the CFSP⁵⁴. Avoiding inconsistencies between different external policies and turf battles amongst different services in charge of external relations is precisely the aim of endowing the HRVP with a 'double hat'. The possibility of autonomous action foreseen by arts. 215(1) and 218(9) TFEU does not affect this evaluation. Arguably, he/she will therefore not interfere with the tasks of the remaining 'relex' Commissioners, such as for instance the Trade Commissioner, who keep their posts and their prerogatives over the competence portfolio they are entrusted with.

As regards the role the HRVP will need to play in striking the balance between trade and non-trade objectives, much will depend on how the relationship develops between the HRVP, the EEAS, the Commission and the Council. One indicator of how things might develop is where Commission staff dealing with trade issues will sit. As it is known, this is not going to be in the EEAS, which will thus not have autonomous know-how in trade matters. DG Trade will stay where it has been for decades, therefore retaining – arguably with limited intention to share⁵⁵ – the institutional memory and the technical expertise that is central to trade policy⁵⁶.

⁵⁴ Dimopoulos, 'The Effects of the Lisbon Treaty', 168.

⁵⁵ Such reluctance acquires particular relevance if looked at in the light of the concept of 'institutional jealousy', which is extensively employed in institutional regimes-related literature, including in studies regarding intra and inter-institutional relations at the EU level. See for instance, A Vitorino, 'Steering the [204](#)

The conclusion that could be drawn is that the High Representative and the Council will continue to make key-political decisions, concerning for instance trade negotiations (who? where? when? with whom?), but DG Trade is likely to continue to develop the content of trade policy measures for the foreseeable future⁵⁷. However, such a conclusion is nuanced by the fact that, following the Lisbon Treaty, trade is not just about trade. Before the reform the equation applied by Community trade policy-makers was the following: depending on the community interest, reduction of trade barriers equals achievement of liberalisation objectives, which is to say that liberalisation is affordable to the extent that it does not conflict with Community interests. The relation between the content of a trade measures and its objectives is now much more complex. For the sake of ensuring the legality of trade measures, DG Trade is now obliged to stick to the objective of liberalisation without declining it according to the Community interest and to consider other variables, i.e. the other general objectives of EU external action. In order to fulfil these uneasy tasks, institutional memory and technical expertise may not be sufficient. However time-consuming, coordination efforts with other Commission services, the HRVP and the EEAS might become a crucial instrument.

It has been argued that the exclusion of DG Trade from the EEAS is a result of the exclusive nature of EU competence in this policy-area⁵⁸. It is to be noted that under the current legal framework – or better, legal network – of EU external policies, exclusivity is not in itself a gateway to consistency. Moreover, consistency is not an end in itself. Consistency as absence of contradictions between trade measures and non-trade objectives becomes crucial under the reformed Treaty because the very legality of trade measures is at stake. Legality in this respect can be achieved only through a trade policy-making exercise that takes a variety of objectives into account by means of coordination mechanisms.

Once again the challenge of coordination is of utmost importance, even more so insofar as trade disputes are concerned. Employed in the past as powerful instruments of foreign policy *lato sensu*, trade disputes involving the EC have represented battles of standards and interests, particularly when the EC was summoned as defendant before the DSB. The question today is who will dispose of the power to use such a powerful instrument? Who will decide what purposes the EU strategy in commercial disputes is to serve? Who will be determine such strategy?

So far, the Commission has been the unchallenged authority in this filed. In particular, the legal service of DG Trade has to date been entrusted with WTO dispute settlement and the TBR. They possess the technical expertise to assess interests and set positions in the midst of a controversy. They retain historic memory of past and ongoing WTO disputes involving the EC and now the EU. It should therefore be

right course through unchartered waters' in *The next Commission: doing more and better* (2009) 19 EPC - Challenge Europe 10, 10.

⁵⁶ Woolcock, 'EU Trade', 25.

⁵⁷ Woolcock, 'EU Trade', 25.

⁵⁸ S Duke, 'The Lisbon Treaty and External Relations' (2008) 1 *Eipascope* 13, 16.

concluded that they represent the more qualified institutional subject and, arguably, they will retain their monopoly over dispute settlement management.

Whereas it appears to be the most reassuring option, two problems may arise in relation to path-dependency in the management of commercial disputes. First of all, trade disputes would remain a field of self-referential policy-making, where priorities are autonomously set by Commission. DG Trade may fail to take into account what are the current non-commercial objectives that trade measures, including those relating to the settlement of disputes, must pursue. The need for coordination comes to the fore once again.

One may argue that the problem of ensuring coordination and consistency is not really new, particularly when it comes to EU external relations. Such a need has always been perceived at the policy level. The difference between the present and the past, namely between the pre- and post-Lisbon era, lies precisely in the governance sphere to which such coordination needs can be ascribed. During the pre-Lisbon era, coordination and consistency were desirable for the sake of policy effectiveness. The reformed Treaty adds a further dimension by indirectly making them crucial for the legality of policy measures. Should a trade measure, for instance the decision to suffer retaliation or to pay compensations as result of an adverse DSB report, be at odds with other “relex” objectives, such as environmental protection or development cooperation, it can be now formally sanctioned by the ECJ.

Secondly, as discussed below, a further potential inconvenience of path-dependency may derive from the reinvigorated role of the European Parliament in trade policy.

4.2 *The European Parliament*

The role of the European Parliament in trade policy is formally enhanced by the Lisbon reform. Firstly, art. 207 TFEU confers upon the EP and the Council the power to adopt the measures defining the framework for implementing the CCP, in accordance with the ordinary legislative procedure. The EP now shares co-decision powers with the Council to adopt measures relating to anti-dumping, safeguards, the Trade Barriers Regulation and the EU’s GSP scheme. Secondly, the EP is granted a greater – however not crucial – say in trade negotiations. Although the EP is not given powers to be directly involved in negotiations or to authorize them, the Commission is now obliged (art. 207(3) TFEU) to regularly report to the specialised EP International Trade Committee and to provide it with information concerning the conduct of negotiations. Finally, the EP will have an enhanced role in ratifying trade agreements through its power to consent to their adoption. Art. 218(6)(a) TFEU lists the cases in which the consent of the EP is a mandatory requirement for the conclusion of an agreement by the Council. Since such cases include *inter alia* the conclusion of agreements covering fields to which the OLP applies, the EP is granted the power to consent to practically all trade agreements by virtue of the extension of the ordinary legislative procedure to trade matters.

In view of the above, questions arise concerning possible EP attempts to be involved in the management of trade disputes, particularly since trade disputes may relate to issues that are sensitive to public opinion. Consumer health and environmental protection, for example, are of particularly important for democratically elected institutions such as the EP, whose members inevitably tend to work for their own re-election throughout their mandate.

Moreover, the enhanced role of the Parliament *via* the application of the OLP for the revision of trade measures might add new means to the EU strategy in commercial disputes. As in most two-level games⁵⁹, the EP veto can be used as a bargaining tool during the diplomatic phase of WTO dispute settlement procedures or during the negotiation of *extra-legem* agreements with complainant WTO members. The subtle threat of an uncooperative Parliament, that retains a power of veto over ongoing negotiations, could be used by EU negotiators as a device to obtain a softening of the counterparts' requests.

4.3 *The Court of Justice*

The broader perspective in which the CCP is placed under the reformed Treaty might also affect the jurisdiction of the Court of Justice. Indeed, the latter could now be called upon to apply additional new parameters when reviewing the legality of trade and non-trade measures, in what could be defined as 'cross-policy' judicial control. Different scenarios can result in such a judicial control. On the one hand, the content of a trade measure could be such as to hamper the achievement of further liberalisation of the world market, which is a stated objective of the CCP. This is likely to result in the annulment of the measure by the Court. Moreover, still concerning trade measures, legality review can now be conducted also in the light of general external objectives such as the promotion of political and social development, the enhancement for multilateralism and so on. On the other hand, non-trade measures might in turn negatively affect trade objectives, namely liberalisation.

As it has been shown earlier⁶⁰, the incompatibility between trade and non-trade concerns enshrined in the last two scenarios is a perfectly conceivable ground for a legality challenge. Particularly relevant for the evolution of dispute management by the EU is the case of alleged inconsistencies of a CCP measure with objectives of the Union's external action other than those inherently related to the commercial policy – i.e. liberalisation. In this case, the Court would plausibly adopt a three-step approach⁶¹. It would establish the alleged *incompatibility* in the first place. The Court would then clarify whether a legitimate *justification* to such incompatibility exists. In other words,

⁵⁹ For a comprehensive theory of multilevel games, see R Putnam, 'Diplomacy and Domestic Politics: The logic of Two-Level Games' (1988) 42 *International Organization* 427.

⁶⁰ See above paragraph I.4.

⁶¹ It mirrors the two-fold reasoning mentioned in para. I.4 regarding the case of a non-trade measure negatively affecting liberalisation.

the existence of a *necessary* functional relation between, on the one hand, the challenged measure's content, which had been previously established as detrimental to some other external action objective and, on the other, the pursuance of a declared objective of the challenged measure itself must be proven. The Court would eventually apply a *proportionality* test in order to ascertain whether or not the content of the measure does exceed what is necessary for the pursuance of its declared objective. Should this be the case, the measure would result disproportionate with respect to its aim, however justified, which would lead the Court to declare the measure void.

The question remains as to whether the Court has got the technical expertise to assess the adverse impact of trade actions on other 'relex' objectives, account being taken of the technical nature of such measures, whose non-commercial side effects are not always easy to detect.

A further limit might arise in relation to those subjects, both institutional and not, who might at once be legally capable of and politically interested in challenging a trade measure on the ground of its incompatibility with other external action objectives. As regard the institutions' position as privileged applicants in actions for annulment, the issue is whether they retain a political interest in challenging a trade measure, be it an agreement concluded under art. 207(3) TFEU or a piece of CCP-implementing secondary legislation adopted under art. 207(2) TFEU, whose coming into being they have contributed to in the first place. Having regard to this aspect, the major change with respect to the TEC regime can be found in the different relative positions of the institutions involved in trade-related decision-making. Both applicable to the conclusion of trade agreements and to the adoption of implementing legislation, the ordinary legislative procedure put the EP on an equal footing with the Council, which makes the two institutions equally responsible for the content of the act and therefore unlikely inclined to challenge it before the ECJ. As for the Commission, its position is more nuanced in that, although it holds a right to initiate the procedure, it does not share legislative responsibility with regard to the content of the eventually adopted measure⁶². The same can be stated with regard to the Member States. The fact that each of them

⁶² From the legal point of view, this consideration holds true even in the light of the Commission's right to modify the legislative proposal at any stage of the procedure and in the light of its role as negotiator on behalf of the Council. On the one hand, the Commission's right to modify the proposal is said to confer to the institution a significant bargaining power during the procedure, particularly *vis-à-vis* the Council; see R Adam and A Tizzano, *Lineamenti di Diritto dell'Unione Europea* (Torino: Giappichelli 2010) 177. The existence of such power of modification of the proposal might actually induce the Commission to make use of it for the purpose of obtaining the desired content of the measure before the end of the legislative procedure, instead of resorting to the ECJ afterwards. However plausible, this scenario does not in fact hamper the capacity of the Commission to challenge the legality of the measure after its adoption. On the other hand, the same can be said with regard to the role of negotiator of trade agreements enjoyed by the Commission. As foreseen in Art. 207(3) TFEU, second and third alinea, such role is played on behalf of the Council, within the framework of the directives issued by the latter and under the strict control of its specialised committee (formerly known as 'Article 133 Committee'). Therefore the Commission's discretion is not unlimited and the Council is ultimately responsible for the conclusion of the agreement. This leaves some room for disagreement with the Commission as regards the content of the agreement itself.

sits in the Council does not prevent possible disagreements to arise with respect to the adopted measures to the extent that the rule of qualified majority voting is applicable, with the result that dissenting opinions within the Council might be disregarded. Finally, having regard to non-privileged applicants, judicial actions are obviously the sole possibility for legal and physical persons to challenge trade measures whose content is deemed to hamper the achievement of other external goals. In this respect, not only political reluctances resulting from decision-making are of no concern since individuals are the recipient and not the actors of the legislative procedure, but also the reform of the admissibility requirements for annulment proceedings brought about by the Lisbon Treaty points in the direction of an enhancement of the chances for non-privileged applicants to resort to legality actions⁶³.

The above shows how concrete the hypothesis of judicial review being conducted by the Court is for the purpose of assessing the legality of trade measures in the light of their compatibility with non-commercial external objectives. Notwithstanding the wide margin of discretion enjoyed by political institutions in striking the balance between trade and non-trade objectives of the CCP, the potential for ECJ intervention should not be underestimated on the ground that the Court has so far chosen to interfere only marginally in trade-related matters for the sake of not tying the hands of political institutions. After all, it was the Court itself that suggested that the incompatibility of EU trade measures with objectives other than commercial ones, such as the protection of fundamental rights, could serve as ground for alleging the illegality of such measures.

Although the initiation of an action for annulment based on the above grounds is both conceivable from the theoretical point of view and actually likely to occur in practice, attention must nonetheless be paid to the difference between the action in itself, and the grounds thereof, as well as the solution that the Court could devise in order to decide such a case. In particular, caution should be used when thinking about what could be expected from the Court. Since the Treaty does not contain any prioritisation rule to be applied to different and potentially conflicting external objectives, the Court would not be in a position to do much more than acknowledging that a trade measures might negatively affect other “relex” objectives. Striking the balance between those must be left to the political institutions. The Court is therefore unlikely to go as far as to criticise the balance that the latter have chosen, simply

⁶³ Under Art. 263 TFEU, fourth alinea, natural and legal persons who intend to initiate an action for annulment can do so to the extent that the contested measure is an act addressed to them or is of direct and individual concern to them or that the measure consists of a regulatory act which directly concerns the applicant and which does not entail implementing measures. This is different from the previous admissibility regime, in which individuals were required to prove their interest in the annulment of the challenged measure by means of a demonstration that the latter was of both direct and individual concern to them. The requirement of the individuality of the measure was particularly cumbersome, all the more in relation to trade measures whose scope is often too general to accommodate such condition for admissibility, which therefore represented a concrete constraint on individuals’ actions against the legality of trade measures.

because there is no rule of prioritisation upon which the European judicature could base any such condemnation.

5. Concluding remarks

This last section attempted to assess whether innovations brought about by the Lisbon Treaty in relation to the Union trade policy and to EU external action will cause a rethinking of the Union's strategy in the management of trade disputes. The argument presented herein applies to the specific domain of SPS and TBT disputes, even though it has been made in relation to commercial disputes in general.

The opinions presented herein lead to the conclusion that such a rethinking of the Union's strategy for the management of commercial disputes is likely to take place insofar as the previous strategy will no longer prove suitable for the achievement of the current objectives of the EU trade policy. This is for three reasons. First, the objectives themselves have changed in number and nature, now encompassing both trade and non-trade goals. Secondly, the circumstances of EU trade action have changed and additional constraints might arise to the extent that the EU constitutional architecture has come to encompass a legally binding Charter of Fundamental Rights and the Union itself is bound to eventually join the European Convention for Human Rights and Fundamental Freedoms. Finally, if considered in the light of both the new objectives and the new context of the Union's trade policy, the current strategy appears too risky and therefore unbearable, as its exposure to adverse judicial review has now become more likely.

What is next then? Whereas they have previously enjoyed a wide scope for manoeuvre, EU political institutions are now in for a quite demanding juggling exercise as their strategy towards commercial disputes must be fine-tuned so as to ensure full consideration of both trade and non-trade objectives of EU external action. The number of balls to throw in the air and catch again has suddenly grown. Bearing in mind the broader orientation of the CCP towards general and potentially conflicting external objectives, the task of balancing between liberalisation and other objectives acquires a new crucial dimension. Long established practices and orientations in policy-making are not likely to change overnight. Commercial strategies, particularly when it comes to international disputes, are no exception in this respect. Time will tell whether political institutions, particularly the Commission, the Council and the HRVP will be up to the task by means of coordination efforts, or whether the ECJ will be called to play a more active – although not necessarily corrective – role in strategy-making.

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