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# *EC Practice in the WTO: How Wide is the ‘Scope for Manoeuvre’?*

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## **Abstract**

*Despite the doctrinal criticism raised as a result of the unbending positions taken by the European Community in Bananas and Beef Hormones, the EC’s implementation record in the WTO, though not exemplary, does not add up to a generally non-complying approach. On the other hand, the record seems to reflect an attitude that, in accordance with the view traditionally maintained by the European Court of Justice from International Fruit to Portugal, finds its cornerstone in the principle of negotiations with a view to achieving mutually satisfactory solutions, even beyond the limits set by the DSU. Following these premises, the purpose of this paper is to analyse the impact that has been exercised on the EC’s contentious practice by interpretations of the WTO system given by the EC courts, in fine tuning with the stand taken by the EC’s political bodies. After having considered the legal and political reasons behind the case-law of the Community’s courts on ‘direct effect’, the paper attempts to analyse to what extent the EC’s conduct in the framework of the WTO dispute settlement process has been influenced by the ‘scope for manoeuvre’ argument, devised by the ECJ in the Portugal ruling. It will become clear that an approach mainly aimed at preserving the balance of mutual advantages among the WTO Members queries the role played in the dispute settlement mechanism by the agreements between parties. An analysis is submitted of four different categories of agreements concluded by the EC in the framework of the dispute settlement mechanism, also in cases not expressly provided by the DSU. On a higher level of investigation, the ‘scope for manoeuvre’ approach is strictly connected with another widely discussed issue, namely the nature of the legal obligations entered into by WTO Member States. The study aims to demonstrate that WTO rules are a source of rights and obligations that are disposable in nature for Member Parties.*

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## 1 Introduction

For some, it has almost become a commonplace that the EC's reputation as a subject of the WTO legal system is far from irreproachable.<sup>1</sup> Indeed, its refusal to effectively implement adverse rulings in a number of well-publicized cases, such as, for instance, *Bananas* and *Beef Hormones*, has been widely scrutinized in the legal doctrine. Furthermore, from another perspective, inflexible positions taken by the EC in the framework of the WTO dispute settlement proceedings have highlighted some of the deficiencies in the textual language and in the procedures of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the DSU), thus calling for its review (currently still under way). To cite a few examples,<sup>2</sup> this has occurred in relation to: a) the establishment of a reasonable period of time for the implementation of Dispute Settlement Body (DSB) rulings (pursuant to DSU Article 21.3), in particular as to the need to harmonize the notion of 'shortest period possible' with the lengthy legislative procedures provided for by the EC Treaty;<sup>3</sup> b) the use and content of the 'status reports', whereby the losing party is required to describe the specific measures that will be adopted to implement the ruling;<sup>4</sup> c) the so-called 'sequencing problem', namely the controversial relationship between

<sup>1</sup> See, for instance, Mercurio, 'Dispute Settlement in the WTO: Questioning the "Security" and "Predictability" of the Implementation Phase of the DSU?', in R. P. Buckley (ed.), *The WTO and the Doha Round, The Changing Face of World Trade* (2003), 115, at 136–137.

<sup>2</sup> For further details on these and other related issues cf. Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective', 4 *JIEL* (2001) 131.

<sup>3</sup> See *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Art. 21.3 (c) of the DSU – Award of the Arbitrator, WT/DS26/15, WT/DS48/13 of 29 May 1998, at 26. In this case, the arbitrator called upon to establish the reasonable period of time, while stating that this period 'should be the shortest possible within the legal system of the Member', nonetheless considered that an important 'particular circumstance' to be taken into account was the complexity of the EC's implementation process. The consequent decision not to shorten the usual 15-month period posed the problem that lengthy legislative procedures, such as those provided for by the EC Treaty, might represent an invisible 'non-tariff trade barrier' for all those interested in a timely accomplishment of the recommendations and rulings issued by the DSB. In the literature, see Senti, 'The Role of the EU as an Economic Actor within the WTO', 7 *European Foreign Affairs Review* (2002) 111, at 114; Monnier, 'The Time to Comply with an Adverse WTO Ruling – Promptness with Reason', 35 *JWT* (2001) 825.

<sup>4</sup> The conduct displayed by the Community during the reasonable period of time in the *Bananas* and *Beef Hormones* cases has shown how little use the 'status report' may be in the absence of any DSU provision determining: (a) how detailed report must be and (b) whether the losing Party is required to describe what specific measures will be adopted to implement the ruling. In the first case see *EC-Regime for the Importation, Sale and Distribution of Bananas*, Status Report by the European Communities, WT/DS27/17 of 13 July 1998. In the *Beef Hormones* case, the EC refused to lift its ban from the very beginning of the implementation period. Furthermore, the EC, apart from stating that its ban was definitively to be maintained, used its status reports to give account only of the scientific studies that had been undertaken (*EC-Measures Concerning Meat and Meat Products (Hormones)*, Status Report by the European Communities, WT/DS26/17, WT/DS48/15 of 14 January 1999). See also the following Status Reports provided for by the European Communities in the *Beef Hormones* case, WT/DS26/17/Add.1, WT/DS48/15/Add.1 of 5 February 1999; WT/DS26/17/Add.2, WT/DS48/15/Add.2 of 9 March 1999; WT/DS26/17/Add.3, WT/DS48/15/Add.3 of 16 April 1999. Behaving in this way, the EC disregarded the contrary warning given by the reasonable period arbitrator in his ruling, according to which 'it would not be in keeping

compliance review (under DSU Article 21.5) and the suspension of concessions (under Article 22).<sup>5</sup>

More importantly, the effectiveness of the new dispute settlement procedures has been seriously questioned as a result of the decision taken by the EC in relation to *Bananas* and *Beef Hormones* to face protracted United States retaliation rather than bring its legislation into compliance.<sup>6</sup> In the case of *Bananas*, the Community eventually amended its regime after reaching two Understandings with the United States and Ecuador,<sup>7</sup> and after more than 12 successive GATT and WTO panel reports, the Appellate Body report, and arbitration awards since 1993 on GATT and WTO inconsistencies concerning import restrictions on bananas.<sup>8</sup> With regard to the *Hormones* case, however, the dispute persists.<sup>9</sup>

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with the requirement of prompt compliance to include in the reasonable period of time, time to conduct studies, or to consult experts to demonstrate the consistency of a measure already judged to be inconsistent': *EC-Measures Concerning Meat and Meat Products (Hormones)*, Arbitration under Art. 21.3 (c) of the DSU, Award of the Arbitrator, WT/DS26/15, WT/DS48/13 of 29 May 1998, at 39.

<sup>5</sup> The 'sequencing problem' was urgently brought to the fore by the *EC-Bananas* case. Opposing the request of the United States to be authorized by the DSB to suspend concessions immediately at the expiry of the reasonable period of time, the EC maintained that the invocation of the remedies provided for by DSU Art. 22 is conditional upon the previous recourse to the Art. 21.5 review, inasmuch as no unilateral determination of non-compliance is allowed for by the DSU. See *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for the Establishment of a Panel by the European Communities, WT/DS27/40 of 15 December 1998, citing European Community, *US Threat of Unilateral Action on Bananas puts Multilateral Dispute Settlement at Risk* (29 October 1998), P6 (EC memorandum circulated to the DSB).

<sup>6</sup> When the reasonable period ended the EC admitted that it would not lift its ban and would continue to study its scientific results in more depth 'to consider what steps may be necessary': *EC-Measures Concerning Meat and Meat Products (Hormones)*, Status Report by the European Communities, WT/DS26/17/Add.4, WT/DS48/15/Add.4 of 11 May 1999.

<sup>7</sup> The two understandings provide for phased implementation steps: by July 2001, the EC must adopt a new licensing system for bananas based on historical reference periods; by January 2002, the EC is to shift an additional 100,000 tonnes of bananas into a tariff quota to be open to bananas of Latin American origin (with reference to which US distributors have a substantial historical share); by 1 January 2006, the EC is committed to the introduction of a tariff-only regime for banana imports.

<sup>8</sup> On 22 June 2001 the EC notified an 'Understanding on Bananas between the EC and the US' of 11 April 2001, and an 'Understanding on Bananas between the EC and Ecuador' of 30 April 2001 (WT/DS27/58 of 22 July 2001). The EC notified the Understandings as mutually agreed solutions within the terms of DSU Art. 3.6. Both Ecuador and the US communicated that the Understandings did not constitute mutually agreed solutions within the terms of Art. 3.6 DSU and that it was premature to take the item off the DSB agenda (for the Ecuador communication see WT/DS27/60 of 9 July 2001). After two waivers to Arts. I and XIII of GATT 1994 had been granted by the Ministerial Conference held in Doha in November 2001 (see WTO doc. WT/MIN(01)/15, *European Communities – The ACP-EC partnership agreement*, and WT/MIN(01)/16, *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, of 14 November 2001), on 21 January 2002 the EC announced that Regulation 2587/2001 had been adopted by the Council on 19 December 2001 (OJ 2001 L 345/13). Using this Regulation, the EC intended to implement phase 2 of the Understandings with the US and Ecuador (WT/DS27/51/Add.25). At the DSB meeting held on 1 February 2002, the other Parties agreed that the item should no longer appear on the agenda of future DSB meetings (WT/DSB/M/119 of 6 March 2002).

<sup>9</sup> Following the enactment of Directive 2003/74 of 22 September 2003 (OJ 2003 L 262/17), on 7 November 2003, the EC informed the DSB that it had fully implemented the recommendations and rulings of the

In addition to *Bananas* and *Beef Hormones*, the EC has to date (as of 31 July 2004) been found in breach of WTO obligations in five other instances, according to a report adopted by the DSB (under Article 16.4 in combination with Article 17.14 of the DSU). In the *Bed-linen* and the *Iron Tube* cases, the legislative measures adopted by the Community have been considered by India and Brazil, respectively, as failing to comply with the recommendations of the DSB.<sup>10</sup> In the *Sardines* case, the EC and Peru resolved the dispute on a mutually satisfactory basis following the adoption of Commission Regulation (EC) 1181/2003 of 2 July 2003.<sup>11</sup> In the *Poultry Products* case, the EC adopted its Regulation No. 439/99 on 6 March 1999 with a view to implementing one of the two recommendations of the DSB, and both parties expressed their will to find a mutually agreed solution.<sup>12</sup> As for the recent *Tariff Preferences* case, the reasonable period of time for implementation has yet to be established.<sup>13</sup>

This cursory overview shows that the EC's implementation record, though not exemplary, does not add up to a *generally* non-complying approach. In the majority of cases, in fact, the Community has declared its willingness to comply with the DSB's rulings, and has adopted implementation measures, albeit with exceedingly lengthy delays (measures adopted after the expiry of the reasonable period of time), and not without contestation as to their consistency with the adverse decision. On the other hand, the record seems to reflect an attitude that, in accordance with the view traditionally maintained by the European Court of Justice (ECJ) from *International Fruit* to

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DSB (see WT/DS26/22 and WT/DS48/20 of 28 October 2003). At the DSB meeting of 7 November, both the US and Canada observed that the measures taken by the EC were still *not* WTO-consistent (see WT/DSB/M/157 of 18 December 2003, at 7–8). Accordingly, the US and Canada refused to remove the retaliation measures adopted against the EC.

<sup>10</sup> Regarding the *Bed Linen* case, on 7 August 2001 the EC Council adopted Regulation 1644/2001 (OJ 2001 L 219/1) amending the original definitive anti-dumping duties on bed linen from India, purporting to comply with the DSB's recommendations and rulings in the original dispute. India disagreed that this re-determination complied with the DSB's rulings. Accordingly, India sought the establishment of a compliance panel under Art. 21.5 of the DSU. In order to implement the recommendations issued in the panel's reports (*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Art. 21.5 of the DSU by India, WT/DS141/RW of 29 November 2002) and of the Appellate Body (WT/DS141/AB/RW of 8 April 2003), the EC Council adopted Regulation 2239/2003 of 17 December 2003 (OJ 2003 L 333/3), terminating the partial interim and expiry review concerning the anti-dumping measures imposed by Regulation 2398/97 (OJ 1997 L 332/1). In the *Iron Tube* case, the EC contended, through its Council Regulation 436/2004 of 8 March 2004 (OJ 2004 L 72/15), that it had fully implemented the findings of the Panel and the Appellate Body (see *European Communities – Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/13 of 23 March 2004). Brazil has expressed its disagreement, keeping the issue under the consideration of the DSB and reserving all rights to pursue this matter further (see WT/DSB/M/167 of 27 May 2004).

<sup>11</sup> *European Communities – Trade Description of Sardines*, Notification of Mutually Agreed Solution, WT/DS231/18 of 29 July 2003.

<sup>12</sup> See DSB Minutes of Meeting of 19 March 1999, WT/DSB/M/57, at 5–6. The reasonable period of time was due to expire on 31 March 1999; see *European Communities – Measures Affecting the Importation of Certain Poultry Products*, Communication from the EC and Brazil, WT/DS69/9 of 23 October 1998.

<sup>13</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Request by India for Arbitration under Art. 21.3 (c) of the DSU, WT/DS246/12 of 20 July 2004.

*Portugal*, finds its cornerstone in the principle of negotiations with a view to achieving mutually satisfactory solutions, even beyond the limits set by the DSU. The number of disputes settled by the Community, alone or jointly with its Member States, by means of a mutually agreed solution, supports this view.<sup>14</sup>

Following these premises, the purpose of this paper is to analyse what impact the EC courts in their interpretation of the WTO system has had on the EC's contentious practice, in fine tuning with the stand taken by the political bodies.<sup>15</sup> The jurisprudence at issue here, essentially that regarding the legal status and effect of WTO law within the EC legal order, has been widely examined, and often harshly criticized, in the literature.<sup>16</sup> The ECJ has been repeatedly accused of underrating or misjudging the radical innovations introduced by the Marrakech Agreements, adopting an interpretation *contra legem* that ignores the transformation of the earlier 'power-oriented' GATT 1947 into the new 'rule-oriented' WTO (a transformation mainly attested to by the innovative 'quasi-jurisdictional' character of the dispute settlement mechanism).<sup>17</sup> These critiques are coupled with those aimed at the EC's conduct within the WTO dispute settlement system, making the link between the case-law of the EC's courts and the practice of the Community's political bodies a worthy object of analysis.

Section 2 will consider the 'interpretative' practice developed by the Community courts, in harmony with the positions of the political bodies, to determine from it the possible *ratio* underlying the overall EC approach to the WTO system. Notwithstanding the undoubted interest provoked by the 'direct effect' issue, our aim here is not to critically assess the position of the ECJ, but to use the words of the Luxembourg judges as a guide to EC practice.

<sup>14</sup> See *infra*, note 64. In the literature see Baroncini, 'The European Community and the Diplomatic Phase of the WTO Dispute Settlement Understanding', 18 *Yearbook of European Law* (1998) 157.

<sup>15</sup> To limit these initial references to monographs published in recent years, see P. Hilpold, *Die EU im GATT/WTO-System – Aspekte einer Beziehung 'Sui Generis'* (1998); and D.I. Siebold, *Die Welthandelsorganisation und die Europäische Gemeinschaft: Ein Beitrag zur Globalen Wirtschaftlichen Integration* (2003).

<sup>16</sup> K.J. Kuilwijk, *The European Court of Justice and the GATT Dilemma: Public Interest v. Individual Rights* (1996); Neuwahl, 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law', in N. Emiliou and D. O'Keefe (eds.), *The European Union and the World Trade Law after the GATT Uruguay Round* (1996), 313; Hilf, 'The Role of National Courts in International Trade Relations', 18 *Michigan Law Review* (1997) 321; Lee and Kennedy, 'The Potential Direct Effect of GATT 1994 in European Community Law', 30 *JWT* (1996) 67; Mora, 'Equilibrium: A Rediscovered Basis for the Court of Justice of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements', 30 *JWT* (1996) 43; Berkey, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', 9 *EJIL* (1998) 626; Cottier, 'Dispute Settlement in the World Trade Organisation: Characteristics and Structural Implications for the European Union', 38 *CMLRev* (1998) 325, at 365–377; Bourgeois, 'The European Court of Justice and the WTO: Problems and Challenges', in J.H.H. Weiler (ed.), *The EU, the WTO and the NAFTA* (2000), 103; Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', in G. De Búrca and J. Scott (eds.), *The EU and the WTO. Legal and Constitutional Issues* (2001), 111; and Mengozzi, *Private International Law and the WTO Law*, 292 *RdC* (2001) 263.

<sup>17</sup> Govaere, 'The Reception of the WTO Agreement in the European Union: The Legacy of GATT', in P. Demaret, J.-F. Bellis and G. García Jimenez (eds.), *Regionalism and Multilateralism after the Uruguay Round* (1997), 703.

In Section 3, then, we will attempt to analyse how this vision has been put into practice, namely to what extent the EC's conduct in the framework of the WTO dispute settlement process has been influenced by the 'scope for manoeuvre' argument. As will become clear, an approach mainly aimed at preserving the balance of mutual advantages between the WTO Members queries the role played in the dispute settlement mechanism by the agreements between parties, especially in those cases in which the DSU does *not* provide for mutually agreed solutions. At a higher level of analysis, then, this is strictly connected with another widely debated issue, namely the nature of the legal obligations entered into by the WTO Member States. This problem will be briefly dealt with in the *final section*.

## 2 Prologue. The 'Scope for Manoeuvre' Argument

It is established case-law that, in view of their *nature* and *structure*, the WTO Agreement and its annexes, including GATT 1947, do not in principle form part of the rules by which the European Court of Justice and the Court of First Instance (CFI) review the legality of acts adopted by Community institutions under Article 230 of the EC Treaty (before amendment, Article 173 EC). Furthermore, WTO agreements do not create rights which individuals can rely on directly before the courts (i.e., they are devoid of direct effect) and any infringement of them will not give rise to non-contractual liability on the part of the Community.<sup>18</sup>

Very different types of effects are, therefore, encompassed in the ECJ's negative stand. Moreover, the ECJ, from *International Fruit*<sup>19</sup> onward, notwithstanding qualified

<sup>18</sup> Judgments of the ECJ in Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395; Joined Cases C-300/98 and C-392/98, *Dior and Others*, [2000] ECR I-11307; Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079; Order in Case C-307/99, *OGT Fruchthandelsgesellschaft*, [2001] ECR I-3159; Joined Cases C-27/00 and C-122/00, *Omega Air*, [2002] ECR I-2569; Case C-93/02 P, *Biret International v. Council*, [2003] ECR I-10497, and Case-94/02 P, *Etablissement Biret et Cie v. Council* [2003] ECR I-10565. Judgments of the CFI in Case T-18/99, *Cordis v. Commission*, [2001] ECR II-913; Case T-30/99, *Bocchi Food Trade International v. Commission*, [2001] ECR II-943; Case T-52/99, *T. Port v. Commission*, [2001] ECR II-981; Case T-2/99, *T. Port v. Council*, [2001] ECR II-2093; Case T-3/99, *Bananatrading v. Council*, [2001] ECR II-2123; Case T-174/00, *Biret International v. Council*, [2002] ECR II-17 and Case T-210/00, *Etablissement Biret et Cie v. Council*, [2002] ECR II-47; Joined Cases T-64/01 and T-65/01, *Afrikanische Frucht-Compagnie GmbH and Internationale Fruchthandelsgesellschaft Weichert & Co. v. Council and Commission*, judgment of 10 February 2004, not yet reported. According to Zonnekeyn, 'EC Liability for Non-Implementation of WTO Dispute Settlement Decisions – Are Dice Cast?', 7 *JIEL* (2004) 483, the two *Biret* decisions, delivered on 30 September 2003 by the ECJ, seem to open the door for further discussion on the liability of the EC for non-implementation of DSB rulings. The ECJ, in fact, refused to grant compensation because the damage occurred *before* the adoption of the DSB decision and *before* the reasonable period of time accorded to the EC to implement the decision had lapsed. Therefore 'by not explicitly excluding the possibility that the EC could have been held liable if the factual circumstances of the cases had been different, the ECJ seems to have left the door half open' (above, at 484).

<sup>19</sup> Joined Cases 21–24/72, *International Fruit Company NV v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219.

disagreement,<sup>20</sup> has considered the direct effect of WTO rules as a precondition to invoking them to review the legality of a Community act.<sup>21</sup>

The purpose of WTO agreements is, then, to govern relations between states or regional organizations for economic integration and not to protect individuals. Such a position is in keeping with the WTO panel's report (published soon after the ECJ ruling in *Portugal*) in the *US Section 301–310* case, where it was observed that:

Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach the GATT/WTO did not create a new legal order the subjects of which comprise both Contracting Parties or Members and their nationals.<sup>22</sup>

Yet, more importantly, the position taken by the ECJ, in an exercise of judicial self-restraint, corresponds to the view already expressed by the Council in the preamble to Decision 94/800 implementing the Uruguay Round Agreements. The final recital of the Decision, in fact, provides that: '... by its nature, the Agreement establishing the World Trade Organisation, including the annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.<sup>23</sup> This stand was justified by the Commission, in the *Explanatory Memorandum* accompanying its proposal to the Council, with the need to avoid that 'a major imbalance would arise in the actual management of the obligations'.<sup>24</sup>

The denial of direct effect finds only two exceptions, initially devised by the ECJ with regard to GATT 1947, in the notorious *Nakajima* and *Fediol* judgments,<sup>25</sup> subsequently

<sup>20</sup> See the Opinion of Advocate General Saggio of 25 February 1999 in Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, at para. 18 ('a provision of an agreement may be held not to have direct effect but that does not justify failing to recognize it as binding on the Community institutions and hence excluding it as a criterion for legality'). In the literature see Tesauro, 'Rapporti tra la Comunità europea e l'OMC', in *Società italiana di diritto internazionale. Diritto e organizzazione mondiale del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio* (1997), 58; Gaja, 'Trends in Judicial Activism and Judicial Self-Restraint relating to Community Agreements', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002), 117, at 129; Maresceau, 'The GATT in the Case-Law of the European Court of Justice', in M. Hilf, F.G. Jacobs and E.-H. Petersmann (eds.), *The European Community and GATT* (1986), 107; Bourgeois, 'Effects of International Agreements in European Community Law: Are Dice Cast?', 82 *Michigan Law Review* (1984) 1250; and Petersmann, 'Application of GATT by the Court of Justice of the European Communities', 20 *CMLRev* (1983) 403. Generally, on the risks of a complete direct effect with primacy system, see Jackson, 'Status of Legal Treaties in Domestic Legal Systems: A Policy Analysis', 86 *AJIL* (1992) 310.

<sup>21</sup> A reconsideration of the matter may be inferred from the ECJ ruling in Case C-377/98, *Netherlands v. European Parliament and Council*, [2001] ECR I-7079, at para. 54.

<sup>22</sup> *United States-Sections 310–310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R of 22 December 1999, at para. 7.72.

<sup>23</sup> OJ 1994 L 336/1. It is worthy of note that the vast majority of commentators have attributed mere political value to the Council's statement made in the preamble. See in this sense the Opinion of Advocate General Saggio of 25 February 1999 in Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, at para. 20. In the same vein, cf. Gaja, 'Il preambolo di una decisione del Consiglio preclude al GATT 1994 gli effetti diretti nell'ordinamento comunitario?', 78 *Rivista di diritto internazionale* (1995) 407.

<sup>24</sup> See the Explanatory Memorandum to COM(94)143 final of 15 April 1994.

<sup>25</sup> Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069, at para. 31; Case 70/87, *Fediol v. Commission*, [1989] ECR 1781, at paras. 19–22.

confirmed in *Portugal* with reference to the WTO agreements.<sup>26</sup> Accordingly, only where the Community intended to implement a particular obligation assumed in the context of the WTO,<sup>27</sup> or where the Community measures refer expressly to the precise provisions of the WTO agreements, is it up to the EC's courts to review the legality of the Community measure in question in the light of WTO rules. The only adjunctive type of effect which the European courts recognize in relation to the WTO rules is linked to the principle of consistent interpretation, by virtue of which the legislation of both the Community and its Member States is to be interpreted in the light of, and in accordance with, the EC's international obligations. This principle, after having been repeatedly applied to GATT 1947,<sup>28</sup> has been extended to the WTO agreements, and specifically to the TRIPs, in the *Hermès* and *Christian Dior* rulings.<sup>29</sup>

Indirectly, furthermore, private parties may also avail themselves of the WTO rules in the framework of Regulation 3286/94 (the so-called Trade Barriers Regulation (TBR)),<sup>30</sup> establishing the procedures to be followed by the Community institutions to address the complaints of private parties or an EC Member State alleging that a third WTO party has violated the obligations undertaken towards the Community. The TBR, which represents the Community response to the US Trade Act 1974, as subsequently amended,<sup>31</sup> allows trade operators' complaints to be channelled through an administrative mechanism that, at any rate, ascribes mainly to the EC Commission the choice to either bring a complaint before the WTO supervisory organs or to terminate/suspend the investigation, or alternatively to seek an agreed solution. Therefore, the TBR – at least partly – seems to share the function and the nature of the traditional diplomatic protection remedy provided for by general international law. TBR-like twin

<sup>26</sup> *Supra* note 18, at para. 49.

<sup>27</sup> For a further implementation see Case C-76/00 P, *Petrotub SA and Republica SA v. Council*, [2003] ECR I-79, at paras. 55 *et seq.*

<sup>28</sup> See, e.g., Case 92/71, *Interfood v. Hauptzollamt Hamburg*, [1972] ECR 231, at para. 6; Case C-79/89, *Brown Boveri & CIE AG v. Hauptzollamt Mannheim*, [1991] ECR I-1853, paras 15–19; Case C-70/94, *Werner v Germany*, [1995] ECR I-3189, para. 23; Case C-83/94, *Leifer and Others*, [1995] ECR I-3231, at para. 24; Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, at para. 52, where the Court infers the duty of consistent interpretation from the primacy of international agreements concluded by the Community over rules of secondary legislation. As to the CFI case law, see Joined Cases T-163/94 and T-165/94, *NTN Corporation and Koyo Seiko v. Council*, [1995] ECR II-1381, at para. 65.

<sup>29</sup> Case C-53/96, *Hermès v. FHT*, [1998] ECR I-3603; Joined Cases C-300 and 392/98, *Parfums Christian Dior v. Tuk Consultancy*, [2000] ECR I-11307; Case C-89/99, *Schieving-Nijstad vof and Others v. Robert Groeneveld*, [2001] ECR I-5851.

<sup>30</sup> EC Council Regulation 3286/94 of 22 December 1994 (OJ 1994 L 349/71). For comments *cf.* Bronckers, 'Private Participation in the Enforcement of WTO Law: the New EC Trade Barriers Regulation', 33 *CML Rev* (1996) 299; Kuyper, 'The New WTO Dispute Settlement: the Impact on the European Community', 29 *JWT* (1995) 49; Molyneux, 'The Trade Barriers Regulation: The European Union as a Player in the Globalisation Game', 5 *European Law Journal* (1999) 375; Sundberg and Vermulst, 'The EC Trade Barriers Regulation. An Obstacle to Trade?', 35 *JWT* (2001) 989; and Mengozzi, *supra* note 16, at 330 *et seq.*

<sup>31</sup> 19 USC 2251–2254. For the amendments, see the 1988 Omnibus Trade and Competitiveness Act (19 USC 2411) and the Statement of Administrative Action (SAA) which forms part of the measures adopted by the Congress to implement the Uruguay Round Agreements.



mechanisms have also been set up in the field of anti-dumping<sup>32</sup> and for subsidized imports.<sup>33</sup>

The hypotheses outlined above mark the boundary beyond which WTO law is not permitted to have effects in the EC legal system. Each of them represents a different example of the kind of 'indirect effect' described in the WTO panel's report on *US-Section 301-310*.<sup>34</sup> In fact, WTO norms do not seem to be able to produce *direct* effects in the EC legal system *per se*, for the very simple reason that between them and private parties there is always the interposition of the EC implementing norm. In other words, WTO rules may be invoked by private parties before EC tribunals only through the filter of a legislative measure or an administrative action aimed at implementing the WTO rule in the EC legal order, thus performing a 'secondary transposition', after the first one automatically provided for by Article 300, paragraph 7 of the EC Treaty.<sup>35</sup> By virtue of this latter disposition, in fact, EC political bodies have to 'ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements', pursuant to Article XVI(4) of the Agreement establishing the WTO. This means that WTO Members have undertaken an obligation of result, remaining free to decide how to comply with it, and therefore whether or not to recognize the direct effect of WTO law.<sup>36</sup>

Thus far we have seen the results reached by the EC courts in their case-law as to the status of WTO law in the Community's legal system. However, as I have already stated in the Introduction, the purpose of this section is not to address the legal soundness of these results but to follow, almost dogmatically, the ECJ line of reasoning, particularly that which emerges in the *Portugal* ruling. My aim here is to sketch out the general perspective of the EC institutions on the WTO system.

Focusing then on *Portugal*, it has often been pointed out that the rationale underlying the ECJ judgement is twofold: legal and political. The legal argument is that WTO rules are neither self-executing nor unconditional. The political one is based on the lack of reciprocity. Let us analyse the two lines of the ECJ reasoning separately, starting from the 'policy' argument.

It has been said that the ECJ in *Portugal* 'has finally shown its hand',<sup>37</sup> by declaring the supposedly real reason for the denial of direct effect, namely the lack of reciprocity.

<sup>32</sup> EC Council Regulation 3283/94 of 22 December 1994 (OJ 1994 L 349/1), repealed and replaced by Council Regulation 384/96 of 22 December 1995 (OJ 1996 L 056/1). For recent amendment see Council Regulation 461/2004 of 8 March 2004 (OJ 2004 L 077/12).

<sup>33</sup> EC Council Regulation 3284/94 of 22 December 1994 (OJ 1994 L 349/22), repealed and replaced by Council Regulation 2026/97 of 6 October 1997 (OJ 1997 L 288/1). For recent amendment see Council Regulation 461/2004 of 8 March 2004 (OJ 2004 L 077/12).

<sup>34</sup> *United States-Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R of 22 December 1999, at para. 7.78.

<sup>35</sup> See ECJ, Case C-181/73, *Haegeman*, [1974] ECR 449.

<sup>36</sup> '... conformity can be ensured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved. Only by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established': *United States-Sections 301-310 of the Trade Act of 1974*, Report of the Panel, *supra* note 34, at para. 7.24.

<sup>37</sup> Eeckhout, 'Judicial Enforcement of WTO Law in the European Union - Some Further Reflections', 5 *JIEL* (2002) 91, at 94.

In brief, the EC position on this issue may be viewed as a form of lawful retaliation (not a countermeasure, as the effect of WTO rules is not mandated by the WTO agreements), in response to the equal stand taken by the most important trade partners of the Community (the United States, Japan and Canada), where WTO rules are considered as not directly effective.<sup>38</sup> This is especially the case as the WTO agreements are still based, like GATT 1947, ‘on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements’, an element that, in the Court’s view, justifies a departure from the principle stated in *Kupferberg*, valid only for ‘asymmetrical’ agreements. According to *Kupferberg*, in fact, the circumstance that ‘the courts of the other party do not recognize such direct application is not in itself such to constitute a lack of reciprocity in the implementation of the agreement’.<sup>39</sup> A different stand, continues the Court, might lead to a ‘disuniform application of the WTO rules’, an expression that directly recalls that ‘major imbalance’ already feared by the Commission in the proposal that led to the adoption of the Council’s Directive 94/800. Therefore, as the WTO system is based on the principle of negotiations, the ECJ may not tie the Community political bodies’ hands; indeed, it is necessary to leave them room for manoeuvre.

The ruling, therefore, confirms the more general tendency to prevent courts from administering reciprocity, a matter which must be left to the political bodies.<sup>40</sup> It makes clear that the whole problem of direct effect is, essentially, a matter of balance of power among the EC bodies.<sup>41</sup>

This said, let us turn back to an analysis of the first part of the Court’s reasoning, which is more relevant to our aims. Firstly, provided that WTO agreements do not dictate what effect the provisions of the agreements are to have in the legal orders of the contracting parties,<sup>42</sup> it is for the ECJ to decide the question.<sup>43</sup> Furthermore, it is for

<sup>38</sup> As to the United States, see Section 102 (a) and (b)(2) of the Uruguay Round Agreements Act, Public Law 103–465 [H.R. 5110]. Generally, on this issue, see Picone, ‘L’applicazione interna degli Accordi OMC’, in P. Picone and A. Ligustro, *Diritto dell’Organizzazione Mondiale del Commercio* (2002), 541; and Cottier, ‘The Relationship between World Trade Organization Law, National Law and Regional Law’, 1 *JIEL* (1998) 103. On the position of the US see Jackson, ‘The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results’, in J.H. Jackson, *The Jurisprudence of GATT and the WTO* (2000), 367; and Leebron, ‘Implementation of the Uruguay Round Results in the United States’, in J.H. Jackson and A.O. Sykes (eds.), *Implementing the Uruguay Round* (1997), 175. As to Japan, see Iwasawa, ‘Constitutional Problems Involved in Implementing the Uruguay Round in Japan’, in *ibid.*, at 137. As to Canada, see Steger, ‘Canadian Implementation of the Agreement Establishing the World Trade Organization’, in *ibid.*, at 243.

<sup>39</sup> Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, at para. 18.

<sup>40</sup> Generally, on this issue, see B. Conforti, *Cours général de droit international public*, 212 RdC (1988-V), at 44 *et seq.*

<sup>41</sup> On this perspective see Cottier, ‘A Theory of Direct Effect in Global Law’, in A. von Bogdandy, P.C. Mavroidis and Y. Mény (eds.), *European Integration and International Coordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002), 99.

<sup>42</sup> A circumstance that is not fortuitous, given that, as is well known, a Swiss proposal aimed at ensuring that the WTO agreements would be capable of having direct effect was rejected during the negotiations and finally dropped. See Kuijper, ‘The New WTO Dispute Settlement System: The Impact on the Community’, in J. Bourgeois, F. Berrod and E. Gippini-Fournier (eds.), *The Uruguay Round Results – A European Lawyer’s Perspective* (1995), 106.

<sup>43</sup> Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, *supra* note 39, at para. 17.

the Contracting Parties 'to determine the legal means appropriate' to fully implement the commitments they have undertaken. By stating this, the Court is implicitly saying that WTO rules are *not self-executing*. Indeed, if the WTO agreements leave it to the Contracting Parties to decide the effect of these norms in their legal orders and if the parties have a 'free choice' on how to implement their commitments, then the WTO rules must be interpreted as addressed 'to the political, not the judicial department'.<sup>44</sup>

Second, the Court, with a view to establishing the status of WTO norms, undertakes, consistently with the 'context approach' followed in *International Fruit*,<sup>45</sup> an analysis of the purpose and nature of the subject agreement.<sup>46</sup> In its view, notwithstanding the major changes brought about by the Uruguay Round Agreements, particularly by virtue of the strengthening of the system of safeguards and the mechanism for resolving disputes, the notion developed for the 'old' GATT almost 30 years before, namely that the system accords 'considerable importance to negotiation between the parties', is still valid for the WTO. This is tantamount to saying that, due to the nature and the structure of the agreements under consideration, WTO obligations are still *not unconditional*, and, therefore, they are not apt to produce direct effects, as the Court had already stated with regard to the old GATT in *Germany v Council*.<sup>47</sup> To prove the validity of this view, then, the Court decided to hit hard, i.e. launching a frontal attack on the 'jewel in the Crown', the new quasi-jurisdictional dispute settlement system, the much praised innovation which is called upon to guarantee the compulsory character

<sup>44</sup> According to the statement issued by Chief Justice Marshall in the notorious *Foster v. Nielson* case (1829), 27 US (2 Pet.) 253 (1829). See also *Diggs v. Richardson*, 555 F.2d 848, 851 (DC Circuit 1976). On this issue, see Evans, 'Self-Executing Treaties in the United States of America', 30 *BYIL* (1953) 178; and Vázquez, 'The Four Doctrines of Self-Executing Treaties', 89 *AJIL* (1995) 695.

<sup>45</sup> *Supra* note 19, at 1227. In this case, the ECJ, rather than looking directly to Art. XI of the GATT, first considered 'the spirit, the general scheme and the terms of the General Agreement'. For the progeny of *International Fruit*, see Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, [1973] ECR 1135; Case 38/75, *Douaneagent der Nederlandse Spoorwegen NV v. Inspecteur der Invoerrechten en Accijnzen*, [1975] ECR 1439; Case 112/80, *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, [1981] ECR 1095; Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA*, [1983] ECR 801; Case 266/81, *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze*, [1983] ECR 731; Joined Cases 290/81 and 291/81, *Compagnia Singer SpA v. Amministrazione delle Finanze dello Stato*, [1983] ECR 847. In Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, at para. 14, the Court stated that: 'A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. The same consideration is repeated, e.g., in Case C-432/92, *Anastasiou and Others*, [1994] ECR I-3087, at para. 23.

<sup>46</sup> On the contrast between a 'context approach' that avoids any analysis of the specific provisions alleged to have direct effect, and the 'textual approach' followed by the ECJ in *Bresciani v. Amministrazione Italiana delle Finanze* (Case 87/75, [1976] ECR 129) and in *Hauptzollamt Mainz v. Kupferberg* (*supra* note 39), where, instead, the question of direct applicability was discussed on the basis of individual provisions, see Pescatore, 'Treaty-Making by the European Communities', in F. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987), 177, at 184–188.

<sup>47</sup> Case C-280/93, *Germany v. Council*, [1994] ECR I-4973, at para. 110. Here the ECJ clearly follows the analysis set out in the *direct effects test* of *Van Gend en Loos*. This test demands that a disposition be clear and unconditional, require no implementing legislation by the Member States and provide no margin of discretion in its application (Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, [1963] ECR 13).

of the overall WTO system. The aim is to demonstrate that negotiations still play a significant, even if not exclusive, role (as was the case at the time of GATT 1947, when the adoption of panel rulings was subject to positive consensus), also in the field of WTO dispute settlement. And here the ECJ has been widely accused of having misfired, giving an erroneous interpretation of the DSU rules governing the executive phase of the adjudicative process. The main critique moved towards the Court's reasoning is that by misinterpreting the DSU provisions the ECJ has reached the incorrect conclusion that compensation and toleration of retaliation are suitable, albeit temporary, alternatives to full and immediate compliance. In other words, the ECJ seems to imply that compliance is *negotiable*, if provisionally, in the WTO. Consequently, a losing party in the DSU proceedings could legitimately go for the 'pay-option', namely to gain licence to continue to violate (i.e., not to implement the DSB-adopted reports in order to bring the offending measure into compliance with WTO obligations), by agreeing on an '*erga omnes*' compensation or by accepting a retaliation on the part of the winning party. The remark is foundational for the 'plan for action' devised by the Court: if a party may choose at its discretion between full compliance or alternative forms of prospective reparation, even if only temporary (but often '*provisoire qui dure*'<sup>48</sup>), then, again, it is imperative for the Community to safeguard the 'scope for manoeuvre' of its organs called on to negotiate compliance with this system. Consequently, the very essence of the WTO is that of being a forum for negotiation aiming at a system of reciprocal and mutually advantageous arrangements.

As is self-evident, what is really at stake here is the very nature of the legal obligations arising from both WTO substantive norms and DSB rulings. It might, in fact, be easily inferred from the ECJ reasoning that WTO rules and DSB decisions – negotiable, even if only temporarily, by Contracting Parties – are not cogent and do not create absolute or immediate obligations, as expressly argued by Advocate General Mischo in the *Atlanta* case.<sup>49</sup>

The majority of the doctrine has upheld the absolutely binding character of WTO obligations, critically appraising both the Court's reasoning and its conclusions.<sup>50</sup> It

<sup>48</sup> Timmermans, 'The Implementation of the Uruguay Round by the EC', in Bourgeois, Berrod and Gippini-Fournier (eds.), *supra* note 42, 501, at 504.

<sup>49</sup> See the Advocate General's Opinion of 6 May 1999 in Case C-104/97 P, *Atlanta AG v. Council and Commission*, [1999] ECR I-6983.

<sup>50</sup> For various comments on the *Portugal* judgement see Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-146/96, *Portugal v Council*', 3 *JIEL* (2000) 441; Zonnekeyen, 'The Status of WTO Law in the Community Legal Order: Some Comments in the Light of the *Portuguese Textiles* case', 25 *European Law Review* (2000) 293; Ruotolo, 'Organizzazione Mondiale del Commercio e Ordinamento Comunitario nella giurisprudenza recente della Corte di giustizia: un nodo ancora irrisolto', 14 *Diritto del commercio internazionale* (2000) 1009; Hilf and Schorkopf, 'WTO und EG/Rechtskonflikte vor den EuGH?', 35 *Europarecht* (2000) 74; Desmedt, 'ECJ Restricts Effect of WTO Agreements in the EC Legal Order', 3 *JIEL* (2000) 191; Berrod, 'La Cour de justice refuse l'invocabilité des Accords OMC: essai de regulation de la mondialisation', 36 *Revue trimestrielle de droit européen* (2000) 419; von Bogdandy and Makatsch, 'Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law', in De Búrca and Scott (eds.), *supra* note 16, 143; Mengozzi, 'La Cour de justice et l'applicabilité des règles de l'OMC en droit communautaire à la lumière de

has thus been recalled that neither compensation nor retaliation are methods of settling disputes, but simply temporary instruments whose aim is to: a) put pressure on the defaulting party, discouraging indefinite failure to comply; and b) ensure that any benefits accruing to the other Members are not nullified or impaired as a consequence of the failure to comply immediately or within the reasonable period of time set in that particular case.<sup>51</sup> Dissenting voices, even if qualified, have been rare.<sup>52</sup>

The same kind of critique has been more recently formulated in the Opinion of Advocate General Alber in the *Biret International* case. In this Opinion, in fact, it was openly stated that, following adoption of a recommendation or of a decision by the DSB, there is no room for negotiation or for discretion on the part of the Contracting Parties. There can be no choice between complying with the DSB ruling or compensating for/ tolerating retaliation. In the long run, there is no alternative to implementation of the DSB-adopted reports.<sup>53</sup>

Let us now turn to analyse whether and to what extent the programme for action devised in the ECJ case-law has been consistently put into practice.

### 3 The 'Scope for Manoeuvre' Argument to the Proof of Practice

As was noted in the Introduction above, the Community, in the *Bananas*<sup>54</sup> and *Beef Hormones* cases,<sup>55</sup> refused to implement timely adverse rulings, preferring to face substantial retaliation on the part of some of the complainants.

It might be maintained that the stand long kept by the EC in these two notorious disputes is an evident example of that kind of 'pay-option' that the ECJ is alleged to

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l'affaire Portugal c. Conseil', 10 *Revue du Droit de l'Union Européenne* (2000) 509; and Van den Broek, 'Legal Persuasion, Political Realism and Legitimacy: the European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order', 4 *JIEL* (2001) 411.

<sup>51</sup> Zonnekeyen, 'The Status of WTO Law in the EC Legal Order – The Final Curtain?', 34 *JWT* (2000) 111, at 123. See also the Opinion of Advocate General Tesouro in Case C-53/96, *Hermès*, [1998] ECR I-3603, at para. 29.

<sup>52</sup> Rosas, 'Annotation Case C-149/96, Portugal v. Council', 37 *CMLRev* (2000) 797; and Eeckhout, *supra* note 37, at 92 *et seq.*

<sup>53</sup> Opinion of Advocate General Alber of 15 May 2003 in Case C-93/02 P, *Biret International SA v. Council*, *supra* note 18, at paras. 80–83. For a comment see Zonnekeyen, 'EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions – Advocate General Alber Proposes a 'Copernican Innovation' in the Case Law of the ECJ', 6 *JIEL* (2003) 761.

<sup>54</sup> Cf. Patterson, 'The US-EU Agreement to Resolve the Bananas Dispute', *ASIL Insights*, April 2001, available at <http://www.asil.org/insights/insigh69.htm>; and Weiss, 'Manifestly Illegal Import Restrictions and Non-compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute', in E.-U. Petersmann and M. Pollack (eds.), *Transatlantic Economic Disputes. The EU, the US and the WTO* (2004), 121. More generally, on the two disputes here at issue see Adinolfi, 'La soluzione delle controversie nell'OMC ed il contenzioso euro-statunitense', in G. Venturini (ed.), *L'Organizzazione Mondiale del Commercio* (2004), 191.

<sup>55</sup> Generally, on this dispute, see Wynter, 'The Agreement on Sanitary and Phytosanitary Measures in the light of the WTO Decisions on EC Measures concerning Meat and Meat Products (Hormones)', in P. Mengozzi (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (1999), 471.

have justified in its case-law. However, as will be seen, the scope for manoeuvre used by the Community bodies has gone well beyond this.

Before addressing this question, some preliminary remarks are necessary. As pointed out in the doctrine, the WTO dispute settlement system is of a ‘mixed’ nature.<sup>56</sup> On the one hand, it has inherited the *acquis* of the GATT (pursuant to DSU Article 3.1), and thus the diplomatic and consensual procedures provided for by Articles XXII and XXIII of the GATT 1947. Accordingly, DSU Article 3.7 affirms that: ‘A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred’. To achieve this aim, the DSU mandates a preliminary diplomatic phase based on consultations. On the other hand, the DSU introduces a new two-tiered adjudicative phase based on proceedings before impartial organs (a panel appointed on a case-by-case basis, and, where its report is contested, the permanent Appellate Body), comprising acknowledged experts sitting in their personal capacity, whose recommendations are adopted (acquiring binding force) by the DSB almost automatically, thanks to the inversion of the rule of consensus (from positive into negative).<sup>57</sup> Nonetheless, the fact that the decisions of the adjudicative bodies (Panel and Appellate Body) are adopted by a *political* body (the DSB), justifies in principle the caution exercised in commonly qualifying the Marrakech dispute settlement system as ‘quasi-judicial’.<sup>58</sup>

Until the conclusion of the panel phase, the DSU accepts and aims at regulating the inherent tension existing between the consensual and the adjudicative method of dispute settlement. Indeed, the DSU, under Article 4, provides for a compulsory preliminary phase based on consultations between the litigants. Mutually agreed solutions may be reached even during the panel procedure; to this end, pursuant to DSU Article 11, ‘Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution’. An interim review phase has also been established to prompt parties towards an amicable settlement, prior to publicizing the panel’s verdict.

With a view to preserving the overall coherence of the system, then, the DSU establishes two rules to harmonize consensual and quasi-judicial means of settlement. Firstly, under DSU Article 3.5: ‘All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements... shall be

<sup>56</sup> See Ligustro, ‘La soluzione delle controversie nel sistema dell’Organizzazione Mondiale del Commercio: problemi interpretativi e prassi applicativa’, 80 *Rivista di diritto internazionale* (1997) 1003, at 1013.

<sup>57</sup> The literature here is vast. Among the many, *cf.* Lowenfeld, ‘Remedies Along with Rights: Institutional Reform in the New GATT’, 88 *AJIL* (1994) 477; Petersmann, ‘The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948’, 31 *CMLRev* (1994) 157; Ruiz Fabri, ‘Le règlement des différends dans le cadre de l’Organisation mondiale du commerce’, 124 *Journal du droit international* (1997) 709; Sacerdoti, ‘La trasformazione del GATT nell’Organizzazione Mondiale del Commercio’, 9 *Diritto del commercio internazionale* (1995) 73; and Van de Bossche and Marceau, ‘Le système de règlement des différends de l’Organisation mondiale du commerce’, 8 *Revue du marché unique européen* (1998), 29.

<sup>58</sup> See Mora, ‘A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes’, 31 *Columbia Journal of Transnational Law* (1993) 103. Kuijper speaks of a trend towards the ‘judicialization of the dispute settlement procedure’: *supra* note 42, at 90.

consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.' Second, under DSU Article 3.6, there is a duty to *notify* the DSB of '[m]utually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.' It is noteworthy that, while DSU Article 3.5 requests that whatever mutually agreed solution decided upon be *consistent* with WTO covered agreements (and the same request is formulated in other DSU provisions providing for mutually agreed solutions), DSU Article 3.4 establishes that: 'Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.' Moreover, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (DSU Articles 3.2 and 19.2). The space not fortuitously left open between agreements being *compatible* and DSB rulings that must be *in accordance with* the covered agreements (in the French text the words used are, respectively, *compatible* and *conforme*) allows the litigant parties the scope for manoeuvre necessary for finding an amicable solution.

Subsequently, then, at a certain stage of the procedure, namely after the presentation of the panel's report and its adoption by the DSB, the DSU seems to resolve the above-mentioned tension between consensual and quasi-judicial tools of dispute settlement in favour of the latter. As stated by DSU Article 3.7: 'In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.' Therefore, compensation should be resorted to only if the immediate withdrawal of the offending measure is impracticable and, in any case, only as a temporary redress pending the withdrawal of the contested measure. Authorized retaliation is, in the end, the 'last resort'. Neither of these two temporary solutions, which, as already said, are aimed at applying pressure to obtain implementation and, in the meantime, to avoid increasing the damage suffered by other Members (provided that retaliation has only prospective effects), absolves the losing party from the duty to implement the recommendations and decisions adopted by the DSB.

At least, that is the theory. In practice, however, particularly regarding the European Community, the consensual tools of dispute settlement continue to play a significant role even *after* the stage in which the procedure has gone through the judiciary channels. States stipulate agreements of different types to regulate procedural or substantive aspects of their disputes, even after the adoption of panel and Appellate Body reports by the DSB. This is not to say that the new quasi-judicial procedures do not work properly as they were intended to, or that DSU provisions or DSB rulings are regularly disregarded. All in all, the DSU system performs reasonably well, and it is not our aim to question this. What is intended here is to note that consensual tools operate in different ways, even beyond the limits set up by the DSU, and with a variety of functions.

This said, and turning now to EC practice, we may finally examine the range of 'scope for manoeuvre', with a view to investigating, in particular, its 'dark side',

namely those examples of conduct that do not find an appropriate legal basis within the DSU.

To clarify this, let us now investigate what role the agreement between parties plays throughout the dispute settlement process. To this end, the different kinds of mutually agreed solutions found in the practice will be divided into four categories: a) agreements *infra ordinem*, i.e. expressly permitted by the DSU, inasmuch as they represent the positive result of either the preliminary ‘diplomatic’ phase or of the consultations held during the panel procedure; b) agreements *infra ordinem* concluded under DSU Articles 22.2 and 22.8; c) agreements *extra ordinem*, i.e., not provided for by the DSU text, and *praeter legem*, whose aim is to fill the lacunae in a treaty; d) agreements *extra ordinem* and *contra legem*.

Before illustrating the different types of agreements, it must be noted that we refer here to a relatively ‘broad’ notion of agreement, as devised, at international level, by the International Court of Justice,<sup>59</sup> and at the Community level, by the ECJ.<sup>60</sup> The practice of both courts, in fact, bears out that the formal designation of an understanding between two states does not influence, *per se*, its legal nature. To determine whether an act or document constitutes a binding agreement in the public international law sense, or amounts only to a political commitment, the analysis shall not be limited to the *form* or instrument in which the transaction is embodied. Instead, the ICJ, in particular, has always given priority to the *nature* of the act or transaction, to its actual *terms* and to the particular *circumstances* in which it was drawn up, with a view to verifying whether the parties intended to undertake binding obligations proper. The key element is, therefore, represented by the *will* of the parties,<sup>61</sup> as it may be reconstructed on the basis of the previously stated criteria. This remark is necessary to approach the multiform world of the WTO ‘mutually agreed solutions’, a deliberately vague expression that is aimed at encompassing the different national procedures of treaty-making.

Let us now proceed to analyse the function and the content of each of the categories of agreements. This will be done, in line with the aims of this article, by referring mainly to the EC’s practice in the WTO contentious system. As the Community is one of the most frequent users of this system,<sup>62</sup> its practice may provide for a reliable sample of more general trends.

<sup>59</sup> Cf. the stand taken by the ICJ in the *Aegean Sea Continental Shelf* case (ICJ Reports (1978) 3, at 39, para. 96), and, subsequently, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* dispute (ICJ Reports (1994) 112, at 121, para. 25).

<sup>60</sup> In this regard, cf. the classic quotation from the Opinion 1/75 of 11 November 1975, [1975] ECR 1355, where the Court affirmed that Art. 228 (1) (now Art. 300) of the EC Treaty, refers to the expression ‘agreement’: ‘... in a *general* sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation’.

<sup>61</sup> A. Cassese, *International Law* (2001), at 128–129.

<sup>62</sup> In the period between 1 January 1995 and 16 April 2004, the European Community participated in DSU proceedings 49 times as respondent and 63 as complainant.



### **A Agreements infra-ordinem, Concluded during Consultations or Prior to the End of the Panel Proceedings**

As already stated, this category directly reflects the privilege accorded to mutually agreed solutions, at least in the first phase of the DSU proceedings.<sup>63</sup> As it is expressly contemplated by the DSU as the preferable solution, it is probably the least helpful among the four categories here at issue in investigating the 'dark side' of the 'scope for manoeuvre'. To this specific end, it is mostly useful for verifying the EC's compliance with the two requirements imposed by DSU Articles 3.5 and 3.6: namely, consistency of the mutually agreed solutions with the covered agreements and the duty to notify their conclusion to the DSB (the so-called 'transparency rule').

During the first years of DSU practice, the Community stipulated a wide range of agreements falling into this first category.<sup>64</sup> In some cases, there has been undoubted respect for the two above-mentioned conditions, as, for instance, in the *Scallops* case, a dispute which began under the GATT 1947 system dispute, and was settled through an exchange of letters after the parties (the EC as respondent, Canada, Peru and Chile as complainants) read the interim report issued by the panel.<sup>65</sup> In some other circumstances, on the other hand, the EC has been less observant. A case in point is the transparency rule, 'a cornerstone principle of the multilateral trading system',<sup>66</sup> for instance, which has been clearly disregarded in a number of cases. In a system where the only subjects who may legitimately bring a violation complaint are contracting parties whose benefits are nullified or impaired,<sup>67</sup> where the WTO bodies are

<sup>63</sup> See Baroncini, 'The WTO Dispute Settlement Understanding as a Promoter of Transparent, Rule-oriented, Mutually Agreed Solutions. A Study on the Value of the DSU Consultations and their Positive Conclusion', in Mengozzi (ed.), *supra* note 55, at 153.

<sup>64</sup> Among the disputes settled by the Community, alone or jointly with its Member States (especially disputes concerning the TRIPs Agreement), through a mutually agreed solution reached during preliminary consultations, see *Japan-Measures Concerning Sound Recordings*, Notification of Mutually Agreed Solution, WT/DS42/4 of 17 November 1997; *Denmark-Measures Affecting the Enforcement of Intellectual Property Rights*, Notification of Mutually Agreed Solution, WT/DS83/2 of 13 June 2001; *Sweden-Measures Affecting the Enforcement of Intellectual Property Rights*, Notification of Mutually Agreed Solution, WT/DS86/2 of 11 December 1998; *India-Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, Notification of Mutually Agreed Solution, WT/DS96/8 of 6 May 1998; *European Communities-Measures Affecting the Grant of Copyright and Neighbouring Rights*, Notification of Mutually Agreed Solution, WT/DS115/3 of 13 September 2002; *European Communities-Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Notification of Mutually Agreed Solution, WT/DS124/2 of 26 March 2001; *Belgium-Administration of Measures Establishing Customs Duties for Rice*, Notification of Mutually Agreed Solution, WT/DS210/6 of 2 January 2002.

<sup>65</sup> *European Communities-Trade Description of Scallops*, Notification of Mutually Agreed Solution, WT/DS7/12 of 19 July 1996 (EC-Canada Agreement), and *European Communities-Trade Description of Scallops*, Notification of Mutually Agreed Solution, WT/DS12/12, WT/DS14/11 of 19 July 1996 (EC-Peru and EC-Chile Agreements). For another example of a mutually agreed solution reached during the panel procedure see *European Communities-Measures Affecting Butter Products*, Notification of Mutually Agreed Solution, WT/DS72/7 of 18 November 1999.

<sup>66</sup> See the Declaration of the representative of Brazil during the US/Japan talks for settling the *automotive* dispute, *DSB Minutes of Meeting* of 31 May 1995, WT/DSB/M/5, part 2.

<sup>67</sup> G. Adinolfi, *L'Organizzazione Mondiale del Commercio. Profili istituzionali e normativi* (2001), 297 *et seq.*

not empowered to promote any form of review *ex officio*,<sup>68</sup> respect for the duty to notify in good time and to describe amicably reached solutions in detail is vital to ensure proper ‘horizontal’ control. Lacking transparency, states might well adjust the settlement of their disputes to their particular interests, if necessary by infringing the obligations imposed by WTO ‘covered’ agreements. In short, by not paying due regard to the need for transparency, WTO Member States might avoid the risk of facing any form of control.<sup>69</sup> In the *Korea – Telecommunications* case, for instance, the EC Commission, after concluding the negotiations, undertook to suspend its WTO action and formally to end the WTO dispute procedure. Then, the EC Commission and Korea informed the DSB that they had reached a mutually agreed solution, but they did not present the text of the agreement.<sup>70</sup> Much the same happened in the dispute regarding the *Japan – Procurement of a Navigation Satellite* case.<sup>71</sup> Here, the United States reacted by requesting information on the mutually agreed solution and, thus, only subsequently, obtained a Joint Statement by the EC and Japan illustrating the content of the solution agreed.<sup>72</sup> In the dispute on the *US Textiles Rules*, the exchange of letters between the United States Trade Representative and the Vice-President of the European Commission, Sir Leon Brittan, was not presented at the time.<sup>73</sup> This prompted the protests of those countries that had asked to be included in consultations,<sup>74</sup> protests that eventually led to the notification six months later.<sup>75</sup> Even more interestingly, regarding *Japan – Telecommunications Equipment*, no mutually agreed solution has ever been notified. Nonetheless, there is evidence that the case was amicably settled by the parties.<sup>76</sup> The same seems to have happened in the *EC – Duties on Imports of*

<sup>68</sup> On the absence of ‘naked justice’ mechanisms in the DSU system see Ligustro, ‘La soluzione delle controversie’, in Picone and Ligustro, *supra* note 38, at 588.

<sup>69</sup> For this reason, the principle of transparency embodied in Art. X of GATT 1994 has been considered by the Appellate Body as ‘a principle of fundamental importance’: see *United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, WT/DS24/AB/R of 10 February 1997, Part VI.

<sup>70</sup> See *Korea-Laws, Regulations and Practices in the Telecommunications Procurement Sector*, Notification of Mutually Agreed Solution, WT/DS40/2 of 29 October 1997. The document attests only that the European Community and the Republic of Korea ‘... hereby notify the Dispute Settlement Body that they have reached a mutually satisfactory solution’ and that on the basis of this development they both had agreed ‘... to terminate consultations on this matter that took place in accordance with Article XXIII:1 of the GATT 1994 and Article 4 of the DSU’. The text of the agreement was subsequently published in the EC Official Journal (see Council Decision 97/784 of 22 April 1997, OJ 1997 L 321/30).

<sup>71</sup> *Japan-Procurement of a Navigation Satellite*, Notification of a Mutually Agreed Solution, WT/DS73/4/Rev.1 of 14 August 1997.

<sup>72</sup> *Joint Statement for Follow-Up to US Enquiry in the WTO Committee on the Agreement on Government Procurement and the Dispute Settlement Body Concerning Resolution of MSAS Complaint by the European Communities and Japan*, WT/DS73/5 of 3 March 1998.

<sup>73</sup> See Dehousse, Ghemar and Vincent, ‘The EU-US Dispute concerning the New American Rules of Origin for Textile Products’, 36 *JWT* (2002) 67.

<sup>74</sup> DSB Minutes of Meeting of 30 July 1997, WT/DSB/M/36, Part 6.

<sup>75</sup> *United States-Measures Affecting Textiles and Apparel Products*, Notification of Mutually Agreed Solution, WT/DS85/9 of 25 February 1998.

<sup>76</sup> In this sense, see *Update of WTO Dispute Settlement Cases*, WT/DS/OV/21 of 30 June 2004, at 197 (*Japan-Measures Affecting the Purchase of Telecommunications Equipment*, WT/DS15).

*Grains case*.<sup>77</sup> It is not surprising that two of the agreements concluded in the above-mentioned cases, namely in *Korea – Telecommunications* and *Japan – Telecommunications Equipment*, were deemed inconsistent with WTO law.<sup>78</sup>

### **B Agreements infra-ordinem Provided for by DSU Articles 22.2 and 22.8**

It has already been said that, once the DSB has adopted the panel/Appellate Body reports, the ruling becomes binding on the losing party, which is compelled to comply with it by modifying or withdrawing the WTO-inconsistent measure. In the event of protracted non-compliance, parties may agree on a mutually acceptable compensation or, as an *extrema ratio*, the complaining Member may ultimately resort to retaliation, requesting authorization from the DSB to suspend concessions or other obligations under the covered agreements. At any rate, under DSU Article 22.8, the suspension of concessions or other obligations is *temporary* and may last only until such time as: a) the measure found to be inconsistent with a covered agreement has been removed, or b) the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or, else c) a *mutually satisfactory solution* is reached. In any case, the DSB continues to keep under surveillance the implementation of adopted recommendations or rulings.

This considered, let us now seek examples in EC practice of agreements that might be framed within DSU Articles 22.2 and 22.8.

Regarding the first category, an example may be found in the framework of the mutually agreed solution 'on modalities for implementation', concluded in the *Taxes on Alcoholic Beverages case*<sup>79</sup> by the Community, as complainant, with Japan. By an exchange of letters, after completing the examination of the revised liquor tax scheme that the Japanese Government had proposed, and after examining the proposed reduced tariff rates from the bound rates set out as a compensation for the longer implementation period, the EC confirmed that, on the basis of the agreed elements and of the integral application of some additional measures, the Japanese proposals resolved the dispute on liquor tax between the EC and Japan. Agreements on modalities for implementation, albeit partly different in their content, were subsequently concluded between Japan and the other two complainants, Canada and the United States.<sup>80</sup> All these agreements provided for: a) how to implement the recommendations and rulings issued by the WTO judicial organs; b) measures of appropriate compensation; c) 'additional measures' by which the parties determined to what

<sup>77</sup> On 30 April 1997, the United States informed the Secretariat that it was withdrawing its request for the establishment of a panel in view of the fact that EC had adopted regulations implementing an agreement reached on this matter (*European Communities-Duties on Imports of Grains*, WT/DS13/8 of 2 May 1997). This agreement has never been notified.

<sup>78</sup> In this sense *cf.* Baroncini, *supra* note 14, at 192. See *ibid.*, at 196, for further analysis of the EC's relevant practice, particularly of those cases in which the text of the mutually agreed solution was not notified in line with the DSU but published in the EC Official Journal.

<sup>79</sup> *Japan-Taxes on Alcoholic Beverages*, Mutually Agreed Solution on Modalities for Implementation, WT/DSS/17 of 30 July 1997.

<sup>80</sup> *Japan-Taxes on Alcoholic Beverages*, Mutually Agreed Solution on Modalities for Implementation, WT/DS10/20 (Japan/Canada), WT/DS11/17 (Japan/United States) of 12 January 1998.

extent the dispute might be considered settled, defined and integrated the content of obligations, and reserved procedural rights for themselves under the DSU provisions. It might, then, be contended that in these cases the overall settlement of the dispute was the result of a ‘complex act’, made up of the DSB ruling *plus* the agreement on compensation (under DSU Article 22.2), *plus* the agreement between parties on the modalities of implementation. The latter represents a ‘creative’ arrangement by which the parties agree on how to implement the DSB ruling in such a way that the dispute be considered as definitively settled. It is, in fact, notorious that, generally, where a panel or the Appellate Body finds that a measure is inconsistent with a covered agreement, they limit themselves to recommending that the Member concerned bring the measure into conformity. Pursuant to DSU Article 19.1, in fact, the WTO judicial organs ‘may suggest ways in which the Member concerned could implement the recommendations’; in this case, their recommendation is not binding on the losing party.<sup>81</sup> Accordingly, as pointed out in the panel’s ruling on the *Guatemala – Antidumping Investigation* case: ‘In the first instance . . . the modalities of implementation of a panel, or Appellate Body, recommendation are for the Member concerned to determine’.<sup>82</sup> In fact, the means by which the recommendation is to be implemented ‘may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned’.<sup>83</sup> Of course, it is possible that the winning party may not be satisfied with the Member’s implementation. Then, the DSU provides for recourse to the dispute settlement procedures to resolve any such disagreements. Just to avoid this further recourse to DSU proceedings, parties decide to mutually agree on the modalities of implementation (thus integrating the DSB ruling).

Given their complex content, the agreements concluded in the *Alcoholic Beverages* case are in part *infra-ordinem* – as they settle the issue of compensation pursuant to DSU Article 22.2 – and in part *extra-ordinem*, as the possibility for the parties to the dispute to agree on the modalities of implementation of the DSB’s ruling is not *expressly* contemplated by the DSU. On the other hand, nor are agreements on implementation prohibited by the DSU. They simply represent the exercise of the freedom accorded to the losing party to choose at its discretion the means employed to comply with the DSB ruling, possibly even concluding an agreement with the other parties to the dispute.<sup>84</sup> Therefore, they may be considered *extra-ordinem*, but perfectly lawful.

<sup>81</sup> On the need for discretion when it comes to implementing a report by a WTO adjudicating body, see the Panel report in *US-Section 301–310 of the Trade Act of 1974*, WT/DS152/R of 27 January 2000. In the literature see Palmetier and Mavroidis, *Dispute Settlement in the World Trade Organization* (2nd ed., 2004), at 295 *et seq.* See also Hoekman and Mavroidis, ‘Policy Externalities and High-Tech Rivalry: Competition and Multilateral Cooperation Beyond the WTO’, 9 *Leiden Journal of International Law* (1996) 273. According to these authors, action conforming to the suggestion will raise an irrebuttable presumption of compliance with the legal obligation.

<sup>82</sup> *Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R of 19 June 1998, at para. 8.3.

<sup>83</sup> *Ibid.*

<sup>84</sup> If these agreements ‘on implementation’ were to be concluded after the adoption of authorized counter-measures, they could be considered to fall under DSU Art. 22.8.

Regarding agreements falling under DSU Article 22.8, however, an example is provided by the two previously mentioned understandings, concluded by the Community with the United States and Ecuador in the *Bananas* dispute.<sup>85</sup> Following their conclusion and implementation, in fact, the retaliatory action authorized against the Community was terminated.<sup>86</sup>

### **C Agreements extra-ordinem (Not Provided for by the DSU) and praeter legem (Whose Aim is to Fill the Lacunae of the DSU)**

More relevant to our aim, that of disclosing the real scope of the margin of manoeuvre defended by the ECJ, are the two last categories of agreements, those without any legal basis in the DSU.

The first type, which will be dealt with in this section, mainly aims at filling in some of the deficiencies in the text and procedures provided for by the DSU. In fact, before managing to complete a formal review of dispute settlement rules and procedures required by the Uruguay Round,<sup>87</sup> WTO Member States developed a practice of 'creative' agreements to overcome some of the DSU flaws. This state practice, coupled with the interpretative practice developed by the WTO judicial bodies, has provided a useful basis for the intergovernmental review process, still under way. As is well known, in fact, the DSU review, which was to have concluded in October 1998, was blocked due to strong divergences among Members. The DSB, then, decided to further the review process until the end of July 1999,<sup>88</sup> but the 1999 Seattle Ministerial Conference ended without agreement. It was only with the 2001 Doha Ministerial conference that negotiations were revived, with the task, not yet achieved, of reaching an agreement by May 2003.<sup>89</sup>

Reverting to the silences of the DSU, it has already been noted that one of the major controversies regarding the dispute settlement procedures concerns the so-called 'sequencing conflict', i.e., the textual conflict over the interpretation of, and the relationship between, the compliance review under DSU Article 21.5 and the suspension

<sup>85</sup> *Supra* note 8.

<sup>86</sup> See DSB Minutes of Meeting of 24 July 2001, WT/DSB/M/107, at 3.

<sup>87</sup> *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, LT/UR/D-1/6 of 15 April 1994.

<sup>88</sup> DSB Minutes of Meeting of 3 February 1999, *Extension of the Deadline for Review of the DSU*, WT/DSB/M/52.

<sup>89</sup> See the *Doha Declaration*; DSB Negotiations, Statement by the Chairman, WT/DSB/W/181 of 18 December 2001. On the DSU review process, in the literature see Parenti, 'Looking Forward: The European Union's Quest for the Millennium Round', in Mengozzi (ed.), *supra* note 55, at 849; Pace, 'Cinq ans après sa mise en place: la nécessaire réforme du mécanisme de règlement des différends de l'OMC', 104 *RGDIP* (2000) 615; Bourgeois, 'Some Reflections on the WTO Dispute Settlement System from a Practitioner Perspective', 4 *JIEL* (2001) 145; Fudali, 'A Critical Analysis of the WTO Dispute Settlement Mechanism: its Contemporary Functionality and Prospects', 49 *NILR* (2002) 39; and Petersmann, 'The Negotiations on Improvements of the WTO Dispute Settlement System', 6 *JIEL* (2003) 237. For a partial collection of the different proposals of amendments, see the report issued in June 2003 by the Chairman of the DSB Special Session, WTO doc. TN/DS/9.

of concessions under DSU Article 22.<sup>90</sup> This problem, which ‘evolved into a near constitutional crisis over the systemic implications of the issues involved’,<sup>91</sup> exploded, as stated above, in relation to the dispute concerning the EC regime on the importation of bananas. In that case, in fact, some of the complainants (the United States, Guatemala, Honduras and Mexico), claimed that they would request the suspension of concessions immediately after the end of the reasonable period of time, irrespective of whether an Article 21.5 review of the new EC banana policy were undertaken (as, indeed, occurred, on the initiative of Ecuador). Accordingly, when the EC’s reasonable period expired, the United States requested DSB authorization to suspend concessions. Then, the EC claimed that, if the US request were approved, ‘the consequences for the multilateral dispute settlement would be grave, since the entire system is built on the premise that Members will refrain from such unilateral determinations [of non-compliance]’.<sup>92</sup> The United States responded that the EC’s interpretation would lead to a *regressus ad infinitum*, namely to another compliance period following conclusion of the first review, followed by another review, another compliance period, and so on.<sup>93</sup> However, while the EC’s position seems more in line with the spirit of the system,<sup>94</sup> the stand taken on this issue by the DSB in the *Bananas* case,<sup>95</sup> and subsequently by the panel in its report on the *US – Import Measures* case,<sup>96</sup> has shown a contrasting trend.

At any rate, since the DSU review has not been completed, parties involved in several subsequent cases have resorted to bilateral agreements on the ‘agreed procedures under Articles 21 and 22 of the DSU’, with a view to solving the ‘sequencing problem’. Those agreements are mainly based on two different models. The first method, developed in such cases as *Australia – Salmon*,<sup>97</sup> and *Canada – Dairy Products*,<sup>98</sup> enables

<sup>90</sup> See Vallas and McGiven, ‘The Right to Retaliate under the WTO Agreement – The “Sequencing Problem”’, 34 *JWT* (2000) 63.

<sup>91</sup> Gleason and Walther, ‘Operation of the Implementation Process: the WTO Dispute Settlement Implementation Procedures: A System in Need of Reform’, 31 *Law and Policy in International Business* (2001) 709, at 721.

<sup>92</sup> See *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Request for the Establishment of a Panel by the European Communities, WT/DS27/40 of 15 December 1998, quoting, European Community, *US Threat of Unilateral Action on Bananas puts multilateral Dispute Settlement System at Risk*, 29 October 1998, P6 (EC memorandum circulated to the DSB).

<sup>93</sup> On this US position, see Mercurio, *supra* note 1, at 134.

<sup>94</sup> See Distefano, ‘Certeza del diritto ed esecuzione delle decisioni OMC alla luce dei primi arbitrati’, 36 *Rivista di diritto internazionale privato e processuale* (2000) 579, at 603.

<sup>95</sup> Where the DSB took into consideration the US’s request for authorization to suspend concessions under DSU Art. 22.2, almost simultaneously with the start of the Art. 21.5 review procedure requested by Ecuador and the EC, see *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Recourse by the United States to Art. 22.2 of the DSU, WT/DS27/43 of 14 January 1999.

<sup>96</sup> *United States-Import Measures on Certain Products from European Communities*, Report of the Panel, WT/DS165/R of 17 July 2000, at para. 6.124.

<sup>97</sup> See *Australia-Measures Affecting the Importation of Salmon*, Recourse to Art. 21.5 of the DSU by Canada, Communication from the Chairman of the Panel, WT/DS18/17 of 13 December 1999.

<sup>98</sup> See *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Additional Understanding between Canada and the US regarding Procedures under Arts. 21 and 22 of the DSU, WT/DS103/24 of 2 January 2002.

the parties to initiate concurrent procedures under Articles 21.5 and 22.6. Article 22 proceedings are then suspended until the Article 21.5 procedure is ended. If, after the review process, the respondent fails to comply with the ruling, then the complainant can restart Article 22 proceedings. The second method, however, first implemented in the *Australia – Leather* case,<sup>99</sup> requires recourse to Article 21.5 review *prior* to initiating procedures to suspend concessions, thereby waiving the Article 22 terms. Anyhow, whether or not non-compliance is found, the losing party undertakes not to object to a retaliation request (even if the 30-day time period specified in the first sentence of the DSU Article 22.6 has expired), but only to the level of authorized suspension.

As to the European Community, it has concluded 'voluntary agreements' falling into each of these categories. With reference to the first, a good example is provided by the agreement concluded between the EC and the United States in the *US – Foreign Sales Corporations* case.<sup>100</sup> As to the second, we may refer to the understandings regarding procedures under Articles 21 and 22 of the DSU, concluded by the EC with Argentina in the follow-up of the dispute on *Bovine Hides and Finished Leather*,<sup>101</sup> and with India, in the follow-up of the *Bed-linen* case.<sup>102</sup>

#### **D Agreements extra-ordinem (Not Provided for by the DSU) and contra legem**

The last category in our analysis bears the most relevance to our aim of investigating the 'dark side' of the 'scope for manoeuvre' argument. Understandings *contra legem*, in fact, are the result of parties to a dispute freely disposing of procedural and substantial rules and, then, the obligations arising from them. These agreements clearly evidence the practical shortcomings deriving from the absence of a collective or 'public' control to eradicate WTO-wrongful conduct in the pursuit of public goods.<sup>103</sup>

A first type of *contra legem* understanding provides a clear example of the 'pay-option', namely the losing party pays a financial compensation and thus acquires licence to continue to violate. This solution, as has been repeatedly said, is clearly in contrast with the DSU. In fact, once the recommendations and rulings are adopted by the DSB, the losing party is obliged to bring its legal system into compliance.

<sup>99</sup> See *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse by the USA to Art. 21.5 of the DSU, WT/DS126/8 of 4 October 1999.

<sup>100</sup> See *US-Tax Treatment for Foreign Sales Corporations*, Understanding between the European Communities and the United States Regarding Procedures under Arts. 21 and 22 of the DSU and Art. 4 of the SCM Agreement, WT/DS108/12 of 5 October 2000. See also WT/DSB/M/90 of 31 October 2000, at 4.

<sup>101</sup> See *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Agreement between the European Communities and Argentina concerning Procedures under Arts. 21 and 22 of the DSU, WT/DS113/24 of 2 January 2002.

<sup>102</sup> See *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Understanding between India and the European Communities regarding Procedures under Arts. 21 and 22 of the DSU, WT/DS141/11 of 13 September 2001.

<sup>103</sup> On this issue see Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *AJIL* (2000) 335.

Compensation and retaliation are both provisional tools for applying pressure and means of legal redress (albeit neither retroactive nor punitive<sup>104</sup>) for the damages suffered by other parties; they are not suitable alternatives for implementation. Furthermore, no financial compensation is available in WTO law. Compensation may be fixed in terms of concessions or other obligations, but is never monetary in nature. Yet, measures of compensation are to be consistent with the WTO agreements (pursuant to DSU Article 22.1) and must be provisionally applied *erga omnes*, namely towards all the WTO members, not only towards those who have suffered a nullification or impairment of their benefits. In the *US-Section 110(5) of the US Copyright Act*, the European Community and the United States have notified the DSB of a 'mutually satisfactory temporary arrangement', whereby the US has agreed to pay the EC \$3 million in compensation over a three-year period.<sup>105</sup> Consultations will then be held with a view to reaching a final solution. As a result of this 'lump-sum' agreement, US WTO-inconsistent legislation (which allows the broadcasting of music in restaurants and bars without paying royalties to EC rights holders) will remain in force pending the three-year period. However, the Community has repeatedly underlined that a temporary compensation is not a substitute for full compliance, and that resolution of the dispute requires the United States to amend its WTO-inconsistent legislation.<sup>106</sup> Australia, on the other hand, has constantly expressed concern about the apparent discriminatory nature of the compensation arrangements agreed between the US and the Community.<sup>107</sup>

Secondly, and more interestingly, let us consider the two understandings that led to an 'out of court' settlement of the US/EC dispute triggered by the 1996 *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, better known as the Helms-Burton Act.<sup>108</sup> It is well known that the Community and Canada opposed this Act,<sup>109</sup> claiming that its retroactivity, its imposition of a secondary boycott and its territorial effect were

<sup>104</sup> See *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Arbitration by the European Communities under Art. 22.6 of the DSU, Decision by Arbitrators, WT/DS27/ARB of 9 April 1999, at para. 6.3 ('We agree... that this temporary nature indicates that it is the purpose of countermeasures to induce compliance. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a punitive nature').

<sup>105</sup> See *United States-Section 110 (5) of the US Copyright Act*, Notification of a Mutually Satisfactory Temporary Arrangement, WT/DS160/23 of 26 June 2003.

<sup>106</sup> See the statements made by the representative of the EC at the DSB meetings held on 18 December 2001 (WT/DSB/M/116 of 31 January 2002, at 4), 1 February 2002 (WT/DSB/M/119 of 6 March 2002, at 3), 17 April 2002 (WT/DSB/M/123 of 6 May 2002, at 2), 22 May 2002 (WT/DSB/M/124 of 13 June 2002, at 2). The same position was reaffirmed at the DSB meeting held on 24 June 2003, after the representative of the US informed the DSB of the conclusion of the temporary arrangement (see WT/DSB/M/151 of 12 August 2003, at 2).

<sup>107</sup> See the statements made by the representative of Australia at the DSB meetings cited in the note above.

<sup>108</sup> Text reprinted in 35 ILM (1996) 357.

<sup>109</sup> On the EC unilateral reaction to the Helms-Burton Act see Lang, 'Le reazioni comunitarie alla legge Americana Helms-Burton', 1 *Il diritto dell'Unione europea* (1996) 1119.



contrary to international law.<sup>110</sup> Moreover, its content amounted to an infringement of the rules posed by the WTO.<sup>111</sup> Consequently, the EC, firstly, asked for consultations in the WTO,<sup>112</sup> and, then, filed a complaint against the US, formally requesting the establishment of a panel to consider the compliance of the US measures with GATT 1994 and GATS.<sup>113</sup> The US responded to the EU challenge by invoking the national security exception, which is part of both GATT (Article XXI) and GATS (Article XIV *bis*). As a result of an EC/US understanding concluded on 11 April 1997, the EU later agreed to suspend the proceedings of the WTO panel by resorting to DSU Article 12.12.<sup>114</sup> In return, the US administration did not undertake to abrogate or modify its contested laws, but only agreed to continue the suspension of Title III of the Helms-Burton Act and to seek a waiver of its Title IV from Congress. Both these initiatives were meant to exempt *only* EC companies from the most controversial aspects of the *Libertad* Act.<sup>115</sup> After further negotiations, an 'Understanding with respect to Disciplines for the Strengthening of Investment Protection' was agreed upon on 17 May 1998.<sup>116</sup> On this basis, the US administration undertook to ask Congress to amend Title IV of the Helms-Burton Act to give the President the Authority to make the waiver permanent in return for respect on the part of the EU of disciplines that would apply to expropriated properties (with a view to making it more difficult for EC investors to take over Cuban properties that had been illegally expropriated). Notwithstanding the commitment made by the Clinton administration, rather than granting the legislative waiver, US Congress asked for a strict implementation of Title IV, thereby showing that there was no intention to restrict extra-territorial legislation. Evidently, the US Congress took the statement made by the parties literally, namely that the 1998 Understanding was a political commitment belonging to the domain of

<sup>110</sup> Bianchi, 'Le recenti sanzioni unilaterali adottate dagli Stati Uniti nei confronti di Cuba e la loro liceità internazionale', 81 *Rivista di diritto internazionale* (1998) 313; Lowenfeld, 'Congress and Cuba: The Helms-Burton Act', 90 *AJIL* (1996) 430; Clagett, 'Title III of the Helms-Burton Act is Consistent with International Law', 90 *AJIL* (1996) 434; Stern, 'Vers la Mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy', 100 *RGDIP* (1996) 979; and Gierbolini, 'The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum', 6 *Journal of Transnational Law and Policy* (1997) 289.

<sup>111</sup> Kuilwijk, 'Castro's Cuba and the Helms-Burton Act – An Interpretation of the GATT Security Exception', 31 *JWT* (1997) 49; and Swaak-Goldman, 'Who Defines Members' Security Interest in the WTO?', 9 *Leiden Journal of International Law* (1996) 361.

<sup>112</sup> *United States-Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Request for Consultations by the European Communities, WT/DS38/1 of 13 May 1996.

<sup>113</sup> *United States-Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Request for the Establishment of a Panel by the European Communities, WT/DS38/2 of 8 October 1996.

<sup>114</sup> Accordingly, the complaining party in DSU proceedings may 'at any time' request the suspension of the work of the panel 'for a period not to exceed 12 months'. Then, if the work of the panel remains suspended for more than 12 months, the authority for establishment of the panel is considered as lapsed. As to the instant case, see *United States-Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Lapse of the Authority for Establishment of the Panel, WT/DS38/6 of 24 April 1998.

<sup>115</sup> See *Memorandum of Understanding concerning the U.S. Helms-Burton Act and the U.S. Iran and Lybia Sanctions Act*, 11 April 1997, text at 36 *ILM* (1997) 529–530. For comments, see Lang, 'Nuovi sviluppi nella controversia CE-USA relativa alla legge Helms-Burton', 2 *Il diritto dell'Unione europea* (1997) 506.

<sup>116</sup> For the text consult <http://www.eurunion.org/news/invest.htm>, the internet site of the EC Commission delegation in the United States.

soft law rather than that of hard law. Therefore, it was to be interpreted as conferring a moral obligation and not as imposing legal obligations.<sup>117</sup> Nonetheless, the vague category of ‘mutually agreed solutions’ envisaged by the DSU seems broad enough to encompass even this kind of agreed settlement. Otherwise, it would be relatively easy for WTO Members to eschew the obligations of compatibility and notification set up by DSU Articles 3.4 and 3.5, by simply manipulating the formal denomination of their understandings. As a matter of fact, Cuba, in reacting to the conclusion of the 1998 arrangement, defined it as an agreement falling within the WTO notion of ‘mutually agreed solution’.<sup>118</sup>

All this said, it is evident that the US and the EC, by concluding the two understandings described above, disregarded both the compatibility and the notification rules. In fact, as has been noted,<sup>119</sup> the 1998 Understanding mainly served to end the negative consequences deriving from a WTO-inconsistent measure only for the EC, leaving the circumstances for other states unaltered. Furthermore, even this partial objective was not attained, given that the arrangement has never become operative, and that the offending measures are still in force.<sup>120</sup> Finally, the agreement has never been duly notified to the DSB.

Therefore, thanks to a WTO-inconsistent mutually agreed solution, a serious policy dispute was settled outside DSU procedures, in order to allay fears that any WTO decision against the United States could provoke an anti-WTO reaction in that country, thus jeopardizing the stability of the overall system. By doing this, the EC availed itself of its rights under GATT and GATS, granting the United States the right to keep violating in exchange for promises never fulfilled. It is, therefore, by no means surprising that the parties opted for a low profile, by referring to this understanding as ‘political commitments’, while the EU Council only ‘took note’ of the decisions and statements made at the London Summit.<sup>121</sup>

Finally, it should be recalled that compulsory notification of a mutually agreed solution is intended to prevent states from reverting to the criticized practice of ‘grey area’ trade restrictions, namely measures brought about under the old GATT by discriminatory and restrictive bilateral agreements establishing voluntary

<sup>117</sup> See Part II, para. 2 of the 1998 Understanding, *supra* note 116.

<sup>118</sup> See DSB Minutes of Meeting of 22 June 1998, WT/DSB/M/46, at 17.

<sup>119</sup> Smis and Van der Borghi, ‘The EU-US Compromise on the Helms-Burton and D’Amato Acts’, 93 *AJIL* (1999) 227, at 235. According to these authors: ‘Although the 1998 Understanding is aimed at strengthening investment protection, the spirit of the Helms-Burton Act runs throughout the document and several concessions to this legislation were made by the European Union’.

<sup>120</sup> On subsequent developments *cf.* Paemen, ‘Avoidance and Settlement of “High Policy Disputes”: Lessons from the Dispute over “The Cuban Liberty and Democratic Solidarity Act”’, in Petersmann and Pollack (eds.), *supra* note 54, at 361.

<sup>121</sup> See 2097th Council meeting-General Affairs-Brussels, 25 May 1998, PRES/98/162 of 27 May 1998, at 12–14. It is clear that the conclusion of agreements whereby the Community renounces its rights under WTO law involves the issue of the distribution of competences among the EC bodies in the treaty-making field. On this question, that cannot be dealt with here in any detail: see Baroncini, *supra* note 14, at 202 *et seq.*

restrictions.<sup>122</sup> 'Grey area' measures, often used in the past to defend the EC market, were incompatible with the GATT prohibitions of trade discrimination (under Article XIII) and non-tariff trade barriers (under Article XI.1). According to Article 11.2 of the Uruguay Round Agreement on Safeguards, WTO parties are now prohibited from resorting to or encouraging such measures.<sup>123</sup>

## 4 Final Remarks

A lesson already learned under the old GATT system is that an international organization relying for the enforcement of its rules only on complaints by its members cannot effectively prevent them from agreeing not to observe these rules in their relations.<sup>124</sup> According to this perspective, sovereignty and supervision are not easily reconcilable.<sup>125</sup> Notwithstanding the major innovations brought about by the Marrakech Agreements, the WTO has not extended the circle of those who can legitimately bring violation complaints beyond its Member Parties. The WTO, as an institution, has not been given the power to initiate *proprio motu* proceedings against its Members. On the other hand, WTO norms are often denied direct effect, i.e. they may not be directly invoked by private parties before the Courts. Therefore, the objective formulated with reference to the EC system by the ECJ in *Van Gen en Loos*,<sup>126</sup> namely that individuals might be involved as guardians of rule compliance by Member States, has been widely disregarded as to WTO law (with the exception of those administrative mechanisms, such as the *US Section 301* or the *EC Trade Barriers Regulation*, according to which private parties play an indirect triggering role, being dependent on the will of the executive bodies). Lacking any form of control 'from above', by the organization, and 'from below', by private operators, transparency is the key to guaranteeing the good functioning of the only supervision mechanism provided for by the DSU, the 'horizontal' one.

In a wider perspective, then, the choice of an exclusive 'horizontal' control reflects the circumstance that WTO trade obligations are still considered by their addressees as not collective (or *erga omnes partes*) in nature. Nor are they deemed to be directed towards the WTO as an autonomous subject, notwithstanding the fact that the multi-lateral system of trade regulation and dispute settlement hinges on an international

<sup>122</sup> When adopted by the EC, export restraints have often been neither authorized by the EC Council pursuant to Art. 113 of the EEC Treaty, nor officially published by the EC Commission. See Petersmann, 'Grey Area Trade Policy and the Rule of Law', 22 *JWT* (1988) 23; Roessler, 'The Constitutional Function of the Multilateral Trade Order', in M. Hilf and E.-U. Petersmann (eds.), *National Constitutions and International Economic Law* (1993), 53, at 59; Ligustro, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC* (1996), at 221 *et seq.*; Yamane, 'Grey Area' Measures, the Uruguay Round and the EC/Japan: Commercial Consensus on Cars', in Emiliou and O'Keefe (eds.), *supra* note 16, at 278.

<sup>123</sup> Lee, 'Revival of Grey-Area Measures? The US-Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards', 36 *JWT* (2002) 155.

<sup>124</sup> Roessler, *supra* note 122, at 61.

<sup>125</sup> Generally, on this issue, see Blokker and Muller, 'Towards More Effective Supervision by International Organizations – Some Concluding Observations', in N. Blokker and S. Muller (eds.), *Toward More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers* (1994), 275.

<sup>126</sup> Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, [1963] ECR-1.

organization endowed with legal personality. Instead, as has been maintained,<sup>127</sup> most of them remain essentially *bilateral* (aiming at regulating ‘bundles’ of bilateral relations) and *not preemptory*, since there is no collective or superior interest to protect (as occurs in those cases in which a ‘common good’ transcending the sum total of individual interests exists, such as for human rights, environmental protection or international criminal law treaties). If the above is true, then it is possible to contract out of these obligations without affecting the individual or collective rights of the other WTO parties.

The crucial question, then, is to assess whether bilateral agreements concluded as between two or a sub-group of WTO Members, with a view to effecting *inter se* changes or suspension of WTO rights and obligations (as happened, for instance, in the *Helms-Burton* or in the *US-Section 110 (5) of the US Copyright Act* cases), may be deemed *valid* between the parties, and *permitted* (i.e., does not give rise to responsibility for wrongful conduct).

In this regard, it should be recalled that, according to Articles 41.1 and 58.1 of the 1969 Vienna Convention, states may *not* stipulate *inter se* modifications or suspensions to a multilateral treaty when these are ‘prohibited in the treaty itself’ or ‘affect the enjoyment by other parties of their rights under the treaty’. DSU Article 3.5 (and other DSU provisions regarding mutually agreed solutions) requests the *compatibility* of every solution to matters formally raised under the consultation and dispute settlement provisions with the covered agreements. It has already been noted that compatibility does not mean conformity: in between there is a slight ‘scope for manoeuvre’. What happens, then, if the *inter se* arrangement is either WTO-incompatible or affects the rights of individual WTO parties? In these cases, we think that the derogative agreement should be considered as *unlawful*, and therefore not permitted, *but valid*, as is true for all the derogatory agreements not infringing upon rules of *jus cogens*.<sup>128</sup> Differently put, the problem is simply one of the responsibility of the participants to the derogative agreement *vis-à-vis* the parties of the multilateral treaty whose rights have, in any case, been affected. And here, again, the key issue is transparency. Nonetheless, if a WTO-inconsistent agreement does not become the object of a violation complaint, the problem of responsibility does not arise. In any case, the *inter se*

<sup>127</sup> Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, 14 *EJIL* (2003) 907. The same conclusion had been reached as to the GATT obligations by M.J. Hahn, *Die Einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (1995) at 396 and Section 3. See also Hudec, ‘Broadening the Scope of Remedies in WTO Dispute Settlement’, in F. Weiss (ed.), *Improving WTO Dispute Settlement Procedures – Issues and Lessons from the Practice of Other International Courts and Tribunals* (2000), 369, at 387.

<sup>128</sup> On the legality of *inter se* agreements deviating from the WTO treaty, see J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (2003), at 315 *et seq.* More generally, on the issue of the validity/illegality of derogatory agreements, see F. Capotorti, *L’extinction et la suspension des traités*, 134 *RdC* (1971-III), at 504; P. Daillier and A. Pellet, *Droit International Public* (7<sup>th</sup> ed., 2002), at 273.

agreement will be effective between its contracting parties until they decide to either modify or terminate it.<sup>129</sup>

Much has been said on the beneficial effects of mutually agreed solutions acting as a 'safety valve' in order to defend either sovereignty or 'non-trade values' (human rights, environment, public health).<sup>130</sup> On the other hand, the low number of agreements *contra legem* found in the practice, bears out that the DSU system performs satisfactorily. This is also due to mutually agreed solutions permitted by the DSU or operating *praeter legem*. Nonetheless, from a *theoretical* point of view, the systemic characteristics described above have a direct bearing on the nature of WTO rules,<sup>131</sup> which are legally binding, but capable of being derogated by agreement, and therefore a source of rights and obligations that are disposable in nature.

<sup>129</sup> On the persistence of a diplomatic ethos in the WTO, notwithstanding the fundamental paradigm shift introduced by compulsory jurisdiction, binding outcomes and the establishment of an Appellate Body, see Weiler, 'The Rule of Lawyers and the Ethos of Diplomats', 35 *JWT* (2001) 191.

<sup>130</sup> Generally, on the solution of the conflicts between WTO law and agreements protecting 'non-trade-values', see Picone, 'L'OMC e il diritto internazionale', in Picone and Ligustro, *supra* note 38, at 634. On the issue of the so-called 'trade-and's', see L.S. Rossi (ed.), *Commercio internazionale sostenibile. WTO e Unione europea* (2003). On the beneficial effects stemming from resort to mutually advantageous adjustments, see Jackson and Sykes, 'Questions and Comparisons', in Jackson and Sykes (ed.), *supra* note 38, at 462–463.

<sup>131</sup> An issue widely debated in doctrine, particularly with reference to obligations arising under the DSU. On opposite positions see, on the one side, Bello, 'The WTO Dispute Settlement Understandings: Less is More', 90 *AJIL* (1996) 416; Sykes, 'The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance', in M. Bronckers and R. Quick (eds.), *New Directions in International Economic Law. Essays in Honour of John J. Jackson* (2000), 347; Reif and Florestal, 'Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding', 32 *The International Lawyer* (1998) 755; and Schwartz and Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 *Journal of Legal Studies* (2002) 179. Among the many in favour of the absolute binding nature of WTO obligations under the DSU see, instead, Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation', 91 *AJIL* (1997) 60 and 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?', 98 *AJIL* (2004) 109; Cottier, *supra* note 16, at 335 *et seq.*; Zonnekeyn, 'The Bed Linen Case and Its Aftermath. Some Comments on the European Community's "World Trade Organization Enabling Regulation"', 36 *JWT* (2002) 993; and Roessler, 'Performance of the System IV: Implementation – Comments', 32 *The International Lawyer* (1998), at 789–790.

