NON-IMPLEMENTATION OF WTO DISPUTE SETTLEMENT DECISIONS AND LIABILITY ACTIONS

Mervi Pere

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1. INTRODUCTION

1.1. Non-implementation of WTO Dispute Settlement Decisions and Liability Actions

The World Trade Organization was established in 1995 and the European Community and its Member States became thereby bound by an overwhelming number of international obligations in the field of international trade. The entering into force of the WTO Agreements has been followed by a flood of cases to the European Court of Justice where the applicants have attempted to challenge Community law provisions on the basis of the international obligations imposed on the Community by virtue of the provisions of the WTO Agreements and the decisions made in the framework of the WTO dispute settlement mechanism.

The case law of the ECJ concerning the effect of WTO law in the Community legal order has been characterised by 'judicial self-restraint' and deference to the discretion of the political and executive institutions of the Community. As a general rule, the possibility of private parties to challenge Community measures on the basis of WTO law has been ruled out. Under some circumstances WTO provisions, however, may become available to private parties. The reluctance of the Court to let private parties to rely on WTO law may, however, sometimes lead to situations the acceptability of which can be questioned from the point of view of effective judicial protection of the rights of individuals.

The transatlantic disputes concerning the banana import regime of the EC and the Community's ban on importation of beef from cattle treated with hormones are notorious. The WTO dispute settlement organs condemned the Community measures in the *Bananas*[1] and *Hormones*[2] cases but the EC failed to amend its legislation to comply with WTO law. As an European, one might to sympathise with the EC for protecting the health of its citizens and refusing to lift the ban on importation of hormone-treated meat. There is, however, more at stake than the respect of international commitments. The non-compliance by the Community also causes damage to private businesses operating within the Community. Most tangibly the consequences of the Community's WTO-illegal behaviour have affected the Community businesses that have suffered heavy losses in face of the retaliatory measures resorted to by the United States under the authorisation of the WTO Dispute Settlement Body (DSB).

Article 288(2) EC provides that in the case of non-contractual liability, the Community shall be held liable for the damage caused by its institutions or by its servants in the performance of their duties. Recently, several actions for damages under this Article have been brought by private parties in order to claim compensation for the damage they have suffered due to the WTO-illegal behaviour of the Community. These cases are connected to the non-implementation of the international obligations imposed on the Community in the *Bananas* and *Hormones* cases by the WTO dispute settlement organs. Only a few of the cases have led to a judgement so far, and these are the first cases dealing with the issue of whether private entities can invoke WTO law in the context of actions for damages. These cases and their chances of success are the main subject of this article.

The Court has rejected all the actions it has dealt with so far and the chances of success of the future actions do not seem very high. First, we are dealing with WTO law and the Court has been very reluctant to let private parties to rely on it. Second, it has been extremely rare that actions for damages under Article 288(2) EC have succeeded. The problem is, however, worth discussing. First of all, an Advocate General recently suggested that individuals should be allowed to rely on WTO law in liability actions under some circumstances where non-implementation by the Community of DSB decisions is involved[3]. The ECJ did not explicitly accept or reject such a suggestion but the question

remains an open one. Moreover, there have recently been some signs of relaxation of the extremely strict criteria for Community liability.

1.2. Focus and Structure

The relationship between the WTO and the European Community is a complicated issue, as was already the relationship between the predecessor of WTO, GATT 1947, and the EC. At the international level the EC, as all the other signatories, is bound by the WTO Agreements according to the rules of public international law. The effect of WTO law at the national level is, however, to be determined by the legal orders of each member (state) of the organisation. In general terms this article concentrates on the relationship of the two organisations from the point of view of how the effect WTO law has been seen and determined in the EC legal order.

More specifically, the article will focus on the issue whether private parties can invoke WTO dispute settlement decisions in liability actions. The jurisprudence of the European Courts concerning the possibility of private parties to challenge Community law provisions on the basis of WTO law and the effect of the case law on liability actions will be in the centre of the attention. Of particular importanc for the purposes of this article are the cases involving WTO dispute settlement decisions.

It is also necessary to examine the rules governing the non-contractual liability of the Community to some extent. This will be done mainly to explain what requirements those rules set on the rule to be relied on in a liability action and whether the WTO law provisions can fulfil such requirements. There are three general conditions that have to be met in order for the Community to incur liability: unlawfulness of the conduct of the institutions, the existence of damage and a causal link between the first two. As the fulfilment of the two latter conditions may depend significantly on the circumstances of an individual case, they will be only briefly described in order to give a full picture of the conditions of liability but remain otherwise outside the scope of this study. The condition of unlawfulness will be given more attention, especially as to what requirements they set on the nature of the rule breached.

The applicants that have brought liability actions and claimed compensation for the damage they have suffered due to the non-implementation by the Community of WTO dispute settlement decisions have also relied on fundamental principles of Community law as a foundation for their actions. Such pleas will, however, mainly remain outside the scope of the article as it concentrates on invocation of WTO law.

The main purpose of the article is to assess the problem whether, and under what circumstances, can private parties benefit from WTO dispute settlement outcomes in liability actions that involve non-implementation by the Community of a ruling or recommendation made by the WTO Dispute Settlement Body.

To be able to examine this problem properly, it is necessary to first shed some light on the position of individual in respect to WTO law in the Community legal order and assess how private parties may benefit from the WTO law in general. Second, and more importantly, it will be analysed if, and how, the means available to invoke WTO can be used by individuals to enforce adopted WTO panel and Appellate Body reports in case the EC does not comply with them. The analysis thereby also attempts to shed some light on the level of judicial protection of the individual in the European Community legal order with regard to WTO law and WTO dispute settlement decisions in particular. The aim is to find out whether a "judicial deficit" exists in the Community system for the protection of individuals in case of adopted WTO panel and Appellate Body reports and whether there is a need for the

remedy under Article 288(2) EC as one of its functions of which has considered to be to compensate for such a "judicial deficit".

The Parts 2 and 3 also describe and explain the rather special characteristics of the jurisprudence of the ECJ relating to the general lack of justiciability of WTO law. In order to assess the chances of success of liability actions brought by private parties against the Community institutions to get compensated for the loss they have suffered due to the non-implementation by the EC of WTO dispute settlement findings, it is necessary to assess how these decisions have been treated by the Court and what arguments have been brought up. Some attention will be given to the underlying reasons for the stance taken by the Court but the purpose of this paper is not to go very deep into the discussion of the reasons in political-economic level.

Part 4 discusses some relevant characteristics of the action for damages under Article 288 (2) EC. It attempts to give a general overview to the position of the form of action in the Community system of judicial protection and takes into account the recent developments in the case law. The conditions for bringing a successful liability action will be described briefly in order to get a full picture of the requirements to be fulfilled. It is necessary to describe the general characteristics of the action in order to illuminate what is at issue in the actions for damages brought due to the non-implementation of DSB decisions by the Community and how such actions differ from actions for annulment.

Part 5 presents the most important cases that deal with the issue of whether private parties may rely on WTO law in the context of liability actions and involve non-implementation by the Community of DSB decisions given in *Bananas* and *Hormones* cases. Particularly important are the recent *Biret* cases[4] and they will be given particular attention.

Part 6 deals the issue of invocation of WTO law in actions for damages in more detail. It discusses how the general rules developed in the actions under Art. 230 and Art. 234 EC affect liability actions. First it is determined, whether it is necessary for a provision of international law to be directly effective to be invoked in a liability action. The second issue is whether private parties can benefit from the *Nakajima* doctrine in liability actions in case of non-implementation of DSB decisions. The third issue relates to the *Biret* cases, which could be interpreted to imply that private parties might be allowed to rely on DSB decision in actions for damages under some circumstances. Such a potential effect of DSB decisions will be discussed in light of the reasoning on which the Court has based its stance to the effect of WTO law. Of great importance to this discussion is the Opinion of Advocate General in *Biret*.

Part 7 makes some observations on whether the applicant can establish the unlawfulness of the behaviour of the Community institutions in a case where the DSB has confirmed the WTO-nonconformity of Community action as the criteria for Community liability require. First, it will be discussed whether the condition that the rule of law relied on is intended to confer rights on individuals can be met when a WTO rule is invoked. This condition is crucial for the purposes of this article. Second, it will be discussed the main aspects that have to be taken into account in establishing that the breach has been sufficiently serious for the purposes of a liability action. This is important mainly to understand whether unlawfulness could be established when the Community institutions have failed to implement a WTO dispute settlement decision.

1.3. Method and Sources

The article is based on the analysis of the case law of the European Court of Justice and the Court of First Instance and on the interpretations presented by commentators of that jurisprudence. Most

important cases dealt with are the ones establishing the rules on the relationship between the WTO law and the Community legal order on the one hand, and the ones determining the conditions of the non-contractual liability of the Community on the other. In the centre of the focus are the cases, which deal with both issues. Particular attention is given to the recent *Biret* case and to the Opinion of Advocate General Alber preceding the judgement of the ECJ in that case.

The relationship between the WTO and the EU is a controversial issue, which is well illustrated by the occasionally peculiar, and most certainly debatable case law of the ECJ. It has provoked intense discussion and an abundance of articles. Most helpful in fleshing out how private parties can rely on WTO law in Community courts has been a recent and comprehensive article by Snyder[5]. The present author will attempt to use other articles in such a way that the main lines of reasoning are taken into account. By contrast, the potential liability of the Community for infringements of its international agreements has been a neglected issue in the literature. The liability of the EC for non-implementation of DSB decisions has been discussed by Zonnekeyn[6] and Reinisch[7] and also briefly by Peers[8] and Davies[9], and these articles provide for the main guidance of the analysis. Several articles and books concerning the conditions of Community (also Member State) liability in general will be used to obtain a more profound picture of the problem[10].

2. WTO AGREEMENTS AND THE INDIVIDUAL IN THE EC LEGAL ORDER

2.1. The Status of International Agreements in the EC Legal Order

The EU's constituent Treaties lack provisions clearly stating the relationship between international law and Community law. Article 300(7) EC provides that international agreements of the Community "shall be binding on the institutions of the Community and on Member States." As to the effects of international law in the Community legal order, the Treaties remain silent. Neither are there provisions on how international law should enter the EC legal order, or of possible review of legality in the light of international law.[11] In the absence of legislative guidance, it has been up to the European Court of Justice to determine the relationship between international and Community law.

One of the basic rules developed in the jurisprudence of the ECJ relates to the hierarchical position of the international agreements of the Community. On one hand, the provisions of international agreements should be compatible with the founding Treaties. On the other hand, they are superior to the secondary legislation of the Community[12]. Infringement of the international obligations of the Community is thus, in principle, one of the possible grounds for finding acts of the institutions invalid. Moreover, international agreements concluded under Article 300 EC have been considered as acts of institutions. Their provisions form "an integral part of Community law" from the moment of their coming into force[13].

When an international agreement of the Community becomes a part of Community law, it also is touched by the unique features of the system. Thereby it can be attributed with direct effect if certain conditions are met[14]. In the *Kupferberg* case the Court ruled that a provision of a free trade agreement with Portugal was directly effective, since the provision was unconditional, sufficiently precise, and its direct application was within the purpose of the agreement[15]. If direct effect is established, the agreements become enforceable also at the domestic level, and not only at a purely international level, and individuals become able to invoke the provisions of such treaties before national and Community courts.[16]

2.2. Routes of Action

Private parties may attempt to challenge Community law provisions on the basis of WTO law mainly in three ways. First, private parties are non-priviledged applicants in an action for annulment pro-

vided in Article 230 EC. The conditions for admissibility have been difficult to fulfil and the situation remains the same also in the light of the recent case law[17]. Second form of action available is the action for damages under Article 288(2) EC. Liability actions for a breach of WTO law, based in particular on the rulings made in the context of WTO dispute settlement mechanism, have lately increased in number. The third and a common route has been an indirect action. Private parties can initiate proceedings in national courts and claim that national or Community measure are incompatible with WTO law. The domestic court may, or in some occasions must, then make a referral to the ECJ.

2.3. Exclusion of 'Direct Effect' of WTO Agreements

2.3.1. 'Legalisation' of the GATT/WTO System

Ever since the *International Fruit Company* case[18] decided in 1972 the Court has been reluctant to let individuals to rely on GATT/WTO law. In that case the ECJ held that the GATT 1947 agreement was not directly effective and upheld its case law firmly during the existence of the old system. The establishment of the WTO and the new GATT 1994 provoked many scholars to argue that the premise on which the GATT was held to lack direct effect could no longer exist due to the significant 'legalisation' of the system[19].

The main argument of the Court regarding the old GATT was that the dispute settlement provisions were characterised by a great degree of flexibility. The WTO Agreements certainly are a significant upgrade of the old GATT system, with several new extensions.[20] First and foremost, the dispute settlement system was dramatically reformed and virtually turned into a (quasi-)judicial procedure[21].

2.3.2. Portugal v. Council

The *Portugal* v. *Council* case[22] was an action for annulment under Article 230 EC introduced by Portugal against a 1996 Council Decision[23] on the conclusion of agreements between the Community and India and Pakistan concerning the arrangements in the area of market access for textile products. The Portuguese Government alleged that the implementation of these agreements adversely affected its textile industry and claimed that the contested decision constituted a breach of WTO law, in particular of certain rules and fundamental principles of GATT 1994, the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures.

The ECJ decided in its judgement in 1999 to uphold its old GATT 1947 case law and refused to review Community law in light of WTO obligations. It came into a firm conclusion that "having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions[24]." It is notable that the Court did not explicitly use the term direct effect in its final conclusion. Neither were the arguments of Portugal based on the claim that the WTO Agreements had direct effect. Instead, it tried to distinguish the whole question of direct effect from its assertion that Member States should be allowed to assert WTO law as a basis for evaluating the validity of Community law.[25]

Although the procedure concerned a direct action brought by a Member State, it is clear that the reasoning of the ECJ was so fundamental that the position it took can be applied in all relevant procedures. The same rules are applied when individuals challenge EC law in actions for annulment or when they bring an action to national courts relying on WTO law and the domestic court refers the case to the ECJ[26]. It is now utterly clear that the main rule is that the WTO agreements cannot

be relied on by individuals to review the legality of the acts of the European Community in national or in Community courts.

The jurisprudence of the Court concerning GATT/WTO law has, on occasion, been harshly criticised by commentators partly on the basis that it differs significantly from how other international agreements have been dealt with in the case law. Why is the Court so reluctant as regards recognising the direct effect of WTO agreements? Are there sound (legal) reasons for such reluctance?[27] The Court based its judgement in *Portugal* partly on new arguments as the Uruguay Round Agreements had done away with many of the arguments relied on by the Court to deny direct effect to GATT provisions. It underlined the nature of the WTO as a forum for intergovernmental negotiation between its members, and that the WTO Agreements themselves did not determine how they should be implemented but let this to be determined according to the national legal orders of its Members.

2.4. Why Are WTO Agreements not Justiciable?

2.4.1. WTO Agreements Do Not Determine How They Should Be Implemented

The Court began in *Portugal* by indicating that it was only where an international agreement did not itself settle what effects it has in the internal legal order of the contracting parties that such effects would fall to be decided by national courts. The Uruguay Round negotiations did not result in any explicit provision on the effect of WTO Agreements in the domestic legal orders of the contracting parties. The Court needed thus to examine whether the WTO Agreements otherwise determine how they should be implemented on the national (or Community) level. It found that, even though the agreements differ significantly from the provisions of GATT 1947, "in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiations between the parties[28]."

The ECJ then went on to examine the nature of the WTO dispute settlement mechanism and found that, although the main purpose of the mechanism is to secure the withdrawal of the measures in question if they are found to be inconsistent with WTO rules, the WTO Dispute Settlement Understanding (DSU) provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis[29]. Next it concluded that the DSU provides that when a member fails to fulfil its obligation to implement the rulings, the DSB shall, if so requested, enter into negotiations, with a view to finding a mutually acceptable compensation[30]. Consequently, the Court reached the conclusion that "to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis[31]." As a result, the ECJ found that the WTO agreements do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties[32].

2.4.2. Lack of Reciprocity

Next, the ECJ turned to the Community legal order and assessed whether it provides grounds for using WTO agreements as a basis for judicial review of Community acts. It refused the possibility of such a review relying on the lack of reciprocity on the part of the Community's trading partners in the performance of the agreements. According to the Court, WTO agreements are based on reciprocal and mutually advantageous arrangements, and the lack of reciprocity in their implementation might lead to disuniform application of the WTO rules[33]. Moreover, if the Community judicature were to ensure that Community law complies with WTO rules, it would "deprive the legislative or

executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners[34]."

If the ECJ had opened the door for actions brought by private parties invoking the WTO law it would have bound the Community far more strongly to the WTO Agreements than is the case in its main trading partners. Such a strengthened enforceability as the empowerment of individuals would lead to would be more than the Community is required to do under public international law. The reciprocity argument is undoubtedly political in nature but, nevertheless, rather convincing. If the Community judiciary tied the hands of the political and executive institutions by allowing direct effect to WTO law the EC could end up in a disadvantageous position. The benefits of its legal system could be exploited by others while the EC, and the exporters of EC goods, would be faced with the limited enforceability in domestic courts of other contracting parties. This could also limit the "bargaining power" of the Community and put it in a more difficult external position.[35]

2.4.3. Institutional Balance

The ECJ rejected the request of Portugal essentially because a legal review by the Court of WTO Agreements would bind the legislative and executive organs of the Community so that they would no longer enjoy similar room for manoeuvre as similar bodies of the Community's major trading partners[36]. Reciprocity is the cornerstone of the judgement but, in the end, it is not reciprocity as such which leads the Court to deny direct effect to WTO law. Instead, it is the constitutional concern of the impact of potential direct effect on the political institutions of the Union.[37]

The Court is clearly willing to leave a considerable amount of discretion to the political organs of the Union with regard to WTO law. The 'judicial self-restraint' exercised by the Court is based on the premise that the legislative and executive institutions should have the dominant roles in the field of foreign policy[38]. Empowering private actors (and also courts at the same time) in the enforcement of WTO law by allowing individuals to rely on the agreements would deprive the legislative and executive organs of the Community of a considerable part of the discretion they would otherwise enjoy. There is thus an apparent conflict between foreign policy discretion and the judicial protection of the 'rights' that international law might confer to individuals[39].

The Court has been criticised for its concern of tying the hands of the EU's legislative and executive institutions. It allegedly went so far that the respect for the principle of *trias politica* can hardly be traced in the judgement[40]. Perhaps the reluctance of the Court to interfere with the political institutions of the Union can be seen as overt judicial policy-making but, as Eeckhout suggests, the large discretion the Court had in the case could only be filled through judicial policy-making[41].

Considerations of a level playing field in external relations, have been claimed to be especially crucial concerning the EU since it is one of the major powers, and therefore bears a lot of global responsibility[42]. By denying direct effect to WTO agreements, the EU reserves itself a chance to take into account non-economic values in its actions to a wider extent than it could if a categorically monist approach to WTO norms would have been accepted. It is clear that the WTO as it is now concentrates clearly on trade issues. Human rights, labour and environmental issues, on the other hand, have been taken into consideration in a rather modest way, at least compared to the EU, although it is clear that such an extremely comprehensive trade regime inevitably has effects on those concerns.[43] Thus, by limiting the enforceability of the WTO law on the national level, the EC reserves itself the right to take those values, or public interest, into account[44].

The interpretation of the Court corresponds with the explicitly stated will of the Council expressed

in the preamble of its decision concluding the WTO agreement. It declared as follows: "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"[45]. Advocate General Saggio doubted the legal relevance of the statement at the Community level[46]. He concluded that it is the responsibility of the judiciary to ensure that the international obligations of the Community are respected by the institutions and the Member States and the Council may not by an act of secondary legislation limit the Court's jurisdiction. Thus, the preambular statement is, according to Saggio, simply a policy statement and cannot affect the jurisdiction of the Community or national courts to interpret and apply the WTO Agreements.[47]

The Court stated that it found its interpretation to correspond with what was stated in the preamble to the Council Decision on the effect of the agreements. The Court was rather careful though, and did not rely on the wording of the statement as a decisive factor for its conclusion but merely stated that its conclusion corresponds with it, which still leaves the significance of the Council declaration debatable.[48] It appears to be in any case more relevant in the Court's view than many would argue.

2.4.4. The Nature of the WTO Agreement

The ECJ pointed out in *Portugal* that the WTO Agreement is founded "on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and is thus distinguished, from the point of view of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community[49]." By this statement the Court attempted to distinguish the WTO Agreements from other Community agreements, to which significantly different rules seem to apply.

The EC's bilateral agreements have concerned trading partners with which the EC traditionally has close ties with, such as parties to Association Agreements[50] or parties to the Yaound– Convention[51]. In contrast to the WTO Agreements, the parties to such agreements were in a weaker bargaining position than the Community, so that the EC has the economic and political means of encouraging compliance. Often in the case of the agreements in question it has also been an intention of the Community to create specific rights and advantages for the other party. [52]

Even though there are features that characterise the international agreements that have been considered directly effective that distinguish them from the multilateral WTO Agreements, the reasoning of the Court is not difficult to criticise[53]. For instance Eeckhout finds it the least convincing part of the judgement[54]. The legal reasoning of the ECJ may be poor but the scope importance of the new organisation is undoubtedly enormous. The Uruguay Round Agreements, indeed, are fundamentally different from the other international agreements of the Community. They brought enormous subject areas of national economic regulation under GATT/WTO discipline and subjected the whole to a new and far more binding dispute resolution system[55]. The agenda of the WTO is also expanding and unpredictable, especially since the decision-making power of the WTO panels and Appellate Body are relatively autonomous[56]. The agreements therefore require a complex balance of powers among the Community institutions[57].

2.5. Nakajima Doctrine

2.5.1. Establishment and Reconfirmation of the Doctrine

The application of the *Nakajima* doctrine involves a situation where a provision lacking direct effect becomes applicable for other reasons[58]. The exceptional situations where the WTO law has been

allowed a stronger enforceability in EC law were introduced in the *Fediol*[59] and *Nakajima*[60] cases. The continued relevance of the doctrine after the establishment of the WTO was confirmed in *Portugal.* There the exception to the general rule that the Court does not review the lawfulness of Community measures in the light of WTO rules was defined in the following terms:

"It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules[61]."

The first limb of the exception deals with a situation where the Community has intended to implement a particular obligation deriving from WTO law. This type of effect of the GATT/WTO law was introduced by the Court in the *Nakajima* case, which concerned anti-dumping measures[62]. The claim was that the Community's basic anti-dumping legislation did not comply with the rules of the GATT Anti-Dumping Code. Its purpose was to get individual anti-dumping measures annulled as unlawful and inapplicable pursuant to Article 241 EC. The ECJ did not consider direct effect relevant in the case but held that the Community was under an obligation to ensure compliance with the GATT provisions and its implementing measures. Therefore it could review the latter in the light of their parent measure.[63]

Private parties are also allowed to challenge Community measures on the basis of WTO law where the implementation measure explicitly refers to a precise WTO law provision. This second limb of the exception derives from the *Fediol* case. The case concerned the so-called New Commercial Policy Instrument by virtue of which companies could bring complaints to the Commission alleging that third countries engaged in illicit commercial practices incompatible with GATT rules. The ECJ ruled that such companies are entitled to request the Court to exercise its powers of review over the legality of the respective Commission decisions in light of the GATT rules[64].

Even though the Court has frequently recognised the *Nakajima* principle, they have tended to avoid applying it by their interpretation of WTO law[65]. It is of great importance to note that the ECJ recently strengthened the principle in *Petrotub*[66] where it applied the principle to a Council regulation imposing definitive anti-dumping duties. The case is an example of the application of the first limb of the exception. The Court found that the Community adopted the concerned basic regulation in order to satisfy its obligations arising from the 1994 Anti-Dumping Code and intended to implement particular obligations laid down in it. Consequently, it was for the Court to review the legality of the Regulation imposing definitive anti-dumping duties in the light of those particular obligations of the GATT Anti-Dumping Code.[67] Most striking and unusual element of the case is that the ECJ, indeed, found that there was an inconsistency between the Community measure and the WTO provision and, consequently, annulled the Regulation.

2.5.2. Scope of Application

The scope of application of the *Nakajima* doctrine is not entirely clear. When does an intention to implement a particular obligation undertaken in the framework of the WTO exist? Could the Community institutions prevent the application of the exception by simply keeping in mind not to explicitly refer to the international obligation in Community legislation? There are two approaches to the *Nakajima* doctrine, which give somewhat different answers to these questions.

According to the first approach, even under the first limb of the exception the source of the particular obligation must be identified with reference to the relevant WTO Agreement or the dispute

settlement report[68]. In this view the second limb would apply where reference is made to a precise provision in an Agreement, or to precise findings made in a report. This view, arguably, finds support in the *Nakajima* and *Petrotub* cases as the Court ruled in both cases that there was an "intention to implement" because there was a reference to the GATT Anti-Dumping Code in the Preamble of the basic anti-dumping regulation[69]. This approach means that the scope for application of the doctrine can be controlled by preambular language and is thus within the discretion of the institutions.[70]

The second approach is more receptive towards the principle. It suggests that the *Nakajima* exception may apply when the intent to implement can be determined from the context of the adoption of a measure. Consequently, there may be cases of intention to implement even where there is no reference to a particular WTO provision[71]. This is supported by the fact that the Court consistently refers to two distinct implementation exceptions[72]. Zonnekeyn advocates for this view and suggests that a rational reading of *Nakajima* reveals that the ECJ used a contextual and teleological approach in the case. Consequently, an omission to refer to a particular WTO law obligation in a Community act would not suffice to prevent the application of the exception.[73] The case *Italy v. Council* supports this approach since there the intention to implement was determined from the context of the adoption of a measure[74]. Moreover, the requirement of an express referral would appear to conflict also with the case law on the duty to state reasons of the institutions[75].

In my view, it cannot be ruled out that the Court could in the future apply the exception in the absence of a referral to a particular obligation under WTO law. Even though such referral has been involved in *Nakajima* and *Petrotub,* it cannot be concluded that the ECJ has limited its own discretion in this regard and excluded the possibility of judicial review in the absence of such a referral. The first approach clearly fully respects the discretion of the political institutions, which appears to be a crucial element in the application of the exception. However, the institutions probably could also prevent the doctrine as it is considered in the second approach from applying by avoiding all reference to WTO law.[76]

The discussion described above shows that a reformulation of the *Nakajima* doctrine would be welcome to clarify under which circumstances it can be applied. In addition to the ambivalence of the formulation "intended to implement", the exact meaning of "a particular obligation assumed in the context of the WTO" remains unclear and would require a more precise definition. Moreover, at its present form, referring to obligations "the Community intended to implement" the formulation seems to emphasise the intentions of the Community institutions rather than any legal obligations that might be involved[77]. The last consideration might, though, correspond to the level of judicial deference the Court has been willing to show to the political institutions of the Community.

The *Nakajima* case law[78] can be seen to reflect the way the Court is seeking a balance between sovereign international discretion for the EC on one hand and judicial control and private interests on the other[79]. The doctrine only applies where the Court is certain that the Community institutions have legislated in order to transpose an international obligation into Community law. Making WTO law available to private applicants under these exceptional circumstances does thus not limit the margin of discretion the Court has been willing to leave to the political organs of the Community. The task of assessing whether the international obligation has been correctly and completely transposed should, however, be considered to be within the remit of the Court.[80]

The application of the *Nakajima* doctrine by the Court has, until recently, been minimalist. The reconfirmation of the doctrine in *Petrotub* might imply, though, that the importance of the exception is increasing and the ECJ is pointing the way for private parties to rely on it when they challenge Community measures on the basis of WTO law. Such direction of the case law would be preferable

as the doctrine offers a possibility for the Court to develop its case law to a more justifiable direction.

2.6. Other Exceptional Ways to Rely on WTO Rules

2.6.1. Consistent Interpretation

While the *Nakajima* doctrine deals with a clear conflict between Community law and WTO law, the principle of consistent interpretation offers a less drastic approach. It sets the obligation to interpret Community law, as far as possible, in the light of the obligations arising from international agreements binding on the Community. The obligation derives from the primacy of international agreements concluded by the Community over provisions of secondary Community legislation. The ECJ has acknowledged that the WTO law forms a part of Community law for the purposes of this principle and the obligation of WTO law consistent interpretation is thus well established as regards interpretation of provisions of Community law[81].

More recently, the obligation has been extended to cover also interpretation of national law in the light of the WTO law. In *Hermes International*[82], a case concerning TRIPS, the ECJ set an obligation for the domestic courts to interpret national rules "in the light of the wording and purpose" of non-directly effective provisions of international agreements. Thus, such provisions should operate in the same way as in the case of non-directly effective directives.[83]

Consistent interpretation means that the interpretation of national or Community law should be adapted to the international obligations of the Community irrespective of whether the obligation has direct effect or not. As known from the context of indirect effect of directives, in certain circumstances the results of direct and indirect effect may very well be similar[84]. Even though indirect effect is far less efficient in creating legal certainty than direct effect, it provides for an important way to enforce WTO law if applied effectively.

The importance of consistent interpretation is, however, limited. The relevant EC or national legislation to be interpreted must, first of all, exist. If a provision exists, it must be sufficiently flexible to be interpreted. The obligation does not apply if there is a manifest conflict between WTO law and the provisions to be interpreted.[85] Moreover, the ECJ has not usually been inclined to apply the principle of consistent interpretation in cases involving challenges by private applicants to the validity of Community measures, which are allegedly contrary to international obligations. On the contrary, it has been more typical for the Court to use the obligation to require Member States and their courts to follow or give effect to international obligations.[86] The issue of institutional balance arises again here. A possible explanation for the selective use of the principle can be found in the reluctance of the Court to interfere where the institutions have not considered that there is a conflict between the international obligations and Community law[87].

2.6.2. Recent Evolutions

The ECJ appears to be willing to improve the enforceability of WTO law under certain circumstances. This is illustrated well by the statements it made in the *Biotechnology* case[88]. The case involved an action brought by the Netherlands for the annulment of a directive on the legal protection of biotechnological inventions[89]. The applicant pleaded, *inter alia*, that the obligations created by the directive for Member States are in breach of the TRIPS Agreement.

The ECJ interpreted the plea as being a complaint by a Member State that the Directive required them to breach their own obligations under WTO law[90]. It did not, however, find that the Directive created any such obligations on the Member States. What is remarkable is that, as the Court will

refuse to review compatibility in the case of a direct breach by the Community of its own obligations, it will now review compatibility in case of an indirect breach which results in the Member States having to depart from their international obligations[91]. It is questionable whether there is a tenable distinction between a provision resulting in direct or indirect breach[92].

In *Dior/Tuk*[93] the ECJ opened the door for individuals to rely directly on any provision of WTO law in shared competence areas within fields in respect of which the EC had not yet legislated when the legal system of a Member State allows for such a direct effect[94]. However, as the Community extends its legislative activities to areas of shared competence the opening of possible direct effect will be closed again[95]. The obligation of domestic courts to closely co-operate with the Community Courts probably renders the possibility of national courts giving direct effect to a specific WTO provision rather remote anyhow, as the reasoning on the basis of which the ECJ has concluded that WTO Agreements have no direct effect concerns the most essential aspects of the Agreements[96].

2.7. Level of Protection of Individuals

There are major conflicts of interests involved as regards the effect of WTO law in the EC legal order. On one hand, there is a clash between the rights of private parties and the discretion given to the political bodies of the Community. On the other hand, promoting trade and non-economic values do not always go hand in hand[97]. The margin of manoeuvre left to the institutions appears to be crucial in balancing these interests. Limited enforceability allows the institutions a wide discretion in transposing WTO obligations into Community legal order and thereby allows it to take into account non-economic interests. The exceptions make WTO law available to private parties once the institutions have clearly signalled the intention to implement WTO law within the Community legal order. They are limited in their import and subject to a restricted interpretation.

The position of the ECJ with regard to the lack of direct effect of WTO Agreements appears to be wise at least in terms of political economy[98]. The exceptional ways to rely on WTO law appear to be a fair attempt to strike a balance between the conflicting interests involved. They make WTO law available also for individuals and may prove nearly as effective as direct effect in integrating WTO law in EC law.

Which areas of WTO law remain closed to individuals as a matter of EC law? The areas of exclusive competence of the Community cover GATT in total and parts of GATS and TRIPS and much of these areas fall under the *Nakajima* exception. As regards the shared competence areas of TRIPS, they are said to be under "a shadow of indirect effect". Consequently, any parts of GATT and the parts of GATS and TRIPS within Community competence, concerning which EC legislation does not refer to WTO provisions or transpose them into EC law cannot be invoked by individuals in the Community courts. The same applies to the shared competence areas of GATS[99].

Some are not, on the other hand, pleased with the situation. One commentator claims that the EC is left almost without judicial control in the area of international trade[100]. It should, however, be born in mind that the Community will usually bear harsh economic consequences of its allegedly protectionist acts on the international law level after such measures have been condemned by the WTO dispute settlement organs. The lack of direct effect of WTO law does not imply that the ECJ has given the Community institution permission to breach WTO law.

The central problem related to this work is that individual undertakings may suffer heavily of WTO-illegal action of the institutions condemned at the international level by the WTO dispute settlement organs and the continued exercise of judicial self-restraint might deprive them of any possibility

to have their rights enforced. It has been argued that the ECJ should strengthen the legal effects of the findings of the WTO dispute settlement organs, as greater legal effects are the minimum requirement from the perspective of the principle of legality[101]. At the same time that for instance Snyder argues in favour of "an appropriate balancing of constitutional values" that the exceptional ways to rely on WTO law may prove nearly as effective as direct effect in integrating WTO law in EC law, she admits that there is a major gap in Community law as regards adopted WTO dispute settlement reports[102].

3. WTO DISPUTE SETTLEMENT DECISIONS IN THE EC LEGAL ORDER

3.1. The Status of Rulings of Judicial Bodies Set by an International Agreement

The ECJ has confirmed that the EC may enter into an international agreement whereby a judicial entity is established if the structure and jurisdiction of such entity is compatible with the EC Treaty[103]. The Court made a statement on judicial systems for the settlement of disputes and on the relationship of such systems with the Community law in Opinion 1/91 on the EEA Agreement, in which it examined the compatibility of the proposed EEA court system with the Community law. In principle, the compatibility of a system of courts flows from the general competence and capacity of the Community to act in international level, or as the ECJ phrased it:

"The Community's competence in the field of external relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."[104]

If an agreement to which the Community is a party establishes a judicial organ to settle disputes between the Community and other parties to the agreement, the decisions of that organ will bind the ECJ if the latter is required to rule on the meaning of the agreement as part of the Community legal order[105]. However, the ECJ has established in its opinion that the Member States and the Community institutions should ensure that the pre-eminent role of the ECJ under the Treaties will not be prejudiced.[106] It set up certain conditions under which it is bound by another court:

"Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the contracting parties to the agreement, and, as a result, to interpret its provisions, the decisions of that Court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule on, by way of preliminary ruling or in direct action, on the interpretation of an international agreement, in so far as the agreement is an integral part of the Community legal order"[107].

By saying that, the ECJ emphasised the binding character of judicial decisions on disputes between the contracting parties to an agreement[108]. Moreover, as the ECJ assumed the EEA agreement not to be directly effective, it implicitly established that the agreement in question itself does not need to have direct effect for the purposes of binding character of judicial decisions on disputes between contracting parties to an international agreement.[109] Procedurally the WTO dispute settlement system offers similarly strong checks and balances and procedural guarantees as the project of a common EEA court did[110]. The case law of the ECJ in Opinion 1/91 has been considered to indicate that the Court should accept binding interpretations of WTO law made by the dispute settlement organs in cases brought before it[111].

3.2. Legal Obligation to Implement DSB Rulings and Recommendations

3.2.1. General

The legally binding nature of the outcomes of WTO dispute settlement at the level of international law should be separated from their effect in the Community legal order. The former aspect, i.e. whether the Community is bound by the decisions, will be analysed in the light of the rules of public international law and the agreement in question. Thus, one should firstly have a look at the wording of the DSU in order to define the nature of the obligation set on a WTO member state as a result of dispute settlement proceedings.

The new mechanism for the settlement of disputes established as a result of the Uruguay Round negotiations has been claimed to entail a significant 'legalisation' of the system compared to dispute settlement under GATT 1947[112]. At present, the WTO dispute settlement is a compulsory and binding system with stringent deadlines. Under the old system a consensus in favour of a report of a panel or Appellate Body was required for its adoption, which meant that a dissatisfied party could block consensus and prevent adoption of the report. The DSU reversed the requirement and provides that the reports are adopted unless there is a consensus not to adopt them.[113] The shift from "positive consensus" requirement to that of "negative consensus" along with the establishment of a standing appellate body composed of independent experts are the main features of the new system that have persuaded many to emphasise its judicial character. By contrast, in the system under GATT 1947 commercial policy played a significantly more important role[114].

3.2.2. Relevant Provisions

Article 3 DSU provides that a solution mutually acceptable to the parties to the dispute consistent with the covered agreements is clearly to be preferred. In the absence of such a solution, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned". Only if the immediate withdrawal of the measure is impracticable compensation should be resorted to as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis *vis-a-vis* the other Member, subject to authorisation by the DSB of such measure.

Article 21 (3) DSU states that "if it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time to do so." If there are no implementing measures by the end of the reasonable period Article 22 (1) DSU provides that Compensation and the suspension of concessions or other obligations are temporary measures available. However, "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements."

According to Article 22 (2) DSU the Member concerned should after a reasonable period of time has lapsed, if so requested, enter into negotiations with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed on time, the other party to the dispute may request authorisation from the DSB to suspend the application of concessions.

As to the nature of the retaliatory measures, Article 22 (8) DSU provides that the "suspension of

concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." The DSB shall "continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented."

3.2.3. Nature of the Obligation

There is some ongoing debate as regards the nature of the legal obligation of WTO Members under the WTO dispute settlement. The main disagreement concerns the question whether implementation of rulings and recommendations and compensation, or even acceptance of retaliation, can be considered as separate options. In other words, does the international law obligation deriving from a dispute settlement report give the option either to compensate with trade or other measures, or alternatively to fulfil the ruling or recommendation of the report and bring its practices or law into consistency with the WTO law?[115]

One interpretation,[116] presented by Jackson, is that "an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes. In this view, the "compensation" (or retaliation) approach is only a fallback in the event of noncompliance"[117]. Zonnekeyn represents the same line of reasoning and states that:

"by accepting compensation, the respondent Member in a dispute, *in se*, recognises the binding effect of WTO law since it acknowledges that its legislation or other measures are in breach of WTO law. The compensation mechanism was not meant to give WTO Members complete freedom to leave WTO inconsistent measures in place and does not, as a matter of principle, accord a "right" to violate a legal obligation entered into under an international agreement."[118] Moreover, "compensation is not a method of settling disputes but simply a temporary instrument to ensure that any benefits accruing to the other Members are not nullified or impaired as a result of the failure to comply within the reasonable period of time set in the particular case and that the defaulting party is not encouraged to persist indefinitely in its failure to comply"[119].

An opposite view is that the WTO rules are not "binding" in the traditional sense but rely, instead, upon voluntary compliance[120]. Non-compliance with international legal obligations is seen as a traditional option for '*realpolitik*' by governments based on cost-benefit analysis[121]. It was phrased by Bello as follows:

"Like the GATT rules that preceded them, the WTO rules are simply not "binding" in the traditional sense. When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas. Rather, the WTO – essentially a confederation of sovereign national governments – relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives." [122]

A textual analysis of the DSU shows that the language is ambiguous enough to give support to each

of the competing views[123]. The present authors are inclined to find the argumentation of the advocates of the former approach more convincing as one of main objectives of the WTO is to create a stable and predictable multilateral trading system[124]. Considering compliance to be voluntary would seriously undermine such features of the system. The possibility afforded by the DSU to maintain the condemned measures for a temporary period after the ruling is important, as such flexibility is crucial in cases where important socio-economic and political considerations are involved[125]. However, the DSU does not provide for a possibility to maintain WTO-illegal measures permanently. In the end, there is a 'real' obligation to comply.

3.3. Non-compliance with DSB Rulings and Recommendations in Actions for Annulment

3.3.1. Case Law

As regards the effect of the WTO dispute settlement outcomes in the EC legal order, some authors have argued that at some point the denial of direct effect should recede before the principle of legality. It has been suggested that adopted WTO dispute settlement results is where the line should be drawn, and it should be possible to review the legality of EC measures in light of them[126]. The ECJ has, however, not yet been persuaded by such line of reasoning. On the contrary, the characteristics of the WTO dispute settlement appears to be one of the main reasons why the ECJ and the CFI have refused to accord direct effect to WTO Agreements.

The conclusion drawn by the ECJ in *Portugal* from the Article 22(1) and (2) DSU was that "to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements *even on a temporary basis*"[127]. The margin of manoeuvre and importance of negotiations referred to in the case were most likely brought up by the Court bearing in mind in particular the implementation phase of DSB rulings and recommendations. The view that even adopted DSB decisions do not create an absolute and immediate obligation of compliance clearly was a reason for the denial of the direct effect of the WTO Agreements[128].

There was no DSB decision connected to the *Portugal* case and no such ruling or recommendation was invoked. Therefore, it is necessary to examine how this specific issue has been dealt with elsewhere in the case law. The *Chemnitz*[129] case involved an action for annulment of a Commission Decision addressed to the applicant rejecting a request for additional import licence under the transitional measures provided for in Council Regulation 404/93[130] on the common organisation of the market in bananas. The applicant based its action, among other grounds, on the allegation that an adopted Appellate Body report had declared the overall system of licences for the importation of third-country bananas incompatible with GATT. It submitted that decisions of the DSB are mandatory and might have direct effect in Community law.

The CFI rejected the argument on the basis that the Commission had adopted amendments to the Regulation, and thus acted to bring the arrangements into compliance with the AB report and the decision of the DSB[131]. The rather striking element in the judgement is that there was not even any discussion of the possibility that the modification of the Regulation might have failed to achieve compliance[132]. The CFI also found that the applicant had not established a link in law between the DSB decision and the action for annulment. It held that "in order for a provision in a decision to have direct effect on a person other than the addressee, that provision must impose on the addressee an unconditional and sufficiently clear and precise obligation vis-*f*-vis the person concerned." Consequently, as the applicant did not put forward any arguments to show that these conditions were met, the Court found no need to consider whether DSB decisions have 'direct effect' or not[133]. The

application of such a requirement renders the possibility of private parties to rely on DSB decisions in actions for annulment in any event rather remote.

Also in *Comafrica*[134] the applicant invoked a decision of the DSB. The CFI did not state specifically that adopted panel reports did not have 'direct effect' here either. Nevertheless, it rejected the argument concerning the DSB as irrelevant based on the reasoning that any final WTO ruling will leave open the possibility for the Commission to pay compensation or will entail a modification of the system in force, which does not rule out that the applicants could derive advantages in future years[135].

There was a WTO dispute settlement decision involved also in *Pfizer*[136] and *Intervet*[137] but the Court avoided ruling anything on their effect in the EC legal order. When an adverse WTO panel or Appellate Body report and its deliberate non-implementation by the EC is involved, it is obvious that politically very sensitive matters are present. The approach of the Courts relating to matters involving DSB decisions has been rather careful, as these recent cases relating to the *Hormones* dispute[138] well illustrate. This demonstrates well the judicial deference of the Courts to the Community legislature in politically sensitive matters[139].

3.3.2. Comments

Even though the Court has been relatively careful with its statements relating to the effect of adopted WTO panel or Appellate Body reports, the approach of the ECJ in *Portugal* and of the CFI in *Chemnitz* and *Comafrica* reflects their clear unwillingness to review Community law in the light of the WTO dispute settlement results. As a general rule the 'direct effect' of WTO reports in annulment actions seems to be ruled out by the Court[140]. It might still be argued, though, that the use of the WTO dispute settlement should be allowed where the EC has not even attempted to either to implement an adopted report or to agree compensation, or if it has not purported to implement the report and negotiations on compensation have failed[141].

Cottier has advocated for the principle of compliance as a basis of the policy of the EC towards adopted WTO reports[142]. If the EC deliberately ignores an adopted report and decides upon expiry of the reasonable period allocated to refrain from offering compensation and to take into account the threat and execution of potential sanctions, Cottier suggests that the report should be 'directly effective' under certain circumstances. Such decisions can be deliberately taken, and take into account the risk of sanctions in an overall balance of foreign policy interests. If the non-compliance is arbitrary and shows mere political expediency, 'direct effect' should be allowed[143]. Compelling reasons not to implement, on the other hand, would prevent such an effect[144].

There are significant arguments against the abovementioned approaches. The reciprocity argument applies to all circumstances where the EC has failed to implement a report. The 'direct effect' of panel reports could place a huge amount of power in the hands of third states. They could rely on the Court of Justice to enforce a ruling or recommendation and would, thus, have no need to negotiate compensation in good faith[145].

One argument against the enforceability of a WTO rule, the breach of which has been confirmed by the DSB, is that as the WTO system is generally limited to orders for specific performance and *ex nunc* termination of the unlawful measure[146], a declaration by the ECJ that an EC measure if unlawful operates as a rule *ex tunc*. This is, however, not an insurmountable problem since the ECJ could rely on Article 231(2) EC and decide that part of the effects of the measure in question shall be considered as definitive rendering its ruling prospective in practice[147].

In my view, the arguments for the exclusion of automatic 'direct effect' of panel and Appellate Body reports seem convincing. Allowing such an effect would not be in accordance with the core principles underlying the argumentation of the Court as regards the effect of WTO law. If private parties would be allowed to invoke the dispute settlement findings, the discretion of the institutions would be considerably reduced and the opportunities for mutually advantageous adjustments could be prevented. The downside of negotiated arrangements is, however, that they could have a price internally when some private firms could be badly injured by the compensation offered or imposed in exchange for a violation of the rules. 'Direct effect' does not, however, appear to be the appropriate remedy against the risk taken by individual economic operators. Instead, a remedy limiting the discretion of the institutions less harshly than 'direct effect' would be preferable.

3.4. Applicability of the Nakajima Doctrine

At first sight the implementation of an international obligation set on the Community by a DSB ruling or recommendation seems like a clear case of application of the *Nakajima* exception. If the Community institutions refer to a specific WTO panel or Appellate Body report when adopting a measure or adopt a measure which attempts to implement such a report, it should be open to individuals to rely on that ruling as grounds to consider a Community act invalid. For example Peers supports the idea that the enforceability of WTO dispute settlement results could be improved by the application of the doctrine. He finds especially strong arguments for the review of EC acts in light of WTO dispute settlement reports when the Community has purported to implement a WTO report. However, its implementation attempts have subsequently been condemned by WTO arbitrators, as has been the case in 'the banana saga'[148].

It would be exceedingly difficult to argue against the application of the *Nakajima* exception if a panel or Appellate Body report was directly referred to in the contested act. However, the EC legislative organs have omitted such direct referrals in the legislative measures adopted to comply with the WTO dispute settlement outcomes that have so far been challenged in the Community Courts[149].

It is also difficult to find credible arguments for the assumption that the modification of the Community legislation in order to comply with a dispute settlement decision is not adopted "in order to implement a particular obligation." To start with, the requirement of "a particular obligation assumed in the context of the WTO", can easily be identified in the panel and Appellate Body reports adopted by the DSB, which instruct the Community to bring its laws and regulations into conformity and identify the relevant WTO rules. As Eeckhout phrased it: "it is hard to envisage a more precise identification of relevant obligations than that resulting from WTO dispute settlement"[150].

The requirement of an intention to implement is more problematic. The legislative measures adopted by Community institutions as a result of WTO panel and Appellate Body reports in the *Bananas* case clearly were adopted in order to implement the obligations, at least in the generally accepted meaning of the term[151]. The preamble to Council Regulation 1637/98 explicitly refers to WTO commitments[152]. Admittedly, no such referral to WTO provisions or to the WTO dispute can be found in the Commission Regulation 2362/98[153]. The Council Regulation, however, mandated the Commission to establish a WTO-compatible banana regime and implementing the Council Regulation is the sole purpose of the adopted provision[154]. The CFI, however found in a liability action that the *Nakajima* exception does not apply to the 1998 Commission Regulation[155].

If the non-compliance of the EC with WTO dispute settlement findings takes the form of passivity on the part of the EC, the position of a private applicant harmed by the Community inaction is even more difficult. When no measures are adopted, an action for annulment cannot be brought. The

Nakajima exception cannot thus be of any benefit to individuals in case of an omission. This brings us back to the scope of manoeuvre of the institutions, which would be put in jeopardy if this was not the case.

3.5. Can Consistent Interpretation Benefit the Applicants?

Private applicants are not likely to benefit from consistent interpretation when they attack Community law on the basis of non-compliance with DSB rulings and recommendations[156]. First, the lack of implementing measures naturally prevents the application of the exception. Second, even if the institutions have undertaken to amend Community law to achieve compliance, it would be difficult for the Court to find that Community measures can be given an interpretation consistent with WTO obligations when an incompatibility has already been found by the DSB. Finally, the applicability of consistent interpretation is questionable in the light of the general reluctance of the ECJ to apply the principle in actions involving challenges by private parties to the validity of Community measures claimed to be in conflict with WTO obligations[157].

3.6. Should the Enforceability of Dispute Settlement Outcomes be Improved?

The overview to the enforceability of the WTO dispute settlement outcomes in the EC legal order shows that so far they have not been given any legal effect at all. The lack of 'direct effect' of DSB rulings and recommendations seems well founded but the same cannot be said about the very minimalist application of the *Nakajima* doctrine. The case law illustrates well the shortcomings of the *Nakajima* exception and the principle of consistent interpretation. The exceptional ways to rely on WTO law cannot be used effectively in respect to DSB rulings and recommendations. Thus, the level of protection they provide for private parties is not the same as in connection to WTO Agreements in general.

It is doubtful whether it is appropriate that the Community law does not provide any kind of protection for private parties against the Community institutions acting in breach of the judicial obligation set on the Community. One can also question whether it is acceptable to leave the matter on the level of international law where the measures of enforcement are on a different level than within domestic law and private parties are left out of possibilities to protect their private interests.

Especially the lack of justiciability or any kind of effect of WTO dispute settlement outcomes in EC legal order illustrate well the clash between rights of private parties and the discretion given to the political bodies of the Community. When the institutions, for one reason or another, ignore their international obligations imposed by the WTO dispute settlement organs, the only problem is not the apparent lack of respect of international commitments. Private economic operators within the Community may also suffer heavily from the non-compliance of the Community. The situation seems most unjustified when the other party to the dispute resorts to retaliatory measures, which may lead to companies having absolutely nothing to do with the original dispute to suffer heavy losses.

In particular the narrow scope of application of the *Nakajima* exception shows that the problem, again, boils down to the question of the margin of discretion of the political institutions of the Community. As the Court has clearly been willing to respect the discretion of the institutions also after the Community measures have been condemned at the level of the WTO law, it could be that a solution limiting the discretion of the institutions to a lesser degree would meet less resistance within the Court and allow it to take into account the principle of legal certainty.

4. RELEVANT ASPECTS OF THE NON-CONTRACTUAL LIABILITY OF THE EC FOR DISCRETIONARY MEASURES

4.1. The Basis of EC Liability

The non-contractual liability of the European Community is based on the Article 288(2) EC, which provides that "in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." The Community may incur liability for damage caused by adopting wrongful acts but it is also clear that omissions by the Community institutions may give rise to liability in so far as the institutions have infringed a legal obligation to act[158]. Article 235 EC explicitly states that the European Court of Justice has the jurisdiction in disputes relating to compensation for damage described in the Art. 288 EC.

The general conditions for the liability of the Community have been clearly defined in the case law of the ECJ. In order for the EC to incur non-contractual liability the applicant must prove, first, that the institution against which the action is brought has acted *unlawfully*. Second, the applicant must show that *actual damage* has occurred. Finally, there must be a direct *causal link* between the wrongful act and the damage complained of[159]. Moreover, in the field of discretionary measures, the Community liability is subject to stricter conditions. Under the *Schöppenstedt* formula, as modified by the *Bergaderm* case, an action for damages against a Community institution will only be successful if a sufficiently serious breach of a rule of law for intended to confer rights on individuals can be shown[160]. *Bergaderm* restated the conditions for imposing Community liability in the same terms as in the conditions for the liability of the Member States for a breach of Community law.

4.2. Independent Form of Action

The action for damages under Article 288(2) EC is *an independent form of action*. That is to say that it is not necessary first to bring an action for annulment under Article 230 EC to determine the unlawfulness of the contested measure or an action for failure to act under Article 232 EC. Nevertheless, an action for compensation brought on the basis of an act which has not been annulled requires the establishment of the unlawfulness of the contested measure[161]. An act which is not illegal cannot form the basis of an action in compensation[162]. Illegality is required but prior annulment is not necessary. The action for damages has a different purpose as a part of the Community system for the protection of individuals than the action for annulment. As the latter aims at setting aside a specific measure, the purpose of an action for damages is to repair the damage caused by an institution[163].

4.3. A Developing Remedy

The remedy under Article 288(2) EC has earlier been considered a measure of sanction against the Community institutions for a very serious breach of law. More recently, it has rather started to resemble the right available for those who have suffered harm as a result of a breach of Community law by a Member State. The remedy is now seen as one available to individuals who have suffered an infraction of a Community law right arising through the fault of the Community institutions [164].

The action for damages under Article 288(2) EC comprises an important element in the system built up to ensure the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer. One of the functions of the remedy has been considered as being compensation for a possible "judicial deficit" found in the Community system for the protection of individuals. The possibility of claiming damages where injuries have been caused by acts which can-

not be challenged, provides for a new and additional opportunity for bringing court proceedings[165].

The test for triggering the non-contractual liability of the Community has been very difficult to fulfil. It is widely acknowledged by commentators that the principles developed by the ECJ and their application tend to frustrate, rather than foster, the chances of success of applicants seeking for compensation[166]. Ward finds an element of irony in the case law as the Court, despite the express mandate in Article 288 for the Court to protect individuals against abuse of authority on the part of the Community institutions, has in fact minimised the accountability of EC decision makers for unlawful conduct[167]. Fines considers the restrictive mechanisms developed by the Court worrying from the point of view of legal certainty. She claims that the Community institutions are in fact quasi non-liable and the protection of the victim is not guaranteed[168].

The Court has also been accused of using a double standard, depending on whether remedies are sought against Member States or against Community institutions[169]. One reason behind the case law has probably been that the Court wanted to ensure that the fledgling Community institutions were not undermined by extensive challenge through judicial review procedures[170]. Effectiveness of the Community order and effective judicial protection do not usually point in the same direction. Adequate protection of individuals involved challenging the activities of the still fragile and young EC institutions[171].

There have been contemporary pressures confronting the Court to relax the test for accountability under Article 288(2), which would increase applicants' chances of success in non-contractual liability claims[172]. For example Ward contends that given:

"the prominence of 'protection of the individual' as a value in the enforcement of Community law, and the role of the imperative of 'effective judicial protection' in improving Member State remedies and procedural rules, it may become increasingly difficult for the Community judicature to refrain from internalising similar principles when the legality of *Community measures* is questioned by private sector actors[173]."

Also Waelbrook made similar statements some years ago and speculated then that the Court's new case law will lead in practice to an opening of the extremely strict conditions of Community liability[174]. It appears that a step to this direction was recently taken as the Court made a new attempt to unify the criteria of Member State and Community liability and sought inspiration from the rules governing the former to determine the circumstances under which the Community may incur liability[175]. The case law will show how big a step we are dealing with in practice. At least the applicants have now good grounds to refer to the less strict rules governing the State liability for the support of their cases[176].

4.4. Principle of Parallelism

The principle of parallelism was introduced in the *Brasserie du P˜cheur* case. It requires that the conditions under which a State may incur liability should not, in the absence of particular justification, differ from those governing the liability of the Community institutions in like circumstances. The doctrine is based on the basic idea that the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage[177].

The judgement of the ECJ in *Bergaderm* case increased the relevance of the parallelism argument in determining the conditions of the Community liability. At the same time the judgement unified the

conditions of Community and Member State liability, it also brought a new element to the case law: the reversal of influence. As the Court had earlier as a rule sought inspiration from the rules governing Community liability to determine the conditions for Member State liability, now the influence was reverse[178]. In *Bergaderm* the Court referred to *Brasserie du P˜cheur* as an authority on the interpretation of Article 288 (2) EC[179] and reiterated there the principle of parallelism. Therefore, it is justifiable to draw analogies form the rules governing the Member State liability to determine whether or not the Community can be held liable under certain circumstances.

It should be noted, though, that there are important disparities between Community and State liability. This relates to the different constraints under which the Community and the national legislature operate within the bounds of the EC legal order. As the Community acts as the primary legislature, the national legislature is bound by the principle of primacy[180]. Therefore, some gaps may still remain in the analogy.

4.5. The Condition of Unlawfulness

4.5.1. A Breach of a Rule of Law

Under the *Schöppenstedt* formula, the applicant has been required to demonstrate a breach of a *superior rule of law for the protection of the individual* in order to establish the liability of the EC[181]. The expression was replaced in *Bergaderm* with the condition that the defendant institution must have infringed *"a rule of law intended to confer rights on individuals"*[182].

Bergaderm deleted the reference to a breach of a "superior" rule of law. What is the significance of this aspect of the judgement? It sees that the Court has not in general placed much importance on the requirement that the rule of law must be superior in its case law. Thus, the omission of the term does not make a real difference[183]. According to the case law, following types of norms can in principle qualify as superior rules of law: Treaty provisions or other primary Community law, general principles of law and Community acts which in formal ranking stand higher than the Community act which caused damage[184].

The general principles of Community law that the ECJ has accepted to operate as superior rules law include the principle of protection of legitimate expectations[185], the principle of proportionality[186], the principle of equal treatment[187], the principle of proper administration[188], the principle of care[189], and the prohibition of misuse of powers[190]. The ECJ has also held that fundamental rights form an integral part of the general principles of law protected by the Court. Consequently, such rights as the right to property and the freedom to pursue an economic activity have also been recognised as superior rules of law for the purposes of a liability action against the Community[191].

Here the important question is whether an international agreement binding on the Community can act as such a rule of law that its violation could give rise to the liability of the EC. Since the international agreements form an integral part of the EC legal order and are hierarchically superior to secondary Community law, the provisions of such agreements are in general able to trigger the liability of the EC. However, the problem in respect to the WTO law is that it often has been considered that an international agreement should have direct effect in order to be invoked in an action for damages against the Community. The issue is, however, not entirely clear and will be discussed in more detail below in the part discussing the invocation of WTO law in liability actions.

4.5.2. The Rule of Law Confers Rights on Individuals

The Court has accepted as a general rule common to the Member States the principle that the

violation of a legal provision may only entail liability for its author if the provision in question is designed to protect the interests of the category to which the individual concerned belongs[192]. Despite the different phraseology used in *Bergaderm*, the requirement that the rule must intend to protect the individual remains conceptually the same[193].

In practice, the Court has applied the requirement rather liberally and, at least as regards internal Community law, the condition that the rule of law must be for the protection of the individual is not very difficult to satisfy[194]. In a concrete case it may, however, prove to be problematic. When the applicant wants to bring a compensation action against the Community for a breach of WTO rules, it is likely that this requirement is the most difficult condition to meet.

4.5.3. Sufficiently Serious Breach

If an infringement of rights protected under the terms of a (superior) rule of law has been found, the degree of seriousness of the breach will be assessed next. In the areas of legislation where the Community legislature enjoys wide discretionary powers[195], it may incur liability only if the measure adopted cannot be appropriately justified. In such areas of legislation the responsibility to compensate may arise only if "the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers"[196]. In its case law the Court has traditionally referred to two elements in determining whether such disregard has occurred: the degree of harm suffered by individuals as a result of the measure, and the extent to which the law has been violated[197].

In the light of the *Bergaderm* judgement, the interpretation of the ECJ of the term 'serious breach' in the context of Member State liability has now been confirmed to be of importance in the Article 288 (2) EC case law[198]. The seriousness of the breach committed by Community institutions will now be dependent upon factors mentioned in *Brasserie du P˜cheur,* which include "the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable"[199].

4.6. The Conditions of Damage and Causal Link

The second essential element for a successful action for damages under Art. 288(2) EC is the establishment of damage[200]. In general, the damage is required to be certain, specific, proved and quantifiable for the Community to incur liability[201]. However, the fact that the amount of damage cannot be precisely quantified in the application will not render the claim inadmissible[202]. The Court will most commonly award damages for economic loss but also other types of damages can be awarded[203]. In quantifying the damage, the extent to which the damage has been incorporated in the selling prices of the complainant undertaking will be taken into account in accordance with the principle of unjust enrichment[204]. The ECJ has held that there is a general duty to mitigate and the damages will be reduced if the applicant fails to do so[205].

Finally, there is the requirement of a causal link[206] between the breach of an obligation resting on the State and the damage sustained by the injured parties[207]. Causation is explicitly required by Article 288(2) EC. The causal nexus between the wrongful act or omission and the damage sustained should be direct immediate and exclusive. It is assessed from a hypothetical perspective according to which there is no causality involved where the same result would have occurred in the same way even in the absence of the wrongful Community act or omission in question.[208]

5. ARTICLE 288(2) EC CASE LAW INVOLVING NON-IMPLEMENTATION OF DSB DECISIONS

5.1. Background - *Bananas* and *Hormones* Disputes

Private parties have recently brought several actions for damages to the Community Courts in connection to the *bananas*[209] and *hormones*[210] disputes at the level of WTO. The applicants have initiated the proceedings in order to get compensated for the loss they have suffered due to the non-compliance by the EC with the international obligations to change its legislation imposed by the WTO panel and Appellate reports in the transatlantic disputes[211].

The companies that have initiated proceedings can be divided into two different groups. The first group consists of the banana operators who have not been allowed to benefit from the volume of licences and tariff quota to which they are entitled to on the basis of the panel and Appellate Body reports[212] and of the importers affected by the prohibition on the importation of beef from cattle treated by hormones condemned by the decision of the DSB[213]. The second group is the European companies affected by the retaliatory measures taken by the United States following the Community's failure to implement the rulings and recommendations of the DSB[214].

As regards the *Hormones* case, the EC stated after the DSB gave its recommendation that it intended to comply with its WTO obligations, and was granted a reasonable period to do so. That did not take place. However, more than four years after the reasonable period lapsed, a directive has finally been adopted in order to comply with the Appellate Body report[215]. Its compatibility with the WTO obligations may, however, very well be challenged in the future. As regards the *bananas* dispute, a resolution is finally at sight[216]. It is not likely, though, that this will represent an end to actions for compensation brought by private companies for financial loss caused by the outgoing regime.

5.2. Main Issue

The DSB decisions in the *Bananas* and *Hormones* cases have imposed obligations to the Community to take action to amend its legislation to comply with the adopted dispute settlement reports. It is questionable whether the fact that the WTO dispute settlement organs have confirmed the unlawfulness of the Community measures, repeatedly concerning the banana regime, suffices to trigger the liability of the EC[217]. The applicants are required to show that the *Schöppenstedt* conditions are fulfilled[218]. They thus need to show that a sufficiently serious breach of a rule of law intended to confer rights on individuals has occurred.

The applicants have basically relied on two categories of rules as "rules of law intended to confer rights on individuals" that have been breached. The first set of rules is WTO law, consisting of the Agreements and of the dispute settlement findings. There are, arguably, two separate requirements that these rules have to fulfil for purposes of an action for damages. First, it is clear that rule in question has to meet the condition for liability that it is intended to confer rights on individuals. Second, the rules should be susceptible to be relied on by private parties. There is, however, some disagreement as to the issue whether or not the invoked rule needs to have direct effect for the purposes of a compensation action.

Apparently frustrated by the reluctance of the Court to let individuals to rely on WTO law, many of the applicants have relied also on other grounds to establish unlawfulness. Various principles of Community law have been clearly identified as superior rules of law in cases involving non-implementation by the EC of DSB decisions. The pleas in question remain outside the scope of this thesis.

However, Davies for instance considers it unlikely that the applicants could 'circumvent' the lack of direct effect of WTO law by relying on these grounds[219].

Among others, the following principles have been invoked: the protection of legitimate expectations[220], the principle of proportionality[221], the principle of equal treatment[222], the right to property[223], the right of freedom to pursue a trade or business[224], the principle of *pacta sunt servanda* and the principle of sound administration[225]. The defendant institutions have not been found to have breached any of the invoked principles in the concerned cases in such a manner that a compensation action would have succeeded.

5.3. Atlanta

A finding made within the WTO dispute settlement system declaring a provision of Community law incompatible with the WTO law was invoked first time in an action for damages in the *Atlanta*[226] case. Before the CFI the applicant claimed compensation for the damage caused by Council Regulation 404/93[227], which prompted it to cancel shipping contracts for the transport of bananas, the cost of which it remained liable for. Atlanta claimed that the import restrictions of the regulation were contrary to GATT. The CFI rejected the argument by simply referring to *Germany* v. *Council*[228] where the ECJ had discarded a similar argument put forward by the plaintiff and dismissed the action[229].

On appeal[230], Atlanta submitted several pleas, the first one of which was based on the Appellate Body report establishing the incompatibility of the Community's common organisation of the market in bananas with WTO law[231]. The Court found the plea inadmissible, since it was only raised the first time at the stage of reply even though nothing prevented the applicant from submitting it at the time of its application to the ECJ. The Court came to this conclusion despite the fact that the decision of the DSB was not in fact published until six months after the lodging of the appeal. According to the reasoning of the Court, the appellant could have maintained its plea of a breach of the provisions of GATT, raised before the CFI, and adduced in particular the WTO dispute settlement in support of its argument that the provisions of GATT were of direct effect[232].

Atlanta left thus open the question whether an adopted panel or Appellate Body report could contain rules of law protecting the individuals on which private applicants could rely on in an action for damages. Advocate General Alber interpreted in *Biret* the judgement to support the view that a liability action based on the Community's non-compliance with a DSB decision could succeed. He reasoned that the finding of the ECJ that the appellant could have maintained its plea and adduced in particular the dispute settlement mechanism set up within the WTO in 1995 in support of its argument that the provisions of GATT were of direct effect expressly indicates the possibility that the new WTO dispute settlement mechanism could alter the effects of WTO law in EC legal order[233].

5.4. Cordis, Bocchi and T. Port

The cases *Cordis*[234], *Bocchi*[235] and *T. Port*[236] were all actions for damages brought to the CFI by applicants in connection to the bananas dispute in order to get compensated for the loss they had suffered as a result of the application of Commission Regulation 2362/98[237]. The Commission adopted the Regulation in order to implement the Council Regulation 404/93[238], which had been amended by Council Regulation 1637/98[239] in order to comply with the decision of the DSB which declared certain aspects of the banana import regime of the Community incompatible with the WTO rules[240]. The key issue in all three cases was the effect of the Community's WTO infringement on actions for damages[241]. To establish the unlawfulness of the Commission's conduct, all the applicants claimed that the detailed rules for the calculation of the reference quantity for the grant of import licences contained in the Commission Regulation infringed the GATT, the GATS and the Agreement on

Import Licensing Procedures.

The applicants apparently wished to distance themselves from the argument that WTO law contains rules of law intended to confer rights on individuals, since they did not put such argument directly to the Court[242]. Instead, they sought in the first place to rely on rules of law internal to the Community legal order and argued that the Community institutions were guilty of misuse of powers. Since the Community arrangements for banana imports had been declared incompatible with the WTO rules by a decision of the DSB having the force of *res judicata* and the Community had undertaken to rectify the infringements concerned, the institutions were, in the applicant's view, precluded from adopting further provisions in breach of those rules[243].

Despite of the attempts made by the applicants not to base their case on the effect of WTO law, the CFI made it quite clear that it is not willing to review the Community measures in the light of WTO law in an action for damages any more than in other types of actions. It began by repeating the general conditions for liability and referring to *Bergaderm* and noted, that the right to reparation requires that the law infringed is intended to confer rights on individuals. Next, the CFI reiterated the core aspects of *Portugal* and stated that the validity of Community law cannot be challenged in the light of WTO law. It concluded that "the WTO rules are not in principle intended to confer rights on individuals", and therefore "the Community cannot incur non-contractual liability as a result of infringement of them"[244]. With regard to the argument that the Commission had misused its powers, the applicants referred to the *Nakajima* exception at the oral hearing for the support of their case[245]. The CFI rejected also these arguments[246].

5.5. Biret

5.5.1. Judgements of the CFI

The origins of the *Biret* cases[247] are in the *Hormones* case between the EC and the United States. The US brought the case to the WTO dispute settlement claiming that the EC's ban on the importation of beef from cattle treated with hormones for growth promotion purposes violated the SPS Agreement[248]. The Appellate Body confirmed that the Community measures violated the SPS Agreement. It came to that conclusion essentially on the ground that there had not been a sufficiently specific scientific analysis of the cancer risks associated with the use of certain hormones as growth hormones[249]. The DSB adopted the report of the Appellate Body and requested the Community to bring the measures found to be inconsistent with the SPS Agreement into conformity with its obligations under that agreement[250].

The applicants brought actions under Article 288(2) EC before the CFI against the Community for compensation for the damage they had suffered as a result of the import ban of beef treated with certain hormones. They maintained that the Council action was unlawful on the ground that it was in breach of the SPS Agreement[251] and submitted that the DSB had confirmed that the directives in question conflicted with WTO law.

The applicants argued that their case differs from *Portugal* in two respects. First, here the Community rules were the subject of express criticism on the part of the DSB. Second, the Community's breach of its obligations was not temporary and negotiable. Rather, it was permanent, as the Community had expressed its intention to maintain the embargo despite the current state of scientific research. Thus, the argument that the dispute settlement mechanism is flexible was, according to the applicant, immaterial in the case[252]. Furthermore, the applicants argued that the judgement in *Portugal* flouts the wording of Article 300(7) EC and conflicts with the established case-law to the effect that international agreements form an integral part of the Community legal order[253].

The CFI was not persuaded by the arguments put to it by the applicants and dismissed the actions. It stated that it is firmly established case-law that in the view of their nature and structure the WTO Agreements:

1. do not in principle form part of the rules by which the ECJ and the CFI review the legality of acts adopted by Community institutions under Article 230 EC;
2. cannot be relied on by individuals before the courts;
3. *any infringement of them will not give rise to non-contractual liability on the part of the Community*[254].

The CFI also stressed that "the purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals." It reiterated the argumentation familiar from *Portugal* that the judicial review of Community law in light of such agreements would deprive the legislative and executive bodies of the Community of the discretion enjoyed by similar bodies of the Community's trading partners[255]. Also the applicability of the *Nakajima* exception was considered – and rejected[256].

The CFI rejected the possibility that a DSB decision might in any way alter the effect of WTO law in EC legal order. It concluded that there is an inescapable and direct link between the DSB decision and the plea alleging infringement of the SPS Agreement. The decision could therefore be taken into consideration only if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question. For the support of this conclusion the CFI referred to the findings made by ECJ in the *Atlanta* case[257].

5.5.2. Appeals to the ECJ

Biret introduced an appeal against the judgement of the CFI. It claimed, primarily, that the CFI had misconstrued Article 300(7) EC and negated its effectiveness. The judgement did not, according to the appellant, "address the argument that the Community, in acceding to the dispute settlement system set up by the WTO agreements, undertook to observe the procedure and the authority of DSB decisions." In the alternative, Biret requested the ECJ to develop its case-law and to acknowledge that all or part of WTO agreements have direct effect and mentioned various reasons which militate in favour of recognition of the Court's power to review whether Community law complies with the WTO law[258].

Advocate General Alber delivered identical, and quite revolutionary, Opinions in the cases[259]. He sided with the applicants and proposed that the Community may be held liable for the non-implementation of WTO dispute settlement decisions after the prescribed reasonable period to comply has lapsed. Under such circumstances, private parties should, according to Alber, be allowed to rely on WTO law in Community Courts to trigger the liability of the Community. The ECJ did not agree with the Advocate General who suggested that the case should be referred back to the CFI. Instead, it rejected the appeal. It is important to note, however, that the dismissal of the case did not indicate a clear rejection of the arguments presented by Alber either. Rather, the ECJ avoided expressly rejecting or accepting, as Zonnekeyn named it, the "Copernican innovation" of Alber.

The ECJ found on appeal that the reasoning of the CFI was insufficient to deal with the plea put forward by the applicant concerning the infringement of the SPS Agreement. According to the ECJ, the CFI missed the central question to the arguments put forward by the applicant. The issue it should have addressed was whether the legal effects of the DSB decision provided grounds for a review of Community legislation in light of WTO rules in an action for damages, and thus called into question the Court's finding that the WTO rules did not have direct effect[260].

In addition to the disregard of the duty to state reasons, the ECJ found that the CFI made an error of law as regards the scope of the *Atlanta* judgement. It stated that the case is irrelevant since the plea in question was rejected as inadmissible and did not examine the substance of the plea[261]. Consequently, *Atlanta* did not provide for any support for the finding of the CFI that a DSB decision cannot be taken into consideration if the Court has not found the SPS Agreement to have direct effect.

Next, the ECJ turned to the question whether there were other grounds on which the rejection of the plea could be founded. It ended up dismissing the plea on the ground that no damage to the appellant had occurred after the reasonable period granted for the EC for compliance with the DSB decision had expired. The reasoning was that the Courts may not carry out a review of the legality of the Community measures before the period before the date the reasonable time to comply expires. Such review would render ineffective the grant of a reasonable period for compliance. As regards the time after the reasonable period expired, the ECJ found that, since the applicant could have not suffered any damage (because it was in judicial liquidation), the Community cannot have incurred liability[262].

What is remarkable is that the ECJ left open the possibility that Community could incur liability damages for failure to implement a WTO ruling in a case where conditions are right. In *Biret* the issue of liability was not further dealt with only due to the circumstances in the case. The ECJ, notably, did not reject the cases on the basis of the lack of 'direct effect' of WTO agreements. It rather seemed to reproach the CFI for relying too much on this aspect of the case law and to reject the view of that the lack of 'direct effect' of WTO Agreements automatically means that a DSB ruling cannot be relied on in liability actions.

The approach of the ECJ to the effect of WTO law appears to be more relaxed than that of the CFI. First, it did not confirm what the CFI considered to be established case-law that an infringement of WTO Agreements will not give rise to non-contractual liability of the Community. Instead, it referred to paragraph 61 of the judgement of the CFI and agreed only with the usual observation that the WTO agreements are not in principle among the rules in light of which the Court is to review the legality of the acts of its institutions[263].

In the meantime, the CFI had reiterated its finding that it is settled case law that any infringement of WTO Agreements will not give rise to non-contractual liability on the part of the Community in the *Dole Fresh Fruit* case[264]. The case was an action for compensation for damage suffered by the introduction of the banana export licence scheme by Council Decision 94/800. The applicant attempted to rely on WTO law but the plea was held inadmissible as a new plea. Nevertheless, the CFI pointed out that the argument was "completely irrelevant" on the above mentioned ground.

Second, the ECJ did not maintain a similar argument as the CFI submitted stating that the DSB decision could only have taken into consideration if the Court had found the SPS Agreement to have direct effect. Instead, it avoided the issue of unlawfulness and turned directly to the second condition of Community liability, the existence of damage. Whether such approach reflects mere circumspection on the part of the Court in a politically sensitive matter or a genuine willingness to give effect to WTO dispute settlement outcomes in the Community legal order remains to be seen in future cases. In any event, it is clear that the liability of the Community may, in any event, only extend to the time after the reasonable period for the compliance with the DSB decision has expired and to the damage occurred after such period has lapsed.

It should be noted that the ECJ, indeed, did not really discuss the issue of unlawfulness in *Biret*. Even though the judgements leave the impression that the Court might be inclined to recognise invocability of WTO law in limited circumstances, there are other hurdles left on the way of bringing a successful liability action for non-implementation of WTO dispute settlement results. The ECJ did not deal at all with the condition that the rule of law invoked in an action for damages under Article 288(2) EC should be one intended to confer rights on individuals. Neither did it assess whether the breach was sufficiently serious to trigger the liability of the Community institutions.

As a conclusion of the discussed cases, it can be said that neither the CFI nor the ECJ had been required to adjudicate on the question of whether or not WTO law contains rules of law which can form the foundation for an action for damages before *Biret*[265]. In *Biret* such an argument was directly put to the Court but the judgement of the ECJ nevertheless left the issue somewhat unclear.

5.6. 'Innocent Exporters' Cases

The implications of *Biret* will possibly be seen in the 'innocent exporters' cases that are at the moment pending in the Court of First Instance[266]. It will be interesting to see how the CFI reacts to the new developments and interprets the cases[267]. The applicants in the cases are European traders who seek compensation from the EC institutions because of their perceived losses resulting from the US measures to suspend concessions in the transatlantic *bananas* dispute. Their main argument is that the Community should be held responsible for the fact that the US has resorted to retaliatory measures as a response to the EC's failure to implement the DSB rulings and recommendations[268]. They maintain that the measures imposed by the US and the damage they have caused are the direct consequence of the EC maintaining in force a system of rules the WTO has already ruled unlawful[269].

The companies that have suffered losses in the face of the US measures are mainly comparatively small firms and their lines of business do not relate to importing bananas in any manner[270]. In a sense, these exporters have suffered on behalf of the entire Community[271]. Therefore, there is a clear political need for regulation or other kind of solution providing for the possibility for the companies to obtain compensation. In fact, there was a proposal in the European Parliament to establish a compensation fund for these companies[272]. It has, however, been seen as questionable whether such compensation would not amount to an unlawful subsidy under WTO law[273]. At present, an action for damages against the Community institutions appears to be the only possibility for the companies to obtain compensation.

The commentators that have discussed the chances of success of these actions have identified some specific issues, which might cause problems to the applicants. Rosas found it altogether unlikely that the claims will be successful[274]. First, he recalled that the measures to suspend concessions are taken by the US, and not the EC[275]. Therefore, it might be difficult to establish the causal link between the unlawful conduct and suffered damage. However, both Reinisch and Zonnekeyn rejected such a view as the disruption of the causal nexus would only take place if the US measure would be unlawful as such and would thus be the cause of the damage. As the DSB approved the retaliatory measures, they are not unlawful and do not disrupt the causal link[276]. In the present author's view, it should not prevent the condition of causality of being met that the harmful measures are taken by the US. The Community institutions were aware that such measures could be taken and, in a way, the EC accepted the measures when it intentionally breached the obligations imposed by the WTO reports.

Second, Rosas argued that private traders do not have a subjective right to a certain level of tariff concessions[277]. The issue whether WTO law can confer rights on individuals will be discussed below.

Suffice it to say that this probably is the strongest argument against the Community liability. Rosas also found that the fact that suspension of concessions is a mechanism, which is built into the DSU system itself and constitutes one of four modes of implementation which would prevent the success of the actions[278]. The present author interprets the argument to imply that 'choosing' to be targeted by retaliatory measures is comparable to complying with the obligations and no liability can arise as the Community has not acted unlawfully. Such reasoning is not convincing as suspension of concessions cannot, in my view, be considered as a "mode of implementation". It, rather, is a temporary measure that can be used to put pressure on the other party to end its non-compliance with interntional obligations.

6. INVOCATION OF WTO LAW IN ACTIONS UNDER ARTICLE 288(2) EC

6.1. Is Direct Effect Required?

6.1.1. Community Liability in the Context of International Agreements

The jurisprudence of the Community Courts on invocability of the WTO law in general was discussed above. As noted, it is settled case law that the WTO Agreements are not in principle among the rules in light of which the Court is to review the legality of measures adopted by the Community institutions[279]. Does the requirement of direct effect apply in actions for damages? Does WTO law contain provisions that qualify as (superior) rules of law for the purposes of an action for damages?

International agreements of the Community qualify as rules of law to be relied on in a liability action, since they according to the case law form an integral part of the Community legal order and have priority over secondary Community law[280]. There seems, however, to be no definitive answer to the question whether Community liability for breaches of international agreements will arise only in cases where an agreement can be shown to have direct effect[281].

Neither the ECJ or the CFI has explicitly ruled that WTO Agreements should have direct effect in order to be invoked in an action under Article 288(2) EC[282]. In *Stimming*[283] the applicant claimed that a regulation infringed the GATT 1947, the direct effect of which was categorically ruled out. The court did not discuss the argument because the applicant did not specify which GATT rules he was referring to[284]. AG Mayras did, however, address the issue. He presented serious doubts as to private parties invoking GATT rules in liability actions and appeared to suggest that such action would require the agreement to have direct effect[285].
Another Advocate General expressed a clearly opposite view. AG Lenz was of the opinion in the Italian bananas case that the possibility that in exceptional cases an infringement of provisions of GATT might give rise to a liability in damages for the Community. He specified that "in particular, one might envisage a case where in such a situation the Community makes no use of the possibilities provided for in GATT of freeing itself from its obligations, but agrees that the dispute should be decided by a neutral tribunal, and then however refuses to comply with the decision"[286]. As the "neutral tribunal" referred to by Lenz hardly can be but a GATT panel, or a WTO panel or the Appellate Body at present, what he most likely meant by his statement was that a private trader could claim damages against the Community when it refuses to comply with a WTO panel[287].

The more recent cases dealing with WTO law already discussed above offer some guidance but do not resolve the issue. In *Cordis, Bocchi* and *T.Port* the statements of the CFI that suggested that the EC cannot incur liability as a result of infringement of WTO rules appeared to be based on the view that WTO rules are not intended to confer rights on individuals rather than on their lack of direct effect[288]. The reference to 'the rights of individuals' cannot be assimilated with direct effect[289]. The very

notion of direct effect appears to indicate that provisions having such effect confer rights on individuals[290] but, by contrast, it is possible that a provision confers rights on individuals despite of its lack of direct effect[291].

Also some commentators have doubted whether private parties may invoke WTO law as a standard of reviewing the conduct of the EC institutions in an action under Article 288(2) EC. Maresceau suggested that direct effect of the invoked international provision would be a *conditio sine qua non* for allowing compensation for violation of international agreements. He found that the lack of direct effect of GATT to constitute an insurmountable obstacle for bringing a liability action founded on a breach of the Agreement[292]. More recently, other commentators have been convinced by the judgements of the ECJ and CFI in *Portugal,* and *Cordis, Bocchi* and *T.Port* and considered it established case law that WTO rules can not constitute superior rules of law in a compensation action under Article 288 (2) EC[293].

The *Biret* case is quite interesting in this context. The finding of the CFI, that the DSB decision in question could be taken into consideration only if the Court had found the SPS Agreement to have direct effect, clearly implies that also the CFI considered direct effect as a prerequisite for relying on WTO law in a liability action. Also Advocate General Alber was of the view that the relevant WTO rules the applicant wishes to submit should have direct effect in order for the compensation action to succeed. The condition is in his view cumulative to the requirement that the rule invoked in intended to confer rights on individuals[294]. The ECJ, however, clearly rejected the straightforward position of the CFI but the meaning of the judgement of the ECJ still remains somewhat ambiguous.

The findings of the ECJ in *Biret* could imply that under very specific circumstances WTO rules can be relied on in actions under Art. 288(2) EC *despite* their general lack of direct effect. Similarly as Zonnekeyn, the present author finds the position of Alber that certain rules "are suddenly blessed with direct effect in the framework of a damages claim" rather unconvincing[295]. In the author's view the most reasonable solution could be to consider that, under the specific circumstances pointed out by the ECJ, certain provisions become invocable despite their lack of direct effect, as is the case when the *Nakajima* doctrine is applied. This exception would, however, apply only in liability actions.

6.1.2. Parallelism – Direct Effect a Condition for Member State Liability?

Some commentators have referred to the case law of the ECJ with regard to the liability of the Member States to support their views of the necessity of direct effect of the invoked provision in actions for damages[296]. As the jurisprudence involving Community liability provides for no final answer to the question whether or not direct effect is required, it is necessary to examine the rules governing the Member State liability in this context. As the ECJ apparently wants to harmonise the liability doctrines, it would be clearly against the trend to consider direct effect as a condition of Community liability if it is not required for a Member State to incur liability.

In the *Francovich*[297] case, which introduced the possibility of holding Member States liable for a breach of Community law the Court held that the directive invoked in the case was not required to have direct effect in order to be invoked in an action for damages against a Member State[298]. From *Francovich* the conclusion can be drawn that the condition for Member State liability that the measure is intended to confer rights on individuals to exist in the context of international agreements may be fulfilled whether direct effect exists or not[299]. Consequently, the lack of direct effect of the WTO Agreements would not as such prevent Member State liability from arising under some circumstances when its provisions have been breached[300]. In principle, the present author sees no compelling reason not to apply the same reasoning to the Community liability as well[301].

Some commentators see that allowing individuals to claim damages against Member States even where the Community provisions they wish to rely on were not directly effective is the most important element of *Francovich*[302]. Therefore not allowing private parties to rely on WTO rules because of their lack of direct effect would miss the core of the rules of the jurisprudence[303], especially if the Court truly wishes to unify the conditions of Community and State liability.

It should be noted, however, that as clear as *Francovich* appears to be, it is possible to interpret the judgement also in another way. According to van Gerven the Court did not in fact base the applicant's right to reparation directly on the provisions of the directive which conferred specific rights, but used these provisions to flesh out provisions of the Treaty and of the directive which, in themselves, were sufficiently precise and unconditional in order to base the right to reparation thereon in principle. He contends that provisions that lack direct effect may not give rise to liability, since, by definition, individuals cannot rely upon such provisions in order to derive rights from them.[304]

6.2. Relevance of the *Nakajima* Doctrine

6.2.1. Applicability in Actions under Article 288(2) EC

When the applicability of the doctrine in the context of an action for damages under Article 288(2) EC is considered, it should be noted that the exception can be applied under the same circumstances as in other types of actions. When the liability of the Community is invoked on the basis of the *Nakajima* doctrine, the direct effect of WTO law becomes a non-issue[305]. If the conditions for the application of the doctrine were met, the applicant would, however still be required to show that the behaviour of the defendant institution is unlawful and that the other conditions for a successful liability action are met. The Community would thus not incur liability even though its actions were reviewed under the on the basis of the *Nakajima* doctrine if the rule of law relied on by the applicant was not intended to confer rights on individuals.

6.2.2. Cases Relating to the Bananas Dispute

The Community banana import regime was challenged in a liability action in *Cordis, Bocchi* and *T.Port.* In these cases the CFI rejected the applicants' argument that the Community was guilty of misuse of powers in adopting the Commission Regulation 2362/98. The applicants claimed that the regulation contained infringements of WTO rules despite of the fact that the Community had given an undertaking to the DSB to repeal the provisions of its regulations which conflicted with WTO rules. Even though the applicants did not rely on the *Nakajima* exception in the clearest possible way[306], the CFI considered the applicability of the doctrine to the case and concluded as follows:

"Neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the Dispute Settlement Body on 25 September 1997 included any special obligations which the Commission intended to implement, within the meaning of the case-law, in Regulation No 2362/98. The Regulation does not make express reference either to any specific obligations arising out of the reports of WTO Bodies or to specific provisions of the agreements contained in the annexes to the WTO Agreement"[307].

The CFI rejected thus the relevance of the doctrine without analysis, even though it is hard to find any other reason for amending the Community's banana import regime but the Appellate Body report[308]. Therefore, it is not surprising that the finding has been harshly criticised by commentators[309]. As mentioned above, it is clear that the contested Commission Regulation was adopted to establish a WTO-compatible regime in line with the panel and Appellate Body reports. It was adopted

with the sole purpose to implement Council Regulation 1637/98, which explicitly refers to WTO obligations and was adopted, even according to the CFI[310], in order to comply with the DSB decision of 25 September 1997.

The ECJ dealt with a similar situation quite differently in the *Kloosterboer* case[311]. The case concerned a challenge by a preliminary reference against a Commission Regulation imposing additional duties on frozen chicken fillets. The plaintiff argued that the duties infringed both the WTO Agreement on Agriculture (AA) and the Council Regulation which had been amended with a view to implementing the provisions on additional duties of the AA. The relevant provisions of the Council Regulation were a direct copy of the AA provisions and the intent to implement emerged expressly from its preamble. The Advocate General considered that this was a clear case for applying the *Nakajima* exception. The ECJ seemed to be evading the question since it conducted its analysis mostly with reference only to the implementing Council Regulation and not the AA. Even though the ECJ did not explicitly say that it was applying the *Nakajima* exception, the case has been seen as "an ideal example" of its application.[312]

To the defence of the CFI in *Cordis, Bocchi* and *T.Port* it has been said that it looked at the Commission Regulation in isolation and was therefore entirely correct since the provision does not contain any indication of an intention to implement WTO obligations[313]. It has been suggested that the Court should come to a different conclusion when it will be required to consider the Commission Regulation in light of the 1998 Council Regulation. It will be invited to do so in the *Chiquita*[314] and *Cartondruck*[315] cases. It has been submitted that the Court should then consider whether the reference in the Council Regulation to WTO law is specific enough to indicate an intention to implement particular WTO obligations as the Regulations in question are so closely connected.

In *Banatrading*[316] the applicant was suing the Council for damages on the grounds that the entire banana regime since 1993 was in violation of WTO law. It argued at the hearing that, despite of the lack of direct effect of WTO Agreements, it was none the less for the Court to review the legality of the Community measure in question in the light of the WTO rules where the WTO has found that there has been a breach of those rules, the Community has undertaken to implement the recommendations and subsequent decisions of the Dispute Settlement Body and has not taken the measures necessary to comply with the recommendations and decisions within the prescribed time-limit[317]. The CFI rejected the argument as a new plea in law and did not discuss it any further[318].

In the present author's view there is no compelling reason why the Court could not apply the *Nakajima* exception in the future actions challenging the Community banana regime. On the other hand, it is possible for the Court to continue with the very narrow interpretation of the doctrine and rule that the wording in the Council Regulation does not trigger the application of the doctrine. In the light of the its very clear reluctance to review the Community banana regime in light of WTO it seems unlikely that it would suddenly change its standpoint and limit the judicial deference it has shown to the discretion of the institutions.

6.2.3. Cases Relating to the Hormones Dispute

The CFI found the *Nakajima* doctrine inapplicable also in *Biret*. It held that the circumstances of the case did not correspond to either of the situations where the doctrine could be applied. Since the contested directives were adopted several years before the entry into force of the SPS Agreement, it is not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions[319]. The CFI thus did not consider the applicability of the *Nakajima* doctrine in relation to the DSB decision. It is explained by the fact that the

Community had not yet taken any final action to amend its legislation in connection to the *hormones* dispute.

The findings of the CFI in connection to the applicability of the *Nakajima* doctrine were not subsequently questioned by the ECJ, unlike some of the other conclusions the CFI had drawn. The Advocate General, however, assessed further whether the doctrine should be applied after all. In particular, Alber discussed whether the statement made by the Community that it intended to comply with its WTO obligations but needed a reasonable time do so, can be considered as a Community measure taken with the intention to implement a particular obligation assumed in the context of the WTO. Alber, however, came into the conclusion that the statement was given in respect to the WTO and belongs to the area of international law. It cannot, as such, produce such legal effects as the application of the *Nakajima* doctrine would require[320].

In September 2003 a directive was finally adopted to implement the 1998 DSB recommendation[321]. The new provision refers expressly to the WTO ruling, which indicates that private parties should now be able to ask the Courts to review the legality of the directive in the light of the relevant WTO provisions and case-law by applying the *Nakajima* doctrine[322]. This clearly involves a situation where the Community institutions have used their discretion and deliberately made WTO available to individuals. The WTO ruling is referred to in the preamble to the directive in the following way:

"In the light of the results of a dispute settlement case brought before the World Trade Organisation (WTO) by the United States of America and by Canada (the Hormones case) and recommendations made in that respect by the WTO Dispute Settlement Body on 13 February 1998, the Commission immediately initiated a complementary risk assessment, in accordance with the requirements of the Agreement on the Application of Sanitary and Phytosanitary Measures (WTO-GATT) as interpreted by the Appellate Body in the Hormones case, of the six hormonal substances (...) whose administration for animal growth promotion purposes is prohibited by Directive 96/22/EC"[323].

If the Court were to improve the protection of the individuals in respect to the WTO-illegal behaviour of the Community institutions, especially as regards non-implementation of the outcomes of dispute settlement, the *Nakajima* doctrine perhaps is not the best solution, as can be seen from *Biret*. The doctrine can not be applied in the absence of implementing measures. It is difficult to see why individuals should be let to rely on DSB decisions when the Community has attempted to implement them but failed in it while, by contrast, if the decisions were completely ignored, individuals could not enforce them in any manner.

6.3. Invocability of WTO Law in Case of Non-Implementation of DSB Decisions?

6.3.1. Biret – A New Exception Established?

It is possible to interpret the judgement of the ECJ *Biret* in the way that a new exception to the general rule concerning the effect of WTO law in the EC legal order was established and WTO law was made available to private parties under certain circumstances in actions under Art. 288 (2) EC[324]. The ECJ did not explicitly state so but at least it left open the possibility that a liability action for failure to implement a WTO ruling could succeed if the damage arises subsequent to the period within which the EU should have implemented the WTO ruling. It will not be seen until the advent of future cases as to which direction the case law develops.

Advocate General Alber was firmly advocating for allowing 'direct effect' to WTO rules in *Biret* under the circumstances of the case: there was an adverse DSB decision addressed to the Community involved, the reasonable period for its implementation had lapsed and the EC had failed to withdraw

or amend its WTO incompatible directives. A more thorough analysis of this new approach to the invocability of WTO dispute settlement decisions will probably be helpful to shed some light on the meaning of the *Biret* judgement of the ECJ, although it remains to be seen if similar reasoning will be used by the Court. The potential adoption of a new exception will be analysed in the light of the most important aspects behind the general reluctance of the Court to let private parties to rely on WTO law.

6.3.2. Limits of Applicability

Both the ECJ and Advocate General were of the view that private parties should not, in any event, be allowed to rely on WTO law before the reasonable period granted for the implementation of the panel and Appellate Body reports has lapsed[325]. Therefore, the possible liability of the Community would extend only to damage suffered by the applicant after such a period has expired. The EC would thus not incur liability, for example, for losses suffered from the beginning of the establishment of a WTO-illegal banana import regime, or the introduction of the import ban on hormone treated meat, or even from adoption of the dispute settlement reports. The position of the companies claiming compensation for the damage they have suffered on account of retaliatory measure taken by the other parties to the disputes would not be affected by the limitation, since these measures are generally resorted to after the period for compliance have lapsed.

6.3.3. Effect on the Margin of Manoeuvre of the Institutions

What appears to be common to all of the exceptional ways for private parties to make use of WTO law is that the application of the exceptions does not interfere with the institutional balance the Courts have been carefully guarding. The analysis of the applicability of the *Nakajima* doctrine showed that this applies to it and the same appears to be the case concerning the effect of WTO law introduced by the ECJ in the *Biotechnologies* case[326] and the principle of consistent interpretation. It is therefore necessary to assess whether, and to what extent, the review of relevant Community action or inaction after the period for implementation of a DSB decision has expired in a liability action would undermine the institutional balance maintained by the Court.

Advocate General Alber discussed the issue quite broadly and started by giving a rather detailed analysis of the WTO dispute settlement system. He essentially argued that there is no *permanent* alternative to complying with rulings and recommendations of the DSB and underlined that compliance cannot, in the end, be avoided by negotiations between the parties to the dispute[327]. It should be noted, however, that the ECJ emphasised in *Portugal* that to require the judicial organs to refrain from applying WTO inconsistent rules would have the consequence of depriving the legislative or executive organs of the possibility of entering into negotiated arrangements *even on a temporary basis*[328].

Alber further stressed that, even though non-implementation may be a commercial policy option, it is not under any circumstances a legally valid option, as under the WTO law there is no discretion left to the legislative and executive organs that could be limited by recognising direct effect to WTO law. The existence of such a commercial policy option on the whole is due to the lack of enforcement measures under international law. The fact that suspension of concessions is the only measure under international law to coerce the Community to comply with the DSB decision cannot, as the Advocate General in my opinion quite rightly argued, be used as an argument by the Court to justify that they are not respected. The Court had a choice to make between accepting the commercial policy option through the exercise of judicial self-restraint[329], or respecting the principle of legality by recognising the binding effect of the DSB decisions and the right of individuals to rely on them in a compensation action. Alber urged the Court to make a decision in the favour of the latter.

What the present author finds more noteworthy in the Opinions is the arguments Alber submitted to distinguish between giving effect to DSB decisions in liability actions on one hand, and in actions that could lead to annulment on the other. As an action for damages cannot as such compel the institutions to adopt or withdraw any measures to change the legislation, the risk of the success of such an action would lead to a lower degree of limitation of the discretion of the institutions than would an action conceivably resulting in the annulment of a measure. Alber made it clear that the type of effect of DSB decisions he advocates for is only to be applied in actions for damages and would merely give the applicant the right to claim compensation from the Community. Consequently, in *Biret* the action could have not resulted in the Court requiring the institutions to allow the import of beef treated with hormones[330].

Implementing the WTO dispute settlement recommendations given in *Bananas* and *Hormones* cases involves taking important socio-economic and political considerations into account. As regards the prohibition of import of beef treated with hormones it is obvious that health and consumer protection were crucial for the introduction of the measures adopted by the institutions and remain central in the (non-)implementation of the DSB recommendation[331]. With regard to the issue of common market organisation for bananas, some Member States of the EC believe that they have a moral responsibility towards some of the ACP countries producing bananas and immediate compliance with the DSB rulings could have put such interests into jeopardy[332]. We are, thus, dealing with situations where the discretion of the Community institutions plays an important role.

However, the interests of some private operators can be in a clear conflict with the more general interests, as for example the position of the companies targeted by punitive duties well illustrates. Accepting the type of effect of DSB decisions proposed by Alber could perhaps be desirable. At the same time it could not compel the institutions to adopt or amend legislation which conflicts with the highly important general interests concerned, it would still guarantee that the rights of private parties are not entirely ignored when the Community is acting in a manifestly WTO-illegal manner. In the present author's view, this would lead to a better balance of interest than giving effect to DSB decisions in annulment actions, or not according them any effect at all.

It would still be wrong to say that the possibility to bring actions for damages invoking WTO law even under these exceptional circumstances would not limit the discretion of the institutions in *any* manner. Naturally the risk of liability arising as a consequence of their actions affects the decision-making of the legislative organs. It increases the pressure on the institutions in respect to implementing rulings and recommendations of the DSB. However, the significance of such limitation of discretion should be weighed against the principle of legality. Accepting the proposed type of effect of DSB decisions in liability action would mean giving much more respect to the latter than has been the case so far.

6.3.4. Reciprocity Argument

The ECJ did not make any inquiries in *Biret* whether any of its major trading partners would also allow a liability claim based on measures found to be in violation of WTO law by the DSB. As it did not even mention such considerations, it might be prepared to waive the requirement of reciprocity in this connection[333]. The Advocate General submitted some observations on the issue. His attitude towards the reciprocity argument in general is quite critical. He contended that the argument is a pure policy argument only disguised as a legal argument by calling it the "principle of reciprocity"[334].

First, Alber acknowledged that the US legislation has excluded the possibility of private claims against

WTO-illegal provisions. He went on and considered that the Council's unilateral statement[335] could not as such establish a similar position for WTO law in the Community legal order.

Alber came to a similar conclusion as AG Saggio in *Portugal* and considered that the statement the Council made in the preamble of its Decision concluding the WTO agreement lacks legal relevance in the Community legal order mainly on the ground that the Court is under Article 300 (7) EC bound by the WTO Agreement and a provision of secondary Community law may not conflict with Treaty provisions.

Alber also reminded of the rule laid down by the ECJ in *Kupferberg* that lack of reciprocity may not as such prevent the direct effect of an international agreement binding on the Community[336]. He did not elaborate much on what makes the argument less important to the proposed effect than it is with regard to WTO law in general. He found it doubtful whether the Community's position in negotiations really could be weakened by allowing 'direct effect' to WTO law in a limited manner in actions for damages. Such effect would, according to Alber, only occur if it were possible for the parties to the dispute to agree that WTO-illegal provisions could remain in force permanently.[337] Finally, Alber emphasised that the principle of legality would be trumped if the Court would find such a policy argument more important.

The type of effect proposed here is clearly far more limited than the one in issue in *Portugal.* The risk of being systematically faced with liability for the harm caused by retaliatory measures could weaken the Community's position in negotiations and limit its 'bargaining power' to some extent. The argument is, however, less forceful than if the effect could lead to the annulment of the Community measure. It should be noted that the Court does not apply the argument consistently as it did not consider the lack of reciprocity an obstacle when it established the *Nakajima* exception and reconfirmed its applicability in the framework of WTO law, even though the application of the exception renders the legal effects of WTO Agreements within the Community legal system further reaching than in the legal systems of the Community's main trading partners[338]. Therefore, in the present author's view the principle of reciprocity cannot as such prevent the Court from letting private parties to rely on WTO law under the exceptional circumstances under consideration.

7. ESTABLISHING UNLAWFULNESS

7.1. General

If the ECJ considers that WTO law could be relied on by private parties in a liability action, the applicants would still have to show that the behaviour of the Community institutions was unlawful. The liability cases in issue involve situations where the WTO dispute settlement organs have confirmed the unlawfulness of the conduct of the institutions. Whether this suffices to trigger the liability of the Community will be assessed in the light of the *Schöppenstedt* conditions. The applicant would, thus, have to show that the WTO rules relied on are intended to confer rights on individuals. This condition will undoubtedly be very difficult to meet. If the applicant would succeed in this, he would still have to prove that the breach was sufficiently serious.

In *Biret* unlawfulness was claimed to be constituted by the adoption of directives imposing a WTO incompatible ban on importation of hormone treated beef[339] and the subsequent failure by the EC to withdraw or amend these measures within the prescribed reasonable time[340]. Correspondingly, the Community has, allegedly, acted unlawfully when it has adopted the WTO-illegal banana import regime and failed to amend it to comply with the DSB decisions given in connection to the *bananas* dispute.

7.2. Does WTO Law Contain Rules Intended to Confer Rights on Individuals?

The ECJ has said on numerous occasions, although not in actions under Article 288(2) EC, that WTO provisions are not intended to confer rights on individuals, which they can rely on before the courts[341]. As noted, the CFI has recently made similar statements also in liability actions[342]. The requirement in question seems to be the most difficult precondition of liability to meet. In the light of the statements of the ECJ and the CFI, it seems that accepting that some of the WTO provisions could be intended to confer rights on individuals would mean, especially for the CFI, adopting a new stance. The Opinions of Advocate General Alber in *Biret* urged the Court to change its view and brought up several arguments in support of the view that the SPS Agreement, indeed, is intended to confer rights on individuals.[343] The ECJ did not discuss the issue but, instead, rejected the plea on the basis that no damage had been suffered.

The CFI stressed in *Biret* that "the purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals"[344]. It is true that the WTO is an inter-governmental organisation in which private business operators do not have any direct role[345]. They have, however, been claimed to be the main beneficiaries of the multilateral trading system[346]. For example Petersmann considers that "the formulation of international trade rules in terms of rights and obligations of states is no convincing reason for preventing individuals from invoking precise and unconditional international guarantees of freedom and non-discrimination", such as the GATT rules underlying the customs union rules of the EC Treaty[347].

Indeed, one of the most important reasons for the establishment of a 'rule-oriented' international economic system by the WTO Agreements was the security and predictability it guarantees for private business operators, which enable them to plan better for longer-term investment and operate in the commerce between nations with vastly differing governmental and cultural structures[348]. In *Section 301* case the WTO panel recognised that:

"Proving security and predictability to the multilateral trading system is another central object and purpose of the system (...) The security and predictability on question are of 'multilateral trading system'. The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines." [349]

It is clear, at least in the light of the panel report in the *Section 301* case, that at the level of WTO the rules appear to be envisaged to be for the protection of the individuals. The approach is very different of than the view of the ECJ and the CFI as the following passage of the *Section 301* case well illustrates:

"it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual to flourish"[350].

It should be noted that the ECJ has held in the *Kampffmeyer*[351] case that if a rule has the function of protecting or developing the general interest, this will not necessarily prevent it from having a dual purpose in that it also has the function of protecting the interests of individuals. The fact that the WTO Agreements have as their purpose the protection of a general interest – namely the liberalisation

of trade – does not as such exclude that the provisions can protect the interests of individuals at the same time.[352]

Neither has the applicant been required to prove that the rule of law alleged to have been breached is intended to protect the specific interests of the individual concerned. Instead, it has been sufficient to show that the rule is for the protection of the individuals generally[353]. The condition is, thus, easier to satisfy than the requirement of direct and individual concern under Article 230(4) EC, which has been applied very strictly by the Courts[354].

Alber argued that the provisions of the SPS Agreement in specific aim to abolish discriminatory measures, which restrict the private business operators' right of freedom to pursue trade. He also submitted that the WTO Agreements regulate primarily market access rules and within the EC legal order similar rules, for instance Article 25 EC, are directly applicable. This part of the reasoning of Advocate General is not necessarily watertight bearing in mind the established case law of the Court, according to which the similarity between provisions of EC Treaty and of international agreements does not indicate that the provisions should be interpreted in the same way. The reason for this is that the purposes of other agreements vary from that of EC Treaty[355]. Clearly there are huge differences between the objectives of the EC Treaty and the WTO Agreements[356].

7.3. Does the Non-implementation of DSB Rulings and Recommendations Involve a Sufficiently Serious Breach?

7.3.1. The Brasserie du Pecheur Criteria

The actions for damages brought due to non-implementation of DSB decisions in *Bananas* and *Hormones* cases involve targeting Community action or inaction in legislative fields characterised by the exercise of wide discretion[357]. In such areas of legislation the applicant has been required to show that the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers in order to establish a sufficiently serious breach[358]. Even though the criteria have been notoriously difficult to fulfil, the discretion of the institutions is not unlimited as has been seen for example in the *Sofrimport*[359] and *Mulder*[360] cases.

Earlier, the ECJ seemed to demand that the conduct of the defendant institution lying behind the illegality be shown to be *verging on the arbitrary*[361]. It has, however, subsequently held that fault in the nature of arbitrariness is not required for liability[362]. Some commentators have suggested that arbitrariness would still have to be demonstrated in circumstances in which the discretion of the institution adopting the legislation is as wide that the institutions have almost unrestricted powers of action[363].

After the *Bergaderm* judgement, that strengthened the significance of the principle of parallelism, it might be thought that it is sufficient for the applicants to show that the breach is sufficiently serious in the light of the criteria established by the ECJ in *Brasserie du Pecheur*. Accordingly, the factors to be taken into account are the clarity and preciseness of the rule, whether the infringement and damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable and the measure of discretion left by that rule to the national or Community authorities[364].

It seems convincing to maintain that the WTO rules dealt with are adequately clear and precise especially as they have been dealt with during the WTO dispute settlement procedure and their content has been clarified by the WTO organs. Neither can an excusable error of law be involved after the WTO-breach has been confirmed and a specific obligation to amend the legislation has been set. Reinisch simply contends that the DSB decision excludes any discretion the violated WTO

rule could otherwise leave to the Community authorities [365].

As regards the intentional or involuntary nature of the breach and the damage caused, it would appear somewhat peculiar to maintain that the institutions were not aware that their action was in breach of WTO law, in particular as regards the failure to amend the condemned rules. Zonnekeyn asserts that it was so obvious that the amendments to the banana import regime were contrary to WTO law that one could argue that the EC consciously tried to avoid the implementation of the WTO rulings[366]. Naturally the same applies to the disregard of the DSB recommendation in the *Hormones* case.

Both commentators who have discussed this problem, Reinisch and Zonnekeyn, agree that the breach can be seen as sufficiently serious in the light of the *Brasserie du P˜cheur* conditions[367]. It is not entirely clear whether it is enough that these conditions are met for the Community to incur liability. Therefore, a brief look at the other conditions the have been considered essential in the case law concerning actions under Art. 288 (2) EC will be necessary.

7.3.2. Other Conditions

In assessing the seriousness of the breach made by Community institutions, the Court has taken into account the consequences of the breach. In the *Ireks-Arkady* case the violation of the superior rule of law was qualified as manifest and grave because it affected a limited and clearly defined group of commercial operators and went beyond the bounds of the economic risks inherent in the activities in the sector concerned[368]. As regards the 'innocent exporters' cases, it is clear that the punitive import duties applied to a particular group of products affect a limited and clearly defined group of companies[369]. Whether or not the companies will otherwise be affected by the upholding of WTO-illegal banana import regime or the ban on importation of hormones treated beef, depends on the circumstances of each case.

It might be thought that the liability actions based on non-implementation of WTO dispute settlement should be rejected if a large number of traders had been affected by the breach. It is clear that that such a factor cannot any longer affect the assessment of gravity of the breach. In the *HNL* case one of the grounds to reject the claim was that the contested measure affected a very large category of traders. The case law was, however, relaxed in that regard in *Mulder*[370]. There the ECJ considered that the damage need only be confined to a 'clearly defined group', as opposed to a 'limited group'. The Court appeared to agree with the view that the fact that loss has been caused to a large number of traders rather constitutes an indicator of the seriousness of the breach than a ground for rejecting the claim, even though such conclusion might have serious financial implications.[371]

As regards the condition that the consequences of the behaviour of the defendant institution were serious, in the sense that they exceeded the bounds of the economic risks inherent in carrying on business in the relevant sector of the market[372], the unification of the conditions of Community and Member State liability makes it arguable, whether the condition should be taken into consideration at present. A similar condition is not to be met under the rules governing the Member State liability[373]. Tridimas seems to consider that the condition remains a requirement for Community liability also after *Bergaderm*[374]. Craig and de B³rca, on the other hand, have taken the view that the applicant should no longer, as a matter of principle, have to show that the loss suffered was serious, since it is not a part of the *Brasserie du P˜cheur* test[375]. If the Court is serious about unifying the conditions also in practice, the condition should not be taken into consideration.

What may cause problems to the applicants is that a breach has not been considered sufficiently

serious where the Community institution has exercised its discretion in the way it did because of an overriding public interest which justified the harm caused to individual interests[376]. The Court has tried to justify the general difficulty of recovering compensation from the Community for loss caused by its measures as follows:

"the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals[377]."

What makes the situation slightly problematic is that there is no clear definition for "an overriding public interest" but it is dealt with subjectively on a case by case basis[378]. Nonetheless, it is the superior rule of law which will set the limitation on the freedom of action by the Community institution[379].

8 Conclusion

The overview to the position of the individual in relation to the WTO law within the Community legal order shows that the ECJ has categorically ruled out the possibility that private parties could challenge Community measures on the basis of WTO law provisions. Instead, the Court has supported a limited enforceability of WTO law. WTO law rules may become available to private parties through the application of the *Nakajima* doctrine and the principle of consistent interpretation. The ECJ has also more recently introduced new situations where private parties may be allowed to rely on WTO law provisions. The statements made in the *Biotechnologies* and *Dior/Tuk* cases can be seen to reflect the discomfort the ECJ appears to be experiencing with the general position that the WTO Agreements are not considered justiciable and cannot be relied on by private applicants[380].

The lack of justiciability of WTO law relates to the conflict between the empowerment of individuals and courts on one hand and the discretion of the political and executive institutions of the Community on the other. The exceptions developed in the case law make WTO available to private parties making sure at the same time that the margin of discretion of the Community institutions is not seriously undermined. They can be seen as fair attempts by the Court to strike a balance between the power of the Community institutions and the interests of the individuals. The solution appears to be wiser in the current international setting than allowing direct effect to WTO law, thereby tying the hands of the Community institutions at the international level. In principle, the present author agrees with this. The analysis above showed, however, that the exceptions have several shortcomings and their limited applicability can leave important gaps to the system.

One of such gaps exists in the case of WTO dispute settlement decisions. The analysis of how such decisions have been dealt with in actions for annulment showed that so far they have not been given any effect in the Community legal order despite of their, arguably, binding nature at the international law level. The 'direct effect' of DSB decisions appears to be, in the present author's opinion, rightfully ruled out and the very narrow approach to the *Nakajima* doctrine has prevented the decisions from becoming available to private parties through the application of that exception. Neither can the principle of consistent interpretation benefit the applicants in any manner in this context.

What is the effect of the general rules on invocation of WTO law on liability actions? What makes the question interesting is that it has been considered that a rule of law does not necessarily have to be directly effective in order to be invoked in a liability action. The CFI has, however, adopted a stance according to which it follows from the position of WTO law in Community legal order that it

cannot benefit private parties in liability actions unless an exception applies. The ECJ seemed to reproach the CFI in *Biret* for taking such a shortcut.

The CFI examined the applicability of the *Nakajima* exception in liability cases involving non-implementation by the EC of DSB decisions. The inadequacies of the doctrine apply similarly to liability actions and other types of actions. First, the exception is of no use if the EC has ignored the DSB decision and not even attempted to implement it. There is no convincing reason for distinguishing between the position of the applicant, on one hand, in a situation where the EC has attempted to implement a DSB decision but failed in it and, on the other hand, in a situation where the EC has not taken any action in order to amend its condemned legislation.

Second, the scope of application of the *Nakajima* exception is very narrow. This implies that the institutions have a complete freedom to control the application of the exception by means of preambular language. This of course fits neatly in the picture where the Court exercises judicial self-restraint and is not willing to limit the discretion of the institutions. It was shown that allowing private parties to rely on WTO law in liability actions would not limit the discretion of the institutions to a similar extent as making WTO available to the applicants in actions, which could lead to annulment. This is mainly because the applicant can merely claim compensation in a liability action and the Court cannot compel the institutions to take any legislative measures. Since the *Nakajima* exception applies, in principle, similarly in both types of actions, such considerations cannot, however, be taken into account in its application. Taking into account these shortcomings of the exception, it can be concluded that if the Court wished to enhance the legal effects of an adopted WTO dispute settlement finding the Community does not comply with, the *Nakajima* exception probably does not provide for the best means to it.

The *Biret* case gave some indications that the ECJ might be willing to let private parties to rely on WTO law provisions in liability actions under the circumstances that there is a DSB decision obligating the EC to amend its legislation but it has failed to do so within the prescribed reasonable period of time. The Community could in any event incur liability only for damage suffered by the applicant after the period for the implementation has lapsed. In order to determine whether such an 'exception' could be established, it was necessary to assess whether or not the proposed type of effect of WTO law would clash with the underlying principles of the case law of case law of the ECJ regarding the effect of WTO law in the Community legal order.

The fact that the Community's main trading partners, at least the US, do not allow a similar effect to WTO law in their legal order would speak against the exception. However, this is not a compelling reason to reject such an effect as the principle of reciprocity has not been applied consistently as also the *Nakajima* exception allows such effects to WTO law in EC legal order that do not exist in the legal orders of its main trading partners.

The effect of the exception on the margin of manoeuvre of the Community institution is crucial. It can be concluded that establishing the type of effect in question would limit the discretion of the institutions to some extent but not as forcefully as if DSB decisions were allowed to relied on by private parties in other types of actions. Deciding whether to accept the exception involves a careful balancing of interests. The interests of individuals and the importance principle of legality should be weighed against the commercial policy interests of the Community and the wide discretion of its political institutions. In the present author's view the balancing of interests should under the limited circumstances in question lead to allowing private parties to rely on WTO law.

Even though private parties were allowed to rely on WTO law in liability actions, they would still have to show that the defendant institutions have acted unlawfully. This would require the applicant to establish that the WTO provision relied on are intended to confer rights on individuals. It seems that this is the biggest obstacle in bringing a successful action for damages on the basis of WTO law as both the CFI and the ECJ have stated that the WTO Agreements are not intended to confer rights on individuals.

As regards the chances of success of the liability actions brought due to non-implementation by the EC of DSB decisions from the point of view of establishing the sufficient seriousness of the breach, it can be concluded that in the light of the (arguable) relaxation of the relevant conditions, it does not appear to be ruled out that the applicants might succeed in showing that the breach was sufficiently serious. However, if the Court is not really serious about unifying the conditions of Community and Member State liability also in practice, the possibility for the actions in question to succeed is extremely hard to reach even though the applicants were otherwise allowed to rely on WTO provisions.

(Footnotes)

[1] *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Panel of 22 May 1997, WT/DS27/R; *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R.

[2] *European Communities – Measures concerning meat and meat products (Hormones),* Report of the Panel of 18 August 1997, WT/DS26/R/USA; *European Communities – Measures concerning meat and meat products (Hormones),* Report of the Appellate Body of 16 January 1998, WT/DS26/48/AB/R.

[3] The Opinions of Advocate General Alber of 15 May 2003 in Cases C-93/02 P, *Biret Internationa SA* v. *Council* and C-94/02 P, *Etablissements Biret and Cie SA* v. *Council,* not yet reported.

[4] Cases C-93/02 P, *Biret International SA* v. *Council* and C-94/02 P, *Etablissements Biret and Cie SA* v. *Council,* not yet reported.

[5] Snyder, 2003.

[6] Mainly Zonnekeyn, 2001a; Zonnekeyn, 2003.

[7] Reinisch, 2000.

[8] Peers, 2001b.

[9] Davies, 2003.

[10] The most important of these include: Tridimas, 2001; Wakefield, 2002; Ward, 2000.

[11] It does not follow from Article 300 (7) EC that the Community should give effect to its international obligations in a certain way. It also cannot be concluded from it that when the EC fails to respect its international obligations, review of legality should be an option. Klabbers, 2000, p. 271.

[12] Cases 21-24/72, *International Fruit Co.NV* v. *Produktschap voor Groenten en Fruit,* [1972] 1219.

[13] Case 181/73, *Haegeman* v. *Belgium,* [1974] ECR 449. Since no supplementary measure transposing the provisions into the EC legal order is needed to form an integral part of that legal order, the Court appears to adhere to a monist approach to the relationship between international law and Community law. Lenaerts – de Smijter, 2000, p. 104. However, the status of WTO law in EC legal order has provoked many to argue that the approach is dualist rather than monist.

[14] Normally, in public international law, individuals are third parties to international agreements even if intended to be the

beneficiaries. Treaties have a binding effect only between the signatories. Cheyne, 1994, p.586. The effects of treaties in national legal orders vary from one state to another. In some States the legal system allows individuals to invoke the provisions of treaties in courts if, normally, treaty has been attributed with direct effect. Schermers, 1982, p. 567.

[15] Case 104/81, *HZA Mainz* v. *Kupferberg* [1982] ECR 3641.

[16] Schermers, 1982, p. 567.

[17] See case *Jego-Qu–r–* where the CFI quite revolutionarily tried to introduce a change in the conditions for access to court and *UPA*, where the ECJ strictly overruled CFI's decision. Case T-177/01, *Jego Qu–r–* v. Commission [2002] ECR II-2365; Case C-50/00P, *Union de Pequenos Agricultores* v. *Council* [2002] ECR I-6677.

[18] Cases 21-24/72, *International Fruit Co.NV* v. *Produktschap voor Groenten en Fruit,* [1972] 1219.

[19] The discussion between the establishment of the WTO and the ruling of the ECJ in *Portugal* v. *Council* was extensive. See *inter alia* Monta»a i Mora, 1996; Eeckhout, 1997; Scott, 1995; Louis, 2000; Lauwaars, 2000; Petersmann, 1995.

[20] Eeckhout, 1997, p. 42.

[21] In addition to that, the most notable features in the new system are the single undertaking approach, the abolition of the so-called grandfather rights, a legal personality for the new organisation and the stringent conditions required for adopting safeguard measures. Monta»a i Mora, 1996, p. 51. See for a comprehensive examination of the main changes in the mechanism Petersmann, 1997, pp. 177-199.

[22] Case C-149/96 *Portugal* v. *Council,*[1999] ECR I-9395. See for more detailed comments *inter alia* Eeckhout, 2002; Zonnekeyn, 2000; Rosas, 2000; Desmedt, 2000; Peers, 2001; van den Broek, 2001; Griller, 2000.

[23] Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products, [1996] OJ L153/47.

[24] Case C-149/96 *Portugal v. Council* [1999] ECRI 8395, para. 47.

[25] Ibid. para. 32.

[26] Griller, 2000, p. 442.

[27] The issue is by its nature as such that it is impossible to entirely exclude from discussion the political considerations underlying the more or less legal reasoning.

[28] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 36.

[29] Ibid. para. 37.

[30] Ibid. para. 39.

[31] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 40.

[32] Ibid. para. 41. The finding of the Court that WTO Agreements do not provide neither for mandatory or suggested direct effect of any parts of the agreement seems correct. It has been argued that the WTO itself prefers negotiations to clear and unconditional judgements and does not expect, or want, its members to accord direct effect to WTO rules. Due to the complex character of the rules and mechanisms, the disputes concerning the application of WTO rules might be best resolved before the WTO's dispute settlement bodies. Certainly there would be a danger that other instances, i.e. national or even Community Courts, would not be capable of giving appropriate and consistent interpretation of the rules. See, Pischel, 2001, p. 130; Eeckhout, 1997, p. 50. *Contra* Petersmann, 2001, p. 105.

[33] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 45. The Court came to this conclusion regardless of the fact that it had stated in *Kupferberg* that "the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognise such direct application does not in itself constitute a lack of reciprocity in the implementation of the agreement." Case C-104/81 *HZA Mainz* v. *Kupferberg* [1982] ECR 3641, para. 18. It would seem at first sight that the doctrine of non-reciprocity in respect of direct effect conflicts with such

position but, as Kuijper puts it, "it does not stand up to scrutiny when a treaty may have such important and wide-ranging consequences for the national economy as does the GATT, and now the WTO and its Annexes. In the case of such a treaty, the party whose constitutional and judicial system does not know the mechanism of direct effect of treaty provisions – or, worse still, specifically excludes such direct effect – places itself in such a favourable position that it becomes fundamentally unfair to its trading partners. In this way it shields itself against what was called above the most powerful enforcement mechanism for treaties, and its negotiators, when discussing interpretation and application of the treaty, arrive with free hands at the table, contrary to their counterparts from countries with direct effect, whose hands are tied by the interpretations of their courts." Kuijper, 1995, p. 64.

[34] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 46.

[35] See for an analysis on the political ground s behind the Court's case law Pischel, 2001.

[36] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 46.

[37] Eeckhout, 2002, p. 96.

[38] Snyder, 2003, p. 331.

[39] Van den Broek, 2001, p. 440. Note that the question whether WTO law confers rights to individuals is very debatable.

[40] According to Zonnekeyn, the *marge de manoeuvre* argument of the ECJ is "clearly not a legal argument and an assault to the "*trias politica*" principle." See Zonnekeyn, 2000b, p. 299.

[41]For the defence of the Court can be said that at least it did not try disguise its true grounds behind the judgement by formal legal reasoning. Eeckhout, 2002, p. 96. The current view of the Court on the relationship between the WTO law and EC law have seems quite realistic. As Snyder put it, the ECJ "articulated a view of the relationship between WTO law and EC law which was less legalistic, more politically cognisant and hence more realistic in the current international setting. It began to point the way toward a much more coherent conception of the relation between the two sites, notably with regard to who should make the basic decisions about the impact of WTO law in the EC legal order and how such decisions should be made." Snyder, 2003, p. 329.

[42] The same does not, however, necessarily apply to the same extent with respect to the implementation of DSB rulings and recommendations. See Cottier – Schefer, 1998, pp. 112, 117.

[43] See for a comprehensive work on the relationship between the EU and the WTO and on how the two sites take non-economic interests into account, Dillon, 2002.

[44] This is not to say that the commercial policy interests would not, more or less, play the main role here.

[45] Council Decision 94/800 EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), [1994] OJ L336/1, last recital of the preamble.

[46] As regards the effects of the preambular statement at international level, Saggio considered it very clear that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot limit the effects of the agreement itself. This is in accordance with customary law on the interpretation of treaties, which was embodied in the Vienna Convention of 22 May 1969.

[47] Para. 20 of the Opinion of Advocate General Saggio of 25 February 1999 in the Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395.

[48] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 48.

[49] Case C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 42.

[50] Case C-17/81 *Pabst & Richarz* v. *Hauptzollant Oldenburg* [1982] ECR 1331; Case C-12/86 *Demirel* v. *Stadt Schwäbisch Gm-nd,* [1987] ECR 3719; Case C-192/89 *Sevince* v. *Staatsecretaris van Justitie,* [1990] ECR I-346.

[51] Meaning ACP countries. Case C-87/75 *Bresciani* v. *Amministrazione Italiana delle Finanze,* [1976] ECR129.

[52] Snyder, 2003, p. 334. See also Rosas, 2000, p. 813.

[53] See for a critical and thorough analysis of this aspect of *Portugal* v. *Council*, Griller, 2000, p. 457 – 460; Peers, 2001a, p. 121.

[54] Eeckhout, 2002, p. 95.

[55] Dillon described the nature of WTO law as follows: "GATT/WTO-law is not merely a set of international obligations, freely undertaken, falling only on the regulatory efficiency of the Community. Rather (...) it is a unique kind of law, having open-ended implications, capable of interfering with legislative and regulatory programmes of the widest variety." Dillon, 2002, pp. 6, 384.

[56] Such autonomy might, according to Snyder, lead to "the phenomena of judicial self-empowerment and "creeping competence", whit which the WTO probably is not equipped with to deal with. Snyder, 2003, p. 333.

[57] Snyder, 2003, p. 333.

[58] The applicants raised an 'absence of direct effect' -argument in the cases where the exception was established. The Court decided with apparent ease not to look for direct effect. It may appear somewhat odd taking into account how the Court has insisted on direct effect otherwise in connection to WTO law and international agreements in general. See Klabbers, 2003, pp. 287-288.

[59] Case C-70/87, *Fediol* v. *Commission*, [1989] ECR 1781.

[60] Case C-69/89, *Nakajima* v. *Council* [1991] ECR I-2069.

[61] Case C-149/96, *Portugal* v. *Council*,[1999] ECR I-9395, para. 49.

[62] Case C-69/89, *Nakajima* v. *Council* [1991] ECR I-2069.

[63] Eeckhout, 1997, p. 44. See also Case C-280/93, *Germany* v. *Council* [1994] ECR I-4973 and Case C-188/88, *NMB* v. *Commission*, [1992] ECR I-1689.

[64] Case C-70-87, *Fediol* v. *Commission*, [1989] ECR 1781 para 21. The 'New Commercial Policy Instrument' has subsequently been replaced by the Trade Barriers Regulation. Council Regulation 3286/94/EC [1994] OJ L349/71.

[65] Cases T-33 and 34/98, *Petrotub SA and Republica SA* v. *Council*, [1999] ECR II-3837; C-352/96, *Italy* v. *Council*, [1998] ECR I-6937; T-55/99, *Confederacion Expanola de Trasporte de Mercancias (CETM)* v. *Commission*, [2000] ECR II-3207.

[66] Case C-76/00P, *Petrotub SA and Republica SA* v. *Council and Commission* [2003] ECR I-2877.

[67] Case C-76/00P, *Petrotub SA and Republica SA* v. *Council and Commission* [2003] ECR I-2877, para. 56.

[68] See e.g. Griller, 2000b, p. 464.

[69] According to the preamble, the regulation was "adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping code." Case C-69/89 *Nakajima v. Council* [1991] ECR I-2069, paras. 30-31. In *Petrotub:* "The preamble to the basic regulation, and more specifically, the fifth recital therein, shows that the purpose of that regulation is, *inter alia*, to transpose into Community law as far as possible the new and detailed rules contained in the 1994 Anti-Dumping Code." Case C-76/00P, *Petrotub SA and Republica SA* v. *Council and Commission* [2003] ECR I-2877, para. 55.

[70] Davies, 2003, p. 320.

[71] Naturally, a more general reference to WTO commitments is required.

[72] See Peers, 2001b, p. 610.

[73] See Zonnekeyn, 2001b, p. 602. Similarly, see Snyder, 2003, p. 347.

[74] The ECJ stated that: "by adopting the Regulation pursuant to agreements concluded with non-member countries following negotiations conducted on the basis of Article XXIV (6) of GATT, the Community sought to implement a particular obligation entered into within the framework of GATT." Case C-352/96, *Italy* v. *Council* [1998] ECR I-6973, para. 20.

[75] Snyder, 2003, p. 347. Case C-45/86, *Commission* v. *Council*, [1987] ECR 1493.

[76] See similarly, Davies, 2003, p. 318.

[77] Snyder, 2003, p. 347.

[78] Along with the application of the principle of consistent interpretation.

[79] An interesting parallel exists with the direct effect of directives in internal European law. The Court has refused to give directives horizontal direct effect but has effectively enlarged the scope of directives by the quasi-horizontal effect resulting from the *Marleasing* case. The approach reaches a balance between sovereignty and individual rights leaving governments a certain amount of discretion and at the same time ensuring that they comply with their obligations. Van den Broek, 2001. p. 438.

[80] The rather limited scope for the actual application of the doctrine is explicable on the basis that the Court does not wish to interfere with executive discretion. Davies, 2003, p. 323.

[81] Case C-61/94, *Commission* v. *Germany*, [1996] ECR I-3989.

[82] Case C-53/96 *Hermes International* v. *FHT Marketing Choice BV* [1998] ECR I-3603.

[83] Weatherill – Beaumont, 1999, p. 417. The formula is similar to the one used in the case C-106/89 *Marleasing SA* v. *La Comercial International de Alimentacion SA* [1990] ECR I-4135.

[84] Neuwahl, 1996, p. 321.

[85] Snyder, 2001, p.363. See also Neuwahl, 1996, p. 322; Trachtman, 1999, p. 677.

[86] Davies, 2003, p. 321. For instance in the case C-61/94 *Commission* v. *Germany* [1996] ECR I-3989 the German Government argued that Community law precluded it from complying with the International Dairy Agreement. The ECJ rejected the argument on the basis of the obligation to interpret Community law in a manner consistent with international agreements.

[87] Davies, 2003, p. 321.

[88] Case C-377/98, *Kingdom of the Netherlands* v. *European Parliament and Council of the EU* [2001] ECR I-6229.

[89] Directive of the European Parliament and of the Council 98/44/EC [1998] OJ L213/13.

[90] Case C-377/98, *Kingdom of the Netherlands* v. *European Parliament and Council of the EU* [2001] ECR I-6229, para. 55.

[91] See also the Opinion of Advocate General Jacobs of 14 June 2001 in Case C-377/98, *Kingdom of the Netherlands* v. *European Parliament and Council of the EU* [2001] ECR I-6229. AG Jacobs argued *inter alia* that "it is in any event desirable as a matter of policy for the Court to be able to review the legality of Community legislation in the light of treaties binding the Community. There is no other court which is in a position to review Community legislation; thus if this Court is denied competence, Member States may be subject to conflicting obligations with no means of resolving them."

[92] It seems logical that the Court, as Davies suggested, introduced the rather unconvincing distinction between a directive which brings the Community itself in breach of its international obligations and a directive which requires the Member States to breach their international obligations in order to avoid an overt interference with the separation of powers. Davies, 2003, pp. 322-323.

[93] Joined Cases C-300/98, *Parfums Christian Dior* v. *Tuk Consultancy BV* and C-392/98, *Assco Ger·ste GmbH, Rob van Dijk* v. *Wilhelm Layher GmbH & Co KG, Layher BV*, [2000] ECR I-11307, para. 48.

[94] van den Broek, 2001, p. 416. The ECJ stated in para. 48 that "in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law."

[95] van den Broek, 2001, p. 416.

[96] See Opinion of Advocate General Cosmos in Cases C-300/98 and C-392/98, *Parfums Christian Dior* v. *Tuk Consultancy BV*, [2000] ECR I-11307, paras. 56 – 82.

[97] Rosas, 2000, p. 816.

[98] The position of the EU has been described in the following way: "the effect of WTO rules is intended to be limited to international responsibility without threatening the predominance of national (or Community) rules in a domestic context. It is a strategy of combining the utmost effect of WTO law abroad with a view to foster market access rights while leaving traditional constitutional allocations of power at home as unimpaired as possible." Cottier – Schefer, 1998, p. 111.

[99] Snyder, 2003, p. 364.

[100] Van den Broek, p. 440.

[101] Eeckhout, 1997, p. 53.

[102] Snyder, 2003, pp. 362, 364.

[103] Zonnekeyn, 1999, p. 719.

[104] *Opinion 1/91 (Re the EEA Agreement)* [1991] ECR 6079 para. 40.

[105] Macleod – Hendry – Hyett, 1996, p. 137.

[106] Macleod – Hendry – Hyett, 1996, p. 137. See *Opinion 1/76 (Re the Draft Agreement for a Laying Up Fund for the Rhine)* [1977] ECR 741, *Opinion 1/91 (Re the EEA Agreement)* [1991] ECR 6079 and *Opinion 1/92 (Re the EEA Agreement)* [1992] ECR I-2821.

[107] *Opinion 1/91 (Re the EEA Agreement)* [1991] ECR 6079 para. 39.

[108] Eeckhout, 1997, p. 52.

[109] *Opinion 1/91 (Re the EEA Agreement)* [1991] ECR 6079 para 21.

[110] Cottier, 1998, p. 371.

[111] Zonnekeyn, 2000a, p. 108.

[112] See for a comprehensive analysis of the changes in the system: Petersmann, 1997, pp. 177-199.

[113] Palmeter – Mavroidis, 1999, p. 153.

[114] See *inter alia* the Opinion of AG Alber in Case C-93/02 P, *Biret International* v. *Council*, para. 74.

[115] Jackson, 1998, p. 85.

[116] See Waincymer, 2002, ch. 9.7 for summary on the different views on the issue.

[117] Jackson, 2000, p. 163.

[118] Zonnekeyn, 2000a, p. 103.

[119] Zonnekeyn, 2001a, p. 259.

[120] Lukas calls this approach "pragmatic" as the former is "legalistic". See Lukas, 1995, p. 197-199.

[121] See for an assessment of the political and legal costs of non-compliance: Cottier, 1998, p. 364-367.

[122] Bello, 1996, 416-417.

[123] Article 3(7) for instance indicates that in the absence of a mutually acceptable solution, the first objective is *usually* to secure the withdrawal of the measures concerned if they are inconsistent with the agreement. This supports the non-binding nature of the obligation. On the other hand, to argue to the contrary, one may refer to Article 22 (1) or to the part of the Article 3(7), which states that compensation should be resorted to only if immediate withdrawal is impractical and only as a *temporary* measure. See Waincymer, 2002, ch. 9.7.2.

[124] See *United States – Sections 301-310 of the Trade Act of 1974*, report of the Panel of 22 December 1999, WT/DS152/R, para. 7.76.

[125] See Kessie, 2000, p. 4.

[126] Eeckhout, 1997, p. 53. See also Davies, 2003, p. 317 and Louis, 2000, p. 504. Louis finds that such a "position, which consists in admitting the legal value of WTO provisions once that have been clarified through what is more and more like to a due process of law seems reasonable. Conversely the immediate recognition of direct effect would interfere with this perspective. It would bring in the mechanism an element of automatism contrary to the intergovernmental trust of the system."

[127] Note that the ECJ also explicitly referred to the legal position of the Community *after* the reasonable period for implementation has expired. C-149/96 *Portugal* v. *Council* [1999] ECRI 8395, para. 39-40. Emphasis added.

[128] Eeckhout, 2002, p. 104. See also *Omega* where the Court stated that " the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions are also authorised, for example settlement, payment of compensation or suspension of concessions. Joined Cases C-27/00 & C- 210/00, *The Queen* v. *Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd; Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd.* v. *Irish Aviation Authority* [2002] ECR I-2569, para. 89.

[129] Case T- 254/97, *Fruchthandelgesellschaft mbh Chemnitz* v. *Commission* [1999] ECR II-2743.

[130] Council Regulation 404/93/EC [1993] OJ L47/1.

[131] Case T- 254/97, *Fruchthandelgesellschaft mbh Chemnitz* v. *Commission* [1999] ECR II-2743, paras. 26-27.

[132] Davies, 2003, p. 324.

[133] Case T- 254/97, *Fruchthandelgesellschaft mbh Chemnitz* v. *Commission* [1999] ECR II-2743, para. 30.

[134] Case T-230/97 *Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co* v. *Commission* [1997] ECR II-3031.

[135] Ibid. para. 40.

[136] See Case T-13/99, *Pfitzer Amimal Health SA* v. *Council* [2002] ECR II-1961.

[137] See T-212/99, *Intervet International BV formerly Hoechst Roussel Vet GmbG* v. *Commission* [2002] ECR 1445.

[138] *European Communities – Measures concerning meat and meat products (Hormones)*, Report of the Appellate Body of 16 January 1998, WT/DS26/48/AB/R.

[139] See Snyder, pp. 338-339.

[140] Eeckhout, 2002, p. 104. See Also Peers, 2001a, p. 116. Also Davies finds it "highly unlikely that a private applicant would ever be able to rely on a decision of the DSB in order to invalidate a Regulation." Davies, 2003, p. 309.

[141] Peers, 2001a, p. 116.

[142] As the EC is now faced with decisions which are binding in international law, and brought about in respect of due process of law and procedures equivalent to judicial settlement in national or international law.

[143] Cottier, 1998, pp. 373-375.

[144] Legal distinction between different types of non-implementation based on the motives and reasons stated in support of non-compliance would probably prove problematic. See Peers, 2001a, p. 117.

[145] Peers, 2001a, p. 117. Peers does not argue that DSB decisions should not have any effect at all but rather argues that the effect should be based on the *Nakajima* doctrine. Similarly, see Eeckhout, 2002, p. 110.

[146] Petersmann, 1997, p. 139.

[147] Bourgeois, 2001, p. 121.

[148] Such a situation is the first one of the three different scenarios described by Peers, which may lead to a different end result. The second scenario involves a situation where the EC has purported to implement a panel report and it has been agreed at WTO level that the implementation is correct. In this case the EC act should not be reviewed in light of the panel report even if the applicant disagree with the WTO-compatibility. In the third scenario the EC's purported implementation has been challenged at WTO level but the dispute has not been concluded yet. In this unlikely case EC courts should suspend the case. Peers, 2001a, p. 117.

[149] Such referrals have been omitted in all other 'implementing' measure concerned except for the very recent Directive adopted as a result of the *Hormones* case. The Directive explicitly refers to a DSB recommendation. It appears clear that the *Nakajima* exception applies if that Directive is challenged on the basis of WTO obligations. Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or throstatic action and of beta-agonists, [2003] OJ L262/17.

[150] Eeckhout, 2002, p. 107.

[151] "Implementation" as defined in the case law seems to have a different meaning from the common sense or generally accepted meaning. Snyder, 2003, p. 347. See for a comprehensive list of 'evidence' supporting the view that the 1998 and 2001 legislation adopted as a result of the banana dispute was intended to implement WTO obligations Peers, 2001b, pp. 611-612, 614-615. See also Zonnekeyn, 2001b, pp. 603-604.

[152] The Regulation explicitly provides that "the Community's international commitments under the World Trade Organisation (WTO) and to the other signatories of the Fourth ACP-EC Convention should be met, whilst achieving at the same time the purposes of the common organisation of the market in bananas." Council Regulation 1637/98/EC [1998] OJ L210/28, second recital of the preamble.

[153] Commission Regulation 2362/98/EC [1998] OJ L293/32.

[154] See Peers, 2001b, p. 611.

[155] The CFI found that neither the panel report nor the Appellate Body report adopted by the DSB "included any special obligations which the Commission intended to implement." It also found that the Commission Regulation in question does not make express reference to any specific obligations arising of the reports of WTO bodies. Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para. 59. The findings will be discussed further below. They apply in this context to other types of actions as well.

[156] In general, as the dispute settlement results clearly are part of the WTO law, EC acts should, as far as possible, interpreted in the light of panel and Appellate Body reports. Peers, 2001a, p. 118. Case T-256/97 *BEUC* v. *Commission* [2000] ECR I-1209 confirms the application of the principle of consistent interpretation to WTO rules.

[157] Davies, 2003, p. 321.

[158] Steiner, 1995, p. 146. See for example Case C-146/91, *KYDEP* v. *Council and Commission* [1994] ECR I-4199, para. 58

[159] Case 4/69, *Alfons L·tticke GmbH* v. *Commission* [1971] ECR 325, para. 10.

[160] Case 5/71, *Zuckerfabrik Schöppenstedt* v. *Council*, [1971] ECR 975 at 984, para 11; Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291.

[161] Wakefield, 2002, p. 43.

[162] Except for the very rare cases where the liability of the Community for valid legislative ('strict liability') acts might occur. See for an overview of conditions Bronkhorst, 1997, pp. 153-167.

[163] Brealey – Hoskins, 1994, p. 232.

[164] Wakefield, 2002, p. xv, 89. The right to get compensated for damage caused by the Communities has even been regarded as a fundamental right. See Schermers – Waelbrook, 2001, p. 520.

[165] Schermers – Waelbrook, 2001, p. 548. See also Fines, 1997, p. 23. Fines is of the opinion, though, that the remedy does not fulfill this function.

[166] This is well illustrated by the fact that up until the year 1996 there had been only 8 successful Article 288 (2) claims brought to the Community Courts. Opinion of AG Tesauro in Joined Cases C-46/93 and C-48/93 *Brasserie du P˜cheur SA* v. *Federal Republic of Germany and Factortame III and The Queen* v. *Secretary of State for Transport ex parte Factortame Limited and Others* [1996] ECR I-1029, n 65.

[167] Ward, 2000, pp. 8-10.

[168] See Fines, 1997, pp. 21-23.

[169] As the Court " forces national tribunals to offer the citizen full protection, that is remedies which are much more effective than those which, in comparable situations, are available against Community institutions." Caranta, 1995, p. 725. Also Ward points out that imperatives of a different nature than of 'the individual' and the need for an 'effective remedy' have prevailed when disgruntled subjects have questioned the legality of *Community* measures. Ward, 2000, p. 11.

[170] Ward, 2000, p. 11.

[171] Kilpatrick, 2000, p. 8-9.

[172] Ward, 2000, p. 289.

[173] Ward, 2000, p. 322.

[174] Waelbroeck perceived such direction in the case law as the Court had shown a more flexible approach in accepting liability of institutions even in the context of their legislative activity. Waelbroeck, 1997. p. 335.

[175] Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291

[176] For instance the seriousness of the breach is assessed according to a more relaxed criteria in the context of Member State liability. Some argue that the same standard now applies to Community liability as well. See Craig – de Burca, 2003, p. 557.

[177] Joined Cases C-46/93 and C-48/93, *Brasserie du P˜cheur v. Germany* and *R.* v. *Secretary of State for Transport, ex parte Factortame and others*, [1996] ECR I-1145, para. 42.

[178] Tridimas, 2001, p. 326. See also Reinisch, 2000, p. 44.

[179] Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291, para 40.

[180] Tridimas, 2001, p. 322.

[181] Case 5/71, *Zuckerfabrik Schöppenstedt* v. *Council*, [1971] ECR 975 at 984, para 11

[182] Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291, para 62.

[183] Rather, the breach of a "superior" rule of law has been considered to be implicit in the concept of unlawfulness which normally is a condition for Community liability to arise. See Tridimas, 2001, pp. 328-329. On the other hand, Aalto is of the opinion that the requirement of a "superior" rule of law was central to the differences between Community and Member State liability. Aalto, 1999, p. 96. In my opinion deleting the reference to a superior rule is not crucial as it still in a way remains as a condition, since a measure can only breach another rule if the latter is superior. See similarly para. 76 of Opinion of AG Tesauro in Joined Cases C-46/93 and C-48/93 *Brasserie du P˜cheur SA* v. *Federal Republic of Germany and Factortame III and The Queen* v. *Secretary of State for Transport ex parte Factortame Limited and Others* [1996] ECR I-1029.

[184] Tridimas, 2001, p. 329; Craig – de Burca, 2003, pp. 549-550.

[185] E.g. Case 74/74, *CNTA* v. *Commission* [1975] ECR 533, para. 44, where the Court held that the Commission had infringed a superior rule of law by failing to include in a regulation "transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules." See also Schermers – Waelbroeck, 2001, p. 554.

[186] Joined Cases 63-69/72, *Werhahn* v. *Council* [1973] ECR 1229; Case T-489/93, *Unifruit Hellas* v. *Commission* [1994] ECR II-1201.

[187] E.g. Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL and Others* v. *Council and Commission*, [1978] ECR 1209, para. 5; Case 238/78, *Ireks-Arkady* [1979] ECR 2955, para. 11; Case T-489/93, *Unifruit Hellas* v. *Commission* [1994] ECR II-1201, paras. 76-80.

[188] Case T-105/96, *Pharos* v. *Commission* [1998] ECR II-285, paras. 73-78.

[189] Case T-167/94, *Nölle* v. *Council and Commission* [1995] ECR II-2589, para. 76.

[190] Case C-119/88, *AERPO and Others* v. *Commission* [1990] ECR I-2189, para. 19.

[191] See Schermers – Waelbroeck, 2001. p. 554 and Lenaerts – Arts, 1999, pp. 264-265.

[192] The requirement resembles the German *'Schutznormtheorie'*, according to which the State is liable only when it breaches a legal norm that protects a subjective public right of the injured party. Such rule must be intended to protect a specific circle of individuals to which the injured party belongs, and not only individuals in general. Similar principles are known also in England and in the Netherlands. The ECJ has in practice applied the condition more liberally. Schermers – Waelbroeck, 2001, p. 553-554.

[193] Tridimas, 2001, p. 327.

[194] There are, however, some principles of Community law that have not been considered to have the protection of individuals as their purpose. The ECJ has held, for instance, that the objective of the rules governing the division of powers between the Community institutions is to maintain a balance between the institutions, and not to protect the individual.

[195] In *Bergaderm*, the ECJ placed a particular emphasis on the degree of discretion enjoyed by the author of the act for the purpose of determining whether or not the breach is serious. The requirement of a sufficiently serious breach applies to all acts in relation to which the institution concerned enjoys wide discretionary powers irrespective of whether the measure is legislative or administrative in nature. By contrast, if the violation occurs in circumstances where the institution in question has only considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach to be found. Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291, para. 44. The ECJ referred there to *Hedley Lomas,* a case dealing with the liability of a Member State. Case C-5/94, *The Queen* v. *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553.

[196] Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL and Others* v. *Council and Commission*, [1978] ECR 1209, para 6.

[197] Tridimas, 1998, p. 23.

[198] See Craig – de B³rca, 2003, p. 555.

[199] Joined Cases C-46/93 and C-48/93 *Brasserie du P¯cheur SA* v. *Federal Republic of Germany and Factortame III and The Queen* v. *Secretary of State for Transport ex parte Factortame Limited and Others* [1996] ECR I-1029, para. 56.

[200] For a more specific analysis, see Toth, 1997, p. 180-191.

[201] Although the Treaty requires the Community to make good "any damage", a more restrictive approach has been applied in the case law of the Court.

[202] Brealey – Hoskins, 1994, p. 234. The ECJ held that it can declare the EC liable for "imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed". A reason for this view is that "to prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain." Joined Cases 56-60/74, *Kampffmeyer* v. *Commission and Council* [1976] ECR 711, para. 8.

[203] Such as damages for personal injuries and for pain and suffering. Damages may also be claimed for penalties paid for repudiation of contracts, for lost profit on concluded of foreseeable contracts and for the wrongful abolition of production refunds. Brealey – Hoskins, 1994, pp. 234-235.

[204] Van Gerven, 1994, p. 30.

[205] Douglas-Scott, 2002, p. 401. The duty to mitigate derives from a general principle common to the legal systems of the Member States "to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself." Joined Cases 104/89 and 37/90,. *Mulder II* [1992] ECR I-3061, para. 26.

[206] For a more specific analysis, see Toth, 1997, p. 191-198.

[207] As formulated in *Bergaderm*. Case C-352/98P *Laboratories Pharmaceutiques Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291,

para 42.

[208] Toth, 1997, p. 192.

[209] See for details of the dispute: Jackson – Grane, 2001; Komuro, 2000.

[210] See for details of the dispute: Pardo Quintillan, 1999, pp. 156-166; Dillon, 2002, pp. 131-140.

[211] *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Panel of 22 May 1997, WT/DS27/R; *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R; *European Communities – Measures concerning meat and meat products (Hormones),* Report of the Panel of 18 August 1997, WT/DS26/R/USA; *European Communities – Measures concerning meat and meat products (Hormones),* Report of the Appellate Body of 16 January 1998, WT/DS26/48/AB/R.

[212] Cases C-104/97 P, *Atlanta AG* v. *European Community* [1999] ECR I-6983; T-18/99, *Cordis Obst und Gem-se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913; T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943; T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981; T-3/99, *Banatrading GmbH* v. *Council* [2001] ECR II-2123; T-57/00, *Banan-Kompaniet AB and Skandinaviska Bananimporten AB* v. *Council and Commission*, judgement of 6 March of 2003, not yet reported.

[213] Cases C-93/02 P, *Biret Internationa SA* v. *Council*, not yet reported; C-94/02 P, *Etablissements Biret and Cie SA* v. *Council,* judgements of 30 September 2003, not yet reported.

[214] The so-called 'innocent exporters' case include at least: Case T-69/00, *Fiamm SpA and Fiamm Technologies Inc.* v. *Commission and Council*; Case T-151/00, *Le Laboratoire du Bain* v. *Council and Commission*; Case T-301/00, *Groupe Fremaux SA and Palais Royal Inc.* v. *Council and Commission*; Case T-320/00, *Cartondruck GmbH & Co. KG* v. *Commission and Council* and Case T-383/00, *Beamglow Ltd.* v. *Council, European Parliament and Commission.* All these cases are still pending. Case law followed until 31 December 2003.

[215] On the basis of the results of further analysis of the risks associated with the use of the substances in question a directive seeking to maintain the prohibition was adopted. Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or throstatic action and of beta-agonists, [2003] OJ L262/17.

[216] The Commission approved a regulation that would implement a new banana regime. The regulation is a result of an understanding reached by the EC and US pursuant to which the EC would introduce a tariff-only regime for imports of bananas no later than the beginning of the year 2006. See in more detail Jackson – Grane, 2001, p. 591. Council Regulation 216/2001/EC [2001] OJ L031/2 and Commission Regulation 896/2001/EC [2001] OJ L126/6.

[217] Zonnekeyn, 2001a, p. 262.

[218] Since we are dealing with discretionary measures. It is now rather the degree of discretion enjoyed by the defendant institution than the fact whether the required measure is legislative or non-legislative in nature that counts for the application of the *Schöppentstedt* formula as modified by *Bergaderm*. See Craig – de Burca, p. 549.

[219] See Davies, p. 317.

[220] Cases C-93/02 P, *Biret Internationa SA* v. *Council* and C-94/02 P, *Etablissements Biret and Cie SA* v. *Council*; Case T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981; Case T-69/00, *Fiamm SpA and Fiamm Technologies Inc.* v. *Commission and Council*, pending.

[221] Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943; Case T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981.

[222] Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943; Case T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981.

[223] Case T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981; Case T-69/00, *Fiamm SpA and Fiamm Technologies Inc.* v. *Commission and Council,* pending.

[224] Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943

[225] Case T-69/00, *Fiamm SpA and Fiamm Technologies Inc.* v. *Commission and Council*, pending.

[226] Case T-521/93, *Atlanta and Others* v. *European Community* [1996] ECR II-1707.

[227] Council Regulation 404/93/EC [1993] OJ L47/1.

[228] Case C-280/93, *Germany* v. *Council* [1994] ECR I-4973.

[229] The CFI concentrated in the case mainly on pleas based on breach of certain fundamental rights. The plea concerning infringement of GATT was one of the ten pleas the CFI did not discuss in detail. Case T-521/93, *Atlanta and Others* v. *European Community* [1996] ECR II-1707, para. 77.

[230] Case C-104/97 P, *Atlanta AG* v. *European Community* [1999] ECR I-6983.

[231] *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R;

[232] Case C-104/97 P, *Atlanta AG* v. *European Community* [1999] ECR I-6983, paras. 17-23.

[233] Para 73 of the Opinion of AG Alber in C-93/02P, *Biret International SA* v. *Council* [2003].

[234] Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-091.

[235] Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943.

[236] Case T-52/99, *T.Port GmbH & Co. KG* v. *Commission* [2001] ECR II-0981.

[237] Commission Regulation 2362/98/EC [1998] OJ L293/32.

[238] Council Regulation 404/93/EC [1993] OJ L47/1.

[239] Council Regulation 1637/98/EC [1998] OJ L210/28.

[240] Note that this was explicitly mentioned by the CFI. See cases *Cordis, Bocchi* and *T.Port,* para. 8.

[241] The applicants also attempted in each case to base their actions on other issues, including the duty to state reasons, proportionality, equal treatment and the right to pursue trade.

[242] The judgement in the *Portugal* case was given after the lodging of the appeals. The parties were called on to submit their observations on the possible consequences of the judgement. The applicants admitted that the WTO provisions did not have general direct effect but this did not affect the argumentation based on rules internal to Community legal order. E.g. Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943, para. 38-39.

[243] Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para. 34. The applicant put forward an argument that since the EC had given an undertaking to the DSB to repeal the provisions conflicting with the WTO rules, it had acted in breach of the principle *nemini licet venire contra factum proprium* when putting that undertaking into practice by adopting a regulation containing infringements of those rules. The Court rejected the argument because an act of a Community institution is vitiated by misuse of powers only if it was adopted with the exclusive or main purpose of achieving an end other than stated and the applicant did not even allege that the Commission had acted in such a way. Paras. 35, 52-54.

[244] E.g. Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para. 51.

[245] Eeckhout, 2002, p. 108.

[246] See 6.2.2. for further analysis.

[247] Case T-174/00, *Biret Internationa SA* v. *Council* [2002] ECR II-17 and Case T-210/00, *Etablissements Biret and Cie SA* v. *Council* [2002] ECR II-47.

[248] The EC adopted Directive 81/602 which requires that Member States prohibit the administering to farm animals of substances designed to promote growth. Council Directive 81/602/EEC [1981] OJ L222/32. Directive 88/146 requires that Member States prohibit importation of animals and of meat from animals to which have been administered the prohibited hormonal substances. Council Directive 88/146/EEC [1988] OJ L70/16. Those directives were repealed by Directive 96/22, which confirmed

the prohibition and added a substance to the list of prohibited substances. Council Directive 96/22/EC [1996] OJ L125/3.

[249] *European Communities – Measures concerning meat and meat products (Hormones),* Complaint by the United States, Report of the Appellate Body of 16 January 1998, WT/DS26/48/AB/R.

[250] See McNeils, 2001, pp. 192-194.

[251] They also claimed that the Community was in breach of the principle of protection of legitimate expectations.

[252] Case T-174/00, *Biret International SA* v. *Council,* [2002] ECR II-17, para. 58.

[253] Ibid. para. 59.

[254] Case T-174/00, *Biret International SA* v. *Council,* [2002] ECR II-17, para. 61.

[255] Ibid. para. 62.

[256] Ibid. paras. 63-64. See 6.2.3.

[257] Case T-174/00, *Biret Internationa SA* v. *Council,* [2002] ECR II-17, para. 67.

[258] Case C-93/02P, *Biret Internationa SA* v. *Council,* [2002] paras. 38-46.

[259] The Opinions of the Advocate General Alber of 15 May 2003 in Cases C-93/02 P, *Biret Internationa SA* v. *Council* and C-94/02 P, *Etablissements Biret and Cie SA* v. *Council.*

[260] Case C-93/02P, *Biret International SA* v. *Council* [2003], para. 56.

[261] Case C-93/02P, *Biret International SA* v. *Council* [2003], para. 59.

[262] Ibid. paras. 61-64.

[263] Compare Case C-93/02P, *Biret International SA* v. *Council* [2003], para. 52 and Case T-174/00, *Biret Internationa SA* v. *Council,* [2002] ECR II-17, para. 61.

[264] Case T-56/00, *Dole Fresh Fruit International Ltd.* v. *Council and Commission* [2003]

[265] Davies, 2003, p. 314. Also the Opinions of Advocate General Alber of 15 May 2003 in Cases C-93/02 P, *Biret Internationa SA* v. *Council* and C-94/02 P, *Etablissements Biret and Cie SA* v. *Council*

[266] Case T-69/00, *Fiamm SpA and Fiamm Technologies Inc.* v. *Commission and Council*; Case T-151/00, *Le Laboratoire du Bain* v. *Council and Commission*; Case T-301/00, *Groupe Fremaux SA and Palais Royal Inc.* v. *Council and Commission*; Case T-320/00, *Cartondruck GmbH & Co. KG* v. *Commission and Council*; Case T-383/00, *Beamglow Ltd.* v. *Council, European Parliament and Commission.*. All the cases are still pending. Case law followed until 31 December 2003.

[267] In my opinion it is rather unlikely that the CFI would come up with anything 'inventive', taking into consideration the way the ECJ in the *UPA* case put the CFI back to its place after its judgement in *J–go-Qu–r–* relaxing the criteria of admissibility of actions for annulment brought by individuals. Case T-177/01, *J–go Qu–r–* v. Commission [2002] ECR II-2365; Case C-50/00P, *Union de Peque»os Agricultores* v. *Council* [2002] ECR I-6677. See also Ragolle, 2003, p. 100.

[268] Rosas, 2001, p. 140.

[269] See Zonnekeyn, 2001a, p. 253-254.

[270] See Kessie, p. 8. They include for instance manufacturers of batteries, bath products, cotton linen and cardboard cartons.

[271] Zonnekeyn, 2001a, p. 265.

[272] Reinisch, 2000, p. 51.

[273] Zonnekeyn, 2001, p. 265, note 52.

[274] By contrast, Zonnekeyn is of the view that the companies have a reasonable chance to succeed despite the restrictive application of the criteria for Community incurring liability. Zonnekeyn, 2001a, p. 261.

[275] Rosas, 2001, p. 140.

[276] Reinisch, 2000, pp. 45, 51; Zonnekeyn, 2001a, p. 271.

[277] Rosas, 2001, p. 140.

[278] Ibid.

[279] Case C-149/96 *Portugal v. Council*,[1999] ECR I-9395, para. 47; also *inter alia* Case C-76/00P, *Petrotub and Republica* v. *Council* [2003] ECR I-79; Case C-93/02P, *Biret International* SA v. *Council* [2003] not yet reported, para. 52.

[280] For example Fines concluded on the basis of the *Odigitria* case that liability can occur on the basis of a unilateral approach to external relations. Fines, 1997, p. 27. In *Odigitria* the CFI accepted the condition that an action under Article 288 (2) EC could only be successful if a sufficiently serious breach of a superior rule of law for the protection of individuals as being relevant to determining Community liability in the field of external relations. Case T-572/93, *Odigitria AAE* v. *Council and Commission* [1995] ECR II-2025.

[281] See for an overview of jurisprudence and academic writing on the issue: Gasparon, 1999, pp. 619-622.

[282] Zonnekeyn, 2001a, p. 265.

[283] Case 90/77, *Helmut Stimming KG* v. *Commission* [1978] ECR 995. Discussed in Gasparon, 1999, p. 621.

[284] Case 90/77, *Helmut Stimming KG* v. *Commission* [1978] ECR 995, para. 107.

[285] Opinion of AG Mayras in Case 90/77, *Helmut Stimming KG* v. *Commission* [1978] ECR 995.

[286] The Opinion of Advocate General Lenz in Case C-469/93, *Amministrazione della Finanze dello Stato* v. *Chiquita Italia SpA* [1995] ECR I-4533, para. 21.

[287] See Monta»a i Mora, 1996, pp. 50-51.

[288] Similarly, Zonnekeyn, 2003, p. 764. Peers, on the other hand, interprets the statements of the CFI to imply that a measure could not be classified as an act intending to confer rights on individuals unless that measure could be relied on in courts. In any event, he claims that such finding of CFI was blatantly wrong and 'direct effect' is not a pre-condition for liability. Peers, 2001b, p. 612.

E.g. Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para. 51.

[289] Zonnekeyn, 2001a, p. 265.

[290] See Gasparon, 1999, p. 615. *Contra* Aalto, 1999. pp. 86-89.

[291] As was the case in Joined Cases C-6/90 and C-9/90, *Francovich and Others* v. *Italy* [1991] ECR I-5357.

[292] Maresceau, 1986, p. 118. See similarly Gilsdorf – Oliver, 'Haftung der Gemeinschaft und ihrer Bediensten – Artikel 215' in H. von der Groeben – J. Thiesing – C.-D. Ehlermann (eds.): *Kommentar zum EU-/EG-Vertrag,* Vol. 5, fifth edition, 1997, para. 36 as quoted in Reinisch, 2000, p. 46.

[293] See Craig – de B³rca, 2003, p. 550.

[294] The Opinion of the AG Alber in Cases C-93/02 P, *Biret Internationa* SA v. *Council* and C-94/02 P, *Etablissements Biret and Cie* SA v. *Council,* para. 46. The same view is supported by Davies who is of the opinion that "since WTO rules cannot be relied upon, the legal position of applicants would not be improved even if WTO rules did confer rights on them." Davies, 2003, p. 310.

[295] See Zonnekeyn, 2003, p. 765.

[296] See Zonnekeyn, 2003, pp. 764-765; Peers, 2001b, p. 612.

[297] Joined Cases C-6/90 and C-9/90, *Francovich and Others* v. *Italy* [1991] ECR I-5357.

[298] The ECJ has explicitly said that the lack of direct effect does not exclude liability. Aalto, 1999, p. 101.

[299] Gasparon, 1999, p. 616.

[300] Aalto, 1999, p. 101.

[301] A commentator has suggested that holding the Community liable for a breach of WTO law would be more likely than the liability of a Member State. See Manin, 1997, pp. 413-415 as quoted in Aalto, 1999, p. 101.

[302] See Snyder, 1993, p. 9.

[303] Peers, 2001b, p. 612.

[304] See van Gerven, 1994, pp. 21-22. He reasoned that provisions may be insufficiently precise or too conditional for specific rights to be derived therefrom, but may nevertheless be used in order to make operative a right to reparation that can be based on *other*, in that respect sufficiently precise and unconditional, Community law provisions.

[305] Zonnekeyn, 2001a, p. 267.

[306] According to Eeckhout the applicants merely referred to the exception in a rather confusing way at the oral hearing. Eeckhout, 2002, p. 108.

[307] Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para. 59.

[308] Davies, 2003, p. 324.

[309] Especially Peers, 2001b and Zonnekeyn, 2001b. See also Eeckhout, 2002, p. 107.

[310] See Case T-18/99, *Cordis Obst und Gem·se Grosshandel GmbH* v. *Commission* [2001] ECR II-0913, para.8.

[311] Case C-317/99, *Kloosterboer Rotterdam BV* v. *Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-9863.

[312] Snyder, 2003, p. 344.

[313] Davies, 2003, p. 319. Also the fact that the applicants did not really base their case on the *Nakajima* doctrine has been considered to explain the outcome and lack of reasoning. See Eeckhout, 2002, p. 108.

[314] Case T-19/01, *Chiquita* v. *Commission*,, pending. See Davies, 2003, p. 319.

[315] Case T-320/00, *Cartondruck GmbH & Co. KG* v. *Commission and Council*; T-383/00. See Zonnekeyn, 2001a, p. 254.

[316] Case T-3/99, *Banatrading GmbH* v. *Council of the EU* [2001] ECR II-2123.

[317] Ibid. para. 38.

[318] The CFI understood the argument as being based on *Portugal* where the ECJ confirmed the applicability of the *Nakajima* exception in the context of the WTO Agreements. The applicant was not allowed to rely on *Portugal* as a new matter of law, since they should have known at the time of bringing the case about the similar exception applying in the context of GATT 1947 case law. Case T-3/99, *Banatrading GmbH* v. *Council of the EU* [2001] ECR II-2123, paras. 38, 46-49. Peers criticises the CFI for dismissing of the argument as out of time. He contends that since the Court considered the GATT 1947 and GATT 1994 as legally distinct treaties, rulings on their legal effect should logically also be considered as legally distinct rulings. See Peers, 2001a, p. 609.

[319] Case T-174/00, *Biret International SA* v. *Council*, [2002] ECR II-17, para. 64.

[320] The Opinion of the Advocate General Alber in Case C-93/02P, *Biret International SA* v. *Council* [2003], paras. 66-69.

[321] Directive 2003/74/EC of the European Parliament and of the Council amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal thyrostatic action and of beta-agonists [2003] OJ L262/17.

[322] Zonnekeyn, 2003, p. 763, note 11.

[323] Directive 2003/74/EC of the European Parliament and of the Council amending Council Directive 96/22/EC [2003] OJ L262/17, 3rd recital of the Preamble.

[324] See Berg, 2003, http://www.amrecht.com/berg1.shtml.

[325] Case C-93/02P, *Biret International SA* v. *Council* [2003], para 62.

[326] Case C-377/98, *Kingdom of the Netherlands* v. *European Parliament and Council of the EU* [2001] ECR I-6229.

[327] Para. 83 of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[328] Case C-149/96 *Portugal* v. *Council*,[1999] ECR I-9395, para. 40.

[329] Which would in any case only be a temporary option as acknowledged by the ECJ in Case C-149/96 *Portugal* v. *Council*,[1999] ECR I-9395, para. 40.

[330] Para. 93 of of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[331] While the international community and the WTO are pressuring the EC to change its stance, internal pressures, namely that EU consumers do not want hormones treated beef, are heavily weighted to the other extreme. McNelis, 2001, p. 207. As there was an equivalent ban on the use of hormones by the EC's own farmers, the EC was, allegedly, politically speaking totally unable to withdraw the ban. Abbott, 2002, p. 7.

[332] While it also has been suggested that the Commission does not want to alienate the powerful distributors of bananas. See Kessie, 2000, p. 5.

[333] Berg, 2003, http://www.amrecht.com/berg1.shtml.

[334] Para. 102 of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[335] The Council stated 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" Council Decision 94/800 EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), [1994] OJ L336/1, last recital of the preamble.

[336] Case C-104/81 *HZA Mainz v. Kupferberg* [1982] ECR 3641, para. 18. Note, however, that the ECJ did not find its arguments in *Portugal* to conflict with *Kupferberg,* since it did not base them on the lack of reciprocity as such but on disuniform application of the WTO rules it might lead to.

[337] Para. 102 of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[338] Monta»a i Mora, 1996, p. 47. See also Peers, 2001, p. 121.

[339] The SPS Agreement applies also to measures adopted before its coming into force. Para. 41 of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[340] A duty to act is required for the purposes of the Community incurring liability due to an omission. The recommendation of the DSB of 13 February 1998 establishes such an obligation. Para. 43 of the Opinion of AG Alber of 15 May 2003 in the Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[341] See, for example, Joined Cases C-300/98, *Parfums Christian Dior* v. *Tuk Consultancy BV* and C-392/98, *Assco Ger·ste GmbH, Rob van Dijk* v. *Wilhelm Layher GmbH & Co KG, Layher BV,* [2000] ECR I-11307, para. 44.

[342] The CFI held that it is clear that "the WTO Agreement and its annexes are not intended to confer rights on individuals which

they could rely on in court." Case T-52/99, *T.Port GmbH & Co.KG* v. *Commission* [2001] ECR II-0981, paras. 46. See also Case T-174/00, *Biret International SA* v. *Council*, [2002] ECR II-17, para. 62.

[343] Paras. 115-119 of the Opinion of the Advocate General Alber in Case C-93/02P, *Biret International SA* v. *Council* [2003].

[344] Case T-174/00, *Biret International SA* v. *Council*, [2002] ECR II-17, para. 62.

[345] Different domestic legal systems merely sometimes provide for an indirect access to the WTO dispute resolution. In the EC such measure is the Trade Barriers Regulation (Council Regulation 3286/94/EC). See Lukas, 1995, pp. 185-192.

[346] Kessie, 2000, p. 2.

[347] Petersmann, 1997, p. 238.

[348] Jackson, 1998, p. 77.

[349] WT/DS152/R, *United States – Sections 301-310 of the Trade Act of 1974*, report of the Panel of 22 December 1999, para. 7.76.

[350] Ibid. para. 7.73.

[351] The ECJ stated in the case, *inter alia*, that "the fact that these interests are of a general nature does not prevent their including the interests of individual undertakings such as the applicants." Joined Cases 5, 7, and 13 to 24/66, *Kampffmeyer* v. *Commission* [1967] ECR 245.

[352] See para. 118 of the Opinion of the AG Alber in Case C-93/02P, *Biret International SA* v. *Council* [2003], not yet reported.

[353] Zonnekeyn, 2001a, p. 263. Case C-282/90, *Vreugdenhil* v. *Commission* [1992] ECR I-1937.

[354] Joined Cases 5, 7, and 13 to 24/66, *Kampffmeyer* v. *Commission* [1967] ECR 245.

[355] The ECJ ruled in *Polydor* that a provision of the free trade agreement between the Community and Portugal was not to be interpreted in the same way as a provision of the EEC Treaty even though the provisions were identically worded. Case 270/80, *Polydor Ltd. and RSO Records Inc.* v. *Harlequin Record Shops Ltd. and Simons Records Ltd.* [1982] ECR 329.

[356] See also Zonnekeyn, 2003, p. 767.

[357] CAP undoubtedly is a legislative field characterised by the exercise of such discretion. Ward, 2000, p. 310. See also Case T-30/99, *Bocchi Food Trade International GmbH* v. *Commission* [2001] ECR II-0943, para. 91.

[358] Ward, 2000, p. 310. Joined Cases 83, 94/76, 4, 15, 40/77, *HNL and Others* v. *Council and Commission* [1978] ECR 1209.

[359] Case C-152/88, *Sofrimport SARL* v. *Commission* [1990] ECR I-2477.

[360] Joined Cases C-104/89 and C-37/90, *Mulder II* [1992] ECR I-3061

[361] Joined Cases 116 &124/77, *Amylum* v. *Council and Commission* [1979] ECR 3497, para 19; Case 143/77 *Koninklijke Scholten-Honig* v. *Council and Commission* [1979] ECR 3583, para. 16.

[362] For example Arnull included arbitrariness to the conditions of liability. In the *Stahlwerke Peine-Salzgitter* ruling the ECJ explicitly pointed out that conduct verging on the arbitrary is not a condition of liability. See Arnull, 1997, p. 141 and Case C-220/91P, *Commission* v. *Stahlwerke Peine Salzgitter* [1993] ECR I-2393.

[363] See Wakefield, 2002, p. 123-124.

[364] Joined Cases C-46/93 and C-48/93 *Brasserie du P¨cheur SA* v. *Federal Republic of Germany and Factortame III and The Queen* v. *Secretary of State for Transport ex parte Factortame Limited and Others* [1996] ECR I-1029, para. 56.

[365] See Reinisch, 2000, p. 50.

[366] Zonnekeyn, 2001a, p. 269. See similarly Reinisch, 2000, p. 50.

[367] Zonnekeyn, 2001a, p. 269; Reinisch, 2000, p. 49.

[368] Case 238/78 *Ireks-Arkady* [1979] ECR 2955, para. 11.

[369] Zonnekeyn, 2001a, p. 269.

[370] Joined Cases C-104/89 and C-37/90, *Mulder II* [1992] ECR I-3061; see also opinion of AG Van Gerven, para. 28.

[371] Arnull, 1997, p. 148. See also Ward, 2000, p. 311.

[372] A commercial undertaking is considered to have volunteered to the economic risk and uncertainties inherent in the sector in which it is operating. Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL and Others* v. *Council and Commission*, [1978] ECR 1209, para 7. See Wakefield, 2002, p. 89. See also Arnull, 1997, pp. 141, 146.

[373] Tridimas, 1998, p. 23.

[374] He refers to the situation as an important gap in the analogy between Community and State liability. See Tridimas, 2001, p. 329.

[375] Craig – de B³rca, 2003, p. 557.

[376] van Gerven, 1994, p. 27; Wakefield, 2002, pp. 88-89.

[377] Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL and Others* v. *Council and Commission*, [1978] ECR 1209, para 5. See also Arnull, 1997, p. 150.

[378] Wakefield, 2002, p. 128. In any case, the effects of a measure on individuals which are known or ought to be known to the adopting institutions should be considered before the adoption of legislation in general interest, even though it might be necessary for these individual interests to be overriden.