

# On the boundary clash between EC commercial law and WTO law

Maria O'Neill\*

1. Abstract
2. Introduction
3. Grappling with the Problem
4. Trends in International Case law
  - 4.1 US
  - 4.2 Japan
  - 4.3 Italy
5. More Recent Cases
6. The *Biret* Case in the ECJ
7. The Constitutional aspect of the relationship with member state legislation
  - 7.1 The Issue of Exclusive Competence
  - 7.2 The Issue of Subsidiarity
  - 7.3 The Political Dimension
8. Conclusion.
9. Bibliography

## 1. Abstract

Both the WTO and the EC have come to a crossroads in their development. The WTO is currently the subject of the Doha round of negotiations, while the EC, together with pillars II and III of the EU, is about to be re-constituted under the draft European Constitution. The issue of the articulation between these two legal systems, despite the best efforts of legal academics over the years, remains unresolved, as evidenced in the recent case of *Biret International SA v. Council*.<sup>1</sup> Issues which were resolved in the early years of the EC on the nexus of the relationship between the EC and the laws of its member states, are now reappearing at the EC-WTO nexus. The EC-Member State principles of supremacy,<sup>2</sup> direct effect<sup>3</sup> and state liability for the non-implementation

---

\* Law Division, Dundee Business School, University of Abertay Dundee, Bell Street, Dundee DD 1 1HG, Scotland, Tel: 01382 308421, Fax: 01382 308400, E-mail: m.oneill@abertay.ac.uk

<sup>1</sup> Cases C-93/02, and Case -94/02, *Biret International SA v. Council of the European Union*, ECR 2003

<sup>2</sup> Case 6/64, *Costa v. ENEL*, [1964] ECR 405, [1966] CMLR 111. et al.

<sup>3</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105, Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1405, [1975] 1 CMLR 1 et al.

of directives<sup>4</sup> are now being echoed at the WTO-EC nexus, in the context of direct effect,<sup>5</sup> legality control, and indirect effect. The *Biret* case raised the issue of “no-fault liability for the Community” for non-compliance with WTO law, echoing discourses many years earlier at the EC-MS nexus. The issue of the boundary demarcations between EC Commercial law and WTO law merits re-examination in light of these developments, with the continuing imperfect legal articulation between these two jurisdictions resulting in a boundary clash which requires a resolution. Ideally this resolution would come in the form of a treaty amendment drafted by the member states of the EU. In this respect the draft Constitution, which fails to adequately address this issue could be seen as a missed opportunity. The ECJ may well find itself obliged to develop on the Advocate General’s opinion in the *Biret* case.

## 2. Introduction

*Biret International SA v. Council*,<sup>6</sup> raised the possibility of the development of “no-fault liability for the Community in respect of its normative acts” where there had been a Dispute Settlement Body (DSB) ruling on the non-compliance of EC law with WTO law. The CFI rejected this possibility finding that ‘the purpose of the WTO agreements is to govern relations between States ... for economic integration... and not to protect individuals’.<sup>7</sup> The CFI reaffirmed the findings in *Portugal v. Council*,<sup>8</sup> following the *Fediol*<sup>9</sup> and *Nakajima*<sup>10</sup> hypothesis, and found that the facts of the *Biret* case did not fall within the two exceptions to the rule that WTO law did not have direct effect in EC law. It further found that the ruling of the DSB did not alter the EC’s law in this area, finding that a ruling of the DSB would only become relevant if the Court had

---

<sup>4</sup> Case C-6, 9/90, *Francovich and Others v. Italy*, [1991] ECR 5357, [1993] 3 CMLR 66, et al.

<sup>5</sup> Case C-149/96: *Portuguese Republic v Council of the European Union*, Official Journal C 47, 19/02/2000 p. 8, (Judgment of the Court of 23 November 1999)

<sup>6</sup> Op. Cit. footnote no. 1.

<sup>7</sup> At point 72 of the judgement of the ECJ.

<sup>8</sup> Op. Cit. footnote no. 5.

<sup>9</sup> Case 70/87 *Fediol v Commission* [1989] ECR 1781. Here the ECJ found that it was not prevented ‘from interpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules’, (at paragraph 20), and that the fact that the regulation in question, (Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, Official Journal L 252, 20/09/1984 p. 1) entitled ‘economic agents .. to rely on the GATT provisions .. in order to establish the illicit nature of the commercial practices which they consider to have harmed them’ and that said economic agents were ‘entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying those provisions’. (at paragraph 22 of the judgement).

<sup>10</sup> Case C-69/89 *Nakajima All Precision v Council* [1991] ECR I-2069. In this case the relevant EC Regulation had been adopted ‘in order to comply with the international obligations of the Community’, (at paragraph 31) thereby becoming subject to judicial review for compliance with, in this case, Articles 2(4) and (6) of the GATT Anti-Dumping Code. (at paragraph 32 of the judgement).

found that the agreement in question, in this instance the SPS agreement, had direct effect, which was not the finding of the CFI in this case. The case was appealed to the ECJ, with the opinion of Advocate General Alber providing a new perspective on this issue.

Building on *Germany v. Council*,<sup>11</sup> the ECJ in *Portugal*<sup>12</sup> found that ‘in conformity with the principles of public international law’, the EC was free to conclude an agreement with a non-EC member state, which could be made to have effect within the ‘internal legal order of the contracting parties’.<sup>13</sup> Further, it held that it was only in the absence of such an express agreement that the ECJ would have to determine what legal effect, if any, such an agreement would have within the EC legal jurisdiction.<sup>14</sup> Under international law, it was recognised by the ECJ that there was an obligation for the ‘bona fide performance of every agreement’; however, this in itself did not determine what legal effect that international agreement would have within the domestic jurisdiction of the contracting parties.<sup>15</sup> This approach was echoed at the WTO level by the panel in *United States – Sections 301-310 of the Trade Act of 1974*.<sup>16</sup> This panel, ruling on US law, and referring to the doctrine of direct effect, stated that; ‘Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect’. Following this approach, the GATT/WTO did not create a new legal order, the subjects of which comprise both contracting parties or members and their nationals.<sup>17</sup> However, as pointed out by Zonnekeyn, the panel report does have an interesting aside in a footnote<sup>18</sup> that the issue of whether WTO agreements would ‘create rights for individuals’, which national courts would have to protect, ‘remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute’.<sup>19</sup> In addition, the panel reserved the right to the WTO to ‘construe any obligations as having direct effect’, and that, in the absence of such construction, member states of the WTO were not precluded from ‘following internal constitutional principles’, finding that some obligations ‘give rights to individuals’.<sup>20</sup>

---

<sup>11</sup> Case C-280/93 *Germany v Council* [1994] ECR I- 4973

<sup>12</sup> Op. Cit. footnote no. 5.

<sup>13</sup> Ibid., at paragraph 34 of the judgment.

<sup>14</sup> Relying on Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, paragraph 17.

<sup>15</sup> Op. cit. footnote no.12, at paragraph 35 of the judgment.

<sup>16</sup> *United States – Sections 301-310 of the Trade Act of 1974*, report of the panel released on 22 December 1999, WT/DS152/R, at para. 7.72

<sup>17</sup> Geert A. Zonnekeyn “The Status of WTO Law in the EC Legal Order; The Final Curtain?” *Journal of World Trade* 34(3): 111-125, 2000

<sup>18</sup> footnote no. 661.

<sup>19</sup> Op. Cit. footnote no. 17.

<sup>20</sup> Ibid.

The above findings formed the legal backdrop to the opinion of Advocate General Alber in the *Biret* case. The intervening years between *Portugal* and *Biret* had, however, seen the development of an intense academic discourse in this area, and saw a number of further cases appearing before the CFI and ECJ. Of particular interest to this author is Van Houtte's highlighting of the "political aspect" of the ECJ's decision in the *Portugal* case, given that the ECJ took into consideration issues outside the confines of its own legal system, such as the fact that the EC's contracting parties at the WTO concluded that WTO rules did not have direct effect within their own legal systems.<sup>21</sup> Reliance was made on the 'reciprocal character of the WTO Agreements' with the WTO being seen as a 'forum for negotiations', which some commentators referred to as being 'anachronistic'.<sup>22</sup> However, other commentators took it as being fair comment with Ehlermann warning against unduly tying the 'hands of the Community negotiators'.<sup>23</sup> The WTO bodies' lack of democratic accountability has been highlighted by Rosas, who pointed out that 'granting direct effect to WTO rules would play into the hands of the likes of anti-globalisation protestors', and 'could instead deprive the democratic institutions of the EU and other WTO members of the margin of manoeuvre they currently possess so as to strike a balance between trade and societal values'.<sup>24</sup>

### 3. Grappling with the problem

The academic discourse had developed the concepts of the non-reciprocity of direct effect,<sup>25</sup> legality control<sup>26</sup> and indirect effect.<sup>27</sup> The legality control argument in particular gave rise to a politically pragmatic response from the ECJ in the *Portugal* case, when it implied 'that legal control of acts' of EC institutions pursuant to WTO law would be 'impossible because the ECJ must leave the necessary "freedom" to the EC legislator in order not to endanger the EC's future negotiating

---

<sup>21</sup> Hans van Houtte; *The Law of International Trade*, Sweet & Maxwell, London, 1995

<sup>22</sup> Op. Cit. footnote no.17.

<sup>23</sup> Ibid.

<sup>24</sup> Allan Rosas; Case Note; Case C-149/96, *Portugal v. Council*, Judgment of the full Court of 23 November 1999, *Common Market Law Review* 37: 797-816, 2000

<sup>25</sup> initially raised by AG Tesauro in the *Hermès* case (Case C-53/96 (reference for a preliminary ruling from the Arrondissementsrechtbank de Amsterdam): *Hermès International v FHT Marketing Choice BV*, Official Journal C 258, 15/08/1998 p. 9), and commented on by Geert A. Zonnekeyn in "The Status of WTO Law in the EC Legal Order; The Final Curtain?" *Journal of World Trade* 34(3): 111-125, 2000, and Axel Desmedt; *European Court of Justice on the Effect of the "WTO Agreements in the EC Legal Order"*, *LIEI*, 200 27(1), 93-101.

<sup>26</sup> Axel Desmedt; *European Court of Justice on the Effect of the "WTO Agreements in the EC Legal Order"*, *LIEI*, 200 27(1), 93-101

<sup>27</sup> Op. cit. footnote no. 24.

position towards its trading partners in the WTO'.<sup>28</sup> Zonnekeyn sees this as not being a legal argument but rather a political one, being 'an obvious assault to the "trias political" principle, which ought to be the cornerstone of every legal system'.<sup>29</sup> The view therefore being adopted was that the 'absence of direct effect of an international agreement protected the validity of Community acts'.<sup>30</sup> These above attempts to rationalise the legal relationship between the EC and the WTO have been reflected in the jurisprudence of fellow members of the WTO, most notably in the US and Japan, with interesting observations to be made on the Italian case law, before it came under the influence of the ECJ's line on this matter.

#### 4. Trends in International Case law

The trends of the case law of the US and Japan match, to a certain extent, the development of the approach of the ECJ to the EC's relationship with the WTO for the same period. It would appear that there was a movement from initially viewing GATT 47 as having, or having the potential to have, direct effect. As GATT and the WTO laws become more complex and profound, there has been a retreat from this initial position with the development of a conclusion that perhaps the WTO legal regime may not have direct effect after all in domestic jurisdictions.

##### 4.1 US

At the GATT panel level, the issue of the direct effect of GATT 47 provisions arose in the panel report of *United States: Alcoholic and malt beverages*,<sup>31</sup> which held that the then-version of 'Article XXIV:12<sup>32</sup> was not applicable to the United States' as the panel noted, at 5.79 of its ruling, that these provisions were "designed to apply only to those measures by regional or local governments or authorities which the central government cannot control". They were convinced, on the basis of the writing of Jackson and Hudec, that 'GATT law had become part of US federal law, and since federal law, according to the US Constitution, is supreme over state law, any inconsistent state law had to give way

---

<sup>28</sup> Op. Cit. footnote no. 17.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> *United States: Alcoholic and malt beverages*, Panel Report, (DS23/R BISD 39S/206) adopted on 19 June 1992, para. 5.78 – 5.80. pg 206.

<sup>32</sup> Which provides the 'Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories'.

before GATT.<sup>33</sup> This issue was addressed in the Uruguay Round ‘Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994’, which is now complemented by Article 22(9) of the DSU.<sup>34</sup> The article addresses the issue of federal states being responsible for the actions of its constituent states, which, in the absence of control being enforced by the federal government on the sub-national government, imposes ‘compensation and suspension of concessions’ provisions on the federal state.<sup>35</sup> To the astonishment of Kuijper,<sup>36</sup> the US had managed, through its implementing legislation and its accompanying statement of administrative action, to reduce ‘itself to the same situation as the EC’ by expressly ‘limiting the supremacy of federal law over state law’, and thereby to largely ‘undo the consequences of’ the adopted panel report in *United States: Alcoholic and malt beverages*.<sup>37</sup> The current situation is that the US federal government can only force a state government to comply with WTO provisions by way of the federal government taking a court action ‘comparable to action pursuant to Article 169 of the EC Treaty’ (now Article 226 EC) against the state concerned.<sup>38</sup> It should be noted that the WTO agreements now contain ‘an elaborate mechanism for consultation with state authorities with a view to guaranteeing that state law is in conformity with the WTO Agreement and its Annexes’.<sup>39</sup>

## 4.2 Japan

In Japan, Iwasawa<sup>40</sup> referred to two domestic Japanese cases, which addressed the issue of the direct applicability of GATT in Japan, namely the *Kolbe Jewellery* case<sup>41</sup> and the later *Kyoto Neckties* case.<sup>42</sup> Under

---

<sup>33</sup> Pieter Jan Kuijper; *The New WTO Dispute Settlement System; the Impact on the European Community*, J.W.T. 1995, 29(6), 49-71.

<sup>34</sup> It provides that ‘The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member.’ When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreement and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

<sup>35</sup> *Op. Cit.* footnote no. 33.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Op. Cit.* footnote no. 31.

<sup>38</sup> *Op. Cit.* footnote no. 33.

<sup>39</sup> *Ibid.*

<sup>40</sup> Yuji Iwasawa; *Implementation of International Trade Agreements in Japan*, in Meinhard Hilf and Ernst-Ulrich Petersmann (eds.), *National Constitutions and International Economic Law*, Kluwer 1993, ISBN 90 6544 665 6

<sup>41</sup> *Kolbe Jewellery*: the relevant judgment was that of May 30, 1966, Kolbe District Court, 3 *Kakeishū* 519, 524 - 25.

Japanese law, ‘treaties are accorded a high authority’, overriding statutes, even those subsequently enacted, under Article 98(2) of the Japanese Constitution. Following this approach, the courts in the *Kolbe Jewellery* case suggested that GATT 47 had direct effect within Japan. The later *Kyoto Neckties* case caused uproar in Japanese legal academic circles when the Kyoto District court’s judgement, ‘apparently denying the direct applicability of the GATT’, was endorsed by the Japanese Supreme Court in 1990. This was a ‘poorly reasoned case’ according to Iwasawa and another academic, Professor Matsushita, who claimed that the courts in *Kyoto Neckties* seemed ‘to ignore Article 98(2) of the constitution’.<sup>43</sup> This was a strange claim to lay at the feet of any Supreme Court, leading to the possible conclusion that the decision was taken for unexpressed politically pragmatic reasons, along the lines taken by the ECJ in the later (1999) *Portuguese Textiles* case.<sup>44</sup>

### 4.3 Italy

An interesting line of GATT jurisprudence can be seen within the EC on the issue of the direct effect of GATT 47 within the Italian jurisdiction. During the latter part of the 1960s, the Italian lower and appeals court had ruled that ‘Article III, para. 2 of GATT<sup>45</sup> conferred on private parties a right to invoke it before the courts’, leading to the Italian state being ordered to reimburse GATT illegal taxes levied on importers. While the ECJ held that the EC had been substituted for the Member States with regard to commitments under the GATT from 1 July 1968 with the introduction of the Common Customs Tariff,<sup>46</sup> the Italian Corte di Cassazione was upholding, in 1968, the findings of its lower courts with regard to Article III, para. 2 of GATT.<sup>47</sup> Since that finding, however, the impact of the ruling had ‘progressively lost significance in practice’,<sup>48</sup>

---

<sup>42</sup> *Kyoto Neckties* case: The relevant judgment here was the Judgment of June 29, 1984, Kyoto District court, 31 *Shōmu Geppō* 207, which seems to have been endorsed by the Judgment of Feb. 6, 1990, Supreme Court, slip op.

<sup>43</sup> Op. Cit. footnote no. 40.

<sup>44</sup> Op. Cit. footnote no. 5.

<sup>45</sup> It provides that ‘The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.’

<sup>46</sup> *Annenistrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* (reference for a preliminary ruling from the Corte Suprema di Cassazione). Joined Cases 267 - 269/81. [1982] ECR 801.

<sup>47</sup> Judgment No. 2293, 6 July 1968, *Ministero delle Finanze v. Cotonificio Valle Ticino s.p.a., Foro Italiano* 1968, I. 2462; Giust. Civ. 1968, I, 1571; Riv. dir. int, 1969, 328; Dir. Scambi int. 1968, 504.

<sup>48</sup> Carlo Mastellone; Case Report on Case 266/81, *SIOT (Società Italiana per l’Oleodotto Transalpino) s.p.a. v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di*

with the Italian courts beginning to reverse its position on GATT 47 in subsequent cases. During the 1970's, while the ECJ was holding that in *International Fruit*<sup>49</sup> that GATT 1947 was binding on the Community, the Italian courts were 'developing the concept' that GATT 47 had direct effect, and that 'specific provisions may be considered as self-executing' in light of their particular content, independent of other provisions of the agreement and regardless of 'elements such as the absence of a jurisdiction for the settlement of disputes'.<sup>50</sup> The Italian courts were aware that the ECJ had taken a different line on this issue, with the Corte di Cassazione stating that, in comparison to the ECJ line, its view was wider than that of the ECJ. It also recognised that different member states of the EC might take different positions on the legal effect of GATT 47, holding that 'GATT could not be considered a Community act under (the then) Article 177'.<sup>51</sup> However, by the time of the *SIOT* and *SAMI* references to the ECJ in 1983 by the Corte di Cassazione, the Italian judiciary were happy to follow the ECJ's line on the legal status of the GATT 47, thereby reversing their earlier case law on the matter.

## 5. More Recent Cases

As stated earlier, a number of cases were heard by the ECJ and the CFI between *Portugal v. Council* and the *Biret* case, during which the issue of the legal relationship between the EC and the WTO arose. These cases, for the most part, which mainly dealt with bananas, are *Atlanta*,<sup>52</sup> and what have become known as the 'March 2001' judgments, of *Cordis*,<sup>53</sup> *Bocchi Food*<sup>54</sup> and *T.Port*.<sup>55</sup> The *Atlanta* case was heard at the CFI, from where an appeal was made to the ECJ, where the issue of the relationship between the EC and the WTO was argued. The ECJ, in its judgment, confined itself to procedural issues and did not address directly the substantive issue of the relationship between the EC and the WTO as

---

*Trieste, Ente autonomo del porto di Trieste*. Preliminary Ruling of 16 March 1983 requested by the Italian Corte di Cassazione, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. S.P.I. (Società Petrolifera Italiana) s.p.a.* (267/81) and *Amministrazione delle Finanze dello Stato v. S.A.M.I. (S.p.a. Michelin Italiana)* (268-269/81). Preliminary ruling of 16 March 1983 requested by the Italian Corte di Cassazione, CML Rev 20: 559-580, page 559.

<sup>49</sup> *International Fruit Company N.V. and others v. Productschap Voor Groenten en fruit (No 3)* Case 21 - 24 /72).

<sup>50</sup> Op. Cit. footnote no. 48.

<sup>51</sup> Ibid.

<sup>52</sup> Case C-104/97P. *Atlanta AG v. European Community*, [2001] 1 CMLR 20

<sup>53</sup> Case T-18/99, *Cordis Obst und Gemuse Großhandel GmbH v Commission of the European Communities*, ECR 2001 page II-00913

<sup>54</sup> Case T-30/99, *Bocchi Food Trade International GmbH v Commission of the European Communities*, ECR 2001 page II-00943

<sup>55</sup> Case T-52/99, *T. Port GmbH & Co. KG v Commission of the European Communities*, ECR 2001 page II-00981

the plea on this matter was not included in the original appeal documentation and was, therefore, deemed inadmissible. The Advocate General did address the issue in his opinion. The ‘March 2001’ judgements were all heard at the CFI level. Only *T.Port* was appealed to the ECJ,<sup>56</sup> but on appeal the ECJ only addressed the issue of the CFI’s calculation of reference quantities.

In the *Atlanta* case at the ECJ, protection of legitimate expectations was pleaded. While the Advocate General recognised that this was ‘one of the fundamental principles of the Community, as the Community retained a discretion as to its running of its common markets’, traders had no legitimate expectation that an existing situation would be maintained when the Community institutions could alter it in the exercise of their discretionary powers.<sup>57</sup> Further, the claim for non-contractual liability of the Community under Article 215 required ‘proof of illegal conduct, damage and a causal link’,<sup>58</sup> and, in AG Mischo’s view, the claimants fell at the first hurdle, proof of illegal conduct. The claim in this case was that, in light of the findings at the WTO in *EC-Bananas*<sup>59</sup> on the issue of the EC banana regime, the EC provisions were now illegal, not that the EC provisions dealing with the common organisation of bananas was in breach of the ‘substantive GATT provisions or those of the WTO’. The claimant therefore claimed that the ‘legislative provisions having been applied to the appellant in disregard of the binding effect on the Community of the decision of the WTO Dispute Settlement Body’.<sup>60</sup>

The AG stated that this plea was inadmissible as it had not been entered in the original appeal documentation from the CFI. However, utilising the common law technique of an *obiter dicta*, the AG stated that in any event, following the case of *Commission v. Germany*,<sup>61</sup> the appellant could ‘not profitably set up the incompatibility of Regulation 404/93 with the WTO Agreement to contest the reasoning of the Court of First Instance.’<sup>62</sup> Going even further down the *obiter dicta* line, even the claim that EC law was in conflict with a decision of the Dispute Settlement Body ‘would not assist the appellant’s case’,<sup>63</sup> on the basis that even a ruling of the Appellate Body of the DSU does not ‘impose on the party whose legislation is found to be contrary to the WTO provisions

---

<sup>56</sup> Ibid.

<sup>57</sup> Ibid. at H8 of the report.

<sup>58</sup> Ibid at H9 of the report.

<sup>59</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body. WT/DS27/AB/R, 9 September 1997.

<sup>60</sup> At point A19 of the AG’s opinion.

<sup>61</sup> Case C-280/93 *Germany v Council* [1994] ECR I- 4973

<sup>62</sup> Ibid at A23 of the report.

<sup>63</sup> Ibid at A24 of the report.

a duty immediately to amend that legislation'.<sup>64</sup> The AG went on to say that 'Clearly... the rights which a decision of the Appellate Body would intend to confer on individuals have nowhere near the scope which the appellant seeks to give them.'<sup>65</sup> This is particularly in light of the fact that, as pointed out by Zonnekeyn, 'Article 22 of the DSU gives WTO members the possibility of maintaining the unlawful measures in place beyond the reasonable period of time if the parties to the dispute have agreed on a suitable compensation.'<sup>66</sup>

In the *Cordis* case,<sup>67</sup> which was heard by the CFI, it was reiterated that 'the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court',<sup>68</sup> nor could the Community incur 'non-contractual liability as a result of infringement of them'.<sup>69</sup> The position in *Portugal v. Council*<sup>70</sup> whereby, despite the significant differences between GATT 1947 and the WTO Agreement, they both 'nevertheless accord considerable importance to negotiation between the parties'<sup>71</sup> was reaffirmed. The issue of the possibility of an imbalance of obligations between member states of the WTO, should the ECJ take any other line, was also addressed. The CFI also reaffirmed the ECJ's line in *Portugal v. Council* that the Community judicature could not 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by' the Community's trading partners within the WTO.<sup>72</sup>

The argument was made in this case that there should be developed a 'new category of misuse of powers' to the extent that the Commission adopted a regulation in breach of WTO obligations. This was rejected outright. It is established case law of the ECJ that misuse of powers can only be claimed if legislation is 'adopted with the exclusive or main purpose of achieving an end other than that stated',<sup>73</sup> but such an allegation was not being made, or could not be made, by the applicants in the *Cordis* case. The claim that a new category of misuse of powers existed should therefore be rejected. The CFI reaffirmed that, following *Portugal v. Council*, that 'it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or

---

<sup>64</sup> Ibid at A27 of the report.

<sup>65</sup> Ibid at A30 of the report.

<sup>66</sup> Op. Cit. footnote no. 17.

<sup>67</sup> Op. Cit. footnote no. 53.

<sup>68</sup> Ibid at point 45.

<sup>69</sup> Ibid. at paragraph 50.

<sup>70</sup> Op. cit. footnote no. 5.

<sup>71</sup> Ibid at paragraph 47.

<sup>72</sup> Ibid at paragraph 49.

<sup>73</sup> Ibid at paragraph 53.

where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules.’<sup>74</sup> As neither the WTO panel report (22<sup>nd</sup> May 1997)<sup>75</sup> nor the Appellate Body report (9<sup>th</sup> September 1997)<sup>76</sup> ‘included any special obligations which the Commission intended to implement, within the meaning of the case-law,<sup>77</sup> in Regulation No. 2362/98,<sup>78</sup> therefore such a claim could not be made here.

In *Bocchi Foods*,<sup>79</sup> the arguments and the findings of the CFI followed closely those of the *Cordis* case. The *T.Port*<sup>80</sup> CFI case followed closely both the arguments and findings of *Bocchi Foods* and *Cordis* with the CFI stating that ‘it should be noted that it is clear from Community case-law that the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court’.<sup>81</sup> The CFI restated the position in *Portugal v. Council* by saying that ‘it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules’.<sup>82</sup>

With reference to the March 2001 judgements, Peers is of the view<sup>83</sup> that the CFI was in error in concluding that the ‘implementation exceptions’ could be ‘deduced from previous case law’. Peers argues that, while previous case law certainly did clarify the position with regard to the 1993 Regulation dealing with bananas, ‘it had not ruled on the applicability of those exceptions to subsequent amendments of the Regulation’. He advocates that it is ‘strongly arguable’ that the purpose of the 1998 Council Regulation was ‘related to a WTO obligation’.<sup>84</sup> Peers goes on to point out that the 1998 regulation ‘expressly states in its

---

<sup>74</sup> Ibid at paragraph 58.

<sup>75</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, 22<sup>nd</sup> May 1997, WT/DS27.

<sup>76</sup> Op. cit. footnote no. 59.

<sup>77</sup> Specifically Case C-69/89, *Nakajima v. Council*, [1991] ECR I-2069

<sup>78</sup> Ibid at paragraph no.59.

<sup>79</sup> Op. cit. footnote no. 54.

<sup>80</sup> Op. cit. footnote no. 55.

<sup>81</sup> Ibid. at paragraph no 45.

<sup>82</sup> Ibid. at paragraph no 57.

<sup>83</sup> Steve Peers: WTO dispute settlement and Community Law, (2001) 26 ELRev, 605

<sup>84</sup> Ibid.

preamble that “the Community’s international commitments under the World Trade Organisation” should be met’. He further points out that the ‘the explanatory memorandum accompanying the proposal for a Council Regulation stated that the Council should “amend Regulation (EEC) No. 404/93 to bring it into line with our international commitments within the framework of the WTO’ and that a ‘system of import licences compatible with the WTO should be introduced’.<sup>85</sup> In light of this persuasive argument, it is hard to ignore Peers’ view that it is difficult to distinguish between a measure ‘being adopted “in order to comply” with the WTO ruling’, as the 1998 regulation clearly is, and a measure ‘intending to implement a WTO obligation’.<sup>86</sup>

## 6. The *Biret* Case in the ECJ

All of these cases brings us to the *Biret* case,<sup>87</sup> and the opinion of Advocate General Alber, which merits examination. The claimant in this case, *Biret* requested that the CFI should develop ‘its case-law in the direction of a system of no-fault liability for the Community in respect of its normative acts’. This claim was rejected on the basis that this plea was introduced late in the proceedings and should have formed part of the original pleadings in this case. Problems also arose with the pleadings on appeal, so that the effect of the DSB ruling was not properly ruled on by the ECJ. The ECJ did however state that it had to take into consideration the period of time given by the WTO to the EC to amend its laws, and any examination of liability of EC institutions for the non-amendment of laws within that time period would ‘render ineffective the grant of a reasonable period for compliance’ with the DSB ruling.<sup>88</sup> The ECJ therefore found that no damage could be proven to have occurred after the ‘reasonable period for compliance’, so it did not have to rule further on the matter. It also avoided ruling on the second plea, ‘concerning the Community’s alleged no fault liability’ as it had been submitted too late to be considered.

The opinion of AG Alber in the ECJ case does however cast a different light on the issues raised in *Biret*. At point 83 of his opinion, he states that a ruling of the DSB removes the margin of manoeuvre of WTO contracting parties, with the obligation being to implement the findings of the DSB immediately and without condition. This, therefore, alters the nature of the obligation of the WTO member states, as there is, after a

---

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Op. Cit. footnote no. 1.

<sup>88</sup> At point 65 of the judgement of the ECJ.

DSB ruling, an ‘obligation sufficiently clear and precise’. He did recognise, however, that there was a need for a community legislative measure to put in place the provisions of the legislative changes in this situation.<sup>89</sup> He went on to say that, from the point of view of Community law, the right of the free exercise of economic activities would be in favour of the recognition of direct effect of the rulings of the DSB, after the expiration of a reasonable delay for amending EC law.<sup>90</sup> In such a situation, Alber is also of the opinion that there would be a case for recognising the possibility of bringing a case for compensation for EC non-compliance with WTO law.<sup>91</sup>

This opinion of the Advocate General, should it be adopted in a future ECJ ruling, would provide a third exception to be added to the *Fedoil*<sup>92</sup> and *Nakajima*<sup>93</sup> exceptions to the rule that WTO law does not have direct effect within EC law. These two exceptions, as confirmed in the *Atlanta* case,<sup>94</sup> are the only ones that currently hold, with a continuing large area of interface between EC and WTO law being subject to a ‘boundary clash’. The question therefore arises that if a case comes before the ECJ, a “post-*Biret*” case where damage can be proven to have occurred after a “reasonable period for compliance has passed” and a plea is entered timeously for the Community to develop “a system of no fault liability in respect of its normative acts” will the ECJ distinguish the *Biret* ruling, and adopt the reasoning of AG Alber in that case. Will the judges of the ECJ, on the other hand, more conscious of the political position of the ECJ within the EC/EU legal framework, give further meat to Ehlermann and Rosas’s<sup>95</sup> argument against unduly tying the “hands of the Community negotiations” recognising the severe democratic deficit at the WTO. The draft EU Constitution merits some examination to see if it sheds any light on this matter.

## **7. The Constitutional aspect of the relationship with member state legislation**

The EU is currently drafting a “Constitution for Europe”. This document is intended to address many of the recurrent constitutional problems of the EC/EU. Article III-315 of the draft Constitution, (after

---

<sup>89</sup> At point 89 of the opinion.

<sup>90</sup> Point 110 of the opinion.

<sup>91</sup> At point 112 of the opinion.

<sup>92</sup> Op. Cit. footnote no. 9.

<sup>93</sup> Op. Cit. footnote no. 10.

<sup>94</sup> Op. Cit. footnote no. 52.

<sup>95</sup> Op. Cit. footnote no. 24.

signature), reflecting a rebalancing of power between the Council of Ministers and the Commission, and the adoption of European laws and Framework laws as the new secondary legislative tools under the Constitution, closely matches the provisions of the current Article 133 EC. The CCP is, however, extended by the draft Constitution to cover not just ‘trade in goods’ and the post Nice Article 133 provisions on trade in services and the commercial aspects of intellectual property, but also to foreign direct investment. The unanimity requirements for voting in the Council of Ministers in the field of services and intellectual property is preserved and is also extended to cover the ‘negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services’,<sup>96</sup> with specific provisions being also made for the conclusion of transport agreements.<sup>97</sup> It would appear, from the current draft of the Constitution, that no such unanimity will be required for international agreements on foreign direct investment. What is new, however, is the statement at the end of Article III-315 that the CCP ‘shall be conducted in the context of the principles and objectives of the Union’s external action’, possibly bringing the CCP under the influence of the more robust provisions being introduced for the EU’s Common Foreign and Security Policy (CFSP) by the draft Constitution.

## 7.1 The Issue of Exclusive Competence

Factors which might influence the ECJ in a post *Biret* judgment would be the issue of exclusive competence and subsidiarity in the post “draft Constitution”. As stated by Lord Slynn of Hadley,<sup>98</sup> the currently numbered Article 133 EC<sup>99</sup> ‘has raised in particular difficult questions’ as to the competence of the EC and, through it, the competence of the EC Commission together with the issue of the relationship between the EC and its member states. This is complicated by the fact that the ECJ, in *Opinion 1/78*,<sup>100</sup> found that the CCP had a dynamic and evolutionary character’, and that the EC must have ‘the possibility .. to take account of new needs and new developments’.<sup>101</sup> This approach is reflected in

---

<sup>96</sup> Article II-317 of the draft ‘Constitution for Europe’.

<sup>97</sup> Which makes the conclusion of agreements under this title, *inter alia*, subject to CFSP provisions.

<sup>98</sup> Lord Slynn of Hadley in the forward to Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996

<sup>99</sup> It should be pointed out that the expanse of Article 133 EC was extended by the Nice Treaty to GATS and TRIPS.

<sup>100</sup> *Opinion 1/78 on the International Rubber Agreement*, [1979] ECR 2871

<sup>101</sup> Jacques HJ Burgeois, *The Uruguay Round of GATT: Some General Comments from an EC Standpoint*, Ch 6 in Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996

*Opinion 2/91*,<sup>102</sup> when the ECJ stated, developing from the *ERTA* judgment,<sup>103</sup> that the ‘principle of exclusivity’ cannot be limited to areas where the EC has ‘adopted rules within the framework of a common policy, but is applicable in all areas corresponding to the objectives of the Treaty’.<sup>104</sup>

In *Opinion 1/94*, the ECJ provided that the now numbered Articles 95 EC<sup>105</sup> and Article 308 EC<sup>106</sup> could not ‘in themselves confer exclusive competence on the Community’.<sup>107</sup> The draft Constitution addresses the issue of exclusive and shared competence in its Articles 12 and 13, referred to above, with the newly expanded CCP being an area of exclusive competence, and shared competence, under Article 13 being ‘where the Constitution confers (on the Union) a competence which does not relate to the areas referred to in Articles 12 (inter alia, the CCP), and 16’. Article 16 provides for ‘supporting, coordinating or complementary action’, and contains both industry and public health issues, which might be relevant to the CCP. Shared competence is attributed, inter alia, to the internal market, agricultural and fisheries, (excluding the conservation of marine biological resources), social policy, the environment, consumer protection and public health issues.

As is pointed out by Craig, rather than conducting a ‘root and branch re-consideration’ of the issue of competence and subsidiarity, the draft Convention adopted the approach of the maintenance of the status quo, but where a shift was made on competence, it had a ‘general tendency ...to reinforce EU power, not to “repatriate” it to the Member States.’<sup>108</sup> It could perhaps be said that the issue of exclusive and non-exclusive competence may not be finally resolved by the draft Constitution, should it come into force. An outstanding problem, relevant to this paper, will be the tension between the Customs Union policy, an area of exclusive competence and ‘other aspects of the internal market’ which is usually shared competence.<sup>109</sup> In addition, the EU’s exclusive external competence, under the post signature Article I-13(2) when the

---

<sup>102</sup> *Opinion of the Court of 19 March 1993. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty. Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work. Opinion 2/91, ECR 1993 page 1061*

<sup>103</sup> *Case 22/70 Commission v Council* [1971] ECR-263 (the *ERTA /AETR* judgment),

<sup>104</sup> Nicholas Emiliou, *The Allocation of Competence Between the EC and its Member States in the Sphere of External Relations*, Ch 3 in Emiliou and O’Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996

<sup>105</sup> Ex Article 100a EC

<sup>106</sup> ex Article 235 EC

<sup>107</sup> *Opinion 1/94*, [1994] ECR 5264.

<sup>108</sup> Paul Craig; *Competence: clarity, conferral, containment and consideration*, (2004) 29 E.L.Rev. 323.

<sup>109</sup> *Ibid.*

internal competence is not exclusively the EU's, retains 'difficulties in terms of clarity'.<sup>110</sup> In order to resolve this issue, both to date, and in this writer's opinion in the future, in the absence of clarity from the EC Treaty or the proposed Constitution, this matter has to be analysed through the use of principles developed by the ECJ, which in themselves are not clear.

What is clear, in the matter of GATT/WTO Agreements, is that the Member States of the EC have 'retained competence over budgetary matters',<sup>111</sup> relating to WTO membership. In addition, Emilou, quotes Timmermans<sup>112</sup> as arguing that, under the current legal framework, even in the area of CAP common organisations, EC member states, even in this highly occupied field, 'retained a parallel power to adopt national measures provided that they did not jeopardise the objectives and functioning of the common markets';<sup>113</sup> however, EC member states would be precluded from entering into international agreements in such policy areas. Emilou also points out, relying on Kapteyn,<sup>114</sup> that in areas where there are no such common policies, EC member states were not so restricted.<sup>115</sup> In World Trade matters there is, however, such a common policy, the Common Commercial Policy.<sup>116</sup> This would continue to be the case in a post-Constitution EU, as under the draft constitution there is 'little containment of EU power' in "the domain of exclusive external competence"<sup>117</sup> under the now numbered Art.I-13(2).<sup>118</sup>

Addressing the current situation, Kuijper throws a spanner in the works by pointing out that the ECJ, in *Opinion 1/94*, does not use the term 'mixed competence' (competence mixed), but 'joint competence' (competence partagée).<sup>119</sup> He goes on to say that the drawing of sharp distinctions between EC and member state competence may not be 'helpful' in addressing issues 'involving the management of the WTO Agreement' and in issues of 'cross retaliation', adding that the duty to co-

---

<sup>110</sup> Ibid.

<sup>111</sup> Eileen Denza *The Community as a member of International Organizations*, Ch 1 in Emiliou and O'Keefe, *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996

<sup>112</sup> From an article in Dutch by Timmermans at [1978] SEQ 276

<sup>113</sup> Op. Cit. footnote no. 104.

<sup>114</sup> At [1978] SEW 276

<sup>115</sup> Op. Cit. footnote no. 104.

<sup>116</sup> Article 133 EC, recently amended by the Nice Treaty, and to be incorporated into Article III-315 of the draft European Constitution (after signature)

<sup>117</sup> Op. Cit. footnote no. 108.

<sup>118</sup> Article I-13(2) provides that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.

<sup>119</sup> Op. Cit. footnote no. 33.

operate between the EC and its member states on this point is more important.<sup>120</sup> This argument could still be made with regard to a post-Constitution situation, even if it is found that the line between exclusive and shared competence has been shifted somewhat under the proposed treaty. Should the issue of WTO obligations by the EC and its member states be relegated to the area of joint or shared competence under EC jurisprudence, then we enter another very difficult area of EC law, that of subsidiarity.<sup>121</sup>

## 7.2 The Issue of Subsidiarity

Cottier sees the relegating of the issue of WTO competence within the EC to an issue of subsidiarity between the EC and its member states as strength from the point of view of the ‘internal power relations’ within the EC.<sup>122</sup> He does, however, admit that from an external perspective, this approach ‘hardly reinforces the position of Europe in relations with other Members of the WTO, in particular the United States’.<sup>123</sup> Cottier also highlights the issue of differentiating ‘law-making’ and ‘law-applying’ case law, and he advocates the politically pragmatic, though legally less satisfying, approach of ‘team-work’ between the Commission and the national administrations concerned in WTO disputes.<sup>124</sup>

The draft European Convention deals with the issue of subsidiarity in the post signature Article I-11 with a protocol attached to the draft Constitution.<sup>125</sup> Article I-11 refers to the principle of conferral being the governing principle of the limits of the Union’s competences with ‘the use of the Union’s competences’ to be ‘governed by the principles of subsidiarity and proportionality’. While both subsidiarity and proportionality are familiar concepts, the conferral principle, despite the new name, also appears to offer little that is new to the analysis of the law in this area. Much of Article I-11 looks familiar, although the reference to whether an action can be sufficiently achieved by a Member State, in

---

<sup>120</sup> Ibid.

<sup>121</sup> Article 3B pre Amsterdam, which provides that; ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’

<sup>122</sup> Thomas Cottier; Dispute Settlement in the World Trade Organization; characteristics and structural implications for the European Union, CMLRev. 35, 325-378, 1998.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Protocol on the Application of the Principles of Subsidiarity and Proportionality.

paragraph 3 of this article, refers to ‘either at central level or at regional and local level’, adds a new layer of governance for the post-Constitution EU principle of subsidiarity. The protocol on the application of the principles of subsidiarity and proportionality builds on the principles provided for in earlier EC/EU documentation,<sup>126</sup> providing for procedural mechanisms for the operation of the principle. As stated by Craig, however, ‘it remains to be seen how subsidiarity and the Protocol operate in practice’.<sup>127</sup>

### 7.3 The Political Dimension

From a first reading, therefore, of the draft Constitution it would appear that clarity cannot be brought to the EC-WTO legal nexus to be adjudicated on a post-*Biret* case. The political aspect of a post-*Biret* judgment is therefore thrown into sharp relief. It is clear to Cottier that ‘non-compliance [with WTO law] may even threaten the consistency of the Union’s legal order’,<sup>128</sup> and with it the concept of the supremacy of Community law. This would put in jeopardy the ‘imperfect constitutional structure’ of the EC referred to in the introduction to this article and as recognised in the draft European Constitution. Cottier points out that the supremacy of EC law depends on ‘legitimacy and persuasion’, with legal provisions which are ‘inconsistent with international obligations’ putting this in jeopardy.<sup>129</sup> Legitimacy of persuasion could also be jeopardised in light of Rosa’s view, referred to earlier, that the lack of democratic accountability of WTO bodies and the need to ‘strike a balance between trade and societal values’ has also to be added to the political mix.<sup>130</sup> This then has to be juxtaposed against Zonnekeyn’s point that failure to grant WTO law direct effect within the EC legal jurisdiction in order to grant the EC negotiators at the WTO room for manoeuvre in future negotiations is an assault on the trias political principle and is based on political reasoning by the ECJ, rather than legal reasoning. Kuijper’s argument on the duty to co-operate between the EC and its member states,<sup>131</sup> discussed earlier in the context of exclusive competence, continues on this theme. Cottier, advocating team work between the EC and its member states with regard to WTO commitments, reflects this politically pragmatic, rather than strictly legal, allocation of obligations. In addition, non-compliance by the EC or part of the EC with WTO

---

<sup>126</sup> Op. Cit. footnote no. 108.

<sup>127</sup> Ibid.

<sup>128</sup> Op. Cit. footnote no. 122.

<sup>129</sup> Ibid.

<sup>130</sup> Op. Cit. footnote no. 24.

<sup>131</sup> Op. Cit. footnote no. 33.

commitments would lose credibility of other WTO member states in the EC, and would lose the EC international market access rights.<sup>132</sup> This academic analysis is reflected in the ECJ's reasoning in *Portugal v. Council* and in the AG's opinion in *Biret*, with regard to WTO obligation which had not been adjudicated upon by the DSB.

## 8. Conclusion.

The above points highlight some problematic issues from a legal perspective, which resolve themselves to relative clarity when examined from a political perspective. The response of the ECJ following what appears to be political reasoning rather than pure legal reasoning, as to the legal effect of WTO law within the EC jurisdiction. It gives rise to a question as to the exact balance of powers between the EC and its member states in the context of the EC's relationship with the WTO and, in this context, the relative role of the EC institutions within the EC jurisdiction and the role that the ECJ has developed for itself within the EC. While the EC is clearly set up to run on the basis of the rule of law, the issue does arise whether the ECJ should ignore the 'unanimous position of the Governments' of the EC vis a vis the World Trade Organisation.<sup>133</sup> As stated in one Common Market Law Review editorial, the balance is between the ECJ acceding to governments' demands pursuant to pressure 'from weak industries defending their own short term interests' or should the ECJ protect the interests of EC consumers and the EC's own interests by 'granting direct effect of' what was then GATT 47 obligations 'against the wishes of the Governments'.<sup>134</sup> As pointed out in the same editorial, 'the Court cannot govern Europe',<sup>135</sup> despite the highly political role that it has been asked to play in the context of the legal relationship between the EC jurisdiction and the WTO jurisdiction. The ECJ, may, however, be faced with this role, in the absence of clearer direction from the treaties, in our "post- *Biret*" case.

Some writers would argue that the ECJ has not been shy of developing law when it felt the need to do so, as in the development of the Treaty of Rome itself, converting a traditional multilateral treaty<sup>136</sup> into a constitutional charter governed by a form of constitutional law.<sup>137</sup> However, as Mancini pointed out, the ECJ 'would have been far less

---

<sup>132</sup> Op. Cit. footnote no. 122.

<sup>133</sup> Editorial Comment; Strengthening GATT, CMLRev. 1983 page 393

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> G.Federico Mancini; The Making of a Constitution for Europe, CMLRev. 1989, page 595

<sup>137</sup> J.H.H. Weiler; The Reformation of European Constitutionalism, JCMS, Vol.35, No1, page 97

successful had it not been assisted by two mighty allies: the national courts and the Commission'.<sup>138</sup> On the issue of GATT and WTO, when the issue comes before the ECJ, 'even the Commission [pleaded] against applying the international rules within the Community legal order'.<sup>139</sup>

Perhaps a more effective analysis can be made of the situation when, unlike with many other international legal obligations entered into by the EC, the WTO and before it GATT 47 do have within them very effective dispute resolution mechanisms. The issue of the EC and the ECJ's relationship with other international tribunals has caused problems for the ECJ in other instances. This issue is brought to the fore by Usher, who points out that this issue of possible overlapping jurisdictions with international tribunals 'has arisen in a number of requests under Article 300 for an Opinion'.<sup>140</sup> He goes on to point out that in *Opinion 1/91*, which dealt with the creation of an EEA Court, the ECJ, in defence of its own prerogatives, held that 'to confer "jurisdiction" on the EEA Court was incompatible with Community law'.<sup>141</sup> This is in line with the observation that the ECJ has shown itself to be hostile 'to the creation of, or accession to, other international tribunals with overlapping jurisdiction or membership'.<sup>142</sup> While the ECJ has exercised an ability to be both restrictive and developmental in its interpretation of the EC treaty, it is most activist in its efforts to ensure the uniform control of the validity of Community acts and the exercising of judicial control over the activities of the EC bodies in the context of the legal process.<sup>143</sup> It is perhaps somewhat naive to expect the ECJ to exercise its activist abilities at its own expense, in the defence of law of another organisation, merely for the sake of the discipline itself.

The WTO legal jurisdiction will develop with time, both as a consequence of further panel and appellate body reports at the WTO, and further rounds of multilateral trade negotiations. The competing pulls of EC law and WTO law, with its interdependent and reflexive relationship, with the development of 'new and endemic boundary clashes' between these two polities leading to, as suggested by Walker, a transformation of mutual self understanding.<sup>144</sup> This contentious evolution is in line with

---

<sup>138</sup> Op. Cit. footnote no. 134.

<sup>139</sup> Op. Cit. footnote no. 133.

<sup>140</sup> John Usher; *The Assertion of Jurisdiction by the European Court of Justice*, Chapter 14 in Patrick Capps, Malcolm Evans, Strados Konstantinidas, *Asserting Jurisdiction, International and European Legal Perspective*, Hart Publishing, 2003, ISBN 1-84113-305-1

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Neil Walker (ed.) *Sovereignty in Transition*, Oxford – Portland Oregon 2003 ISBN 1-84113- 337 – X (HBk), Ch 1 Neil Walker; *Late Sovereignty in the European Union*

constitutional lawyers' pluralistic thinking which emphasise 'the possibility of constitutional collision between high judicial authorities of different polities as the major point of contestation and crucial axis of rational authority'.<sup>145</sup> In the meantime the EC Commercial lawyer, working with the "dynamic and evolutionary character of the CCP"<sup>146</sup> is left with an imperfect, but perhaps evolving, situation in the absence of the direct effect of WTO law within the EC. These issues will increasingly require attention in the forthcoming years, in the absence of amendments to the draft Constitution for Europe prior to enactment, then by way of further developments of ECJ jurisprudence.

## 9. Bibliography

### Journal Articles

- Burgeois, Jacques HJ; The Uruguay Round of GATT: Some General Comments from an EC Standpoint, Ch 6 in Emiliou and O'Keeffe, the European Union and World Trade Law after the GATT Uruguay Round, John Wiley and Sons, 1996.
- Burns, Tom; Subsidiarity: Principle and Practice, Scots Law Times, 1995, 9, 67-71.
- Cottier, Thomas; Dispute Settlement in the World Trade Organization: Characteristics and structural implications for the European Union, CMLRev. 35, 325-378, 1998.
- Craig, Paul; Competence: clarity, conferral, containment and consideration, (2004) 29 E.L.Rev. 323.
- Denza, Eileen; The Community as a member of International Organizations, Ch 1 in Emiliou and O'Keeffe, the European Union and World Trade Law after the GATT Uruguay Round, John Wiley and Sons, 1996.
- Desmedt, Axel; "European Court of Justice on the Effect of the "WTO Agreements in the EC Legal Order", Legal Issues of European Integration, LIEI, 2000 27(1), 93 –101.
- Editorial Comment; Strengthening GATT, CMLRev. 1983 page 393
- Mancini, G.Federico; The Making of a Constitution for Europe, CMLRev. 1989, page 595.
- Emiliou, Nicholas, The Allocation of Competence Between the EC and its Member States in the Sphere of External Relations, Ch 3 in Emiliou

---

<sup>145</sup> Ibid.

<sup>146</sup> Jacques HJ Burgeois, The Uruguay Round of GATT: Some General Comments from an EC Standpoint, Ch 6 in Emiliou and O'Keeffe, the European Union and World Trade Law after the GATT Uruguay Round, John Wiley and Sons, 1996

and O’Keeffe, *the European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

Iwasawa, Yuji; *Implementation of International Trade Agreements in Japan*, in Meinhard Hilf and Ernst-Ulrich Petersmann (eds.), *National Constitutions and International Economic Law*, Kluwer 1993, ISBN 90 6544 665 6.

Kuijper, Pieter Jan; *The New WTO Dispute Settlement System; The Impact on the European Community*, J. W.T. 1995, 29(6), 49- 71

Mastellone, Carlo; *Case Report on Case 266/81, SIOT (Società Italiana per l’Oleodotto Transalpino) s.p.a. v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste, Ente autonomo del porto di Trieste*. Preliminary Ruling of 16 March 1983 requested by the Italian Corte di Cassazione, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. S.P.I. (Società Petrolifera Italiana ) s.p.a.(267/81) and Amministrazione delle Finanze dello Stato v. S.A.M.I (S.p.a. Michelin Italiana ) (268-269/81)*, preliminary ruling of 16 March 1983 requested by the Italian Corte di Cassazione, CML Rev 20: 559-580, page 559.

Peers, Steve; *WTO dispute settlement and Community Law*, (2001) 26 ELRev, 605.

Rosas, Allan; *Case Note; Case C-149/96, Portugal v. Council*, Judgment of the full Court of 23 November 1999, *Common Market Law Review* 37: 797-816, 2000.

Lord Slynn of Hadley in the forward to Emiliou and O’Keeffe, *the European Union and World Trade Law after the GATT Uruguay Round*, John Wiley and Sons, 1996.

Usher, John; *The Assertion of Jurisdiction by the European Court of Justice*, Chapter 14 in Patrick Capps, Malcolm Evans, Strados Konstadinidas, *Asserting Jurisdiction, International and European Legal Perspective*, Hart Publishing, 2003, ISBN 1-84113-305-1

van Houtte, Hans; *The Law of International Trade*, Sweet & Maxwell, London, 1995.

Walker, Neil; *Late Sovereignty in the European Union*, in Neil Walker (ed.) *Sovereignty in Transition*, Oxford – Portland Oregon 2003 ISBN 1-84113- 337 –X (HBk), Ch 1.

Weiler, J.H.H.; *The Reformation of European Constitutionalism*, JCMS, Vol.35, No1, page 97.

Zonnekeyn, Geert A.; “*The Status of WTO Law in the EC Legal Order; The Final Curtain?*” *Journal of World Trade* 34(3): 111-125, 2000.

### **Case law:**

## WTO Case Law

*United States - Alcoholic and malt beverages*, Panel Report, (DS23/R/BISD 39S/206) adopted on 19 June 1992

*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, WT/DS27, 22<sup>nd</sup> May 1997.

*European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body. WT/DS27/AB/R, 9 September 1997.

*United States – Sections 301-310 of the Trade Act of 1974*, panel report, 22 December 1999 WT/DS152/R

## EC Case Law

Case 22/70 *Commission v Council* [1971] ECR-263 (The ERTA /AETR judgment)

Case 21 - 24 /72, *International Fruit Company N.V. and others v. Produktschap Voor Groenten en fruit (No 3)*, Case 70/87 *Fediol v Commission* [1989] ECR 1781.

Case 181/73, *Hageman v. Belgium*, [1974] ECR 449,

*Opinion 1/78 on the International Rubber Agreement*, [1979] ECR 2871

Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641

Joined Cases 267 - 269/81, *Annenstrazione delle Finanze dello State v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* [1982] ECR 801,

Case 70/87 *Fediol v Commission* [1989] ECR 1781.

Case C-69/89 *Nakajima All Precision v Council* [1991] ECR I-2069

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

Case C-61/94, *Commission v. Germany*, [1994] ECR I-3989.

Case C-285/94 *Italy v. Commission*, [1997] ECR I-3519

Case C-53/96; *Hermès International v FHT Marketing Choice BV*, Official Journal C 258, 15/08/1998 p. 9

Case C-149/96: *Portuguese Republic v Council of the European Union*, Official Journal C 47, 19/02/2000 p. 8

Case C-104/97P. *Atlanta AG v. European Community*, [2001] 1 CMLR 20

Case T-18/99, *Cordis Obst und Gemuse Großhandel GmbH v Commission of the European Communities*, ECR 2001 page II-00913

Case T-30/99, *Bocchi Food Trade International GmbH v Commission of the European Communities*, ECR 2001 page II-00943

Case T-52/99, *T. Port GmbH & Co. KG v Commission of the European Communities*, ECR 2001 page II-00981

Case C-213/01 P: *T Port GmbH & Co. KG v Commission of the European Communities* OJ C 101, 26/04/2003 p. 7.  
Cases C-93/02, and Case –94/02, *Biret International SA v. Council of the European Union*, ECR 2003

### **Primary and Secondary Legislation**

Draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10<sup>th</sup> July 2003, Submitted to the President of the European Council in Rome – 18 July 2003, (2003/C 169/01), and its Protocol on the Application of the Principles of Subsidiarity and Proportionality, as signed in Rome, on the 29<sup>th</sup> October 2004.

2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [Official Journal L 317, 15.12.2000].  
Council Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization", OJ L 349/71 of 31 December 1994, amended by Council Regulation 356/95, OJ L 41/3 of 23 February 1995.