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**SYMPOSIUM ARTICLE:** The Effect of the WTO in European Court Litigation

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**SUMMARY:**

... I would first like to summarize what WTO (World Trade Organization) dispute settlement looks like for those of you who may not follow the WTO on a day-to-day basis. ... What about implementation of these WTO dispute settlement rulings - notably, what about implementation or respect for these decisions by the European courts (the Court of First Instance or our highest court, the European Court of Justice)? That very question is one of the most hotly debated issues in European Union (EU) law, and it goes to the relationship between EU law and international law generally. ... Another objection was that, by giving direct effect to an international treaty, the Court would upset the balance between the European institutions. ... The Court essentially said that if (and only if) a treaty does not specify what its domestic law effect is supposed to be, then it is for the judiciary to decide. ... In other words, if the EU legislature adopted a measure and that measure was meant to implement a particular GATT rule, or if it referred to a specific GATT provision, then the Court said, "as the legislature acknowledged the GATT, so I will apply it. ... Yet in the case of the WTO, the Court effectively says "no reciprocity, no direct effect." ...

**TEXT:**

[\*443]

I would first like to summarize what WTO (World Trade Organization) dispute settlement looks like for those of you who may not follow the WTO on a day-to-day basis. The WTO dispute settlement system has, I would say, at least four characteristics that are of interest for our purposes today. First of all, it has compulsory jurisdiction. n1 This means that if you are one of the 148 members of the WTO and have a dispute or a disagreement with another country, that other country must go through the dispute settlement process. Second, litigation can proceed through two instances: before ad hoc panels and, on appeal on questions of law only, before the standing Appellate Body. Rulings of these tribunals acquire binding legal force within the WTO, unless there is a consensus amongst the WTO members (including the member having prevailed in litigation) against that, which is very unlikely and has never happened so far. Third, WTO dispute settlement proceeds quickly, at least in comparison to many domestic jurisdictions: panel proceedings should normally only last for about nine months; if the panel's decision is appealed to the WTO Appellate Body, that appeal proceeding should then last no longer than ninety days. Taking some procedural back and forth into account, you should normally have a decision in both instances within two years. Fourth, and finally, if a country does not implement a ruling of a panel or of the WTO Appellate Body, the winning party may then exercise pressure to induce compliance by the losing party by taking countermeasures, notably by introducing retaliatory trade restrictions on imports from the other country. n2 That's WTO dispute settlement for you in a nutshell.

What about implementation of these WTO dispute settlement rulings - notably, what about implementation or respect for these decisions by the European courts (the Court of First Instance or our highest court, the European Court of Justice)? That very question is one of the most hotly debated issues in European Union (EU) law, and it goes to the relationship between EU law and international law generally.

The EU, contrary to the United States, does not have a supremacy clause in its founding treaty. Nor do we have a law

or a provision that says that we are a monistic legal order. The choice for a monist system in the EU is essentially judge-made law. It was developed by the European Court of Justice in a case some thirty years ago, n3 and explained in more detail some twenty years ago. n4 It is interesting to see how the European Court of Justice rejected the concerns of the opposition – of those who said, "look Court, this is not something for you to enter into, and if a choice has to be made it should be for a dualist system. International responsibility is one thing, it's another thing what these international rules and rulings should mean in our own legal order."

[\*444] The Court dealt with at least three of their objections. One objection was that whenever international treaties contain dispute settlement provisions, the Court should really leave the interpretation of those international treaties to their own dispute settlement mechanisms. The Court did not think that this was a very relevant consideration to reject monism. It said that it was its responsibility to decide what these international rules meant in the EU domestic legal order. n5 Another objection was that, by giving direct effect to an international treaty, the Court would upset the balance between the European institutions. The Commission and the Council of Ministers were actually out there in the international arena negotiating and enforcing treaty law, so the Court should allow them to decide when to give domestic law effect to an international rule or not. Otherwise, the Court would influence the European Commission (EC)'s negotiating position. Again, the Court rejected this objection. The Court essentially said that if (and only if) a treaty does not specify what its domestic law effect is supposed to be, then it is for the judiciary to decide. n6 The third objection related to reciprocity. Before giving direct effect to a particular treaty, one should first inquire whether the EC's treaty partners also do so through their domestic courts. If they do not, the EC should not do so either, otherwise there would be a lack of reciprocity. Again, the European Court of Justice rejected that argument. It said that, according to international law, treaties must be performed in good faith, and that courts granting direct effect did not have to be guided by the practice of courts in other jurisdictions. n7

Now imagine a split screen. So far I have described the main jurisprudence of the Court since the 1970s, confirmed in the mid-1980s, and it kind of travels along. But then there appears a subscreen on your television set, which shows the General Agreement on Tariffs and Trade (the GATT). This was a provisional agreement, never ratified by its Contracting Parties – it did not even establish an organization. And that particular international arrangement was also being litigated before the Court. The Court decided very early on (at about the same time that the direct effect of regular international treaties was being put forth), that the GATT should not have direct effect. n8 As a result, you could not challenge an EC measure on the basis of the GATT. The Court cited various reasons in support of its position: the Court notably felt that there were too many escape clauses, too many exceptions to the GATT, and that the dispute settlement mechanism of the GATT was too diplomatic and not rigorous enough. As a result, every case that came before the Court where a party appealed to the GATT was immediately rejected. The Court made no attempt to reconcile this particular case law with its mainstream cases – the main screen – on international law. n9 The GATT seemed to be a rare species that one could ignore in our domestic legal order without being all too concerned about the implications for the status of general international law or our monist philosophy.

The "ghetto lawyers," as GATT lawyers were then sometimes called, obtained one consolation prize. That was in the early 1990s when the Court decided, in a case called [\*445] Nakajima, n10 that it was going to pay attention to the GATT if implementing legislation of the EC referred to the GATT in so many words. This happens to be the case with the EC's antidumping legislation. In other words, if the EU legislature adopted a measure and that measure was meant to implement a particular GATT rule, or if it referred to a specific GATT provision, then the Court said, "as the legislature acknowledged the GATT, so I will apply it." n11 Other than these limited instances, no direct effect was given to the GATT.

Then arrives the WTO in 1994, and the WTO is a different animal than the GATT. Thus, WTO dispute settlement is much more rigorous than the dispute settlement system that existed in the GATT period. Furthermore, as far as substance goes, the WTO tightened up many GATT norms too. So quite a few people wondered whether this meant that the WTO would join the ranks of "regular" international law and would be granted direct effect.

This proposition was fairly soon tested before the European Court in a case called Portugal v. Council. n12 Again, the Court denied that litigants (in this case, even a Member State) could test the validity of EU measures by appealing to WTO rules. The Court seemed to realize that it had to adapt its reasoning somewhat, since the WTO was different than the GATT, yet the Court also harkened back to its GATT case law. First of all, the Court still found the dispute settlement system in the WTO too diplomatic in nature. n13 The second reason given by the Court was that in a preamble – a preamble of a decision by which the EU Council of Ministers had concluded the WTO Agreement – the sentiment was

expressed that none of these agreements should be invoked before European courts. n14 And the third reason, and I think this is the nut of the debate, is that the Court reflected on reciprocity. The Court found that none of the EU's major trading partners gave direct effect to the WTO. n15 This was another reason for the Court to deny direct effect to the WTO.

Now, you just heard me say that twenty years ago, in the Kupferberg case, the Court rejected an appeal to reciprocity. Yet in the case of the WTO, the Court effectively says "no reciprocity, no direct effect." What has happened here? Granted, the Court tries to reconcile this WTO ruling with its prior case law. It says that the WTO is a bit different from the other treaties it had been looking at. These other treaties concerned bilateral treaties in which the EU tried to establish a special relationship with a third country; or they dealt with a multilateral framework like the Lome Convention where the EC in its negotiations with developing countries did not expect to receive reciprocal concessions. But, according to the Court, the WTO is different: its membership comprises a large group of countries with which the EC does not want to establish particularly close relationships, and WTO rules are based on a balance of concessions. n16 Yet even if one accepts these distinctions between particular treaties, one is left with a bigger question: can the reception of international law in the same domestic legal order be different such that some treaties receive monist treatment while others are received in dualist mode?

This case law obviously has given rise to quite a few reflections. What is the Court doing here? Why is it creating a "status aparte" for the WTO, as among other international agreements? There are, in fact, several explanations. One of the most intriguing ones has [\*446] been given by an Italian scholar, now a judge sitting on the European Court of First Instance, Paolo Mengozzi, who asked us to imagine what would have happened if the European courts had given direct effect to the WTO. n17 That would have meant that the ultimate say over much of the EU's activity, notably over economic issues, would have been transferred to another court and to another jurisdiction, which is to say to the WTO panels and ultimately the Appellate Body. Maybe that is what explains the reluctance of the European Court of Justice in giving direct effect to the WTO and to WTO dispute settlement rulings.

Other observers have gone so far as to say that the European Court should broaden its WTO case law to other treaties, to other areas of public international law. They believe that the Court should reverse the Kupferberg doctrine. n18 The Court should take into account the fact that the role of the EU in the international community has changed. The EU is no longer the ugly duckling it once was. Remember, in the early 1980s at the time Kupferberg was decided, the EEC (European Economic Community), as it was then still called, suffered from "Eurosclerosis." There was genuine concern that this European project might fail. The Court's reliance on international law might be seen as a reinforcement of the EEC's relatively weak position. Now the EU has become a forceful player and has learned from other players - notably, the United States - that if you are forceful, maybe you do not want to surrender yourself to international law too easily. Forceful players perhaps have more of an interest to be in a dualist system where their legislature must clearly decide whether or not to implement international rules and rulings and give them domestic law effect. From this perspective, the Court's WTO jurisprudence seems a beacon for the EU's treatment of international law generally.

Personally, I do not see the European Court of Justice reversing itself so easily on international law generally, for a number of reasons. It would be a major about face for the Court. The Court has had instances where it has reversed itself on particular issues. But for the Court to treat international law so differently that it would effectively convert the EU to a dualist system instead of a monist system of law, in my view, goes a few bridges too far. There is not only the force of often repeated precedent and the legitimizing role of consistency that pleads against a major shift in the Court's case law. There is also a more basic or fundamental consideration. The EU itself is created by treaties. It was not created by force or through a unilateral exercise of power. Having put so much faith in treaties to create our European institutions, it would be counterintuitive for us to be denying this DNA in our (continental) European genes by reducing the impact of international law in our domestic legal order. My prediction today, therefore, would be that the WTO jurisprudence of the European Court will probably remain a special case. Whatever the Court decides to do with WTO law will not say much about the Court's treatment of other international law.

Having said that, I think we are at a crossroads where the Court's WTO case law is concerned. This case law could go in one of three directions, at least where claims of private parties are concerned. n19 First of all, the Court could maintain the status quo and recognize only limited instances in which private individuals can successfully invoke WTO [\*447] law, such as the Nakajima exception discussed above. The second option would be for the Court to eliminate all such exceptions, like Nakajima, and hold once and for all that the WTO can never serve as a benchmark to test the legality of EU measures. In other words, there should be no more instances where private individuals or Member States can appeal to WTO law in litigation before the European courts. This position is notably advocated by those who are involved in the

WTO negotiating process and who want to make sure that the EU can get its points across effectively. They are concerned that if the courts continue to give domestic law effect to the WTO, the EU loses power in the international negotiations with its trading partners. The European courts may come up with solutions for issues that trading partners have with the EU, which go beyond what these countries would have been able to obtain from the EU through the WTO process otherwise, unless they had been prepared to give additional concessions to the EU. After all, the EU's trading partners, and most notably our biggest, most powerful trading partner, the United States, does not recognize such domestic law effect either. The third option the Court has is to actually reinforce the position of those who want to be able to invoke WTO rules and rulings before European courts. They emphasize that the WTO is not only concerned with state-to-state relations. The success of the WTO in increasing the world's welfare depends to a considerable extent on private initiative. Conferring domestic law effect on WTO rules or rulings encourages private entities to rely on, and invest in, WTO principles. This does not necessarily mean giving direct effect to all WTO rules – that would probably be too many bridges, too far – but it could mean, for instance, giving direct effect to particular WTO dispute settlement rulings in areas outside of trade remedies, thereby broadening the Nakajima exception.

In 2003, the European Court of Justice rendered a judgment suggesting it was considering the third option. In *Biret*,<sup>n20</sup> the Court had to deal on appeal with a damages claim from a French importer of meat who had gone bankrupt in the mid-1990s. The case went before the Court of First Instance and the importer said, "I've gone bankrupt because of the EU ban on hormone treated beef. That ban was declared WTO-illegal. n21 Accordingly, the EC should compensate me for my damages." The Court of First Instance summarily rejected that claim for damages by reiterating the European Court's case law denying direct effect to WTO law. n22 The French importer, who apparently still had funds for lawyers even though it was bankrupt, then went on appeal to the European Court of Justice. n23 This higher European Court faulted the Court of First Instance for having dealt too summarily with *Biret*'s WTO-based claim. According to the Court, the lower court could not have confined itself to saying that because WTO rules have no direct effect, that rulings of WTO tribunals that have applied these rules in specific instances should not have direct effect either. n24 So, did *Biret* receive money following the Court's criticisms of the lower court and its omission of reciprocity concerns? No. The Court considered that *Biret* had gone bankrupt before the WTO Appellate Body had invalidated the hormones ban and also before the expiry of the period granted to the EU by the WTO to implement this Appellate Body ruling. n25

[\*448] Although the French importer ultimately received no benefit from its appeal, the Court's strong implication was that rulings of WTO tribunals should be taken more seriously. It seemed especially significant that no mention was made in the Court's judgment of a lack of reciprocity in other countries – although had the Court looked at the United States, for instance, it would probably have found that it would not make a whit of difference to a U.S. court whether it was asked to apply a WTO rule or whether it was asked to apply one of the WTO dispute settlement rulings that had gone against the United States. A U.S. court would be expected to say, "I can't do anything with that. Lack of direct effect is part and parcel of the Uruguay Round Agreements Act." n26

However, two very recent judgments of the Court of First Instance and of the European Court of Justice in early 2005 indicate a different approach, which is closer to the first option. In these judgments, both Courts considered private challenges of the EU's 1999 Bananas regime n27 following the WTO dispute settlement rulings that this regime was WTO-inconsistent, also invoking the Nakajima exception. Both Courts rejected these private claims, which included a damages claim. Significantly, the European Court of Justice relied again on the lack of reciprocity to reject the private challenge. n28 In addition, the European Court of Justice and the Court of First Instance once again opined that the WTO's dispute settlement mechanism accords considerable importance to negotiation between the parties, n29 even after the reasonable period of time to implement a dispute settlement ruling has lapsed. n30

Option one, two, or three? The European courts' case law on the WTO will likely remain a work in progress for some time to come.

#### FOOTNOTES:

n1. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round vol. 31, 33 *I.L.M.* 1226 (1994), [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#dispute](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#dispute) (last visited Feb. 17, 2005).

n2. Id. art. 22(1).

n3. Case 181/73, Haegeman v. Belgium, 1974 E.C.R. 449.

n4. Case 104/81, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., 1982 E.C.R. 3641.

n5. Id. paras. 19–20.

n6. Id. para. 17.

n7. Id. para. 18.

n8. Joined Cases 21, 22, 23 & 24/72, Int'l Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 E.C.R.1219.

n9. In particular, the Court did not inquire whether other international agreements, to which it had granted direct effect, contained more rigorous and less diplomatic dispute settlement provisions, and fewer safeguard clauses, than the GATT. In this connection, it is of interest, for instance, that Advocate-General Rozes opined in the Kupferberg case that the bilateral treaty at issue between then non-Member State Portugal and the EC was as "flexible" as the GATT and should not be given direct effect. The Court did not follow this opinion and gave direct effect to the treaty with Portugal without however attempting to distinguish this treaty from the GATT. See Hauptzollamt Mainz, 1982 E.C.R. at 3674.

n10. Case C-69/89, Nakajima All Precision Co. v. Council, 1991 E.C.R. I-2069.

n11. Id. paras. 29–32.

n12. Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395.

n13. Id. paras. 36–40.

n14. Id. para. 48.

n15. Id. paras. 43-45.

n16. Id. para. 45.

n17. Paolo Mengozzi, *Private International Law and the WTO Law*, 292 *Recueil des Cours* 253, 316-18 (2001).

n18. See generally my coauthor P.J. Kuijper in M.C.E.J. Bronckers & P.J. Kuijper, *De WTO voor de Europese Rechter*, 52 *Sociaal-Economische Wetgeving* 450 (2004), notably the text at note 32.

n19. Elsewhere I have argued that claims of EU Member States based on WTO law ought to be treated differently from WTO-based claims of private individuals and that the European courts should entertain such Member State claims because of the current constitutional makeup of the EU. See, e.g., Marco Bronckers, *Editorial: La Jurisprudence des Juridictions Communautaires Relatives a l'OMC Demande Reparation: Plaidoyer pour les Droits des Etats Membres*, 37 *Cahiers du Droit Europeen* 3-14 (No. 1-2, 2001).

n20. Case C-94/02 P, *Biret Int'l SA v. Council*, 2003 E.C.R. I-10497.

n21. WTO Appellate Body Report on *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, D.S.R. 1998:I, at 135, 231 (Feb. 13, 1998), <http://www.wto.org>; WTO Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, D.S.R. 1998:III, at 699, 1002 (Feb. 13, 1998), <http://www.wto.org>.

n22. See Case T-174/00, *Biret Int'l SA v. Council*, 2002 E.C.R. II-17, paras. 61-69.

n23. See *Biret Int'l*, 2003 E.C.R. at I-10497.

n24. Id. paras. 56-59.

n25. Id. para. 63. Note that rulings of WTO panels and the Appellate Body are still held to only have prospective effect as a matter of WTO law.

n26. *19 U.S.C. 3511* (1999).

n27. Council Regulation 1637/98 of 20 July 1998 Amending Regulation (EEC) No 404/93 on the Common Organisation of the Market in Bananas, 1998 O.J. (L 210) 28; Commission Regulation 2362/98 Laying Down Detailed Rules for the Implementation of Council Regulation 404/93 Regarding Imports of Bananas into the

Community, 1998 O.J. (L 293) 32.

n28. C-377/02, *Van Parys v. Belgisch Interventie-en Restitutiebureau*, para. 53 (E.C.J. Mar. 1, 2005), at <http://europa.eu.int>.

n29. *Id.* para. 42.

n30. T-19/01, *Chiquita Brands Int'l, Inc. v. Commission*, paras. 161-64 (E.C.J. Feb. 3 2005), at <http://europa.eu.int>.