

## **IMPLEMENTATION OF WTO RULINGS : THE ROLE OF COURTS AND LEGISLATURES IN THE US AND OTHER JURISDICTIONS (EC, CHINA)**

Prof. Dr. Ernst-Ulrich Petersmann\*

### I. IMPLEMENTATION OF WTO RULINGS: NO MAJOR PROBLEM?

#### 1. The WTO Dispute Settlement System faces no "compliance crisis"

During the first eleven years of the WTO dispute settlement system, all WTO panel and Appellate Body reports were adopted by the Dispute Settlement Body (DSB). WTO Members appear to have complied with more than 80 per cent of all WTO dispute settlement rulings on the more than 150 panel and Appellate Body reports, as well as with most arbitration awards pursuant to Articles 21, 22 and 25 of the Dispute Settlement Understanding (DSU). Pursuant to Article 21.6 DSU, the DSB keeps the implementation of adopted rulings and recommendations under surveillance, and WTO Members provide the DSB with "status reports" on their progress in the implementation of dispute settlement rulings and recommendations. Notwithstanding the inadequate "dispute prevention functions" of the DSU (e.g. vis-à-vis temporary, illegal safeguard measures) and the occasionally delayed compliance or non-compliance with WTO dispute settlement rulings (notably if changes in domestic *legislation* were required, or in case of highly politicized "wrong cases"), the WTO's dispute settlement and compliance record appears to be better than that of other worldwide dispute settlement systems (e.g. in UN conventions).

#### 2. There are few Doha Round Proposals on the Implementation of WTO Rulings

In the Doha Round negotiations, there appear to be only few proposals by WTO Members on further improving the implementation of WTO dispute settlement rulings. The negotiations on improvements and clarifications of the DSU currently focus on a limited number of proposed amendments to the DSU (concerning post-retaliation, sequencing, remand, third party rights, open meetings, possible time-saving, preventive measures) and proposed actions by the DSB or other WTO bodies (regarding open meetings, panel composition, additional guidance to WTO adjudicative bodies). None of these proposals seems to address specifically the implementation of WTO rulings. Earlier proposals in the DSB Special Sessions for strengthening the legal remedies (e.g. LDC and African Group proposals for amending Article 21.8 DSU so as to provide for DSB recommendations of monetary compensation of injury suffered by less-developed WTO

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\* Joint chair professor of international and European Law at the European University Institute and its Robert Schuman Centre for Advanced Studies in Florence, Italy. Former professor at the University of Geneva and its Graduate Institute of International Studies, and legal adviser/consultant in GATT and the WTO (1981-2005). Former secretary, member or chairman of numerous GATT and WTO dispute settlement panels. Chairman of the International Trade Law Committee of the International Law Association. The author wishes to thank the EUI doctoral candidate Mario Mendez for helpful comments, criticism and research assistance.

Members), and for clarifying the 'compliance panel' proceedings as well as the DSU provisions on compensation and suspension of concessions, remain on the negotiating table. In the Negotiating Group on Rules, proposals have been made for amending the dispute settlement provisions in the Antidumping and Subsidy Agreements so as to provide for the suspension of antidumping and countervailing measures immediately after having been ruled by the DSB to be WTO-inconsistent, as well as for the refunding of excess anti-dumping and countervailing duties collected pursuant to WTO-inconsistent measure.

### 3. Legal and Judicial Remedies against Violations of WTO Rules Remain Inadequate

Do the absence of a real "compliance crisis"<sup>1</sup>, the only few proposals by WTO Members on further strengthening the implementation of WTO rulings, and the lack of Doha Round proposals specifically addressing the implementation of WTO rulings by domestic legislatures and courts imply that the subject of this conference session 7 is of no practical importance? The answer to this question must be negative for at least two reasons:

- (1) As long as WTO Members do not more clearly specify the available legal remedies in WTO dispute settlement proceedings, WTO jurisprudence on WTO obligations to "withdraw" illegal measures risks to remain controversial (e.g. if WTO dispute settlement bodies suggest repayment of illegal subsidies, anti-dumping or countervailing duties).<sup>2</sup> Similarly, the WTO jurisprudence on "suspension of concessions" and other countermeasures risks to remain contested as long as WTO Members fail to specify to what extent the purpose of such measures is not only to re-balance reciprocal rights and obligations but also to "induce compliance."<sup>3</sup> If WTO Members cannot agree on the above-mentioned Doha Round proposals, some of these controversial legal questions (such as the availability of general international law remedies in WTO dispute settlement proceedings) will have to be clarified by WTO jurisprudence and by public discourse.
- (2) The only two EC Court judgments on disputes among EC member states since 1958 illustrate that many intergovernmental trade disputes can be avoided by leaving the interpretation and application of international trade rules to domestic courts. Many WTO rules and dispute settlement rulings could be implemented more effectively by stronger *domestic legal and judicial remedies* against violations of WTO rules, for instance if domestic legal remedies were made available not only for *export* industries (e.g. under Section 301 of the US Trade Act and the EC's Trade Barriers Regulation) against violations of WTO rules by *foreign* governments, but also for domestic importers and consumers against violations of WTO rules by their own government (e.g. in case of manifest

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<sup>1</sup> Cf. J.Magnus, Compliance with WTO dispute settlement decisions: Is there a crisis? in: R.Yerxa/B.Wilson (eds), Key Issues in WTO Dispute Settlement. The First Ten Years, 2005, 242.

<sup>2</sup> On these legal controversies see, e.g., D.Palmer/P.Mavroidis, Dispute Settlement in the WTO. Practice and Procedure, 2<sup>nd</sup> ed. 2004, at 295 ff. In a pending dispute before the EC Court of Justice (Case 351/2004, *IKEA*), the EC Court is requested to give a preliminary ruling on whether antidumping duties collected in violation of WTO rules, as confirmed by WTO jurisprudence (in the *EC Bed Linen* case), have to be reimbursed.

<sup>3</sup> Cf. Palmer/Mavroidis (note 2), at 300 ff; J.Pauwelyn, Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law, 2003, at 219 ff.

disregard for procedural WTO requirements for customs valuation, antidumping calculations, risk assessments and approval procedures for sanitary measures).<sup>4</sup>

WTO dispute settlement rulings present themselves as quasi-judicial responses to requests of WTO Members for interpretations of their *existing* WTO rights and obligations. Yet, in international as well as in national jurisdictions, adjudicators inevitably choose among contested meanings of the agreed rules. Are WTO dispute settlement rulings and their domestic implementation politically legitimate? This paper argues:

- WTO dispute settlement rulings tend to promote not only important economic values (e.g. consumer welfare, non-discriminatory conditions of competition), but also legal and political values (e.g. freedom, rule of law, transparent policymaking, quasi-judicial settlement of disputes) that justify additional legal and judicial remedies and incentives for implementation of WTO rulings (section II below).
- As the WTO requirements (e.g. in Article XVI.4 WTO Agreement) to ensure the conformity of domestic laws, regulations and administrative procedures with WTO obligations must respect the "democratic margin of appreciation" of domestic legislatures, proposals for "fast-track legislation" for the implementation of WTO Rulings are politically unrealistic (section III).
- Enforcement of some WTO rules and of certain WTO dispute settlement rulings could be de-politicized and rendered more effective by enlisting domestic courts and individuals as self-interested agencies for the decentralized enforcement of *administrative* implementing measures (section IV).

## II. WTO DISPUTE SETTLEMENT RULINGS: LEGAL EFFECTS, LEGITIMACY AND CONSTITUTIONAL FUNCTIONS

### 4. Primary and Secondary WTO Obligations to Comply with WTO Rules

In addition to the "primary" international legal obligations of each WTO Member to implement its WTO obligations in good faith and "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" (Article XVI.4 WTO Agreement), the adoption of WTO panel and Appellate Body findings by the DSB entails additional "secondary" obligations

- (1) to "secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements" (Article 3 DSU), either "immediately" or within "a reasonable period of time" (cf Article 21.3 DSU) depending, *inter alia*, on whether compliance with WTO law requires legislative, administrative or judicial measures;<sup>5</sup>
- (2) if WTO treaty benefits continue to be nullified after the end of the implementation period, to accept either "a mutually satisfactory adjustment" (Article 26.1 DSU), including voluntary compensation as a "temporary measure" pending "full implementation of a recommendation to bring a measure into

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<sup>4</sup> For a detailed explanation of this argument see E.U.Petersmann, Prevention and Settlement of Transatlantic Economic Disputes, in: E.U.Petersmann/M.Pollack (eds), Transatlantic Economic Disputes: The EU, the US and the WTO, 2003, chapter 1.

<sup>5</sup> On the misunderstandings by some lawyers and trade politicians of the international law and WTO obligations to terminate illegal measures see J.H.Jackson, International Law Status of WTO Dispute Settlement Reports : Obligations to Comply or Options to 'Buy Out', 98 AJIL (2004), 109 ff.

conformity with the covered agreements” (Article 22.1 DSU), or “suspension of concessions or other obligations” as a remedy aimed at rebalancing reciprocal WTO rights and obligations and inducing compliance with WTO law.<sup>6</sup>

Lawyers and international judges legitimize international legal obligations in terms of consent by sovereign states, rule of law, judicial procedures and the customary methods of treaty interpretation for clarifying the words and objective meaning of agreed treaty rules. The Appellate Body’s focus on textual interpretation and on the formal methods of treaty interpretation reflects this judicial concern for “legal legitimacy.” Governments, civil society and academics must go beyond this “legal formalism”<sup>7</sup> and examine the legitimacy of WTO rules and WTO dispute settlement rulings more comprehensively.

##### 5. Beyond Legal Formalism: Democratic Legitimacy and Welfare-Enhancing Effects of WTO Dispute Settlement Rulings

WTO dispute settlement proceedings should be open to the public, and WTO “trade jurisprudence” requires stronger democratic “checks and balances” protecting general citizen interests (e.g. consumer welfare is nowhere mentioned in WTO rules). Yet, the criticism by local politicians of international adjudication as “undemocratic” appears unwarranted if, as in the case of the WTO, the applicable international rules and dispute settlement procedures have been ratified by domestic parliaments and protect individual freedom and non-discriminatory conditions of competition far beyond national laws. The WTO remains the only worldwide rule of law system with compulsory jurisdiction accepted and regularly used by almost all major powers. Its unique dispute settlement system pursues limited, welfare-enhancing functions.<sup>8</sup> As WTO dispute settlement rulings are the result of quasi-judicial proceedings subject to legal and political safeguards that go beyond those in other worldwide dispute settlement proceedings (such as WTO appellate review, extensive third party rights, admissibility of *amicus curiae* submissions), WTO dispute settlement rulings can assert a relatively broad degree of legal and democratic legitimacy – notwithstanding the numerous imperfections of WTO dispute settlement proceedings when compared with *domestic* - rather than with other *intergovernmental* - dispute settlement proceedings. It is also important to recall the non-economic “transformation functions” of the WTO guarantees of freedom, non-discriminatory competition and rule of law: Just as the GATT membership of the EC has helped to transform the EC Treaty into the most effective peace treaty in Europe, WTO rules (such as the WTO Accession Protocol for China and its legal guarantees for private “rights to trade” and judicial review by independent tribunals) are of strategic importance

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<sup>6</sup> On the voluntary nature of trade compensation under the WTO, and the prevailing view that DSU rules and practices exclude general international law obligations of reparation of injury caused by violations of WTO rules (e.g. financial compensation), see : M.Bronckers/N. van den Broek, Financial Compensation in the WTO. Improving the Remedies of WTO Dispute Settlement, 8 JIEL (2005), 101 ff.

<sup>7</sup> S.Piccio, The WTO’s Appellate Body : Legal Formalism as a Legitimation of Global Governance, in : Governance : An International Journal of Policy, Administration and Institutions, 18 (2005), 477 ff.

<sup>8</sup> For example, the DSU only applies to legal claims and disputes regarding the interpretation and application of WTO agreements (cf. Article 1 DSU). It “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law” (Article 3.2 DSU). WTO dispute settlement panels, the Appellate Body and WTO arbitrators apply *existing* WTO rights and obligations to concrete disputes and “cannot add to or diminish the rights and obligations provided in the covered agreements” (Articles 3.2, 19.2 DSU).

for transforming formerly closed countries into open societies based on respect for rule of law and non-discriminatory competition.

6. WTO Rules Respect National Sovereignty to Give Priority to Non-Economic Interests

Apart from the “input-legitimacy” of WTO dispute settlement rulings deriving from the intergovernmental and parliamentary approval of WTO law and the quasi-judicial nature of WTO dispute settlement procedures, WTO rules and WTO dispute settlement rulings can also assert “output-legitimacy” from their promotion of individual liberty (e.g. of producers, investors, traders and consumers), non-discriminatory conditions of competition, international rule of law and welfare-increasing trade and competition. WTO rules protect the sovereign rights of each WTO Member to correct “market failures” (e.g. by non-discriminatory competition, environmental and social rules) and to give priority to non-economic “public goods” (e.g. by national measures pursuant to Articles III, XV-XXIV GATT, V-X GATS, 6-8, 30-32 TRIPS Agreement). Unilateral violations of WTO obligations can therefore be presumed to lack legal and economic legitimacy (e.g. in terms of reducing consumer welfare, violating self-imposed international legal obligations, discriminatory departures from non-discriminatory conditions of competition). Numerous DSU provisions reflect this rational self-interest of WTO Members “in providing security and predictability to the multilateral trading system” and in securing “the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements” (Article 3 DSU).

III. WTO LAW AND DOMESTIC LAW: THE ROLE OF LEGISLATURES, COURTS AND ADMINISTRATIONS

7. WTO Law Commits all Domestic Government Bodies

The international obligations of WTO Members apply to all their relevant government bodies and may require legislative, administrative and judicial implementing measures at national as well as local levels. The legal obligation of each WTO Member to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements” (Article XVI.4 WTO Agreement) respects the sovereign right to decide whether to incorporate WTO law directly into the domestic legal system (“monism”) or to implement WTO obligations only indirectly through additional domestic laws and regulations (“dualism”). Likewise, the WTO obligations to make available judicial remedies inside WTO Members only exceptionally prescribe (e.g. in Article XX of WTO Agreement on Government Procurement) that domestic courts must apply WTO rules as applicable law. The domestic regulation of the interrelationships between WTO rules and domestic trade rules differs considerably among WTO Members, thereby reducing legal “security and predictability” of WTO rules in the multilateral trading system. Just as WTO rules and the DSU promote legal security and reduce transaction costs at the international level, so could additional WTO rules on domestic implementation of WTO obligations enhance protection of liberty, non-discriminatory conditions of competition and rule of law inside WTO Members.

8. Freedom of WTO Members to Choose their Means of Domestic Implementation

Proposals for further strengthening the domestic implementation of WTO dispute settlement rulings are often resisted by governments, for example on the ground that

- (1) WTO dispute settlement rulings recognize “the well-established principle that ‘choosing the means of implementation is, and should be, the prerogative of the implementing Member’”;<sup>9</sup>
- (2) in many countries (including countries with "monist" legal systems like the US), WTO rules have no "direct effect", and national legislatures have constitutional powers to enact legislation inconsistent with international obligations;
- (3) respect for constitutional democracy requires leaving the elaboration of domestic implementing legislation to domestic legislatures.

Of course, the WTO must respect the fact that attitudes of national parliaments *vis-à-vis* international law, and the role of national legislatures in the domestic implementation of WTO rules, legitimately differ among WTO Members. For example, notwithstanding US leadership in the WTO, the US penchant for unilateralism and exceptionalism in UN bodies reflects the widespread view inside the US that "the internationalism and multilateralism we promoted were for the rest of the world, not for us".<sup>10</sup> Whereas many other GATT/WTO Members successfully used GATT/WTO law as an instrument for reforming *domestic* laws (e.g. for creating a customs union among EC member states, introducing guarantees of rule of law, judicial review and private "rights to trade" in China), the US government and US Congress tend to reject such use of international law inside the US as being inconsistent with the American ideal of democratic national constitutionalism.<sup>11</sup>

#### 9. "Fast-Track Legislation" for Implementing WTO Rulings Appears Unwarranted

In the US, the intergovernmental negotiation of trade agreements and their parliamentary ratification and implementing legislation are governed by Congressional "fast track legislation" based on US Secretary of State Cordell Hull's "constitutional insight" that granting limited "trade promotion authority" to trade negotiators, and limiting Congressional trade policy powers (e.g. to repeat the "logrolling dynamics" of the protectionist Smoot-Hawley tariff legislation of 1930), can promote welfare-increasing trade liberalization and non-discriminatory trade legislation in the national interest.<sup>12</sup> The

<sup>9</sup> US-Offset Act/Byrd Amendment Arbitration (WT/DS217/14, WT/DS234/22, para.52).

<sup>10</sup> J.Rubinfeld, *The Two World Orders*, in: G.Nolte (ed), *European and US Constitutionalism*, Council of Europe 2005, at 233, 235.

<sup>11</sup> On American 'constitutional nationalism' and European 'multilevel constitutionalism' see E.U.Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in: C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2006, chapter 1; J.Rifkin, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream*, 2004. Most Europeans agree with the US view that popular sovereignty inside democratic nation states remains a precondition for legitimate transnational governance (cf. J.A.Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States*, 2005). The different constitutional conceptions relate to the European willingness to accept more far-reaching constitutional and international legal restraints on national foreign policy discretion in order to promote "international public goods" (e.g. as defined by EU and WTO law) rather than purely national interests (as advocated by "realist" and "neo-conservative" US defenders of hegemonic national foreign policies). The EC's "Area of Freedom, Justice and Security" (Articles 64 ff EC Treaty) illustrates the successful EC's experience with transforming economic liberalization (e.g. of free movement of workers and other persons inside the EC) into a common security policy based on "civilian power" rather than military power. European constitutionalism refutes the claim by "realists" that rule of law and "democratic peace" are possible only inside nation states.

<sup>12</sup> Cf. K.W.Dam, *Cordell Hull, the Reciprocal Trade Agreements Act and the WTO*, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance*, 2005, chapter 3.

idea of a reciprocal WTO commitment for the domestic implementation of WTO dispute settlement rulings by "fast-track legislation" appears, however, to be inconsistent with the need to respect the democratic autonomy of national parliaments. While WTO dispute settlement rulings requiring termination of discriminatory *administrative* trade restrictions are regularly implemented inside the US and other WTO Members, the implementation of WTO rulings requiring domestic *legislation* requires parliamentary majority support that may change over time and may, inevitably, remain difficult to secure in democracies.

The European Parliament's proposals for setting-up a WTO parliamentary body for more effective parliamentary control of WTO activities could promote better first-hand information of members of parliaments and reduce the "information asymmetries" and "democratic distrust" *vis-à-vis* intergovernmental rule-making in worldwide institutions far away from domestic citizens and parliamentary constituencies.<sup>13</sup> Yet, US Congressmen remain reluctant to cooperate in inter-parliamentary meetings abroad which risk being criticized by local political constituencies as lacking democratic legitimacy, undermining the trade negotiating authority of the US government, and wasting tax payers' money.<sup>14</sup> In the Doha Round negotiations, WTO Members have not submitted proposals for additional WTO rules promoting the implementation of WTO dispute settlement rulings by domestic parliamentary legislation. Occasional difficulties in mustering parliamentary support for domestic legislation implementing WTO dispute settlement rulings are the inevitable costs of respect for democratic decision-making.

#### IV. PREVENTING, DECENTRALIZING AND DEPOLITICIZING WTO DISPUTES BY USING DOMESTIC COURTS AND CITIZENS FOR ENFORCING WTO RULES

##### 10. WTO Disputes over Private Rights should primarily be settled in Domestic Courts

Many WTO disputes arise only because WTO Members (including the US and the EU) prevent their domestic courts from applying WTO rules. The unofficial names of many WTO disputes (such as "Kodak/Fuji", "Havana Club") reflect the fact that many intergovernmental WTO disputes are initiated by private complainants (e.g. invoking Section 301 of the US Trade Act or the corresponding EC Trade Barriers Regulation) in order to protect *private rights* or other private interests (e.g. of service suppliers, investors, government procurement suppliers, holders of intellectual property rights).<sup>15</sup> From the point of view of the economic theory of optimal intervention, WTO dispute settlement proceedings at *intergovernmental* levels are often sub-optimal, inefficient methods for the settlement of "secondary disputes" concerning primarily *private rights, interests* or *obligations* (e.g. to pay customs duties).<sup>16</sup> Such WTO disputes could often be

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<sup>13</sup> See the contribution by the Member of the European Parliament E. Mann, A Parliamentary Dimension to the WTO: More than Just a Vision? in: Petersmann (note 8 above), chapter 21.

<sup>14</sup> See the contributions by former US Congressmen D.E.Skaggs and J.Bacchus to Petersmann (note 8), chapters 19 and 22.

<sup>15</sup> Whereas the WTO Protocol on the accession of China (WT/L/432) and the domestic laws of some WTO Members with civil-law traditions (like the EC) guarantee "private rights to trade", including "rights to import and export goods" (WT/L/432, Part I.5.1), WTO Members with common law traditions (like the US) protect freedom of trade more through objective guarantees than through individual rights.

<sup>16</sup> For a practical illustration of this argument see the case study of the "Havana Club" dispute in the WTO, in which two wealthy French and US companies succeeded in transforming their private dispute over private trade mark rights into an intergovernmental dispute between the EU and the US, entailing threats of transatlantic trade war, cf. F.Abbott/T.Cottier, in: Petersmann (note 2), chapter 16.

prevented if *domestic courts* were offering effective private remedies against violations of WTO rules (including reparation of injury).<sup>17</sup> Reciprocal WTO commitments to decentralize and depoliticize certain trade disputes over private rights and obligations - by enlisting domestic courts and the vigilance of self-interested citizens to interpret and apply justiciable WTO rules in domestic legal systems where traders rely on these rules - would reduce transaction costs, enhance rule of law and promote “democratic ownership” of world trade law. As long as the EU and the US cling to their mercantilist power politics of permitting only their *export* industries to petition WTO dispute settlement proceedings against *foreign* governments, without allowing their domestic industries to challenge the same WTO-inconsistent domestic practices in domestic courts<sup>18</sup>, the proposed decentralization and depoliticization of such WTO disputes appear to be politically feasible only through reciprocal WTO commitments

- (1) requiring domestic courts to *interpret* domestic trade rules (e.g. on customs valuation, antidumping, intellectual property rights) in conformity with the WTO obligations of the country concerned;<sup>19</sup> and
- (2) empowering domestic courts to *apply* specifically agreed, justiciable WTO rules (as already provided for in Article XX of the WTO Agreement on Government Procurement) at the request of private plaintiffs vis-à-vis *administrative* trade restrictions inconsistent with WTO law.

Just as self-interested citizens and their private access to domestic courts are recognized as the most important guardians of rule of law inside constitutional democracies and also in European integration law, so should rational, democratic governments leave the settlement of international trade disputes over private rights/obligations primarily to their domestic courts, and resort to intergovernmental WTO procedures for the settlement of private disputes only as subsidiary means if WTO Members failed to grant effective judicial review<sup>20</sup>, or if national courts were to ignore or misinterpret WTO rules. The

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<sup>17</sup> For a detailed explanation of this argument see Petersmann (note 2), at 41 ff.

<sup>18</sup> At the request of the political EC institutions (whose legal advisers claim that “it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body”, and “that it is rarely or never possible to speak of a sufficiently serious breach of WTO law” by the political EC institutions justifying the EC’s non-contractual liability for damages pursuant to Article 288 EC Treaty, cf. P.J.Kuiper, *WTO Law in the European Court of Justice*, 42 *Common Market Law Review* (2005), 1313, at 1334), the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC’s GATT and WTO obligations.

<sup>19</sup> Even though this principle of WTO-consistent interpretation is recognized in many jurisdictions (e.g. pursuant to the “Charming Betsy doctrine” in the US), it is only rarely applied by domestic courts in many WTO Members, cf. J.A.Restani/I.Bloom, *Interpreting International Trade Statutes: Is The Charming Betsy Sinking?*, in: 24 *Fordham Int’l L.J.* 1533. The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of the political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g. in Case 112/80, *Dürbeck*, ECR 1981, 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information of the Court).

<sup>20</sup> See, for example, the WTO obligations regarding “judicial review” in Section I.2 (D) of China’s Protocol on Accession to the WTO, WT/L/432, at 4: “China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the

proposed reciprocal WTO commitments could be of crucial importance for promoting rule of law and judicial protection of WTO rules in the large number of less-developed WTO countries (like China) without effective rule-of-law traditions. Also in free trade areas and customs unions like the EC which has incorporated WTO law as an “integral part of the Community legal system” in order to secure compliance by all national and EC organs with their WTO obligations (cf. Article 300:7 EC Treaty), domestic courts offer the only judicial remedy for resolving the ever larger number of complaints inside the EC over national and EC violations of WTO rules (cf. Article 292 EC which prevents EC member states from submitting such disputes to the WTO).<sup>21</sup> The EC Court recognizes the “direct applicability” of precise and unconditional international law obligations of the EC for almost all areas of international law and most international agreements except WTO law, where the political and judicial EC bodies emulate the dualist approach of the “non-self executing” provisions in the US Uruguay Round Agreement Act of 1994 and deny “direct applicability” of WTO rules on political grounds.<sup>22</sup> Just as the WTO obligations of the US are judicially enforceable only at the request of the federal government vis-à-vis state actions, so are the EC’s WTO obligations judicially enforceable inside the EC only against member states, but not against the EC institutions.<sup>23</sup> Similarly, the EC Court emphasizes the legal obligation of national courts to interpret EC law in conformity with the WTO-obligations of the EC<sup>24</sup>, but often disregards relevant WTO obligations in its own ECJ jurisprudence. Such double standards and “judicial protectionism” are likely to serve as an unfortunate model in WTO countries with less-developed judicial systems (like China) and to weaken their explicit WTO commitments to protect “private rights to trade” through effective judicial safeguards.<sup>25</sup>

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TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.”

<sup>21</sup> The legal situation is different in NAFTA which has incorporated several WTO provisions and offers member states a choice between NAFTA and WTO dispute settlement proceedings.

<sup>22</sup> Cf. e.g. Case C-245/02, *Anheuser-Busch Inc. v B.Budvar*, Judgment of 16 November 2004 (nir), para 54: “The Court has already held that, having regard to their nature and structure, the provisions of the TRIPs Agreement do not have direct effect. Those provisions are not, in principle, among the rules in the light of which the Court is to review the legality of measures of the Community institutions under the first paragraph of Article 230 EC and are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.” The exceptional judicial recognition of “direct applicability” of WTO rules pursuant to the EC Court’s “Nakajima” and “Fediol” exceptions has hardly ever been applied by the EC Court. The EC Court’s arguments against “direct applicability” rely on obvious misinterpretations of WTO rules (cf. Case T-69/00, *FIAMM*, December 2005: “applicants are wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO Member to comply, within a specified period, with the recommendations and rulings of the WTO bodies”) as well as on political arguments (like lack of international reciprocity, need to protect the “scope of manoeuvre” of the political EC bodies) that had been rejected as legally irrelevant by the EC Court in its *Kupferberg* judgment (Case 104/81, ECR 1982, 3659). Unsurprisingly, the legal advocates of the political EC institutions now criticize the ‘Kupferberg-reasoning’ as “richly naïve” and request the Court to respect the political discretion of EC bodies to violate WTO rules (Kuijper, note 18, at 1320-1323), without regard to the EC’s constitutional commitment to “strict observance of international law” (Articles 300:7 EC, I-3 2004 Treaty Establishing a Constitution for Europe).

<sup>23</sup> For a criticism of the pertinent case-law of the EC Court by various EC Advocates-General and academics see: E.U.Petersmann, On Reinforcing WTO Rules in Domestic Laws, in: J.J.Barcelo III/H.Corbett (eds), *Rethinking the World Trading System 2006*, chapter 11.

<sup>24</sup> Cf. e.g. Case C-245/02 (note 22), paras. 54-57.

<sup>25</sup> See above note 20 and section I.5 of the WTO Protocol on the Accession of China (WT/L/432).

11. Certain Final WTO Dispute Settlement Rulings on WTO-inconsistent Administrative Discrimination could be made enforceable by Domestic Courts

Intergovernmental dispute settlement proceedings tend to be optimal only for disputes over conflicting *national interests*<sup>26</sup>, for example in case of unnecessarily trade-restrictive, non-discriminatory public interest legislation (e.g. approval procedures for sanitary measures), technical production and product regulations (like asbestos), or trade restrictions for non-economic purposes (e.g. prohibition of gambling services, protection of the environment). If disputes over WTO-inconsistent *administrative* trade restrictions violating private rights (interests) cannot be settled by *domestic* legal and judicial remedies (e.g. because the EC and US prevent their courts from applying WTO rules) and WTO dispute settlement rulings confirm the violation of WTO rules, the domestic implementation of WTO dispute settlement rulings after the expiry of the “reasonable implementation period” could be promoted by reciprocal WTO commitments to render certain categories of final WTO dispute settlement rulings (e.g. on private intellectual property rights, WTO-inconsistent administrative discrimination or restrictions) enforceable in domestic courts under mutually agreed conditions. More comprehensive domestic judicial remedies (e.g. including financial compensation in case of infringements of intellectual property rights) could set incentives for the decentralized enforcement of WTO dispute settlement rulings through domestic courts rather than through intergovernmental, welfare-reducing sanctions.<sup>27</sup>

Several ECJ Advocates-General have rightly emphasized that “in a ‘Community governed by law’ DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion.”<sup>28</sup> Yet, just as the EC Court has declined to enforce WTO obligations vis-à-vis the political EC institutions, so has the Court also refused to enforce WTO rulings (e.g. on the illegality of the EC’s import restrictions on bananas), even if the implementation period had expired several years ago and the EC institutions and EC implementing measures had explicitly committed themselves to compliance with the WTO dispute settlement rulings.<sup>29</sup> The Court has also rejected the EC’s non-contractual liability (Article 288 EC) for compensation of the damages caused by the sanctions against the EC’s non-compliance with WTO dispute settlement rulings.<sup>30</sup> In another

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<sup>26</sup> For a detailed explanation of this argument see Petersmann (note 2), at 34 ff. Such legal and judicial remedies could also help to make the relevant WTO rules more policy-relevant in domestic decision-making processes and to prevent intergovernmental trade disputes from arising.

<sup>27</sup> On the lack of financial compensation in WTO dispute settlement proceedings see: M.Bronckers/N.van den Broek, Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement, in: JIEL 8 (2005) 101 ff. On the exceptional agreement on arbitration pursuant to Article 25 DSU over monetary compensation for US infringements of copyrights see: B.O’Connor/M.Djordjevic, Practical Aspects of Monetary Compensation: The US-Copyright Case, in: JIEL 8 (2005), 127 ff. On the many disadvantages of trade sanctions in the WTO see: R.Z.Lawrence, Crimes & Punishments? Retaliation under the WTO, 2003.

<sup>28</sup> Opinion by Advocate-General Alber in Case C-93/02, *Biret*, CMLR (2006), 435

<sup>29</sup> Case T-19/2001, *Chiquita*, judgment of February 2005 (nyr). The Court invokes Articles 21 and 22 DSU as justification for its refusal to grant effective judicial remedies.

<sup>30</sup> Case T-69/00 (note 22), para. 205: The possibility “of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members”.

pending dispute, the EC Commission has asked the EC Court to reconsider and replace its “Nakajima exception” by a more flexible “consistent interpretation principle”<sup>31</sup> so as to obviate the practice of the political EC institutions to avoid references to WTO law in the EC implementing regulations as a means of limiting their judicial accountability.<sup>32</sup>

12. Conclusions (to be drafted more diplomatically in the final text)

WTO law remains of crucial importance for a mutually beneficial division of labor, for international rule of law and the transformation of less-developed countries into rules-based, open economies. The frequent EU and US double standards of promoting WTO rules and WTO dispute settlement rulings abroad (for the benefit of export industries), and resisting “rule of WTO law” at home (for the benefit of rent-seeking lobbies), render additional WTO rules for more effective domestic implementation of WTO dispute settlement rulings unlikely. As a civilian power based on a “Community of law”, the EC should take the lead for further strengthening the many deficiencies of the WTO dispute settlement system and for preventing, decentralizing and depoliticizing intergovernmental trade disputes by stronger domestic legal and judicial remedies. Realist US foreign policies should support the strategic potential of the WTO legal and dispute settlement system for transforming formerly closed states without judicial rule-of-law traditions (like China, Russia, Islamic countries) into rules-based, open economies. As long as EC and US trade politicians pride themselves on their power to ignore WTO obligations and pressure their domestic courts to ignore WTO dispute settlement rulings<sup>33</sup>, respect for WTO rules and the domestic enforcement of WTO dispute settlement rulings will remain contested also in all other WTO Members, and the “Charming Betsy”<sup>34</sup> is likely to sink further into oblivion.-

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<sup>31</sup> Case 313/2004, *Franz Egenberger*, pending.

<sup>32</sup> For Machiavellian justifications see once more Kuijper (note 18, e.g. at 1332-34), who argues for focusing on the political “law in action” rather than the WTO “law in the books”.

<sup>33</sup> WTO decision are “not binding on the US, much less this court”, US Court of Appeals for the Federal Circuit, judgment of 21 January 2005 (*Corus Staal*), available at <http://www.fedcir.gov/opinions/04-1107.pdf>. For similar EC Court statements see note 22 above. In the *Corus Staal* dispute, the US Supreme Court denied petition for certiorari on 9 January 2006 (<http://www.supremecourtus.gov/docket/05-364.htm>), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition (“We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department’s “zeroing” methodology – held invalid by both a WTO Appellate Body and a NAFTA Binational Panel – is not entitled to *Chevron* deference because it would bring the United States into noncompliance with treaty obligations.” (available at <http://www.robbinsrussell.com/pdf/265.pdf>)).

<sup>34</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).