

# Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law

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## I. Introduction

International trade law is public international law. Trade agreements such as the WTO Agreement and the range of agreements concluded under its umbrella, namely the GATT 1994, the GATS (General Agreement on Trade in Services) and the TRIPs Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) are public international law treaties. The subjects of public international law are states, not private parties — the classical schism of public international law, the dichotomy of the spheres of national law, where private parties are subjects and agents of the law, and international law, where states and their organisations are (nearly) the sole members of the so-called international community. Is it different for international trade law? Could it, should it be different?

Quite naturally, since the law's subjects are states, its substance concerns first and foremost state actions and state omissions, such as tariffs, technical barriers to trade and subsidies. Yet, quite different from many, though by no means all other areas of public international law, the state actions and omissions regulated by international trade rules concern directly and primarily private persons. It is their economic activity that is affected by those actions or omissions, or trade regulation measures. The constraints that international trade law puts on states thus directly benefit, or concern, private parties.

International trade law shares this characteristic with human rights law. It is not surprising that Petersmann, among others, keeps pointing to its function to protect individuals from unjustified state interference.<sup>1</sup> There is, however, an arguably significant difference between the two subjects. While human rights law is intended to protect the individual primarily because of his or her human nature and inherent, inalienable dignity, international trade law protects individual economic activity primarily based on the belief that free trade furthers economic and political gains for the societies and states involved. Individual activity is thus protected not for its own sake but because it serves a greater good. Of course one may contest both the correctness of these

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<sup>1</sup> See e.g. E.U. Petersmann, "Darf die EG das Völkerrecht ignorieren?", *EuZW* 8 (1997), 325 et seq.; id., "Rights and Duties of States and Rights and Duties of Their Citizens", in: U. Beyerlin et. al. (eds), *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt*, 1995, 1087 et seq.

deliberations<sup>2</sup> and their relevance. However, the function of international trade law may help to come to grips with its currently hybrid status in the limbo between international and national (or European Community) law, namely the refusal of leading trading nations to give direct effect to international trade law provisions in their national legal systems and to give private parties a direct say in the enforcement of those provisions.

One does not have to look far to discover the immediate relevance of international trade law for private parties, and *vice versa*. Recent cases before the WTO Dispute Settlement Body, its panels and its standing Appellate Body, have amply demonstrated that (some) companies have realized that their vital interests are concerned and may be significantly affected or furthered by the functioning of those rules. The driving forces behind these cases are virtually always companies whose interests are at stake. In the (in)famous *Bananas Case*,<sup>3</sup> it was Chiquita which guided the hand of the United States Trade Representative (USTR) in successfully challenging the EC's Banana import regime. The regime itself, to start with, was built (*inter alia*) around the interests of French banana importers. In the *Kodak-Fuji* dispute,<sup>4</sup> the two companies pitted against each other through their respective governments (United States and Japan) even gave the case its popular name. Similarly in anti-dumping cases often a small number of producers in the importing country use their government to keep equally few foreign competitors out of their market, which then, of course, often turn to their government to challenge the other government's measure in the WTO fora.<sup>5</sup>

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- <sup>2</sup> Also human rights serve certain "functions", and the right to trade may be considered a human right.
- <sup>3</sup> Appellate Body Report of 9 September 1997, WT/DS27/AB/R, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.
- <sup>4</sup> Panel Report of 31 March 1998, WT/DS44/R, *Japan – Measures Affecting Consumer Photographic Film and Paper*.
- <sup>5</sup> Anti-dumping, it is worth noting in passing, is also one of those areas where the immediacy and, at the same time, the distance between WTO law and private parties becomes apparent. Dumping is a private (purportedly) anti-competitive activity (as opposed to subsidization, a state-sponsored anti-competitive practice). WTO law, however, does not outlaw dumping, i.e. does not regulate the private behaviour as such. It merely allows for, regulates, and restricts the members' reactions to dumping,

A number of states have reacted to the discrepancy between the private (company to company/state) nature of the interests immediately concerned and the public (state to state) structure of international trade law. They offer administrative channels, such as the U.S. "Section 301"<sup>6</sup> or the EC Trade Barriers Regulation<sup>7</sup> procedures, through which private parties can submit their complaints — based on an alleged violation of international trade law by another state — to their respective national authorities. Prominent recent users of the EC Trade Barriers Regulation, have been Spanish swordfishers complaining about discriminatory treatment in Chilean ports and European shipbuilders fighting against subsidies for their Korean counterparts.<sup>8</sup>

While businesses are immediately affected, other private parties have strong interests in economic regulation, and thus the operations of international trade law, too. Virtually all players of the so-called "civil society" may have such legitimate interests, out of which the most vociferous are environmental NGOs and labour rights proponents. Their participation in the *operations*<sup>9</sup> of trade law has found its manifestation in particular in an active use of *amicus curiae* briefs.

International trade law, in other words, concerns private parties and their business with other private parties. They have a strong and immediate interest in the creation and the application, namely the enforcement, of international trade law. But is it a tool in their hands? Is it "their" law, despite its public international law nature? To what extent can they transcend the nation-state and use international trade law like other (national) law that concerns them?

Beyond the question of interests involved, it is worth noting that many provisions in international trade law are designed for the private party, with the private party in mind and more or less structurally "ap-

namely the conduct of anti-dumping investigations and the imposition of anti-dumping measures.

<sup>6</sup> Trade Act of 1974, paras 301-06, codified as amended in 19 U.S.C. paras 2411-2416.

<sup>7</sup> Council Regulation (EC) No. 3286/94 of 22 December 1994, O. J. No. L 349 of 31 December 1994, 71-78.

<sup>8</sup> For details of the cases see the European Commission's DG Trade's website at <http://europa.eu.int/comm/trade/policy/traderegul/cases.htm>

<sup>9</sup> Their sometimes very visible attempts to influence the *creation* of trade law by influencing trade negotiations ("Seattle") are another important part of their participation in this area, but not the subject of this analysis which concentrates on the *operation* of (existing) rules.

plicable” to the private party. The WTO agreements contain numerous provisions that address “rights” for private parties — provisions that could, as they stand, be applied directly to private parties. While this is arguably less clear in provisions such as arts I (Most Favoured Nation Treatment – “MFN”) and III (National Treatment – “NT”) of GATT 1994, which address “products of another Member”, the GATS and the TRIPs Agreement expressly establish certain obligations *vis-à-vis*, e.g., “service providers”<sup>10</sup> and “nationals of other Members.”<sup>11</sup> The focus on the private actor is clearest in a number of procedural provisions, *inter alia* those regarding judicial protection. The Anti-Dumping Agreement, for example, addresses in some detail the procedure for notification of the companies involved, their right to be heard, and the treatment of their confidential information in the investigation.<sup>12</sup> The GATS provides, e.g., for judicial, arbitral or administrative review of regulatory measures affecting services upon application by a service provider.<sup>13</sup> The TRIPs Agreement, beyond professing in its preamble that “intellectual property rights are private rights”, contains detailed prescriptions, e.g., for procedures to be made available to private parties under national law for the enforcement of those rights. These provisions, such as article 50 of the TRIPs Agreement concerning provisional measures, could be applied directly to the respective situations they intend to regulate. In other words: many provisions of WTO law are drafted in a way that would allow for their immediate and direct application. Judging by their structure, form and content, they *could*, in particular, be understood as conferring individual rights on private parties. Whether they do so is a matter of debate.

How and to what extent can private parties make use of international trade law? In the following, we will try to sketch the various angles from which private parties can take part in, or influence, the operations of international trade law. Setting the stage, we will start with a brief overview over private party participation in international regimes at large (II.), before looking at the international level of trade law enforcement, namely WTO dispute settlement where private party par-

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<sup>10</sup> Cf., e.g., arts II para. 1 (Most Favoured Nation) and XVII para. 1 (National Treatment) of the GATS.

<sup>11</sup> Cf., e.g., article 3 of the TRIPs Agreement.

<sup>12</sup> Cf. arts 6.1, 6.2, 6.4 and 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”).

<sup>13</sup> Article VI of the GATS.

ticipation and influence manifests itself in the form of *amicus curiae* briefs and, in an indirect way, through the work of private counsel as representatives of state parties to disputes (III.). Looking at the function of international trade law on the member, i.e. national and, in the case of the EC, supranational level, we will take the European Court of Justice's (ECJ) jurisprudence as an example of how international trade law may or may not operate within a (supra-)national system through direct and/or indirect effect (IV. 1.). We will conclude this overview with a brief look at the aforementioned administrative mechanisms such as U.S. "Section 301" and the EC Trade Barriers Regulation which provide private parties with a procedure to engage their authorities in the fight against other states' violations of international trade law (IV. 2.). A few concluding remarks shall provide a look at, and perspective within, the overall picture as it stands to date (V.).

## II. Participation of Non-State Actors in International Judicial Proceedings

The participation of non-state actors in international judicial or other enforcement proceedings has generally been limited to two areas, the protection of human rights<sup>14</sup> and international economic relations.<sup>15</sup> In

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<sup>14</sup> See e.g. as regards access of individuals to the European Court of Human Rights under article 34 of the European Convention on Human Rights as amended by the Eleventh Protocol which entered into force on 1 November 1998, see also Rule 61 paras 3 to 5 of the ECHR's Rules of Conduct on Third Party Intervention. Within this contribution, however, we will focus on dispute settlement mechanisms in the context of international economic relations.

<sup>15</sup> Of course, also in the field of international criminal justice, individuals may become part of proceedings before an international tribunal. For serious violations of international humanitarian law the *ad-hoc* tribunals for the former Yugoslavia and Rwanda as well as the future Permanent International Criminal Court are there to address individual criminal responsibility as defined through norms of public international law. For details on the statutes of these international tribunals see the UN website <http://www.un.org/law/>. However, our focus here is on active private party use of law rather than on the coverage of individual private behaviour by prohibitions, and their enforcement, under international humanitarian law.

general international law non-state actors have, with a few exceptions,<sup>16</sup> generally been precluded from access to the relevant international *fora*. A brief overview shall provide the background for our further analysis.

In general international law proceedings, before the ICJ, only states may appear as parties.<sup>17</sup> International organisations have access to the ICJ only in so far as they can request the court to give an advisory opinion on a question of law.<sup>18</sup> Also, non-party participation by private actors in proceedings before the ICJ has been very limited. While the ICJ in 1950 permitted the International League for Human Rights<sup>19</sup> to submit a written *amicus curiae* statement on the pertinent legal questions in the *South-West Africa* advisory proceeding, it rejected the same organisation's request for participation as *amicus curiae* in the contentious *Asylum* Case between Colombia and Peru. The Court's Registrar argued that the difference in wording between Article 66 para. 2 of the Statute of the ICJ (participation of "international organization" in advisory proceedings) and Article 34 para. 2 (participation of "public international organizations" in contentious proceedings) indicated that NGOs had to be excluded from contentious proceedings. Later, in both the *Namibia* and the *Nuclear Weapons* advisory proceedings, the ICJ rejected requests from NGOs to be given the opportunity to submit written or oral statements in advisory proceedings. In the *Namibia* advisory proceedings, the Court also refused an individual's request to submit an *amicus curiae* brief. In the Registrar's view, the reference of

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<sup>16</sup> See notably the Central American Court of Justice for an early example of a regional court to which non-state actors had access. See C. Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction", in: *Judicial Settlement of International Disputes*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 1974, 285 et seq., (315–322). Private parties also have access to a number of claims tribunals in the area of compensation for damages suffered as a consequence of war, see, e.g., the Iran-US Claims Tribunal and the United Nations Compensation Commission for Damages suffered as a Consequence of the second Gulf War. See D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", *AJIL* 84 (1990), 104 seq.; D.J. Bedermann, "The United Nations Compensation Commission and the Tradition of International Claims Settlement", *N.Y.U. J. Int'l L. & Pol.* 27 (1994), 1 et seq.

<sup>17</sup> See Article 34 para. 1 of the Statute of the ICJ.

<sup>18</sup> See Article 96 of the Charter of the United Nations and Arts 65 et seq. of the Statute of the ICJ.

<sup>19</sup> At the time the International League for the Rights of Man.

Article 66 para. 2 of the Statute to international organisations precluded the Court from accepting submissions from individuals because “the expression of its powers in Article 66, paragraph 2, is limitative, and that *expressio unius est exclusio alterius*.” In sum, the Court appears to limit its discretionary power to accept and consider submissions of non-state actors to *amicus curiae* briefs from international NGOs in advisory proceedings. It will not accept briefs from individuals or other non-governmental organisations in advisory proceedings and does not accept *amicus curiae* briefs from non-state actors at all in contentious proceedings.<sup>20</sup>

In international economic relations, however, access of non-state actors to judicial proceedings has become a common feature. International investment disputes involving private parties and states are frequently resolved through international arbitration. For this purpose, international arbitration institutions, including the International Chamber of Commerce, ICSID, and many others, provide an appropriate framework. Also, the arbitration rules of the Permanent Court of International Arbitration provide for arbitration between a state and a private party or an international organisation and a private party.<sup>21</sup> The World Bank Inspection Panel is another example of private party involvement in quasi-judicial review of compliance with standards to be applied in international economic relations. The Panel has jurisdiction over complaints against the World Bank submitted by an “affected party in the territory of the borrower which is not a single individual.” The Inspection Panel’s jurisdiction is however strictly limited to actions or omissions of the Bank. It examines cases where the complainant alleges that there is “a failure of the Bank to follow its own operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the bor-

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<sup>20</sup> For a detailed account of NGOs’ participation as *amici curiae* in proceedings before the ICJ see D. Shelton, “The Participation of Non Governmental Organizations in International Judicial Proceedings”, *AJIL* 88 (1994), 611 et seq., (619–628); see also G. Marceau/ M. Stilwell, “Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies”, *JIEL* 4 (2001), 155 et seq., (165).

<sup>21</sup> See Permanent Court Of Arbitration Optional Rules For Arbitrating Disputes Between Two Parties Of Which Only One Is a State, Permanent Court Of Arbitration Optional Rules For Arbitration Between International Organizations And Private Parties.



rower's obligations under loan agreements with respect to such policies and procedures)."<sup>22</sup>

The United Nations Convention on the Law of the Sea (UNCLOS) is yet another example in point. It illustrates that international negotiators are increasingly aware that non-state actors should have access to international judicial proceedings if their economic interests are at stake. Under article 292 UNCLOS, private parties can bring cases for prompt release of a vessel detained and not released by a state on behalf of the flag state if empowered by that state to do so. Also, the International Tribunal for the Law of the Sea may have jurisdiction over cases brought by private parties against the Deep Sea-Bed Authority concerning the exploitation of the deep sea-bed.<sup>23</sup> Finally, the Statute of the International Tribunal for the Law of the Seas generally provides that "the Tribunal shall be open to entities other than States Parties [...] in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."<sup>24</sup>

Regional economic organisations and associations frequently provide for judicial proceedings involving private parties, states and international organisations. The most obvious, and most developed example of this is the European Court of First Instance and, on appeal, the ECJ<sup>25</sup> which can hear cases brought by, or involving, natural or legal persons.<sup>26</sup> Moreover, both before the Court of First Instance and the ECJ any person establishing an interest in the result of any case sub-

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<sup>22</sup> Resolutions establishing the Inspection Panel (IBRD Resolution No. 93-10 and IDA Resolution No. 93-6), para. 12. On the World Bank Inspection Panel see I. Shihata, *The World Bank Inspection Panel*, 1994; D.D. Bradlow/ S. Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order", *ZaöRV* 54 (1994), 392 et seq.; S. Schlemmer-Schulte, "The World Bank's Experience with its Inspection Panel", *ZaöRV* 58 (1998), 353 et seq. Cf. also the article of S. Roos in this Volume.

<sup>23</sup> Article 187 UNCLOS. See also the similar provisions in the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, article 59.

<sup>24</sup> Article 20.

<sup>25</sup> See on the respective jurisdictions, Protocol on the Statute of the Court of Justice of the European Community as amended by Council Decision of 24 October 1988 Establishing a Court of First Instance of the European Communities (88/591/ECSC, EEC, EUROATOM), O.J. No. L 319 of 25 November 1988, 1 et seq., as subsequently corrected and amended.

<sup>26</sup> Arts 230 para. 4, 232 para. 3, 234, 235, and 238 of the EC Treaty.

mitted to the courts may intervene, save in cases between Member States, between institutions of the EC or between Member States and institutions of the EC.<sup>27</sup> Any person whose application to intervene in a proceeding before the Court of First Instance has been refused, can appeal to the ECJ.<sup>28</sup>

Further examples of regional economic organisations or associations in which non-state actors have been given access to the courts include the Andean Court of Justice, established in 1979,<sup>29</sup> and the court of the Common Market of Eastern South Africa (COMESA).<sup>30</sup> Private parties have access to judicial proceedings under NAFTA and its side agreements such as, e.g., the North American Agreement of Environmental Co-operation.<sup>31</sup> The proposed Caribbean Court of Justice will have jurisdiction to issue preliminary rulings upon referral by national courts and can hear cases brought by natural and legal persons. It is also envisaged that the court will have appellate jurisdiction over decisions of national courts and will act as a regional supreme court, thus a full substitute to the Judicial Committee of the Privy Council which currently serves as the highest court of appeal for the former British colonies in the Caribbean.<sup>32</sup> Finally, the regime established by the Southern American Common Market (Mercosur) also provides for a mechanism under

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<sup>27</sup> Arts 37 (2) and 46 (1) of the Protocol on the Statute of the Court of Justice of the European Community as amended (see above note 25).

<sup>28</sup> Article 50 (1) *ibid.*

<sup>29</sup> Tribunal como Órgano Judicial del Sistema Andino de Integración Subregional, established on 28 May 1979. See 17, 19, 25, 31, 32 et seq., 37, 38 et seq. of the Treaty Creating the Court of Justice of the Cartagena Agreement as amended by the Protocol Amending the Andean Subregional Integration Agreement (Cartagena Agreement), approved in Trujillo, Peru on 10 March 1996, between Bolivia, Colombia, Ecuador, Peru and Venezuela; see <http://www.altesa.net/tribunal/trib2.htm>, and [http://www.comunidadandina.org/english/andean/ande\\_trib2.htm](http://www.comunidadandina.org/english/andean/ande_trib2.htm)

<sup>30</sup> Article 26 of the Treaty Establishing the Common Market for Eastern and Southern Africa.

<sup>31</sup> For a detailed account of the procedure under the NAAEC see e.g. F. Abbott, "The NAFTA Environmental Dispute Settlement System as Prototype for Regional Integration Arrangements", *Yearbook of International Environmental Law* 4 (1993), 3 et seq.

<sup>32</sup> See for details of the proposal J. Lehmann, "An Outside View of the Caribbean Court of Justice", *Caribbean Law Review* 10 (2000), 297 et seq., and <http://www.caricom.org/expframes2.htm>

which complaints by natural and legal persons will be heard.<sup>33</sup> Others, however, such as the East African Common Market Tribunal<sup>34</sup> and the mechanism established for the settlement of economic disputes within the Association of Southeast Asian Nations (ASEAN) are not open to natural and legal persons.<sup>35</sup> Likewise, the rules governing the Court of Justice for the Economic Community of West African States (ECOWAS) do not provide for direct access of non-state actors. Only Member States of the organisation can institute proceedings on behalf of their nationals against ECOWAS organs or other Member States.<sup>36</sup> So far this court has not commenced its work.<sup>37</sup>

Thus, as of now, the participation of non-state actors in international judicial proceedings has not been addressed in a consistent way. In the realm of general international law, the ICJ has accorded non-state actors only very limited access. In international economic law, in particular in respect of investment-related disputes and in the context of a number of regional integration regimes, participation of private parties is reasonably developed. The same applies to a number of human rights regimes. In general, however, private party participation has not yet been advanced beyond an incongruous patchwork.

### III. Private Parties and the Enforcement of International Trade Rules within the WTO Framework

Only Members of the WTO can participate as parties or third parties in dispute settlement within the WTO framework. However, on a number of occasions, private parties have submitted their views directly to the panels or the Appellate Body in the form of so-called *amicus curiae*

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<sup>33</sup> Article 21 and Annex of the Protocolo Adicional al Tratado de Asunción sobre la Estructura Institucional del Mercosur of 16 December 1994 to the Tratado de Asunción of 26 March 1991, [http://www.mercosur.com/in/info/tratados\\_acuerdos.jsp](http://www.mercosur.com/in/info/tratados_acuerdos.jsp)

<sup>34</sup> Tomuschat, see note 16, 375–377.

<sup>35</sup> Protocol of 20 November 1996 on Dispute Settlement Mechanism, to the Framework Agreement of 28 January 1992 on Enhancing ASEAN Economic Cooperation, as amended by the Protocol of 15 December 1995 to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, see <http://www.aseansec.org/economic/dsm.htm>

<sup>36</sup> Article 9 para. 3 of the ECOWAS Protocol.

<sup>37</sup> Lehmann, see note 32, 297, 298.

briefs. Also, private sector advisors have participated as members of WTO Member delegations and have appeared in oral hearings before panels and the Appellate Body. However, both forms of participation have been the subject of intense discussions both within the WTO and the NGO and business communities. A number of panels and the Appellate Body were asked to rule on, or react to, various issues of private participation. We will first address the admissibility and treatment of unsolicited *amicus curiae* briefs and will then deal with the representation of private parties on member delegations at dispute settlement hearings.

## 1. Amicus Curiae Briefs

In the absence of clearly stated rules, the submission of unsolicited *amicus curiae* briefs raises a number of delicate questions. Are panels or the Appellate Body obliged to accept and consider *amicus curiae* briefs? Are they required to reject such submissions? Is the decision on whether to accept and consider *amicus* briefs at their discretion? Based on which criteria? Should there be a special interest requirement? Until when should private parties be allowed to submit briefs? Should the panel or the Appellate Body notify the parties to the dispute in advance if they intend to take into account information submitted by private parties?

We will examine the answers various panels and the Appellate Body have given so far to these questions as regards *amicus curiae* briefs submitted to a panel and, at the review stage, to the Appellate Body. While, at the stage of panel proceedings, submissions of private parties may constitute an element of fact-finding their significance in proceedings before the Appellate Body is logically limited to interpretations of the law.<sup>38</sup>

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<sup>38</sup> On *amicus curiae* briefs submitted to WTO panels or the Appellate Body, see Marceau/Stilwell, see note 20, 155 et seq.; A.E. Appleton, "Amicus Curiae Briefs in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?", JIEL 3 (2000), 691 et seq.; S. Ohlhoff, "Beteiligung von Verbänden und Unternehmen in WTO - Streitbeilegungsverfahren. Das Shrimp-Turtle-Verfahren als Wendepunkt?", *EuZW* 10 (1999), 139 et seq.

### a. Panels

Accordingly, at the stage of panel proceedings, panels and the Appellate Body have resolved to categorise and judge the issue under article 13 of the DSU (Dispute Settlement Understanding) on the panels "Right to Seek Information." Article 13 reads as follows:

1. Each panel shall have the right to seek information or technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

In *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* ("United States – Shrimp"),<sup>39</sup> the first case in which a panel and, on appeal, the Appellate Body dealt with the issue,<sup>40</sup> the Panel received two unsolicited *amicus curiae* briefs from environmental NGOs.<sup>41</sup> The four parties that had initiated the panel proceedings,

<sup>39</sup> See on this case in more detail Ohlhoff, see above, 139 et seq.

<sup>40</sup> Unsolicited *amicus curiae* briefs were first submitted to WTO panels in: *United States - Standards for Reformulated and Conventional Gasoline* (WT/DS2) and in: *European Communities - Measures Concerning Meat and Meat Products* (WT/DS26). The panels in these cases did not consider the briefs. See Marceau/ Stilwell, see note 20, 158.

<sup>41</sup> One of the briefs was submitted jointly by the World Wide Fund for Nature International (WWF), and the Foundation for International Environmental Law and Development (FIELD). The other brief was authored jointly by the Center for International Environmental Law (CIEL), the Center for Marine Conservation (CMC), the Environmental Foundation, the Philippine Ecological Network, and Red Nacional de Acción Ecológica.

Thailand, Pakistan, India and Malaysia, asked the Panel not to consider these documents. The United States, however, argued that the Panel, under its authority to seek information from any relevant source according to article 13 of the DSU, should avail itself of any pertinent information in the two *amicus* briefs and in any other similar communications.<sup>42</sup>

The Panel eventually decided not to take the two briefs into consideration because it was of the view that it did not have the authority to do so. In its view, “the *initiative* to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting *non-requested* information from non-governmental sources would be [...] incompatible with the provisions of the DSU as currently applied.”<sup>43</sup> However, the Panel informed the parties “that it was usual practice for the parties to put forward whatever documents they considered relevant to support their case.”<sup>44</sup> Thus, the Panel authorised the parties to submit these briefs as part of their own submissions and thereby introduce them into the dispute. The Panel also informed the parties that, in such case, the other parties would be given two weeks to respond to the additional material. The United States availed itself of this opportunity by designating part of one of the briefs as an annex to its second submission to the Panel.

The United States appealed the findings of the Panel and asked the Appellate Body to find that the Panel erred in finding that it would be barred from accepting non-requested information received from non-governmental sources by the DSU.<sup>45</sup> In its view, the Panel, contrary to the pertinent provisions of the DSU, had restricted its discretion regarding the establishment of the relevant facts in deciding that the DSU *required* it not to consider non-requested information from non-governmental organisations. The United States argued that such a restriction could not be found in the rules of the DSU. The other parties argued that the wording of article 13 (“each panel shall have the right to

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<sup>42</sup> Panel Report of 15 May 1998, WT/DS58/R, para. 7, *United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States - Shrimp)*.

<sup>43</sup> Panel Report, *ibid.*, para. 8. Italics added.

<sup>44</sup> Panel Report, *ibid.*, para. 7.

<sup>45</sup> Appellate Body Report of 12 October 1998, WT/DS58/AB/R, para. 98 *United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States - Shrimp)*.

seek information [and] may seek information") indicated that a panel could only consider such information it had actively sought rather than received without a prior request.

The Appellate Body essentially confirmed the United States' view.<sup>46</sup> It noted that access to the WTO dispute settlement system is limited to members of the WTO. It is not available to other entities such as individuals or organisations, whether governmental or not: "Thus, [...] only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel."<sup>47</sup> Accordingly, the Appellate Body concluded that the Panel was not under an obligation to accept and consider the two *amicus curiae* briefs it had received.

However, does this imply that the Panel was required to reject the *amicus curiae* briefs as it had felt? The Appellate Body answered in the negative, pointing to the panels' authority and duties under arts 11, 12 and 13 of the DSU. According to article 11, a panel has the duty to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements...". Articles 12 and 13 provide the instruments which invest the panel with "ample and extensive authority to undertake and to control the process by which it informs itself of both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."<sup>48</sup> Article 12 authorises panels, after consultation with the parties to the dispute, to develop their own Working Procedures and provides further that "panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process." Accordingly, the Appellate Body noted that it had, in a number of other cases,<sup>49</sup> held that article 13 invests panels with very wide discretion as to

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<sup>46</sup> See below Section III.1.c. on the admissibility of *amicus curiae* briefs submitted as part of the parties' submission in the proceedings before the Appellate Body.

<sup>47</sup> Appellate Body, see note 45, para. 101. Emphasis added.

<sup>48</sup> Appellate Body, *ibid.*, para. 106.

<sup>49</sup> Appellate Body Report of 16 January 1998, WT/DS26&48/AB/R, para. 147, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report of 27 March 1998, WT/DS56/AB/R, paras 84 et seq., *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*.

whether or not to seek information, as to the source of information, its acceptability, relevancy, and weight.<sup>50</sup> Therefore,

“in the present context, authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not [...]. The amplitude of the authority vested in panels to shape the process of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.”<sup>51</sup>

The Appellate Body, having found that panels are required neither to accept and consider nor to reject unsolicited *amicus curiae* briefs, went on to stress that the panels’ discretionary authority to deal with such briefs was very wide: “[A]cceptance and rejection [...] need not exhaust the universe of possible appropriate dispositions” of *amicus* briefs. It found that the Panel had acted within the authority of article 13 of the DSU when it suggested that the parties designate the *amicus* briefs or parts thereof as part of their own submissions.<sup>52</sup>

In *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“United States – British Steel”), an NGO representing the interests of the United States’ steel industry<sup>53</sup> submitted an *amicus curiae* brief to the Panel. However, the Panel, while acknowledging its discretionary power to accept the brief, chose to reject it because the “brief was submitted after the deadline for the parties’ rebuttal submissions, and after the second substantive meeting of the Panel with the parties. Thus, the parties have not, as a practical matter, had adequate opportunity to present their comments on the [...] brief to the Panel. In [the Panel’s] view [this] raises serious due process concerns to the extent to which the Panel could consider the brief.”<sup>54</sup>

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<sup>50</sup> Appellate Body, see note 45, paras 103 et seq.

<sup>51</sup> Appellate Body, *ibid.*, para. 108.

<sup>52</sup> Appellate Body, *ibid.*, para. 109.

<sup>53</sup> The American Iron and Steel Institute (AISI).

<sup>54</sup> Panel Report of 23 December 1999, WT/DS138/R, para. 6.3, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*.



The Panel in *Australia – Measures Affecting Importation of Salmon (Recourse to Article 21.5 by Canada)* received a letter from a group of Australian fishermen and processors. This letter addressed the alleged discrimination between imports of pilchards for use as bait or fish feed and imports of salmon. Considering the Appellate Body's ruling in *United States – Shrimp*, the Panel held that the information submitted "has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of article 5.5. of the SPS Agreement in the treatment by Australia of pilchard versus salmon imports." Therefore, the Panel "accepted this information as part of the record."<sup>55</sup>

There are two further instances where *amicus curiae* briefs were submitted to the panels: *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India* and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("European Communities – Asbestos"). In the first case, the Panel received a brief from an NGO<sup>56</sup> before its first meeting and invited the parties to comment on the brief. In its report it held that it did not find it necessary to consider the brief.<sup>57</sup> The Panel in *European Communities – Asbestos* received one *amicus* brief before and a further three *amicus* briefs after the first meeting.<sup>58</sup> The EC incorporated two of the briefs into its submission and asked the Panel to consider these briefs and reject the other two which, in the view of the EC, lacked relevance; Canada requested the Panel to reject all four *amicus* briefs. The Panel decided to consider the briefs incorporated by the EC in its submissions and chose, without giving reasons, not to take into account the

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<sup>55</sup> Panel Report of 18 February 2000, WT/DS18/RW, paras 7.8 et seq., *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*.

<sup>56</sup> The Foreign Trade Association.

<sup>57</sup> Panel Report of 30 October 2000, WT/DS141/R, para. 6.1, *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*.

<sup>58</sup> From Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias AC, and American Federation of Labor and Congress of Industrial Organizations.

remaining two briefs. The Panel did not accept a fifth *amicus* brief<sup>59</sup> received after the Interim Report was issued.<sup>60</sup>

## b. Appellate Body

While the phenomenon of *amicus curiae* briefs submitted in panel proceedings has thus found a secure home in article 13 of the DSU, the issue is less clear at the stage of Appellate Body proceedings. Article 13 deals with fact-finding by the panels. It is not applicable to appellate review. However, the Appellate Body found it sufficient that nothing in the DSU prevents it from considering *amicus curiae* briefs and built its jurisprudence on the issue on its rule-making power as regards appropriate additional procedures addressed neither in the DSU nor in the Working Procedures.

The Appellate Body has received non-requested *amicus curiae* briefs in a number of instances. While the United States attached statements authored by environmental NGOs as exhibits to its own submission in *United States - Shrimp*,<sup>61</sup> the Appellate Body first dealt with true *amicus curiae* briefs in *United States - British Steel*.<sup>62</sup> The EC argued that *amicus curiae* briefs were inadmissible in appellate review proceedings as article 13 of the DSU did not apply to the Appellate Body. Even if it did, the provision was limited to factual information and technical advice, and thus excluded legal arguments or interpretations received from non-members.<sup>63</sup> Moreover, the confidentiality of the proceedings might be threatened. Brazil and Mexico supported this view. The United States urged the Appellate Body to accept the *amicus curiae* briefs and emphasized the Appellate Body's authority under article 17 para. 9 of the DSU — the power to draw up its own Working Procedures — to consider them.

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<sup>59</sup> From Only Nature Endures.

<sup>60</sup> Panel Report of 18 September 2000, WT/DS135/R, para. 6.2, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*.

<sup>61</sup> See below Section III.1.c.

<sup>62</sup> From the American Iron and Steel Institute and the Speciality Steel Industry of North America.

<sup>63</sup> Appellate Body Report of 10 May 2000, WT/DS138/AB/R, para. 36 *United States - Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (United States - British Steel - AB)*.

In the provisions of the DSU and the Working Procedures, the Appellate Body found nothing that would require it either to accept and consider or to reject *amicus curiae* briefs. As held previously in *United States – Shrimp*,<sup>64</sup> it found that access to WTO dispute procedures is limited to WTO Members acting as parties or as third parties to a dispute. Only parties and third parties have a legal right to make submissions and to have their submissions considered.<sup>65</sup> However, the Appellate Body found that article 17 para. 9 of the DSU which vests the Appellate Body with the authority to draw up its own Working Procedures gives it broad authority to adopt rules to the extent that they are consistent with the provisions of the DSU and any covered agreement.<sup>66</sup> The Working Procedures, in Rule 16 (1), allow the Appellate Body to develop appropriate procedures where a situation arises which is not addressed by the Working Procedures. The Appellate Body concluded that this gave it the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it finds it useful and pertinent to do so. In this case, it did not find that such a situation existed and rejected the two briefs.<sup>67</sup>

The issue was recently elevated to a new level in *European Communities – Asbestos*. Noting that a number of NGOs had submitted *amicus curiae* briefs to the Panel and that the same had to be expected at the stage of the Appellate Body proceedings, the Appellate Body asked the parties and third parties in this case to comment on its proposal to adopt a formalised request for “leave procedure” for the purposes of this appeal. In the Appellate Body’s view, the adoption of such additional procedures would help to ensure the fair and orderly conduct of the appeal. Canada, the EC and Brazil were of the view that such procedures would best be dealt with by the WTO members; the United States, however, welcomed the adoption of a request for “leave procedure”. Zimbabwe stated that it had no reason to oppose the adoption of such a procedure.<sup>68</sup>

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<sup>64</sup> See above.

<sup>65</sup> Appellate Body, see note 63, para. 40.

<sup>66</sup> Appellate Body, *ibid.*, para. 39.

<sup>67</sup> Appellate Body, *ibid.*, para. 42. See for a detailed, and critical, analysis of the Appellate Body’s reasoning, Appleton, see note 38, 694–698.

<sup>68</sup> Appellate Body Report of 12 March 2001, WT/DS135/AB/R, para. 50 *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products (EC – Asbestos)*.

The Appellate Body adopted, on the basis of Rule 16 (1) of the Working Procedures, an Additional Procedure laying down the procedure to be followed by NGOs to request leave to submit an *amicus curiae* brief. The Appellate Body transmitted the Additional Procedure to the parties and third parties in a communication dated 7 November 2000 and posted it on the WTO website on 8 November 2000:<sup>69</sup>

- “1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16 (1) of the Working Procedures for Appellate Review, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.
2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000.
3. An application for leave to file such a written brief shall:
  - (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
  - (b) be in no case longer than three typed pages;
  - (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
  - (d) specify the nature of the interest the applicant has in this appeal;
  - (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
  - (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be re-

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<sup>69</sup> Appellate Body, see above, para. 51.

petitive of what has been already submitted by a party or third party to this dispute; and

- (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.
4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.
5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.
6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat by noon on Monday, 27 November 2000.
7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
  - (a) be dated and signed by the person filing the brief;
  - (b) be concise and in no case longer than 20 typed pages, including any appendices; and
  - (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.
8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute by noon on Monday, 27 November 2000.
9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure."

The Appellate Body's measures provoked intense and purportedly highly controversial discussions at subsequent meetings of the DSB. Many WTO Members took the view that the Appellate Body had overstepped the limits of its competence in taking this rather creative step.

In the end, however, the Appellate Body accepted none of the numerous *amicus curiae* briefs and requests for leave received.

In the course of the proceeding, before the Additional Procedures had been published, the Appellate Body received 13 *amicus curiae* briefs from various NGOs. The Appellate Body returned these submissions to their authors informing them about the Additional Procedures and inviting them to request leave according to the procedures adopted. Pursuant to these Additional Procedures the Appellate Body received 17 requests for leave. The Appellate Body rejected six of them without further consideration because they were filed after the specified deadline.<sup>70</sup> The remaining 11 applications were rejected without any detailed reasons given.<sup>71</sup> The applicants were informed in short letters that they had failed to comply with the requirements. One brief which was submitted by a number of environmental organisations<sup>72</sup> despite having been denied leave was not accepted.<sup>73</sup>

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<sup>70</sup> Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturer's Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States).

<sup>71</sup> Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Associations (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom); Center for International Environmental Law (Switzerland); International Ban Asbestos Secretariat (United Kingdom); Ban Asbestos International and Virtual Network (France); Greenpeace International (The Netherlands); World Wide Fund for Nature International (Switzerland), and Lutheran World Federation (Switzerland).

<sup>72</sup> Foundation for International Environmental Law and Development; Ban Asbestos (International and Virtual) Network; Greenpeace International; International Asbestos Secretariat, and World Wide Fund for Nature International.

<sup>73</sup> Appellate Body, see note 68, paras 53 to 57.

Those Members warning against increased transparency of the dispute settlement proceedings for non-Members found their views confirmed in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, where the confidentiality of the proceedings became an issue. Consuming Industries Trade Action Coalition (CITAC), a coalition of United States companies and trade associations, had submitted an *amicus curiae* brief<sup>74</sup> in which it had referred to specific arguments in Thailand's appellate submission, making explicit reference to "Section III.C.5 of the Thailand Submission". In Thailand's view it therefore appeared on the face of the CITAC brief that CITAC had had access to Thailand's brief, contrary to arts 17 para. 10 and 18 para. 2 of the DSU and that CITAC's submission should be rejected.<sup>75</sup>

The Appellate Body informed Poland and the third parties about Thailand's concerns and requested them to indicate whether any of its officials, or other representatives, counsel or consultants had provided a copy, or disclosed or otherwise communicated, the contents of Thailand's submission to any person not participating in these proceedings. The Appellate Body also requested Poland to respond to Thailand's allegation that the law firm acting as counsel to Poland had a client relationship with CITAC.<sup>76</sup>

In the end, the circumstances under which CITAC had been informed about the details of Thailand's submission could not be clarified. Poland explained that it had put into place "substantial internal confidentiality procedures" and that its law firm had withdrawn as its legal counsel in this appeal although, in Poland's view, there had been no proof of wrongdoing on the firm's part.<sup>77</sup> The United States took the opportunity to raise a broader point regarding the transparency of the dispute settlement process. In its view, this matter "exemplified the need for enhanced transparency in WTO dispute settlement. [T]he practice of claiming confidential treatment for submissions that did not contain confidential business information corroded public support for the WTO dispute settlement system and inhibited the ability of mem-

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<sup>74</sup> Appellate Body Report of 5 April 2001, WT/DS122/AB/R, para. 62 *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand – Anti-Dumping Duties on Steel)*.

<sup>75</sup> Appellate Body, *ibid.*, para. 63 et seq.

<sup>76</sup> Appellate Body, *ibid.*, paras 68 et seq.

<sup>77</sup> Appellate Body, *ibid.*, paras 71 et seq.

bers to represent fully the interests of their stakeholders.”<sup>78</sup> As in earlier cases, the Appellate Body found a prudent way out: it rejected the *amicus curiae* brief received from CITAC noting that it found it to be irrelevant to its task.

### c. Briefs as Part of Member Submissions

Another, indirect form of the introduction of private party statements in WTO proceedings has already been mentioned. In *United States – Shrimp* the United States attached to its appellant’s submission three exhibits which contained comments by, or “*amicus curiae* briefs” submitted by, three groups of environmental NGOs.<sup>79</sup> In their joint appellees’ submission, India, Pakistan, and Thailand, argued that the Appellate Body should reject the exhibits. In their view, “a number of the factual and legal assertions contained in the Exhibits go beyond the position taken by the United States”.<sup>80</sup> Therefore, the incorporation of the briefs into the United States’ submission “gives rise both to contradictions and internal inconsistencies, and raises serious procedural and systemic problems.”<sup>81</sup> Malaysia also asked the Appellate Body not to admit the exhibits.<sup>82</sup>

In a communication to the parties the Appellate Body informed them that it had decided to accept for consideration the legal arguments made by the NGOs in the briefs attached as exhibits to the United States’ submission to the extent that they may be pertinent. It also asked the United States to clarify to what extent it agreed with or adopted the legal arguments set out in the exhibits. The United States responded that:

“[t]he main U.S. submission reflects the views of the United States on the legal issues in this appeal [...] The United States is not adopt-

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<sup>78</sup> Appellate Body, *ibid.*, para. 73.

<sup>79</sup> First, the Earth Island Institute; the Humane Society of the United States; and the Sierra Club; second, the Center for International Environmental Law (“CIEL”); the Centre for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippines Ecological Network; Red Nacional de Acción Ecológica, and Sobrevivencia; and, third, the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development.

<sup>80</sup> Appellate Body, see note 45, para. 80.

<sup>81</sup> Appellate Body, *ibid.*, para. 81.

<sup>82</sup> Appellate Body, *ibid.*, para. 82.



ing [the NGOs'] views as separate matters to which the Appellate Body must respond. The United States agrees with the legal arguments in the submissions of the [NGOs] to the extent those arguments concur with the U.S. arguments set out in our main submission."

The Appellate Body found:

"that the attaching of a brief or other material to the submission of either appellant or appellees, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments."<sup>83</sup>

However, given the United States' tentative and qualified endorsement of the NGOs' views, the Appellate Body thought it appropriate to focus on the legal arguments in the main U.S. appellant's submission.<sup>84</sup>

## 2. Member Representation by Private Counsels and Other Private Sector Representatives

Another very intermediate form of private party involvement is worth mentioning in particular because of its practical significance. A number of WTO Members have availed themselves of the help of private counsels or other private sector representatives in the conduct of dispute settlement proceedings. Private sector involvement can provide both valuable support to WTO Members, in particular, those with limited financial or personal resources, and an opportunity for the private sector to make itself heard in settlement of disputes in which it has a particular interest. It was long disputed whether private counsels or other private

<sup>83</sup> Appellate Body, *ibid.*, para. 89. The Appellate Body also had to decide the same question on appeal as regards the submission of *amicus curiae* briefs as part of the United States' submission to the Panel. It decided that the Panel was right to allow the United States to designate the *amicus* briefs or parts thereof as integral part of its own statement. Thus, the Panel could consider those briefs like any other documents filed by the United States, para. 109.

<sup>84</sup> Appellate Body, see note 45, para. 90.

sector representatives should be admitted to act as counsel to the Members before panels or the Appellate Body. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas (European Communities – Bananas)* the Panel did not admit private lawyers to appear before it as counsels to a developing country Member. The Appellate Body, on appeal, admitted the lawyers.

The Panel had argued that it had been common practice to reject private counsel in GATT and WTO dispute settlement proceedings if one party objected. The Panel expressed concerns about the confidentiality and the fairness of the proceedings. It also referred to its working procedures which it felt excluded private lawyers from Panel meetings. If private counsel were admitted, the Panel argued, the intergovernmental character of WTO dispute settlement proceedings would change.<sup>85</sup>

In the appellate proceedings, Santa Lucia again requested that its private counsel be admitted to the oral hearing. It argued that, in its view, private lawyers as such should be allowed to represent a state before a panel or the Appellate Body. Further, a WTO Member had the sovereign right to decide who was part of its official delegation and therefore a governmental representative and was free to extend that status to its lawyers.

In contrast, the United States, Mexico and the other complaining parties argued that there was no basis for the WTO to change its established practice in the area. "WTO dispute settlement [...] is dispute settlement among governments, and it is for this reason that the DSU safeguards the privacy of the parties during recourse to dispute settlement procedures". Also, neither the Vienna Convention on Diplomatic Relations nor general rules on diplomatic relations gave states *carte blanche* as to whom they may appoint to their delegations. As regards the presence of private lawyers before other international tribunals, this was based on specific rules to be agreed between the parties to the pertinent international agreements. Moreover, developing countries were entitled to assistance from the WTO Secretariat if necessary. Finally, if private lawyers were allowed to participate, a number of issues concerning "lawyers' ethics", conflicts of interest, representation of multiple governments and confidentiality would need to be resolved.<sup>86</sup>

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<sup>85</sup> Panel Report of 22 May 1997, WT/DS27/R, para. 7.11, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*.

<sup>86</sup> Appellate Body, see note 3.

The Appellate Body eventually accepted that Saint Lucia be represented at the oral hearing by private counsel. It noted that nothing in the Marrakesh Agreement, the DSU nor the Working Procedures, nor in customary international law or in the prevailing practice of international tribunals, gave conclusive indications as to the composition of a Member's delegation in WTO appellate proceedings. Accordingly, "it is for a WTO Member to decide who should represent it as a member of its delegation in an oral hearing of the Appellate Body. Representation by counsel of a government's own choice may well be a matter of particular significance — especially for developing-country Members — to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings."<sup>87</sup>

The Appellate Body's view was later followed by panels. In *Indonesia - Certain Measures Affecting the Automobile Industry*, Indonesia declared that two private lawyers were members of its delegation. The United States requested the Panel to exclude them from the Panel meeting. The Panel decided to admit the lawyers. In line with the Appellate Body's analysis in the *Bananas Case*, it concluded that it was "for the government of Indonesia to nominate the members of its delegation to the meetings".

However, it emphasized that "all members of parties' delegations — whether or not they are government employees — are present as representatives of their government, and as such are subject to the provisions of the DSU and of the standard working procedures". In particular, those provisions required confidentiality of all submissions to the Panel and all information so designated by other members as well as for the closed sessions. Therefore, the Panel expected all delegations to "fully respect those obligations" and to "treat these proceedings with the utmost circumspection and discretion". It stated that the Members would be held responsible for all actions of their nominated and so confirmed

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<sup>87</sup> Appellate Body, *ibid.*, paras 10 et seq. See generally J.M. Lang, "The Role of Private Legal Admissions in International Economic Disputes", in: U. Immenga/ N. Lübben/ H.P. Schwintowski (eds), *Conflict Resolution in a Global Economy*, 2001, 39 et seq.

representatives of their governments and that they had to abide by all of the applicable provisions.<sup>88</sup>

As in the context of *amicus curiae* briefs, the protection of confidentiality was also the focus of discussions on the participation of private counsel. In *Korea - Taxes on Alcoholic Beverages*, for example, Korea indicated that it intended to retain expert counsel. The European Communities emphasized the importance of preserving the confidentiality of panel proceedings and insisted on Korea's assurance of full responsibility for its private counsels. The United States was of the view that private lawyers should not be admitted. In any case, appropriate measures should insure the confidentiality of the proceedings.<sup>89</sup>

The Panel admitted Korea's lawyers during the proceedings. However, it stressed that "the private counsel concerned are official members of the delegation of Korea, that they are retained by and responsible to the government of Korea, and that they will fully respect the confidentiality of the proceedings and that Korea assumes full responsibility for confidentiality of the proceedings on behalf of all members of its delegation, including non-government employees."<sup>90</sup> The Panel further stressed that, in the event that confidential written submissions should be provided to non-governmental advisors who are not official members of the delegation, the duty of confidentiality extends to them as well.<sup>91</sup>

The protection of confidential information, although lawyers' bread and butter, nonetheless remains an important issue, as exposed recently at some length in the Appellate Body report in *Thailand - Antidumping Duties on Steel*. In this case, Thailand's appellant submission became to be known by a non-governmental organisation representing U.S. business interests. The organisation was a client of the law firm representing Poland, the complaining party in this dispute. Although wrong-doing by the law firm was not proven, Poland, in an apparently symbolic gesture, withdrew the firm as its counsel from the case.<sup>92</sup>

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<sup>88</sup> Panel Report of 2 July 1998, WT/DS55/R, para. 14.1 *Indonesia - Certain Measures Affecting the Automobile Industry*.

<sup>89</sup> Panel Report of 17 September 1998, WT/DS75/R, paras 10.27 et seq., *Korea - Taxes on Alcoholic Beverages (Korea - Alcoholic Beverages)*.

<sup>90</sup> Panel Report, *ibid.*, para. 10.31.

<sup>91</sup> Panel Report, *ibid.*, para. 10.32.

<sup>92</sup> Appellate Body, see note 74, paras 62-78, and above Section III.1.b.

### 3. Conclusion

While the issue of private lawyer presence at hearings of the dispute settlement institutions of the WTO appears to have been settled and accepted by WTO Members in principle, the admissibility, and the treatment of, *amicus curiae* briefs in panel or appellate proceedings is still, and will be for some time, a matter of intense debate. Panels and the Appellate Body have resolved that they have the discretionary right to accept and consider such briefs where appropriate. The approach taken appears concise and consistent in theory.<sup>93</sup> In practice, however, panels and the Appellate Body have accepted and considered *amicus curiae* briefs only in a very limited number of instances; mostly, they were rejected, in many cases without any apparent reason.

More importantly, however, as evidenced by the opposition of WTO Members in the *Asbestos* Case, the Appellate Body, in the view of many WTO Members, has stretched its judicial tasks and powers to interpret the WTO agreements, in particular the DSU, to their constitutional limits within the WTO system. While those concerned in the private sector pressed hard to get their hands on the WTO's dispute settlement system, many WTO Members did not appear to be prepared to render even a small part of control over the proceedings, and over their subject matter, to anyone but their peers in the system. They feel that the decision to accept and consider *amicus curiae* briefs goes beyond the Appellate Body's scope of powers under the DSU. In their view, the matter is to be considered a matter which directly bears on WTO Members' rights and obligations. It should therefore, taking into account the limits to the WTO's judicial system resulting, in particular, from article 3 para. 2 of the DSU, be decided by WTO Members rather than by the WTO judiciary.

Indeed, there are a number of arguments which can be made to support the view that WTO Members should continue to maintain exclusive control over the dispute settlement proceedings. There is the risk of politicising disputes if the public were granted unlimited access to voice its views in the court house. Also, the more the public gets access to dispute settlement proceedings the more difficult it becomes to protect the confidentiality of information in proceedings concerning sensitive matters involving, for example, business secrets of the industries concerned. Moreover, small developing countries with only little, if any, resources to conduct dispute settlement proceedings may be over-

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<sup>93</sup> See, however, for a critical analysis Appleton, see note 38, 691 et seq.

whelmed by the amount of information they might have to manage in high-profile cases attracting a lot of interest. Without knowing which information the dispute settlement institutions will rely on, responding to the material in front of them becomes a game of Russian Roulette. Also, and more systematically, the WTO is an organisation of states; its legal system is a regime with rights and obligations exclusively granted to, and imposed on states. Its dispute settlement system serves to resolve disputes between the members of the organisation about their understanding of the rights and obligations existing between them. Important and justified as it may be, giving the public a say, it might be argued, is in the absence of rights and obligations for the private sector, an alien element and should be treated with restraint in a still state-driven system.

However, who but those concerned by the subject-matter of a proceeding are better suited to comment on it? How could the WTO's credibility and legitimacy in the public sphere be increased without opening the doors to a secretive dispute settlement mechanism which is at the heart of the constitutionalised WTO? Many of the developing country members and other WTO Members' concerns are of a practical nature; they could be remedied by practical solutions. The Appellate Body's attempt to formalise, and clarify, its dealings with *amicus curiae* briefs in the *Asbestos* Case provides a first illustration of how the number of such briefs and their volume can be limited to manageable portions. Also, in the same case, the Appellate Body presented a model which put it in a position to ensure that only such briefs which are relevant to its task, as defined by its terms of reference, would reach the stage of consideration.

The issue requires, and will most likely receive, clarification by WTO Members in the ensuing reform of the WTO dispute settlement mechanism. Doing so will not be the most important matter for WTO members to resolve in the area of dispute settlement in the next few months; yet, so as to reassert the confidence of both WTO Members and the public in the WTO's dispute settlement, a viable answer is needed to both WTO Members' legitimate concern to preserve the dispute settlement system as a tool in their hands and the private sector's legitimate interest in increasing the system's transparency and its ability to render fair and equitable decisions.

#### IV. The (Supra-)National Level

Private parties, as seen in the preceding sections, may in some form or another be empowered to have a part in the process of enforcement of international trade law as it takes part between its subjects, the states. There, however, their role is limited to voicing their immediate interest in a mediate manner. They are not, really, part of the game. They may argue their somehow recognised interests *within* the law, but the law is not theirs, they are not part of it, only the pawns in the states' game. They are not players on the (public) international legal stage, but spectators who by their applause or booing may influence the players and/or the referee. The reason is their lack of "subjectivity" in public international, and therefore international trade law.

So the focus shifts: if private parties cannot come to international trade law, can — and does — international trade law come to them? The question is whether and to what extent international trade law is, may be, or may become part of national law so as to be applicable to, and usable by, private parties, subjects of national law.<sup>94</sup>

The role and function of international trade law in national law has been the subject of much debate under the old GATT 1947. With the inception of the WTO in 1995 and the significant step towards constitutionalization<sup>95</sup> of the multilateral trading system it entailed, however, the question received new substance. WTO law was now law and no longer a mere framework of diplomatic guidelines, and hence would offer itself to legal applications rather than mere political consideration. After all, the application of stated law, as such, can be performed in all

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<sup>94</sup> National law in this sense, of course, includes EC and other supranational law directly applicable to private citizens of the respective legal realm.

<sup>95</sup> See, e.g. H. Schloemann/ S. Ohlhoff, "Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence", *AJIL* 93 (1999), 424 et seq., footnote 1, with further references. Other terms used to describe the development from the GATT to the WTO system include, e.g. "legalization" and "juridicization" (see *ibid* for references). We consider that while all these are useful and correct, they do not fully capture what has happened, or rather is happening in the international trading system and beyond, i.e., in our view, the emergence of a constitutional realm of international economic and to some extent non-economic political relations. See also S. Ohlhoff/ H. Schloemann, "Rational Allocation of Disputes and Constitutionalization: Forum Choice as an Issue of Competence", in: J. Cameron/ K. Campbell (eds), *Dispute Resolution in the WTO*, 1998, 302 et seq.

legal systems, national just as well as international. Pointedly put: with the advent of the WTO, direct effect of its law became a question of political will, not one of legal possibility.

Of course the question of applicability of public international law, including treaties, in national systems is a matter of national constitutional (and other national) law. But whether and to what extent international trade law can be received into the national realm, if the constitution (and/or other national law) so provides, may depend strongly on the structural characteristics of the treaties and customary law norms in question. It is this point that has nurtured most of the debate within the EC, and before the ECJ.

One may envisage different forms in which international trade law may take effect in national law. First, it may become part of national law and be directly applicable so as to produce direct effect, i.e., create legal rights and obligations *inter alia* for private parties. This may happen directly through a monist national constitutional setting or through implementing legislation. Second, implementing legislation may incorporate parts of international trade law into specific regulations, e.g., in anti-dumping or other areas, thereby creating a selective applicability. Third, international trade law may take indirect effect in national systems through the institution of consistent interpretation. Of course, a multitude of variations of the interplay of national and international law are imaginable.

In our analysis we will take the reception of WTO law into national systems as an example. Other trade agreements of all sorts have received individual treatment that has, in some instances, differed, depending on a multitude of legal, but mostly more political factors. We concentrate on WTO law because it aspires to universality and is therefore arguably the key to our subject question: is the nation-state being transcended?

## 1. Direct Effect? International Trade Law within the EC

In its legislation implementing the Uruguay Round agreements, the United States has left nothing to chance, i.e., to national courts: it has expressly ruled out that private parties may rely on WTO law before national U.S. courts.<sup>96</sup> The situation in many other Members, however,

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<sup>96</sup> 1994 Uruguay Round Agreements Act, 19 USC § 3511, Pub. L. No. 103 - 465 (1994), § 102(c).



is more complex. One example is the EC, where the question of the internal effect of WTO law has led to a rich debate on the underlying systematic issues and to a less rich but nonetheless interesting ECJ jurisprudence. In the following we will concentrate on this example as it highlights the attempt of a differentiated approach.

Can private parties use international trade law as “their” law within the EC? Different forms of “use” are imaginable:

1. Claims based on immediately applicable
2. ble rights conferred by international trade law — in EC parlance: “direct effect”. This presupposes that individual rights can be extracted from the treaty in question.
3. Claims based on rights conferred by national law (e.g. constitutional liberties) which have been restricted by national measures which are incompatible with applicable international trade law. Here, trade law itself does not confer individual rights but is a yardstick for the validity, or applicability, of a rights restricting national measure.
4. Claims based on rights provided by national law by express or implied reference to international trade law as a whole or to specific treaty provisions. Examples of this are the EC Trade Barriers Regulation and the U.S. “Section 301”.<sup>97</sup>
5. Claims based on rights conferred by national law as interpreted in conformity with international trade law (“consistent interpretation”).

#### a. Overview: The ECJ’s present position on WTO law

Article 300 para. 7 of the EC Treaty (formerly article 228 para. 7) provides the basis for considering whether WTO law is EC law. It reads as follows:

“Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and the Member States.”

The issue, on the face of it, is straightforward: Community agreements (such as the WTO Agreement and the agreements under its umbrella<sup>98</sup>)

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<sup>97</sup> See above notes 6 and 7.

<sup>98</sup> While the EC’s “membership” in GATT 1947 was a difficult issue which the Court had to resolve in *International Fruit (International Fruit Com-*

are Community law, and their hierarchical status is between primary and secondary law.<sup>99</sup> The Community, in other words, subscribes to a form of monism. But what exactly that means for the applicability of the WTO agreements under Community law to Member States and private parties alike is a matter of debate.

After the inception of the WTO, many assumed, hoped or feared that the ECJ would allow WTO law to become part of everyday EC law, in contrast to its earlier position on the GATT 1947 and despite the Council stating in the preamble of its decision on the conclusion of the WTO agreements that "by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member States courts."<sup>100</sup> The new legal quality of the WTO regime as a whole, and the ECJ's earlier jurisprudence on the status and effect of Community treaties in Community law, many argued, would compel the ECJ to accord immediate applicability, in particular "direct effect," to WTO law. In this view, an importer may directly rely on the EC's GATT commitments to obtain a certain customs classification or tariff rate, or a foreign service provider may attack discriminatory licensing practices of Member States' regulatory authorities before Community courts by direct reference to the EC's GATS commitments.

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*pany NV and others v. Produktschap voor Groenten en Fruit*, Judgement of 12 December 1972, ECR 1972, 1219) (concluding that the Community has assumed membership from and through its Member States), the EC (as well as the European Community for Coal and Steel and Euratom) is now, alongside and parallel to its Member States, a Member of the WTO and a party to all agreements under its umbrella. The exact reach of the Community's and the Member States' respective competences to conclude the agreements was clarified in the ECJ's Advisory Opinion 1/94 of 15 November 1994, ECR 1994, I-5267.

<sup>99</sup> Permanent position of the ECJ since *International Fruit Company*, see above, paras 5 et seq. Cf. A. Ott, *GATT und WTO im Gemeinschaftsrecht*, 1997, 68 et seq.; A. Epiney, "Zur Stellung des Völkerrechts in der EU", *EuZW* 10 (1999), 5 et seq., (6 et seq.).

<sup>100</sup> Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), O.J. 1994, L 336/1.

The ECJ, however, did not do this. It avoided the question as long as it could. This became most apparent in *Hermès*<sup>101</sup> in 1998, when to the surprise of observers, it found it unnecessary to decide the question of direct effect despite extensive treatment of the matter (and pleas in favour of direct effect) by the Advocate General *Tesouro*. When the Court was finally forced to pronounce itself on the status of WTO law in Community law in *Portugal v. Council* in November 1999, it outright denied WTO law's direct applicability in, or as, EC law, in this case even in a claim by a Member State against the Council. Echoing its earlier jurisprudence on GATT 1947, the Court made a reasonably unambiguous statement of principle:

“[H]aving regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.”<sup>102</sup>

Ever since, the ECJ and the Court of First Instance have repeated this mantra more or less *verbatim* whenever the need arose, most recently in the joint cases *Dior* and *Assco*<sup>103</sup> and the parallel cases *Cordis, T. Port* and *Bocchi*.<sup>104</sup> Despite fierce opposition from some legal scholars,<sup>105</sup> it must by now be seen as established ECJ jurisprudence that WTO law as a whole cannot be directly invoked either by a Member State or a private party against a Community or a Member State measure as a matter of Community law. In the above classification, this applies (without differentiation or visible discussion by the ECJ) to modes (1) and (2).

Starting from the principle of non-applicability (or non-invocability), the ECJ accepts three exceptional cases in which WTO law may be invoked before Community courts:

- If Community law leaves room for WTO compatible interpretation
- If Community law expressly incorporates WTO law; and
- If a Community measure aims to implement WTO law.

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<sup>101</sup> *Hermès International v. FHT Marketing Choice BV*, Judgement of 16 June 1998, ECR 1998, I-3637.

<sup>102</sup> Case C-149/96, *Portuguese Republic v. Council*, Judgement of the Court of 23 November 1999, para. 47.

<sup>103</sup> See note 155 and accompanying text.

<sup>104</sup> See notes 155, 157, 158 and accompanying text.

<sup>105</sup> Petersmann, see note 1 (before *Portugal v. Council*, referring mainly to *Bananas*).

At a closer look, however, all three cases are not really exceptions to the rule the ECJ's mantra establishes, namely that secondary Community law is not subject to compatibility with WTO law, or more pointedly: that for purposes of rights of individuals and EC Member States alike, secondary Community law trumps WTO law. WTO law only becomes applicable, or rather: invocable, where it "doesn't hurt" (in the first case: consistent interpretation) or by virtue of an act of the community legislator (in the latter two cases).

### *aa. Consistent Interpretation*

The first case is, of course, not specific to WTO law. The principle of "consistent interpretation" (of Community law with international law binding the Community) is not new but has been pronounced most clearly recently in *Commission v. Germany* where the Court put it in context with other cases where consistent interpretation is due:

"When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the [EC] Treaty. Likewise, an implementing regulation must, if possible, be given the interpretation consistent with the basic regulation (see C-90/92 *Dr. Trepper v. Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569 paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provision must, so far as possible, be interpreted in a manner that is consistent with those agreements."<sup>106</sup>

The principle is, in varying forms, applied in many other jurisdictions.<sup>107</sup> As Cottier/ Schefer point out, consistent interpretation is an important means to avoid unnecessary conflict between national and

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<sup>106</sup> *Commission v. Federal Republic of Germany*, Case C-61/94, ECR 1996, I-3989, I-4021, para. 52. A year earlier, in *Fritz Werner GmbH v. Federal Republic of Germany*, Case C-70/94, Judgement of 17 October 1995, ECR 1995, I-3189, the Court had referred to a GATT provision as support for its interpretation of a Community regulation on export controls (para. 23).

<sup>107</sup> The U.S. Supreme Court has established the same for U.S. law very early in 1804, in the famous *Charming Betsy* Case, where Chief Justice Marshall held that "an act of Congress shall never to be construed to violate the law of nations if any other construction is possible." 2 Cranch 64 (1804).

international law that is independent of whether the interpreting judge is bound by a monist or dualist constitution.<sup>108</sup>

The mechanism is, of course, putty in the hands of courts, specifically the ECJ. As in the case of horizontal (in)direct effect of not or insufficiently transformed Community directives,<sup>109</sup> the limits of interpretation are themselves a matter of interpretation. In spite and because of this, the relevance and potential of this form of application of WTO law for private parties should not be underestimated. In fact, WTO rule language may often be more precise than national legislation<sup>110</sup> and therefore operate as a welcome clarification tool even in the eyes of reluctant judges.

### *bb. Incorporation by Reference*

The latter two "exceptions", in fact, go back to earlier decisions under GATT 1947, namely *Fediol III*<sup>111</sup> and *Nakajima*,<sup>112</sup> and have been reaffirmed by recent decisions under the WTO, namely *Portugal v. Council*.<sup>113</sup>

In *Fediol III*, the Court had to decide whether the reference in the "New Trade Policy Instrument"<sup>114</sup> to "illicit commercial practice" and the rules of international law, in particular those of GATT, meant that these rules were thereby included into the regulation and were thus open to application by private petitioners and ultimately reviewed by the Court. The Court, rebuffing the Commission which had attempted to rely on the International Fruit jurisprudence that GATT rules were not fit to be invoked by private parties before Community courts, answered in the affirmative:

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<sup>108</sup> T. Cottier/ K. Nadakavukaren Schefer, "The Relationship between World Trade Organization Law, National and Regional Law", *JIEL* 1 (1998), 83 et seq., (90).

<sup>109</sup> See in particular the landmark case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, Judgement of 13 November 1990, ECR 1990, I-4135, paras 6-9.

<sup>110</sup> Cottier/ Schefer, see note 108, 90.

<sup>111</sup> Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, Judgement of 22 June 1989, ECR 1989, 1781.

<sup>112</sup> Case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Community*, Judgement of the Court of 7 May 1991, ECR 1991, I-2069.

<sup>113</sup> See note 102, para. 49.

<sup>114</sup> Council Regulation 2641/84, O.J. 1984 L 252, page 1.

“It follows that, since Regulation Nr. 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying those provisions.”<sup>115</sup>

The rationale is straightforward: where Community law expressly incorporates WTO law by reference, it becomes thereby, i.e., by virtue of that incorporation, applicable secondary Community law and may consequently be invoked before Community courts. This is no different from other cases of inclusion by reference, e.g., of technical data or the like. Of course, while this mechanism opens certain areas of (then) direct application of international trade law, the fact that WTO in this case comes in the guise, and assumes the status, of secondary Community legislation, cannot invalidate or trump other secondary law (except through application of general principles applying to conflicting rules on the same hierarchical level, namely *lex posterior* and *lex specialis*). This technique — incorporation by reference — now finds its most prominent example in the Trade Barriers Regulation (TBR), the successor of the New Trade Policy Instrument, which takes a violation on international trade law as the triggering requirement for the TBR procedure. This mechanism serves in particular to address, through Community institutions, violations of international trade law by third countries.<sup>116</sup>

### *cc. Act of Transformation*

The last “exception”, first stated in *Nakajima*, is more complicated. Where Community law is explicitly or implicitly conceived to implement WTO law, the ECJ assumes it must be understood to aim to do so without limitation and without exception, unless explicitly stated. Based on this assumption, the Court measures the validity of the measure in question against the very WTO law it aims to implement. The rationale for applicability and invocability of WTO law, again, is the —

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<sup>115</sup> See note 111, para 22.

<sup>116</sup> See Section IV. 2 below.

in this case assumed — will of the community legislator to incorporate WTO law.<sup>117</sup>

How did the ECJ arrive at this point? In the following, we will sketch the development of the Court's jurisprudence on the issue from the old GATT days until today. We will discuss certain points and elements of reasoning and, where appropriate, look at contradictions, or at least inconsistencies, in the Court's jurisprudence. Other authors have provided excellent studies exploring in detail the legal and political pros and cons of the direct effect of WTO law. In view of the practical focus of this overview, we can therefore restrict ourselves to brief comments and otherwise refer to those studies.<sup>118</sup>

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<sup>117</sup> By this act of transformation WTO law, thus, assumes the status of directly applicable EC law, but only in a negative function. However, an awkward edge remains: why would WTO law suddenly be accorded its higher place in the hierarchy of EC law (above, e.g., the regulation that aims to transform it) in accordance with article 300 para. 7 of the EC Treaty and thereby affect the validity of a piece of Community legislations, while it otherwise does not? The mechanism of article 300 para. 7 of the EC Treaty is straightforward: a Community treaty is applicable Community law. If the ECJ thinks that WTO by virtue of its nature is not fit to confer legal positions, it denies it, in effect, the legal status provided for by article 300 para. 7. If that is correct and fair, then it is strange that the Community legislator by virtue of its assumed will to transform WTO law correctly reinstates that status *vis-à-vis* the very act of transformation. If the legislator's will is the power that makes WTO law applicable, it cannot be used against, or outside of, that very act of will that gives it life. But of course, one may argue that it is simply a matter of inconsistency of the measure itself, that the will to transform correctly makes it inherently flawed if it does not. If this is the rationale it would have helped to say so clearly.

<sup>118</sup> See in particular (before *Portugal v. Council*) Cottier/ Schefer, see note 108, who provide a helpful overview of the different schools of thought and an equally helpful list of pros and cons in the annex; P. Eeckhout, "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems", *CML Rev.* 34 (1997), 11 et seq.; W. Meng, "Gedanken zur Frage unmittelbarer Anwendbarkeit von WTO-Recht in der EG", in: U. Beyerlin, see note 1, 1063 et seq.; J. Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, <http://www.jeanmonnetprogram.org/papers/98/98-3-.htm>; (after *Portugal v. Council*); M. Hilf/ F. Schorkopf, *WTO und EG: Rechtskonflikte vor dem EuGH?*, *Europarecht* 2000, 74 et seq. Most recently, J. Bourgeois, "The European Court of Justice and the WTO: Problems and Challenges", in: J. Weiler (ed.), *The EU, The WTO and The Nafta - Towards a Common Law of International Trade*, 2000, 71 et seq.

## b. Before 1995: GATT 1947 in Community Law

Looking at the status of GATT 1947 in EC law requires a slightly broader look at the general ECJ jurisprudence on the status of Community treaties in EC law. We have already seen the rather straightforward rule established by article 300 para. 7: Community treaties are Community law (and may be used as such before Community courts).

The ECJ established this as early as 1972 in the *International Fruit*<sup>119</sup> decision, albeit *a fortiori*; when it held that even the GATT 1947, to which the Community as such had not been a signatory, was nonetheless binding on it. In this decision, the Court established a two step test for private parties invoking Community treaties: the international agreement must be binding on the Community, and the relevant provision must establish a right for Community citizens to rely on it. The GATT 1947 passed the first test, but failed the second.

For the purposes of this analysis, it is useful to take a rather extensive look at this first pronouncement by the Court on the question of the direct effect of GATT:

“19. It is also necessary to examine whether the provisions of the general agreement confer rights on citizens of the community on which they can rely before the courts in contesting the validity of a community measure.

20. For this purpose, the spirit, the general scheme and the terms of the general agreement must be considered.

21. This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements” is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

22. Consequently, according to the first paragraph of article XXII “each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to all matters affecting the operation of this agreement”.

23. According to the second paragraph of the same article, “the contracting parties” — this name designating “the contracting par-

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<sup>119</sup> See note 98.



ties acting jointly” as is stated in the first paragraph of article XXV — “may consult with one or more contracting parties of any question to which a satisfactory solution cannot be found through the consultations provided under paragraph (1)”.

The reasoning for denying direct effect, thus, starts from “the spirit, the general scheme and the terms” of the GATT 1947 as the treaty under scrutiny and then finds essentially three points which carry the Courts thereafter constantly recalled statement that the rules of GATT 1947 were characterized by “great flexibility”, so great that they were not fit to be invoked by private parties before Community courts:

- *reciprocity and (ongoing) negotiation* as the basic principle, found in the preamble;
- the diplomatic and *flexible dispute settlement* under arts XXII and XXIII of GATT 1947 and the equally flexible enforcement, allowing for the continuation of violations; and
- the possibility for *safeguards* justifying violations of substantive GATT rules.

It is worth keeping in mind, however, the starting point: the “spirit and general scheme” — it is this point that has allowed the Court to justify its continued denial of direct effect even under the WTO, as the “great flexibility” argument as such was significantly reduced.

Parallel to, and in contrast with, its consequent rejection of the direct effect of the GATT 1947, the ECJ, in a series of judgements, showed itself favourable towards direct effect of other Community agreements, both association agreements and trade agreements, reaffirming that Community agreements are an “integral part” of the Community legal order subject to Court review. In its 1974 *Haegeman II* decision, the Court held that:

“an Agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty is, as far as it concerns the Community, an act of one of the institutions of the Community in the meaning of subparagraph (b) of the first paragraph of Article 177. From the date it comes into force, its provisions form an integral part of Community law.”<sup>120</sup>

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<sup>120</sup> Case 181/73, *R. V. Haegeman v. Belgian State* (“*Haegeman II*”) Judgement of the Court of 30 April 1974, ECR 74, 449, 1. The Court has subsequently reiterated this language, e.g., in Case 104/81, *Hauptzollamt Mainz v. C.A.*

In 1982, the ECJ held in *Kupferberg* that a German company could directly rely on a provision of the Free Trade Agreement between the (then) EEC and (the then non-Member State) Portugal. In this case, the Court stressed that, of course, the parties to a treaty were free to agree with one another on the executability of treaty provisions when concluding the treaty or otherwise. In the absence of such an agreement, i.e., if and when the question of direct effect is not addressed by the treaty itself, the Court was called upon to decide whether a provision should be applied as a matter of Community law.<sup>121</sup>

In this respect, the Court, referring to the public international law obligation to perform in good faith, stated that parties to a treaty are generally free to determine how to do so, “unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means”, and went on to explicitly deny that reciprocity at this point was relevant: “Subject to that reservation, the fact that the Courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.”<sup>122</sup> The Court also rejected other possible arguments against the direct effect, namely the existence of an institutional framework for consultations<sup>123</sup> and of a safeguards clause.<sup>124</sup>

After having concluded that the nature of the agreement thus did not prevent traders from relying on it, the Court went on to examine

*Kupferberg* (“*Kupferberg*”), Judgement of the Court of 26 October 1982, ECR 1982, 3641, para. 13.

<sup>121</sup> *Kupferberg*, see above, para. 17. This is to be seen in contrast to the Council’s attempt to rule out direct effect of WTO law through a unilateral and purely internal statement in the preamble of its decision on the conclusion of the Uruguay Round Agreements, see above. While Advocate General Tesouro in his opinion in *Hermès* (correctly) found the statement plainly irrelevant for the Court’s analysis (ECR 1998, I-3606, para. 24 (I-3623)), the Court referred *obiter* to the statement without further elaboration *after* it had found its mantra rejecting “invocability” in *Portugal v. Council*, see note 102, para. 48 (“That interpretation corresponds, moreover, to what is stated in the final recital in the preamble...”).

<sup>122</sup> *Kupferberg*, see note 120, para. 18.

<sup>123</sup> *Ibid.*, para. 19-20.

<sup>124</sup> *Ibid.*, para. 21.

whether the specific provision in point was “sufficiently precise” and “unconditional”.<sup>125</sup>

In the 1986 *Demirel* decision, the ECJ distilled its jurisprudence on the internal effect of Community agreements into the principle:

“A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of a subsequent measure.”<sup>126</sup>

Despite its general openness towards direct application of Community agreements, the GATT 1947 continued to remain off limits, as established in *International Fruit*. The Court reaffirmed this in the most prominent of its many pronouncements in the *Bananas* cases, namely in the 1994 *Germany v. Commission*<sup>127</sup> decision. This judgement is remarkable not because it reiterates the Court’s understanding of the inappropriateness of direct effect of GATT law but because it also extends this rationale to Member States which are, strictly speaking, not subject to the subjective right requirements applicable to their citizens. Direct effect, in other words, had nothing to do with it. Nonetheless, the ECJ was undeterred and held that Germany could not rely on the GATT 1947 *vis-à-vis* Community institutions, even though this put Germany in the awkward position of being forced to breach the GATT (by virtue of the Community acting for it) with no chance of forcing the Community to comply. Both Member States and private parties

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<sup>125</sup> As stated earlier, it is rather clear for many GATT and WTO rules that they meet that standard. Consequently, the crucial step – where GATT failed at the time and WTO law fails today, in the eyes of the ECJ – is the “nature”, “general spirit” and/or “general scheme” step, opened by the teleological interpretation (“object and purpose”). Needless to say: this particular interpretative step is rather accessible for, or vulnerable to, the injection of general (political) considerations.

<sup>126</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Judgement of 30 September 1987, ECR 1987, 3719, para 14. The agreement in point was the EC-Turkey Association Agreement.

<sup>127</sup> Case C-280/93, *Federal Republic of Germany v. Council* (“*Bananas*”), Judgement of 5 October 1994, ECR 1994, I-4973, paras 110-112.

were thus in the same boat — they still are since the Court clarified the same result for WTO law in *Portugal v. Council*.<sup>128</sup>

By the time of the *Banana* decision, the canon of the rule (of no direct effect/no direct applicability) with its “exceptions” — explained above — was already complete. In 1989, the Court had ruled in *Fediol III*<sup>129</sup> that international trade law becomes law invocable by private parties (and presumably Member States) if and when it is included in secondary Community law by reference. In 1991, the Court had established the second “exception” in its *Nakajima*<sup>130</sup> judgement, namely that Community law will be measured against international trade law if and when it aims to implement it.

Finally in *Chiquita Italia*,<sup>131</sup> the Court was asked to rule on the compatibility of an Italian internal taxation law with certain GATT 1947 provisions. The decision, although rendered in 1995, dealt with a time period that concluded before the entry into force of the Uruguay Round agreements, so that these played no role. The Court, without further examination, reiterated its principle that the GATT 1947 was unfit to confer individual rights invocable in Community courts, referring back to its pronouncements in the 1994 *Banana* decision.<sup>132</sup> Interestingly, however, this contrasts sharply with the Court’s treatment of

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<sup>128</sup> See below Section IV 1. c. This indeed puts the Member States in a tricky situation: they are, like the Community itself, members of the WTO and are therefore bound *vis-à-vis* third parties as a matter of public international law. But as a matter of Community law, the EC is exclusively competent for international trade matters (article 133 of the EC Treaty). If the Member State is unable to force the Community to act in accordance with WTO law, the Member State is forced without recourse to act in violation of its public international law obligations. The ECJ does not address this point, although it would have been worth considering as one of the inherent problems of mixed agreements. A. v. Bogdandy/ T. Makatsch, “Kollision, Koexistenz oder Kooperation”, *EuZW* 11 (2000), 261 et seq., defending the ECJ’s denial of direct effect (for private parties) in principle, suggest allowing Member States to rely on WTO law *vis-à-vis* the Community. See for a general critique also M. Hahn/ G. Schuster, “Le droit des Etats membres de se prévaloir en justice d’un accord liant la communauté”, *RGDIP* 99 (1995), 367 et seq.

<sup>129</sup> See note 111.

<sup>130</sup> See note 112.

<sup>131</sup> Case C-469/93, *Amministrazione delle Finanze dello Stato v. Chiquita Italia*, Judgement of 12 December 1995, ECR 1995, I-4533.

<sup>132</sup> *Ibid.*, paras 26-29.

the fourth ACP-EEC Convention in the same context. The Court went on at length to establish that a simple standstill provision contained in an additional protocol to the Convention had, in fact, direct effect.<sup>133</sup>

### c. After 1995: Same Result, (slightly) different Reasons

Looking at the reasons for the Court to reject direct effect of GATT 1947, there were indeed a few good reasons to expect that it may change, or rather adapt, its position in view of the new circumstances. In particular in view of the significant transition “from diplomacy to law” through the inception of the DSU which established a clearly adjudicatory, mandatory system with two instances, strict legal procedures and the negative consensus principle closing any escape route the GATT 1947 had offered. In fact, few international treaty systems, if any, have achieved that level of *de jure* and *de facto* binding law. The criteria used by the Court for denying direct effect to GATT 1947 — while being generous in giving direct effect to other Community agreements — as set out in *International Fruit*, namely the “great flexibility” of the rules in light of the object and purpose of the GATT and their “not unconditional”<sup>134</sup> nature, seemed to have lost their bite. Could an international treaty be tougher than the WTO regime? But the Court did not make this step and instead adopted, or rather continued, what von Bogdandy/ Makatsch have appropriately labelled a “conflict avoidance strategy”.<sup>135</sup>

For those who were waiting for the above sketched move, the Court’s 1996 judgement in *Commission v. Germany*<sup>136</sup> supported their expectations. The Court agreed with the Commission that Germany was, based on article 228 (now 300) of the EC Treaty, as a matter of applicable Community law, bound to conform to an agreement on dairy products concluded by the Community in the GATT Tokyo Round,<sup>137</sup> i.e., an agreement under the GATT 1947. Without further ado, thus, the Court subjected Germany to the legal obligations of a Community agreement as a matter of Community law. Let it be recalled, in this context, that article 300 makes no distinction between Community in-

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<sup>133</sup> Ibid., paras 54-63.

<sup>134</sup> *Bananas*, see note 127, para. 110.

<sup>135</sup> v. Bogdandy/ Makatsch, see note 128, 265.

<sup>136</sup> Case C-61/94, *Commission v. Federal Republic of Germany*, Judgement of 10 September 1996, ECR 1996, I-3989.

<sup>137</sup> *Id.*, para. 15

stitutions and Member States: both are equally bound (or not bound) by Community treaties.

When the *Hermès* Case was to be decided, everyone expected a clear word from the Court.<sup>138</sup> A Dutch court, faced with an application to render a ruling based on article 50 para. 6 of the TRIPs Agreement on a case involving an internationally registered (non-Community) trademark right (*inter alia* for the Netherlands), had asked the ECJ whether a measure under certain general provisions of Dutch procedural law was to be understood as a provisional measure in the sense of article 50 of the TRIPs Agreement.

Advocate General Tesauro<sup>139</sup> had gone to great length to demonstrate that after the changes made in the Uruguay Round, it was now time to consider direct effect. In his deliberations, worth reading in detail, Tesauro carefully addressed all of the Court's "old" reasons for denying direct effect to GATT 1947 and concluded that they are no longer applicable to WTO law:

- the "great flexibility" that may have characterized the old GATT 1947 was certainly no inversion of the system of rules and exceptions — he refers in particular to the Understanding on Balance of Payment provisions in GATT<sup>140</sup> and the Safeguards Agreement<sup>141</sup> — so that the "fabric" of the system was now clearly comparable to other binding treaties<sup>142</sup>;
- the flexible GATT dispute settlement allowing for a blockage by the violating state had been replaced by the DSU providing for the

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<sup>138</sup> A few months before, the Court had already once declined to answer the question of direct effect in *T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas*, joined cases C-364/95 and C-365/95, para. 66, this time with good reason, as the question by the Finanzgericht Hamburg had been conditional upon applicability of article 234 of the EC Treaty (now article 307) — priority for earlier agreements *vis-à-vis* the EC Treaty — which the Court denied as Ecuador, the relevant state in this case, had not been a GATT 1947 contracting party and had joined the WTO only in 1996, i.e., after the relevant events of the case.

<sup>139</sup> See note 121.

<sup>140</sup> Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (complementing arts XII and XVIII of GATT 1994).

<sup>141</sup> Agreement on Safeguards (complementing arts XII and XIX of GATT 1994).

<sup>142</sup> See note 121, ECR 1998, I-3606, paras 28, 29.

“negative consensus” rule, i.e., providing for mandatory and binding dispute settlement without escape;<sup>143</sup>

- and the possibility of compensation instead of performance in the case of an adverse panel decision only offered temporary relief and did not make the obligations non-binding.<sup>144</sup>

Tesauro concluded that the Court in his view would have to change its position in light of its overall jurisprudence regarding direct effect of international agreements. Finally, interestingly, he hinted that if the Court wanted to deny direct effect because of the lack of reciprocal jurisprudence of other member’s courts, it should do so openly under the principle of “reciprocity of implementation” – or even generally defer to the “political organs” prerogative to “administer” international agreements.<sup>145</sup>

Despite this unusually passionate plea from the Advocate General, the Court showed itself unimpressed and simply denied that it even had to answer the question of direct effect – apparently because the Dutch court had only asked for an interpretation of article 50 para. 6 of TRIPs. But this was an escape: as Tesauro had explained in his opinion, the Dutch court apparently presupposed that the provision had direct effect, hence the question had to be addressed.<sup>146</sup> In general, it was unusual for the Court to be overly restrained when called to assist national courts in article 234 (then article 177) proceedings. The Court, thus, limited itself to an interpretation of article 50 TRIPs, strictly answering the Dutch court’s question. In effect, the Court’s evasion seems awkward. It seems clear that the question of direct effect was directly relevant to the case and should have been decided there and then. If the provision was directly applicable as a matter of Community law, it was clearly necessary for the Dutch court to know this. Even more so in the opposite case.

Perhaps the most interesting decision for the entire debate was rendered on the very same day as *Hermès* and had nothing to do with WTO law: in *Racke*, the Court decided that a private party could rely on general rules of customary international law on the termination of treaties – in this case the *clausula rebus sic stantibus*<sup>147</sup> – to claim the

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid., para. 35.

<sup>146</sup> Ibid., paras 8, 24.

<sup>147</sup> As reflected in article 62 of the Vienna Convention on the Law of Treaties.

invalidity (or inapplicability) of a norm of secondary Community law.<sup>148</sup> Through a regulation based on the termination of the EC-Yugoslavia Agreement, the Council had amended earlier regulations based on the Agreement on which *Racke* wanted to rely to its benefit. If this quite impressive judgement giving “indirect direct” effect to customary international law is to hold, it arguably puts the Court at odds with its continued denial formula regarding WTO law: the question of “direct effect” is perhaps beside the point, after all.<sup>149</sup> According to *Racke*, the question is one of the legality of secondary Community law — which is simply illegal if it violates superior international law. If that is the issue, then the question whether WTO law is able to confer individual rights is in most cases irrelevant, as the individual *right* in question (say: the import of Bananas unrestricted by the Banana regime) which is affected by the secondary legislation under scrutiny may actually be rooted in Community law. If and when that is the case, WTO law should be at least as good as customary international law to serve as a measure of legality of such restricting measure, independent of whether it is itself able to confer individual rights. In *Racke*, thus, it became apparent that although the Court in its pronouncements on GATT seemed to revolve around private rights, it actually didn’t really do so. Under the (misleading) label of “direct effect”/“direct applicability”, the issue was looked at much more broadly as the general question whether the treaty in question (here WTO agreements) is meant to be applicable as national (Community) law or not.

In his opinion in *Portugal v. Council* in 1998, Advocate General Saggio put his finger in the wound. Portugal had contested the validity of a Council decision on the conclusion of bilateral textile agreements with Pakistan and India, *inter alia* claiming that they (and thus the decision) violated WTO obligations. Saggio exposed the central flaw in the Court’s jurisprudence on GATT: the rules of the WTO are by virtue of article 300 para. 7 of the EC Treaty “*paramètres de légalité*” of secondary Community law<sup>150</sup> — a question quite distinct from the problem of whether these rules conferred individual rights. Just as the Community institutions, as decided in *Racke*, were bound to observe general rules of customary international law, they were equally bound to ob-

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<sup>148</sup> Case C-162, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* (“*Racke*”), Judgement of the Court of 16 June 1998, in particular paras 42-43.

<sup>149</sup> The Court even stated so *ibid.*, para. 47.

<sup>150</sup> Case C-149/96, Opinion of the Advocate General of 25 February 1999, in particular para. 18.



serve Community treaties. These are, thereby, conditions of legality (validity or applicability<sup>151</sup>) of secondary Community law. If they are, the question of whether they confer individual rights (in this case even, as in *Bananas*, individual rights of Member States) is immaterial: the individual (or Member State) may find the rights affected by the relevant secondary Community law most notably in the constitutionally guaranteed basic rights, e.g., of freedom of profession or of property etc. Basic constitutional understanding establishes that these rights may only be affected (if at all) by properly conceived laws. If WTO is a “parameter of legality” for secondary Community law, then individuals and Member States negatively affected by such law in the exercise of their otherwise guaranteed rights may claim its invalidity (or inapplicability, as the case may be).

The Court, however did not bow. Just as in *International Fruit* 26 years earlier, the Court set out to analyse whether WTO law as a package met the standard of an agreement that could be invoked before Community courts (not making any distinction between private parties and Member States). In a visible attempt to establish (the semblance of) jurisprudential continuity, the Court referred a number of times to its *Kupferberg* decision and extracted namely the criterion of whether the Community agreement at issue “interpreted in the light of its subject-matter and purpose”, itself specifies the means of its implementation.<sup>152</sup>

Acknowledging that the DSU and the WTO agreements had introduced major changes, the Court nonetheless found generally that “the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties” — a variation of the “great flexibility” label attached to GATT 1947. The Court then found that the principle of openness to negotiation notably in article 22 para. 2 of the DSU which allows for negotiations on (temporary) compensation in lieu of specific performance if a member cannot, or chooses not to, bring itself into conformity with a panel or Appellate Body ruling, and concluded:

“Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the

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<sup>151</sup> For the purposes of this sketch of the issues, it is immaterial what exactly “parameter of legality” would mean. In line with the general principles of the relationship between Community law and Member State law, one may tend towards assuming a relationship of priority of application rather than of strict conditions for validity.

<sup>152</sup> *Ibid.*, para. 35, referring to *Kupferberg*, see note 120, para. 18.

WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of [the DSU] of entering into negotiated arrangements even on a temporary basis.”<sup>153</sup>

From this, the Court concludes that the WTO agreements do not themselves provide how they are to be implemented<sup>154</sup> (i.e., that they do not establish, as such, immediately binding rules). Such an argument is rather weak, if not a complete failure. The fact that the parties to international agreements may at any time enter into negotiations with a view to modify their terms, agree on enforcement etc., is not only quite distinct from the question of whether an agreement is substantively binding but also applies to each and every treaty. Does it make a treaty (or a private contract) less clear or less binding that the parties may agree to settle on different terms at any time? Certainly not.

Of course, the issue here is article 300 para. 7 of the EC Treaty which has the effect of binding political organs internally to the terms of treaty — the dilemma of monism, in a way. But there are ways to solve this more in line with the applicable law. Within the application of a Community agreement through article 300 para. 7, one could imagine that the Court takes, depending on the circumstances of the case, fully into account all measures taken or to be taken by the political organs within their external (treaty making) powers *as part of the agreement* it applies. A direct/indirect application by the Court, in other words, could well accommodate fully the institutional balance. The Court's backpeddelling from the far reaching consequences of article 300 para. 7 may be politically (and even somehow systematically) correct, but it does not fit with the applicable law. The Court's jurisprudence at this point, in other words, may be seen as a rather awkward attempt to use a political questions doctrine without saying so.

The Court offered further support for its findings, namely variations of the reciprocity argument. The agreements found having direct effect were characterized by a certain asymmetry which allowed for according them direct effect without excessive regard to reciprocity (the courts of the other party doing the same) — which was not the case in the strictly reciprocal WTO system. Again, one is tempted to find this argument awkward. While it makes political sense, it is difficult to reconcile with both the letter of article 300 para. 7 of the EC Treaty and the principles established namely in *Kupferberg* — unless one stretches the teleologi-

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<sup>153</sup> Ibid., para. 40.

<sup>154</sup> Ibid., para. 41.

cal interpretation, as the Court seems to do, to a maximum, offering space for the desired political considerations.

Be that as it may, the Court had fixed its line. Since then, it has stuck to its mantra that the WTO agreements as a whole are not of such a nature as to be invoked by private parties or Member States *vis-à-vis* Community institutions, namely the Commission and the Council. Without further discussion, this dogma has been applied consistently, recently in the joined cases *Dior* and *Assco*<sup>155</sup> by the Court itself and in the largely parallel cases *Cordis*,<sup>156</sup> *T. Port*<sup>157</sup> and *Bocchi*<sup>158</sup> by the Court of First Instance.

In *Dior*, a case largely similar to *Hermès*, also involving the interpretation and application of article 50 of the TRIPs agreement, the Court gave another interesting note of differentiation to its jurisprudence on the application of WTO law in the Community. While it confirmed that it had broad powers of *interpretation* over mixed agreements (i.e. agreements concluded by both the Community and its Member States due to split external competences, i.e., *inter alia*, GATS, the TRIPs Agreement and the WTO Agreement itself) justified in particular by the need for uniformity within the Community, the Court explicitly deferred to Member States courts (and constitutions) to decide the question whether a mixed agreement, applied in a case not touching on Community issues and thereby played out within the exclusive realm of Member States, may be accorded direct effect in such cases. While this is consequent from a constitutional European law perspective, it is curious that the agreements which the Court finds by their nature incapable of having effect under the strong monist link established by article 300 para. 7 may, in the eyes of the same Court, be so as to be capable of doing just that in national systems. In the area of TRIPs, for instance, where the Community may occupy progressively more areas, this may lead to the awkward situation that Member States courts, having used the TRIPs Agreement directly on a given set of cir-

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<sup>155</sup> Joined cases C-300/98 and C-392/98, *Parfums Christian Dior S.A. v. Tuk Consultancy B.V. and Assco Gerüste GmbH, Rob von Dijk v. Wilhelm Layher GmbH & Co. KG, Layher B.V.*, Judgement of 14 December 2000.

<sup>156</sup> Case T-18/99, *Cordis Obst und Gemüse Großhandel GmbH v. Commission*, Judgement of the Court of First Instance of 20 March 2001.

<sup>157</sup> Case T-52/99, *T. Port GmbH & Co. KG v. Commission*, Judgement of the Court of First Instance of 20 March 2001.

<sup>158</sup> Case T-30/99, *Bocchi Food and Trade International GmbH v. Commission*, Judgement of the Court of First Instance of 20 March 2001.

cumstances for a while (as long as it was governed by national laws), may find themselves without that recourse in exactly the same cases once the Community has spoken, although the substantive law may be identical. In fact, the German Government, e.g., has stated in its comments on the ratification of the Uruguay Round agreements by the German parliament that “a part of the agreements, in any case of the TRIPs Agreement” (excluding Title III) were directly applicable in the Federal Republic.<sup>159</sup>

The cases *Cordis et al.*,<sup>160</sup> finally, have damped hopes nurtured by some that even if primary recourse against Community measures was “not available in the absence of direct effect”, there may be secondary relief against WTO incompatible Community measures, namely damages. The plaintiffs in these cases had sought damages for losses suffered due to the new Banana regime of 1998,<sup>161</sup> the Community’s reaction to its defeat before the WTO Appellate Body.<sup>162</sup> They based their claim on a range of arguments, the most promising being that the Community organs had abused their discretion by purposefully “implementing” the WTO dispute settlement decisions in a WTO incompatible way — which was a case of wrongful implementation as declared actionable in *Nakajima*.<sup>163</sup>

But the Court of First Instance did not falter. Relying heavily on the Court’s reasoning in *Portugal v. Council*, the Court of First Instance concluded that as the WTO agreements did not create individual rights for individuals, their violation could not sustain secondary claims for damages.<sup>164</sup> As to the *Nakajima* claim, the Court of First Instance stated in apodictic brevity that the Panel and Appellate Body Reports’ findings did not constitute obligations in the sense of the *Nakajima*

<sup>159</sup> Deutscher Bundestag, Drucksache 12/7655 (neu), 337, 345, 347. The Swiss Government has done likewise, cf. Cottier/ Schefer, see note 108, 109, footnote 103.

<sup>160</sup> See notes 156, 157, 158.

<sup>161</sup> Council Regulation (EC) No. 1637/98 of 20 July 1998, and Commission Regulation (EC) No. 3262/98 of 28 October 1998.

<sup>162</sup> See note 3.

<sup>163</sup> A recently brought case by Chiquita Brands International, Inc., Chiquita Banana Company B.V. and Chiquita Italia S.p.A. against the Commission before the Court of First instance seems to rely essentially on the same reasoning. Case T-19/01, cf. O.J. 2001/C 108/23.

<sup>164</sup> *Cordis*, see note 156, paras 45–46 et seq.

ruling, so that their incorrect implementation was equally not actionable.<sup>165</sup>

This last conclusion is of considerable importance and warrants several question marks. Not only does it seem at odds with the claim of “great flexibility” of the WTO agreements barring their applicability, but also it is the very function of panel and Appellate Body reports to clarify existing obligations, so that once such a decision is existent and binding, at least the *Nakajima* exception, one may argue, should take hold, if not direct effect altogether, as argued by some.<sup>166</sup> If anything, one may suspect that this conclusion may well hold before the ECJ, but perhaps not without a fresh reasoning.

The balance sheet, thus, looks as follows: WTO law cannot be invoked as such before Community courts by private parties except in three confined cases, namely (1) in the course of consistent interpretation, (2) if and insofar as Community law refers to it, or incorporates it by reference (*Fediol III* “exception”), and (3) if the Community measure in question is a clear attempt to transform it into Community law (*Nakajima* “exception”). The Community courts seem to reject any attempt to differentiate, with regard to invocability of WTO law, between primary and secondary (damages) claims.

## 2. Administrative Mechanisms for Private Parties

Despite this rather limited booty from a private party point of view as far as direct effect is concerned, a closer look reveals that this concerns primarily the lack of protection of (primarily) citizens against their own government, or more precisely: the impossibility (for both citizens and foreign private parties) of forcing the Member government — in this case the Community and its institutions — to adhere to its international trade law commitments *through actions before its own courts*.

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<sup>165</sup> Cordis, see note 156, para. 59.

<sup>166</sup> Eeckhout, e.g., see note 118, 53, in his differentiated analysis worth reading, advocates considering direct effect for final dispute settlement reports in contrast to the agreements themselves which may be denied the same for a number of reasons: “Where a violation is established the binding character of the agreement and the principle of legality should in my view trump any lack of direct effect. (...) The reasons for not granting direct effect — whether it is the agreement’s flexibility, or the division of powers between the legislature and the judiciary, or the respect for the appropriate dispute forum — cease to be valid where a violation is established.”

The situation is different when it comes to the outward looking perspective, i.e. to actions of foreign governments. Some WTO Members have instituted formalized administrative procedures to allow private parties to bring cases of alleged breaches of international trade law before their national institutions with a view to, ultimately, challenge, or rather make the government challenge the foreign government's action on the international level. Two prominent examples are the U.S. "Section 301" and the Community's "Trade Barriers Regulation". While it goes beyond the scope and purpose of this overview to analyse the instruments in detail,<sup>167</sup> a brief look may illustrate the operational principles.

The (in)famous "Section 301" of the U.S. Trade Act of 1974<sup>168</sup> provides that private parties may bring cases where their interests are affected by trade measures of third countries *inter alia* if these measures violate international trade agreements — a good idea that other members, notably the European Community, took up. The provision's notoriety stems from the fact that it goes well beyond the function to address violations of international trade law: other possible causes of action are measures by foreign governments that are "unjustifiable", "discriminatory" or "unreasonable".<sup>169</sup> "Unreasonable" are measures that are "otherwise unfair and inequitable". It is for these requirements, which allow for the invocation of nationally defined standards such as labour standards, that the provision has brought the United States the, to some extent justified, reproach of excessive unilateralism and has tainted the section with the aura of being an aggressive rather than a defensive instrument.

The 1994 EC "Trade Barriers Regulation",<sup>170</sup> focusing on the defence against actual violations of international trade law, is perhaps the better example of such administrative mechanisms. The Regulation allows three types of petitioners to raise such violations by foreign governments, namely the Member States, persons representing Community

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<sup>167</sup> For a detailed description and analysis, see S. Ohlhoff/ H. Schloemann, "Durchsetzung internationaler Handelsregeln durch Unternehmen und Verbände – Im Blickpunkt: EG-Verordnung gegen Handelshemmnisse", *Recht der Internationalen Wirtschaft* 45 (1999), 649 et seq.

<sup>168</sup> See note 6. For its genesis see, e.g., J. Bliss, "The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Responses", *Law and Policy in International Business* 20 (1989), 501 et seq., (504 et seq.)

<sup>169</sup> Cf. § 301 (a) (1) and (b).

<sup>170</sup> See note 7.

industries (in particular associations) and individual enterprises. The violations that may be addressed are those of all trade agreements concluded by the Community, both multilateral agreements such as the WTO agreements and bilateral agreements — with the caveat that individual companies may not rely on bilateral treaties. In a stringent procedure consisting of several steps, the Commission, once the petitioner has supplied sufficient evidence to warrant an examination, is charged with conducting such examination into the actions of foreign governments and, if violations are found and further requirements are met, with taking action for redress. This action can consist, for example and if necessary, of instituting dispute resolution proceedings before the competent bodies, namely the WTO Dispute Settlement Body.

Although the procedure is quite straightforward, a caveat remains for the private petitioner: the Commission and (when it comes to taking counter-action) the Council are to act only if this is in the “Community interest”. This requirement acts, pointedly put, as a “trade policy filter”<sup>171</sup> in an otherwise technical legal procedure, equivalent to a state’s discretion as to whether to act on the basis of diplomatic protection. Nonetheless, both Commission practice and ECJ jurisprudence suggest that this does not mean unlimited discretion. In regular cases, the “Community interest” is established automatically through the violation of international trade law. The requirement acts as a negative controlling criterion rather than as a positive requirement.<sup>172</sup>

The actions taken by the Community organs under the Regulation are, in principle, fully subject to judicial review by the community courts. Even the “Community interest” criterion is justiciable to the extent that the Community institutions are called to justify their assessment based on facts whose existence is reviewable.<sup>173</sup>

The procedure is thus a reasonably strong weapon in the hands of an aggrieved private party. It may induce, and to some extent force, the Community institutions to act on its behalf and go, if necessary, through WTO dispute settlement and subsequent enforcement.

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<sup>171</sup> Ohlhoff/ Schloemann, see note 167, 653.

<sup>172</sup> See, on the predecessor instrument, the “New Trade Policy Instrument” (Council Regulation (EEC) No. 2641/84 of 17 September 1984), Advocate General *Van Gerven* in *Fediol*, see note 111, ECR 1989, 1811. The text of the Regulation itself does not indicate this inversion. So far the ECJ has not been forced to rule on the issue.

<sup>173</sup> Ohlhoff/ Schloemann, see note 167, 656–57.

While the U.S. Section 301 has been used very actively by petitioners and has led to a number of prominent WTO cases, notably the *Bananas* Case, European companies have only recently discovered the enormous potential that lies in the Trade Barriers Regulation mechanism. One reason for this is that the Regulations predecessors, the "New Trade Policy Instrument" of 1984, did not provide for petitions by individual companies. But the train has started to roll: the most prominent examples of TBR use are the *Chile-Swordfish* and the *Korea-Shipbuilders'* cases.<sup>174</sup>

### 3. Conclusion

On the (supra)national level, private parties who wish to realize advantages on the basis of international trade law rules face a twofold situation.

Their opportunities to force governments to conform to international trade law through action in their own national courts are, at present, still very limited. In virtually all major trading nations, governments have successfully defended themselves against attempts to hold them accountable for violations of international trade law. Courts have resisted claims to accord direct effect of those rules. In the case of the ECJ, this comes at the price of an arguably less than convincing jurisprudence which tries to fend off the consequences of a strongly monist constitutional basis, namely article 300 para. 7 of the EC treaty. At the same time, more political than legal constitutional arguments based on the institutional balance and the need for reciprocity in external trade relations arguably provide good reason for an overall balanced result.<sup>175</sup> In very limited cases, indirect use of international trade law rules is pos-

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<sup>174</sup> The Commission's Directorate General for Trade maintains a well organized website that offers a good overview over the cases brought, as well as guidelines for petitioners at [http://europa.eu.int/comm/trade/policy/traderegul/index\\_en.htm](http://europa.eu.int/comm/trade/policy/traderegul/index_en.htm)

<sup>175</sup> The political argument, as Kuijper put it somewhat compellingly, is simple: "In the case of [the WTO] treaty, the party whose constitutional and judicial system does not know the mechanism of direct effect of treaty provisions – or worse still: specifically excludes such direct effect – places itself in such favourable position that it becomes fundamentally unfair to its trading partners." P.J. Kuijper, "The New WTO Dispute Settlement System – The Impact of the European Community", *JWT* 29 (1995), 49 et seq., (64).



sible, namely where there is room for "consistent interpretation", where Community law incorporates international trade law by reference and where legislation expressly aims to implement international trade law but does so badly. However, in certain countries and with regard to certain provisions in trade agreements, namely in the field of TRIPs, direct effect has taken hold.

The situation is significantly better (from a private party perspective) when it comes to addressing international trade law violations of foreign countries, or rather: to enlisting a government's support to attack other government's international trade law violations. Fairly well developed administrative mechanisms such as the U.S. "Section 301" and the EC "Trade Barriers Regulation" procedures offer a powerful tool for private parties to induce, and to some extent force, their governments to address their grievances *vis-à-vis* third countries. Here, the ECJ has been significantly more forthcoming and has assumed a reasonably dense judicial control over the operation of the Trade Barriers Regulation. However, the instrument remained one of diplomatic protection with the state, the Community, ultimately controlling the international process.

Hence, in both cases the classical "schism" remains largely intact: states have defended their decisive position at the intersection between international law and national law, or between subjects of national law (individuals) and subjects of international law (governments). The nation state, in other words, is not (yet) being transcended.

## V. Concluding Remarks

The role of private party actors in the operations of international trade law is, alas, still a very sketchy one. On the international level, the public international law nature of the trade law rules, namely the WTO agreements, have allowed so far only for one official way for private parties to participate, namely by way of submitting *amicus curie* briefs in WTO dispute settlement proceedings. Another more intermediate form of "privatisation" of the operations of international trade law is the participation of private lawyers as members of government delegations in WTO proceedings. While of course this possibility is not meant to protect private party interests but is meant to ensure high quality legal representation of governments, it nonetheless offers the opportunity for governments and interested private parties to team up in, and coordinate, their legal representation. Both of these forms of participation

are intermediate. The interested private parties do not enjoy any rights and remain on the sidelines of the game. As stated earlier, they remain spectators whose applause or booing may influence the main players, the states.

On the national plane, the question whether international trade law steps down into the national sphere to be usable by private parties within national legal systems calls for a mixed response. Looking at the EC as an example of a major trading block's attempt to come to grips with the questions involved, the ECJ's jurisprudence both historically and at present shows itself as a "conflict-avoidance strategy". The ECJ categorically, although with shaky reasoning, denies direct effect to WTO rules, but has allowed for three scenarios in which these rules may be invoked before Community courts, namely if they are included by reference in Community legislation, if Community law explicitly aims to transpose them and if and when there is room for consistent interpretation which then is to prevail. In contrast to these highly limited possibilities to force a government into WTO conformity through action in its own courts, outward aiming administrative mechanisms such as the U.S. "Section 301" and the EC "Trade Barriers Regulation" offer reasonably efficient means to induce proceedings against third country measures. These proceedings may lead to international dispute settlement and enforcement.

Is the nation-state being transcended in international trade law? The answer at this point must be negative. Despite the above sketched instances of participation and ways to make use of certain elements, parts or principles of international trade law, private parties are, when push comes to shove, still very much limited to a spectator's role. Of course, international trade law rules have so-to-say "transpired" into many national law rules; and of course, private parties are being taken very seriously by the state actors in the formation and the enforcement of international trade law. But the operations of international trade law, at this point in time, remain firmly in hands of the states. They are the uncontested sole actors on the international scene; and they have overall control over the operations of international trade law in their domestic legal systems, as our sample case of the EC demonstrates. There, the ECJ has admitted a certain enforcement of WTO rules only if and when the executive/legislative organs have sanctioned this "transcendence". Even if and when EC law is subjected to WTO "consistent interpretation", this is a confirmation of the primacy of (in this case supra-) national law. Even in the outward looking administrative mechanism of the "Trade Barriers Regulation", the EC Commission and Council re-

tain significant influence through the built-in "trade policy filter", the requirement of "Community interest". In the end, these mechanisms remain instruments of diplomatic protection in the hands of governments. Nonetheless, they are highly developed and forceful weapons in the hands of private parties whose potential is yet to be discovered and used by most of those concerned.

In the same sense, it is crucial to note that these limitations on technical legal enforcement possibilities must not be confused with the enormous range of "political" possibilities for private parties to influence both the creation and the operation of international trade law. The above sketch of legal mechanisms, in other words, does not reflect the political and economic reality. Despite their dominant role, governments very much depend on private party input. When it comes to enforcement of trade rules *vis-à-vis* other governments, it is crucial that private parties bring their cases to the attention of their government and that they do so in a qualified way. The input, however, is in no way limited to the initiation of action. Even purportedly powerful government agencies such as the United States Trade Representative rely heavily on continued input from interested private parties, in particular if and when formalised dispute settlement proceedings are on the way.

The aforementioned is even more true when it comes to negotiations. Private parties should never assume that their government will take their concerns and interests into full consideration when going to the negotiation table unless, and insofar as, they have told them to do so. Detailed and high-quality input from private parties is crucial in the formative stage of international trade law rules. Well-founded position papers and oral representations, both from individual companies and groups, trade associations and other "civil society" actors, are usually more than welcome in understaffed trade ministries, and may have considerable influence on the respective government's position. Relevant negotiations are under way at almost any time, and private party actors are well advised to monitor closely when and where their interests are concerned. At present, in particular the "built-in agenda" of mandated negotiations in agriculture and services ("GATS 2000") are important. If the governments decide to launch a new multilateral round of negotiations, a multitude of issues immediately relevant to private parties will be up in the air. Perhaps most important, however, is a largely neglected field of negotiations, namely accession negotiations. Here, market access to, and conditions for competition in, the new member are defined for the future. It is this enormous importance of the "first shot" that has made the accession of China such an arduous process.

In sum, the influence of private parties on both the operations and the creation of international trade law is significant, despite legal limits. The rules are highly relevant for their business and/or their political concerns. They are well-advised to make use of the multitude of possibilities, within which the legal mechanisms are limited but significant elements. Looking into the future, these elements are sure to become more and more refined and developed. However, it is open whether private actors and international trade law will ever “transcend” the nation-state. For the time being, the question mark in the article’s title is there to stay.