

**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

**EUI Working Paper LAW No. 2001/5**

**A Theoretical Reconstruction of  
WTO Constitutionalism and its Implications  
for the Relationship with the EU**

**CHRISTOPH U. SCHMID**

**BADIA FIESOLANA, SAN DOMENICO (FI)**

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Printed in Italy in June 2001  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico (FI)  
Italy

# **A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU**

CHRISTOPH U. SCHMID\*

## ***I. Introduction***

The relationship between the European Community and the post Second World War international trade system has always been difficult. Whilst GATT '47 was never entered into by the Community, the Member States were founding parties to this Treaty and maintained their membership following the creation of the European Community (EC). However, with the gradual transfer of competence in the area of commercial policy, and in particular with the introduction of the Common Customs Tariff on 1/7/1968, the Community has taken over the entire contractual rights and obligations of its Member States. This change, initially only internal, has also taken on relevance in international law by the tacit acceptance of the other contracting parties. However, the full responsibility of the individual EC Member States for the entirety of GATT obligations remained unaffected.

As regards the internal status of GATT '47 within the Community, it was in a continuous line of case-law starting with the famous 1972 *International Fruit* judgment that the European Court of Justice (ECJ) denied direct effect to that agreement. This conclusion was based on the assessment that GATT '47 relies on the principle of negotiations with a view to “reciprocal and mutually advantageous arrangements” and that it “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.”<sup>1</sup>

As compared to GATT '47, the new GATT/WTO system established in 1995 constitutes a considerably more solid and comprehensive order of world trade. Besides establishing the institutional framework of the WTO, the new regime includes important innovations such as the incorporation of new areas such as trade in services and intellectual property rights in the GATS and TRIPS agreements, the demise of the grandfather clause and the refinement of the safeguards regime in GATT, and a substantially revised legal dispute settlement (DS) mechanism. The latter comprises of a two-tier adjudicative system com-

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\* Research fellow, EUI Florence; habilitation candidate, University of Munich. For comments and criticisms, I wish to thank the participants of the workshop on the constitutional relationship between the EU and the WTO organised by Gráinne DeBúrca and Joanne Scott at the EUI. I am most grateful to Navraj Singh Ghaleigh for reviewing my English.

<sup>1</sup> Case 21-24/72, *International Fruit* [1972] ECR 1219.

posed of panels and an appellate body (AB) which can be seized by any interested Member and whose decisions do no longer require political consensus in the WTO Council in order to be adopted.

In view of this far reaching juridification of the WTO system, a reassessment of its status within the EU has been called for since 1995. However, in its recent decision in *Portugal v. Council*<sup>2</sup> (taken upon Portugal's request for annulment of a Council Decision by which an agreement with India and Pakistan on market access arrangements for textile products was ratified), the ECJ confirmed, in broad terms, its old *International Fruit* jurisprudence. According to the ECJ, the admittedly important changes the WTO system underwent with respect to GATT '47 do not alter its essentially negotiation-based nature. It is true that the new dispute settlement mechanism pursues the main objective of securing the withdrawal of national measures found incompatible with WTO rules. However, it also gives parties the opportunity to enter into negotiations with a view to finding, albeit only as a temporary measure, mutually acceptable compensation, should the immediate withdrawal of the measures in question be impracticable.<sup>3</sup> Therefore, according to the Court, "the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties."<sup>4</sup> Whilst in the case of free trade or association agreements, direct effect may legitimately be instrumentalised for integrationist goals just as within EC law itself, the reciprocity in its effective internal application is argued to be much more important in the case of WTO law - particularly since the EC's most important commercial partners, *i.e.* the US, Canada and Japan, do not accept direct effect either. Even though the fact that some parties do not recognize direct effect is not in itself sufficient to constitute a relevant lack of reciprocity in the implementation of an agreement according to the ECJ's earlier jurisprudence, this is supposed to be different in the case of WTO rules: "To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or

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<sup>2</sup> Case C-149/96 *Portugal v. Council* nyr; for comments see S Griller, "Judicial Enforceability of WTO Law in the EU", 3 (2000) *JIEL*, 441; G Zonnekeyn, "The Status of WTO Law in the EC Legal Order", 34 (2000) *JWT*, 111; G Berrisch and H-G Kamann, "WTO-Recht im Gemeinschaftsrecht – (k)eine Kehrtwende des EuGH", (2000) *Europäisches Wirtschafts- und Steuerrecht*, 89; M Hilf and F Schorkopf, "WTO und EG: Rechtskonflikte vor den EuGH?", (2000) *Europarecht*, 74.

<sup>3</sup> Art. 22 (1) and (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) = Annex 2 to the WTO agreement.

<sup>4</sup> *Portugal v. Council* (n.2 above), para 41.

executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.”<sup>5</sup>

This judgment may be criticized in many respects. First, its consistency with Art. 300 VII TEC, according to which international agreements entered into by the EC are binding for its institutions, may be duly questioned. In terms of constitutional equilibrium, one may strongly criticise the different treatment of the EC and its Member States with respect to the direct effect question. Indeed, the ECJ has previously approved an infringement procedure against Germany in order to stop the breach of obligations deriving from the GATT '47 Dairy Agreement, without examining their direct effect at all.<sup>6</sup> Yet, the Court's language in *Portugal v. Council* indicates that it is little concerned with doctrinal consistency or constitutional equilibrium. Rather, the emphasis is on traditional notions of Public International Law such as reciprocity and the legislative or executive organs' scope for manoeuvre, which would appear to indicate that the EC's autonomy and power in external trade policy is the judgment's decisive rationale. This may be said to reflect a traditional “realist” concept of international trade relations and law.

Accordingly, a critique may most persuasively challenge not the Court's doctrinal inconsistencies, but rather the underlying theoretical concept itself. This is the approach of this essay. After demonstrating that the realist vision no longer corresponds to the actual functioning of the WTO system, two alternative theoretical concepts are offered - liberal constitutionalism and deliberative multi-level governance - which are examined with respect to their suitability to provide normative guidance for the WTO system. Opting for the deliberative approach, this essay then tries to proceduralise it by suggesting concrete patterns of articulation between the EU and WTO systems.

## ***II. Theoretical Conceptions of the World Trade Order***

### **1. Realism**

#### **a) Foundations**

Famously, the realist concept, which may be traced back to the new European order established by the Westphalian Peace Treaties (1648), represents the archetype of the modern international system. It is based on the interaction of sovereign territorial Nation States who pursue their preferences of political power accumulation and economic wealth maximisation in an anarchic interna-

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<sup>5</sup> *Ibid.*, para 46.

<sup>6</sup> See Case C-61/94, *Commission v. Germany* [1996] ECR I-3989.

tional environment through more or less rational decisions. In this environment which obviously favours the powerful, international law is not able to effectively control and contain States' behaviour. Instead it is largely reduced to a political tool for strategic intergovernmental negotiations in which sovereign States continuously test their powers against each other in bargaining and trade-offs. Sanctions are the main implementation tool.

In the field of international trade, law is, put bluntly, merely a strategic device to foster foreign market access rights for domestic producers and to deny them at home to foreign producers. To this end, partial liberalisation measures are traded against other States' concessions. On occasion, this conception may include the altogether disrespect for international law when other partners are not expected to react with sanctions, when a State is ready to accept sanctions, or – under more elaborate arrangements - to pay compensation.<sup>7</sup> Reciprocity rationales are invoked as the principal justification of such protectionist strategic behaviour.

#### **b) Why economic insights do not remedy the situation: the prisoner's dilemma**

Classic liberal trade theory, whose beginnings are generally associated with Adam Smith's *Wealth of Nations*, has famously shown that free trade is always the better option as compared to protectionism ("mercantilism"), since it leads to real or comparative advantages for a particular national economy entailing an increase in welfare both at national and international level. Whereas this conclusion is generally accepted for bilateral or multilateral trade liberalization, the critical case is that of unilateral liberalisation. Theoretically at least, even if a State's trading partners continue to shield off their internal markets by protectionist measures, an increase in imports might still result in a productive specialization in its domestic economy and, thus, in an increase in overall welfare. Yet it is rather obvious that these effects may come to bear only in the long run,

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<sup>7</sup> This scenario was very much present under the old GATT' 47 which was eroded by bilateral agreements such as *Orderly Marketing Agreements (OMAs)* or *Voluntary Restraint Agreements (VRAs)* stipulating quantitative restrictions against the GATT's wording and spirit. These agreements were often negotiated in secret which meant that ultimately States could act relatively freely in a protectionist manner. The EC was said, not wrongly so, to be particularly fond of such bilateral agreements. This bias became clearly visible in the Banana dispute when, after blocking the first panel report under the consensus rule of the old GATT, the Commission successfully "bought" the resistance of several South American Countries by allocating them special privileged quota and obtained a waiver for the Lomé Agreement which was also suspected to be in conflict with GATT. The EC's (vain) resistance against an upgrading of the GATT Dispute Settlement mechanism during the Uruguay round may eventually be considered another expression of this overall strategy.

and presuppose that the various factual preconditions for such a productive specialization are actually present.

The last observation already gives an idea of why unilateral trade liberalisation may face huge political obstacles within a State.<sup>8</sup> Indeed, as with any other sectoral policies, external trade policy is not devoted to the theoretical, abstract and scarcely tangible aim of overall welfare, but rather to partial welfare interests of certain groups in society - and predominantly those which have most political influence. In addition, groups favouring protectionism (mainly domestic producers who create jobs and contribute significantly to a State's tax revenue), often have a better position than groups favouring trade liberalisation, in particular consumers, import traders and export-oriented producers. Consumers are ordinarily a heterogeneous and poorly organized group which can be easily disadvantaged. Exporters often face considerable difficulties in convincing the government and the public of their arguments in favour of liberalisation, since their advantages are often associated with disadvantages of domestic producers. In particular, liberalisation often entails the immediate loss of jobs in import-competing areas of the domestic industry, whereas the potential future gains in other sectors are, if any, barely calculable. Conventionally therefore, only reciprocal trade liberalisation is politically acceptable. This depends, however, upon the co-operation of foreign States – a factor normally beyond the influence of national governments. Hence, the theoretically optimal solution for all, trade liberalisation, is not necessarily that most attractive to national politicians with ambitions of re-election.

Game theory confirms this result by re-conceptualising the basic constellation as a “prisoner's dilemma”. Each State must take its decision independently, and the value of the decision can only be assessed once the others' decision is known. The free trade option becomes politically unattractive if the other party reacts in a protectionist way, in the hope that no countermeasures will be taken. In turn, protectionism is only a reasonable response if the other party does not react similarly. To summarise, one party loses out in the asymmetric constellations (free trade vs. protectionism), but both lose under symmetric protectionist conditions. By contrast, both parties are relative winners under symmetric liberalist conditions, but possibly with slightly worse results compared to the (favourable) asymmetric constellation. This dilemma may be said to be the reason for the relative instability of the traditional international trade system. It entails that there is frequently an incentive to seek benefits at the disadvantage of others. Since all participants have reason to distrust one another, each participant will be tempted to unilaterally opt for the asymmetric constellation. If this hap-

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<sup>8</sup> See on the following W Meng, “Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG”, in U Beyerlin et al (eds.), *Recht zwischen Umbruch und Bewährung, Festschrift für Rudolf Bernhardt* (Berlin, Springer, 1995), 1062 at 1079ff.

pens on a frequent basis, the participants' distrust will become sufficiently great such that protectionism will be the predominant behaviour.

### **c) Reticence towards the “internalisation” of international trade law**

The realist concept attributes a low-profile role to international trade law not only on the international plane, but also internally, *i.e.* as regards its status in national legal systems. More specifically, refusing to play the diplomatic game by accepting the internal application of international trade law is alleged to result in an unsustainable imbalance in the internal implementation of an international agreement to a state's own detriment. This means that, whereas its trading partners may continue to use the law strategically at the sole risk of compensation claims or sanctions, a State may find its hands tied by its own citizens enforcing its international commitments before domestic courts. Such a State would thereby be largely deprived of the liberty of breaking international law when it deems appropriate, or to engage in diplomatic negotiation procedures with others whose outcomes need not necessarily be in conformity with the law. Obviously, these arguments are very similar to those advanced by the ECJ in *Portugal v. Council*.

More subtle arguments with a realist flavour against the internal application of international treaties have been advanced by John Jackson. This author focuses on detrimental effects on a State's internal institutional and constitutional structures.<sup>9</sup> Firstly, direct effect would considerably strengthen the role of the judiciary to the detriment of other powers and thereby adversely effect the institutional balance as established in the national constitution. Beyond that, a directly effective international treaty superior to ordinary domestic legislation may be subversive to the idea of democracy representation. Most national constitutions provide little scope for democratic participation in the treaty-making process by confining the role of parliament to approve or disapprove (with mostly negative overall results) the ratification of a treaty as a whole. Therefore, national legislatures should be given the discretion of integrating and adapting the treaty into the national legal system, in order to guarantee a smooth interaction. In particular, they may have a legitimate interest to adapt international treaty language to the domestic system and style. It is true that this may allow them to add protectionist safeguards, especially when the act of implementation becomes part of an internal power struggle among political parties or institutions. Even the latter option may however be legitimate, since “some

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<sup>9</sup> J H Jackson, “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, 86 (1992) *AJIL* 310, at 315-319; on this see T Cottier and K N Schefer, “The Relationship between World Trade Organization Law, National and Regional Law”, 1 (1998) *JIEL* 83, at 97ff.

breaches may be minor and therefore preferable to the alternative of refusing to join the treaty altogether”. In the event that direct effect is explicitly provided for in an international treaty, it would even be conceivable that courts, for reasons of judicial self restraint vis-à-vis the legislator, find other ways to prevent individuals from invoking a Treaty, such as denying them standing or holding that the relevant provision is exclusively addressed to government bodies and not to private litigants.

## **2. Liberal Constitutionalism**

### **a) Outline**

The liberal constitutional model seeks to provide an effective counter-device to States’ protectionist temptations. It is based on the assessment that ordinary international agreements on trade liberalisation are insufficient to remedy the prisoner’s dilemma situation described above. Rather, a more stable international legal order monitored by international and national courts is needed in order to guarantee States’ respect for their free trade commitments. Only if such an order is actually effective may governments resist protectionist pressure from lobby groups. Then, invoking these legal commitments may even become a powerful defence strategy for the government against those groups.

In order to establish such a stable legal order, liberal theorists argue that the international trade system needs to be “constitutionalised”.<sup>10</sup> This means that international trade law be granted the status of higher law placed beyond the influence of the ordinary political process. The core of such an international constitution of free trade should be the grant of judicially enforceable subjective liberty and equality rights to individuals. The national judiciary rather than the executive should be entitled to ensure the necessary authoritative interpretation and supervision of free trade commitments. On account of its neutrality, rationality and shielded position vis-à-vis the political process, judicial control is viewed as the best defence in order to prevent politicians from giving way to protectionist rent-seeking interests.

### **b) Liberal constitutional features in the WTO system**

Liberal theorists further argue that the present GATT/WTO system may already be interpreted to include important constitutional principles and rights.<sup>11</sup>

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<sup>10</sup> See E-U Petersmann, *Constitutional Functions and Problems of International Economic Law* (Fribourg, UP, 1991), 218.

<sup>11</sup> See Petersmann *ibid.*, *passim*, and P-T Stoll, “Freihandel und Verfassung. Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung (GATT/WTO)”, 57 (1997) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*Heidelberg Journal of International Law*), 83, at 116ff.

Procedurally, it makes available a forum and mechanisms for gradual trade liberalisation, and subjects international trade relations to the Rule of Law. This finds its expression in the binding legal quality of WTO provisions and in the existence of a dispute settlement mechanism which renders authoritative legal opinions on trade disputes. Beyond that, GATT/WTO contains a set of provisions which require States to guarantee certain specific procedural requirements of the Rule of Law in the domestic legal order. Among these figure the duty of publication and neutral and just implementation of trade regulations (Art. X GATT) as well as the principles of transparent policy-making, due process and judicial protection of individual rights.

As regards substantive law, it should be noted at the outset that GATT/WTO law does not provide a constitution of free and undistorted trade. Indeed, such may only be found in regional integration communities such as the EC and presupposes the abolition of impediments to trade altogether. However, GATT/WTO law stipulates the fundamental constitutional principle of non-discrimination. This may be subdivided in two elements. The first is the most-favoured nation principle (Art. I: 1 GATT, Art. II: 1 GATS and Art. 4 TRIPS) according to which any trade concession accorded by any party to any product must be granted “immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” The second element is the principle of national treatment (Art. III: 4 GATT) according to which foreign products, once they have crossed the border, may not be treated less favourably than like products of national origin. It is important to note that these duties are not directed to the States, but associated with “products” and “like products”, for which reason their implicit addressees are import and export traders. Thus, the national treatment principle entails subjective freedom rights with the constitutional “market-generating” function of allowing importers to choose among foreign suppliers according to efficiency criteria only, irrespective of the exporter’s nationality. Beyond that, the MFN principle ensures the stability and reliability of mutual (“synallagmatic”) trade concessions because it prevents trading States to offer more favourable conditions to third States in subsequent transactions. Thus, it also ensures the transparency of the system by rendering impossible the proliferation of different bilateral agreements on mutual concessions. Ultimately, this entails a multiplication of liberalisation measures which, if accorded to one State, may automatically be invoked by all the other Member States as well. This ensures that all Member States, even small States or newcomers, participate in the liberalisation benefits, irrespective of their differing bargaining powers or strengths.

Besides the principle of non-discrimination, one may note the “principle of the use of uniform and proportionate policy instruments”.<sup>12</sup> It finds its most important expression in the GATT’s general prohibition of quantitative restrictions and its preference for tariffs (Art XI GATT). The latter is based on the ground that quantitative restrictions tend to decrease the impact of changes of world market prices on imports and consumers, whereas tariffs have an impact only on the price of a good - which constitutes a less strong interference with the undistorted functioning of the market. In addition, tariffs generate governmental revenue rather than private “quota rents” to the benefit of domestic producers. For these reasons, the “tariffs only” strategy may be said to provide an important basis for the transparency, foreseeability and negotiability of trade restrictions.<sup>13</sup>

As regards their function, these constitutional guarantees of the world trade system are supposed to supplement national constitutional economic rights. As Jan Tumlir put it in a famous formula: “the international economic order can be seen as the second line of national constitutional entrenchment”.<sup>14</sup> National constitutions and GATT might thus be viewed as a “compound” of mutually reinforcing constitutions. However, with reference to the European situation, this formula should be extended, because GATT law has become an integral part of the Community legal system, and national competence in the field of external trade policy has been transferred to the EC. Thus, GATT/WTO law also adds to, concretises and at the same time controls the protection offered by EU law to the freedom to trade. Alongside national constitutional and EU law, GATT/WTO law may thus be viewed as the “third line of constitutional entrenchment”<sup>15</sup> in the European multi-level constitutional system.<sup>16</sup>

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<sup>12</sup> Term by Petersmann *ibid.*, 230.

<sup>13</sup> Stoll (n.11 above), 122.

<sup>14</sup> J Tumlir, “International Economic Order and Democratic Constitutionalism”, 34 (1983) *ORDO* 71, at 80.

<sup>15</sup> Petersmann (n.10 above), 439.

<sup>16</sup> A liberal economic interpretation of the direct effect question has more recently been suggested by the ordoliberal author Josef Drexler, “Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsordnung” in B Großfeld (ed.), *Festschrift für Wolfgang Fikentscher* (Tübingen, Mohr, 1998), 822. While under the liberal constitutional model, constitutional principles and rights are interpreted in the light of economic criteria, with the result that direct effect should be admitted, Drexler has proposed an inversion of the reasoning: a delegation of the answer from the “WTO constitution” (which is argued to be neutral with respect to the direct effect question) to the market. Accordingly, single economic actors need to be endowed with a decisional prerogative in economic matters (“*Erstentscheidungsrecht*”). From this perspective, Drexler reaches the conclusion that direct effect should in principle also be admitted, since it is a necessary precondition of an *Erstentscheidungsrecht* of the market participants, contributes to economic stability and establishes a level playing field.

### 3. An Assessment

#### a) Realism

The realist characterisation of the world trade system, which seems to underlie the ECJ's jurisprudence including *Portugal v. Council*, may be challenged on the ground that it underestimates the actual functioning of the WTO system, in particular the dispute settlement mechanism, and, therefore, prematurely gives way to alleged political constraints.

This conclusion is supported by a review of the various steps of the panel and AB procedure. First, the DS may be independently initiated by any single State, without any party possessing a veto right as under the old GATT regime. Even though the following procedural step is one of consultation and possibly conciliation,<sup>17</sup> the observance of WTO rules is guaranteed by the requirement that any settlement or compromise must be notified to the DSB so that any remaining violation would become known, and another party might start a DS procedure. Therefore, the "shadow of the adjudicative procedure" is present even at the negotiation stage. Once a panel is established, the procedure will be exclusively legal. Panellists appear to conceive of themselves as judges, with an ethos of neutrality and independence. The formulations in Art. 11 DSU according to which panels are supposed to "assist the DSB in making recommendations" and should give the parties "adequate opportunity to develop a mutually satisfactory solutions" may be viewed as euphemisms to play down their

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However, this result is dependent on the existence of a sufficiently effective "private law society" on a worldwide level. For it is taken for granted that such an order does not emerge spontaneously, but rather needs to be established through international law or, more realistically, the convergence of national legal orders in the relevant aspects. In answering this question, one finds positive achievements and shortcomings. Positive is the widespread international acceptance of freedom of contract - which forms the very basis of a private law society - and the general recognition, by basically all legal systems, of contracts concluded in a foreign State. Negative is the lack, for the time being, of tools capable of containing excessive regulatory market interventions by States such as monopolies as well as private interventions by means of cartels or abuse of a dominant position, and an effective protection of social and environmental standards. Whereas in the EC a sufficiently effective common market has undeniably been achieved, Drexler argues that the WTO regime will probably be supplemented by such mechanisms in a foreseeable future and might therefore be equally viewed as a sufficiently effective "world constitution of decentralized market economy". This is also guaranteed by the establishment of the effective WTO dispute settlement regime, which ensures the respect for the Rule of Law to a sufficient degree, even though individual actions are not admissible.

<sup>17</sup> See for more details, T Cottier, "Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union", 35 (1998) *CML Rev.*, 346ff. As regards the implementation stage see also P-T Stoll and A Steinmann, "WTO Dispute Settlement: The Implementation Stage", 3 (1999) *Max Planck UNYB*, 407.

actual strength. In practice, panels simply decide the case in a court-like manner. They have worked out compromise solutions only exceptionally, if this was explicitly requested by the parties. As stated, panel and AB reports are now almost automatically accepted by the DS body (the WTO council sitting in the capacity of the DSB); a rejection would only be possible by unanimity, including the vote of the winning party – a situation which should never happen. As regards Member States' record of compliance with DSB decisions, this is remarkable up until now. Only in two major instances (*Hormones* and *Bananas*), did a party - the EC - not comply within the set deadline. However, the procedure for sanctions set forth in the DSU was respected in both cases – even though a regrettable lacuna was found<sup>18</sup> - so that the integrity of the system could be maintained. Beyond that, both instances have shown how high the political and economic costs of non-compliance have been raised. Finally, the alternative to compliance, overstated by the ECJ in *Portugal v. Council*, of offering compensation has not proved to be very important. Indeed, such solutions depend on the acceptance of the winning party and all other Member States which have an interest in the procedure, a situation which is rather unlikely to happen.

All in all, it may be submitted that the DS mechanism has succeeded in radically changing the character of international trade law. Whereas in former times, it was more or less a sort of “convenience regime” in the realist sense, which depended to a large extent on reciprocity and which could be more or less easily disobeyed, it has now metamorphosed into a binding and effective regime which may therefore duly claim a genuinely legal character, comparable to that of national law.

This legal revolution shakes the very foundations of the realist concept. Indeed, reciprocity rationales and the possibility of an imbalance in the actual management of the parties' obligations lose importance if a high compliance record is ensured by an independent legal dispute settlement mechanism. Likewise, the internal policy and institutional implications stressed by John Jackson also need to be reviewed under these conditions. As regards the alleged imbalance between domestic institutions, the actual shift of power which takes place is not a shift from the executive to the judiciary, but a shift from the State and European level to the GATT/WTO system. It may be recalled that a similar development occurred in the process of European integration which was famously promoted by the activist jurisprudence of the ECJ even in years of political

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<sup>18</sup> As regards the important lacuna in Art. 21 (5) DSU, see below n.41.

standstill.<sup>19</sup> Therefore, the argument invoking democratic shortcomings due to the absence of the legislature's involvement in the treaty making procedure gains force on account of the huge political influence of the WTO system. Yet the reply must again be similar to the European development. If, on account of economic globalization, neither the problem-solving capacities of the State nor those of the EU are actually sufficient, but an international level co-ordination is actually needed, the reaction cannot simply be to minimise that level's impact on the domestic and European system and to open ways for national or regional institutions to circumvent it. Rather, conditions of legitimate governance need to be established as far as possible at WTO level, too.

### **b) Liberal constitutionalism**

The preceding observations already point to the weaknesses within the 'liberal constitutional' concept. Whereas its emphasis on market participants' subjective rights as a remedy against governments' protectionist temptations provides a normatively attractive alternative to the "realist anarchy", this concept may itself be criticised for not taking sufficient account of the actual functioning of the WTO system. If, at least for the time being, the WTO has managed to tame the earlier "realist" power-game in international trade relations, this has not been achieved through the grant of domestically enforceable constitutional rights to private parties, but within the system itself through the establishment of the dispute settlement mechanism. Therefore, the WTO system is no longer adequately characterised as a merely functional counter-device to States' protectionist instincts. In this respect, these objections may be linked to the democratic critique of the liberal concept of the EU in that "negative integration" mechanisms such as the non-discrimination principle, the market freedoms and the principle of undistorted competition are inadequately characterised as mere components of an economic "private law constitution" which functions so to speak automatically and enjoys a sufficient *per se* legitimacy.<sup>20</sup> Rather, the delegation of effective powers (even if they are mainly adjudicative, with a weak executive as in the case of the GATT/WTO system) creates a "surplus in supranational governance". Thus, the WTO DSB carries out genuine constitutional adjudication by balancing competing constitutional values and principles of huge political significance such as free trade versus environmental or social policy, or universalism against regionalism. Such matters may typically be

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<sup>19</sup> See, among many, C-D Ehlermann, "Die Europäische Gemeinschaft, das Recht und die Juristen", (1992) *Neue Juristische Wochenschrift* 1857 (English version in (1993) *CML Rev.*).

<sup>20</sup> See C Joerges, *The Market Without a State? – States Without a Market?: Two Essays on the Law of the European Economy*, EUJ Working Paper Law No. 96/2 (Florence, European University Institute, 1996).

found on the agenda of national and supranational constitutional courts. This important role raises the question of the emerging system's legitimacy and therefore requires that some mechanism, even if only by mediation, of participation and representation of citizens is also ensured at the international level. To summarise, whereas market freedoms clearly constitute important elements for a system's democratic legitimacy, liberal constitutionalism needs to be complemented by a theory accommodating the emerging supranational regime and its legitimacy.

To this end, the following approach will first propose a constitutional theory which to some extent builds on liberal constitutional theory, but also seeks to capture the functioning and the legitimacy of the WTO system by emphasizing its function as "third line constitutional entrenchment" in the overall multi-level constitutional system. This theory will be a version of deliberative democracy cautiously adapted to the peculiarities of the WTO. It is on this basis that a more precise proposal for the interconnection of the two systems will be elaborated in the final part.

#### **4. Deliberative Multi-Level Governance**

##### **a) Conspectus**

The theory of deliberative democracy has been developed as an answer to the present crisis of the traditional concept of Nation State based democracy, exemplified by the German Constitutional Court in its controversial Maastricht judgment.<sup>21</sup> Famously, this requires, as a democratic "catalyst", a culturally and ethnically homogenous people (demos), which constitutes a pre-democratic community, sharing a high degree of "background" consensus on the polity's most important political issues; a consensus which, as its most distinctive feature, makes citizens accept even massive redistributory measures. Yet, due to increasing social and ethnical pluralism and the "transnationalisation" of many economic, social and political activities, modern Nation States suffer from a diminishing consent on basic values and the gradual fading away of a common identity of their citizens. These developments obviously undermine the demos-based concept of democracy. As a consequence, only a procedural version of a pluralist democracy would seem to be possible whose guarantees are largely limited to values associated with fair process, such as openness, transparency and equal chances to present one's view.<sup>22</sup> However, this version is always in

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<sup>21</sup> BVerfGE 89, 155. For a severe criticism of these aspects of the judgment see J H H Weiler, "The State 'über alles'", in O Due et al. (eds.), *Festschrift für Ulrich Everling* (Baden-Baden, Nomos, 1995).

<sup>22</sup> J Cohen, "Procedure and Substance in Deliberative Democracy", in S Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political* (Princeton, UP, 1996),

danger of degenerating into a purely aggregative form of democracy with the well-known defects of rendering possible any substantive outcomes, including arbitrary or discriminatory decisions.

Deliberative democracy tries to parry these objections by combining a minimum basis of substantive values on which as broad consensus is supposed to persist – namely the requirements that all citizens should be, and treated as, free and equal - with a sophisticated procedural approach. Building on notions of modern discourse theory as developed by Jürgen Habermas and others, deliberative democracy aims at institutionalising the ideal that all political decisions are taken through free public reason-giving in which all participants have equal voice.<sup>23</sup> Instead of relying on tactical bargaining and strategic coalitions, in making binding decisions participants must refer to considerations capable of being recognised and accepted as pertinent and appropriate by all those affected by them and who share the commitment to find, and to act on the basis of, mutually justifiable terms of co-operation (principle of *deliberative inclusion*<sup>24</sup>). In doing so, the highest, most concrete, common denominator of consent should be established. Conversely, deliberation should continue on a more general level whenever shared understandings of lesser generality have broken down. In this way, decisions on which not all participants can agree should nevertheless be based on reasons which are acceptable to all, as judged from their own perspective.

These deliberative requirements limit to a large extent the number of possible substantive outcomes serving the common good, and thus concretise the concept of equal membership in the polity. Consequently, the constitutional rights of liberty and equality may be claimed to constitute at the same time preconditions and results of democracy, the latter in so far as they are endogenised by the participants and, therefore, materialise again in specific political decisions. This has been referred to as the deliberative circle of constitutional rights and democracy<sup>25</sup> - a construct which may be able to overcome the one-dimensional liberalist preference for constitutional rights over democracy. If such deliberative conditions are actually present, democratic self-government may not be affected adversely, but actually enhanced by the cultural and ethnical heterogeneity of participants. The diminishing background consensus of a “pre-democratic

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96; O Gerstenberg, “Law’s Polyarchy: A Comment on Cohen and Sabel?”, 3 (1997) *ELJ*, 343.

<sup>23</sup> See most prominently J Habermas, *Faktizität und Geltung (English: Between Facts and Norms)* (Frankfurt a.M., Suhrkamp, 1992).

<sup>24</sup> Cohen (n.22 above), *ibid*.

<sup>25</sup> O Gerstenberg, *Bürgerrechte und deliberative Demokratie* (Frankfurt a. M., Suhrkamp, 1997).

demos” may be gradually complemented by a new demos gradually emerging as a result of the polity’s attachment to the constitution (“Verfassungspatriotismus”), or, in the form of new “sectoral demoi” expressing a new common transnational identity within various sub-societal groups such as epistemic communities in science.

Evidently, deliberative conditions do not emerge spontaneously, but need to be cautiously established and monitored through a set of sophisticated constitutional safeguards. First, alongside basic freedom and equality rights, procedural rights such as citizens’ rights of information, control and participation ensuring equal opportunity for effective influence are required. Furthermore, it needs to be ensured that all deliberative decision units (to put it neutrally) possess, or are provided with, sufficient and balanced expert-knowledge in order to take full account of technical expertise in regulatory decisions. This is supposed to enable constant learning processes in which novel problems are tackled by monitoring, adapting and fine-tuning regulatory experiences over time. Finally, *ex ante*, simultaneous and *ex-post* controls by administrative agencies and courts are essential. However, those deliberative monitoring bodies are in principle only supposed to create and promote deliberative decision-making in the respective “deliberative units”, not to substitute their decisions by their own ones.

#### **b) Deliberative conditions and structures in institutions and courts**

Far from being completely realised in any real world setting, deliberative conditions may be claimed to constitute a regulative ideal for decision-making bodies in any democratic polity, whether traditionally or directly representative, national or supranational. However, the experience of European Nation States shows that deliberative conditions are rather unlikely to emerge in traditional representative democracies dominated by party politics. Parties commonly distribute political power and offices according to loyalty and utility criteria, respect for the preferences of particular electorates and lobbies needs to be shown and special relationships between political parties, industry and workers’ and employers’ associations have long existed and all serve to obstruct innovative regulation in many cases. Accordingly, it comes as no surprise that deliberative democratic theory has been inspired by experimentalist constitutional settings of direct, including notably associative, governance in which political tasks are delegated to private/public “problem solving units” representing societal sub-systems such as e.g. standardisation organizations.<sup>26</sup>

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<sup>26</sup> See M C Dorf and C Sabel, “A Constitution of Democratic Experimentalism”, *Columbia L. J.* 98 (1998), 267; J Cohen and C Sabel, “Directly-Deliberative Polyarchy”, *ELJ* 3 (1997), 313.

Furthermore, deliberative structures have been claimed to develop transnationally in the EU, in particular within the agency and committee structures to which large parts of implementing regulation have been entrusted under the so-called new approach.<sup>27</sup> The political processes within these bodies various public and private bodies and institutions are based on predominantly non-hierarchical and co-operative “networks”. This new type of governance has been described as one of recommendation, expertise, explication and consultation replacing the traditional national command and control style.<sup>28</sup> It is quite plausible that these features of the European system may promote deliberative conditions: If on account of complexity, legitimacy and compliance constraints, governance by command and control is no longer possible and needs to be replaced by non-hierarchical and co-operative patterns in which a balance between competing interests is achieved, the realm of arguments and rational persuasion is automatically increased.

Another candidate for the realisation of deliberative conditions may be claimed to be legal, in particular public and constitutional law, adjudication, irrespective of the level of governance on which it takes place. Compared to the political process, it is governed by a relatively strict set of procedural and methodological constraints which may be supposed to favour balanced and rational outcomes. Beyond that, it has even been argued that courts are constrained by a process of participatory decision-making which resembles the legislative process in traditional representative democracy - *i.e.* the production of judicial decisions through voluntary, self-directed debate among citizens. In addition, the binding of subsequent parties by precedent to the extent that they are similarly situated as the original parties may constitute a form of democratic interest representation.<sup>29</sup> As regards constitutional adjudication, it is well-known that this often substitutes itself for political decision-making by balancing competing values, for example property rights and their social limitations, competing human rights, competing values such as competition vs. environment, culture, consumer protection etc. In order to be legitimate, such “political adjudication” should not only be doctrinally and methodologically coherent, but also socially acceptable by taking into account the public interest as well as a wider range of stakeholders’ interests than would normally exercise a right to standing as a

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<sup>27</sup> See comprehensively C Joerges and E Vos, *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart, 1999).

<sup>28</sup> W Streeck, “From Market Making to State Building? Reflections on the Political Economy of European Social Policy”, in S Leibfried and P Pierson (eds.), *European Social Policy between Fragmentation and Integration* (Washington, Brookings, 1995), 389.

<sup>29</sup> See C Peters, “Adjudication as Representation”, *Columbia L. J.* 97 (1997), 313.

party in the proceedings.<sup>30</sup> In this context, it should be noted that the ECJ's jurisprudence – a huge part of which is devoted to the balancing of competing constitutional values<sup>31</sup> – has often been criticised of not respecting basic principles of deliberative adjudication. In particular, in what may be termed the “Cartesian” style of this court, important social and political choices are normally not made explicit, but remain hidden behind formalist deductions based on the fiction that legal reasoning could be approximated to natural sciences.<sup>32</sup>

Finally, attention must be given to important limitations of deliberative governance in supranational institutions and courts.<sup>33</sup> A key criticism attacks this model of deliberative democracy on the basis that, contrary to local constitutional experimentalism where agencies and courts are only supposed to monitor deliberative conditions within political bodies, deliberation is herein conducted in rarefied, elitist arenas in which the representation of citizens is not always sufficiently guaranteed. Thus, democracy is alienated from citizens who are in danger of becoming the objects of other actors' deliberations in a paternalistic overall scenario. Indeed, the functioning of complex EC institutions such as agencies and committees may be characterised as completely opaque to the ordinary EC citizen. These structural limits of deliberation in institutions and courts imply that - under the subsidiarity premise that democracy should be realized as far as possible by the citizens themselves- the highest possible transparency and openness of institutions to citizens is required. Further, it entails the necessity of restrictions on institutional and adjudicative powers *tout court*. Therefore, it may be submitted that the deliberative approach may ultimately only complement, not replace, democracy by direct political representation.

With these virtues and limitations of deliberative governance at supranational level in mind, the suitability of this approach to analytically capture and normatively guide the WTO's supranational core element, the dispute settlement system, will now be examined. This will be done in two steps. Firstly, the prodeliberative framework conditions and constraints under which the DSB

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<sup>30</sup> See A Chayes, “The Role of the Judge in the Public Law Litigation”, *Harvard L. Rev.* 89 (1976), 1281; for Europe see M Cappelletti, *Giudici legislatori?* (Milan, Giuffrè, 1984), 63 and passim.

<sup>31</sup> For a contextual account see, among many, M Poiars Maduro, *We the Court*, (Oxford, Hart, 1998).

<sup>32</sup> See J H H Weiler, “The Function and Future of European Law”, in V Heiskanen and K Kulovesi (eds.), *Function and Future of European Law* (Helsinki, UP, 1999), 9, at 17ff.; similarly S Leible, “Die Rolle der Rechtsprechung des EuGH bei der europäischen Privatrechtsentwicklung”, in D Martiny and N Witzleb (eds.), “Auf dem Wege zu einem Europäischen Zivilgesetzbuch” (Springer, Berlin, 1999), 55, at 73ff.

<sup>33</sup> See P L Lindseth, “Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community”, 99 (1999) *Columbia L. Rev.* 628.

mechanism operates, will be analysed. Then, the respect for deliberative criteria in the panel and AB jurisprudence will be scrutinised.

### ***III. A Deliberative Reconstruction of the WTO Dispute Settlement Mechanism***

#### **1. Pro-deliberative framework conditions in the WTO system**

Generally, the WTO dispute settlement mechanism may be said to operate under huge legitimacy constraints. It labours under the threat of single Members, in particular very powerful ones, not accepting and implementing reports. In this respect, notable differences between the WTO and the EU or even a Nation State are present.

National courts, to implement decisions, may draw on a more or less effective enforcement machinery disposing of the monopoly of force. The EC, to be sure, does not dispose of that monopoly. However, its impressive compliance record is due to the high degree of internationalisation in the national legal systems,<sup>34</sup> which entails that national lawyers are increasingly less aware of the European or national origin of a specific rule and that EC law is enforced through national procedural law devices. In addition, in the case of conflicts between European and national law, EC law may draw on its long established authority, the realistic availability of sanctions (Arts. ex 169ff TEC) as well as the high political stakes of potential disobedience for a Member State. In particular, the internal annulment, by a national constitutional court or similar body, of European measures would gravely impair the Rule of Law at European level and thus endanger the achievements of an integration project which has successfully safeguarded peace and prosperity for nearly half a century.<sup>35</sup>

By contrast, the WTO is a much more recent and therefore necessarily less developed creature. Its internalisation in national legal systems is still relatively limited, which is also due to the frequent denial of direct effect. As an enforcement device, retaliation is certainly available against a defaulting member, but a frequent recourse to such means would not only run counter to free trade, but probably also endanger the system, with its basic objectives of “reciprocal and mutually advantageous arrangements” being frustrated. For these reasons, rational persuasion is among the WTO’s most effective enforcement devices. This

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<sup>34</sup> According to the instructive study by H H Koh, “Why do nations obey international law”, 106 *Yale L. J.* 2599 (1997), this is the decisive criterion for States’ compliance with international law.

<sup>35</sup> See C Schmid, “The neglected conciliation approach to the ‘Final Arbitrator’ conflict”, 36 (1999) *CML Rev.* 509, at 510f.

must ensure that even negatively affected parties accept decisions as just outcomes (the principle of deliberative inclusion mentioned above), or at least as an outcome which may be subject to critique, but whose legal quality is beyond any doubt. This may be supposed to avoid challenges against the dispute settlement body's status and authority and promote the creation of a "supranational jurisprudential *acquis*" which may provide the authority of precedent in subsequent controversies. It may be anticipated that the panel and AB's preference for compromise solutions clearly reflect this deliberative approach.<sup>36</sup>

The framework conditions under which the DSB operates may therefore be characterized as clearly pro-deliberative. To draw a comparison with the history of Nation States, they might even bear some resemblance to "founding moments" which have been reserved to the elaboration of a constitution. There, in the absence of major legal and factual constraints, the ground for the force of arguments and rational persuasion has found to be particularly fertile.<sup>37</sup> Having noted this, it needs, however to be scrutinised whether the real functioning of the dispute settlement mechanism actually meets these standards.

## **2. Pro-deliberative features in the functioning of the WTO dispute settlement system**

As regards the requirements for deliberative adjudication, one may distinguish various procedural and substantive elements such as fairness of the procedure, methodological coherence and integrity of the adjudicator's reasoning, and promotion of deliberative conditions within the Member States and their institutions as well as within other international institutions.<sup>38</sup>

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<sup>36</sup> Among the DSB's 'masterpieces' may be said to be the 288 p. report on the famous Sec. 301 of the US 1974 Trade Act (WT/DS152/R, 22 December 1999). This contains the legal basis for unilateral trade sanctions whose compatibility with WTO law was challenged by the EU when such sanctions were threatened on it when it failed to implement in time the DSB decision on its Banana import regime. Arguing that the possible application of the Statute according to its wording was less important than its actual wording in political practice, it found no violation of WTO law, but preventively subjected the exercise of the statute under numerous conditions in order to ensure its consistency with WTO law. Thus, whilst a negative finding might have endangered the US' support for the WTO in general, this report tries to control and contain American power policy in future cases.

<sup>37</sup> See J Elster (ed.), *Deliberative Democracy* (Cambridge, Cambridge University Press 1998).

<sup>38</sup> Cf. R Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, *Collected Courses of the Academy of European Law* 1998 (forthcoming), on which this analysis will build. See also G Marceau and P N Pedersen, "Is the WTO Open and Transparent?", 33 (1999) *Journal of World Trade* 5.

### a) *Procedural legitimacy*

At first glance, several features of the DSB might raise doubts about its fairness. Proceedings (Art. 14 DSU) including the pleadings of the parties to the dispute and third parties (Art. 18.2.) are secret which renders impossible any public debate or feed-back by the international law community prior to adoption. Moreover, there is no formal mechanism for participation of affected non-governmental actors and citizens in the proceedings.

However, these weaknesses are considerably ameliorated by other aspects of WTO law and practice. Thus, the practice has been established to publish panel and AB reports on the Internet immediately following their release to the parties. These reports are usually very comprehensive and well drafted. All arguments are expounded in detail in the introductory sections, and even expert testimony and advice is included to the extent it has formed part of the body's evidentiary record. In this context, the establishment of an AB is of singular importance, since even though the appellate decision must be rendered within only 90 days following the panel ruling, this interval allows for critical deliberation and the reception of public reactions. Beyond that, in the *Shrimps* ruling<sup>39</sup> the AB, reversing a panel decision,<sup>40</sup> allowed the use of *amicus curiae* briefs from non-governmental organization which ensures a certain representation of civil society and counteracts the danger that decisions are taken by an elite of trade specialists only, without considering the views and the specialized knowledge of other actors in other fields.

Moreover, the jurisprudence of the dispute settlement bodies, in particular that of the AB, may be claimed to interpret the rather summary and concise regulation of the procedure in the light of the "due process ideal" rather than in terms of technical efficiency in the settlement of disputes.<sup>41</sup> Thus, Art. 7 II

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<sup>39</sup> United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998.

<sup>40</sup> Whereas the panel had argued that the wording of Art. 12 DSU which authorises panels to "seek" information would exclude the reception of non-requested information. Against that, it has been powerfully argued that since the procedure is governed by very few rules, its effectiveness would be seriously impaired were the dispute settlement bodies confined to the powers specifically enumerated. Moreover, the peculiarity that the DSU, notwithstanding its summary character, explicitly stipulated a right to seek information may be explained by the fact that this right is precisely about the difference between inquisitorial and adversarial systems both of them may be found in WTO Member States, entailing that the DSU's conception needed to be clarified (Howse (n.38 above), 12).

<sup>41</sup> Howse (n.38 above), 9f. Disagreeing with this conclusion is P Mengozzi, "Structure et principes de l'OMC à la lumière de la mise en oeuvre des recommandations de l'ORD dans l'affaire Bananes III", (1999) *Revue du Marché Unique Européen* 256. In the Banana III case, the EU had not correctly implemented the recommendations of the Bananas II panel (in

DSU, according to which panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute, was interpreted by the AB to imply that all claims the complainant intends to make must in the first instance be contained in the request for a panel. The ratio of this interpretation was to guarantee that the defendant and third parties have sufficient information for an adequate response. Another important interpretation was given to the panel's duty "to make an objective assessment of the matter" (Art. 11 DSU). This duty was interpreted to be one of law, and therefore, subject to appellate review. In *Hormones*,<sup>42</sup> the AB further clarified the matter as follows: "The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and make factual findings on the basis of that evidence. The deliberate disregard of, or failure to consider, the evidence submitted to a panel is incompatible with an objective assessment of the facts." Moreover, the decision to disregard evidence as irrele-

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a way which was obvious to any attentive observer). Thereafter, the US requested the DSB to authorize sanctions under Art. 22 DSU. The EU, alleging the WTO-consistency of its implementation measures, insisted that the matter should be decided under Art. 21 (5) DSU. According to this provision, a disagreement on the consistency of a Member's measures taken to comply with DSB recommendations must be decided "through recourse to these dispute settlement procedures, including wherever possible recourse to the original panel." Thus, a manifest contradiction between Art. 22 DSU and Art. 21 (5) DSU had been revealed. Indeed, if a repeated recourse to the Art. 21 (5) DSU "implementation review" procedure were permitted, such would render impossible the adoption of any sanctions (this was called the "sequencing problem", see C M Valles and B P McGivern, "The Right to Retaliate under the WTO Agreement", 34 (2000) *Journal of World Trade* 63), In order to remedy a procedural deadlock (the EU blocked the adoption of the DSB's agenda to prevent the Art. 22 DSU procedure from continuing), WTO's DG Ruggieri suggested a compromise according to which a panel under Art. 22 (6) DSU was established. Under this provision, an arbitration with the primary purpose to review the level of the sanctions requested may be carried out. In the arbitration decision, the panel found a compromise which might be considered an acceptable way out of the dilemma. The panel found that, under the Art. 22 (6) DSU procedure, it was also allowed to scrutinise by way of incidental control the WTO-consistency of the EU's amended regime. In substance, the panel then confirmed the obvious shortcomings of the EU's implementation measures. As a consequence, it approved the sanctions requested by the US, but reduced their amount drastically. Since the panel has found an acceptable compromise in a situation which could have greatly threatened the integrity of the whole system, Mengozzi's conclusion, according to which "le principe d'un règlement des différends prompt et efficace tend à prévaloir sur le principe du procès en bonne et due forme (...)" is unacceptable. This is even more so as the EU implementation measures were manifestly inconsistent with WTO rules, and the US and other WTO Members had already raised objections against the (identical) draft of these at an early stage and requested the establishment of a Art. 21 (5) DSU panel. The EU, however, had denied this, and in an attempt to prolong the procedure insisted on using the full period the DSB had granted it for the implementation of the Banana II report.

<sup>42</sup> EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, 16 January 1998, p. 133.

vant itself was found to be a reviewable issue of law.<sup>43</sup> It was also convincingly argued that, though the panel has discretion to decide whether to allow an *amicus curiae* to submit a brief, and to consider or not the information provided, this decision should be reviewable on the basis that a defective exercise or abuse of the discretion granted may well constitute a violation of the duty to make an objective assessment of the facts.<sup>44</sup> Finally, procedural justice rights have also been strengthened by allowing that a private legal counsel may attend at and plead in proceedings. Since private attorneys are usually trained in domestic litigation and therefore more sensitive to due process issues than lawyer-diplomats, this decision might further contribute to the consolidation of a true court-like system of adjudication.

*b) Substantive legitimacy*

*aa) Methodological coherence and integrity*

The fundamental task of the DSB mechanism is to ensure a just and convincing balance between free trade and competing social and environmental values. Whereas former GATT '47 panels were sometimes accused of a "free trade bias", the new WTO DS bodies have already attained a more convincing record, to which their methodological sensitivity may have contributed. To begin with, the importance of the provisions' wording as the starting point of any interpretation was frequently emphasized. This approach was justified by resorting to Art. 31 Vienna Convention which stipulates that "provisions of a treaty be given their ordinary meaning in context and in light of the treaty's objective." This approach was held to be relevant for the interpretation of WTO law on the grounds of the convincing reasoning that the DSB's mandate is "to clarify the existing provisions of agreements [covered by the WTO umbrella] in accordance with customary rules of interpretation of public international law" and that most dispositions of the Vienna Convention may be characterized as codified customary law.<sup>45</sup> Such was indeed held at several occasions by the International Court of Justice with respect to specific provisions of this Convention.<sup>46</sup>

Arguably, this textual approach has advantages in terms of deliberative legitimacy. Whereas the priority of teleological interpretation may be assumed to

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<sup>43</sup> *Hormones*, *ibid.*, at para. 143.

<sup>44</sup> Howse (n.38 above), 13.

<sup>45</sup> Japan-Taxes on Alcoholic Beverages, WT/DS8, 10-11/AB/R, 4 October 1996, p. 12; United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996, p. 17.

<sup>46</sup> Compare the summary in J P Müller and L Wildhaber, *Praxis des Völkerrechts*, 2nd ed. (Bern, Stämpfli & Cie, 1982) 9f.

privilege the agreements' general goal - namely that of promoting free trade - careful attention to wording frequently draws the interpreters' attention to compromises reached at the drafting stage. Thus, in *Hormones*, the AB had to examine the panel's interpretation of the following formula: trade restrictive sanitary and phytosanitary measures "based on" international standards. The panel interpreted this to mean that such measures must conform to the standards in question, on the basis of the agreement's purported general aim of eliminating the trade restrictive effects of diverse regulation through harmonisation.<sup>47</sup> The AB reversed this interpretation on the ground that the detailed formulations of the text may hide a "delicate and carefully negotiated balance... between these shared, but sometimes competing, interests of promoting international trade and of protecting the life and the health of human beings."<sup>48</sup> On similar grounds the AB, in *Hormones* again, rejected the systematic maxim applied by the panel that exceptions - in this case again to free trade - need to be construed narrowly.

Beyond that, the frequent reference to general international law standards contains the further advantage that it draws the interpreter's attention to the objective of internal coherence of international law, including sources as diverse as free trade and environmental or social protection agreements. This approach obviates temptations to view WTO as a "self-contained regime"<sup>49</sup>, which has been advocated with respect to the old GATT<sup>50</sup> and which invites the possibility of privileging free trade rationales over competing values. In a similar context, one may mention the limited hermeneutic importance acknowledged by the AB to *travaux préparatoires* which are mentioned in Art. 32 Vienna Convention only as an optional and subsidiary source of interpretation which may only be resorted to when an assessment of the wording and teleology leads to an unclear, manifestly absurd or unreasonable interpretation of the text. This hierarchy among methods of interpretation was justified on the ground that "retrospective, originalist interpretation almost inevitably privileges the supposed intentions and expectations of a fairly narrow "interpretative community" (that of the treaty negotiators) over the broader community affected by interpretive decisions; namely, the community implicated in the notion of democratic or social

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<sup>47</sup> For an early critique see M Hilf and B Eggers, "Der WTO-Panelbericht im EG/USA Hormonstreit", (1997) *Europäische Zeitschrift für Wirtschaftsrecht*, 559. Incidentally, this contribution was forwarded to the AB by the EUI library – perhaps an indication that the DS bodies are concerned about peer review.

<sup>48</sup> *Hormones* (n.42 above), at para. 177.

<sup>49</sup> This term was coined by Bruno Simma, "Self-Contained Regimes", 18 (1985) *Netherlands Yb. Int. L.*, 111.

<sup>50</sup> See P Mavroidis, "Das GATT als self-contained Regime", (1991) *Recht der Internationalen Wirtschaft* 6.

legitimacy.<sup>51</sup> Exactly along these lines, the hermeneutic value of a concept's historical meaning (as apparent in the *travaux préparatoires*) was actually limited by the AB in *Shrimps*.<sup>52</sup> There it stated, albeit without express reference to the Vienna Convention but to the “by definition evolutionary nature of some treaty provisions”, that the notion “natural sources” must be read “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so...”.

Finally, the role accorded to precedents by the AB may be argued to contribute to the DSB's legitimacy in that continuity and consistency are valuable attributes in any legal system. Whereas no strict rule of *stare decisis* is contained in the DSU, the AB has nonetheless found that adopted reports which create “legitimate expectations” concerning future cases need to be considered.<sup>53</sup> This finding was convincingly interpreted in a pro-deliberative way as to mean that panels are bound to follow previous jurisprudence, unless they provide a reasoned justification for a deviation from that jurisprudence.<sup>54</sup> Beyond that, the AB held that a panel could even find useful guidance in the reasoning of an unadopted panel report that is considered to be relevant. This should also imply that where such reasoning is not endorsed, the reasons for doing so should be expounded.

*bb) Promoting deliberative principles at other levels of governance*

Beyond methodological coherence and integrity, the DSB may also promote deliberative democratic conditions through a sensitive review of national or supranational measures. In the review of such measures, there are, at least in theory, two extreme possibilities: complete deference to another actor's interpretation and application of its own law and *de novo* scrutiny, *i.e.* the full control of such measures against one's own standards. Both may be argued to be inadequate. Complete deference may give recourse to undemocratic practices within a State, whereas *de novo* review may easily constitute an undue interference with the other actor's constitutional autonomy and democratic accountability. By contrast, a “deliberative adjudicator” may be submitted to opt for an intermediary approach along the following lines. Formal minimum requirements such as a fair procedures including the consideration of all, including foreign

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<sup>51</sup> Howse (n.38 above), 19, distinguishing between the “narrow” interpretive community constituted by the treaty's drafters and the broader community concerned with subsequent effects and practice.

<sup>52</sup> *Shrimps* (n.39 above), at para. 107.

<sup>53</sup> *Japan-Taxes on Alcoholic Beverages* (n.45 above), 11ff.

<sup>54</sup> D Palmetier and P C Mavroidis, *Dispute Settlement in the World Trade Organization* (The Hague, Kluwer 1999) 40-42.

stakeholders' interests and the respect for methodological integrity are objectively measurable and have a strong universal "legitimacy-appeal". Therefore they may be controlled strictly. The same is true, though to a lesser extent, of typical constitutional "Nation State failures"<sup>55</sup> such as unequal treatment of foreigners. However, beyond these standards, political decisions taken by other actors within their competence should be respected as far as possible. Member States are more closely linked to the citizen, more aware of the peculiarities of a given local situation and more politically directly accountable to their citizens than supranational institutions. Therefore, following the subsidiarity based reasoning suggested by Robert Howse,<sup>56</sup> their decisions may be assumed to enjoy more legitimacy than decisions at WTO level. As a consequence, the balancing between free trade and competing social values carried out by a State or the EC should be respected as far as possible.

These guidelines may be said to be largely respected by the WTO's adjudicators, the AB in particular. Both with respect to fact finding and in reviewing other institutions' and actors' measures, the AB held the legal basis to be the Art. 11 DSU duty to "make on objective assessment of the facts". This has made possible an appropriately flexible approach. Thus, in *Hormones*, the AB had to interpret Art. 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures according to which measures under these agreements shall be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health..." On this formula, the AB found that, while the threshold of a purely hypothetical possibility of risk needs to be surpassed and the party adopting the SPS measures needs to put forth positive evidence of a risk, such evidence may also come from qualified and respected minority scientific opinions. In saying so, the AB also recognised that in risk assessments a government needs to pay heed to public opinion which may be influenced not only by scientific evaluations, but also by rationally barely verifiable fears. Therefore, democratically accountable governments were granted wide discretion in the fulfilment of their task to prevent risks, in particular when they are irreversible to their population. As a result, Members were allowed to take seriously public opinion providing it was not plainly contradictory to scientific evidence. In consequence, the EC only lost the *Hormones* case because it had not put forth sufficient positive evidence of a risk, but was given the possibility to do so within a certain time frame – which, however, it failed to do. Similarly, in *Shrimps*,<sup>57</sup> the AB, again reversing a panel decision, conceded to

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<sup>55</sup> The term is borrowed from Christian Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective", 3 (1997) *ELJ* 378, at 390.

<sup>56</sup> Howse (n.38 above), 25.

<sup>57</sup> *Shrimps* (n.27 above), *passim*.

the U.S. the general right to uphold legislation according to which certain environmental standards should be respected in the production or harvesting of shrimps to be imported from other States (in that case, a safety device allowing sea turtles to escape from a shrimp capture net). However, the US lost the case because the implementation of this right was not carried out in a sufficiently fair and non-discriminatory procedure. Indeed, exporting States were not guaranteed certain minimum rights (such as the right to be heard, to appeal or seek review of a certification decision and to receive a reasoned notification of it) by which the use of safety devices was to be certified.

Finally, another deliberative “entrenchment” feature may be noted - the possibility for a complaining State to ask the DSB for concrete recommendations on WTO-consistent measures by which the regime found in violation might be replaced (Art. 19 (1) 2 DSU). Even though these recommendations are of course not binding, the presentation of a concrete alternative – which tries to respect as far as possible the objectives of the earlier illegal regime – puts the State in question under additional “deliberative pressure” to accept it or to give a convincing justification of why this cannot be done.<sup>58</sup>

### **3. Conclusions for the articulation of WTO and EU law**

Summarising the foregoing assessment, one may find that the deliberative legitimacy of the WTO dispute settlement system is substantial, particularly in view of the short time of its existence. Rather than constituting a third level alienating still more political powers from the citizen, the WTO has proven to be able to act as a reasonable guardian against protectionist temptations of the EU and other Members. Therefore, the general conclusion should be drawn to promote the success of the WTO legal system as a valuable element of the European multi-level constitution by granting it an effective internal status. In the framework of this contribution, only some tentative hints may be given on how this might be done.

In the first place, an effective inter-systemic co-ordination requires that conflicts between WTO and EU law cannot, as practised in *Portugal v. Council*, simply be ignored on account of the allegedly diplomatic nature of the world trade system. If this unsustainable approach were continued, an incurable inter-

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<sup>58</sup> In the Banana conflict, this system has been actually practised. Upon the request of one of the complaining parties, Ecuador, a Banana panel has recommended an alternative tariff-only import regime. Recently, the Commission has announced that it would be willing to establish such a regime at latest in 2007, although the transitory regime to be adopted (after the finding of the new Banana regulation as again inconsistent with WTO law) is still controversial. See M Salas and J H Jackson, “Procedural Overview of the WTO EC – Banana Dispute”, 3 (2000) *JIEL* 145, at 157, n.94.

systemic conflict between WTO law and EU law might seem to be unavoidable sooner or later, which might seriously compromise the Rule of Law.<sup>59</sup>

When deciding about the kind of internal status to be assigned to WTO law, the peculiarities of its essential supranational institution - the DSB - need again to be respected. First, the interaction, among legal and diplomatic elements, which is precisely regulated in the DSU, should not be disturbed, and States' scope for negotiation not be curtailed. This means that directly effective decisions on WTO law should at any rate be excluded during the negotiation stage preceding the establishment of a panel. If a panel is then established, the respect for the adjudicative system's deliberative quality and the need to avoid inter-systemic conflicts should entail respect for the general priority of its decisions. Therefore, competing adjudication by national or supranational courts on matters pending before, or already dealt with by, the DSB should also be excluded. Put differently, this means that not single WTO rules, but only WTO dispute settlement decisions should, in so far as they contain clear and unconditional findings (such as, most importantly, the finding of a violation of WTO law) enjoy direct effect. This solution appears also to be a minimum requirement of the Rule of Law.<sup>60</sup> Indeed, with a finding of a breach by an international dispute settlement body, the binding character of WTO law and the legality principle in general carry much greater weight since existing points of dispute with regard to the compatibility of relevant measures with the Agreement have been decided in a definitive and authoritative manner.

A difficult situation arises when no DS procedure is (yet) pending, but a finding of a violation of WTO law seems to be nevertheless possible in a domestic court or administrative proceedings, such that an authoritative finding on the WTO-consistency of national or European measures would be needed. In this situation, it would be ideal if a reference procedure, which has proven to be a very effective tool of inter-systemic co-ordination in the EC context, could be

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<sup>59</sup> Imagine the following scenario. The Community fails to obey a WTO dispute settlement decision forbidding protectionist measures against certain foreign products. As a result, sanctions are implemented against it, which also affect domestic firms active in the relevant area. At the same time, according to Community law, these firms would not be allowed to invoke the dispute settlement decision and would be subjected to high protectionist customs duties for the import of the products at issue.

<sup>60</sup> See P Eeckhout, "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems", 34 (1997) *CML Rev.* 11. A more recent view is that of G A Zonnekeyn, "The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance", 34 (2000) *JWT* 93 with more references in n.4.

introduced into the WTO system as well.<sup>61</sup> This would of course be a task of the “WTO legislator” in the first place. However, in the absence of such an innovation, it might perhaps be possible for the EU to reach a similar result by initiating, by common agreement, panels between itself and single Member States. Such panels would have the function of “reference panels”. With this possibility, the fact that both the EC and its Members are full WTO Members might be rendered fertile. Importantly, no legal obstacles appear present in WTO or EC law against such a use of the panel procedure.<sup>62</sup> Such a “reference panel” might have the advantage that the potential inconsistency of EC measures with WTO law would be revealed as early as possible - at any rate before a panel is initiated by a third State with less desirable consequences such as the forced withdrawal of regulation on which economic operators may have already relied. If the advantages of such “reference panels” become clear, this might ultimately even encourage the other WTO members to formally introduce this device in the DSU.

Finally, the EU’s deference to WTO law in general and DSB decisions in particular should however not be unlimited. Just as the EU’s Member States should have the power to raise “constitutional core objections” against EU

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<sup>61</sup> On the different possibilities of interconnecting national and international courts see M Hilf, “The Role of National Courts in International Trade Relations”, 18 (1997) *Michigan J. Int. L.* 321.

<sup>62</sup> In this context, a crucial question would be whether the establishment of a reference panel could also be requested unilaterally. Indeed this might be an adequate reaction if the ECJ continues to ignore the legal quality of the WTO system. In this context, it should however be noted that P Pescatore, “Opinion 1/94 on “Conclusion” of the WTO Agreement: is there an escape from a programmed disaster”, 38 (1999) *CML Rev.* 387, at 403, has maintained, though without giving any further explanation, that the initiation of a panel by a Member State would violate Arts. 10 and 292 TEC According to the latter provision, the “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein”. This objection is however hardly tenable, since a panel procedure does obviously not concern the interpretation or application of the EC Treaty, but rather that of WTO law. Even the *Haegeman*-formula, according to which the ECJ’s jurisdiction extends to international treaties as acts concluded by a Community institution, may barely be interpreted as to preclude Member States’ access to a dispute settlement procedure established in a mixed agreement for whose implementation the EC and its Member States are jointly liable. This conclusion should be also true for the areas of WTO law falling under exclusive Community competence. For the respect for international dispute settlement decisions may be said to be part of the hard core of the national constitutional Rule of Law principle and as such covered by a constitutional core exception to Community law and competence (see n.63 below).

measures (which may be derived from Arts. 5 and 10 TEC),<sup>63</sup> the same should hold true for the EU in relation to WTO law. In the European “multi level constitutional system” such a “vertical balance of powers” may be argued to be essential to ensure deliberative conditions within the WTO bodies, the DSB in particular. It is essential to note, though, that – just as in the relationship of national constitutional and EC law - such an objection should be really limited to primary law essentials. Otherwise, the functioning of the DSB might be seriously endangered. Procedurally, the ECJ as the EU’s constitutional guardian – and not the Council for reasons of political opportunity<sup>64</sup> – should be legitimated to delimit the EC’s constitutional core. Such might be rendered possible by analogous application of Art. 300 (6) TEC to DSB decisions. According to this provision, the Council, the Commission or a Member State may ask for a Court opinion on the compatibility of a planned international agreement with EC law. This formula might be extended to the direct internal effect of a DSB decision.

To summarise, the solution suggested here tries to pursue several objectives, the first of which is to take the WTO treaties seriously as a legal system with genuine “deliberative legitimacy” and to effectively articulate WTO law with EC law. Thereby, the WTO constitution would be recognised as an integral part of the European multi-level constitution’s checks and balances. However, since in this model the competencies and powers of the WTO should also be controlled, the WTO Members should be allowed to raise constitutional core exceptions on exclusively legal grounds against the direct effect of DSB decision.

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<sup>63</sup> See in detail, C Schmid, “From Pont d’ Avignon to Ponte Vecchio. The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law”, 18 (1998) *YEL*, 413.

<sup>64</sup> It shall be left open here whether “political exceptions” of the EU against the direct effect of a particular DSB decision are also possible. At any rate, such exceptions would need to be decided by unanimity in the Council on account of the independent international law liability of EU Member States for the full compliance with WTO law.