Multi-Level Constitutionalism and Constitutional Conflicts

Interconnecting the National, European and International Economic Constitutions in the Banana Dispute

by

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“The Community legal system is characterised by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system, which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified modus operandi. Its steadfast adherence to that aim, which the Court itself has described as an obligation of solidarity, is certainly lent considerable weight by the judicial review mechanism which is defined in the Treaty and relies on the simultaneous support of the Community court and the national courts.”

Giuseppe Tesauro, Advocate General,

Preface

This thesis is the outcome of a research project on the constitutional implications of the decade-long Banana conflict undertaken at the European University Institute Florence from 1996 to 2001. In a first step of this project, the most important single conflicts, which form “puzzlepieces”, as it were, of the overall conflict, were analysed separately in several preliminary studies. These include the articles “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” (YEL 18 (1998), 415), “All bark, and no bite - A Review Essay on the German Federal Constitutional Court’s Banana Decision” (ELJ 7 (2001), 95) and “A Theoretical Reconstruction of WTO Constitutionalism and its Implications on the Relationship with the EU” (EUI WP Law 5/2001). These studies gradually led to the insight that the various interconnections of the three constitutional levels – international, European and national – might be meaningfully viewed together in an overall multi-level constitutionalist framework. This plan gave rise to the basic structure of this thesis: The status quo of the interconnection of the three constitutional levels with all its contradictions and weaknesses is presented in a first part. This analysis reaches the conclusion that the existing contradictions and tensions are largely structural, as each constitutional order’s legal position is equally plausible and coherent from its own perspective. Consequently, it is argued that a proposal for a more harmonious interconnection of the three constitutional levels should go beyond a legal-doctrinal analysis and resort to a theoretical elaboration of the status and function of each level in the overall setting. Accordingly, in the second part of this thesis, several theories providing answers to this question – realism, functionalism, neoliberalism and multi-level governance – are examined and tested with respect to their ability to provide solutions to the legal conflicts between the three constitutional levels. Opting for an approach based on multi-level governance theory, the third part of this thesis will be devoted to elaborating concrete proposals in positive law on the relationship of GATT/WTO and European law as well as European and national constitutional law, in which the result of the earlier studies are refined, extended and put together.

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I am dedicating this work to my wife, Stephanie, and our children, Sophia Valentina and Miriam Raphaela.

Fiesole, 6 December 2001

Christoph U. Schmid
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Introduction

“The emergence of transnational governance structures goes beyond the horizon of traditional constitutional theory, according to which a fully developed and specialised State power, distinct from society and specialised in the conclusion of collectively binding decisions, formed the very pre-condition for the operation of a constitution. Who sticks to this Nation State-dependent understanding of a constitution will hardly appreciate the idea of constitutionalising governance structures of the non-statal European and international system. Yet, given the factual significance of these structures, which grows further as the erosion of the Nation State progresses, this attitude comes close to abandoning the fundamental idea of both constitutionally binding and constraining the exercise of public power altogether.”

Christian Joerges

It is the characteristic feature of the present “post-national”, or “global”, constellation that a significant number of economic, social and political phenomena are increasingly transcending the borders of our Nation States and, consequently, can no longer be controlled and regulated autonomously by them. On the one hand, this development has significantly decreased the political margin of manoeuvre and the problem-solving capacity of the Nation State and brought about the proliferation of spontaneous orders, the most prominent of which is the international economy. On the other hand, the globalisation process has, though slowly and as yet barely effective in many policy areas, also led to the establishment and up-grading of international structures aimed at taming and regulating markets, with a view to recouping at least some measure of control, which formerly existed nationally, at the international level.

These developments massively alter the nature of international relations. The traditional style of international co-operation was international in the true sense of the word, in that Nation States participating in international agreements and organisations could essentially be

3 For an impressive variety of perspectives, see the contributions in G. Bermann, M. Herdegen and P. Lindseth (eds.), Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects, 2000.
said to maintain the control over their external activities and policies. Also, the competencies of such organisations were mainly quite narrow in scope, and did not, generally, encompass economic and social core functions, which are absolutely vital to the well functioning of their Member States. Institutionally, this state of affairs was often expressed in veto rights and the right to exit from international arrangements pursuant to classic general treaty law. By contrast, the new international structures reflect the increasing diffusion, complexity and transnational character of the task of regulating and controlling markets and their social implications. They are commonly denominated supranational or transnational structures of governance, with this term indicating that “governing” takes place without a government in the classical sense. Covering fundamental economic, social and political functions of their Members, they enjoy an increasing amount of autonomy and, to a significant extent, escape the effective influence and control of single Member States. These developments materialise in supranational governance structures being delegated ever wider fields of competence, in the establishment of equivalents to classic State institutions, \textit{i.e.}, governments, courts and parliamentary assemblies, and in important changes such as the introduction of qualified majority-voting in decision-making bodies. Also, together with the regulatory problems themselves, the surrounding know-how, often both scientific and administrative, has moved to the international plane as well. Under these conditions, the option of exit, often still existing formally, becomes increasingly illusory for Member States in reality. As a result, supranational governance structures have become new political subjects which exercise public, formerly national, power. Nation States have become by no means superfluous, but have entered into relationships of ever increasing interdependence with them, which is analytically captured by the term “network governance”.

As all new supranational governance structures are legal creatures, devoid of the cultural, historical or ethnical bonds that hold Nation States together, this fundamental change in the nature of international co-operation has massively affected the nature of international law, too.\textsuperscript{4} Traditional international agreements often possessed only a weak normative character and were used as a tool of diplomacy; even though they were obeyed by “most States in most cases most of the time” (Louis Henkin), they could also be disregarded without major consequences when important national values and interests were at stake. Similarly, traditional international organisations were typically governed by relatively loose legal frameworks which
were rarely enforceable before courts. Only recently, in the wake of the collapse of Commu-
nism, has the emergence of a broader liberalist consensus contributed to a stronger status of
international law. But supranational governance goes well beyond this development. As it
covers important regulatory policies, the respect for mutual commitments has become abso-
lutely vital for the Member States. As a result, such structures have required different and
more effective legal instruments, institutions and enforcement tools in order to overcome the
huge problems of co-ordination and collective action which the presence of several or even
many Member States necessarily entails.

Active in international trade, a traditionally strong field of international co-operation
which has seen a further proliferation through globalisation, the European Union (EU) and
the World Trade Organisation (WTO) may be said to represent two extremes: the former be-
ing a quite rudimentary while the latter is a very advanced form of supranational governance
structures. The WTO is the outcome of the Uruguay Round of negotiations on global trade
liberalisation and took effect on 1/1/1995. It has the basic objective of offering a forum for
world-wide trade co-operation, co-ordination and arbitration, thus transforming international
trade relations from a power-based system into a rule-based one, rooted in fundamental prin-
ciples such as non-discrimination, and most-favoured nations treatment, from which indi-
viduals benefit at least indirectly. Whereas its predecessor, GATT ’47, was a provisional and
fragmented arrangement characterised by intergovernmental negotiations and weakened by
national veto powers in important institutional settings, the WTO constitutes a more solid and
comprehensive order of world trade. Besides its establishment as a formal international or-
ganisation, important innovations include the regulation of new areas such as trade in ser-
vices and intellectual property rights in the GATS and TRIPS agreements, as well as several
changes in the trade of goods area in the reformed GATT agreement. These include the de-
mise of former national reservations to GATT rules such as the “grandfather clause” and the
refinement of the exceptions and safeguards regimes. Finally, the whole organisation is en-
dowed with a largely revised, more effective, compulsory legal dispute settlement mecha-
nism. This now comprises a two-tier adjudicative system composed of panels and an appel-
late body, whose reports no longer depend on political consensus to be adopted and which
has relatively effective enforcement devices at its disposal. The new WTO adjudicative bod-
ies have the difficult task of rendering the often deliberately vague and general legal rules of

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4 See C. Tietje, “The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global
the WTO agreements concrete. It is up to them to balance free trade versus competing non-economic values such as provisions for social or environmental protection. Thus, the WTO qualifies as a supranational governance structure mainly through its independent and powerful adjudicative bodies.

Compared to the WTO, the European Union is a much further developed association of States aiming at an ever closer economic, social and political integration. Its most important component, the European Economic Community, was founded in 1958 with the purpose of bringing about political integration via economic integration, thus rendering future wars in Europe impossible. Over the years, the EU has gradually taken over a wide range of political competencies from its Member States, and has come to form a fully-fledged supranational polity above them, which now resembles a federation. It is endowed with its own administrative and legislative institutions which are similar to those of a Nation State, and possesses a huge body of secondary law which is directly applicable and supreme to national law, and thus confers judicially enforceable rights and duties on individuals. The EC has set up a common market of goods, services, labour and capital, and a system of undistorted competition. Moreover, it pursues a considerable number of further policies beyond the market such as social policy, consumer protection, industrial policy, gender equality, environmental protection, regional cohesion and several others. In the 1993 Maastricht Treaty, its fields of activity were extended to a monetary union, and – albeit in a first step under the more traditional intergovernmental infrastructure of the European Union - to foreign and security policies, justice and home affairs. Yet, the Community’s progress in integration has not only been brought about by legislation, which until the 1986 Single European Act could be blocked by national veto rights, but also by the activist jurisprudence of its court, the European Court of Justice, which has, since its beginnings, been the EU’s “most supranational” institution.

As legal creatures, the WTO and the EU are frequently said to possess their own constitutions. Yet, this multi-faceted term may boast a variety of meanings which need to be distinguished. In a traditional understanding, it refers to a “constitutional moment” or constitutional rupture which defines the founding or refounding of coherent polities. Such a constitution acquires the status of a popular symbol which “heightens the sense of participation by

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the many”, and whose legitimacy is based on a huge popular consensus.\(^5\) In this sense, constitutions are normally linked to Nation States based on common history, language, culture and often even ethnicity. A rather polar understanding may be found in international law. The term constitution is generally understood there as the set of substantive, long-term basic rules\(^6\) and principles upon which a specific international regime is based – with the consequence that even the most insignificant and weak international organisation might claim to possess its constitution. Both understandings may, however, be deemed inadequate to capture the essence of supranational governance structures. Whereas the first is too narrow, excluding phenomena of gradual constitutionalisation of non-statal polities such as the EU, the second is too wide and “inflationist”, awarding the predicate “constitution” to almost any international structure. When everything is somehow constitutional, nothing is any longer truly constitutional, and the term loses its eminent significance. Focusing precisely on the core function of constitutions, which is to guide, legitimise, and control the use of public power, a constitutional perspective should, instead, be adopted whenever and wherever any meaningfully powerful governance takes place, be it in a Nation State or beyond.\(^7\) Only such an understanding can do justice to governance’s fundamental requirement of legitimacy. Assuming that supranational governance structures are gradually substituting the regulatory capacities which the Nation States are losing in the globalisation process, it is normatively desirable, in order to compensate for an otherwise existing vacuum, that those structures also come to assume constitutional functions, namely those of establishing effective and democratically legitimate governance beyond the Nation State. This is, of course, a formidable task, in which the understanding of democracy will need to be taken well beyond its traditional State-oriented limits, and for which new experimentalist constitutional arrangements need to be tested. However, if democratically legitimate governance is to continue in the age of globalisation, there is no alternative.

Yet, adopting a constitutional perspective towards each individual emerging supranational governance structure does not fully render justice to the real situation. Just as these structures have melted with the Nation States into an overall multi-level system of network governance, the overall constitution is also composed of a compound of national, European and interna-

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\(^6\) Definition by E.-U. Petersmann, Constitutional Functions and Problems of International Economic Law, 218.

tional constitutions which need to be read together. Dealing with this constitutional compound, which may be termed “multi-level constitutionalism”, is the subject of this thesis.\(^8\) It involves the fundamental task of the harmonious interconnection of the different levels, since “constitutional conflicts” among them might otherwise endanger the well functioning, and ultimately the very viability, of the overall system.

This task meets crucial difficulties. Unlike federal States, there is no highest level or institution that has the uncontested prerogative of co-ordinating the others and of deciding on their sphere of powers (“Kompetenz-Kompetenz”). Also, precise rules, recognised by all sides, on the relationship of the different orders are, in the main, missing. This is particularly so with respect to the European and national level, whose interplay was not determined in the European Treaties at all, but left to the Courts to decide. Even though the relationship of the WTO and the EU is governed by some provisions in both agreements, the crucial question of the internal status of WTO law and decisions is also left to the adjudicators of both sides. This situation is in itself hugely conflict-prone. When deciding on the relationship with other systems, experience shows that courts do not usually adopt the perspective of the overall system and pursue the objective of its well functioning, but, instead, defend the competencies and powers of the constitutional level to which they belong against the others, whose effects are frequently resented as intrusions which endanger the own identity and autonomy. This is understandable legally and psychologically, as the defence of their own constitution is precisely the mandate of each of the constitutional courts, and its judges are even sworn to uphold it. Furthermore, for the institutions of one level, the relationship with the others is usually a highly sensitive matter, as the loss of autonomy becomes particularly clear and painful whenever another system claims superiority and tries to impose its rules against one’s own constitution.

Against this background, it is clear that the task of interconnecting the three levels cannot be considered a purely legal-doctrinal exercise. The central guideline should, instead, also be the objective of constitutionalism, namely that of establishing the framework conditions for

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\(^8\) The term was coined by Ingolf Pernice, who does not, however, include the WTO level; see “Constitutional Law Implications for a State Participating in a Process of Regional Integration”, in E. Riedel (ed.), *German Reports on Public Law*, 1998, 46; and *idem*, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, *CMLR* 36 (1999), 703. For a similar perspective of “supranational federalism” see A. v. Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999.
effective and democratically legitimate governance. In this endeavour, one faces the core
democratic problem that, as with national sovereignty in general, national constitutions are
being eroded by the constraints of globalisation, whilst the emerging supranational constitu-
tions continue to be relatively remote from the citizens thus making it difficult to see how
popular sovereignty can be realised at that level. In sum, the massive problems actually exist-
ing in the relationship among the three constitutional levels reflect both the technical difficul-
ties of interconnecting legal systems and the underlying legitimacy questions.

To do justice to this task, this thesis tries to reconstruct the interconnection among the
three constitutional levels in three steps. First, the status quo and its problems will be pre-
sent. This includes the well-known final arbiter conflict between the ECJ and the Bundes-
verfassungsgericht and the problems related to the status to be granted to GATT/WTO law
within the European legal order. As an illustration, the conflict on the European Banana im-
port regime, in which the three constitutional orders clashed in an unprecedentedly wide,
complex and serious way, will be presented. This analysis will show that the existing diver-
gences are largely structural, as the legal positions of all three constitutional systems are
equally coherent and plausible from their own internal point of view. From this insight, the
fundamental conclusion is drawn that any proposal for reading the three constitutions to-
gether as a meaningful whole and for interconnecting them in a more harmonious way should
resort to theoretical models on the functions of the three levels. To this end, in the second
part of this thesis, various theoretical concepts - realism, functionalism, neo-liberalism and
multi-level governance - are examined and tested with respect to their ability to provide use-
ful guidelines for the interconnections of the three constitutional levels. Opting for an ap-
proach based on multi-level governance theory, the third part of this thesis will be devoted to
elaborating concrete proposals in positive law based on this theoretical framework.
Chapter I: The Relationship between National and European Law

“European law enters Germany only over the bridge of the national ratification statutes. To the extent that this bridge is not able to carry it, it does not deploy any legal validity on German ground. When, then, European institutions enact regulations or directives, their validity in Germany will also depend on their finding their legal basis in the EC Treaty, which means that they, too, will have to be transported over the bridge of the national ratification statutes.”

Paul Kirchhof, Former Judge of the Bundesverfassungsgericht.

I. Introduction

In 1974, in the famous Solange decision of the Bundesverfassungsgericht (BVerfG), a serious conflict between the EC Treaty and the German Grundgesetz became visible for the first time. It remains unresolved and greatly threatens the good relationship between the two legal orders and their highest courts. On the German side, the BVerfG, in its role as the guardian of the Grundgesetz and in line with its jurisprudence on foreign and security policy in general, claimed for itself the exceptional competence to review any European law to be applied on German territory in the light of the constitutional “integration clauses” (imposing basic requirements on the participation of Germany in the EC and the EU). On the European side, the European Court of Justice (ECJ) had always regarded such competence as incompatible with its own jurisdiction as enshrined in the EC Treaty. Even though the BVerfG

9 “Die Kooperation zwischen Europäischem Gerichtshof und Bundesverfassungsgericht”, 130.
10 Solange I, BVerfGE 37, 271.
12 The overall coherence of the BVerfG’s jurisprudence is well illustrated by H. Schwarz, Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik, 1995.
raised the threshold conditions for its “activation” in the Solange II decision, it still continued to insist on the existence of such competence. In the dispute regarding the EC Banana import regime, the conflict surfaced again The Verwaltungsgericht (administrative court) Frankfurt requested the BVerfG to review some provisions of the EC banana regime, which it considered to be at odds with the fundamental economic freedoms enshrined in the Grundgesetz.

Rather dramatically, the relationship between the ECJ and the BVerfG has been compared to the “Cold War” logic of “mutual assured destruction”. Unlike a mere threat, a decision to actually set aside a European act as unconstitutional would be very hazardous since other States could follow this example (creating a “domino effect”) relying on a rationale of reciprocity, thus putting an end to legal uniformity, which is a basic requirement of the rule of law within the EC. With regard to the constraints of globalisation, this could generate fatal economic and geopolitical consequences even for the disobedient Member State itself. Against

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13 Solange II, BVerfGE 73, 339.
16 See below Part I, excursus, III, 2b.
17 J. Weiler and U. Haltern, “The Autonomy of the Community Legal Order - Through the Looking Glass”, Harvard Int. L. J. 37 (1996), 411; J. Weiler, U. Haltern and F. Mayer, “European Democracy and its Critique”, W.Eur.Politics 38 (July 1995), 3. However, Weiler and Haltern also concede the limits of their comparison: There is no “non-proliferation treaty” in EC law, so that several constitutional courts could initiate a Cold War at the same time; moreover, courts are not the only actors – governments, too, might use the threat that their courts could set aside a European act as a tactical weapon in a bargaining process at EC level (438f).
18 For a contrary view, see M. Kumm, “Who is the Final Arbiter of Constitutionality in Europe?”, CMLR 36 (1999), 351, with a reply by this author, CMLR 36 (1999), 519. According to Kumm, even an annulment of EC
this background, dissuasion becomes the essential criterion that determines the relationship among the Courts. Clearly, the submission by the Verwaltungsgericht Frankfurt was ultimately rejected by the BVerfG in its last Banana decision of 7 June 2000.\(^\text{19}\) However, since the BVerfG only raised the threshold for the admissibility of a submission, the conflict remains unresolved, and could still develop into a massive danger for the two legal orders and their highest courts when economically or legally more important issues are at stake. On the whole, even though this Cold War scenario of mutual destruction and dissuasion has worked in a makeshift way up to now, it may be argued that it generates not only a high degree of legal uncertainty which is unacceptable in a highly integrated polity such as that of the EC, but also, to a large extent, hinders fruitful inter-institutional co-operation.

Finally, it should be noted that, whereas the BVerfG, which is usually considered the most dangerous rival of the ECJ, seems to be perfectly aware of the stakes of legal unity in Europe, as shown in the final Banana decision, the same might not be true for other European legislation by a national court might have mainly positive consequences since it would even put the EC under pressure to increase the democratic quality of decision-making and the ECJ to take delicate issues like legislative jurisdiction and human rights more seriously. Thereby, national Courts would play a significant role as contributors to and facilitators of democratic deliberations. This assessment is submitted to be misleading. The stability of the EC essentially depends on the Rule of Law which, for the considerable lack of political consensus at EC level, is known to be much more important there than within the Member States. This stability constitutes the very basis of the existing liberal constitutionalist consensus and is grounded on the implicit fundamental assumption that no Member State may unilaterally set aside a European act by invoking any internal law. This is even true for a piece of legislation concluded under a majority regime which an outvoted State is bound to implement even against its government’s will. If such a piece of legislation were actually set aside by a national court, it would seem completely unrealistic that a satisfactory political solution would now be available even though there was no consensus when the act was concluded. Nor is it to be expected that such a step would lead to a constructive deliberation process between the courts and the EC legislator increasing the quality of EC legislation and that of judicial review by the ECJ in the future. First, setting aside a controversial EC act typically involves an economic advantage for the State doing so and a disadvantage for others. Second, even if a State invokes its own constitution as the basis of such action, this would hardly be met with comprehension by other Member States whose constitutions do not contain any obstacle against the act in question (or which do not possess constitutions with a comprehensive substantive law standard at all). As a consequence thereof, other Member States’ courts, relying on a sort of reciprocity rationale, might also feel inclined to avoid EC acts entailing serious economic disadvantages for their States. In addition, States which do not possess constitutional review might feel greatly disadvantaged. All in all, the avoidance of an EC act by a national court might at least bring about a return to the unanimity requirement and thus a painful setback for integration.

\(^{19}\) NJW 2000, 3124.
constitutional or high courts. The danger of a first blow would seem to be particularly high after the Eastern enlargement of the EC. Not only are the legal orders of the Eastern European candidates for membership less stable and less resistant to political pressure, but they also enjoy a lesser degree of convergence on substantive values and standards in comparison to the economically further developed Western European countries, which might render conflicts more likely and decreases the chances of compromise solutions. Moreover, Eastern European States seem primarily attracted by the economic side of the EU, whereas they are apparently less aware of the membership condition of limiting their own, only recently recouped, sovereignty in favour of a supranational community - a conviction which developed in Western Europe only after two catastrophic World Wars. Under these conditions, it may seem quite plausible that a new or recently strengthened constitutional court in Eastern Europe will prove an overzealous pupil of the Western European constitutional courts. Correspondingly, following the doctrinal lines developed by them in detail, it might actually set aside an EC act as being fundamentally incompatible with its constitutionally protected economic interests, for example in agriculture or mining.

II. The National Perspective: The Integration Clauses of the Grundgesetz and their Supervision by the BVerfG

According to the Grundgesetz, the transfer of State sovereignty to the EC through the German statutes ratifying the EC Treaties is subject to entrenched conditions. In contrast to the new Article 23 Grundgesetz, the old Article 24 Grundgesetz - which is still relevant for the EC Treaties and any secondary law based on them - does not name these explicitly. Instead, they must be defined pursuant to common methodological principles. Accordingly, it must first be recognised that this provision, which gives constitutional authorisation to integration, may not be regarded as a breach of the constitution – and it would actually entail such, if European norms authorised by it to enter the national legal order were allowed to violate the Grundgesetz. Instead, the integration clauses should be read in the light of the other provisions of the Grundgesetz, particularly the so-called “eternity clause” of Article 79 (3) Grundgesetz. This contains a reference to human dignity and the value of human life (Article 1 Grundgesetz) as well as the fundamental federal, democratic and social principles on which the Federal Republic of Germany is based (Article 20 Grundgesetz) and which may

not even be set aside by the constitutional legislator acting by unanimity. In cases of conflict, the competing constitutional principles must be balanced so that each of them retains the highest possible degree of effectiveness (the so-called device of “praktische Konkordanz”, i.e., optimisation). The new Article 23 Grundgesetz, introduced before the ratification of the Maastricht Treaty, now explicitly incorporates these limits to integration. Thus, it may be understood as an abstract balancing formula along the lines of the doctrine of “praktische Konkordanz”.

Like any other constitutional provisions, the integration clauses in Article 23 and former Article 24 Grundgesetz have to be monitored by the guardian of the Grundgesetz, the Bundesverfassungsgericht (hereafter BVerfG). This is a clear, inescapably binding obligation of the Court from which it cannot dispense itself. Therefore, in the light of German constitutional law, the BVerfG does not have any alternative but to exercise a control over EC law to be applied in Germany. Since direct judicial review is not provided for procedurally, such control can only be exercised in an indirect way, i.e., over the “bridge” of the review of national ratification statutes: to the extent that a European act exceeds the limits of the integration clauses, the ratification statute (having the status of ordinary law, inferior to the constitution) is void, and as a result, the European act is devoid of legal force on national ground.

The BVerfG’s approach has frequently been criticised as a violation of community and public international law, and as an attempt to subjugate the ECJ under its own control. Yet, whilst it is widely known that other European constitutional courts have, in the meantime, developed similar approaches, in part certainly inspired by the BVerfG, it seems, up until now, to have widely escaped commentators’ attention that the ECJ opted for a practically identical approach as regards the relationship of the EC law with international law treaties.

To ensure formal and substantive compatibility of international treaties with the EC Treaty, Article 300 (6) EC provides for a priori control by means of an opinion of the ECJ, which may be requested by the Council, the Commission or a Member State. To date, the ECJ has come to the conclusion of incompatibility on three occasions, whereafter the EC Treaty had

21 The father of this concept is former constitutional court judge Konrad Hesse. See K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. 1995, at no. 28 and 72.
22 For details, see Streinz op. cit., at 247ff.
23 For a survey, see the contributions in A.-M. Slaughter, A. Stone Sweet and J. Weiler (eds.), op. cit.
to be amended before the ratification of the agreement in question.\textsuperscript{25} In the case of the EEA opinion, the ECJ even found the agreement as threatening to the foundations of the EC (as it provided for the establishment of a court system which potentially competed with the ECJ), with the effect that the agreement was re-negotiated and substantially modified before ratification by the EC. This construct of a possible hard core of EU law which might not even be changed by the EC legislator was viewed by some as similar to the eternity clause in Article 79 (3) GG.\textsuperscript{26} However, in cases where \textit{a priori} supervision via an Article 300 (6) EC opinion is not exercised, the ECJ has also declared itself competent to exercise \textit{a posteriori} supervision. Thus, in 1991, France successfully brought an action for a declaration that the Agreement signed on 23 September 1991 by the Commission and the US regarding the application of their competition laws was void, the main argument being that the Commission was not competent pursuant to Article 300 (1) EC to conclude the agreement.\textsuperscript{27} In its decision, the ECJ actually decided whether, under its formal requirements the EC was competent to conclude the agreement concerned, and whether the correct procedure had been followed. It stressed that “the exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review (…) of the legality of the acts adopted.”\textsuperscript{28} Furthermore, in April 1995, Germany brought an action for the partial annulment of the Council decision concluding the Uruguay round of the WTO negotiations, in so far as the Council thereby also approved the conclusion of the Framework Agreement on Bananas with Costa Rica, Colombia, Nicaragua, and Venezuela.\textsuperscript{29} The ECJ, extending its review even to substantive requirements of EC law, found that part of the agreement violated the general EC law principle of non-discrimination, and annulled the act whereby the Community institution


\textsuperscript{26} In this sense, R. Bieber, “Les limites matérielles et formelles à la révision des traités établissant les communautés européennes”, \textit{RMC} 1993, 343ff.; J. L. da Cruz Vilaca and N. Picarra, “Y a-t-il des limitis matérielles à la révision des traités instituant les communautés européennes?”, \textit{CDE} 1993, 3; for a more restrictive and convincing approach towards the existence of such an unchangeable hard core, see M. Heintzen, “Hierarchisierungsprozesse innerhalb des Primärrechts der Europäischen Gemeinschaft”, \textit{EuR} 1994, 35.


\textsuperscript{29} Case C-122/95, \textit{Germany v. Council} [1998] ECR I-973.
sought to conclude the agreement (not the agreement itself). As a consequence, the Court held that the relevant part of the Framework Agreement was deprived of any effect within the Community legal order;\textsuperscript{30} the international law implications of this finding were not dealt with the ECJ. The parallel to the BVerfG’s approach which reviews the legality of the German ratification statues of the EC treaties is all too obvious, and should lead to more understanding for the national situation.

### III. The European Side: Unconditional Supremacy of EC Law

By way of contrast to Article 23 Grundgesetz, the EC Treaties did not, and do not, tackle the interface between EC and national law. Instead, all the related questions remained to be resolved by the jurisprudence of the ECJ. To this end, this court developed over the years the well-known doctrines of autonomy from international law,\textsuperscript{31} direct effect, supremacy, pre-emption, consistent interpretation (also called *interprétation conforme* or indirect effect) and State liability. As is well known, these doctrines, which constitute a supranational conflict of laws body,\textsuperscript{32} have gradually been generally accepted by European courts. They have resulted in the “constitutionalisation of the Treaties”, thereby promoting integration even during years of political stagnation.\textsuperscript{33}

However, some elements turned out to be in potential conflict with national constitutions: the unlimited supremacy of EC law as a result of the alleged emancipation of the EC from its basis in international law and national constitutional law. This potential conflict surfaced as early as 1962, when the ECJ defined its conception of the nature of the EC in the classic *Van Gend en Loos case*:

“The conclusion to be drawn (...) is that the EC constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and which binds both their nationals and themselves.”\textsuperscript{34}


\textsuperscript{33} In Case 294/82, *Les Verts* [1986] ECR 1339 at 1365 (confirmed in Opinion 1/91, [1991] ECR I-6084 at 6102), the ECJ refers to the treaties as the Community’s constitution. As to the concept of constitutionalisation, see J. Weiler’s classic, “The Transformation of Europe”, *Yale L.J.* 100 (1991), 2403.

\textsuperscript{34} Case 26/62, *van Gend en Loos* [1963] ECR 1.
In the same judgment, EC law was also qualified as an “independent source of law” - this being referred to as the concept of the “autonomy” of EC law. As is well known, it is from these findings that the Court inferred that such EC law provisions as are sufficiently precise, unconditional and not in need of further implementation should, in principle, have direct effect. Beyond this, in the equally famous Costa v. Enel case, the autonomy of the “new legal order” was also construed to imply that EC law should not be subject to restrictions by the internal law of the Member States. In other words, EC law should enjoy supremacy vis à vis conflicting provisions of national law:

“The integration into the laws of each Member State of provisions which derive from the EC and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as EC law and without the legal basis of the EC itself being called into question (...).”

The formula “domestic legal provisions, however framed” clearly shows that the ECJ had in mind the primacy of EC law with respect to any national law, including constitutional law. So, from the ECJ’s perspective, supremacy would also encompass the integration clauses of national constitutions and the limits to integration stated by them. The sole reference to the need for ratification in Article 313 (formerly 247) EC does not incorporate such national constitutional requirements into EC law. This conclusion was confirmed expressis verbis in the case Internationale Handelsgesellschaft in 1970:

“Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the EC would have an adverse effect on the uniformity and efficacy of EC law (...) Therefore the validity of an EC measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”

Interestingly, Advocate General Warner advocated the contrary position, the so-called Hypothekentheorie (“mortgage theory”), some years later:

“The court has already said in general terms that it cannot uphold measures incompatible with fundamental rights recognised and protected by the Constitutions of Member States (...) I would be inclined to refine on [sic] this and to say that a fundamental right recognised and protected by the Constitution of a Member State must be recognised and protected also in EC law. The reason lies in the fact that, as has often been held by the Court (...), EC law owes its very existence to a partial transfer of sovereignty by each of the Member States to the EC. No Member State can, in my opinion, be held to have included in that transfer power for the EC to legislate in infringement of rights protected by its own Constitution. To hold otherwise would involve attributing to a Member State the capacity, when ratifying the Treaty, to flout its own Constitution, which seems to me impossible (...).”

However, in the *Hauer* judgment, the Court strongly opposed this view by confirming its former judgment, which has since constituted the basis of its jurisprudence.  

“As the Court declared in its judgment *Internationale Handelsgesellschaft*, the question of a possible infringement of fundamental rights by a measure of the EC institutions can only be judged in the light of EC law itself. The introduction of special criteria for assessment stemming form the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of EC law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the EC.”

Contrary to what was argued by one author in the literature, it may be added that the democratic homogeneity of the EC and its Member States, and particularly the fact that the fundamental principles enshrined in Article 79 III *Grundgesetz* are also acknowledged in the ECJ’s jurisprudence, do not mean that these principles are relevant to the EC in exactly the form they have been given by the *BVerfG*. The fact that the ECJ has often had recourse to national constitutional provisions in order to develop EC law, especially human rights, does not prove the contrary. For, in this sense, national constitutional law is not a proper legal source of EC law, but merely a “law-finding source”.

Another chapter in the history of the supremacy doctrine is provided by the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of

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Amsterdam. In this protocol, the Council tried to protect the doctrine from challenges based on these principles:

“The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining of the *acquis communautaire* and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and EC law, and it should take into account Article F(4) of the Treaty on European Union, according to which the Union shall provide itself with the means necessary to attain its objectives and carry through its policies”.

In the German literature, it was argued that this provision (“shall not affect the principles developed by the Court of Justice regarding the relationship between national and EC law”) was meant to limit the competence of control exercised by national constitutional courts by virtue of their constitutions. One commentator even expressed the fear that the *BVerfG* could be disempowered by this provision and recommended that ratification of the Treaty of Amsterdam be postponed until this provision was amended. However, it should be noted that even an explicit statement by the Community legislator as to the unlimited primacy of European law would not change the constitutional conflict in any way, since its origin in national constitutional law would remain unaffected. For this very reason, if German representatives voted for such a provision in the Council, this would clearly violate Article 23 *Grundgesetz* by rendering the control of the minimum requirements set forth in this provision by the national constitutional court impossible.

The most recent discussion on supremacy has been triggered by the EU Charter of Fundamental Rights, which was approved by the European Council in the final round of the IGC in Nice on 13-14 October 2000. It is true that the Charter has, so far, only the character of a “solemn declaration”, which is not legally binding. However, the prospect of its becoming so, possibly by its inclusion in a future European constitution, renders the question of its potential impact on the Community legal system highly relevant. Art. 53 of the Charter, which is one of the general provisions set out in the last chapter of the Charter and which contains a

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41 See *Treaty of Amsterdam*, final version, CONF/4007/97, TA/P/6 28 no. 2.
safeguard clause which may often be found in international treaties, might be read as implying a general and far-reaching restriction on the supremacy of Community law. This provision reads as follows:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

Indeed, the last passage “by the Member States’ constitutions” might be interpreted in the sense that, when the level of protection offered against a Community measure by a national constitutional right is higher than that offered by European law, an individual may rely on the national human right before a national court. The apposition, “in their respective fields of application”, which was, apparently, inserted on the initiative of the Commission in order to exclude any impact on supremacy, does not, however, solve the problem. For, as it is well known, the borderline between national and European competence is generally difficult to draw, and many areas in which human rights violations may occur are characterised by an overlap of national and Community competence. Yet, even though the “anti-supremacy” interpretation of Art. 53 of the Charter may be supported by some arguments derived from its drafting history, it is ultimately not tenable on several grounds. First, in a strictly literal interpretation, one may stress the precise language of the provision according to which “nothing in this Charter” may lead to restrictions of rights in national constitutions. Clearly, this does not exclude the possibility that other Community instruments may have such an effect. This somewhat formalistic literal interpretation is further supported by important political considerations. The reference to the national constitutions primarily stresses the drafters’ political message that the Charter is not meant to replace national constitutions. Conversely, it does not intend to diminish the essentials of the Community law acquis as regards the relationship between the Community legal order and national law, either. A contrary interpretation would not only be completely outside the mandate of the Convention, but it would also have to be supported by much stronger and clearer evidence, capable of overcoming the clear case law of the ECJ. Finally and perhaps most importantly, the model on which Art. 53 of the Charter is based, Art. 53 of the European Convention of Human Rights, has never been interpreted in the sense of limiting the supremacy of that Convention over national law, either.
Thus, at the end of the day, the doctrine of unlimited supremacy is still valid in Community law.

IV. A Doctrinal Analysis of the Two Positions

1. The “Bridging” Function of National Ratification Statutes

Distilling the essence of the conflict, it may be stated that whereas the Grundgesetz, at least in its current interpretation by the BVerfG, imposes a mandatory control of any international law to be applied internally via a scrutiny of the ratification statutes, European law does not recognise any limitation of, or exception to, supremacy based on national constitutional law. This reflects the conventional legal position in international law according to which a State may generally not rely on its constitution in order to justify a failure to comply with a treaty.46 However, even though this would, therefore, constitute a violation of European law, constitutional review of European law provisions is logically possible as long as the continuing validity of the national ratification statutes continues to be a pre-requisite of the internal application of EC law. Since an ordinary law is normally below the constitution, a ratification statute could be subject to the control of constitutional courts like any other national law. In the end, the supremacy of EC law would remain contingent upon this constitutional authorisation. An alternative view is only offered by the “federal emancipation” thesis.

2. Cutting the Bridge: The “Federal Emancipation” Thesis

The “federal emancipation” thesis denies the continuing dependence of EC law on national ratification statutes. This thesis relies first on a specific interpretation of the ECJ’s “constitutionalisation” jurisprudence, in which it has famously endeavoured to distinguish the “new legal order” from earlier international law regimes. In this jurisprudence, international law was apparently understood as an enemy of the integration goal of the EC. This jurisprudence was interpreted by some commentators in the sense that the EC had, either from birth or as a result of the process whereby the treaties where constitutionalised, emancipated itself from the national ratification statutes, i.e., cut the ties to its basis in public international

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45 See, convincingly, J. Bering Lüsberg, op. cit., 1189ff.
and national constitutional law, and become a “new legal order sui generis”. The first indication in this direction was found in the statement in *Costa v. ENEL* in which the ECJ talked for the first time of an independent legal order and not any longer of a special order of international law. In the ECJ’s later jurisprudence, the emancipation thesis might appear to underlie the reference to the treaties as the EC’s “constitution”, a term traditionally reserved for the “higher law” of a sovereign State. An even stronger indication in this direction might be found in the more recent first EEA-opinion which, as described above, was understood by some to mean that a certain hard core of the treaties could not be changed even by the European legislator.

According to this view, the Member States are no longer the uncontested “masters of the treaty”, and the EC is becoming a widely autonomous polity, its law no longer subject to unlimited modification or control by the Member States. As a result, the Member States could ensure the EC’s respect for their Constitutions’ limits to integration only collectively through legislative action – namely, through those treaty modifications that the ECJ would still allow. If this were actually true, it would, indeed, mean a definitive emancipation of the EC treaties from both international and national law.

A coherent doctrinal and theoretical explanation of the “emancipation thesis”, including also the national constitutional law side, was offered by Hans Peter Ipsen in his famous *Gesamtaktstheorie* (“collective act theory”). Thereafter, the genesis of the EC system did not depend primarily upon the national ratification statutes as in the case of ordinary international law treaties. Instead, what was crucial was national participation in the collective act of establishing the EC. This was based exclusively on Article 24 (1) *Grundgesetz* and, for this reason, did not need to comply with the rest of the German constitution, so that any problem

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49 As to the various meanings of this concept, see M. Heintzen, “Die Herrschaft über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?” *Archiv des Öffentlichen Rechts* 119 (1994), 564.
of compatibility with it simply could not emerge in the first place. Article 24 (1) GG would open the national legal order up to a law from another source which does not depend on the continuing force of the ratification act, since EC law would impose itself pursuant to the EC constitutional rules themselves.\textsuperscript{50} To sum up, the Gesamtaktstheorie presupposes an emancipation from the ratification statute and a subsequent superordination of EC law over national constitutional law at the foundation of the Community. This super-ordination may be characterised as “federal” in so far as it presupposes an absolute supremacy of European over national law – a phenomenon typically reserved to federal constitutions.\textsuperscript{51} Expressed in a metaphoric way, the “bridge”\textsuperscript{52} constituted by national statutes of ratification would be cut; it would have become a bridge in the Avignon style, on which the States may still wish to dance but which does not lead anywhere any longer. As a consequence, the interconnections between both legal orders might be entirely dealt with by supranational conflict of laws rules such as unconditional supremacy, which could not be adjudicated by national courts.

3. Objections

a) The Gesamtaktstheorie as a Piece of Legal Metaphysics

Desirable as it may seem to some, a federal emancipation of EC law from the national ratification statutes can hardly be presupposed, either at the origin of the Community or at a later stage.\textsuperscript{53} An emancipation at the foundation stage, as advocated by the Gesamtaktstheo-


\textsuperscript{51} See, for a famous example, Article 31 of the Grundgesetz: Bundesrecht bricht Landesrecht (federal law “breaks” State law).

\textsuperscript{52} For the “bridge metaphor”, see P. Kirchhof, in Corte Costituzionale (ed.), Diritto Comunitario Europeo e Diritto Nazionale, 1997, 62.

rie, would presuppose that the EC was created (ideally by some sort of *pouvoir constituant*) as a federal-type polity - what Schilling called the “big bang theory” of EC law. Against such a theory, it must be objected that the foundation treaties were concluded by government officials and ratified by national parliaments as normal international law treaties. There are absolutely no indications that the national governments and parliaments involved had anything else in mind but an ordinary international treaty.

Furthermore, it should be excluded that, when making this international treaty, its drafters presupposed a “monistic” federal-type subordination of national law to EC law. As is generally known, there was, and is, no consensus among the founding States on the monistic model as regards the interface between national and international law. In particular, Germany and Italy adhere to a pluralistic view and, besides requiring a national act of transformation in order to allow for international law to be applied internally, reserve to themselves the right to review international law treaties internally, though this may be at the price of incurring international law liability. More importantly still, it should also be considered that with the establishment of a hierarchically superior federal system capable of depriving them of their constitutional identity, the European Nation States, and possibly not only those which share a dualistic tradition, would have committed a clear and massive violation of their constitutions which can hardly be implied from their action. Finally, as stated, even the ECJ still explicitly referred to the “international law-character” of the treaties in *van Gend*

die Geltung des Gemeinschaftsrechts*, Archiv des Völkerrechts 35 (1997), 275f. The BVerfG’s Maastricht judgment is also based on this view, see BVerfGE 89, 155 at 184, 190, 198ff.


55 Since H. Triepel, Völkerrecht und Landesrecht, 1899.

56 Even if, following the tradition of some Member States like France, Belgian and the Netherlands, monism were to be accepted as the valid model for the reconceptualisation of the relationship between EC and national law at the foundation stage, considerable conceptual and effectiveness-related differences between monism in international law and federal monism could not be ignored. As will be expounded, there is no possibility, within international law monism, of individuals constraining a State before national courts to act in accordance with its obligations. Under normal circumstances, only an *ex post* review on the international level for the purpose of establishing a State’s liability is possible. So the performance of international law obligations is not always guaranteed. Specifically, in cases in which their vital interest is at stake, States have often found ways to circumvent international law obligations, or availed themselves of the possibility of paying compensation to other parties instead of complying with their obligations.
1962; the reference to “international law” was only omitted in 1964 in Costa v. Enel, and the term “constitution” is generally associated with the 1986 decision in Les Verts. Thus, the “big bang theory” may, indeed, be criticised as a piece of “legal metaphysics” and an *ex-post* rationalisation of developments which were neither intended nor foreseen at the foundation of the EC.

So, at best, the evolution towards the “federal emancipation” of EC law might have occurred gradually in the wake of the conclusion of the treaties through the ECJ’s famous “constitutionalisation jurisprudence” and/or other developments. But this hypothesis is equally problematic. First, for reasons of legal certainty, one may rightly claim the need for a formal agreement of the Member States for such a far-reaching change of the EC’s status. But even if such a formal requirement were waived, any unequivocal expression of consent by the Member States would seem to be crucial. There are, however, no such indications. The above-mentioned process of internalisation of EC law is certainly not enough, as it does not necessarily cover the unlimited supremacy of EC law. Beyond this, the ECJ was, clearly, not granted the unilateral power to change the essentials of the system, which would, however, have been the case if its “constitutionalisation jurisprudence” were to be interpreted in a “federal” way. This interpretation could, at best, be justified if the emancipation of EC law could be shown in customary law, through tacit acceptance of the ECJ’s “constitutionalisation jurisprudence” by the Member States. As far as national constitutional courts are concerned, this seems, however, to be excluded as well. As stated, even though a national court’s annulment of an EC act may be argued to be rather unlikely for practical reasons, the majority of the constitutional or highest courts of the Member States did and do not, in a legally binding way, exclude control over EC law. As explained, they could not even have done so without breaching the constitutions by which they were set up and which they are supposed to monitor. This is not only true for the German Constitutional Court. In France, the Advocate General has, in the famous Nicolo case before the Conseil d’Etat, even explicitly discarded the Kelsenian monistic model which implies the super-ordination of EC law. The same is also true for most other European constitutional or highest courts. Moreover, accep-

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58 Streinz, *op. cit.*, at 128ff.
60 As to the UK, see the House of Lords in the Factortame Case, *CMLRep* 3 (1990), 375 at 380; for Spain, see Spanish Constitutional Court, Declaration D 1-7-1992, *Jurisprudencia Constitucional* XXXIII (1992), 460 at
tance of “federal emancipation” cannot be seen in any legislative documents either. The above-mentioned provision of the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Amsterdam (“shall not affect the principles developed by the Court of Justice regarding the relationship between national and EC law”) cannot be interpreted in this way, either.

In a more general perspective, it should be noted that even an explicit statement by the Community legislator as to the unlimited primacy of European law would not change the constitutional conflict in any way, since its origin in national constitutional law would remain unaffected. Indeed, if German representatives voted for such a provision in the Council, such action would be void, as it would violate Article 23 Grundgesetz by rendering the control of the minimum requirements set forth in this provision by the national constitutional court impossible. As a final footnote, one may observe that the recent transition from the Community to the Union even shows a certain regression to international law patterns of intergovernmental co-operation which also seems to contradict the thesis of federal emancipation.61

b) The International Law Interpretation of the Community as an Alternative

Another major argument which defeats the federal emancipation interpretation of the ECJ’s jurisprudence is that the central features of the interface between the EC Treaties and national law may be explained in international law terms, too.62 To start with, it may be repeated that the EC was founded by an ordinary international law treaty; its supranational features are essentially linked to the wider scope of competencies delegated to it and the existence of an elaborate and highly effective legal, administrative and adjudicative machinery. Thus, the difference from traditional international law is not one of principle, but only one of degree. As stated before, it is equally recognised in international law that a State may generally not rely on its constitution in order to justify a failure to comply with a treaty. The main doctrinal novelty of the EC Treaties lies in the effective combination of the direct effect and

472. Unlimited supremacy based on a hierarchical super-ordination was only advocated by the Belgian Court de Cassation in the Le Ski case (EuGRZ 1975, 308); however, the new Cour d’ Arbitrage again claims a limited competence of constitutional review, see H. Bribosia, “Applicabilité Directe et Primauté des traités internationaux et du Droit Communautaire”, Revue Belge de Droit International 33 (1996), 29.


supremacy doctrines, which results in what may be called “internal primacy”,\textsuperscript{63} entailing the immediate disapplication, by any national or European court, of national law which conflicts with European law. This is rarely found in traditional international law, where norms enjoy direct effect only exceptionally, and States are generally free to choose the means they think most adequate for compliance with international obligations (so that all internal remedies against a national act contrary to international law must, normally, have been exhausted before a violation can be found). Beyond this, whereas in international law judicial review may only take place \textit{ex post} with the purpose of finding a State liable for non-compliance, in the European context, by means of the Article 234 (formerly 177) EC reference procedure, an \textit{ex ante} judicial review may take place. Thus, a State can be constrained to give immediate effect to its EC law obligations. In other words, international law liability for non-compliance is turned under EC law into an obligation to comply.

Through these devices, a Member State may not only be liable for the breach of an international obligation inconsistent with its own constitution as in traditional international law, but it might also be forced to act against its constitution. This possibility would be particularly relevant in majority decisions, by which the EC could actually disregard national constitutional limits by adopting measures contrary to them. Were the ECJ to accept a measure as compatible with EC law, the Member States would enjoy no other remedy against it. This is what renders constitutional conflicts much more critical than in traditional international law, even though they are not completely different. Finally, according to this view, the thesis proposing limits to material revision of the Treaties, which was only made in a vague \textit{obiter dictum}, is not yet definitively established and should, therefore, not be interpreted as implying an irreversible emancipation of the EC system from international law.

4. Procedural Consequences for the Review of Community Law by National Courts

The findings of the irrelevance, in EC law, of national limitations to integration and of the unlimited internal supremacy of EC law are taken to imply that there is no scope for review of EC law by national courts. In particular, such a power would seem to be incompatible with the ECJ’s authority as ultimate umpire with regard to the interpretation and validity of EC law, as laid down in Article 220-234 (formerly 164-177) EC.

\textsuperscript{63} De Witte, \textit{op. cit.}, at 428ff.
This function of the ECJ is, indeed, indispensable to guarantee uniform application of EC law throughout the EC. Thus, the reference procedure in Article 234 EC is particularly important, since it ensures that the ECJ is consulted with regard to a potentially divergent interpretation of EC law by national courts. Within EC law, the ECJ’s monopoly of interpretation clearly comprises the review of the Treaty’s legislative competence provisions as well.64

From this perspective, if not the review procedure as such, at least a finding of a European

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64 For a different, but unconvincing view, see T. Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations”, Harvard Int. L.J. 37 (1996), 389 at 392. According to Theodor Schilling, it is possible that a court of an international organisation which does not possess legislative Kompetenz-Kompetenz may well be endowed with judicial Kompetenz-Kompetenz, i.e., it may well be the ultimate umpire with respect to the interpretation of legislative competence provisions. However, this judicial competence would include the power of deliberately exceeding the legislative competence of the organisation (!). In EC law, however, the existence of such a judicial Kompetenz-Kompetenz of the ECJ would be uncertain: Arts. 173-177 EC might be relied on in favour of it, whereas Arts. 4 and 164 EC would point against it. Now, this problem could be solved by according the ECJ only a “formal”, and not a “substantive” judicial Kompetenz-Kompetenz; as a result, national courts would retain a substantive judicial Kompetenz-Kompetenz, which would ultimately allow them to review the ECJ’s decisions on the interpretation of legislative competence provisions. This argumentation seems ill-founded. First, it is true that the EC is an order of limited competencies and, therefore, does not have legislative Kompetenz-Kompetenz (although one might read another conclusion into the ECJ’s first opinion on the EEA, Opinion 1/91, [1991] ECR I-6079, which would, however, be ultra vires). Secondly, however, it should be clear that the ECJ was given the power, in the interest of legal unity, to decide as the ultimate umpire also on competence issues. This power even includes very wide interpretations of legislative competence provisions, which might be considered as ultra vires by some, but, nevertheless, according to normal standards of public international law, are binding unless the transgression is essential and manifest (see, specifically on this problem, Streinz, op. cit., at 324, text at footnote 177). However, it is wrong to deduce from the competence of (even extensive) interpretation an explicit competence to exceed the bonds of limited legislative competencies deliberately. Thus, it is already unnecessary to draw on Articles 4 and 164 EC in order to justify a limitation of such a judicial Kompetenz-Kompetenz, since it simply does not exist. For this very reason, there is no need to differentiate between a formal and a substantive judicial Kompetenz-Kompetenz either. Finally, it seems self-evident that Schilling’s view would be prone to destroy legal unity in the EC and would, therefore, counteract the intentions of the fathers of the Treaty.

See, also, the convincing response to Schilling by Weiler and Haltern, op. cit., For the origins of the concept of Kompetenz-Kompetenz, see P. Lerche in C. H. Ule et al. (eds.) Festschrift 150 Jahre Heymanns-Verlag, 1995, 409. As to the constitutional conflict regarding competencies, see, also, H.-P. Folz, Demokratie und Integration: Der Konflikt zwischen Bundesverfassungsgericht und Europäischem Gerichtshof über die Kontrolle der Gemeinschaftskompetenzen, 1999. See more recently on the same subject F. Mayer, Kompetenzüberschreitung und Letztentscheidung: das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen, 2000.
act as unconstitutional by a national court would clearly be in breach of EC law, and liable to infringement proceedings pursuant to Articles 226-228 (formerly 169-171) EC).

5. Limited Conflict Avoidance Capacities of National Constitutional Law

As regards the conflict avoidance capacities of national constitutional law they are, on this basis, confined to procedural devices. First, the finding of a European act as unconstitutional must be reserved to the BVerfG in an analogous application of Article 100 Grundgesetz.65 This can be justified by the (at any rate) quasi-constitutional character of the European Treaties and by the need for legal certainty, with which review by lower courts would be incompatible. Secondly, and more importantly, it must be ensured that the ECJ has the opportunity to give an opinion on any relevant issue at stake in the case. Thus, before finding a European act unconstitutional, the BVerfG is generally compelled to refer the matter to the ECJ pursuant to Article 234 (3) EC.66 This is so even if another national court has already referred the same matter to the ECJ, but a new important legal issue has arisen in the meantime.67

More importantly, the balancing of the relevant constitutional criteria - the task of bringing about integration on the one hand and of ensuring respect for all other constitutional principles and values including human rights and national competencies on the other - shows that judicial self restraint with respect to a limited control for manifest and grave flaws is possible. This is exactly the approach chosen by the BVerfG in the Solange II-decision68 and (probably) confirmed by the reference to the “co-operation relationship”69 between the ECJ

65 According to Art. 100 Grundgesetz, any national judge must suspend a pending proceeding and refer a national parliamentary statute for constitutional review to the BVerfG, if he or she is convinced of its incompatibility with the Grundgesetz and if such a finding would be relevant for the outcome of the case at issue (the so-called “incidental control procedure” - konkrete Normenkontrolle). Thus, no national judge may decide on the constitutionality of a statute (as opposed to regulations and provisions enacted by the executive) - the Federal Constitutional Court has the monopoly of constitutional review.


67 Thus, if the BVerfG did not consider the Banana case moot and, additionally, were to hold the EC Banana regime at odds with Art. 24 GG, it would have to refer the case once again to the ECJ, since the latter has not yet given an opinion on the status of WTO dispute settlement resolutions in EC law, particularly as to their potential direct effect.

68 Solange II, BVerfGE 73, 339 at 374ff.

69 However, the term “co-operation” is rather euphemistic in this context. It means more or less that the BVerfG leaves the daily business of adjudication to the ECJ, but reserves itself the right to intervene on constitutional
and the BVerfG in the field of human rights protection in the Maastricht judgment. So, a more or less contingent and minor violation of constitutional essentials in a single case can still be accepted. Only if the ECJ’s jurisprudence is subject to structural weaknesses which are likely to produce divergent results in a variety of cases — and these were, indeed, claimed to exist on account of the methodologically unsatisfying control of human rights in the Banana judgment — can such control be effectuated.

In order to limit the outbreak of conflicts to a minimum, the BVerfG has, in its answer to the submission of the EC banana market regulation by the Frankfurt-am-Main administrative court for judicial review in 2000, raised the admissibility conditions for showing such structural weaknesses to a maximum, which will be difficult to reach in practice. According to this decision, constitutional complaints and submissions by judges complaining of fundamental-rights infringements are inadmissible unless they show that the development of European law, including ECJ case law, has, since the “Solange II” decision, generally fallen below the mandatorily required fundamental-rights standard of the Grundgesetz in a given field. To fulfil this condition, the Court seems to require — although this is stated in ambiguous and somewhat contradictory language — a comprehensive analysis of the protection of the fundamental right(s) in question in European jurisprudence by the lower court.

Since this condition is extremely difficult to fulfil, submissions invoking structural weaknesses of European human rights protection are hardly likely to occur for the moment. However, despite these procedural safeguards, which will be shown to be incompatible with effective inter-institutional checks and balances among European and national institutions, the essence of the conflict is still unresolved. And it is equally clear that, in a case with higher

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72 The judgment is analysed in more detail infra, excursus, III., 3.
economic significance, the margin of interpretation that the BVerfG has left to itself is high enough to find “structural flaws” which would well require constitutional review. Thus, in the end, a certain potential for conflicts cannot be excluded de lege lata by national constitutional law despite the BVerfG’s “traité de paix”.73

V. Assessment

After the discussion of the European and national constitutional law positions, the essence of the conflict may now be distilled: according to the Grundgesetz, constitutional review of EC legislation is mandatory, even though it may be carried out with lower intensity. Otherwise, one would have to read the Grundgesetz as allowing for violations of its hard core, which would be fundamentally incompatible with the eternity clause in Article 79 (3) Grundgesetz. Technically, constitutional review may only be exercised by way of scrutiny of national ratification statutes, since a national court has no jurisdiction over EC legislation.

EC law, on the other hand, demands the irrelevance of any national constitutional law exception and the inadmissibility of constitutional review by national courts. Within the EC law interpretation, there is, however, an important difference between the “federal emancipation thesis” and the international law reading of the EC’s status: if the EC legal system still depends on national ratification statutes as suggested by the latter reading, constitutional review via the review of these statutes is logically still possible, though it is likely to constitute a vio-

73 Cf., C. Grewe, “Le «traité de paix» avec la Cour de Luxembourg: l’arrêt de la Cour constitutionelle allemande du 7 juin 2000 relatif au règlement du marché de la banane”, RTDE 37 (2001), 1. On the development, see, also, D. Grimm, “The European Court of Justice and National Courts: “The German Constitutional Perspective after the Maastricht Decision”, Columbia J. of Eur. L. 3 (1997), 229 at 241ff.; dissenting G. Hirsch, “Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?”, NJW 1996, 2457 at 2459. However, former ECJ-judge Günter Hirsch does not deny the conflict potential as such. Instead, he wants to render impossible the outbreak of a conflict by propagating a further judicial self restraint in the sense that even the review of the standards set out in Art. 79 III Grundgesetz should not be undertaken on a case to case basis, but should be confined to “structural flaws”. According to him, Art. 79 III Grundgesetz would only guarantee the indispensable minimum of democratic legitimation and legal protection. However, such a restrictive interpretation of the provision seems to be incompatible with the unlimited obligation of all German organs to respect the basic rights enshrined in the Grundgesetz (Art. 1 III Grundgesetz, to which Art. 79 III refers) and the role of the BVerfG to monitor the respect of the Grundgesetz in each single case (see Art. 92 Grundgesetz). In addition, reactivating the BVerfG’s task of control only in the case of major structural flaws would bear the risk that then, the constitutional order could already be politically changed in a legally irreversible way. This, however, is exactly the mischief Art. 79 III GG has the task of avoiding.
lation of international law. If, on the other hand, the EC had actually emancipated itself from its basis in national constitutional law and international law, this review would no longer be logically possible. As a consequence, the interconnections between both legal orders might be entirely dealt with by supranational conflict of law rules such as unconditional supremacy, which could not be controlled by national courts. On the basis of the “federal emancipation thesis”, the conflict would have been logically decided in favour of European law. Since the “federal emancipation thesis” and its most coherent dogmatic justification, the Gesamttaktstheorie, have, however, been shown as barely defensible, the conflict remains unresolved. From their internal perspectives, the supremacy and final arbiter claims of both sides are equally coherent and cogent, which should exclude any definitive doctrinal solution. The conflict may, therefore, be ascribed strong structural features.
Chapter II: The Relationship between the GATT/WTO System and European Law

“Though born roughly in the same period, committed to similar beliefs in the virtues of liberalized trade and open markets, sharing in many instances a common legal vocabulary, the GATT and the European Communities developed over the years as the Cain and Abel of international economic law—except that in this case, Cain was cast out into the wilderness by a complacent and self-satisfied Abel. It is time to bring him back to the fold.”

Joseph H.H. Weiler

I. Preliminaries

The status of the world trade order in Community law revolves essentially around the concept and the implications of its potential internal applicability in that system, usually called “direct effect”. This question will be considered in the light of three preliminary issues: the theoretical concept of direct effect in general; direct effect of internal Community law and direct effect of other international agreements in the Community legal order.

1. Doctrinal Essentials of the Status of International Treaties in National Law

a) Foundations: Internalisation, Internal Validity and Applicability

On the conventional view, international law comes into existence through “normative action” such as agreements or customs of States or international institutions. These are, therefore, the authors and original subjects of international law at the same time. It follows that States or international institutions are also solely responsible for the compliance with and the implementation of their international law obligations. In this respect, they are usually accorded a great deal of discretion with regard to the modalities and instruments by which compliance is achieved. In particular, there is, in principle, no public international law duty for States to extend the validity and applicability of international law to their internal legal order, even though this may considerably increase its effectiveness.

74 “Cain and Abel – Convergence and Divergence in International Trade Law”, in idem (ed.), The EU, the WTO and the NAFTA, 2000, 1.
If, however, a State were to decide that international rules are to become a part of its internal legal order, which in particular includes citizens as its subjects, technically speaking, there first needs to be an “internalisation command” in that order, which mandates such internal validity. In national systems characterised as dualistic – which basically means that they presuppose national and international law as two independent, so to speak, juxtaposed orders -, such a command is usually contained in a national transformation or implementation act which usually takes the form of an ordinary statute enacted by parliament. However, an internalisation command is also necessary under a monistic system which presupposes the unity of the national and the international legal order, the latter being usually granted supremacy over the former. Otherwise, it would simply remain unclear whether a norm generated at the international level of the overall monistic legal order should be applied at the subordinated national level, too.

National legal orders based on the monistic system usually limit themselves to a general command which may be enshrined in their constitution or in some other important legal document. Such a general command normally stipulates that the entry into force of an international agreement is a sufficient condition for its internal validity. As a famous example, one may quote Article 26 of the French constitution of 1946, whereafter “international treaties duly ratified and published have legal authority even if they are in conflict with French laws, without there being a need, for their application, of legislative provisions beyond those necessary to ensure their ratification.” A more limited example is Article 25 Grundgesetz, a monistic feature in the otherwise rather dualistic German system, according to which the “general rules” of international law, and only these, automatically come to form part of the national legal order. As regards the European system, the national “integration clauses”, such as those contained in ex-Article 24 and new Article 23 Grundgesetz, which open the national legal order for supranational law, may be interpreted in this way, too, though without prejudice to the constitutional conditions and limits that they impose on European integration and the supremacy of European law.

As regards the EC legal order, an “internalisation command” may be found in Article 300 (7), ex 228 (7), EC by which “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States”. The result of this command is that international law is validated also at Community law level (internal validity). Since this formula applies to all kinds of international agreements concluded by the Community and since, moreover, the EC Treaties contain no other requirement for the
internal validation of international law, it is plausibly regarded as evidence that the EC presupposes a monistic structure of European and international law.\textsuperscript{75}

Finally, internal validity should be distinguished from internal \textit{applicability}, which depends on additional conditions to be fulfilled. In order to be internally applicable, a single provision not only needs to be valid, but also of a legal nature and technically capable of direct application as regards its texture and drafting, \textit{i.e.} it must be sufficiently clear, precise, unconditional and not in need of further implementation through other norms. This distinction makes sense, because a provision which is internally valid, but not directly applicable, may still deploy legal effect by influencing in particular the interpretation of national norms pursuant to the principle of consistent interpretation of domestic law with international law, which is recognised in EC law, too.

\textit{b) Internal Applicability and the Possibilities for its Exclusion}

\textit{aa) Mutual Exclusion of Direct Effect by the Parties}

Direct effect gives rise to enormous implications on States as parties of an international agreement, in particular by internally shifting power from the executive to the judiciary and by limiting their scope of discretion in the agreement’s implementation.\textsuperscript{76} Thus, it becomes clear that they may wish to exclude such an effect – just as they may, under exceptional conditions, wish to stipulate it in the agreement, in order to guarantee its reciprocity. It is obvious that both can be done on account of the contractual autonomy of the parties. Moreover, when the parties have not explicitly done so, it is, as the ECJ stated in the \textit{Kupferberg} judgment, up to the courts to decide whether an \textit{implicit} exclusion may be inferred from the terms, the general scheme and the spirit of an agreement.\textsuperscript{77} Such an interpretation may be particularly justified when the parties do not want the agreement established by them to take on the character of genuine “law”, when they want to establish a diplomatic forum without juridified character, or when they want to exclude individuals from invoking the agreement before national courts, which would curtail their leeway at the implementation stage.


\textsuperscript{76} See below 4b), cc).

\textsuperscript{77} Case 104/81, \textit{Kupferberg} [1982] ECR 3641, para. 22 and 23.
Against this background, the two-step approach by which the ECJ usually examines the internal status of international agreements becomes clear. In a first step, the whole agreement is analysed. With a view to its terms, general scheme and spirit, the Court analyses whether, to restate the two extreme constellations, the parties meant it to work as a framework for diplomatic negotiation or as an enforceable legal instrument. Only if the latter is the case, may the pertinent provisions themselves be examined in a second step with respect to their technical ability of being directly applied. Having said this, it is rather obvious that different courts, when called upon to decide on the internal applicability of an agreement in the absence of an explicit stipulation by the parties, may come to different results.

*bb) Unilateral Exclusion of Direct Effect by One Party*

Since internal applicability of international provisions depends on a national “internalisation” command, it follows that this may be unilaterally denied to an agreement concerning international norms by provisions of the domestic legal order in which the international norms are supposed to take effect. As there is no general international law rule requiring the internal applicability of international norms, this may be excluded by the parties, and such a denial would only be contrary to international law if the parties had made a different stipulation. However, if one excludes unrealistic positions of extreme monism under which the incompatibility of a domestic norm with international law automatically entails its nullity *ex tunc*, even a denial contrary to such stipulation would be internally valid.

In the European context, it has, however, been argued that the European secondary law legislator would be prevented, by primary law, from determining the internal status of international treaties unilaterally. Pursuant to this opinion, the formula “shall be binding on the institutions of the Community and on Member States” in Article 300 (7) EC would, in an anticipated way, order the direct effect of any treaty provision fulfilling the technical requirements of being directly applied. Consequently, a secondary law provision such as the act of incorporation could not validly exclude direct effect. However, the wording of Article 300 (7) EC is not clear in this respect, as the formula can also be regarded as a mere internalisation of the fundamental international law principle of *pacta sunt servanda* - in other words,

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it requires only internal validity, and not internal applicability. Indeed, the other interpreta-
tion would lead to an unusually far-reaching opening of the domestic legal order and might
deprive the Community of the possibility of dealing with the implementation of international
treaties in a flexible way. Thus, it would, to a certain extent, contradict the international law
principle “in dubio mitius”, according to which an interpretation which minimises the curtail-
ing of a State’s sovereignty is preferable in doubtful cases. For these reasons, Article 300 (7)
EC should, in principle, not be extended beyond pacta sunt servanda.

In summarising the above, it may be submitted that, just as with any national legislator,
the Community legislator is, in principle, not precluded from denying direct effect to interna-
tional norms by way of secondary law commands. Only if this is not done is it the task of the
courts to find out whether certain provisions of an agreement may enjoy direct effect.

c) Direct Effect and additional “Subjectivity Requirements”

As has already been outlined, in the absence of an exclusion of direct effect by the parties,
the legal character of an agreement and the technical fitness of the provisions in question are,
in general international law, regarded as sufficient grounds for their being invocable before
domestic courts by private parties. This means that directly effective provisions automatically
confer subjective rights on individuals. It is interesting to note that this conclusion is not
shared by internal administrative law. Thus, under the Schutznormtheorie of German admin-
istrative law, only the violation of a norm which is purported to confer subjective rights on
individuals may be invoked; whether a norm pursues this objective is to be determined by
means of interpretation in the absence of an explicit stipulation to this effect. 80

In directly applicable internal EC law (primary law and regulations), no such specific sub-
jectivity requirement may be found. 81 As will be shown in more detail in the next paragraph,
to tackle the question of direct effect, the ECJ has repeatedly limited itself to considering the
nature, the systematic context and the wording of the European act in question. Regarding the
latter, the ECJ only requires that the act in questions impose on the addressee an uncondi-
tional and sufficiently clear and precise obligation vis-à-vis the person concerned. This was
even maintained when the Court granted direct effect to a Council decision addressed to the

80 See, among many, F. Kopp, VwGO, § 42, no. 48ff.
81 See M. Ruffert, “Dogmatik und Praxis des subjektiv-öffentlichen Rechts unter dem Einfluß des Gemein-
DVBl. 1998, 69.
Member States, when this was invoked by an individual before a national court. In general, this jurisprudence seems to be inspired essentially by EC law’s high reliance on decentralised implementation by individuals challenging national provisions before domestic courts on European grounds – which has been called the principle of “functional subjectivisation”.

As regards the direct effect of provisions contained in international agreements, the ECJ has essentially adopted the same position in the Kupferberg judgment. Yet, this position has recently been relativised by the Court of First Instance in the Chemnitz case, which was part of the Banana conflict. There, a German fruit importer had requested additional “hardship” import licences from the Commission under Article 30 of the Banana regulation. However, as regards the conditions for the internal applicability of an adopted WTO dispute settlement report (which established the inconsistency with GATT/WTO rules of the Banana regulation), contrary to former case law which had examined this question ex officio, the Court of First Instance requested the plaintiff to show that these conditions were met:

“(…) Furthermore, the applicant has not established a link in law between the decision of the Dispute Settlement Body and this action. It is clear from the Community case-law that, in order for a provision in a decision to have direct effect on a person other than the addressee, that provision must impose on the addressee an unconditional and sufficiently clear and precise obligation vis-à-vis the person concerned. The applicant has not put forward any arguments to support the view that those criteria are met. Its argument concerning the effects of the Standing appellate body’s report and the Dispute Settlement Body’s decision must therefore be rejected as unfounded, without there being any need to consider whether the mandatory decisions of the Dispute Settlement Body have direct effect.”

Finally, in its case law regarding the liability of the EC for damage suffered as a result of illegal Community action, the ECJ requests that the measure in question specifically aim to protect the interests of individuals. This requirement comes close to the German Schutznormtheorie.

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83 Ruffert, op. cit.
84 Case 104/81, Kupferberg [1982] ECR 3641, para. 22 and 23.
86 Chemnitz case, loc. cit., para. 28ff.
As an intermediate position with respect to direct effect, it has been maintained that certain international provisions, in particular GATT or WTO rules, may generate rights and duties only for Community institutions and/or Member States, but not for citizens.\(^88\) This would entail that these provisions cannot be invoked by individuals in preliminary reference proceedings, but only by States in treaty infringement proceedings or nullity suits. This interpretation aims to ensure that Community and Member State institutions act consistently with international law, so that no international liability may arise. Also, as the amount of EC legislation reviewed under GATT/WTO standards would remain much smaller due to this limitation, the significance of the GATT/WTO dispute settlement mechanism would increase, and the political scope of manoeuvre of the Member States in the implementation of GATT/WTO rules and decisions would remain considerably wider.

However, one must not ignore the objections raised against this solution:\(^89\) National courts would be forced to violate openly objective international law invoked by private parties. National courts would even be prevented from referring such a case to the ECJ under Article 234 EC. Legal findings reached in infringement proceedings involving Member States would be irrelevant for private parties, at least while a contested piece of legislation remained in force. In the face of this contradiction, the need for a uniform decision with respect to all parties was claimed. In other words, either no plaintiff or every plaintiff should be able to rely on GATT/WTO law before domestic courts. As will be shown later, though, the advantages of restricting the award of direct effect to government suits might outweigh these disadvantages.

2. The ECJ Jurisprudence on the Direct Effect of Internal Community Law

As already mentioned, the important issue of the relationship between EC and national law was, with the exception of the direct effect of regulations, not dealt with in the European Treaties, but instead left to the ECJ’s jurisprudence. The direct effect doctrine, first develop-


\(^89\) See A. Peters, “The Position of International Law within the European Community Legal Order”, GYIL 2000, 9, 66ff., with further references.
oped in the celebrated *van Gend en Loos* case, already mentioned in relation to the constitutional relationship among the EC and Member States, provided the starting point. In this case, a Dutch importer challenged an import duty by invoking Article 12 (now 25) EC before a domestic court which referred the case to the ECJ. Setting forth its two-step procedure, the ECJ replied that an answer to this question would require it to resort to the spirit, the general scheme and the wording of the EC-Treaty as well as to the provision at stake. Since the objective of the Treaty was the establishment of a Common Market, the Court found that it could not be treated as equivalent to an ordinary international agreement confined to the creation of mutual obligations among States. Instead, it was of direct importance to citizens, which was confirmed by the preamble’s reference to the “peoples of Europe” and by the establishment of institutions to which the Member States had conferred parts of their sovereignty. The Court concluded that, given that the wording of Article 12 (now 25) EC also contained a clear and unconditional (negative) obligation, it was suitable for application in the relationship between Member States and their citizens. In later cases, the Court has also required the legal obligation to be complete and legally perfect (*i.e.*, not in need of further implementation measures) in order to be directly applied. In a further step, the Court has extended the direct effect doctrine to positive treaty obligations such as the equal treatment requirement stipulated in Article 141 (ex 119) EC, regulations, directives (*vis-à-vis* statal institutions only) and decisions.

Evaluating the impact of the direct effect doctrine, it is certainly correct to say that the future of the Community would have been very different without it. It has increased the effectiveness of EC law immeasurably, as national courts can apply EC law with greater speed and can use their powers, including the award of damages and other remedies such as *interim* measures, to enforce their orders. Anticipating the situation of the GATT/WTO system, the granting of direct effect could be a similar starting point for the constitutionalisation of the world trade order, with the effect of curtailing the sovereignty of the Member States in international economic relations to the benefit both of individuals and of the emerging global trade order itself. The crucial question will be whether these implications are, in fact, desirable.

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Further approaching the status of the GATT/WTO system, another significant preliminary issue is provided by the Court’s jurisprudence on the internal status of (other) international treaties. It was in 1974, in the famous *Haegeman* case, that the ECJ was first confronted with an international agreement and its status in EC law. In proceedings before a Brussels court, the *Haegeman* company, an importer of Greek wine, claimed repayment of countervailing duties imposed on it by the Belgian customs authorities pursuant to Council Regulation 816/70. The company claimed the duties to be incompatible with the Association Agreement between the Community and Greece, which stipulated the commitment to equal treatment. The crucial problem of this case was the Court’s jurisdiction to interpret this agreement. Advocate General Warner had argued that, pursuant to the wording of Article 177 (now Article 234 EC) the Court was only competent to rule on the interpretation of the Treaty and on the validity and interpretation of acts of the Community. The Court, disregarding the manifest difference between a unilateral internal measure and a bilateral or multilateral treaty which depends on each party’s agreement, assimilated the acceptance of an international agreement to an act performed by a Community institution in terms of Article 177, now 234 (1) (b) EC. Furthermore, it held that the provisions of the Association Agreement “from the coming into force thereof, form an integral part of Community law” which the Court is mandated to scrutinise. This conclusion was also based on Article 228 (7), now 300 (7) EC, whereby international agreements concluded by the Community are binding both for the Community and its Member States. As mentioned, the latter findings were interpreted as the Court’s adherence to a monistic view of the relationship between international law and Community law. In the remainder of the case, the direct effect question did not, however, need to be dealt with since the countervailing duties were classified as a levy which was found to be compatible with the Agreement.

In subsequent jurisprudence, the direct effect question arose in a number of cases dealing with association agreements. The Court’s fundamental approach to these cases was already developed in the first of them, the *Bresciani* case. The Court had to examine the potential direct effect of Article 2 (1) of the 1963 Yaounde Convention which had been concluded be-

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92 *Case 181/73, Haegeman* [1974] 449.
tween the Community and certain associated African States and the island of Madagascar. The quoted provision of the Convention purported to abolish customs duties on goods produced in the associated States progressively. Thereby, it specifically referred to the corresponding provisions of the EC Treaty. Having noted that the question of direct effect was to be decided in function of the spirit, general scheme and wording of the Convention, it held that the purpose of the association was to promote the economic development of the associated States. Hence, even the lack of reciprocity in the obligations stipulated in the Convention could not exclude its direct effect. Instead, the Court found that Article 2 (1) of the Convention contained a specific and unconditional obligation which reflected the corresponding EC Treaty obligation contained in ex-Article 13 EC. Consequently, the provision was held to be directly effective. A more or less similar reasoning may also be found in the subsequent cases Pabst, Demirel, Sevince, Kziber and Anastasiou.

In the present context, the Kupferberg case is more important as it dealt with a free trade agreement - which clearly have a less “integrative function” than association agreements and, thus, come closer to the function of GATT. In concreto, the Court had to decide whether a German tax on wine imported from Portugal was compatible with Article 21 (1) of the 1972 free trade agreement between the Community and Portugal. On the ground that this provision would, again, be similar to, and pursue a similar function as, Article 95 (now 90) EC, the Court held it to be directly effective.

In addition to this conclusion, the Court clarified important general questions concerning the treatment of international agreements. First, as already stated above, it confirmed that it is up to the parties to stipulate whether an agreement is supposed to enjoy direct effect; in the absence of such determination, the Court declared itself ready to decide the question according to its own criteria. In this context, it observed that agreements with non-Member States are, in general, not to be given the same wide and policy-orientated interpretation as is given to the Community treaties, even where the agreement almost exactly reproduces the wording

95 Abolished as obsolete by the Treaty of Amsterdam.
of a provision in the EC Treaty. However, the Court rejected the reciprocity-based argument that direct effect could only be granted when the other party’s courts acted likewise. It stressed that, while international law obliged the parties to an agreement to bona fide performance, the mere fact that one party did not recognise direct effect did not provide sufficient evidence to question such performance. Moreover, the Court found that the special institutional framework of joint committees for consultations and negotiations that the agreement provided for its implementation did not exclude the direct application of provisions which fulfil the technical conditions of direct effect. Finally, against the opinion of the Advocate General who had advocated a similar approach as with GATT, the Court did not consider the safeguard clauses contained in the agreement to be an obstacle to direct effect, either. This was because these clauses allowed the parties only to derogate from certain provisions of the agreement, but not from the tax provision at stake. Beyond this, the Court stressed that the safeguard clauses only applied to special circumstances and after the due consideration within the Joint Committee in the presence of both parties.

Even though it does not involve a direct effect question, the Court’s first EEA opinion is also interesting with respect to the compatibility, with the EC treaty, of a free trade agreement setting up its own judiciary.\textsuperscript{102} Here, the ECJ held that legal decisions taken by an international court established by an international agreement into which the Community has lawfully entered, are also binding for the ECJ itself. However, as a result, the Court denied the compatibility of the EEA court system with the Treaty; above all, on account of the far reaching overlap of competence with the ECJ, which regarded the Court as being incompatible with Article 164 (now 220) EC.

Assessing this jurisprudence, it appears to be fully consistent if the Court, in an overall judgment based on the spirit, the general scheme and the wording of an agreement as a whole, has quite generously awarded direct effect to bi-lateral trading and association agreements. These agreements pursue a policy of economic rapprochement, and granting them direct effect has relatively limited and calculable implications. By contrast, GATT is a multilateral agreement which does not pursue any integrationist goals. Moreover, it is obvious that the direct effect of a world-wide agreement would put higher constraints on the EC’s foreign trade policy in general. Already on this basis, it may be expected that the Court, in again as-

sessing the spirit, general scheme and the wording of this agreement, might prefer a more restrictive approach towards the internal status of GATT.

II. The Relationship of GATT ’47 and European Law

1. The Status of the Community within GATT ’47

Whilst the GATT ’47 was never entered into by the Community, the original six EC Member States were founding parties of this treaty and maintained their membership even subsequent to the creation of the EC. With the gradual transferral of competence in the area of external commercial policy, and, in particular, with the introduction of the common customs tariff on July 1, 1968, the Community has, however, taken over the contractual rights and obligations of its Member States. This “succession in function” (“Funktionsnachfolge”), initially only internal, has also assumed relevance in international law by the tacit acceptance of the other contracting parties. Yet, the external obligation of the individual EC Member States vis-à-vis other GATT parties thereby remains unaffected. Whilst the ECJ has recognised the de facto membership of the Community, it has apparently never characterised GATT’47 as part of the Community legal order, which it usually does with other international treaties. However, deducing from this that the Court did not accept GATT’ 47 as internally binding according to Article 228 (7), now 300 (7) EC seems to be a formalistic overstatement. As regards its hierarchical status, it has been deduced from Article 228 (7) EC, according to which international agreements entered into by the EC are binding on its institutions and on the Member States, that these should be ranked between primary and secondary


105 In this sense, see W. Schroeder and M. Selmayr, “Die EG, das GATT und die Vollzugslehre”, JZ 1998, 344, who also advocated that it was due to this reason that the ECJ denied justiciability to this agreement and thus predicted a different approach as regards the WTO agreements, as these had been formally ratified by the EC – an assessment that turned out to be completely irrelevant for the ECJ’s reasoning in successive caselaw.
law (“mezzanine theory”). However, it should be added that, if direct effect were granted neither to individual plaintiffs nor to EC Member States, such status would not entail any meaningful implications.

2. GATT’s Essential Features and their Assessment in the International Fruit Company Decision

It was in the famous International Fruit Company case in 1971 that the ECJ was first confronted with the issue of the internal status of GATT 47. In this preliminary reference, a Dutch company sought to have a set of Community regulations providing for restrictions on the importation of apples from third States declared invalid. This claim was based on the violation of Article XI GATT, which lays down the general elimination of quantitative restrictions, and resembles Article 12 (now 25) EC. The Court analysed the GATT in a quite succinct way. Confining itself to the first of the two analytical steps expounded above, it referred only to the spirit, the general scheme and the terms of the agreement as a whole, but did not examine whether the invoked provision itself would meet the technical conditions generally required for direct effect in EC law.

a) Overall Assessment

Assessing GATT’s general characteristics, the ECJ noted that, “according to its preamble, the agreement is based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements and that it “is characterised 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.” 106 This assessment boils down to the Court conceiving of GATT essentially as a forum for intergovernmental negotiation, rather than as a fully-fledged legal system. In order to understand these reservations, it is necessary to examine in more detail the GATT provisions on safeguard measures and derogations as well as on consultation and dispute settlement.

b) Safeguards, Measures and other Exceptions

Article XIX GATT constitutes a quite open-textured exception to the fixed tariff concessions and the general ban on import quotas in favour of the domestic economy. It provides
that, where, on account of a GATT obligation or a concession relating to a benefit, certain
imported products cause or threaten serious injury to domestic producers of the same product
or of directly competitive products, a Contracting Party is authorised to unilaterally suspend
the obligation and to withdraw or modify the concession. This could occur either after man-
datory consultation and a failure to agree, or, on a temporary basis only, without consultation
in urgent cases. In turn, other GATT Parties affected by such measures had the right to sus-
pend substantially equivalent concessions as compensation for the losses. The requirements
of Article XIX GATT were handled in a rather flexible way. If a State did not manifestly act
in bad faith, a safeguard measure would generally be consented to by the other Parties.107

As regards derogations from its free trade principles, the GATT contains a wide list of
grounds, *inter alia*, public morality, public health, human, animal and plant life (Article XX
GATT), national security (Article XXI GATT) and even the protection of the balance of
payments (Article XII GATT). In all of these, a State is justified to disregard GATT provi-
sions as long as such action does not amount to an arbitrary or unjustifiable discrimination, or
to a disguised restriction on trade. In addition, in exceptional circumstances and after exten-
sive consultation, a two-thirds majority of the Contracting States may grant a “waiver” from
some of the GATT obligations for a single State for a certain period of time. Such a measure
is, however, subject to annual review by the Contracting Parties.

c) Consultation and Dispute Settlement

Negotiation and consultation as means of dispute resolution have always been guiding
principles of the GATT. This is laid down, *inter alia*, in Article XXIII GATT which requires
each Contracting Party to give adequate opportunity for consultation with other Parties on all
issues capable of impairing the well functioning of the agreement and to grant “sympathetic
consideration” to such consultation. In practice, consultation was carried out in a “two-step
mode”, *i.e.*, firstly by consultation among the individual parties concerned, and secondly by
referral to the Contracting Parties jointly in the GATT institutions.

Article XXIII GATT, the provision to which the ECJ attached paramount importance in
the *International Fruit Company* case, provides for a dispute settlement procedure to be fol-

*JWT* 1996, 67, 75.
lowed where a Party invokes that the attainment of any objective of the GATT is being nullified or impaired or where it is being denied a benefit accruing to it under the GATT as a result of the failure of another Party to carry out its obligations under the Agreement. The practical functioning of the procedure was summarised well by Philip Lee and Brian Kennedy as follows:108

“The Parties were first obliged to attempt to find a solution on a voluntary basis: the complainant could only make representations to which the other party was obliged to accord sympathetic consideration. This “consultation” procedure in some way duplicated Article XXII GATT and, because of this, the Contracting Parties decided in 1960 that it was to be understood that consultation under Article XXII GATT would fulfil the conditions of the first stage of Article XXIII:1 GATT. If no compromise was reached, the matter could be referred to the Contracting parties, which were obliged to investigate it and to issue appropriate recommendations or to give a ruling. While originally the preparation of such decision was exercised by the Contracting Parties and then by working parties, beginning in the 1950s, reports were prepared by independent panels. Following the presentation of written proceedings by the parties and an oral hearing in front of the panel, the panel would issue a reasoned opinion. This report would be sent to all Contracting Parties and discussed after thirty days. The parties could only reach a decision by consensus, including the vote of the “convicted” State. Only in this event, the report and its conclusions would take effect. A surveillance mechanism was in place to ensure that the panel recommendations and rulings were carried out. Contracting Parties could suspend the application of any obligations or concessions under the agreement and, in the event of such suspension, the party concerned was entitled to withdraw from the GATT.”

Evaluating the practice of dispute settlement, it was in the first place the consensus requirement for the adoption of panel reports that conferred a diplomatic character on the whole procedure. Even though it has happened only rarely that a report was actually vetoed (famous examples include the EC’s veto of the first Banana panel report and the US’ veto of the tuna – dolphin report), it is against the background of the availability of the veto right that the entire functioning of the procedure needs to be assessed.

3. Subsequent Jurisprudence

The International Fruit Company jurisprudence was continuously relied upon in numerous subsequent judgments. Even though significant changes were introduced into the GATT

108 Lee and Kennedy, op. cit., 71f.
by the Tokyo Round of negotiations, which included a separate “Understanding on Dispute Settlement” (codifying the existing practice and specifying certain time-limits), the Court never referred to any of these with a view to qualifying its previous assessment.\footnote{See Cases 266/81 SIOI v. Ministero delle Finanze [1983] ECR 731; 267-269/81, Amministrazione delle Finanze dello Stato v. SPI & SAMI [1983] ECR 801.}

However, two important exceptions from the denial of direct effect, which may be characterised as a sort of indirect effect, were recognised in the \textit{Fediol}\footnote{Case 70/87, Fediol v. Commission [1989] ECR 1781.} and \textit{Nakajima}\footnote{Case C-69/89, Nakajima v. Council [1991] ECR I-2069.} cases. In \textit{Fediol}, an action brought under Article 173 (now 230) EC, the EEC Seed Crushers’ and Oil Processors’ Federation had challenged a Commission decision by which its request to initiate a procedure with respect to certain commercial practices of Argentina regarding the export of soya cake pursuant to Council Regulation No 2641/84 had been rejected. This regulation, the so-called “New Commercial Policy Instrument” inspired by the notorious US Article 301 Trade Act provision, gives Community citizens a right to Community intervention against “illicit commercial practice” of third States. In determining when such practice may be found, the Court resorted to the GATT, since the recital to the Regulation contained an explicit reference to it, from which the ECJ deduced the EC legislator’s intention to guarantee its consistency with GATT. In the rest of the judgment, the Court examined the compatibility of the Argentine measures with Articles III, XI, XX and XXIII GATT, but did not find any violation. It is interesting to note first that, making the review of GATT compatibility of a Community act dependent on an explicit reference to GATT in that act, the Court indirectly leaves the EC legislator with the choice for or against such review. Second, this jurisprudence leads to the politically little convincing result that the compliance with GATT by third States and foreign enterprises may be controlled by private parties, although this is not the case with respect to the Community’s own compliance with this treaty.

In \textit{Nakajima}, the Court even went one step further. A European importer of printers from Japan tried to challenge the imposition of an anti-dumping duty on the ground that the EC Anti-Dumping Regulation\footnote{Council Regulation 2423/88, OJ L209/1.} in force at that time was incompatible with the GATT Anti-Dumping Code enacted during the Tokyo Round. When reviewing the regulation, the Court allowed for an incidental control of GATT compatibility, as the recital to the Regulation stated that it “was adopted in accordance with existing international obligations, in particular
those arising from Article VI GATT and from the GATT Anti-Dumping Code.” The ECJ deduced that the EC legislator wanted to implement specific GATT obligations of the Community. As to the substance of the case, the Court did not, however, find any violation of these texts either. In a doctrinal perspective, both the Fediol and the Nakajima judgments are consistent with the theoretical foundations of direct effect. If the parties to an agreement are free to exclude direct effect mutually or even unilaterally, it should also be possible that such effect is internally re-acknowledged by one party under particular circumstances.

The last major instances in which the Court had to deal with the internal status of GATT '47 in the Community legal order were the Banana, Chiquita and the Dairy Agreement judgments. In the Banana judgment, in which the German government had impugned the EC Banana regulation in an annulment action under Article 173 (now 230) EC, the Court held that the regulation’s consistency with GATT was not justiciable. In saying so, the Court once again referred to its assessment of the diplomatic nature of GATT as developed in its International Fruit jurisprudence. It distinguished Fediol and Nakajima by stressing that the review of the compatibility with GATT was only possible “if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly referred to a specific provision of GATT.” Importantly, the Court did not acknowledge any difference regarding whether the EC regulation was challenged by a Community citizen or a Member State in this analysis.

As regards the national constitutional law implication of this jurisprudence, it was even submitted that denial of justiciability to GATT/WTO in proceedings initiated by Member States, and the unequal treatment might constitute a violation of the Rule of Law as a core part of national constitutions. Thus, from the perspective of the German Grundgesetz, the right of a Member State to have Community legal acts reviewed under international law standards by the ECJ may be considered indispensable, too. This is true in particular for obligations that the Community has taken in place of the Member States and for whose compliance the latter continue to be individually liable under international law. Otherwise, the hard core of the principle of the Rule of

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113 Nakajima, op. cit., at para. 30.
115 Bananas, op. cit., para 111.
Law, which manifests itself here in the openness towards international law, would be breached. The judgment of the ECJ would thereby probably exceed the limits to integration contained in the *Grundgesetz* in Articles 23 I 1, 3 and 79 III. Under this premise, a similar judgment might no longer be covered by the general command to apply EC law contained in the national statutes of ratification of the European Treaties, and, according to the principles of the Maastricht judgment of the *BVerfG*, might be found not to have any effect on national territory. Thus, this scenario might ultimately cause another dangerous “constitutional conflict” among the EC and a Member State.

In *Chiquita*, the *Banana* judgment’s “justiciability exception” was also granted to Member States. An Italian banana importer had argued that an Italian consumption tax on Bananas was incompatible *inter alia* with the GATT and the 4th *Lomé* Agreement. Whilst the latter’s invocability was approved, the ECJ refused to control the GATT-consistency of the national measure. The reason the Court alleged for this finding was again the diplomatic nature of GATT first noted in *International Fruit Company*. By contrast, the subsequent *Dairy Agreement* decision is in stark contradiction with this reasoning. Here, the ECJ allowed an action by the Community against the Republic of Germany under Article 169 EC to stop the breach of obligations deriving from the *Diary Agreement* concluded under GATT' 47, without even addressing their direct effect at all. A high Community official justified this approach on the ground that, with regard to the “modalities of compliance with international treaties with respect to third countries”, the European institutions would have to decide alone within the bounds of their competence, without a minority Member State having a right to particular conduct by the EC in the WTO. By contrast, according to Article 228 (7) (now 300 (7)) EC, the Community should be able to ensure the respect of WTO law “internally” by Member States. This approach continued by the ECJ even under the WTO system, will be shown to be exposed to severe criticism.

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III. The Relationship of WTO and European Law

1. Introduction

The World Trade Organisation came into effect on 1.1.95 as the successor to GATT' 47. Alongside the agreement establishing the WTO itself, the WTO system consists of the following three main agreements: GATT' 94 (which incorporates GATT ’47, together with new additions), the General Agreement on the Trade in Services (GATS) as well as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Among the “minor” GATT agreements, the agreements on Sanitary and Phytosanitary Measures (SPS), on Technical Barriers to Trade (TBT), on Trade-Related Investment Measures (TRIMs) and on Anti-Dumping are particularly important. Further common instruments are a Dispute Settlement Mechanism and a Trade Policy Review Body. All these agreements can only be signed jointly by a Member State (the “single undertaking approach”). By contrast, the so-called Pluri-lateral Trade Agreements (“PTAs”) - successors of former GATT codices – can be acceded to separately and become integral parts of the WTO system only for those parties that have ratified them.120

The WTO Treaty was concluded by the Community and all the Member States jointly as a so-called “mixed agreement”. Called upon to demarcate the spheres of competence among them, the ECJ issued a quite differentiated finding in its opinion 1/94.121 On the one hand, it held that the WTO agreements affected exclusive Community competence under common commercial policy powers (Article 113, now 133, EC) with respect to GATT ’94 and the SPS and TBT agreements. On the other hand, it found that the Community and the Member States are jointly competent to conclude and administer GATS and TRIPS as such are not covered by the EC’s exclusive competence under Article 113 (now 133) EC. However, where the Community, acting under Article 94 EC or other powers explicitly or implicitly conferred upon it by the treaties, occupies these fields by new internal legislation, it also acquires exclusive competence (“pre-emption”122) externally. This demarcation reflects the division be-

120 To date, four pluri-lateral trade agreements exist: The Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Arrangement, and the Arrangement Regarding Bovine Meat.


122 On this phenomenon, see A. Furrer, Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nation-
tween exclusive competencies such as the common commercial policy already set forth in the Treaty to which the subsidiarity principle does not apply ("exclusivité par nature"), and exclusive competencies created by the occupation of certain fields by secondary legislation ("exclusivité par exercice").

As a consequence, the EC’s internal competence is subject to change with respect to fields covered in a mixed international agreement. As a result, the delimitation of competencies as drawn in Opinion 1/94 has a purely provisional character, and may not be relied upon in fields in which new EC legislation has been enacted. This may give rise to legal uncertainty and even cases of liability as, the Community and its Member States being full members of the whole WTO agreements package, the internal division of competencies may generally not be invoked as an excuse for unconditional performance according to general international treaty law (Article 26f. Vienna Convention of the Law of Treaties).

The WTO opinion was further criticised on the ground that the distribution of competence might entail huge practical problems of co-ordination among the EC and the Member States - a fact which the ECJ had, however, considered as irrelevant for the delimitation of competence. In particular, so the critique continues, it would now allow Member States to decide separately about the internal status of the areas under their competence. This finding was even expressly confirmed by the ECJ in the recent Dior judgment as regards TRIPS provisions falling within Member State competence. In the WTO opinion, the ECJ had not expressed any position on this, but generally stressed the obligation to work loyally together in the application of the Treaty in order to ensure the essential “requirement of unity in the international representation of the Community”. That notwithstanding, the complex competence position may entail the risk of weakening the EC’s position within WTO, in particular by possibly allowing third States to outplay the EC against its Member States or vice

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123 See K. Lenaerts and P. van Ypersele, “Le Principe de Subsidiarité et son Contexte”, Cahiers du Droit Européen 1994, 3, 28f. However, it is controversial whether subsidiarity actually applies to this second type of exclusive competencies.


versa.\textsuperscript{128} At least for the time being, though, such problems have apparently not become critical.\textsuperscript{129}

With a view to the direct effect question, it will first be examined whether and to what extent the features upon which the ECJ has grounded the diplomatic classification of the GATT’47 in the *International Fruit Company* jurisprudence have been changed. These included, most importantly, the safeguard measures and the consultation and dispute resolution mechanism.

2. Important Features of the new GATT/WTO System

a) Safeguards

The GATT/WTO system contains a new Agreement on Safeguards which precisely demarcates the relevant requirements for safeguards and, generally, lays down a more stringent and rigid procedure. These features were argued to contribute to more effective procedural guarantees as well as increased foreseeability and legal certainty. The most important innovations may be summarised as follows: Whereas, under Article XIX GATT, a previous written notice by a party to the Contracting Parties and its availability for consultation were sufficient to adopt safeguard measures lawfully, Article 3 of the new Agreement renders obligatory, before any measures are taken, an investigation which includes public notice to all interested parties and public hearings in which they can present evidence and their opinions on the justification of an envisaged measure. Thereafter, the competent domestic authorities are under an obligation to draft a report containing their findings on all pertinent questions of fact and law. Moreover, the new Agreement contains a precise and detailed definition of the concept of “serious injury” and stipulates time-limits for all safeguards as well as provisions for the application of safeguards and provisional measures in cases where there is a risk of a serious injury.

\textsuperscript{128} Cf., C. Chatháin, “The EC and the Member States in the Dispute Settlement Understanding of the WTO: United or Divided?”, *ELJ* 5 (1999), 461.

\textsuperscript{129} In practical perspective, it should also be noted that national administrations, subject to budgetary constraints, have massively cut down on sectors in which powers were delegated to supranational bodies. Thus, in spite of its opinion 1/94 allocating shared competence to the EU and its Member States, the latter often no longer possess the personal and logistical resources in order to contribute meaningfully to foreign trade policy, the essentials of which have been delegated to the EU.
A new Committee on Safeguards is established under Article XIII of the Agreement. This body must be notified immediately after the initiation of a process of investigation, the finding of serious injury and the decision to adopt a measure. It also possesses several quasi-judicial powers such as the power to ascertain whether Members have respected the procedure for the adoption of a safeguard measure under the Agreement. On the request of Members who are applying such measures, it has the competence to control whether the envisaged suspensions of obligations by other Members is substantially equivalent. Even though this question is not explicitly settled, the Committee’s findings might be supposed to be binding in later dispute settlement procedures, because otherwise the powers granted to it would not be effective at all. As a consequence therefrom, Committee decisions should, in principle, be subjected to the same procedural rules as the dispute settlement bodies. Finally, the Agreement prevails over the original provision on safeguards contained in Article XIX GATT in cases of conflicts.

As regards derogations from the GATT’s free trade principles and provisions, they have remained unaltered in its 1994 version. It should, however, be noted that no economic constitution can do without such derogations, since free trade cannot, neither practically nor legitimately, be granted priority over competing values in all cases whatsoever. Thus, Community law contains similar derogations from free trade of goods such as Article 30 (ex 36) EC and the Cassis mandatory requirement formula. Yet, the fact that should be decisive for the assessment of derogations is that their application is now subject to legal scrutiny under the new dispute settlement procedure.

b) Consultation and Dispute Resolution

As already stated on several occasions, the most important up-grading of the GATT ’47 institutional framework took place in the field of dispute resolution. In the Marrakesh Agreement concluding the Uruguay Round, a new Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was introduced. This system has been endowed with exclusivity in the sense that any dispute can only be resolved in accordance with the rules and procedure of the Understanding, which excludes bilateral settlements outside the GATT/WTO system (Article 23 (1) DSU). The main general feature of the new system is its quasi-judicial character.

In detail, the dispute settlement procedure starts with a mandatory consultation stage. A request for consultation being made by a State and notified to the DSB, the addressee State shall reply
within 10 days after its receipt, and both parties shall enter into consultations in good faith within a maximum period of 30 days, with a view to reaching a mutually satisfactory solution (Article 4 (3) DSU). After that, the parties may voluntarily resort to alternative dispute resolution devices such as good offices, conciliation and mediation.

If consultations and alternative dispute resolution devices fail to settle a dispute within 60 days after the request for consultation, the complaining party may request the establishment of a panel (Article 4 (7) DSU). The initiation of a panel can only be refused by a consensus decision of the Dispute Settlement Body (Article 6 (1) DSU) whose tasks are performed by the general GATT Council. Panels are composed of well-qualified governmental and/or non-governmental individuals such as senior national officials or international law experts (Article 8 (1) DSU) selected with a view to ensuring the independence of the body. The function of the panels is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements by making an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements (Article 11 DSU).

The procedure is dealt with in detail in Article 12 DSU. Its most important characteristic are rigid and short deadlines following a timetable to be established by the panel normally within one week of its composition (Article 12 (3) DSU). The panel’s report shall, as a general rule, be completed after 6 months of confidential deliberations, whereby a 3 month prolongation can be granted by the DSB upon motivated request (Article 12 (8), (9), 14 DSU). Panels may seek information and technical advice from any relevant source and may consult experts (Article 13). The panel report shall be circulated to the members, who are entitled to raise objections which must be considered by the DSB (Article 16 DSU). The adoption of the report (Article 16 DSU) shall take place within 60 days of circulation unless a party formally notifies its decision to appeal or the DSB decides by consensus not to adopt the report. Appeals are dealt with by a Standing appellate body composed of seven persons, three of whom shall serve on any one case (Article 17 DSU). The establishment of an appeal procedure is meant to compensate for the abolition of the veto power to oppose the adoption of a panel report. The appeal is restricted to issues of law covered in the panel report and legal interpretations developed by the panel (Article 17 (6) DSU). The appeal procedure (regulated in Article 17 (4)-(13) DSU) is also completed by means of a report, which needs to be accepted by the DSB under the same conditions as panel reports; i.e., within 30 days of its circulation to the Members (Article 17 (14) DSU).

With respect to the implementation of DSB rulings and recommendations, the Member concerned shall, at a DSB meeting to be held within 30 days after the adoption of the relevant report, inform the DSB of its intentions as to the modalities of compliance (Article 21 (3) DSU). The maximum time-frame for compliance is of 15-18 months (Article 21 (3)-(4) DSU). Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to
comply, such dispute shall be decided through recourse to the dispute settlement procedure, including, wherever possible, resort to the original panel (Article 21 (6) DSU). In the event of non-compliance within the fixed time-frame, compensation and the suspension of concessions or other obligations are available as temporary measures. However, none of these remedies is preferred to full implementation (Article 22 (1) DSU). Compensation is only possible if the parties agree to it within a reasonable period of time (Article 22 (2) DSU). Otherwise, only the suspension of concessions is available (Article 22 (2)-(9) DSU). The following guiding principles apply in this context: As a general rule, the complaining party should first seek to suspend concessions or other obligations with respect to the same trade sector(s) where a violation of WTO law has been found; if this is not practicable or effective and the circumstances are serious enough, the suspension of concessions may also take place in other sectors (“cross-retaliation”, Article 22 (3) DSU). The level of the suspension of concessions or other obligations shall be equivalent to the level of the damage caused by the violation (Article 22 (4) DSU). Any retaliation measures must be authorised by the DSB, which may again decide by majority to reject the request. Disputes over the modalities of suspension such as the amount of sanctions shall be resolved in a specific arbitration procedure (Article 22 (6) DSU).

In an assessment of the functioning of the new dispute settlement system, one may find a peculiar mixture of legal adjudication and diplomatic negotiation, even though the former may be argued to be dominant.\(^{130}\) The initial step of consultation and possibly conciliation is clearly one of diplomacy, irrespective of whether a panel is established later. Even when a panel is established, bilateral negotiations in which the panel is not involved in any way may be continued outside the panel process. If the parties communicate that they have reached an agreement at some stage, the panel will simply stop its work, and its report will be confined to a short summary of the case and the indication that a settlement has been concluded. However, such compromise must be notified to the DSB so that any remaining violation of WTO will become known, and another party may start a dispute settlement procedure against it. As in any other kind of international arbitration or adjudication, the dispute settlement procedure may also be engaged in by a party for tactical or strategic purposes, in order to promote a favourable compromise in the ongoing negotiation process. This, however, does not contradict its legal character.

Once a panel is actually established, this procedure will be exclusively legal. In their self-understanding, panellists appear to conceive of themselves as judges, with an ethos of neu-

trality and independence. The formulations in Article 11 DSU according to which panels are supposed to “assist the DSB in making recommendations” and should give the parties “adequate opportunity to develop mutually satisfactory solutions” may be viewed as euphemisms to play down the actual strength of the mechanism. In practise, panels have worked out compromise solutions only on rare occasions, in which this was explicitly requested by the parties; otherwise, they have simply adjudicated the cases brought before them in the light of WTO law - and they have done so quite successfully for the time-being, since all reports but three were accepted and implemented by the parties.

Moving now to the interconnection of GATT/WTO and EU law, this can, just as with the interface of EU and national law, be viewed from the perspective of both WTO and EU law.

3. The WTO Perspective on the Relationship with EU Law

The WTO perspective on the relationship with the legal orders of its members contains several fundamental elements: Firstly, as regards substantive law, there is a conflict among the different rationales of universal and regional trade agreements, in particular as regards the scope of the Article XXIV GATT exemption for free trade areas and tariff unions. Second, with respect to the enforcement of DS decisions, there is the question of whether a WTO member owes specific performance to a decision, or whether compensation or accepting retaliation are lawful alternatives; and, most importantly in the present context, the question of the internal status to be granted to WTO law within the Members’ legal orders.

a) Regionalism vs. Universalism:

aa) Background

In substantive law terms, the relationship between the WTO and the EU reflects the structural conflict of regionalism vs. universalism, as the EU latter constitutes a regional trade agreement deviating from the WTO’s global mission. Regional trade agreements may take various forms, their most basic from being free trade areas in which the parties agree to eliminate all customs duties and other “restrictive regulation of commerce” among themselves; a more upgraded form is a customs union, in which the internal liberalisation is complemented by the alignment of customs duties and other commercial policy elements towards

third States, with the effect that the customs union operates as single customs territory for the purpose of international trade; definitions of these two forms are given in Article XXIV:8(a) and 8(b) GATT. A still more advanced regional arrangement, not specifically contemplated in GATT, is the establishment of a completed common market, as in the case of the EU.

All regional arrangements may be perceived in potential conflict to multi-lateral trade liberalisation, as the objective of regional trade integration entails by its very nature a different, necessarily less favourable, treatment of third States, which is in conflict to the multi-lateral MFN principle underlying GATT/WTO. In particular, the formation of strong regional trade alliances may put the WTO system under strain, as they are capable of governing and distributing among themselves world trade in a *divide et impera* manner, and of rendering the actual conditions governing trade among them difficult to control for outsiders. On the other hand, the need for closer integration on a regional basis is undeniable, and the WTO barely possesses the legitimacy to prohibit, in the most extreme case, the EC Treaty on the ground of its being inconsistent with its own rules.

In a sort of compromise approach due to political and economic constraints, Article XXIV GATT allows such regional trade arrangements under certain conditions on the theoretical assumption that the benefits of fuller trade liberalisation between some countries will outweigh the discriminatory effects of these preferential agreements on non-parties. To ensure the attainment of this objective, and also to impose limits on regional agreements capable of circumventing multi-lateralism, two conditions are required. First, the agreements should cover “substantially all” trade between the parties; second, the creation of a customs union should not raise trade barriers with third States. These conditions are summarised in the Preamble to the “Understanding on the Interpretation of Article XXIV GATT ‘94”:

“contribution [to the expansion of world trade] is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any substantial sector is excluded; (…) the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Member with such territories (…) .”

In order to alleviate the adverse effects of the establishment of regional arrangements for third parties, Article XXIV:6 GATT foresees “compensatory adjustment”, where a WTO member acceding to a regional trade agreement is required to modify its scheduled commitments to third States. In the event that a regional arrangement intended to lead to a free trade area or customs union does not comply with the requirements of Article XXIV GATT, the
possibility of granting a waiver, which requires a two-thirds majority of the contracting parties (Article XXIV:10 GATT), is provided for. In practice, one of the major weaknesses of the GATT regime for regional trade agreements has proved to be the possibility of interim agreements which are alleged to lead to a free trade area or customs union within “a reasonable length of time” (Article XXIV: 5(c) GATT). Under GATT ’47, the enforcement of Article XXIV GATT appears to have been very weak, with the effect that the establishment of regional trade agreements was de facto mainly left to the political discretion of parties wishing to do so. However, following the creation of the WTO, the legal enforcement of Article XXIV GATT has been considerably tightened. This became visible in the Turkey - Textile Imports from India case.

bb) Turkey - textile imports from India

In Turkey - textile imports from India, the WTO dispute settlement had to decide on the consistency with Article XXIV GATT of a customs union agreement concluded between Turkey and the EU. Under this agreement, Turkey is required to align its commercial policy to that of the EU, and this included not only the alignment to the EC’s common external tariff, but also adoption of trading rules implementing the EC’s import policy. Specifically, Article 12 of the agreement provides that “in conformity with the requirement of Article XXIV GATT, Turkey will apply, as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector.” Implementing this provision, Turkey introduced new quotas on its imports of textiles from India.

Following India’s challenge, the WTO panel and appellate body found that these quantitative restrictions were contrary to Article XI and XIII of GATT ’94 and Article 2.4 of the WTO Agreement on Textiles and Clothing, and were not justified by the customs union exemption laid down in Article XXIV GATT. First, as regards the political prerogative of the WTO Council and the regional trade agreements committee to decide on the interpretation of GATT provisions, the panel, confirmed by the appellate body, held that while the overall compatibility of a customs union agreement with Article XXIV GATT involved a very complex economic, legal and political assessment, it declared itself competent to give a ruling on the WTO compatibility of a specific measure adopted in the ambit of a customs union.

As to the distribution of the burden of proof, the appellate body held that the Party claiming the benefit of the regional trade agreement exemption must demonstrate that the measure at issue was introduced upon the formation of a customs union that fully complies with the requirements of Article XXIV:8(a) and 5(a) GATT. Interpreting Article XXIV:5(a) GATT, the appellate body put great emphasis on the formula that “the provisions of this agreement shall not prevent (...) the formation of a customs union or of a free trade area (...)”. The appellate body considered this formula as a restrictive exemption which requires that the application of a specific WTO rule – here the rules on quantitative restrictions – would actually be rendered impossible the formation of a customs union. This means that a specific provision in the customs union agreement must be necessary for its formation. Importantly, in order to decide what is necessary for the formation of a customs union, the appellate body resorts not to the content of the specific customs union set up between Turkey and the EU, but to the GATT concept of a customs union. This narrow interpretation is premised on the rationale of Article XXIV:4 GATT, according to which a customs union should not raise barriers to trade with third countries.

In conclusion, the appellate body found that the precise alignment of Turkey to the EU’s quota system for textile imports was not necessary for a workable customs union. Though Turkey had sustained that the adoption of quantitative restrictions was necessary for the full operation of the customs union in order to prevent trade diversion, the appellate body disagreed on the ground that less restrictive means would have been available. Certificates of origin, which would have allowed the Community customs authorities to distinguish between Turkish-origin textile imports and those from other third countries such as India, might have been sufficient. This rationale would be all the more justifiable as the EC would have to remove its quantitative restrictions at the time fixed by the WTO agreements anyway. Importantly, this interpretation does not allow the creation of a more advanced form of a customs union which foresees the abolition of internal borders and therefore requires a totally common commercial policy based on uniform trade rules. It is clear that this objection could theoretically also be made to the creation of, or the accession of a country to, an integrated common market, as this is not specifically contemplated in Article XXIV GATT. In practice, such an objection seems to be politically impossible. The appellate body shows itself to be aware of such dangers when it stresses that “we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and XIII GATT will ever be justified by Article XIV GATT.”
b) Procedural and Status Issues

aa) Enforcement of DS Decision: The Compliance Obligation

The issue of whether WTO law includes the obligation of specific performance towards DS decisions is highly controversial. At the same time, it is also highly relevant in the EU context with respect to Article 300 (7) (ex-228 (7) EC), according to which EC institutions and Member States are bound by international agreements entered into by the EC.

On the one hand, some academic commentators and representatives of the Commission have argued that the DSU itself does not contain any absolute compliance obligation in the perspective of public international law. Compensation or the acceptance of retaliation would instead be considered in the DSU as separate and fully legitimate options, alternative to compliance. This view is based on the observation that the DSU seems to favour solutions which are “mutually acceptable” to the parties, even as a preference to the withdrawal of measures inconsistent with WTO law. Thus, Article 22 (8) DSU lays down that the suspension of concessions shall cease not only if the incompatible measure is withdrawn or the Member concerned has provided a solution to the nullification and impairment of benefits, but also if a “mutually satisfactory solution is reached”. Similarly, Article 3 (7) DSU provides that what is “clearly to be preferred” is a mutually acceptable solution, but one that is “consistent with the covered agreements”. What is more, a presumption in favour of the legality of accepting retaliation might be deduced from the fact that the suspension of concession is precisely regulated by the DSU. Thus, this must be “equivalent” to the level of the nullification and impairment caused by the measure found to be inconsistent with WTO law. Therefore, it must not be characterised as a punitive measure, but has, as its main objective, to restore the imbalance in concessions caused by the measure found to be incompatible.

However, whilst the non-punitive character of the suspension of concessions may well be acknowledged, the core of these arguments may be powerfully objected to on the ground that full bona fides performance is the ordinary obligation of any party to any international treaty, and that the DSU does in no way deviate from this general principle. This is confirmed by the general principle contained in Article XVI:4 WTO agreement, according to which each

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134 Cf., Banana Arbitration under 22 (6) DSU, WT/DS27/ARB, para. 6.3.
135 See J. Jackson, “The WTO Dispute Settlement Understanding – Misunderstanding on the nature of a Legal Obligation”, in Cameron and Campbell (eds.), Dispute Resolution in the WTO, pp. 69, 73.
Member “is to ensure the conformity of its laws, regulations and administrative procedures” with its obligations under the WTO agreements. More specifically, the DSU explicitly stresses in Article 22 (1) that unconditional compliance is the preferred option:

“(…) neither compensation nor the suspension of concessions or other obligations is preferred to the full implementation of a recommendation to bring a measure into conformity with the covered agreements (…)”.

As regards the alleged alternative of compensation, this may lawfully be granted only on a temporary basis (Article 22 (1) DSU). The admitted fact that the DSU does not possess any effective means to prevent temporary compensations from becoming definitive in the event that no party objects (proceedings \textit{ex officio} are excluded), may well be considered as a weakness in the system, but does not render “definitive compensation” lawful. For all these reasons, compensation and the acceptance of retaliation should not be conceived of as regular and lawful alternatives to compliance. Instead, they represent the only legal remedies available in international law for the breach of an agreement. On a different line of argumentation, an obligation of compliance and, with this the direct effect of any agreement in international law, could always be excluded by referring to the alleged alternatives of compensation or accepting retaliation.\textsuperscript{136}

A second and different question, again relevant under Article 300 (7) EC, is whether the obligation of compliance only refers to WTO decisions, which would entail national and European courts never being under obligation to scrutinise the WTO-consistency of EC acts by themselves. However, this reasoning would be too wholesale, too. The duty of compliance with WTO law extends to the whole body of the WTO agreements, not only to DS decisions. On this basis, if DS proceedings are actually pending, the ECJ might well wait for their outcome and not take any own decision before. However, if this is not the case, the duty of compliance exists all the same, and it may well need to be clarified under which conditions it might have to be controlled by the Members’ internal courts such as the ECJ.

\textit{bb} \textit{No WTO Law Provisos on its Internal Status in its Members’ Legal Orders}

Even though WTO law thus contains the absolute obligation of compliance, it is silent on the question of how a Member State is supposed to comply and the domestic remedies a State

should make available. The history of the negotiations of the Marrakesh dispute settlement agreement show that this question has been very controversial.\(^\text{137}\) Firstly, a Swiss proposal designed to ensure that the WTO agreements would be capable of having direct effect or some equivalent status in the national law of all participants was rejected by most big trading blocks and subsequently dropped.\(^\text{138}\) Furthermore, even an agreement on a provision entitling the DSB to recommend to a Member how it should comply in bringing its measures into conformity with WTO rules was dismissed. According to the provision finally adopted to this effect, Article 19 (1) DSU, a panel or the appellate body may only “suggest” ways to do so. A \textit{a fortiori}, a GATT/WTO obligation that would require the ECJ to grant direct effect to WTO law may be excluded. Thus, it may be concluded that citizens were not considered by the trade negotiators in the GATT as candidates to enforce the validity of its rules.

This assessment was unequivocally confirmed in the panel on \textit{Section 301 of US Trade Act 1974}. The panel noted that the fact that WTO law indirectly protects the economic opportunities of individual traders, and that many of the benefits from the treaties flow from such protection, cannot be bootstrapped into the notion that WTO obligations are owed directly to traders. Thus, the panel literally took up the ECJ’s famous language in \textit{van Gend} and \textit{Costa}: “Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals”.\(^\text{139}\)

\textbf{4. The European Perspective on the Relationship with WTO Law}

\textit{a) Regionalism vs. Universalism}

As may be expected, the EU pursues a much milder stance on the regionalism vs. universalism conflict. The different assessment by both sides became visible in the case \textit{Italy vs.}
which was decided by the ECJ almost parallel to the WTO DS bodies’ decision in Turkey - textile imports from India. Italy vs. Council arose out of the enlargement of the EC to Austria, Finland and Sweden. In the context of their accession to the EU, these countries had to implement the complete legal acquis of the EC, an obligation imposed of course on any new member. Thus, they also had to join the EU customs union, align their external tariffs to the EU’s common external tariff, and become a part of the EU’s extensive preferential trade regime. Under GATT law, this required, as already outlined, negotiations with affected third State trading partners, with a view to achieving “mutually satisfactory compensatory adjustment” (Article XXIV:6 GATT) and paragraph 5 of the Understanding on the Interpretation of Article XXIV of GATT ‘94. In the framework of such negotiations, the EU granted Thailand and Australia, both faced with a considerable increase in the customs duties applied to specific exports, new tariff quotas which allowed for specified quantities of rice to be imported at a zero tariff. These agreements were implemented by means of a Council Regulation.\(^{141}\)

Italy, fearing disadvantages for its domestic rice production, challenged the legality of this Regulation inter alia as incompatible with GATT. It argued that “there can be no mutually satisfactory solution” where, as here, non-member countries to the free trade area obtain specific advantages from the enlargement of the Community in the absence of adequate compensatory adjustment.\(^{142}\) According to Italy’s argument, mutuality presupposes the acceptability of a regional trade agreement for each GATT Member State, including Italy, too. The ECJ was prepared to review the consistency of the Regulation with WTO law under the Nakajima doctrine which will be presented below, as the agreements and the implementing Regulation were explicitly designed to ensure compliance with Article XXIV GATT ’94. As regards the substance of the case, the Court, however, held that the GATT concept of “mutually satisfactory compensatory adjustment” does not constitute an “objective criterion”


\(^{142}\) Para. 11.
against which the legality of a specific agreement can be measured. For the compliance with the GATT provision, it is only necessary to show that an agreement has been reached:

“if the parties themselves have reached agreement on the question of mutually satisfactory compensatory adjustment, the requirement referred to in Article XXIV:6 GATT must be regarded as fulfilled and cannot therefore serve as a basis for examining the legality of the Regulation…”

It should be noted in passing that this reasoning is very much in line with earlier jurisprudence, stating the margin of discretion granted to the Community institutions even more explicitly.

“The Court has consistently held that the Community institutions enjoy a margin of discretion in their choice of the means needed to achieve the common commercial policy… In a situation of that kind, which involves an appraisal of complex economic situations, judicial review must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of power…”143

In an overall assessment, the findings of the ECJ in *Italy v. Council* are based on a view of mutuality defined in terms of the EU as a whole as opposed to its trading partners. Despite the independent membership of EU countries in GATT/WTO, the unity of external commercial policy is considered as requiring that the internal political debates as to the balance of advantage between Member States will not be re-opened in the context of GATT rules. Moreover, the EC executive is granted wide discretion as to the priorities and enforcement of external commercial policy. This discretion is extended not only to external agreement, but, necessarily, also to internal institutional acts.

As has been plausibly noted, this political interpretation of Article XXIV:6 GATT appears to be well justifiable in the light of GATT/WTO law. First, the political characterisation of negotiations for compensatory adjustment is shown by paragraph 5 of the Understanding on the Interpretation of Article XXIV GATT: should an agreement fail within a reasonable period of time, the customs union may go ahead anyway, the affected third countries being “free to withdraw substantially equivalent concessions in accordance with Article XXVIII GATT”. Therefore, it appears that, whilst failure to enter into negotiations does lead to a violation of Article XXIV GATT, failure to reach agreement does not. More generally, the application of Article XXIV GATT as a whole might even be considered to be essentially a po-

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politcal issue. This view finds support in Article IX:2 WTO-Agreement, according to which the Ministerial Conference and the General Council possess the “exclusive authority” to adopt interpretations of all the WTO agreements, with the Committee on regional trade agreements being a subordinate body reporting to these institutions.

However, as shown, the WTO bodies strongly objected to the political characterisation of the Article XXIV GATT exception to multi-lateralism. Their jurisprudence is in stark contrast to the attitude of self restraint and deference to the European political institutions displayed by the ECJ. In a more general perspective, the different positions of the ECJ and the WTO dispute settlement bodies as regards the political or legal nature of regional trade agreement-based exceptions clearly shows the wide margin of discretion existing in the interpretation of WTO rules. It is obvious that this might lead to serious clashes between the WTO and powerful regional trade regimes such as the EU and others (e.g., NAFTA or MERCOSUR). Indeed, the margin of discretion granted by the ECJ to the Community executive is a fundamental element in the internal status that EC law grants to the WTO system.

b) The Internal Status of WTO Law in the European Legal Order

As regards the crucial question for the interconnection of WTO and EU, namely the former’s legal status within the latter, this presentation will take the order of chronological events. Firstly, the Council decision on the Uruguay Round of Negotiations which tried to exclude direct effect, will be outlined (aa). After this, the ECJ’s subsequent jurisprudence on the subject will be analysed. This comprises the Hermès decision, in which the Court tried to distinguish direct effect and consistent interpretation (bb); and, more recently, the crucial new landmark decision in Portugal vs. Council which denies again an effective interconnection between both legal orders (cc).

aa) The Denial of Direct Effect in the Uruguay Round Council Decision

With a view to the considerably increased juridification of the dispute settlement mechanism many commentators had expected a more positive attitude from European institutions towards the direct effect question. However, the Council had already stated its opposing

view in the decision concerning the conclusion of the results of the Uruguay Round of Multi-
lateral Trade Negotiations.\textsuperscript{145} The 11th recital of the preamble reads as follows:

“(...) by its nature, the Agreement establishing the World Trade Organisation, including the An-
nexes thereto, is not susceptible to being directly invoked in Community or Member State courts
(...)”

In an earlier memorandum, this conclusion had been justified by the Commission as fol-
lows:

“it is important for the WTO Agreement and its annexes not to have direct effect, that is one
whereby private individuals who are natural or legal persons could invoke it under national law.
It is already known that the United States and many others of our trading partners will explicitly
rule out any such direct effect. Without an express stipulation of such exclusion in the Commu-
nity instrument of adoption, a major imbalance would arise in the actual management of the ob-
ligations of the Community and other countries.”\textsuperscript{146}

The legal significance of the Council decision is highly controversial. Contrary to earlier
opinions by Advocate Generals Cosmas and Elmer,\textsuperscript{147} which show a considerable degree of
defereence, Advocate General Saggio did not attach much weight to it for various reasons.
Firstly, according to general public international law on treaty interpretation as codified in
Articles 31 – 33 Vienna Convention on the Law of Treaties (VCLT), these unilateral declara-
tions are not capable of influencing the interpretation of GATT/WTO law, which instead
needs to be informed by the “ordinary meaning to be given to its terms in their context and in
light of its object and purpose” (Article 31 VCLT).\textsuperscript{148} Secondly, the similar declaration of the
US legislator is argued to be equally irrelevant for the same reasons. According to the general
international law rule “\textit{inademplenti non est adimplendum}” codified in Article 60 VCLT,

\textsuperscript{145} OJ L 336/1, of 23 December 1994.
\textsuperscript{146} Explanatory Memorandum to COM (94), of 15 April 1994, 143 final, at 5a.
\textsuperscript{148} Advocate General Saggio in Case C-149/96, \textit{Portugal v. Council}, nyr, para. 20.
only the substantial violation of a Treaty by one party may give rise to a denial of its legal effect. Thirdly, Advocate General Saggio stressed, by referring to the opinion of Advocate General Tesauro in *Hermès*, that pursuant to Article 228, new 300 (7) EC, international agreements are binding for EC institutions; therefore, the Council could not, by a secondary law measure, limit the jurisdiction of the ECJ or national Courts on the matter.

However, it should be repeated that Article 300 (7) should not be interpreted as precluding the EC legislator from excluding direct effect altogether. As noted, this may be done by the parties by joint agreement or unilaterally by one party, with the latter option possibly entailing a violation of international law. Such a stipulation would need to be respected by the ECJ, too. However, in the present case, Advocate General Saggio’s view may be upheld for other reasons: in its decision, the Council does not seem to stipulate a constitutive normative command, but merely its own declaratory assessment of the nature of WTO law. Whereas, as already outlined, the nature of an agreement may well imply a tacit mutual exclusion of direct effect, the Council’s unilateral assessment of it is not an authoritative restatement of the parties’ intentions and may, therefore, be rebutted. As a consequence, the last word on whether the nature of the WTO system is actually such as to exclude direct effect should, indeed, lie with the Courts.

**bb) Direct Effect Confused with Consistent Interpretation: The Hermès Case**

The *Hermès* case\(^{149}\) was a reference procedure dealing with a procedural question regarding the granting of interim measures under the TRIPS agreement in a dispute among two firms.

(1) Facts

By virtue of international registrations designating the Benelux, *Hermès International* is proprietor of the name “*Hermès*” and the name and device “*Hermès*” as trade marks. It applies these trade marks *inter alia* to neckties which are marketed in the Netherlands through a selective distribution system. After finding evidence that its Dutch competitor *FHT* was marketing counterfeit copies of its ties, *Hermès* applied to the President of the *Arrondissementsrechtsbank Amsterdam* (competent for such orders under Dutch procedural law) for an in-

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interim order requiring FHT to cease infringement of its copyright and trade mark. This order was granted. In the same proceedings, Hermès also requested the President of the Arrondissementsrechtsbank to fix a period of three months from the date of service of the interim decision as the period within which FHT could, under Article 50 (6) TRIPS, request revocation of these provisional measures and a period of 14 days as the period within which Hermès could initiate proceedings on the merits of the case, this period to run from the date on which FHT requested revocation.

Article 50 (6) TRIPS reads: “(...) Provisional measures (...) shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member’s law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is longer.”

The Dutch judge considered that the latter request could not be granted, because Article 50 (6) TRIPS does not place any time-limit on the defendant’s right to request revocation of provisional measures, but instead allows the defendant to request revocation of a provisional measure at any time prior to the delivery of judgment in the main proceedings. This finding is very convincing, because, otherwise, provisional measures could deploy some res iudicata effect after the expiry of the said period, which would seriously worsen the defendant’s legal position by depriving him of the possibility of initiating main proceedings altogether.

This notwithstanding, the judge thought it necessary to refer the question of whether the interim order at issue actually constituted a “provisional measure” within the meaning of Article 50 (6) TRIPS to the ECJ; as this would have the effect that a period would need to be fixed within which the plaintiff would have to start main proceedings if the defendant were to ask for the revocation of the provisional measure. Setting such a deadline would clearly decrease the value of a provisional order, as the defendant could constrain the plaintiff to initiate main proceedings, whereas, without such a deadline, the defendant would need to initiate main proceedings himself – which is the legal situation in Dutch150 and German procedural law. The reasoning behind the TRIPS provision is that provisional measures are, apparently, trusted less, and the solution of cases through main proceedings, which ensure better guarantees of a fair procedure, is preferred. However, as the Dutch judge pointed out, this rationale

does not square well with the Dutch system, in which a high standard for provisional orders is set forth: the defendant is summoned to appear, the parties have the right to be heard, and the judge hearing the application makes an assessment of the substance of the case, which he also sets out in a reasoned written decision, against which an appeal may be lodged. Finally, although the parties, then, have the right to initiate main proceedings, in matters falling within the scope of the TRIPS Agreement, they normally abide by the interim decision.

(2) Decision

First, the Court had to decide on its own jurisdiction as regards the interpretation of Article 50 TRIPS. In this context, the Dutch government had invoked the ECJ’s WTO opinion 1/94,\(^{151}\) according to which “measures to secure the effective protection of intellectual property rights”, such as Article 50 TRIPS, essentially fall within the competence of the Member States only, on the ground that the Community had not yet exercised its internal competence with respect to the questions raised here. The Court replied to this objection that Regulation No. 40/94 on the Community trade mark had already been in force at the time of the signature, by the Community and its Member States, of the Final Act of the WTO agreement. Under the heading “provisional and protective measures”, Article 99 (1) of this Regulation states:

> “Application may be made to the courts of a Member State, including Community trade mark courts, for such provisional, including protective, measures in respect of a Community trade mark or Community trade mark application as may be available under the law of that State in respect of a national trade mark, even if, under this Regulation, a Community trade mark court of another Member State has jurisdiction as to the substance of the matter.”

In this regard, the Court stated at paragraph 28 of the judgment:

> “It is true that the measures envisaged by Article 99 and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade-mark. However, since the Community is a party to the TRIPS Agreement and since this agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protections of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPS Agreement.”

The fact that the dispute in the main proceedings concerned trade-marks whose international registration was designated as Benelux was found immaterial on two grounds. First, the ECJ pointed to its consolidated jurisprudence according to which it is solely for the national court hearing the dispute to assess the need for a preliminary ruling so as to enable it to give its judgment. Second, where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, this provision should be interpreted uniformly, whatever the circumstances in which it is to apply.

Second, the Court answered the referred substantive law question on the characterisation of the Dutch measures in the framework of Article 50 TRIPS. One might have expected that the ECJ would have needed to decide the direct effect issue before being able to give an answer on the merits of the case. Along these lines, Advocate General Tesauro had, indeed, recommended, in his final opinion, the granting of direct effect if reciprocity would be ensured among the WTO Members involved in a case. Whereas this solution may sound attractive at first glance, it would not be always practicable in a multi-lateral regime, under which not only two, but several parties – which may treat the direct effect issue differently – are regularly involved in a dispute. In addition, the result would be an unequal treatment of domestic importers whose legal positions under GATT/WTO would be made dependent on the behaviour of foreign States.

It was, perhaps, against the background of these difficulties that the court tried to circumvent the direct effect question altogether. With respect to the question of direct effect of Article 50 TRIPS, it stated that it would not be required to give a ruling on this question, but only to answer the question of interpretation submitted to it by the national court “so as to enable that court to interpret Dutch procedural rules in the light of this article.” In the following passage, the Court expounded that, notwithstanding its high procedural requirements, an _interim_ order under Dutch law should be considered as a “provisional measure” in the sense of Article 50 (6) TRIPS, since it was also covered by the basic doctrinal distinction between _interim_ measures and main proceedings upon which the TRIPS provision was based as well.

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One may first note that the ECJ did not question the applicability of TRIPS to internal cases in the EU at all. This is in contrast to previous jurisprudence on the GATT ’47 in which the ECJ treated the EC and its Member States as one GATT Member.\textsuperscript{154} Yet, one may justify this jurisprudence on the ground that, as regards internal competence, unlike the GATT, the TRIPS issues that are relevant here fall within national competence, a case in which the “one Member fiction” must logically not apply.

Secondly, the ECJ’s extremely wide approach to its interpretative jurisdiction deserves attention. Even though, in \textit{Hermes}, EC trademark law was not relevant at all, the ECJ deemed it sufficient to trigger its interpretative competence that the norm to be interpreted may, in other cases, be potentially relevant for the application of Community law. It is rather obvious that, on this reasoning, the Court will be able to claim jurisdiction over many, if not most, GATS and TRIPS issues. Consequently, this reasoning is likely to attenuate the procedural consequences of the division of competencies set out by the ECJ in its WTO opinion 1/94.

This assessment has now been further confirmed by the recent \textit{Dior} case,\textsuperscript{155} also dealing with a Dutch reference on the interpretation of Article 50 TRIPS. There, the ECJ explicitly extended its interpretative jurisdiction beyond trade-mark protection law: “Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope, and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation. Only the Court of Justice acting in co-operation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.”\textsuperscript{156}

Thirdly and most importantly, as regards the direct effect question, even though the ECJ claimed not to deal with it, it may be argued that it did indirectly decide on it all the same. This is because it seems impossible to reach the result found by the ECJ by simple consistent interpretation of Dutch procedural law within its wording – this criterion being the traditional limitation of interpretation and the only relevant difference between consistent interpretation

\begin{footnotes}
\footnote{154}{Case 266/81, \textit{SIOT} [1983] ECR 731, 776, para. 12.}
\footnote{155}{Case C-300/98 of 14 Dec. 2000, \textit{Dior}, nyr, para. 32ff.}
\end{footnotes}
and direct effect. As stated, unlike with Article 50 (6) TRIPS, under Dutch law the defendant may not simply request revocation of a provisional order, with the effect that a deadline will be fixed within which the plaintiff must start main proceedings. Moreover, it would seem to be virtually impossible to read such a non-existing deadline into a national provision by means of ordinary interpretation. Therefore, the conclusion very much seems to be that the ECJ must have implicitly approved the direct application of Article 50 TRIPS by the Dutch judge.

As regards the Dutch side, this conclusion is not extraordinary and may even have been considered as implicit by the Dutch judge. This may be explained by the fact that the Netherlands belong to the monistic countries, in which an international agreement duly entered into under both international and national law automatically comes to form, without any further steps being necessary, an integral part of the domestic legal order. However, the Dutch judge could have known that the ECJ’s approach to the direct effect of GATT used to be much more restrictive; and since the Dutch court considered the interpretation of the TRIPS Agreement as a question of European law, it should have included a reference question regarding the internal status of TRIPS, as well. The ECJ, in turn, benefited from this omission by evading the direct effect question on the simple ground that it had not been asked.

In the more recent Dior case, the ECJ explicitly left the decision on the direct effect issue to Member State law as far as the fields left to national legislative competence of the TRIPS agreement following the reasoning of opinion 1/94 are concerned: “In a field to which TRIPS applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in Hermès (…) that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs. On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.”

In a field reserved to national competence, this jurisprudence may lead

to the somewhat weird result that, whereas the ECJ may rule on the interpretation of a WTO law provision, a national Court might then deny the ruling any internal effect by refusing to grant the provision direct effect. This contradiction shows again the difficulties linked to the division of internal competence among the EU and its Member States established in opinion 1/94.

cco) The New Denial of Direct Effect to WTO Law by the ECJ: Portugal vs. Council

aa) Facts

After the end of the negotiations of the Uruguay Round on 15 December 1993, leading to the establishment of the World Trade Organisation (WTO) and the adoption of a set of WTO agreements amongst which the Agreement on Textiles and Clothing and another on Import Licensing Procedures on 15 April 1994, the EC had continued negotiations on further market access arrangements for textile products with India and Pakistan. On 15 October and 31 December 1994, the Commission, and India and Pakistan respectively, had signed two “Memoranda of Understanding”. Portugal, fearing dangers for its own textile industry, objected to these memoranda. As a reaction, the Council adopted Regulation No 852/95 on the granting of financial assistance to Portugal for a specific programme for the modernisation of its textile and clothing industry as a means of compensation.\(^{158}\) After this, the understandings with India and Pakistan were signed on 8 and 27 March 1996 respectively, and approved by Council decisions taken by qualified majority against the votes of Spain, Greece and Portugal on 26 February 1996.\(^{159}\)

In both understandings, the parties agreed on concessions for market access as regards certain textile products going beyond the WTO Agreement on Textiles and Clothing. With respect to India, the EC undertook, in exchange for that country’s commitment to bind the tariffs applicable to certain textile and clothing items, to remove all restrictions currently applicable to certain handloom and cottage industry products and to give favourable consideration to exceptional flexibilities for other textiles products up to the amounts of a fixed quota; the latter obligation was also stipulated in the understanding with Pakistan in exchange for its commitment to eliminate quantitative restrictions for a series of textile products.

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\(^{158}\) OJ 1995 L 86, 10.

\(^{159}\) OJ 1996 L 153, p. 47.
By application of 3 May 1996, Portugal brought an action under Article 173 (1) EC against the Council Decision 96/386/EC of 26 February 1996. Alongside several objections based on EC law, Portugal contended that the understandings with India and Pakistan violated certain rules and principles of WTO law, in particular those of GATT ‘94, the Agreement on Textiles and Clothing, and the Agreement of Import Licensing Procedures. Portugal invoked several arguments to support this view: first, alluding to the Fediol exception, WTO law should be justiciable here, because the Community measure, constituting a derogation from GATT ‘94 and the Agreement on Textiles and Clothing, had referred expressly to specific provisions of WTO law. Furthermore, the Portuguese government argued that the WTO agreements were substantially different from GATT ’47, in particular as regards the new dispute settlement procedure. Finally, it was maintained that the case did not raise the problem of direct effect in the first place; WTO law was only relied upon here by an EC Member State for the purpose of reviewing the legality of a Council measure.

bb) Decision

In his opinion, Advocate General Saggio strongly attacked the jurisprudence of the Court and fervently endorsed the view that Community acts should be measured against WTO law standards which should act as “paramètre de légalité” in both Article 230 (ex 173) and 234 (ex 177) EC cases. To justify this result, the Advocate General relied in particular on the primary law command in Article 300 (7) EC, according to which treaties entered into by the EC are binding on its institutions and on Member States. In the face of the establishment of the WTO as a stable institutional infrastructure and the DSB as a mandatory enforcement mechanism the legal characterisation of WTO could no longer reasonably be denied. The contrary Council decision in occasion of the ratification of the Uruguay Round agreements would not be able to change this result for the reasons already mentioned above. The missing reciprocity in the granting of direct effect would not change this legal position, as the ECJ had already stressed in Kupferberg that this was not an absolute precondition. At least in an annulment procedure initiated by a Member State as a privileged subject of EC law, the “invocability” of WTO law is presented by the Advocate General as an absolutely cogent result. As a consequence, the Advocate General examined the consistency of the agreements with India and Pakistan with Article 2 GATT and Articles 4-7 WTO Agreement on Textiles and Clothing, but found no violation. As these agreements would only accelerate trade liberalisa-

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tion in the fields covered, they would be perfectly compatible with the overall objective of GATT/WTO law. According to GATT law, the measures contained in the agreements would be allowed as long as they do not affect the rights of third parties. As Portugal is a EU Member, it could not, however, be characterised as a third party in this sense.\(^\text{161}\)

However, the Court gave a completely different decision. First, it pointed to its *Kupferberg* jurisprudence, according to which it is up to the parties to an international agreement to determine the internal effect of its provisions; only if such determination is missing, does the question fall to the ECJ. Furthermore, the Court remembered that, even though, in general international law, every party is bound to perform an international agreement *bona fide*, it is up to the contracting party to determine the modalities of the performance; this means that direct effect is in no means commanded by general international law.

In the assessment of GATT/WTO along these lines, the admittedly important changes this system underwent with respect to GATT ‘47, in particular the strengthening of the safeguards regime and the dispute settlement mechanism, do not alter, according to the ECJ, its essentially negotiation-based diplomatic nature. It is true that the dispute settlement mechanism pursues the main purpose of securing the withdrawal of national measures found to be incompatible with WTO rules. However, it also gives the 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 incriminating measures be impracticable (Article 22 (1) and (2) DSU). Consequently, to require judicial organs in the EC to refrain from applying national or EC rules inconsistent with WTO law would deprive the EC’s legislative and executive organs of this possibility. Thus, “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.”\(^\text{162}\)

In the following part, the ECJ argues that such effect is not determined by its own jurisprudence on the internal status of international agreements, either. First, the WTO, being still founded on the principle of negotiations with a view to reciprocal and mutually advantageous arrangements, needs to be distinguished from agreements such as free trade agreements concluded between the Community and non-Member countries which introduce a certain asymmetry of obligations, or pursue special integrationist objectives such as association agree-

\(^{161}\) Opinion, para. 29

\(^{162}\) Para. 41.
ments. This seems to mean that, whilst in the case of free trade or association agreements, just as with EC law itself, direct effect may be instrumentalised for integrationist goals, in the case of the WTO, the reciprocity in its effective internal application enjoys much more importance - particularly since it is known that the most important commercial partners of the EC, i.e., the US and Japan, do not accept direct effect, either. Even though, according to the *Kupferberg* judgment, the fact that some parties do not recognise direct effect is not in itself sufficient to constitute a relevant lack of reciprocity in the implementation of an agreement, this is argued to be different in the case of WTO rules where lack of uniform application would constitute a greater danger: “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 executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.” Thus, reciprocity rationales may be viewed as decisive for the Court’s view. Finally, the Court notes that this interpretation is in harmony with the above-mentioned final recital in the preamble to Decision 94/800, by which the WTO Treaties were ratified by the EC and according to which the WTO agreements were not susceptible to being directly invoked in Community or Member State courts by their nature. Thus, the Court left open whether it would be bound by this Decision in the case of conflicts.

**cc) Comment**

In a doctrinal perspective, the most important question is whether the decision is, as may be derived from the AG’s opinion, actually incompatible with the primary law command contained in Article 300 (7) EC, according to which EC institutions and Member States are bound by international agreements entered into by the EC. This would undoubtedly be so if this primary law provision automatically entailed the granting of direct effect to international treaties entered into by the EC; indeed, if this were so, direct effect could not be denied by European secondary law, such as acts of ratification of international agreements, and would have to be recognised by the ECJ as well. In this sense, it has been argued that the formula “shall be binding on the institutions of the Community and on Member States” in Article 300 (7) would, in an anticipated way, order the direct effect of any treaty provision fulfilling the technical requirements of being directly applied.164

163 Para. 46.
164 Meng, *op. cit.*, 1070.
Against this, it has been argued that the wording of Article 300 (7) EC is not clear in this respect. The formula could also be regarded as a mere internalisation of the fundamental international law principle of *pacta sunt servanda*; in other words, it would only prescribe internal validity, but not internal applicability. The other interpretation, so the argument runs, would lead to an unusually far-reaching opening of the EC legal order and might deprive the Community of the possibility of dealing with the implementation of international treaties in a flexible way. Thus, it would, to a certain extent, contradict the international law principle “*in dubio mitius*”, according to which the interpretation which least curtails a State’s sovereignty is preferable in doubtful cases.

However, whereas the first opinion may be reproached as overstating the point, the contrary might be said about the second, with the result that some middle ground solution would need to be envisaged. In substance: if a Community governed by the rule of law is supposed to be internally bound by an international treaty as stated in Article 300 (7) EC, it seems to be undeniable that this legal obligation should also be controlled by the Community’s court, at least in objective control procedures whose purpose it is to ensure the legality of European acts. Unlike private actions, control proceedings by Member States against the EC or *vice versa* fulfil this purpose exactly. In other words, in a Community governed by the rule of law, there must not be any internally valid act which is not justiciable in any proceedings at all.

However, a violation of Article 300 (7) EC would not be present if GATT/WTO law could actually be conceived of as a purely diplomatic regime of intergovernmental policy making. As stated, the parties to an agreement may establish it only as a framework for diplomatic negotiation and deny it any legal character, thus also excluding, explicitly or implicitly, internal direct applicability by mutual consensus. Under this assumption, the binding effect of GATT/WTO as an international agreement in the sense of Article 300 (7) EC would not extend to mandatory compliance in each single case, as by their very nature diplomatic arrangements do not generate legally-binding results, even though making use of their institutions and procedures may well be a legally-binding obligation. However, in view of the strong juridified features of the WTO system, the premise of this view remains hugely problematic. This is even more so as, the WTO agreements having been concluded as mixed agreements, EC Member States are externally liable for full compliance with the agreement

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165 Eeckhout, *op. cit.*, 38, fn. 80.
by the EC and themselves, and may also be exposed to effective retaliation by third parties. Last but not least, the EC’s support of an infringement action by the Commission against Germany in the Dairy case mentioned above should be read as implying the ECJ’s implicit consensus on the legal characterisation of GATT.

However, as GATT/WTO contains diplomatic elements as well, the ECJ’s view may not be refuted being undoubted wrong doctrinally; instead, such a conclusion will be shown to require a more profound theoretical analysis. At doctrinal level, one could, however, further argue that, if GATT/WTO’s partly diplomatic character is found to exclude the binding character of its provisions, the same might not be true for DS decisions which are rendered at the end of a manifestly legal procedure. This points to the question of whether direct effect could and should be granted to DS decisions only.

\textit{dd) Limiting Direct Effect to Adopted Dispute Settlement Reports as an Alternative?}

On account of the denial of direct effect to WTO rules, the option of granting direct effect only to adopted dispute settlement reports deserves further attention. Indeed, the ECJ’s objection to direct effect based on the compensation alternative laid down in Article 22 DSU would not apply in the same way to dispute settlement decisions which are not implemented in time and in which compensation has been refused by the other party, which has almost always happened so far. Such DS decisions might well be granted direct effect. This would constitute a huge step forward towards a more effective interconnection of the constitutional levels, and might seem to provide an acceptable compromise towards the recognition of WTO as a true legal order.

Yet, this interesting possibility raises a whole set of difficult questions. As a first objection, one might state that – similar to what the ECJ held in its first EEA opinion with respect to the EEA court – such an effect of dispute settlement decisions would be tantamount to endangering the jurisdictional monopoly conferred on the ECJ by Article 164 EC.\textsuperscript{166} This objection may, however, be defeated by referring to a famous ECJ quotation from precisely this opinion:\textsuperscript{167}

\begin{quote}
“Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and,
\end{quote}

\begin{footnotes}
\item[166] Spanish government in Chemnitz case, \textit{op. cit.}
\end{footnotes}
as a result, to interpret its provisions, the decisions of the court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event the Court of Justice is called upon to rule, by way of a preliminary ruling or in a direct action, on the interpretations of the international agreement, in so far as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of Courts is in principle compatible with Community law. The Community’s competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretations and application of its provision.  

This legal assessment of the ECJ is all the more relevant for the case of WTO law as the EEA agreement did not have direct effect in the Court’s view at that time. Notwithstanding this unequivocal jurisprudence, a similar argument of institutional incompatibility was, however, raised by the Council in Portugal v. Council to deny the invocability of WTO law as a “paramètre de légalité”, which could be used a fortiori as an argument against the direct effect of dispute settlement decisions. This argument was not discussed in the decision, but plausibly rejected in the opinion of Advocate General Saggio:

“In its defence, the Council states that the WTO Agreements provide for an autonomous system for the settlement of disputes which usurps the Court’s powers to interpret and apply the rules of the agreements. In my opinion, the system provided for in the WTO Agreements, and in particular in the Understanding on the Settlement of Disputes, does not imply any limitation on the jurisdiction of the Court of Justice because, first, it does not provide for the establishment of a judicial body but for a system for the settlement of disputes between persons subject to international law: the body which adopts the decisions or recommendations is a political body to which individuals within a particular domestic legal order have no access; and, second, the establishment of a judicial body whose jurisdiction was not limited to interpreting and applying the agreement but also included the power to annul measures of the Community institutions would be incompatible with the Community legal order inasmuch as it would clearly conflict with Article 164 of the EC Treaty. In any case, it is evident that internal review of the rules of agreements by the Community institutions and the Member States cannot fail to offer a stronger guarantee of the fulfilment of the obligations undertaken at international level and is therefore in keeping with

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168 The refusal of the EEA jurisdiction followed, above all, on account of the far reaching overlap of competence with the ECJ, which regarded the court as being incompatible with Art. 234 (ex 164) EC.

169 Opinion cit., para. 21 and 27.

170 Opinion cit., para. 23.
the objectives of the agreement. The fact that the contracting parties have undertaken to use the dispute settlement system provided by the WTO Agreements to settle disputes arising from breaches of the agreement and the possible adoption of retaliation measures, does not preclude the parties themselves from annulling or sanctioning internal measures which might be contrary to the rules of the agreement.”

Other implications of the option of granting direct effect only to adopted dispute settlement decisions were considered in the last Atlanta and Chemnitz cases decided by the Court of First Instance. In its Opinion in the last Atlanta case, Advocate General Mischo had to examine whether the WTO appellate body report in Bananas could constitute a ground for liability on the part of the EC, for which direct effect would be a precondition. The Advocate General denied this possibility for the reason that the DSU granted a Member “a reasonable period of time” to comply with the ruling (Article 21 (3) DSU, and that the option of compensation, which allowed the contested legislation to be left in place, was also available (Article 22 DSU). As already stated, this objection is barely convincing, as compensation is not meant as a permanent solution and the direct effect of a dispute settlement decision should be limited to the period after the expiry of the time-frame set for implementation anyway.

More interesting is the Court of First Instance’s reasoning in the Chemnitz case, in which the potential direct effect of the appellate body report in the Bananas case was discussed. The importing company, Chemnitz, had argued that the appellate body had found the (original) EC Banana Regulation inconsistent with WTO law, and that, in its present form, it could therefore not be implemented in a manner consistent therewith. This argument seems to imply that dispute settlement decisions enjoy direct effect and may hence entail the nullity of the Regulation ex tunc. Subscribing to the reasoning suggested by the Commission, the Court left the direct effect question open in its reply. It ruled that the appellate body report had only found some inconsistent elements, but not called into question the overall WTO consistency of the Regulation’s tariff quota system as such. Accordingly, the Commission had adopted the 1998 amendments to the Regulation with a view to bringing them into compliance with WTO rules. Consequently, so the Court concluded, the applicant could not rely on the report in order to claim that the Banana regulation no longer existed. Yet, as the Court of First Instance’s assumption on the overall consistency of the tariff quota system with GATT/WTO was shown to be plainly wrong in subsequent panel procedures, one might argue a contrario that, in this opposite hypothesis, the applicant might be able to rely on the nullity of the
Regulation found by the appellate body. However, whilst this conclusion *a contrario* is not completely implausible, it is not entirely cogent here as one might also argue that the Court had only applied an “at any rate for the case at issue” reasoning, which would not allow any conclusion to be drawn for the hypothesis in which the whole scheme was found to be WTO-inconsistent.

Second, the Court of First Instance reasoned that the plaintiff had not established a link in law between the decision of the DSB addressed to the Member States only and the present action. To do so, the plaintiff would have had the burden of showing that the DSB decision imposed on the EC as its addressee an unconditional and sufficiently clear and precise obligation, which it did not fulfil. This reasoning is again very difficult to analyse. Since the wording of the dispute settlement decision which found the Banana regime inconsistent with the WTO is, of course, clear and unconditional in itself, the fundamental problem seems to lie in showing that this finding gave rise to an obligation also vis-à-vis the plaintiff as a third party. This could only be denied on account of a subjectivity criterion similar to the German administrative law *Schutzwzwecklehre*, which requires the protection of individuals’ rights to be a specific purpose of a norm (a construct which was shown above to be rather alien to EC law), or an analysis of the nature and general scheme of the WTO agreements (the first of the two criteria being usually applied for the direct effect test), assuming that these would be capable of affecting dispute settlement decisions, too. It is clear that, on account of these criteria, and as actually also advocated by the Spanish government, direct effect of adopted dispute settlement decisions could be denied for largely the same reasons – the diplomatic characterisation of the WTO and the lack of reciprocity in particular – just as it had been denied for WTO rules in *Portugal vs. Council*. Thus, via a complex detour, we have come back to the question of the legal vs. diplomatic characterisation of the WTO itself.

**ee) Conclusion: Unlimited Judicial Self Restraint and the Need for a Theoretical Analysis**

The reasons why the ECJ adheres to the diplomatic characterisation of the WTO may be further expounded. Thus, what really matters to this Court seem to be less concerns of doctrinal consistency or the new institutional features of the GATT/WTO system, but the broad scope of the WTO and the huge political and economic implications of deferring to it. Unlike bilateral association or free trade agreements which affect the EU system only marginally,
the WTO constitutes an encompassing transnational order for world trade, which is for issues that are also governed by the EU system itself. Thus, it may be capable of limiting the EU’s policy choices and thus of changing its global standing and self-understanding to a huge extent. Just as internally the granting of direct effect to EU law has completely changed the EU’s own shape and character, the same might be true for the WTO. In this situation, the ECJ prefers to leave dealing with the WTO entirely to the EC’s political institutions.

With a view to these far-reaching political implications, it is submitted that a realistic assessment of the future status of GATT/WTO should go beyond a doctrinal analysis and should be based on a contextual, i.e., political and economic, background assessment of the concept and the function of the WTO and its relationship with the EU. Only when the ECJ’s theoretical assumptions may thus be refuted, can this Court’s deductions therefrom in Portugal vs. Council also be successfully questioned. Before such analysis is undertaken, the Banana conflict, in which a considerable number of these frictions between the three constitutional levels came to light in a dramatic way, will be presented in an excursus.
Excursus: The Banana Conflict

I. The European Banana Import Regime in a Nutshell

1. The Banana Market Regime in the Context of the Common Agricultural Policy

The 1993 EC banana import regime established a sectoral planified economy system, in which “bureaucratic dirigism” substitutes, to a large extent, market mechanisms. In this respect, it is a typical child of the Common Agricultural Policy (CAP) and reflects its more general complexities and contradictions. Historically, the establishment of the CAP was part of a larger compromise between agricultural and competition policy which rendered possible the foundation of the European Economic Community in 1958. France, which was still dependent to a considerable extent on agriculture, and traditionally more prone to interventionist policies, was willing to accept free trade of German industrial goods only at the price of a guarantee of the survival of its agriculture. As a result, an interventionist system of agricultural policy which limited the Community’s general free market system, in particular the application of free movement and competition rules, was established. Its – in part competing - objectives were set as follows: to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; to stabilise markets; to assure the availability of supplies; and, finally, to ensure that supplies reach consumers at reasonable prices. To achieve these objectives, the CAP, which normally uses the form of common European market organisations (covering by now about 95% of all agricultural products), may resort to all necessary measures, in particular regulation of prices, aid for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports and exports. According to the principle of financial solidarity, the CAP is financed by guidance and guarantee funds which notoriously consume about one half of the Community’s budget. Moreover, the CAP is committed to a system of Community preference which is

173 Cf., Art. 32, ex 38 No, 2, Art. 42 EC.
174 Cf., Art. 33 (1) (a)-(e) (ex 39) EC.
175 Cf., Art. 34, ex 40 (1) (c) EC.
supposed to protect Community products against normally cheaper world market products. However, the EC’s accession to the WTO rendered important changes in the CAP necessary, which were brought about by the agricultural reform of 30/6/1992, which included, most notably, a shift from direct product subsidies (by mechanisms such as guaranteed intervention prices) to producer income aid. As set forth by the Commission in its Agenda 2000, the accession of Eastern European countries still largely dependent on agriculture will require other profound changes, mainly for budgetary reasons. Indeed, the extension of the current dirigiste system of planification, subsidisation, and compensation to the new Eastern European Member States would prove unaffordable.

2. Essential Features of the EC Banana Market Regime

As regards the banana market, this has always played a special role in the EC. At the foundation of the Community in 1958, bananas were excluded on a German request from the common import regime to be established in a protocol attached to the Implementing Convention based on Article 136 EC.\(^{176}\) This enabled Germany, whose high consumer demand for bananas was satisfied by cheap imports of “Dollar bananas” from Latin America, to maintain a duty-free import quota completely exempted from tariffs and annually adapted to the demand. In an overall perspective, the exemption of bananas from the CAP entailed that different national markets - some entirely free, others completely protected, others again in between - persisted.

The consistency of the European Banana regime with GATT was already challenged for the first time when the different national regimes were in place and national markets were still formally secluded. Several Latin American countries, Columbia, Venezuela, Guatemala and Costa Rica, alleged injuries under the different national import schemes and invoked the GATT dispute settlement procedures, whereafter a panel was established on 10 February 1993. In its report, it found that the quota schemes in place in some countries violated Articles I (the most-favoured nation principle) and XI.1 (quantitative restrictions). However, the EC was able to block its acceptance in the GATT Council as, according to standing practice, a unanimous decision, including the votes of the members found in breach of the agreement, would have been necessary.\(^{177}\)


\(^{177}\) The theoretically possible majority vote according to Article XXV:4 GATT 1947 was not used.
When the goal of the completion of the internal market was envisaged at the end of 1992, the issue of setting up a harmonised banana import regime was taken up again. It was obvious from the beginning that the harmonisation of the different systems in order to open up the frontiers within the internal market would be an extremely difficult task. After long discussions and the threat of some Member States including France to block all other harmonisation measures and thus the completion of the internal market as a whole, a protectionist regulation was enacted by majority-voting in the Council against the strong resistance of the countries with formerly free markets, namely Germany, the Netherlands and Belgium. Germany even sought to stop the regulation before the ECJ by means of a temporary injunction, however without success.

The 1993 Banana regulation was meant to protect not only the rather insignificant number of banana producers in the Community, but also those of former colonial States of Africa, the Caribbean and the Pacific rim (the so-called ACP States), which are connected with the EC in development associations through, most notably, the Lomé Conventions, and the distributors of these bananas. The protection of the EC and ACP producers was to the detriment of the “Dollar-Bananas” produced in Latin American, which are generally cheaper and of a better quality than EC and ACP Bananas. In substance, the regulation introduced a differentiation between EC, traditional and non-traditional ACP and, finally, “third country” banana producers as well as the different distributors. A variable quota tariff was placed on the import of third-country bananas and the so-called non-traditional ACP-imports, which was originally set at 2 million tonnes yearly (thus cutting back the import of about 2.3 millions in 1992) at a duty of 75 ECU per tonne respectively duty free for non-traditional ACP-imports. The former distributors of third world bananas received 66.5 % of it (“A-operators”), the distributors of traditional ACP-bananas and Community bananas – even though they had not previously been involved in the import of such bananas – 30% (“B-operators”), whereas the remaining 3.5% was reserved to market participants, who began marketing third world bananas or non-traditional ACP bananas from 1992 (“C-operators”). The shares of the respective quotas were granted to individual distributors on the basis of the average amount sold by

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them between 1989 and 1991. Technically, this was done by means of licences, which were subject to the provision of a security, and transferable to other distributors. Import amounts above the customs quota were subject to a punitive duty-rate of 750 ECU per tonne for non-traditional ACP-bananas and 850 ECU per tonne for third world bananas.

As a result of the new system, German importers had about 840,000 tonnes at their disposal, in comparison with imports of 1,371,000 tonnes in 1992, which constituted a reduction of about 40%.\(^\text{180}\) Following the implementation of the new system, it turned out that the gap could not even be filled by Dollar bananas imported by the operators of Community or ACP bananas favoured by the 30% clause, nor by additional Community or ACP bananas. This was due to the fact that the relationships between producers and importers were based on long-term contracts and investments. In other words, the producers of European and ACP bananas were not able (or ready) to satisfy the demand of Member States previously supplied by Dollar bananas, and the operators favoured by the 30% clause were not prepared to import from third countries. Instead, they preferred to sell, for high profits, their licenses to traditional importers of the Dollar bananas who suffered from reduced quotas. Thus, a redistribution of income in favour of distributors of Community and ACP bananas was caused.

Against this background, it is obvious that the whole regime resulted not only in a massive increase of prices for the consumers of countries such as Germany, which had previously been supplied with Dollar bananas. Instead, due to the artificial trade restriction inherent in the regime, huge wealth losses, mainly to the detriment of Latin American producers and European consumers, were caused. An independent study undertaken at the World Bank\(^\text{181}\) concluded that the import restrictions cost EC consumers $ 2.3 billion a year in artificially inflated prices, out of which only about $ 300 million benefited ACP producers, whilst most of the extra costs resulted in monopoly profit for European distributors. Moreover, the study submitted that the system massively distorted competition, encouraged black marketeering, restricted the growth of the EU banana market, discriminated against efficient producers and robbed inefficient ones of incentives to raise productivity and cut costs.

\(^\text{180}\) The statistics are taken from Everling, \textit{op. cit.}, 405.

II. Challenges before GATT/WTO Dispute Settlement Bodies and the Reactions of the EU

1. The Second Panel

When the 1993 Banana Regulation’s draft text was published, the parties to the first Banana panel, Columbia, Venezuela, Guatemala and Costa Rica, fearing a massive decrease in their exports to the EC, requested consultations under the GATT. The EC refused this request by alleging that a not yet adopted text could not be characterised as a “measure” subject to GATT rules. As a reaction, these countries asked for a dispute settlement in accordance with Article XXIII GATT. After consultations held in April 1993, a panel was established on 16 June 1993 which submitted its report on 18 January 1994. Rejecting the EU’s view that the association with ACP countries under the Lomé Agreements should be characterised as a customs union or a free-trade area in the sense of Article XXIV GATT, the report found that essential features of the Regulation, including the tariff preferences to ACP countries and the import licensing scheme violated Articles I (MFN), II (tariff bindings) and III (national treatment) GATT. However, as in the first Banana panel, the EU again blocked the report and prevented it from being adopted.


As it was clear, even at that time, that this would no longer be possible under the new GATT/WTO system due to enter into force on 1 January 1995, the Community tried to forestall future challenges to its import regime by these countries. Thus, on 29.4.1994, a framework treaty was agreed with Costa Rica, Columbia, the Dominican Republic, Nicaragua and Venezuela (but not Guatemala) for banana imports. This granted these countries a reduction of tariff duty from 100 to 75 ECU per tonne, a larger tariff quota amounting to one half of the entire tariff quota for third country bananas (which was distributed among them by country-specific export quotas in relation to their traditional trade share), and the right to issue export licences to be used for import into the EC by A and C-operators. The treaty was implemented by Commission Regulation No. 478/95.\(^{182}\) It was to be regarded by the parties as a final settlement of the dispute.

\(^{182}\) OJEC 1995 no. L 49, 13
During the negotiations establishing the WTO, the EC was able to place the framework agreement in the schedule containing the EC’s trade concessions within the GATT, with the result that it became part of WTO law. However, when the WTO agreements were adopted by the EU on 22/12/1994, Germany made a reservation in respect of the framework agreement. On 10/4/1995, this Member State initiated an annulment action against it before the ECJ, which was partly successful.\textsuperscript{183}

3. The 1994 Waiver granted to the Lomé IV Convention

As a further effort to ensure the GATT-consistency of the Banana regime, European and ACP countries successfully negotiated a five-year waiver till 29 February 2000 concerning the \textit{Lomé IV} Convention, an association agreement between the EC and former ACP colony States, which are \textit{inter alia} granted privileges for imports into the EC.\textsuperscript{184} These waiver negotiations, which followed a suggestion by the second Banana panel, were completed in the GATT General Council a short period before the establishment of the WTO. The EC had a strong interest in obtaining this instrument before the WTO rules came into force, since the granting of waivers is now subject to a more stringent procedure. According to its wording, the waiver only exempted the EU from its obligations under Article I (1) GATT, the most favoured nation principle, so that the unequal treatment of ACP States \textit{vis-à-vis} other producer countries was justified. However, all the other GATT obligations of the EC remained unaffected, and it was precisely this limited scope of the waiver that gave rise to controversies in the third Banana panel.

4. The Third Banana Panel

a) Procedural Overview

Despite the settlement achieved in the framework agreement just mentioned, on 4 October 1995, Guatemala, Honduras, and Mexico, joined for the first time by the United States, made a new request for consultations against the EC Banana regime.\textsuperscript{185} By this time, the Uruguay Round agreements were in effect, and so the claimants could have recourse to the upgraded new WTO dispute settlement understanding and other Uruguay Round instruments such as

\textsuperscript{183} Case C-122/95, [1998] ECR I-973.
\textsuperscript{184} GATT Doc.C/W/829/Rev. 2 of 7.12.1994
\textsuperscript{185} WT/DS16/1.
the GATS, the agreement of Import Licensing Procedures, the Agreement on Agriculture and the Agreement on Trade Related Investment Measures. Ecuador, the world’s largest producer of bananas, became a WTO Member on 21 January 1996 and immediately joined the group of complainants.

Following the failure of the consultations held on 14-15 March 1996, the WTO Council, in its function as the Dispute Settlement Body, established a panel in compliance with the complainants’ request on 8 May 1996. The panel reports, circulated on 22 May 1997, found a considerable amount of violations of the regime with GATT, GATS, and the WTO Licensing Agreement. On the Community’s appeal, the new WTO appellate body upheld the panel report with minor modifications on 9 September 1997. This report was adopted by the DSB on 25 September 1997. As alluded to, under the new procedural rules of the WTO dispute settlement understanding (DSU), the Community could no longer block the acceptance of the panel and appellate body reports, since a (so-called negative) consensus of all WTO Members would now have been necessary to do so (Article 16 IV and 17 IV DSU). In a subsequent arbitration decision according to Article 21.3 (c) DSU requested by the EU, the “reasonable period of time” prescribed by Article 21 DSU for the implementation of the report was set at 15 months and one week, i.e., up to 1 January 1999.

**b) Substantive WTO Law Essentials**

As the third panel and appellate body report very clearly outlined the most important violations of the Banana regime with GATT/WTO law, these will be briefly summarised in order to give an overview of the substantive law problems which are not at the core of this the-

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186 There were formally separate reports for each of the complainants which contained minor differences in their cases, though the panel’s conclusion were largely identical.

187 WT/DS27/AB/R.


189 WT/DS15.
On the whole, the discriminatory tariff, quota and licensing system established by the Banana regulation are manifestly incompatible with the spirit, the overall system and many single provisions of the world trade system, and might thus be regarded as a textbook case, as they cover a maximum of GATT violations which can arise in a single case. This raises the suspicion that the regime was established without any regard to the EC’s obligations under GATT at all.

**aa) Standing of the US as a Preliminary Question**

At the outset, the panel and appellate body had to examine the important preliminary question of whether the US was to be allowed to join the complainants and to invoke GATT violations. The EC contested this right by claiming that the US could not invoke an own legal interest. The necessity of such an interest, in other words the exclusion of an *actio popularis* under the DSU, was derived by the EC from Articles 4.11. and 10.2. DSU which regulate the intervention by third parties. The appellate body replied that both provisions concern a different situation in that the US could not be regarded as a third party here. Whilst the first provision deals with the joining in at consultation proceedings already under way between members when the third party “considers to have a substantial trade interest”, the second refers to the right of third parties, having a “substantial interest” in a matter before a panel, to be heard and to make written submissions to the panel. The appellate body concluded that neither of these provisions nor anything in the WTO Agreement provided a basis for asserting that the parties to the dispute had to meet any similar standard.

Moreover, the appellate body also denied that there was an international law principle expressed in the jurisprudence of the International Court of Justice according to which the right of “standing” in international proceedings would require a “legal interest”. To the contrary, the appellate body stressed the wide wording of the basic provisions governing the settlement of disputes - Article XXXIII:1 GATT: “if any Member should consider that any benefit accruing to it directly or indirectly... is being nullified or impaired...” and Article 3.7 DSU: “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” It inferred from these provision that a Member should enjoy broad discretion in deciding whether to initiate dispute settlement proceedings or not.

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The language of Article 3.7. would even suggest that a Member is expected to be largely self-regulating in deciding whether any such action would be “fruitful”. Finally, the appellate body also noted that the US was a producer of bananas, that the internal US market could be affected and that, in general, due to the increased interdependence of the global economy Members are more likely than ever to be affected by potential WTO law violations. On account of these reasons, taken together, the US were granted standing.

**bb) Article I GATT – MFN Principle**

The basic content of the MFN principle is that any trade advantages granted to one party must be automatically granted to all other parties as well. It is manifest that the unequal treatment of Dollar and EC/ACP bananas by means of different tariffs and tariff contingents constitutes a violation of that principle. In a second step, this infringement might have been justified on the ground that EC and ACP States would constitute a free-trade area or a customs union in the sense of Article XXIV GATT which constitutes an exception to Article I GATT.192 These provisions allow States assembled in free-trade areas and customs unions to grant one another additional trade advantages not subject to the MFN principle. However, it was quite clear that special association with the ACP countries under the Lomé Agreements could not qualify for one of these possibilities. Both would presuppose in principle that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories; however, a customs union also requires that substantially the same duties and other regulations of commerce are applied by each of the members to trade with third States (Article XXIV:8(a) and (b) GATT). The Lomé Agreements provide only for unilateral trade privileges accorded by the EU to Lomé States, while these are allowed to maintain most of their import restrictions in order to protect their industries. Therefore, the EC resorted additionally to Part IV GATT and argued that these provisions allowed for the unilateral granting of concessions in favour of developing countries. To this argument, the panel replied that while unilateral tariff reduction for developing countries may even be compatible with the GATT, under no circumstances could some third world States be privileged at the expense of others when both are in a similar state of development. However, the waiver for the Lomé IV Agreement mentioned above entailed that differential

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192 This argument had already been dealt with in the Bananas II panel (GATT Doc. dispute settlement 38/R, reported in *ILM* XXXIV (1995), 180, 224, no. 159. It is taken up again here on account of its fundamental importance.
tariffs were exempted from the MFN requirements during its validity, i.e., till 29 February 2000. Yet, the appellate body found that the waiver did not extend to the discriminations in the allocation of import licences. In this case, a violation of Article I GATT was present.

**cc) Violation of earlier Tariff Concessions, Article II GATT**

An important feature of the GATT/WTO system is the establishment of preferential tariff rates which are fixed in the relevant schedules annexed to GATT as provided in Article II GATT. For bananas, the EC had, already in 1963, conceded a value tariff of 20% which became a binding part of GATT. This tariff concession had been violated in several ways: First, the weight tariff introduced by the Regulation could lead to a higher tariff rate than the value tariff; e.g., in 1992, the rate was of 24%. Second, the punitive tariff of 850 ECU/t for imports exceeding the quotas is equivalent to a value tariff of 160%, which constitutes a flagrant violation of Article II GATT.

**dd) Violation of the National Treatment Rule, Article III:4 GATT**

Article III:4 GATT contains the rule that imported products shall be accorded a no less favourable treatment than like products of national origin in respect of all laws and regulations affecting their marketing. In this context, the panel found that the unequal allocation of the quotas, in particular the cross-subsidisation of Community operators receiving 30% of the import quota for Dollar bananas, constituted a violation of the national treatment rule.

**ee) Quantitative Restrictions and Article XIII GATT**

In the first place, it is already questionable whether the punitive tariffs of 850 ECU/t do not constitute a quantitative restriction under Article XI:1 GATT. This might, indeed, be argued because the extremely high punitive tariff renders imports economically impossible, and thus has the effect of a quantitative restriction. However, in Bananas III, the panel and the appellate body preferred to deal only with the provision on non-discriminatory administration of quantitative restrictions, Article XIII GATT, as this obligation also applies to tariff quotas (Article XIII (5) GATT). In this context, the dispute settlement organs found two inconsistencies: first, the allocation of tariff quota shares, by agreement and by assignment, to some Members not having a substantial interest in supplying bananas to the European Communities, but not to other Members, constitutes discriminatory unequal treatment. The same

193 For this and the following information, see Cascante and Sander, op. cit., 78f.
was found for the allocation of quotas to certain Latin American countries in the framework agreement.

However, in this context, the scope of the above-mentioned waiver becomes relevant. As stated, according to its wording, it exempts the EC only from Article I:1 GATT, and “only to the extent necessary to permit the EC to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention”. Having confirmed its competence to review the scope of the waiver following the objections raised by the EC in this respect, the appellate body stated that, first, only some measures of the Banana regulation were required by the 4th Lomé Agreement. Second, reversing the panel decision, it continued that even for these measures, the waiver must not be extended against its wording to Article XIII GATT. The panel’s main arguments, the close relationship between Articles I:1 and XIII:3 and the need to give “real effect” to the waiver, are not regarded as sufficient to override its clear wording. This result is further motivated by the appellate body by referring to the exceptional nature of waivers and the strict disciplines to which they are subjected.

\textit{ff) Licensing agreement and GATS}

Besides these violations, the panel and the appellate body also found violations of Article X (3a) GATT and Article 1.3 of the WTO Licensing Agreement through the discriminatory way in which the licenses had been administered. The discriminatory allocation of import licences – in particular due to the quota system established in Article 18 Banana Regulation, the exemptions from licenses for operators of EC/ACP Bananas foreseen in the framework agreement, and the granting of exceptional hurricane licenses to them – were also found to constitute violations of Articles II:1 (MFN) and XVII (non-discrimination requirements) GATS. Importantly, GATS and GATT were held to apply concurrently, since in situations such as the present one measures were liable to fall under the scope of application of both agreements.

\textit{5. The Difficult Implementation of the Bananas III Report}

To comply with the Bananas III Report, the European Commission published a draft amendment regulation on 14 January 1998 which was forwarded to the Council of Agricul-
ture Ministers. When the content reached the complainants, all of them including Panama - pressed by powerful US-owned companies such as Dole, Del Monte and Chiquita - sustained that the previous inconsistencies with GATT, the discriminatory licensing system in particular, had not been removed. However, the EU rejected this criticism. In a reconsideration, on the complainants’ request, of the issue in the DSB on 25 March 1998, the EU contended that all objections were premature, since the amended regulation had not yet been implemented. Even though diplomatic exchanges continued throughout May and June of 1998 and the new Regulation was formally approved and published in the Official Journal on 29 July 1998.

Its essential content may be summarised as follows. First, in order to enable traditional ACP suppliers to maintain their presence on the EU market, a special framework of technical and financial assistance was introduced. Substantively, according to the amended regime, the tariff quota for traditional imports from ACP States was maintained at 857,000 tonnes (duty free), but was no longer distributed between ACP countries. This solution was alleged to offer more flexibility. Furthermore, for third State and non-traditional ACP imports, the tariff quota of 2,200,000 tonnes was maintained at a duty of 75 ECU per tonne for third State imports and duty free for non-traditional ACP-imports; the punitive duty of 765 ECU per tonne on imports beyond the quota was maintained, too. An additional tariff quota of 353,000 tonnes at a duty of 300 ECU per tonne was opened for third State bananas to take account of the EU enlargement and to ensure adequate supplies to the market; this apparently was a compromise in order to appease the Germans and the Dutch. Finally, the licensing system was simplified; however, according to the Commission’s implementation legislation, though the tariff quotas had been formally abolished, the imports were again allocated among importing countries based on their share of the EC market during the period from 1994 to 1996, i.e., when the rules found in breach of GATT and GATS were in place. It is this discrimination, crystallising the effects of the previous illegal regime, which may have particularly enraged the complainants of the third panel.

When, after the failure of consultations, the complainants wanted to challenge again the compliance of the implementation legislation with the DSB decision, serious procedural problems surfaced. These were related to the difficult relationship between Articles 21.5 and


\[195\] Council regulation (EC) No 1637/98 of 20/7/98, OJ L 210/28, 28/7/98; a new licensing regime was subsequently established in Commission Regulation No 2362/98.
22 of the DSU. Article 21.5 DSU reads: “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to these dispute settlement procedures, including, wherever possible, resort to the original panel...” By contrast, Article 22 DSU establishes that a party may request authorisation for retaliation if the other party “fails to bring the measure found to be inconsistent with a covered agreement into compliance...” As a result, it was not clear whether the review procedure established in Article 21.5 DSU had to be exhausted before retaliatory action could be allowed by the DSB according to Article 22 DSU. Whereas the EU insisted on the first interpretation, the US and the other complaining States obviously preferred the second. Moreover, the phrase that the dispute on correct implementation “shall be decided through recourse to these dispute settlement procedures” left it unclear whether such procedures were to be repeated in their entirety, or whether an expedited procedure with immediate reference to a panel (without prior consultations and without the possibility to appeal) would be sufficient.

While the complaining parties presented the EU with a request for consultations “without prejudice” to their rights under Article 21.5 DSU on 18 August 1998, the US also announced, on 22 October 1998, unilateral retaliatory action pursuant to Section 301 of the US Trade Act of 1974 if the EU regime was not in compliance with WTO rules by 15 December 1998. In an immediate response, the EU authorities strongly denounced the threat to resort to unilateral action by the US and confirmed their initial position that retaliatory action could be initiated only upon a “multi-lateral finding” of non-compliance in a procedure under Article 21.5 DSU followed by the formal permission for such action according to Article 22 DSU. Moreover, the EU insisted that it would challenge a Section 301 sanction by the US against itself at the WTO in separate proceedings. Since the US upheld their threat of retaliation, the EU initiated proceedings on 25 November 1999; consultations without any positive outcome were held on 17 December 1998, and a panel was requested by the EU on 26 January 1999.\footnote{WT/DS/152. This panels report was circulated on 22 December 1999. Arguing that a potential application of the Statute in a way inconsistent with WTO rules was irrelevant, but that only its actual application in practice would matter, the panel found no violation of WTO law, but preventively subjected the exercise of the statute to numerous conditions in order to ensure that its application would be consistent with WTO law in future cases.}

A new tactical move was carried out by the EC on 15 December 1998, a few days before a US-EU summit was scheduled to take place in Washington. On that day, the US Trade Rep-
representative was to announce a list of European products targeted with 100 percent punitive tariff duties, pursuant to the unilateral Section 301 determination. Against this background, the EU asked itself for the establishment of a panel in accordance with Article 21.5 DSU. Strongly criticising the unilateral action threatened by the US, the EU requested the panel to find that, in the absence of a formal request for the establishment of an Article 21.5 DSU panel by the complaining party, its implementing measures “should be presumed to conform with WTO law.” To this move, the US and the other complaining States convincingly objected that such a panel would not scrutinise the compatibility of the EU implementation measures with WTO law, but would, instead, be confined to interpreting the scope and legal effects of Article 21.5 DSU itself.

As a reaction to the sui-generis Article 21.5 DSU request\(^\text{197}\) made by the EU, Ecuador filed its own request for an Article 21.5 panel on 18 December 1998. Unlike the EU’s request, this State’s request contained the clear indication that the panel should examine the compatibility of the European implementing measures. In addition, Ecuador asked the panel to make suggestions on how the EU might implement its recommendations. During a special meeting of the DSB on 12 January 1999, an agreement was reached that both Article 21.5 DSU panel requests should be separated. As a consequence, both requests were granted by the DSB under the negative consensus rule and referred to the original panel.

However, notwithstanding the establishment of the two Article 21.5 DSU panels, the US also announced on 12 January 1999 that it would continue the Article 22 DSU procedure. Accordingly, pursuant to Article 22.2 DSU, the US requested the authorisation to suspend tariff concessions and other obligations to the EU, covering trade to an amount of US$ 520 million. This request had a particularly incisive impact since under the reverse consensus rule, it is deemed to be adopted automatically. In response to this threat, Santa Lucia, Dominica and the Ivory Coast, backed by the EC, blocked the adoption of the agenda for this meeting, with the effect that the DSB meeting scheduled on 25 January 1999 was suspended, and the American request for authorisation to retaliate could not be granted.

After several other DSB meetings in which no solution on the future procedure was found, this procedural impasse could be overcome only on 29 January by a compromise suggested by WTO Director-General Renato Ruggiero. Following this proposal, the DSB suspended consideration of the American request for authorisation to retaliate under Article 22.2 DSU,

\(^{197}\) Salas and Jackson, op. cit., 156.
in exchange for the EU requesting arbitration on the appropriate level of retaliation pursuant to Article 22.3 DSU. The arbitration was due on 2 March 1999. Surprisingly, however, the arbitrators did not issue a report on that date, but instead asked for additional information from the parties. This might have been a tactical move by the panellists in order to allow for the Articles 21.5 and 22.6 DSU decisions to be rendered on the same day in respect of the DSU’s tight time schedules. This delay put the US in an embarrassing situation since it was under considerable internal pressure from the Congress to impose the retaliatory tariffs. In response the US decided to apply retaliatory tariffs retroactively as of 3 March 1999 conditional to WTO authorisation; however, pending this authorisation, it also suspended, as of March 3, customs clearance of all products on the previously established list of retaliatory tariffs. In another countermove, on 4 March 1999, the EC requested consultations with the US in respect of the beginning of retaliatory action without authorisation by the WTO, thus starting an additional dispute settlement procedure.

On 6 April 1999, the reconvened third Banana panel reported its decisions on the Article 21.5 requests filed by Ecuador and the EU as well as the arbitration award requested by the EU in accordance with Article 22.6 DSU. Hardly surprisingly for GATT/WTO experts, the panel found essential features of the 1998 amended Bananas regulation to be again incompatible with WTO law. In addition, following Ecuador’s request to make specific suggestions on implementation, the panel proposed a tariff-only system, possibly combined with negotiations in view of a suitable WTO waiver.

In the arbitration award, the panel found an impressive procedural compromise which, despite strong criticisms by the EU,\(^\text{198}\) might be considered an acceptable way out of the dilemma. On the one hand, the award confirmed the US’ right to retaliate even before the completion of an Article 21 (5) DSU procedure. On the other hand, the panel found that it was also allowed to scrutinise, by way of incidental review, the WTO-consistency of the amended regime as foreseen in Article 21.5 DSU; thereby it confirmed its earlier findings from the Article 21 (5) DSU report just outlined. Thus, while the US won the case, the EU’s main objection had been addressed as well. The retaliatory action was taken only upon multi-lateral authorisation in accordance with DSU rules, and the Article 21 (5) DSU examination was completed before such authorisation as well. At the same time, in the arbitration decision prop-

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erly speaking, the panellists enormously reduced the retaliation tariffs envisaged by the US from the previous 520 million dollars to an amount of 191.4 million dollars per year. Interestingly, the calculation was based on a hypothetical banana regime compatible with WTO rules, thereby rejecting the US approach based on an estimate of lost profits to American companies.

In its reaction to the decision, the EU affirmed that it would comply with it, but reserved its right of appeal\(^{199}\) which it, however, renounced at a later stage. On 7 April 1999, the US requested under Article 22.7 DSU the authorisation of retaliatory action to the extent allowed by the Article 22.6 DSU award. When this request was granted on 19 April 1999, the US had already taken action due to the pressure of internal lobbies; the final list of retaliatory tariffs had been published on 9 April 1999. Whilst the list comprised European goods as diverse as pecorino cheese, handbags, bed linen, lead-acid storage batteries and electrothermic coffee or tea makers, the Netherlands and Denmark were completely exempted from the sanctions which was apparently a reaction to their vote against the 1998 amended Banana regulation in the EC Council. A new controversy was in sight when – in a so-called “roundabout approach”– the US intended to change the list of products subjected to retaliatory tariffs every six month, thus causing additional hardship to European exporters; these plans were, however, withdrawn at a later stage.

On 19 November 1999, Ecuador, too, requested authorisation of retaliatory actions. This country is the world’s biggest Banana producer, supplying 30% of the world banana market in 2000, worth US$ 900 million, and is, therefore, particularly vulnerable to trade restrictions.\(^{200}\) The request for sanctions was aimed at “cross-retaliation” and was to cover specifically distribution services under GATS (distribution services sector), Article 14 (Protection of Performers, Producers of Phonograms and Broadcasting Organisation), Article 3 (Geographical Indications) and Article 4 TRIPS (Industrial Design). Trade in goods was not tar-

\(^{199}\) The object of the appeal is, however, not clear. Since the Art. 22.6. DSU award is definitely not appealable, only the Art. 21.5 DSU decision might be so, on the assumption that Art. 21.5. gives the right to a repetition of ordinary proceedings – an interpretation which the ruling of 6 April 1999 rather seems to exclude.

\(^{200}\) An estimated 1.2 million Ecuadorians, or 10% of the total population, depend on bananas for their livelihood. The 220 million Euro WTO compensation awarded to Ecuador last year was equivalent to almost one quarter of its exports to the EU - whereas the US sanctions were valued at a mere 1% of its total exports to the EU. In recent years, Ecuador’s exports have contributed about 39% and 25% of the banana imports of the EU and the US respectively.
geted as Ecuador was afraid of negative effects on its own economy which might have even worsened the current crisis. The Netherlands and Denmark were again exempted from the sanctions. As the EC objected to the level of suspensions proposed by Ecuador (US $ 450 million) and alleged a violation of the principles laid down in Article 22 (3) DSU, another arbitration procedure according to Article 22 (5) DSU took place, in which, on 17 March 2000, the arbitrators reduced the amount of suspensions equivalent to the level of impairment suffered by Ecuador to US$ 201.6 million.\textsuperscript{201}

6. The Final Settlement of the Dispute

To comply with the new finding, the Commission presented a new proposal,\textsuperscript{202} on 10 November 1999, containing two phases of amendments of the Banana regime, which was discussed in a controversial way and adopted with modifications by the Agricultural Council only in December 2000.\textsuperscript{203} Its essential features are as follows: in a first stage, three new tariff contingents are to be established. Contingent A comprises 2,200,000 tonnes at a tariff of 75 Euro per tonne. Contingent B, encompassing 352,000 tonnes also at a tariff of 75 Euro per tonne is a flexible contingent which can be adapted to the demand in accordance with an estimation of consumption (Article 27 Regulation 404/93) to be carried out in an administrative committee procedure. Finally, contingent C is an autonomous contingent, \textit{i.e.}, one not bound under previous GATT concessions, of 850,000 tonnes at a tariff of 300 Euros. Whereas all three quotas are open to bananas from any origin, ACP countries, in accordance with Article 168 (2) \textit{Lomé} IV Convention, enjoy a tariff preference both within and out of quota of up to 300 Euro. For imports exceeding the tariff contingent, the applicable tariff is still the former tariff of 793 Euro per tonne, reduced to 680 Euro after 1/7/2000, minus a certain reduction to be calculated in a complex way on the basis of tariff bids by importers. In order to remove the former discriminations in the reference-year based allocation of licences found to be in violation of GATT and GATS, the licences are now to be allocated on a “first come, first served basis”. In a second stage to enter into force after 2006, the regime is to be replaced

\textsuperscript{201} On this case, see E. Vranes, “Principles and Emerging Problems of WTO Cross Retaliation”, \textit{EuZW} 2001, 10.

\textsuperscript{202} On this, see H.-D. Kuschel, “Neuer Kommissionsvorschlag zur Einfuhrregelung bei Bananen ist wiederum nicht WTO-konform”, \textit{EuZW} 2000, 203.

\textsuperscript{203} On this, see European Commission (ed.), \textit{RAPID Memo} 1/135, \textit{The Banana Case: Background and History}, 11 April 2001.
entirely by a tariff-only system. However, before such a “flat tariff” can be applied, the Commission is to conduct negotiations with the main suppliers under Article 28 GATT, as the new tariff would involve a partial suspension of former GATT concessions.

Yet, this proposal was again attacked by the US as inconsistent with the 1999 arbitration report. In particular, the license allocation procedure was accused of leading to ship races to EC harbours. However, on 11 April 2001, a compromise was achieved between the European Commissioner for Trade, Pascal Lamy, and the new US Trade Representative, Robert B. Zoellick - old friends as the reports indicate.\(^{204}\) This foresees first that licences will again be allocated on the basis of historic references. Second, in another amendment to the Council Regulation, the B quota will be increased by 100,000 tonnes, whereas the higher taxed C quota will be reduced by the same quantity and exclusively reserved to ACP origin bananas, subject to an Article VIII GATT waiver which the US will help the EU to achieve. In turn, the US suspends the sanctions imposed on EU exports as of 1/7/2001.

Two weeks later, the dispute with Ecuador was also settled. Under this deal, country quotas will be lifted, import volumes from Latin American increased by 100,000 tonnes to 353,000 tonnes - in line with the US-EU agreement - and market access to traditional and non-traditional importers from Ecuador is improved. The implementing Regulation 216/2001 based on the EU’s agreements with the United States and Ecuador was adopted by the European Commission on 2 May 2001. The whole new regime is scheduled to enter into force on 1/1/2002.\(^{205}\)

All in all, the WTO challenges against the regime may thus be said to have been finally successful. This was different for national challenges by Germany and German importers as most of them failed. Nevertheless, they provide more interesting insights to the functioning of the multi-level constitutional system.

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205 Financial Times of 2/8/2001, p. 3, left column. In this article, potential problems in obtaining the Latin American producer countries’ consent to the waiver were reported.
III. Challenges of the Banana Regime before European and National Courts

1. The ECJ’s Judgement in Germany v. Council

After the enactment of the 1993 regulation, Germany sought to have it declared void in an annulment action before the ECJ. In its well-known 1994 Banana judgment, the Court refuted the German request. Germany had invoked more than ten objections against the regulation, most of which were “hopeless” from the very beginning because they were either manifestly unfounded or had already been in constant jurisprudence. Burdening the Court with these reflected a considerable degree of insensitivity and was prone to deviate the Court’s attention from the truly crucial issues.206 For example, it was clear that Germany could not reasonably invoke a violation of the objective to supply consumers at reasonable prices contained in Article 33 (1) (e), EC since the development of prices in the whole internal market needs to be taken into account and since the objectives of Article 33 (1) EC are anyway in part competing so that the legislator must necessarily enjoy a considerable degree of discretion in balancing them. The same is true for the objection according to which the way the tariff quota is allocated to conflicts with the objective of undistorted competition laid down in Article 3(f) EC. Here, it was sufficient for the Court to point to Article 42 EC, according to which competition rules shall apply to agricultural products only to the extent determined by the Council within the framework of the objectives and procedures of the CAP. However, the substantive law objections concerning violations of fundamental rights, namely the equality principle, the freedom of property and the freedom to pursue a business are absolutely crucial and merit closer inspection.

With respect to the objection that the establishment of a quota system and the allocation of the quota among the different economic operators constituted an infringement of the equality principle, the Court first stated:

“(…) It is true that since the Regulation came into force those categories of economic operators have been affected differently by the measures adopted. Operators traditionally essentially supplied by third-country bananas now find their import possibilities restricted, whereas those formerly obliged to market essentially Community and ACP bananas may now import specified quantities of third-country bananas. However, such a difference in treatment appears to be inher-
ent in the objective of integrating previously compartmentalised markets, bearing in mind the
different situations of the various categories of economic operators before the establishment of
the common organisation of the market. The Regulation is intended to ensure the disposal of
Community production and traditional ACP production, which entails the striking of a balance
between the two categories of economic operators in question. Consequently, the complaint of
breach of the principle of non-discrimination must be rejected as unfounded.”

Next, the Court discarded a violation of the freedom of property in a similarly wholesale
way:

“Both the right to property and the freedom to pursue a trade or business (...) are not absolute,
but must be viewed in relation to their social function. Consequently, the exercise of the right to
property and the freedom to pursue a trade or profession may be restricted, particularly in the
context of a common organisation of a market, provided that those restrictions in fact correspond
to objectives of general interest pursued by the Community and do not constitute a disproport-
ionate and intolerable interference, impairing the very substance of the rights guaranteed. The
right to property of traders in third-country bananas is not called into question by the introduc-
tion of the Community quota and the rules for its subdivision. No economic operator can claim a
right to property in a market share which he held at a time before the establishment of a common
organisation of a market, since such a market share constitutes only a momentary economic posi-
tion exposed to the risks of changing circumstances. Nor can an economic operator claim an ac-
quired right or even a legitimate expectation that an existing situation which is capable of being
altered by decisions taken by the Community institutions within the limits of their discretionary
power will be maintained, especially if the existing situation is contrary to the rules of the com-
mon market.”

The objection based on a violation of the freedom to pursue a profession was dealt with by
the Court in a somewhat longer passage which is nevertheless worth citing as a whole since it
also contains arguments relevant to the context of the equality principle:

“With reference to the alleged infringement of the freedom to pursue a trade or business, it must
be stated that the introduction of the tariff quota and the machinery for subdividing it does in-
deed alter the competitive position of economic operators on the German market in particular,
who were previously the only ones able to import third-country bananas free of any tariff restric-
tion, within a quota which was adjusted annually to the needs of the market. It must still be ex-
amed whether the restrictions introduced by the Regulation correspond to objectives of general
Community interest and do not impair the very substance of that right.

The restriction of the right to import third-country bananas imposed on the economic operators
on the German market is inherent in the establishment of a common organisation of the market
(...) The abolition of the differing national systems, in particular the exceptional arrangements still enjoyed by operators on the German market and the protective regimes enjoyed by those trading in Community and traditional ACP bananas on other markets, made it necessary to limit the volume of imports of third-country bananas into the Community. A common organisation of the market had to be implemented while Community and ACP bananas were not displaced from the entire common market following the disappearance of the protective barriers enabling them to be disposed of with protection from competition from third-country bananas. The differing situations of banana traders in the various Member States made it necessary, in view of the objective of integrating the various national markets, to establish a machinery for dividing the tariff quota among the different categories of traders concerned. That machinery is intended both to encourage operators dealing in Community and traditional ACP bananas to obtain supplies of third-country bananas and to encourage importers of third-country bananas to distribute Community and ACP bananas. It should also in the long term allow economic operators who have traditionally marketed third-country bananas to participate, at the level of the overall Community quota, in the two sub-quotas introduced.

With respect in particular to the applicant’s criticism that the application of the Regulation has given rise to trading in import licences between traders in Community and traditional ACP bananas and traditional importers of third-country bananas, to the detriment of the latter, it must be noted that Article 20 of the Regulation accepts the principle that licences are transferable. The practical consequence of that principle is that the holder of a licence, instead of himself importing and selling third-country bananas, may assign his import rights to another economic operator who himself wishes to import.

The principle of transferability (...) is not peculiar to the common organisation of the market in bananas, but exists in other sectors of agricultural policy, in particular with respect to trade relations with non-Member countries. Moreover, the transfer of import licences is an option which the Regulation allows the various categories of economic operators to exercise according to their commercial interests. The financial advantage which such a transfer may in some cases give traders in Community and traditional ACP bananas is a necessary consequence of the principle of transferability of licences and must be assessed in the more general framework of all the measures adopted by the Council to ensure the disposal of Community and traditional ACP products. In that context it must be regarded as a means intended to contribute to the competitiveness of operators marketing Community and ACP bananas and to facilitate the integration of the Member States’ markets. Accordingly, the restriction imposed by the Regulation on the freedom of traditional traders in third-country bananas to pursue their trade or business corresponds to objectives of general Community interest and does not impair the very substance of that right.”
Finally, the Court dealt with the alleged violation of the principle of proportionality. Surprisingly, this was done not in the context of the different fundamental rights, but in a separate paragraph:

“The applicant also argues that the arrangements for trade with third countries are in breach of the principle of proportionality, in that the objectives of supporting ACP producers and guaranteeing the income of Community producers could have been achieved by measures having less effect on competition and on the interests of certain categories of economic operators.

It should be pointed out in this respect that in matters concerning the common agricultural policy the Community legislature has a broad discretion which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. The Court has held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question (…)"

The Court’s review must be limited in that way in particular if, in establishing a common organisation of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility. In the present case, it became apparent from the oral argument presented to the Court that the Council *inter alia* had to reconcile the conflicting interests of some Member States which produce bananas and were concerned that their agricultural population living in economically less-favoured regions should be able to dispose of produce of vital importance for them and thus avoid social problems and of other Member States which do not produce bananas and were primarily concerned to ensure that their consumers were supplied with bananas on the best price terms and had unlimited access to third-country production.

The Federal Republic of Germany submits that less onerous measures, namely a more extensive system of aid for Community and ACP producers coupled with a system of levies on imports of third-country bananas serving to finance that system of aids, would have made it possible to achieve the objective pursued.

While other means for achieving the desired result were indeed conceivable, the Court cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted by the Community legislature if those measures have not been proved to be manifestly inappropriate for achieving the objective pursued.
The applicant has not shown that the Council adopted measures which were manifestly inappropriate or that it carried out a manifestly erroneous assessment of the information available to it at the time when the Regulation was adopted (...) Nor is it clear that the alternative measures suggested by the applicant are suitable for achieving the objective of the integration of markets, which is the basis of any common organisation of a market.

It follows that the complaints of breach of the right to property, disregard of acquired rights, infringement of the freedom to pursue a trade or business and failure to comply with the principle of proportionality must likewise be rejected as unfounded.

This massive criticism that this rather lax protection of human rights by the ECJ provoked may best be shown in an analysis of subsequent jurisprudence.

2. Subsequent Jurisprudence

The procedural complexity, the incisive economic impact of the Regulation on importers, and its unconditional approval by the ECJ generated a huge amount of litigation of which only two important “sagas” will be presented here.207

a) The T-Port Cases

The German import company T. Port started a true judicial cavalcade before national and European courts. In the first case, he had asked for additional licences for the time after 1993, exceeding the contingent fixed in the Banana regulation, for reasons of hardship. This request was based on the contention that its imports during the reference years for the allocation of the quota had been exceptionally low due to the economic breakdown of a producer. If the number of licences were not increased, the importer claimed to face bankruptcy. The request was first rejected by the Verwaltungsgericht (Administrative Court) Frankfurt and, on appeal, the Verwaltungsgerichtshof (Higher Administrative Court) Kassel.208 These courts refuted the plaintiff’s arguments according to which the Banana regulation was inapplicable since it exceeded the limits to European law set by the Grundgesetz, as interpreted in the Maastricht Judgement of the Constitutional Court.209

The plaintiff successfully challenged, still in interim proceedings, these decisions before the BVerfG, claiming that they infringed fundamental rights. The latter court’s decision, a

207 A complete overview for the period till 1/3/1996 is given by Everling, op. cit., 428ff.
208 The judgments are summarised in EuZW 1997, 61f.
209 BVerfGE 89, 155.
brief chamber decision taken by three judges, is highly interesting as it tries to avoid any conflict with European law by resolving the case exclusively under German law. The ruling is based on the freedom of property granted by Article 14 GG and the right to effective judicial protection enshrined in Article 19 (4) GG. According to constant jurisprudence, the latter also encompasses the right to be granted *interim* measures, particularly if the applicant is in danger of bankruptcy. In the Constitutional Court’s view, the Verwaltungsgerichtshof had violated these rights by ignoring that the Banana Regulation, on the assumption that it is to be considered as valid under constitutional law, left space for hardship measures. Thus, this Court managed to avoid, at least on the surface, any conflict by not addressing at all the plaintiff’s argument that the Regulation would be *ultra vires* on constitutional grounds. However, even though its result may appear plausible, the ruling circumvents the application of EC law without any visible justification: first, the admissibility of an *interim* measure would have had to be assessed in the first place under Community law, in particular under Article 186 EC, and not under a national constitutional provision. Indeed, the Verwaltungsgerichtshof had examined this question and found that the Community law requirements to grant *interim* relief were not fulfilled; therefore, the Constitutional Court’s ruling seems, indeed, to presuppose logically the primacy of the Article 19 IV Grundgesetz over EC law, or at least a “constitutional-consistent” interpretation of EC law.210 Similarly, if supremacy of EC law were to be taken seriously, the freedom of property and its scope of protection would have had to be dealt in its European, not national, version.211

Having been ordered by the Constitutional Court to re-examine the case, the Verwaltungsgerichtshof now granted additional licences for 2,500 tonnes in 1995 at a tariff of 75 ECU per tonne by way of *interim* measures. At the same time, it referred to the ECJ the questions of whether, as the BVerfG had suggested, the Commission was actually obliged to grant relief for hardship cases pursuant to Article 16 III and Articles 27 and 30 of the Regulation, and whether national courts would be allowed to grant *interim* measures before such action was taken by the Commission.

In its judgment *T. Port I* of 26 November 1996212, the Court answered that Article 30 (not Article 16 III) of the Regulation could, indeed, serve as a legal basis for hardship measures.

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212 Case C-68/95; German version reported in *EuZW* 1997, 671.
These would need to be granted by the Commission in the event that an importer suffered problems due to a low allocation of licences on the basis of economic anomalies in reference years for which he was not to be held responsible. Moreover, the ECJ held that the Commission’s jurisdiction for these measures was exclusive and that national courts were not allowed to grant interim relief themselves. The plaintiff’s only possibility would, therefore, be to challenge a Commission decision, or the omission of such in due time, before the Community courts. The grant of interim measures by the Verwaltungsgerichtshof was thus found illegal, without however any immediate consequences, in that the case had become moot.

While the references were still pending before the ECJ, the extra licences granted by the Verwaltungsgerichtshof had already been exhausted, and the plaintiff started other proceedings against the custom administration. Proving that he was already indebted by approximately 1,7 Million DM and that he would otherwise face immediate bankruptcy, he sought to achieve permission to import Dollar bananas without any licences and free of customs charges from the Hauptzollamt (customs administration) Hamburg and the Bundesfinanzministerium (federal ministry of finance). After this request had been denied, he seized the BVerfG by way of Verfassungsbeschwerde (individual constitutional complaint). In a decision of 26 April 1995, the BVerfG declared this complaint inadmissible, because the ordinary remedies before the finance courts had not been exhausted. However, the Court stated by way of an obiter dictum that it might be possible that the competent finance courts might temporarily suspend the application of provisions of the Regulation on account of the import regime’s potential incompatibility with GATT, which might be relevant under Article 234 (new 307) EC - an argument which had not yet been considered by the ECJ.

Following the Constitutional Court’s decision, the plaintiff successfully challenged the customs authorities’ decision before the Finanzgericht (finance court) Hamburg, by which it was granted interim measures against the fiscal administration’s refusal of imports of Dollar bananas without licences and free of duties. This Court acknowledged a “dominant probability” that the plaintiff would enjoy a right to import a certain quantity of Dollar bananas at a duty of 20% per tonne, which the Court agreed to convert to 75 ECU per tonne. This result was based on Article 234 EC, according to which the GATT – as interpreted by the first Ba-

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213 Reported in EuZW 1995, 412f.
214 As authority, the Court quoted Ch. Vedder, in Grabitz/Hilf (eds.), Kommentar zum EGV, Art. 234 no. 5.
215 Reported in EuZW 1995, 413.
nanas panel which had found violations of Articles 1, 2 and 3 - would take precedence over secondary EC Law. Under Article 234 (new 307) EC, Member States are justified in not applying secondary law incompatible with obligations arising out of international treaties concluded prior to the EC Treaty.

At the same time, the Finanzgericht court referred several new questions to the ECJ. The first question regarded the previously mentioned interpretation of Article 234 EC and the status of GATT in the Community legal order. The second question raised the issue of the validity of Regulation 478/95, since the finance court suspected a violation of the equality principle contained in Articles 39 and 42 EC and Article 13 GATT. The third question, conditional to a positive answer to the first two questions, concerned the issue of the invocability of GATT provisions by Community citizens. The finance court found that, following the constitutional court’s obiter dictum, it had the competence to decide in a procedure for interim relief on the conflict between Community secondary legislation and the international law obligations of the Federal Republic under the GATT. Moreover, the right to effective judicial protection contained in Article 19 IV GG presupposed that Community citizens may invoke certain GATT provisions. For otherwise, a judicial scrutiny of the GATT-compatibility of the Banana regime would not be possible at all, which would result in a lack of judicial control, as the possibility of invoking GATT provisions as “paramètre de légalité” had already been denied to the Federal Republic in the Banana judgment. Finally, the Court stated that, after the ECJ’s reply to the reference question, it might have to verify if the Community banana regime was constitutionally ultra vires according to the principles established by the BVerfG in the Maastricht judgment216 and refer the case to this Court.217

However, the decision to grant interim relief - not the reference to the ECJ - was quashed on procedural grounds by the Bundesfinanzhof (Federal Finance Court) following the appeal by the custom authorities. The Bundesfinanzhof held that an “anticipated” interim order such as the one granted by the Finance Court was procedurally impossible, but that this order might still be granted at a later stage through the suspension of the enforcement of a tariff decision. Following the appeal decision, the custom authorities claimed that the importer had to pay the punitive tariff for imports exceeding the quotas fixed in the Banana regulation, i.e., the amount of 850 ECU per tonne. Upon a new request of the plaintiff, the Finanzgericht

216 BVerfGE 89, 155, Maastricht
217 EuZW 1996, 128.
suspended the payment of the tariffs until such time as it had received the ECJ’s decision on the preliminary ruling mentioned earlier. This decision was once again appealed against by the customs authorities. This time, however, the Bundesfinanzhof upheld the lower court’s ruling.\textsuperscript{218} It fully confirmed the Finanzgericht’s view of the potential supremacy of GATT by virtue of Article 234 (new 307) EC. Elaborating on the latter’s reasoning, it added that the direct effect of GATT provisions might not even be relevant, since even a not directly applicable international norm might have to be considered \textit{ex officio} on account of the legality principle.

The Finanzgericht’s reference was answered on 10 March 1998 by the ECJ in the \textit{T. Port II} judgment. First, as to the effect of the GATT, the ECJ held that Article 234 EC did not apply to the present case. This was motivated by the reasoning that this provision would guarantee only pre-existing rights of a foreign State. However, Ecuador, the country of origin of the bananas in the case at issue, had joined the GATT/WTO system only in 1996, which excluded any pre-existing rights to be invoked under Article 234 (new 307) EC.\textsuperscript{219} As a consequence of this finding, the question on the internal status of GATT was no longer directly relevant for the decision, and the ECJ left it open. With respect to the second question, the validity of the above-mentioned framework agreement with some Latin American countries in general and the exemption of B-group importers from licensing requirements (which led to a price advantage of about 33\% as compared to A and C group importers), the ECJ first upheld the allocation of 50\% of the third countries’ tariff quota to the parties to the agreement, since, under Community law, no equal treatment duty would exist in respect of third countries. Moreover, in so far as a different treatment of third countries also entailed, as an “automatic” consequence, a different treatment of Community importers trading with these countries, this would be justified as well. However, this “automatic different treatment” was not found with respect to the granting of export licences. As expounded above, when importing bananas from the parties to the agreement, A and C importers were required to present licences whereas B importers were exempt from this duty. According to the Court, this different treatment amounted to a violation to the principle of equality set forth in Article 40 (4)

\textsuperscript{218} Reported in \textit{EuZW} 1996, 126.

\textsuperscript{219} It is interesting to note that the Federal Finance Court had defended the opposite view (\textit{EuZW} 1996, 127, sub II., 2.b), aa)) according to which the fact that Ecuador was not a party to GATT’47 was irrelevant on account of the “multi-lateralisation” of the MFN principle (quoting as authority: A Verdross and B. Simma, \textit{Universales Völkerrecht}, 3\textsuperscript{rd} ed. 1984, § 767).
3 EC, since it was not motivated by the objective of market integration and since the Council had not presented sufficient grounds of justification for it. This finding was repeated in the judgment Germany v. Council\textsuperscript{220} given on the same day, and led to a certain \textit{assouplissement} of the conflict as a whole.

However, \textit{T. Port}’s legal resources were not yet exhausted. After the ECJ’s decision in \textit{T. Port I} of 26 November 1996, in which Article 30 Banana Regulation was found to constitute a legal basis for hardship measures, \textit{T. Port} tried to use this possibility and, in December 1996, asked once more for the granting of additional licences on account of unusual difficulties encountered with Latin American suppliers during the reference years relevant for the allocation of its individual import quotas (Article 19 (2) Regulation) before 1993. Since the request was not answered by the Commission in the next two months, the plaintiff filed an action for failure to act pursuant to Article 175 (ex 232) EC. On 9 July 1997, the original application was dismissed by the Commission on the ground that sufficient grounds for hardship measures, and in particular also for the lack of negligence on the part of the applicant, had not been offered. This decision was challenged by the importer, but upheld by the CIF in its \textit{T. Port III} judgment of 28 March 2000.\textsuperscript{221}

In this judgment, the conditions for hardship orders were assessed so narrowly that the firm’s complaint had no chance from the outset. Thus, difficulties based on disruptions to agreements with producers that arose only after the adoption of the Regulation were rejected without examining any infringements of fundamental rights as a basis for hardship orders on the mere ground that these were not difficulties inseparably connected with the transition from the old to the new regimes.\textsuperscript{222} The effectiveness of legal protection in relation to hardship applications also leaves much to be desired. The description of the position in the \textit{T. Port III} judgment\textsuperscript{223} speaks for itself: “by registered letter of 16 December 1996… the plaintiff [against the background of threatening bankruptcy, C.S.] applied to the Commission for speedy adoption of a hardship measure, specifically the issue of additional import certificates for third-country bananas under the customs quota. Since the Commission did not respond to this application over the next two months, the plaintiff lodged a complaint for omission, by letter received on 27 February 1997… pursuant to Article 175 [old version]… by decision of 9 July 1997, the Commission rejected the applications made by the plaintiff by letter of 16 December 1996.” In the context of this litigation, one

\textsuperscript{220} C-122/95 and C-364 and 365/95.
\textsuperscript{221} T-251/97.
\textsuperscript{222} Case T-251/97, \textit{T. Port III}, para. 76.
\textsuperscript{223} Para. 13ff.
may, indeed, ask whether, on account of the long period of time which elapsed before the Commission’s answer to the request for hardship measures, the right to effective legal protection granted in national constitutional law (Article 19 (4) GG) is still sufficiently protected.

On the whole, with the softening of the ECJ’s Banana jurisprudence in *T. Port II* and the 1998 amendments to the import regime, *T. Port’s* problems seem to have been resolved, and at the time of writing no more actions are pending before European courts.

*b) The Atlanta Cases*

The *Atlanta* company established at Bremen is a traditional importer of tropical fruit. After the establishment of the new Banana regime, *Atlanta’s* imports had decreased, without any transitional periods and permanently, by 50%. Like *T. Port*, *Atlanta* was not able to substitute the amount of imports in dollar bananas that it had been deprived of under the new regime by the import of EC or ACP bananas, since such bananas were not available in sufficient quantities on the market, their producers being linked to other distributors by long-term contracts. The sudden decrease in supplies entailed the consequence that the complainant could no longer use his infrastructure (transport, cooling and ripening devices) built up in the course of decades in an economically viable way. As a result, several hundreds of workers were made redundant, and 8 out of 40 branch establishments were closed. Since the minimum capacity of the firm’s infrastructure was not ensured, *Atlanta* plausibly alleged that it would face imminent dangers of bankruptcy.

After the request for additional licences for the year 1993 (exceeding the contingent fixed in the Banana regulation) had been refused by the *Bundesamt für Landwirtschaft und Ernährung* (federal agency for agriculture), the importer challenged these decisions before the *Verwaltungsgericht Frankfurt*. Sharing the plaintiff’s objections on the compatibility of the import regime with European primary law and national constitutional law, the *Verwaltungsgericht* continued to raise doubts on the validity of the Regulation even after the ECJ’s Banana judgment. Therefore, by way of interim measures, the *Verwaltungsgericht* ordered the national administrative agency to grant additional licences to the plaintiff. At the same time, it referred the questions to the ECJ of whether the Regulation was valid in particular in respect of Article 190 EC (since the Council had not motivated the increase of the import tar-

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224 The facts are reported in *EuZW* 1997, 183.
iff and the allocation of the tariff quota), and whether and under which conditions a national court might grant interim measures against EC legislation upon whose validity it had doubts.

The ECJ answered these references in the two fundamental Atlanta judgments of 9/11/1995.\(^{225}\) As regards the first question, the ECJ confirmed its findings in the 1994 Banana judgment, and added that the motivation of the Regulation was sufficient as its essential objectives were plain from the its preamble, the general factual context and other EC legislation. As regards the second question, the ECJ, elaborating on its earlier jurisprudence in Zuckerfabrik,\(^{226}\) found that a national court may suspend the effect of EC legislation, but only under certain narrow conditions. First, the national court must have considerable doubt as to the validity of the Community act and refer any question of validity which has not yet been answered by that court to the ECJ. Second, the decision must be urgent in the sense that the temporary order is necessary in order to avoid the applicant suffering severe and irreparable damage. Third, the national court must adequately take the interests of the Community into account. Fourth, in the examination of all prerequisites, the national court must pay attention to the standing caselaw of both the ECJ and the Court of First Instance on the legality of regulations or a decisions.

Having received these answers, the Verwaltungsgericht continued to share the plaintiff’s objections with respect to the Banana regulation’s compatibility with German constitutional limits to European law as interpreted in the Maastricht decision of the Constitutional Court. Thus, this Court now referred the matter to the BVerfG for constitutional control in analogous application of Article 100 GG. In substance, the Verwaltungsgericht endorsed the main points of criticism raised in the literature\(^{227}\) and found that the hard core of the principle of equality, the freedom of property, and the freedom to pursue a business had been infringed by the Banana regulation. First, with respect to the objection of discrimination, the formula used by the ECJ in which “those formerly obliged to market essentially Community and ACP bananas may now import specified quantities of third-country bananas” is criticised as highly ambiguous and incomplete. In particular, it hides that, in the repartition of the quota for Dol-

lar Bananas, the reservation of a high percentage of it (30%) to a group of operators who were not previously engaged in trade with third country imports in any way, is completely unusual and evidently discriminatory. It was clear to all participants without any prognostic assessment of future developments that in the lack of long-term relationships with the producers, the quotas of Dollar bananas granted to EC/ACP operators could not be used, but would instead be sold to traditional operators of such bananas. Thus, the result of a “pure and arbitrary financial transfer from one group of operators to another” was undeniable and apparently accepted by the Community institutions, including the Court.²²⁸ Contrary to what may be inferred from the Banana judgment, it is rather obvious that such financial transfer was by no means necessary to integrate the market.

This reasoning with respect to the freedom of property and the freedom to pursue a business was found to contain important weaknesses, too. While it is generally accepted even by most national constitutions that the subsistence of market shares cannot be claimed, and that no legitimate expectations with respect to existing market situations can be recognised, real property investments in the producing countries and domestic ports and distribution networks were also threatened here. In particular, the sudden and forced limitations on imports at reasonable tariffs without transitional periods, which put the plaintiff in danger of bankruptcy, were prone to affect the very substance of the right or property.²²⁹ What is more, even though the Court mentioned in abstracto limitations on legal interventions (“disproportionate and intolerable interference, impairing the very substance of the rights guaranteed”), it did not balance in concreto the intensity of the impact of the Community measures on the vested rights of the economic operators on the one hand, and the necessity of the measures for the public interest on the other. According to general methodological standards recognised also under Community law, such a balancing analysis should, however, have been an integral part of the proportionality test. The Court’s deference to the Community legislator’s political discretion leads not only to the limitation of judicial review to manifestly inappropriate measures in view of the objectives pursued by the legislator, which are again uncritically approved; moreover, the complainant is allocated the burden of proof as to the superiority of the suggested alternatives. A legitimate proportionality check would, however, require the

²²⁸ See Everling, op. cit., 414 who stresses that this result was frankly admitted by the Council in the proceedings and even criticised by Advocate General Gulmann.

²²⁹ Such infringement in property rights is characterised as “Erdrosselung” (economic strangling) in German constitutional law.
Community legislator’s political discretion to be treated as entirely irrelevant; only the justification of the measures should be taken into account – and such justification should be verified by the Court according to objective and neutral standards.\(^{230}\) As Ulrich Everling convincingly stated, submitting the principle of proportionality to the discretion of the institutions in the way the Court has done grants them a *carte blanche* and reduces judicial control to a minimum.\(^{231}\) This may be argued to frustrate the intrinsic function of the proportionality principle which is to prevent excessive intrusions into subjective freedom rights and, more generally, to contain public power, thus ultimately contributing to the separation of powers by subjecting the legislature to a neutral judicial control. The conclusion which seems to underlie the *Verwaltungsgericht’s* reference was, to put it brutally, that the ECJ behaved as the Council’s and the Commission’s “house court” rather than as a true constitutional court which takes its mandate to defend individual rights in a credible way seriously.\(^{232}\)

**3. The BVerfG’s Banana Decision**

The answer to the *Verwaltungsgericht’s* reference by the Constitutional Court was given only after nearly four years when the *judge rapporteur* of the Maastricht Judgement, Paul Kirchhof, had already been succeeded by Judge Siegfried Broß. In its decision of 7 June 2000, the *BVerfG* rejected the *Verwaltungsgericht’s* submission as inadmissible in a tone strongly critical of the lower court.\(^{233}\) The pertinent reasoning, which takes national constitu-


\(^{231}\) Everling, *op. cit.*, 419.

\(^{232}\) The – provisionally – last European step in the *Atlanta* saga is the dismissal of the company’s claim for damages suffered by the application of the regulation. The appeal decision is the judgment in C-104/97 P of 14 October 1999, confirming the Court of First Instance’s judgment of 11 December 1996 in Case T-512/93, *Atlanta II* [1996] ECR II-1707.

tional law conflict avoiding capacities to an extreme,\textsuperscript{234} runs as follows: while the Verwaltungsgericht had set out its view of the unconstitutionality of the regulation in a way which met the requirements of Article 80(2) BVerfGG (Federal Constitutional Court Act), the special admissibility conditions for submitting provisions of Community law had, however, not been met.\textsuperscript{235} These followed from the Solange II decision, from which the BVerfG had not, contrary to the administrative court’s view, deviated in the Maastricht judgment, and also from Article 23 GG. According to these, the BVerfG would no longer exercise its jurisdiction over the application of Community secondary law as long as the EC, in particular ECJ case law, in general guarantees effective protection of fundamental rights against the power of the Communities in a way to be regarded as essentially equivalent to the fundamental-rights protection mandatorily required in each field by the Grundgesetz, and also generally guarantees the essential content of the fundamental rights. The concept of the co-operative relationship introduced in the Maastricht judgment showed no differences from this. A submission was accordingly admissible only where departure from these preconditions could be shown. This called for a comparison of fundamental-rights protection at national and Community level, as the BVerfG had undertaken in the Solange II decision.\textsuperscript{236} This was, however, lacking in the case at hand.

Furthermore, according to the BVerfG, the T. Port I decision, which had been taken in the meantime,\textsuperscript{237} was susceptible to refute the thesis of a negative fundamental-rights development in the EU, since, therein, the Commission was obliged to take all the transitional measures regarded as necessary.\textsuperscript{238} These were intended to enable the problems arising after the introduction of the common market organisation to be solved provided that they nonetheless had their origin in the situation of the national markets prior to the adoption of the regulation. The administrative court ought, at the latest after the BVerfG’s pointer to this judgment in its letter of 26 March 1997, to have recognised the inadmissibility of its submission and ought to have withdrawn it.

The answer by the administrative court’s presiding judge was, first, reproached of being formally incorrect since not he alone but only the whole chamber could accompany and alter the submis-

\textsuperscript{234} See, supra, chapt. I, IV, 5.
\textsuperscript{235} Decision, para. 53ff.
\textsuperscript{236} BVerfGE 73, 378-381.
\textsuperscript{237} Case C-68/95, [1997] ECR 61.
\textsuperscript{238} Decision, para. 49ff, 66ff.
sion decision until the BVerfG’s decision. Secondly, the statements were wrong in content. The presiding judge had answered that Article 30 of the banana regulation offered no means to remove the fundamental-rights infringements since the severity was not random but desired by the framers of the regime. Unlike in T. Port I, the plaintiffs did not ask for the setting of a different reference period for the import licenses due to them, but, instead, requested a general increase in the reference quantities in order to remove hardship associated with the introduction and allocation of the customs quota in general. Accordingly, this ultimately concerned not an individual case but hardship necessarily associated with the preferential treatment for EC and ACP bananas, and equally affected all German importers. These statements, according to the BVerfG, were in contradiction with the grounds in the submission decision, complaining mainly of the absence of transitional measures.

Finally, the BVerfG took no position at all regarding the constitutional implications of GATT/WTO law.

4. Critical Analysis

Commenting upon the “appeasement-type” reception of the ECJ Banana jurisprudence by the BVerfG, one may cast considerable doubt on whether European law actually offers a sufficient standard of hardship relief as alleged by the BVerfG (a), and whether this court’s self-restraint regarding constitutional review of European law is compatible with the Grundgesetz and a suitable means to guarantee the respect of human rights by the EC more generally (b). Against, this background, the practical consequences of the BVerfG’s decision may be analysed (c), and some conclusions for an alternative approach may be drawn (d).

a) The European Law Side: Effective Redress for Encroachments of Fundamental Rights through Hardship Relief Applications?

Whilst the BVerfG could probably have declared the submission moot under procedural law as the Banana regime had been fundamentally changed in 1998, from a substantive

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239 One may, indeed, be surprised that the BVerfG remained silent regarding the 1998 revision of the banana market regime. According to its existing case law (see BVerfGE 29, 325 (326); on this, E. Benda and E. Klein, Lehrbuch des Verfassungsprozeßrechts, 1991, no. 806; and D. Umbach, and Th. Clemens, Bundesverfassungsgerichtsgesetz, 1992, § 80, no. 81f), an amendment to a law while judicial review is pending leads to its being moot; no action to review the legality of moot acts (in which a plaintiff seeking, e.g., compensation, may have an interest) or comparable legal remedy is provided for in procedural constitutional law, and such application would accordingly fail at least because of the enumerative principle for constitutional actions. Finally, the new
law perspective the *Verwaltungsgericht’s* reasoned assessment of the fundamental rights was very convincing and hardly needs to have anything added to it in terms of content. What one is dealing with here is, in fact, textbook cases of fundamental-rights infringements, which could scarcely occur more clearly in conditions of rule-of-law, *i.e.*, in the absence of situations where the administration of justice and the protection of rights come to a stop - an assessment expressed, in similar terms, by former ECJ judge Ulrich Everling.

It is accordingly relevant whether - as indicated by the *BVerfG* - the ECJ decision in *T. Port I* previously mentioned can alter this constitutional assessment. The answer is, however, no doubt negative, in view of the narrow sphere of application and the careless treatment of hardship applications pursuant to Article 30 of the regulation by the European bodies. As already described by the presiding judge of the administrative court, such applications are by no means, contrary to the *BVerfG*’s presentation, admissible for all transitional problems associated with introduction of the new market organisation, but solely for those traceable to extreme disruptions during the reference years prior to the adoption of the relevant market regulation for the allocation of licences. These difficulties must additionally be inseparably connected with the transition from national regulations to the new regime and must not be traceable to lack of care by the market participants concerned either. The burden of proof for the meeting of all these conditions is on the firm.

As reported, the only decision, not even addressed by the *BVerfG*, on hardship provisions, the judgment by the Court of First Instance of 28 March 2000, *T. Port III*, assessed the condi-

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241 Cf., Everling, *op. cit.*, 401 (406): “It is difficult to imagine a clearer discrimination between operators (...) than that accepted here by the Court without profound examination”.


243 Case T-251/97, *T. Port III*, nyr, para. 70.
tions for hardship orders so narrowly that the firm’s complaint had no chance from the outset. Thus, difficulties based on disruptions to agreements with producers that arose only after adoption of the regulation were rejected without testing for any infringements of fundamental rights as a basis for hardship orders on the mere ground that they were not difficulties inseparably connected with the transition from the old to the new regimes. The effectiveness of legal protection in relation to hardship applications also left much to be desired.

These circumstances render quite illusory the assessment of the BVerfG\(^{245}\) that the administrative court ought, by the date of the pointer to the \textit{T. Port I} decision at the latest, to have recognised the inadequacy of its justification for its submission, and withdrawn it. Whether there is, in other respects, a contradiction between the statements of the presiding judge and the submission decision - as alleged in the decision - seems initially irrelevant for the test by the BVerfG, which is not bound by the scope of review indicated in the application.\(^{246}\) Additionally, the presence of a contradiction does not, on closer examination, seem compelling either - although a more detailed explanation of the situation by the administrative court would have been desirable. For the administrative court’s finding that such massive interference with ownership rights and professional freedom could, at most, have been justified if transitional measures had been taken does not mean that this is already the case if a legal basis for particular transitional measures is available. Instead, it is conceivable that - as stated by the administrative court’s presiding judge - the encroachments are so severe that they could not have been brought back to a constitutionally acceptable level even by transitional measures. This idea is even expressed explicitly by the Verwaltungsgericht in relation to the equality principle:\(^{247}\)

\begin{quote}
“whether equal treatment of both groups [of importers] could have been reached by introducing a transitional measure that would have allowed both groups to adjust to the new circumstances, or by allotting rigid quotas of EC and ACP bananas to the traditional third-country marketers, need not be gone into since in the chamber’s view the regulation challenged, which does not provide for such measures, infringes the plaintiff’s fundamental rights under Article 3(1) of the Grundgesetz.”
\end{quote}

\begin{flushright}
\textsuperscript{244} Case T-251/97, \textit{T. Port III}, nyr, para. 76.
\textsuperscript{245} \textit{Banana} decision, para., 67.
\textsuperscript{247} \textit{EuZW} 1997, 182 (189, bottom of left-hand column).
\end{flushright}
In the upshot, the BVerfG itself should have examined whether the recognition of a legal basis for particular transitional measures could have changed the constitutional assessment. In view of the massive fundamental-rights infringements and the shortcomings in dealing with hardship applications, the bare statement that the administrative court “could not, against the background of the T. Port I decision of the ECJ, deduce a general fall in the fundamental-rights standard in its case law” is not persuasive.\textsuperscript{248}

\textit{b) The Restriction of the BVerfG’s Power of Review}

In general respects, the statement that the Maastricht judgment has not departed from the Solange II decision in respect of the BVerfG’s power of review in the fundamental-rights area meets with no objection. For the formula of co-operative relations between the BVerfG and the ECJ introduced in the Maastricht judgment was in fact described there in direct reference to the Solange II case law to the effect that the ECJ would guarantee fundamental-rights protection in each individual case, while the BVerfG could confine itself to the general guarantee of the fundamental-rights protection mandatorily required by the Grundgesetz.\textsuperscript{249} Accordingly, the BVerfG would again exercise its competence in the fundamental-rights sphere only should the Community bodies depart again from the fundamental-rights standard attained at the point of the Solange II decision. Even the publications by constitutional judges Dieter Grimm and Paul Kirchhof cited by the administrative court in support of the alleged differences between the co-operative relationship described in the Maastricht decision and the Solange II decision allow scarcely any other conclusion. Thus, Grimm’s article says, \textit{verbatim}:\textsuperscript{250}

“Constitutional complaints and submissions by judges are accordingly inadmissible as long as breaches of fundamental rights in the individual case are asserted. They are, however, admissible if it is shown that the mandatory fundamental-rights standard is generally being missed. What that means in detail calls for further clarification…”.

As the last sentence indicates, the real problem thus lies in specifying the formula of the \textit{general guarantee of fundamental rights} taken as a basis in the Solange II and Maastricht decisions, whose absence is what leads to the activation of the review power of the constitu-

\begin{itemize}
\item \textsuperscript{248} \textit{Banana} decision, para. 67.
\item \textsuperscript{249} BVerfGE 89, 155 (175).
\item \textsuperscript{250} D. Grimm, “The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision”, \textit{Columbia Journal of European Law} 2 (1997), 229 at 228.
\end{itemize}
tional court in the first place. To flesh out this formula, especially in Paul Kirchhof’s publications, there are, indeed, indications pointing in the direction of the equation between “general” and “structural” assumed by the administrative court. Thus, as early as 1991, he had already mentioned three possible situations where involvement by the BVerfG might come into consideration: where protection of individual rights through Article 173 EC is inadequate, where particular types of fundamental rights are missing at EU level, and finally where the ECJ is “simply and generally” not capable of fundamental-rights protection. At least the first two situations are manifestly of a strongly structural nature. It seems only consistent from this viewpoint, too, to call any weaknesses necessarily associated with a particular methodical procedure for fundamental-rights review as “structural”.

Even a retreat to such a review of structural flaws is not unproblematic from the viewpoint of the Grundgesetz. For, in principle, the BVerfG, in contrast to other constitutional or supreme courts such as, in particular, the US Supreme Court, is obliged by Article 92f Grundgesetz and Articles 90ff BVerfGG to make a fundamental-rights review in the individual case. This requirement is obviously no longer guaranteed if particular weaknesses in fundamental rights protection by the ECJ are assessed as mere “slips” that do not yet add up to a structural shortcoming; also problematic, then, is the absence of equal treatment between possibly completely identical first cases that are still let by as slips, and later ones that amount to “the last straw”. Yet, this restriction on the criteria of review could presumably still be justified on account of the ratio of reconciling the constitution’s pro-European orientation embodied in the enabling clause on the one hand and constitutional human rights on the other.

Undoubtedly, this interpretation does not allow any breach of the constitution, but instead calls for the creation of as considerate as possible a balance between the conflicting constitutional principles; Article 23 Grundgesetz can accordingly be understood as a special “optimisation formula”. Thus, while single defects in the protection of individual human rights at European level are still tolerable, none of these rights may be given up completely. This dogmatic construction was already the basis for the Solange II decision, in which the waiving of review in individual cases was explicitly justified by reference to Article 24 Grundgesetz.

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old version, as long as equivalent protective instruments exist at European level.\textsuperscript{253} As Peter M. Huber\textsuperscript{254} has shown, this outcome can be obtained still more exactly by interpreting Article 19(II) Grundgesetz in the sense of the theory of the \textit{abstrakter Wesensgehalt} (\textit{i.e.}, the essential content of a constitutional human right, examined not in each single case, but in an abstract perspective encompassing all relevant cases), which can be equated with the formula of general guarantee of fundamental rights. In any case, however, it is the quality of protection of the individual right that is to be focused on. And as the administrative court has convincingly shown, specifically the protection of the right of ownership and professional freedom is, in view of the numerous methodical weaknesses in fundamental-rights review, in structural deficit not only in the banana judgment itself but in the area of the whole of agricultural market organisation law.

Against this background, the restrictive specification of the formula of general guarantee of fundamental rights given in the Banana decision seems scarcely compatible any longer with the guarantee of the \textit{Wesensgehalt}. It proves that even showing structural infringements of individual rights is insufficient; instead, a court making a submission must assess “the European legal development including ECJ case law since 1986” as a whole, and must also undertake an exhaustive comparison of fundamental-rights protection under national and European law. According to a first interpretation, this formula might allow compensation of the weaknesses in protecting particular rights by the strengths in the protection of others. It would, therefore, no longer guarantee the \textit{abstrakten Wesensgehalt} of the fundamental rights in question. In other words, market participants severely affected in their ownership rights and professional freedom would see themselves being told that, for example, freedom of religion and assembly and other fundamental rights were well protected against European institutions, so that a relevant fall in the fundamental-rights standard in the context of a general overall view could not be assumed.\textsuperscript{255}

\begin{footnotesize}
\textsuperscript{253} \textit{BVerfGE} 73, 339, 375f.
\textsuperscript{254} \textit{EuZW} 1997, 517, 519.
\textsuperscript{255} Additionally, the position that even structural infringements of individual basic rights are no longer enough to trigger the Federal Constitutional Court’s review power again also conflicts with the \textit{ratio} of the \textit{Ewigkeitsklausel} of Article 79(3) Basic Law (\textit{i.e.}, the “eternity clause” enshrining certain basic human rights and values which must not be renounced in any change of the constitution). For it is essentially intended to avert the danger that a departure from fundamental constitutional principles may sometimes - and as German history teaches, in fact much quicker than expected - become politically irreversible, and no longer removable by legal means.
\end{footnotesize}
This interpretation is admittedly countered by the new addition, in comparison with the earlier case law, on the general guarantees of fundamental rights: in that it refers to the “jeweils” mandatorily required standard in fundamental-rights protection”. Logically, the addition “jeweils” can be understood only as meaning not the individual case but, abstractly, the standard of protection required for each of the individual fundamental rights. Accordingly, at any rate in the case of particular fundamental rights, the proof of structural protective deficits should suffice. The only logical difference still conceivable from the administrative court’s position would, then, be that the requisite “general” proof of deficits in protection would have to be brought for the whole of Community law, and not only - as practised by the administrative court - in agricultural market organisation law. This interpretation would, admittedly, in turn, be in contradiction, to some degree, with the requirement formulated by the BVerfG to draw a comparison of the German and European protection of fundamental rights on the model of the Solange II decision, since the latter extended to more or less all fundamental rights. Yet, even this preferable interpretation ultimately seems scarcely compatible with the Grundgesetz. Since, traditionally, a great part of the property infringements complained of to the ECJ have to do with agricultural market regulation law, then the abstrakter Wesensgehalt and thus the general protection of property would no longer be guaranteed even once this is structurally in deficit in (only) this area of law - as shown by the administrative court.

Both interpretations are contradicted in methodical respects, moreover, by the BVerfG’s statement cited, that it “would not have been possible for the administrative court, against the background of the ECJ’s T. Port I decision, to deduce a general fall in the fundamental-rights standard in its case law.” For, if the complaint of a fall in general fundamental-rights standard presupposes a (negative) overall assessment of the development since 1986, and not even the showing of considerable defective developments in a whole area of law such as agricultural market organisation law is enough for this, then, conversely, one single (hypotheti-
(c) “pro-fundamental-rights” decision could not alter this overall assessment - unless different criteria are to apply to “pro-right” and “anti-right” decisions.

All in all, it is scarcely possible any longer to follow logically the fleshing-out of the formula of the general guarantee of fundamental rights, in view of the various contradictions, so that its more precise content, unfortunately, remains obscure.

\[c) \text{Practical Consequences}\]

One immediate practical consequence of the restrictive, unclear specification of the formula of general protection of fundamental rights is presumably that submission of provisions of Community law to the BVerfG for judicial review will scarcely be possible at all in the future. For the comparison of European and German fundamental-rights protection involves a task that can no longer reasonably be handled by a court, especially since it could easily be a topic for entire academic monographs.\(^{257}\) That the BVerfG has thrown out as inadmissible even the submission-decision of the Frankfurt administrative court, which was carefully worked out with exhaustive consideration of the literature, might, presumably, deter other courts from making submissions. A successful submission would thus seem conceivable at most where a court took up exhaustive academic preliminary work into its submission decision – a, perhaps, unusual procedure which could, undoubtedly, bring the BVerfG into fairly great embarrassment. Leaving this possibility aside, the Banana decision has presumably reduced the BVerfG’s power of review to a largely symbolic political significance - which was, perhaps, the court’s very intention.\(^{258}\)

It should be noted that the EU fundamental rights charter adopted at the end of 2000 will presumably end by making the investigation of the European fundamental-rights standard still more complicated. For, on the one hand, the charter is not legally-binding, while on the other, it is to be expected that the ECJ - as is the practice to date in respect of the constitutional traditions of Member States and the ECHR - will recognize individual constitutional rights listed therein as general legal principles of Community law; but difficulties will no doubt arise here, too, in the methodical quality of judicial review, something not even the charter can prescribe to the ECJ.\(^{259}\)


\(^{258}\) As already stated by H.-H. Rupp, JZ 1987, 241, in relation to the Solange II decision.

\(^{259}\) On further practical problems in judicially applying the charter, see J. Weiler, “Does the European Union truly need a Charter of Rights?”, ELJ 6 (2000), 95; Ch. Callies, “Die Charta der Grundrechte der EU”, EuZW
d) Overall Assessment and Conclusion

The Banana decision further confirms the failure of the concept practised by the BVerfG since Solange I\textsuperscript{260} of, on the one hand, verbal maintenance of a general power of review, and, on the other, a relative degree of flexibility in cases in which it might actually have been activated. For in its last Banana decision, the BVerfG was no longer constitutionally capable of giving the ECJ’s case law its blessing. In its fleshing out, the formula of “general fundamental-rights guarantee” is scarcely compatible with the Grundgesetz any longer, and not even internally consistent. The BVerfG has thus shown that it does not really mean to exercise its power of review, in the absence of having any alternative concept available.

One explanation for this behaviour is the negative assessment, evidently shared by the BVerfG, of the consequences of a domestic declaration of non-applicability of Community legal acts. Such action would, indeed, affect the legal cohesion existentially important to the Community - in which political consensus is, if anything, even rarer than in nation States. If one constitutional or supreme court began to declare Community law non-applicable domestically, it is likely that others would follow suit – the “cold war” logic of “mutually assured destruction” already pointed to above.\textsuperscript{261} Perhaps the least harmful consequence would be that the majority principle in the Council, laboriously re-introduced in the Single European Act, would de facto be rendered ineffectual. That these fears are widely shared is shown by the negative reactions, particularly of foreign observers, to the Maastricht judgment,\textsuperscript{262} which has brought out the possibility of national non-application of Community law more pressingly than did the earlier case law. In these circumstances, it is, indeed, comprehensible for the BVerfG not to wish to put integration at risk for a comparatively minor matter such as the banana market regime. Instead, clearly signalling to its own courts and also to foreign observers that it wanted to deal as little as possible with Community law seems to have been the preferable option. Though this retreat will no doubt have been noted with relief in many

\begin{thebibliography}{99}
\bibitem{260} BVerfGE 37, 271.
\bibitem{261} See, above, chapt. I.
\end{thebibliography}
quarters, the far-reaching sacrifice of fundamental-rights protection is undoubtedly an unprecedentedly high price for it. It accordingly ought to be the object of academic efforts and future BVerfG case law to develop an alternative approach which will make a certain degree of review over the ECJ possible, though without endangering the cohesion of the legal Community by declaring Community law inapplicable domestically.

IV. Evaluation of the Conflict and Conclusions for the following Analysis

To sum up, the Banana dispute may be found to be composed of several single substantive and procedural conflicts. The final arbiter conflict in the EU vs. national law relationship and the conflict over the recognition of the WTO as a genuine legal system in its relationship with the EU may be characterised as procedural conflicts. By contrast, the divergences among the scope of economic rights and free market vs. planified sectors of the economy in the EU vs. national law scenario, as well as those between free trade vs. protectionism and universalism vs. regionalism in the WTO vs. EU scenario, are truly substantive in nature.

In a summary evaluation of the substantive side of the conflict, it may be noted that the divergences among the EU and the WTO may seem to be stronger than the divergences among the EU and national constitutional law on the scope of economic rights and free market vs. planified sectors of the economy. Regarding the latter, both the national and the European system are made up of a mixture of economic models; both of them have free market-oriented and planified sectors in their economies, and it is mainly their more or less coincidental “misfit” that gave rise to the clash in the Banana conflict: Germany preferred a free-market system in the import of Bananas, whereas it might well opt for more planified or interventionist systems in other economic areas. Whereas the dirigiste system of the Common Agricultural Policy is clearly an exception to the overall market-based liberal economic system of the Community, the Grundgesetz does, by no means, exclude planified sectors of the economy such as agricultural market organisations; on the contrary, similar regimes have also existed nationally before their harmonisation at European level. More generally, the

263 A classic example which has general significance for all other market organisations are the milk market organisations which established a dirigiste system entailing huge restrictions on the market freedom of farmers, milk traders and processors. Thus, the Milch- und Fettgesetz (law on milk and fat) of 10 December 1952 obliged farmers to sell, by means of ordinary private law contracts, their milk to a certain dairy territorially determined by regional authorities (see P. Badura, Wirtschaftsverfassung und Wirtschaftsverwaltung, 1971, 167ff.). Milk traders or dairies that wanted to buy milk for processing or for resale were obliged to obtain it only
German constitution does not contain specific overall requirements for the economy and is therefore interpreted as being relatively neutral in this respect. Even the current system of the social market economy (soziale Marktwirtschaft) was denied constitutional status, and the legislator is generally accorded a great deal of discretion in economic matters by the BVerfG, while only extreme economic models such as a pure liberalist laissez-faire or comprehensive and rigid planification are constitutionally excluded.\textsuperscript{264} In line with this, the Verwaltungsgericht Frankfurt unproblematically presupposed the constitutionality of market organisations as dirigiste instruments in its reference decision. It even expounded that, under the circumstances of the case, the importer could have been aware of the establishment of such an organisation, and thus could not rely on an unlimited exercise of his commercial freedoms in the future. Nevertheless, the Grundgesetz’ fundamental economic rights and principles, such as the freedom of property, and the freedom to pursue a business on the one hand, and the social State principle on the other, necessarily entail important consequences for the German “economic constitution”. In particular, restrictions of economic freedom rights are always subject to rigid requirements, such as the protection of the hard core of a right and the principle of proportionality, which renders necessary inter alia periods of transition for the entry into force of interventionist measures. As becomes apparent from the Verwaltungsgericht’s reference decision, it is essentially here that the ECJ is criticised for weaknesses, and it is here - and not so much in the dichotomy of planified vs. free market economy - that the core of the substantive conflict seems to lie.\textsuperscript{265}

Notwithstanding the probably minor scope of the substantive conflict between EU and national law in comparison with the free trade vs. protectionism and the regionalism vs. universalism conflict in the EU-WTO relationship, both substantive conflicts, to a significant degree, endanger the effective relationship among the three constitutional levels. As regards

from certain dairies which were again locally determined by the authorities. These restrictive provisions were repeatedly challenged without success before administrative courts and occasionally even before the constitutional court. In many decisions, administrative courts justified the restrictions on farmers, milk traders and processors on account of public health rationales, in particular, the effective supply of this important product in cities. On this basis, even rationales such as the amortisation of investments of individual dairies were held to override the claims of farmers against the obligation to supply a certain dairy which paid less than others.

\textsuperscript{264} See BVerfGE 4, 7 (1954); BVerfGE 25, 1 (1968); BVerfGE 30, 292 (1971); BVerfGE 50, 290 (1978).

\textsuperscript{265} Even though this has not been discussed by national courts, the effectiveness of human rights protection - protected by Article 19 (4) Grundgesetz - may be a problem as well. Thus, as reported, in the Atlanta case, no answer was given by the Commission to an urgent request for an interim order.
potential solutions, there are no ready made conflict rules that indicate what principles and values should take priority over others. Instead, all the principles and values involved enjoy a significant degree of legitimacy – even protectionism when the survival of important parts of the domestic industry is at stake – and none of them can be easily sacrificed.

What is more, divergences among value perceptions and priorities are, to a certain extent, even unavoidable between three different constitutional systems based on different premises and objectives, and monitored by different judicial organs. Acceptable solutions may, therefore, only be achieved through careful and sensitive balancing of competing values and principles on a case-to-case basis. It is obvious that the procedural framework for conflict resolution becomes decisive under these conditions. It is precisely here that the shortcomings of the current interconnections between the systems which surfaced in the Bananas dispute – the last arbiter question and the non-recognition of GATT/WTO as a legal system – come to bear. And, fortunately enough, such procedural weaknesses should be easier to remedy than clashes among substantive values which are generally more deeply embedded in national systems. This confirms the importance of the central task of this thesis, namely, to establish a functioning interconnection between the three constitutional systems.

To overcome the current deadlocks in the interconnection of the three systems, the foregoing analyses have repeatedly shown that doctrinal possibilities are quite limited. Thus, in the EU vs. national law final arbiter conflict, the positions of both sides were logically perfectly consistent from the internal perspective of each of them, and the supremacy and final arbiter claims of both sides had to be acknowledged as equally coherent and cogent. The conflict was, therefore, ascribed strong structural features, which limited the potential of classic doctrinal devices from the very outset. Yet, both the doctrinal solutions currently available, the BVerfG’s constant threat to set aside a European act as unconstitutional – read by many into the BVerfG’s Maastricht decision –, and the far-reaching judicial self restraint displayed in the last Banana decision, needed to be criticised as being far from ideal. Whereas the former scenario always implied the “mega-accident” of the breakdown of the Rule of Law, the current scenario renounces any national constitutional control on the protection of human rights at EC level, which might, however, be said to be badly needed in view of the substantively and methodologically unsatisfactory human rights protection granted by the ECJ in Bananas and elsewhere. As both the solutions currently available are thus inadequate, any promising attempts to resolve or alleviate the conflict need to transcend the internal doctrinal perspectives of each legal order and to review the theoretical premises of the positions involved.
A very similar conclusion may be reached for the interconnection between WTO and EU law. As outlined, the current jurisprudence of the ECJ, in particular in *Bananas* and in *Portugal vs. Council*, may be criticised in many doctrinal respects. Thus, it was argued that it is barely compatible with Article 300 (7) (ex 228 (7)) EC, according to which international agreements entered into by the EC are binding on Member States and EC institutions alike – which, in a Community based on the Rule of Law, should also be read as requiring judicial control. What is more, the legality of the different treatment of the EC and its Member States with respect to the direct effect question may be questioned – as reported, the ECJ 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, whereas it discarded annulment actions by Member States on account of the alleged lack of direct effect of WTO law.\(^\text{266}\)

Yet, the language of the judgment, in particular the emphasis on traditional public international law notions such as reciprocity and the scope of manoeuvre of the legislative or executive organs, clearly indicates that the ECJ seems to care less about perfect doctrinal consistency or even the constitutional equilibrium among the EC and its Member States than about the Community’s sovereign power in external trade policy. All this shows the ECJ adhering to the traditional “realist” vision of international trade relations, in which sovereign States interact in an anarchic and power-oriented way. Consequently, a critique may most powerfully challenge not the Court’s doctrinal inconsistencies, but this theoretical vision itself.

On these grounds, the following analysis will transcend the internal perspectives of each legal order and adopt an overall perspective of the status and functions of the three constitutional systems as suggested by democratic, constitutional and legal-structural theories. This analysis will aim to flesh out a theoretical framework capable of providing normative guidelines for interconnecting the three constitutional levels in an effective, legitimate and mutually reinforcing way.

Part II: A Theoretical Reconstruction of the Functions of the Three Levels

“Post-enlightenment lawyers have separated social, political and moral theory from technical international doctrine... By leaving theory to others, modern lawyers accept irrelevance – to avoid controversy... But doctrine constantly reproduces problems which seem capable of resolution only if one takes a theoretical position. Because theory cannot be discussed in a specifically juristic way, technical competence offers no help and the lawyer’s very identity is imperilled.”

Matti Koskenniemi, From Apology to Utopia: The Structure of International Legal Arguments, 1989, p. XIII, XV.

For a reconstruction of the role and function of supranational regimes, a whole set of constitutional theories is available. The starting point of the following analysis is the traditional realist model which seeks to preserve the central role and supremacy of the State even in the age of globalisation. At the other extreme of the scale, one may locate functionalism which announces an ever stronger erosion of State sovereignty on account of the delegation of ever more policy fields to specialised, expertocratic supranational structures to whom superior technical problem-solving capacity is ascribed. Another important theory, neoliberalism, advocates a similar model: the supremacy of supranational regimes and their legal system is based on their higher capacity to achieve the paramount goal of establishing a regional or even global market, characterised essentially by economic freedom rights of market operators and undistorted competition. The last and most promising theory, to which this thesis will subscribe, is that of multi-level governance. It admits neither a general preference for the State nor for supranational regimes, but tries to integrate both into an overall system of network governance. Pursuant to this theory, the delegation of policy fields to supranational regimes is assessed in accordance with their problem-solving effectiveness on the one hand and their democratic legitimacy on the other. Each of these models will be shown to provide for a specific version of the interconnection of the three constitutional orders.

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267 For an instructive introduction in German, see P. Behrens, “Integrationstheorie”, RabelsZ 45 (1981), 8.
Chapter I: Realism

“Granting protection to GATT provisions within the Community legal order is detrimental, because just as military disarmament, legal disarmament, too, must be carried out in a reciprocal way. Unilateral concessions achieve nothing else but to provide advantages for disarmament’s enemies (...)”

Jörn Sack, Commission Official268

I. Conspectus

In its classic version, realism builds on the new European order established by the Westphalian Peace Treaties (1648), characterised by the emergence of “the State” as a transpersonal entity, based on a social contract among the individuals, representing a nation of people, enjoying the dominion of a territory and pursuing exclusively its own, self-determined interests – phenomena culminating in the notion of sovereignty, the State’s super-ordination to, and autonomy from, all other entities.269 As exemplified par excellence in the philosophy of Thomas Hobbes, the State perceived in this sense was understood as the sublimation of the crude state of nature, thus guaranteeing the security of its peoples and ensuring the preservation and expansion of its own power.

In this perspective, international relations are constituted by the interaction of sovereign territorial Nation States which pursue their preferences of power accumulation and wealth maximisation in an anarchic and competitive international environment through strategic rational decisions, with no higher authority effectively controlling and containing them. International politics, therefore, amount to a zero sum game over power, influence and resources. In this environment which obviously favours the powerful, international law is no law at all properly speaking; devoid of any significant degree of effectiveness, it is not able to control and contain the behaviour of States, but is largely reduced to a political tool for strategic negotiation in which sovereign States continuously test their powers against each other in bargainings, trade-offs and sanctions, which are used as the main implementation tool. International organisations, which flourished from the 17th and 18th centuries onwards in the form of

military alliances or peace orders, were viewed as devices in the power struggle among States compatible with their overall diplomatic strategies. However, just as with international law’s status vis-à-vis national law, truly effective international organisations were regarded as undesirable rivals of States.

Accordingly, in the field of international trade, law and international organisations are conceived of as strategic devices to, put bluntly, foster market access rights abroad for domestic producers and to deny them at home to foreign producers. To this end, partial liberalisation measures are traded against the concessions of other States. This conception may include the occasional disrespect for international law altogether when the other partners are not expected to react with sanctions, when a State is ready to accept such sanctions, or – under more elaborate arrangements - to pay compensation. Reciprocity rationales are invoked as the principal external justification of such protectionist strategic behaviour. In a simplified perspective this primitive system may be said to have continued to exist, albeit with important developments and exceptions, even after the Second World War under the GATT ’47.

Thus, in the seventies and eighties, GATT’ 47 was increasingly eroded by bilateral agreements such as Orderly Marketing Agreements or Voluntary Restraint Agreements stipulating quantitative restrictions against its wording and spirit. These agreements were often negotiated clandestinely, which led to a completely intransparent situation in which, at the end of the day, States could act relatively freely in a protectionist way. The EC was frequently alleged, not wrongly so perhaps, to be particularly fond of such bilateral agreements. This bias became visible once more 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 quotas, and obtained a waiver for the Lomé Agreement which was also suspected to be in conflict with GATT. The EC’s - finally vain - resistance against an upgrading of the GATT Dispute Settlement mechanism during the Uruguay Round may eventually be considered another expression of this overall approach.

However, traditional realist views were challenged with the increased awareness of international interdependence, which emerged in the early seventies as a reaction to the oil crisis and was further stimulated by the Club of Rome’s famous report on the limits of growth pub-

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269 See, on this and the following developments, the well-written account by M. Kaufmann, Europäische Integration und Demokratieprinzip, 1997, 190ff.


lished in 1972. The growing international interdependence was also reflected in the increasing number of transnational and non-statal actors such as multi-national corporations and non-governmental organisations pursuing social, environmental and ethical objectives. In general, international relations were about to take on a more stable institutional form, characterised by recognised and habitudinal patterns of co-operation with converging expectations. The central realist tenet, according to which international co-operation was typically based on a certain stable hegemonic distribution of power among States, was shaken by the proliferation of international institutions following the decline in US hegemony.

In international relations theory, developments led to the qualification and sophistication of realist concepts within the so-called “regime theory”. The proliferation of international regimes – generally defined as institutional arrangements for the collective management of political interdependencies in sectors which can no longer be effectively governed by States alone – was explained by the observation that “regimes continued in some measure to constrain and condition the behaviour of States towards one another, despite systemic change and institutional erosion.” This phenomenon was attributed to regimes’ functional advantages: they establish common rules to guide the behaviour of other actors, thus enabling an upgrading of the status and role of international law and ensuring foreseeability of decisions. They also provide information which furthers transparency and thereby facilitates policy choices. Lastly, by providing a normative and institutional framework for precise and stable agreements, regimes decrease transaction costs in international co-operation. In sum, in a public economy perspective, co-operation of sovereign States in regimes was shown as a rational and cost-saving behaviour induced by nothing else but the self-interest of States.

In a more political perspective, regimes were shown to be capable of enlarging the problem-solving capacities of States under modern societal conditions of complexity and fragmentation by providing them with an “extension of influence”, as it were, to the international plane, thus enabling them to play “two level games”:

“At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximise their own ability to satisfy domestic pressures, while minimising the adverse consequences of foreign developments.

Neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign."\(^{273}\)

The two level game pattern thus allows States to maintain their national actor perspective even while participating in a regime’s common institutions.\(^{274}\) In all this, the crucial realist element, the central role of State sovereignty, is still omnipresent: the sole purpose of international regimes is to render States’ policies more effective. Thus, States remain in a dominant and controlling position *vis-à-vis* all regimes, and States may, of course, leave any of them whenever they wish to do so. It is against this background that the realist reading of GATT/WTO, the EU and their relationship with their Member States needs to be viewed.

**II. A Realist Reading of GATT/WTO**

1. *Economic Explanations*

In the field of international trade, realist accounts frequently rely on economics, more specifically on classic free trade and modern political economy, to show both the virtues and the real-world obstacles to free trade. According to free trade theory, whose beginning is generally associated with Adam Smith’s famous Wealth of Nations (1776), 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 increases in welfare both at national and global level. Whereas this conclusion is generally recognised for bilateral or multi-lateral trade liberalisation, the case of unilateral liberalisation appears to be far less clear in economic theory. The dominant view seems to be that, even if trading partners continue to shield off their internal markets by protectionist measures, an increase only in imports may result in a productive specialisation in the domestic economy and, thus, in an increase in overall welfare of the country in question.\(^{275}\) Yet, it is rather obvious that these effects may come to bear only in the long run, and presuppose that the multiple institutional, logistic and organisational framework conditions and resources for such a productive specialisation are actually present.

__Quotations__


\(^{274}\) M. Kaufmann, *op. cit.*, 194.

The last observation already gives an idea of why unilateral trade liberalisation may face huge political obstacles within a State. This has been explored in more detail by political economy ("public choice theory").\textsuperscript{276} This theory starts from a contextual characterisation of national trade policy. Just as other sectoral policies, this policy is not devoted to the rather theoretical, abstract and hardly tangible aim of overall welfare, but instead to (partial) welfare interests of certain groups in society - and predominantly those which have most political influence. In addition, groups favouring protectionism, \textit{i.e.}, mainly domestic producers who make jobs available and largely contribute to a State’s tax revenue, often have a better lobby in a State than groups favouring trade liberalisation, \textit{i.e.}, consumers as well as import traders and export-oriented producers. Consumers, in particular, are generally less well organised, and thus can be disadvantaged more easily. 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. Thus, 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 measurable and calculable. As a result, only reciprocal trade liberalisation is normally politically acceptable. This depends, however, upon the co-operation of foreign States, which is normally beyond the influence of national governments.

These circumstances explain why the theoretically best solution for everyone, trade liberalisation, is not necessarily the most attractive one for national politicians committed to the goal of being re-elected. Instead, they are often inclined to pursue a double strategy which consists of ensuring a maximum of exports to other countries on the one hand, and of blocking the domestic market as far as possible for foreign products on the other. If it actually worked, this strategy might, indeed, be the best solution for the State in question. However, if several States behave in such way, the overall result will be protectionism on all sides, which is the worst case for everyone. If, however, all countries opt for free trade, this situation may well be the best in a long-term economic perspective, but it is only the second-best in political terms. This situation has been conceived of as a prisoner’s dilemma as described by modern game theory: each State must take its decision independently, and the value of the decision can only be assessed once the decision of the others is known. The free trade option becomes politically devaluated if the other party reacts in a protectionist way, in the hope that

\textsuperscript{276} See, for an instructive summary, W. Meng, “Gedanken zur Frage unmittelbarer Anwendung von WTO-
no countermeasures will be taken. In turn, protectionism is only reasonable behaviour if the other party does not react in the same way. All in all, one party loses out in the asymmetric constellations (free trade vs. protectionism), but both do 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 always 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 opt unilaterally for the asymmetric constellation. If this happens on a more frequent basis, the participants’ distrust will become so huge that protectionism will become the predominant behaviour.

2. Legal Implications

Against this background, “realist” international lawyers have recognised the need to stabilise the international trade system legally, in order to prevent States from being trapped in the prisoner’s dilemma, which is manifestly incompatible with the self-interest of States. Correspondingly, the up-grading of the WTO from GATT ’47, in particular as regards the establishment of a more effective dispute settlement mechanism, found wide support. This notwithstanding, GATT/WTO was denied constitutional status as a fully fledged legal system: in order to reserve to a State the possibility of non-compliance when paramount self-interests are deemed at stake, the “internalisation” of GATT/WTO law within the domestic legal system of its Member States is refused. Specifically, refusing to play the diplomatic game by accepting the internal applicability (direct effect) of GATT/WTO law is alleged to result in an unsustainable imbalance in the internal implementation of an international agreement to one’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 effectively enforcing international trade law before domestic courts. This State would thereby be deprived of the liberty of breaking international law when it deemed it appropriate, or to engage in diplomatic negotiation procedures with others whose outcomes need not necessarily be in conformity with it. As alluded to, this reasoning corresponds to the ECJ’s reciprocity-oriented justification for the denial of direct effect to WTO law in Portugal vs. Council, according to which the WTO agreements do not deter-

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mine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties. The additional emphasis on the Council’s and the Commission’s political scope of manoeuvring – which their foreign counterparts are alleged to enjoy - may be viewed in a similar light.

3. Critique

The realist assessment may be challenged on the ground that it underestimates the actual functioning of the WTO system and, therefore, prematurely gives way to alleged political constraints. For the reciprocity argument loses strength in particular when a politically independent legal dispute settlement mechanism exists which may be independently initiated by any single State, and whose decisions are almost always obeyed and implemented by the parties. Then, a major imbalance in the actual management of the parties’ obligations should no longer be of great concern.

Yet, the realist concept may be reproached as an even more fundamental error: if, on account of economic globalisation, neither the problem-solving capacities of the State nor those of the EU are actually sufficient, but additional supranational co-ordination of trade relations is actually needed at global level - and the evidence shows that this is so -, the reaction cannot be that that level’s impact on the domestic and European system should be minimised, which might lead to huge problems which put the Rule of Law in international trade relations at risk. Instead, conditions of legitimate governance should be established as far as possible at that level as well. The realist concept gives no answer to these questions.

III. A Realist Reading of the EU

Realist interpretations of the EU, focusing on the central controlling and commanding role of the Nation States individually within the supranational polity, are offered in a more empirical and a more normative version. Whereas the first argues that Member States do actually continue to possess the leading role in the European system, the second advocates that, irrespective of whether this is still the case in reality, Member States should, at any rate, retain or regain control over the integration process for reasons of democratic legitimacy.

1. Analytical level

While a functionalist reading of the European integration processed prevailed during the first years of the Community’s existence, an intergovernmentalist concept gained momentum
for the first time in French President General De Gaulle’s vision of a “Europe des Patries” propagated in the mid-sixties. Famously, this culminated in France’s boycott of Council meetings, the so-called “politique de la chaise vide”, which ultimately led to the 1966 Luxembourg agreement in which the unanimity principle for council decisions was de facto established. De Gaulle’s vision clearly entailed an emphasis on the authority, political effectiveness and even a kind of mystified, pre-democratic legitimacy of the Nation State, assigning to the EC only a technical role of co-operation, its authority being entirely derived from its Member States and their peoples. Yet, these concepts remained mainly at a propagandistic level and aimed to justify the French political behaviour, without being analytically elaborated very far.

After a few sporadic attempts with realist flavour, such as Donald Puchala’s reconceptualisation of the Community as a “system of concordance”277, the realist reading was consolidated with the extension of international relations regime theory to the Community. This approach was inaugurated by an essay by Stanley Hoffmann published in 1982278 and consecutively refined in the works of Alan Milward279 and Andrew Moravcsic.280 All these studies were premised on the fundamental observation that the Nation State, though having lost a great deal of its problem-solving capacities in economic, social and cultural matters due to the ever growing international interdependencies, continued to flourish as a centre of political power and a focus of its citizens’ allegiance and solidarity. This phenomenon was explained by re-interpreting the Community as a regime of sovereign Nations, as an institutionalised intergovernmental co-operation widening its Member States’ scope of manoeuvre through stabilising mutual relations, providing information and decreasing political, economic and social transaction costs by regulating certain policy fields together.

When the integration process regained momentum in the eighties, this explanatory model was even extended to matters decided by majority-voting (which was reintroduced in the Single European Act 1986) and more generally to the functioning of the EC’s central institutions such as the Commission and the EP which enjoy a considerable amount of autonomy. In the realist reading, though a State would occasionally be forced to act against its will, all

278 S. Hoffman, “Reflections on the Nation-State in Western Europe today”, *JCMS* 20 (1982), 21
these devices were argued to serve ultimately its interest by rendering statal policies more effective. The key feature on which this thesis was based was the option of enabling States to play “two-level games”. Such games allegedly increased the power of the executive vis-à-vis the national legislature, in particular by reducing its right of assay in complex legislation to the yes/no alternative in council decisions and treaty amendment ratification procedures. Furthermore, unpopular decisions, which would not have been accepted nationally, could frequently be shielded off from national discourse altogether (on account of the non-public nature of Council deliberations) or, if that was not possible, at least attributed to some European scapegoat without damaging the government’s national reputation very much. Such strategies were further facilitated by the Community’s high dependence on law and legal dispute resolution, as alleged legal constraints were frequently used as a tool for the de-politicisation of “hot issues”, with law enjoying a higher degree of legitimacy than politics in common European tradition. At European level, the scope of manoeuvre of national governments was widened by the possibility of designing package deals containing some “sweets” for everyone, and of offering, or claiming, side payments as well as other compensatory mechanisms. All in all, in Luhmannian terms, the main asset of the Community in the realist view was to provide an important Entlastungsfunktion (discharging function) for the Nation State.  

If single parts are plausible, the realist interpretation of the Community may be shown to be too one-sided, sub-complex and therefore ill-suited to explain the integration process as a whole. First, even though States were important actors during all the integration process, realism tends crucially to underestimate the importance of European institutions, which have progressively developed a life of their own, as well as the even more autonomous role of European law. Thus, classic literature, such as Joseph Weiler’s “The Transformation of Europe”, has shown that the ECJ’s “constitutionalisation” doctrines such as direct effect and supremacy most importantly, which were developed in an incremental and scarcely perceivable way, provided extremely important framework conditions of the integration process – and not only were they not contemplated in the founding treaties, they were not even consented to by the Member States at later stages. Indeed, Moravcsik himself has admitted that the phenomenon of the constitutionalisation of the treaties could no longer be explained meaningfully from a regime theoretical perspective, since the ensuing loss of sovereignty rights was simply too massive as to be rationally explained by the mutual advantages of the

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281 See, for an introduction, S. Machura, “Niklas Luhmanns «Legitimation durch Verfahren» im Spiegel der
States. However, following another famous essay by Joseph Weiler, it is exactly the dualism between the Member State-dominated political institutions and the relative autonomy and strength of a directly applicable and hierarchically superior supranational legal order that conferred stability on the European system.

As regards the Commission, this institution has always had a dominant influence on the EC’s core competence of market regulation. This is legally due to the Commission’s monopoly of legislative initiative, the introduction of qualified-majority voting in the Council (which enabled the Commission to disrespect national minority positions), as well as its strong competencies in enforcement of EC law; practically, this is due to the Commission’s bureaucratic know-how and its central position in co-ordinating the other actors of the European system. In addition, more recently in the so-called “new approach” to market regulation started at the end of the eighties, the “dualist supranational” distinction between the Member States’ dominated political institutions vs. the supranational legal system’s autonomy began to fade even further. This became manifest with the rise of new private-public governance structures surrounding the Commission such as standard-setting bodies, agencies and committees, which were allocated fundamental tasks inter alia in agricultural, foodstuff, and environmental regulation. These structures have created a more political administration which escape dominant influence and control by Member States, the Council’s role being restricted to enacting framework legislation, which is often less controversial.

To sum up these objections: if single parts of it do seem plausible and are capable of clearly explaining the State’s behaviour, particularly at important political junctures in the integration process, the realist interpretation as a whole is too one-sided, sub-complex and thus ill-suited to provide a convincing overall framework for the interpretation of the European system. In other words, if Europe promotes the scope of manoeuvre of Nation States and enables them to play “two level games”, this is probably not the most important part of the whole story.

However, the realist interpretation of Europe does not end here. There are also important voices which stress that, even if, in reality, the Member States may have lost control of the integration process to a considerable degree, this development is normatively undesirable or

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even dangerous on account of a lack of democratic legitimacy, and should, therefore, be stopped or even reversed. Among such normative perspectives, the German BVerfG’s “Staatenverbund” concept spelled out in the Maastricht judgment and the scholarly concept of “administrative supranationalism” deserve particular attention.

2. Normative level

   a) The “Staatenverbund” Concept

   The Maastricht judgment was rendered on an individual complaint (Verfassungsbeschwerde) against Germany’s ratification of the Treaty of Maastricht, which argued that this would be unconstitutional. The judgment, which was drafted by constitutional law professor and judge rapporteur Paul Kirchhof and, indeed, contained a somewhat diluted version of his views published earlier,284 confirmed and refined earlier jurisprudence on the constitutional limits to integration. These were found to exist in particular in the area of human rights and competence where the BVerfG announced the possibility of stepping in were the Community not to respect the indispensable minimum standard contained in the Grundgesetz. Beyond this, it also claimed limitations on majority decisions in the Council, arguing that the majority principle was limited by the principle of mutual solidarity where constitutional principles and elementary interests of the Member States were at stake.

   However, the main political thrust of the judgment were objections to integration derived from the principle of democracy which the BVerfG – faced with an individual action, for which the violation of an individual constitutional right needed to be invoked – addressed by means of a complex detour via the voting rights laid down in Article 38 Grundgesetz. According to this court, democracy is essentially rooted in the “people”, the demos of a Nation State, which constitutes a pre-democratic community of fate which shares a high degree of background consensus on the polity’s most important political problems. And since it is clear that in Europe no such relatively homogeneous spiritual, cultural and political entity exists, the democratic potential of Europe is regarded as limited. Accordingly, the BVerfG concluded that Germany’s membership in a Community of States performing sovereign tasks was, of course, not excluded, but that its competencies should be limited and that the national

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representative institutions would need to retain “a sufficient number of tasks and competen-
cies of substantial political weight”. Finally, the BVerfG manifested its views also by invent-
ing a new name for the EC. Instead of Community, it created the new term “Staatenver-
bund”, which arouses associations to the old public international law concept “Staatenver-
bund” (confederation) and whose essential content seems to lie in its unsuitability for democ-
Subsequently, these criticisms were taken up and refined by several authors. The German
contitutional law scholar Marcel Kaufmann explored the consequences of the Staatenver-
bund concept for a Member State and, thus, linked it to regime theory. According to this
author, it is true that the State remains the ultimate locus of democracy, so that the Commu-
nity’s powers can only be derivative; this notwithstanding, a Member State of the EC is no
longer a classic sovereign Nation State, but a modern integrated State whose very identity is
deeply transformed by its ideal, institutional and normative allegiance to the Community; the
Community is thus seen as a stage in a State’s evolution. Consequently, it is not only the
Community which shall respect the State’s identity, but also vice versa. However, if national
sovereignty is no longer present in the Community’s daily business, it is nevertheless consid-
pered as retained in the State’s capacity to recover potentially unlimited scope of action by
discarding European law in conflict with national constitutional law or by leaving the Com-
munity altogether. Thus, the lacuna of regime theory, the allegedly far-reaching autonomy of
the European legal system, is claimed to be filled – albeit only by defining it away in contra-
diction with reality.

b) Administrative Supranationalism

Whilst it was sometimes argued that the Maastricht judgment was a typically German
product, simultaneously reflecting at the same time a high degree of constitutional sensitivity
and a reliance on an outdated “demos-bound” concept of democracy, similar democratic con-
cerns have also been raised more recently by the American author Peter Lindseth. This

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285 In a trenchant criticism, J. Weiler (“Der Staat «über alles»”, JBÖR 44 (1996), 91) has linked this concept –
for which constitutional lawyer Hermann Heller was quoted as a source - even to the chief Nazi legal ideologist
Carl Schmitt.

286 See Kaufmann, op. cit., 188ff., 337ff., 404ff.

287 P. Lindseth, “Democratic Legitimacy and the Administrative Character of Supranationalism: The Example
scholar has analysed in more detail the implications of the “no-demos conception” on the legitimacy of Community institutions, law and appropriate devices of control. His main reasoning runs as follows: whereas national administrative agents mostly enjoy implicit popular confidence owing to the membership in the same community, supranational governance is deprived of the cultural, social and historical underpinnings of the modern administrative State. This lack renders supranational governance fragile, and continually exposed to the threat of social and political backlash, which needs to be taken into account also within an assessment of the European system’s effectiveness. Signs of this backlash may actually be observed in the various anti-Europe movements existing in several European countries.

Furthermore, this author does not overlook the fact that the diminishing problem-solving capacities have strained the idea of the Nation State as the ultimate locus of sovereignty and increased the range of supranational powers up to a point at which the construct of delegation of administrative powers to the EU has become mere fiction. Indeed, the notion of delegation presupposes that the principal is, in theory, capable of doing the job himself. However, in the European reality, EU Member States would no longer be able to cope with the EU’s tasks themselves, and the value of European integration lies precisely in the “surplus” in governance and problem-solving capacities created at supranational level. In other words, this means that the existence of “governance without government” entails the presence of “agents without principals”. However, and this is Lindseth’s crucial point, sovereignty and delegation of power would retain significance in a cultural and spiritual sense, in so far as they continue to shape popular understandings. These are viewed as “empirical realities in their own right”, since a viable political system needs to be supported not only by élites but also by the broader population.

As a consequence of the lack of demos-based legitimacy, the European system should be viewed in an administrative law perspective (“administrative supranationalism”). In this perspective, the European treaties constitute mere enabling legislation, the legitimacy of which is channelled through the national constitutional States separately. Administrative law devices should also be made use of to control and supervise the normative and executive powers delegated to supranational institutions. Treaty interpretation by European courts, in particular in the fields of competence and subsidiarity, should be guided by an “in dubio pro mitius” principle as opposed to the ECJ’s well-known teleological “preference for Europe”; in addition, a European conflict tribunal should be set up to decide more neutrally than the ECJ on the division of competencies among the EU and its Member States.
c) Critique

The main objection that may be raised against both the *Staatenverbund* and the administrative supranationalism concepts is that their normative claim is simply incompatible with reality. If, on account of the increasingly transnational character of many economic and social activities, the problem-solving capacities of the Nation State are no longer sufficient, and the need for effective transnational co-ordination emerges, the latter may not reasonably be denied or curtailed on account of democracy objections. In other words, if, due to the complexities and scope of the European system, the construct of “delegation” increasingly becomes mere fiction, this fiction may not simply be upheld for the reason that it is rooted in the social, historical and cultural perceptions of the people. With the probably inevitable further intensification of European integration, this would only widen the gulf between the national *demoi* and the European institutions. But worse than this, stopping or reversing the process of European integration on account of a perceived lack of democratic legitimacy would leave a vacuum, as certain transnational phenomena with which the Nation State can no longer cope would simply be left uncontrolled, prone to the market or other uncontrolled orders. It is obvious that such a development, in particular should it further affect the *acquis* of the European social States, would have extremely negative consequences for the European citizens. Against this background, the only possible way out of the dilemma should be clear: autonomous democratic legitimacy of European governance, which should be able to supplement the democratic legitimacy derived from the Nation State, should be promoted in the overall multi-level system. Such an attempt, which must, of course, overcome the narrow *demos*-based concept of democracy, will be sketched out later.

**IV. The Realist Version of the Relationship among the Legal Orders**

This criticism against the realist reconceptualisation of the EU would not, however, be entirely persuasive if the central claim of the normative models, the concept of “dormant sovereignty” - which may be activated by a State when it deems appropriate by striking down unconstitutional European law – were really true. It has already been stated that, on this point, the doctrinal views of European and national law diverge fundamentally. Thus, the analysis also needs to be pursued at a higher level of abstraction, by resorting to legal-structural models about the relationship of the European and national legal orders. Among these, several
authors have used the conceptual apparatus of the Pure Theory of Law developed by Hans Kelsen and his followers, which may, indeed, seem to be a promising approach.288

The Pure Theory defines as a legal system a set of norms which have been recognised as a unity, understood in the sense that all of them may be traced back to a common reason of existence, a Grundnorm, which, however, remains fictitious. The Grundnorm is hierarchically the highest rule for law-creation, and it commands the validity of all subordinated norms. In such a “chain of validity”, any subordinated norm also commands, besides its other contents, the validity of the norm subordinated to itself.289 As a consequence, the criteria relevant for assigning norms to a common Grundnorm become decisive. According to Kelsen, a legal system deriving from a common Grundnorm presupposes that the effectiveness of all its norms is guaranteed.290 As a criterion to measure such effectiveness, Kelsen relies on the availability of powerful sanctions, capable of enforcing legal rules against their addressees’ will.

This conceptual apparatus has been applied to the relationship of the supranational legal order with national law: from the EU’s coming into existence through an international treaty, its subsequent evolution brought about by amendments to the founding treaties, and its sub-


289 Famously, Kelsen, drawing on this approach, characterised the relationship between the international and the national legal order as monistic. He conceived of monism as the only logically possible solution, since the law would be indivisible and no legal subject could face the conflicting commands of several legal orders (which might happen under a dualist system) - or, following his famous quotation from the Bible, “no one can serve two masters” (Matthew VI, 24); cf. H. Kelsen, Reine Rechtslehre, 2nd ed., 1992, 330.

290 H. Kelsen, Reine Rechtslehre, op. cit., 196ff. This requirement imports so to speak an “impure” empirical element into the Pure Theory of Law. It presupposes that the recognition of a legal system is only possible if its rules’ normative character is ensured effectively. Thus, this requirement ensures that valid law cannot simply be created in the moment of its construction by legal science, but can only be the product of “real world” social interaction. For a different view, see Grussmann, op. cit., at 50: The effectiveness of an order of norms would only be an arbitrary criterion for the heuristic value of the assumption of its validity. It remains, however, unclear what may be gained analytically by recognising non-effective systems as legal orders. On these problems, see H. Dreier, “Sein und Sollen. Bemerkungen zur Reinen Rechtslehre Kelsens”, in idem (ed.), Recht-Moral-Ideen, 1981, 217, 222.
sisting dependence on the national ratification statutes, Marcel Kaufmann⁹¹ and Theodor Schilling⁹² have inferred its subordination and dependence from a *Grundnorm* contained in national law. Thus, this reconstruction leads to a monistic model in which EU law would be subordinated to national law. This reconstruction is mainly based on the claim that EC law would not possess any effectiveness independent of national law, and, therefore, no validity as an autonomous legal order,⁹³ because it would prove ineffective in hard conflicts with national law. This would be further justified by the fact that most European constitutional courts reserve themselves the power to review European law on grounds of constitutionality. Since the EC does not, to a large extent, dispose of its own administration and, therefore, has to rely on national administrations sworn to uphold their constitutions, EC law would not be able to impose itself over national law in cases of hard conflict. For this reason, only “nationalised EC law”, *i.e.*, EC law compatible with the criteria of validity derived from a national *Grundnorm* and, therefore, applied by national administrations, would be effective. EC law would thus remain integrated in the chain of validity of the legal systems to which it owes its very existence: the national legal systems.

As a result, EC law would be a - not necessarily uniform - appendix of the legal orders of all Member States. The threat of splitting should, however, be avoided by means of the self restraint of national law, ordained in “opening clauses” like Article 23 GG, which mandate national law to take account of the objectives and needs of the integration process through an optimisation of conflicting European and national principles. This interpretation is alleged to have the advantage that it allows for the use of the Member States’ potentials of democratic legitimacy for the EC. Finally, conflicts of validity between the two orders could be avoided, and conflicts among norms would remain in the sphere of law, with their solution not requiring a choice between law and “non-law”.

As a first comment on this monistic model, one may point to its threatening, though barely realistic, implications for the stability of the European *Rechtsgemeinschaft* (legal commu-

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⁹³ Kaufmann, *op. cit.*, at 540.
nity). In particular, the EC would, in principle, be vulnerable to any intervention by a Member State, without having any defence. If a Member State were to give up its constitutional self-restraint and simply to abolish the whole Community with respect to itself by repealing its ratification statutes, sanctions according to Articles 226 ff (formerly 169 ff) by the EC would have to be viewed as non-law or, at least, as per se illegal, since they would not be compatible with the national Grundnorm. Thus, the EC would only exist by the grace of the Member States, and could barely guarantee the essential uniformity of its law.

However, this type of reconstruction does not resist closer inspection for several reasons. In a first line of criticism, it may be objected that it is by no means clear that EC law would not be effective at all in the case of hard conflicts. As already stated, EC law sanctions might be adopted vis-à-vis Member States which fail to respect either EC legislation or the fundamental values and principles of the Community order (Article 226-228 (formerly 169-171) EC and new Article 7 EU). These might be implemented, at least in part, by Community institutions only (e.g., by blocking any financial transfers to the State in question), so that the impact of the potential refusal of national organs to implement EC law might be considerably weakened. Beyond this, it is important to note that additional sanctions of other Member States (which would act as a sort of guarantor or trustee for the EC) pursuant to international law against a Member State which fundamentally and repeatedly disobeys EC law, thereby departing from the basis of the EC’s “self-contained regime”, would, as ultima ratio, also seem to be possible. The probable strength of EC law and/or international law sanctions is further supported by the appreciation that an outbreak of a “Cold War” and a possible suspension or termination of the membership of the Community might have such negative political and economic consequences for the “disobedient” State that it could barely allow itself to insist on its position without accepting a compromise in which the controversial EC provisions would regain at least part of their effectiveness. Taken together, these possibilities guarantee a considerable degree of independent effectiveness to the European order, which would seem to exclude its monistic subordination to national law.

In a second and even more persuasive line of criticism, it should be stressed that the exclusive reliance on sanctions in order to measure the effectiveness of a legal order seems to be misguided in the first place. This perspective ignores the fact that more than from sanctions, the effectiveness of a legal system derives from voluntary compliance. This phenomenon is absolutely crucial, not only because systematic non-compliance on a large scale could barely be dealt with effectively by any enforcement mechanism and would, therefore, almost
inevitably lead to the collapse of any legal system. Also, from a democratic point of view, a system which needs to resort to sanctions on a regular basis is likely to lack legitimacy.

Elaborating on the preconditions of States’ compliance with international law, modern research has brought to light a bundle of concurring elements:294 (1) considerations of legitimacy and distributive justice inherent to international law, (2) the iterative process of discourse among the parties, the treaty organisations and the wider public and, more generally and convincingly, (3) transnational legal process as such, i.e., “the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalised by domestic legal systems. This approach may be said to encompass and refine the others, in that it attaches central weight to “(...) the pathways whereby a “managerial” discourse of “fair” international rule penetrates into a domestic legal system, thus becoming part of that nation’s internal value set.”295 These grounds for compliance apply with particular force to the “constitutionalised” European system in which the internalisation of Community norms and principles has already gone much further than in traditional international law.

Thus, it seems even misleading in the first place to base a structural assessment of the interface of the two orders exclusively on the most exceptional situation of the internal disapplication of EC law by a Member State on constitutional grounds – a revolution-type situation which has never happened to date and on whose ultimate consequences one might only speculate. Considering the ordinary functioning and interconnection of the two systems in the light of compliance rationales, it should instead be admitted that, within the ever wider fields of its competence, EC law de facto sets the basic legal “validity criteria” (i.e., norms close to the Grundnorm in the “validity chain”) alone, which are then “internalised” and implemented by national law, mostly without any supplementary internal “validity check” or other kind of second-guessing. In this context, it may be even more important to observe that by transferring important regulatory tasks to the Community, the know-how, often both scientific and administrative, and the institutional infrastructure necessary for problem-solving will have moved to European level as well. Thus, many regulatory fields have become so complex and diverse that it is factually increasingly difficult for the Member States to exercise any meaningful national “validity-check” at all. This development is reflected inter alia in the fact that, to date, such checks have only been considered for human rights and competencies by the

295 Koh, op. cit., at 2601ff.
Although these fields are, of course, highly relevant for the EC, it may be observed that in similarly important areas, such as foodstuff law risk regulation performed in comitology procedures, any validity-check based on national constitutional principles seems to be notoriously absent. Finally, the process of the internalisation of European norms and their underlying values which are stressed by compliance theory inevitably entails some sort of autonomous “legitimacy-building” of EC law. This development would be ignored by a monistic model with subordination of EC law, under which the EC’s legitimacy is derived essentially from the Nation State.\textsuperscript{296}

All in all, given its sanction and enforcement instruments on the one hand, and the high level of compliance through the internalisation in the national legal orders on the other, it seems to be rather unrealistic to deny EC law any autonomous (\textit{i.e.}, not derived from national law) effectiveness. On the contrary, as stated already in the introduction, autonomous effectiveness may be argued even to be the distinctive feature of supranational governance regimes, a feature which distinguishes it from traditional international regimes. Finally, the end of the Banana dispute persuasively confirms the failure of the monistic concept. For a case had arisen where the \textit{BVerfG} could no longer really give the ECJ’s case law its constitutional blessing. In its opaque construction of the formula of “general fundamental-rights guarantee”, which is, in a way, scarcely compatible with the \textit{Grundgesetz} any longer, and not even internally consistent, the \textit{BVerfG} has shown that it does not really mean to exercise its review reservation, without, however, having any alternative concept available. Instead, the \textit{BVerfG} did not wish to set integration at stake for a comparatively minor matter in the overall economic view such as the banana import regime, but preferred to signal clearly to its own courts and also to foreign observers that it wanted to deal as little as possible with Community law. Insisting on the unlimited supremacy of national law under these conditions becomes more and more illusory.

\textsuperscript{296} Moreover, one might object that, in the normal case of “nationalised” (\textit{i.e.}, approved by the national \textit{Grundnorm}) Community law, the Nation State’s democratic legitimacy potentials could be made use of according to any model, not only according to monism with the subordination of EC law.
Chapter II: Functionalism

“\textit{The good thing about expert governance in agencies is that you no longer know whom to corrupt.}”
\textit{Giandomenico Majone}\textsuperscript{297}

Functionalism is a child of the development of the modern industrial society since the 19\textsuperscript{th} century. It reflects the unprecedented rise of the economy, the natural sciences and technology in many fields of life. These are argued to obey their own \textit{functional, i.e., purpose and objective-oriented, logic and technical rationality} which are opposed to “the political” and its manifestation in the State. Accordingly, functional authority relying on experts is alleged to be non-ideological, unpolitical, pragmatic and efficient and therefore superior to political authority dependent on the often irrational preferences of the electorate and political parties.

As an integration theory, functionalism accordingly denotes the delegation of public tasks to supranational agencies on account of their superior problem-solving capacities and their bureaucratic and technical expertise.\textsuperscript{298} Thus, functional integration dissolves the former realist \textit{junctim} between authority and territory. The first examples of such “functional” international institutions were river commissions, the world post union (established 1874) and world telegraphic union (1868). Owing to increased political co-operation and economic interdependencies in the twentieth century, a lot of other institutions of this kind have been established in fields as diverse as radio and TV, navigation, aviation, weather forecasts and atomic energy.\textsuperscript{299} All these fields are characterised by sectoral processes of technical co-operation among Nation States.

The central methodological postulate of functional integration theory is the so-called “spillover effect”: the quasi-automatic, gradual, but irresistible extension of technocratic authority from one sector to others. Whereas classic functionalism saw this process strictly confined to technical fields, neo-functionalism, developed from the sixties onwards largely with a view to explaining the ongoing European integration process, extended it also to more po-

\textsuperscript{297} Statement in a conference at the European University Institute in 2000 (rephrased by the author).
\textsuperscript{299} For a more exhaustive presentation, see I. Seidl-Hohenveldern, \textit{Das Recht der Internationalen Organisationen}, 5\textsuperscript{th} ed. 1986, 313ff.
Spill-over is supposed to be brought about by the establishment of common institutions and the transfer of loyalty, less that of the ordinary people, but primarily that of political and bureaucratic élites, interest and party representatives. Key functionalist elements such as technical expert governance and spill-over phenomena may now be analysed in more detail in both the EC and the WTO.

I. A Functionalist Reading of the EU

1. From the “Zweckverband” to the “Regulatory State”

The functional reading of the EU was elaborated already in the early seventies by Hans Peter Ipsen who characterised the Communities as “Zweckverbände funktioneller Integration” (objective-oriented associations of functional integration). This concept served, in the first place, to provide an alternative to the dichotomy between State and international organisation. It emphasised the technical and sectorally limited character of delegated European authority, thus separating it from the unlimited political powers and the social, spiritual, and, at times, even mythical content of the Nation State. It further stressed its instrumental orientation towards the establishment of a common market, whose functioning conditions and viability would, therefore, become the analytical and normative Leitmotiv of European law.

The functional concept was further refined in the eighties and nineties by Giandomenico Majone under the label of “Europe as a regulatory State”. Interpreting the internal market as a project of re-regulation, rationalisation and modernisation, Majone advocates an efficiency-oriented economic optimisation of regulatory policy. This should renounce redistributive activities and limit itself to the correction of market failures. These tasks should be carried out by non-majoritarian expert bodies, for which the American federal agencies are recommended as a model. The legitimacy (“accountability”) of this type of administration should be guaranteed by stringent transparency requirements and judicially enforceable participation rights in the regulatory process, rather than by hierarchical oversight which does not allow for effective governance under modern conditions of diffusion and complexity.

This concept, too, shares the fundamental functionalist thesis that the essence of modern “governance” is technocratic rather than political, so that expert decision-making should be

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300 See Kaufmann, op. cit., 164ff.
institutionalised at national and supranational level. Expert decision-making is regarded as superior to other forms both procedurally and substantively, since it is supposed to enable discursive decision-making among rational and neutral actors who have no self-interest, which is supposed to lead to the technically best policy outcomes. By contrast, traditional intergovernmental bargaining is deemed inadequate on account of huge collective action problems, and the possible fixation on particular national interests rather than overall interests. However, extending this to the European level, the national model of parliamentary democracy is also viewed as defective on account of the well-known pathologies of party politics, interest group manipulations, blockages and policy failures: the short-termism of electoral policy entails that “politics” threaten (sound) “policy”, as the division of the democratic process “into relatively short intervals produces negative effects when the problems faced by society require long-term solutions.”

Acting under the permanent threat of being voted out of office, politicians have few incentives to develop policies whose fruits might become visible only in the long run. As a result, politics aiming at pleasing the electorate tend to create bad outcomes: “Legislators engage in advertising and position-taking rather than in serious policy-making, or they design laws with numerous opportunities to aid particular constituencies. Thus, re-election pressures have negative consequences for the quality of legislation”.

By contrast, expert decision-making is alleged to be devoid of all these flaws.

2. Critique

The fundamental objection against the functionalist reading of the EU would seem to be rather obvious: government by technical and scientific experts and bureaucratic élites is fundamentally incompatible with democracy. However, this assessment needs to be specified further. Following a famous distinction introduced by Fritz Scharpf, the democratic concept may be divided into two understandings. The first and more traditional one, denominated “input-legitimacy”, stresses government by the people, by means such as election or forms of direct participation in decision-making processes. The second one, characterised as “output-legitimacy”, emphasises government for the people, meaning that, as long as decisions are

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303 G. Majone, loc. cit.
just and effective, they can be assumed to be in the citizens’ interest even though the citizens are not directly involved.

In modern Nation States, combinations of the two forms of legitimacy can often be found: traditional democratic mechanisms are supplemented by non-majoritarian expertocratic institutions such as, most prominently, courts and central banks. Such institutions, which are active in fields which are regarded as unsuitable to be left to the market or to national politics, are widely considered as legitimate derogations from the principle of democratic (input-) legitimacy justified by effectiveness and efficiency rationales. This finding might be transposed to European institutions which may also be ascribed a certain degree of expertocratic “output-legitimacy”. However, it is equally clear that, in contrast with the national situation where expertocratic institutions only complement conventional democratic institutions, they enjoy much more weight and influence at European level. A sound mixture of both elements would, however, suggest that some solid form of “input-linkage” to the electorate should be retained even though technical and bureaucratic efficiency may ultimately suffer from this.

The weight of this finding is increased by an even more general criticism. As European and national political experience have continuously shown, there is no such thing as politically neutral technocratic expertise; and hence, the advocated prospect of impartial, effective and, at the same time, legitimate decision-making is a chimera. Though embedded in a scientific and technocratic context, important questions of market regulation, such as risk regulation in foodstuff law, entail difficult and complex political and moral choices. Experts may be easily biased in such questions on account of allegiances, sympathies or even “professional deformations”.

These two crucial criticisms, according to which expert “output-oriented” legitimacy is not sufficient for a highly integrated polity such as the EU and a clear distinction between technical and political matters is impossible, are, to a certain extent, reflected and confirmed by recent institutional developments in EU market regulation. As a word of caution, this analysis will, however, be limited to the “functionalist candidates” among the institutions. In fact, it is rather obvious that the Council of ministers representing the national executives does not have any “in-built” technocratic bias. The same is true for the Parliament which, though limited in its competencies by the limited extent of co-decision procedures and still

devoid of the right of legislative initiative, tends to have clear pro-integrationist preferences and to favour all kinds of diffuse issues and interests extending from consumer and environmental protection to European citizenship.

However, technocracy may be alleged to dominate the Commission and the influential “corporatist network” governance structures surrounding it, in particular committees, agencies, standard-setting bodies and private (mostly lobby) associations. It is, indeed, true that these structures have a dominant influence, especially on the EC’s core competence, market regulation. In particular, corporatist network governance was argued to be strong in the wake of the so-called “new approach” to market regulation alluded to above. This strategy was motivated, first of all, by the need to enact huge masses of secondary legislation to meet the 1993 internal market deadline which could no longer be achieved by the traditional law-making procedures which, to a large degree, involve the Council. In substance, the new approach consisted essentially in a balancing, within a scheme of framework directives enacted by the Council, of the national concerns for continued social protection in the market, and a European interest in the maintenance of economic rationality. This scheme contained only general “benchmark” standards, and left their operationalisation to ad hoc institutional arrangements at European level which still, however, maintained the strong participation of national and private interests.306 Such arrangements may be characterised as transnational governance structures in which law-making and law-implementing in important fields of market regulation such as risk regulation (e.g., in foodstuff, product safety or environmental law) are more or less openly delegated to discovery processes outside constitutionally provided procedures. Examples include most notably private standard-setting bodies, committees and agencies. Yet, the few politically neutral agencies recently established at EC level are largely confined to “regulation by publication”, i.e. to ancillary administrative tasks such as the gathering, evaluating and diffusion of information in fields which are highly characterised by scientific expert knowledge; none of them was endowed with fully-fledged regulatory competencies comparable to those of the American agencies.307 Instead, such tasks were mainly conferred upon the new committees, which are assemblies of supranational and national politicians, experts and interest group representatives chaired by a Commission official.

and which represent a higher degree of political influence of the Member States. Established and modified by the two comitology decision (1987 and 1999), these institutions have the task of enacting subordinate market regulation, implementing and concretising framework legislation enacted by the Council.\footnote{See C. Joerges and E. Vos, EU Committees: Social Regulation, Law and Politics, 1999.} On the whole, the fact that more political structures were mostly preferred over technocratic agencies points to the fact that Member States increasingly perceive the EC’s activity as essentially political, for which expertocratic legitimacy is deemed insufficient. Then, mere administrative, output-oriented legitimacy is no longer sufficient, but democratic input legitimacy – which, in the European tradition, needs to be constitutionally assigned – is necessary. These findings constitute other important provisos for the approach to be developed later.

II. A Functionalist Reading of the GATT/WTO System

In a functionalist reconstruction, the GATT/WTO system may be characterised as a sectoral international regime with the task of establishing and administering free trade. Such a reading may, indeed, derive from several sources. First, most favoured-nations agreements and other trade regimes were part of the first international organisations in the 19th century. Also, following what might be described as a spill-over logic, they have since their beginnings known an impressive widening of scope, reaching from trade in goods to services and intellectual property, and now broaching even the field of international competition.\footnote{See R. Zäch (ed.), Towards WTO competition rules: key issues and comments on the WTO report (1998) on trade and competition, 1999.}

Whereas the activities of GATT/WTO are predominantly of a co-ordinating nature in these fields, in other areas, such as the Trade Barriers Agreement (TBA) and the Agreement on Sanitary and Phytosanitary Measures (SPS) positive standards have also been set, which are interpreted by some as the first steps towards a world-wide harmonisation or even unification of trade laws, and “flank” matters, by a world trade “government”.

However, it is precisely in these respects that the functionalist logic has suffered substantial blows in the last years. It has become increasingly clear that the regulation of international trade is much more than a technical matter which may be left to experts working in some hidden place in intransparent conditions shielded off from public knowledge and discourse. Instead, the regulation of international trade has evolved from its traditional object of preventing protectionism to the much more difficult and genuinely political tasks of balanc-
ing free trade against competing values deeply rooted in national culture and political process such as social and environmental protection. For this reason, the harmonisation of standards by non democratically accountable experts is increasingly perceived as illegitimate. Institutionally, this change of perception has been reflected in the growing importance of the WTO adjudicative mechanism vis-à-vis its “regulatory branch”, the WTO Council and its sub-units - whose scope of manoeuvre is, at any rate, substantially restricted by the unanimity principle. The WTO adjudicative mechanism, the institution where value balancing is carried out, performs de facto the task of a global constitutional court. Its legitimate scope of review of national measures conflicting with free trade policy still needs to be determined. Even at this stage, it has become clear, though, that the functional paradigm in its classic dimensions of expertocracy and spill-over is ill-suited both to reconstruct analytically and provide normative guidelines for WTO governance in general, and WTO adjudication in particular.

III. The Functionalist Version of the Relationship among the Legal Orders

One of the principal proponents of the functionalist view of the EC, Hans Peter Ipsen, has also elaborated its legal translation into a doctrine of unlimited supremacy of European law. As outlined above, this has been doctrinally justified through the Gesamtaktstheorie (collective act theory) according to which European law does not derive its validity from national constitutions, but was established as a superior legal order by means of a single, “revolutionary-type” of collective act by the founding States. Translated into the concepts of the Kelsenian Pure Theory of law, this theory amounts to a monistic model with the subordination of national law. This would presuppose that, in the wake of the “Gesamakt” revolution, all national law is subordinated to a European Grundnorm, with the effect that European law alone may determine the criteria of validity of any national law. Such a conception would render “total” supremacy of European law possible, which would be limited neither vertically by national constitutional law, nor horizontally as regards the expansion of its legislative competencies. It would, therefore, go much further than the underlying functional approach, i.e., Ipsen’s Zweckverband or Majone’s regulatory State which legitimise only the sectoral delegation of policy fields unsuitable to be left to the national legislator.

Irrespective of this huge theoretical defect, functionalist monism with subordination of national law also meets considerable obstacles under a Pure Theory reconstruction relying on sanctions and voluntary compliance as a means to ensure the effectiveness of European law. Even though the latter possesses considerable autonomous sanction and enforcement devices,
and is regularly internalised and complied with without supplementary national “validity checks”, it seems overstated to recognise it as being able to dominate effectively, and impose its validity criteria upon national law in all circumstances. As its implementation and enforcement is, to a very high degree, entrusted to the national administration and judiciary, a possible revolt – in particular a soft one like the numerous interim measures granted by German courts against the Banana regulation – drastically decreases its effectiveness and is likely lead to a sort of “draw”, materialising in some sort of legal or political compromise. This should, in turn, exclude the unlimited subordination, measured in terms of effectiveness, of national law under EU law. As a result, not only the monistic subordination of national under EU law as advocated by functionalist theorists, but, instead, any type of monistic hierarchical relationship between the two legal orders should be excluded.

**Chapter III: Neo-liberalism**

“No man’s life, liberty, or property is safe when the legislature is in session.”

*Mark Twain*

After the fall of communism, liberalism probably constitutes the dominant and most successful constitutional model world-wide. Among its various strands, American libertarianism and German ordo-liberalism, which was developed in Germany in the thirties as a counter-movement to the Nazi style planified economy and continues to be an influential school to date, deserves particular attention in the present context, since it has analysed both the EU and the WTO in depth.

Generally, liberalism commences from the assumption that under conditions of social pluralism, characterised by the dissolution of integrating institutions such as religion or homogenous ethnicity, personal convictions as well as value choices and hierarchies of individuals become more and more diverse. As a consequence, it becomes increasingly impossible for politics to reconcile such different assumptions. Functioning automatically, through

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an “invisible hand” (Adam Smith) in a decentralised way, the system of free and open markets is hailed as the best institutional response to these conditions. It lays the foundations of peaceful co-existence of human beings by enabling social interaction without a previous consent on values, and guarantees a maximum of personal freedom. The price mechanism becomes the main indicator for social exchange. Given these eminent advantages of the market system, any statal interference with the free play of market forces is regarded with suspicion. Redistribution, in particular, is considered to be inadmissible since it would always constitute paternalistic interference with private freedom and entail the strategic promotion of the interest of particular “rent-seeking” groups.

Within an ideal liberal polity, the law’s function is confined to providing the legal infrastructure of the market. This role is performed, in the first place, by private law, in particular contract and tort law, which is said to constitute the very constitution of a liberal polity.\textsuperscript{312} Regulatory law such as competition law is only needed to guarantee the well functioning of the market through undistorted competition, which means that market failures such as cartelisation, abuses of market power, and the elimination of competition through mergers need to be controlled. Apart from market exchanges, any further social communication or even an agreement on a political constitution is, strictly speaking, not even necessary in the first place. If this should develop, it should, at any rate, be subordinated to the market mechanism. Finally and most importantly, it is claimed that this system has no legitimacy problems: general consent on the existence of a market and on market behaviour rules is assumed to have been given since each individual would only benefit from them.\textsuperscript{313}

I. The Neo-liberal Reconceptualisation of the EU

Even though the system of the European Communities was clearly not designed in deliberate pursuit of ordo-liberal visions, the adepts of this school came to see their conceptions


realised in an optimal way quite soon. The paramount liberalist features in the European economic constitutions were traced back to the institutional asymmetry of supranational law and intergovernmental politics immanent to the European treaties: On the one hand, “market-correcting”, i.e., regulatory and interventionist policies (“positive integration”) depend on the consent of the EC’s legislative organs, in the first place, the Council of Ministers, and are thus in an institutionally disadvantaged position. On the other hand, the most important liberal principles are already laid down as legally-binding rules in the founding treaties, which enjoy supremacy over EC legislation and national law, amounting to a constitutional status; these are the abolition of tariffs as well as quantitative and qualitative restrictions in favour of the free movement of goods, services, labour and capital, and a system of undistorted competition. Following the ECJ’s jurisprudence on direct effect and supremacy of EC law, these principles can relatively easily be implemented and enforced by the supranational institutions, the Commission and the ECJ without the Member States having a further say (“negative integration”). As a result, liberal market freedoms were “constitutionalised” in the European Treaties, i.e., laid down as basic rules superior even to national constitutions, and thus shielded off from the vicissitudes of the political process. In these circumstances, it is barely surprising that German ordo-liberals, in contrast to traditional public lawyers and the Bundesverfassungsgericht, have never raised objections even against the spearhead of the ECJ’s constitutionalisation doctrines, the unlimited supremacy of EC law over national constitutions.

Probably, the most important liberal constitutional feature in the EC system may be said to be the strong position assigned to competition law. In the Member States which possess such a law, it has the status of an ordinary law beyond the constitution and, thus, enjoys the same hierarchical rank as competing regulatory and interventionist policy goals. Consequently, under national constitutional systems, economic freedoms are protected against statal intervention only in the framework of constitutional rights. The situation in the EC is remarkably different: being part of the European treaties, the main competition principles have constitutional status, and, therefore, could, coupled with a huge degree of political sensitivity of the Commission, be imposed on national law in the course of the years. This rendered the


gradual dismantling of national monopolies possible, and the deregulation of the so-called service public area which encompasses the sectors of postal services, telecommunication, supply of energy and other public goods, etc. To this extent, the EC system gradually eroded the national “mixed economies”, which were compromise solutions between the market and interventionist economic models.

Neo-liberal visions seemed to reach their apex with the internal market programme launched by the Commission in the mid-eighties. It had its roots in the famous ECJ’s Cassis de Dijon decision in which Germany was forced to allow the import of a French liqueur which contained a lower percentage of alcohol than similar German products. Elaborating on the proportionality principle contained in Article 30 (ex 36) EC, the ECJ found that Germany had to recognise the French product standard. As it became increasingly clear that the harmonisation approach was quite slow to establish an internal market and often blocked by national resistance, the Cassis principle was extended to the whole sector of market regulation in the well-known 1985 White Paper of the Commission. The philosophy of this approach was to generate a regulatory competition of national economic and social standards in which the most adequate standard would win the race. This was welcomed by neo-liberals as a more effective realisation of the market freedoms, capable of doing away with the complex State-centred legal co-ordination of transnational economic relations by private international law (conflict of laws). The liberal vision of a transnational “private law society” enabled by a supranational economic constitution seemed to be finally accomplished.

However, this approach did not have the expected success, since, due to reasons of distrust, different regulatory traditions, and compatibility problems with the existing national regulations, the Member States were often unwilling to accept the others’ standards in matters such as health and safety and environmental protection, and preferred to undergo a Treaty infringement procedure. Furthermore, in cases in which the difference between two standards was particularly huge, for example, when they were based on different objectives or regulatory philosophies, mutual recognition did not work at all.

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318 COM (85) 310 final.
The modest success of the concept of mutual recognition heralds a more general failure of the ordo-liberal reconceptualisation of the EU. The deregulatory effect of the EC Treaties’ basic freedoms and competition provisions on national regulation, State monopolies and the public service sector structures did, and do not, establish a sort of pre-political supremacy of the internal market governed by an “invisible hand”. Instead, they most frequently involved a set of creative political processes which came about by complex interaction of various private and public, European and national actors and which often led to the re-regulation, by new European law, of the sector in question.\(^{321}\) This was facilitated in the main by the introduction of qualified-majority voting in the Single European Act in 1986 and rendered the establishment of new administrative mechanisms and institutions such as agencies and committees necessary.

Another argument against the neo-liberal reading of the EU is the fact that its activities are increasingly extended beyond the market into regulatory, and sometimes even distributive, policies. In this context, it should first be remembered that the Common Agricultural Policy (CAP) was never subjected to market mechanisms and the free trade paradigm from the very beginning.\(^{322}\) As described in relation to the EU’s Banana regime, it has always been a purely interventionist regime, which the neo-liberals have characterised as an unfortunate and damaging Altlast. This view is too narrow-minded. Despite the highly doubtful “market-correcting” CAP strategies of product-subsidies instead of producer-dependent subsidies, price maintenance, promotion of industrial farming and animal breeding methods etc., it should also be noted that the EC policy in this field also aims at protecting human and animal health, and curing the landscape and the environment as a whole – tasks which are unsuitable to be subjected entirely to market mechanism.

A further meaningful shift away from a liberally conceived market regime became obvious with the extension of the Community to new policy fields in the Single European Act and the Maastricht Treaty.\(^{323}\) Thus, the new activities such as the European Social Fund, economic and social cohesion and industrial policy are clearly redistributory. Other activities and projects, such as trans-European networks, research and technological development are distributory. Finally, the largest part of the new policies are regulatory, i.e., market-creating


\(^{322}\) Mussler, op. cit., 121.

\(^{323}\) Mussler, op. cit., 147ff., 166ff.
and market-correcting, and go largely beyond the liberal market logic. This is true for important fields such as environmental policy and consumer protection which limit companies’ professional and contractual autonomy. One may thus conclude that not only free markets, but also regulatory and, at times, even redistributory activities are at the core of the EC’s political activities. The neo-liberal concept denies even the legitimacy of such European tasks and is, therefore, clearly unable to provide a theoretical framework for them.

The expansion of “market-correcting” policies at EU level aggravates the objections against neo-liberalism from the standpoint of democratic theory. The most fundamental critique has always been that the supremacy of the market over other political goals must not be assumed as being “naturally” granted under democratic conditions, but requires an explicit decision by the people. This decision presupposes the existence of a political and legal order of freedom and constraint, a public sphere and political dialogue. If this is so, it should be admitted that the democratic process can also lead to different decisions, most notably decisions on an adequate “blend” of free-market mechanisms and regulatory as well as interventionist instruments; a notorious example is the decision of when and to what extent a certain public good, such as the environment, should be commodified, i.e., subjected to the market mechanism at all. Furthermore, the market may be reproached as not possessing a moral filter against irrational, or even aggressive, preferences of certain societal groups. Such preferences may be generated by the societal environment and personal values. At any rate, they cannot be governed, contained and balanced merely by the price mechanism as a social “mediator”. Correspondingly, the market alone is not able to manage the social and economic problems arising from the integration process, but, instead, democracy must move to the supranational level as well.

To summarise, it is due to its bias in favour of negative market integration, which also entails the complete neglect for procedural tools and conditions needed for the establishment of a European democracy in neo-liberal theory, that this concept does not constitute an adequate model for the EU. As a result, it is not able to provide either adequate guidelines for constitutional conflicts which typically involve the balancing of European economic freedoms and competition rules against national regulatory policies, or, as in the Banana conflict, vice versa.

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324 See, on this again, Gerstenberg, op. cit., 205.
II. The Neo-liberal Reconceptualisation of the WTO

1. Outline

As regards the WTO, the neo-liberal model seeks to provide a powerful counter-device to the “realist” protectionist temptations of States as explained by public choice theory. Whilst ordinary international agreements on trade liberalisation are deemed insufficient to remedy the prisoner’s dilemma situation described above, a stable legal order is called for to monitor States’ respect for their free trade commitments. Only if such a legal order is actually effective may governments resist protectionist pressure from domestic lobby groups, and the invocation of international legal commitments may even become a powerful defence strategy against such groups.

In order to provide for such a stable legal order, liberal theorists argue that the international trade system needs to be “constitutionalised”. The core of such a constitution of free trade should be the granting of subjective liberty and equality rights to the citizens as well as their effective protection by national and international courts. The judiciary, rather than the executive, should be entitled to ensure the necessary authoritative interpretation and supervision of free trade commitments. In fact, judicial control is viewed as the best defence in order to prevent politicians from giving way to protectionist rent-seeking interests.

Liberal theorists further argue that the present GATT/WTO system may already be interpreted so as to include important constitutional principles and rights. Generally speaking, whilst this system does not provide a constitution of free and undistorted trade - which is reserved to regional integration communities such as the EC and presupposes the abolition of impediments to trade altogether -, it makes a forum and procedures as well as substantive principles for gradual trade liberalisation available. Its biggest achievement, though, lies in subjecting international trade relations to the Rule of Law. This finds its expression in the binding legal quality of WTO rules and in the existence of a Dispute Settlement Mechanism which renders authoritative legal opinions on trade disputes. Beyond this, the WTO system


contains a set of provisions which require States to guarantee certain specific procedural requirements of the Rule of Law even in their domestic legal order. Among these are, the duty of publication, and of neutral and just implementation of trade regulation (Article 10 GATT) as well as the principles of transparent policy-making, of due process and of judicial protection of individual rights.

The fundamental substantive constitutional principle in GATT/WTO law is that of non-discrimination, which may be subdivided in two elements. First, it consists of the most-favoured nation principle (Article 1 (1) GATT, Article 2 (1) GATS and Article 4 TRIPS) according to which any trade concession accorded by any party to any product must be granted immediately and unconditionally to a similar product originating in, or destined for, the territories of all other contracting parties. Second, it encompasses the principle of national treatment (Article 3 (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 only directed to States. Instead, the formulation “products” and “like products” entails that import and export traders, too, may be viewed as their addressees. In substance, these principles have 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 this, the MFN principle ensures the stability and reliability of “synallagmatic” trade concessions because it prevents trading States from offering more favourable conditions to third States in subsequent transactions; thus, it further ensures the transparency of the system by rendering the proliferation of different bilateral agreements on mutual concessions impossible. Thereby, it also renders possible a multiplication of liberalisation measures which, if accorded to one State, could 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 different bargaining powers or strengths.

Finally, one may note the “principle of the use of uniform and proportionate policy instruments”. This finds its most important expression in the GATT’s general prohibition of quantitative restrictions and its preference for tariffs (Article 11 GATT). This is based on the rationale that quantitative restrictions tend to decrease the impact of changes in the world market conditions of supply and demand on imports and consumers, whereas tariffs have an

327 Petersmann, op. cit., 230.
impact only on the price of a good - which constitutes a less strong, and therefore more proportionate, 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. All in all, the “tariffs only” strategy may be said to provide an important basis for the transparency, calculability and negotiability of trade restrictions.\textsuperscript{328}

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”\textsuperscript{329}. 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/WTO 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 and concretises the protection offered by EU law to the freedom to trade.\textsuperscript{330} Alongside national constitutional and EU law, GATT/WTO law may, therefore, be viewed as the “third line of constitutional entrenchment”.\textsuperscript{331}

\textsuperscript{328} Stoll, \textit{op. cit.}, 122.

\textsuperscript{329} “International Economic Order and Democratic Constitutionalism”, \textit{ORDO} 34 (1983), 71-83 (80).

\textsuperscript{330} Petersmann, \textit{op. cit.}, 439.

\textsuperscript{331} A somewhat different “liberal economic” reading of the GATT/WTO system has more recently been suggested by Josef Drexl (“Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsordnung”, in B. Großfeld (ed.), \textit{Festschrift für Wolfgang Fikentscher}, 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, Drexl 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, Drexl reaches the conclusion that direct effect should, in principle, also be admitted, since it is a necessary precondition of an \textit{Erstentscheidungsrecht} of the market participants, contributes to economic stability and establishes a level playing field. However, this result is made dependent on the existence of a sufficiently effective “private law society” on a worldwide level. It is taken for granted that such an order does not emerge spontaneously, but, instead, needs to be established though international law or, more realistically, the convergence of national legal orders in the relevant aspects. In answering this question, one finds both positive achievements and shortcomings. 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 are positive. The lack, for the
2. Critique

It is undoubtedly the great merit of the liberalist constitutional reading of the GATT/WTO system that it provides a powerful and coherent alternative to the “realist anarchy”. On this view, the WTO may, indeed, be characterised as a legal stronghold of the subjective rights of the market participants against protectionist temptations of governments as criticised by free trade and public choice theory.

As a first critique, it may, however, be noted that the liberal reconceptualisation does not sufficiently take the actual functioning of the new WTO system into account. Whilst, for the time being, the WTO has actually managed to tame the earlier diplomatic power-game and to bring to bear, to a certain extent, supranational constitutional features, this has not been achieved through the granting of domestically enforceable constitutional rights to private parties, but within the system itself has been achieved through the establishment of an effective dispute settlement mechanism. Yet, this observation calls for another general characterisation of the GATT/WTO system, according to which it is no longer adequately captured as a mere functionalist constitutional counter-device against States’ protectionist temptations. What one may observe is not a shift of power from the executive to the judiciary as in ordinary direct effect cases, but the emergence of a third level of governance above national and European levels. It is true that this level is, somewhat strangely perhaps, limited to a weak executive branch, which fulfils mainly organisational tasks, and to a strong judicial branch. This carries out genuine constitutional adjudication by balancing competing constitutional values and principles of huge political significance such as free trade vs. environment or social policy, or universalism vs. regionalism – subject matters which may, otherwise, only be found on the agenda of national and supranational courts, and for whose resolution neo-liberalism, which focuses too narrowly on the prevention of protectionism, does not offer any convincing guidelines. Even worse, neo-liberalism might be accused of a bias of values associated with time being, of tools capable of containing excessive 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, are negative. Whereas, in the EC, a sufficiently effective common market has undeniably been achieved, Drexl argues that the WTO regime will probably be supplemented by such mechanisms in the foreseeable future and might, therefore, be equally viewed as a sufficiently effective “world constitution of decentralised 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.
free trade, as their (exclusive) constitutionalisation puts them into a position of advantage with regard to non-economic values.332

In these respects, these objections may be linked to the democratic critique of the neo-liberal vision of the EU in that negative integration mechanisms such as the non-discrimination principle, commercial freedoms and undistorted competition are not just components of an “economic constitution” which functions automatically, as it were. Instead, the delegation of powers to GATT/WTO, even if they are essentially adjudicative, creates a “surplus in supranational governance” and raises the question of this system’s democratic legitimacy. This requires that some form, or effective substitute, of democratic participation and representation of citizens be ensured at international level. In sum, whereas market freedoms do constitute important elements for a supranational system’s legitimacy, liberal constitutionalism needs to be complemented by a theory that accommodates the “surplus in supranational governance” within the WTO system.

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 emphasising its function as “third line constitutional entrenchment” in the overall multi-level constitutional system. It is on the basis of this theory, denominated multi-level governance and constitutionalism, that a more precise proposal for the interconnection of the two systems will be elaborated.

For reasons of completeness, it should be added, here, that unlike functionalist protagonists, neo-liberal authors have, apparently, never defended a well elaborated version of the relationship among the legal orders. However, as already mentioned above, the constitutional concept underlying the whole approach would seem to require unconditional supremacy, too, and, therefore, a monistic hierarchical relationship among the WTO, the EU and the national level. Yet a similar general problem as in functionalism surfaces here. According to the neo-liberal model, the supremacy of supranational law would only be justified as long as the EU or WTO constitution stuck to their task of enabling markets and defending them against intrusions by the legislator in favour of rent-seeking lobbies. However, as the existence of planified sectors in the European constitution in general, and single cases such as Bananas in particular, show, the EU by no

means confines itself to its neo-liberal function of enabling markets. In these cases, it would clearly be against the neo-liberalist spirit to grant EC law unlimited supremacy. However, a conditional application of the supremacy rule, dependent on whether the supranational regime’s functional “market mission” is fulfilled in a particular field, would barely work in practice.

Chapter IV: Multi-Level Governance and Constitutionalism

“If the EU were to apply for membership in the EU, it would not qualify because of the inadequate democratic content of its constitution. Nevertheless, a good 50% of the acts passed in France today are in fact merely the implementation of measures decided in the opaque labyrinth of institutions in far-away Brussels, so, is France still democratically governed? (...) The WTO systems of agreements comprises almost 10,000 pages and is the result of marathon negotiations lasting over a decade and in which over 150 States and thousands of experts participated. Although these agreements contain far-reaching implications for employees in crisis-prone industrial sectors and in agriculture, the German government is generally almost overzealous in implementing the demands stipulated in the agreements. Did German citizens really have a recognizable influence on these decisions? (...) Against this background, one may point almost paradigmatically to a fundamental dilemma of politics in the age of globalisation – the contradiction between “system effectiveness and citizen participation”.

Michael Zürn, Democratic Governance beyond the Nation-State

I. Conspectus

The concept of multi-level governance is based on the premise that each of the forgoing concepts has some truth in it, but does not entirely do justice to the complex phenomenon of supranational governance both in the EU and the WTO. Firstly, it is contrary to functional claims of gradual “statalisation” of the EU and a gradual “destatalisation” of its Member States that multi-level governance accommodates the subsisting important role of the latter and their institutions; in fact, these remain powerful within the overall system both as decision makers in the Council and as enforcers of EU law. However, multi-level governance also acknowledges that, by delegating huge parts of market and social regulation to the su-

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333 EJIR 6 (2000), 183f.
pranational level, which also entails the creation of powerful supranational institutions, the Member States have lost a meaningful degree of autonomous powers in these fields and may, therefore, no longer be regarded as the “focal points” of the overall system. Likewise, multi-level governance acknowledges the value of functional specialisation and expertise, without, however, overestimating its capacities, and without clinging to the illusion of its allegedly apolitical scientific and technical nature. The same is true for the neo-liberal vision of the free market, whose importance as a counterdevice to protectionism is acknowledged, but whose neglect of democracy, constitutional exclusivity and primacy over social values is not approved.

Turned into positive terms, multi-level governance leaves open the question of where the EU and the WTO may be situated on a flexible scale between a traditional Nation State and less developed forms of international co-operation. It, instead, refers to the complex, multifaceted and often contingent interaction of public and private institutions in “networks” at different – sub-national, national, international and supranational - levels of governance. As suggested by some of its proponents, multi-level governance may be conceptualised with the analytical tools of systems theory, which conceives of the economy, politics, law and society (as opposed to single actors including the “State”) as different systems within an overall network. These tools might, indeed, adequately capture the increasing functional differentiation, specialisation and decentralisation of the multi-level system’s various components, which evolve in constant learning processes in which novel problems are tackled by monitoring, adapting and fine-tuning regulatory experiences over time. As these conceptual tools are, analytically, completely detached from the State, they are unproblematically capable of transnational extension.

In substantive terms, the multi-level governance approach crucially revolves around two fundamental criteria in order to analytically and normatively reconstruct the relationship among the various constitutional levels: institutional capacity, i.e., the technical potential of effective problem-solving at supranational level; and (democratic) legitimacy, understood in Weberian terms as the degree to which supranational governance is socially accepted and complied with by the governed, and thus able to exist at all.


As regards capacity, the multi-level approach stresses the “network” aspect of current governance. This entails that no actor, and respectively no subsystem, may act autonomously in an effective way any longer; instead, their relationship is in essence decentralised, co-operative and highly interdependent. It is obvious that, under these conditions, hierarchical direction, such as the classic “command and control” type of administration, drastically loses importance. Instead, “soft governance mechanisms” such as recommendation, expertise, explanation and consultation gain increasing weight alongside the traditional national command and control style.\textsuperscript{336} Even where supranational institutions possess strong autonomous enforcement tools as in EU competition law, and where the “long shadow of hierarchy”, \textit{i.e.}, the threat of an \textit{octroi} is therefore always present, a clear preference for negotiated solutions in sensitive issues seems to exist.\textsuperscript{337} Incidentally, this development reflects a more general trend towards societal self-regulation as the only remaining means of enabling effective governance in complex and fragmented societies; a development blurring the line between the public and the private spheres - and their legal counterparts, private and public law.\textsuperscript{338}

As regards multi-level governance’s second fundamental element, legitimacy, this is based on the fundamental premise that \textit{the essence of all governance is political}. Whilst scientific expertise and legal adjudication are absolutely indispensable elements of modern governance, they are never of an entirely neutral scientific or “legal-technical” nature. Hence, all kinds of governance raise the question of legitimacy without which no political system may exist. Roughly speaking, legitimacy may be defined as encompassing a set of human rights, separation and balancing of powers, rule of law and, most importantly, democracy. These constitutive elements interact in a “flexible system” (\textit{bewegliches System})\textsuperscript{339}, under which deficiencies of some elements can, to a certain extent, be compensated by the strength of others, which renders necessary a comprehensive overall assessment. Along these lines, a provisional assessment of the EU’s and the WTO’s legitimacy is already possible: in the EU, all


\textsuperscript{337} For example, this was evidenced once again in the recent comprise in the conflict on fixed book prices in the German language area. See C. Schmid, “Diagonal Competence Conflicts between European Competition Law and National Law. The example of book price fixing”, \textit{European Review of Private Law}, 8 (2000), 155.

\textsuperscript{338} See the contributions in D. Grimm (ed.), \textit{Wachsende Staatsaufgaben - sinkende Steuerungsfähigkeit des Rechts}, 1990.

\textsuperscript{339} This important methodological concept goes back to Austrian legal theorist Walter Wilburg.
legitimacy components are, in principle, present; with democracy, however, being in a structurally weak position on account of the significant lack of a Europe-wide political discourse, “pan-European” intermediate institutions such as media, parties and associations and the expertocratic corporatist specificities of network governance. By contrast, the legitimacy of GATT/WTO is limited to the Rule of Law and its contribution to the overall checks and balances of power within the multi-level constitutional system.

As regards the functioning of multi-level governance, a holistic approach, as advocated by the theories presented above, which attempts to capture the complexity of the European system in a few buzzwords and maxims, is not promising. Instead, lower level and simpler concepts are needed to describe different modes of governance in relation to institutional capacity and legitimacy. For this evaluation, four different types of multi-level governance may be distinguished: regulatory competition and mutual adjustment, intergovernmental and supranational political decisions and, finally, hierarchical (i.e. administrative and judicial) direction. Whereas all four are represented at EU level, only the second and the fourth play a role in the GATT/WTO system. This difference will give rise to a completely different assessment of the relationship between the three constitutional levels.

II. A Multi-Level Governance Reconceptualisation of the EU

1. Regulatory Competition and its Strain on Democratic Legitimacy

In the post-national constellation, the default relationship between the various constitutional levels is that of regulatory competition and mutual adjustment. Whereas national governments continue to adopt such policies nationally, they do so in response to, or in anticipation of, policy choices of other governments. The outcomes of mutual adjustment can be diverse, mutually or unilaterally beneficial or even detrimental for everyone. Just as competition is beneficial to the economy, it may also trigger regulative innovations and progress. However, not infrequently, such “systems competition” prevents governments from adopting policies that would reflect the preferences of their constituencies. As a drastic example, Fritz Scharpf points to the situation in which the American States found themselves in the early decades of the 19th century, when even “progressive” State governments could not adopt legislation to limit the employment of children for fear of losing market shares in interstate

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340 F. Scharpf, op. cit., on which the following description relies.
The origins of the shift of governance from national to European level may be found in such inadequacies of mutual adjustment of policies among States as an answer to increasing economic interdependence. This notwithstanding, similar competitive constraints may still be observed even after the completion of the Single Market in some policy fields, such as taxation, employment relations, and social and environmental policies. It goes without saying that, at global level, such discrepancies are particularly strong, in particular between “first” and “third” world countries.

Regulatory competition and mutual adjustment may have a negative impact on democratic legitimacy. With the major political decisions being imposed on a State by external economic and social pressures, the core of national democracy is threatened, as “de iure freedom and political legitimacy is worth nothing without factual freedom of choice.” Instead, democracy presupposes “spatial congruence” between the space in which regulations are valid and the space in which the social interactions to which the regulatory decision refers takes place (“output congruence”). Beyond this, democracy also requires spatial congruence among the people who are affected by a decision and their representatives in the decision-making system (“input congruence”). Otherwise, a group affected by a decision, but not involved in its making, can be said to have been determined by others instead of self-determined. Supranational governance structures, which aim at co-ordinating and harmonising “production factors” such as product- and process-related production standards as well as social standards, can thus be viewed as an attempt at re-establishing spatial congruence. However, as will be shown below, their one-sided focus on economic and technical matters, as opposed to the more culturally and traditionally linked social policies, leads to additional problems for democracy.

2. Intergovernmental Politics and its Lack of Effectiveness

The second mode of multi-level governance is that of intergovernmental politics, which may be found both in the WTO and in parts of the European system. This mode of governance implies that, national policies are co-ordinated or standardised by agreements at European level, but that national governments remain the protagonists of the decision-making

process, that none of them can be bound without its consent, and that the transformation of agreements into national law and their implementation remains fully under their control. Currently, this mode of governance applies to the cases in which the European system provides for unanimous decision, most importantly on tax policy, common foreign and security policy and the remaining parts of the Third pillar, such as police co-operation. Likewise, within the WTO political organs, its general council and its “sub-councils”, intergovernmental politics dependent on unanimity is the universal rule.

To the extent that participating governments possess veto rights, the legitimacy of intergovernmental politics can be derived from that of national governments. However, the institutional capacity of this mode of governance is normally limited to solutions which are preferable to the status quo for all participating governments. To be sure, consensus may, in certain cases, be fostered by package deals and side payments or other compensatory mechanisms, which have actually become the preferred options to overcome the unanimity hurdle in the EU. Yet, in cases of major interest clashes, solutions will be blocked totally – and it was exactly this possibility that was the intrinsic reason for the pillar-construction of the EU, with sovereignty issues being particularly salient in the Second and (in part ex) Third pillar. Situations of blockage also arise in cases of regulatory competition where national solutions differ greatly, and some, especially smaller, countries benefit from this situation, such as in tax competition in Europe.

3. Supranational Politics and its Challenges for Effectiveness and Legitimacy

The third mode of multi-level governance is that of supranational politics. This form is taken here as encompassing all forms of policy-making which escape complete control by Member States, and is, therefore, characterised by the various degrees of autonomy of supranational institutions. This type of governance applies only to the EU, and, in particular, to the establishment of the Single Market and the EC’s concomitant tasks under the First pillar. In these matters, European legislation normally requires the initiative of the Commission, which, then, must be approved by qualified-majority by the Council of Ministers and, increasingly, also by the European Parliament. In this type of governance, the institutional resources and strategies of the supranational actors on the one hand, and the convergence of
preferences among national governments on the other, are mixed and may vary greatly from one policy area to another – which makes its assessment in terms of institutional capacity and legitimacy difficult.

Whereas supranational measures requiring qualified-majority may normally still be blocked in cases of strong divergence among national interests, this is no longer the case in the more frequent constellation in which Member governments disagree over the concrete shape of a European measure, but still prefer a common solution to the status quo. It is in these cases that supranational institutions work particularly effectively: the Commission’s agenda-setting monopoly, the expanding co-decision rights of the Parliament, the good services and esprit de corps of national representatives in the COREPER, as well as national and European experts in agencies and the hundreds of committees preparing, or specifying the details of, council directives.

The legitimacy of such joint-decision procedures loses its intergovernmental foundation and, therefore, its linkage to Nation State-based democracy. This has given rise to the extremely wide debate on how democracy could be re-established or substituted at European level. Only two cornerstones of this debate may be referred to here: its antithetic starting point, the BVerfG’s above-mentioned “no demos” thesis (a), and, once this thesis has been attenuated, if not refuted, the practical difficulties of establishing democracy in the current network governance, which seems to favour market-building at the expense of Welfare State functions (b).

a) Democratic Legitimacy and the Question of a European Demos

According to the BVerfG’s view, already presented above, democracy is essentially rooted in the “people”, understood as the relatively homogeneous demos of a Nation State. This is alleged to constitute a pre-democratic, ethnically, culturally, historically and linguistically defined community of fate which shares a high degree of “background” consensus on the polity’s most important political issues, which legitimises majority decisions and their acceptance by the losing minority. And since it is clear that, in Europe, these conditions are

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344 Incidentally, this is already no longer true with respect to the change or withdrawal of such policies. Here, individual governments are no longer able to respond to new circumstances or changing constituency preferences; cf., Scharpf, op. cit., 13, fn. 11.

345 To illustrate this point, Joseph Weiler has offered the hypothetical example of the annexation of Denmark by Germany, which was decided in a common Danish-German parliament by a majority of about 95%, with all the
largely absent, Europe is denied, at least in its present state, any significant democratic potential. To quote one exemplary voice: “Collective identities develop, become stable and are passed into tradition in communities of communication, of experiences and of memories. Europe, even within the narrower scope of Western Europe, has no communication community, hardly any common memories and only limited common experiences.”

However, the “no demos-thesis” has been challenged on various grounds. To start with, a homogenous demos may, by no means, be praised as an ideal for a social community in the first place. For this would presuppose a priority of the people with respect to the State, in the sense that persons sharing close social, historical and cultural affinities would, at a certain historical moment, have decided to institutionalise their social co-existence within a State. This argument is, however, not confirmed by history, as often only the formation of a State, gradually or through a revolution, has given rise to the emergence of a demos which was created through unification movements or similar developments. Such a demos formation may hardly be presented as a social ideal, as it has frequently involved the subjugation or at least assimilation of minorities of the population which share different collective identities.

Furthermore, and more importantly in the present context, due to increasing social and ethnical pluralism, the specification and complexification of societal relations and the “transnationalisation” of many economic, social and political activities, modern Nation States suffer from a diminishing consensus on universal values and the decrease of a common identity of their citizens, which has led to the erosion of a unitary, ethnically rooted national demos. Under modern conditions, collective identity has, instead, become a sort of “package deal”,

Danish deputies being outvoted by their German counterparts. Even if this decision seemed to be technically correct, it would manifestly lack democratic legitimacy in the absence of a common demos.

348 To restate a famous quotation by Ernest Renan: “L’oubli, et je dirai meme l’erreur historique, sont un facteur essentiel de la création d’une nation , et c’est ainsi que le progrès des études historiques est souvent pour la nation un danger. L’investigation historique, en effect, remet en lumière les faits des violence qui se sont passés à l’origine de toutes les formations politiques, meme de celles dont les conséquences ont été les plus bienfaisantes. L’unité se fait toujours brutalement (...)”
with whose individual components only a minority is in total agreement, but the practical sum of which is accepted by a majority.  

Beyond this, the “remaining modern demos” cannot plausibly be conceived of as a monolithic construct which is either present or absent. Instead, it is a compound of several features which may be realised to different degrees, in which even split “demos-like affinities” and identities are possible. Thus, there may be a minimum degree of collective identity which entails some basic concern for the well-being of the collective. Such a public spirit (Gemeinsinn) may be claimed to constitute a precondition for public deliberations about political choices. Public spirit may be transformed into public discourse if most of the members affected by the decision have a capacity to communicate publicly. Whereas such discourse may exist transnationally in smaller sectoral publics such as epistemic communities, the development of a broader public discourse is dependent on a common language and intermediate institutions such as the media, associations and a common party system. Finally, the strongest form of a demos, common collective identity and solidarity, may provide the basis for redistributive processes within a polity. Common solidarity is the readiness of individuals to give up things they value for the benefit of the collectivity. Whether this is actually present may be measured by public acceptance of re-distributive social policies.

In applying these distinctions to the European level, a low degree of “public spirit” may well be claimed to exist there. This may be seen not only in the common European cultural heritage, but also in the memory of two disastrous world wars coupled with the insight - which lies at the very beginning of the Communities and which is well rooted in the conscience of most Europeans - that European integration is the only way to guarantee peace and prosperity for the future Europe. Similarly, the experiences of Communism and its fall after 1989 may well generate the insight that European integration must not stop at the borders of the former iron curtain, but needs to be extended to the whole of Europe. Furthermore, the existence of a European constitutional order which has consolidated the fundamental rights of citizens, extended them beyond national borders and established a European citizenship, giving basic rights such as the right of vote in communal assemblies, may provide another contribution to a weak European demos – in the sense of what Jürgen Habermas called “con-

349 K.-H. Ladeur, op. cit., 39, with further references.
stitutional patriotism” (*Verfassungspatriotismus*). Higher degrees of public spirit may only be observed in Europe in new “sectoral demoi” expressing a new common transnational identity. This may emerge within societal groups such as epistemic communities in science, and European “networks” in culture and education, including the ever growing exchanges of pupils, students, researchers and workers. Finally the lack of a strong, “Nation State type” *demos*, which legitimates even processes of redistribution, is not that much of a problem since such mechanisms are barely present in the European system anyway. Structural and Regional Funds, the main means of redistribution in Europe, may be said to be largely insignificant when compared to traditional mechanisms of redistribution within Nation States, such as the German *Länderfinanzausgleich*.

On this basis, one may perfectly share Joseph Weiler’s lucid claim that the currently perceivable *demos* in European States is split among a persistently strong national *demos* and a weak, but growing, European one. Even Weiler’s different characterisation of both *demoi* is normatively most attractive and, in the long run, by no means unrealistic: whilst the national *demos* should be the location of the irrational side of persons and peoples, representing their internal belongingness, feelings and emotions – in short the “*Eros*” –, the European *demos* should be the stronghold of the intellectual and rational taming of the “*Eros*”, representing a sense for tolerance and co-operation in many fields of life – the “civilisation”.

*b) Democratic Legitimacy and Network Governance*

If the principal existence of a thin European *demos* may be recognised, the problem is that European governance is currently only founded to a relatively small degree (corresponding perhaps most authentically to the powers of the European Parliament) on this emerging “thin *demos*” and what may be considered as its traditional and legitimate expression – namely, democratic accountability based on general and equal elections and public debate, fostered by a party system, the mass media, and civil society. Instead, the predominant network type of governance largely operates by means of expertise and functional representation and mediation of interests, with economic lobby interests often enjoying advantages. However, it is exactly in this situation that an emerging constitutional theory, deliberative supranationalism, also sees its potential to establish democratic conditions in an alternative way.

In a nutshell, deliberative theory starts off from a twofold insight. On the one hand, modern pluralistic conditions are supposed to undermine the traditional *demos*-based concept of democracy; on the other, the alternative of a pluralist democracy without basic common values, whose guarantees are largely limited to values associated with fair process, such as openness, transparency and equal chances to present one’s view, is always in danger of degenerating into a purely aggregative form of democracy. The latter might have the well-known defects of rendering possible any substantive outcomes, including arbitrary or discriminatory decisions. Deliberative theory tries to parry these objections by combining a minimum basis of substantive values on which a 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. In this sense, 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. 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, provided that they share the commitment to find, and to act on the basis of, mutually justifiable terms of co-operation (“deliberative inclusion”). 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. If realised in practice, these deliberative requirements are claimed to limit, to a large extent, the number of possible substantive outcomes serving the common good, and thus to concretise the concept of equal membership in the polity. On this basis, the constitutional rights of liberty and equality are postulated to constitute the preconditions and results of democracy at the same time, 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

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354 Cohen, *op. cit.*
the deliberative circle of constitutional rights and democracy\textsuperscript{355} - a construct which may be able to overcome the one-dimensional liberalist preference for constitutional rights over democracy. Ultimately, if such deliberative conditions are actually present, democratic self-government is claimed not to be affected adversely, but actually enhanced by the cultural and ethnical heterogeneity of participants – and it is precisely this that makes the deliberative concept so attractive for transnational extension.

At a theoretical level, the deliberative concept has known fundamental attacks which are, however, not fully convincing. Deliberation may thus not necessarily be equated with the collective seeking of higher moral truth in a fictitious “normative super-discourse” which encompasses the whole society, and ignores real world functional constraints, complexity and fragmentation of societal subsystems. Instead, much is already gained if decision-making units respect deliberative conditions alongside the functional specificities and constraints of the subsystem in question. It is also misleading to reproach deliberation for necessarily yielding purely technocratic governance in which élites are favoured with respect to the uneducated. It should, instead, be recognised that, in the modern “knowledge society” (\textit{Wissensgesellschaft}), technocratic expertise is absolutely indispensable, but that the decisive question lies in its institutional “re-coupling” with public discourse and democratic decision-making. This is admittedly a huge problem, particularly if deliberation takes place in transnational élitist circles far away from both the people and from the conventional democratic mechanisms of control. Notwithstanding this, the respect of deliberative procedures seems to be the first important precondition for the democratic “re-coupling” of decisions taken or influenced by experts. Finally, the argument that the existence of deliberative conditions is very difficult to measure is, by itself, not suitable to refute this approach altogether. If anything, it calls for the institutionalisation and regulation of deliberative requirements. In sum, if adequately combined with functional needs and constraints of network governance and detached from the ideal of a moral super-discourse involving the whole society, deliberative democracy may be regarded as a normatively attractive model to complement traditional Nation State based democracy in the European multi-level system.

\textsuperscript{355} O. Gerstenberg, \textit{Bürgerrechte und deliberative Demokratie}, 1997.
Moving back to the reality of the European scenario, it is in one of the core elements of network governance – comitology – that an impressive study\(^\text{356}\) based on empirical evidence has actually claimed that deliberative decision-making may materialise in practice. In its basic concept, deliberative decision-making, indeed, seems to be well compatible with the specificities of network governance: if on account of effectiveness, 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. In the experience of European committees, deliberative conditions seem to have been promoted, in particular by the rationality potential inherent to science; scientists are normally supervised by their own epistemic communities, expertise provokes counter-expertise, and conflicts among experts may, in salient cases, ultimately even mobilise the media.\(^\text{357}\) It is equally true that the transnational character of these debates may neutralise long-established alliances between scientific experts and industry at national level, and that, as a result, the influence of powerful national lobbies is even neutralised in a number of cases at European level.

However, up until now, deliberative conditions and decisions seem to have been achieved rather occasionally and only in some areas of European network governance, whereas in others – such as the veterinary committees involved in the BSE crisis – this system has shown to be vulnerable to manipulation by powerful lobbies. It should, therefore, be acknowledged that, so far, such network decision-making structures are, on the whole, not sufficiently institutionalised and “constitutionalised” through clear and legally binding procedural frameworks; this entails that responsibilities are often not clear, and that committees frequently work under conditions of complete intransparency to the public. Such observations have given rise to the fatal thesis that deliberative conditions, especially among scientists, may emerge predominantly when decision-making happens in secret, shielded off from public debate and control – a thesis which has not yet been plausibly refuted. Instead, empirical evi-


\(^{357}\) K. Eder, “Herrschaftskritik und die Sucher nach ihrem Träger”, 1999, concluding that the European \textit{demos} will be the result of public communication, in other words, that it generates itself in communicative processes.
dence shows that there is no assurance that all affected interests, in particular diffuse interests of consumers and other weak and inhomogeneous societal groups will even be aware of what is going on at European level, let alone that they may have realistic chances of influencing policy outcomes.\textsuperscript{358} Worse than this, important regulatory decisions seem to be sometimes achieved even by “subterfuge” in opaque institutional conditions without any public discourse taking place at all.\textsuperscript{359}

These legitimacy concerns are aggravated by the fact that European governance provides structural advantages for deregulatory, “market-making” policies at the expense of national Welfare State policies. To quote again from Fritz Scharpf: “all is not well from a problem-solving perspective if the market-making policies on which Europe can agree will damage the capacity of national governments to adopt those “market-correcting” policies on which the Union cannot agree. Unfortunately, this European problem-solving gap tends to exist in precisely those policy areas where national governing functions are most vulnerable to systems competition”, \textit{i.e.}, in particular costly Welfare State functions and process regulation, such as environmental standards. Since Welfare States continue to be absolutely crucial for societal consensus all over Europe, but are, at the same time, so diverse and complex that they may not be harmonised in the foreseeable future (\textit{e.g.}, public and earnings-related social insurance in Scandinavian and continental countries; strong industrial relations in Germany), the regulatory competition scenario remains present which puts Welfare States under considerable pressure. Solutions to these dilemmas are extremely difficult to design.\textsuperscript{360} Roughly comparable concerns may be raised with respect to the WTO system, too. As recently criticised, intellectual property rights protected by TRIPS may, for example, be an obstacle to the cheap production of medicines needed to combat epidemics such as AIDS in third world countries.\textsuperscript{361}

The fourth mode of multi-level governance, which is most important in the present context, is labelled hierarchical direction. In the European system, it is present in the delegation of enforcement powers to the Commission, and to expertocratic institutions such as the Euro-

\textsuperscript{358} Scharpf, \textit{op. cit.}, 19.
\textsuperscript{360} For interesting proposals, see Scharpf, \textit{op. cit.}, 22.
\textsuperscript{361} See, on this, \textit{e.g.}, the bitter criticism by A. Stefanini, “Chi Può Curarsi e Chi no Te Lo Dice la WTO”, \textit{Salute e Mercato}, 2/2000, 8.
pean Central Bank. Beyond this, the most important source of hierarchical direction in supranational systems is alleged to be law and adjudication.

4. Supranational Governance by Law and Adjudication and its Effectiveness Surplus

Supranational governance by law operates by means of the application of pre-established legal texts, which have been enacted by intergovernmental or supranational policy-making, and which enjoy supremacy towards inferior norms. These legal texts are, in the first place, the founding treaties which set up supranational structures; in the EC, also secondary law which has been enacted by supranational institutions as a result of the delegation of law-making authority by the founding treaties may displace national law. As legal, constitutional texts in particular, are, by their nature, often vague, abstract and general, supranational courts and adjudicative bodies enjoy a considerable degree of discretion in applying and further developing them by means of the acknowledged methods of judicial law-making such as analogy and the “imaginative distillation” of general principles. Thus, in many cases, legal governance is less determined by the legal texts themselves than by adjudication. Governance by law’s reliance on higher-ranking and often general constitutional norms also explains its ordinary functioning: it mostly proceeds by means of negative intervention into the lower legal system, entailing the immediate inapplicability or avoidance of one of its norms. Only on rather exceptional occasions does supranational constitutional law also imply positive commands on the inferior norms or the inferior legal system.\(^{362}\)

Negative intervention by supranational primary law may be directed against supranational secondary law or national law. The first case does not, properly speaking, amount to supranational legal governance, but forms part of the EC’s internal checks and balances aiming at the control of supranational politics. Such control should be the stronger when the legitimacy of a supranational European act may be deemed to be lower, with a strict and effective constitutional review being capable of compensating legitimatory weaknesses to a certain extent. Thus, on account of the Banana regulation’s more than dubious democratic provenance – a majority vote in which several Member States were blackmailed\(^{363}\) – a very strict constitu-

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\(^{362}\) EC law examples include the duty of mutual recognition, the duty to provide for the effective implementation legislation for European state liability or competition law, or the duty of Member States to actively prevent their citizens from acting in violation of fundamental economic freedoms, \textit{e.g.}, by blocking borders to the import of foreign products.

\(^{363}\) See, above, fn. 175.
tional control would have been necessary. On these grounds, the fact that the undemocratic procedure was not mentioned at all by the ECJ, and the wide discretion the ECJ granted to the European legislator may be said and was actually perceived as such by national courts, to make the Regulation’s weak legitimacy even weaker.

Negative intervention by supranational law against national law is the typical form of legal governance. As already stressed in the neo-liberalist reconceptualisation of the EU, it is precisely the feature of such negative intervention into national law which leads to a structural advantage of deregulation of the formerly nationally regulated fields of the economy. This intervention proceeds by simple application of the EC Treaties’ economic freedoms and competition rules by the ECJ and the Commission (negative integration). By contrast, positive integration, which means enactment of new European regulation, depends on majorities in the political institutions, which are often difficult or impossible to reach. Against this background, a closer analysis of supranational governance by law and adjudication in terms of effectiveness and legitimacy essentially boils down to an evaluation of the impact of negative intervention.

a) Effectiveness

The effectiveness of negative intervention may be analysed at two levels, that of supranational law and that of the inferior national law. To start with the first: as regards its immediate result, namely, that of rendering conflicting provisions of the inferior legal system inapplicable or void, negative intervention is very effective. As is well known, in market-building by deregulation, EC law was very effective. Pursuant to the direct effect and supremacy doctrines, it was able to count on the valuable co-operation of national courts and individuals, enforcing EC law against conflicting national law before national courts, most often in combination with the Article 177 (now 234) EC reference procedure. All this led to a high degree of internationalisation of the EC legal order into the national ones, with the effect that it became comparably effective. This notwithstanding, the dangers of ineffectiveness of European legal governance are present for the same reason, namely, that, for its enforcement, EC law depends, to a large extent, on the collaboration of national law, national administrations and courts who owe their ultimate allegiance to their own States and constitutions. Non-compliance may, then, happen particularly when supranational measures are felt to be illegitimate. Here again, the German instance courts’ resistance against the Banana regulation through the granting of interim measures provides a telling example.
As regards the effects of supranational governance by negative intervention in the national legal systems, these range from simple disruptions which negatively affect its effectiveness to the deliberate elimination of certain legal provisions or even entire sub-systems. This happens because hierarchical interventions always involve the risk of not respecting the intra-systemic knowledge, specialised acquis, autonomy, logic and functioning conditions of the “subjected” legal system – i.e., particularly those features which reflect the functional differentiation, specialisation, autonomisation and transnational extension of modern society. As an example, again drawn from the field of private law, one may point to European consumer protection law directives. On account of their punctual nature, they are only effective in combination with the rest of national private laws, to which they are, in general, not well-tuned, as no single law may account for the specificities of 15 others. In the field to be examined here, the ECJ’s wholesale non-recognition of GATT/WTO as a legal system in Portugal vs. Council – an inverted form of hierarchical imposition, as it were - may lead to similar results, as this system’s regulatory potential and its economic benefits cannot be realised if it is denied any meaningful interconnection with the internal legal orders of its founding Members.

In order to reconstruct and assess the effects of a supranational legal intervention into the national legal system analytically, it may be useful, as a first step, to compare these to legal interventions into other social systems more generally; such a comparison is also justified as social systems are reflected in the legal sub-systems which are supposed to regulate them. Now, “steering” social systems by law, sometimes also referred to as the “juridification of social spheres”, has turned out to be a highly complex endeavour often prone to ineffectiveness. To give an example, the famous process of “materialisation” of national private law, in which law aims to compensate for social injustices by taking over control of social phenomena such as situative (e.g., inferior knowledge) or structural (e.g., the dependence of worker or tenants) limitations of the contractual freedom of both parties, has turned out to become easily ineffective or even counterproductive. Similarly, the juridification of Welfare State functions has also proved easy to turn into ineffectiveness. Last but not least, the legal planification of economic sectors, even long before the Banana experience, has shown that the

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365 Specifically, far-reaching maternity protection in labour law may decrease women’s chances on the labour market, and an excessive tort liability for dangerous services, such as surgery, has resulted in high prices, as the risk must be insured and the premiums are added to prices, often making them unaffordable for the poor.
law’s ability to steer the economy effectively is limited. In general terms, it is especially when the autonomous logic and functioning conditions of other sub-systems such as the market mechanism are no longer respected that the results of legal interventionism may be ineffective and counterproductive. As a remedy, it has been plausibly argued that legal “steering” of social systems is most effective when it keeps to a “reflexive” or “procedural” role, which aims, first of all, at stabilising the good functioning of other social systems, with any interventions taking place only indirectly by means of influencing the other system’s framework conditions and autonomous logic, *e.g.*, by providing incentives “in the autonomous language” of the other systems, such as the “language” of prices and costs in the economy.

It may be derived from these findings that effective governance by supranational law should equally keep to such a “reflexive” or “procedural” role, if it does not specifically aim at displacing provisions of the lower legal system (as is frequently the case in the EC’s deregulation measures linked to the establishment of the Single Market). This means that it should also sensitively account for the lower legal system’s autonomy, integrity and the social and political constraints under which it operates. As regards the interconnection of the two systems in particular, this should be guided only by “interface standardisation” through non-hierarchical co-ordination which ensures the relative autonomy of each sub-system. This does not exclude, as a type of working relationship in co-ordination, the general supremacy of a specific legal system such as the EU or GATT/WTO legal system over a more general one. However, supremacy, understood as such a working relationship, must not be equated with unconditional hierarchical imposition. The interventions of the higher system on the lower must, at least, be limited where the core constitutive principles of the latter are at stake, and where, consequently, co-ordination relationships would lead to *de facto* hierarchical imposition. Any sub-system must, therefore, recognise the core principles and policies

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366 See G. Teubner, *op. cit.*; Th. Vesting, *Prozedurales Rundfunkrecht*, 1997; Gralf-Peter Callies, *Prozedurales Recht*, 1999. It should be noted that the term “procedural law” is wider than mere procedures. It refers to the temporalisation of legal problems, with the law’s steering potential being tuned to the effects a legal measure or act is likely to generate in time. The similar term “reflexive law”, suggested by Gunter Teubner, means that the law should, in itself, “reflect” the functioning conditions of other social systems.

367 A similar reasoning was proposed, as regards the interface of national and European media law, by Thomas Vesting, *op. cit.*. It is argued, here, that this reasoning may be generalised to the interface of any supranational with lower law.

of the other interacting sub-systems and, so as to avoid dangerous “identity conflicts” from the outset, *integrate them into its own doctrinal structures as restrictions.*

A particular example of this may be found in private international law, which has the task of co-ordinating competing national orders of private law: here foreign law is only applied so that the “*ordre public*,” composed of fundamental rules and principles of the domestic legal order, even though this may not be applicable to the case at all, is not violated. Whereas in conventional private international law, the *ordre public* exception is based on legitimacy rationales related to the violation of human rights or other fundamental elements of a State’s legal order, it may also be associated with the effectiveness of the interconnection between legal sub-systems. Indeed, the interface of supranational law in specific branches such as media law, or certain cases of competition law which impair national cultural values have been analysed according to such procedural criteria.

*b) Legitimacy*

The legitimacy of supranational legal governance may be said to have a bright and a dark side. To explain the latter, it may be useful to provide a comparison with the national situation as a point of reference. National constitutions have always worked as a non-majoritarian complement to, and sometimes a corrective to, representative democracy by public will formation. In this respect, constitutional rules represent the “tying of Ulysses in order to prevent him from succumbing to the sirens’ singing”, as *Jon Elster* put it, i.e., the establishment of fundamental rules, by a legislature at a certain time, which are particularly protected against their future abolition and which may be imposed by Courts against future governmental and legislative action. In this respect, constitutions have, over the centuries, worked as useful checks and balances in Western democracies, and may therefore be assigned an uncontested degree of legitimacy even though the degree and reach of constitutional “hand-tying” remains highly controversial in specific cases.

However, there are fundamental differences between national and supranational constitutions and their judicial guardians, which might change this assessment. National constitutions are more closely linked to the ultimate sovereign, the people, whereas supranational law generally enjoys a weaker legitimation on account of the above-mentioned difficulties of func-

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369 Vesting, *op. cit.*

tional representation and expertocratic governance – a basic finding well reflected in the term of “global subsidiarity” suggested by Robert Howse. Also, in the national scenario, constitutional courts and the legislator are in a continuous, mutually complementary interplay: if national norms are declared unconstitutional, the legislator can normally fill the gap without major problems; conversely, if the legislator’s perception of societal problems changes over time, such changes will normally also be reflected in constitutional jurisprudence. This situation of a mutually complementary interplay does not exist at supranational level, where either no “ordinary (secondary) law legislator” exists at all as in WTO, or where, as in the EU, the institutional capacity of legislative organs is limited by institutional provisos (majority rules) and fundamental incompatibilities between national systems which render harmonisation in highly “legitimacy-relevant” fields such as Welfare State systems barely possible. Moreover, national constitutions govern more or less all fields of life and society, and they are, therefore, responsible for balancing all constitutional values and principles on an equal footing. By contrast, supranational constitutions are functionally limited to the policy fields chosen for integration as in the EU, or even to a single field such as international trade as in GATT/WTO. This specialisation may easily lead to bias and a narrowing of perspective, as conflicting values have often no, or only limited, constitutional status within supranational systems. Finally, national constitutional courts operate in an environment in which a stronger degree of convergence on basic values may be supposed to persist. Similarly, they are also more integrated into political discourses which are, so far, widely confined to the national level; they know national situations better and are more easily exposed to criticism by public opinion.

It follows from all these observations that the legitimacy of supranational governance by law is severely limited. In short, this type of governance is characterised by a strong “capacity (effectiveness) surplus” through its deregulatory potential: it is able do much more things than it may do legitimately. What is most problematic against this background is the supranational balancing of substantive values such as free trade or undistorted competition vs. social or environmental protection as provided for in national constitutions. Instead, only basic standards of rationality (reasonableness), procedural fairness and the absence of discriminatory practices should be strictly controlled in such conflicts, whilst the generally higher le-

gitimacy of the national system should lead to far-reaching deference to different national regulatory choices.372

Where, then, does the bright side of supranational legal governance lie? An answer may point both to the procedural virtues of the rule of law, and to its substantive capacity to correct “nation State failures”. To start with the first, the Rule of Law entails the transition from the realist-type state of nature to the state of law; it ensures the civilised treatment of foreign citizens and States, substituting power-dominated decision-making with rule-contained and deliberative decision-making. This is essentially due to the integrity of legal procedures and judges and the people’s widespread trust and belief in this integrity. This may, to a certain extent, be an irrational naïveté, as it is sometimes put, but it is also the result of the law’s (relative) impartiality and deliberative quality. While, as noted, the deliberative qualities of supranational political process are, to date, rather controversial, legal adjudication seems to provide a safer candidate for the realisation of deliberative ideals. This is due to the compliance of the law and of adjudication with a relatively strict set of procedural and substantive constraints, which may be supposed to lead to more balanced and rational outcomes compared to political processes. Beyond this, 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.373 As regards constitutional adjudication, which often replaces political decision-making by balancing competing values, it should not only be doctrinally and methodologically coherent in order to be legitimate, but also socially acceptable, by taking into account the public interest as well as a wider range of stakeholders’ interests – thus, going beyond those interests which give a right to standing as a party in the proceedings.374

The main substantive virtue of supranational legal governance lies in its capacity to remedy “Nation State” failures (or Community failures in the relationship between the EC and GATT/WTO). In this respect, the principle of non-discrimination and the control of “beggar-my-neighbour” behaviour are of utmost importance, with the maxim “no taxation without

372 See, for an illuminating elaboration on this point, M. Poiares, We the Court, 1998.
representation” becoming the substantive core principle for democracy beyond the Nation State. In fact, the imposition of the detrimental externalities of one’s own policies on neighbour States constitutes a widespread behaviour even among modern liberal democracies. Such externalities can be environmental, as cross-border air pollution or waste shipment to other States, political, as in the case of the remittance of asylum seekers to neighbour States, or economic, as in the case of protectionist trade measures or unfair tax privileges in order to attract companies from other States, which decreases their tax revenue and puts their Welfare State institutions under strain. The task of controlling and correcting such “Nation State failures” is thus of the highest significance. It lays the ground for new basic rules in international relations which, if implemented effectively, would bring the world closer to a peaceful, fair and just co-existence of Nations, and may, therefore, be well-assigned the predicate “constitutional”.

To summarise, in a legitimacy perspective, supranational legal governance should, indeed, be confined to a predominantly “procedural law” type role vis-à-vis national systems: its primary task is to stabilise the latter by defending their effectiveness, political scope of manoeuvre, and viability by preventing “beggar-my-neighbour” behaviour – features which may be called “top-down empowerment”. Several constitutional essentials of the EC system may be read along these lines: the non-discrimination guarantee of Article 12 (ex 6) EC can be read as a counterbalance to the particularism and exclusionary nature of national basic rights; similarly, the prohibition of protectionist policies by the four market freedoms and the avoidance of private market “manipulations” through competition rules and State aid controls, which are increasingly extended to the granting of unfair tax advantages, can be interpreted in this sense given that Member States are prevented from resolving economic and social problems at the expense of their neighbours. In short, whereas the legitimacy of supranational governance by law is limited, where competing values need to be balanced, it is huge where it is capable of compensating Nation-State or, in the case of GATT/WTO, Community failures.

376 Joerges, op. cit.
The GATT/WTO system may be viewed as belonging to the overall, network-type, multi-level system of governance, too. In its origin, GATT ’47 had the principal task of bringing economics of comparative advantage and competition to bear among sovereign States. By contrast, the world trading system, today, has taken other important objectives on board, namely the managing of a high degree of economic interdependence (caused by a massive decrease of natural barriers to cross-border economic activities and of transportation, communication and transaction costs) and the co-ordinating of free trade with other non-economic constitutional values, such as social and environmental protection. These challenges should be accommodated by the establishment of the WTO, whose law now constitutes an encompassing and voluminous construct which influences, constrains and controls large parts of European and national law.

Applying the modes of governance framework of analysis suggested by Fritz Scharpf, the main feature of WTO governance, which also constitutes its paramount difference as compared to the EU, has already been stated several times: the inferiority of its legislative branch in comparison with its adjudicative branch. It should be noted in passing that, to remedy this imbalance, interesting proposals to up-grade the political branches in the WTO have been made. These include the creation of committees of national parliamentarians to accompany, observe and consult the WTO council(s), the establishment of Councils on hot issues such as “trade and ethics”, and even the creation of some pre-form of WTO parliamentary assembly. However, as long as such proposals are not implemented, WTO governance will be dominated by intergovernmental politics and adjudication. Whereas the enactment of any regulation requires unanimity in the WTO council(s), its dispute settlement system enjoys a distinctly greater degree of autonomy and may, therefore, be understood as a truly supranational institution.

On account of the predominant role of WTO adjudication, its effectiveness and legitimacy is of decisive significance. Whereas in the EU, ECJ judgments, occasionally, may be amended or, more frequently, complemented by secondary legislation, the WTO adjudicators

\[\text{378} \text{ See D. De Bièvre, “Re-designing the virtuous circle: two proposals for WTO Reform”, in EUI, Robert Schuman Centre, BP-Chair (ed.), Resolving and Preventing US-EU Trade Disputes, 15; and J. Steffek, “Free Trade as a Moral Choice”, ibidem, 45.}\]
have, in practice, almost always the last word on sensitive issues on account of the unanimity principle in the WTO’s political branch.

1. Effectiveness of WTO Adjudication

The questions relevant to the effectiveness of WTO Law and Adjudication are at the core of this thesis and have already been broached several times. As with supranational legal governance in general, WTO adjudication boils down to negative integration, which is usually very effective, but bears the expounded danger of a “capacity-surplus”. Against the background of the hitherto high degree of compliance of the Member States with dispute settlement reports – which have worked as the main enforcement tool of WTO law –, the central question therefore arises of whether the effectiveness of WTO law can and should be further enhanced. The answer to this question should be made dependant on the legitimacy of WTO adjudication.

2. Legitimacy of WTO Adjudication

Resorting to the criteria for legitimacy listed above, the WTO may claim to possess but the Rule of Law, and to provide a contribution to the overall balance of power in a vertical system of constitutional checks and balances. Given that the WTO is probably one of the most secretive international organisations, with the framework rules for transparency and interest group participation being less developed than in other organisations, very much depends on the performance of the DSB. In order to assess what the DSB may legitimately do in reviewing the WTO-consistency of national measures, it seems useful first to shed light on the framework conditions under which it operates.

a) Framework Conditions of WTO Adjudication

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 deci-

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sions, may draw on a more or less effective enforcement machinery which may resort to the monopoly of force. The EC, to be sure, does not possess this monopoly. However, its impressive compliance record is mainly due to the high degree of internationalisation in the national legal systems, which entails national lawyers being increasingly less aware of the European or national origin of a specific rule and that EC law be 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 effective countermeasures (Articles 226ff (ex 169ff) EC) as well as the high political stakes of potential disobedience for a Member State. As already emphasised several times, 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.

By contrast, the WTO is a much more recent and consequently a less developed creature. Its internalisation in national legal systems is still relatively limited, which is mainly due to their 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 the WTO’s most effective enforcement device. Such deliberative adjudication must ensure that even negatively affected parties accept decisions as just outcomes, or at least as an outcome which may be subject to critique, but whose neutrality, integrity and high 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 gradual creation of a “supranational jurisprudential acquis” which may provide the authority of precedent in subsequent controversies. It may be anticipated that both the panel’s and the appellate body’s preference for compromise solutions clearly reflect such a deliberative approach.

b) Implications for Legitimate WTO Adjudication

Under these extremely constraining framework conditions, the scope for legitimate WTO adjudication is limited to ensuring the deliberative features of the Rule of Law as opposed to a power-oriented system, as these enjoy a strong universal “legitimacy-appeal”. In the first place, this means that the fairness of the DSB’s own procedure should be guaranteed scrupulously (aa). Beyond this, WTO adjudicators should proceed with methodological coherence
and integrity in their legal reasoning (bb). Finally and most importantly (3), in a more substantive perspective, they should display greatest sensitivity when reviewing other national, supranational and international institutions’ measures.

aa) Procedural legitimacy

At first glance, several features of the DSB might raise doubts about its fairness. Proceedings (Article 14 DSU) including the pleadings of the parties to the dispute and third parties (Article 18.2.) are secret which renders impossible any public debate or feedback 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 have been considerably ameliorated by WTO practice. Thus, the practice has been established to publish panel and appellate body 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 that it has formed part of the body’s evidentiary record. In this context, the establishment of an appellate body is of singular importance, since even though the appellate decision must be rendered within only 90 days of the panel ruling, this interval allows for critical deliberation and the reception of public reactions. Beyond this, in the Shrimps ruling, the appellate body, reversing a panel decision, allowed the use of amicus curiae briefs from a non-governmental organisation, thus ensuring a certain representation of civil society and counteracting the danger that decisions are taken by an élite of trade specialists only, without considering the views and the specialised knowledge of other actors in other fields.

382 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 this, 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 specifically enumerated powers. Moreover, the peculiarity that the DSU, notwithstanding its summary character, explicitly stipulates 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 which may be found in WTO Member States, entailing that the DSU’s conception needed to be clarified (R. Howse, in J. Weiler (ed.), The EU, the WTO and the NAFTA, 2000, 35ff.)
Moreover, the jurisprudence of the dispute settlement bodies, in particular that of the appellate body, 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.\textsuperscript{383}

Despite heavy criticism,\textsuperscript{384} this assessment holds true also for the \textit{Banana III} case. As reported, in this case, the EU had not correctly implemented the recommendations of the \textit{Bananas II} panel (in a way which was obvious to any WTO law insider). Thereafter, the US requested the DSB to authorise sanctions under Article 22 DSU. The EU, alleging the WTO-consistency of its implementation measures, insisted that the matter should be decided under Article 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.” A manifest contradiction between Article 22 DSU and Article 21 (5) DSU had thus been revealed. Indeed, if a repeated recourse to the Article 21 (5) DSU “implementation review” procedure were permitted, this would render impossible the adoption of any sanctions (this was called the “sequencing problem”).\textsuperscript{385} In order to remedy a procedural deadlock (the EU had blocked the adoption of the DSB’s agenda to prevent the Article 22 DSU procedure from continuing), WTO’s DG Ruggieri suggested a compromise, according to which a panel under Article 22 (6) DSU was established. Under this provision, an arbitration procedure with the primary purpose of reviewing 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 Article 22 (6) DSU procedure, it was also allowed to scrutinise the WTO-consistency of the EU’s amended regime by way of incidental control. 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 the amount of the sanctions drastically. Since the panel had found an acceptable compromise in a situation which could have greatly threatened the integrity of the whole system, Paolo 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 US and other WTO Members had already raised objections against the (almost identical) draft of the European

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\begin{itemize}
\item \textsuperscript{383} Howse, \textit{op. cit.}
\item \textsuperscript{385} See C. Valles and B. McGivern, “The Right to Retaliate under the WTO Agreement”, \textit{JWT} 34 (2000), 63.
\end{itemize}
\end{footnotesize}
implementation measures at an early stage and requested the establishment of a Article 21 (5) DSU panel.

As a further step towards the “due process ideal”, Article 7 (2) 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 appellate body to imply that all the claims that the complainant intends to make must, in the first instance, be contained in the request for a panel. The ratio of this interpretation is 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” (Article 11 DSU). This duty was interpreted to be one of law, and therefore, subject to appellate review. In *Hormones*, the appellate body 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 irrelevant was itself found to be a reviewable issue of law. It was also convincingly argued that, though the panel has the discretion to decide as to whether to allow an *amicus curiae* to submit a brief or not, and to consider 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. Finally, procedural justice rights have also been strengthened by allowing a private legal counsel to attend and plead in proceedings. Since private attorneys are usually trained in domestic litigation and are, 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.

Notwithstanding these achievements, one cannot note ignore such adverse phenomena as the so-called technique of “completing the analysis”, frequently used by the appellate body. This euphemism addresses the situation in which the appellate body, after partially reversing a panel finding (what has occurred in 15 out of the first 17 appellate body reports, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, 16 January 1998, p. 133. *Hormones*, *ibid.*, at para. 143. Howse *op. cit.*, 13. See, critically, S. Cone, “The Appellate Body, the Protection of Sea Turtles and the Technique of “Completing the Analysis”, *JWT* 33/2 (1999), 51.
even though, on two occasions alone, the final conclusions have been completely overturned), decides the case itself. This may be explained by the fact that the DSU does not, at least not explicitly, give the appellate body the power to remand a case to a panel. Indeed, such a procedure would barely be compatible with the DSU’s strict time schedules. The unfortunate result of the “completing the analysis” technique may be found in the fact that the appellate body decides, as first and last instance, certain relevant questions of law and fact which the panel may not even have addressed at all. This procedure not only deprives the parties of their right, under the DSU, to have a case examined by two instances, but it also renders impossible any feedback on the first instance decision which would be most important in terms of the control and, thus, the legitimacy of the decision. Beyond this, this technique contributes to the development of the panel procedures becoming more and more a degraded to sort of prelude to the real endgame which takes place only in the appellate body. This development also becomes visible in the fact that, at the present stage, the clear majority of cases are appealed against, which not only entails that the tight time-schedules set forth by the DSU can no longer be respected in an increasing number of cases, but also that the appellate body’s human and logistic resources may soon become exhausted.

Even though these matters constitute serious problems, they are, at the present stage, not capable of endangering the overall fairness of the procedures. This may be inferred from the circumstances that, as will be shown in the following, the appellate body has, up until now, displayed great sensitivity in politically hot issues and that the overall functioning of the mechanism is still very good. All in all, the fair procedure requirement may be considered as having largely been realised in the WTO dispute settlement system.

**bb) 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 dispute settlement bodies have already attained a more convincing record, to which their methodological

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390 Drawing on the very controversial Tuna/Dolphin panels, Robert Howse had reached the profoundly negative overall assessment on dispute settlement under the old GATT that “the trade policy élite that staffed the GATT Secretariat and the panellists themselves, as well as some academics in the field, tended to view the actual legal text and doctrine of the GATT as a tool which could be manipulated to achieve whatever result in a particular case (…)”. Howse, op. cit.
sensitivity may have contributed. To begin with, the importance of the wording of the provi-
sions as the starting point of any interpretation was frequently emphasised. This approach
was justified by resorting to Article 31 of the Vienna Convention on General Treaty Law,
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 provisions of the
Vienna Convention may, in fact, be characterised as codified customary law. This was,
indeed, held on several occasions by the International Court of Justice with respect to spe-
cific provisions of this Convention.

Arguably, this textual approach has advantages in terms of deliberative legitimacy.
Whereas the priority of teleological interpretation may be assumed to privilege the agree-
ments’ general goal – namely, that of promoting free trade - careful attention to the wording
frequently draws the interpreters’ attention to compromises reached at the drafting stage.
Thus, in Hormones, the appellate body had to examine the panel’s interpretation of the for-
mula, trade restrictive sanitary and phytosanitary measures “based on” international stan-
dards. The panel had interpreted this to mean that such measures must conform exactly 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. The appellate
body 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.” On similar grounds, the appellate body, 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.

391 Japan-Taxes on Alcoholic Beverages, WT/DS8,10-11/AB/R, 4 October 1996, p. 12; United States-Standards
393 For a critique, see M. Hilf and B. Eggers, “Der WTO-Panelbericht im EG/USA Hormonstreit”, EuZW 1997,
559.
394 Hormones, loc. cit., at para. 177.
Beyond this, 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 and social protection agreements. This approach obviates temptations to view the WTO as a “self-contained regime”,395 which had been advocated with respect to the old GATT396 and which again 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 appellate body to travaux préparatoires. This is in line with Article 32 of the Vienna Convention which mentions legislative history 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 legitimacy.”397 Exactly along these lines, the hermeneutic value of a concept’s historical meaning (as apparent in the travaux préparatoires) was actually limited by the appellate body in Shrimps.398 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” had to 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 appellate body 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 appellate body has nonetheless found that adopted reports which create “legitimate expectations” concerning future cases need to be considered.399 This finding was convincingly interpreted in a pro-

395 This term was coined by Bruno Simma, “Self-Contained Regimes”, Netherlands Yb. Int. L. 18 (1985), 111.
397 Howse, op. cit., distinguishing between the “narrow” interpretive community constituted by the Treaty’s drafters and the broader community concerned with subsequent effects and practice.
398 Shrimps, loc. cit., at para. 107.
399 Japan-Taxes on Alcoholic Beverages, loc. cit., 11ff.
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. Beyond this, the appellate body 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.

cc) Institutional Sensitivity in Dealing with 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 space to “beggar-my-neighbour” policies towards foreign States and 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 similar to that which was proposed above for supranational adjudication in the EU: formal minimum requirements such as a fair procedures including the consideration of all, including foreign stakeholders’, interests and 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” such as protectionist discrimination against foreigners or foreign goods. 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, to a higher degree, politically accountable to their citizens than supranational institutions. Therefore, following Robert Howse’s “global subsidiarity” reasoning, 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.

401 Howse, op. cit.
In this context, the interpretation of the formulas “like products” and “no less favourable treatment” in Article 3 GATT is of crucial importance. As ECJ jurisprudence on “de facto”, “indirect” or “disguised” discrimination shows, these formulae may be construed as far-reaching market-access rights, restricting huge parts of domestic regulation. Similarly, if “likeness” is determined only on the basis of the physical similarity of products, products differing in their production methods and even origin-neutral criteria of differentiation would be covered. Thus, as has been convincingly suggested, the different treatment of product and production-oriented domestic standards and measures should be abandoned, and “like products” should be interpreted as meaning “not differing in any respect relevant to an actual non-protectionist regulatory policy.”

These guidelines of “global subsidiarity” may again be said to be largely respected by the WTO’s adjudicators, the appellate body in particular. Both with respect to fact finding and in reviewing other institutions’ and actors’ measures, the appellate body held the legal basis to be the Article 11 DSU duty to “make on objective assessment of the facts”. This has made an appropriately flexible approach possible. Thus, in *Hormones*, the appellate body had to interpret Article 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 appellate body 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 appellate body 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 experiences and fears which are barely verifiable rationally. Thus, 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 public opinion seri-

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404 *Ibidem*, 261.

405 See the instructive synopsis by W. Davey, “Has the WTO Dispute Settlement System Exceeded its Authority?”, *JIEL* 3 (2001), 79.
ously 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*, the appellate body, again reversing a panel decision, conceded to the US 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 this case, a safety device allowing sea turtles to escape from a shrimp capture net). The US, however, 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.

In cases in which the domestic legislator’s balancing of values is not objected to, the WTO adjudicator may, nevertheless, provide guidelines on how to interpret domestic regulation in future cases, so as to contain future “power policy”. A true masterpiece in this respect, worthy to form part of legal history, is the 288 page report on the famous (or infamous) Section 301 of the US 1974 Trade Act, which was also issued in the framework of the Bananas conflict. This provision contains the legal basis for unilateral trade sanctions whose compatibility with WTO law was challenged by the EU when it was threatened with such sanctions on account of it having failed to implement the 1997 appellate body decision on its Banana import regime in time. Arguing that the possible application of the Statute according to its rather wide 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 to numerous conditions in order to ensure its consistency with WTO law. In other words, the panel has provided the US with a lengthy and detailed commentary, binding under WTO law, on how to interpret and apply its own law! All in all, 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. This is an outstanding and admirable example of making use of the law’s deliberative quality and potential for legitimate supranational governance.

\[406\] *Shrimps, passim.*

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 to be in violation might be replaced (Article 19 (1) 2 DSU). Even though these recommendations are clearly 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. 408

To summarise, the legitimacy of the WTO system is mainly limited to the deliberative, “Nation-State failure-correcting” potential of supranational adjudication. While this fulfils extremely important functions in containing States’ political power-play, it presupposes a high degree of respect for procedural fairness and methodological coherence and integrity, and imposes considerable limits in the substantive review of national or supranational measures. It is against this background that the interconnection between the WTO and its Member States’ legal orders will need to be reconstructed.

408 In the Banana conflict, this system was actually practised once. Upon the request of one of the complaining parties, Ecuador, the first Banana panel recommended an alternative tariff-only import regime. Incidentally, this is exactly the system that the EC now wants to adopt after 2006 – having lost nearly ten other WTO dispute settlement procedures in the Banana dispute in the meantime. See M. Salas and J. Jackson, “Procedural Overview of the WTO/EC – Banana Dispute”, JIEL 3 (2000), 145, 157, fn. 94.
Part III: An Alternative Proposal for a Multi-Level Constitutional Interconnection of the Three Levels

Chapter I: Interconnecting National Constitutional Law and European Law

“Irrespective of how the Bundsverfassungsgericht’s position is to be assessed under public international law, I see the biggest shortcoming in the fact that though constitutional conflicts could be expected at the conclusion of the EC Treaties, they were not regulated (...) Against this background, it should be considered whether an institution, with which we have become familiar in Germany, namely, the Common Senate of the highest federal courts, could not be established at EU level as well as a kind of court of arbitration. As members, one might imagine representatives of the ECJ and a representative of the highest court of each Member State. The ECJ could not take over this task of arbitration as it is an institution of the Community.”

Siegfried Broß, Judge at the Bundesverfassungsgericht, competent for European Matters409

I. Conclusions from Multi-Level Governance for the Solution of Constitutional Conflicts between the European and the National Legal Order

According to the multi-level governance approach, the interconnection of national constitutional and European law should be modelled so as to optimise the effectiveness and legitimacy of both levels. As regards effectiveness viewed in the narrow “ultimate authority” perception of the Pure Theory of law, it has already been shown in the legal-structural reconstruction of realism on the one hand, and functionalism and neo-liberalism on the other, that neither legal order is “strong” enough to impose itself without any limits upon the other, and that unconditional and unlimited supremacy is, therefore, impossible.

The multi-level governance approach considerably refines this conclusion by the network perspective according to which all constitutive elements, sub-systems and interconnecting mechanisms are mutually interdependent, none of which is able to deploy a great deal of autonomous effectiveness: while national law increasingly depends on supranational law to

restore its problem-solving capacities under the constraints of economic globalisation, European law would simply not be able to determine and monitor national implementation measures in detail. Moreover, in order to maintain also the national level’s effectiveness, it has been outlined that European law should behave in a “reflexive” way, respecting as far as possible the autonomy and the intra-systemic ordre public, i.e., the core constitutional rules and principles of national law.

Transformed into a legal-structural perspective, the lack of absolute hierarchy renders impossible any monistic interpretation of the relationship of the two levels, so that a dualistic interpretation seems to be the cogent logical consequence. Indeed, this model would seem to come closest to the reality of two legal orders which are visibly separated despite important interconnections, and which are protected by two powerful courts, each of which has the last word with respect to all legal issues arising within each system. In the language of the Pure Theory of law, the pluralist approach assumes the existence of two logically independent systems with different Grundnormen. As a consequence, conflicts of validity between the two orders are excluded by definition, whereas “conflicts of obligation” for individuals facing the equally justified claims for validity of norms emanating from the two orders are possible.

Other consequences regard the reach of conflict norms – so to speak “bridging norms” – between the two systems, in particular the supremacy rule. For, logically, such rules cannot change the pluralistic structure itself; in other words, they could not bring about a “legal revolution” through the annexation of a legal order under the Grundnorm of another. This means that, logically, the supremacy rule can only go as far as the national Grundnorm allows it to go; i.e., EC law can only influence the national legal order in so far as national constitutions allow it to do so through their “opening clauses” such as Articles 23, 79 III Grundgesetz. Procedurally, the competence of the guardian of the supremacy rule, the ECJ, must also be limited, with the consequences that this court has no competence to sit as the final arbiter over “Grundnorm-relevant” conflicts in application of that rule. Instead, only national courts would, logically, be able to take this decision.410

410 The theory of institutional legal positivism reaches a similar result from a less formalist conceptual starting point. It conceives of law as a system, directed towards a coherent unity of norms, the existence of a legal order being regarded as a sort of “regulatory ideal”. Since the actual enforcement of the legal order ultimately depends on legal institutions, founded and directed by norms, it may be qualified as an “institutional normative system”. The interface between legal orders is regulated in each system by specific criteria of legal validity, as contained in so-called norms of recognition (Hart). An analysis of the interplay of the EC and national legal
As a result of the radical pluralist scenario, the two legal orders would stand side by side like secluded medieval strongholds and restrict the relationships between each other – to the ultimate detriment of the effectiveness of both. The scenario of legal subjects having to serve two masters, *i.e.*, facing conflicting commands by different legal orders would be possible. For constitutional conflicts could not be solved legally, and would need to be left to politics. This approach, however, meets with several strong objections. First, political solutions to constitutional conflicts would appear to be unlikely not just in view of the generally limited degree of political consensus among Member States which renders political decisions rarely smooth and easy. Also, political decisions would be particularly difficult to reach in cases in which a State has been outvoted in the conclusion of a secondary act, but nonetheless continues to challenge it on constitutional grounds, thus endangering legal unity. Secondly, the radical dualist scenario could also generate strongly negative implications for the effectiveness of the supranational legal order. These do not lie only in the central danger, which has been mentioned several times already, of the outbreak of the Cold War scenario, with a national constitutional court setting aside a European act. Instead, as mentioned, the

orders along these lines shows that both orders do not constitute one monistic system in which EC law would be super-ordinated to national law: “The monistic picture does not square well with the fact that the effective legislature for the EC is the Council of Ministers, whose members are identifiable only by reference to the place they hold according to state-systems of law; so EC powers of legal change and criteria of validity presuppose the validity of competencies conferred by state-systems, but not themselves validated by EC law. More generally, the institutional theory of law insists on a degree of sociological realism, hence is not in the Kelsenian sense a pure theory. From this point of view, it is clear that institutions of state law look to the state legal order for confirmation of their competencies, not treating this as contingent upon ulterior validation or legitimation by the EC; while reciprocally EC institutions look to the foundation treaties as sufficient for their validation. A pluralistic analysis is, in this instance, and on these grounds, clearly preferable to a monistic one.” Institutional legal positivism also advocates a similar restriction of supremacy: “(...) The legal systems of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity, within the criteria of validity proper to distinct systems, do not add up to any sort of all-purpose superiority of one system over another. It also follows that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate (...) What this indicates is that acceptance of a pluralistic conception of legal systems entails acknowledging that not all legal problems can be solved legally.” N. MacCormick, “The Maastricht-Urteil: Sovereignty Now”, *ELJ* 1 (1995) 259, 264. For a similar conclusion, see, also, J. Isensee, “Vorrang des Europarechts und deutsche Verfassungsvorbehalte - offener Dissens”, in J. Burmeister (ed.), *Festschrift für Klaus Stern*, 1997, 1239 at 1266ff.

411 N. MacCormick, *op. cit.*, 264. Incidentally, monism with subordination of EC law is not even discussed by this author.
German instance courts’ indirect resistance through the frequent award of interim measures against the Banana regulation has considerably decreased its effectiveness throughout its entire existence. On all these grounds, the radical dualist situation is no viable solution from an effectiveness perspective, and there is a strong need to establish, or make more use of the existing, effective legal interconnections among the two legal orders which would ultimately overcome the Cold War scenario.

This conclusion is strongly supported by legitimacy rationales, too. A complete submission of the national legal order under the supranational would be at odds with the generally higher legitimatory “dignity” of the former in the terms of the global subsidiarity reasoning outlined above. Secondly, breaking up the Rule of Law by leaving constitutional conflicts to politics would also mean renouncing the law’s deliberative virtues, which have enabled it to tame the earlier political “powerplay” in international relations and allowed it to create the Community’s supranational acquis. By contrast, it is particularly the lack of hierarchy among the supranational and the national level under dualism that might even favour a deliberative legal solution among the courts. Moreover, other framework conditions for such a legal solution should be relatively good in the EC: it possesses a fully fledged legal system in which, unlike the WTO, non-compliance and accepting sanctions are definitively unavailable as an alternative. Also, from a legal-technical perspective, interconnecting two legal orders should not pose insurmountable problems. Resolving such conflicts is, indeed, a genuinely legal task as shown inter alia by the existence of a whole legal discipline devoted to it: conflict of laws. The lack of a conflict resolution mechanism at EC level may, therefore, well constitute an important institutional failure, but does not cast doubt on the legal characterisation of this task.

With respect to the concrete question of what kind of intersystemic coupling should be established, basic guidelines may also be derived from the multi-level concept. The fact that there exists no hierarchical sub- or super-ordination, but heterarchical, complex couplings between the two legal orders should entail that neither should seek to stand above the other, but should respect the other’s relative autonomy. Moreover, each legal order should, as outlined above, integrate the other’s intrasystemic “ordre public”, i.e., its core features including its “versions” of human rights and legislative competence delimitation, into its own doctrinal structures.

From these provisos, a two-step solution may now be derived. First, a conflict should be avoided as far as possible. This could be practically achieved through judicial co-operation,
in which the two constitutional judiciaries agree on a common constitutional standard, in particular in the fields of legislative competencies or human rights protection (“concordance solution”). To reach such a compromise, instead of a blind *octroi* of supremacy, the competing principles underlying the conflicting norms of both sides should be optimised so that each may retain maximum effectiveness.\(^{412}\)

Second, if a co-operation along these lines fails, the conflict should not simply be left open, in the hope that it will never break out as a result of a national court setting an EC act aside. However, according to multi-level governance logic, a further legal interconnection between the clashing constitutional orders should be established. This means that a third, *legal* instance should take an “interconnection decision”. Such an instance might be found *de lege lata* at two levels only: at the level of the European Union, overarching the European Communities, or at the level of general public international law. A solution at EU level might be slightly better than the straightforward resort to international law, because it would ensure conflict resolution closer to the European system, which might be important with a view to accommodating and preserving its specific supranational features. Thus, the Union’s “roof construction” above the Member States and the Communities, otherwise nearly devoid of content, could be rendered useful for the sake of legal co-ordination between them. Since, *de lege lata*, the EU obviously only disposes of a political institution, the European Council, and not of any adjudicatory or mediatory institutions, EU law would, however, still have to be supplemented by international law as regards the establishment and functioning of a conflict resolution institution.\(^{413}\) The result of this would be a special international law sub-regime between general international law and EC law.

If such a third-level, co-ordinative institution could actually be established, the EU might be characterised as a three-tier structure with a weak super-ordination, limited to co-ordinative functions, of the EU over the Communities and the Member States. At this point, one might object that, just as with regard to the Communities, a monistic subordination of the Member States under the Union should equally be excluded, and that, consequently, no binding conflict resolution at EU level would be conceivable. This might, however, also be a virtue. For it might be possible that a *legal, albeit not necessarily strictly binding, mediation*


\(^{413}\) The recourse to public international law for the resolution of constitutional conflicts as *ultima ratio* is also advocated by T. Stein in O. Due et al. (eds.), *Festschrift für Ulrich Everling*, 1995, 1439 at fn. 3, and *idem*, “Die regionale Durchsetzung völkerrechtlicher Verpflichtungen, *ZaöRV* 47 (1987), 95ff.
decision be taken at EU level. This might offer a persuasive compromise solution difficult to oppose in political practice, a fact which might ultimately confer also legitimacy, i.e., acceptance by both orders, to such a mediation decision. Such a “co-ordinative”, mediation-like solution, which would represent an intermediary step between monism and pluralism, a kind of “weak or limping monism” as it were, would seem to fit the multi-level governance conception of the EU particularly well.\footnote{Finally, it is interesting to note in the present context that Neil MacCormick, qualifying his earlier view of (radical) pluralism, has now advocated a solution based on international law, which is similar to the one proposed here. His new model termed “pluralism under international law” shares the starting points of radical pluralism in that the two legal orders are not in a hierarchical relationship with each other, but interact on the same level, and that, therefore, the supremacy of EC law must be limited. The only difference lies in the position attributed to international law. In this context, the self-perception of the EC as a legal order sui generis and not as a mere subset of international law should be respected, so that EC law and international law should be regarded as separate legal orders. However, whilst, according to radical pluralism, international law simply constitutes a further non-hierarchically and, therefore, also a pluralistically juxtaposed third legal order, according to the model of “pluralism under international law”, EC law and national legal systems are not only bound to respect international law, but also to derive their validity from it: “(...) The obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems... [The Member States] are subject to obligations of international law among themselves in respect of the treaties they have agreed, and the treaties in question have had the effect of constituting a new legal order sui generis which could not now be lawfully repudiated by any of the members, though it could be dissolved or radically changed in character by treaty amendment. The good reasons that we have for conceptualising the relevant relationships in favour of a co-ordinate, rather than a hierarchical, interaction between EC legal order and Member State legal order are not reasons for denying that this co-ordinate relationship is itself subject to norms of international law. Hence, the validity and partial mutual independence of EC law and Member State law is authorised by (public) international law. [Thus,] State courts have no right to assume an absolute superiority of state constitution over international good order, including the European dimension of that good order.” MacCormick continues that this three-tier structure, in which EC law and national law would, at the same level, be subordinated to international law, would represent a form of “monism” in Kelsen’s sense. As to constitutional conflicts, “pluralism under international law” would suggest that we do not have to run out of law (and into politics) as suggested by radical pluralism. Rather, there would always be “a possibility of recourse to international arbitration or adjudication to resolve the matter.” Comparing the approach developed here with “pluralism under international law”, only two differences may be found: First, MacCormick does not resort to the EU level, but to international law only. Second, provided that a conflict resolution decision is binding under international law, but not under EC and national constitutional law, the whole construct may not be qualified as a true Kelsenian type monism, but, at best, as a kind of “limping monism”. Beyond is, MacCormick’s new model might face further practical objections on account of its purely}
To realise these goals in positive law, the further analysis will proceed in the following order: first, it first tries to show that the BVerfG and the ECJ have not yet exhausted all potential to avoid conflict (II). With respect to the hard case in which such a “concordance solution” fails, it will be argued that legal resources are still not exhausted. To this effect, it will be argued that a conflict resolution mechanism consisting of conciliation - i.e., mediation or arbitration\(^{415}\) - at EU level, may be derived, de lege lata, from international law provisions to be cautiously adapted to the European system (III).

II. Optimising the Existing Interconnections: Making Use of the full Conflict Resolving Potential of European and National Law

As already alluded to, even though European law does not offer any ready-made solution, it contains, albeit in a quite crude shape, some general principles which might be developed further, refined and concretised for the sake of conflict resolution. The starting point should be the call, sometimes encountered in academic literature, for a duty of European institutions to respect basic features and structures of the Member States, including those constitutional essentials which a Member State is not allowed to forego. As sedes materiae of such a duty, one might think of the subsidiarity principle (Article 5 (formerly 3 b) EC) or the loyalty duty enshrined in Article 10 EC combined with the duty of the EC to respect the national identity of the Member States (Article 6 (1) EU).

\(^{415}\) These two notions are often not distinguished in the literature. Here, conciliation is used as a general term encompassing both mediation and arbitration. Whereas mediation, typically meaning a conciliation procedure by a representative of a third state, which may even have its own interest in the case, is more politically oriented, arbitration is normally carried out by a neutral body such as a commission, often composed of international lawyers. Thus, the solution to be proposed here is closer to arbitration. This notwithstanding, the general term conciliation will be used here.
1. Subsidiarity

The famous subsidiarity principle - probably one of the most outstanding examples of symbolic legislation\(^{416}\) to be found in legal history - might be viewed as broad enough to encompass the obligation for Community institutions to respect, whenever possible, common or specifically national particularities, including specific national constitutional values.\(^{417}\) However, as mentioned above, in the Protocol on Subsidiarity and Proportionality annexed to the Amsterdam Treaty, the Member States stressed that supremacy should not be restricted on grounds of these principles. Now, one might discuss the legal nature of Protocols and re-open the famous “Barber” debate as to the extent to which the council may legitimately interfere with the ECJ’s jurisdiction at all. It is, however, submitted that such an approach would misinterpret the very nature of subsidiarity. For this concept is basically concerned with the delimitation of competence and not with the resolution of conflicts between norms which fall within different spheres of competence.\(^{418}\) The delimitation of competence is logically prior to the resolution of conflicts between norms; for such conflicts can only arise if the concurring norms have already been judged as otherwise valid - which also means that they are valid on competence grounds, \textit{i.e.}, not \textit{ultra vires}. Thus, adding a conflict of laws dimension would only increase the already existent conceptual vagueness of this principle. As will be shown, there are more appropriate \textit{sedes materiae} of a duty of co-operation and solidarity with conflict of laws implications.

2. The EC’s Loyalty Duty pursuant to Articles 10 EC and 6 (1) EU

The duty of EC institutions to respect the essentials of national constitutions might be derived from the EC’s loyalty duty pursuant to Articles 10 EC and 6 (1) EU. As will be shown, it could allow for a concordance approach based on a certain convergence of substantive standards which might render conflicts less likely to become acute. The following analysis deals first with the scope of this duty (a), then turns to its procedural implications (b) including the reach of the ECJ’s judicial competence which merits particular attention (c).

\(^{416}\) As to this concept, see M. Deckert, \textit{Folgenorientierung in der Rechtsanwendung}, 1995, 24.
\(^{417}\) B. De Witte, “European law and national constitutional values”, \textit{LIEI} 2 (1991), 1 at 20.
a) The Scope of Articles 10 EC and 6 (1) EU

Article 10 EC, included in the Treaty at the request of the German delegation, is continuously referred to by the ECJ as a general clause to deal with all kinds of legal problems arising between the EC and its Member States. Three directions followed by the ECJ in the concretisation of this provision may be relevant in the present context. The first is the deduction of genuine legal duties which have partly been put into concrete terms. Thus, the principal duty to take appropriate measures to ensure the fulfilment of treaty obligations and to facilitate the achievement of the EC’s tasks is construed widely so as to include ancillary duties necessary for its effective implementation. Second, Article 10 EC was relied upon in the elaboration of the general doctrines as to the relationship between EC and national law. So, as stated, recourse to this provision has been apparent in judicial elaboration of the supremacy doctrine. Also, the duty of directive-conforming interpretation (by some called “indirect effect”) and the European principles on State liability were partly based on Article 10 EC. Third, since the middle of the 80s, the ECJ has extended Article 10 EC to include also duties of the EC with respect to the Member States. In this respect, Article 10 EC may be said to embody the principle of Gemeinschaftstreue, similar to the principle of Bundestreue (federal loyalty) which exists in federal States. Also in this context, highly “concretised” duties have been developed, e.g., the Commission’s duty to pass all information relevant to the

420 Thus, the ECJ deemed the enactment of a national budget law to be necessary, when Community law required certain financial means to be devoted to a certain scope (Case 6/73, Commission v. Italy [1973] ECR 161). Another such ancillary obligation is the duty to recover unlawful state aid regardless of internal provisions on limitation (Case C-24/95, Alcan [1989] ECR 175). Furthermore, the ECJ even postulates that the duty of efficient implementation of Community law encompasses the duty of States to foresee appropriate sanctions with dissuasive effect; on this, see, comprehensively, E. Steindorff, EG-Vertrag und Privatrecht, 1996, 303ff.
application of EC law to national courts, including the production of documents requested by a national court and the examination of a Commission official as a witness before a national court.  

The duty to respect the national identities of the Member States was introduced in Article 6 (1) of the Maastricht Treaty to counteract the fear of an omnipotent Union and a creeping “destatalisation” of the Member States. In this respect, Article 6 (1) EU was even said to reflect a conception of the Union as an association of Member States, a “Europe des patries” being designed to contain the supranational Communities.

At any rate, the ambiguous term “national identity” does not mean any sort of national seclusion in the present context. Instead, it is to be construed in terms of a respectful attitude towards the basic structures, institutions and orientations of a State, including, however, the fundamental decision of all Member States for European integration. Accordingly, it is claimed that the EC may not adopt measures which intrude disproportionately into the realm of the Member States - maxims as yet difficult to put into concrete terms.

Even before the Maastricht Treaty, the Gemeinschaftstreue dimension of Article 10 EC had been viewed as the entrance gate of national constitutional law into EC law by academic literature although the ECJ had never made a statement in this respect. This interpretation may be thought to be confirmed by the expressly stipulated command to respect the Member States’ national identities contained in Article 6 (1) EU. For, in the case of States based upon a written or unwritten legal constitution (which is true for all Member States of the EC), con-

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425 As to the genesis and the scope of this provision, see M. Hilf, “Europäische Union und nationale Identität der Mitgliedstaaten” in A. Randelzhofer et al. (eds.), Gedächtnisschrift für Eberhard Grabitz, 1995, 157, 160ff.
stitutional identity, comprising the main features of a constitution, should be viewed as an important component of national identity. In other words, as Bruno de Witte has convincingly put it, “the fairly vague notion of ‘national identity’ might become legally relevant by referring to the constitutions as the depository of national identity”. Even though Article 6 (1) EU may have been intended as a largely symbolic message with the political purpose of appeasing Member States - which is also shown by its exemption from the ECJ’s jurisdiction (Article 46 (formerly L) EU) -, it would appear unjustifiable not to take its clear wording seriously. Therefore, the duty should not be interpreted as a purely programmatic maxim without any legally-binding value, and its scope should not be restricted to, say, cultural matters.

Furthermore, it would seem untenable to exclude protection of national constitutional identities from the scope of Article 10 EC and to determine in this sense, by application of the acquis-safeguard clause contained in Article 47 (formerly M) EU, the interpretation of Article 6 (1) EU as well. It is true that the ECJ has always confined itself to the elaboration of independent and uniform European constitutional standards, in particular in the area of human rights. However, as shown in the theoretical reconstruction above, as far as it does not guarantee respect of national constitutional essentials (as shaped by the competent national courts), this interpretation of the treaties is incompatible with a pluralistic reading of the relationship between EC and national law and is therefore ultra vires. To put it differently, as opposed to the important judicial development of European constitutional standards, in particular in human rights, the possible disrespect, by EC organs, of national constitutional essentials cannot be recognised as a valid acquis communautaire which would be relevant for the interpretation of the EC according to Article 47 EU. So, all in all, no persuasive argument can be made in favour of the exclusion of constitutional identity from the scope of Article 6 (1) EU. As a consequence thereof, Article 47 EU may now be drawn upon just in the opposite direction: in order to avoid that the standard of protection of national identity is higher under Article 6 (1) EU than under Article 10 EC, the latter provision must be interpreted as to include constitutional identity as well.

As a result, the duty to respect national identities may be equally based on both provisions. As regards its judicial control, it may therefore be found irrelevant that Article 6 (1) EU is not under the jurisdiction of the ECJ, because it may equally be protected via Article 10 EC.

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430 De Witte, *op. cit.*, at 20.
With respect to the substance of the duty, one may claim, in the first place, that the EC is bound to take the constitutional problems of the Member States into account and to collaborate with them in a constructive way in order to avoid conflicts. In particular, the principles forming the constitutional identity of a Member State should remain untouchable for the EC even in majority decisions.\footnote{This was also the perspective adopted by the Federal Constitutional Court in the Maastricht decision ($BVerfGE$ 89, 155 (184), when it stated that the majority principle was limited by constitutional principles and fundamental interests of the Member States. In saying this, the Federal Constitutional Court seemed, however, to imply that, in these cases, the majority rule shall be suspended in favour of unanimity. It seems overstated, though, to base such an incisive change in the institutional structure of the Community only on Art. 10 EC.} For a more precise definition of the substance of a national identity, the self-portrait of a State should provide the starting point. For a hard core of societal, cultural and legal values and norms can only be credibly protected if a State itself has the right to decide what is part of it. Thus, in conflict of laws terms, Articles 5 EC and 6 (1) EU may be compared to a \textit{Qualifikationsverweisung} (connection for the purpose of qualification’’),\footnote{On this notion, see, G. Kegel, \textit{Internationales Privatrecht}, 5\textsuperscript{th} ed. 1995, 49.} which calls upon national law to decide on the scope of the notion of identity. In a further step, it must, however, be noted that part of the national identity is also the membership of a supranational community. This, in turn, can only exist if Nation States accept a far-reaching limitation of their national sovereignty, including the general supremacy of European law over national law. As a result, Articles 10 EC and 6 (1) EU may duly be read as formulae of “concordance” similar to Article 23 GG. The material premises of both legal orders can, therefore, be interpreted in a quite similar way, thus facilitating a “concordance solution” of conflicts.\footnote{In substance, this solution is comparable to the one proposed by D. Phelan (\textit{Revolt or Revolution: the Constitutional boundaries of the EC}, 1997, 417ff.) that, in order to prevent a dangerous revolt or revolution (also understood in the sense of the subordination of the national legal order under a new \textit{Grundnorm}), a new norm should be introduced into EC law: “The special type of rights embedded in national constitutions which are considered by the national courts to express basic principles concerning life, liberty, religion, and the family, to have as their interpretative teleology a national vision of statehood and morality, and to be fundamental to the legitimacy of the national legal order and the preservation of its concept of law take precedence over EC law within their field of application.” This norm should be supervised by national courts, and not by the ECJ (\textit{op. cit.}, 417). However, apart from the fact that its adoption is politically very improbable, this formula, clearly inspired by the Irish abortion case, seems ill-suited to deal with national economic constitutional rights as invoked in the Banana conflict.}
b) Implications on Conflict Resolution

If the interpretation of Articles 10 EC and 6 (1) EU just given is to be taken seriously, the co-operation of the ECJ and national constitutional courts, and the protection of the constitutional identity of a Member State through the ECJ, should go much further than in the present jurisprudence, which is characterised by two major weaknesses on both sides: on the national side, the threat of national constitutional courts, in particular the BVerfG, to set aside European acts as unconstitutional, without ever referring a single case to the ECJ as provided for in Article 234 EC, and thus without even attempting to engage in a specific problem-related discourse with the ECJ, is extremely problematic. On the EC side, the problem lies in the ECJ’s exclusive concern with the elaboration of uniform European constitutional standards and its refusal to take national constitutional laws as more than mere sources of inspiration into account. Instead, an effective protection of the core of national constitutions would only seem to be possible if those provisions and principles considered by the highest national courts as “identity-relevant” are taken into account directly by the ECJ. These should comprise national human rights, even in so far as these are different from European human rights as shaped by the jurisprudence of the ECJ. They should also include national conceptions of the scope of authority transferred to the EC in the EC Treaties.

As a consequence, it seems essential that, on the one hand, a national constitutional court refers problematic cases to the ECJ and expounds constitutional problems and constraints in detail. This should include an explanation of the shape it gives to human rights and competence provisions, and a comprehensive account of why it thinks that such standards are mandated by a Constitution which must also be read in the light of the mandate of furthering integration. On the other hand, it seems necessary that, at least in majority decisions in which at least one State was outvoted, the ECJ considers the findings of national jurisprudence di-

434 It should be noted, though, that this critique may not be turned against lower national courts in the same way, since they have given detailed accounts on constitutional problems on various occasions. This is true, for example, for the reference decision of the Administrative Court of Frankfurt which expounds in detail the potential clashes of the Banana regulation with the freedoms of property and profession of the Grundgesetz as well as the equality principle.

435 A duty to take into account all national constitutions would apply to judicial lawmaking. There, the ECJ could not act as a kind of conciliation body whenever national courts regard a “judicial construction” developed by the ECJ (e.g., on state liability) as unconstitutional. For, in this case, the ECJ would clearly act as a judge in its own cause, which is inadmissible pursuant to a universal legal principle.
rectly, and integrates it into its decisions. This should not be limited to answers given to national constitutional courts, but should be extended to any reference in which constitutional problems are raised. It should be noted, though, that this balancing requirement does not mean at all that the ECJ would have to accept a constitutional dictate by a single Member State. Instead, this court would be entitled and obliged to consider the needs of the EC in this balancing procedure. Thus, if it gives reasons for the inappropriateness of a national constitutional standard at EC level, the ECJ might, of course, derogate from it. This might be particularly plausible in the case in which a wide variety of different national constitutional standards exist. If these standards happen to be mutually exclusive (i.e. the banning of a certain violation of a constitutional right in one State would entail the violation of an inverse right in another State), the ECJ might even be forced to opt in favour of one standard.

This reading of Articles 10 EC and 6 (1) EU finds support in deliberative theory. This may be applied not only to democratic decision making by citizens, but with even stronger force for inter-institutional discourse itself, which should work as procedural transformation mechanism of public discourse, i.e., initiate, support, sustain and tame it. Under these premises, an intense deliberation between the judiciaries about the best law would appear desirable. This should focus on the most appropriate standard of human rights protection and on the respect of the mutual autonomy in the field of legislative jurisdiction. Then, even the competence of national constitutional courts to examine the constitutional compatibility of European acts seems useful, since it can initiate a process of deliberation. However, it should also be ensured that the discourse can continue “when shared understandings of lesser generality have broken down”; i.e., a kind of “proceduralisation of deliberation”, as it were, must be assured. In practical terms, this should mean that neither side should have the right to end the dialogue definitively, nor the ECJ by imposing unlimited primacy, nor national constitutional courts by setting aside European acts. A final decision should, instead, be reserved to a co-ordinating third instance.

It is submitted that, in order to comply with these conditions, the ECJ would have to abandon its role as the motor of integration and the guardian of the treaties at least in “identity-relevant” cases. Instead, it would have to act as a true Cour d’Arbitrage, in other words, as a constitutional conciliation body, as if it were placed over both the Communities and the Member States. Such an approach could be very rewarding: even though national constitutional standards would not always be fully respected, an explicit discussion of the jurisprudence of the national courts might considerably improve the co-operation between both courts, since it engages them in a specific problem-related discourse. This might be a powerful means for a deliberative rationalisation and the de-escalation of conflicts.
c) In particular: The Reach of the ECJ’s Jurisdictional Competence

Assuming that the ECJ were willing to act as a conciliation body along these lines (which does not seem probable at the present stage), one must determine the scope of its judicial competence flowing from the task of conciliating constitutional conflicts derived from Articles 10 EC and 6 (1) EU - which must be clearly distinguished from the limited judicial competence flowing from the supremacy rule. In this respect, it may be submitted that it would, at least, be disloyal for a Member State to deny authority to a ECJ conciliation-type decision by drawing only on the limited reach of supremacy. According to the deliberative principles followed here, it would, instead, be entirely up to the Member State in question to show in detail why its constitutional identity is not sufficiently protected even though the ECJ has explicitly taken this into account at some length in its decision. The burden of justification would thus be shifted. However, if the constitutional court of a Member State were really able to give reasons for an ongoing massive violation of constitutional identity - for which a not manifestly unfounded *bona fides* declaration should be enough\footnote{However, the plausibility of the reasons given should be verified at a later stage in the conciliation procedure. See, below, sub V 4.} -, the jurisdiction of the ECJ should be deemed to have reached its limits. For as shown, the ECJ must be regarded as a part of the EC legal order, and cannot ultimately be qualified as a third and higher institution with the competence to decide constitutional conflicts as the last umpire. In other words, the task of conciliating conflicts of a Community organ may not lead to a new subordination of the national legal order under the EC system – this would amount to putting the wolves in sheep’s’ clothes.

In summary, according to the interpretation advocated here, Articles 10 EC and 6 (1) EU should be read, following deliberative principles for the inter-institutional relationships between European and national courts, as obliging the ECJ to consider national constitutional standards directly in its decisions. This might open a fertile problem-related discourse between the judiciaries. However, as long as the ECJ refuses to carry out the task of conciliation and to consider national constitutional identities, or for as long as their protection is manifestly inadequate in a *bona fides* analysis of the competent national constitutional court, there exists a serious institutional failure or, legally speaking, a gap in the Community system with respect to the procedural concretisation and implementation of Articles 10 EC and 6 (1) EU. The remainder of this article will analyse whether and how this gap may be filled.
III. Establishing a New Interconnection: A Public International-EU Law Conciliation Approach

A public international law solution to constitutional conflicts raises several complex problems. As a preliminary issue, it will be shown that the general conditions of admissibility for gap-filling in EC law and for recourse to international law in particular can be complied with (1). After this, the international law solution will be expounded in detail (2). Then, the analysis turns to the extremely difficult question of the extent to which this solution might, with the necessary adaptations, be transposed into EC law (3). Having done so, the possible implications for EC law, international law, national constitutional law and legal theory will be examined (4) and its practical consequences evaluated (5).

1. Preliminary Questions for the Application of International Law

a) General Conditions for and Methods of Gap-Filling in EC Law

As stated, European law’s starting points for the protection of a national constitution are the general clauses stipulated in Articles 10 EC and 6 (1) EU. However, these were found to contain a gap as to their procedural implementation where a concordance solution between the ECJ and a national constitutional court fails. Starting with the general conditions for gap-filling in EC law, it must in the first place be ascertained that the lacuna to be filled must be an issue of law as opposed to politics or diplomacy. As to constitutional conflicts, it has already been stated that this is exactly the premise on which the conciliation concept advocated here is based. Next, the question to be dealt with must fall within EC competence. Since the EC does not dispose of universal powers, gap-filling by judicial law-making may only take place in the case of an ‘internal gap’, i.e., if the area at stake does not fall within the competence of national law. This requirement also applies to gap-filling by international law. For, regardless of whether international law may be applied internally within a State, it is, at any rate, superseded by national law at that level. In our case, this requirement does not, however, create any problem. The resolution of constitutional conflicts may be regarded as an integral complement to Articles 10 EC and 6 (1) EU and, as such, as an integral part of the European-national conflict of laws area. This has already been developed by the famous doctrines of

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437 For this concept, see C. Schmid, Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht, 1996, 22ff.
the ECJ mentioned above and cannot reasonably be dealt with by national law, since a uniform solution available for all Member States needs to be found.

Moving on now to methods of gap filling, it should be noted, in general, that the concretisation of a general clause in constitutional law requires a multi-faceted process in the borderland of law and politics, the traditional techniques such as recourse to analogy or to general principles of EC law being capable of only providing a starting point. Here, both of them are obviously useless for the lack of legal “material” in European primary law. The same is true for common constitutional principles of the Member States, since the absolute majority of them do not have federal systems; beyond that, the EC could not simply be equated to one of the few European federal States either. Therefore, the only remaining possibility lies in recourse to international law principles.

b) Gap-Filling through International Law

Since the last century, the problem of the relevance of violations of internal law through the conclusion of a treaty has been discussed in international law. A solution to the problem was codified in Article 46 of the Vienna Convention on the Law of Treaties of 23/5/1969 (here referred to as the Vienna Convention). Thereafter, only the breach of “internal law regarding competence to conclude treaties” can be invoked under certain conditions against a international law treaty. Before the application of this disposition can be discussed here, however, it has to be ascertained whether international law can be applied at all within the EC (a) and, if yes, what methodological resources exist to do so. Besides the direct application of international law, its indirect application through the elaboration of general principles of EC law is to be taken into consideration (b).

aa) Direct Applicability of General International Law in the Community’s Internal Legal Sphere

Despite the remaining link of the EC treaties to their international law basis, the application of international law inside the Community legal sphere is problematic, because, through the constitutionalisation process, the EC has undoubtedly detached itself from a classic international organisation. Therefore, international law might no longer be suited to deal with the specific needs of supranationalism.
On these grounds, some authors have completely dismissed the application of international law in the internal Community legal sphere.\textsuperscript{438} the EC should be conceived of as an autonomous “self-contained regime”. International law is only a law for “international emergency situations”, incapable of dealing with the ongoing processes of integration. The underlying logic is different: whereas international law promotes co-ordination and co-operation among sovereign nations, EC law aims at solidarity and integration. With regard to this fundamental incompatibility, general provisions of the law of treaties, especially those on violation, withdrawal, termination and suspension, would not be appropriate in the context of the EC. In short, international law would be a “Trojan horse” in the EC, which might endanger the integration process. As a legal “forward defence”, recourse to it should therefore be completely excluded.

However, this solution seems to go too far.\textsuperscript{439} The situation of EC law may, in some respects, be compared to human life: a child, in its adolescence, is easily prone to emancipate itself from its parents by rejecting many of their traditions and teachings in order to become a person in his or her own right. Only in later years will parental wisdom often be rediscovered. Similarly, with respect to the progress of the EC system, the thesis of the “full emancipation” of EC law from its bases in international law and national constitutional law may be largely regarded as a founding myth by which integration should be promoted and enthusiasm for the new European system be encouraged. However, in its present state of maturity, EC law should have appreciated that there is no fundamental incompatibility between the goals of “co-operation” and “integration”; instead, the latter is a somewhat intensified continuation of the former. In legal terms, this means that, to realise the \textit{effet utile} of EC law, it should be sufficient to exclude the application of international law where there is an actual conflict, an actual incompatibility with the EC’s aims. In normal circumstances, it is, indeed, true that recourse to international law is not necessary, since EC law is itself able to deal with the legal problems arising in the Community. But under exceptional circumstances - espe-


cially regarding the interpretation of ambiguities or in gap-filling - international law may provide a vast reservoir of provisions and principles capable, at times, of supplementing EC law. In the present context, because of the capitulation of EC law before constitutional conflicts, there is, indeed, an emergency situation where international law could prove to be a life jacket-rather than a “Trojan horse” for the EC. At any rate, it seems obvious that even the application of international rules which may not completely suit the particular character of the EC might still be better than leaving the legal conflict to an extra-legal power-dominated Cold War scenario. To continue with this metaphor: entirely discarding the application of international law as a “forward defence” might eventually injure the EC’s own avant-garde.

Beyond this, it should be noted that the latest turn in the evolution of the EC - the establishment of the EU - has, to some extent, demonstrated a return to international law patterns of intergovernmental co-operation. As previously stated, the Union is a typical international law creation, through which the Member States wanted to strengthen their control over the supranational communities and counteract “autodynamics”, in particular, in new fields of collaboration such as CFSP and CJHA. It is true that this evolution of the EC has not brought about a general fall-back on international law for EC system as a whole. Such a far-reaching intrusion into the structures of the EC cannot be based on the general provisions of the Union Treaty alone (Articles 1-7 (formerly A-F) and 46-53 (formerly L-S)). What is more, Article 47 EU, whereafter the establishment of the Union is without prejudice to the EC acquis, does not allow for this result since the Community’s supranational peculiarities constitute an essential element of the acquis. Instead, the whole European system may now be described as a legal and political continuum reaching from classical international co-operation on one end to advanced forms of multi-level governance in the supranational Communities on the other. If this is so, it would seem implausible and at odds with the maxims of continuity and coherence of European law as a whole to exclude the most important parts of the European system, the Communities, completely and without any exception from the application of general international law. More importantly, the exceptional application of international law responds to the legal duty of any subject of international law, be it a member of an integration community or not, to resolve international conflicts with international law mechanisms, if other prior-ranking solutions have failed (see Articles 2 Nr. 2 and 33 UN-Charter). For conflicts resulting from international treaties, the international law minimum standard is represented by general treaty law as codified in the Vienna Convention. However, as already stated, in the course of the application of any international law norm to the internal Community legal
sphere, it should be verified that this norm is not in conflict with the specific structural features of the EC - in particular, it should be guaranteed that the withdrawal of a Member State from the EC is generally unavailable as a remedy.

bb) EC-Consistent Concretisation and Adaptation of International Law

The “compatibility analysis” just mentioned may show the need for international law norms to be concretised, supplemented or adapted in order to meet the specific needs of the EC. This is methodologically possible by shaping what is generally termed “general principles of law”, using the international law provisions as a model and a frame of reference. As we have seen, the ECJ has had recourse to general principles when formulating European human rights on the basis of national constitutional rights. At this stage, international law norms are no longer a direct source of EC law, but are used as a sort of “legal quarry” to shape new EC law. Like the “general principles of law recognised by all civilised nations” in the sense of Article 38 (1) (c) of the statute of the International Court of Justice, they become mere “law-making sources”.\textsuperscript{440} In the present context, it is important to note that international law has also been used as a “law-finding” source for the elaboration of EC law by the ECJ.\textsuperscript{441}

In this procedure, international law provisions must be put into the context of the specific features of the EC - a Community unlimited in time, based on the rule of law (its law being directly applicable and generally taking precedence over national law) as well as on democratic principles, and aiming at ever closer integration. Thus, norms suiting the needs of the EC can be developed by concretising, completing and adapting the international law model. Thus, this procedure may be termed “EC-conforming concretisation and adaptation of international law”.\textsuperscript{442} It does not consist of pure inventions, but of a referential method of judicial

\textsuperscript{440} As to the distinction between “legal source” and “law-finding source”, see J. Esser’s classic, \textit{Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts}, 4\textsuperscript{th} ed. 1990, 134. See, also, G. Hoffmann-Becking, \textit{Normaufbau und Methode}, 1973, 33ff.

\textsuperscript{441} Summary in Schwarze, \textit{op. cit.}, at 10ff.

\textsuperscript{442} This concept is borrowed from Private International Law where it is mainly used to address the modification of substantive norms in order to solve logical or teleological conflicts (see D. Looschelders, \textit{Die Anpassung im Internationalen Privatrecht}, 1995, and Schmid, \textit{op. cit.}, at 106ff.) resulting from the concurrent application, by virtue of conflict of laws rules, of different national regimes (e.g., the law of successions of State A vs. family law of State B). Here, conflicts may result from tensions between general public international law and the specific features of the EC as an integration community.
law-making which comes close to analogy.\(^{443}\) Compared to the “inductive filtering” of common features of norms and principles\(^{444}\) which is used to formulate ordinary general principles of law, this method involves an even smaller degree of law-making since input and output-provisions more or less share the same level of abstraction.\(^{445}\) However, the limits to law-making through general principles following from the institutional separation and balance of powers at EC level\(^{446}\) need to be respected.\(^{447}\) Thus, there must be a harmful gap in existing law; a general principle must really be found and not merely invented; the priority of the legislator must be respected by the judge, at least if legislative action is not blocked by political obstacles; detailed regulations, e.g., in secondary or procedural law, which leave the legislator with a wide discretion, can generally not be developed through general principles.

cc) A Combined Approach in the Present Case

The two different approaches may be combined in the present case in the following way: as long as the outcome fits the structural peculiarities of the EC, international law may be applied directly. In so far as this is not case, it is necessary to effect a concretisation and adaptation of the relevant international law rules in order to bring them into conformity with the specific features of the EC. Thereby, special international law, related to the EC-law “sub-regime”, is created, which should be distinguished from genuine EC law as long as it is not implemented by EC institutions and courts. Now that the applicability of international law as an emergency regime in the intra-Community legal sphere has been ascertained, a virtue should be made out of this necessity. In other words, international law should be applied and, if necessary, adapted so as to ensure that it constitutes an adequate and useful supplement to the EC system.

\(^{443}\) Hoffmann-Becking, op. cit., at 359.

\(^{444}\) This technique is referred to as “analogy of law” (Rechtsanalogie) by F. Bydlinski, Juristische Methodenlehre und Rechtsbegriff, 2\(^{nd}\) ed. 1991, 478ff., and as “legal induction” (Induktion) by C.-W. Canaris, Die Feststellung von Lücken im Gesetz, 2\(^{nd}\) ed. 1982, 90ff.

\(^{445}\) Thus, in a strict sense, the term “general principles of law” is not exact here: first, input and output provision may be quite concrete and detailed, hence not necessarily general. Secondly, if one presupposes the division between rules and principles along the line of the degree of abstraction and direct applicability in a case, the output may also be rules, and not principles. See, generally, for the fact that a sufficiently precise “legal input material” can lead to concrete and detailed outputs, J. Krogholler, Internationales Einheitsrecht, 1975, 151.

\(^{446}\) As to this concept, compare W. Bernhardt, Verfassungsprinzipien - Verfassungsgerichtsfunktionen - Verfassungsprozeßrecht im EWG-Vertrag, 1987, 86ff.

\(^{447}\) See Oppermann, op. cit., at 405.
a) Introduction

The consequences of a violation of internal law by an international treaty is a classic issue within international law, which has been discussed in legal practice and literature for more than a century.\(^{448}\) Three main solutions permitting a State to discard the application of a treaty on these grounds without incurring international law liability have been proposed.\(^{449}\) First, there was the “theory of relevance”, arguing that violations, especially violations of internal law relating to the treaty making power of the organs negotiating the treaty (e.g., parliament vs. government), should generally be relevant at international law level and would give the State in question a right to withdraw from the convention. The arguments made in favour of this solution were: respect for internal democracy and separation of powers (particularly, the executive should be unable to circumvent the legislature); the need for a correct internal implementation of the treaty (which would be impossible if the treaty were to violate fundamental norms of internal law); analogies with the law of agency (according to which the principal can invoke lack of, or abuse of, power by the agent against a third party in certain situations). For the opposite conclusion, namely the irrelevance in international law of violations of internal law, the following points were made: international legal certainty, the duty of a State to examine potential conflicts with internal law before entering into an international contract and the absence of an obligation of a party to a contract to verify whether


\(^{449}\) As to the following points, see the summary in Wildhaber, *op. cit.*, at 175ff.
the other parties respect their own internal laws by concluding the contract.\footnote{This was the position of the well-known Advisory Opinion of the Permanent Court of International Justice on the Treatment of Polish Nationals in Danzig, (1932) \textit{P.C.I.J. Rep. Ser. A/B} no. 44, p. 24.} As might be expected, a compromise solution between the two, which seeks to reconcile the needs of legal certainty and respect for internal law and democracy, was finally proposed: the so called “theory of evidence”.\footnote{See, Verdross and Simma, \textit{op. cit.}, at 444, § 690 with further references.} According to this, the withdrawal from a treaty is only possible if the other party has, or, according to normal standards of good faith, should have, noted the violation of essential internal law. Furthermore, there has been disagreement as to the kind of internal law capable of being invoked: only internal provisions regarding the capacity of the organ concluding the treaty or any other internal provisions limiting the discretion of this organ, too.

b) Article 46 of the Vienna Convention

In 1969, the “theory of evidence” was codified in the Vienna Convention on the Law of Treaties\footnote{In 1969, the “theory of evidence” was codified in the Vienna Convention on the Law of Treaties (here abridged VCLT). The general rule is contained in Article 27 VCLT:} (here abridged VCLT). The general rule is contained in Article 27 VCLT:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.”

Article 46 is phrased as follows:

“Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practices and in good faith.”

However, in the second paragraph, the above-mentioned dispute as to what kind of internal law should be covered by the formula is not resolved. Thus, this question must be determined by means of interpretation. First, “internal law regarding competence to conclude treaties” might refer only to provisions delimiting \textit{institutional competence}, in other words the
“capacity” of the various institutions representing a State; i.e., whether, for example, a government representative is entitled to conclude an international agreement only with or without the consent of the whole government or parliament, etc. 453 A somewhat broader reading would suggest that any type of competence provision could be relevant in this context. This would include, in particular, provisions relating to legislative jurisdiction, i.e., the scope of subject matters in which internal law allows the conclusion of international agreements or the transfer of powers to an international organisation. Thirdly, indirectly, the treaty-making power, and thus the “competence” of the organ representing the State, might also be considered as limited by all internal law, including constitutional provisions on human rights etc. This interpretation would bring Article 46 VCLT in line with the internal law of States, the organs of which, on entering into an international treaty (or participating in the decision making process of an International Organisation), must, of course, respect any internal provision.

The genesis of the Article 46 VCLT shows that the latter option was apparently intended, even if some doubts remain. 454 Thus, the commentary on Article 43 of the 1966 draft convention (Article 46 in the final 1969 version) explicitly states: 455

“Constitutional limitations affecting the exercise of the treaty-making power take various forms. Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless “approved” or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties... The question which arises under this article is how far any of these constitutional limitations may affect the validity under in-


453 Incidentally, the German translation of the term “competencies”, “Zuständigkeit”, is based on this interpretation. However, the German version not being authentic, this has no direct legal relevance.

454 See Müller, op. cit., at 19ff., 207. According to Art. 32 of the same convention, recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion may only be had if an interpretation based on the wording, the object and the purpose of the treaty leaves the meaning ambiguous or obscure, or leads to a result which is manifestly unreasonable. Since this disposition only codifies standing customary law, it may certainly be applied to the rest of the convention as well. Here, however, the preparatory work helps to clarify the purpose of the provision and is therefore examined before.

ternational law of a consent to a treaty given by a State agent ostensibly authorised to declare that consent.”

This result had already been advocated by special reporter Sir Humphrey Waldock. However, the International Law Commission’s deliberations on the 1966 draft seem to show that a majority of Commission members was against the integration of substantive provisions in order to safeguard legal certainty at the international level. According to their view, only few and narrowly defined exceptions to the principle of irrelevance were to be admitted. This perception is still relied upon by several commentators. However, this view seems not only to ignore the Official Comment quoted above, but also not to account for the changes the 1966 draft underwent with respect to the 1969 final version. Thereafter, following fruitless negotiations in the aftermath of the allegation of the breach of essential internal law, a State no longer had the possibility of simply discarding the application of the relevant treaty provision. Instead, it was only given the right to a conciliation procedure in front of the United Nations (Article 66 b VCLT), respectively the International Court of Justice (Article 66 a VCLT). By the introduction of these procedures, still missing in the 1966 draft, the threat to legal certainty was considerably diminished. Thus, an important rationale for excluding substantive law provisions can no longer be relied upon.

Moreover, a teleological interpretation also confirms the wider reading of Article 46 VCLT. As Alfred Verdross and Bruno Simma have pointed out, the need to integrate substantive provisions is all the greater since these provisions are not protected in any other way at the international law level. Rudolf Streinz rightly emphasises that the manifest violation of substantive law provisions such as those protecting human rights, fundamental to the good functioning of a State, would lead to unacceptable tensions with international law if the latter chose to ignore them. Philippe Cahier stresses that, in the Vienna Convention, there is no apparent reason for the different treatment of formal and substantive provisions having an

456 ILC-Yearbook II-71 (1965): “The Commission was fully aware [in the 1963 draft, C.S.] that constitutional restrictions upon the competence of the executive to conclude treaties are not limited to procedural provisions regarding the exercise of treaty-making power but may also result from provisions of substantive law entrenched in the constitution...”.

457 See ILC-Yearbook I-124ff. (1966) and the comment by Wildhaber, op. cit., at 348; for a summary of the preparatory work, see K.-W. Geck, ZaöRV 27 (1967), 429 at 437.

458 See the references in Verdross and Simma, op. cit., at 445, no. 19.

459 Verdross and Simma, op. cit., at 44ff.

460 Streinz, op. cit., at 32ff.
impact on a State’s treaty making power. Jörg P. Mueller argues that the integration of substantive provisions has a meaningful parallel in the increasing importance of *ius cogens* and human rights in international law, which is also reflected in the express reference to human rights in the Vienna Convention preamble. To these well-founded arguments, one might add that international law also has to account for the *functional changes of international structures and law*, particularly the genesis of strong regional alliances and communities. In this context, the “idyllic” classical constellation underlying Article 46 VCLT, *i.e.*, the danger that heads of State may enter into a binding international treaty without consulting parliament *etc.*., while being by no means obsolete, may have lost some importance. Instead, conflicts over the delimitation of spheres of competence and a common standard of substantive values such as human rights increasingly arise. Now, it is exactly in these situations that international law should offer procedural devices for the peaceful settlement of disputes. Thereafter, what is important in Article 46 in this context is not only its substantive side, and the rebuttable presumption of the relevance, in international law, of manifest breaches of internal law; equally important is its procedural side, the compulsory dispute settlement procedure, only at the end of which a definite decision on the conflict between internal and international law will be taken. Now, according to the generally acknowledged methodological principle that long-standing norms may have to be adapted in the light of changing social circumstances, and that, then, they may acquire a meaning and function different from the one their drafters had in mind, these changes in international structures, and also the institutional needs arising thereof, should be taken into account in the interpretation of Article 46 VCLT. This may even lead to a differentiated interpretation of this provision: in the case of a classical executive agreement, the narrower reading of Article 46 might still be applied, in order to guarantee a maximum of legal certainty. However, in the case of treaties founding international law-making institutions in which certain common substantive law standards, and agreements on the delimitation of legislative competence are vital, this provision should be read as also allowing for a dispute settlement procedure with respect to such conflicts

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461 Cahier, op. cit., at 244ff.
462 Müller, op. cit., at 20ff.
463 See Verdross and Simma, op. cit., §§ 52-59, 41ff.
464 This perspective is also present in the opinion of Luzius Wildhaber. Whereas the integration of substantive provisions into Art. 46 VCLT is generally discarded by him, he should revise this assessment if international treaties should increasingly become a danger for national constitutions in the future (op. cit., at 349). Precisely this state of affairs may have been reached within the Community law “sub-system”.
which would otherwise be capable of destroying the organisation. As a result, it is assumed here that substantive norms should be integrated into Article 46 VCLT.

c) The Theory of Evidence as Customary International Law

With respect to its status among the sources of international law, Article 46 VCLT is unanimously considered by the literature to be codified customary law, although the available case material might give rise to some doubts in this sense.\footnote{Cahier, \textit{op. cit.}, at 244; Streinz, \textit{op. cit.}, at 326; Jennings and Watts (eds.), \textit{op. cit.}, at 1288, § 636.} This implies that with regard to the move from the theories of relevance and irrelevance to the compromise formulated in the theory of evidence, a customary law “consolidation” is deemed to have occurred at the time of the entry into force of the Vienna Convention. In general, such a “consolidation” – requiring general practice as an objective element and \textit{opinio iuris} as a “subjective” element\footnote{D. Fidler, “Challenging the Classical Concept of Customs”, \textit{GYIL} 39 (1998), 198, 201.} - has already been explicitly stated by the International Court of Justice for other provisions of the Vienna Convention, and it should, indeed, be correct for most of its provisions.\footnote{Compare the summary in J. P. Müller and L. Wildhaber, \textit{Praxis des Völkerrechts}, 2\textsuperscript{nd} ed. 1982, 9ff.} It is likewise generally recognised that, with the long and uncontested standing of the Convention, even provisions born out of compromise at the drafting stage can be regarded as having acquired customary status in the meantime.\footnote{Generally shared view, see Jennings and Watts (eds.), \textit{op. cit.}, at 1199, § 581.} These assessments are further confirmed by the fact that most writers who consider the recourse to international law at all tacitly apply the Vienna Convention to the EC Community, without bothering about the customary law quality of the provisions at issue.\footnote{In this sense, see, \textit{e.g.}, K. Lenaerts and E. De Smijter, “The EU as an Actor under International Law”, \textit{YEL} 19 (1999/2000), 95.}

Yet, in a more subtle analysis, it might be questioned if the customary law version of the theory of evidence also encompasses national substantive law provisions as advocated here. One might, of course, argue that, in the European context, at least those Member States of the Community which are also parties to the VCLT should be assumed to be obliged, \textit{bona fides}, to promote the use of the convention by drawing on, or allowing other States to invoke, the codified version of the theory of evidence; this does not, however, solve the problem entirely, as France and Great Britain are not parties to the Vienna Convention. In order to circumnavigate this obstacle, one might perhaps further sustain that in the case of codified customary

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\textsuperscript{465} Cahier, \textit{op. cit.}, at 244; Streinz, \textit{op. cit.}, at 326; Jennings and Watts (eds.), \textit{op. cit.}, at 1288, § 636.

\textsuperscript{466} D. Fidler, “Challenging the Classical Concept of Customs”, \textit{GYIL} 39 (1998), 198, 201.

\textsuperscript{467} Compare the summary in J. P. Müller and L. Wildhaber, \textit{Praxis des Völkerrechts}, 2\textsuperscript{nd} ed. 1982, 9ff.

\textsuperscript{468} Generally shared view, see Jennings and Watts (eds.), \textit{op. cit.}, at 1199, § 581.

\textsuperscript{469} In this sense, see, \textit{e.g.}, K. Lenaerts and E. De Smijter, “The EU as an Actor under International Law”, \textit{YEL} 19 (1999/2000), 95.
law of such eminent status and long and uncontested standing as the Vienna Convention, it might be no longer justified to resort to the case law at all; this would mean that the customary law version would merge with the current interpretation of single provisions such as Article 46 VCLT. However, this interpretation may be criticised as stretching the hugely controversial concept of customary law too far. Indeed, there is apparently not a single case in international practice in which the wide reading of Article 46 VCLT has been confirmed. Yet, a more adequate answer to these complex questions would require a thorough analysis of the current debate on customary law which goes beyond the scope of this analysis.

For the present purposes, it may, however, be suggested that a promising critical strand in this debate be followed. According to this, the customary law requirements of general practice and *opinio iuris* are so abstract, complex and open that they allow for almost any purely result-oriented manipulations. More rationality may, therefore, only be gained if one transcends the doctrinal perspective in favour of a theoretical concept of international relations. From this perspective, the most basic, clearly discernible and theoretically “capturable” patterns of State’s behaviour should also be awarded the distinction of customary law status. Among such theoretical approaches, international liberalism – which, just as neo-liberalism, may be viewed as a useful complement to the multi-level approach advocated here – seems to be the most attractive approach. In a nutshell, it argues, against international law orthodoxy, that economic interdependence and the emergence of private governance regimes should be recognised as a contrast to the traditional understanding of sovereignty, and that the basic internal rules and procedures of States, such as the Rule of Law, fairness, triadic dispute resolution etc., should also be binding at international level. This step has, however, been described as daunting for two reasons. First, the “fractured and controversial discourses that rage among international-relations theorists and among political theory” seem to exclude a consensus on international liberalism. Even more importantly, the fundamental distinction between liberal (western style democratic States governed by the Rule of Law) and non-liberal States seems to render such an approach in any real world scenario to be illusory.

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470 See the detailed and convincing elaboration by Fidler, *op. cit.*, 201-211.
472 Fidler, *op. cit.*, 248.
However, it is particularly the latter insight that may offer a plausible way out of the dilemma for the EU. There, both the existence of basic liberal structures and the mutual consensus on them may be presupposed. Liberal international theory may, on these grounds at least, be submitted to contain notions of customary law limited to liberal States, a construct similar to “local custom” which has, on various occasions, been recognised in international law in a bilateral context.473 This means that, when an international law “emergency sub-regime” of Union (as opposed to Community) law is recognised, as argued here for the solution of constitutional conflicts, this regime should be open to the recognition of basic liberal rules, structures and institutions as customary law. These undoubtedly include the fundamental mechanism of triadic dispute institutions and the exclusion of being the judge of one’s own case. On these grounds, a third level of conflict resolution, as suggested here, might also be advocated on the basis of “local liberal custom” among the EU Member States.

d) The Procedural Implementation of the Theory of Evidence

As to the procedural consequences of a State’s allegation of a manifest breach of internal law, the Vienna Convention foresees the following devices: first of all, the State has to notify the violation and the intended measures to all the other Member States (Article 65 (1) VCLT).474 Notification can also be made in response to another party claiming performance of the treaty or alleging its violation (Article 65 VCLT) if the State in question, after becoming aware of the facts, does not have to be considered as having expressly or by reason of its conduct acquiesced in the validity of the treaty or in its maintenance in force or operation (Article 45 VCLT). If, within a period of not less than three months, no party has raised any objection, the party making the notification may withdraw from the treaty (Article 65 II VCLT). The withdrawal can - and, for reasons of proportionality and pursuant to the princi-

473 Fidler, op. cit., 240, in particular n.184. It should not be ignored, though, that in other areas such as human rights - whose importance in international law is steadily growing, perhaps even towards a *ius cogens* status - a similar splitting of international law’s universal character may be undesirable, because it might remove the pressure on non-liberal States to observe basic standards which might be alleged to be protected by customary international law.

ple of *favour conventionis*, must - be confined to those provisions in conflict with internal law, if those are separable from the rest of the treaty with regard to their application, if they do not constitute an essential basis of the other’s party consent, and if the continued performance of the remainder of the treaty is not unjust (Article 44 III VCLT). If, however, objections are raised after the said notification, the parties shall seek a solution through the means indicated in Article 33 UN-Charter, *i.e.*, negotiations, mediation, arbitration, decisions by a court, etc. (Article 65 III).

If no solution has been reached within a period of 12 months following the date on which the objection was raised, any one of the parties may set in motion an obligatory conciliation procedure by the UN, provided for in an appendix to the Vienna Convention (Article 66 b). Thereafter, a conciliation commission shall be established, which is constituted of five conciliators, two of whom may be named by the parties and the remaining one by the four other conciliators. The commission shall report within twelve months of its constitution. The report shall consist in recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement; it shall not be binding upon them.

More problematic, however, is the question of to what extent these procedural provisions can be recognised as customary international law. Since Article 66 VCLT was introduced only at the Vienna Conference, it can hardly be qualified as such. This is primarily true for the jurisdiction of the ICJ in Article 66a VCLT, which applies only to the parties to the Vienna Convention which have signed it without reservation to this provision. The same should be true for the details of the provisions concerning the conciliation procedure under the guidance of the UN and the deadlines which must be respected. However, the basic lines of the procedural implementation of the theory of evidence should be regarded as customary law, since otherwise, as already stated, the result would be an incomplete regime posing threats to legal certainty. These basic features may be supposed to include: the duty of a State to notify the intended disapplication of international treaties (including the possibility of making the notification in response to another party claiming performance or alleging a violation), the principle of separability of single treaty provisions, the non-automatic relevance, in international law, of the violation of internal law and, finally, the duty of a State to reach a conciliatory solution before unilaterally withdrawing from a treaty. This refers to the re-

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475 See, Jennings and Watts (eds.), *op. cit.*, at 1294ff., § 644; Verdross and Simma, *op. cit.*, at 537, § 845 with further references.

476 Verdross and Simma, *op. cit.*, at 535, § 840, no. 5.
course to negotiations among the parties and other means for peaceful dispute settlement, and, where these efforts fail, to a neutral (albeit not binding) conciliation procedure.\textsuperscript{477} In addition, the duty of a State to search for a peaceful and just solution in any international dispute is already enshrined in Articles 2 Nr. 3 and 33 UN-Charter; therefore, a fall-back to the Vienna Convention is superfluous. In the case of disputes over the validity of treaty provisions, this duty can, by the very nature of things, refer only to negotiations and, where these fail, a conciliation procedure. Correspondingly, for the lack of alternatives, one should assume a reduction of a State’s discretion as to the appropriate means of dispute resolution in the sense of Articles 2 Nr. 2 and 33 UN-Charter. Thereafter, a State alleging a manifest breach of essential internal law through an international treaty should have the right to negotiations among the parties (or other appropriate means of peaceful dispute resolution) and, if necessary, to a neutral conciliation procedure to be organised by the parties.\textsuperscript{478} An exception to this right could only apply when the allegation of breach is manifestly abusive or unfounded. Were the other Member States to deny such a procedure to the State in question, the presumption of the international law relevance of the alleged breach should become irrebuttable. As a sort of self-executory “international law-default judgment”, the State in question might, then, lawfully assume the relevance, in international law, of the alleged breach and withdraw from the treaty in question or respectively disapply the incriminating provisions.\textsuperscript{479}

e) Summary

According to this customary law version of the relevance theory, manifest breaches of essential national provisions including constitutional dispositions on legislative competence and possibly also on human rights need not to be tolerated by a State. As a consequence, however, the violated internal provisions do not become automatically relevant at international law level, entailing the nullity (or partial nullity) of the conflicting international treaty. Instead, the State in question only has the right (and the duty) to a conciliation procedure in

\textsuperscript{477} Conforti and Labella, op. cit., at 46, n 2 with further references; L. Calfisch, “Friedliche Streitbeilegung im gesamteuropäischen Rahmen”, ZSR 112 (1993), I-307 at 311ff.

\textsuperscript{478} Compare Art. 33 (1) UN-Charter which reads: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” (emphasis by this author).

\textsuperscript{479} See A. Vamvoukos, Termination of Treaties in International Law, 1985, 21ff. (with particular reference to clausula rebus sic stantibus).
which the question of the international law relevance of the violated internal provisions will be decided definitely. This rule means that a State’s resistance against international law which is manifestly in conflict with essential internal law, cannot be equated to a “normal” treaty violation which triggers the liability of a State in international law. Thus, the sanctions that international law provides for treaty violations may only be applied after a conciliation procedure. The procedural consequence is that the allegation of a manifest breach can be viewed as an exception to the duty of performance of a treaty. Finally, since no general duty of provisional application is stated in international law, a State alleging a manifest breach should be allowed to disapply the treaty, or the incriminating provisions of it, pursuant to reasonable internal and international standards for interim measures for as long as the conciliation procedure lasts.

3. Adapted Application of the Theory of Evidence to Constitutional Conflicts between the EC and its Member States

a) Resort to Customary Law

With regard to the possible application of the theory of evidence to constitutional conflicts between the EC and its Member States, the customary law version of the international law provisions would have to be applied. Even though the criteria ratione materiae of the Vienna convention could be complied with, its direct application is impossible, since it was enacted only after the EC-Treaty and, at any rate, not all the Member States of the EC have ratified it. However, this should not constitute an obstacle to the solution proposed here, since no relevant differences have been found between the two versions.

b) Applicability of the Evidence Theory in General

The thesis of the applicability, mutatis mutandis and as ultima ratio, of the theory of evidence to the EC constitutes the crucial part of the solution suggested here. Two strands of possible general objections will be addressed. First, the argument that important differences exist between the normal case of application of that theory in international law and the pecu-

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480 The EC-Treaty is an international treaty between States (Art. 1, 2 Nr. 1 (a) VCLT), which - at least at the time of its conclusion - was the constituent instrument of an international organisation (Art. 5 VCLT).

481 All the Community Member States except France and the UK have done so.
liarities of the EC context. Second, the concern that the existence of the ECJ and other specific features of the EC system might pre-empt recourse to a separate conciliation procedure.

\textit{aa) The Theory of Evidence is apt to deal with Constitutional Conflicts as ultima ratio}

It is quite obvious that the theory of evidence and its implementation through a conciliation procedure was tailored to classical executive agreements and classical international organisations (Article 5 VCLT), and its application to closely integrated supranational communities with law-making institutions and judiciary was probably barely considered. As a reply, one may first recall that, as argued above, international law should take the strong structural evolution of international organisations into account, and try to offer urgently needed conflict settlement devices even there. This also means that international law norms and procedures should be adapted as far as possible within their wording to circumstances different from those originally contemplated by their drafters. Beyond this, it should, however, be noted that, despite the differences just mentioned, the basic structural pattern of substantive law conflicts between the EC and its Member States is not fundamentally different from ordinary conflicts between international law and essential internal law as originally contemplated in Article 46 VCLT. As shown above, the EC has not yet evolved into a monistic federal system in which the Member States would be hierarchically subordinated to the EC, but is characterised by the pluralistic juxtaposition of several legal orders. Thus, here too, we face the situation that essential internal law is violated by an international treaty or by measures based on that treaty, and that, if all existing EC and national institutions have failed to resolve the conflict, recourse to an international law emergency mechanism as \textit{ultima ratio} is indispensable in order to avoid fatal legal tensions and “conflicts of obligation” for citizens. In the EC context, the availability of a legal conflict resolution device seems to be even more important than in normal international law settings. Because of the close dove-tailing of important areas of policy, economy and law in the integration process, such conflicts would be capable of generating devastating effects on both the EC and its Member States. With respect to the (at least) \textit{de facto}-irreversibility of the integration process, a withdrawal of a State from the EC, or the suspension of its membership, would not be a viable solution. For these reasons, the EC cannot simply ignore the violation of fundamental internal law, but, as already stated, should be expected to provide for a conciliation mechanism capable of enabling a State to remain a member without having to abandon its constitutional essentials.
In addition, it may be noted that some of the arguments presented above in favour of the “theory of relevance” gain weight in the EC context. Thus, that the EC respect essential national law is all the more necessary because of the far-reaching homogeneity between the EC and its Member States as to the respect of human rights, democracy and the Rule of Law; the hard core of human rights in particular, as an integral part of national legal identities in the sense of Article 6 (1) EU, should be regarded as “intra-Community ius cogens”. Moreover, in the EC context, it is equally undesirable that basic national provisions may be circumvented through “evasive action” at the supranational level. The need for effective national implementation is another argument. Since the functioning of the EC system largely depends on national administrations which are sworn to uphold their own constitution, imposing a European norm which violates national constitutions would be difficult in practice - notwithstanding the considerable degree of autonomous effectiveness of the EC system, which may, as shown, be derived from Articles 226ff. EC. Furthermore, some of the arguments in favour of the “theory of irrelevance” presented above seem to be less persuasive in the EC context. First, under a majority regime, a State no longer has the possibility of making the ratification of a “sub-treaty” (i.e., an act of secondary law) dependent on the non-existence of violations of internal law, which is generally true for the conclusion of ordinary international treaties. Moreover, the argument that a State entering into an international treaty cannot be expected to investigate its partners’ internal laws in order to avoid violations, loses weight, since the EC organs have specialised lawyers from all Member States at their disposal, who might well be expected to enquire about potential fundamental violations of national law.

bb) Recourse to the Theory of Evidence is not pre-empted by the Existence of the ECJ and other Specific Features of the EC System

Furthermore, the objection must be addressed that the recourse to the theory of evidence might be pre-empted by specific features of the EC system, in particular the existence and the competencies of the ECJ. This ratio is present in Article 292 EC according to which disputes arising from the application of this treaty may only be solved with the devices provided for therein. However, as explained above, whilst the ECJ is the ultimate arbiter for the interpretation and review of the validity of EC law according to Article 234 EC, it has no competence to resolve, in a binding way, conflicts between “identity-related” parts of national constitutions and EC law, either on grounds of supremacy or with respect to its mandate of conciliation derived from Articles 10 EC and 6 (1) EU. Thus, if the ECJ fails to resolve such conflicts in a way which is acceptable for national constitutional courts, there is, indeed, a seri-
ous lacuna in the EC system. In such a case, there is no EC device in the sense of Article 292 EC which might be made use of, but the need for conflict resolution is more urgent than ever. To this, one might object that a conciliation body would not have the competence to make a decision which would be binding under standing EC and national law, either. This is certainly true, but it cannot be ignored that its decision would be binding under international law. Under the VCLT, the non-binding character of the report of the conciliation commission was agreed upon only as a compromise formula, which, for many contracting parties, did not go far enough. On account of the “pro-international law” orientation of the EC’s and all the Member States’ legal orders, any other solution would seem to be untenable in the EC context. Moreover, a separate conciliation procedure handled by a neutral body would not only add a further legal level of de-escalation, but it might also enjoy more legitimacy than the ECJ: the body’s only task would be that of finding a compromise, it would not be the simultaneous guardian of one of the clashing legal orders, and the complaining State would have a greater say in the procedure. This is why a properly designed conciliation procedure would make sense despite the existence of the ECJ. 482

Next, following the pluralistic logic, recourse to the theory of evidence is not precluded by the development of judge-made human rights at EC level, either, as long as (and only as long as) they are not capable of protecting the Member States’ constitutional identity in the sense of Article 6 (1) EU. Finally, there is no contradiction here with Article 48 (formerly N) EU whereby legislative modifications of primary law may only be adopted by the Member States acting jointly in an IGC. In the first place, we are not dealing here with a legislative modification of the treaties stricto sensu, but with the supplementation of EC law by existing international law. Moreover, a conciliation device would not even contradict the ratio of Article 48 EU. As expounded above, on account of their task of guaranteeing democracy in Europe, the Member States should not be confined to the cumbersome treaty modification procedure or the enactment of new secondary law, but should also be in a position to participate in the exercise of judicial review over EC law which undermines their constitutional identity.

482 It is certainly not ideal that the conciliation body is to take a decision only after the ECJ, and it would seem to be preferable if cases in which a “constitutional core objection” was raised were handed over to this body straightaway. However, such solution is only possible de lege ferenda (see below VI. 6) De lege lata, it is hardly deniable that the ECJ is allowed to decide on such cases, too - and it was advocated here that it should do so as if it were itself a conciliation body rather than the guardian of one of the competing legal orders, because such an approach would render conflicts less dangerous already de lege lata.
Now that the applicability of the evidence theory has been acknowledged in general, it may be further examined whether and how its specific substantive requisites may be applied and adapted in order to safeguard to the largest possible degree the supranational acquis of the EC. With a view to the enormous quantity of secondary legislation, it must be ensured, in particular, that the “constitutional core objection” is confined to very exceptional cases and that it is not capable of undermining the effectiveness of the EC constitutional system as a whole.

c) Substantive Law Requisites of the Evidence Theory

Among the substantive requisites of the evidence theory, regard should be had as to whether secondary law may be equated with an international treaty in the international law meaning of the word (a), whether the requirement of a State’s consent can be substituted by a State being outvoted in a majority decision (b), how the “manifestness” criterion should be read in the EC context (c), how the application of the theory can be restricted to conflicting provisions in order to limit its disintegrative effect (d), and, finally, what the general procedural consequences of a relevant breach of internal law might be (e).

aa) EC Secondary Law as an International “Sub-treaty”

First of all, it may be stated that a conflict between secondary law and national constitutions could formally be captured by the wording of the evidence theory in the VCLT: Even though general treaty law does not explicitly provide for the distinction between primary and secondary law, secondary law authorised by treaty provisions may be regarded as a “supplementary treaty” concluded by the organs of the international organisation set up by the “original treaty” (see Article 5, 2nd alternative VCLT), which, however, shall enjoy primacy over such supplementary provisions (i.e. secondary law). So, the international law solution could be separately applied to a specific act of secondary law only - which is very important in the EC context. Incidentally, this also means that the state of development of customary international law at the time of the conclusion of the secondary law act is relevant with respect to the extension of the evidence theory to substantive law provisions.

bb) Consent and Majority Decision

As already mentioned, the application of the theory of evidence should not be precluded by the fact that, under Article 46 VCLT, a State may invalidate its consent to be bound by a treaty, whereas in the EC situation, a State may not have even given its consent, but may
have been outvoted under a majority regime. For, if international law makes a device available for the protection of national constitutions even for a State consenting to an international treaty, this should apply with even stronger force when the special international law sub-regime at issue allows for majority decisions (argument a mayor ad minus).

cc) Manifestness of the Violation of Internal Law

The function of limiting the constitutional objection to exceptional cases should be performed by the “manifestness” requirement. In line with the dissuasive function of this criterion, a breach would have to be manifest at the moment of the adoption of the secondary legislation by the competent EC organ; a subsequent decision by a national court would therefore be too late. Thus, in contrast to a violation of the European Convention of Human Rights, the violation of a national constitutional right will not normally be obvious to other Member States of the EC. However, with respect to the increased duty of mutual loyalty arising in the EC context, it should be sufficient that, in the Council procedure, a Member State’s representative draws the other Council members’ attention to a possible violation of the national constitution (or other essential internal law), even though this assessment still needs to be confirmed by the judiciary of that State. Conversely, in the EC context too, the right to invoke a ground for avoidance should be deemed to be lost whenever a State has, explicitly or tacitly, expressed its consent to the validity of the contested act (ratio of Article 45 VCLT). In particular, a State must not have normally voted in favour of the act in the Council.

As a consequence, therefore, the procedure will mostly only be carried out when the secondary law act in question has been taken by a majority decision against the vote of one or several Member States, as it was true in the case of the Banana regulation. Similarly, in the case of a “package deal”, the application of the evidence theory should be pre-empted if a State - perhaps even after having pronounced a warning as to the potential incompatibility of a part of the “package” with its own constitution - has nevertheless voted in favour of the whole package for paramount reasons of self-interest. For if a high-ranking State executive considers constitutional problems to be surmountable and is ready to trade them against other advantages, the other States should not have to carry the risk of a wrong assessment of the State’s executive. However, one might consider an exception to this rule with respect to comitology decisions in which a State was represented not by a member of the government, but by a civil servant or a scientific expert who cannot necessarily be expected to be sufficiently aware of constitutional obstacles.

483 See, also, Streinz, op. cit., at 32ff.
Finally, in the event that the constitutionality of a judicial construct by the ECJ is at stake, the manifestness requirement should be considered fulfilled when a State makes a corresponding statement in the proceedings or when constitutional objections are raised by a national court in the Article 234 EC reference leading to the relevant ECJ decision.

dd) Restriction of the Procedure on the Conflicting Provisions

As to the sphere of application of the theory of evidence, it seems quite obvious that it should be limited to the secondary legislation in question - which has been interpreted as a supplementary treaty in the sense of Article 5 2nd alt. VCLT. Beyond this, following the ratio legis of Article 44 VCLT, even a limitation of the procedure on the incriminating provisions of the act in question seems necessary, in order to minimise its disintegrative effects.\(^{484}\) In both cases, the separability requirements contained in Article 44 para. 3 must be fulfilled. Whereas, according to these, a junctim with the ongoing validity of the primary law basis of the secondary law act, or even the whole EC-Treaty, seems to be excluded, the avoidance of the secondary act in question might well deprive accompanying measures of their implicit ratio ("Geschäftsgrundlage"), with the effect that they must be included in the procedure.

ee) Legal Consequence: Conciliation Procedure, no Automatic Invalidation

With respect to the legal consequences of a relevant breach of internal law, the need to ensure the smooth functioning of the legal system and the requirement of legal certainty should, in the EC context, too, prevent such a breach from being automatically relevant at the level of EC law. Instead, just as in international law, a Member State alleging such a breach can only be accorded the right (and the duty) that a conciliation procedure be carried out.

d) Requirements for the Conciliation Procedure

The procedural consequences of a manifest breach of essential internal law are also extremely complex, especially since they are less precisely regulated in international law, and their transposition to the EC context poses significant problems. The following remarks will, first, briefly deal with the negotiation stage (a) and, then, turn at some length to the conciliation procedure in the event that negotiations fail (b) as well as the legal consequences associated with denying the availability of such a procedure to the aggrieved party (c).

\(^{484}\) This argument refutes the objections against the application of Art. 46 Vienna Convention raised by Streinz (op. cit., at 322ff.) and Weiler and Haltern (op. cit., at 441, fn. 115) that public international law would not make available an alternative to the invalidation of the whole EC-Treaty.
aa) The Negotiation Stage

As to the negotiation stage provided for in international law (see Article 65 III VCLT and Article 33 UN-Charter), no particular measures seem to be necessary since the standing organs of the EC always have the discretion to revoke or amend an act allegedly in conflict with internal law. However, if such negotiations or other peaceful means of dispute settlement fail, or are blocked by one of the parties, a conciliation procedure should take place.

bb) Establishment, Procedure, Contents and Effects of the Decisions of a Conciliation Body

Right at the outset, it should be stressed that while international law should be read as requiring neutral dispute settlement within the European context, it does not provide more than a “subsidiary default model” of what such a procedure might look like. As a matter of principle, the specific procedure to be followed, including the establishment of the conciliation body and the effects of its decision, is left to the discretion of the parties. So, the EC and its Member States could opt for any neutral institutional arrangement capable of providing for an adequate implementation of the theory of evidence. The only solution which would seem to be excluded would be the assignment of this task to the ECJ. For then, this court would act as a judge in its own cause which, pursuant to a universal legal principle, is inadmissible. However, the EC could also opt for a parliamentary mediation commission, as suggested by Schwarze, or an ex ante control by a European Constitutional Council, as suggested by Weiler and Haltern. It would even seem to be the best and most effective solution de lege ferenda to extend the competence of such a body to any constitutional objection raised against a piece of legislation at the enactment stage, and to exclude a previous decision of the ECJ in that case. Only if no such alternative solution is arranged by the EU should the international law default model of the VCLT be adapted to the supranational particularities of the European system, in order to ensure the minimum requirements that a conciliation procedure should be expected to meet.

In the first place, because of the constitutionalisation of the treaties by the ECJ, and particularly as a consequence of the doctrines of direct effect and supremacy, the EC participates in the exercise of public power directly affecting the citizen more than any other international organisation. This means that its organs and their procedures need to meet democratic standards (however, because of its essential structural peculiarities, they should not be expected
to comply with democratic principles of exactly the same shape as Member States).  

Therefore, an organ deciding de facto as the ultimate umpire over the “communitarisation” of a national constitutional standard in human rights or in other fields - and this would be the effect of a conciliation decision – must, to the extent that this is possible, be democratically legitimated. A conciliation body should, thus, be set up by the Member States as the European “constitutional legislator” through a specific Treaty Amendment. Only if a constitutional conflict were to arise before such an amendment would such a conciliation body need to be appointed by the Council or the Commission, acting as the European executive.

With respect to the composition of such a conciliation body, by adapting the international law default model to the supranational peculiarities of the EC, some general requirements may be derived. First, it should be noted that, since the procedure will enhance the degree of control exercised by Member States with respect to the application of EC law, Member State representatives should have a strong voice. Correspondingly, the body might well be made up of an equal number of judges of the constitutional or highest courts of the Member States involved and the ECJ; if several Member States raise constitutional objections, all of them together should be entitled to appoint half of the ordinary members of the body. As provided for in the VCLT, it would seem appropriate that the ordinary members appointed in this way jointly nominate the president of the body. It would also be conceivable, though, that the President of the ECJ (or another ECJ judge, if the President has been involved in a previous decision on the case) fulfils this task. Under a majority regime - which represents the normal

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485 Incidentally, this finding must be also taken into account when interpreting Art. 23 Grundgesetz and similar constitutional provisions of other Member States, whereafter a Member State is only allowed to participate in a Community meeting inter alia basic democratic standards.


487 Similarly, Weiler and Haltern (op. cit., at 446) recommended that a European Constitutional Council be composed of national constitutional court judges and presided by the President of the ECJ. However, the latter might have already contributed to the ECJ’s former decision about the Community act in question and might therefore be considered as biased. For this reason, if members of the ECJ are supposed to participate in the conciliation body, they should not have been involved in the previous procedure. For the somewhat similar proposal of a “common senate” along the German model, see, now, S. Bross, “Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte”, Verwaltungsarchiv 2001, 425.
international law solution and which seems to be the only way of avoiding a blockage in the system -, the President’s vote would be decisive.

As far as the formal contents of the decision are concerned, a conciliation decision should, in principle, be confined to finding (or dismissing) a relevant breach of essential national law. Contrary to an ordinary international conciliation body, a European institution should not, in line with its (quasi-) judicial status, have any competence to design an alternative solution. However, after setting aside a European act, the body might well suggest, more or less precisely, such requirements that a similar act would be expected to meet in order to be compatible with the treaties and with the core of national constitutions; even such a far-reaching intertwining of the judiciary and the legislature would seem acceptable given the predominantly legal character of the EC. Besides annulling or upholding a European act, the conciliation body might also have recourse to “mitigating mechanisms” such as those that are used at times by national constitutional courts. In particular, it might compromise by not declaring a European act void with immediate effect but by demanding its (possibly only partial) substitution within a reasonable period of time.

As to the substantive contents of the decision, it is of paramount importance to ensure that no Member State’s (alleged) identity may be protected at the expense of the Community’s identity, i.e., its fundamental values and orientations. This means that, in principle, no national provision in disregard of human rights, the basic freedoms and the principle of undistorted competition may be protected.

For example, Greece should not be allowed to invoke its constitution as a ground for discriminatory measures against Macedonia or Turkey. No Member State should be allowed to grant State aid independent from the EC treaty framework by invoking constitutional rationales such as the guarantee of certain branches of the industry or agriculture. Such an objection should be inadmissible.

If this condition is fulfilled, the conciliation body should balance the intensity of the breach of the national constitution, the desirable legal standard in the field at issue (e.g., human rights protection) at EC level as well as the consequences for both sides arising out of the application or disapplication of the act at stake; thereby, the rebuttable presumption of

488 See, for an extreme example, the judgment of the BVerfG on German abortion law (BVerfGE 88, 103 at 251ff. There, the court concretised the constitutional requirements as to the protection of the foetus by imposing a minimum standard (the so-called “Untermaßverbot”).
relevance following from a State’s allegation of an essential breach should provide the start-
ing point. As already stated above with regard to the ECJ’s mandate of conciliation, the con-
ciliation body might, however, also decide against a national standard if it explains why this
would not be suitable at EC level. This might be so in the event that the body has to reconcile
widely different or even mutually exclusive constitutional standards. Thus, there is no danger
of a “constitutional dictate” by one Member State.

Concerning the effects of the decision: as already stated above, with regard to the close re-
lationship of the Member States in an integrated community and the need for legal uniform-
ity, the findings of the conciliation body should be directly applicable and binding in interna-
tional law. Moreover, on account of the importance of legal unity within the EC, the reach of
the binding effect of the decision should be erga omnes.\textsuperscript{489}

The ordinary international law solution of a unilateral withdrawal of a State from the treaty in
question would hardly appear viable in the context of an integration community in which the
unity of law is essentially important. Only if the European act in question falls within an area
where differentiation according to conventional treaty law or closer co-operation pursuant to the
new Amsterdam rules is possible,\textsuperscript{490} might the EC legislator attempt to convert the EC act at is-
sue into “relative law”, valid only in the Member States which have approved it.

Through its erga omnes effect, a decision on the exceptional relevance of national norms
at the European level would indirectly adapt the “contours” of the corresponding European
provisions to those of the national ones. Therefore, such a procedure might ultimately be ca-
ble of bringing about a gradual convergence between European and national law standards.

\textit{cc) Legal Consequences in the Case of Denial of a Conciliation Procedure}

Starting from the ECJ’s premises as to the unlimited primacy of European law over na-
tional law, the logical consequence would be that the ECJ’s jurisdiction over EC law is ex-
clusive. On this basis, it might be expected that the EC would deny a conciliation procedure
to a Member State alleging the breach of its constitution. However, since international law
cannot be disposed of arbitrarily by the EC, it is submitted that the latter could not, legiti-

\textsuperscript{489} Generally in favour of this result in the case that EC law exceeds fundamental national constitutional limits
v. Bogdandy, in Grabitz and Hilf (eds.), \textit{op. cit.}, Art. 5, no. 79ff.
\textsuperscript{490} On this, see C.-D. Ehlermann, “How Flexible is Community Law? An Unusual Approach to the Concept of
«Two Speeds»”, \textit{Michigan Law Review} 1984, 1274, and more recently \textit{idem}, “Differentiation, Flexibility,
mately, deny such a procedure to a Member State without offering a functionally adequate EC law substitute. Therefore, the international law solution would seem appropriate even for this case: the presumption of the relevance, in EC law, of the alleged violation of the constitution becomes irrebuttable, and the Member State in question may lawfully discard the application of the incriminating act.\footnote{491}{See, above, text accompanying fn. 146.}

In practice, a declaration of the definite disapplication of a European act by a national judge should be dispensable. As will be described below, under certain conditions, the Member State may grant measures of interim relief when asking the EC for a conciliation procedure. If, however, the EC makes no effort to do so, the State in question could simply continue the interim measures, and no other steps would seem to be necessary. However, if the EC not only denies a conciliation procedure to a Member State, but also starts treaty infringement proceedings with respect to the transitory disapplication, by way of the said interim measures, of the European act at stake, the possibility of a legal solution would probably be exhausted, and a political solution might finally become unavoidable.

4. Dogmatical and Legal Theory Implications of this Solution

a) EC Law

The international law concretisation of Article 10 EC and 6 (1) EU through the theory of evidence, as elaborated in the previous sections, provides that a Member State outvoted in the Council has the right to invoke a manifest violation of essential internal law as an exception to its duty of performance with respect to the European act at issue. In doing so, it would have to ask for a conciliation procedure, as a result of which the question would be decided by a neutral body to be set up by the parties. A treaty violation procedure would be admissible only if the State in question were to refuse to obey the conciliation decision. Accordingly, the theory of evidence constitutes an exception to the ECJ’s jurisdiction and to the doctrine of the unlimited supremacy of EC law, which may be limited through the exceptional primacy of national law found in the conciliation procedure.

Next, if a State has the right to demand that such a conciliation procedure be carried out, all \textit{interim} measures in view of such a procedure - especially measures capable of avoiding the \textit{“de facto-}anticipation\textit{”} of the decision by factual circumstances \textit{(“Vorwegnahme der Hauptsache“)} - must be allowed. With respect to the admissibility of such measures, one
might apply the ECJ’s own case law, constituting an exception to Articles 242 and 243 (formerly 185 and 186) EC.\textsuperscript{492} Thereafter, the disapplication of the challenged act of secondary legislation pending the decision of the conciliation body would be lawful in cases where the individuals or firms concerned would otherwise face the danger of irreversible losses or bankruptcy. However, national measures capable of undermining the practical effectiveness of the (future) conciliation decision would, generally, still be illegal. This would be particularly true for a national constitutional court decision declaring European acts inapplicable before the conciliation procedure is completed. Even though such a decision would not be relevant at the level of EC law nor exclude a subsequent conciliation procedure, and even though it would not create problems unless the Member State in question loses the conciliation procedure, renouncing \textit{a priori} the factual possibility of respecting a future decision by an international dispute settlement body, it should in itself be considered as a clear violation of international law.

\textbf{b) Public International Law}

Next, the applicability of the theory of evidence entails very important consequences even if the conflict were to persist and if, contrary to the solution advocated here, the European side were to insist on the unlimited supremacy of EC law, thus leaving no space for conciliation. For even a Member State willing to challenge this conception of the EC system and to disobey the jurisprudence of the ECJ in this respect could not react \textit{legisbus solutus}. Instead, it would have to respect, as an international emergency regime, the international law minimum standard to which Article 46 VCLT belongs. In other words, a State would be bound to respect this provision even if the ECJ had previously rejected its applicability. Under these premises, \textit{the competence of constitutional control, retained by the BVerfG, would, in so far as it were to include the avoidance of an EC act without a previous request of carrying out a conciliation procedure, be a massive violation of international law independent of its incompatibility with EC law.}

Even if one wanted to discard the applicability of the customary version of the theory of evidence as to the substantive competence limits of the treaty-making power of a State (or for other international law reasons), the lesson to be drawn from international law should at least be that a legal solution is to be found for constitutional conflicts. Thus, at any rate, before

setting aside a European act, a Member State should make every reasonable effort to establish a legal mechanism capable of resolving conflicts. This obligation should again be derived from Article 23 Grundgesetz as well as from Article 10 EC and 6 (1) EU.

c) National Constitutional law

On the level of national constitutional law, this solution would have important implications as well. As stated, the integration clauses of the Grundgesetz aim at a stable EC governed by the rule of law. Otherwise, the homogeneity requirements Article 23 Grundgesetz imposes on the EC would be completely illusory. Now, under the premise that an international law solution which is capable of decreasing the potentially disintegrative effect of constitutional conflicts exists, German institutions would be bound to make use of it. Thus, setting aside secondary legislation without substantial efforts by German organs to have the EC set up a conciliation procedure would not only be a violation of international law and EC law, but also of national constitutional law.

The fact that, though binding under international law, the decision would not be binding under standing EC and national constitutional law should not pose too great a problem. It is true that, if the national constitutional limits to integration were disrespected by the conciliation decision, the constitutional court would not, in theory, be prevented from finding a violation of the Constitution and setting aside the act for the territory of the Member State (just as it threatens to set aside EC acts now). However, this outcome is unlikely for various reasons: First, legally, the cumulative weight of the national constitution’s mandates to further European integration and to guarantee the respect for international law might enable a Constitutional Court to give up, by virtue of the balancing principle of practical concordance, more constitutional ground than before. Second, a failure to respect or implement a conciliation decision should now be considered a violation of EC law too, and the Commission would be able to commence treaty violation proceedings. Finally and most importantly, it would appear to be politically unthinkable that a Member State first asks for a conciliation procedure and then does not respect its outcome.

493 It is submitted here that the constitutional court might well change its opinion after the report of the conciliation body, to which political pressure and the undoubtedly higher level of acceptance might contribute. In particular, even if the procedural rules on the conciliation should presuppose, for the initiation of a procedure, the judge’s conviction of the unconstitutionality of the Community act in question (similar to Art. 100 Grundgesetz, which presupposes the conviction, on the part of the lower court judge, of the incompatibility of a law with the constitution), this would not prevent him or her from adopting a different opinion later. This is precisely one of the purposes of the conciliation procedure.
d) Legal Theory Implications for the Structure of the EU

Moving back to the theoretical models presented above, it can now be claimed that through an adapted application of the theory of evidence that the model of ‘pluralism under national law’ might be put into practice. As already suggested, within the European system, a conciliation body might be conceived of as an organ of the Union, competent for the procedural implementation of Articles 10 EC and 6 (1) EU read together with the theory of evidence. Thus, the Union’s “roof construction” above the Member States and the Communities, otherwise nearly devoid of content, could be rendered useful for the sake of legal coordination between them. This construction would comply well with the rationale of an intergovernmental Union aiming at containing the supranational Communities and countering bureaucratic “autodynamics”. According to this reconstruction, the structure of the Union might even be characterised as the very initial stage of a three-tier federal overall structure, similar to the famous theoretical debate in the fifties and early sixties about the structure of German and Austrian federalism.494

This debate focused on the question of whether the federal structure consisted of two or three entities (“zwei- oder dreigliedriger Bundesstaat”): the Länder (the States), the Bund (the Federation) and possibly also a third level representing the State as a whole (“Gesamtstaat”), on which, among other things, conflicts between the Länder and the Bund could be solved. This reconstruction resolves the conflict that, under the Grundgesetz as it stands, the Bund is, in some respects, super-ordinated, in others on an equal footing with the Länder, and in favour of the highest “coordination competence” of the “Gesamtstaat”. This puts the Länder and the Bund together as complementary parts of one polity, and, thus, represents them as one coherent unity. Under the constitution, the Bund and the Länder are awarded different competencies and are, for this very reason, within their relative sphere of competence the highest, and hence, sovereign, legal entities. Furthermore, the constitutions of the Bund and the Länder are derived from the constitution of the Gesamtstaat. Only the latter possesses legislative Kompetenz-Kompetenz.

This view was criticised, though, by the partisans of a two-tier federalism, to whom the BVerfG adhered in the Hessen-judgment,495 as a theoretical castle in the air. For, in reality, only two enti-


495 See BVerfGE 13, 53 (77).
ties could be found: the Bund and the Länder, and no Gesamtstaat overarching them.\(^{496}\) The three-tier construction would only pursue the aim of awarding the Länder sovereignty and an equal footing with respect to the Bund; thus, what was at stake in reality was not the delimitation of real political tasks, but the questions of hierarchy and supremacy. The real problems of the federal State, however, go well beyond the delimitation of several spheres of competence, and lie in the effective and legitimate interface of several centres of decision-making which displays important features of a system of multi-level governance: in the influence of the Bund on the Länder (legal control, intervention, administrative execution, political homogeneity etc.) and, conversely, in the participation of the Länder in the decisions of the Bund (Bundesrat [second chamber], constitutional amendments etc.) and, finally, in the mechanisms of achieving compromises between the two entities. The three-tier model would distort this finely-tuned system by overemphasising the delimitation of competencies and the question of hierarchy.

An evaluation of these two positions shows that their difference is not very big, because the different notions are to be found at different levels of analysis comprehension, and because they have a partly complementary function. In the first place, undoubtedly, the Gesamtstaat is not a political entity existing in reality. Instead, it is but a theorem, embodying the idea of unity of the Bund and the Länder as a political-ethical idea, a fictitious subject of imputability of the common good, which brings together all the constitutional elements which, legally or factually, guarantee this unity. In the reality of the German political system, the tasks of the Gesamtstaat are also carried out by the Bund; the latter is, in one entity, Zentral- and Gesamtstaat, at the same time part of the whole and its guarantor.\(^{497}\) This being so, the three-tier construction is indeed not needed at the German level. Notwithstanding this, it is a useful analytical tool for the reconstruction of the competence and hierarchy structures, which is the paramount goal of the Pure Theory of Law.

As opposed to the German situation, a three-tier structure does, albeit in a very initial stage, exist at EC level, consisting of the Union which the European Council as its own institution, and below it both the Communities and the Member States. If the Union, according to what is proposed here, were also competent to conciliate conflicts between the Communities and the Member States, the three-tier structure would also become more practical. This structure would be monistic in so far as the decisions of the conciliation body would be respected. Since these would only be binding under international law, but not under standing EC and national law, this construction would not be perfectly monistic. Inspired by conflict of laws

\(^{496}\) See U. Scheuner, Staatstheorie und Staatsrecht, 415, 422ff.

\(^{497}\) Cf., Isensee, op. cit., § 98, C, 562ff.
terminology, one might call it “weak or limping monism”. However, an important difference with respect to the classic three-tier Kelsenian model cannot be overlooked: according to the conception proposed here, the Union, as the third level, is relatively weak, its legal competence-competence being limited by the constitutional essentials of the Member States. This being so, one may note a meaningful substantive law-“intertwining” of the three-tier structure: while, on the one hand, the Union would be supra-ordinated to the Member States, on the other, this position would be limited in that a (weak) Union Grundnorm stipulates the identity-relevant components of the national legal systems as prior-ranking even at EC level, albeit contained by the mechanism of a conciliation-oriented optimisation of the underlying colliding principles. Therefore, this conceptualisation does not so much emphasise a hierarchical superposition, but the co-ordinative function of the third (EU) level. This reflects the reality of multi-level governance, its legal and political reality being, indeed, not so much characterised by questions of supremacy and the delimitation of competencies, but rather by the multiple and complex dovetailing of administrations, politics, and law.

To sum up, the three-tier construction advocated here seems, to a large extent, to be capable of avoiding the dangers of an unlimited pluralism, under which two legal orders stand side by side like medieval strongholds and restrict the relationships between each other, to the ultimate detriment of both. If one wishes to take up again Paul Kirchhof’s bridge metaphor, the Union as the third component of a three-tier overall structure might be conceived of as the Florentine Ponte Vecchio, with the conciliation and co-ordination mechanism being a common European house on the bridge.

5. Practical Consequences and Final Assessment

As to the procedure to be follow by a national constitutional court, the following summary may be stated: if it were to regard a European act, assessed by the ECJ to be in conformity with EC law, as a violation of the own constitution, it would have to suspend the proceedings and refer the case to the ECJ pursuant to Article 234 III EC if the latter has not yet had the opportunity to pronounce itself on all the relevant legal issues. Besides this, it would be possible, though of limited utility, for the national court to ask the further question as to whether

498 In private international law, the expression “liaison boîteuse” is used to describe a legal relationship which is not recognised as legally valid in all States involved. The example par excellence is a marriage, which, for the lack of certain legal preconditions (e.g., one state recognises religious marriages, the other does not), is not recognised in another country.
Article 10 EC may be supplemented by the international law theory of evidence. At any rate, were the ECJ to give a negative answer, this should not prevent a Member State from further action. For, first, according to the view advocated here, the application of general international law cannot be disposed of by the EC as long as it does not provide for a specific functional equivalent. Second, the ECJ would appear biased as to this question since it relates indirectly to its own competence. Thus, if the conflict is not resolved by co-operation between the ECJ and national courts in the Article 234 EC procedure, the Member State in question should demand that a conciliation procedure be carried out. In this regard, it would, first of all, have to notify the EC and all other Member States. The procedure before the constitutional court might still be suspended in the meantime; the provisional disapplication of the incriminating European provisions might be ensured by *interim* measures. Now, three alternatives are possible:

- The EC establishes a conciliation body and this decides in favour of the Member State declaring the European act in question *void erga omnes*. Then, the procedure before the constitutional court might simply be stopped.

- The EC establishes a conciliation body and this decides in favour of the EC by upholding the act in question. As already stated, even though this decision would not be binding under standing national constitutional law, there would be strong reasons for the Member State concerned to accept it.

- In response to the State’s claim that a conciliation procedure be carried out, the EC denies any such possibility by claiming exclusive jurisdiction for the ECJ (or by alleging other reasons).

As stated above, such a reaction would, indeed, be the logical consequence of the EC’s (however unfounded, as shown) presumption of the super-ordination and unlimited supremacy of EC law over national constitutional law. As a result, the constitutional conflict would remain unresolved. However, since it brings about its juridification, the solution proposed here would still have considerable advantages. For the EC, the outcome would be positive in that the potential threat to the uniformity of EC law would be decreased, and another “level of de-escalation” would be introduced. It would be entirely up to the EC to reach a stable solution by setting up a conciliation procedure. The advantages for the Member State lie in the fact that it would no longer have to resort to clearly illegal devices in order to guarantee respect for its constitution. In particular, a claim to respect common international law standards
rather than merely the alleged constraints implied by its own internal law might be viewed more sympathetically by the other Member States. What is more, by discarding the negative effects of the current regime, the positive effect of subsidiary national judicial control over EC acts would become plain. In addition, the call for the establishment of a competing organ for constitutional adjudication might put the ECJ under pressure to handle constitutional conflicts itself rather than ignore them as it does at present. Thus, the solution might have the effect of a Solange III decision, and like its famous predecessors, it would prove most effective if it could encourage the ECJ to take over de facto the task of conciliation itself by taking national constitutional problems more seriously and by integrating national views on constitutional essentials into its decisions - all this, however, without the negative flavour of the current Cold War scenario. Finally, the availability of a subsidiary international law solution de lege lata might make European and national politicians more interested in elaborating a genuine European constitutional solution. As already stated this author’s preference would be a European Constitutional Council, being composed of ECJ and national constitutional court judges. This body would co-exist with the ECJ, and it would be competent to decide on any “constitutional core objection” (not just on competence issues, as suggested by Weiler and Haltern) raised against an EC act by a Member State. The procedure to be followed should be an ex ante review to be carried out within a certain deadline after the enactment of an EC act, and it ought to render any further review by the ECJ inadmissible.

To sum up: by way of comparison with other doctrines of conflict of laws developed by the European judiciary to enhance the effet utile of European law, the supplementation of Article 10 EC and Article 6 (1) EU by the international law theory of evidence might add an important institutional mechanism capable of mediating constitutional conflicts and of ensuring a better constitutional balance between the EC and its Member States. At the same time, the residual national competence of constitutional control over European acts would be stipulated as an integral part of the checks and balances of the EU’s constitutional system. Thus, the widely criticised but, under the premises of pluralism and standing national constitutional law, unavoidable challenge to the ECJ by national constitutional courts might ultimately result in a positive outcome.
Chapter II: Interconnecting European and GATT/WTO Law

“In the Bananas judgment, it was an unforgivable mistake by the judges, who apparently were blinded to such a point by their own theories that they did not realise that they had before them not a private party, but a Member State, itself a contracting party of GATT and a member of the Council, which, under the EC Treaty, enjoys the treaty-making power. In a case raised under Article 173 by one of the so-called “privileged” parties (Member States and Community Organs), who have the right of challenging any action of the Community on any ground, the decision of the Court was a blatant denial of justice. I cannot help quoting here a topical French saying: C’est pire qu’une faute, c’est une erreur (…) By its stubborn ignorance of the most elemental rules of the GATT/WTO system the Court of Justice has fallen back to a legal low which cannot compare with the standard of adjudication at international level. To restore its authority, it is time for the Court to concern itself with the substance of the rules of international trade, instead of denying usque ad absurdum the internal relevance of rules which have been shaped with the full consent of the EC inside GATT and the WTO”.

Pierre Pescatore, former Judge of the European Court of Justice

I. Conclusions from Multi-Level Governance for the Solution of Constitutional Conflicts between the WTO and its Members’ Legal Orders

A reconceptualisation of the relationship between the WTO and the legal orders of its Members along the lines of multi-level governance again requires an exercise of optimising the effectiveness and legitimacy of both legal orders. As regards effectiveness, one may, just as with the relationship between EU and national law, first think of the Pure Theory of Law concept of effectiveness focusing on the “stronger” legal order, capable of fully subjecting the other. According to this, the relationship between the WTO and the legal orders of its members may also be characterised as pluralistic in principle.

First, the possibility of a monistic super-ordination of WTO law above EU and national law may clearly be dismissed. Its successful start notwithstanding, the WTO is still fighting for the establishment of a supranational *acquis* and its recognition as a genuine legal system endowed with autonomous effectiveness. Under these conditions, it would seem to be clearly premature to view WTO law as dominating effectively, and as imposing its criteria of legal validity upon, all EU and national law. Second, despite the “thinner” normative quality of WTO law, it is on account of the basic degree of autonomous effectiveness entailing compliance with DSB rulings in the vast majority of cases that a subordination, in Pure Theory concepts, of the WTO system under the various *Grundnormen* of the legal orders of its members should also be dismissed. It is true that the EU, and within their field of competence also the Member States, have the factual power to disrespect WTO law and dispute settlement findings altogether in a first step. However, under the new WTO system, the disrespect of DSB findings entails sanctions which the WTO may authorise its other Members to impose. As the Banana conflict has shown, whereas the “(voluntary) compliance pull” of WTO law may be argued to be existent, but is much smaller than that of EC law on account on its lesser internalisation into its Members’ legal systems, these sanction powers are enormous, in particular in the frequent case in which these are imposed by powerful other WTO members such as the US, Canada or Japan. These sanctions, or their mere “shadow”, are likely to lead, if not to full compliance, at least to compromises in which WTO law will be able to preserve a considerable degree of autonomous effectiveness. One might object further that, in cases of highest political importance – such as, e.g., the Hormones case –, a Member State might be prepared to accept even massive sanctions rather than any compromise, or leave the WTO altogether, even if this entailed massive political and financial costs. At this stage, it again becomes clear that the Pure Theory framework is not fully adequate in that the overall effectiveness of a system can hardly be assessed on the sole ground that sanctions might not lead to compliance in rather rare and extreme cases coming close to a revolution-type situation, while, in the vast majority of cases, Member States do comply with DSB rulings. Such an extreme model inevitably leads to normative distortions and is not able to provide adequate

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500 Incidentally, this interpretation shows more generally that, as soon as an international agreement or organisation acquires a certain degree of autonomous effectiveness, its relationship with national law may only be realistically characterised as dualistic. This might constitute a heavy blow for monistic theories presupposing the superordination of international law. For it would seem to be pointless to continue to regard less effective international regimes as superior to national law in a monistic overall model, whereas more effective ones would need to be reconceptualised in a dualistic relationship with national law. Instead, the only consistent alternative would be to apply dualistic criteria to any international regime, irrespective of the existence of “supranational qualities”.

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guidelines for a State’s or the Community’s behaviour towards the GATT/WTO system, in particular for the interconnection of the legal systems to be established.

Just as in the European vs. national law relationship described above, the pluralistic model also corresponds much better to the basic feature of the overall network of governance, in which hierarchical relationships are displaced by heterarchical ones, as all constitutive elements, sub-systems and interconnecting mechanisms are mutually interdependent, with none of them being able to deploy a meaningful degree of effectiveness autonomously. Whilst it is established on the basis of such a dualist framework that no unconditional hierarchies exist, the central task remains to interconnect the two legal orders effectively. In this context, it may be stated that the current interconnection - which, apart from the constellations in which indirect effect is admitted, relies mainly on the dispute settlement system - works well, but its potential is quite limited, which is also due to the restricted personal and logistic resources of the system. However, any attempt to further enhance the WTO’s effectiveness should again be made dependant on the WTO’s legitimacy.

In this context, important significance should be attached the above findings. As regards governance processes, it was found that, while the legitimacy of intergovernmental policy making is as yet rather limited (classical diplomatic intransparent decision-making among trade specialists with limited access of civil society), the deliberative legitimacy of the adjudicative system is substantial. In a substantive law perspective, the WTO, like the EU, has, on the one hand, the legitimacy potential of correcting Nation State or Community failures; blatant trade protectionism as practised by the EU in the Banana conflict is certainly among these and would give the supranational system the legitimacy to interfere. On the other hand, there is the huge deregulatory potential immanent to hierarchically superior WTO rules, which is not balanced by an effective political system as it exists at national level and could, therefore, easily lead to a free trade bias. On these grounds, one is again facing the “capacity surplus” typical for governance by law, and a careful balancing of effectiveness and legitimacy rationales is necessary.

It is against this background that the following analysis will deal with various potential options of enhancing the effectiveness of the interconnection among WTO and EU law. First, the most prominent possibility of awarding direct effect to WTO rules will be examined (II). Clearly, this would enable an effective decentralised enforcement of WTO rules, which would thereby metamorphose into subjective rights just as advocated by neo-liberalism. As important legitimacy objections will, however, be raised against such an unlimited direct ef-
fect, at least in actions by private persons as opposed to those of Member States governments, it will be further analysed whether direct effect could be limited to DSB findings. This would exclude WTO rules from being directly enforceable before domestic courts, and thus preserve the State’s predominant role in the system (III). Finally, the possibility will be examined of rendering the DSB procedure more effective on the example of the EC by introducing a “reference procedure” as in Article 177 EC in which the consistency of national measures could be controlled at an early stage. Such a scrutiny, which would take place before economic operators may have relied on it, would reduce the economic stakes of proceedings, thereby reducing their adversarial nature and promoting compliance (IV).

II. Interconnection through Direct Effect of WTO Rules

As has become clear from the above presentation of the ECJ jurisprudence in *Bananas* and *Portugal v. Council*, and, in particular in Advocate General Saggio’s opinion, two versions of the internal applicability of WTO law should be distinguished. Firstly, full direct effect in its most common understanding, meaning the right of private parties to invoke WTO rules against national or European legislation before domestic courts. Secondly, a much weaker version of direct effect entailing that WTO rules may only be used as a basis for a challenge to the legality of Community acts in actions brought by Member States – as a “paramètre de légalité” in the words of Advocate General Saggio.

1. Full Direct Effect: Creating Individual Rights?

   a) Adverse Implications

   As the European experience shows, the granting of direct effect, which renders WTO law directly enforceable by private parties before national and supranational courts, would certainly be the best means to enhance its effectiveness. As advocated by neo-liberalism, such action would take WTO law away from the control of national governments, elevate WTO rules to the status of subjective fundamental economic rights and thereby render the WTO legal order a widely effective international constitution of free trade.

   However, the legitimacy objections just alluded to need to be considered in more detail. It seems, at first, to be useful to remind the subtle general arguments against the domestic status of international treaties given in a famous article by John Jackson, one of the architects of the
new GATT/WTO system.\textsuperscript{502} His view focuses on detrimental effects on a State’s internal institutional and constitutional structure. Thus, direct effect would considerably strengthen the role of the judiciary to the detriment of other powers, and thereby effect the institutional balance as foreseen in the national constitution. More importantly, a directly effective international treaty superior to ordinary State legislation would even be dangerous to the idea of democracy and the democratic representation of individuals. This is because most constitutions provide for little democratic participation in the treaty-making process by confining the role of parliament to approve or disapprove (with mostly negative consequences) the ratification of a treaty as a whole.

Secondly, according to John Jackson, national legislatures should be given the discretion of integrating and adapting the treaty into the national system, in order to guarantee a smooth interaction. In particular, they may have a legitimate interest to adapt international treaty language to the domestic legal system - which may also allow them to add some 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 be legitimate, since some breaches may be minor and therefore preferable to the alternative of refusing to join the treaty altogether. Otherwise, in the event that direct effect is explicitly provided for in an international treaty, it would even be possible that courts, for reasons of judicial self restraint towards the legislator, will 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.

These arguments against unlimited direct effect may be further strengthened by a comparison of the situation within the WTO and the EU. This shows that the granting of direct effect would meet considerable obstacles based on democratic legitimacy.\textsuperscript{503} First, whereas the European integration project is based on a “unique combination of ideological conver-

\textsuperscript{501} Opinion, para. 23.
gence and ideological concessions after the war and to this day”, giving rise, as shown, to the emergence of a thin, but nonetheless perceivable, European demos, the same cannot be said about the WTO. To show this, one must not even resort to the lack of public discourse let alone solidarity among its Members’ peoples; it is already sufficient to point to this organisation’s lack of a social agenda, and the precarious status of human rights in it. Furthermore, in the EU context, economic rights have not been created and justified on their own merit as neo-liberals would have it, but have, instead, been framed by the Court as a by-product and tool of the pursuit of the common collective goal of the establishment of a Single Market; this was legitimated by the general consensus of all participating governments and enshrined as the primary objective of the EC Treaty. This consensus already explicitly foresaw, albeit in a much lesser extent as actually happened in the constitutionalisation process, regulations as directly effective pieces of EC secondary legislation. Beyond this, European judge-made economic rights were, and are, embedded in the wider institutional and political context of the Community and its Member States, which has extremely important implications. Economic rights could, thus, never claim a monopoly of constitutionality; Instead, the recognition of European human rights by the ECJ was famously traced back to the common constitutional traditions of Member States, which, of course, included all kinds of human rights, economic rights playing even a minor role. In this sense, the ECJ balanced European individual social rights against Member States interests and policies in famous decisions such as Wachauf.\footnote{Case 5/88, Wachauf [1989] ECR 2609.} This would not be possible in the WTO context. More generally, the constitutionalisation of EU law was accompanied and stabilised by the existence and gradual extension of positive integration devices, \textit{i.e.}, active regulative policy-making, which could, to a certain extent, – albeit not completely as shown by Fritz Scharpf’s lucid analysis referred to above – compensate for the deregulatory effect of the constitutionalisation of economic freedom rights. In sum, European constitutionalisation was a highly complex, mutually reactive process of judicial and political integration, which significantly included national judges, administrations and citizens, and in which the ECJ’s role was frequently limited to triggering political initiatives through a combination of threat of future censure and argumentation. This would not, to a comparable degree, be possible at WTO level, either; not only because it lacks effective law-making powers, but more importantly because it would not have, as shown, sufficient legitimacy to harmonise and unify wide areas of economic law at global scale in the first place. Therefore, the granting of direct effect to WTO rules might have a
one-sided deregulatory effect which might gravely impair national political problem-solving capacity in social regulation.

b) An Alternative Differentiated Approach

As a first reaction one might, therefore, restrict direct effect to cases of clear “Nation State or Community failures” such as Bananas, in which the legitimacy of a supranational negative intervention may be assumed as given. Unfortunately, so far, such a solution seems to be barely practicable. A convincing distinction between the constellations of “Nation State or Community failures” and of a deregulatory bias would be extremely difficult. Thus, in Bananas, the Community might have invoked its Lomé obligations in order to justify the regime, at least on the “honourable” ground of helping its former colonies, and its characterisation as a protectionist “Community failure” would, therefore, remain hugely controversial. Assuming that it should be impossible to circumscribe such situations with enough precision in pre-established legal – WTO or EU/national law – rules, the distinction line would need to be drawn by judges on a case-to-case basis. Yet, there is no judge, nor, respectively, any institution among the three constitutional levels which could legitimately do so. The WTO adjudicative bodies, the only ones, in practice, capable of deciding this question, have already deliberately dismissed the idea of reading a direct effect obligation into WTO law – precisely because of the legitimacy objections just mentioned. As a result, it may be concluded that direct effect of WTO law could not legitimately be imposed on the EC in politically controversial cases.

Yet, it is exactly this finding that points to the possibility of how the effectiveness of WTO law could still be considerably improved with regard to the present situation. As the Hermès case has shown, there are also instances of a more technical nature, particularly as regards the TRIPS agreement, in which there is no “sovereignty issue” at stake, and the granting of direct effect would not entail any deregulatory risk, either. On the basis of this finding, the ECJ might develop a more flexible approach by granting direct effect in such cases only, i.e., as long as it deems the European executive’s prerogatives in foreign trade policy not to be at risk. Yet, this approach would offer more flexibility not only in technical issues. Comparable to what was proposed by Advocate General Tesauro in Hermès, it could also enable the ECJ, possibly after enquiring of the executive’s view, to grant direct effect in favour of certain countries only if reciprocity is ensured or if the sovereignty implications of a certain matter are minor.
It should be noted, though, that this solution would still need to be fine-tuned with the functioning of the WTO dispute settlement procedure. In particular, the political room for decision making by WTO Members in this procedure might be illegitimately curtailed, and the delicate balance between diplomatic and legal means of dispute resolution provided for in the DSU disturbed, if national courts or European courts were encouraged to make decisions on WTO rules at any moment of an ongoing dispute settlement procedure. Thus, at the consultation stage before the formal establishment of a panel, it is obvious that any directly effective court decision might be counterproductive. It might largely restrict the scope of manoeuvre in the consultations accorded to the parties in Article 4 DSU; in particular it might gravely affect the balance achieved by means of member-to-member trade-offs which frequently involve cross-sector bargaining. It is true that, if no third party feels affected by such measures and initiates a panel procedure (which is, however, quite unlikely), there is no control that WTO law is respected is being in such settlements, ex officio control being inexistent. However, the DSU’s preference for political negotiation is absolutely clear and unequivocal at this point. Beyond this, a directly effective domestic court decision should be avoided also because it might be inconsistent with a later panel report; and a possible internal res iudicata effect of that court decision might deprive the State in question from even the possibility of complying, and expose it to sanctions. As a result, directly effective court decisions should at any rate be excluded whenever a dispute settlement procedure has been initiated or this may be expected to happen.

To sum up, while direct effect should not be imposed on the EC against its will, the ECJ might consider granting direct effect to WTO law in cases of no “sovereignty relevance” and as long as interference with WTO dispute settlement procedures is not to be expected.

2. WTO Law as “Paramètre de Légalité” in Community and Member State Actions

It has already been mentioned several times that the justiciability of WTO law as a “paramètre de légalité” in Community and Member State actions raises questions which are different from those entailed by the full direct effect of WTO law in individual suits. This is particularly so as both the EC and its Member States are externally liable for full compliance with the agreements, and may also be exposed to retaliation by third parties for violations occurred only in other Member States. Moreover, under the premise of the characterisation of GATT/WTO as a predominantly legal, and not only diplomatic, system, there is a strong argument that the Community and its Member States should have at their disposal a legal
means to control that it is respected. The situation in which a legal international agreement by which the Community is bound by public international and primary law (Article 300 (7) EC), but which can generally not be invoked by anyone as a legality requirement for internal legislation, should simply not exist in a Community governed by the Rule of Law.

As regards actions by the EC against Member States, the power of the Commission under Article 226 (ex 169) EC to force Member States to comply with GATT/WTO may be well justified on account of the EC’s own liability for the implementation of all WTO law. As the EC possesses only weak direct implementation mechanisms, the infringement procedure does, indeed, constitute a legitimate enforcement tool in these cases. As regards the Member States, the possibility of bringing a legal action also represents a constitutional counterbalance to the majority principle in the Council; the only means of defence for the Member States against European law breaching international law. An action by a Member State serves therefore not only as an individual remedy, but also as a control of legality.

This conclusion is further confirmed by the distinction between the reliance on a superior rule of law as a source of rights and the reliance on such a rule in view of the control of the compatibility of legislation. This is usually made in national constitutional procedural law, and might, therefore, by regarded as a common constitutional tradition of Member States which the ECJ generally accepts as a legitimate source of EC primary law, too. A similar approach seems to underlie the ECJ’s own famous Simmenthal decision. There, the Court held that the very nature of Community law - without any extra conditions comparable to

507 For example, Verfassungsbeschwerde und Normenkontrolle in the German Bundesverfassungsgerichtsgesetz.
509 Case 106/77, Simmenthal [1978] ECR 629, paras. 17 and 18. It should, however, be noted that this conclusion may be criticised as ultra vires, as the ECJ cannot make binding findings on the validity of national law as such, but only on its consistency with EU law (which is already an extension of its sole task to interpret Community law foreseen in the Treaties).
those required for direct effect needing to be fulfilled - rendered “automatically inapplicable any conflicting provision of current national law”. All in all, the wholesale refusal of the ECJ to examine the compatibility of the Regulation with GATT’ 47 may, indeed, be alleged to represent a déni de justice, as former EC judge Ulrich Everling did.\textsuperscript{510} Compared to these powerful arguments, the possible danger that, in some cases, private lobby groups will induce a government to file suit needs to be accepted.\textsuperscript{511} However, in such instances, it should be up to the national government’s responsibility to decide whether such action is really in the interest of the State and the Community and whether it will not lead to unacceptable deregulatory consequences. Finally, it is also obvious that, even if some industry-induced government actions were to be filed, these would be much fewer than private actions.

Whilst the justiciability of WTO law in Member State and Community actions should therefore be ensured, the crucial question is whether a “sovereignty exception”, as described above in the context of individual suits, should also be possible here in exceptional cases. In deciding this question, not only the legality arguments just outlined, but also the legitimacy arguments invoked against direct effect should be balanced. Specifically, it should be noted that the deregulatory risk for the Community as a whole is, of course, equally present in cases of government suits, in which one or several Member States might gain from deregulation in a particular area. On these grounds, a compromise solution should again be envisaged. Whilst it is clear that a “sovereignty exception” left to the Court’s discretion as in individual suits is insufficient, such an exception should be still possible if it is adopted in the Council with the necessary majority in the policy field at stake – hence mostly qualified majority, which is the rule for both the common agricultural and the common commercial policy. Technically, in such cases, the ECJ would then need to suspend the procedure and refer the matter to the Council.

This solution may also be argued to be compatible with Article 300 (6) EC, even though this question is not an easy one. It is true that this provision entails, as shown, that legal review of the respect of the EC’s international legal commitments should always be possible at least in Member State actions. However, there are two possibilities for motivating an exception. First, one might argue that GATT/WTO is not a “100% legal” agreement, but also con-

\textsuperscript{510} This objection is raised by Everling, \textit{op. cit.}, 409; H.-D. Kuschel, “Die EG-Bananenmarktordnung vor deutschen Gerichten”, \textit{EuZW} 1995, 689; and Pescatore, \textit{op. cit.}

\textsuperscript{511} M. Hilf and F. Schorkopf, “WTO und EG: Rechtskonflikte vor den EuGH?”, \textit{EuR} 2000, 74
tains elements of diplomatic bargaining and reciprocity, which might be taken to justify occasional “sovereignty exceptions” barring legal review. The second argument goes back to legal structural findings derived from the pluralistic model and the network concept. Accordingly, similar to what was postulated above for the conflict among national constitutional and European law, supremacy of international treaties over EC law must not be unlimited under a pluralistic model, either. This would mean that an implicit “constitutional identity limit” or “substantive ordre public” exception should be read also into the whole EC treaty, which would also justify the exceptional restriction of Article 300 (6) EC.

To sum up, WTO law should generally be invocable as “paramètre de légalité” in Member State and Community actions. However, in exceptional cases in which the EC’s or a Member State’s identity is deemed threatened, the Council should have the right to adopt a “sovereignty exception” by the necessary majority. This solution might represent an adequate compromise by taking the legitimacy concerns of both sides into account.

III. The Direct Effect of WTO Dispute Settlement Reports within the European Legal Order

1. Conspectus

If the granting of direct effect to WTO law in private actions might overburden the relationship between WTO and national/EU law, the remaining possibility of granting direct effect to adopted dispute settlement reports alone deserves attention. Technically, this could be done whenever a report contains clear, unconditional and technically immediately implementable findings, such as, most importantly, the finding of a violation of WTO law. An assessment of this solution should again be informed by effectiveness and legitimacy rationales. Regarding the former, it is obvious that this approach would mean an important step forward for the compliance with WTO law. As to the latter, it would also have considerable advantages. In fact, it is only the sensitive and cautious balancing of WTO and national law by the specialised and experienced WTO adjudicators who respect procedural fairness, methodological coherence and integrity, and show a sufficient degree of institutional sensitivity

512 It should be noted at this stage that the establishment of a third level conflict resolution would appear to be impracticable in the GATT/WTO vs. EU scenario, as this is not as much legally consolidated as the relationship among national constitutional and EC law.

and deference towards higher legitimated national and supranational measures that enjoys sufficient deliberative legitimacy as to justify interventions in EU/national law. Beyond this, the interconnection of the dispute settlement procedure with EU/national law is nowhere near as “brutal” as the immediate avoidance of a European or national provision following the granting of unlimited direct effect to WTO rules. Instead, it would enable smoother co-ordination of both legal orders, offering possibilities for conciliation, more flexible time-frames for compliance, and the transitory possibility of compensation as an alternative to full compliance.

Moreover, this solution also seems to fit the legal character of the dispute settlement procedure and thus the Rule of Law principle in general.\textsuperscript{514} Indeed, with a finding of 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 domestic measures with WTO law have been decided in a definitive and authoritative manner. Finally, it should be recalled that direct effect of DSB decisions also seems to be a recommendable solution from a doctrinal view. Thus, this solution is backed up by the ECJ’s findings in its first opinion on the European Economic Area on the internal Community status of the decisions of international courts.\textsuperscript{515} As reported, the ECJ held, in that opinion, that legal decisions taken by an international court established by an international agreement into which the Community has lawfully entered are also binding for itself.\textsuperscript{516} Against this background, it should not be easy to distinguish a denial of direct effect to adopted dispute settlement report.


\textsuperscript{516} The refusal of the EEA jurisdiction followed here, above all, on account of the far reaching overlap of competence with the ECJ, which regarded the court as being incompatible with Art. 164 EC.
2. Fine-Tuning Direct Effect with Political Elements in the Dispute Settlement Enforcement Procedure

If direct effect of adopted dispute settlement reports should thus be recognised as a principle, its granting must still be cautiously fine-tuned with the political-diplomatic elements of the DSU in order not to disturb the sensitive balance of legal and political elements provided for in the dispute settlement procedure. These problems have first been addressed in two pioneer studies by Thomas Cottier.\textsuperscript{517} As a baseline, it seems to be clear that a dispute settlement report must not be granted direct effect before the expiry of the period accorded to a State for the implementation of the panel or appellate body report. In fact, only then does the international law command actually become effective, as \textit{ex tunc} avoidance does not exist in WTO procedural law. Beyond this, several other scenarios need, however, to be distinguished: the case of controversies about the WTO-consistency of implementation measures (a), compensation wrongly used as a definitive remedy (b), and the simple disregard of dispute settlement decisions (c).

\textit{a) Controversies about the WTO-Consistency of Implementation Measures}

First, as happened in the Banana case, when national or European implementation legislation is enacted, doubts may emerge as to whether this is now compatible with WTO law. In these cases, Thomas Cottier has suggested the following distinction. Whenever WTO-consistent interpretation allows gaps to be filled and possible inconsistencies in national legislation to be avoided, this may be done \textit{de lege lata} by the judge. By contrast, in situations where this is not possible, as the wording of the implementation norms is unequivocal and leaves no interpretative space,\textsuperscript{518} “judicial policy may develop a later-in-time rule, which requires respect for national measures and practices adjusted based on the WTO report”, as these have not yet been subjected to a new panel review. In addition, courts should, however, also be allowed to address manifest shortcomings without a new panel procedure being initiated.


\textsuperscript{518} Cottier, \textit{op. cit.}, 373f.
This assessment may be largely approved, even though the last finding should be relativised. As a general rule, the higher legitimacy of national or European measures should, indeed, entail that these are respected as a rule, even if one party raises doubts about their WTO-consistency and their consistent interpretation is not possible. However, one should also examine the effects of a Article 21 (5) DSU procedure, which is the specific WTO law device to deal with doubts on the WTO-consistency of an implementation measure. If such a procedure has been started, the national legislation should not be disapplied domestically, as this would interfere with it. If, however, no such procedure has been initiated – which means that the other WTO parties which have started the original procedure are satisfied with the implementation measures taken to remedy the breach - it appears to be barely imaginable that a national court or the ECJ will find a major inconsistency with WTO law, which would amount to a massive shortcoming. So, as a rule, the national/European implementation legislation would need to be applied in that case too, without European or national courts having the right to address shortcomings.\(^{519}\)

\textit{b) Compensation wrongly used as a Definitive Remedy}

The second possible scenario is that of a compensation. To this effect, the DSU allows a decision, to be taken within 20 days of the expiry of the implementation period, to grant temporary compensation (Article 22 (2) DSU). In order not to interfere with the parties’ right to reach such a political solution, internal judicial action should also be suspended for the period for which compensation is granted. However, there is a serious \textit{lacuna} in the DSU system: it is not stated how long temporary compensation may last, and there appears to be no procedural device in the DSU capable of preventing temporary compensation from becoming definitive. For, if the Member States disadvantaged by the measures in question are satisfied with the compensation offered, no further steps will be taken. Without a request by a State, the DSB is not authorised to enact any measure of retaliation in order to achieve full compli-

\(^{519}\) It should be further noted that Steve Peers has suggested that European implementation measures should always be justiciable before European courts in application of the \textit{Nakajima} exception. This argument is, of course, well consistent as the implementation measure is specifically taken to comply with WTO law obligations. However, the rationale of not interfering with an ongoing Art. 21 (6) DSU procedure should be paramount here as well. In addition, as Peers himself has shown, this approach would lead to immense complexities if applied, \textit{e.g.}, to the 1998 amendments to the Banana regime (which was adopted in order to implement the 1997 appellate body report). See S. Peers, “\textit{Banana Split: WTO Law and Preferential Agreements in the EC Legal Order}”, \textit{EFA} 4 (1999), 195.
ance. Now, the question is, whether such a settlement *praeter legem* - which may be significantly disadvantageous for private parties – would need to be accepted by national and European courts, too.

In this situation, it should first be recalled that, according to Article 22 (1) DSU, observance of the DSB decision is clearly preferable and that, as a consequence, the possibility of compensation is not a legally admissible alternative to full compliance. Instead, it is the essential legal remedy of international law in the sanctioning of a breach of an agreement before the ultimate suspension of concessions. On a different line of argumentation, the direct effect of agreements in international law would always be excluded on account of the alternative of compensation. Nevertheless, it is realistically barely possible for domestic courts to revolt against their governments and to disrespect a political settlement reached with third States by granting direct effect to the dispute settlement decision which has established the violation. Even though such a definitive settlement of the dispute would constitute a clear violation of the wording and spirit of the DSU, its challenge should be left to WTO bodies and procedures and not to domestic courts.

*c) The Complete Disregard of a Dispute Settlement Decision and its Consequences*

The third possible scenario arises when a party simply ignores the panel report and exposes itself to the suspension of concessions by other parties. In this situation, Thomas Cottier has submitted that a distinction should be introduced according to whether the State in question or the Community just remains passive (e.g., because implementation legislation could not be enacted due to resistance in the Council of Ministers) or deliberately chooses to ignore the panel decision and to accept the risk of incurring retaliation measures by third States upon authorisation of the DSB. In the first case, which is alleged to amount to the most flagrant violation of international law, direct effect should be granted on grounds of legality and the protection of individuals. By contrast, the second case is argued to be much more complex. Here, solutions should be made dependent on the motives and reasons stated in support of the resistance against the report; at any rate, arbitrary non-compliance and mere political expediency should not be judicially protected.

This reasoning may again be approved in general, but it might be somewhat more elaborated in the context of the EU. As a general rule, it should be recognised that – even though

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this may again be contrary to WTO law – national or European courts must not prevent the executive from deciding against the implementation of a dispute settlement report. As stated, reasons of internal legitimacy, in particular protecting the social Welfare State against far-reaching deregulatory constraints, may justify such behaviour, and it can only be up to the political branch to decide upon it. However, whereas a Nation State executive may simply choose not to comply in this case and to accept possible sanctions, the situation of the EU is different on various important grounds. First, as repeatedly stated, all Member States are WTO Members and may incur sanctions for non-compliance; second, as in the case of the Banana regulation enacted by qualified-majority decision in the Council, one or more Member States may themselves suffer economic damage from a piece of EU legislation violating the GATT/WTO rules, and the legitimacy rationales for exceptionally disapplying a dispute settlement finding would not apply to them.

On these grounds, while the disregard of a dispute settlement decision on account of paramount Community interests should not be completely excluded, Member States’ interests would need to be taken into consideration, too. Thus, one may develop a compromise proposal similar to the construct of “sovereignty exceptions” to the internal justiciability of WTO law suggested above. This could be as follows: since the ratification of the WTO by both the EC and its Member States should be read as implying a principal decision in favour of the acceptance of dispute settlement findings, too, it would need to be revoked by actus contrarius - i.e., by a “non-implementation” Council decision. To this, the same procedural rules as for the European act found in violation of WTO law should apply, which would again mean that qualified majority would be the rule, as it applies to common commercial policy (Article 133 (4) EC). By contrast, if no such “non-implementation decision” is taken by the Council, national and European courts should be entitled and obliged to grant direct effect to the dispute settlement decision after the expiry of the deadline set for its implementation.\footnote{Against a negative council decision, and its confirmation by the ECJ, a State might, albeit only as ultima ratio, still ask for an autonomous conciliation procedure as set forth for EU vs. national constitutional conflicts. However, contrary to the view proposed by some German authors, it should not be enough if the State in question were to view the mere disregard of a dispute settlement decision as a violation of the Rule of Law. On the contrary, a State should be required to show bona fides violations of other substantive constitutional provisions.}

A somewhat different assessment should apply to the second scenario in which the Community initially declares its willingness to comply with the ruling in the DSB session subse-
quent to the adoption of the report (Article 13 (3) DSU), but then fails to implement the report in the established time-frame. In this situation, the granting of direct effect to a DSB decision by domestic courts should be possible provided that no “non-implementation” decision by the Council is taken. It would, indeed, be unacceptable if economic operators, who have relied on a certain internal measure to be withdrawn at the time announced by the EC in the DSB, were further disadvantaged for the simple reason that the European legislator was not able to do his or her job in time. This result would be parallel to the famous internal ECJ jurisprudence on the direct effect of directives; in this situation, the principle of *estoppel* - according to which no one is allowed to invoke their own illegal behaviour against another person - prevents a Member State from invoking national provisions against a directive after the expiry of the time-frame set for its transposition into national law. Even if internal EC legislation cannot, of course, be compared in all circumstances to the implementation of a dispute settlement decision, the rationale of the *estoppel* and reliance principles should be of decisive weight even in the latter case.

III. “Reference Panels” among the Community and its Member States

1. Conspectus

Summarising the above findings, two fundamental findings on the interconnection of EU and GATT/WTO law have been made so far: first, whilst in individual actions direct effect should be granted to WTO law only in cases without incisive domestic legitimacy implications, in government actions, WTO law should generally be invocable as a legal basis for the challenge of a piece of EC legislation, unless a “legitimacy exception” is adopted with the necessary majority in the Council. Second, it has been found that dispute settlement report findings should, in principle, enjoy direct effect, though only after the expiry of the implementation deadline and without prejudice to the EC’s capacity to enact a “non-implementation” Council decision.

It is obvious that tension leading to potentially divergent decisions may exist between these two options: whilst, normally, the WTO procedures are much speedier than actions before the ECJ on account of their tighter time-frames, it is by no means excluded that a panel is initiated by a third State when the ECJ is about to give its own decision on the WTO-consistency of a European measure. Yet, this is not even the main problem: even if no panel procedure is initiated or foreseeable at the time of an ECJ decision, this may always happen
later. If the ECJ is bound to examine the consistency of European measures as advocated here, the danger of diverging decisions is always present. This possibility would be even more precarious as GATT/WTO is most complex and many central rules such as MFN leave a wide huge scope of interpretation – as evidenced, for example, by the frequent divergences between the panels and the appellate body or the fundamental disagreements among the ECJ and the WTO adjudicative bodies on the interpretation of the Article 23 GATT exception for free trading areas and customs unions. In particular, it might be expected that the ECJ would take a more generous stance towards the compatibility of EC measures with GATT/WTO provisions such as the free trade area or customs union exception. As a consequence thereof, economic operators may have relied on the validity of an EC measure after an EC decision stating its consistency with GATT/WTO law, whilst a later contrary finding by WTO dispute settlement bodies might force the EC to revoke them. At European level, this might also give rise to damage claims by private parties against the EC, whose wholesale refusal by the ECJ, as in several Banana follow-up cases, again undermines the Rule of Law in the EC and thus the legitimacy of European governance. Clearly, this danger is even higher in the present scenario in Portugal vs. Council in which the ECJ refuses to deal with the WTO consistency of EC measures altogether.

To avoid contradictory decisions as far as possible, a closer procedural interconnection among European courts and WTO adjudicative bodies would be desirable. In this context, it is obvious that in the current *a posteriori* type of WTO procedures, the economic and financial stakes are often very high, which increases the controversial character of the dispute and the adversarial character of the procedure, and ultimately puts WTO’s legitimacy under additional strain. The possibilities of realising *a priori* procedures should therefore be explored. In particular, a dispute settlement procedure might seem opportune when a panel has not, or not yet, been convened, but with a view to the importance, complexity, controversiality or the economic stakes of a particular dispute, an authoritative finding would seem to be needed in order to provide Member States and economic operators with legal certainty at an early stage - in particular, when a Community act has been planned or enacted, but not yet entered into force. The same may be true when, already, at the drafting stage of a European measure, it appears likely that a third State might convene an ordinary panel against the EU and/or a Member State immediately after its formal enactment.

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522 See, above, Part I, chapt. 2, III., 3. a), 4 a).
The procedural device most adequate for such cases would be a sort of “reference procedure” following the model of Article 234 (ex 177) EC. This has not just proven to provide a most effective and well-functioning interconnection between the EU and national legal systems. In a wider analysis, it has also been shown by Meinhard Hilf that a reference procedure is actually the most effective tool for the interconnection of international and national law.\(^5\)

It should, therefore, be examined whether a similar procedure could also be established at WTO level.

As no \textit{a priori} reference procedure is currently provided for in the DSU, it would clearly be the best solution if its establishment could be achieved by the “WTO legislator” through a reform of the DSU. In order not to overburden the relationship between WTO and EU law and the resources of the DS bodies, only WTO Members, and not national courts dealing with private actions, should have the right to refer questions on the compatibility of domestic measures with WTO law at the present stage. However, as long as the device of reference panels is not formally introduced into the DSU by the “WTO legislator”, “reference panels” might also be possible \textit{de lege lata} in the EU context. For, according to standing law, ordinary panels might be convened between the Community and one or several Member States or \textit{vice versa}, which might simply take on the function of references panels. In this way, the fact that both the Community and its Members are full WTO Members might be rendered fertile. Whilst their membership should, in principle, also authorise them to initiate proceedings against each other, the compatibility of such use of the panel procedure with WTO and EU law needs to be examined in more detail.

\textit{2. Consistency with WTO law}

Under WTO law, reference panels between the EU and a Member State do not seem to meet major obstacles, the Community and all its Member States being, individually, full Members of the WTO. This means that they are liable for the full implementation of the agreement; as equally mentioned, the internal distribution of competencies is in principle irrelevant on the international plane and must, therefore, not be invoked against other States. Thus, “intra-European panels” should be possible on any subject matter.

Moreover, irrespective of the apparently unsettled question whether an *actio popularis* is always admissible in the dispute settlement system or not,\(^{524}\) the issue of legal interest (*gravamen*) should not be too huge a problem, either. According to Article XXIII GATT, responsibility arises when a “Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded (...).” In the *Banana* case, the appellate body emphasised that the wording “if any Member should consider” is consistent with Article 3.7. DSU which reads pertinently: “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” Against this background, the appellate body concluded that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. It found that the language of the quoted provisions suggests that a Member is expected to be largely self-regulating in deciding whether any such action would be useful.\(^{525}\) Therefore, the quoted provisions might be supposed to be wide enough to encompass even panels against measures which have already been decided, but not yet entered into force. Such interpretation would also conform to the general principle of “timely and effective prevention and resolution of trade disputes” which underlies the whole DSU system, as may be inferred, in particular, from the DSU’s tight time schedules.

Furthermore, it is generally recognised that panels may be initiated irrespective of whether any existing internal remedies are exhausted. Finally, the fact that a potential future enforcement of the panel report within the EU by means of compensation or sanctions would not fit the peculiarities of the EC as an integration community may be deemed irrelevant. A panel may also be initiated with the mere intention of ensuring compliance with WTO law - as this is, indeed, its primary purpose. The factual possibility or the intention of a State to impose sanctions in a case of non-compliance is not a binding requirement for the admissibility of a panel procedure.

3. Consistency with EU Law

The consistency of “reference panels” between the EU and a Member State with EU law is far less clear. Here, a distinction should be made as to whether such panels are initiated by mutual agreement or on a unilateral basis.

\(^{524}\) See, on this, Kuyper, *op. cit.*, 239f.
a) Panel Initiation by Mutual Agreement

It would, clearly, be the preferable option if a reference panel procedure between the EU and a Member State could be initiated by mutual agreement. Such action would be possible when a Member State raises a WTO law objection in the EC legislation procedure, and the Council decides to clarify the legal position before the relevant agreed measure enters into force. Technically, then, the Council would have to request the State in question to initiate proceedings against the EC or *vice versa*.

Furthermore, a panel might also be initiated after seizure of the ECJ with an annulment action brought by a Member State under Article 230 (ex 173) EC (the scenario of *Bananas* and *Portugal v. Council*), if the parties and the court agree that the risk of divergent views by European courts and the dispute settlement bodies is too high. Then, the ECJ would need to suspend the procedure and ask the parties to initiate a panel against each other. A panel might equally be considered, either at the request of a party or by the ECJ on its own motion, in a Treaty infringement procedure brought under ex–Article 226 (ex 169) EC by the Community against a Member State for the violation of a WTO law provision pertaining to the Community’s sphere of internal competence (the *Dairy Agreement* scenario). Finally, in a reference procedure pursuant to Article 234 (ex 177) EC involving a private action, a reference panel should be reserved to most exceptional event that the private claim coincides with important interests of one or several EU Member States.

*b) Unilateral Panel Initiation by a Member State*

Whether a panel unilaterally initiated by a Member State against the EU as *ultima ratio* to guarantee the EU’s respect for WTO law would be possible is a highly controversial issue. For it would obviously put at risk the requirement of unity in the international representation of the Community, frequently emphasised by the ECJ.\(^\text{526}\) Moreover, such action might be perceived as a disloyal act of a Member State against the Community, and should, therefore, be generally discarded on account of Article 10 EC.

However, following the multi-level governance concept, an exception might be conceivable if, as in *Portugal vs. Council*, the ECJ were to continue the blockage of the interconnec-


tion between WTO and EU law on account of its allegedly lacking legal character, without such action being backed by a “legitimacy exception” adopted by Council decision as suggested above. In such a situation, effectiveness and legitimacy rationales militate in favour of forcing the ECJ to take GATT/WTO seriously as a legal system; these should exceptionally override the requirement of unity in international representation. As regards effectiveness, if a “gateway” or interconnection within the overall network is blocked to the detriment of overall effectiveness, it is the systemically adequate answer to circumvent the blocked link and force its re-opening. With respect to legitimacy, it has already been stated that the ECJ’s jurisprudence amounts to a déni de justice, which puts the Rule of Law at risk and triggers a Member State’s liability in international law towards third States, which should justify such a drastic countermeasure as a unilateral panel.

The exceptional admissibility of unilateral panels in such situations may also be shown to be compatible with EC law. To be sure, it has been sustained that the initiation of a panel by a Member State would violate Article 298 (ex 219) EC, according to which 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 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 precluding Member States’ access to a dispute settlement procedure established in a mixed international agreement for whose implementation the EC and its Member States are jointly liable.

A more serious argument against the exceptional initiation of a unilateral panel would be that, in the EC sphere of competencies within the WTO framework as delimited in opinion 527

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527 In addition, it should be noted that the Commission has pronounced itself against “obligations of the Community and the Member States under WTO law” which would also exclude “reference panels”. In its decision concerning the conclusion of the Uruguay round quoted above, the Commission stated: “It is our understanding that Member State participation in the WTO alongside the Community gives rise to no obligations between those parties under the WTO Agreement and its Annexes. It would be a good idea to communicate this Interpretation to our trading partners by means of a formal declaration.” This recommendation did not, however, come to form a part of the Council’s act of adoption. Moreover, contrary to what was suggested by the Commission, no formal declaration was ever communicated to the EC’s trading partners.

I/94, the EC is alone competent to implement the respective agreements or parts thereof. To reply to this objection, it is necessary to resort to the reasoning presented in the context of constitutional conflicts between the EC and a Member State. There it has been shown that the EC is bound to respect constitutional essentials of the Member States as far as possible according to the solidarity and loyalty duty laid down in Articles 10 EC and 6 (1) EU. Now, the respect for the Rule of Law is undoubtedly among these constitutional essentials, and it should be considered as comprising the general justiciability of the EC’s international legal commitments, unless an exception is explicitly adopted by the Council. Just as in the relationship between the EC and a Member State, the Rule of Law also comprises the availability of a judicial action in case the latter deems its legal position to have been violated, this finding should also be true for the control of compliance with a mixed agreement for whose implementation the EC and its Member States are jointly liable. Therefore, an exception from the exclusive competence may be claimed to lie in these cases pursuant to Articles 10 EC and 6 (1) EU.

Yet, another consideration establishing a cross-interconnection among the three constitutional levels seems to be important in the present context. If, as advocated here, the wholesale denial of justiciability to WTO law in government actions constitutes a violation of a national constitutional essential, it would, as shown with respect to the interface of European and national constitutional law, also entitle a Member State to a separate conciliation procedure under general international law (Article 46 VCLT). Now, WTO law being a specialised sub-system of international law, its adjudicative mechanism may claim priority as regards WTO law questions with respect to a conciliation procedure under general international law on account of the lex specialis rule. This would mean that the complaining EC Member State is even obliged to make first use of the WTO’s adjudicative mechanism before requesting a conciliation procedure pursuant to general international law.

In a final step, this conclusion may be extended further in the following way: where a national constitutional right or principle of substantive law (such as the freedom of property, the freedom to pursue a business or general principles such as equality in the Bananas conflict) is deemed to have been violated by an EC measure, and this right or principle has international law correlates (such as the WTO law non-discrimination provisions) which are so similar that a violation of one typically also constitutes a violation of the other, a State may, for reasons of practicability, first choose to proceed on the international law avenue rather than asking for a conciliation procedure in the relationship between EU and national constitu-
tional law. Such preference for an international solution would fit the “international openness” of the national constitutions of all the EC Member States well. However, it would seem to go too far to state an obligation for a State to opt for the international avenue; instead, assessing the similarity of national and international rights and principles should depend on a State’s discretion. This notwithstanding, making use of an existing procedure, even though in a legally and politically highly controversial way, should, generally, seem to be preferable to the establishment of a completely new one as the conciliation body recommended above. Thus, in *Banana* type situations which might arise in the future, a Member State should, after exhausting European law remedies, seriously consider to seek redress from WTO bodies if the Community institutions, including the ECJ, were to prove unable to protect its constitutional identity, and if the EC refused to establish a panel by mutual agreement. To move even one step further in cross-interconnecting the three constitutional systems, it is also according to national constitutional law that a resort to WTO adjudicative bodies would be prior-ranking in comparison to the unilateral disapplication of European measures as unconstitutional by the *BVerfG*, as it would be a less incisive measure, doing less damage to legal unity within the EU.
Summary and Conclusion

Viewed in a more general perspective, the analysis of the three constitutional levels’ inter-connection in the Banana conflict has impressively shown to what degree the two involved supranational regimes, the EU and the WTO, have become independent from the Nation States which have established them and deployed autonomous effectiveness. Not only are they influencing and taking over ever more policy fields; their autonomous power is so high that they are, to a wide degree, able to impose their law on their Member States. Whereas this insight is hardly controversial for the EU, the Banana conflict has shown that it applies, albeit to a lesser degree, also to the WTO. Indeed, it was WTO rules and institutions which finally forced the EU to abandon its blatantly protectionist import regime; by comparison, the national constitutional attack was perhaps even more vociferous, but proved much less effective in the end. These experiences confirm the basic postulates of this thesis, the necessity of adopting a constitutional perspective towards the EU’s and the WTO’s basic rules, institutions and structures, if democratically legitimate governance is not to vanish in the age of globalisation; and the necessity of reading the three levels together in a multi-level constitutionalist way with a view to establishing a functioning and mutually reinforcing relationship between them.

In the first part of this thesis, the autonomy of the EU and the WTO towards the national constitution became visible when all three were shown to reach completely different results on the identical facts of the Banana import regime. Substantively, the divergences between the national and European reading of the scope of economic freedoms and between the free market vs. planified economy principles proved to be huge; equally huge divergences could be found in the EU vs. WTO law scenario between regionalism vs. universalism and free trade vs. protectionism. In procedural law, the differences were even bigger: whereas EU and national constitutional law disagree on the ultimate arbiter to decide on constitutional conflicts, the national side reserving to itself the possibility of disapplying European law internally, the EU does not even take the WTO as a legal system seriously and therefore denies, with a few minor examples, any judicial control of the compatibility of EU measures with WTO law. Yet, the legal positions of all three levels should be viewed from their internal perspectives as doctrinally coherent and persuasive. From this finding, it has been deduced that the resources of legal doctrine are exhausted for the solution of constitutional conflicts among the three levels of governance.
Against this background, a proposal for a convincing solution could only be made on the basis of a theoretical model describing the functions and the possible interaction of the three levels. To this end, various theoretical concepts were analysed in the second part of this thesis. The first of them, realism, which is the conventional model of international relations theory and focuses on the central position of the Nation State, was shown to be no longer well defendable on account of the massive loss of power to the supranational level by the State, even though its newer offspring, such as regime theory, provides useful insights. The two contrary theories, functionalism and neo-liberalism, which both advocate legitimate supranational governance on functional grounds and claim supremacy of supranational law in limited fields, were equally shown to be inadequate. The basic functionalist claim of legitimate expert governance endowed with higher rationality in limited “technical” policy fields is contradicted by the predominantly political character of supranational governance and its extension far beyond limited policy fields with technical character into the realm of “high politics”. Similar objections were pronounced against neo-liberalism. This theory generally distrusts the legislator interfering in the free play of market forces and wants to establish a powerful constitutional counterdevice against the protectionist instincts of States and their vulnerability to rent-seeking lobby activities. Whilst this is, indeed, an important function of supranational constitutionalism, it has also proved undercomplex. For, in the real world, the more difficult conflicts are on competing principles and values such as free trade vs. social and environmental protection - and consequently, the viability and legitimacy of modern social States require active governance fulfilling tasks of social regulation and redistribution, tasks which the market cannot achieve and whose realisation should not be thwarted by the selective constitutionalisation of free trade values only.

The theory which has been advocated here, multi-level governance, is more complex and tries to avoid these shortcomings. Starting off from the basic insight that the essence of all governance is political, it puts central weight on the principles of effectiveness and democratic legitimacy for the allocation of competencies and powers between national and supranational levels. This analysis led to a differentiated assessment. As regards effectiveness, the relationship of the three constitutional levels should be considered as “pluralistic”, as neither level has the institutional capacity to subjugate the others completely; attempts at hierarchical imposition rather diminish the effectiveness of all levels. Moreover, the effectiveness of one level’s influence on another is highest when the former seeks to understand and respect the other’s constraints and functioning conditions, including its substantive “ordre public”, i.e.,
the principles and rules that form its very identity. As regards legitimacy, the result is again multi-faceted, even though two main lines of argument may be individualised. On the one hand, supranational governance in its substantive version is capable of correcting “Nation State or Community” failures, i.e., the well-known proneness of these polities towards imposing economic, social or political externalities on their neighbours; in its procedural version, it subjects power-dominated relationships to the Rule of Law with its deliberative potential, which acts as a strong legitimating device. On the other, it also bears in itself a strong deregulatory potential or “effectiveness surplus”. This is due to the fact that the constitutional invalidation of national (or European) laws can be relatively easily achieved by adjudication, which functions as a form of hierarchical direction, whereas the establishment of regulatory structures and regimes at supranational level, indispensable as they are for its legitimacy, generally requires political consensus and is therefore often difficult or impossible to achieve.

It is on the basis of these findings derived from multi-level governance theory that concrete proposals de lege lata for a more effective and legitimate interconnection of the three constitutional orders has been developed in the last chapters. As regards the ultimate arbiter conflict among EU law and national constitutional law, a two step solution has been suggested. This includes, first, the optimisation of the existing interconnecting mechanisms by introducing deliberative constraints for each constitutional level to take the identity, i.e., the intra-systemic ordre public of the other seriously. If such efforts fail, a third level conflict resolution through a public international law conciliation body is recommended. It has been shown that this solution could already be realised de lege lata by cautiously resorting, as a gap-filling device within EU law, to general international law, specifically Articles 46 and 65 of the Vienna Convention of the Law of Treaties, which foresee an independent conciliation procedure in the event of manifest violations of essential internal law by an international treaty. Even though such a conciliation decision would not be formally binding either for EC or for national constitutional law, its “legitimacy appeal” should be substantial, with the effect that it should normally be obeyed. As a result, this mechanism would indirectly re-establish a form of weak three-tier monistic relationship in the Kelsenian sense between the two levels.

As regards the conflict about an adequate interconnection between EU and WTO law, direct effect has, in principle, been excluded for politically relevant issues on account of the legitimacy problems relating to the hardly avoidable deregulatory effect of WTO rules. How-
ever, contrary to the ECJ’s jurisprudence, it has been admitted for technical issues such as procedural law questions which came to the fore, for example, in the Hermès case. Beyond this, three other proposals for a better interconnection were developed which go far beyond the status quo. First, it has been argued that WTO law should be able to be invoked as a “paramètre de légalité” of European measures in nullity suits initiated by Member State governments and in treaty infringement procedures brought by the Commission against a Member State. As a security valve alone, a “legitimacy exception” should be possible, which would, however, require a Council decision to be taken with the necessary (normally qualified-) majority. Second, the general granting of direct effect to WTO dispute settlement decisions after the expiry of the implementation period has been recommended. Here, too, a “non-implementation” decision by the Council should be possible to obviate otherwise unavoidable legitimacy dangers in the wake of deregulatory pressures. Thirdly and perhaps most unconventional, panels between the EU and a Member State have been suggested in order to clarify the WTO-consistency of European measures at an early stage before economic operators rely on them, and in order to avoid potentially conflicting decisions between the WTO and EU adjudicators.

Whilst all these proposals are, clearly, open to debate and should be further refined and tested in practice, the aim of this thesis would be largely achieved, if its central premises were followed by others: attributing constitutional status to all three levels, reading them together as a meaningful whole, and, last but not least, accepting theoretical guidance in the face of the impossibility of reaching convincing solutions at legal-doctrinal level.


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