

# THE APPLICATION OF *PORTUGAL V. COUNCIL*: THE BANANA CASES

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## I. ABSTRACT

The Courts of the European Community (EC) considered in four recent cases the scope of the European Court of Justice (E.C.J.) judgment in *Portugal v. Council* that the World Trade Organization (WTO) Agreement cannot be used by EC Member States as a basis for challenging the legality of EC measures. That is to say, the WTO Agreement does not have ‘direct effect’ in the EC legal order. The four cases discussed in this Article all addressed whether individuals could rely on WTO rules to impugn the EC’s attempts to implement the Dispute Settlement Body (DSB) reports in European Communities—Regime for the Importation, Sale and Distribution of Bananas (*EC–Bananas*). The EC Courts responded in these cases by applying *Portugal v. Council*. The Courts denied the applicants the right to challenge the relevant EC measures, even where those measures had been ruled inconsistent with WTO rules by a panel convened under Article 21.5 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This Article suggests that the EC Courts correctly concluded that although WTO members are under a soft international obligation to fully implement WTO DSB reports, the express wording and structure of the DSU means that this obligation cannot be given direct effect in the EC legal order.

## II. INTRODUCTION

This Article discusses four recent decisions of the EC Courts, which will be collectively referred to as the *Banana Cases*: the Euro-

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pean Court of First Instance (C.F.I.) rulings in *Cordis v. Commission*,<sup>1</sup> *Bocchi Food Trade International v. Commission*,<sup>2</sup> and *T Port v. Commission*<sup>3</sup> (the *Quota Damages Cases*), and the judgment of the E.C.J. in *OGT Fruchthandelsgesellschaft (OGT)*.<sup>4</sup> The *Banana Cases* all arose from the EC's legislative efforts to implement the panel and Appellate Body reports adopted by the WTO DSB in *EC–Bananas*.<sup>5</sup>

This Article focuses on the sections of the decisions which consider the interaction between EC law and the WTO Agreement,<sup>6</sup> giving particular attention to the effect of adopted WTO panel and Appellate Body reports in the Community legal order. As a precursor to this discussion, it is necessary to explain briefly *Portugal v. Council*,<sup>7</sup> on which the reasoning in the *Banana Cases* was based.

1. Case T-18/99, *Cordis Obst und Gemüse Großhandel GmbH v. Commission* (2001), available at <http://curia.eu.int> (last visited Nov. 16, 2001).

2. Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* (2001), available at <http://curia.eu.int> (last visited Nov. 16, 2001).

3. Case T-52/99, *T Port GmbH & Co KG v. Commission* (2001), available at <http://curia.eu.int> (last visited Nov. 16, 2001).

4. Case C-307/99, *OGT Fruchthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen* (2001), available at <http://curia.eu.int> (last visited Nov. 16, 2001).

5. WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Complaint by Ecuador, WT/DS27/R/ECU, 1997 WTO DS LEXIS 11 (May 22, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/recu.wp5](http://www.wto.org/english/tratop_e/dispu_e/recu.wp5) (last visited Nov. 16, 2001); WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Complaint by Guatemala and Honduras, WT/DS27/R/GTM, 1997 WTO DS LEXIS 15 (May 22, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/rgtm.wp5](http://www.wto.org/english/tratop_e/dispu_e/rgtm.wp5) (last visited Nov. 16, 2001); WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Complaint by Mexico, WT/DS27/R/MEX, 1997 WTO DS LEXIS 17 (May 22, 1997), available at [http://www.wto.org/english/traop\\_e/dispu\\_e/rmex.wp5](http://www.wto.org/english/traop_e/dispu_e/rmex.wp5) (last visited Nov. 16, 2001); WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Complaint by the United States, WT/DS27/R/USA, 1997 WTO DS LEXIS 13 (May 22, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/rgtm.wp5](http://www.wto.org/english/tratop_e/dispu_e/rgtm.wp5) (last visited Nov. 16, 2001); WTO Appellate Body Report on EC Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 1997 WTO DS LEXIS 10 (Apr. 29, 1996), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/rgtm.wp5](http://www.wto.org/english/tratop_e/dispu_e/rgtm.wp5) (last visited Nov. 16, 2001) [hereinafter Appellate Body Report].

6. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

7. Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395; see generally Axel Desmedt, *European Court of Justice on the Effect of WTO Agreements in the EC Legal Order*, 27 LIEI 93 (2000); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/95, Portugal v. Council*, 3 J. INT'L ECON. L. 441 (2000); Alan Rosas, *Case C-149/96, Portugal v. Council. Judgment of the Full Court of 23 November 1999*, 37 COMMON MKT. L. REV. 797 (2001); Geert A. Zonnekeyn, *The Status of WTO Law in the Com-*

### III. CASES

#### A. *Portugal v. Council*

In *Portugal v. Council*, Portugal challenged the decision of the Council of the European Union to conclude<sup>8</sup> Memoranda of Understanding with India and Pakistan on market access for textile products.<sup>9</sup> These Memoranda were negotiated and concluded following the end of the Uruguay Round of negotiations, in the context of continuing WTO textile market access discussions. Among other complaints,<sup>10</sup> Portugal challenged the Memoranda as being inconsistent with the 1994 General Agreement on Tariffs and Trade (GATT 1994),<sup>11</sup> the Agreement on Textiles and Clothing,<sup>12</sup> and the Agreement on Import Licensing Procedures.<sup>13</sup>

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*munity Legal Order: Some Comments in the Light of the Portuguese Textiles Case*, 25 EUR. L. REV. 293 (2000).

8. In the context of the EC's external relations law, "conclude" has two simultaneous meanings. On the one hand, the term signifies the internal EC process by which the EC institutions decide that a particular agreement should be accepted by the EC. On the other, it signifies the international act by which the EC expresses its definitive consent to be bound. Without the first step, the expression of EC consent to be bound would be invalid in EC law. Without the second, third parties would not know whether the EC had decided to enter into the agreement in question. See I. MACLEOD ET AL., *THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES* 92 (1996).

9. Council Decision 96/386/EC of 26 February 1996 Concerning the Conclusion of Memoranda of Understanding Between the European Community and the Islamic Republic of Pakistan and Between the European Community and the Republic of India on Arrangements in the Area of Market Access for Textile Products, 1996 O.J. (L 153) 47.

10. Portugal also alleged that Council Decision 96/386/EC breached the principle of publication of Community legislation (*Portugal*, Case C-149/96, ¶¶ 53–54); the principle of transparency (*id.* ¶¶ 55–58); the principle of cooperation in good faith in relations between the EC institutions and the EC Member States (*id.* ¶¶ 59–68); the principle of legitimate expectations (*id.* ¶¶ 69–77); the principle of non-retroactivity of legal rules (*id.* ¶¶ 78–82); the principle of economic and social cohesion (*id.* ¶¶ 83–87); and the principle of equality between economic operators (*id.* ¶¶ 88–93). None of these claims was successful and the application was dismissed in its entirety (*id.* ¶ 94).

11. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

12. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994). The full text of the agreement is available on the WTO website, [http://www.wto.org/english/docs\\_e/legal\\_e/16-tex.pdf](http://www.wto.org/english/docs_e/legal_e/16-tex.pdf) (last visited Nov. 16, 2001).

13. Agreement on Import Licensing Procedures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994). The full text of the agreement is available on the WTO website, [http://www.wto.org/english/docs\\_e/legal\\_e/23-lic.pdf](http://www.wto.org/english/docs_e/legal_e/23-lic.pdf) (last visited Nov. 16, 2001).

The detailed reasoning of the case will be considered below. Most significantly, the E.C.J. held that Portugal could not rely on the provisions of the WTO Agreement, because they were not among the rules that could be used to challenge the legality of EC measures.<sup>14</sup> That is to say, the Agreement was held not to have direct effect within the EC legal order. Unlike the EC measures considered in the *Banana Cases*, those associated with the Memoranda of Understanding were not the subject of proceedings under the DSU.

## B. The *Quota Damages Cases*

1. *The Original EC Rules and the WTO Challenge.* The three *Quota Damages Cases* arose from amendments made to the EC rules governing the allocation of banana import quotas in the aftermath of *EC-Bananas*.<sup>15</sup> Council Regulation 404/93,<sup>16</sup> which established the framework for the common organization of the EC banana market, originally drew a distinction between bananas produced in the EC, bananas from third countries *other than* African, Caribbean and Pacific (ACP) states,<sup>17</sup> “traditional” ACP bananas, and “non-traditional” ACP bananas. An Annex to Council Regulation 404/93 specified the quantities of bananas traditionally exported by each of the ACP states to the EC.<sup>18</sup> “Traditional” ACP bananas were those that did not exceed the stated quantities, while “non-traditional” ACP bananas were those that did.

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More specifically, the Portuguese Government claimed that Council Decision 96/386/EC was contrary to the WTO rules on four grounds. It disputed the lawfulness of the option granted to the Indian government to reintroduce alternative specific duties and to grant export licenses under procedures not provided for in the WTO Agreements, on the ground that these powers were contrary both to Article II of GATT 1994 and the provisions of the Agreement on Import Licensing Procedures. The Portuguese Government claimed, furthermore, that the imbalance between the commitments undertaken by the Community and those undertaken by India and Pakistan on opening up their respective textiles markets was unlawful, particularly in respect of the option of granting requests for exceptional flexibility. Finally, it relied on a breach of the obligation to publish international agreements provided by Article X of GATT 1994. *Portugal*, Case C-149/96, Op. Advocate Gen., ¶ 25.

14. *Portugal*, Case C-149/96, ¶ 47.

15. See cases cited *supra* note 5.

16. Council Regulation 404/93 of 13 February 1993 Regarding the Common Organisation of the Market in Bananas, 1993 O.J. (L 153) 47.

17. Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St Lucia, St. Vincent, and the Grenadines and Suriname.

18. In tons/net weight: Cote d'Ivoire 155,000; Cameroon 155,000; Suriname 38,000; Somalia 60,000; Jamaica 105,000; St Lucia 127,000; St Vincent and the Grenadines 82,000; Dominica 71,000; Belize 40,000; Cape Verde 4,800; Grenada 14,000; Madagascar 5,900. See Council Regulation 404/93 (Annex), 1993 O.J. (L 47) 11.

Council Regulation 404/93 originally laid down an annual tariff quota for third-country and non-traditional ACP bananas of 2.2 million tons. In turn, the annual tariff quota was divided as follows:

- a) 66.5% for operators<sup>19</sup> who had marketed third-country and/or non-traditional ACP bananas (“Category A”);
- b) 30% for operators who had marketed EC and/or traditional ACP bananas (“Category B”);
- c) 3.5% for operators established in the EC who had started marketing bananas other than EC and/or traditional ACP bananas from 1992 (“Category C”).<sup>20</sup>

Operators were to receive import licenses for bananas on the basis of the average quantities of bananas they had sold in the last three years for which figures were available.<sup>21</sup>

Commission Regulation 1442/93<sup>22</sup> established detailed rules for the issuing and administration of those import licenses. It further subdivided Category A and B operators into three types of qualifying entities (“activity functions”). The activity functions were divided between primary importer, secondary importer, and ripener.<sup>23</sup> In order to qualify as Category A and/or B operators, economic agents must have performed at least one of these activities in “marketing” bananas during the above three year reference period. Fixed percentages of the licenses required to import bananas from third countries or non-traditional ACP sources at lower duty rates within the tariff quota were allocated on the basis of these activity functions. Article 5 of Commission Regulation 1442/93 provided for a weighting coefficient of fifty-seven percent for primary importers, fifteen percent for secondary importers, and twenty-eight percent for ripeners of bananas. However, the EC regime for banana imports was impugned successfully by Ecuador, Guatemala, Honduras, Mexico, and the

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19. An operator was defined as a legal or natural person established in the EC who marketed a minimum quantity of bananas on their own account. *See id.* art. 19(1); *see also* Commission Regulation 1442/93 EEC of 10 June 1993 Laying Down Detailed Rules for the Application of the Arrangements for Importing Bananas into the Community, 1993 O.J. (L 142) 6, at art. 3.

20. Council Regulation 404/93, *supra* note 18, art. 19(1).

21. *Id.* art. 19(2).

22. Commission Regulation 1442/93 of 10 June 1993 Laying Down Detailed Rules for the Application of the Arrangements for Importing Bananas into the Community, 1993 O.J. (L 142) 6.

23. *Id.* art 3(1). More specifically, primary importers engaged in the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the EC. Secondary importers/customs clearers acted as owners, supplying and releasing for free circulation green bananas and selling them with a view to their subsequent marketing in the EC. Ripeners acted as owners, ripening green bananas and marketing them within the EC. 1993 O.J. (L 142) 7.

United States in *EC–Bananas*. The Appellate Body report ultimately held that, *inter alia*:

1. The activity function rules were inconsistent with Article I:1 of GATT 1994, as their procedural and administrative requirements for importing third-country and non-traditional ACP bananas differed from, and went significantly beyond, those required for importing traditional ACP bananas.<sup>24</sup>
2. Most of the suppliers from the complainant WTO members were classified in Category A for the vast majority of their past marketing of bananas, and most of the suppliers of EC (or ACP) origin were classified in Category B for the vast majority of their past marketing of bananas. Thus, the allocation of thirty percent of the licenses allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates to Category B operators was inconsistent with Articles II and XVII of the General Agreement on Trade in Services (GATS), as it created less favorable conditions of competition for like service suppliers from the complainant WTO members.<sup>25</sup>
3. The vast majority of the ripening capacity in the EC was owned or controlled by natural or juridical persons of the EC and most of the bananas produced in or imported to the EC were ripened in EC owned or controlled ripening facilities. On the other hand, most of the suppliers from the complainant WTO members would usually be able to claim reference quantities only for primary importation, and possibly for secondary importation, but not for the performance of ripening activities. Thus, the allocation to ripeners of a certain portion of Category A and B licenses allowing importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with Article XVII of the GATS, as it created less favorable conditions of competition for like service suppliers from the complainant WTO members.<sup>26</sup>

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24. Appellate Body Report, *supra* note 5, ¶ 206.

25. *Id.* ¶ 244.

26. *Id.* ¶ 246. The Appellate Body also held the following: a) the allocation of tariff quota shares to some, but not to other, WTO members not having a substantial interest in supplying bananas to the European Communities was inconsistent with Article XIII:1 of GATT 1994; b) the tariff quota reallocation rules of the Banana Framework Agreement (BFA) were inconsistent with Article XIII:1 of GATT 1994 and the chapeau of Article XIII:2 of GATT 1994; c) the BFA export certificate requirement was inconsistent with Article I:1 of GATT 1994; and d) the Community practice with respect to hurricane licences was inconsistent with Article III:4 of GATT 1994 and Articles II and XVII of the GATS). *Id.*

In light of the WTO DSU proceedings, the EC amended Council Regulation 404/93 with Council Regulation 1637/98,<sup>27</sup> and replaced Commission Regulation 1442/93 with Commission Regulation 2362/98.<sup>28</sup> The relevant rules of the revised banana import regime are discussed in the following section.

2. *The Revised Rules.*<sup>29</sup> Under the revised rules, traditional ACP bananas were defined as those imported from twelve ACP countries<sup>30</sup> up to an annual aggregate limit of 857,700 tons.<sup>31</sup> The Annex to Commission Regulation 2362/98 proportionately allocated a tariff quota of 2.553 million tons for non-traditional ACP bananas<sup>32</sup> and third-country bananas<sup>33</sup> to Colombia, Costa Rica, Ecuador, Panama, and an “others” category (the Annexed Origins).

Traditional ACP bananas and non-traditional ACP bananas up to 240,748 tons were duty free.<sup>34</sup> For additional non-traditional ACP bananas, a preferential out-of-quota duty applied.<sup>35</sup> A duty of EUR 75 per ton was applied to up to 2.553 million tons of third-country ba-

27. Council Regulation 1637/98 of 20 July 1998 Amending Regulation 404/93 EEC on the Common Organisation of the Market in Bananas, 1998 O.J. (L 210) 28.

28. Commission Regulation 2362/98 of 28 October 1998 Laying Down Detailed Rules for the Implementation of Council Regulation 404/93 EEC Regarding Imports of Bananas into the Community, 1998 O.J. (L 293) 32.

29. The EC has subsequently replaced the revised rules discussed in this section in order to achieve a mutually satisfactory solution with the United States and Ecuador in *EC–Bananas*. See Council Regulation 216/2001 of 29 January 2001 Amending Regulation 404/93 EEC on the Common Organisation of the Market in Bananas, 2001 O.J. (L 31) 2; see also Commission Regulation 896/2001 of 7 May 2001 Laying Down Detailed Rules for Applying Council Regulation 404/93 EEC, 2001 O.J. (L 126) 6 (regarding the arrangements for importing bananas into the Community). The new regime entered into force on 1 July 2001. See generally Press Release, Commission, EU Welcomes Suspension of US Sanctions Following Resolution of WTO Banana Dispute (July 2, 2001) IP/01/930; Press Release, Commission, Commission Adopts Regulation to End Banana Dispute (May 2, 2001) IP/01/628; Press Release, Commission, EU and Ecuador Reach Agreement to Resolve WTO Banana Dispute (Apr. 30, 2001) IP/01/627; Press Release, Commission, U.S. Government and European Commission Reach Agreement to Resolve Long-Standing Banana Dispute (Apr. 11, 2001) IP/01/562; Press Release, Commission, Statement from Pascal Lamy: The Commission and the U.S. Administration have Agreed on a Solution to the Banana Dispute (Apr. 11, 2001) IP/01/559 (press releases on file with the Duke Journal of Comparative and International Law).

30. See *supra* note 17.

31. Council Regulation 404/93, *supra* note 16, at art. 16(1), Annex.

32. For example, imports from traditional ACP countries over the 857,700-ton limit or quantities supplied by ACP countries that were not traditional suppliers to the EC, such as the Dominican Republic. See *id.* art. 16(2).

33. *Id.* art. 18(1)(2).

34. *Id.* art. 18(1)(2)(3).

35. *Id.* art. 18(5).

bananas.<sup>36</sup> An out-of-quota duty applied for additional third-country bananas exceeding 2.553 millions tons.<sup>37</sup>

The operator categories (A, B, and C) and the market activity functions were abolished. Instead, Commission Regulation 2362/98 divided the tariff quota and the traditional ACP quantities between traditional operators<sup>38</sup> and newcomers.<sup>39</sup>

Traditional operators were each to receive an annual ‘single reference quantity’ for all the Annexed Origins from the national authorities, based on the quantities of bananas actually imported from the Annexed Origins during a reference period.<sup>40</sup> For imports in 1999, the reference period was 1994–1996.<sup>41</sup>

On receipt of specified import data and documentation,<sup>42</sup> the national authorities were to determine a “provisional reference quantity” for each traditional operator, on the basis of the average quantities of bananas actually imported from the Annexed Origins during the reference period.<sup>43</sup> The Commission was to be notified of these provisional reference quantities.<sup>44</sup>

Using this information, and considering the overall allocation between traditional operators and newcomers, the Commission was authorized to set a “single adjustment coefficient” which the national authorities would apply to each traditional operator’s provisional reference quantity.<sup>45</sup> The national authorities then were to determine the final reference quantity for each traditional operator, applying the Commission’s adjustment coefficient.<sup>46</sup>

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36. *Id.* art. 18(1)(2).

37. *Id.* art. 15.

38. According to the regulation:

“traditional operators” shall mean economic agents established in the European Community during the period for determining their reference quantities, and also at the time of their registration under Article 5 below, who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period. The minimum quantity referred to in the first paragraph shall be 100 tonnes imported in any one year of the reference period. This minimum quantity shall be 20 tonnes where the imports consist entirely of bananas with a length of 10 centimetres or less.

Commission Regulation 2362/98, *supra* note 28, at art. 3.

39. *Id.* art. 7.

40. *Id.* art. 4(1).

41. *Id.* art. 4(2).

42. *Id.* art. 5.

43. *Id.* art. 6(1).

44. *Id.* art. 6(2).

45. *Id.* art. 6(3). The Commission set an adjustment coefficient of 0.939837.

46. *Id.* art. 6(4).

The applicants in the *Quota Damages Cases* were traditional operators under Commission Regulation 2362/98. The common feature of the applicants in the *Quota Damages Cases* was that the application of the adjustment coefficient by their respective national authorities led to a reduction in their provisional reference quantities.<sup>47</sup> The applicants all claimed that this reduction was unlawful. Consequently, they sued the Commission in actions before the C.F.I., claiming non-contractual damages to compensate them for the financial loss they allegedly suffered as a result of the application of the reduction coefficient and the adoption of Commission Regulation 2362/98.<sup>48</sup>

3. *The Judgments.* The applicants in the *Quota Damages Cases* alleged that despite the Community's response to *EC-Bananas*, Commission Regulation 2362/98 still conflicted with GATT 1994, GATS, and the Agreement on Import Licensing Procedures. After the close of pleadings on the *Quota Damages Cases* in the C.F.I., however, the E.C.J. delivered its judgment in *Portugal v. Council*, holding that in "[r]egard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions."<sup>49</sup>

*Portugal v. Council* establishes that EC Member States cannot challenge the legality of Community measures for alleged conflicts with the WTO Agreement. That is to say, the WTO Agreement has no direct effect in the EC legal order for Member States. Arguably, *a fortiori*, the WTO Agreement cannot have direct effect for individuals either.<sup>50</sup> Indeed, the applicants all conceded, in additional observa-

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47. Case T-18/99, *Cordis Obst und Gemüse Großhandel GmbH v. Commission* (2001), ¶ 15 (adjusting 848,759 kg to 797,695 kg), available at <http://curia.eu.int> (last visited Nov. 16, 2001); Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* (2001), ¶ 18 (adjusting 6,660,977 kg to 6,260,233 kg), available at <http://curia.eu.int> (last visited Nov. 16, 2001); Case T-52/99, *T Port GmbH & Co KG v. Commission* (2001), ¶ 14 (adjusting 13,709,963 kg to 12,885,130 kg), available at <http://curia.eu.int> (last visited Nov. 16, 2001).

48. Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997), available at [http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf) (last visited Nov. 16, 2001). Article 288 of the Treaty provides that in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. See also Griller, *supra* note 7, at 470.

49. Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395, ¶ 47.

50. See Honourable Nicholas Forwood QC, Judge of the C.F.I., *The Status of WTO Law in the Community Legal Order*, Paper Presented at the 4th Annual Conference of the World Trade Law Association (Nov. 10, 2000) (on file with the Duke Journal of Comparative and International Law).

tions to the C.F.I., that WTO provisions did not have general direct effect within the Community legal system.<sup>51</sup>

The applicants then attempted to re-frame their arguments as complaints that the EC institutions, by adopting Commission Regulation 2362/98, were guilty of “misuse of powers” as a matter of EC law.<sup>52</sup> More specifically, the applicants argued that because the EC arrangements for banana imports had been declared incompatible with WTO rules in the adopted panel and Appellate Body reports, and that the EC had undertaken to rectify the infringements concerned, the EC was then precluded as a matter of EC law from adopting further provisions in breach of those rules.<sup>53</sup> The Commission, they claimed, had deliberately infringed WTO rules in order to achieve the organization of the banana market and had therefore misused its powers.<sup>54</sup>

The practical consequences of this argument were obvious. The issue of direct effect would become irrelevant if the adoption of a measure infringing WTO rules could be shown to be a “misuse of power.” The focus of judicial attention no longer would be on whether WTO rules were sufficiently precise and unconditional to be given direct effect.<sup>55</sup> Instead, it would be directed towards the action and ‘subjective’ intentions of the EC in light of its international obligations.<sup>56</sup> The C.F.I., no doubt conscious of the fact that the ‘misuse of power’ argument thus had the effect of undermining the E.C.J.’s ruling in *Portugal v. Council*, denied the applicant any relief based on the WTO Agreement for the following reasons.

The C.F.I., in deciding the *Quota Damages Cases*, noted the applicants’ concessions and first applied *Portugal v. Council*. The C.F.I. held that WTO rules are not intended to confer rights on individuals,

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51. *Cordis*, Case T-18/99, ¶ 33; *Bocchi*, Case T-30/99, ¶ 38; *T Port*, Case T-52/99, ¶ 33.

52. A misuse of powers has been defined by the E.C.J. as the adoption by an EC institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. See Case C-156/93 *European Parliament v. Commission*, 1995 E.C.R. I-2019 ¶ 31.

53. *Cordis*, Case T-18/99, ¶¶ 31-37; *Bocchi*, Case T-30/99, ¶¶ 36-42; *T Port*, Case T-52/99, ¶¶ 31-37.

54. *Cordis*, Case T-18/99, ¶¶ 31-37; *Bocchi*, Case T-30/99, ¶¶ 36-42; *T Port*, Case T-52/99, ¶¶ 31-37.

55. See *infra* section IV.C.

56. See Case 6/54, *Netherlands v. High Authority*, 1955 E.C.R. 103, 116; Case 15/57, *Compagnie des Hauts Fourneaux de Chasse v. High Authority*, 1958 E.C.R. 211, 230.

and consequently that the EC cannot incur non-contractual liability as a result of their infringement.<sup>57</sup>

In relation to the alternative ‘misuse of power’ submissions, the C.F.I. determined that an act of an EC institution is vitiated by misuse of powers only if it was adopted “with the exclusive or main purpose of achieving an end other than that stated.”<sup>58</sup> Further, it held that a finding of misuse of powers may only be made on the basis of “objective, relevant and consistent evidence.”<sup>59</sup> The applicants’ submission that the Commission had adopted Commission Regulation 2362/98 “to achieve its ends, namely the organization of the market in bananas,”<sup>60</sup> was thus fatal to their claims. Without identifying or providing an ulterior aim behind the legitimate objective stated in the Regulation, i.e. the detailed implementation of Council Regulation 404/93 as amended, their claim of misuse of powers could not be substantiated.<sup>61</sup>

In addition, the C.F.I. stressed that the applicants’ reliance on misuse of powers to challenge the substance of Commission Regulation 2362/98 for breach of WTO rules was ill conceived. Misuse of powers, according to the C.F.I., involves the EC Courts’ review of the “purpose of a measure and not its content.”<sup>62</sup> The C.F.I. also rejected the argument that the EC was precluded from adopting a regulation which infringed, or continued to infringe, WTO rules, when the EC had previously undertaken to comply with those rules in the WTO.<sup>63</sup> The C.F.I. held in effect that the applicants were attempting to bring the adopted reports within the *Nakajima*<sup>64</sup> and *Fediol*<sup>65</sup> exceptions identified in *Portugal v. Council*. The exceptions allow the EC Courts to review the legality of EC measures in the light of WTO rules in two circumstances.<sup>66</sup> In the first circumstance, the EC intends to imple-

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57. *Cordis*, Case T-18/99, ¶ 51; *Bocchi*, Case T-30/99, ¶ 56; *T Port*, Case T-52/99, ¶ 51.

58. Case C-285/94, *Italian Republic v. Commission*, 3 E.C.R. I-3591 (1997).

59. Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos SA and Transacciones Maritimas SA and Recursos Marinos SA and Makuspesca SA v. Commission*, 1 E.C.R. II-247 (1997); *see also Cordis*, ¶ 53; *Bocchi*, ¶ 58; *T Port*, ¶ 53.

60. *Cordis*, Case T-18/99, ¶ 36; *Bocchi*, Case T-30/99, ¶ 41; *T Port*, Case T-52/99, ¶ 36.

61. *Cordis*, Case T-18/99, ¶ 54; *Bocchi*, Case T-30/99, ¶ 59; *T Port*, Case T-52/99, ¶ 54.

62. *Cordis*, Case T-18/99, ¶ 56; *Bocchi*, Case T-30/99, ¶ 61; *T Port*, Case T-52/99, ¶ 56.

63. *Cordis*, Case T-18/99, ¶ 57; *Bocchi*, Case T-30/99, ¶ 62; *T Port*, Case T-52/99, ¶ 57.

64. Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council* (1991) E.C.R. I-2096.

65. Case 70/87, *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. 1781 (1991).

66. *Cordis*, Case T-18/99, ¶ 58; *Bocchi*, Case T-30/99, ¶ 63; *T Port*, Case T-52/99, ¶ 58.

ment a *particular obligation* assumed in the context of the WTO.<sup>67</sup> In the second, the EC measure refers expressly to the precise provisions in the WTO Agreement annexes.<sup>68</sup>

The C.F.I. refused to apply the exceptions to the adopted reports, as they did not include any “special obligations” that the Commission intended to implement within the meaning of *Nakajima*.<sup>69</sup> Nor did they come within *Fediol*, as they did not “make express reference either to any specific obligations arising out of the reports of WTO bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement.”<sup>70</sup> Consequently, the C.F.I. ruled in each case that: “The applicant cannot therefore base its action on an alleged infringement of certain agreements contained in Annex 1 to the WTO Agreement in this case or on an alleged misuse of powers.”<sup>71</sup>

### C. *OGT*<sup>72</sup>

In contrast to the private applicants in the *Quota Damages Cases*, Ecuador successfully challenged the legality of the revised EC banana import regime through a further WTO challenge. The WTO panel in *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 by Ecuador*<sup>73</sup> (*EC—Bananas—Article 21.5 Panel*) determined that the amended EC rules referred to above continued to infringe the WTO Agreement.<sup>74</sup> More specifically, *EC—Bananas—Article 21.5 Panel* held, *inter alia*:

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67. *Nakajima*, Case C-69/89, ¶ 30 held that the Community was intending to implement its obligations under the GATT 1947 Anti Dumping Code through Commission Regulation 2423/88. Therefore, the E.C.J. could determine whether the Council had acted in breach of the Code by adopting the Regulation.

68. The *Fediol* court held that Article 2(1) and the preamble of Commission Regulation 2641/84 expressly referred to GATT 1947. *Fediol*, Case 70/87, ¶ 22. Consequently, the E.C.J. could interpret GATT in order to rule on whether the Commission had correctly concluded that Argentina’s conduct was not an “illicit commercial practice” within the meaning of that Regulation.

69. *Cordis*, Case T-18/99, ¶ 59; *Bocchi*, Case T-30/99, ¶ 64; *T Port*, Case T-52/99, ¶ 59.

70. *Id.*

71. *Cordis*, Case T-18/99, ¶ 60; *Bocchi*, Case T-30/99, ¶ 65; *T Port*, Case T-52/99, ¶ 60.

72. Case C-307/99, *OGT Fruchthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen* (2001), available at <http://curia.eu.int/> (last visited Nov. 16, 2001).

73. WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Recourse to Art. 21.5 by Ecuador, WT/DS27/RW/ECU, 1990 WTO DS LEXIS 7 (May 6, 1999), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/27rwecue.pdf](http://www.wto.org/english/tratop_e/dispu_e/27rwecue.pdf) (last visited Nov. 16, 2001) [hereinafter Art. 21.5 Panel Report].

74. Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) reads: “Where there is disagreement as to the existence or consistency with a

- a) WTO members in the two groups—traditional ACP suppliers on the one hand and non-traditional ACP and third-country suppliers on the other—were not restricted similarly within the meaning of Article XIII:1 of GATT.<sup>75</sup> Moreover, the allocation of a collective tariff quota for traditional ACP states did not approach as closely as possible the share which those countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT.<sup>76</sup> Therefore, the reservation of the quantity of 857,700 tons of bananas for traditional ACP imports under the revised regime was inconsistent with paragraphs 1 and 2 of Article XIII of GATT 1994.<sup>77</sup>
- b) While WTO members have a degree of discretion in choosing a previous representative period, it was clear in this case that the period 1994–1996 was not a “representative period.”<sup>78</sup> Accord-

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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.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 112 (1994) [hereinafter DSU].

75. The Article 21.5 panel gave many examples of this dissimilar treatment; one example was that exports under the tariff quota by third-country and non-traditional ACP suppliers were restricted, in aggregate, to 240,748 tons, whereas traditional ACP suppliers were restricted, in aggregate, to 857,700 tons. Art. 21.5 Panel Report, *supra* note 73, ¶ 6.26.

76. The chapeau to GATT 1994 Article XIII:2 reads: “In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions.” GATT 1994, *supra* note 11, at art. XIII:2. Article XIII:2(d) requires that the allocation of shares within a tariff quota be based on proportions during a representative period. *Id.* The EC chose 1994–1996 as the representative period. However, the Article 21.5 panel found that traditional ACP average exports in that period were only about eighty percent of the 857,700 tons reserved for traditional ACP imports. Art. 21.5 Panel Report, *supra* note 73, at ¶ 6.28. On the other hand, the tariff quota of 2,553,000 tons for non-traditional ACP and third-country bananas had run at over ninety-five percent utilization since its creation (and there had been some out-of-quota imports). *Id.* Thus, the Article 21.5 panel concluded that the EC regime did not clearly aim at the requisite distribution of trade under the chapeau to Article XIII:2. *Id.*

77. Art. 21.5 Panel Report, *supra* note 73, ¶ 6.29.

78. Article XIII:2(d) provides that if a WTO member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the member

shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

ingly, the country-specific allocations assigned by the EC to Ecuador, as well as to the other named Annexed Origins, were not consistent with the requirements of Article XIII:2 of GATT 1994.<sup>79</sup>

- c) It was not reasonable for the EC to conclude that Protocol 5 of the Lomé Convention<sup>80</sup> required a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP state's pre-1991 best-ever export volumes was not required by Protocol 5 of the Lomé Convention.<sup>81</sup> Absent any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of GATT 1994.

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GATT 1994, *supra* note 11, at art. XIII:2(d). The Article 21.5 panel found that 1994–1996 could not serve as a representative period because of the presence in the banana market of the following distortions:

With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

Art. 21.5 Panel Report, *supra* note 73, ¶ 6.43.

79. Art. 21.5 Panel Report, *supra* note 73, ¶ 6.50.

80. Fourth ACP-EEC Convention of Lomé, *opened for signature* Dec. 15, 1989, 29 I.L.M. 783 (1990). In 1994, the WTO General Council granted a waiver to the EC from its obligations under Article I:1 GATT to allow the EC preferential treatment provided for products originating in ACP states. This decision is known as the Lomé waiver. The Fourth ACP-EEC Convention of Lomé: Extension of Waiver, Decision of 14 October 1996, WT/L/186 (Oct. 18, 1996), available at <http://docsonline.wto.org> (last visited Nov. 16, 2001).

81. The Article 21.5 panel referred to the Appellate Body's conclusion in *EC–Bananas* that the EC is required under the Lomé Convention to “allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes.” Appellate Body Report, *supra* note 5, ¶ 178. The Article 21.5 panel continued:

In our view, the Appellate Body's choice of the plural in this sentence indicates that the requirements of the Lomé Convention refer to country-specific pre-1991 best-ever volumes. To put it differently, Protocol 5 to the Lomé Convention does not “require” the European Communities to allow certain traditional ACP suppliers to exceed their individual pre-1991 best-ever import quantity within the “collective” allocation of 857,700 tonnes reserved for all traditional ACP suppliers under the revised regime.

Art. 21.5 Panel Report, *supra* note 73, ¶ 6.67.

When *EC–Bananas–Article 21.5 Panel* was adopted by the DSB, OGT had already commenced proceedings in the German courts against the German authorities concerning the levying of a customs duty on the importation of bananas from Ecuador. In January 1999, OGT imported 43.01 tons of bananas from Ecuador. The German authorities applied the third-country import duty of EUR 75 per ton under Council Regulation 404/93<sup>82</sup> and OGT paid the amount due. However, OGT then appealed the duty assessment to the German courts and applied for a suspension of its enforcement.

When the case came to trial, the German court was referred to the decision in *EC–Bananas–Article 21.5 Panel*. It considered that *EC–Bananas–Article 21.5 Panel*, subject to the issue of direct effect, could mean that the revised EC banana import regime was unlawful. It therefore referred OGT to the E.C.J. on a question of EC law<sup>83</sup> and asked the E.C.J. whether OGT could rely on GATT 1994 Articles I and XIII to challenge the validity of the duty set by Council Regulation 404/93. The E.C.J. characterized the question as whether Articles I and XIII of GATT 1994 had direct effect in the EC legal order.<sup>84</sup> It ruled that the answer to this question “may be clearly deduced from existing case-law,” enabling the E.C.J. to give its decision by “reasoned order” under Article 104(3) of its Rules of Procedure.<sup>85</sup> Accordingly, the E.C.J. cited *Portugal v. Council*<sup>86</sup> and *Dior and Others*<sup>87</sup> (where *Portugal v. Council* was applied so as to deny direct effect to the provisions of TRIPS), and stated that “[i]t follows that the same must apply, for the same reasons, to the provisions of GATT 1994.”<sup>88</sup>

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82. Council Regulation 404/93, *supra* note 16.

83. Article 234 (ex Article 177) of the Treaty Establishing the European Community reads:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the [EC] . . . . Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Treaty Establishing the European Community, *supra* note 48, at art. 234 (ex art. 177).

84. Case C-307/99, OGT Fruchthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen (2001), ¶ 22, available at <http://curia.eu.int/> (last visited Nov. 16, 2001).

85. *Id.* ¶ 23.

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

87. Joined Cases C-300/98 & C-392/98 Parfums Christian Dior SA v. Tuk Consultancy BV E.C.J. (2000), available at <http://europa.eu.int/> (last visited Nov. 16, 2001).

88. OGT, Case C-307/99 at 6, ¶ 26.

As for the application of the *Nakajima*<sup>89</sup> and *Fediol*<sup>90</sup> exceptions, the E.C.J. ruled that Council Regulation 404/93 as amended was “not designed to ensure the implementation in the EC legal order of a particular obligation assumed in the context of GATT, nor does it refer expressly to specific provisions of GATT.”<sup>91</sup> In reaching this conclusion, the E.C.J. appears to have dismissed the fact that the preamble to Council Regulation 1637/98, which amended Council Regulation 404/93, stated that “the [EC]’s international commitments under the World Trade Organisation (WTO) . . . should be met.”<sup>92</sup>

In addition, OGT argued that the first paragraph of Article 307 (ex Article 234) EC applied to GATT 1994 and that this provision could give GATT 1994 direct effect. The first paragraph of Article 307 (ex Article 234) EC reads:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.<sup>93</sup>

In addressing this argument, the E.C.J. was prepared to assume that GATT 1994 was an agreement within the scope of the paragraph.<sup>94</sup> However, the E.C.J. correctly stated that GATT 1994 is legally distinct from GATT 1947 under Article II:4 of the WTO Agreement, that it differs significantly from GATT 1947 as part of the overall WTO regime, and was concluded by the EC, and not by the Member States.<sup>95</sup>

Even under the assumption that GATT is within the scope of Article 307 (ex Article 234), the E.C.J. referred to the judgment in *Bu-*

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89. Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council* 1991 E.C.R. I-2096.

90. Case 70/87, *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission* 1989 E.C.R. 1781.

91. *Id.*

92. Council Regulation 1637/98 of 20 July 1998 Amending Council Regulation 404/93 on the Common Organisation of the Market in Bananas, 1998 O.J. (L 210) 28.

93. Treaty Establishing the European Community, *supra* note 48, at art. 307 (ex art. 234), para. 1.

94. *OGT*, Case C-307/99 at 6, ¶ 29.

95. See Opinion 1/94 of the Court of 15 November 1994. Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, 1994 E.C.R. I-5267 (point 1 of the operative part). In this context, it is also difficult to see how OGT could successfully argue that GATT 1947 could be given direct effect without undermining the E.C.J.’s existing case law, which consistently denied individuals and Member States the general right to rely on its provisions. See, e.g., Case 21/72, *Int’l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219; Case C-280/93, *Fed. Republic of Germany v. Council of the European Communities*, 1994 E.C.R. I-4973.

*roga*<sup>96</sup> in which it held that agreements to which Article 307 (ex Article 234) EC applies do not become part of EC law, and do not create new rights for individuals or economic operators. If a national of a Member State could not claim rights under the agreement before the EC Treaty entered into force for the Member State, he or she can not derive any such rights by virtue of Article 307 (ex Article 234) EC.<sup>97</sup>

However, the E.C.J. did not expressly apply *Buroga* in detail to *OGT*, and instead repeated the essential findings described above. Nevertheless, one can interpret the E.C.J.'s implicit reasoning to be that since GATT 1994 has no direct effect in itself, Article 307 (ex Article 234) EC could not alter its legal status in EC law.<sup>98</sup> The E.C.J. thus concluded that

[t]he answer to the question referred must therefore be that Articles I and XIII of GATT 1994 are not such as to create rights which individuals may rely on directly before a national court in order to oppose the application of the second subparagraph of Article 18(1) of Regulation 404/93, as amended by Regulation 1637/98.<sup>99</sup>

#### IV. COMMENTS

The *Banana Cases* raise the issue of whether an adopted dispute settlement report creates a specific and binding obligation on the EC to bring its measures into conformity with WTO rules. If the report does create such a specific obligation, a further question arises as to whether such an obligation can create directly effective rights in the EC legal order. As is explained in the following discussion, *Portugal v. Council* itself implicitly resolves these two issues. The *Banana*

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96. Case 812/79, Attorney Gen. v. Buroga, 1980 E.C.R. 2787 ¶ 10.

97. MACLEOD ET AL., *supra* note 8, at 229–30.

98. The analysis in *OGT* of Article 307 (ex Article 234) of the Treaty Establishing the European Community has been taken further in Case T-2/99, T Port GmbH & Co. KG v. Council of the European Communities (2001), available at <http://europa.eu.int/> (last visited Nov. 16, 2001) [hereinafter T Port II] and Case T-3/99, Bananatradung GmbH v. Council of the European Communities (2001), available at <http://europa.eu.int> (last visited Nov. 16, 2001). First, in both cases, the C.F.I. found that GATT 1994 was legally distinct from GATT 1947 and was therefore not within the scope of the Article (*T Port II*, Case T-2/99, ¶¶ 79–81; *Bananatradung*, Case T-3/99, ¶¶ 73–77). Second, the obligations arising from GATT 1994 fell on the Community and not the Member States (*T Port II*, Case T-2/99, ¶ 82; *Bananatradung*, Case T-3/99, ¶ 76). Third, Article 307 (ex Article 234) was not intended to confer rights on individuals and therefore its alleged breach could not be a separate ground for claiming damages (*T Port II*, Case T-2/99 ¶¶ 83–84; *Bananatradung*, Case T-3/99, ¶¶ 78–79). Finally, any argument that Article 307 (ex Article 234) gave GATT 1994 direct effect was inconsistent with existing case law on the issue (*T Port II*, Case T-2/99, ¶ 85; *Bananatradung*, Case T-3/99, ¶ 80).

99. *OGT*, Case C-307/99, ¶ 31.

Cases can therefore be interpreted as a logical application of the E.C.J.'s reasoning in *Portugal v. Council*.

#### A. Existence of the Obligation of Conformity

In deciding whether the WTO Agreement mandated the manner and form of its implementation, the E.C.J. noted in *Portugal v. Council* that the main purpose of the DSU was “to secure the withdrawal of . . . measures . . . found to be inconsistent with the WTO rules.”<sup>100</sup> In addition, the E.C.J. held that Article 22.1 of the DSU on compensation and retaliation “shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.”<sup>101</sup> Thus, the E.C.J., expressly recognized that, in the words of Jackson, “an adopted dispute settlement report establishes an international law obligation upon the Member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes.”<sup>102</sup>

#### B. Content of the Obligation of Conformity

Although Jackson has correctly identified the existence of the “obligation of conformity,” it is necessary to inquire further and determine the *precise content* of that obligation. Does the obligation require WTO members to achieve full consistency between their impugned measures and the WTO Agreement? Or is the duty less stringent? Can WTO members fulfil the obligation by an alternative course of conduct?

The content of the “obligation of conformity” can be discerned from both the wording and structure of the DSU. As to its wording, Article 3.7 speaks of compensation being “resorted to” only if the immediate withdrawal of the offending measure is impracticable, and of retaliation as “the last resort.” In addition, DSU Article 22.1 states that “neither compensation nor the suspension of concessions or other obligations is *preferred* to full implementation of a recommendation to bring a measure into conformity with the covered agree-

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100. Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395, ¶ 37.

101. *Id.* ¶ 38.

102. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings of the Nature of Legal Obligation*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 69, 70 (James Cameron & Karen Campbell eds., 1998); cf. Judith H. Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996); Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me Pull-You: the Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755 (1998).

ments.”<sup>103</sup> The implication of these provisions is that the DSU “clearly establishes a preference for an obligation to perform the recommendation.”<sup>104</sup> Indeed, the above quotation from *Portugal v. Council* indicates the identical conclusion of the E.C.J. In this regard, one must remember that although full conformity with DSB rulings is the favored course of action under the DSU, it is not the sole route of implementation legitimately available to WTO members. Thus, one must also consider the structure of the DSU. Where a WTO member fails to achieve conformity within a reasonable period of time,<sup>105</sup> the DSU provides for the possibility of that WTO member entering into temporary Article 22 arrangements in lieu of full implementation.

Consequently, the above factors indicate that the content of the obligation of conformity is “soft.” That is to say, a WTO member is obligated at least to *attempt* to bring its measures into conformity with WTO rules. A WTO member cannot simply ignore the recommendations of the DSB. Nevertheless, a WTO member’s failure to achieve conformity within the relevant time limits does not mean that it has breached its international obligations, as it has the option of entering into temporary Article 22 arrangements in lieu of full implementation.<sup>106</sup> This is not to say that the WTO member’s substantive breach of WTO rules will be “absolved” by the activation of Article 22. The DSB’s ruling that the member is in breach cannot be retrospectively “annulled” by the dispute settlement parties’ choice to agree on compensation or to implement retaliation. Rather, the argument set forth here is that the *secondary obligation* of bringing the offending measure back into conformity with the WTO Agreement can be fulfilled

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103. DSU, *supra* note 74, at art. 22.1 (emphasis added).

104. Jackson, *supra* note 102, at 74.

105. This determination must be made pursuant to Article 21.3. *See* DSU, *supra* note 74, at art. 21.3.

106. *See* Desmedt, *supra* note 7, at 100; *see also* Griller, *supra* note 7, at 450–54; Rosas, *supra* note 7, at 809; Zonnekeyn, *supra* note 7, at 300–02. The obligation of conformity will only be breached where the WTO member makes it clear that it has no intention of implementing an adopted report for whatever reason. The view expressed in the text is confirmed to a significant degree by EC practice. Council Regulation 1515/2001 on the Measures That May Be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-dumping and Anti-subsidy Matters, 2001 O.J. (L 201) 10 (Recital 4 of its preamble provides that the EC may bring its anti-dumping or anti-subsidy measures into conformity with DSB recommendations and rulings “where it considers this appropriate”). In addition, the explanatory memorandum to the Commission proposal for the Regulation states clearly that “WTO rules do not oblige the Community to implement a report adopted by the DSB.” *See* Commission Proposal for a Council Regulation on the Measures that may be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Measures, 2001 O.J. (C 270 E) 242.

by an attempt to perform the obligation, rather than a complete performance.

The E.C.J. implicitly recognized this limitation on the obligation of conformity when setting out the justification for its decision in *Portugal v. Council*, which appears at two separate points of the judgment:

40. Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of [the DSU] of entering into negotiated arrangements even on a temporary basis . . . .

46. To accept that the role of ensuring that [WTO] rules comply with Community law devolves directly on the [EC] judicature would deprive the legislative or executive organs of the [EC] of the scope for manoeuvre enjoyed by the counterparts in the [EC]'s trading partners.<sup>107</sup>

In other words, the E.C.J. sought to ensure that the EC was on a 'level playing field' with other WTO members that had not given the WTO Agreement direct effect. The remedial consequences of direct effect in the EC legal order (i.e., disapplication of the impugned EC measure) could unilaterally restrict the EC's ability to maintain infringing measures through temporary compensation arrangements. In contrast, those political institutions of other WTO members whose actions were not subject to such judicial scrutiny would have a full ability to enter into compensation arrangements (or accept retaliation), while simultaneously maintaining their own measures that were inconsistent with the WTO Agreement.<sup>108</sup> The E.C.J.'s concern not to undermine the EC's right to enter into compensation arrangements was based on an appreciation of the fact that the EC was not bound to achieve full implementation by the obligation of conformity. The EC still had the right to enter into Article 22 arrangements, albeit in tandem with a soft obligation to attempt to comply with the DSB ruling.

Moreover, the E.C.J.'s reasoning in *Portugal v. Council* appears to have assumed the existence of an adopted dispute settlement report. The E.C.J.'s focus on compensation presupposes the adoption of "the panel or Appellate Body report" which activates the implementation procedures under DSU Article 21. This assumption refutes the argument of those commentators who previously suggested

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107. Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395, ¶¶ 40, 46.

108. See Griller, *supra* note 7, at 455; see also Zonnekeyn, *supra* note 7, at 299.

that while it may be generally problematic to give direct effect to the WTO Agreement *per se*, one could envisage giving direct effect to rulings of the DSB. As Rosas states, the forms of implementation mentioned in DSU Article 22 (compensation, suspension of concessions, amicable settlement) “apply precisely when there *has* been a determination of non-compliance by the dispute settlement organs.”<sup>109</sup> This analysis has been confirmed by all the *Banana Cases* discussed in this Article. The fact that both the Appellate Body and Article 21.5 reports confirmed that the EC was in breach of certain provisions of the WTO Agreement did not alter the EC Courts’ conclusion that those provisions could not be given direct effect. In conclusion, the EC Courts have correctly ruled in *Portugal v. Council* and the *Banana Cases* that the legal status of an adopted dispute settlement report does not oblige the EC to achieve full implementation of its recommendations where the possibility of temporary compensation and retaliation exists. The obligation is for the EC to attempt to implement an adopted report within a reasonable period of time.

### C. Direct Effect of the Obligation of Conformity?

The EC Courts were correct to rule in the *Banana Cases* that the “soft” obligation of conformity cannot have direct effect in EC law for the following reasons. Despite its analysis in *Portugal v. Council*,

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109. See Rosas, *supra* note 7, at 811. The E.C.J. in *Portugal v. Council*, however, did not consider the impact of the still unsettled “sequencing” issue, which was the subject of intense debate in the DSB during the implementation of *EC-Bananas*. In essence, the sequencing issue is whether a DSU Article 21.5 panel report to the effect that a WTO member has not correctly implemented an “original” dispute settlement report must be obtained before Article 22 procedures can be activated. Nevertheless, the resolution of the sequencing issue would have no effect on the outcome of *Portugal v. Council* or the *Banana Cases*. The sequencing issue concerns the point at which Article 22 procedures can be validly commenced. Nevertheless, after the adoption of either the original report(s) or the Article 21.5 report(s), the *possibility* of Article 22 arrangements still exists. As has been seen above, this possibility is enough to limit the content of the obligation of conformity, so that the EC is only under a soft obligation to attempt full implementation after the adoption of any dispute settlement report. It is hoped that the sequencing issue will be addressed in the DSU review, which is due to be reactivated after the 2001 Ministerial Conference in Doha, Qatar. See WTO Dispute Settlement Body Minutes of Meeting held January 25–February 1, 1999, WT/DSB/M/54 (Apr. 20, 1999); see also WTO Dispute Settlement Body Panel Report on EC Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 22.2 of the DSU by the United States—Communication from Japan, WT/DSB/W/91 (Jan. 25, 1999) (stating that when there is a disagreement on measures taken to comply with the recommendations and rulings of the panel and the Appellate Body, “the prevailing parties may not resort to Article 22 procedures for compensation or the suspension of concessions or other obligations before the disagreement is settled through the procedure laid down in Article 21.5 of the DSU”) (on file with the Duke Journal of Comparative and International Law).

the E.C.J. has held that to determine whether a rule in an international agreement has direct effect, it is necessary first to ascertain whether the content of that rule is clear, precise, and unconditional, and then to evaluate the content in light of the aims and context of the agreement.<sup>110</sup> The obligation of conformity does not fulfil this two-limb test for direct effect.

As regards the first limb of the test, the obligation of conformity cannot be classified as clear or precise. As to clarity and precision, Jackson admits that the language of the DSU does not solidly “nail down” what the legal effect of a DSU report should be.<sup>111</sup> Indeed, he discerns the existence of the obligation of conformity from the cumulative effect of at least eleven DSU provisions.<sup>112</sup> Accordingly, it is impossible to identify a stand-alone provision in the DSU which gives a definitive legal basis for the obligation of conformity.

As for the second limb of the test, do the aims and context of the WTO Agreement support a finding that the obligation of conformity can be relied upon in EC Courts? In answering this question, two points can be made. First, the E.C.J. in *Portugal v. Council* was mistaken in characterizing the WTO Agreement as founded, like GATT 1947, on negotiations with a view to “reciprocal and mutually advantageous arrangements.”<sup>113</sup> However, the structure of the DSU and the wording of Article 22 taken together suggest that the aims and context of the WTO Agreement require the E.C.J. to refrain from scrutinizing EC legislation in the light of WTO rules.

As to the characterization of the WTO Agreement as reciprocal and mutually advantageous, Advocate General Saggio states, in his Opinion to *Portugal v. Council*:

It must be recognised that many provisions of the agreements attached to the Agreement establishing the WTO give rise to obligations and prohibitions that are unconditional and include specific undertakings for commitments by the contracting parties in the context of their reciprocal relations . . . .

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110. See, e.g., Case 87/75, *Bresciani Amministrazione Italiana delle Finanze*, 1976 E.C.R. 129, ¶ 16; Case 270/80, *Polydor Ltd. v. Harlequin Record Shops Ltd.*, 1982 E.C.R. 329, ¶ 14 *et seq.*; Case 17/81, *Pabst & Richarz AG v. Hauptzollamt Oldenburg*, 1982 E.C.R. 1331, ¶¶ 26–27; Case 104/81, *Hauptzollamt Mainz v. C A Kupferberg & Cie KG aA*, 1982 E.C.R. 3641, ¶¶ 11–14, 23; Case 12/86, *Demirel (Meryem) v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, ¶ 14; Case 192/89, *Sevince v. Staatssecretris van Justitie*, 1990 E.C.R. I-3461, ¶ 15; Case C-18/90, *Office nat'l de l'emploi v. Bahia Kziber*, 1991 E.C.R. I-199, ¶ 15; Case C-432/92, *The Queen v. Minister of Agric., Fisheries and Food, ex parte S P Anastasiou (Pissouri) Ltd.*, 1994 E.C.R. I-3087.

111. Jackson, *supra* note 102, at 72.

112. DSU, *supra* note 74, at arts. 3.4, 3.5, 3.7, 11, 19.1, 21.1, 21.6, 22.1, 22.2, 22.8, 26.1(b).

113. *Portugal*, Case C-149/96, ¶ 42.

[A]nd it has rightly been held that the present system gives little latitude to States who believe they are victims of illegal conduct on the part of another contracting party.<sup>114</sup>

Advocate General Saggio's analysis is preferable to that of the E.C.J., particularly when one considers that it is difficult to characterize an international agreement possessing a compulsory dispute settlement procedure as inherently flexible and founded on negotiation.<sup>115</sup> Further, the E.C.J.'s characterization led it to draw an uncomfortable distinction between the WTO Agreement and "agreements concluded between the [EC] and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the [EC]," the latter having been given direct effect.<sup>116</sup> As Griller notes, the E.C.J. drew no clear borderline between "asymmetric" and "reciprocal and mutually advantageous" agreements.<sup>117</sup> In addition, it is even more difficult to apply these simple labels to complex international trade agreements in which commitments may appear to be evenly balanced, but in fact are asymmetric when implemented to the relevant markets. For example, economic opportunities for the vast majority of WTO members in the EC market are much greater than could be offered to the EC in return.<sup>118</sup>

However, as to the structure and wording of the DSU, the E.C.J. correctly concluded that judicial scrutiny and potential disapplication of measures, which the EC is entitled to maintain temporarily under Article 22, would both frustrate the EC's *express rights* under the WTO Agreement and unilaterally disadvantage the EC vis-à-vis foreign governments who are not under equivalent restraints. Therefore, the express wording of Article 22 and the structure of the DSU as a whole indicate that the direct effect of WTO rules would run counter to the permissive "aims and context" of the WTO dispute settlement system.<sup>119</sup> Thus, the obligation of conformity also fails the second limb of the direct effect test.

Finally, the lack of certainty, precision, and unconditionality in the obligation of conformity also leads one to conclude that it cannot

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114. *Id.* ¶ 21.

115. See Desmedt, *supra* note 7, at 98; see also Griller, *supra* note 7, at 457; Rosas, *supra* note 7, at 808; Zonnekeyn, *supra* note 7, at 300.

116. *Portugal*, Case C-149/96, ¶ 42. An example of an "asymmetric" agreement was held to be the EEC-Portugal Free Trade Agreement, given direct effect in *Hauptzollamt*, Case 104/81.

117. See Griller, *supra* note 7, at 459; see also Rosas, *supra* note 7, at 813.

118. See Griller, *supra* note 7, at 458.

119. Rosas, *supra* note 7, at 811.

be brought within the *Nakajima*<sup>120</sup> exception to *Portugal v. Council*. Although the scope of the *Nakajima* exception has yet to be fully clarified,<sup>121</sup> *Nakajima* itself was concerned with the situation where the EC stated its intention to implement a precise GATT 1947 Anti-Dumping Code provision (i.e., Article VI of the Code).<sup>122</sup> Advocate General Saggio recognized in *Portugal v. Council* that *Nakajima* was “more consistent with the general case-law on international agreements and is based on different criteria from those used to evaluate the effects of the GATT with regard to [EC] legislation.”<sup>123</sup> That is to say, Article VI of the Code was implicitly considered clear, precise, and unconditional. It is therefore suggested that the *Nakajima* exception ultimately requires an application of the first limb of the direct effect test referred to above. As can be seen from *OGT*, it is not enough for the EC legislation to identify the EC’s general obligation to conform to WTO rules. The legal compulsion for the relevant EC measure must be a clear, precise, and unconditional provision in the WTO Agreement. Consequently, the lack of precision and conditional nature of the obligation of conformity means that the EC Courts were correct to hold in the *Banana Cases* that it is not a “particular obligation”<sup>124</sup> of the WTO Agreement, as that term is understood in EC law.

## V. CONCLUSION

This Article has sought to show that WTO members are only under a “soft” international obligation to bring unlawful measures into conformity with the WTO Agreement. That obligation of conformity only requires a WTO member to attempt to achieve consistency between its laws and the WTO Agreement after the adoption of an unfavorable dispute settlement report. Failure to achieve consistency does not constitute a breach of international law, as the WTO Agreement expressly permits the recalcitrant member to engage in temporary Article 22 procedures while maintaining the offending measures. This argument has been implicitly confirmed by the EC Courts in the *Banana Cases*.

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120. Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council* 1991 E.C.R. I-2096.

121. See Griller, *supra* note 7, at 463–67; see also Rosas, *supra* note 7, at 815.

122. *Nakajima*, Case C-69/89, ¶ 30; see Case C-280/93, *Fed. Republic of Germany v. Council of the European Communities*, 1994 E.C.R. I-4973, Op. Advocate Gen., ¶¶ 145–51.

123. Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395, ¶ 21.

124. *OGT Fruchthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen* (2001), ¶¶ 22, 27, available at <http://curia.eu.int/> (last visited Nov. 16, 2001).

Further, by recognizing the soft nature of the obligation of conformity, the EC Courts rightly concluded that it cannot be given direct effect in the EC legal order. This is because the obligation is neither clear nor precise. Further, the WTO Agreement, and in particular, DSU Article 22, allows the EC to maintain temporary measures which breach WTO rules. Giving general direct effect to the WTO Agreement would allow the EC Courts to disapply EC measures which contravene the Agreement, thus undermining the EC's express rights under international law.