
Bananas, Direct Effect and Compliance

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Abstract

The complex bananas litigation could serve as a course in international economic law, as it raises a rich set of issues that arise in a highly contentious circumstance and present difficult issues of legal policy. At the core of this litigation is the question of compliance with law. This comment briefly and selectively reviews the legal manoeuvring in the European Community, the GATT, the World Trade Organization and the US, as a basis for an analysis of the problem of compliance in the GATT/WTO system, and the relation of direct effect to compliance. This comment argues that hard law is not necessarily good law, and that strengthened implementation, including possible direct effect, is not necessarily desirable. This seems obvious once we recognize that, putting aside for a moment transaction costs and strategic costs, states generally have the level of compliance that they want. The correct role for scholars and for lawyers involved with these issues is to help political decision-makers to identify circumstances in which, due to such problems, states have not achieved the desired level of compliance.

1 Introduction: Enforcement Problems in WTO Law and the Doctrine of Direct Effect

A realist must recognize that law is used in different ways in different societies: that what we call 'law' is socially constructed, and extraordinarily variable in its characteristics and effects. More surprising, perhaps, but no less real, is that within each society, there exist different kinds of law, with different types and degrees of binding force. There is no 'natural' condition of law. Rather, the one constant in law is

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that it is binding – in some sense and degree – to restrict future conduct.¹ The purpose of this comment is to begin to describe some of the ways in which the binding nature of international law varies. Avinash Dixit has recently written persuasively that economists should abandon their nostalgia for a world of unfettered free trade, and should construct models based on the world as it is, including preferences for protectionism.² I would like to suggest a parallel for international lawyers: we should abandon our nostalgia for a world of unequivocally binding law, and analyse the world as it is.³

It is natural that different laws in different circumstances bind states in different ways. In fact, we need an analytical approach to law that recognizes more fully than even the American legal realists and the critical legal studies adherents have done that the binding force of law is a vector that results from a combination of the specified substantive rule and the applicable procedure: we need an integrated analytical technique. An integrated analytical technique will allow us to recognize that legal processes are not necessarily designed to apply the substantive rule most effectively – incorrect assumptions to the contrary result in ignorant and facile critique of international law and other law that is designed to impose less than ‘full’ binding effect.

Rather, the degree of binding effect is a design feature that may be adjusted and combined with the substantive rule to create the optimal set of incentives for conduct. So, for example, one substantive rule might be better for use in a context of strong enforcement and a different substantive rule might be better in a context of weaker enforcement.⁴ Critique, and good positive scholarship, would then pursue a kind of means-ends analysis, pointing out where the level of binding force is actually less (or

¹ One might extend this approach by stating that law involves governmentally-imposed costs for certain behaviour, such as criminal acts, breach of contract, violation of regulation, etc. These costs, by definition, influence but do not necessarily determine behaviour: the fact that there is a law against murder does not mean that murder does not occur, but hopefully results in fewer murders. This is a realist and economic approach to defining law. For another perspective, see D’Amato, ‘What “Counts” as Law?’, in N. G. Onuf (ed.), *Law-Making in the Global Community* (1982). There are other arguable core attributes of law, such as universality. However, universality is a component of *ex ante* specification of *ex post* binding effect. Universality involves treating like cases alike, and as realists and critical legal scholars have shown, ‘likeness’ may be a flexible enough concept as to limit the scope of universality. In addition, one might add that law is always an emanation of the state, although this is uncertain. However, this point applies more in a domestic context than in an international context, where ‘government’ is less easy to identify (although it may exist).

² A. Dixit, *The Making of Economic Policy* (1996).

³ These are not merely parallel points. The neo-classical nirvana is a world with no trade barriers and with immediately and ineluctably binding rules against trade barriers. In a world where trade barriers exist, it makes some sense that rules constraining trade barriers would contain exceptions, qualifications and loopholes, as well as procedural attenuation.

⁴ For example, in a domestic criminal context, a disproportionately large penalty might be appropriate where the chances of successful prosecution are small, while a more moderate penalty might create better incentives for efficient violation where enforcement is stronger.

more!) than that desired.⁵ Such scholarship might identify solutions to the transaction costs or strategic costs that prevent the achievement of the level of binding force desired. As a descriptive project, in order to provide political decision-makers with a full range of institutional alternatives, I believe it useful to examine which mechanisms cause strong compliance; as a normative matter, it is incorrect to assume that more compliance is always good.

A Direct Effect of GATT in the EC

One mechanism that seems to strengthen compliance is direct effect. Direct effect allows individuals to invoke the relevant law in domestic courts, ‘deputizing’ or ‘coopting’ the domestic legal system, or perhaps making the domestic rule of law ‘hostage’ to compliance with international law. Direct effect is related to standing. In fact, while many state that US law denies direct effect to WTO law, it would be more correct to say that while US law provides direct effect to WTO law, only the federal government has standing to invoke it.

The ECJ has generally declined to accord direct effect to GATT obligations. This is at least partly because other states (*viz.* the US) do not accord direct effect thereto. It would create a bargaining disparity, which would have to be adjusted if the US denied direct effect to these obligations while the EC accorded them direct effect. Thus, according to this interpretation, the ECJ is simply upholding political bargain. While, in *Kupferberg*, the ECJ specifically rejected reciprocity as a basis, in and of itself, for denial of direct effect, in the recently decided *Portugal v. Council*, the ECJ suggested that the absence of reciprocity as to direct effect would lead to an imbalance in application of WTO obligations.⁶ As noted by many commentators, the ECJ has denied direct effect to GATT 1947 at the expense of doctrinal integrity.

In the recent *Portugal v. Council* decision, the ECJ found that certain provisions of WTO law could not be applied to invalidate a Council decision.⁷ The ECJ, faced with the difficulty that the factual predicate for its earlier denial of direct effect to GATT 1947 had been undermined by various institutional and substantive modifications,⁸ as described below, found that the nature of the WTO dispute resolution system still did not provide a sure enough basis for direct effect. That is, the possibility, under

⁵ See A. Chayes and A. H. Chayes, *The New Sovereignty – Compliance with International Regulatory Agreements* (1995), at 17–22 (‘If treaties are at the center of the cooperative regimes by which states and their citizens seek to regulate major common problems, there must be some means of assuring that the parties perform their obligations at an acceptable level.’). The Chayeses recognize, but do not respond to, the question of the desired level of compliance. For an excellent review of the literature, with a similar focus on compliance, see Koh, ‘Review Essay: Why Do Nations Obey International Law?’, 106 *Yale L.J.* (1997) 2599.

⁶ Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG*, [1982] ECR 3641, at 3663–3664; Case C–149/96, *Portugal v. Council* (23 November 1999).

⁷ Case C–149/96, *Portugal v. Council* (23 November 1999).

⁸ See Opinion of Advocate General Tesauro, delivered on 13 November 1997, in Case C–53/96, *Hermes International v. FHT Marketing Choice BV*; Opinion of Advocate General Lenz, delivered on 16 February 1995, in Case C–469/93, *Amministrazione delle Finanze dello Stato v. SpA Chiquita Italia*, at para. 21.

article 22 of the WTO Dispute Settlement Understanding, for temporary compensation instead of withdrawal of the offending measure, argues against direct effect.

The ECJ linked this concern to concerns for reciprocity with the EC's major trading partners, suggesting that direct effect would constrain the EC to simply withdraw the offending measure, eliminating the possibility of seeking a negotiated solution as permitted under the Dispute Settlement Understanding. This restriction of the possible manoeuvring space of the political bodies would, according to the ECJ, lead to an imbalance in the application of WTO law.⁹ Finally, in *Portugal v. Council*, the ECJ extended its holdings in the *Fediol* and *Nakajima* cases under GATT to the WTO context, to the effect that where WTO law is specifically intended to be incorporated or applied by EC law, the WTO law would be so incorporated or applied.¹⁰

On a more theoretical note, one might point out that WTO law was 'designed' for application by the WTO dispute settlement process, and would have different binding effect, and different consequences, from those intended if transplanted to the European court system through the doctrine of direct effect. The doctrinal paradox that the EC more broadly has pressed direct effect for EC law on its member states, while, as a 'member state' of the GATT, has declined to provide direct effect, may be solved when one considers the more complex institutional and contextual factors.

B *Compulsory Effect of GATT/WTO Dispute Resolution*

The post-Uruguay Round approach to dispute resolution in the WTO is more formal and 'legalistic' than the prior GATT model, which emphasized pragmatism and consensus. It has been celebrated as more binding than before. Yet the change to greater legalism in form masks and contrasts with an unruly political context: in one sense, it appears odd that in 1994, just as substantially increased obligations were put into place, substantially more rigorous dispute resolution was also established. If continuity and avoidance of disruption were a goal, and if the pre-1994 equilibrium were viewed as worthy of maintenance, the opposite approach might be taken: diminish the rigour of dispute resolution when you increase the substantive obligations. On the other hand, some of the substantive obligations might not have seen the light of day without more rigorous dispute resolution to maintain the bargain. The question always is what level of compliance did states intend – unfortunately, of course, states left the Uruguay Round negotiations with varying understandings of their commitments.

Perhaps over time, more rigorous dispute resolution will overcome its unruly context and lend it order. Perhaps in the recent troubles over implementation we are witnessing the opposite phenomenon: the rejection by the world trade body of an inartfully transplanted dispute resolution organ. It is too early to tell, but perhaps this transplant will fail to take because it was too rigid; because it was an expression of nostalgia for simpler, more formally binding dispute resolution.

This comment explores the parameters of binding force using the vehicle of the

⁹ Case C-149/96, *Portugal v. Council* (23 November 1999), paras. 40, 45.

¹⁰ Case C-149/96, *Portugal v. Council* (23 November 1999), para. 49.

Bananas litigation in three phases: US, EC and WTO. (The US phase is relatively minor, and will receive commensurate attention.) These three phases illustrate the characteristics of espousal, direct effect and international litigation, respectively. While there are many parameters of bindingness, my main concern is the degree to which international law becomes binding by influencing, or where direct effect applies, coopting the domestic legal order.¹¹ In the US phase, I examine how Section 301 of the US Trade Act of 1974 provides something like 'rights of action' to US domestic persons to litigate at international law within the trade system, referring to, but not independently analysing, the EC's WTO challenge to Section 301. This issue might be seen as relating more to standing than direct effect, but the issues are related.¹²

Finally, I juxtapose these two possible ways of giving effect to international law (through direct effect and through espousal in international tribunals) with the ostensibly technical problem of WTO dispute resolution raised in *Bananas, Hormones, Magazines* and other recent WTO cases: the problem of implementation of final WTO dispute resolution decisions.¹³ While Article 23 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) seems to have reduced the ambit of unilateral enforcement under Section 301, the DSU provides in exchange only quasi-automatic adoption of dispute resolution decisions, while providing neither for direct effect of WTO obligations nor for ineluctable multilateral implementation. We might ask, does this transaction provide a net gain for compliance? And, furthermore, was a net gain for compliance intended?

The simple legal proposition on which I draw is that, all other things being equal, directly effective law, by virtue of its use of the domestic legal system to provide a kind of 'automatic' implementation, has greater binding effect than international law that is not directly effective.¹⁴ By invoking the domestic legal system, directly effective international law takes advantage of a 'traditional' sovereign, and its powers to make law binding, even against the domestic state itself, in its own court system. By comparison, international law that lacks direct effect must look to international legal mechanisms for binding effect. These international legal mechanisms may result in compliance, but they have different dynamics. For example, direct effect shifts control to private litigants, while individuals have less formal access to international legal mechanisms.

In this sense, the lack of direct effect of WTO law¹⁵ can be seen as a kind of tool of

¹¹ Of course, international law may also become binding in international political discourse by virtue of strong international political enforcement mechanisms.

¹² See Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *AJIL* (1992) 310.

¹³ See Reif and Florestal, 'Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding', 32 *Int'l Law* (1998) 755.

¹⁴ See Hilf, 'New Frontiers in International Trade: The Role of National Courts in International Trade Relations', 18 *Mich. J. Int'l L.* (1997) 321.

¹⁵ For a review of implementation and direct effect in a number of jurisdictions, see J. H. Jackson and A. O. Sykes (eds), *Implementing the Uruguay Round* (1997).

calibration of bindingness: where panel and appellate body decisions automatically obtain formal binding legal status, in a still unruly political context, lack of direct effect provides the kind, but not the degree, of ‘political filter’ formerly provided by the requirement for consensus in order to adopt panel decisions.¹⁶ It is this kind of socially immanent give and take, calibration and adjustment that is natural – automatic direct effect is not.

On the other hand, it is possible that a different analytical technique, measuring the quality of WTO law solely in terms of its implementation, will inappropriately discredit WTO law. So if a standard of ‘perfectionism’ in compliance is established, the WTO legal system will come up embarrassingly short.¹⁷ The point is that there are important values that contend with compliance, not the least of which is democratic legitimacy.

Finally, it is also possible that any political filter can be overused. Interestingly, the GATT 1947 political filter did not seem overused in formal terms, at least until the very end of its life.¹⁸ However, statistics about use of the consensus approach to block dispute resolution cannot be relied upon without recognizing that the political filter may have important informal effects: it may actually chill the use of dispute resolution in the first place, or contribute to settlements adverse to complainants, due to the threat of blockage.

2 The Banana Litigation in the EC, the GATT, the WTO and the US

My goal in this section is to analyse several of the diverse parts of the banana saga in terms of a common currency: relative bindingness of international law. In order to do so, I relate the basic facts and litigation history, and explain the decisions thus far of the ECJ, two GATT panels and the WTO Dispute Settlement Body (DSB), as well as the related actions of the United States Trade Representative (USTR) under Section 301 of the U.S. Trade Act of 1974.

A *The Basic Facts*

The history of this case – political, economic and legal – is quite complex; I present a brief and selective summary for those unfamiliar with the matter. From the founding of the EC until 1993, EC Member States maintained different banana import

¹⁶ New political filters seem to arise from political need, or will. Consider de Gaulle’s *chaise vide* policy that led to the Luxembourg Compromise in the European Community in the 1960s. The bananas litigation also shows the possibility of using rules of consensus relating to the adoption of agendas as a mechanism by which to block legal action.

¹⁷ See R. E. Hudec, ‘Broadening the Scope of Remedies in WTO Dispute Settlement’, (unpublished manuscript on file with the author) at 24.

¹⁸ I thank Robert Hudec for this insight, which he refers to as the ‘diet effect’: we tend to eat more just before we go on a diet, and states tended to block adoption more just before they agreed to forego this ‘sweet’.

regimes.¹⁹ Some imposed import restrictions or prohibitions, while others applied a tariff-only regime or allowed bananas to enter duty-free. Germany had insisted on this freedom as a condition for entry into the EC. Bananas were not eligible for free circulation within the EC because of the different conditions for their entry in various Member States.

On 13 February 1993, in order to create a single market in bananas, the EC Council of Ministers adopted Regulation EEC No. 404/93 on the Common Organization of the Market in Bananas,²⁰ based on Protocol 5 of the Lomé Agreement of 1989,²¹ extending preferential treatment to bananas originating in certain African, Caribbean, and Pacific ('ACP') states, many of them former colonies. Regulation 404/93 substituted a common regime for preferential treatment for the various national regimes previously in force. This preferential treatment has adversely affected other states, including a number of Latin American states, producing 'dollar bananas'. Regulation 404/93 established a tariff quota system for banana imports from countries other than traditional ACP countries, as well as differential specific duties. The system reserved 30 per cent of this market to the category of operators who marketed Community or traditional ACP bananas. 66.5 per cent of the tariff quota was allocated to traders in dollar bananas or non-traditional ACP bananas, with the remaining 3.5 per cent reserved for new traders. This effectively required traders in dollar bananas to purchase back market share from traders in Community or traditional ACP bananas.

In March 1994, just a few days after the second GATT panel report was issued, the EC entered into a 'Framework Agreement', settling with Colombia, Costa Rica, Nicaragua and Venezuela, pursuant to which they agreed not to pursue adoption of a

¹⁹ This was an exception to the common commercial policy, pursuant to the Banana Protocol attached to the Treaty of Rome.

²⁰ Council Regulation 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, OJ 1993 L 47/1. Regulation 404/93 provided the following tariff quota treatments:

<i>Category</i>	<i>Source</i>	<i>Border measures</i>
EEC:	Bananas produced within the EEC	No border measures
Traditional ACP:	Bananas imported from ACP countries within individual country quotas	Duty free
Non-traditional ACP:	Bananas imported from traditional ACP countries above individual country quotas or from non-traditional ACP countries	Duty free (within tariff quota) 750 ECUs per ton (outside tariff quota)
Third country:	Bananas imported from non-ACP third countries	11 ECUs per ton (within tariff quota) 850 ECUs per ton (outside tariff quota)

²¹ African, Caribbean and Pacific States–European Economic Community: Final Act, Minutes and Fourth ACP–EEC Convention of Lomé, 15 December 1989, 29 *ILM* 783.

favourable GATT panel report.²² Guatemala refused to join, and the US objected to the settlement by the others. The Framework Agreement increased the EC global tariff quota for bananas and allocated 49.4 per cent of it among the included states as follows: Colombia, 21 per cent; Costa Rica, 23.4 per cent; Nicaragua 3 per cent; and Venezuela 2 per cent. The Framework Agreement also established a regime of required export certificates (and import licences) that provided differential treatment. European distributors owned by US interests were required to obtain import licences in circumstances in which historical marketers of EC or ACP bananas were not.

In December 1994, the EC sought and received a GATT waiver for its Lomé activities.²³

The EC revised the banana regime in 1998 under Regulations 1637/98 and 2362/98. It maintained the tariff quota at the same levels as the prior regime. However, the EC, unable to reach an agreement with the substantial non-ACP suppliers as to the allocation of the quota, allocated it according to Article XIII(2)(d) of GATT. The EC maintained a separate duty-free tariff quota of 857,000 tons for traditional ACP bananas.

Effective 3 March 1999, the US Customs Service began withholding liquidation on EU goods worth approximately \$520 million. On 6 April 1999, the arbitrators' report described below authorized the US to suspend concessions equal to \$191.4 million and on 19 April 1999, the USTR published a final list of products to be subjected to 100 per cent tariffs.²⁴

1 *The ECJ Cases*

The ECJ held that private plaintiffs harmed by Regulation 404/93 could not challenge it under Article 173 of the Treaty of Rome, because they were not sufficiently individually concerned.²⁵ In May 1993, Germany challenged Regulation 404/93 in the ECJ,²⁶ because the Regulation required Germany to restrict its previously liberal

²² Costa Rica–Colombia–Dominican Republic–European Community–Nicaragua–Venezuela: Framework Agreement on Banana Imports, 34 *ILM* (1995) 1.

²³ The relevant portion of the waiver reads as follows: '[Article 1 of GATT] ... shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.' Fourth ACP–EEC Convention of Lomé, 19 Dec. 1994, GATT Doc. L/7604 (19 Dec. 1994), at 2. The waiver does 'not preclude the right of affected contracting parties to have recourse to articles XXII and XXIII of [GATT]'. The role of the waiver is discussed below.

²⁴ Office of the United States Trade Representative, Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale and Distribution of Bananas, 64 F.R. 19209 (19 April 1999).

²⁵ Case C-256/93, *Pacific Fruit Company v. Council and Commission*; Case C-257/93, *Leon van Parijs and Others v. Council and Commission*; Case C-262/93, *Anton Dürbeck v. Council and Commission*; Case C-276/93, *Chiquita Banana Co. v. Council*; Case C-282/93, *Comafrika and Others v. Council and Commission*; Case C-283/93, *Pacific Fruit Company Italy v. Council and Commission*; Case C-286/93, *Atlanta and Others v. Council and Commission*; Case C-287/93, *Simba SpA v. Council*; Case C-288/93, *Comaco v. Council*.

²⁶ Case C-280/93, *Germany v. Council*, [1994] ECR I-4973.

banana import regime.²⁷ Among several bases for attack, Germany claimed that Regulation 404/93 conflicted with the Community's obligations under the GATT. In order to succeed, Germany had to demonstrate that the GATT had direct effect, and was therefore applicable by the ECJ.

Direct effect – the selective applicability of the Treaty of Rome and subsidiary law in the courts of the Member States – has been a core feature of the 'constitutionalization' of the Treaty of Rome.²⁸ After all, without direct effect, the willingness of domestic courts to refer cases to the European Court of Justice under Article 177 of the Treaty of Rome would be meaningless, and the force of EC law in the Member States would be greatly attenuated. Many provisions of the Treaty itself, of regulations issued under the treaty, and even of certain directives – instructions to Member States to legislate – have been found to have direct effect.

Let us examine, very briefly as has been done well elsewhere,²⁹ the jurisprudence of direct effect of international treaties to which the EC is party.³⁰ Since the *International Fruit* case, the ECJ has consistently held that the relative lack of binding character of the GATT 1947 'preclude[s] an individual from invoking provisions of the GATT before the national courts of a Member State in order to challenge the application of national provisions'.³¹ This relative lack of binding character arises from the 'reciprocal' nature of the obligations among the parties, from the safeguards clause allowing derogation from GATT obligations under extreme circumstances, and from the dispute settlement provisions.

Germany tried to distinguish prior jurisprudence following *International Fruit* to the effect that GATT does not have general direct effect, arguing that this line of reasoning only applies in suits by citizens, not in suits by governments. However, the ECJ rejected Germany's argument. This rejection holds that even governments acting under

²⁷ Germany was permitted to import an annual quota of bananas duty free, based on quantities imported in 1956, under the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, provided for in Article 136 of the Treaty of Rome [the 'Banana Protocol'].

²⁸ See Weiler, 'The Transformation of Europe', 100 *Yale L. J.* (1991) 2403; Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *Am. J. Comp. L.* (1990) 205; Mancini, 'The Making of a Constitution for Europe', 26 *CMLR* (1989) 295; Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', 75 *AJIL* (1981) 1.

²⁹ See, e.g., K. J. Kuilwijk, *The European Court of Justice and the GATT Dilemma: Public Interest Versus Individual Rights* (1996); Berkey, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', 9 *EJIL* (1997) 626, at 629 note 11 (citing a broad literature, including the work of Ernst-Ulrich Petersmann).

³⁰ This jurisprudence began with *International Fruit*, Joined Cases 21–24/72, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219. Exceptions for circumstances in which the treaty obligation is incorporated in directly effective EC law, or is implemented by EC law, are expressed in *Fediol* and *Nakajima*. Case 70/87, *Federation de l'Industrie de l'huilerie de la CEE (Fediol) v. Commission*, [1989] ECR 1781; Case C–69/89, *Nakajima All Precision Co. Ltd. v. Council*, [1991] ECR I–2069. See Brand, 'Direct Effect of International Economic Law in the United States and the European Union', 17 *Northw. J. Int'l L. & Bus.* (1997) 556, 591.

³¹ Joined Cases C–228/90–234/90, C–339/90 and C–353/90, *Simba v. Ministero delle Finanze*, [1992] ECR I–3713, at para. 29.

Article 173 of the Treaty of Rome do not have the right to rely on GATT 1947 to invalidate contradictory EC secondary law.³²

The ECJ followed *International Fruit*, holding that GATT is characterized by great flexibility, including under Article XIX, the safeguards provision, and that therefore the GATT rules are ‘not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT’.³³ This jurisprudential position may be deconstructed. All legal rules are flexible and conditional: the correct question to ask relates to the degree to which they are flexible and conditional. No doubt, the GATT 1947 is more flexible and conditional than, for example, certain of the provisions of the Treaty of Rome, or most of the provisions of German domestic law. However, the GATT 1994 is, by any measure, less flexible and conditional than the GATT 1947.³⁴

Moreover, the grant of direct effect to a legal rule is a political decision, as the EC and US have recognized, in different ways. As a matter of interpretation under uncertainty, courts may look at the relative flexibility and conditionality – the conduciveness to direct effect – or may try to establish the intent of the political branches, but, at least in the US, it is clear that the political branches have the ultimate power to accord self-executing nature to international treaties to which the US is party. The location of the ultimate power in the EC is less clear,³⁵ and, more importantly, the ECJ jurisprudence on direct effect of international agreements is incoherent.³⁶

In a second major line of attack, Germany argued that Regulation 404/93 infringed fundamental legal rights and general principles of law that are part of the WTO legal system. The argument was that Regulation 404/93 constitutes unjustifiable discrimination against traders in non-ACP bananas, and that their losses of market share infringes their property rights and freedom to pursue a trade. Furthermore, Germany argued that the tariff quota under Regulation 404/93 violates the principle of proportionality, as a system of direct aid would have accomplished the same goal

³² See Everling, ‘Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts’, 33 *CMLR* (1996) 401, at 421–423.

³³ Case C-280/93, *Germany v. Council*, [1994] ECR I-4973, at para. 110.

³⁴ See Lee and Kennedy, ‘The Potential Direct Effect of GATT 1994 in European Community Law’, 30 *J. World Trade* (1996) 67.

³⁵ See Council Decision Concerning the Conclusion on Behalf of the European Community, as Regards Matters Within Its Competence, of Agreements Reached in the Uruguay Round Multilateral Negotiations, OJ 1994 L 336/2 (purporting to deny direct effect to the Uruguay Round Agreements). But see Petersmann, ‘Constitutionalism and International Organizations’, 17 *Northw. J. Int’l L. & Bus.* (1997) 398, at 419–421; Bourgeois, ‘Introduction’, in J. Bourgeois, F. Berrod and E. Gippini Fournier (eds), *The Uruguay Round Results: A European Lawyer’s Perspective* (1995), at 18.

³⁶ See, e.g., Case C-53/96, *Hermes International v. FHT Marketing Choice BV*, Opinion of Advocate General Tesouro delivered on 13 November 1997; Brand, ‘Direct Effect of International Economic Law in the United States and the European Union’, 17 *Northw. J. Int’l L. & Bus.* (1997) 556, at 591; Hilf, ‘New Frontiers in International Trade: The Role of National Courts in International Trade Relations’, 18 *Mich. J. Int’l L.* (1997) 321.

with less infringement of other rights.³⁷ While agreeing that these principles are part of EC law, the ECJ rejected Germany's claims, finding that Regulation 404/93 was intended to 'strike a balance' between these rights and other social goals. With respect to the principle of proportionality, the ECJ granted broad discretion to the EC 'legislature', finding that this discretion was not exceeded.³⁸

These two lines of attack have great substance. The first relates to the question of the proper allocation of authority in the international system: Does or should GATT apply within the EC system? The question of direct effect is a question of allocation of power, as well as a technical question of degree of compliance. The second line of attack relates to authority in a different way: Is an EC regulation, which has direct effect in Germany, subject to constraints pursuant to general principles such as proportionality? The German Federal constitutional court (*Bundesverfassungsgericht*) is concerned to ensure that these types of principles are applied at the EC level, and has suggested that it stands ready to apply them itself if the EC fails.³⁹ In effect, Germany is seeking to squeeze the EC in the middle: between GATT direct effect on the one hand and domestic constitutionalism on the other hand.

2 GATT 1947 Cases

In 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela began an action under GATT 1947, the predecessor to the current GATT treaty (GATT 1994), criticizing the banana import regimes of EC Member States other than Germany.⁴⁰ The resulting 1993 panel report found that the EC Member States' banana import regimes violated GATT, but the EC blocked adoption of the panel report. During the panel's deliberations, the EC legislated Council Regulation 404/93. In 1993, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela brought a new GATT 1947 action, challenging the revised EC banana import regime under GATT 1947. The resulting panel report, issued in 1994, found that the EC measure violated Article I (relating to MFN non-discrimination), Article II (relating to tariff bindings) and Article III (relating to national treatment non-discrimination) of GATT.⁴¹ However, due to the EC's blocking action, this panel's report was also never adopted and therefore obtained no binding legal effect.

³⁷ Case C-280/93, at I-5061-5062.

³⁸ *Ibid.*, at I-5069.

³⁹ See, e.g., Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision', 3 *Colum. J. Eur. L.* (1997) 229.

⁴⁰ GATT Panel Report on European Economic Community – Member States' Import Regimes for Bananas, 1993 GATTPD LEXIS 11, DS32/R (3 June 1993) (not adopted).

⁴¹ The EC specific tariffs violated its bindings in violation of Article II; the tariff preference for ACP bananas violated the MFN principle of Article I and were not exempted under Articles XXIV or XX(h); and the system of allocating import licences violated Articles I and III and were not exempted under Articles XXIV or XX(h). GATT Panel Report on the European Economic Community – Import Regime for Bananas, 19 Jan. 1994, GATT Doc. DS 38/R, para. 170 (Feb. 11, 1994), 34 *ILM* (1995) 177 (not adopted).

3 *The WTO/GATT 1994/GATS Case: Panel and Appellate Body*

The WTO was established at the beginning of 1995. In October of 1994, USTR Mickey Kantor announced that the USTR would investigate the EC banana regime under Section 301 of the Trade Act of 1974. In September 1995, the US requested consultations with the EC. In 1996, the WTO established a panel to address the EC banana import regime. The panel reported on 22 May 1997, and the Appellate Body upheld most of the panel decision on 15 September 1997. A number of issues were raised in the substantive WTO litigation. Following is a selective summary of issues addressed by the Appellate Body.

First, there was an interesting initial issue as to whether the US had sufficient legal interest to participate as a complainant: an issue of standing or legal interest.⁴² This was raised, of course, because the US exports no bananas to the EC, although the Appellate Body found that a potential export interest could not be excluded, and that effects on the US internal market could provide a legal interest.⁴³ Here the Appellate Body took a fairly positivist approach, finding nothing in the DSU restricting the right to bring a claim to those states possessing a legal interest.⁴⁴ Furthermore, the US claims under GATS did not raise the same concerns, and could not be severed from the GATT claims.

A second set of interesting issues concerned the relationship of GATT obligations with provisions of the Uruguay Round Agreement on Agriculture, on the one hand, and the General Agreement on Trade in Services (GATS), on the other hand. The EC argued that the Agreement on Agriculture modified its obligations under GATT, providing a defence to claims of violation of Article XIII (MFN operation of quantitative restrictions). While the Appellate Body accepted this possibility in theory, it found nothing in the Agreement on Agriculture specifically modifying the obligations of Article XIII.

With respect to the GATS, the EC argued that GATS could not apply if the GATT applied – that these agreements have exclusive fields of operation. The Appellate Body, using a positivist approach to give maximal scope to Member States' obligations, found nothing in the agreements supporting this argument.

With respect to the availability of the Lomé waiver, the Appellate Body disagreed with the panel, which had found that the Lomé waiver could apply to Article XIII. The Appellate Body interpreted the waiver narrowly: given that the waiver did not

⁴² See Bustamante, 'The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime', 6 *Minn. J. Global Trade* (1997) 533. Even legal interest may be a manipulable concept. Note the history of the South-West Africa cases in the International Court of Justice.

⁴³ WTO Appellate Body Report, European Communities – Regime for the Import and Sale of Bananas, WT/DS27/AB/R, AB 1997–3 (97–0000), 9 September 1997 (Bacchus, Beeby and El-Naggar), at para. 136 [hereinafter Bananas Appellate Body Report].

⁴⁴ The Appellate Body rejected the EC's argument that as a 'substantial interest' is required for multiple consultations or third party claims under Articles 4.11 and 10.2 of the DSU, respectively, *a fortiori*, such an interest would be required to initiate a claim. This position shows a highly positivist respect for the text as written, eschewing construction based on logic alone.

explicitly refer to Article XIII, and given the importance of the non-discrimination norms of Article XIII, it was impossible to find an implicit waiver. Furthermore, the Appellate Body found that certain offending aspects of the EC banana regime were not necessary to implement the relevant provisions of the Lomé Convention, and therefore were not within the scope of the waiver.

These types of uncertainty arise from the treaty coverage of large amounts of potentially overlapping territory. It is only natural that there would be uncertainty regarding how these overlaps are to be resolved, and that, like all savvy litigants, the EC would argue a procedural difficulty to avoid substantive responsibility.⁴⁵ Perhaps there are circumstances where these types of arguments go too far, but the procedural argument, based on procedural justice and proper allocation of social authority, should not be relegated to a lower status than substantive arguments from substantive justice. In fact, in a world where substantive justice is contested and in many minds, relative, procedural justice may be the more viable liberal reference.

4 *The Implementation Litigation*

After the 'automatic' adoption of the Bananas III Appellate Body report, and panel reports, as modified, the EC modified its banana regime. This raised tremendous procedural questions, with great substantive ramifications. From the US perspective, is a member state permitted to create a 'devil of a thousand faces', changing its non-complying regime periodically to frustrate the ability of the complaining state to suspend concessions under the DSU? In a legal regime that does not include penalties, but only compensation, and seldom provides for retrospective compensation, the possibility of sequential modifications requiring sequential dispute resolution proceedings could eviscerate the system.

From the EU perspective, can the complaining Member State suspend concessions even after the non-complying regime has been revised? Certainly if the revised regime were WTO-compliant, the answer to the latter question would be 'no'. However, how and when should the determination of compliance of the revised regime be made, and what can be done in the interim? Here the DSU left some interpretative gaps.

These questions are more procedural, and less substantive, than the question, addressed in the well-known debate between John Jackson and Judith Hippler Bello as to whether member states must comply or may instead pay compensation.⁴⁶ The answer, to this author's mind, is that both Jackson and Bello are right, in the following sense. As a matter of law, it appears, as Jackson argues, that the slightly better interpretation of the DSU is that it intends states to have an obligation to reform non-compliant measures. The DSU does not state this clearly. As a matter of practice,

⁴⁵ Interestingly, Ambassador Hugo Paemen, head of the EC delegation to the US, is quoted as saying that 'one of the mistakes' the EC made during this dispute was to focus on the procedural aspects of the case, rather than on the substance. 'EU Unsure How to Comply with New WTO Decisions on Bananas', *Inside U.S. Trade*, 16 April 1999, at 19.

⁴⁶ See Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation', 91 *AJIL* (1997) 60; Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More', 90 *AJIL* (1996) 416.

as Bello argues, states may fail to comply with this obligation and would be obligated under the DSU to continue to provide compensation. There are no additional formal penalties for obstinacy. Bello argues that WTO law is ‘not “binding” in the traditional sense’.⁴⁷ This comment argues for a more graduated analytical technique to be applied to the binding nature of commitments.

In a legal system such as that of the WTO, there are questions of finality. As most rulings are of the nature of injunctions – they ‘order’ a state to withdraw a measure, or to bring a measure into compliance with WTO law – there can be disputes as to whether they have met with compliance. This is different from a money judgment, or a prison sentence, which would be the likely remedy in many domestic systems. The work of the International Court of Justice is more like the work of WTO dispute resolution, often resulting in an order, rather than a money judgment, and thus susceptible to delay by requests for interpretation.⁴⁸ Article 94 of the UN Charter and Articles 59 and 60 of the Statute of the International Court of Justice make clear that these orders are final and must meet compliance.⁴⁹ However, much depends on the specificity of the tribunal’s order. In addition, the ICJ has a stronger ‘political filter’ than the WTO: its jurisdiction is dependent upon a *compromis*; therefore, there is often less need for a political filter at the moment of implementation. Of course, the WTO and ICJ circumstances are different, and apply different types of law. Finally, there is no general obligation in international law to make international law directly effective in order to ensure compliance.

Here, the EC purported to comply, and the questions were (a) whether it did, and, most critically, (b) what can be done prior to a multilateral determination of compliance. Prior to that moment, there were questions about the amount of time available to the EC to bring its regime into compliance prior to the right of the US to suspend concessions. The question of the amount of time available must be combined with the question of how to determine compliance and when the right to suspend concessions in respect of a revised regime arises. Together, these form the context of litigation strategy, in which the EC and US in this case sought substantive advantage, and negotiating leverage, through procedural argumentation.

(1) ‘Reasonable Period of Time’ Arbitration under Article 21.3(c) of the DSU

The WTO Dispute Settlement Body adopted the Appellate Body Report, and the panel reports, as modified, on 25 September 1997. Pursuant to Article 21.3 of the DSU, on 16 October 1997, the EC informed the DSB that it would respect its WTO law obligations. The EC and the complaining parties were not able to reach agreement on a ‘reasonable period of time’ pursuant to Article 21.3(b) of the DSU, and so on 17

⁴⁷ *Ibid.*, at 416–417.

⁴⁸ See E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: Foreign Trade Law and Policy in the USA, the EC, and Switzerland* (1993); *Idem*, ‘Constitutionalism and International Organizations’, 17 *Northw. J. Int’l L. & Bus.* (1997) 398.

⁴⁹ See Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment of 25 March 1999.

November 1997, the complaining parties requested that an arbitrator be appointed to determine the length of a 'reasonable period of time' in this case under Article 21.3(c). Interestingly, in the absence of timely agreement among the parties on an arbitrator, the Director General of the WTO appointed a member of the Appellate Body, Said El-Naggar, as the arbitrator, indicating to the parties that El-Naggar would consult with the Appellate Body in pursuit of its practice of collegiality.⁵⁰ Article 21.3(c) of the DSU states as follows:

In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

The EC requested 15 months and one week (*until 1 January 1999*), arguing its need to engage in a long and complex internal legislative process, as well as its need to coordinate with the ACP countries under the Lomé Convention. The arguments here presaged the problems that arose later. The complainants argued that the request of the EC was not for a 'reasonable period of time', as the EC had not been willing in Article 21.3(b) negotiations to state that it would use that time to implement the DSB decision. During the oral hearings of the arbitration, the EC stated that it would do so.⁵¹ The arbitrator granted the EC's request, noting the difficulty of implementation. This perspective is interesting, as, while not admitting that domestic law can be a defence to claims of violation of international law,⁵² the arbitrator accepted that it is appropriate to take domestic mechanisms into account in determining the time available to comply with international law. This demonstrates a recognition that there is more at stake in the WTO system than compliance alone.

It is important that the obligation to provide compensation if a losing member does not bring its system into compliance only arises at the end of the 'reasonable period of time' under Article 22.2. This can be explained, consistent with John Jackson's understanding of the obligation to comply, as allowing time to comply and permitting compensation only in the event of inability to do so. Alternatively, and in accordance with Bello's perspective, it can be explained as providing a 'schizophrenic' 'reasonable period of time' that serves both as time for implementation of compliance and time for negotiation of the consequences of non-compliance. The case before us seems to provide evidence for the latter, more practical, perspective.

⁵⁰ European Communities – Regime for the Importation, Sale and Distribution of Bananas, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator, Said El-Naggar, WT/DS27/15 (98-0013), 7 January 1998 [hereinafter, 21.3(c) Report].

⁵¹ 21.3(c) Report, at para. 17.

⁵² See Vienna Convention on the Law of Treaties, Article 27.

(2) Authorization of Suspension of Concessions and ‘Equivalence’ Arbitration Under Article 22.6 of the DSU

(i) Authorization of Suspension of Concessions

On 14 January 1999, pursuant to Article 22.2 of the DSU, the US requested authority to suspend \$520 million of concessions under GATT 1994. The EC had argued that the US could not yet request authority to suspend concessions because the EC had substituted the revised banana regime, and it would require a panel to rule under Article 21.5 regarding the compliance of the revised regime before the DSB could consider suspension of concessions. In any event, the EC wished to refer this request to arbitration under Article 22.6 of the DSU in order to address (i) the compliance of the US procedure with Article 22.3 of the DSU,⁵³ and (ii) the equivalence of the level of suspension proposed to the nullification or impairment suffered by the US.⁵⁴

In support of the EC position on Article 21.5, Dominica and St Lucia, two ACP banana producers, blocked adoption of the agenda for a 25 January 1999 meeting of the DSB, arguing that the DSB should not address requests for retaliations until a panel under Article 21.5 found that the respondent had not properly implemented the relevant WTO decision.⁵⁵ Recall that one of the ‘advances’ in dispute resolution under the Uruguay Round was to provide, under Article 22.6, for ‘automatic’ authorization of retaliation, unless there is a contrary consensus. St Lucia and Dominica’s procedural manoeuvre challenged this advance, for if individual states may block adoption of a DSB agenda, they may block retaliation. This ‘new’ area of uncertainty demonstrates that there is always room for manoeuvre: treaties are incomplete contracts.⁵⁶ While there is room for manoeuvre, treaties carry meaning and relative binding force, especially in an institutional context that provides for binding dispute resolution, and here (after a political compromise allowed the agenda to be accepted) the chairman of the DSB ruled that an agenda item that calls for a decision by reverse consensus cannot be blocked. He also rejected Dominica’s and St Lucia’s arguments to the effect that authorization to retaliate should not be considered because an Article 21.5 panel had not yet determined the compliance of the revised banana regime. He

⁵³ Article 22.3 refers to procedures for determining whether a member may engage in cross-retaliation: retaliation in a sector other than the one in which the violation occurred, or under a covered agreement other than the one that was violated. This is important here, because the US did not suffer nullification or impairment in the goods sector, but proposed to retaliate by imposing barriers to EC goods.

⁵⁴ European Communities – Regime for the Import and Sale of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27/ARB (97–1434), 9 April 1999 [hereinafter Arbitrators’ Report].

⁵⁵ ‘WTO Members Avert Procedural Crisis on Bananas; Will Meet Again Today’, *Inside U.S. Trade*, 29 January 1999, at 1, 17.

⁵⁶ See Dunoff and Trachtman, ‘Economic Analysis of International Law’, 24 *Yale J. Int’l L.* (1999) 1; Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harv. Int’l L. J.* (1999) 333.

did so on the basis that this argument would effectively block the US request for retaliation.⁵⁷

On 29 January 1999, the DSB decided to submit the matter to arbitration by the original panel.⁵⁸ The first issue addressed by the arbitration panel was whether the US should have engaged in the procedure contemplated by Article 22.3 for cross-retaliation: retaliation in a sector or under a covered agreement other than the one in which the opposing party's violation was found. Here, the EC argued that the US only experienced nullification or impairment in distribution services, under GATS, and therefore must follow the procedure prescribed by Article 22.3 in order to retaliate in the goods sector, as it planned. However, the arbitration panel disagreed with the EC, finding that it is the *violation*, not the *nullification or impairment*, that defines the scope of retaliation. This liberal interpretation provides maximum flexibility for retaliation within Article 22.3.

Next, the arbitration panel took up the difficult issue of equivalence, beginning from the baseline of the US request for retaliation as to \$520 million of EC goods, and trying to determine whether this is equivalent to the remaining nullification or impairment under the revised banana regime.

Importantly, both sides, and the arbitrators, agreed that the appropriate reference to determine the amount of nullification or impairment was not the prior EC banana regime, but the revised regime.⁵⁹ Thus, the goal of dispute resolution is not punishment,⁶⁰ but righting of the balance of concessions. However, at the date of the reference to the arbitration panel, there was no determination yet made that the revised regime resulted in any nullification or impairment. This is certainly a technical problem with the DSU.

In light of the absence of a definitive determination of the compliance and nullification or impairment of the revised banana regime, the EC requested the arbitration panel to suspend the arbitration until 23 April 1999, 10 days after the expected completion of the proceedings brought by Ecuador and the EC under Article 21.5 of the DSU to determine whether the EC's modifications to its banana regime brought it into compliance with the EC's WTO obligations.⁶¹ However, as Article 22.6 requires arbitrations thereunder to conclude within 60 days after the date of expiry of the 'reasonable period of time' (2 March 1999), the arbitration panel denied the EC request. The arbitration panel did so in order to maintain the applicability and force of the time limit under Article 22.6. If the Article 22.6 proceedings were subordinated to the Article 21.5 proceedings, which the EC argued were subject to the full

⁵⁷ 'WTO Members Avert Procedural Crisis', *supra* note 55. Canada has recently proposed clarifications to the DSU to specify that suspension of concessions may not be authorized while Article 21.5 proceedings are pending. 'Canada Floats Language to Clarify WTO Dispute Settlement Provisions', *Inside U.S. Trade*, 28 May 1999, at 8.

⁵⁸ Composed of Messrs Stuart Harbinson (chair), Kym Anderson and Christian Häberli.

⁵⁹ Arbitrators' Report, at para. 4.5.

⁶⁰ *Ibid*, at para. 6.3.

⁶¹ These proceedings were brought before the same reconvened panel.

consultation and appeal procedure applicable to new proceedings, these time limits, and their significant contribution to binding effect, would be neutralized.

While the EC argued that Article 22 does not provide for determination of nullification or impairment, the arbitration panel responded that it does not prohibit such determination, and that its purpose *requires* determination of nullification or impairment, and assessment of the magnitude thereof. However, the arbitration panel noted that it would not make a *formal* determination of nullification or impairment (this determination was not included in its mandate), but only would make an informal determination as necessary to ensure *equivalence* of the level of nullification or impairment to the level of suspension of concessions. On this matter, the arbitration panel concludes as follows:

In the special circumstances of this case, and in the absence of agreement of WTO Members over the proper interpretation of Article 21 and 22, it is necessary to find a logical way forward that ensures a multilateral decision, subject to DSB scrutiny, of the level of suspension of concessions. In our view, we have accomplished this task.⁶²

This approach shows the arbitration panel's willingness to interpret the DSU in such a way as to give it full effect: to avoid allowing ambiguities and infelicities of drafting to frustrate the search for a 'multilateral decision'. Thus, importantly, the arbitration panel refused to wait for the conclusion of Article 21.5 proceedings.

The arbitration panel then turned to the question of whether the revised banana regime nullifies or impairs EC concessions to the US. It began by examining the compliance of the revised banana regime with Article XIII of GATT. The arbitration panel pointed out that under the revised regime, the EC set up several separate categories:

1. an MFN tariff quota applicable to substantial suppliers of non-traditional ACP bananas, allocated in accordance with shares of imports during a previous representative period (2,553,000 tons);
2. a sub-limit within the MFN tariff quota for non-substantial suppliers of non-traditional ACP bananas (240,748 tons); and
3. a duty-free quota for traditional ACP bananas (including non-substantial ACP suppliers), based on pre-1991 best-ever imports (857,700 tons).

The arbitration panel found this disparate treatment to continue to violate Article XIII(1) of GATT.⁶³ The EC had made an implausible argument that the duty-free quota for traditional ACP bananas was not a tariff quota but an upper limit for the zero-tariff preference, and was therefore not subject to Article XIII, and that these separate quotas should be evaluated separately for Article XIII purposes. The arbitration panel rightly rejected these arguments. The arbitration panel found that the 857,700 ton duty-free quota for traditional ACP imports violated Articles XIII(1) and XIII(2). It violated Article XIII(1) because it established a discriminatory regime, applying different quotas to the same goods based on country of origin. It violated Article

⁶² Arbitrators' Report, at para. 4.15.

⁶³ *Ibid.*, at para. 5.14.

XIII(2) because its allocation to individual countries did not comport with the requirement to 'aim at a distribution of trade approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of . . . restrictions. . . .' The arbitration panel also found that this quota violated the Article I requirement of MFN (most-favoured nation) treatment. While the Lomé waiver would otherwise exempt this quota from MFN, the fact that the quota is a *collective* quota, rather than a country-by-country quota, removes it from the scope of the waiver.

In addition, the arbitration panel found a continuing violation of GATS Articles II and XVII, finding that under the revised regime, US suppliers of wholesale services are accorded *de facto* less favourable treatment than EC/ACP suppliers, and that the criteria for 'newcomer' status under the revised licensing procedures treats US service suppliers less favourably than like EC service suppliers.⁶⁴ The arbitration panel stated as follows:

... US companies in their attempts to supply wholesale trade services in the European Communities, with respect of part of their business, must purchase or lease licences from or otherwise enter into contractual arrangements with those who have access to licences. Given the structure of the previous regime, those licence holders would be in the group of service suppliers in favour of which the previous EC regime altered competitive conditions. Thus, United States and other third-country service suppliers are faced with a competitive disadvantage that is not equally inflicted on service suppliers of EC/ACP origin.⁶⁵

Thus, the arbitration panel informally determined that there was a continuing violation of WTO law, and was able to proceed to determine its magnitude, in order to be able to assess the magnitude of the appropriate suspension of concessions. Interestingly, the informal determination, and the assessment of equivalence under Article 22.7, is final and does not seem to be subject to review by the Appellate Body, or to adoption by the Dispute Settlement Body. The informal determination of compliance should somehow be subject to review; otherwise, there would be the anomalous possible circumstance where the Appellate Body forms a different view under Article 21.5 of the DSU, but that different view cannot form the basis for a change in the level of suspension of concessions under Article 22.7.

(ii) *Equivalence*

The arbitration panel began by setting up the following formula. If the suspension of concessions is measured by reference to the gross value of EC imports proposed to be blocked by the US, then the nullification or impairment must be measured in similar terms: the impact on the value of relevant EC imports from the US. 'More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a 'counterfactual' situation).'⁶⁶ This basic formula is itself an innovative precedent, and there are obviously alternative ways of regarding equivalence. For

⁶⁴ *Ibid.*, at para. 5.97.

⁶⁵ *Ibid.*, at para. 5.69.

⁶⁶ *Ibid.*, at para. 7.1.

example, one could focus on the relative profitability of the particular imports, or the number of jobs involved. These are the things that are really at stake in trade negotiations, so one can imagine that reference to simple calculations of the value of imports could result in problems. A country may seek suspension of concessions in a high profitability area, or in an area where many jobs are involved, in respect of a violation that involves a low profit, low jobs, sector. Indeed, the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*, the only tribunal to consider suspension of concessions under GATT 1947, examined relative *impairment*.⁶⁷ However, the arbitration panel explicitly rejected this approach.

The US had argued that its claims should be based on lost profits to US firms exporting from other states, but the arbitration panel also rejected this argument.⁶⁸

B The Article 21.5 Proceedings

Both Ecuador and the EC brought proceedings under Article 21.5 of the DSU. The EC brought proceedings on 15 December 1998, seeking confirmation that its revised banana regime must be presumed to be in compliance with its WTO legal obligations.⁶⁹ On 18 December 1998, Ecuador requested the DSB to re-establish the original panel to examine whether the EC measures to implement the recommendations of the DSB were WTO-consistent.⁷⁰

The EC argued that Article 23 of the DSU provides a general principle of deference: unless a domestic measure has been declared illegal pursuant to WTO dispute resolution proceedings, it is presumed valid. The panel rejected this argument as applied to this context, stating that

we are well aware of the controversy in the DSB over the interpretation of these Articles [21, 22 and 23] and their relationship, but we view that question as one best resolved by Members in the context of the ongoing DSU review and not in a panel proceeding where there is only one party present and only a few active third parties.⁷¹

The panel also suggested that the EC had not provided enough information for the panel to determine whether it had responded adequately to the original findings of illegality.

In the Ecuador Article 21.5 Panel Report, the panel generally followed reasoning similar to that outlined above with respect to the Arbitrators' Report, finding that the

⁶⁷ Report of the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*, adopted on 8 November 1952, BISD 1S/62 (according wide deference to the Netherlands in calculation of the magnitude of suspension of concessions).

⁶⁸ Arbitrators' Report, at para. 7.1.

⁶⁹ European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by the European Communities, Report of the Panel, WT/DS27/RW/EEC (7–1433), 12 April 1999 [hereinafter, EC Art. 21.5 Panel Report].

⁷⁰ European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by the European Communities, Report of the Panel, WT/DS27/RW/ECU (7–1443), 12 April 1999 [hereinafter, Ecuador Art. 21.5 Panel Report].

⁷¹ EC Art. 21.5 Panel Report, para. 4.17.

EC continued to violate GATT Articles I(1) and XIII (1) and (2), as well as GATS Articles II and XVII.

C US Unilateralism and 'Espousal' under Section 301: A One-way Mirror

The US does not provide substantial direct effect for WTO law in its own domestic legal system.⁷² While the WTO agreements appear to have been intended to have effect as law within the US domestic legal system, the Uruguay Round Agreements Act limits standing to raise issues of non-compliance to the federal government itself; that is, only the federal government may bring a lawsuit to challenge domestic law as inconsistent with the WTO agreements.

On the other hand, and perhaps somewhat inconsistently in theory, private US persons are permitted to raise issues of other states' non-compliance with WTO law through the Section 301 mechanism.⁷³ Section 301 provides for a specialized type of espousal of international law claims of private persons, such as Chiquita Banana or Kodak. While the USTR is not *required* to espouse particular claims, there are strong incentives to do so. Of course, the USTR can also 'self-initiate' investigations under Section 301.

The US involvement in the bananas dispute largely occurred through Section 301. Chiquita Brands International, Inc., and the Hawaii Banana Industry Association filed a petition thereunder in September 1994.

To analyse this type of espousal, and in order to begin to compare it to a regime of direct effect on the one hand, or a 'pure' inter-national law regime on the other, it is useful to break it down into components.

- These cases involve US persons complaining about foreign conduct. Thus, the 'cause of action' is 'extrajurisdictional'. It could also be intrajurisdictional if these complainants had the right to challenge US conduct, which they do not under the Uruguay Round Agreements Act. Thus, Section 301 is a one-way mirror that allows US persons to complain about foreign systems, but denies foreign persons rights to complain about US systems.
- The USTR holds discretion to take action in response to the complaint: there is a political filter. First, the USTR may decline to commence an investigation. Second, even in cases that are otherwise mandatory, there are important exceptions to the obligation of the USTR to act. Third, the President may direct the USTR not to take action even in cases that are otherwise mandatory.

⁷² See Uruguay Round Agreements Act, H.R. 5110, 103d. Cong., § 102(c), 19 U.S.C. § 3512(c) (providing that no person other than the Federal Government of the United States shall have any cause of action or defence under any of the Uruguay Round Agreements or by virtue of congressional approval thereof).

⁷³ See Petition of Chiquita Brands Int'l, Inc. and the Haw. Banana Indus. Assoc. before the Section 301 Comm., Office of the U.S. Trade Representative (2 Sept. 1994); Office of the U.S. Trade Representative, USTR Kantor Makes Preliminary Decision that EU Banana Regime Harms U.S. Interests; Initiates Section 301 Investigation of Colombian and Costa Rican Banana Export Practices (9 Jan 1995).

- While Section 301 provides in theory for action outside of the WTO Dispute Settlement Understanding, even in cases involving WTO members under WTO agreements, Article 23 of the DSU requires such cases to be pursued, if at all, through WTO dispute resolution. However, as Section 301 does not provide for highly mandatory action, it is difficult to see that Section 301 itself is a ‘measure’ that may, without more, be viewed as violating Article 23 of the DSU.

Thus, Section 301 is a step ahead of traditional international law in compliance, insofar as it provides some guidelines by which US private persons may obtain espousal of their claims of violation of WTO international law by other countries. However, it does not provide a route for US private persons to complain about US violations of WTO international law, as direct effect would.

The EC has, in the general context of the banana dispute, brought a proceeding against the US with respect to Section 301. The EC argues that the time limits in Section 301 are incompatible with the US obligations under Article 23 of the DSU to engage in multilateral dispute resolution with respect to claims under covered agreements. A panel was established on 26 January 1999. At the time this essay was finalized, no report had been issued.

3 Conclusion: Compliance, Direct Effect and the Maturity of Legal Systems

Should WTO law be directly effective in the EC and US? If it were, the recent problems of implementation in the bananas litigation would be substantially reduced. However, scholars cannot answer this question based on theory, or *a priori* reasoning.⁷⁴ Nor can scholars use traditional methods of juxtaposition of a ‘problem’ with a ‘solution’. Yes, there is a concern regarding implementation, but the more important question is the magnitude of the concern, compared to the magnitude of countervailing concerns. The determination of whether direct effect – or more reliable implementation – is appropriate depends on the level, and type, of binding force that is desired. In turn, the type of binding force desired depends, to some extent, on the substantive obligations concerned, as well as on the institutional legitimacy of the legislator that makes the law and the tribunal that applies it. Certainly the US would have rejected the Uruguay Round if WTO law had been required to be accorded direct effect. Once we think of direct effect in terms of preferences, rather than in abstract theory, it becomes strange for a scholar to insist upon direct effect when political institutions have spoken so clearly in contradiction.

WTO law has binding force without direct effect, but the recent experience in the *Bananas*, *Hormones*, *Magazines* and other cases shows that this binding force is not complete. The best that scholars can do is to provide positive analysis of the level of

⁷⁴ See Jackson’s analysis of the policies that might be implicated in granting direct effect to treaties, Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86 *AJIL* (1992) 310, at 321–327.

binding force actually achieved, as well as comparative institutional analysis of various alternative modifications of the present system. For example, one might examine the choice between agreeing to confer direct effect on WTO law, on the one hand, and agreeing to clarify the implementation provisions of the DSU, on the other hand. Scholars could begin to identify the costs and benefits of each, but it would be up to political actors explicitly or implicitly to evaluate and engage in comparisons among these. Of course, political actors do so in a manner described by public choice analysis as well as public interest analysis.

Thus, in theory it is also not possible to recommend whether the WTO dispute resolution system should be reformed to provide greater clarity as to the relationship between Article 21.5 proceedings to determine compliance with rulings and Article 22 proceedings regarding suspension of concessions. If greater compliance is desired, greater clarity could be the appropriate route, but would be required to be considered in comparison to other routes to greater compliance.⁷⁵ Furthermore, in the real world there are circumstances in which we wish for and can achieve something less than full clarity and full compliance. However, there is a second parameter at stake here, besides the desired level of compliance: the desired predictability of compliance and regularity of the legal system. This parameter would seem to argue in favour of revision for greater clarity, even if greater compliance is not desirable. All in all, one may intuit that it would be better to fix the drafting problem in Articles 21.5 and 22.6, and, if give in the system is needed, provide it elsewhere. This type of intuition is generally what we use in making decisions in these types of circumstances.

The natural condition of law is rough and imperfect, like our society, and like us. To say that the natural condition of law entails direct effect,⁷⁶ or perfect compliance, is surely incorrect. Legal systems may be evaluated as to their maturity not by reference to whether they achieve direct effect or full compliance, but by reference to whether they provide a full range of social options that allow political decision-makers flexibility to design instruments with the right amount of binding effect for particular circumstances. The EC and US have shown us this with their positions on direct effect of WTO/GATT obligations: the question of direct effect is not a question for scholars or even, in the first instance, judges. Rather, it is a policy question to be answered in political terms. Of course, in the EC and US systems, there are substantial circumstances in which judges are permitted to decide whether international legal rules have direct effect, or are self-executing. This fact can be interpreted as an implicit delegation to courts of this decision, with the possibility of legislative or perhaps constitutional reversal.

Denial of direct effect and weak mechanisms of compliance may be viewed not necessarily as gaps in compliance, but as mechanisms to reinforce democratic legitimacy, to the extent that the state is the locus of democratic legitimacy. The issue

⁷⁵ The US is seeking improvement in rules governing implementation as part of the current review of the DSU. Office of the United States Trade Representative, Report on Trade Expansion Priorities Pursuant to Executive Order 13116 ('Super 301'), 64 F.R. 24439, 24441 (6 May 1999).

⁷⁶ Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', 8 *ELR* (1983) 155.

of democracy has been important in US approval of the WTO, as well as in the current rhetoric of environmental and labour advocates. In order to manage the international system and its interpenetration with domestic systems, it may be useful to provide for subtle, even ambiguous, mechanisms that provide some 'give' as states make adjustments. Direct effect without more direct democratic participation in formulation of the directly effective law raises as many issues as it resolves.⁷⁷

Finally, 'give' in the system may reflect power politics more accurately than an inflexible system: the beneficiaries of flexibility are the more powerful states. This implicit discrimination may, of course, be criticized from one perspective. However, it might also be interpreted as preserving and maximizing the constraint on powerful states, by avoiding circumstances in which they find themselves with no alternative but to renege formally on their obligations. As every good fisherman knows, some give in the line is necessary to reel in the big fish, because if the line breaks, you have nothing. This is not an apologia for bad drafting, incoherent systems or other problems in the DSU: it is a realistic recognition that law and politics must coexist, and that the nirvana of perfect compliance is a chimera.

⁷⁷ See Weiler and Trachtman, 'European Constitutionalism and its Discontents', 17 *Northw. J. Int'l L. & Bus.* (1997) 354, at 376.