

International Trade Law: The Impact of Justiciability and Separations of Powers in EC Law

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Direct effect of international agreements – WTO – Current jurisprudence and theories – Implications for separation of powers and checks and balances – Justiciability – Criticism of current standards: precision and reciprocity – Reversal of dual concept in EU external relations

THE STATE OF PLAY: A LEGACY OF INCONSISTENCY

It would seem to be a matter of course that legal rules are applied in courts and that individuals are entitled at all times to call upon them in defence of their rights and interests. It would also seem that what essentially is true for domestic law under the constitution should also be true for international law. And yet, this is not the case. Classical concepts of international law limit the reach of rights and obligations to relations among sovereigns and sovereign states. Subjects, or citizens, of such sovereigns, fail to be part of the system. They are unable to invoke its rules, albeit that they may have been strongly affected, for example by the laws of warfare, at the time. Classical perceptions of international law, based upon co-existence of States, have evolved. The post-World War II era and the advent of human rights fundamentally changed the paradigm, paying more attention to humans within international law. Yet, this change has not translated into a redefinition the status of individuals within the system. The traditional divide between domestic and international law still looms large. Ever since, only a few nations have developed a tradition of considering international law part of the law of the land (doctrine of monism).¹ Many have continued to operate under the divide

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¹ For example: Belgium, the Netherlands, Switzerland and the United States. *See, e.g., A. Peters, Völkerrecht: Allgemeiner Teil* (Zürich, Schulthess 2008) p. 185.

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(doctrine of dualism).² The dualist doctrine has had a profound influence.³ It also influenced monist conceptions and left behind the doctrine that not all of international law can be relied upon by individuals, but only those rules which are given so-called direct effect⁴ or which, in US parlance, are self-executing, i.e., grant cause of action to individuals and do not require implementation by domestic legislation in order to become domestically operational and effective, also in assessing the lawfulness of domestic law.⁵ The distinction of monism and dualism, albeit often blurred in reality, profoundly informed the relationship of international and constitutional law. It continues to do so in contemporary law.⁶

The same holds true for EC law. Formally shaped in terms of international law, its status in the domestic law of member states has been at the heart of legal developments in EC law. Eventually, the four freedoms were given direct effect, from early decisions on free movement of goods since *Van Gend & Loos*⁷ in 1963

² For example: Australia, Canada, Germany, the Nordic Countries (Scandinavia), and the United Kingdom and countries belonging to the Commonwealth. See Peters (2008), *supra* n. 1, at p. 184 et seq.

³ For the dualist doctrine see, e.g., G. Gaja, 'Dualism – a Review', in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford, Oxford University Press 2007) p. 52.

⁴ For the doctrine of direct effect see, e.g., A. Peters, 'The Position of International Law within the European Community Legal Order', 40 *German Yearbook of International Law* (1997) p. 9 at p. 42 et seq.; T. Cottier and K. Nadakavukaren Schefer, 'The Relationship between World Trade Organisation Law, national and regional Law', 1 *Journal of International Economic Law* (1998) p. 83 at p. 91 et seq.; J.P. Trachtman, 'Bananas, Direct Effect and Compliance', 10 *European Journal of International Law* (1999) p. 655 at p. 657 et seq.; D. Petrović, *L'effet direct des accords internationaux de la communauté européenne: à la recherche d'un concept* (Paris, Presses Universitaires de France 2000) p. 7; T. Cottier, 'A Theory of Direct Effect in Global Law', in A. von Bogdandy et al. (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague, Kluwer 2002) p. 99 at p. 105 et seq.; J. Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect', in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2002* (Oxford, Oxford University Press 2003) p. 263 at p. 272 et seq.; A. Bogdandy, 'Pluralism, Direct Effect, and the ultimate Say: On the Relationship between International and Domestic Constitutional Law', *International Journal of Constitutional Law* (2008) p. 1 at p. 8 et seq.

⁵ In this paper, 'direct effect' is used to assess whether a norm in general confers on individuals a subjective right or not. This means that a private person in a state or Union may base a claim in, and be granted relief from, the domestic courts against another private person or the state on the basis of the state's obligations under an international treaty. See, e.g., Cottier and Nadakavukaren Schefer (1998), *supra* n. 4, at p. 91 et seq.; Peters (1997), *supra* n. 4, at p. 18 et seq.; Klabbers (2003) *supra* n. 4, at p. 272 et seq.

⁶ Von Bogdandy suggests that monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. He defines the two terms as intellectual zombies of another time, which should be laid to rest, or 'deconstructed', von Bogdandy (2008), *supra* n. 4, at p. 4.

⁷ ECJ 5 Feb. 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*.

to decisions relating to free movement of capital and thus of investment in *Sanz de Lera*⁸ in 1995. Direct effect shifted EC law from an agreement on international co-operation and ‘concertation’ – very much the perception in the 1950s – to a constitution for Europe, directly relevant and empowering alike private actors, individuals and corporations both in dealing with authorisation and with competitors. In the same vein, the doctrine of direct effect given to directives upon the lapse of the implementation period has been at the heart of reinforcing the rule of law within the law of the European Union.⁹ It was accompanied by judge-made law creating obligations of state responsibility and liability of governments towards citizens wherever direct effect was not a suitable avenue to implement the directives and provisions adopted therein.¹⁰ Conceiving that European Community law would become the law of the land of its members, adopting a monist conception and to link it to the primacy of EC law has been one of the most prominent developments in 20th century international law – effectively creating a legal order *sui generis* placed closer to constitutional law than the classical precepts of the body of international law of co-existence and co-operation.¹¹ In creating a common and internal market, the doctrine of direct effect of EC law has been the most important tool of judicial policy available to the European Court of Justice, way beyond different methods of interpreting the law.

In external economic relations, this process of empowerment has been bifurcated and much less consistent than in internal affairs. The story has been told many times. The European Court of Justice adopted a proactive policy of granting direct effect to key provisions of preferential free trade agreements, in particular with European Free Trade Association (EFTA) countries, and of Association agreements, including the Lomé Agreements. The existence of diplomatic institutions, such as mixed commissions, did not exclude direct effect in *Kupferberg*¹² – quite different from the assessment of the Swiss Supreme Court in assessing the

⁸ ECJ 14 Dec. 1995, Case C-163, 165 and 250/94, *Sanz de Lera*.

⁹ See generally D. Chalmers et al., *European Union Law* (Cambridge, Cambridge University Press 2006) p. 371.

¹⁰ ECJ 19 Nov. 1991, Case C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*.

¹¹ In the case *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, *supra* n. 7, the European Court of Justice came to the conclusion that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. See also M. Jachtenfuchs, ‘Die Europäische Union – ein Gebilde sui generis?’, in K.D. Wolf (ed.), *Projekt Europa im Übergang? Probleme, Modelle und Strategien des Regierens in der Europäischen Union* (Baden-Baden 1997) p. 15.

¹² ECJ 26 Oct. 1982, Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* See also P.J. Kuijper and M. Bronckers, ‘WTO law in the European Court of Justice’, 42 *Common Market Law Review* (2005) p. 1313 at p. 1317 et seq.

1972 Swiss EC Free Trade Agreement in *OMO*¹³ and subsequent case-law.¹⁴ Likewise, decisions taken by mixed commissions operating under an international agreement were deemed to have direct effect, i.e., to entitle individuals to call upon them in protecting their interests and rights. The European Court of Justice would not look at considerations of reciprocity, i.e., whether the other parties to the agreement would grant direct effect and thus reinforce legal protection in the pursuit of market access in the same vein. In fact, legal protection for foreign suppliers in the Community, entitled to invoke international trade agreements, is often better than that for EC suppliers in the markets of the partner to the agreement, the courts of which – such as the Swiss Federal Court – failed to grant direct effect to individuals. The monist concept of international agreements both was applied to both domestic law and external relations within the realm of bilateral agreements concluded by the Community. The two layers found themselves in line and in conformity.

The difference is striking when it comes to the law of the General Agreement on Tariffs and Trade (GATT), and subsequently the World Trade Organization (WTO).¹⁵ The European Court of Justice developed a fundamentally different line of thought.¹⁶ The provisions of the GATT had been generally held to be unsuitable for direct effect ever since *International Fruit Company*.¹⁷ According to the Court, the GATT amounted to an instrument of negotiations and entails its own mechanism of dispute settlement. An exception was made in *Nakajima*¹⁸ to the extent that a regulation directly refers to GATT law in terms of implementation, in particular in the field of trade remedies (anti-dumping, countervailing duties (CVDs)). Likewise, the court agreed to apply GATT rules in assessing cases relat-

¹³ BGE 25 Jan. 1979, *OMO*, 105 II 49, E. 3a.

¹⁴ See, e.g., BGE 8 March 2005, *SOVAG*, 131 II 271, 294 and BGE 6 Sept. 2006, *Urteil 2A.593/2005*, E. 5.4.

¹⁵ See Kuijper and Bronckers (2005), *supra* n. 12, at p. 1313; M. Bronckers, 'The Effect of the WTO in European Court Litigation', 40 *Texas International Law Journal* (2005) p. 443; T. Cottier and M. Oesch, *International Trade Regulation. Law and Policy in the WTO, the European Union and Switzerland* (Bern, Cameron May and Stämpfli 2005) p. 143; A. Antoniadis, 'The European Union and WTO law: a Nexus of Reactive, Coactive, and Proactive Approaches', 6:1 *World Trade Review* (2007) p. 45 at p. 48 et seq.

¹⁶ See for the development of the doctrine Klabbers (2003), *supra* n. 4, p. 263 at p. 274 et seq.

¹⁷ ECJ 12 Dec. 1972, Cases 21-24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*.

¹⁸ ECJ 7 May 1991, Case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*. See, e.g., Peters (1997), *supra* n. 4, at p. 74 et seq.; A. Davies, 'Bananas, Private Challenges, the Courts and the Legislature', in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2002* (Oxford, Oxford University Press 2003) p. 299 at p. 318 et seq.; G.A. Zonnekeyn, 'The latest on indirect effect of WTO law in the EC legal order – the Nakajima case law misjudged?', in G.A. Zonnekeyn, *Direct Effect of WTO Law* (London, Cameron May, The Good News Press 2008), p. 111.

ing to the TBR¹⁹ in *Fédol*.²⁰ The adoption of the WTO Marrakesh agreement and the expansion of the system with additional agreements did not change the Court's assessment.²¹ Following a general recommendation by the Council, the European Court of Justice considers WTO to be generally unsuitable for direct effect. The doctrine even applies in disputes which do not involve individuals – the very essence of any issue of direct effect. The Court ruled in *Portuguese Republic v. Council*²² in assessing a textile regime in EC law that it is not appropriate to call upon WTO law and to grant its provisions effects which may unsettle EC law. The Court explicitly stated that such policies not only rely upon the alleged vagueness of WTO law, but also on the major trading partners, which in particular meant the United States of America,²³ denying direct effect by means of statutory provisions of the Uruguay Round Implementation Act.²⁴ Subsequent decisions in *Hermès*²⁵ and *Dior*²⁶ confirmed such a ruling, even in an area relating to civil

¹⁹ Council Regulation (EC) No. 3286/94 of 22 Dec. 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (the so-called Trade Barriers Regulation, TBR), *OJ* [1994] L 349, 31.12.1994, p. 71. On the TBR see, e.g., M. Bronckers, 'Private participation in the enforcement of WTO law: The new EC Trade Barriers Regulation', 33 *Common Market Law Review* (1996) p. 299 and in general G.A. Zonnekeyn, *Direct Effect of WTO Law* (London, Cameron May, The Good News Press 2008) p. 193 et seq.

²⁰ ECJ 22 June 1989, Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fédol) v. Commission of the European Communities*. See also Peters (1997), *supra* n. 4, at p. 73 et seq.

²¹ See J.C. Piris and R. Torrent, 'Les problèmes juridiques posées à la Communauté européenne par la conclusion des accords de Marrakech', in Société Française de Droit International, *Colloque de Nice – La réorganisation mondiale des échanges* (Paris, Pedone 1996) p. 251.

²² ECJ 23 Nov. 1999, Case C-149/96, *Portuguese Republic v. Council of the European Union*. For annotation and comments on this case see, e.g., S. Griller, 'Judicial enforceability of WTO law in the European Union: annotation to case C-149/96, Portugal v. Council', *Journal of International Economic Law* (2000) p. 441; P. Mengozzi, 'La Cour de justice et l'applicabilité des règles de l'OMC en droit communautaire à la lumière de l'affaire Portugal c Conseil', 10 *Revue du Droit de l'Union Européenne* (2000) p. 509; M. Hilf and F. Schorkopf, 'WTO und EG/Rechtskonflikte vor den EuGH?', 35 *Europarecht* (2000) p. 74 and P. Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – some further Reflections', *Journal of International Economic Law* (2002) p. 91.

²³ See Cottier and Nadakavukaren Schefer (1998), *supra* n. 4, at p. 106 et seq.

²⁴ *Portuguese Republic v. Council of the European Union*, *supra* n. 22, at para. 43 et seq. See also Griller (2000), *supra* n. 22, at p. 455 et seq.; Antoniadis (2007), *supra* n. 15, at p. 52 et seq.; A. Tancredi, 'EC Practice in the WTO: How Wide is the "Scope for Manoeuvre"?' 15 *European Journal of International Law* (2004) p. 933 at p. 941 et seq. and D.W. Leebron, 'Implementation of the Uruguay Round Results in the United States', in J.H. Jackson and A. Sykes, *Implementing the Uruguay Round* (Oxford, Clarendon Press 1997) p. 175 at p. 202 et seq.

²⁵ ECJ 16 June 1998, Case C-53/96, *Hermès International (a partnership limited by shares) v. FHT Marketing Choise BV*. For further details see G.A. Zonnekeyn, 'The Hermès Judgement – Reconciling the Principles of Uniform and Consistent Interpretation', in G.A. Zonnekeyn, *Direct Effect of WTO Law* (London, Cameron May, The Good News Press 2008) p. 35; L. Engelberger, 'Die unmittelbare

procedures. Finally, the court denied any effect of decisions taken by the Dispute Settlement Body on the basis of panel or appellate body reports. Claims for compensation based upon the alleged violation of WTO law were all rejected in *Biret*²⁷ despite the fact that relevant violations have been authoritatively established in WTO law.²⁸ The Court also rejected claims for compensation for special harm induced by lawful surcharge tariffs imposed against the EU in the process of enforcing WTO dispute settlement decisions.²⁹ There is no room for remedying *Sonderopfer* (special damage) induced by, and suffered from, the enforcement of WTO obligations.

By contrast to regional trade agreements, reciprocity, the alleged vagueness of WTO law and principles, the existence of a specific dispute settlement process and mechanism of enforcement all result in denying any effect of WTO law in EC courts beyond the doctrine of consistent interpretation. The Court – besides in *Fédiol* and *Nakajima*³⁰ – left it to the courts of member states to grant direct effect of mixed agreements in *Dior*³¹ and *Merck Genéricos*,³² in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which do not fall under the exclusive jurisdiction of EC law.³³

In conclusion, regional agreements and the multilateral trading system could not be treated more differently. Overall, the situation is one of considerable inconsistency. The Court applies both monist and dualist concepts at the same time, depending upon the subject-matter and treaty being considered.

Anwendbarkeit des WTO-Rechts in der Schweiz. Grundlagen und Perspektiven im Kontext internationaler Rechtsentwicklungen', in T. Cottier (ed.), *7 Studies in Global Economic Law* (Bern, Peter Lang 2004) p. 163 et seq.

²⁶ ECJ 14 Dec. 2000, Case C-300/98 and C-392/98, *Dior and others*. See, e.g., Engelberger (2004), *supra* n. 25, at p. 167 et seq.

²⁷ ECJ 30 Sept. 2003, Case C-94/02 P, *Etablissements Biret et Cie v. Council*.

²⁸ See for recent developments G.A. Zonnekeyn, 'Enforceability of WTO law for individuals: Rien ne va plus?', in G.A. Zonnekeyn, *Direct Effect of WTO Law* (London, Cameron May, The Good News Press 2008) p. 177.

²⁹ ECJ 9 Sept. 2008, Case C-120/06 P and C-121/06 P, *FLAMM and FLAMM Technologies v. Council and Commission*.

³⁰ *Nakajima and Fédiol*, *supra* n. 18 and 20. See also Kuijper and Bronckers (2005), *supra* n. 12, at p. 1323 et seq.; Klabbers (2003), *supra* n. 4, at p. 286 et seq.

³¹ *Dior*, *supra* n. 26.

³² ECJ 11 Sept. 2007, Case C-431/05, *Merck Genéricos-Produtos Farmacéuticos Lda v. Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

³³ For an overview of the existing case-law on mixed agreements, in particular the TRIPs Agreement, see J. Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', 69 *Nordic Journal of International Law* (2000) p. 395 and the Opinion of Advocate-General Ruiz-Jarabo Colomer of 23 Jan. 2007 in Case C-431/05, *Merck Genéricos-Produtos Farmacéuticos Lda v. Merck & Co. Inc. and Merck Sharp & Dohme Lda*, judgment of the ECJ of 11 Sept. 2007.

EXPLAINING THE DUAL STANDARD

It is difficult to explain on its face the dual standard adopted by the European Court of Justice in dealing with domestic law and preferential agreements on the one hand and the GATT and WTO agreements on the other hand. The main traditional formal criteria – clarity and determinacy of rules – employed in order to assess whether a provision has direct effect no longer provide a convincing and adequate answer. Principles and rules contained in the WTO agreements are as varied as rules in other agreements. Many of them are of a comparable clarity to those found in other agreements. In fact, the rules of the WTO are often much more detailed than treaty provisions found in bilateral agreements. The principles of non-discrimination,³⁴ for example, show normative structures similar to those of provisions relating to non-discrimination in EC law³⁵ and in bilateral free trade agreements. Many of them have been inspired by the language of GATT and found their way into EC law and preferential agreements. It is not difficult to detail the structural similarities of different instruments dealing with the regulation of trans-boundary trade, both within and outside EC law. Moreover, direct effect granted to the four freedoms in terms of fundamental rights is structurally similar to giving direct effect to human rights, in constitutional law, the European Convention on Human Rights³⁶ and the UN Covenants, in particular relating to civil and political rights.³⁷ These norms share a broad and open-textured language. They do not respond to criteria of clarity and determinacy. They are open to a wide range of possible interpretations. Judges and courts have given them an operational shape by means of decisions and precedents. The open-textured language has not pre-empted direct effect as an individual right.³⁸ Indeed, the operation of fundamental and human rights, such as due process of law, as well as the four freedoms in EC law, essentially relies upon judge-made law.

There is little doubt that judges and Courts take into account a host of factors in assessing the status and impact of treaty provisions. The full and true reasons for granting or denying direct effect are not often explicitly spelled out as exceptionally they were in honestly calling upon the political argument of failing reci-

³⁴ See, e.g., T. Cottier and P.C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor, The University of Michigan Press 2000).

³⁵ Art. 12, 13 and 141 of the Treaty establishing the European Community (consolidated text), *OJ* [2002] C 325, 24.12.2002.

³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 1950, Registry of the European Court of Human Rights, 2003. Available at <www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf>, visited 17 Oct. 2008.

³⁷ International Covenant on Civil and Political Rights 1966, 14668 *UNTS* p. 171.

³⁸ See in general about the International Covenant on Civil and Political Rights, e.g., C. Tomuschat, *Human Rights. Between Idealism and Realism* (Oxford, Oxford University Press 2003) p. 96.

procuity in assessing the impact of WTO law in EC law in *Portuguese Republic v. Council*.³⁹ In reality, the underlying motives for denying or granting direct effect are much more complex than what judgments convey in explicit terms. It is submitted that they essentially rely on the constitutional status and structure of courts in a given constitutional setting. They relate to the relationship of a given court to other branches of government in a horizontal way. They relate to the relationship of a given community and legal order to other layers of governance in a vertical manner. This is not unique to EC law and international law. It also exists within domestic law. While the law in a domestic context is generally thought to enjoy direct effect, some constitutional norms are nevertheless denied such nature, and implementation is left to legislators. For example, so-called policy objectives (*Staatszielbestimmungen*) are held to be unsuitable for judicial application beyond establishing elements of interpretation which may be taken into account in assessing other legal provisions.⁴⁰ The same holds true for social rights in constitutions to a large extent.⁴¹ Avoiding tensions and conflict with legislators and other branches of government therefore amounts to a critical factor in assessing direct effect of law.

These correlations can also be observed in the rulings of the European Court of Justice. It is interesting to observe that the Court in the tradition of *Kupferberg* tends to grant direct effect to preferential agreements which are essentially in line with domestic EC law. Free trade agreements and association agreements concluded by the EC tend to export features and regulations adopted within Community law. They are in line with internal market law and the potential for conflict is thus minimal. Granting direct effect to such agreements therefore expands rights and obligations to constellations beyond internal market rules to third party interests within the EC. Such rulings do not result in clashes with other branches of governance of the EC, in particular the Council and Parliament. In negotiating these mainly regional agreements, the Council and the Commission are in a position to control the results to a large extent. They find themselves in a predominant position in terms of power relations with the partner countries to these agreements. Free trade agreements and association agreements therefore belong to the realm of Community law. They belong to the same family and may be termed

³⁹ *Portuguese Republic v. Council*, *supra* n. 24, at para. 44 et seq.; see also *Kupferberg*, *supra* n. 12, para. 18, and *supra* n. 24 on the question of reciprocity.

⁴⁰ See for a definition K.P. Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen, Mohr Siebeck 1997) p. 326.

⁴¹ In general, social rights depend upon further legislative implementation and funding mechanisms. See T. Cottier, 'The Judge in International Economic Relations', in M. Monti et al. (eds.), *Economic Law and Justice in Times of Globalisation. Festschrift for Carl Baudenbacher* (Berlin, Nomos Verlag 2007) p. 99 at p. 111.

hegemonial agreements.

The situation is completely different in the realm of WTO law. True, the EC is a key player in WTO negotiations. External commercial relations have been the main foreign policy prerogative of the EC since the beginning. It obliges the EC to speak with one voice and to seek internal policy co-ordination before the Commission comes to the table in Geneva. The negotiating positions adopted therefore used to be fairly rigid, and thus influential. During the GATT days, basic agreements were concluded between the United States and the EC, and eventually multilateralised. Yet, even though such powers had been granted to the Commission, the result inevitably risked challenging existing domestic regulations and being at variance with what Council and today Parliament had agreed upon in internal legislation. Agricultural trade is an example in point. For decades, the EC suffered from challenges of the Common Agricultural Policy (CAP) in GATT panels and the results of the Uruguay Round imposed substantial obligations to liberalise. Moreover, the new Agreement on the Application of Sanitary and Phytosanitary Measures,⁴² albeit approved by the EC and its member states, offered a basis to challenge policies of risk assessment and risk management and created substantial tensions with adopted domestic policies in the field. It is no coincidence that the few cases where implementation failed within the Community relate to foodstuff and agricultural products.⁴³ It applies to the importation of bananas,⁴⁴ of hormone treated meat⁴⁵ and for genetically modified organisms.⁴⁶ Granting direct effect to relevant WTO rules and to decisions adopted upon the reports of panels and the Appellate Body inevitably places the Courts in a dominant position and in conflict with domestic policies adopted by the political branches of the Union. Granting direct effect in such cases may therefore expose the Courts to political challenges. It may go beyond the role which the traditions of the rule of law and of the institutional balance in the Union have assigned to the judiciary during the past fifty years. These tensions are created because the WTO Agreements do not expand EC law, but create a new body of law often challenging existing domestic

⁴² Agreement on the Application of Sanitary and Phytosanitary Measures. Available at: <www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>, visited 17 Oct. 2008.

⁴³ For an overview of cases see, e.g., World Trade Organization, *WTO Dispute Settlement One Page Case Summaries 1995-2007*. A case-by-case, collection of single-page summaries of panel and Appellate Body reports adopted by the WTO Dispute Settlement Body (Geneva, WTO Publications 2008). Available at: <www.wto.org/english/res_e/booksp_e/dispu_summary08_e.pdf>, visited 17 Oct. 2008 or Tancredi (2004), *supra* n. 24, at p. 934 et seq.

⁴⁴ Report of the Appellate Body of 9 Sept. 1997, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R.

⁴⁵ Report of the Appellate Body of 16 Jan. 1998, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R.

⁴⁶ Reports of the Panel of 29 Sept. 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R.

EC regulations in the field. The multilateral system does not belong to a particular hegemony, either of the United States (as was perhaps the case in the early days of the GATT), or of the Union, or of any other third party. This characterisation is even truer today. Globalisation of international trade and the emergence of new powers, in particular Brazil, India and China, no longer allow new rules to be prepared bilaterally.⁴⁷ The effort necessarily entails a wider group of members. This finding also explains why results are even more difficult to achieve under the WTO. It translates into difficulties in agreeing on the agenda of negotiations. It also translates into difficulties in achieving consensus, as the work under the current Doha Development Agenda since 2001 demonstrates. And any compromises found are likely to require changes in domestic law.

In conclusion, different international agreements, albeit comparable in form, clarity, determinacy or vagueness of provisions, operate under very different conditions of political economy which Courts cannot ignore. These differences need to be taken into account. So far, Courts have largely failed to express them in the language of coherent judicial policies and doctrines, leaving much of the motivation unspoken and needing to be read between the lines of their rulings. Is it possible to work towards a more coherent approach, taking these differences into account? We think it is, by reverting to doctrines of separation of powers and of checks and balances.

TOWARDS COHERENCE: THE DOCTRINE OF SEPARATION OF POWERS

The application of international agreements and the doctrine of direct effect impact on different layers of governance. They affect the member states and thus have a vertical effect. They may affect EC law and thus touch upon the powers of other organs of the Union. The proactive doctrine of direct effect, developed by the European Court of Justice, mainly relates to vertical separation of powers and checks and balances. The defensive and dualist policies adopted mainly operate on a horizontal level. Both, however, operate within Community law, and the question arises as to whether a more coherent, overall policy can be found which could treat both constellations on the basis of a uniform theory of direct effect.

Vertical checks and balances

The granting of direct effect to the four freedoms and of many other provisions of the EC Treaty, as well as of direct effect to directives and ordinances, mainly

⁴⁷ Cf. the Homepage of the Organisation for Economic Co-operation and Development (OECD) for further Studies and Literature: <www.oecd.org/publications/0,3353,en_2649_201185_1_1_1_1_1,00.html>, visited 17 Oct. 2008.

affects the powers of member states. Laws and regulations, or practices, of members are challenged and individuals are granted rights overriding such laws. Assessing the compatibility of domestic law with the precepts of EC law amounts to the core business of the judiciary in such vertical constellations. It is not different from giving direct effect to the Treaty, and to the four freedoms in particular. Considerations of separation of powers and checks and balances are not predominant. The ruling is based upon the doctrine of primacy of EC law, which in turn is founded upon the need to bring about consistency and harmonisation in applying the common law of Europe.⁴⁸ The inclusion and application of human rights standards in EC law has further reinforced this rationale.⁴⁹

Yet, arguments relating to separations of powers and the relationship of the judiciary and legislators are not absent. The doctrine of direct effect of free movement of goods, persons, establishment and services was originally based upon the concept of transitional periods which had elapsed and now placed the ball in the camp of the judiciary in protecting the rights of citizens. It would seem that the capacity of the Court to deal with these matters was taken for granted. Explicit language expounding the capacity of the courts, however, can be found in relation to the principle of equal pay for men and women.⁵⁰ The Court held in *Defrenne II*⁵¹ that judges are not merely able to assess *de jure* discrimination, but that they are also able, based upon the facts, to assess *de facto* discriminations. The judgment offers a basis for what we call the doctrine of justiciability.⁵² Implicitly, this doctrine was applied to free movement of capital. It was considered not to be suitable for direct effect due to close linkages with diverging national economic and mon-

⁴⁸ This doctrine has been introduced by the Court of Justice with the decision ECJ 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.* See also J.H. Reestman, 'Primacy of Union Law', 1 *European Constitutional Law Review* (2005) p. 104.

⁴⁹ See on the inclusion and application of human rights standards in EC law, e.g., M. Zuleeg, 'Der Schutz der Menschenrechte im Gemeinschaftsrecht', *Die öffentliche Verwaltung: Zeitschrift für öffentliches Recht und Verwaltungswissenschaft* (1992) p. 937; K. Lenaerts, 'Fundamental Rights in the European Union', 25 *European Law Review* (2000) p. 126; M. Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional Setting* (Åbo/Turku, Åbo Akademi University 2007).

⁵⁰ Art. 141 Treaty establishing the European Community (consolidated text), OJ [2002] C 325, 24.12.2002.

⁵¹ ECJ 8 April 1976, Case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*.

⁵² See, on the doctrine of justiciability, D. Wüger, 'Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien', in H. Hausheer (ed.), *Abhandlungen zum schweizerischen Recht* (Bern, Stämpfli Verlag 2005) p. 205; D. Wüger, 'Die direkte Anwendbarkeit', in T. Cottier et al. (eds.), *Der Staatsvertrag im schweizerischen Verfassungsrecht. Beiträge zu Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht* (Bern, Stämpfli Verlag 2001) p. 145; Cottier (2002), *supra* n. 4, at p. 115.

etary policies, all controlled by the political branch. The Court held the matter in *Casati*⁵³ suitable for progressive liberalisation only, commensurate with secondary law – a responsibility which primarily rested with the Council at the time. Direct effect was eventually granted only upon reformulation of the Treaty, following the introduction of the Monetary Union in 1992.⁵⁴

In assessing the direct effect of directives, separation of powers and respect for domestic powers was taken foremost into account. While positive assessment of direct effect has relied upon standard criteria of clarity and determinacy of rules ever since *Becker*,⁵⁵ denial of direct effect relies upon powers granted to domestic legislators in implementing provisions of directives. To the extent that directives offer options from which to choose, and imply substantial fiscal and financial implications, the matter is left to political branches of government, subject to liability and state responsibility upon failure to implement a non-self-executing directive (*Franovich*⁵⁶). The prerogative of democratic legislation also was respected in assessing obligations imposed by directives. Direct effect was limited to entitlement and excluded obligations to private actors (*Faccini Dori*⁵⁷). This theory was expounded at a time when the European Parliament was not heavily involved in legislation, and directives were not formally required to be published. Denying direct effect to obligations of private actors triggered extensive controversy at the time.⁵⁸ The Court, at least directly, has not changed its policy even upon revision of the Treaty and a fundamentally different role of Parliament. With legislation today being a joint concern of the Council and of Parliament, it is

⁵³ ECJ 11 Nov. 1981, Case 203/80, *Criminal proceedings against Guerrino Casati*. See also M. Petersen, 'Capital Movements and Payments under the ECC Treaty after Casati', 7 *European Law Review* (1982) p. 167 and E. Steindorff, 'Kapitalverkehrsfreiheit in der EG nach Casati', in W. Hadding (ed.), *Festschrift für Winfried Werner zum 65. Geburtstag am 17. Oktober 1984: Handelsrecht und Wirtschaftsrecht in der Bankpraxis* (Berlin, Saladruck 1984) p. 877.

⁵⁴ ECJ 4 June 2002, Case C-367/98, *Commission v. Portugal*. For further details see, e.g., W. Franz, *Handbuch Europarecht. Band 1. Europäische Grundfreiheiten* (Berlin, Springer 2004) p. 1058 et seq.; R. Ruge, 'Goldene Aktien und EG-Recht', 14 *Europäische Zeitschrift für Wirtschaftsrecht* (2002) p. 421; C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (Oxford, Oxford University Press 2007) p. 531 et seq.

⁵⁵ ECJ 19 Jan. 1982, Case 8/81, *Ursula Becker v. Finanzamt Münster-Innenstadt*.

⁵⁶ *Andrea Francovich and Danila Bonifazi and others v. Italian Republic supra* n. 10.

⁵⁷ ECJ 14 July 1994, Case C-91/92, *Paola Faccini Dori v. Recreb Srl*.

⁵⁸ See U. Gassner, 'Horizontale Wirkung von EG-Richtlinien', *Juristische Schulung* (1996) p. 303; P.V. Figueroa Reguero, 'Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives', Jean Monnet Working Paper 7/02. Available at <www.jeanmonnetprogram.org/papers/02/020701.html>, visited 17 Oct. 2008; T. Tridimas, 'Black, White, and Shades of Grey: Horizontality of Directives Revisited', in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2002* (Oxford, Oxford University Press 2003) p. 327. S. Prechal, *Directives in European Community Law: a Study of Directives and their Enforcement in national Courts* (Oxford, Oxford University Press 2005).

likely to be a matter of time until direct effect is no longer barred in relation to obligations for reasons of democratic legitimacy. It would seem that the powers of Parliament offer an adequate foundation for establishing democratic legitimacy in its own right in order to protect the rights of citizens and companies affected by non-implemented directives.⁵⁹

Issues of vertical checks and balances also arise in applying international agreements to the extent that they affect domestic law and policies of member states.⁶⁰ Thus, direct effect granted to free trade agreements and association agreements mainly affects members. Since these agreements are generally fully in line with parallel obligations in EC law, but do not exceed them, direct effect is an additional means to bring about compliance with principles of EC law in the external relations of members. This may explain why issues of separation of powers have not been predominant in such constellations.

In the search for common ground for a theory of direct effect in vertical constellations, it is submitted that an implied concept of justiciability exists. In the final analysis, direct effect is granted upon an implied assessment as to whether the subject-matter is suitable to be handled and decided by courts in a given constitutional framework without further legislative action. In other words, it is a matter of assessing justiciability, i.e., whether the topic is suitable for judicial assessment and thus judicial legislation. A formula of sufficient clarity and determinacy of rules fails to depict the full breadth and depth of the judicial policy implied. The broad language of fundamental freedoms as well as civil and political human rights, all given direct effect today, witness that justiciability does not inherently depend upon the clear language of a provision. Instead, recourse to democratic legitimacy of obligations, financial and fiscal implications of regulatory systems, and existing options provided to the legislator all indicate the limits of justiciability. These factors also explain why policy goals (*Staatszielbestimmungen*)⁶¹ and social rights have not obtained the status of direct effect and entitlement in EC law as well as in domestic constitutional law. To a large extent, they depend upon progressive implementation by means of complex legislation.⁶² They are outside the proper provinces of the courts when it comes to shaping entitlements and the law.

⁵⁹ On democratic legitimacy in Europe, see, e.g., R. Bieber, 'Demokratische Legitimation in Europa: Das Spannungsverhältnis zwischen den Funktionen von Europäischem Parlament und staatlichen Parlamenten', 2 *Zeitschrift für europarechtliche Studien* (1999) p. 141.

⁶⁰ See in general about the vertical competences into the European Union A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform', 39 *Common Market Law Review* (2002) p. 227.

⁶¹ See *supra* n. 40.

⁶² See *supra* n. 41.

Horizontal checks and balances

The granting of direct effect of treaty provisions as well as of international agreements also affects the institutional balance between different organs of the Union. This brings up the issue of horizontal separations of powers and checks and balances. Since the doctrine of institutional balance⁶³ does not follow strict separations of powers and cannot be explained in terms of the trinity of legislation, implementation and adjudication, it is more appropriate to assess the implications of treaty law in terms of checks and balances among the different organs of the Union.

Direct effect of treaty provisions affects the triangle of the Council, Parliament and the Courts. It is no coincidence that the European Court of Justice has been rather reluctant to engage in constitutional review. Most cases relate to action taken by the Commission, and decisions taken in implementing EC law are subject to judicial review, for example in the field of competition policies and subsidies. Likewise, recourse to trade remedies in external relations is assessed on the basis of secondary rules implementing WTO provisions. The Court, however, has been reluctant to review the compatibility of secondary legislation with treaty rules. In matters of economic policy, it exercises considerable restraint, limiting review to a test of arbitrary and capricious regulations – a judicial policy which leaves ample leeway to legislators. Such restraint may be explained in terms of fostering the process of integration and the powers of the EC. It may also be informed by self-imposed limits to judicial power, taking into account the overall institutional balance. Indeed, an overtly activist European Court of Justice might be rapidly exposed to political pressures. It might be drawn into the limelight, and its powers reviewed in subsequent treaty revisions. For such reasons, the judicial policy of the Court, in building its long-term authority, has been a cautious one.

The same reasons also explain the denial of direct effect of WTO law, given the tensions it many create, as described above. The tradition of defining external relations as a matter of foreign policy beyond legal control further reinforces this perception. Issues in principle are not considered justiciable when it comes to reviewing EC secondary legislation on the basis of WTO rules. In this way the Court protects itself from criticism. At the same time, it fails to contribute to the institutional balance within the EC, as the political branches enjoy virtually unlimited discretion in shaping the rights and obligations of economic operators in foreign relations. The doctrine of denying direct effect and, as a result, turning in

⁶³ The literature on the doctrine of institutional balance is voluminous. For a comprehensive study see H. Goeters, *Das institutionelle Gleichgewicht – seine Funktion und Ausgestaltung im Europäischen Gemeinschaftsrecht* (Berlin, Duncker & Humblot 2008).

effect towards a dualist system in current judicial policy of the European Courts fails to build upon the lessons learned from progressively granting direct effect to EC law. It has been argued that the realms are completely different, and lessons learnt cannot be transferred from one layer of governance to another.⁶⁴ We argue below that there are differences in degree, rather than in principle, and that lessons can well be learnt from experience in constitutional and EC law. Thus, the situation should be reversed and developed. Preserving the prerogatives of the Council, Parliament and the Commission in external economic relations does not require an overall exclusion of direct effect of WTO law. Rather, a nuanced approach may be developed and further combined with policies of judicial restraint. A doctrine should build upon the well-established practices and experiences developed for vertical relations discussed above.

TOWARDS MORE COHERENCE: MULTI-LAYERED GOVERNANCE AND JUSTICIABILITY

The theory of multi-layered governance

A coherent doctrine defining the relationship of international and domestic law should be built and should take into account the framework of multilayered governance emerging in the 21st century. No other polity than that of the EU is more suitable to follow this route, as it is the main expression of multi-layered governance in legal history.⁶⁵ While perceptions of national sovereignty loom large on other continents, Western Europe has developed a remarkable system of an additional regional layer of governance, the purpose of which has been to combat protectionism, advance welfare and to counter state failures and deficiencies in doing so. The WTO system today adds yet another additional layer of governance. It pursues comparable tasks on the global level. To the same extent that EC law balances state powers WTO law primarily addresses EC powers in key policy areas. It offers checks and balances against failures to which the EC, like any other

⁶⁴ See von Bogdandy (2008), *supra* n. 4, at p. 5 et seq.

⁶⁵ See G. Marks, 'Structural Policy and Multilevel Governance in the EC', in A.W. Cafruny and G.G. Rosenthal (eds.), *The State of the European Community, Volume 2: The Maastricht Debates and Beyond* (Harlow, Longman 1993) p. 391 et seq.; I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', 36 *Common Market Law Review* (1999) p. 703 at p. 708 et seq.; T. Cottier and M. Hertig, 'The prospects of 21st Century Constitutionalism', in A. von Bogdandy and R. Wolfrum (eds.), 7 *Max Planck Yearbook of United Nations Law* (2003) p. 261 at p. 299 et seq.; T.E. Aalberts, 'The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading', 42 *Journal of Common Market Studies* (2004) p. 23 and T. Cottier, 'Konstitutionalisierungsprobleme im internationalen Wirtschaftsrecht: verfassungsrechtliche Herausforderungen im Rahmen der WTO', *recht. Sonderbeft: Die Öffnung des Verfassungsrechts. Symposium zum 65. Geburtstag von Prof. Jörg Paul Müller* (2005) p. 50 at 51 et seq.

polity, is not immune. Moreover, it offers means to defend and protect legal entitlements of EC operators abroad and thus amounts to a key framework in building the rule of law around the globe. States are bound to comply with international law under the fundamental principle of *pacta sunt servanda*.⁶⁶ This principle also applies to courts. They form part of government in the broad sense and are subject to commitments undertaken by a State in international relations. Whenever possible they are obliged to honour international agreements. The doctrine of consistent interpretation, widely applied, responds to this requirement while denying direct effect as a matter of principle unnecessarily (as much as dualism in general) limits the effectiveness of *pacta sunt servanda*.

Looking at WTO law as an additional layer of governance allows breaking from the traditional and fundamental distinctions between domestic and international law. The schism, based upon Hobbesian perceptions of international society,⁶⁷ is no longer adequate in the face of the challenges of globalisation. International economic law, as much as EC law on a regional scale, expands on domestic constitutions in terms of complementary constitutionalism.⁶⁸

It is submitted that all layers of governance are built upon law. They share common factors of legitimacy, even though the different factors are of different importance to different layers. Democracy, fundamental rights, general principles of law, legal security, and preserving peaceful relations are legitimising factors on all layers alike, albeit in varying combinations and with differing preponderance. While democracy, balanced by fundamental rights, is key to local and national layers, international layers of governance draw legitimacy mainly from functions of stabilising relations, general principles and legal security. They draw legitimacy from checking local and national processes against failures and welfare destroying protectionism.⁶⁹ As a corollary, access to legal protection in all layers needs coordination and mutual support. None of the layers can or should be treated in fundamentally different ways. They all need to interact in a meaningful and coordinated way, avoiding what we have termed the paradox of judicial review, re-

⁶⁶ Art. 26 Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* p. 331. See also ECJ 16 June 1998, Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, para. 49 et seq., albeit the decision essentially relied upon the protection of legitimate expectations under Community law.

⁶⁷ See M.C. Williams, 'Hobbes and International Relations: A Reconsideration', 50 *International Organization* (1996) p. 213.

⁶⁸ See A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) p. 579.

⁶⁹ See T. Cottier and S. Scarpelli, 'Die Legitimität des Europarechts', in A. Epiney et al. (eds.), *Die Herausforderung von Grenzen. Festschrift für Roland Bieber* (Baden-Baden, Nomos Verlag 2007) p. 37 at p. 48 et seq.

⁷⁰ T. Cottier and M. Oesch, 'The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework', in T. Cottier and P.C. Mavroidis (eds.), *The Role of the Judge in International Trade Regulation* (Ann Arbor, The University of Michigan Press 2003) p. 287.

sulting from tensions between extensive and limited standards of review.⁷⁰ Multi-layered governance does not mean that higher levels of law on the echelon always prevail. International law does not always trump EC law, as EC law does not always trump domestic law. As all layers of governance are prone to failure, checks and balances need to cut both ways. Thus, violations of fundamental principles of law, in particular human rights, by a higher echelon or storey of the edifice must not be honoured and compliance must be denied. In fact, this theory simply builds upon the doctrine of *ordre public* which each of the layers is entitled to protect. This model can be traced in the traditions of *Solange*⁷¹ expounded by the German Constitutional Court. It may also help to explain the findings of the European Court of Justice in *Kadi* in defining the relationship of UN law and EC law.⁷² The protection of fundamental rights of EU law does not cede validity to public international law and it thus effectively protects human rights in the process of globalisation where adequate protection is deficient on the global level.

Realists object that the Hobbesian world is not ready for multilayered governance. The law cannot assume similar functions in an anarchical society of States to those it assumes in domestic affairs under national constitutions. These concerns need to be taken seriously in shaping rights and obligations. There is no point in engaging in legal commitments which States will fail to honour. But these are matters of degree. To the extent that international law is adopted, the normative system should call for compliance, including that of the Courts. Again, matters are not fundamentally different from the domestic layers. Rules are broken everywhere all the time. This is not peculiar to international law. Everywhere the law essentially relies upon trust and protection of legitimate expectations to which people are entitled and have an interest in seeing protected. The power to enforce is important, but a system solely built upon power is doomed to fail. There is no reason to draw a fundamental distinction between different types of law, of rights and obligations.

A theory of justiciability and direct effect

Looking at different layers of governance in a comprehensive and coherent manner inevitably has implications for the status of international law in domestic law. The position and status of rules pertaining to a superior polity in a given legal system should be dealt with consistently on the basis of similar principles. The successful evolution of direct effect in EC law offers an impressive and nuanced

⁷¹ BVerfGE 29 May 1974, BVerfGE 37, 271, *Solange I* and BVerfGE 22 Oct. 1986, BVerfGE 73, 339, *Solange II*.

⁷² ECJ 3 Sept. 2008, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, para. 280 et seq.

example of how rights and obligations for citizens contribute to the stabilisation and persistence of a legal system. Short of direct effect, and the prime role of Courts, the Union would not be what it is. At the same time, direct effect has not threatened the identity of member states and domestic legal traditions. It offers an appropriate balance and has significantly contributed to checks and balances. The lesson to be learnt from EC law is that direct effect in essence is built upon the doctrine of justiciability,⁷³ carefully striking a balance between the prerogatives of the political and the judicial branches of government.

The doctrine of justiciability, implicit in EC case-law, can be further expounded and developed. Research undertaken in Swiss law and court practices demonstrates that the principles expounded in the field of delegation of regulatory powers to the executive branch can be put to work in order to define the powers of the judicial branch.⁷⁴ This allows us to define the contours of self-executing rules in international agreements in line with the precepts of separation of powers and checks and balances.

The formulation of norms always includes delegation of powers to a greater or lesser degree to those implementing the rules. In reality, there is no fundamental methodological distinction between rule-making and rule-applying. Rather, the legal process reflects a continuum, and the so-called application equally entails creative components in the process of interpretation. Again, it is a matter of degree. The standard concept of clear and well-defined rules as a formal prerequisite for direct effect in major jurisdictions entails a requirement that the main decisions have been made in international negotiations and are not left to courts. Facing a norm, courts need to decide to what extent they are empowered to shape the rule further in the process of interpretation and concretisation. These powers, it is submitted, can be assessed on the basis of similar criteria to those which were developed under the principle of legality in assessing powers of the executive branch. The rules on delegation of powers can be equally employed in defining the provinces of the courts in international economic law. Thus, under the principle of legality, self-executing treaty provisions need to define rights and obligations; the more they impinge on liberty, the more precise such rules must be. According to the extent that this requirement is met, courts may further shape the details of the rules in the process of interpretation and application to specific facts. Otherwise, the treaty provision cannot be applied directly. Norms of a purely programmatic nature do not respond to this requirement and need to be left to implementation by the legislator. Similarly, if a norm entails substantial budgetary implications, the matter needs to be left to the political branch, and direct effect must be denied to the treaty norm. Courts are not able to design complex regulatory systems on their own. At the other end of the spectrum, justiciability is given

⁷³ See *supra* n. 52.

⁷⁴ See Cottier et al. (eds.) (2001), *supra* n. 52; Wüger (2005), *supra* n. 52.

with a broadly defined norm in experimental constellations and where little experience exists so far. Along these lines, a political questions doctrine may emerge reflecting standards of legality and delegation developed in the tradition of constitutional law.

The principle of legality⁷⁵ is not the only criterion in assessing direct effect. The specific role of courts, in protecting minorities and those not well represented in the political process, offers additional criteria both in assessing direct effect of international law rules and in defining the standards of review of legislation in the light of such obligations. The compensatory function of direct effect in the process of law-making and the specific role of courts in supplementing the process equally need to be taken into account. This explains why courts have essentially shaped the contours of human rights despite the fact that they are mainly drafted in vague terms.

It is submitted that this philosophy should be equally applied to all layers of global economic law alike, domestic, regional and international.⁷⁶ The doctrine of justiciability will bring about nuanced results. It does not follow that all provisions of WTO will be given direct effect. In fact, the courts will find in many instances that the matter needs to be left to the political process, because the regime at issue is complex and has an extensive economic, political or fiscal impact. There are good reasons to argue that a regime for the importation of bananas is not justiciable and does not fall within the proper provinces of the Court. The same may be true for hormones and GMOs. They entail major political issues and direct effect may as a result be denied or reduced on the basis of a political questions doctrine, or a limited standard of review. It is regrettable that the issue of direct effect of WTO law has been exposed in the context of these cases. It is regrettable that these cases have overshadowed other constellations which, beyond the doctrine of consistent interpretation,⁷⁷ are perfectly suitable for direct effect, such as procedural issues addressed in the TRIPs Agreement, for example. It also is a pity that direct effect has mainly been discussed in relation to disputes adjudicated in the WTO. The proper constellation of direct effect in any legal order does not depend upon international dispute settlement. On the contrary, it entitles and obliges courts to apply these rules in their own right, taking into account existing precedents. The matter is not linked to the implementation of specific decisions, and the particularities of the WTO dispute settlement system in itself is not an obstacle to granting direct effect to WTO rules in the context of domestic litigation. At the same time, the large body of case-law in the WTO today offers considerable guidance to courts in assessing rights and obligations. It is rather a matter

⁷⁵ See Cottier (2002), *supra* n. 4, p. 99 at p. 117 et seq. See in detail on the principle of legality Wüger (2005), *supra* n. 52, p. 461.

⁷⁶ See Cottier (2007), *supra* n. 41, at p. 109; also Cottier (2002), *supra* n. 4, at p. 115.


⁷⁷ See Kuijper and Bronckers (2005), *supra* n. 12, at p. 1328 et seq.

of training and expertise which future generations of judges and economic lawyers will hopefully have at hand. Although the law is far from clear, it is interesting to observe that Swiss judicial authorities have adopted a more nuanced attitude to GATT and WTO law, not fundamentally excluding direct effect.⁷⁸

Granting direct effect to a norm, finally, does not entail unlimited review. As judicial review in domestic law – recognising rights and obligations – shows different policies and degrees, judicial review on the basis of international norms can engage the same policies, modulating levels of interference. Standards of review can be shaped accordingly.⁷⁹ There are areas where activism is called for, in particular where interests are weakly defended in the political process, such as those of importers, consumers or minorities. There are areas of greater restraint where interests are well defended, as is generally the case for economic issues affecting producers and exporters who are well represented in the political process. Modulations of this kind are able to limit the harsh effects of direct effect which full review tends to produce in affecting the prerogatives of the political branches of government. The theory of justiciability allows going beyond widely used consistent interpretation and recognising that WTO rules in principle are susceptible of and accessible for direct effect.

CONCLUSIONS

Recent developments of EC case-law on WTO have led to a move towards outdated concepts of dualism. They have failed to learn and borrow from the rich monist experience and the doctrine of direct effect within Community law and within preferential agreements concluded by the Community. This trend should be reversed in the light of the need to work towards a coherent interface of domestic and international law in response to globalisation. The theories of multi-layered governance and of justiciability offer the possibility to develop a nuanced doctrine of direct effect of WTO law which takes into account vertical and horizontal separation of powers and checks and balances. It would allow building upon the rich experience of Community law and would show the way forward in developing the role of courts in implementing WTO law at home. It would also show the way forward for identifying norms which are suitable for direct effect, and those the implementation of which needs to be left to the political process. It would allow the development of appropriate standards of review. In so doing, Courts might be inspired by the doctrine of multilayered governance and compensatory constitutionalism in an attempt to bring about an overall coherent doctrine defining the relationship between international agreements, Community law and the law of member states.



⁷⁸ See Engelberger (2004), *supra* n. 25, p. 89 et seq.

⁷⁹ See Cottier (2007), *supra* n. 41, at p. 112.