The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting

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Abstract

The European Court of Justice has long been criticized for consistently holding that the General Agreement on Tariffs and Trade (GATT) does not have direct effect. The end of the GATT Uruguay Round prompted a renewed analysis of direct effect by Kees Jan Kuilwijk. In his book, The European Court of Justice and the GATT Dilemma, *Kuilwijk argues that the continued denial of direct effect to the GATT 94 not only proves that the ECJ has protectionist motives but also that it is unconcerned with individual rights. In addition to updating the traditional critique of the Court's doctrine, Kuilwijk's book illustrates the tendency of that critique to fail to acknowledge the full complexity of the direct effect question. Thus, a more measured and thorough exploration of the legal, political and economic issues involved in analysing the issue of direct effect may prove useful. This paper attempts such an analysis. Its purpose is not to advocate a particular position but merely to illustrate the gaps in the traditional critique.*

1 Introduction

Whether the European Court of Justice should permit enforcement of provisions of the General Agreement on Tariffs and Trade within the European Community legal system is a difficult question to answer.[1] In his book, *The European Court of Justice and the Gatt Dilemma*, Kees Jan Kuilwijk concludes that the Court should do so by means of

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[1] With the entry into force of the Agreement Establishing the World Trade Organization, references to the GATT are misleading and unidiomatic. The term GATT now refers to the General Agreement on Tariffs and Trade only and not the entire world trading structure as in the past. Thus, the term 'GATT 47' in this paper refers to the old GATT agreement and its practice. The new GATT 1994 Treaty, which consists

granting direct effect to the GATT 94.[2] While Kuilwijk's book contains a sophisticated legal, political and economic analysis of the direct effect question and is a worthwhile addition to the prevailing academic view on this issue, its treatment of the relevant concerns does not always fully elucidate their complexity.

This article thus attempts to illustrate the competing considerations facing the ECJ in deciding whether to grant direct effect to the GATT 94. It will be shown that when one thoroughly examines the legal, political and economic realities of the GATT 94 it is no longer obvious, as Kuilwijk argues it is, that: i) the ECJ's jurisprudence requires direct effect; ii) denying direct effect is detrimental to the Community's interests; and iii) direct effect is necessary to protect individual rights. After a brief introduction to the current ECJ doctrine and its critics, the paper will pursue three distinct lines of analysis: doctrinal, motive and political economy. While the analysis is motivated by Kuilwijk's book, the discussion will often explore issues beyond the bounds of his critique.

A *Current State of the ECJ Doctrine*

Four principles govern the domestic legal effect of international agreements. These principles are the following: direct application, direct effect, supremacy and interpretation. The ECJ developed a common conception for each of these principles, with the exception of direct effect.[3] Although the Court granted direct effect to other international agreements, it held in *International Fruit Company*, an Article 177b preliminary reference decision, that individuals could not enforce GATT 47 provisions because the agreement lacked direct effect.

The Court reached this conclusion based on a consideration of the 'spirit, general scheme and the terms of the General Agreement'.[4] The Court held that, because the

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largely of the GATT 47 as amended and several related understandings, will be referred to simply as the GATT 94. Other agreements that were part of the Uruguay Round Agreements, such as the Agreement on Safeguards, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), or the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), will be referred to individually and separately.

[2] K. J. Kuilwijk, *The European Court of Justice and the GATT Dilemma* (1996).

[3] For example, the ECJ adopted a monist conception of direct application so that international agreements and Community law form part of a single legal system. See Case 181/73, *R.&V. Haegeman v. Belgian State*, [1974] ECR 449, and Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219. The ECJ also held that international agreements are supreme over all secondary Community law. See Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. Kga.A.*, [1982] ECR 3641, and *International Fruit Company*. Finally, the ECJ held that similarly worded provisions contained in both the EC Treaties (the European Community (EC) Treaty and the Treaty on European Union (Maastricht Treaty) will hereinafter be referred to collectively as the 'Treaty') and international agreements do not have to be interpreted in the same manner. See Case 270/80, *Polydor Limited and RSO Records Inc v. Harlequin Record Shops Limited and Simons Records Limited*, [1982] ECR 329, and Case 70/87, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL III) v. EC Commission*, [1989] ECR 1781.

[4] *International Fruit Company*, *supra* note 3, at 1227.

GATT 47 'is based on principles of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements," [and] is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties, and the settlement of conflicts between the contracting parties', it did not provide individuals with rights which could be invoked in national courts.[5]

The ECJ also held that Member States could not enforce the GATT 47 provisions in Article 173(1) actions before the Court.[6] The ECJ used *International Fruit Company* as a precedent in this decision to conclude that 'those features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State'.[7] Thus, the Court consistently held that the nature and structure of the GATT 47 precluded any of its provisions from having direct effect.

Although the ECJ denied direct effect to the GATT 47, it did allow some of the agreement's provisions to have legal significance within the Community. The Court held that GATT 47 provisions could be used to interpret the meaning of Community legislation which expressly referred to those provisions. For example, in *FEDIOL III* the ECJ held that the GATT 47 Article 3 prohibition against discriminatory taxes could be used to interpret the meaning of 'illicit commercial practices' under the Community's New Commercial Policy Instrument Regulation because this regulation required the Community to comply with its international obligations. The Court distinguished its previous direct effect holdings by stating that 'the GATT provisions have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation'.[8] In the end, however, the Court found that the contested measures did not constitute an illicit commercial practice.

The Court also held that GATT 47 provisions can be used to interpret Community legislation when that legislation implemented a specific GATT 47 provision.[9] For example, in *Nakajima*, the Court held that the GATT 47 Anti-dumping Code could be used as grounds for reviewing the legality of an anti-dumping margin determined under the Community's Basic Anti-dumping Regulation. In a manner similar to its decision in *FEDIOL III*, the Court held that this was possible because the regulation 'was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code'.[10] Again, however, the ECJ found that the substantive provisions of the Anti-dumping Code had not been violated.

Because the ECJ has not addressed the direct effect question since the signing of the Uruguay Round Agreements, the above decisions constitute the Court's doctrine

[5] *Ibid.*

[6] Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] I ECR 4973.

[7] *Ibid.* at 5073.

[8] *FEDIOL III*, *supra* note 3, at 1831.

[9] Case 69/89, *Nakajima All Precision Co Ltd v. Council of the European Communities*, [1991] I ECR 2069.

[10] *Ibid.* at 2178.

towards the GATT 94. Therefore, the current ECJ doctrine continues to hold that the GATT 94 lacks direct effect and only has legal significance when Community legislation expressly refers to, or is intended to implement, specific GATT 94 provisions.

B *Current Criticisms of the ECJ Doctrine*

The ECJ's GATT direct effect doctrine has been criticized on many grounds. In fact, Kuilwijk claims that it is 'one of its [the ECJ's] most seriously criticized doctrines ever'.[11] Kuilwijk's book provides one of the most sophisticated critiques to date. In the mode of the other critics of the Court, Kuilwijk first argues that the GATT 94 is not significantly different in nature and structure from the other international agreements to which the ECJ has granted direct effect. Thus, he concludes that it is inconsistent to deny direct effect to the GATT 94. Second, he argues that granting direct effect to the GATT 94 would force the Community to adopt a rule-based liberal economic foreign trade policy which would maximize the economic welfare of the Community.[12] He therefore concludes that the Court harms the Community by continuing to deny direct effect.

Kuilwijk's arguments, however valid and informative, are often one-dimensional

[11] See, e.g., the many writings of Ernst-Ulrich Petersmann. In 'The EEC as a GATT Member — Legal Conflicts between GATT Law and European Community Law', in M. Hilf, F. G. Jacobs and E.-U. Petersmann (eds), *The European Community and GATT* (1986), Petersmann provides a broad critique of the ECJ's policy that stresses the failure of the Court to apply general principles of Community law to the GATT 47. 'Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT', in M. Hilf and E.-U. Petersmann (eds), *The New GATT Round of Multilateral Trade Negotiations* (1991), offers a balanced treatment of the political economy function of international trade rules and the need to allow individual enforcement. Finally, in 'National Constitutions and International Economic Law', in M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993), Petersmann argues that the GATT 47 protects individual economic rights and should be constitutionalized by means of direct effect.

For other critical perspectives, see Tumlir, 'GATT Rules and Community Law — A Comparison of Economic and Legal Functions', in Hilf, Jacobs and Petersmann, *supra* this note, who offers an analysis of the economic effects of trade protectionism, and Bourgeois, 'Trade Policy-Making Institutions and Procedures in the European Community', in Hilf and Petersmann (1993), *supra* this note, who provides a thorough examination of the application of general principles of Community law to foreign trade. See also Hilf, 'The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany', in Hilf, Jacobs and Petersmann, *supra* this note, for a succinct list of the arguments for and against direct effect.

With regard to the Uruguay Round Agreements, see Komuro, 'The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding', 29 *Journal of World Trade* (1995) 5, for an analysis of the new Dispute Settlement Understanding. See also Kuijper, 'The New WTO Dispute Settlement System — The Impact on the European Community', 29 *Journal of World Trade* (1995) 49, and Lee and Kennedy, 'The Potential Direct Effect of GATT 1994 in European Community Law', 30 *Journal of World Trade* (1996) 67, for analyses which caution against granting direct effect to the GATT 94. In general, Kuilwijk's analysis of the GATT 94 follows Petersmann's critiques.

[12] A third line of Kuilwijk's argument involves theories of political economy and legal rights. This argument, however, seems to collapse into the other two as it is used to provide philosophical support for the notion that the lack of enforcement of the GATT 94 obligations allows the Community institutions to adopt protectionist trade policies which result in welfare losses for the Community as a whole and unjustly harm individuals.

and coloured by a conspiratorial tone that ultimately weakens his critique. For example, he states that the ECJ denied direct effect to the GATT 47 in order 'to support a "secret bond" between the Commission and the Council, on the one hand, and import-competing Community producers, on the other'.[13] He argues that the Court's concern over reciprocity in the GATT 47 reflected a 'persistent adherence to the traditionalist mercantilist, negative and defensive view of foreign trade policy'.[14] Thus, he concludes that the Court should grant direct effect to the GATT 94 in order to provide the 'divine guidance ... needed to attain economic paradise'.[15] Given Kuilwijk's tendency to slip into such one-sided advocacy, a more balanced treatment of the direct effect question may be useful.

2 Doctrinal Analysis

One of the main criticisms of the ECJ's GATT 47 direct effect doctrine was that it was inconsistent with the Court's doctrine regarding other international agreements. An analysis of the cases in which the ECJ has dealt with other international agreements reveals that the Court has examined four principle elements when deciding whether such agreements are capable of having direct effect.[16] These elements are the following: i) reciprocity in the initial balance of the obligations established by the agreement; ii) reciprocity in the ability to enforce the obligations established by the agreement; iii) the possibility of derogating from the obligations established by the agreement; and iv) the method of dispute settlement established by the agreement.

International Fruit Company and the confirming line of cases[17] show that the ECJ denied direct effect to the GATT 47 based upon a consideration of these same four elements. Critics of the Court's doctrine have argued that because the nature and structure of the GATT 47 did not differ appreciably from the other international agreements with respect to these four elements there was no justification for using them as a reason to deny direct effect to the GATT 47.[18] Kuilwijk attempts to

[13] Kuilwijk, *supra* note 2, at 247.

[14] *Ibid*, at 340.

[15] *Ibid*, at 28.

[16] In his study, Kuilwijk examines the following five cases: Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, [1976] ECR 129, *Kupferberg*, *supra* note 3, Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] ECR 1331, Case C-192/89, *SZ Sevince v. Staatssecretaris Van Justitie*, [1990] I ECR 3461, and Case C-18/90, *Office national de l'emploi (Onem) v. Bahia Kziber*, [1991] I ECR 199. His analysis relies most heavily on *Kupferberg* and *Sevince*.

[17] Case 9/73, *Carl Schluter v. Hauptzollamt Lorrach*, [1973] ECR 1135, Case 126/78, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, [1975] ECR 1439, Case 266/81, *Societa Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze and others*, [1983] ECR 731, Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiane SpA (SPI) and SpA Michelin Italiana (SAMI)*, [1983] ECR 801, Joined Cases 290-291/81, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, [1984] ECR 847, *FEDIOL III*, *supra* note 3, *Nakajima*, *supra* note 9, *NMB (Deutschland) GmbH and others v. EC Commission and another*, [1992] I ECR 1689, and *Germany v. Council*, *supra* note 6.

[18] See, e.g., Maresceau, 'The GATT in the Case-Law of the European Court of Justice', in Hilf, Jacobs and Petersmann, *supra* note 11, and Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects', 27 *Journal of World Trade* (1993) 5.

strengthen this criticism by arguing that the existence of the new Agreement on Safeguards, which limits the ability of the contracting parties to derogate from their GATT 94 obligations, and the increasingly judicial nature of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) result in there being even less reason for the Court to deny direct effect to the GATT 94. Indeed, he claims that a continued denial of direct effect shows that 'the provisions of GATT are instead treated as the "children of a lesser God", not worthy of the Court's attention'.[19]

A *GATT Reciprocity May Differ from That in the Other International Agreements*

Although it is certainly true that the GATT 47 and the other international agreements were similar in many important ways, it may not be entirely correct to state that there were no reciprocity differences between them which justified different direct effect doctrines. While the other international agreements were designed to implement various stages of economic integration between the Community and its treaty partners, the GATT 47 was structured to create a mechanism for negotiating non-discriminatory and reciprocal tariff reductions among its contracting parties. Thus, the nature of the other international agreements may have been more conducive to direct effect than the GATT 47.

In *Kupferberg*, for example, the ECJ considered the Free Trade Area Agreement between the Community and Portugal which eliminated all tariffs and other barriers to trade between the two parties. In *Pabst & Richarz* and *Sevince*, the Court considered the Greek and Turkish Association Agreements, respectively, which created customs unions, a higher form of integration than a free trade area, between the parties. Finally, the Yaounde Convention, considered by the ECJ in *Bresciani*, provided for non-reciprocal duty-free entry into the Community of goods from the ACP countries. These agreements, which established rights and obligations similar to those existing between the Member States of the Community, all created higher forms of integration than the GATT 47.

The Community and its treaty partners in the other international agreements also had historical ties which did not exist between the contracting parties of the GATT 47. For example, at the time that the ECJ was considering the free trade area agreement in *Kupferberg*, Portugal had already applied for membership in the Community. In *Pabst & Richarz*, the ECJ made explicit references to the fact that the association agreement was intended to prepare Greece for entry into the Community. The ACP countries in the Yaounde Convention were by definition those which had historical ties to Community Member States. Even Kuilwijk admits that these historical and potential future relationships between the Community and its treaty partners may have

[19] Kuilwijk, *supra* note 2, at 343.

resulted in an 'extra-territorial solidarity' or an 'anticipated solidarity' which did not exist between the GATT 47 contracting parties.[20]

When dealing with the GATT 47, in contrast, the Court always described the agreement's purpose by referring to its preamble which stated that it was an agreement for 'entering into reciprocal and mutually advantageous arrangements directed to the *substantial reduction of tariffs* and other barriers to trade and to the *elimination of discriminatory treatment* in international commerce'.[21] Thus, the Court noted that the GATT 47 contracting parties only agreed to reduce tariffs and to eliminate discrimination between them and not to pursue economic integration. The GATT 47 did not anticipate the creation of a single market like that of the Community, but rather allowed the contracting parties to preserve a diversity of market structures as long as they did not unfairly differentiate between contracting parties. Because the GATT 47 did not attempt to integrate disparate legal and economic systems like the other international agreements did, it may not have required the enhanced enforcement and uniform application of its provisions that would have resulted from granting direct effect.

Finally, one must recognize that the practical position of the Community in the GATT 47 was different than its position in the other international agreements. The other international agreements involved countries which were in a much weaker bargaining position than the Community. Because these agreements allowed the parties to withdraw from the agreement if they so desired, the EC could use the threat of doing so, and the resulting loss of treaty benefits for the other party, as a means of forcing compliance with the agreement's obligations. Thus, the Community had a real ability to influence the policies of the other parties to these agreements even when these parties did not grant direct effect to the agreement.

In the GATT 47, however, the Community was not in as strong a position to influence the policies of the other contracting parties. The United States and Japan, the two other large contracting parties, had an equal amount of bargaining power as the Community. The Community could not threaten to withdraw from the system if it felt its rights were not sufficiently respected because such a threat lacked credibility. Thus, the Community was limited to working within the GATT 47 system in a way that it was not in the other international agreements. In this case, it may have been appropriate for the Court to insist upon explicit reciprocity from the other contracting parties before granting direct effect to the GATT 47.[22]

The reasons for being cautious about drawing comparisons between the direct effect granted to the other international agreements and direct effect for the GATT 47

[20] Although Kuilwijk does recognize that these relationships may distinguish the reciprocity in the other international agreements from that found in the GATT 47, he contends that *Kupferberg* 'seems to indicate that the Court does not attach too much importance to the different "reciprocity" aspects of the legal nature of an international agreement when considering its capacity to produce direct effect'. Kuilwijk, *supra* note 2, at 121.

[21] Emphasis added. See, e.g., *International Fruit Company*, *supra* note 3, at 1227, *Schluter*, *supra* note 17, at 1157, and *Germany v. Council*, *supra* note 6, at 5072.

[22] Lee and Kennedy, *supra* note 11, at 83.

also apply to the GATT 94. The GATT 47 preamble, which remains the preamble to the GATT 94, conveys the message that the world trading system, as structured by the Uruguay Round Agreements, is intended to function as a forum for negotiating multilateral negotiations directed at trade liberalization. And while it is true that the Uruguay Round did produce some agreements requiring harmonization, most noticeably the Antidumping Code, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), it is also true that those agreements contain provisions which seem to require national laws that provide for individual rights.[23] Hence, one must be careful to maintain a distinction between those Uruguay Round Agreements which appear to be intended to have something akin to direct effect and the GATT 94 itself.

Of course, the existence of these other Uruguay Round Agreements could be cited as support for the argument that the ECJ should grant a form of conditional direct effect to the GATT 94 whereby direct effect in any specific case would depend on whether the other countries involved had also agreed to grant direct effect. However, as will be argued below, granting even conditional direct effect might deprive the Community of rights which it possesses under the GATT 94. Thus, there are still substantial differences between reciprocity in the GATT 94 and the other international agreements, and indeed even the other Uruguay Round Agreements, which show that the Court may not be deliberately treating the GATT 94 as the child of a lesser God but merely as a different species of agreement.[24]

B *The Structure of the GATT Safeguards May Not Contemplate Direct Effect*

The ECJ always noted the flexibility of the GATT 47 Article 19 safeguard clauses, which allowed contracting parties to suspend GATT 47 concessions in response to increased imports that 'cause or threaten serious injury to domestic producers', among its reasons for denying direct effect.[25] Critics have claimed that the Court acted inconsistently in its analysis of the GATT 47 because it was not bothered by similar safeguard clauses when granting direct effect to other international agreements.[26]

Kuilwijk goes further than the Court's other critics in arguing that the ECJ's treatment of the GATT 47 safeguard clauses 'mistakes GATT law for GATT practice'.[27] He contends that the safeguard clauses were never really flexible and led the

[23] See, e.g., the Uruguay Round Agreements on Antidumping Article 13, on Subsidies Article 23, and TRIPS Article 41.

[24] It should be noted that Switzerland led an initiative halfway through the Uruguay Round to require each WTO member to give the GATT 94 direct effect, or some equivalent status, in their national law. As Kuijper, *supra* note 11, at 65, notes this 'would have assured equality between the parties in respect of "internal enforcement" of the GATT'. The fact that this was not included in the final Uruguay Round Agreements seems to indicate, however, that the WTO members as a whole still do not desire direct effect for the GATT 94.

[25] See, e.g., *International Fruit Company*, *supra* note 3, at 1227.

[26] See, e.g., Petersmann (1991), *supra* note 11, at 86-92, for a general critique of this part of the ECJ's jurisprudence.

[27] Kuilwijk, *supra* note 2, at 342.

contracting parties to adopt grey area trade measures such as voluntary export restraints (VER) and orderly marketing agreements (OMA). He claims that this was a constitutional defect of the GATT 47 which could have been corrected by giving direct effect to the agreement. Given the new Agreement on Safeguards, he concludes that there is no longer any excuse for denying direct effect for the GATT 94 because it now 'explicitly prohibits grey area trade restrictions and forms a true example of the new firm commitment to adherence to the law, subscribed to by the Community'.[28]

While the ECJ's critics certainly do have valid criticisms, once again the issue is not nearly as one-sided as presented. For example, an examination of the cases in which the ECJ considered other international agreements shows that the safeguard clauses in those agreements differed significantly from those found in the GATT 47 and in the GATT 94. In *Kupferberg*, for instance, the Court stated that the safeguard clauses in the Portugal Free Trade Agreement applied 'only in specific circumstances and as a general rule after consideration within the joint committee in the presence of both parties'.[29] In *Sevince*, the Court agreed with Advocate General Darmon's claim that the safeguards in the Turkish Association Agreement could be invoked only in cases where there was a threat of 'disturbances on [the] employment market which might seriously jeopardise the standard of living or level of employment in a particular region, branch of activity or occupation'.[30] Therefore, the Court appeared to attach importance not only to the fact that the safeguards in the other international agreements were applicable only after political consultation with the other treaty party, but also that they could be used in specific circumstances.

Neither of these limitations was found in the GATT 47, nor is found in the GATT 94. Article 19 of the GATT 47 only required notification of contracting parties which would be affected by safeguard measures prior to their implementation in order to afford those parties an opportunity to ask for consultation over compensation. Articles 12 and 13 of the Agreement on Safeguards do now require notification of the GATT Committee on Safeguards when initiating an investigation, making a finding of injury, or imposing a safeguard measure. However, nothing in the GATT 94 allows the members or the Committee on Safeguards to prevent the implementation of a safeguard measure by another member.[31] Thus, it appears that GATT 94 safeguards can be used without the same level of prior consultation as required by the other international agreements.

GATT 47 Article 19 also required a threat of, or the existence of, 'serious injury' before a contracting party could impose a safeguard measure. However, this

[28] *Ibid.* It should be noted that GATT 47 Article 19 remains in force alongside the Agreement on Safeguards subject to the condition that the Agreement on Safeguards controls in the case of any conflict.

[29] *Kupferberg*, *supra* note 3, at 3664.

[30] *Sevince*, *supra* note 16, at 3486.

[31] Agreement on Safeguards Article 13 does provide that the Committee on Safeguards will monitor the use of safeguard measures and can review the equivalence between the effects of any safeguard measure and the compensation offered. However, the Committee's findings have no legal status. Thus, these requirements do not seem to be as strong as those found in *Kupferberg* where a safeguard measure could not generally be imposed unless approved by the Joint Committee.

determination was left to the discretion of the government imposing the safeguard measure itself.[32] Agreement on Safeguards Article 2 does now require a member to conduct an open investigation to prove the existence of injury. Article 3, however, still leaves the determination of 'serious injury' up to the competent authorities of the member imposing the safeguard. Thus, members can use safeguard measures to remedy a broader range of injuries and have a larger amount of discretion in determining the need for safeguard measures than in the other international agreements. Given these differences, it may not be entirely fair to the Court to claim that its treatment of safeguards is inconsistent.[33]

Because the ECJ could always grant direct effect to the GATT 94 while at the same time holding that the Community had properly invoked a safeguard clause, one must move beyond the doctrinal question of the ECJ's case law consistency to consider whether the political economy of the safeguards regime really demands direct effect. It is correct to state that, prior to the Agreement on Safeguards, the flaw in the GATT 47 safeguard regime was not that it was too flexible but rather that it was not flexible enough. Contracting parties which did not want to pay compensation for, did not want to meet the non-discrimination requirement of, and did not want to conduct an investigation to justify a safeguard measure often adopted grey area trade measures such as VERs and OMAs to remedy the injuries caused by increasing imports.[34] These measures effectively imposed quota systems on international trade and thus were more economically harmful than tariffs. It is not clear, however, how direct effect could have prevented the use of these measures which were effectively sanctioned under the GATT 47.[35]

[32] GATT 47 panel reports indicated that deference was to be given to a contracting party's determination that a safeguard measure was necessary. See, e.g., the 1951 *Hatters' Fur Case*, Sales No. GATT 1951-3 (Nov. 1951), in which US safeguards applied against imports of Czechoslovakian hatter's fur were upheld.

[33] In fact, Advocate General Darmon in *Sevince* directly contrasted the safeguards in the Turkish Association Agreement with those in the GATT 47. He noted 'in the first place, that their overall context is more restrictive than that of GATT and, secondly, that they are expressly defined as exceptions to the rule that the provisions in question are to be automatically applied, whereas those of GATT, which appear to be in harmony with the generally "flexible" overall system of which they form part, could hardly be classified as exceptions to a rule of automatic application which, in fact, does not form part of that system'. Therefore, he seemed to acknowledge that the safeguards in the GATT 47 might be sufficiently more flexible than those in the other international agreements to justify the denial of direct effect. *Sevince*, *supra* note 16, at 3488.

[34] For example, in the 1980s both the US and the Community negotiated VERs with Japan to limit auto imports from Japan. Presumably, both the US and the Community could have invoked the GATT 47 safeguard clauses but, as noted, this would have required an investigation to prove that their domestic auto industries were being harmed by the Japanese imports and would have required them to compensate Japan and any other contracting party for the injury caused by any safeguard measures imposed.

[35] Kuilwijk does provide a useful insight when he states that 'safeguard clauses in international agreements on trade liberalization always represent a link between two conflicting objectives: first, respect by

The Agreement on Safeguards does represent a real step forward in that it brings grey area trade measures such as VERs and OMAs within the discipline of the GATT 94 and effectively bans them with only a few exceptions. The fact that these measures have been reigned in, however, does not automatically mean that direct effect is now necessary to enforce compliance. In fact, one could say that the adoption of the new safeguards regime indicates that once the members recognize that there is a problem with the agreement's structure *and* muster the political consensus to address the problem, they will act to do so.[36] In this case, it may not be appropriate for the ECJ to grant direct effect to the GATT 94 and force the Community to adopt unilateral positions before a world political consensus exists. And as will be shown below, granting direct effect to the GATT 94 may also deprive the Community of its rights under the agreement. Thus, one must be very careful indeed not to confuse GATT 94 law with practice.

C *The Nature of GATT Dispute Settlement May Not Require Direct Effect*

The dispute settlement mechanism of the GATT 47 was heavily criticized because it did not require rule-based adjudication to resolve disputes and effectively allowed the contracting parties to engage in power oriented diplomacy.[37] Despite this, however, the critics of the ECJ's direct effect doctrine claimed that because the GATT 47 dispute settlement mechanism did not differ appreciably from those found in the other international agreements to which the Court had granted direct effect, it should not have been used as a justification for denying direct effect.[38]

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governments for their commitments regarding trade liberalization, and, second, their concern to keep a margin of manoeuvre thus enabling them to protect the domestic market through the imposition of restrictive measures when necessary'. Kuilwijk, *supra* note 2, at 136. However, the fact that the GATT 47 allowed safeguard measures may indicate that the contracting parties were not able to jointly resolve this conflict.

[36] See, van Themaat, 'The Possibilities for National Measures of Implementation to Strengthen the Legal Quality of International Rules on Foreign Trade', D. C. Dicke and E.-U. Petersmann (eds), *Foreign Trade in the Present and a New International Economic Order* (1988), at 45–46, for an analysis of why it is more politically realistic to undertake efforts to reduce national government discretion on an international rather than a national level.

[37] Of the 195 disputes brought to the attention of the contracting parties under GATT 47 Article 23 between 1948 and March 1995, only 98 resulted in the circulation of panel reports and only 81 of these panel reports were actually adopted. Komuro, *supra* note 11.

[38] See, R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), for a detailed description of the operation of the GATT 47 dispute settlement. See Jackson, 'The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections', in N. Blokker and S. Muller (eds), *Towards More Effective Supervision by International Organizations* (1994) for general criticisms of the GATT 47 dispute settlement. See van Themaat, 'Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round: A Comment', in Hilf and Petersmann (1991), *supra* note 11, for an argument that direct effect should await the establishment of an international trade court.

While the GATT 47 dispute settlement mechanism was rightly criticized for being weak, there still may have been an important distinction between the GATT 47 and the other international agreements which justified the ECJ's determination that it was part of the reason for different direct effect doctrines. The GATT 47 was an agreement designed to establish a system of multilateral rounds of reciprocal trade negotiations across multiple sectors. Thus, the GATT 47 effectively created a continuing relationship of negotiations between the contracting parties designed to propel the process of trade liberalization and resolve lingering disputes by means of cross-sectoral bargaining.

This was not the case with the other international agreements. These agreements created static systems that resulted from one-time negotiations over the rights and obligations of the parties. Thus, direct effect may not have been appropriate for the GATT 47 because it would have effectively allowed an individual to interfere with a process of ongoing negotiations between the contracting parties: that is, direct effect might have prevented contracting parties from blocking panel reports that settled disputes in ways with which they disagreed and hoped to modify through negotiation. While one may not approve of blocking panel reports in order to force negotiations to resolve policy differences, it cannot be denied that this was a significant right which each contracting party possessed under the GATT 47.

The Uruguay Round DSU significantly strengthened the GATT 47 dispute settlement mechanism. The DSU did so by providing deadlines for all procedures, by creating an Appeals Body, and, most importantly, by reversing the consensus-to-adopt-panel-reports approach of the GATT 47 to a consensus-to-block-panel-reports approach.[39] Given the changes introduced by the DSU, Kuilwijk argues that the dispute settlement mechanism can no longer be characterized as flexible. He concludes that because 'the dispute settlement system matured and now closely resembles an actual judicial system [with a] firm commitment to legalism' it should no longer be used by the ECJ as a justification for denying direct effect to the GATT 94.[40]

One must carefully examine the actual operation of dispute settlement under the GATT 94, however, before concluding that the changes introduced by the DSU mean that direct effect is now appropriate. Dispute settlement systems do not fall into one of two polar categories, i.e. hard legal or soft political systems, but rather lie along a continuum between the two. Although the DSU has shifted the GATT 94 system towards the legal pole, it is not yet clear where it falls on the continuum. While it certainly has made GATT 94 dispute settlement more legalistic, the DSU does not appear to have replaced all intergovernmental negotiation with strict precedent-based

[39] See Komuro, *supra* note 11, for a detailed description of the procedures of the DSU.

[40] Kuilwijk, *supra* note 2, at 342.

application of GATT 94 law.[41] Thus, it may be premature to state, as Kuilwijk does, that the GATT 94 should be given direct effect because the DSU is now a true judicial system.

In fact, the language of the DSU shows that negotiation still plays a large role in the panel procedure. For example, DSU Article 3(3)'s call for the 'prompt *settlement* of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired'[42] indicates that the adoption of panel reports is not the only means of resolving a dispute. DSU Article 4 requires consultations between the disputants before one may request the establishment of a panel to hear the dispute and Article 5 offers the use of good offices, conciliation and mediation as an alternative means of resolving disputes.

DSU Article 12(7) provides that 'where the parties to the dispute *have failed* to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB'.[43] This implies that negotiations between the disputants may take place on a parallel track with a panel procedure. After the issuance of a panel report, DSU Article 16(1) provides for a 20-day waiting period before the report can be considered for adoption by the DSB. This provides the disputing parties with another opportunity to settle their dispute by negotiated agreement. Finally, even after a panel report has been appealed and the Appeals Body has issued an appellate report, there is still a 30-day waiting period before that report can be adopted by the DSB. This again provides time for the disputing parties to negotiate a settlement of their dispute without the adoption of a panel report.

One should also realize that the DSU procedures are not the only means of settling disputes within the GATT 94. It has been noted that there are over 30 different ways to resolve disputes within the GATT 47.[44] Many GATT 47 provisions, such as Article 8(1) which requires a member to review the way it values goods for customs purposes when requested to do so by another member, call for consultations between members. Other GATT 47 provisions are framed to avoid disputes in the first place, such as Article 25(5) which allows a member to seek a waiver from its obligations upon approval of the other members. Thus, one should be careful not to focus solely on the DSU when considering the nature of GATT 94 dispute settlement.

The current dispute over the US Helms-Burton Act illustrates some aspects of GATT 94 dispute settlement that may caution against automatically assuming that direct effect is now appropriate. After this Act took effect on 12 March 1996, pressure from the Community and Canada forced President Clinton to delay enforcement of its

[41] See, e.g., Lee and Kennedy, *supra* note 11, at 81, for an analysis of the first dispute to come under the DSU, a dispute between the US and Japan over cars and car parts. They conclude that the resolution of this dispute by means of a negotiated agreement between the countries 'seems to suggest that, far from becoming a strictly legal device, the dispute resolution system retains its flexible nature and that negotiation, rather than formal legal complaint, will remain the most common form of conflict resolution'.

[42] Emphasis added.

[43] Emphasis added.

[44] M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (1995), at 386.

provisions which granted US nationals a private right of action against foreign companies that 'traffic' in property confiscated by the Cuban government from US nationals.[45] When negotiations to resolve the dispute broke down on 16 October 1996, the Community filed a WTO complaint against the USA claiming that the Act violated both the MFN principle and the prohibition against quantitative restrictions. The US argued in defence that the Act qualified for the Article 21 national security exemption from GATT 94 violations. Although negotiations between the two sides continued, no compromise was reached by the time a panel was formed. At that time, the USA stated it would boycott any panel because it did not 'believe anything the WTO says or does can force the U.S. to change its laws'.[46]

The US stance, which quickly prompted a renewed effort to reach a compromise, illustrates the strengths and limitations of the DSU. Both the US and the Community realized that a panel resolution of the dispute was a 'lose-lose' proposition: that is, a ruling for the US would threaten the WTO by encouraging other countries to defend questionable trade-related policies under the national security exemption, while a ruling for the Community would slow momentum for further trade liberalization by weakening domestic political support in the US.[47] This merely intensified the pressure for a political settlement of the dispute.[48] Thus, the DSU may actually encourage, rather than inhibit, the use of political negotiation to resolve disputes in cases where there is not strong support for the adoption of a panel report to settle the dispute.

In fact, negotiations eventually did lead the Community to suspend its WTO complaint for six months on 11 April 1997 and again on 15 October 1997. The Community agreed to do so in order to allow the Clinton administration time to seek a Congressional change to the Helms–Burton Act. The Community, however, reserved its right to revive the complaint if no satisfactory result was achieved. Stuart Eizenstat, the US Under Secretary of Commerce and chief US negotiator, has stated that 'this understanding represents a beginning and not an end. There is absolutely no

[45] President Clinton did not suspend the provisions which deny visas to executives and major shareholders of companies which 'traffic' in property confiscated by the Cuban government from US nationals.

[46] Sanger, 'U.S. Won't Offer Trade Testimony on Cuba Embargo', *NY Times*, 21 February, 1997, Section A, at 1.

[47] Lawrence, 'A Cuban Dilemma: Competing Pressures from Home, Abroad Confront Clinton as He Nears Deadline on Helms-Burton', *Journal of Commerce*, 6 January 1997, at 32C.

[48] After the US announcement, Sir Leon Brittan, the Community's top foreign trade official, stated that the WTO 'panel procedure can be halted at any time if the parties reach agreement'. WTO chairman Renato Ruggiero also stated that he hoped 'the two sides can find a solution to the problem . . . [and] deal with the dispute settlement procedure in a way which will facilitate agreement by the two sides'. Lawrence, 'U.S. Will Snub WTO Panel on Anti-Cuba Law', *Journal of Commerce*, 21 February 1997, at 1A.

certainty we will reach an agreement . . . . There is going to be hard bargaining ahead.'[49] As of the time of this writing the resolution of this dispute is still uncertain.

This dispute shows that a shift towards a more rule-based adjudication of disputes requires a change in the attitude of the members' governments, not just a change in the DSU.[50] A more legalistic DSU does not change the fact that dispute settlement in the GATT 94 still may involve political negotiations between members.[51] Where the GATT 94 has well-defined rules and disputes are narrowly focused, the DSU will indeed work well. However, when there is no consensus on either the substance or the application of the rules, the more legalistic DSU may not be able to save dispute settlement from political negotiation.[52] Thus, one should carefully consider the actual operation of the DSU before claiming that dispute settlement would benefit from the existence of direct effect.

3 Motive Analysis

A second line of criticism of the ECJ's direct effect doctrine has attempted to impugn the Court's motive for denying direct effect. This criticism has largely been based upon an analysis of the ECJ's treatment of the second element of reciprocity found in international agreements, i.e., reciprocity in the enforcement of obligations. The ECJ's critics have argued that it was improper for the Court to use the lack of absolute reciprocity in the GATT 47 as a reason for denying direct effect because unilaterally granting direct effect would have ensured that at least the Community strictly adhered to its GATT 47 obligations.[53] The critics have claimed that this would be beneficial because it would have prevented the Community institutions from acting arbitrarily in the context of foreign trade policy.[54]

Kuilwijk attempts to extend this critique by endowing it with moral significance. He states that the ECJ's doctrine shows that it maintains a 'persistent adherence to the

[49] de Jonquierres and Dunne, 'Helms-Burton Antagonists Keep Fingers Crossed', *Financial Times*, 14 April 1997, at 6. While President Clinton agreed to continue to delay enforcement of the provision allowing suits against foreign companies which traffic in seized property, there was no movement on the provision allowing the US to block the entry of officers and shareholders of companies which traffic in such confiscated property. President Clinton stated that he would ask Congress to repeal this measure if the Community concluded and implemented a bilateral agreement to constrain the ability of companies to invest in illegally expropriated foreign assets in the future.

[50] See, e.g., Hudec, *supra* note 38, at 363.

[51] As of 9 May 1997, of the 24 cases brought by the US to the new DSU, four had been decided by panels in favour of the US, five had been settled, seven were still under consideration by panels, and eight were in the early stages of negotiation. Of the 10 cases brought against the US, three had been withdrawn, three had been decided by panels against the US, one had been settled, one was still under consideration by a panel, and two were in the early stages of negotiations. Sanger, 'Clinton Grants, Then Suspends, Right to Sue Foreigners', *NY Times*, 9 May 1997, Section A, at 1.

[52] See Trebilcock and Howse, *supra* note 44, at 392.

[53] See, e.g., Hilf, Jacobs and Petersmann, *supra* note 11.

[54] See, e.g., Hilf and Petersmann (1993), *supra* note 11.

traditional mercantilist, negative and defensive view of foreign trade policy'.[55] He argues that the ECJ focuses on the reciprocity of enforcement in order to disguise a desire to allow the Community institutions maximum flexibility in creating foreign trade policy. He concludes that this harms the Community because 'the true reason that the political institutions do not want to have their hands tied is that they wish to retain the freedom to confer special favors on specific industries, not because they are convinced that they are capable of better serving the public interest by retaining such freedom'.[56]

A *Possible Non-Mercantilist Motivations for the ECJ's Doctrine*

Before accusing the Court of undue protectionism, one must determine if there are any valid legal reasons for denying direct effect. First, it must be acknowledged that the reciprocity of enforcement in the GATT 94 is much different from that in the Community or the other international agreements to which the Court has granted direct effect.[57] The US has explicitly stated that the GATT 94 will not have direct effect in US courts.[58] It also appears that direct effect does not exist in Japan.[59] Because both the US and Japan, the two other large players in the dispute settlement mechanism

[55] Kuilwijk, *supra* note 2, at 340. One should recognize, however, that the language and structure of the GATT 47 itself is mercantilist. Within GATT 47 parlance, reductions of tariffs and other trade barriers are termed 'concessions'. Because these concessions are made from the current levels of protection without regard for harmonization, it cannot be said that the GATT 47 is intended to create a level playing field. Therefore, it may be wrong to assume that the agreement's provisions always maximize economic welfare and that the ECJ must have mercantilist motives for denying direct effect. The relationship between economic theory and direct effect will be examined in more detail in Section 4A.

[56] *Ibid.* at 341.

[57] In the Community legal setting, the ECJ has held that a Member State cannot escape a breach of its Treaty obligations by claiming that either another Member State or a Community institution has breached its Treaty obligations. See, e.g., Case 232/78, *Commission v. France*, [1979] ECR 2729, and, Cases 90-91/63, *Commission v. Luxembourg and Belgium*, [1964] ECR 625. The Court dealt explicitly with the issue of reciprocity of enforcement in regard to the other international agreements only in *Kupferberg*. The reciprocity issue arose in this case because a Swiss court had denied direct effect to a free trade area agreement similar to the EC–Portugal one. The Court concluded that the structure of the EC–Portugal free trade area agreement, in which a Joint Committee engaged in political resolution of all disputes, did not contain a lack of reciprocity. *Kupferberg*, *supra* note 3, at 3650.

[58] The US implementing legislation, 19 U.S.C. §102(c), provides the following:

> No person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

[59] While Article 98(2) of the Japanese Constitution states that international agreements must be respected, a 1984 Kyoto District Court held that a GATT 47 violation by the Japanese government merely triggers the right of other countries to demand negotiations and does not invalidate domestic law. This decision was affirmed by the Japanese Supreme Court which held that 'a violation of a provision of GATT pressures the country in default to rectify the violation by being confronted with a request from another member country for consultation and possible retaliatory measures. However, it cannot be interpreted to have more effect than this. Therefore, it cannot be held that the legislation in question is contrary to the GATT and null and void.' J. H. Jackson, W. J. Davey and A. O. Sykes, Jr., *Legal Problems of International Economic Relations* (3rd ed., 1995), at 224–226.

besides the Community,[60] explicitly deny direct effect, this position may represent the common understanding of the members about the nature of the GATT 94 agreement.

Second, it should be acknowledged that the dispute settlement mechanism actually utilizes the lack of direct effect to help resolve disputes. As previously noted, the lack of direct effect allows members to settle a dispute by means of a negotiated agreement prior to a formal ruling on the validity of trade measures. This is useful because it allows member-to-member trade-offs and cross-sectoral bargaining over concessions which would not occur if the dispute were resolved by means of a panel report or by national courts applying GATT 94 law.[61] Thus, direct effect might actually inhibit the operation of the GATT 94 by denying the members some of the flexibility contained in the DSU.

Third, one must recognize that direct effect may actually deprive the Community of rights which it possesses under the GATT 94 after the issuance of an adverse panel report. If the ECJ required the withdrawal of a Community measure because it violated the GATT 94 before a panel had even decided that the measure actually did violate the agreement, then the Community would be deprived of the right to choose the method of remedying the injury caused by the measure: that is, a Court ruling by means of direct effect would mandate specific performance as the only remedy for all GATT 94 violations and deny the Community the ability to offer compensation as a remedy for such violations. This limitation on the policy discretion of the Community might be particularly harmful in the context of the GATT 94 because the agreement has such broad economic consequences.[62] This possible asymmetry between Community enforcement of the GATT 94 and individual enforcement is reinforced by DSU Article 23(1), which requires members to resort to the DSU to redress any violations of the GATT 94.

There is some debate over whether a member which has been found to be in violation of a GATT 94 obligation actually may choose the method of remedying its

[60] Of all the complaints brought between 1948 and 1989, the US, Japan and the Community, or its Member States, were involved as plaintiffs 62% of the time and as defendants 76% of the time. Hudec, *supra* note 38.

[61] Lee and Kennedy, *supra* note 11, at 88, argue that allowing an individual importer to successfully challenge the validity of an agreement settling a dispute such as the US–Japan agreement on cars and car parts could lead to a case of double jeopardy because 'a state having already made concessions in other fields may then also be forced to withdraw the measure impugned by its national court'. They conclude that this would then decrease the incentive to settle disputes through negotiated agreements and might threaten the functioning of the GATT. Cf. Hilf and Petersmann (1991), *supra* note 11, for an argument that reciprocity is a bilateral concept which should not be used in a multilateral treaty such as the GATT.

[62] See Kuijper, *supra* note 11, at 64, for a discussion of why a country which specifically excludes direct effect when others do grant direct effect 'places itself in such a favorable position that it becomes fundamentally unfair to its trading partners'.

violation.[63] Judith H. Bello has argued that the GATT 94 preserves the GATT 47 principle that

> the only sacred, inviolable aspect of the GATT [is] the overall balance of rights and obligations of benefits and burdens, achieved among members through negotiations ... [so that] a government could renege on its negotiated commitment not to exceed a specified tariff on an item, provided it restored the overall balance of GATT concessions through compensatory reductions in tariffs on other items.[64]

Therefore, she concludes that a member found to be violating the GATT 94 may do one of the following: i) withdraw the offending measure; ii) maintain the measure but provide compensatory benefits; or iii) decline to withdraw the measure or provide compensation and instead allow the injured member to retaliate.[65]

In response, John H. Jackson has argued that the withdrawal of the offending measure is the proper method of remedying GATT 94 violations.[66] He notes the historical practice of 'the GATT contracting parties [to treat] the results of an adopted panel report as legally binding' and argues that 11 clauses of the DSU support the notion that a panel report imposes an international law obligation on the member to

[63] Petersmann has argued extensively that international law requires the specific performance of all international obligations, including WTO obligations, in good faith. See e.g., 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); Petersmann, 'Proposals for a New Constitution for the European Union', 32 *CMLR* (1995) 1123; Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern Journal of International Law and Business* (1996/97) 398.

However, it should be acknowledged that compensation has been recognized as a valid remedy in some international law contexts. This has occurred particularly in cases involving the breach of a concession agreement. For example, dictum of the Permanent Court of Justice in *Chorzów Factory*, 1927 PCIJ, Series A, No. 9, first suggested that while restitution was the preferred remedy, compensation would serve as a valid secondary remedy if restitution were not possible. Although the arbitrator in *Texaco v. Libya*, 53 ILR (1974) 389, equated restitution with specific performance, the eventual remedy in this case was the payment of compensation. And in *BP v. Libya*, 53 ILR (1974) 296, the arbitrator rejected the primacy of specific performance and ordered the payment of compensation.

Furthermore, Derek Bowett has argued that the US–Iranian Claims Tribunal decisions explicitly establish the international law principle that the remedy for the breach of a state contract with an alien is compensation. Bowett claims that there is a distinction between the remedies for unlawful takings, lawful ad hoc takings, and lawful takings that are part of a general programme of nationalization. In the case of an unlawful taking, Bowett states that the appropriate remedy includes all potential profits up to the date of the judgment. The remedy for ad hoc takings is the value of the lost going concern, i.e. the value of all tangible and intangible assets, but does not include lost profits. Finally, the remedy for a taking that is part of a nationalization programme is the value of the tangible assets lost. Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', 59 *BYbIL* (1988) 49. These principles might be relevant if one viewed a GATT 94 violation as equivalent to the taking of one nation's going concerns by another.

[64] Bello, 'The WTO Dispute Settlement Understanding: Less Is More', 90 *AJIL* (1996) 416, at 417.

[65] *Ibid.* See also Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration', in J. Bhagwati and R. E. Hudec (eds), *Fair Trade and Harmonization. Vol 2, Legal Analysis* (1996), at 47, who argues that an integrated dispute settlement system under which violations of commitments in one sector can be remedied by retaliatory action in another helps preserve the entire negotiated package of concessions.

[66] Jackson, 'Editorial Comment: The WTO Dispute Settlement Understanding — Misunderstandings on the Nature of Legal Obligation', 91 *AJIL* (1997) 60.

which it is directed to perform the recommendations of the panel.[67] Thus, he concludes that the GATT 94 'clearly establishes a preference for an *obligation to perform* the recommendation ... and provides that in *nonviolation cases*, there is *no* obligation to withdraw an offending measure, which strongly implies that in *violation* cases there *is* an obligation to perform'.[68]

While the language of the DSU does establish a preference for specific performance, it also supports the notion that compensation is a possible remedy. DSU Article 22(1) states that 'compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings [of the panel] are not implemented within a reasonable time' and that 'neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a [panel] recommendation'. DSU Article 21(3)–(4) establishes the reasonable period of time for implementation as 15 months from the date of adoption of a panel or Appellate Body report.[69] Thus, full compliance is indeed the preferred remedy for a GATT 94 violation.

But, DSU Article 22(2) states that if a member

> fails to bring the measure found to be inconsistent with a covered agreement into compliance ... within the reasonable period of time ... such member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.

Thus, the DSU clearly states that compensation is a possible, even if not a preferred, remedy for a GATT 94 violation. The fact that the members may agree on compensation during the reasonable period of time given for the implementation of a panel decision suggests that compensation may be used as the final means of remedying a GATT 94 violation.

This idea is further supported by the DSU language pertaining to retaliation. DSU Article 22(2) also states that if an agreement on compensation is not reached, the invoking member may request authorization from the DSB to suspend GATT 94 concessions granted to the violating member. DSU Article 22(8) states, however, that

[67] *Ibid*, at 62.

[68] *Ibid*, at 61.

[69] DSU Article 21(3)(c) states that the reasonable period of time may be shortened or lengthened in binding arbitration depending on the particular circumstances of the case. The reasonable period of time for implementation has been arbitrated in two cases: *Japan and Taxes on Alcoholic Beverages* and the *European Communities and the Banana Regime*. In the *Alcoholic Beverages* case, WT/DS8/15 (14 February 1997), the arbitrator rejected the Japanese argument that political difficulties in passing tax reform legislation and the adverse effects on consumers and producers demanded an implementation period longer than 15 months. In the *Banana Regime* case, WT/DS27/15 (7 January 1998), the arbitrator did give credence to the Community arguments that the complexity of the banana regime legislation and the need to consult the ACP countries mandated an extension of the reasonable period of time but only gave the Community one week beyond the 15-month period to implement the panel decision. Neither of these arbitration rulings touched on the issue of compensation as an alternative remedy.

> the suspension of concessions ... shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, *or* the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits.

Under the language of DSU Article 22(2) cited above, one possible solution would be compensation. Thus, while retaliation is truly temporary, it may be the case that compensation can be a permanent remedy to a violation. This may make sense within the context of the GATT 94 because retaliation would in effect counter one violation with another violation, while compensation counters a violation with monetary payments.

Thus, the GATT 94 may actually be a unique international agreement in that it attempts to utilize the 'realpolitik' of the environment in which it operates to its benefit by providing methods of remedying violations which are flexible enough to maintain the functioning of the agreement: that is, the GATT 94 may provide a choice of remedy precisely because allowing such a choice helps preserve momentum for the trade liberalization process which is the ultimate purpose of the agreement. Permitting members to preserve domestic legislation that arguably violates GATT 94 provisions, as long as they are willing to pay for them in the form of compensation, may help convince those members to accept other restrictions upon their foreign trade policy autonomy.

This possible function of the dispute settlement mechanism can be illustrated using the recent Beef Hormones decisions. In this case, both a GATT panel and a WTO Appeals Body have ruled that the Community's non-discriminatory ban on the sale of hormone-treated beef violated the GATT 94 because it was not supported by sufficiently strong scientific evidence. However, both of these bodies upheld the right of the Community to set the level of consumer protection it deemed appropriate under the 1994 Sanitary and Phytosanitary Agreement. Thus, the Community was allowed to keep the ban in place until April 1999 while it attempted to produce stronger evidence for the scientific validity of its ban.

Rather than forcing the Community to produce evidence for the scientific validity of its ban, perhaps it would be best to allow the Community merely to pay compensation to the US producers of hormone-treated beef in order to keep its ban in place. This would avoid the need for a ruling on debatable scientific evidence and give expression to the desires of Community consumers. In fact, during the dispute, Community officials admitted that the beef hormones ban was specifically designed to placate consumer suspicions about chemical additives in food.[70] After the initial panel ruling, some Community officials also suggested that they would prefer to pay compensation than to remove the ban.[71] Thus, it may be the case that the welfare which consumers in the Community derive from knowing that their beef has not been treated with

[70] Andrews, 'In Victory for U.S., Europe Ban on Treated Beef Is Ruled Illegal', *NY Times*, 9 May 1997, Section A, at 1.

[71] French Agriculture Minister Vasseur went so far as to state that 'France is entirely prepared to pay penalties if that is what is needed to prevent hormone-treated American meat from gaining entry to our territory.' Reuters, 'France May Ban U.S. Meat Over Hormones', *LA Times*, 12 May 1997, Part D, at 2.

hormones exceeds the compensation which the Community will have to pay to maintain the beef ban in the face of the panel ruling.[72]

By allowing the Community the flexibility to pay compensation, the GATT 94 would help to ensure its own survival and reconcile domestic political interests with the requirements of the world trade regime. For example, one should consider what would happen if it were not the US, but instead a single small country that was the sole producer of hormone-treated beef. In this case, it seems entirely disproportionate and unfair to require the Community to abolish a complex domestic policy regime when it could easily pay compensation instead. Direct effect becomes a very troublesome proposition in such a situation because the ECJ could not realistically do anything other than order specific performance for a GATT 94 violation. Thus, direct effect would deny the Community the ability to choose the compensation remedy under the GATT 94.[73]

Finally, one should consider the possible outcomes for the Community if the ECJ actually did begin to rule on the GATT 94 compatibility of Community measures. If the ECJ correctly held that a Community measure violated the GATT 94, then the Community could be deprived of its ability to choose the method of remedying the violation. Thus, the Community would be worse off than if a panel had decided that the Community measure violated the GATT 94. If the ECJ incorrectly held that a Community measure violated the GATT 94, then the ECJ would also be worse off because it would be forced to repeal a measure which did not really violate the agreement.

If the ECJ held that a Community measure was compatible with the GATT 94, then the Community would remain in the same position as when direct effect did not exist because either the ECJ's decision would be correct, in which case there would never be an adverse panel decision, or the ECJ's decision would be incorrect, in which case it could be overturned by a future panel. Therefore, it is not clear that the Community would ever be placed in a better position within the GATT 94 framework by granting direct effect to the agreement.[74] Given all of the foregoing, it may be the case that the Court has only denied direct effect to the GATT out of a desire to preserve the best

[72] Estimates state that the US beef industry lost $250 million dollars of sales in 1996 because of the Community measure. Clark, 'U.S. Hails EU Beef Imports Ruling by WTO', *Financial Times*, 10 May 1997, at 2.

[73] See Roessler, 'The Constitutional Function of the Multilateral Trade Order', in Hilf and Petersmann (1993), *supra* note 11, for an argument that the GATT is not really intended to resolve conflicts of interest between nations but rather within nations. Roessler concludes, however, that this calls for the constitutionalization of the GATT in domestic legal settings.

[74] These considerations point to another possible motive for the ECJ's decision not to grant direct effect. If one looks at the ECJ as a domestic court within the GATT 94 context, the Court may not want to grant direct effect because it does not want to make incorrect decisions. That is, the ECJ may not be very different from national courts in the Community context or lower courts in a domestic context, in that it does not want to operate outside its area of expertise and risk having its decisions reversed.

possible legal position for the Community within the GATT system rather than to satisfy a mercantilist agenda for the benefit of specific traders.[75]

B *Implications of the ECJ's Method of Analysis*

Having recognized the possibility of non-mercantilist motives for denying direct effect to the GATT 47 and GATT 94, it is necessary to examine the ECJ's method of analysis to determine if it proves that the Court's direct effect doctrine is motivated by a protectionist agenda. Kuilwijk attempts to do this by noting that the ECJ's method of analysis has been inconsistent. He argues that while the Court has considered the direct effect of individual provisions of the other international agreements, 'in the case of GATT the Court has unequivocally denied direct effect of the whole agreement as such'.[76] He claims that the Court has done this in order to cloak its true protectionist motives for denying direct effect.[77] Thus, he concludes that the Court's inconsistency is proof of its mercantilist agenda.

This criticism misconstrues the ECJ's method of analysis. The Court has considered the direct effect of all international agreements, including the GATT 47, by means of a two-level inquiry. First, the Court determines if the nature and purpose of the agreement precludes all provisions from having direct effect. If that threshold inquiry is met, then the Court examines a particular provision of the agreement to determine if it has direct effect. This second-level inquiry necessarily involves a second consideration of the nature and purpose of the agreement as the Court must establish the role of the particular provision within the framework of the agreement.

A close examination of the ECJ case law clearly shows consistency in the Court's method of analysis. In Recital 21 of *Kupferberg*, the Court stated that 'neither the nature nor the structure of the Agreement concluded with Portugal may prevent a trader from relying on the provisions of the said Agreement before a court in the Community'.[78] Thus, direct effect is possible. In Recital 22, the ECJ stated that the 'question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the Agreement of which it forms part ... [and] it is necessary to analyse the provision in the light of both the object and purpose of the Agreement and of its context'.[79] Thus, the Court must examine the specific provision in the context of treaty to determine if it has direct effect. In Recital 26, the Court held that the particular provision did have direct effect. Therefore, the references to the nature and purpose of the agreement not only establish that the

[75] The fact that Kuilwijk fails to acknowledge this argument is telling as much of his critique is based on the underlying assumption that the GATT 94 is designed to protect the individual rights of consumers. The effect of making such an assumption on the direct effect question will be explored further in Section 4A.

[76] Kuilwijk, *supra* note 2, at 105.

[77] *Ibid*, at 158.

[78] *Kupferberg*, *supra* note 3, at 3664.

[79] *Kupferberg*, *supra* note 3, at 3665.

agreement passes the first-level inquiry but also relate to the second-level inquiry as well.

International Fruit Company shows the ECJ using this same method of analysis with respect to the GATT 47. In its decision, the Court stated that in order to determine 'whether the provisions of the General Agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure ... the spirit, the general scheme and the terms of the General Agreement must be considered'.[80] Thus, the Court must engage in the first-level inquiry. The ECJ never got to the second-level inquiry, however, because 'those factors [spirit, general scheme and terms of the GATT 47] are sufficient to show that, when examined in such a context, Article 11 of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts'.[81] Therefore, it held that Article 11, and all other provisions of the GATT 47, could not have direct effect. Thus, the ECJ's different direct effect doctrines may be due to differences between the other international agreements and the GATT 47 rather than to a deliberate policy of trade protectionism.[82]

The Court's treatment of direct effect for the GATT 47 may have been not only consistent with its prior jurisprudence but also logical, given the structure of the GATT 47. The GATT 47 did not contain any references to the possibility of direct effect for its provisions and, as a result, the US and Japan denied direct effect. This left the Court with a policy choice. It could hold, as it had with the other international agreements, that because the GATT 47 did not preclude direct effect and because it was desirable to enhance enforcement of the agreement in the Community, the GATT 47 was directly effective. Alternatively, the Court could hold that direct effect was not appropriate for the GATT 47.

It is true that the ECJ deferred to the wishes of the Community institutions in making this policy choice. For example, in *FEDIOL III*, Advocate General van Gerven noted that while Articles 1 and 2 of the New Commercial Policy Instrument 'confine themselves to making a general reference to international law and to generally accepted rules ... the background to Regulation 2641/84 leaves no doubt that the reference to "international law" is a reference to GATT'.[83] Likewise, in *Nakajima*, the ECJ stated that the New Basic Anti-Dumping Regulation 'was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code'.[84] Thus, the Court did allow

[80] *International Fruit Company*, *supra* note 3, at 1227.

[81] *Ibid.*

[82] Kuilwijk actually implicitly recognizes the possibility of consistency in the Court's direct effect analysis by virtue of the fact that he examines the same four criteria in analysing both the other international agreements and the GATT 94. Kuilwijk, *supra* note 2, at 106. However, the necessity to prove his thesis that the Court is deliberately protectionist prevents him from fairly acknowledging the differences in the two types of agreements and noting the consistency of the Court's analysis.

[83] *FEDIOL III*, *supra* note 3, at 1805.

[84] *Nakajima*, *supra* note 9, at 2178.

the Community institutions to determine when they wished to be explicitly bound to the GATT 47 obligations in the Community legal setting.

This position may have been entirely appropriate, however, given the structure of the GATT 47. If the GATT 47 contracting parties had truly wished to have private rights of action for the agreement then they would have negotiated provisions guaranteeing such rights or at least would have provided greater specificity with respect to the domestic implementation of the agreement's provisions.[85] As Hudec has noted, while courts can certainly aid in the furtherance of an existing trade policy, governments must actually fully commit themselves to a policy before courts can perform the substantive function of judicial review.[86] Because the GATT 47 contracting parties had not committed themselves to direct effect, the ECJ's hands were not tied. In this situation, it may have been entirely appropriate for the Court not to require direct effect but instead to leave the policy choice to the Community institutions.[87]

This situation has not changed with respect to the GATT 94. The GATT 94 still does not require direct effect and the US and Japan continue to deny the agreement direct effect. The Community institutions also continue to make their opposition to direct effect clear. The Commission proposal concerning the implementation of the Uruguay Round agreements stated that

> it is important for the WTO Agreement and its annexes not to have direct effect [because] without an express stipulation of such exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries.[88]

The Council endorsed this proposal in its decision approving the conclusion of the WTO agreement and its annexes.[89] Thus, the Community institutions continue to express a desire for the GATT 94 not to have direct effect except in the specific instances in which they declare that they do desire direct effect.

The Court's policy position does not necessarily lead to a situation in which the Community institutions have completely unfettered discretion in the exercise of foreign trade policy.[90] The ECJ can still hold that direct effect does exist after a panel

[85] See, e.g., Hilf and Petersmann (1993), *supra* note 11, and Hauser, 'Foreign Trade Policy and the Function of Rules for Trade Policy Making', in Dicke and Petersmann, *supra* note 36, for discussions of this possibility.

[86] Hudec, 'The Role of Judicial Review in Preserving Liberal Foreign Trade Policies', in Hilf and Petersmann (1993), *supra* note 11.

[87] That is, the direct effect decision may fall into an area of law and politics where it is perhaps appropriate for the ECJ to carefully reflect on the political acceptability of its decision. See, e.g., Everling, 'The Law in the External Economic Relations of the European Community', in Hilf, Jacobs and Petersmann, *supra* note 11, at 98, and Lee and Kennedy, *supra* note 11, at 88, for general discussions.

[88] COM(94) 414 final.

[89] Council Decision 94(800) EC, OJ 1994 L336 (22 December 1994).

[90] See Petersmann, *Constitutional Functions*, *supra* note 63, for the argument that the Court's position does lead to a situation in which the rule of law has been abandoned. He claims that it is a mistake to reject stricter constitutional and judicial controls on foreign trade policy powers on the grounds that a constitutional democracy needs unfettered powers to survive in a world of international power politics. He concludes that the lack of an effective foreign policy constitution can even undermine the effectiveness of the domestic policy constitution.

and WTO Appeals Body ruling. This would allow individuals and Member States to enforce the Community's GATT 94 obligations as determined by the WTO, while preventing them from denying the Community of its rights under the agreement. Thus, the Court would be responsible for ensuring that the Community does either alter its law, or provide compensation if permissible, after the WTO ruled that the Community was in violation of GATT 94 law.

In fact, granting direct effect to the GATT 94 could lead to a serious problem of interpretive coherence under the agreement. If individuals were allowed to litigate GATT 94 provisions in national courts this could lead to interpretations of the agreement which are valid only within a certain member's national courts. For example, in the absence of a definitive panel ruling addressing a certain issue, two different members' national courts could reach contradicting rulings on identical issues. This is especially likely given the fact that the DSU does not contain provisions allowing national courts to make references to a WTO Appeals Body to answer interpretive questions.[91] Thus, it may be best for the consistency of GATT 94 law to leave all interpretations of the agreement to panel and Appeals Body rulings.

Such a system would not necessarily weaken compliance with the agreement. *Germany v. Council*, which led to the reconsideration of the Court's denial of direct effect in the first place, demonstrates the Community's desire to comply with its obligations once they are firmly established by panel and Appeals Body rulings. On 5 September 1997, the Community lost its appeal of the panel ruling which held that the Community's banana regime violated the GATT 47. At this time, Community officials stated that the Community would abide by the Appeals Body ruling.[92] However, the Community was not able to develop a new banana regime which was GATT 94 compatible by the 16 October 1997 deadline for submitting a proposal to implement the WTO ruling. At this time, the Community cited the complexity of the banana regime for its failure to implement the ruling and stated that it might decide to pay compensation instead.[93] In either case, though, the Community clearly expressed a desire to remedy its violation.

On 14 January 1998, the Community did propose a new banana regime, which it claimed satisfied all of its GATT 94 obligations. On 13 February 1998, however, the six original plaintiffs in the panel ruling issued a declaration stating that this proposed regime still violated the GATT 94.[94] Given the complexity of implementing panel rulings by means of specific performance, as illustrated by the banana dispute, it may well be wise for the Court to deny direct effect for the GATT 94 until panel and Appeals

[91] This problem may become even more troublesome when one considers the fact that individuals do not have intervenor rights in GATT 94 disputes. The lack of a right for an individual affected by a trade dispute to be heard by a panel deciding the dispute could be used to bolster the argument that a national court should not be bound by a panel report. This could then lead to further interpretive divergence if individuals litigated GATT 94 provisions in national courts via direct effect. Of course, one must admit that individuals do have the right to petition their member governments and have domestic means by which they can express their positions in trade disputes.

[92] 'Bananas: EU Agrees to Abide by WTO Ruling', *European Report*, 29 September 1997.

[93] 'EU Requests "Time to Think" over WTO Banana Ruling', *European Report*, 18 October 1997.

[94] 'EU Agriculture Ministers Seek Second Opinion on Bananas', *European Report*, 18 February 1997.

Body rulings have been made. This would not necessarily prevent individuals or Member States from suing the Community to enforce compliance with specific rulings. It would only appropriately leave the possible choice of remedy up to the Community. Thus, it is not clear that the Court's denial of direct effect prior to a WTO ruling necessarily proves that the Court acts with protectionist motives.

4 Political Economy Analysis

According to the GATT 47 preamble, the members agreed to the formation of 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'. The principles of reciprocity and non-discrimination are operationalized by means of the Most Favoured Nation (MFN) and the National Treatment (NT) requirements of GATT 47 Articles 1 and 3. Substantial reductions in tariffs and other trade barriers are achieved through the periodic rounds of negotiation required by Article 28 *bis* and are recorded in binding schedules under Article 2. Finally, WTO Agreement Article 2(1) provides a 'common institutional framework' for the management of trade and commercial relations among the GATT members. Thus, the Uruguay Round Agreements created the structure necessary to facilitate and operate a liberalizing multilateral world trading regime.

Given the GATT 47's purposes, the ECJ's critics have complained that denying direct effect both prevented the Community from obtaining the full economic welfare benefits possible under the agreement and denied individuals the protection of the fundamental rights provided by the agreement.[95] Kuilwijk extends this critique by arguing that the Court 'for the sake of the sacred political balance, has failed to strike an acceptable balance between protection of individual rights and protection of the public interest' in the area of foreign trade policy, while it has not done so with respect to the Community's internal market.[96] Thus, Kuilwijk concludes that direct effect is necessary 'not only [as] a matter of sound economics but also, and first and foremost, [as] a matter of justice'.[97]

A *Differences between GATT and Community Fundamental Rights*

One must carefully consider the nature of individual rights in the GATT 94 before drawing comparisons with the Community internal market. First, whether the GATT 94 protects individual rights depends on the extent to which national implementing legislation provides individuals with the ability to claim rights under the agreement.[98] Since the agreement does not provide for direct effect itself and most members deny direct effect, it may be assuming what one wants to prove to claim that direct effect is

[95] See, e.g., Hilf and Petersmann (1993), *supra* note 11, and Hilf and Petersmann (1991), *supra* note 11.

[96] As with his motive analysis, Kuilwijk argues that this occurs because the Court does not wish to inhibit the Community institutions' ability to conduct a protectionist foreign trade policy. Kuilwijk, *supra* note 2, at 257.

[97] Kuilwijk, *supra* note 2, at 258.

[98] See, e.g., Tumlir, *supra* note 11.

necessary to protect individual rights. It is the very existence of direct effect itself which determines whether individual rights actually exist within the GATT 94. Thus, the proper inquiry is to determine whether the members' mutual promises to respect the agreement's rules is intended to create rights for individuals in the manner of the EC Treaty.

Second, it is not entirely clear that the GATT 94 embodies individual rights in the same form as they exist within the Community's internal market. For example, the Community right to non-discrimination requires the equal treatment of all traders unless discriminatory treatment is objectively justified.[99] Although GATT 47 Article 13 prohibits discriminatory treatment of like products, there are several exceptions to this general principle. Most noticeable are the anti-dumping and countervailing duty regimes.[100] Article 24 also permits an exception to the MFN principle for regional trade blocs. Because these exceptions effectively allow members to distinguish between traders, the agreement may sanction instances of discrimination which would not be permitted within the Community.

The principle of proportionality is used within the Community to analyse the efficiency and effects of Community regulations when determining their validity under the EC Treaty.[101] While the GATT 47 generally imposes stricter limitations on the use of trade policy instruments as they become less economically efficient, it is not clear that this is based on as rigid a principle of proportionality as is observed in the Community. For example, although Article 11 outlaws the quota form of protectionism in favour of the less distorting and more transparent tariff form, there are also

[99] See, e.g., Case C-177/90, *Ralf-Herbert Kühn v. Landwirtschaftskammer Weser-Ems*, [1992] I ECR 35. The Court has stated that discrimination results from either 'treating differently situations which are identical, or treating in the same way situations which are different'. Case 8/82, *Hans-Otto Wagner v. Bundesanstalt für landwirtschaftliche Marktordnung*, [1983] ECR 371, at 387.

[100] Not only do these regimes permit discretionary treatment, but they also cannot be justified on efficiency grounds. For example, anti-dumping duties may be imposed on imported products merely upon a showing of price discrimination. If anti-dumping duties were designed strictly on economic efficiency grounds, they would only be allowed upon a showing that imports were being priced at less than their average variable cost of production because this would indicate that foreign exporters were engaged in predation. The strongest rationale for the current anti-dumping duty regime is that it serves as a safety valve to vent protectionist pressures. Trebilcock and Howse, *supra* note 44, at 115–119. If the members really want to deal with predation, then they should negotiate competition rules. Michael Leidy, 'Antidumping: Solution or Problem in the 1990's', in IMF, *International Trade Policies: The Uruguay Round and Beyond* (1994).

Likewise, a country imposing countervailing duties is not required to prove that a foreign government's subsidies cost more than the benefits they ultimately produce. Instead, duties may be imposed merely on a showing that the subsidized imports have caused material injury to similar situated domestic producers in the importing country. Thus, countervailing duties serve as an inefficient means of dealing with the distributive effects caused by liberalized trade. Trebilcock and Howse, *supra* note 44, at 152–153. Instead of countervailing duties, direct transfer programmes such as labour adjustment assistance payments would be a more efficient means of dealing with these distributive effects.

[101] See, e.g., Case 114/76, *Bela-Mühle Josef Bergmann v. Grows-Farm*, [1977] ECR 1211. The Court has used this principle to determine 'in the first place, whether the means [a Community law] employed to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement'. Case 66/82, *Fromancais v. Fonds d'orientation et de regularisation des marches agricoles (FORMA)*, [1983] ECR 395, at 404.

several exceptions to this requirement.[102] Article 12 permits quantitative restrictions in response to a serious balance of payment problem and Article 18 allows LDCs to impose quantitative restrictions for infant industry reasons. Thus, it appears that the agreement permits inefficiencies which would not be allowed within the Community.

Finally, the Community and the GATT 47 principles of undistorted competition may not be equivalent. While the Community is intended to create a single unified market, the GATT 47 merely attempts to create a multilateral trading system based on the principle of reciprocity.[103] The GATT 94 members do not have to adopt harmonized trade rules but merely must exchange what they view to be equal trade benefits. As noted above, there are several instances in which unilateral and discriminatory trade actions are permitted. And one of the largest problems with the GATT 94 is the lack of a competition policy regime.[104] Thus, the members retain a measure of national control which allows them to affect competitive conditions to a greater extent than the Community Member States can.

The foregoing arguments are not meant to deny that the GATT 94 has significant effects on individuals. They are merely intended to show that the nature of individual rights in the GATT 94 may differ from that in the EC Treaty. After all, the ECJ has never held that the GATT 47 'is more than an agreement which creates mutual obligations between the contracting states'[105] as it has for the EC Treaty. Thus, one should be careful about assuming that the Community concept of direct effect should automatically be extended to the GATT 94 in order to protect individual rights. Instead, one should engage in a thorough analysis of the actual nature of the obligations contained within the GATT 94 to determine the appropriateness of direct effect.

B *The Place of Individuals within the GATT*

When considering the nature of the GATT 94 obligations in relation to direct effect, it is important to make explicit the political economy view of international trade from which one is operating. Kuilwijk and the Court's other critics generally work from the classical trade theory view which emphasizes the benefits of unilateral trade liberalization.[106] Under this view, unilaterally granting direct effect may indeed be

[102] It should be noted that the Article 11 prohibition against quotas was historically incapable of preventing the rise of negotiated bilateral agreements such as VERs and OMAs which effectively imposed quota systems. Although these measures have been disciplined under the Agreement on Safeguards, the settlement of the US–Japan dispute over cars and car parts under the DSU by means of a bilateral agreement shows that negotiated solutions which result in quota-like regimes may still occur under the GATT 94.

[103] Kuilwijk claims that the Community is intended 'directly or indirectly, at the creation of a level playing field'. Kuilwijk, *supra* note 2, at 231. As anyone familiar with trade theory will recognize, this is a very problematic statement because a truly level playing field in the sense of equal conditions across all countries, results in a situation where trade is no longer beneficial to any country. Thus, it is not clear what to make of Kuilwijk's claim.

[104] See Trebilcock and Howse, *supra* note 44, at 122-124.

[105] Case 26/62, *Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, [1963] ECR 1, at 12.

[106] See Trebilcock and Howse, *supra* note 44, at 1–6, for a concise yet thorough explanation of this theory.

beneficial and necessary because it would produce welfare benefits for individuals in the Community and help protect the individual rights of both Community consumers and traders.

The GATT 94, however, is ultimately an agreement regulating the rights and obligations of its members, not of individuals. The preamble to the GATT 47 states that the members, as sovereign states, recognize

> that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

These are goals which can only be achieved and evaluated on a macroeconomic basis with respect to the members themselves and not on a microeconomic basis with respect to individuals.

The concluding remarks contained in the second panel decision concerning the Community banana regime are revealing. The panel stated that it

> wishes to point out, however, that the Contracting Parties have at their disposal other procedures under the General Agreement ... that are designed to allow Contracting Parties to take into account, in the view of the Panel, economic and social considerations. The adoption of this report would not prevent the Contracting Parties from taking action under any of these Articles.

Thus, the panel made its ruling on the validity of the Community's banana regime without regard to the economic and social consequences on individuals.

This emphasis on the members as opposed to individuals is inherent in several of the agreement's founding principles. For example, non-discrimination within the GATT 47 means non-discrimination between members and not non-discrimination between individual traders in different member countries. In fact, it would be impossible to ensure that discrimination did not occur between individual traders across members because natural differences in the factor endowments and technology of different members automatically produce differences in the competitive positions of their traders. And without these differences in factor endowments and technology, international trade would not produce economic welfare gains at all.

The Uruguay Round Agreements confirmed that reciprocal and multilateral negotiations between sovereign members form the basis for all trade agreements. This emphasis on reciprocity has been severely criticized for the negative effects it may have on trade liberalization efforts.[107] One should realize, however, that the GATT 47

[107] Kuilwijk states that reciprocal trade negotiations are a 'costly farce' designed to 'win domestic political support from important export industries'. He concludes that 'reciprocity never may be viewed as an exchange of economic gains, because this would suggest that liberalization entails economic costs' and that reciprocity is only an 'exchange of domestic political support among governments'. Kuilwijk, *supra* note 2, at 128–129. Kuilwijk's 'costly farce' characterization depends, however, on the assumption that the GATT members would actually unilaterally liberalize their trade policy. As the history of international trade suggests, this is not necessarily guaranteed. Because countries have historically acted in a self-interested and protectionist manner, the reciprocity requirement provides built-in pressures for multilateral trade liberalization. Thus, reciprocity may serve a useful economic purpose by helping to achieve further trade liberalization.

does attempt to mitigate these effects with the MFN principle: that is, the combination of reciprocity and MFN provides an incentive for the exporters in any given member to lobby their government for further tariff reductions on imports. The exporters have an incentive to do this because they know that any reductions in their domestic import tariffs will be matched on a reciprocal basis by not just some, but all the other members. Thus, exporters are harnessed as a trade liberalizing lobbying force to counteract the protectionist lobbying of domestic import-competing firms.[108]

The reciprocal method of negotiating agreements is used, even though non-reciprocal trade liberalization is in the self-interest of each member, because individual members may not be willing to liberalize trade on a non-reciprocal basis.[109] That is to say, it may be necessary for each member to provide some tangible benefit to the others in order for each member to actually accept the entire package of trade liberalization measures. The reciprocity principle helps ensure that these beneficial trades actually do occur by requiring each member to grant a trade concession in order to attain a concession. Given this design, direct effect might actually inhibit further worldwide trade liberalization by allowing an individual to require a member to unilaterally liberalize its trade measures without forcing other members to do the same: that is, direct effect may result in concessions which do not have to be matched by the other members.

In fact, granting direct effect may even allow individuals within a member to directly harm others. The welfare gains which result from free trade occur on an aggregate level for a member as a whole. However, distributive effects occur on an individual level due to labour dislocations resulting from free trade.[110] While it is

[108] Cf. Hauser, *supra* note 85, at 3–4, for an argument that importers are inherently better organized than exporters as a lobbying force because a government cannot secure the benefits which exporters desire, access to foreign markets, without the help of other foreign governments.

[109] In general, unilateral trade liberalization will produce welfare gains for the liberalizing country. Although there are two cases where unilateral trade liberalization is economically inefficient, the optimal tariff and infant industry arguments, these cases require the assumption of a large country with significant market power and are therefore probably unrealistic. Thus, they should not be used to claim that national interests should prevail over individual rights within trade policy. There is a case where limited protectionism can lead to worldwide, not just national, welfare gains. This may occur when external scale production economies are present in a national economy which would allow a national producer to become the most efficient worldwide producer but which cannot be realized currently due to the fact that the producer's initial production level is inefficient compared to the current world production. In this case, limited protection may allow the national producer to achieve the economies of scale necessary to compete in the world market. Once the producer reaches the competitive scale, it will supply the world market at a price which is lower than the current world price. Thus, the world achieves a welfare gain. This argument depends, however, on two limiting assumptions. First, the protected domestic market must be large enough for the producer to achieve the scale needed to compete on the world market. Otherwise, once protectionism is lifted, the producer will not be able to expand to achieve the scale of the most efficient worldwide producer. Second, protectionism must be limited in time and extent to the minimum necessary to allow the producer to achieve the required scale of production. Deciding when and how to end protectionism is much easier in theory than practice. Thus, once again this should not be used to argue that national interests are superior to individual rights.

[110] That is, workers trapped in import competing industries will be hurt by free trade because they cannot shift to the sectors which enjoy additional export opportunities. These trapped workers will suffer a decrease in their real wage and a decline in their standard of living.

theoretically possible to offset these effects with a portion of the overall welfare benefits resulting from a shift to free trade, this is a political decision. Since there is no guarantee that this decision will actually be made, it is possible that direct effect would allow individuals to use courts to force their government to adopt trade policies which harm other individuals without a consideration of the domestic distributive effects.[111]

Given these considerations,, it is clear that one should be cautious about automatically assuming that the GATT 94 should be viewed as a source of individual rights. Much of the language and structure of the agreement is designed with the intent of regulating trade relations between sovereign members which retain the freedom to control their domestic economies. Therefore, it may be appropriate for the Court to refuse to grant legal effect to the GATT 94 until the Community institutions have expressly declared a desire for such effect or until the Community's obligations have been determined by panel and Appeals Body rulings. In the end, the Court has left the question of enforceability of the GATT 94 to the institutions capable of dealing with their distributive effects and reconciling individual rights with the public interest. It is far from obvious that this constitutes a rejection of sound economics or principles of justice.

5 Conclusion

The question of whether the GATT 94 should have direct effect is complex. The GATT 94 is a constitutional agreement like the EC Treaty. However, it adopts a different set of economic goals than the EC Treaty does. The GATT 94 is also an international agreement of the Community. However, it establishes a regulatory structure which is different from that established by the other international agreements into which the Community has entered.

It is also far from obvious that the GATT 94 is intended to protect individual rights. The agreement is specifically designed to manage trade relations between sovereign entities. Thus, perhaps the concept of direct effect which exists for the EC Treaty and the other international agreements should not apply to the GATT 94. After all, one may still respect the rule of GATT 94 law and individual rights domestically without granting direct effect to the agreement.

On the other hand, it must be acknowledged that the agreement does contain clear and precise obligations to which all the members have agreed. The GATT 94 has introduced a dispute resolution system which mandates the resolution of conflicts between members in a rule-based manner. And, in the end, it is true that the effects of the world trade rules are felt by individuals. However, the fact that individuals are ultimately affected by seemingly clear rules should not be enough, by itself, to

[111] See Trebilcock and Howse, *supra* note 44, at 178-183, for a discussion of possible labour adjustment policies and wealth transfer schemes designed to compensate those who lose under free trade. Of course, one could always grant direct effect and then use redistributive measures to mitigate any undesirable effects. Even in this case, however, it is still the case that direct effect introduces a level of complexity into dispute settlement that may not be desirable given the intended operation and current structure of the world trading system.

conclude that there should be individual rights of enforcement. As argued, there are numerous doctrinal, pragmatic and philosophical reasons to refuse direct effect until the members explicitly agree on such a right. Until that time, it certainly is possible, and perhaps logical, to grant a limited form of direct effect which would allow for individual enforcement of any final panel or Appeals Body rulings. But in the end, while the principle of direct effect has made significant contributions to the development of the Community legal system, it may not be appropriate for the GATT 94 and the world trading system.

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