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4-3-2004

# Private parties and WTO Dispute Settlement System

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## Recommended Citation

Alemanno, Alberto, "Private parties and WTO Dispute Settlement System" (2004). *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 1.  
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# **Private parties and WTO Dispute Settlement System**

## **Who bears the costs of non-compliance and why private parties should not bear them**

Alberto ALEMANNO\*

*“The duty to keep a contract ... means a prediction that you must pay damages if you do not keep it-and nothing else”*

Oliver Wendell Holmes, Jr., *The path of the law*, 10 HARVARD L. R. 457 (1897)

### **1. Introduction**

The WTO system, by providing rules addressed to both States and private parties, represents the most sophisticated legal framework ever conceived to govern global trade<sup>1</sup>. Unlike many other international organizations, the WTO has a dispute settlement system characterized by compulsory jurisdiction, strict time frame, automatic decision-making process<sup>2</sup>, and is based on a two-tier mechanism of panels of first instance and an Appellate Body (AB). As stated in the Understanding on rules and procedures governing the settlement of disputes (DSU), the new system, replacing the

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<sup>1</sup> The WTO, established on 1 January 1995, is subsumed and expanded upon the GATT, an international agreement that had regulated international trade since 1947.

<sup>2</sup> The adoption of panel by the DSB cannot longer be blocked by the losing party as it was the case under the GATT system. A refusal of the report is possible only within 30 days of circulation by consensus (thus including also the highly improbable vote of the winning party). See, Articles 16.4 and 17.14 DSU.

old and less rule-oriented GATT settlement mechanism, is a “central element in providing security and predictability to the multilateral trading system”<sup>3</sup>.

However, despite the progressive *judicialization* of the dispute procedure<sup>4</sup>, private parties have no direct access to any of the WTO Geneva-based bodies to complain about government practices that allegedly infringe on a WTO agreement<sup>5</sup>, nor can they rely on rights granted by WTO law before domestic courts, as they lack of direct effect<sup>6</sup>.

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<sup>3</sup> Article 3.2 DSU.

<sup>4</sup> On the evolution of the dispute settlement from a “power-oriented” to a more “rule-oriented” mechanism, see William J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding “Over-Legalization”*, in MARCO BRONCKERS & REINHARD QUICK (eds.), NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, Essays in Honor of John Jackson 291 (Kluwer Law International: The Hague, London, Boston, 2000); the most significant element brought by the reform is the introduction of the so called “automaticity principle” according to which the formation of panels, adoption of reports and retaliation - if a DSB’s ruling is not complied with - are all automatic.

<sup>5</sup> However, in the event of a Member violating WTO rules, private companies can petition their governments to have recourse to the dispute settlement system to challenge the legality of their measures with the WTO agreements. Both the US and the EC have created trade remedy mechanisms that allow private parties to complain about illegal practices of third countries and to request their trade authorities (US Trade Department; the EC Commission), to intervene before the WTO. As for the US trade mechanism, see Fred L. Morrison & Robert Hudec, *Judicial protection of Individual Trade Rights in the US*, in MEINHARD HILF & ENRST-ULRICH PETERSMANN, NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 130 (Kluwer ed., 1993); as for the EC, see Marco Bronckers & Natalie McNelis, *The EU Trade Barriers Regulation Comes of Age*”, 35 J. WORLD TRADE, 427 (2000). For a periodic updates on the operation of the Trade Barriers Regulation in the EU, see [http://europa.eu.int/comm/trade/policy/traderegul/index\\_en.htm](http://europa.eu.int/comm/trade/policy/traderegul/index_en.htm).

<sup>6</sup> In this paper, “direct effect” refers to the possibility of a private person in a WTO Member to base a claim in domestic courts against another private party, or another Member State, relying on an alleged violation of a WTO rule. The literature on the issue of direct effect of WTO rules is extensive and the problem is yet unresolved. For our purpose, it is sufficient to remind that, as a result of the Uruguay Round, both the EC and the US excluded the invocation of any rule of the WTO before national courts as a matter of statutory law. See respectively, Decision 94/800 of 22 December 1994, OJ 1994 L336/1 and 1994 Uruguay Round Agreement Act, 19 USCS §3511, Pub. L. No. 104-305 (1996), §102(c). Several reasons explain why private parties are not allowed direct access to the dispute settlement system, among which: the majority of the Members do not want the organization to lose its intergovernmental nature; Member want to maintain their monopoly in deciding which cases to bring before the DSB; lack of adequate structure and resources. In short, recognizing direct effect to private parties would inevitably hamper the WTO Members’ attempts to defend the national interest by eliminating the flexibility underpinning the whole multilateral trade system. For a canonical overview on direct effect in international law generally, see John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, (1992). More specifically on direct effect of WTO rules, see *ex multis* Jacques Bourgeois, *The European Court of Justice and the WTO*, in GRAINNE DE BURCA & JOANNE SCOTT, THE EU, THE WTO AND THE NAFTA, TOWARDS A COMMON LAW OF INTERNATIONAL TRADE 71, at 115 (Hart publishing ed., 2000); Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MKT. L. REV. 325 (1998) and Francis Snyder, *The Gatekeepers: The European Courts and WTO Law*, 40 COMMON MKT. L. REV. 365 (2003). Among the voices *contra* the recognition of direct effect of both WTO and DSB’s rulings see e.g., Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT’L L. 655, 677 (1999) and Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, (September 12, 2003) at <http://ssrn.com/abstract=444640>

Having this in mind, *quid iuris* when a violation of a WTO agreement has been sanctioned by a panel and/or the Appellate Body? May private business operators invoke the DSB's reports before the courts of the losing member? Are individuals entitled to recover compensation for damages suffered from the non-compliance?

In this paper I will try to provide an answer to these questions, by addressing the neglected, though crucial, issue of the legal status of the WTO Dispute Settlement Decisions in national and regional law.

The question is not merely academic: despite the fact it only arises in pathological situations of non-compliance, this issue is extremely relevant for those private companies who might be affected by the non-implementation of DSB's rulings addressed to countries where they do business. To some extent the question of the legal status of panel and AB reports measures the effectiveness of the new dispute settlement system in promoting security and predictability for all the actors, notably for private companies.

On the one hand, the DSU provides for an obligation to comply with the ruling. On the other, its text offers a range of ways and means of provisional implementation aimed at putting economic and political pressure on Members to withdraw or amend the WTO-illegal measures. According to these rules, instead of complying with the report the losing party may offer to compensate, when immediate withdrawal of the measure is "impracticable". Should this party fail to agree with the winning party on a "mutual acceptable compensation", it can face retaliation under the form of surcharge tariffs<sup>7</sup>. As a matter of fact, these remedies do not result in the resumption of sales of the products or services in the Member maintaining inconsistent WTO measures, rather they tend to raise substantially the trade barriers amongst countries<sup>8</sup>. It follows that, whenever these alternative

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<sup>7</sup> Article 22.1 and 22.2 DSU

<sup>8</sup> In particular, doubts have been expressed as to the effectiveness of retaliation as a temporary remedy for breach of WTO law by several scholars, see e.g. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY:

ways are taken, often as a “traditional option of *realpolitik*” by the governments<sup>9</sup>-, the costs of non-compliance are mainly borne by those private companies directly affected by the WTO violation<sup>10</sup>. The current enforcement mechanism is traditionally depicted as a balanced system of powers whereby the WTO has sufficient power to promote global trade without becoming a threat to representative democracy. Retaliation aims at producing incentives for the exporting groups to lobby against protection measures while allowing the offending member to have the final say on its regulatory policy.

However, retaliation, mainly relying on the unforeseeable outcomes resulting from the activity of interest groups, may not always ensure compliance. Hence, WTO’s member non implementation with DSB’s rulings may hurt innocent firms that find their products barred from the market or subject to higher duties.

This situation amounts to a real denial of justice: why should private companies bear the costs of strategic commercial decisions taken by WTO members without having a right to recover their damages? There exists an anomaly in a system of dispute settlement that ascertains the violation of WTO rules, but whose decisions cannot be invoked before courts by individuals affected by their non-implementation. Henceforth, there is a need to shift the costs of non-compliance with DSB’s reports from the private business operators to the responsible Members.

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COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 109-11 (Harvard University Press: Cambridge and London, 1998); Joost Pauweliyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach*, 94 AM. INT’L L. 335, 338 (2000); Steven Charnovitz, *Rethinking WTO Trade Sanctions*, AM. J. INT’L L., 792, 792-832 (2001) and Robin Nordblad, *Enforcement of World Trade Organization Law*, FINNISH YEARBOOK OF INTERNATIONAL LAW 13 (2002).

<sup>9</sup> Cottier, *supra* note 6, at 364.

<sup>10</sup> For this line of argument, see Edwin Kessie, *Enhancing Security and Predictability for private Business Operators under the Dispute Settlement System of the WTO*, 34(6) J. WORLD TRADE 1, 17 (2000) (stating that “Altough private business operators do not have access to the DSS of the WTO, they are the ones who are most likely to be affected by the inefficiencies of the system” and Charnovitz, *supra* note 12, at 810-11 (arguing that WTO sanctions hurt “innocent ecomic actors” and violate the “basic human right” to “voluntary commercial intercourse”).

Against this backdrop, the real challenge is to accommodate the private parties' interests within the DSS without reducing the discretion that WTO Members enjoy in the implementation of the DSB's reports<sup>11</sup>.

To date, any WTO member's court has recognized the 'invokability' of these reports, by regarding this issue as strictly related to the question of direct effect of WTO obligations. Lacking WTO rules of direct effect, the possibility to invoke DSB's reports before courts is denied. Hence, private business operators cannot recover the damages suffered as a direct result of the non-compliance with a DSB's report<sup>12</sup>.

This paper argues that private business operators, currently bearing all the costs of non-compliance, should be allowed to invoke the DSB's reports before the courts of the losing Member in order to recover the damages suffered as a result of the non implementation with the DSB's rulings. To this end, it will demonstrate that looking at the status of DSB's reports exclusively through the lens of direct effect might be misleading. It will illustrate that the 'invokability' of a DSB's report is a separate conceptual problem from the one of direct effect and how the arguments generally put forward to deny direct effect of WTO rules do not necessarily prevent the recognition of some status to the WTO dispute settlement decisions in domestic law<sup>13</sup>. To provide private parties the right to obtain the recovery of the damages suffered does not amount to the recognition

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<sup>11</sup> A first step toward the opening of the DSS to private parties was made by the Appellate Body's report in the *Shrimps/Turtle* case where for the first time the submission of *amicus curiae* briefs was accepted. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

<sup>12</sup> The finger has really often been pointed at the EC as it still persists in non implementing the *Hormones* ruling. Report of the Appelate Body, *EC – Measures Concerning Meat and Meat Products*, WT/DS26 & 28 (hereinafter the "Hormones case"). However, also the US is refusing to comply with several WTO rulings, such as the "Foreign Sales Corporation", the "Homestyle exemption to copyright rules" and the "Havana club" ruling. See Report of the Appellate Body, *US – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/ARB (Aug. 30, 2002) (hereinafter the "FSC case") and Report of the Appellate Body – Section 211 Omnibus Appropriation Act of 1998 – WT/DS176/9 (hereinafter the "Havana Club case").

<sup>13</sup> In this line of thought see Thomas Cottier, *The impact of the TRIPs Agreement on private practice and litigation*, in JAMES CAMERON & KAREN CAMPBELL (eds.), *DISPUTE RESOLUTION IN THE WTO* 126 (Cameron & May, 1998), who says that the "invokability" of DSB's decision "is a matter entirely different from the issue of direct effect".

of direct effect, but rather it is a matter of recognizing decisions made by and through the WTO system.

The WTO Dispute settlement system would gain both in terms of legitimacy and efficiency by the recognition of the invokability of panel and AB reports before the courts of the losing member ignoring the DSB's ruling. This solution would provide an adequate incentive for Members to comply with their obligations under WTO rules, without depriving them of the discretion they enjoy in the implementation process. In fact, the invokability of these reports aiming at the recovery of damages would not prevent a losing Member from deciding whether to bring its measure into conformity or to have recourse to temporary measures, such as compensation or retaliation. It would rather protect private operators from a situation of possible denial of justice by giving at the same time teeth to the DSS.

While the US<sup>14</sup> and Japan<sup>15</sup> have both systematically ruled out the possibility for an individual to rely on WTO DSB's reports, the European Community (EC)<sup>16</sup>, through its Luxembourg-based courts, has always showed more judicial openness and receptiveness for WTO law<sup>17</sup>.

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<sup>14</sup> In the US “there is virtually no constitutional basis for individual challenges to trade policy measures … The general tendency of federal statutes in the trade policy area is to provide the executive with extremely broad discretion, leaving little room for judicial review”. See Morrison & Hudec, *supra* note 5, at 132.

<sup>15</sup> In Japan, the attitude adopted by the courts toward GATT/WTO rules and decisions seems to be quite prudent. Although DSB's rulings may be invoked in various situations: as “aids in interpreting Japanese domestic trade laws”, or “as evidence supportive of a conclusion reached through the interpretation of the laws”, they cannot be relied upon before courts. See, Yuji Iwasawa, *Implementation of International Trade Agreements in Japan*, in HILF & PETERSMANN, *supra* note 5, at 343; Bourgeois, *supra* note 6, at 115.

<sup>16</sup> The words “European Economic Community” (EEC), “European Community” (EC) and European Union (EU) do not mean the same thing. The EEC was established in 1957 by the Treaty of Rome, but was then radically reformed by the Treaty of Maastricht in 1992, thus becoming the EC. The Treaty of Maastricht also gave rise to a more ambitious supranational project: the EU, based on three “pillars”: the first pillar being the EC, the second and third respectively the EU Foreign and Security policy and the EU Home and Internal Affairs. Under the draft Constitutional Treaty, currently discussed by the Intergovernmental Conference (IGC), the EU's pillar-based system is voted to disappear as a result of the merger of the Treaties in a unique text: the Constitutional Treaty of the EU. The only remaining entity would be the European Union.

<sup>17</sup> Although the Council Decision 94/800 has clearly denied the direct applicability of WTO rules, that issue is by no means settled in the European legal order. Both legal scholars and the European Courts are currently engaged on a lively debate about the legal effects of WTO law in the internal legal order. Such a debate has been triggered by an increasing receptiveness to WTO law by the European Courts. Under their current case law, WTO Agreements could serve as a ground for review in cases where the Community intends to implement a particular WTO obligation (the

This paper will therefore mainly refer to the discourse developed within the EC upon the role of private individuals in the implementation of WTO dispute settlement decisions. The recent attempt made by a French meat trader to recover damages incurred as a result of the EC non-compliance with the *Hormones* decision<sup>18</sup> is provided, throughout the paper, as an example of private parties' involvement in the implementation phase<sup>19</sup>.

A possible opening by the European Court of Justice towards private parties' involvement could strongly influence other relevant WTO implementation *fora*, such as the US and Japan. As private business operators may benefit from such a solution, regardless of their place of incorporation, the European debate over the issue seems to attract great interest in the business world.

## **2. A brief overview over the DSS: who bears the costs of non-compliance?**

Before turning to the issue of private parties' involvement within the DSS, through the analysis of the *Biret* case in the broader context of the *Hormones* dispute, it is necessary to briefly describe how the dispute settlement works and, accordingly, which is its nature: conciliatory, diplomatic, political or legal?<sup>20</sup>

The DSU, governing the new dispute settlement system, provides specifically for a set of norms related to the implementation of Panel and Appellate Body decisions<sup>21</sup>.

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*Nakajima* doctrine: Case C-69/89, Nakajima All Precision Co.Ltd., v. Council, 1991 E.C.R. I-2069), or if a Community act expressly refers to specific provisions of the WTO Agreements. (the *Fediol* doctrine: case C-70/87, Fediol v. Commission, 1989 E.C.R. 1781).

<sup>18</sup> See *supra* note 12.

<sup>19</sup> See Case T-174/00, Biret International v. Council, 2003 not yet published on E.C.R. and the appeal against this judgement, case C-93/02, Biret International v. Council, 2003 not yet published on E.C.R.

<sup>20</sup> See Andrew T. Guzman & Beth A. Simmons, *To settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 303 (2002) for an insightful (empirical) analysis of the dynamics underpinning the DSS.

<sup>21</sup> Articles 16.4 and 17.14 DSU.

Before being adopted by the Dispute settlement body, Panel and AB reports do not have any direct binding effect on Members, but they are instead mere recommendations. Once a recommendation has been adopted by the DSB<sup>22</sup>, the losing party has primarily an obligation to bring the unlawful measure into conformity with WTO law<sup>23</sup>. At a DSB meeting scheduled within 30 days after the date of adoption, the losing party has a duty to inform the DSB of its intentions in respect of implementation of the recommendations<sup>24</sup>. Article 21.1 underlines the importance of prompt compliance with recommendations and rulings of DSB “to ensure effective resolution of disputes to the benefit of all Members”.

Secondly, when it is “impracticable” to comply immediately, the Member has a “reasonable period in which to do so”<sup>25</sup>. This period of time may be either proposed by the Member, provided that it is approved by the DSB, or “mutually agreed” by the parties to the dispute within 45 days of the date of the adoption of the recommendation<sup>26</sup>. If the reasonable period of time for implementation is not determined in one of these two ways, provision is made for that period to be decided through binding arbitration within 90 days of adoption. However, such a limit period for implementation cannot exceed 15 months<sup>27</sup>. The determination of the duration of this period is relevant to the extent that, lacking an obligation to retroactively remedy any offending measure, the calculation of nullification and impairment commences from the expiry of the reasonable period<sup>28</sup>.

Thirdly, the DSB has to keep under surveillance the implementation of the adopted recommendation<sup>29</sup>. Issues of implementation may be raised at the DSB by any Member at any time

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<sup>22</sup> Adoption occurs according to a “reverse consensus” rule: adoption occurs automatically, unless the DSB (all Contracting States) decides by consensus to reject the report. Currently depending on whether or not an appeal is lodged, a case may take around 12-15 months before the adoption of the final report. See Article 20 DSU.

<sup>23</sup> Article 19.1 DSU.

<sup>24</sup> Article 21.3 DSU.

<sup>25</sup> Article 21.3 DSU.

<sup>26</sup> *Id.*

<sup>27</sup> Article 21.3(c) DSU.

<sup>28</sup> Except in the case of prohibited subsidies.

<sup>29</sup> Article 21.6 DSU.

following their adoption. Implementation is to remain on the DSB's agenda until the issue is resolved. Article 21.5 establishes then a mechanism for dispute resolution (compliance panel) when there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply to with recommendations and rulings.

But what happens when the losing party fails to bring measures into conformity with the adopted report within a reasonable period of time? How should the courts deal with a persisting inconsistency of the domestic measure with WTO obligations?

Remedies within the WTO are prospective: they do not aim at punishing the offending member, but they rather tend to readjust trade relations so that the complainant will not suffer further losses. There are basically two “temporary” measures that a successful complainant may seek: it may ask either for compensation or for suspension of concessions (countermeasures)<sup>30</sup>. Both these instruments are temporary measures available exclusively in the event that the recommendations are not implemented within a reasonable period of time<sup>31</sup>. They operate according to the following scheme: a member failing to comply within the time limit “shall, if so requested” enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing a mutually acceptable compensation. If those negotiations do not lead to an agreement between the parties, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements<sup>32</sup>.

A first problem that may arise in this situation is to determine the level of suspension. If the losing party objects to the proposed level of suspension, it may call for an arbitration proceeding

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<sup>30</sup> Although the DSU refers to suspension of concessions, in the trade jargon this remedy is generally described as countermeasure or retaliation act.

<sup>31</sup> Article 23 DSU.

<sup>32</sup> Since 1995, the DSB has allowed retaliatory measures in several transatlantic cases, such as those on bananas, hormone-treated beef and Foreign Sales Corporations. See *supra* note 12. However, actual countermeasures have been adopted only in the *Bananas* and in the *Hormones* cases.

aiming at establishing whether the level of suspension is legal and appropriate with reference the WTO violation. A second problem one may face with this “temporary” measure is then to determine in which sector the suspension of concessions should occur. Under the DSU, the preferred option is that retaliation should be in the same trade sector and under the same WTO agreement where the violation occurred<sup>33</sup>. However, if the complaining party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector, cross-retaliation may be authorized in another trade sector or under another agreement that those where the WTO violation took place<sup>34</sup>.

Who loses and who wins from the adoption of “temporary” implementation measures?

While these two temporary measures have been designed to facilitate and foster compliance with the report, the beneficiaries are likely to be companies that have not been affected by the original WTO violation. Compensation<sup>35</sup>, consisting generally in charge reduction and applying on a multilateral most-favored-nation basis, favors all companies operating in the market and benefiting accordingly from the reduction. Countermeasures, although disfavoring consumers in the applicant country (who will pay higher prices for the targeted products), tend to protect the domestic and foreign providers of products competing with those targeted by the measure as they reduce considerably the level of competition in the market<sup>36</sup>.

Who are then those affected by the adoption of these “temporary” implementation measures?

We may distinguish between two categories of economic operators. First, private companies in the complaining Member whose exports continue to not receive the benefits that are normally entitled

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<sup>33</sup> Article 22.3 (a) DSU.

<sup>34</sup> Article 22.3 (b) (c) DSU.

<sup>35</sup> To our knowledge, parties to a dispute have only once agreed on compensation: *US – Section 110(5) of the US Copyright Act*, WT/DS160/ARB25/1.

<sup>36</sup> For an analysis of the economic effectiveness of retaliation acts, see Robert Hudec, *Broadening the scope of Remedies in WTO Dispute Settlement*, in FRIEDL WEISS, IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES 369, 387 (Cameron & May, 2000) and Peter Van den Bossche, *The Doha Development Round Negotiations on the Dispute Settlement Understanding*, Institute for International Law, U.K. Leuven Faculty of Law, Working Paper N. 47, available at <http://www.law.kuleuven.ac.be/iir/nl/wp/WP47e.pdf>

to and, secondly, those companies in the respondent countries that are affected by the retaliatory measures (retaliation and cross-retaliatory measures). Therefore the only remedy that all affected private parties would aim at is the withdrawal of WTO-inconsistent measures, as it would result in the resumption of exports<sup>37</sup>.

In short, when a WTO Member ignores the ruling, private companies run the risk of not being protected by a system that on the one hand make them bear all the costs of non-compliance and, on the other, does not allow private parties to rely on the DSB's decisions before any court.

### **3. A case study: the non-implementation of the *Hormones* rulings and private parties**

To fully understand the (non) role played by private business operators in the DSB's reports implementation process, we will turn to those companies that have been directly affected in their business by the famous *EC-Hormones* dispute<sup>38</sup>. This case is probably the one that, by highlighting what may be perceived to be a limitation on the effectiveness of the current WTO dispute settlement system, best illustrates the tensions within the WTO system between private operators and WTO members<sup>39</sup>.

In this case both the panel and the Appellate Body found the European legislation, originating in the 1980s and restricting the imports of hormone-treated beef, in violation of the SPS Agreement<sup>40</sup>,

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<sup>37</sup> As Allan Rosas noticed: "(suspension of concessions) restricts rather than promotes trade, while hurting companies which have nothing to do with the subject matter of the dispute, including companies of the complaining party", *Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective*, J. INT'L ECONOMIC L., 131, 143 (2001).

<sup>38</sup> Panel Report, *European Communities – Measures concerning meat and meat products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997); Appellate Body Report, WT/DS26/AB/R.

<sup>39</sup> See Daniel Wuger, *The Never Ending Story: The Implementation Phase in the Dispute between the EC and the US on Hormone-treated Beef*, LAW & POL'Y INT'L BUS., at 777, for a detailed reconstruction and insightful analysis of the dispute.

<sup>40</sup> Annex 1A to the Agreement Establishing the World Trade Organization.

essentially on the ground that it was not based on a complete risk assessment analysis of the cancer risks associated with the use of certain hormones as growth hormones<sup>41</sup>. Because the EC failed to meet the deadline to comply with the report, the complaining parties (US and Canada) were authorized by the DSB to impose retaliatory measures in the form of punitive tariffs on certain products exported into their respective territories by the EC<sup>42</sup>. The EC, maintaining its ban until today, is currently facing heavy retaliatory action. European exporters of luxury products - ranging from French cheese producers to Italian handbag manufacturers<sup>43</sup> - are those most affected by the economic sanctions.

Although this measure was meant to restore the balance of concessions established between the parties during the Uruguay Round, it raised substantially the trade barriers between the two countries by damaging not exclusively those companies who do not receive the benefits that are normally entitled to under the WTO Agreement (essentially the hormone-treated beef importers), but also those private companies exporting from the EC into the US that have nothing to do with the original complaint (mainly luxury goods producers)<sup>44</sup>. In addition, it must also be noted that, some months after the USTR increased tariffs, the US Congress enacted Section 407 of the Trade and Development Act of 2000 (the “*Carousel Legislation Act*”) allowing the US trade authorities to rotate the products contained in the retaliation list when a country does not comply with the DSB

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<sup>41</sup> More precisely, the WTO Appellate Body reversed most of the findings of the panel. The WTO Appellate Body only upheld the finding that prohibition of imports of meat from hormone-treated animals to the EU did not comply with the requirement that such a measure should be based on a relevant assessment of the risks to human health.

<sup>42</sup> The World Trade Organization had allowed the US, which used to ship \$500 million of beef to the European Union annually, to impose punitive tariffs on EU goods worth \$117m (€101m) a year in 1999. Canada has been authorized to retaliate for the amount of 11 million US dollars.

<sup>43</sup> The sanctions targeted several European delicacies such as Roquefort cheese, Danish ham, German chocolate and French mustard.

<sup>44</sup> Having the US beef industry been severely damaged by the EC ban, it has been proposed to allocate the income obtained from the application of the retaliatory measures to these companies through the establishment of a Beef Industry Compensation Trust Fund. See Trade Industry Compensation Act of 2000, S. 2709, 106<sup>th</sup> Cong. § 2(7) (2000).

ruling<sup>45</sup>. The legislation attempts to put pressure on the foreign governments, through their domestic exporters, to bring their measures into conformity with the WTO Agreements<sup>46</sup>. It follows that a growing number of economic operators have been heavily affected by the EC non-compliance with the WTO final ruling.

Lastly, the EC has issued a new *Hormones directive* that has in essence upheld the WTO-illegal restrictions to the imports of hormones<sup>47</sup>. Although the EC claims that this legislation is now WTO-compatible - being based on new scientific evidence -, the US has already voiced its opposition to this new text by arguing that it would still be contrary to WTO law<sup>48</sup>. It is therefore highly probable that the question could go back to the WTO in the next months<sup>49</sup>.

Meanwhile, a growing number of companies are heavily affected by the EC non-compliance with the report.

#### **4. The *Biret* case or “how to take WTO law seriously” within the EC legal order**

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<sup>45</sup> US Pub. Law 106-200, 18 May 2000, 114 Stat. 251, Sect. 2. The EC immediately requested consultations under Article 4 of the DSU arguing the “Carousel legislation” was against the DSU as it allowed unilateral suspension of concessions that had not been authorized by the DSB. However, after an agreement was reached in the Bananas case, the EC did not go further in the proceedings thus leaving the issue of the legality of this measure still open.

<sup>46</sup> On the “Carousel legislation”, see Alberto Alemanno & Carine Moquart, *La loi carrousel: dernier développement du conflit entre Etats-Unis et l’Union européenne*, LETTRE DU DROIT DU COMMERCE INTERNATIONAL 3 (2000).

<sup>47</sup> Directive 2003/74/EC implementing the WTO ruling, entered into force on 14 October 2003. EU Member States must implement it within 12 months of its entry into force.

<sup>48</sup> See, Press Release of the EU Commission, 15 October 2003, *EU complies with WTO ruling on Hormone beef*, [http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr151003\\_en.htm](http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr151003_en.htm)

<sup>49</sup> On the possible outcomes of the *Hormones* dispute, see Daniel Wger, *supra* note 38, at 17. The European Communities asked Canada and the US on December 1, 2003 to initiate a compliance procedure to assess the WTO consistency of the EC's new measure in the hormone-treated beef case but Canada and the US said that they would rather hold further discussions. See, WTO DSB press release, at [http://www.wto.org/english/news\\_e/news03\\_e/dsb\\_1dec03\\_e.htm](http://www.wto.org/english/news_e/news03_e/dsb_1dec03_e.htm)

The *Biret* judgment represents one of the most representative cases showing the tensions currently existing within the DSS's implementation process between Members and its business economic operators<sup>50</sup>.

#### **4.1 Facts and the CFI's judgment**

In June 2000, *Biret International*, a French trader of meat, filed an action before the Court of first instance (CFI) seeking compensation for the damage which it claimed to have suffered as a result of the adoption and maintenance in force of the European ban on the import into the Community of meat and meat products from cattle treated with certain hormones.

The plaintiff, relying on the WTO Hormones decision condemning this ban as violating WTO law, asked the Court to hold the EC liable for the non-implementation of the report under Article 228 of the EC Treaty (ex Article 215)<sup>51</sup>.

*Biret* based his action on two arguments. First, it contended that since 1 January 1995 (date of entry into force of the WTO Agreements) the European hormones regime has conflicted with the WTO agreements, particularly with the SPS. Secondly, it stated that this case would fall outside the scope of the classic case law denying direct effect to the WTO Agreements as the violation was "subject of express criticism on the part of the DSB" and was "permanent" since "the EC has expressed its intention to maintain the embargo despite the current state of scientific research"<sup>52</sup>. In

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<sup>50</sup> Although not issue of first impression, the ECJ and the CFI have been confronted only twice with individual's actions based on DSB's reports pronounced against the EC. In both cases, the applicants relied on the WTO Appellate Body Report in the *Bananas* case. See supra note 30. In the first case, the ECJ dismissed the claim on procedural grounds (Case C-104/97 P, *Atlanta AG v. European Union*, [199] ECR I-6983), and in the second the CFI rejected the claim as unfounded relying on the fact that in the meanwhile the EC amended its regulation bringing it into compliance with the DSB's report (Case T-254/97, *Fruchthandelsgesellschaft mbH Chemnitz v. Commission* [1999] ECR II- 2743).

<sup>51</sup> According to EC's settled case law, in order for the EC to be held "non-contractually" liable, a number of conditions have to be met: a) the conduct of the EC institutions must be unlawful; b) there must be a real and certain damage c) there must be a causal link between the conduct of the institution concerned and the alleged damage. In the present claim, the central question is to determine whether the EC's attitude vis-à-vis the Hormones decision satisfies, in the light of the ECJ's case law, the unlawfulness requirement.

<sup>52</sup> Supra note 19.

other terms, the plaintiff asked the Court to examine the issue of invokability of DSB's reports irrespective of the direct applicability of the WTO Agreements.

However, the Court of first instance dismissed the action for damage by referring to the “firmly established case-law” denying the right of individuals to rely on WTO rules before the European Courts<sup>53</sup>. It then added that the “decision of the DSB of 13 February 1998 [...] cannot alter” this conclusion.

According to the Court,

“There is an *escapable and direct link between the decision and the plea alleging the infringement of the SPS Agreement*, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question”<sup>54</sup>.

Although suggested by the applicant to examine the two issues separately, the Court, in line with its traditional case law, treated the invokability issue as strictly related to the question of direct effect of WTO rules. It then emphasized *ad colorandum* that

“the purpose of the WTO Agreements is to govern relations between States or regional organizations for economic integration and not to protect individuals”<sup>55</sup>.

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<sup>53</sup> Id., ¶ 61.

<sup>54</sup> Id. ¶ 67.

<sup>55</sup> Id. ¶ 62.

## **4.2 The Advocate General's opinion**

Biret introduced an appeal against the CFI's judgment, thus giving the Advocate General (AG) the opportunity to deliver an opinion on the matter<sup>56</sup>. Surprisingly, the Advocate General Alber sided with the applicant, by advising the ECJ to recognize the possibility of individuals to invoke DSB's reports and, accordingly, to hold the EC liable for failure to implement the *Hormones* ruling.

How did the AG come to this "revolutionary" conclusion?<sup>57</sup>

The AG started his opinion by analyzing in great detail the Dispute Settlement Dispute's mechanisms. Relying on Art. 22 of the DSU, the AG took the position that WTO Members do not have other (legal) choice than to comply with the adopted reports<sup>58</sup>. The recognition of a "direct effect" to a Panel and/or Appellate Body's ruling – he proceeded - would not reduce the margin of discretion that WTO Members enjoy in the implementation process, as there is no room for further negotiations<sup>59</sup>.

Moreover, even if the implementation of DSB's rulings and recommendations requires the adoption of a legislative act, the European Community has not adopted during the last four years any acts following the expiration of the reasonable period of time accorded to comply with the decision. Against this backdrop, the AG wondered whether *Biret* should face this situation without

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<sup>56</sup> The task of the Advocate General is to propose to the Court, in complete independence, a legal solution to the case in question. Its Opinion does not bind the Court of Justice. See, Opinion of Advocate General Sigbert Alber in case C-93/02, *Biret International v. Council*, delivered on 15 May 2003, not yet published on E.C.R.

<sup>57</sup> Geert Zonnekeyn, *EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions – Advocate General Alber Proposes a "Copernican Innovation" in the case law of the ECJ*, J.INT'L ECONOMIC L. 6(3), 761-769 (2003).

<sup>58</sup> *Supra* note 53, ¶ 86.

<sup>59</sup> *Id.*, ¶ 95.

any possibility of recovery or should it rather be entitled to invoke the *Hormones* decision establishing the WTO illegality of the ban<sup>60</sup>.

The AG embraced the latter conclusion relying on the existence of a fundamental right of free trade within the EC legal order. According to Alber, it would not only be unfair to refuse to compensate the damages suffered by an individual as a result of the non-compliance - lasting for more than four years - with a DSB's report, but it would also amount to a fundamental right's violation<sup>61</sup>. In addition, he argued that the recognition of the right of individuals to invoke WTO's reports before the courts does not imply *per se* an individual's right to compliance. Private operators would not be able to oblige the European Community to implement the decision in a particular way, but they would simply be allowed to claim damages suffered as a result of the non-compliance. In other terms, the AG made a claim in favor of the invokability of DSB's reports by arguing that this would not reduce the margin of discretion that EC authorities enjoy in ensuring the implementation of the WTO's rulings.

Finally, the AG clearly stated that where a DSB's report establishes a WTO violation and the EC has not complied with the report, within a reasonable period of time, WTO law is "directly applicable"<sup>62</sup>. In other words, the AG clearly addresses a message to the EC legislator: the WTO law has to be taken seriously!

#### **4.3. The ECJ's judgment**

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<sup>60</sup> Id., ¶ 90.

<sup>61</sup> Id., ¶ 92.

<sup>62</sup> Id., ¶ 114.

As announced by some commentators, it was quite unlikely that the Court would have adhered to the AG's position<sup>63</sup>. Therefore the judgment caused no surprise when it rejected the appeal in its entirety<sup>64</sup>.

However, a careful reading of its text shows the will of the Court to bring its classic case law a bit further towards the recognition of some role for individuals in the implementation phase of DSB's reports.

The ECJ first criticized the CFI for having reduced the issue of invokability of the DSB's report to the one of direct effect of WTO rules stating that

“...such reasoning does not suffice [...] to deal with the plea put forward by the applicant at first instance concerning infringement of the SPS Agreement”<sup>65</sup>.

The Court also faulted the CFI for not having considered the EC ban in the light of the *Hormones* ruling since DSB's reports provide grounds for a review by the Community Courts of the legality of EC law<sup>66</sup>.

However, the ECJ, after showing such an unexpected opening towards a possible control upon EC rules under the DSB's findings, ultimately rejected the action since Biret did not suffer any damages after the expiration of the reasonable period of time to comply with the report. Biret went out of business in 1995, while the 15 month-period within which to implement the report elapsed only in May 1999. According to the Court, recognizing a right to recover damages suffered before

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<sup>63</sup> Zonnekeyn, *supra* note 55; at 769.

<sup>64</sup> Among the first reviews to this judgment, see Alberto Alemanno, *Droit de l'OMC, “Biret International”*, 3 REVUE DU DROIT DE L'UNION EUROPÉENNE, (2003); Werner Berg, *ECJ Opens Door to Direct Applicability of WTO Rules in EC Law--a Little*, 12 GERMAN AMERICAN LAW JOURNAL 2003, at <http://www.amrecht.com/berg1.shtml>.

<sup>65</sup> See *supra* note 19, ¶ 56.

<sup>66</sup> Id., ¶ 57.

the end of this deadline would render ineffective the grant of a reasonable period of time for compliance with the DSB's report<sup>67</sup>.

On the basis of these arguments, the Court has rejected the appeal in its entirety. However, in the same judgment, the Court seems to leave open the possibility that individuals may rely on DSB's reports to recover those damages encountered after the expiration of the reasonable period of time within which the EC is supposed to comply.

#### **4. Some reflections on private parties' role in the WTO's report implementation**

Since WTO Agreements fail to supply a satisfactory answer to the question of private parties' involvement in the implementation of DSB's decision, the issue finally boils down to an interpretative question. Lacking a concrete answer to that question into the WTO Agreements, most WTO members' courts have taken a very careful position with respect to this issue. As for the panels and the AB, they have discussed about the status of their reports only in one occasion by stating in an *obiter dictum* that

“Whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute”<sup>68</sup>.

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<sup>67</sup> Id., ¶ 62.

<sup>68</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, (Dec. 22, 1999) [hereinafter Section 301 Panel Report], ¶ 7.72.

To our knowledge, neither national nor regional courts have ever taken into consideration the DSB decisions in their judgments, by recognizing a right to damage to private parties.

Against this backdrop, I turn now to examine the underlying arguments developed both in the literature and in the case law against the recognition the invokability of DSB's reports.

The analysis will illustrate how most of the legal policy considerations that run against such a recognition may be counterbalanced by other arguments in favor of this result.

## **5.1 The arguments *pro* and *con* “invokability” of DSB’s reports**

Which are the main obstacles to the recognition of a right of individuals to rely on DSB's report?

Most of the arguments that have been developed in both the literature and in court against the enforceability of DSB's reports by private parties are strictly interrelated to the issue of direct effect of WTO rules. There is a clear tendency to reduce these two issues to a unique problem.

### **5.1.1 The *contra***

The invokability of DBS's reports has generally been denied on the following grounds.

*a) Direct effect of WTO rules would serve as a pre-condition for the invokability of reports*

According to this argument, lacking WTO rules of direct effect, it would be impossible to recognize a right of individuals to invoke DSB's reports as this would lead to granting a *de facto* direct effect to these rules. In other words, recognizing the invokability of the reports would circumvent the well-established lack of direct effect of WTO rules<sup>69</sup>.

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<sup>69</sup> It is mainly relying on this argument that the ECJ has thus far refused to hold the EC liable for its persisting non-compliance with WTO decisions. See, for instance Case C-104/97 P, Atlanta, [1999] E.C.R. I-6983, ¶ 20. The same argument has also been developed in Japan, see Iwasawa, *supra* note 15, at 337.

As underlined above, this argument leads to a situation in which the absence of direct effect protects the WTO Member who ignores a DSB's reports, thus shifting the costs of non-compliance from the losing Member to the affected private parties.

I do not find this argument persuasive as I conceive the issue of direct effect of WTO rules as conceptually different from the one of invokability of DSB's reports<sup>70</sup>. In the former situation, parties would rely on WTO rules before courts by alleging a violation, whereas in the latter a violation would already have been established. Moreover, it has to be noticed that granting a right of individual to invoke DSB's reports before courts does not amount to the recognition of direct effect to WTO rules as Members would still be free to decide whether or not to comply with the report. In other words, private parties would not be able to oblige the WTO losing Member to implement the decision in a particular way. They would be exclusively allowed to rely on a WTO ruling to seek for damages arisen subsequently to the period within which the losing Member should have complied with the report.

In the *Biret* case, the ECJ would seem to have easily overcome this argument: it looks prepared to consider itself bound by an adopted report irrespective of the direct applicability of the WTO Agreements. Support for this view can be found in one of its landmark judgment, *Francovich*, in which it has been established that the lack of direct effect does not necessarily exclude liability under EC law<sup>71</sup>. It follows that “invokability” and direct effect are two self-contained concepts.

Finally, this argument can be easily reversed by claiming that it is the very fact of lacking of direct effect that justifies the recognition of a right of individuals to rely on WTO decisions. Since

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<sup>70</sup> In the same line of thought, see Cottier, *supra* note 13, at 126 (“this matter is entirely different from the issue of direct effect”) and Thomas Cottier & Krista Nadakavukaren Schefer, *The relationship between the world trade Organization Law, National and Regional Law*, 1 J. INT'L ECONOMIC L. 83, 84 (1998) (“This is an issue which legally speaking is separate from direct effect in the traditional sense”).

<sup>71</sup> Case C-479/93, *Francovich v. Italian Republic*, 1995 E.C.R. I-3843.

WTO rules lack direct effect, the DSB's reports should be enforceable before national courts in order to provide individuals with some judicial protection of the rights they derive from the WTO.

*b) Reliance on the reports would upset reciprocity and the balance of power with major trading partners that deny such an effect ("balance-of-concessions argument")*

This is the "paramount policy argument"<sup>72</sup> developed to refuse direct effect to WTO rules and, accordingly, any other policy increasing receptiveness for WTO law. According to this view, originally developed under the GATT system, the WTO has to be seen as a framework of balanced trade concessions that have been negotiated during several multilateral negotiation rounds. In this framework, should a WTO Member recognize direct effect, or the mere invokability of the DSB's rulings before its courts, this would upset the balance of mutual rights and obligations of that State and the other WTO Members. It follows that as long as any trade power such as the EC or the US do not allow private parties to rely on WTO rules, or on its DSB's rulings, before its courts, most of the WTO Members will deny direct effect or any other form of invokability of these rules.

From a political point of view, a stricter enforcement of WTO rules is seen as potentially detrimental to WTO Member's interests.

The current situation has been effectively described as a deadlock in which "Everybody expects someone else to make a move with the result that nobody moves"<sup>73</sup>.

Arguably the reciprocity principle is relevant not only to deny direct effect of WTO rules, but also to rule out a possible reliance on WTO's decisions before courts. Should the ECJ recognize the EC liable for non-implementing the *Hormones* decision, that would put the Community under

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<sup>72</sup> Piet Eeckhout, *The domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMOM MKT L. REV. 11, 48 (1997).

<sup>73</sup> J. Bourgeois, *supra* note 6, at 116; this situation has also been described as an "impasse in academia and practice" by Cottier & Schefer, *supra* note 67, at 84.

pressure to bring its measures into conformity. On the contrary, if the US continues to persist in non-complying, for instance, with the recent steel decision<sup>74</sup>, it would not be subjected to the same kind of pressure. Henceforth, the EC increased receptiveness to WTO law would upset the reciprocity principle.

*c) DSB's reports would not be binding, but simply one of the implementation options available to the losing member*

According to this argument, the legal status of these reports when adopted is strictly related to the question of the nature of legal obligations deriving from the membership to the WTO and its DSS. As the DSU gives WTO Members the possibility of maintaining the unlawful measures in place beyond the reasonable period of time by allowing compensation or suspension of concessions, it might be argued that full implementation with the DSB's reports would not be an absolute obligation<sup>75</sup>. Hence the question that arises is: are DSB's reports binding upon the parties?

Professor Jackson<sup>76</sup>, one of the most prominent voices in the International Trade arena, has convincingly argued that compensation and suspension of concessions, being temporary measures available exclusively in the event that recommendations are not implemented within a reasonable period of time, do not constitute an exception to complying with WTO obligations<sup>77</sup>. By examining

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<sup>74</sup> Report of the Appellate Body, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R.

<sup>75</sup> The most persuasive formulation of this thesis has been developed by Judith Hipler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 A.J. INT'L L. 416 (1996) who wrote: "[t]he only truly binding WTO obligation is to maintain the balance of concessions negotiated among members". According to this Author, the WTO system has to be seen as a framework of balanced trade concessions that have been negotiated during several multilateral negotiation rounds, rather than as a strictly rule-oriented judicial system. In the same line of thought, see also T.M. Reiff – M. Forestal, *Revenge of the Push-Me, Pull-You: the Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW 755, 763 (1998).

<sup>76</sup> John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 A.J. INT'L L. 60, 63 (1997).

<sup>77</sup> The question whether a Panel and Appellate Body reports, once adopted by the DSB, are binding upon WTO Members has been the object of a significant debate during the last decade. There seems to be a consensus among scholars that DSB rulings, once the reasonable period has expired, constitute international legal obligations. Parties do

the DSU articles governing the implementation process, he concluded that the DSU “clearly establishes a preference for an obligation to perform the recommendation”<sup>78</sup>. Indeed, the obligation to comply with the report may be inferred from the language of the DSU itself<sup>79</sup>.

Therefore, even when it is not implemented by the responsible Member, a DSB ruling is legally binding.

I believe it would be inconsistent with the legalistic nature of the new DSS to interpret its text by recognizing a complete freedom whether to comply with DSB’s decisions. More realistically, compensation is a “practical option to temporarily defuse a dispute between WTO Members who are parties to a dispute”<sup>80</sup>. This conclusion is confirmed by Article 17, paragraphe 14, that reads “An Appellate Body report shall be adopted by the DSB and *unconditionally* accepted by the parties to the dispute (...). Finally, the DSU’s rules on compensation and retaliation should not act as a barrier to acknowledging that WTO dispute settlement decisions are binding on the WTO Members’ judiciary and, accordingly, may be relied upon by individuals before courts<sup>81</sup>.

*d) The invokability would reduce the margin of discretion that WTO members enjoy in the implementation*

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not have other choice than to comply with the DSB’s rulings. For an overview over this debate, see JEFF WAINCYMER, WTO LITIGATION, PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 659-664 (Cameron May ed., 2002). See also Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 A. J. INT’L L. 535, 538 (2001). For a recent contribution, see Nathalie McNelis, *What Obligations Are Created by World Trade Organization Dispute Settlement Reports?*, J. WORLD TRADE 647, 672 (2003).

<sup>78</sup> Jackson, *supra* note 74.

<sup>79</sup> Art. 22.1 of the DSU provides that “...neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements ...”.

<sup>80</sup> Geert A. Zonnekeyn, *The Status of Adopted Panel and AB Reports in the European Court of Justice and the European Court of First Instance*, 34(3) J. WORLD TRADE 93, 103 (2000).

<sup>81</sup> In the same line of thought, see Eeckhout, *supra* note 69, at 55.

Another argument generally put forward to deny the invokability of DSB's reports is based on the claim that holding a WTO Member liable for non-compliance would remove the legal room of maneuver that WTO Members enjoy in the reports' implementation.

A losing WTO Member held liable on that ground, being forced by individuals to implement the report as soon as possible, would lose its discretion in deciding whether or not to comply with the decision.

However, it should be noticed that WTO Members' liability does not reduce *per se* the ability of the State to decide whether to comply, as it does not entitle the individual to oblige the WTO Member to abide by the report. Therefore, although held liable for non-implementation, the losing Member would still be free to decide whether and how to implement the report.

In other words, it is not argued here that courts should suspend the application of domestic law contrary to the decision, as this would admittedly amount to reducing the discretion Members enjoy in complying with WTO obligations. Rather this paper suggests that individuals should be granted a right to recover the damages suffered as a direct result of persistent and arbitrary non-compliance with DSB's reports<sup>82</sup>.

In short, the invokability of these reports would not prevent a losing Member from deciding whether to bring its measure into conformity or to have recourse to temporary measures, such as compensation or retaliation. It would rather protect private operators from a situation of possible denial of justice while giving teeth to the DSS.

Finally, it seems that the reasons for not granting direct effect cannot convincingly be extended to deny the invokability of the reports. In other words, the reasons for not granting direct effect –

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<sup>82</sup> Thomas Cottier took this view arguing that in cases where WTO rulings are simply ignored, courts, both of the EC and of its Member states, should no longer apply those measures found inconsistent with the reports. See Cottier, *supra* note 6, at 374.

whether it is the agreement's flexibility, the "balance of powers" argument, or the lack of direct effect of WTO rules – "cease to be valid where a violation is established"<sup>83</sup>.

### **5.1.2 The *pro***

After having showed as most of the legal policy arguments do not seem really persuasive in denying the possibility of individuals to invoke the settlement dispute reports, we turn to examine some of the arguments in favor of this solution, by presenting some of the advantages that could be attained through more judicial openness and receptiveness for WTO law in national and regional courts.

#### *a) Individuals as the main beneficiaries of the multilateral trade system*

Although the WTO is essentially an international organization in which private individuals do not play any role, they are the main beneficiaries of the whole trading system.

A growing number of WTO provisions – such as those concerning public procurement, intellectual property rights or food safety – have an immediate impact not only on legal relations between the WTO Members and their citizens but also between individuals themselves.

This is probably the most appealing legal policy argument that can be made to support the granting of a right of individuals to invoke before national and regional courts the adopted decisions.

As the Panel in Section 301 case has stated:

"...it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix'. Many of the benefits to Members which are meant to flow as a result of the acceptance of various discipline under the GATT/WTO depend on the activity of individual

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<sup>83</sup> Eeckhout, *supra* note 69, at 53.

economic operators in the national and global market places. The purpose of these disciplines, indeed one of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish”<sup>84</sup>.

“The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators”.

“Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines...”<sup>85</sup>.

Moreover, this argument finds a strong support and might be strengthened by the theory developed by some Authors according to which GATT/WTO rules would lay down fundamental rights of freedom of trade, aimed at restricting the power of governments to regulate their economic activities <sup>86</sup>. If the WTO Agreements provide individuals with fundamental rights, its Members should recognize not only the invokability of the reports, but also the direct effect of WTO rules or at least of some of them, in order to ensure the protection of these rights through enforcement mechanisms. Whenever these free trade rights – the argument proceeds - should be considered also as fundamental, the absence of justiciability would constitute a dangerous hole in the legal system.

In this line of thought, one may conclude by stating that, by having a fundamental economic right to be compensated, private business operators must be able to invoke the non-implementation of these reports as a basis for liability of the WTO losing Member.

### *b) Denial of justice and legitimate expectations*

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<sup>84</sup> See *supra* note 67, ¶ 7.73.

<sup>85</sup> See *supra* note 67, ¶ 7.76.

<sup>86</sup> See in particular the writings by Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in Hilf & Petersmann, *supra* note 5, at 3-52; contra, Steve Peers, *Fundamental right or Political Whim? WTO Law and the European Court of Justice*, in DE BURCA & SCOTT, *supra* note 6, 111, at 130.

This paper has already described the situation of denial of justice that it might arise from the deliberate WTO Member's decision to not comply with a report. As we have seen, the DSU, by providing alternative, although temporary, measures to implement the WTO decisions, such as compensation and retaliation, makes individuals bear the cost of non-compliance without allowing them to rely on WTO's reports before national courts.

When a losing Member does not comply with a DSB's report, it is presumably aware of its unlawfulness and of the possibility of harm inflicted to some private parties. However, under the current DSU regime, private parties affected by the persisting non-implementation with the report are not entitled to invoke the WTO decision before any courts. Conversely, the lack of invokability of the reports is judicially protected by the DSS.

What about all those companies affected by either the persistent WTO violation or by the retaliatory measures?

It would be unfair to deny to private parties the right to claim for damages in a situation in which the losing Member's inaction would negatively impact on its business. It has also been argued that non-compliance with a DSB's report may amount to a weakening of protection of legitimate expectations<sup>87</sup>.

From an EC perspective, this situation is even less tolerable to the extent that the Community Legal order considers not only the Member States as subjects but also the individual. Therefore I believe that the absence of protection of individual rights currently existing within the DSS calls for the recognition by the European Courts of the invokability of the DSB's reports as the only possible way to give the individuals the right to seek for damages suffered as a result of the EC's non-compliance.

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<sup>87</sup> Cottier & Scheffer, *supra* note 67, at 85.

*c) Incentive to comply with DSB's reports: toward full compliance?*

Holding a WTO losing Member liable for non-compliance with DSB's reports would contribute to the health of the WTO dispute resolution, by providing an adequate incentive for Members to comply with their obligations under WTO rules, while yet at the same time depriving them of the discretion they enjoy in the implementation process.

Although the final goal of the DSS is not to assure full compliance with the DSB's reports<sup>88</sup>, but simply to achieve between the parties a mutual acceptable solution, “policies of simply ignoring the rulings by blocking their adoption are no longer available”<sup>89</sup>. From a legal perspective, a DSB's report is a “legally binding order”<sup>90</sup> addressed to a WTO Member, whose adoption cannot be blocked any longer by the losing Member. Equally, from a political perspective, ignoring adopted recommendations is not possible without carrying high political costs because of the increasing pressure from both outside (other governments) and inside (affected private parties) the country. Last, but not least, non-compliance, being negatively perceived by the public opinion, may damage the reputation of the losing country that may find itself under the public spotlight. Hence, non-compliance, causing problems abroad and at home, is increasingly feared by WTO Members.

Henceforth, the threat of being condemned to pay damages arisen subsequently to the period within which the WTO Member should have implemented the report may constitute a great incentive to comply, by reinforcing the judicial nature of the DSS.

Finally, the perspective of being obliged to pay damages associated with the threat of retaliatory measures may considerably enhance the incentives to abide by the WTO settlement

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<sup>88</sup> See Carlos M. Vazquez & John Jackson, *Some reflections on Compliance With WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 565 (2002) explain that “members were unwilling to pay the collateral costs in terms of sovereignty for a regime that would achieve [full] compliance”.

<sup>89</sup> Cottier, *supra* note 6, at 364.

<sup>90</sup> Hudec, *supra* note 33, at 377.

disputes' decisions. While the total costs of non-compliance would inevitably increase, their burden would partly shift from the economic operators to the losing Member.

*d) More fair balance between the conflicting interests of the WTO actors*

This argument holds that reliance on DSB's reports would provide a valuable solution to the need of striking a more fair balance between the interests of the WTO actors: its Members and their private business operators.

The invokability of DSB's reports could improve the relationship that private operators have with the multilateral trading system without subverting its flexible diplomatic nature.

*e) Major changes in the lives of international trade lawyers*

The recognition of some legal effects deriving from the non-implementation of these decisions could also bring about major changes in the lives of international trade lawyers, by injecting new energy within a law practice which is closer to a consultancy activity than to a litigation one<sup>91</sup>. As a result of the acceptance of the invokability of the DSB's reports, practicing lawyers will more often rely on WTO rules thus making the system more predictable for all WTO actors, resulting in an increased confidence within the DSS among private parties.

These arguments seem to justify, at least in principle, the acknowledgement of the invokability of DSB's reports before the courts of the WTO losing Member. Indeed, it is partly relying on these arguments, originally developed by the AG, that the ECJ has admitted to consider itself bound by the DSB's reports irrespective of the direct applicability of the WTO Agreement.

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<sup>91</sup> For an interesting presentation of the role of lawyers in the current WTO Dispute Settlement, see *The function of legal services in WTO dispute settlement – A European Perspective*, Taylor Wessing, at [http://www.taylorwessing.com/our\\_services/index.html](http://www.taylorwessing.com/our_services/index.html)

## **6. Conclusion**

While WTO Members are aware of the importance to protect also private individuals - also as far as the DSS is concerned - they also pursue other equally important interests that may not necessarily coincide with those of private operators. This is the reason that explains why the WTO, notably its DSS, has been conceived as a flexible system that allows parties to deviate from the rules whenever they think it is necessary. However, there is an increasing pressure for more direct involvement of private parties in the WTO dispute settlement<sup>92</sup>.

This paper, after assuming that arbitrary non-compliance should not be judicially protected by the DSS, tries to develop a solution capable of addressing private parties' interests within the DSS's implementation process.

Since private parties are those most affected by the inefficiencies of the DSS, it is important to find a way to somehow accommodate their interests within the system without subverting the DSS's main objective, which is to promote mutual acceptable solutions between Members.

The analysis ventures to suggest that allowing individuals to seek compensation of damages deriving from non-compliance by the losing Member may be a valuable solution to strike a more fair balance between the interests of the WTO actors: its Members and their private business operators. Thus, the invokability of DSB's reports could improve the relationship that private operators have with the multilateral trading system without modifying its flexible nature.

It is not argued here that WTO Members' courts should suspend the application of domestic law contrary to the decision, as this would amount to a restriction of the discretion Members enjoy in

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<sup>92</sup> Apart from the numerous claims made in the literature for granting individuals access to the WTO dispute settlement proceedings, the debate ranging over whether private parties should be allowed to submit their *amicus curiae* briefs before the panels and AB clearly shows the existence of this trend. See *supra* note 11.

complying with WTO obligations, but it has been simply suggested that it should be granted a right of individuals to recover the damages suffered as a direct result of persistent and arbitrary non-compliance with DSB's reports. The recent *Biret* judgment by the ECJ seems to prove that such an approach, at least within the EC, may reasonably encounter the favor of the Courts, even those of large trading powers<sup>93</sup>. Should the courts of one WTO Member open their doors to private parties' claims relying on DSB's reports, this solution would probably reverberate beyond its borders. This opening could positively impact the whole WTO DSS's proceedings by giving incentives to the losing Member to comply with DSB's rulings. Regardless of their origin, all economic operators affected by the non-compliance with a DSB's decision should be entitled to seek compensation before the Courts of the losing Member who consciously and persistently chooses not to give effect to the WTO ruling. As a result, both the private parties directly affected by the WTO violation and those affected by the sanctions imposed as a result of the non-compliance, would be allowed to claim damages before the Courts of the losing WTO Member. As showed above, this could happen without subverting the "complex package deal" represented by the WTO<sup>94</sup>, nor its "principle of equilibrium"<sup>95</sup>. Indeed, this solution would not reduce the margin of discretion Members enjoy in the implementation process nor it would force them to comply with the reports.

However, it remains open the question to see how this result may be attained within the current WTO institutional framework. This solution may be either left to each WTO Member, who may act domestically, or it may be agreed multilaterally at international level. In view of the progressively *judicialization* of the DSS, I am personally in favor of the possibility of seeking multilaterally

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<sup>93</sup> On the issue of unilateral implementation of decisions of the DSB in specific and adjudicated cases by "large trading powers", see Cottier & Scheffer, *supra* note 67, at 117.

<sup>94</sup> Snyder, *supra* note 6, at 365.

<sup>95</sup> Miquel Montana I Mora, *Equilibrium: A rediscovered basis for the Court of Justice of the European Communities to refuse direct effect of the Uruguay Round Agreements?*, 30 J. WORLD TRADE 43, 59 (1996).

agreed rules regarding the internal effect of DSB's reports in future negotiations<sup>96</sup>. The rule-oriented nature of the current dispute settlement would justify the introduction of some enforcement remedies capable of strengthening its implementation process. The introduction of a WTO Member liability for non-implementation of a ruling would be likely to improve the overall effectiveness of the DSS by moving the system closer to the objective of full compliance<sup>97</sup>.

Finally, if it is true that the main weakness of the DSS - currently under scrutiny - lies in the fact that it does not provide incentives for Members to comply with their WTO obligations, I believe the invokability of DSB's reports before the WTO losing Member's courts could pave the way to achieving the goal of full compliance. The high levels of legitimacy reached by the Panel and AB's reports among WTO Members could not but facilitate that process.

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<sup>96</sup> Negotiations on the reform of the WTO Dispute Settlement System are currently under way and they do not have led yet to an amendment of the DSU. See e.g. Nikolaos Lavranos, *Some Proposals for a Fundamental DSU Reform*, 29 LEGAL ISSUES EUROPEAN INTEGRATION 73 (2002).

<sup>97</sup> JOHN JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 113 (The MIT Press: Cambridge, 1997) refers to the same idea by using the different expression "rule of integrity".