

Chapter 16
Remedies and Compliance
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I. Introduction

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II. State Responsibility and Self-Contained Legal Systems

The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) contain a number of principles and rules which are worth highlighting before looking any further at WTO implementation and compliance issues.¹ Every internationally wrongful act of a State entails the international responsibility of that State (Article 1). There is such an act when conduct is (a) attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State (Article 2). Breaches of WTO law clearly come within those provisions (subject to what will be said below about contracting-out). The ILC Articles set out the legal consequences that such international responsibility entails (Article 28). First, those consequences do not affect the continued duty of the responsible State to perform the obligation breached (Article 29). Second, the State responsible for the

¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC at its 53rd Session, Official Record of the General Assembly, 56th Session, Supplement No. 10 (A/56/10). See also J.R. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002).

internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition (duties of cessation and non-repetition, Article 30). Third, the responsible State is under an obligation to make full reparation for the injury caused (duty of reparation, Article 31). The ILC Articles provide for three forms of reparation: restitution, compensation and satisfaction. They may be applied either singly or in combination (Article 34). Restitution amounts to re-establishing the situation which existed before the wrongful act was committed, provided that it is not materially impossible and does not involve a burden out of all proportion (Article 35). Compensation for the damage caused by the wrongful act is required insofar as such damage is not made good by restitution (Article 36). A further part of the ILC Articles addresses the implementation of State responsibility. One form of implementation is for the injured State to take countermeasures against the State responsible for an internationally wrongful act in order to induce that State to comply with the obligations listed above. Such countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. They shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question (Article 49). Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question (proportionality, Article 51). Finally, the ILC Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law (*lex specialis*, Article 55).

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III. Binding or Non-Binding?

WTO panels and the Appellate Body routinely establish in their reports that certain measures of a WTO Member are inconsistent with certain WTO obligations. They then recommend, pursuant to Article 19(1) DSU, that the Member concerned bring the measures into conformity with its obligations. The reports are adopted by the DSB, a WTO organ representing the membership, as a matter of course. Members routinely treat that process as establishing an obligation to follow the recommendation and to comply. And yet there is a debate whether WTO dispute reports give rise to an obligation to comply; whether, in other words, they are 'binding'.² For an external observer this must be puzzling indeed. What would be the use of having such an elaborate dispute settlement process, if the rulings do not need to be respected; another Wild West story?

A closer look at the system reveals that there is some basis for the debate. There are two sources of confusion. The first is the language and terminology used in the DSU. The text carefully avoids employing judicial-type terms and concepts.³ There are no courts or judges, merely 'panels' and an 'Appellate Body'. They do not issue judgments or rulings, but 'reports'. The conclusion in those reports is a 'recommendation' to bring the measure into conformity. Compensation or suspension of

² See in particular the debate between J.H. Bello, 'The WTO Dispute Settlement Understanding: Less is More' 1996 *American Journal of International Law* 90(3) 416-8 and J.H. Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?' 2004 *American Journal of International Law* 98(1) 109-25.

³ J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Jean Monnet Working Paper 9/00*, at <www.jeanmonnetprogram.org/papers/00/000901.html> (last visited 18 April 2008).

concessions are temporary measures, but neither is 'preferred' to full implementation. The impression conveyed is one of a system in which dispute rulings are fundamentally ambivalent, leaving room for manoeuvre and, ultimately, non-compliance.⁴

The second source of confusion revolves around the remedy of suspension of concessions. If a Member perseveres in not complying, the complaining Member may re-establish the balance between them by suspending other concessions, at a level equivalent to the 'nullification and impairment', in other words the trade and economic damage caused by the breach. No further remedies are available in case of continued non-compliance. In practice, therefore, the Member concerned appears to have the option to buy itself out of its obligations.

From a broader international law perspective, however, there seems little doubt that WTO dispute reports are 'binding'. One should first of all bear in mind that the fundamental purpose of any system of secondary rules is to enforce the primary, substantive rules. Such systems serve to strengthen the most fundamental principle of treaty law, *pacta sunt servanda*. As Simma and Pulkowski observe, the fact that States decide to go through the cumbersome process of multilateral treaty-making suggests that the rules elaborated in this process are of particular importance. In their view, even though, hypothetically, States are free to negotiate special norms of international law with a view to softening their obligations, we should not presume lightly that states would be less willing to live up to special obligations than to duties under general international law. They rightly argue that, absent a clear indication, special

⁴ Griller argues that the European Court of Justice in its case-law on the lack of direct effect of WTO law is a victim of that impression, see S. Griller, 'Judicial Enforceability of WTO Law in the European Union' 2000 *Journal of International Economic Law* 3(3) 441-72.

rules must be deemed to embody a particular commitment.⁵ The fact that the WTO Members decided to set up a dispute settlement system with automatic, compulsory jurisdiction indicates the importance attached to their compliance with WTO obligations. It is a system that is in many ways much stronger than most other dispute settlement systems established by multilateral agreements.

The ILC Articles on State responsibility further show that a breach of treaty norms produces a range of legal consequences, and brings different remedies into the picture. The DSU does something very similar. It is important to distinguish between what triggers responsibility and dispute settlement in the first place – breach of a primary obligation – and the various legal consequences of such a breach. The ILC Articles confirm that the legal consequences of an internationally wrongful act do not affect the continued duty of the responsible State to perform the obligation breached (Article 29). One would likewise assume that the legal consequences of a breach of WTO law do not affect the continued duty of the WTO Member concerned to perform the relevant WTO obligation. It would be very strange indeed if one of the consequences of going to WTO dispute settlement would be that the respondent party would be under some kind of lesser, weaker obligation to comply with WTO law than prior to this legal process. Clearly, that cannot be the case.

A textual analysis of the DSU also leads to the conclusion that there is an international law obligation to comply with panel and Appellate Body reports, as Jackson has convincingly shown.⁶ The reader may be referred to that analysis.

However, most significant, in this author's view, is the consistent practice of the Members, together with the caselaw that has developed as part of that practice. Pursuant to Article 21.5 DSU

⁵ Simma and Pulkowski, above footnote 4, at 507.

⁶ Jackson, above footnote 12.

disagreements ‘as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings ... shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel’. Such a compliance panel will look at the measures adopted to comply with an earlier ruling. A substantial number of WTO Members have used this opportunity. A mere cursory examination of the panel reports adopted in such compliance cases shows that, routinely, (a) complainants claim that the defending party has failed to comply with the rulings and recommendations of the DSB, and (b) panels confirm or deny such claims, depending on the outcome of their substantive examination. Compliance panels may be appealed. The Appellate Body has not as yet squarely been asked whether rulings and recommendations of the DSB are ‘binding’; WTO Members simply accept that they are bound to comply. Nevertheless, the Appellate Body has been faced with several tangential issues and arguments, and its response to those arguments is straightforward and telling. In *EC – Bed Linen*, for example, the issue was whether it was possible, in a compliance case, to re-examine an unappealed finding by the original panel; a finding, therefore, adopted by the DSB. The Appellate Body’s reply is worth quoting in full:

in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 of the DSU. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4 – unless

appealed. Members are to *comply* with recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the DSU. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB – with respect to the particular claim and the specific component of the measure that is the subject of the claim. Indeed, the European Communities and India agreed at the oral hearing that both panel reports and Appellate Body Reports would have the same effect, in this respect, once adopted by the DSB.⁷

Even more straightforward is the position of the arbitrator in *EC – Chicken Cuts*. The arbitration award concerned the reasonable period of time for implementing the ruling in that case, which concerned the customs classification of chicken cuts. The EC argued that, in order to comply, it first needed to obtain a new decision by the World Customs Organization on the classification issue. The arbitrator was concerned that this could mean that implementation would become conditional on such a decision. In response, he stated:

⁷ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, at paras 92-3.

It is axiomatic that alleged violations of the covered agreements must be redressed exclusively through the procedures set out in the DSU, providing for examination of such allegations by a panel and possibly the Appellate Body, and that, if violations are found and the relevant reports are adopted by the DSB, the respondent Member is obliged to implement promptly the recommendations and rulings of the DSB. These recommendations and rulings are *binding* on implementing Members, and give rise to an *obligation* to bring their WTO-inconsistent measures into conformity with their obligations under the covered agreements.⁸

The conclusions to be drawn from the above analysis are obvious. Adopted panel and Appellate Body reports thus create a clear, unconditional obligation to comply with the recommendations they contain (namely, for the responding party to bring its measures into conformity) within a reasonable period of time. If correct implementation is lacking, it is possible to agree on compensation, or to suspend concessions. These remedies, however, are not an alternative to compliance. Rather, they seek to induce compliance.⁹ The fact that these remedies exist should not be seen as in any way diminishing the obligation to comply, but as enhancing it. They show the importance that WTO Members attach to an effective and efficient system of dispute settlement. The WTO is not a Wild West.

IV. The Basic Function of Dispute Settlement

In the light of the discussion in the preceding section, what is the basic, primary function of WTO dispute settlement and the remedies it offers? If WTO dispute rulings are binding on Members in the

⁸ Award of the Arbitrator, *EC – Chicken Cuts*, at para 55 (emphasis added). The arbitrator was James Bacchus, former Member and Chairman of the Appellate Body.

⁹ See also section IV of this Chapter.

way described above, the fundamental purpose of the system appears to be to induce compliance. That is indeed how the system is described in WTO rulings.¹⁰

There exist, however, competing theories. Palmeter and Alexandrov challenge the proposition that suspension of concessions is intended to induce compliance. In their view, such suspension amounts to a mere re-balancing of reciprocal obligations. They are concerned that the emphasis on inducing compliance may lead to suspension of concessions being used as a punitive instrument. They advance various policy arguments against punitive measures, including concerns over sovereignty and equity.¹¹ They are further worried that there is too much emphasis on *pacta sunt servanda*: that the system cannot sustain this, and that it is not what countries signed up to.

Such concepts, focusing on the re-balancing character of suspension of concessions, rather than on an obligation to comply, are widely defended. Perhaps the strongest theoretical argument in support of such an approach is the one developed by Schwartz and Sykes, which is based on the economic theory of contracts.¹² That theory distinguishes between efficient and inefficient breaches of contractual obligations. A breach is efficient if the economic gains for the party committing the breach are greater than the losses for the party to whom the obligation is owed. Schwartz and Sykes apply this theory to the WTO. The gains and losses that they focus on are those of the domestic political actors who decide to

¹⁰ See D. Palmeter and S.A. Alexandrov, 'Inducing Compliance in WTO Dispute Settlement' in D.L.M. Kennedy and J.D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 646-66.

¹¹ *Ibid*, at 660-2.

¹² W.F. Schwartz and A.O. Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' 2002 *Journal of Legal Studies* 31(1-part 2) 179-204.

conclude trade agreements. They thus take a public choice perspective. If a breach of WTO law amounts to greater political gain for relevant political actors in the country committing the breach, compared to the political losses in the affected WTO Members, the breach is efficient. The Member in breach is unlikely to prefer compliance, nor would such compliance be economically efficient. Suspension of concessions is therefore an efficient tool, which permits efficient breaches.

Attractive and theoretically astute though it may seem at first blush, this extension of the theory of efficient breach to WTO dispute settlement is ultimately unconvincing.¹³ It advocates a peculiar type of economic efficiency that is not the 'real' economic efficiency resulting from free trade in world markets. Rather, it is a concept of efficiency applied to political actors, a calculus of the respective political capital of decision-makers in various WTO Members. The usefulness of public choice theory for understanding some of the reasons why countries conclude trade agreements cannot be denied. It does not follow however that public choice should also become a normative standard. It may well be possible to *explain* the conclusion of trade agreements by means of economic concepts applied to the political process, but that does not mean that the agreements thus concluded *ought* to be *interpreted* using the same efficiency arguments. The economic efficiency which the WTO seeks to promote is that of free trade and free markets, not that of political actors. From that perspective, suspension of concessions (or retaliation) as a reaction to a breach of WTO law is of course recognized as being wholly inefficient. The trade restrictions operated by the country in breach of its obligations are aggravated by further restrictions in the complaining country. Indeed, most economists comment that retaliation makes no economic sense, and that the country imposing trade sanctions 'shoots itself in the foot' and damages its own economy. In fact, if one accepts standard economic theories on the benefits of free trade, it is difficult to see what

¹³ See also Jackson, above footnote 12.

role there could be for the theory of efficient breach. The default position is that trade restrictions are not economically efficient for the country imposing them. How then could the economic gains in the country restricting trade surpass the losses in the country of exportation?

It becomes increasingly necessary to focus on companies and markets, and not trade between countries. Trade between countries is a conceptual construct, a construct that is quickly losing its explanatory force. As eloquently discussed in *US – Section 301 Trade Act*, trade takes place between private operators.¹⁴ From the perspective of those operators, economic efficiency is not just enhanced by the absence of trade restrictions. It is further enhanced by what the DSU calls, with great accuracy and insight, the security and predictability of the multilateral trading system. Article 3.2 DSU recognizes that the dispute settlement system of the WTO is a central element in providing such security and predictability. Suspension of concessions is, in itself, wholly antithetical to such security and predictability, as the practice shows: exports of French mustard to the US are restricted in retaliation for the EU's refusal to admit beef treated with hormones. What is the connection, and how could one argue that this is predictable and enhances the security of trade? Suspension of concessions can therefore only be understood and defended in the broader framework of the dispute settlement system, as a remedy that serves to induce compliance. If the WTO agreements make economic sense, which should be assumed and should guide their interpretation, the basic function of dispute settlement must be inducing compliance.

¹⁴ Panel Report, *US – Section 301 Trade Act*, above footnote 9, at paras 7.76-7.77.

Of course, re-balancing of concessions as an ultimate instrument in certain cases of non-compliance is not excluded. A provision of WTO law that has been violated can be amended, and WTO Schedules can be modified.¹⁵

V. 'Bring Into Conformity' – Prospective or Retrospective?

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VI. Remedies in Case of Continued Non-Compliance

As is well known, Article 22.2 DSU outlines two remedies in case of non-compliance with a dispute settlement ruling at the end of the reasonable period of time for implementation: compensation and suspension of concessions. These remedies are usually presented as alternatives, but it must be noted that Article 22.2 sequences them. The preference is for mutually acceptable compensation, and it is only where no such compensation can be agreed that the party having invoked the dispute settlement procedures may request authorization to suspend concessions. In practice, cases of agreed compensation are very rare.¹⁶ Where compliance is not forthcoming, the aggrieved Member is left with the choice of either suspending concessions, with all the problems that entails,¹⁷ or leaving the case on the agenda of the DSB and exercising further diplomatic pressure.

¹⁵ As was the US response in *US – Gambling*, see WT/DSB/M/232 of 25 June 2007, p. 9 ff.

¹⁶ An instance is the *US – Section 110(5) Copyright Act* dispute, see B. O'Connor and M. Djordjevic, 'Practical Aspects of Monetary Compensation' 2005 *Journal of International Economic Law* 8(1) 127-42.

¹⁷ See further below.

As discussed earlier, the object of suspension of concessions is to induce compliance with the dispute settlement ruling, and with the primary WTO obligations. Such suspension is therefore a form of countermeasure, in the meaning of the ILC Articles.¹⁸ It involves ‘the non-performance for the time being of international obligations of the State taking the measures towards the responsible State’ (Art 49(2) ILC Articles). The DSU tightly regulates suspension of concessions in Articles 22.3 to 22.8. The conditions and procedures imposed by those provisions can also be read in the light of the ILC Articles. Article 22.4, for example, requires that the level of the suspension of concessions or other obligations authorized by the DSB be equivalent to the level of nullification or impairment. This should be interpreted in accordance with Article 51 ILC Articles on the proportionality of countermeasures: they ‘must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’.

The inadequacies and deficiencies of suspension of concessions have been extensively analyzed and debated.¹⁹ The country employing trade sanctions shoots itself in the foot when it responds to trade barriers by imposing restrictions of its own, and free trade is simply further limited. As Pauwelyn put it, such sanctions are the epitome of mercantilism.²⁰ Another defect is that the sanctions remedy is in practice not equally available to all WTO Members. Developing countries with smaller markets cannot wield

¹⁸ Simma and Pulkowski, above footnote 4, at 521; J. Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach’ 2000 *American Journal of International Law* 94(2) 335-47.

¹⁹ See in particular M. Bronckers and N. van den Broek, ‘Financial Compensation in the WTO – Improving the Remedies of WTO Dispute Settlement’ 2005 *Journal of International Economic Law* 8(1) 101, at 104-6.

²⁰ Pauwelyn, above footnote 37, at 343.

those sanctions in an effective way.²¹ Furthermore, the *EC – Hormones* litigation has revealed the difficulties associated with identifying at which point in time the suspension of concessions needs to be terminated. The DSU does not, as it stands, provide for a procedure for this.²²

There is in any event a question mark over the effectiveness of these WTO countermeasures. The pre-WTO GATT virtually never employed them and nevertheless appeared to have a compliance record comparable to that of the WTO. The essential problem may well consist in the fact that the victims of sanctions and the perpetrators of breaches of WTO law are not the same. It is not the Member of the WTO (State or regional organization) committing the breach that is penalized as such. The victims are companies exporting from that Member. The effectiveness of the countermeasures therefore depends on the extent to which those companies are able to exercise pressure on their government to comply. In this sphere we again see the dichotomy between governments and market operators.

The only real defence for suspension of concessions is the basic rationale of dispute settlement: to induce compliance. In the light of its downsides, however, it is unsurprising that there is extensive debate about possible alternatives. Most of that debate concentrates on developing forms of compensation.²³

This Chapter does not attempt to offer a full analysis of proposals to improve implementation. One critical issue is nevertheless worth highlighting. When considering systems of compensation a strict distinction is needed between forms of compensation that focus on the WTO Member found in breach,

²¹ See also the Chapter 18 of this Handbook.

²² See Panel Report, *US – Continued Suspension*.

²³ But see also Pauwelyn's proposal for collective enforcement, above footnote 37.

and those that focus on the traders affected by the illegal measures in issue. It would be relatively straightforward to introduce new DSU provisions imposing an obligation on the Member that was found in breach to offer compensation in other trade sectors. What is currently a voluntary remedy could be turned into a compulsory one. A number of questions would of course arise concerning the calculation of such compensation; whether it may be discriminatory; whether it is time-limited or permanent, etc. Leaving those questions aside, it must be noted that such a remedy would not be primarily aimed at inducing ultimate compliance. The WTO Member concerned could in fact conceive of such compensation as a method for buying itself out of the obligation that triggered dispute settlement. Such a remedy would fit with the theory of efficient breach, discussed earlier. It would not fit so well with the rationale of inducing compliance. Nor would it fit with the overall aim of dispute settlement to strengthen the security and predictability of the world trading system. Companies and consumers benefiting from the enhanced market access that constitutes compensation will be different from those suffering from the illegal trade restriction. In fact the introduction of such a remedy may increase insecurity to the extent that WTO members would endorse and seek to employ the theory of efficient breach. Members may well be tempted to start looking at WTO dispute settlement merely as a mechanism for re-balancing concessions. The negative effects of an established breach of WTO law would simply consist of an obligation to further liberalize, in a trade sector that is less politically sensitive.

By contrast, systems of compensation that focus on affected traders would be more orthodox in the light of some of the basic principles that this Chapter has aimed to identify. Such systems would come closer to the concept of reparation in the ILC Articles: it is the actual damage caused by the WTO-illegal measure that is compensated. Security and predictability of the multilateral trading system would be enhanced in the sense that traders could develop some confidence that compensation for violations of

WTO law is available, and that they will not be left in the cold. If the compensation is paid from the coffers of the government responsible for the breach, such a remedy is also likely to improve compliance. Government expenditure invariably sharpens the attention of politicians. The EU experience with financial sanctions imposed on Member States for continued non-compliance with their EU obligations (see Art 228 EC Treaty) is a case in point: there are very few cases where this remedy needs to be employed, because governments comply as soon as they are threatened with such sanctions.

It is of course another matter whether the international trade system is sufficiently mature to contemplate the introduction of compensation systems for traders affected by WTO violations. There are undoubtedly many participants and commentators who would reply in the negative. This is a matter for further reflection and debate. It may nevertheless be noted that in another important area of international economic law, international investment law, compensation of private companies is an ordinary remedy.

VII. Compliance and Municipal Law

Finally it may be useful to say a few words about compliance and municipal law. The standard doctrine in international law is that, in the absence of specific provisions setting out in what manner municipal law needs to implement certain international obligations, it is for domestic legal systems to determine how implementation will be shaped. International law does not as a rule determine its effect in municipal law. The WTO Agreement appears to be no exception. Article XVI:4 WTO Agreement merely provides, in general terms: 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'. Whether WTO law has 'direct'

or ‘self-executing’ effect seems a matter for municipal law. It must be added that there appear to be very few WTO Members, if any, whose legal system recognizes full direct or self-executing effect of WTO law.

It is beyond the scope of this Chapter to offer a broader analysis of the direct effect question.²⁴ One should nevertheless note the connection with implementation and compliance. It is obvious that a legal system which is monist, and which recognizes that WTO law forms part of domestic law, will make its own, strong contribution to compliance. That is in particular so where that system also recognizes that internal legislation needs to comply with the international norm (primacy), and empowers courts to uphold that norm.

As an example, the above discussion on compensation may be connected with claims brought by traders in the EU affected by the EU’s legislation on respectively bananas and beef treated with hormones; and by the retaliatory sanctions imposed by the US. Those traders brought actions for compensation of damage (so-called non-contractual liability) against the EC before the Court of First Instance. If those actions had been successful (which they were not),²⁵ their effect would have been to

²⁴ As regards the EU, see P. Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004) Chapter 9. For a recent discussion of the policy issues involved, see J.H. Jackson, ‘Direct Effect of Treaties in the U.S. and the EU, the Case of the WTO: Some Perceptions and Proposals’ in A. Arnall, P. Eeckhout and T. Tridimas (eds), *Continuity and Change – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008) 361-82.

²⁵ CFI, Case T-19/01, *Chiquita and Others v Commission*, [2005] ECR II-315; CFI, Case T-69/00 *FLAMM v Council and Commission*, [2005] ECR II-5393; CFI, Case T-383/00, *Beamglow v EP, Council and Commission*, [2005] ECR II-5459; CFI, Case T-320/00, *Cartondruck v Commission and Council*, [2005] ECR II-27; CFI, Case T-301/00, *Groupe Fremaux v Council and Commission*, [2005] ECR II-25; CFI, Case T-151/00, *Laboratoire du Bain v Council and Commission*, [2005] ECR II-23; CFI, Case T-135/01, *Giorgio Fedon & Figli v Council and Commission*, [2005] ECR II-29. See further A.

secure the compensation of private traders, referred to above. Municipal law would have in effect provided for the sort of compensation that further strengthens the security and predictability of the multilateral trading system. If such an approach were generalized, WTO law itself would be in lesser need of providing for an effective remedy. This goes to show the interaction between international and municipal law in matters of compliance.

Moreover, it is not so obvious that the WTO Agreement says very little about municipal implementation. Next to the general provision of Article XVI:4 WTO Agreement, there are specific provisions in various agreements which may have a particular relevance for municipal implementation. An example is the TRIPS Agreement and its provisions on enforcement of intellectual property rights (Part III of the TRIPS Agreement). Those provisions address the range of remedies and procedures (including judicial procedures) for violation of such rights that WTO Members must make available. Caselaw may soon develop on the meaning and scope of those provisions.²⁶ Panels and the Appellate Body may thus be called upon to examine municipal legal systems in greater depth than in the case of claims about non-compliance with substantive WTO provisions. The experience of the European Court

Thies, 'Case-Note: Cases T-69/00, *FLAMM and FLAMM Technologies*, T-151/00, *Le Laboratoire du Bain*, T-301/00, *Fremaux*, T-320/00, *CD Cartondruck AG*, T-383/00, *Beamglow Ltd* and T-135/01, *Giorgio Fedon & Figli S.p.A.*, *Fedon S.r.l. and Fedon America USA Inc.*, Judgments of 14 December 2005, Grand Chamber of the Court of First Instance' 2006 *Common Market Law Review* 43(4) 1145-1168.

²⁶ See, for example, the ongoing *China- Intellectual Property Rights* dispute.

of Justice shows that it is often through cases on domestic issues of remedies and procedures that the international norms become more intrusive.²⁷

A further point concerns interjudicial dialogue. The fact that in most legal systems WTO law does not have direct or self-executing effect does not preclude that municipal courts are confronted with issues of WTO law, in one way or other. Often, for example, the lack of direct effect is distinguished from principles of consistent, conform or harmonious interpretation. Many legal systems recognize that domestic legislation needs to be interpreted in the light of binding international norms. Municipal courts may thus start looking at the WTO caselaw itself. In particular, questions may arise as to the legal effect of WTO dispute rulings – panel and Appellate Body reports. In the EU such questions have in fact already arisen. Whilst the EU Courts appear reluctant to recognize any particular, separate legal effect of WTO dispute rulings,²⁸ recent international legal history does show that interjudicial dialogues may quickly develop across legal boundaries. It is not excluded that, at some point, municipal courts start forming some type of coalition with the WTO adjudicators, in particular the Appellate Body.

Finally, in a 21st century approach to international law, there may be scope for arguing that WTO law directly confers certain rights on private parties. In the *LaGrand* case, the ICJ accepted Germany's argument that a provision of the Vienna Convention on Consular Relations 'creates individual rights'. The provision at issue concerned communication between a foreign detained person and the consular post of that person's home State. The Court noted that the article expressly spoke of the detained person's

²⁷ See P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials*, 4th edition (Oxford: Oxford University Press, 2007), at 305-343 (discussing cases like *Simmenthal*, *Factortame* and *Francoovich*).

²⁸ For further discussion see P. Eeckhout, 'A Panorama of Two Decades of EU External Relations Law' in Arnulf, Eeckhout and Tridimas (eds), above footnote 43, 323, at 334-6.

‘rights’. The clarity of those provisions admitted of no doubt. It followed that the Court had to apply them as they stood, and thus as recognizing individual rights.²⁹ Such reasoning can easily be extended to parts of WTO law, in particular the TRIPS Agreement, which frequently speaks of the rights of intellectual property holders. In the *LaGrand* case, the ICJ did not indicate that such individual rights can be directly relied upon in a municipal context; it was for Germany, through the proceedings before the ICJ, to seek to uphold the rights of the LaGrand brothers. But even if the individual rights in question can only be protected at the international level, adjudicative rulings recognizing such rights do expose municipal systems that are impervious to the international norm being directly applied in judicial proceedings. If the Appellate Body were ever to accept that provisions of the TRIPS Agreement, for example, create individual rights, there would be strong pressure on municipal legal systems to provide for adequate protection of such rights.

VIII. Conclusions

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²⁹ ICJ, *LaGrand (Germany v United States)*, Judgment, 27 June 2001, I.C.J. Reports (2001) 466, at para 77.