

Trade and Competition Law in the EU and Beyond

Edited by

Inge Govaere

Ghent University, Belgium

Reinhard Quick

Verband der Chemischen Industrie e. V., Germany

Marco Bronckers

University of Leiden, The Netherlands

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© The Editors and Contributors Severally 2011

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2011925765



ISBN 978 0 85793 566 3

Typeset by Columns Design XML Ltd, Reading, Berkshire
Printed and bound by MPG Books Group, UK

15. The domestic law effect of the WTO in the EU – a dialogue with Jacques Bourgeois

Marco Bronckers*

Jacques Bourgeois has been a professional mentor for me ever since I became his stagiaire in 1981 when he was a prominent member of the external relations division of the European Commission's Legal Service. He taught me the intricacies of European trade policy, as well as the vicissitudes of the Community's membership of the GATT and subsequently the WTO. His blend of intellectual rigour and forward thinking, coupled with an eye for the possible, has always held special appeal for me. On a wide variety of issues we have thought alike, that is to say I have come to think like him. I cherish the fact that over the years we have become good personal friends too and so have our families.

On this happy occasion of Jacques' *Festschrift*, I want to revisit a topic that has preoccupied me on and off for many years, and see how the position where I have ended up compares with that of Jacques'. That topic is the domestic law effect of the WTO in the European legal order. It is a topic that has intrigued scores of European scholars and practitioners. In fact, in this volume Piet Eeckhout and Ernst-Ulrich Petersmann devote chapters to it as well.

Bourgeois has addressed this topic on many occasions, at conferences, seminars and in papers. To compare our views, I will notably refer to a comprehensive and admirable contribution he published in the year 2000: 'The European Court of Justice and the WTO'.¹

* Subject to the usual disclaimer, I express my appreciation for the excellent research assistance of my law firm colleagues Marie Boscher and Tomas Silla, and my helpful discussions with Natalie McNelis.

¹ See Bourgeois, J.H.J., 'The European Court of Justice and the WTO', in J. Weiler (ed.), *Towards a Common Law of International Trade*, Oxford, Oxford University Press, 2000 (hereafter 'Bourgeois').

15.1 THE LAW AS IT STANDS

To start with, Bourgeois recalls that the European Court of Justice (ECJ) refuses to grant direct effect to the WTO.² According to the ECJ (now renamed the Court of Justice of the European Union), the WTO's dispute settlement system is fundamentally diplomatic in nature, and gives members who have been found to infringe a WTO obligation other options in addition to compliance. Furthermore, the ECJ has noted that in none of the EC's major trading partners do courts allow private parties to challenge domestic measures by reference to WTO law. As a result, according to the ECJ, private parties cannot directly challenge the validity of national or EC³ measures on the basis of GATT/WTO obligations. Bourgeois adds that the Court has made some kind of an exception, in that it will admit such direct challenges in those instances where the European legislator has indicated that it intended to implement WTO law (the so-called *Nakajima* doctrine).⁴

This case law of the Court is unchanged, at the time of this writing in early 2011. No provision of the WTO has been found to have direct effect;⁵ the *Nakajima* doctrine is still good law.⁶

Bourgeois then makes a number of important points. He argues that WTO law contains no obligation on members to grant direct effect to WTO provisions on their domestic legal order.⁷ That view is commonly held nowadays.

He also argues that there is no principle in EC law according to which the European Courts must take certain WTO obligations into account in the interpretation of EC law, notably its foreign trade law.⁸ As Bourgeois notes, whenever the European Courts *did* decide to grant direct effect to other

² Case C-149/96, *Portugal v Council* [1999] ECR I-8395.

³ As Bourgeois was writing in 2000, he still referred to the European Community (EC). Ten years or so later, at the time of this writing, we speak of the European Union (EU) since the entry into force of the Lisbon treaty. I will use both pre- and post-Lisbon terminology, generally depending on when a particular argument was made, by him or others.

⁴ Case C-69/89, *Nakajima v Council* [1991] ECR I-2069.

⁵ E.g. Case C-428/08, *Monsanto Technology LLC v Cefetra BV, Cefetra Feed Service BV, Cefetra Futures BV, Alfred C. Toepfer International GmbH*, judgment of 6 July 2010 (not yet reported), paras. 71–2; Case T-237/08, *Abadía Retuerta, SA, v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (Cuveé Palomar)*, judgment of 11 May 2010 (not yet reported), para. 66.

⁶ E.g., Case T-45/06, *Reliance Industries v Council* [2008] ECR II-2399.

⁷ See Article XVI.4 WTO.

⁸ Bourgeois, at p. 110.

international treaties this was judge-made law as well.⁹ In other words, the European courts did not feel compelled to do so either on the basis of the international treaty at issue or on the basis of equivalent principles in the European treaties. I see nothing in the Lisbon Treaty, which entered into effect in December 2009, to have changed this approach. While the European Union is committed 'to contribute to ... the strict observance and the development of international law',¹⁰ the decision whether or not to grant domestic law effect (including direct effect) to international treaty obligations has been left to the courts.

From an international law perspective the distinctions drawn by the European courts between the WTO treaty and other international agreements are 'puzzling', as Bourgeois has written.¹¹ The European courts do not seem to have given the correct interpretation of the changes wrought in the WTO framework, compared to the predecessor agreement the GATT. In particular, as Bourgeois points out, the WTO's dispute settlement system has been substantially reinforced compared to the old consensus-based GATT system.¹² One might add that the WTO's dispute settlement system is also unusually compelling compared to other international agreements to which the European Court of Justice *did* grant direct effect.¹³ Bourgeois and I agree therefore that the reasons advanced by the ECJ to deny direct effect to the WTO are not legally persuasive.

15.2 LEGAL POLICY ASSESSMENT

Yet while it is of interest to debate the merits of the legal arguments that the European Court of Justice in its judge-made law has used to deny direct effect to the WTO's provisions so far, the bottom line question is whether the Court reached the right result.

⁹ E.g., Case C-303/08, *Bozkurt*, judgment of 22 December 2010, not yet reported, at para. 31; C-372/06, *Asda Stores* [2007] ECR I-11223, at para. 91 (regarding the direct effect of a Decision taken pursuant to the EEC – Turkey Association Agreement).

¹⁰ See Article 3 TEU.

¹¹ Bourgeois, at p. 107.

¹² Bourgeois, at p. 108.

¹³ M. Bronckers, in Kuijper, P.J. and Bronckers, M., 'WTO Law in the European Court of Justice', *Common Market Law Review*, Vol. 42, 2005, pp. 1313, 1344.

15.2.1 Bourgeois' Views

Bourgeois fundamentally takes issue with the denial of direct effect to WTO law.¹⁴

[A]t the end of the day there is something wrong with a system that on the one hand generates rules designed to regulate international trade, even if it is supposed to regulate what states are supposed to do or not to do in matters of trade, but on the other, denies people, affected by what states do or not do in matters of trade, the possibility of relying on these rules to protect their interests.

He also believes it is preferable from a WTO perspective to allow private parties to bring WTO-based challenges in national court, rather than allowing private parties access to the WTO's own dispute settlement process, as he considers the latter overburdened.¹⁵

Characteristically, however, Bourgeois does not close his eyes to political realities. Governments keep more discretion to deviate from WTO rules for as long private parties cannot challenge such deviations in court. It would be politically difficult for the EU to stomach that its courts would grant direct effect to WTO law, whereas none of its trading partners are inclined to give courts this role. And Bourgeois echoes the concern that, given the diverging positions of the member states on trade issues (he recalls the *Bananas* dispute) any grant of direct effect to WTO law by the European courts could be internally divisive within the EC (and now the EU).¹⁶ Accordingly, Bourgeois does not plead for an unconditional grant of direct effect to WTO provisions. Instead, he formulates a rather nuanced proposal.

First, courts should test whether their grant of direct effect would upset the balance of rights and obligations of the EC, not in respect of one particular WTO member or all the members, but in respect of a relevant cross-section of the WTO's membership. Furthermore, the test should be limited to the WTO agreement in question, rather than to the WTO package of agreements as a whole. In order for the European courts to reach an informed opinion on this question, Bourgeois envisages that they ask the defending institutions (the Commission, the Council of Ministers) whether granting direct effect would upset the balance of the EC's rights and obligations under that agreement.

¹⁴ Bourgeois, at p. 113.

¹⁵ Bourgeois, at p. 116.

¹⁶ Bourgeois refers to Thomas Cottier as a scholar who shared this concern in a 1997 paper. Bourgeois, at p. 117.

Second, and in addition to this inquiry, Bourgeois would not want the European courts to recognize the enforceability of a WTO rule in the absence of a WTO panel or Appellate Body ruling condemning the EC's measure that is being litigated before the European courts. He argues that before such a ruling is issued the EC has different ways to avoid or resolve an incompatibility with WTO law, such as a negotiated solution, including the 'unbinding' of a tariff concession.

Ultimately, then, Bourgeois would allow a private litigant to challenge the validity of an EC measure on the basis of a WTO rule, and thereby grant this rule 'direct effect', in the limited circumstance that (1) the EC measure had already been condemned in WTO dispute settlement proceedings and (2) granting the private litigant this opportunity would not upset the balance of rights of obligations of the EC under the relevant WTO agreement.

15.2.2 Bronckers' Views

I believe that Bourgeois' proposal represents a creative attempt to reconcile his fundamental starting position, that the WTO's rules should somehow also be meaningful to private parties in order to be meaningful at all, with the political realities of the day. Expressed differently, in my view any useful proposal on the WTO's domestic law effect must give a place to the *conviction* that international economic law is to be meaningful to private parties, as well to the *responsibility* the EU and its institutions have to manage this international system sensibly in a way that takes the effects on European interests overall duly into account.¹⁷

What I find more problematic are the two conditions that Bourgeois wants to impose on the European courts before they should grant direct effect to provisions of the WTO package of agreements: the prior condemnation of the EU's measure, and the balance of rights and obligations (reciprocity). I would rather impose a different condition: allowing the political institutions to suspend the interpretations of WTO law to which the European courts have given direct effect for as long as they believe the imbalance continues.

¹⁷ This proposition echoes one of the main themes in Max Weber's lecture *Politik als Beruf* (1919): '[A]n ethics of conviction and an ethics of responsibility are not absolute antitheses but are mutually complementary, and only when taken together do they constitute the authentic human being who is capable of having a "vocation for politics".' (this translation is from Livingstone: *Max Weber: The Vocation Lectures* 92 (Owen and Strong (eds), Hackett, 2004)). Thanks to Thierry Gontier (Lyon III) for pointing this reference out to me.

15.2.2.1 Prior WTO condemnation

As is well known, only governments can bring a dispute to the WTO, and so far only governments can be actively involved (as a party or an intervener) in litigation before the WTO.¹⁸ Accordingly, requiring that an EU measure first be condemned by a WTO tribunal before the relevant WTO obligations can be given direct effect by the European courts puts a considerable burden on private litigants. They would have to go through a foreign government first.

Except for the unusually well-connected private industry, seeking the endorsement or espousal of its claim by a government will be a challenge for a private party. Government-to-government litigation has a dynamic of its own and often imposes diplomatic costs on the relations between governments. These political costs, as well as the resources (manpower and expenses) required to bring a case to a successful conclusion, will be factored in before one government decides to sue another government at the WTO. Such considerations severely limit the protection private parties can derive from WTO rules in disciplining unwelcome regulatory activities of a member, in case a prior WTO ruling were to become a condition precedent to a WTO rule being granted direct effect by the European courts. In fact, with this condition it would become pretty unpredictable when these rules might have a beneficial effect for private parties, thereby weakening one of the basic rationales for the move of a power-based to a rule-based system.¹⁹

Furthermore, this condition of a prior WTO condemnation of the controversial EU measure will be particularly difficult to satisfy for *European* interest groups who want to rely on a WTO obligation to correct or invalidate that EU measure. A sizable number of WTO obligations constitute principles of good governance, which can protect domestic production as much as foreign trade against misplaced regulation. For example, the WTO principle that restrictions on the sale of food ought to have a scientific basis, and cannot be based merely on speculative health concerns, has been pertinent not only to European importers of US hormone-treated

¹⁸ Even the very limited possibility for private parties to support as *amicus curiae* a government's written submissions in a WTO dispute remains controversial. See, e.g. Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, at para. 2.5, circulated on 15 November 2010.

¹⁹ Jackson, J.H., 'Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT', *Journal of World Trade Law*, Vol. 13, 1979, pp. 1–21.

beef,²⁰ but also to European producers of vitamin-enriched cornflakes or fruit drinks.²¹

In most cases, chances are that European interest groups will not find a foreign government willing to assume the political and litigation costs to challenge the EU measure. Moreover, in accordance with the EU's solidarity rule, no EU member state – although all are members of the WTO and entitled to bring cases to the WTO – can challenge an EU measure before the WTO.²² Consequently, this 'exhaustion of international remedies' rule effectively deprives European citizens from the possibility to rely on WTO principles before the European courts in a case not involving imported goods or services. I find that unacceptable.

In addition, it is not always necessary to wait until a WTO tribunal has had occasion to adjudicate a dispute on a WTO measure in order to have a pretty good idea whether that measure runs foul of WTO law. Thus, a WTO ruling involving a similar measure of another WTO member country may make it pretty clear that an EU measure, when challenged before a WTO tribunal, will be held to infringe WTO law too. Without going so far as to say that WTO rulings constitute binding precedents for WTO tribunals in other disputes,²³ in such cases it could make good sense for the EU (including the European Courts) to draw the consequences in order to

²⁰ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998; see also 'Joint Communication from the European Communities and the United States' in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/28, from 30 September 2009.

²¹ See Bronckers, M., 'Exceptions to Liberal Trade in Foodstuffs: The Precautionary Approach and Collective Preferences', in C. Baudenbacher, P. Tresselt, and T. Orlygsson (eds), *The EFTA Court: Ten Years On EFTA*, Oxford, Hart, 2005, pp. 105–6 (commenting on Case E-3/00, *EFTA Surveillance Authority v Norway*, 2000–2001, EFTA Ct Rep 75, and ECJ, Case C-192/01, *Commission v Denmark* [2003] ECR I-9693).

²² See Article 4.3 TEU.

²³ In the successive stages of the long-running saga on zeroing in antidumping law, the US Government fiercely resisted any reference to earlier WTO rulings, in which various measures of the US and other Members involving zeroing had already been condemned, on the grounds that these rulings did not constitute binding precedent. The most recent Panel report in this case asserted that prior Appellate Body rulings do create 'legitimate expectations' that they will be followed; see Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, at paras. 7.28–7.35, circulated on 18 January 2011. See generally McNelis, N., 'What Obligations Are Created by World Trade Organization Dispute Settlement Report?', *Journal of World Trade*, Vol. 37, 2003, pp. 647–72.

avoid the domestic cost of unnecessary litigation and/or to improve the integrity of the international system.²⁴

In sum, I find the condition that WTO obligations should only be given direct effect by the European courts in the event a disputed EU measure has been condemned by a WTO tribunal too limiting. Moreover, even a WTO ruling condemning an EU measure does not provide the certainty that *Bourgeois* is looking for to make sure that a European court will not unnecessarily condemn the EU for an action for which the EU might still obtain legal cover. After all, following a WTO ruling condemning its action the EU could still decide for example to ask for a waiver,²⁵ or renegotiate a concession.²⁶ Expressed differently, the European courts will always have to think for themselves and interpret WTO obligations to which they give

²⁴ It is of some interest that the EU legislature, in the trade remedies area, has already recognized that WTO rulings involving trade remedies of other WTO countries can be a good reason for the EU to amend a trade remedy measure of its own without waiting for a WTO ruling specifically condemning the EU's measure. See Council Regulation (EC) No. 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ (2001) L 201/10.

²⁵ The EU was already in a similar situation during the Bananas saga, where it obtained a 'Cotonou Waiver' (European Communities – the ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15, accessible at: www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm) after the early rounds of the 'Bananas III' WTO dispute settlement rulings, such as the Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.

²⁶ This is exactly what the United States did following the condemnation by the WTO Appellate Body of a restriction it had imposed on electronic gambling. See Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663; followed by USTR, *Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI*, 3 May 2007 (available at: www.ustr.gov/about-us/press-office/press-releases/archives/2007/may/statement-deputy-united-states-trade-represen). The US move was considered controversial. See Ruse-Khan, H., 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations', *Journal of International Economic Law*, Vol. 11, 2008, p. 313, at pp. 323–4. The US renegotiation of its concessions apparently also did not come cheap. See King, K.F., 'Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot', *Columbia Science and Technology Law Review*, Vol. 11, No. 41, 2010, at pp. 55–6.

domestic law effect as best as they see fit.²⁷ Prior WTO rulings are helpful, but neither necessary nor decisive to the outcome of a European Court case.

Bourgeois does make a sensible point though by recalling that the WTO régime, like many other treaties, offers governments the possibility to claim exceptions.²⁸ Therefore, private claims that a government has violated WTO principles should not be taken at face value. Governments should be offered the possibility to decide whether they want to invoke such an exception. I would therefore like to slightly reformulate Bourgeois' suggestion to say that, before condemning an EU measure on the basis of a WTO principle, the European courts should first request the institutions whether they want to avail themselves of any of the exceptions or exceptional remedies the WTO is providing for; and, if so, demonstrate that the required steps have been taken (it would not be a good enough for the EU's political institutions, by way of a defense in a court action, merely to claim or speculate that they *might* appeal to an exception to escape or cover a WTO violation).

15.2.2.2 Reciprocity

As to the *reciprocity* condition that Bourgeois has formulated, this is problematic for different reasons. One first will recall, as does Bourgeois, that the ECJ, in its seminal *Kupferberg* judgment of the early 1980s, dismissed reciprocity as a relevant criterion when determining whether or not a prohibition on tax discrimination in a bilateral trade agreement (between the then EEC and then non-member Portugal) ought to be given direct effect. According to the ECJ, the implementation of the treaty by the third country, and notably whether the courts of the other party recognized direct effect, was not relevant to determine whether this treaty could be granted direct effect in the EU legal order.²⁹

With the passage of time, the Court's refusal to take the practice of other countries into account has been criticized, essentially as being politically naive. Bourgeois echoes this criticism, when he argues that it does not seem

²⁷ See generally Bronckers, M., 'The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?', *Common Market Law Review*, Vol. 44, 2007, pp. 601–27.

²⁸ Incidentally, the fact that governments might occasionally avail themselves of such a rule-based exception following a particular dispute settlement ruling does not make that dispute settlement system diplomatic in nature, as the ECJ may have thought in respect of the WTO.

²⁹ Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie. KG a.A.* [1982] ECR-3641, at para. 18.

'out of order' for a court to take into account 'manifest and substantial' non-performance by the other party. He believes that a court must not only have regard to the lack of direct effect but also more broadly to the overall behaviour of the other state.³⁰ He would want a court to test whether enforcing a WTO rule would 'on the whole', not just in respect of a particular WTO member, upset the balance of the EC's rights and obligations. That test should be limited to the WTO's rule in question, not to the EC's position in the WTO as a whole. Bourgeois submits that this condition should not present a court with too many difficulties, as it could ask the defendant institutions to state why granting 'direct effect' to a provision of a given WTO agreement would upset the balance of the EC's rights and obligations under that agreement.³¹

Preliminarily, I do not see the relevance here of whether the courts in another country allow the WTO to have 'direct effect', i.e. allowing private claimants to rely on WTO law in a challenge of domestic measures or legislation. As the European Court pointed out in *Kupferberg*, while being bound under public international law to perform its treaty obligations in good faith, each country remains free to determine the legal means to do so.³² Some countries, it will be recalled, allow at least certain provisions of public international law to enter directly into the domestic legal order, allowing national courts to refer to these provisions in resolving private challenges of domestic measures (so-called *monist* countries); other countries only allow public international law to enter into the domestic legal order after and through transformation of these international law provisions into a domestic statute (so-called *dualist* countries).³³ As it is accepted that each country has the basic constitutional freedom to choose the system it prefers of giving effect to public international law, I do not see how the

³⁰ Bourgeois, at p. 118.

³¹ Bourgeois, at p. 119.

³² See ECJ, *Kupferberg*, *supra* n. 29, at para. 18.

³³ In reality, few countries opt for a purely dualist or a monist system, and virtually all countries find themselves on a spectrum tending more or less towards one or the other pole. In the period of decolonization more countries moved towards dualism, as a means to underscore their sovereignty. In more recent times a trend towards monism has been discerned, for instance in central and eastern countries as a means to distinguish themselves from their history in the Soviet Union, which was very much dualist in nature, and where international law could never be invoked let alone enforced before national courts. See Franckx, E. and Smis, S., 'Doorwerking van Internationaal Recht in de Belgische en Russische Nationale Rechtsorde: een rechtsvergelijkende analyse', in J. Wouters and D. Van Eeckhoutte (eds), *Doorwerking van internationaal recht in de Belgische rechtsorde*, Antwerpen-Oxford, Intersentia, 2006, pp. 123–5.

European courts (who operate in a monist-type system) could draw any negative inferences for the direct effect of WTO law in the EU legal order from the fact that courts in a more dualist country will not entertain direct appeals to WTO law of private claimants.

Whether or not other countries do not effectively perform their substantive obligations under an international treaty that a European Court is called upon to apply is a different matter. Yet at least in respect of certain treaties I have difficulties accepting that reciprocity could become relevant at all. In particular, where the enforcement of human rights treaties are concerned, it is not at all obvious why reciprocity should matter. For instance, should a Belgian court really inquire before granting direct effect to a human rights treaty at the request of a Chinese individual who feels harmed by aggressive police behaviour in Brussels, whether China's human rights record under that treaty is up to par? In this context it is to be noted that in France, where the Constitution in general terms imposes a reciprocity condition before a court can grant domestic law effect to international agreements,³⁴ the courts in more recent times have determined that the rule of reciprocity does *not* apply with respect to international human rights treaties.³⁵

A French author, Bechillon, eloquently observed:³⁶

If there is one category of international agreements to which the application of a reciprocity principle really is incongruous it is human rights treaties – or, more generally, those treaties which create subjective rights for private parties ... these treaties do not have as their primary objective the establishment of a legal framework contributing to peaceful relations between nations, but are designed

³⁴ See Article 55 of the French Constitution: 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.'

³⁵ *Cour de cassation* in 1989 (Civ, 1ère, 15 November 1989, Bulletin civil I, n° 346, p. 233); *Conseil Constitutionnel* in 1999 (Décision n° 98-408 DC, 22 January 1999, *Traité portant statut de Cour Pénale Internationale*). The European Court of Human Rights had previously come to the same conclusion in *Ireland v the United Kingdom* (App. No. 5310/71) (1978) Series A no. 25, at para. 239 ('Unlike international treaties of the classic kind, the [European] Convention on [Human Rights] comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement" ...').

³⁶ De Bechillon, D., 'De quelques incidences du contrôle de conventionnalité internationale des lois par le juge ordinaire (Malaise dans la Constitution)', *Revue Française de Droit Administratif*, 1998, p. 225, at p. 235 (my translation).

to offer to a State that so wishes the means to commit itself, before the international community, to recognize and protect the rights it intends to grant to private persons residing in its territory and a fortiori to its citizens. Accordingly, there is absolutely no reason why the violation of a treaty by a third State could justify that a State rids itself of the constraints it has imposed on itself.

WTO agreements do not create human rights, nor more generally subjective rights for individuals. At the same time, as Bourgeois³⁷ has noted, many of the WTO's rules do benefit private parties directly; and the WTO's objectives of increasing economic welfare could not be realized without the very activities of private parties. A well-known WTO panel report put it this way:³⁸

[I]t 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 disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish. Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the [WTO's] Preamble ... The security and predictability in question are of 'the multilateral trading system'. 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.

Moreover, the WTO's rules are 'colour-blind': they can be as relevant to domestic parties as to foreign trade or traders.³⁹ From this perspective, the application of a reciprocity condition in respect of the direct effect of the WTO's principles seems inappropriate.

Yet all our experiences show it is politically not palatable that treaty partners are perceived not to play by the same rules and create economic disparities. This is illustrated, for example, by the outcry these days over China's currency policy. Now one could argue that WTO principles are no

³⁷ See his observation cited *supra* n. 14.

³⁸ WTO Panel Report, *Section 301-310 of US Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, at paras. 7.73, 7.75-7.

³⁹ See text *supra* nn. 20 and 21.

longer exclusively based on reciprocal trade concessions (consider the rule-based parts in the GATT, GATS and TRIPS treaties), and that trade disequilibria do not justify trade wars or judicial 'tit for tats'. However, these finer points will not diminish the sense of political frustration if the other side is seen not to be a good citizen and our own courts continue to give direct effect to these same rules to the benefit of trade and traders from the other side. The EU's negotiating power with third countries to remedy an economically unbalanced situation is likely to suffer in the event the European courts were to continue to allow foreign traders the benefit of challenging EU measures, including EU trade retaliatory measures, on the basis of WTO rules (From this perspective as well, international economic law seems different from international human rights law. There is no reason to assume that the negotiating power of the EU to improve human rights protection in a third country would suffer in the event the EU courts continue to protect the human rights of that country's citizens. On the contrary, the EU's moral authority might suffer if EU Courts were seen to suspend human rights protection of foreign citizens.) Bourgeois is right not to close his eyes to this political reality. The European courts' own credibility, if not legitimacy, would come under considerable strain if they were to ignore strong political sentiments about foreign economic policy. But I cannot follow him when he assigns an essentially political question to the courts.

Bourgeois concedes that the European courts are ill-equipped to decide whether or not there is a 'disequilibrium' in the EU's rights and obligations under a WTO agreement. He would encourage them to ask the EU's defending institutions for advice. This is a tricky suggestion, unless one ensures that the private litigant can meaningfully contest the views put forward by the institutions on this issue. Otherwise, the independence of the European courts is put at risk. Courts cannot depend on the views of another branch of government, and certainly not when this other branch is one of the litigating parties, when resolving a dispute. That would be a violation of the fundamental right to an 'independent tribunal', enshrined in Article 6 of the European Convention on Human Rights, as well as in Article 47 of the Charter.

Again, recent French experiences illustrate this point. When private parties appealed to international treaties other than human rights treaties, the *Conseil d'Etat* before entertaining such pleas routinely asked the French Foreign Ministry for advice whether the treaty partner of France had implemented the obligation at issue, and the *Conseil d'Etat* considered this advice binding. This practice was challenged before the European Court of Human Rights, which ruled that it violated the right of the private plaintiff

to have access to an independent tribunal.⁴⁰ Recently, the French *Conseil d'Etat* formally accepted this ruling of the European Court of Human Rights.⁴¹

In other words, I agree with Bourgeois that the European courts should not ignore, when faced with private appeals to international economic agreements like the WTO, whether the EU's treaty partner(s) is substantially not performing its treaty obligations towards the EU. Yet I do not believe courts are well placed to make this assessment. This puts them in a difficult position, as their role of an independent tribunal does not allow them to defer to the views of one of the litigating parties (i.e. a defending EU institution). I am also sceptical of EU political institutions that only 'discover' when called upon to defend themselves in a particular piece of litigation that there is a substantial lack of reciprocity in the implementation of an international agreement.

The mere fact that an EU measure would be invalidated by the EU courts on the basis of an international agreement to which they granted direct effect is unlikely to create a substantial imbalance in the implementation of that agreement to the detriment of the EU.⁴² There would have to be other, rather more serious accompanying circumstances. These would have to be identified by the political branches of government. They should have determined that there is a substantial lack of reciprocity in the implementation of a particular agreement in a *regular* review, outside the context of litigation; and they should have indicated that certain steps were needed to redress that situation (which might include the suspension of direct effect, or even domestic law effect generally of that agreement in the EU). I also expect that governments will be more careful when attributing a substantial lack of implementation to another country in a general rule-making type of decision, duly published, than in largely confidential court pleadings in a specific case. Such a public decision will have to withstand the scrutiny of the other country, and of other interested parties.

It is true that, following such a rule-making type review, the courts would be bound by the assessment of reciprocity by another branch of government as well. But, as I have argued, there is a difference with the courts

⁴⁰ ECHR, *Chevroi v France*, No. 49636/99 (Sect. 2), ECHR 2003-III, 13 February 2003.

⁴¹ CE, 9 July 2010, No. 317747, *Cheriet-Benseghir*: JurisData No. 2010-011132; Rec. CE 2010.

⁴² In that particular case, the EU may simply have erred and infringed the international agreement at issue, without there being any indication that the EU's treaty partner (or the EU itself for that matter) is failing to implement the agreement on any significant scale.

relying on, and deferring to a reciprocity assessment that is made by another government branch within the context and for the specific purpose of litigation.⁴³ In short, in the event and for as long as the EU political institutions properly establish that there is a serious lack of reciprocity in the implementation of an international economic agreement, I would find it perfectly acceptable for the EU courts to decline or suspend any direct effect of that agreement. But how does one get to this result?

The key problem is that, pursuant to standing case law of the European Court of Justice, such a political assessment on lack of reciprocity would be frustrated as soon as and whenever the European courts have given direct effect to provisions of the international (e.g. WTO) agreement at issue. The reason is that the Court of Justice has normally coupled direct effect of international agreements with supremacy.⁴⁴ Expressed differently, once an international treaty provision has been given direct effect, the EU's legislature can no longer overrule or suspend that interpretation of the European courts through later legislation or decisions.

It should also be noted that the EU courts to date have given no indication that they would be willing to suspend the direct effect of an international agreement only *temporarily*, for as long as the state of a substantial disequilibrium continues. Yet the recognition of a temporary suspension is essential if one wants to deal with a lack of reciprocity. After all, one would like to think that the EU will normally be able to resolve serious imbalances in an international agreement to which it is a party or withdraw.

15.3 CONCLUSION

I agree with Jacques Bourgeois that one must give meaning to international economic agreements like the WTO by allowing private individuals to appeal to them in order to discipline domestic regulation. I also appreciate his concern that the benefits private individuals can draw from such agreements need to be circumscribed though, notably in the event that there

⁴³ This distinction was also recognized in the Opinion of the *Commissaire du Gouvernement* Schwartz of 9 April 1999 on the reciprocity principle, but not followed by the *Conseil d'Etat*, in the original *Chevol*-litigation preceding the European Court of Human Rights judgment referred to *supra* p. 40. The importance of Mr Schwartz's Opinion was recognized by Rogoff, M.A., 'Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice', *Maine Law Review*, Vol. 58, 2006, pp. 406, 460–61.

⁴⁴ E.g. Case C-549/07 *WallentinHermann* [2008] ECR I-11061, at para. 28.

is a substantial imbalance in the implementation of the agreement by the EU and its treaty partners.

In order to arrive at this balanced outcome, Bourgeois would be prepared to recognize in principle that the WTO can have direct effect, but then attach certain conditions narrowing this grant of direct effect. These conditions contain elements I find useful, and others with which I have more difficulty. Fundamentally, I do not believe that courts are well placed to assess whether the EU suffers from a substantial lack of reciprocity in the economic relations with its treaty partners. I also have a problem with the concept of direct effect, given its linkage with supremacy in the case law of the European courts. This has turned direct effect into an inflexible instrument.⁴⁵ In particular, once a treaty provision has been granted direct effect by the EU courts, the EU's political (and democratically elected) institutions are no longer allowed to suspend the benefits of this international economic agreement temporarily, when they determine that there is a substantial lack of reciprocity in its implementation by the EU's treaty partner(s).

Until we have found ways to turn direct effect into a more flexible instrument where international economic agreements are concerned, I am happy to see that the EU courts have developed techniques to pay respect to international rules and rulings without granting them direct effect. One important principle they have developed is that of treaty-consistent interpretation: whenever an EU measure permits several interpretations the courts feel obliged to choose the interpretation that is consistent with a relevant international agreement. Another fledgling technique developed more recently by the EU courts has been to transform international legal principles into an interpretation of EU law. In this way they can avoid inconsistencies with international rules or rulings of a competent international tribunal, while not being bound to always follow them. Through these techniques the European courts are creating a balance between private interests and overall European interests in giving domestic law effect to international economic law. This is still a work in progress.⁴⁶

I believe it would be desirable for the EU political institutions to engage with these fundamental issues. The European Parliament made an effort in

⁴⁵ See Bronckers, M., 'From "Direct effect" to "Muted dialogue": Recent developments in the European Courts' case law on the WTO and beyond', in M.K. Bulterman et al. (eds), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot*, Austin et al., Wolters Kluwer, 2009, p. 403, at p. 414.

⁴⁶ See generally Bronckers, *idem*.

a report of some years ago for instance,⁴⁷ and would be well placed to reinitiate a debate. The domestic law effect of international agreements like the WTO should not be left to the hazards of case-by-case court judgments with an occasional reflection by some interested private commentators.

⁴⁷ European Parliament – *Report of the Committee on Legal Affairs and Citizen's Right on the relationships between international law, Community law and the constitutional law of the Member States*, 24 September 1997, A4-0278/97, at pp. 13–14.