The WTO in the EU: Unwinding the Knot

John Errico[†]

Introduction 179
I. **Direct Effect** 182
II. **Case Law** 183
A. *International Fruit* 183
B. *Kupferberg* 184
C. *Portugal* 185
D. *Biret* 186
E. Between *Biret* and *FIAMM* 188
F. *FIAMM* 189
III. **Analysis** 190
A. *Nakajima* and *Fediol* 190
B. Requirements for Non-Contractual Liability 191
1. *The First Requirement: A Breach of Community Law* . 192
2. *The Second Requirement: The Rule Breached Must Intend to Confer Rights on Individuals* 197
3. *The Third and Fourth Requirements: The Breach Must be Sufficiently Serious and There Must Exist a Direct Causal Link* 201
4. *Summary* 201
C. Non-Contractual Liability Without a Violation of Law .. 202
D. "Pure" EC Law Principles: Fundamental Rights 203
E. Pragmatic Concerns and the Future 203
Conclusion 206

Introduction

The myriad expansion of treaties and organizations governing international trade in the second half of the twentieth century[1] has doubtlessly contributed to increases in the volume of international trade. Despite these benefits, the creation of systems such as the World Trade Organization (WTO), formerly the General Agreement on Tariffs and Trade (GATT),

† B.A., History, Yale University, 2008; Candidate for J.D. and L.L.M. in International and Comparative Law, Cornell Law School, 2011; Managing Editor, Cornell International Law Journal, Volume 44. I would like to thank Professor John J. Barceló III for his suggestion of this topic and his helpful critiques, Professors Mitchel Lasser and Clifford Jones for their illuminating teaching on international law topics, and all my ILJ colleagues for their friendship and continued hard work.

1. For example, European Union (EU) and the World Trade Organization (WTO) (formerly the General Agreement on Tariffs and Trade (GATT)), the North American Free Trade Association (NAFTA), and others.

which contain rules by which the trade activity of signatory states can be judged, has added an additional layer of complexity to the trading regimes of signatory states. With the WTO's recent creation of the Dispute Resolution Body (DSB),[2] signatory states and, importantly, private entities such as businesses within these states, can face real penalties for their government's non-compliance with WTO provisions.[3] For example, a signatory state that has received a favorable judgment against another signatory state at the DSB for violation of WTO law may ultimately be able to impose new tariffs or suspend tariff concessions granted as a result of membership in the WTO.[4] Such a judgment could seriously harm businesses in the violating member state that depend on open borders to conduct trade.[5] As a result, the impact and use of WTO law within the legal orders of signatory states is a vitally important topic.

The complexity and importance of this topic are best examined by investigating the role of WTO law within the legal order of the European Union (EU), which is itself an entity existing somewhere between a fully-fledged nation state and a "mere" international treaty.[6] Private entities within the EU interested in changing the trading practices of the EU, or that have been damaged as a result of the authorized suspension of concessions by a trading partner under WTO law, have increasingly attempted to use WTO law as a means to declare the law or practices of the EU impermissible or to obtain compensation for damages suffered. The EU's relative openness[7] to international law within the its legal order[8] has led commentators to state that private litigants within the EU may be able to use WTO law to invalidate EU law[9] or to obtain damages under the EU's non-contractual liability provision, Article 340(2), formerly Article 288(2) TEC.[10] This state of affairs stands in stark contrast to the United States, where

2. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 14-15 (Cambridge Univ. Press 2004) (1999).

3. *See*, *e.g.*, Joined Cases C-120/06P & C-121/06P, Fabbrica Italiana Accumulatori Motocarri Montecchio SpA v. Council, 2008 E.C.R. I-6513, ¶ 23-24, 30 [hereinafter FIAMM, ECJ] (noting that, as result of the EU's non-compliance with WTO law regarding bananas, the US was authorized to levy a customs duty on products including batteries and spectacles, which were produced by FIAMM and Fedon. Both companies complained that the EU was liable for damages allegedly suffered by the imposition of the customs duty.).

4. *Id.* ¶ 23-24.

5. *Id.* ¶ 30.

6. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405-07 (1991).

7. Compared to, for example, the United States.

8. *E.g.* Case C-104/81, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., 1982 E.C.R. I-3641 [hereinafter Kupferberg].

9. *See* PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS 330 (2004) (noting that there exists a presumption of direct effect in international law, with the apparent notable exception of GATT/WTO law).

10. To allay confusion, when introducing a Treaty provision, this paper will parenthetically reference the older Treaty Establishing the European Community (TEC) numbering system (the renumbering system instituted by the Treaty of Amsterdam, effective 1999 until 2009) and, when applicable, the original Treaty number under the

such claims are barred due to sovereign immunity.[11]

To the disappointment of litigants and scholars alike,[12] the European Court of Justice (ECJ), the highest court in the European Union on matters of EU law, has continually denied review of the legality of EU law on the basis of WTO law and has correspondingly denied damages to private entities even when the EU's behavior has been explicitly declared inconsistent with WTO obligations by the DSB.[13] In the terms frequently used by commentators and the ECJ (and utilized in this note), the ECJ has also continued to deny the "direct effect" of WTO law within the EU legal order. Although this result may be unsurprising from a political perspective, particularly considering that comparable actions are not available in the EU's trading partners, the legal basis on which these actions have been denied in the EU has been unfulfilling and opaque.

This Note will specifically focus on the claims of private litigants who have been damaged by the EU's explicit noncompliance with WTO law as determined by the DSB. The DSB has determined that EU law is inconsistent with WTO law in the DSB in both the *Bananas* and *Hormones* disputes.[14] Each dispute brought with it a flurry of litigation within the EU by litigants who claimed either that their business had been harmed by the EU's non-compliant law,[15] or that their business had been harmed when the EU's trading partners authorized suspension of trade concessions in response to the EU's non-implementation of DSB recommendations. In these situations, litigants attempt to use Article 340(2) of the EU Treaty to argue that they are justly entitled to damages under EU law.

Treaty of Rome. At times, this may result in three separate numbers being listed for a Treaty provision.

11. *See* John H. Jackson, *Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals*, *in* CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 361, 373–75 (Anthony Arnull, Piet Eeckhout & Takis Tridimas eds., Oxford Univ. Press 2008).

12. *E.g.* PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION, LEGAL AND CONSTITUTIONAL FOUNDATIONS (Francis G. Jacobs, ed. Oxford Univ. Press 2004); Armin Von Bogdandy, *Legal Effects of World Trade Organization Decisions within Europe Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288(2) EC*, 39 J. WORLD TRADE 45 (2005); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96,* Portugal v. Council, 3 J. INT'L ECON. L. 441 (2000); Alberto Alemanno, *Recent Development: Judicial Enforcement of the WTO* Hormones *Ruling Within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions?*, 45 HARV. INT'L L.J. 547, 560 (2004); Geert A. Zonnekeyn, *EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions - Are the Dice Cast?*, 7 J. INT'L ECON. L. 483 (2004).

13. Two important but rarely permitted exceptions to this general idea exist: the *Nakajima* and *Fediol* exceptions, to be explored later in this note. *See infra* Part III.A.

14. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (Jan. 16, 1998).

15. *E.g.*, Case C-94/02, Établissements Biret et Cie SA v. Council, 2003 E.C.R. I-10565 [hereinafter Biret, ECJ].

This Note will analyze the arguments presented by litigants in an attempt to obtain damages for the suspension of concessions initiated by trading partners of the EU and will attempt to clarify the legal standards used to evaluate such claims. Rather than focus on specific criticisms of cases or Advocate General opinions, which have been covered exhaustively in the literature,[16] this Note will argue that, although the ECJ's jurisprudence on this subject is confused and discouraging,[17] it is clear from tracing the analytical structure of the ECJ's arguments that this jurisprudence is motivated by an overriding concern for the pragmatic and political ramifications of its decisions. The EU's recent adoption of the Lisbon Treaty and proposed accession to the European Convention on Human Rights (ECHR) may create additional avenues for legal arguments. Part I of this Note defines the term "direct effect" as used in this discussion. Part II reviews the relevant case law on point. Part III analyzes the relevant arguments and cases, and presents criticisms and suggestions for the future.

I. Direct Effect

"Direct effect" is a term that has no generally accepted definition within the EU[18] and presents a source of confusion when dealing with international law inside the EU legal order. The idea of direct effect first crystallized in the ECJ's landmark case of *Van Gend en Loos*.[19] In that case, the plaintiff claimed that reclassifying the chemical urea-formaldehyde into a different tariff category—an action which resulted in an increased tariff on the chemical—was a violation of then-Article 12 of the EU Treaty.[20] The plaintiff hoped to use Article 12 to argue before a national court that such an increase by another member state was invalid. Essentially, the plaintiff hoped that an individual could rely on a provision of the EU Treaty—an *international* treaty—in the court of a *national* member state to invalidate the actions of another member state.[21]

In holding that a provision of EU law could be invoked before a national court to invalidate the actions of a member state—that certain EU Treaty provisions had direct effect—the ECJ stated that the EU constitutes "a new legal order"; furthermore, after taking note of the "general scheme"

16. *E.g.*, Mario Mendez, *The Impact of WTO Rulings in the Community Legal Order*, 29 EUR. L. REV. 517 (2004).

17. *See* KEES JAN KUILWIJK, THE EUROPEAN COURT OF JUSTICE AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS? 120 (1996).

18. Rikard Nordeman, The Direct Effect of GATT/WTO Law in the EC Legal Order (2008) (unpublished Masters thesis, Lund University Faculty of Law) (on file with author). John Jackson suggests that direct effect can be compared to the phrase "self-executing" in the United States. Jackson *supra* note 11, at 376.

19. Case 26/62, NV Algemene Transp. v. Neth. Inland Revenue Admin, 1963 E.C.R. 1 [hereinafter Van Gend].

20. *Id.* ¶ B. Old Article 12 under the original Treaty of Rome numbering stated that "[m]ember States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in trade with each other." Currently, Article 37(2) (ex-Article 31(2), TEC) restates the same principle.

21. *Id.*

of the Treaty and the fact that the "clear and unconditional prohibition" of Article 12 "is not a positive but a negative obligation," the ECJ stated that Article 12 could be used as the basis of a lawsuit by private plaintiffs in national courts.[22] The test for whether a given Treaty provision has this direct effect has been expanded upon in subsequent cases to include whether the provision is sufficiently clear and precise, whether the provision is unconditional, and whether it confers a specific right upon which a citizen may base a claim.[23] Direct effect has also been found for particular EU secondary legislation, such as regulations, decisions, and, in certain circumstances, directives.[24]

The question posed when analyzing the direct effect of international law is conceptually similar: whether an individual can use the provisions of an international agreement, such as the WTO, at the ECJ to invalidate actions or laws of EU institutions. It may be natural to presume that the test established in *Van Gend* for Treaty and secondary law provisions in the EU would also apply to international agreements. However, the ECJ has been careful to note that Community legislation is fundamentally different from international obligations, despite the binding nature of the latter. For example, the ECJ stated in the *Kupferberg* case that "the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question."[25] The tests for determining whether international obligations undertaken by the EU have direct effect will be explored below, together with the question of whether direct effect is a requirement for non-contractual liability of EU institutions.

II. Case Law

A. *International Fruit*

Dispute surrounding the effect of international law generally and the GATT in particular (predecessor to the WTO) within the European Union is nearly as old as the EU itself. In *International Fruit*,[26] the first case before the ECJ dealing with the effect of GATT law within the EU, the plaintiffs argued that certain EU regulations restricting the importation of apples from third countries were invalid because they were contrary to Article XI of the GATT.[27] The plaintiffs initiated their action in the Netherlands, and the Netherlands referred the treaty-interpretation question to the ECJ under then-Article 177 of the EU Treaty (now Article 267 (ex-Arti-

22. *Id.*

23. Case C-57/65, Alfons Lütticke GmbH v. Hauptzollamt Sarrelouis, 1966 E.C.R. I-205.

24. *E.g.*, Case C-41/74, Yvonne van Duyn v. Home Office, 1974 E.C.R. I-1337 (finding that certain directives can have direct effect).

25. Kupferberg, *supra* note 8, ¶ 17.

26. Joined Cases C-21/72 & C-24/74, Int'l Fruit Company NV v. Produktschap voor Groenten en Fruit 1972 E.C.R. I-1219 [hereinafter International Fruit].

27. *Id.* ¶ 3.

cle 234, TEC)).[28]

The ECJ stated that the international law relied upon could invalidate Community law only if it satisfied two conditions: first, the provision of international law must bind the Community;[29] second, the provision must be "capable of conferring rights on citizens of the Community which they can invoke before the courts."[30] The ECJ determined that the GATT did bind the Community, satisfying the first condition; however, it also determined that the GATT did not satisfy the second condition because individuals were unable to rely upon the provision before the courts.[31] The ECJ suggested that the GATT was based on the principle of negotiation taken "on the basis of 'reciprocal and mutually advantageous arrangements' [and was] characterized by the great flexibility of its provisions, in particular those [concerning] the possibility of derogation."[32] Accordingly, the ECJ determined that it was impossible to rely upon GATT provisions before Community or national courts to invalidate Community acts or legislation.[33]

B. *Kupferberg*

Kupferberg clarified *International Fruit* by setting definitive criteria for judging the applicability of international agreements within the EU legal order. In *Kupferberg*, a German importer claimed that the German customs office was impermissibly imposing a "monopoly equalization duty" on port wines from Portugal[34] in contravention of a free-trade agreement in place between Portugal and the EU (before Portugal became a part of the EU).[35] The German importer wanted to use this agreement to invalidate the actions of the customs office.[36]

In holding that this agreement had direct effect—that is, that it could invalidate Community law—the ECJ acknowledged that international law was binding under then-Article 228(2) (ex-Article 300(7), TEC).[37] The ECJ further stated that account must be taken of the international origin of the agreement at hand when evaluating direct effect.[38] Finally, the ECJ held that the question of whether an agreement is sufficiently unconditional and precise as to have direct effect must be considered in the context of the

28. *Id.* ¶ 4.
29. *Id.* ¶ 7.
30. *Id.* ¶ 8.
31. *Id.* ¶¶ 18, 27.
32. *Id.* ¶ 21.
33. *Id.* ¶ 28.
34. Kupferberg, *supra* note 8, ¶ 2.
35. *Id.* ¶ 6.
36. *Id.* ¶ 9.
37. Ex-article 300(7), TEC, stated "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States." Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 Art. 300(2). Interestingly, this provision was removed under the Treaty of Lisbon, effective 2009 [hereinafter EC Treaty].
38. Kupferberg, *supra* note 8, ¶ 17.

"object and purpose" of the agreement.[39] The ECJ found that this agreement, and the particular provision in question, met the criteria for direct effect.[40]

C. *Portugal*

With the creation of the WTO in 1994, many scholars believed that its more stringent dispute settlement requirements would cause the ECJ to reverse its *International Fruit* holding regarding the applicability of WTO in the EU, since there was no longer "great flexibility" regarding derogation.[41] These hopes were dashed with the ECJ's decision in *Portugal*.

In *Portugal*,[42] Portugal sued under then-Article 173 (now Article 263, ex-Article 230, TEC) for the annulment of a Council Decision regarding the conclusion of a Memorandum of Understanding between the EU and Pakistan, and another between the EU and China.[43] The Portuguese government claimed that these memoranda violated various WTO rules, and hoped to convince the ECJ to declare them invalid on that basis.[44] Portugal distinguished its argument from previous cases regarding the direct effect of GATT law—including such cases as *International Fruit* and *Germany v. Council*[45]—by stating that GATT 1994, establishing the WTO, "radically alter[ed] the dispute [resolution] procedure."[46]

Portugal was not successful in convincing the ECJ of its claim. The ECJ merely recited the rationale of *International Fruit* in reaching the conclusion that the Dispute Settlement Understanding, like GATT law, continues to provide the legislative and executive branches with a great degree of flexibility in resolving disputes.[47] Correspondingly, to hold that WTO agreements have direct effect—that is, the ability to make EU law invalid—would "have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis."[48] The ECJ also suggested that the EU's trading partners have concluded that "[WTO provisions] are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law,"[49] and that an interpretation to the contrary by the EU "may lead to disuniform application of the WTO rules."[50] The ECJ also noted that such an interpretation corresponded to the text of the Council Decision's pream-

39. *Id.* ¶ 23.
40. *Id.* ¶ 26.
41. *E.g.* Griller, *supra* note 12, at 446.
42. Case C-149/94, Portuguese Republic v. Council, 1999 E.C.R. I-08395. [hereinafter Portugal], ¶ 1.
43. *Id.*
44. *Id.* ¶ 25.
45. Case C-280/93, Federal Republic of Germany v. Council, 1994 E.C.R. I-04973.
46. Portugal, *supra* note 42, ¶ 31.
47. *Id.* ¶ 40 (noting, for example, that the ability of the legislative or executive organs to enter into temporary negotiated agreements would be limited).
48. *Id.* ¶¶ 38–40.
49. *Id.* ¶ 43.
50. *Id.* ¶ 45.

ble, stating that "by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts."[51]

Portugal also argued that the disputed Council Decision violated certain other principles of Community law, including the "principle of publication,"[52] the "principle of transparency,"[53] the "principle of cooperation in good faith in relations between the Community institutions and the Member States,"[54] the "principle of legitimate expectations,"[55] and numerous other principles. The ECJ rejected all of these claims, firmly stating that Portugal could not alter the Council Decision or the ECJ's relevant decisions on the lack of direct effect of WTO law.[56]

D. *Biret*

Despite the ruling in *Portugal*, some scholars saw an opportunity for obtaining damages under Article 340(2), the EU's non-contractual liability provision, for harm resulting from the EU's express violation of WTO law as determined by the WTO's DSB.[57] Such a situation presented itself when the DSB, in an action initiated by the United States and Canada, determined that certain directives of the EU Council—including a 1981 directive and other subsequent directives prohibiting import into the EU of certain hormonal substances and beef raised with such substances—were invalid.[58] Acting on a recommendation from the Appellate Body, the DSB recommended that the EU change its law to comply with its WTO obligations.[59] The EU stated that it intended to comply with these recommendations but, after a fifteen month period, failed to implement proposed legislation and, as of the time of the Court of First Instance's (CFI)[60] judgment and the ECJ decision in this matter, the EU had still not implemented the proposed legislation.[61] Biret, a French company that traded meat, contended that the directives declared invalid by the DSB harmed its business because they prevented it from importing meat from the United States.[62] Biret therefore initiated an action under former Article 235 (now Article 268) seeking compensation for damages suffered.[63] Before the proceedings, Biret was judicially liquidated, ostensibly because it was unable to sell

51. *Id.* ¶ 48 (internal quotations omitted).
52. *Id.* ¶ 53.
53. *Id.* ¶ 55.
54. *Id.* ¶ 59.
55. *Id.* ¶ 69.
56. *Id.* ¶ 94.
57. *E.g.*, Griller, *supra* note 12, at 472.
58. Case T-174/00, Biret Int'l SA v. Council, 2002 E.C.R. II-17 [hereinafter Biret, CFI], ¶¶ 1, 10.
59. *Id.* ¶ 12.
60. The Court of First Instance (CFI) hears certain references from national courts and other matters in a first-instance manner. Litigants can appeal adverse rulings to the ECJ.
61. Biret, ECJ, *supra* note 15, ¶ 24.
62. *Id.* ¶ 27.
63. Biret, CFI, *supra* note 58, ¶ 23.

imported beef.[64]

Biret first argued that the EU's failure to reach its own goal of implementing the DSB recommendations frustrated its legitimate expectations, a principle under which illegality can be found in EU law.[65] The CFI dismissed this claim out of hand, stating that Biret did not receive assurances from the Community promising the implementation of any particular decision, and further that Biret could not legitimately expect that the existing situation would remain the same when the power to change it lay in the sound discretion of Community institutions.[66] With regard to infringement of WTO law, the CFI relied on "firmly established" EU law—namely *Portugal* and other similar cases—to find that WTO law, by its "nature and structure" does "not . . . form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 [now Article 263, ex-Article 230, TEC]."[67] The CFI cited *Portugal* to support the proposition that WTO agreements are founded on the principle of negotiation, and that recognizing WTO law as a basis for illegality of EU legislation would be to deprive the EU's legislative or executive bodies of the discretion enjoyed by the EU's trading partners.[68]

Although the CFI decision was a nonstarter, much scholarly focus has centered on the opinion of Advocate General Alber,[69] who wrote an opinion pending the ECJ's decision in *Biret*.[70] Biret contended that it should be able to contest the legality of Community legislation based on international law.[71] Alber rejected this suggestion by claiming that, regardless of whether international law forms the basis of legality review, plaintiffs must have the ability to challenge the claim; that is, according to Alber, individuals should not be able to rely on the international law to challenge acts of Community secondary legislation.[72] Alber also rejected the applicability of the so-called *Nakajima* and *Fediol* exceptions, discussed below.[73] Alber's most controversial statements touched on the direct applicability of WTO case law resulting from DSB rulings. Alber noted that DSB rulings are unlike the general WTO provisions at issue in *Portugal* and *International Fruit* in that they clearly do not have direct effect by dint of the fact that they do not provide the option of noncompliance.[74] Alber denied that

64. Biret, ECJ, *supra* note 15, ¶ 26.
65. Biret, CFI, *supra* note 58, ¶ 47.
66. *Id.* ¶ 55.
67. *Id.* ¶ 61.
68. *Id.* ¶ 62.
69. In the EU, the Advocate General (AG) proposes to the Court an independent opinion to the legal problem presented by the case. This opinion is not binding on the ECJ.
70. Opinion of Advocate General Alber, Case C-94/02, Établissements Biret et Cie SA v. Council (May 15, 2003) [hereinafter Biret, AG Alber].
71. *See id.* ¶ 1.
72. *Id.* ¶ 52.
73. *Id.* ¶ 69. *See infra* Part III.A.
74. Biret, AG Alber, *supra* note 70, ¶¶ 72–76, 86 (Noting that non-compliance is "not a lawful option.").

finding damages would limit the discretion enjoyed by the legislative and executive branches, and concluded that

> It seems unfair to deny a citizen a right to claim damages where the Community legislature, by failing to act, maintains a state of affairs that is contrary to WTO law more than four years after the expiry of the period allowed to comply . . . and continues unlawfully to reduce the citizen's fundamental rights.[75]

Alber believed that these fundamental rights include the "freedom to trade" and rejected the idea that Community institutions would be forced to change the law in order to respond to an action for damages, and further, that a finding of direct effect would weaken the Community's negotiating position within the WTO.[76] He concluded that WTO law is directly applicable and that WTO norms have as their object the protection of individuals.[77] Alber therefore concluded that DSB decisions, including the one at issue in *Biret*, should be directly applicable before the ECJ.[78]

The ECJ's decision in *Biret* did not take up the mantle of Advocate General Alber. The decision first reiterated the continuing validity of *Portugal* and the inapplicability of *Nakajima* and *Fediol*,[79] before, debatably, criticizing the CFI for not adequately distinguishing between the direct effect of the WTO agreement in general, and of the DSB decision specifically.[80] In the end, however, the ECJ avoided the heart of the matter by finding that Biret could not have suffered any damage from the arguably illegal Community directives after they were determined to be illegal before the DSB because the time given for implementing changes to EU law to comply with the DSB judgment expired in 1999, and Biret was judicially liquidated in 1995.[81] Based on this finding, the Court denied Biret's damages claim.

E. Between *Biret* and *FIAMM*

After *Biret*, some scholars believed—based on Advocate General Alber's "provocative analysis"[82] and the fact that the ECJ did not completely close the door on claims for damages—that there might be cases where a violation of a WTO law or DSB decision would lead to a valid action for damages. In the years after the *Biret* decision, however, that opportunity was incrementally and eventually definitively ruled out.[83]

In *IKEA*,[84] *Van Parys*,[85] and *Chiquita*,[86] the court—either the ECJ or CFI—was tasked with evaluating claims for illegality of EU law based on

75. *Id.* ¶ 92.
76. *Id.* ¶¶ 97–103.
77. *Id.* ¶¶ 115–119.
78. *Id.* ¶ 120.
79. Biret, ECJ, *supra* note 15, ¶¶ 55–57.
80. *Id.* ¶¶ 56–60.
81. *Id.* ¶¶ 63–66.
82. Mendez, *supra* note 16, at 525.
83. *See* FIAMM, ECJ, *supra* note 3.
84. Case C-351/04, Ikea Wholesale Ltd v. Comm'rs of Customs & Excise, 2007 E.C.R. I-7723.

WTO law or DSB decisions. None of the cases in the *Biret* line—those discussing the issue of damages based on Article 340(2) for the EU's non-implementation of a DSB decision—came before the ECJ. As such, this line of argumentation was not advanced until *FIAMM*, discussed below.[87] By denying the *Nakajima* and *Fediol* exceptions, and by recounting the reasoning in *Portugal*, the ECJ and CFI summarily rejected all claims regarding the direct effect of WTO law or the ability of plaintiffs to claim damages.

F. *FIAMM*

In 2008 the ECJ definitively closed the door on the possibility of claiming damages under Article 340(2) actions based on WTO law violations. The ECJ's decision in *FIAMM* represents the consolidation of two CFI cases, both of which were based on the same explicit violation of WTO rules by the EU.

In 1993, the EU adopted a regulation which governed the EU's relationship with African, Caribbean, and Pacific State banana importers.[88] In 1996, the United States and other WTO members instituted an action at the DSB alleging that this regulation violated several WTO provisions.[89] Both the DSB report and subsequent Appellate Body report found that certain elements of the EU's banana trading regime were in violation of WTO principles, and recommended that the Community bring its laws into conformity with WTO requirements.[90] Although the EU stated that it intended to comply with the WTO, the United States was not satisfied that the EU's new trading regime, adopted in 1998, complied with WTO rules.[91] As a result, the DSB authorized the United States to suspend trade concessions it had given to certain items imported from the EU, including batteries and certain kinds of plastics.[92] These suspensions remained in place until 2001, when the United States was satisfied that the EU had sufficiently changed its banana importation regulatory scheme to comply with WTO law.[93] The affected parties in *FIAMM* were those businesses—battery and plastics exporters located in the EU—that were harmed by the American suspension of trade concessions.

Advocate General Maduro was careful to address criticism regarding the EU's regime on the use of WTO law and DSB decisions to invalidate EU law or to obtain damages.[94] Substantively, Maduro cited the *Portugal* line

85. Case C-377/02, Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB), 2005 E.C.R. I-1465.
86. Case T-19/01, Chiquita Brands Int'l, Inc. v. Comm'n, 2005 E.C.R. II-315.
87. *See infra* Part II.F.
88. FIAMM, ECJ, *supra* note 3, ¶ 13.
89. *Id.* ¶ 14–15.
90. *Id.*
91. *Id.* ¶17–20.
92. *Id.* ¶ 24.
93. *Id.* ¶ 27.
94. Opinion of Advocate General Maduro, Joined Cases C-120/06P and C-121/06P, Fabbrica Italiana Accumulatori Motocarri Montecchio SpA v. Council (ECJ, delivered Feb. 20, 2008) [hereinafter FIAMM, Maduro].

of cases as standing for the proposition that the flexibility of WTO provisions in general and DSB decisions in particular made both ill-suited for invocation before the EU courts.[95] Despite the obvious injustice present in the claims brought by the injured plaintiffs in *FIAMM*, Maduro declined to find any ability to claim damages beyond the *Fediol* and *Nakajima* exceptions, which he determined were inapplicable in this case.[96]

FIAMM, however, presented one additional argument, namely, that Community institutions could be liable in an Article 340(2) action for damages, even if the Community did not act illegally.[97] Based on the view that the damages suffered by the injured plaintiffs here were "unreasonable," Maduro thought that the case should be referred back to the CFI for a ruling on whether non-contractual liability in the absence of a breach of law could be possible.[98]

The ECJ reaffirmed and expanded its *Portugal* ruling by holding in *FIAMM* that plaintiffs could not rely on WTO law or DSB decisions before the ECJ when arguing for invalidity or for damages.[99] Surprisingly, and somewhat abruptly, the ECJ also expressly rejected the possibility of obtaining damages despite no violation of law, as discussed more fully below. The ECJ thus completely barred any hopes for compensation, and also definitively affirmed that there is no possible way, absent *Nakajima* and *Fediol*, for private litigants to invoke WTO law before a court to obtain damages or invalidate EU law.[100]

III. Analysis

A. *Nakajima* and *Fediol*

Even from the early jurisprudence of the ECJ in this matter, the Court recognized two scenarios in which GATT/WTO law could be used to review the lawfulness of EU acts. These are the so-called the *Nakajima* and *Fediol* exceptions.

Fediol concerned the existence of a regulation that permitted producers to complain to the Commission about illicit commercial practices of third-party countries.[101] A concerned producer argued that the Commission's lack of prosecution in the case of an Argentinean producer was incorrect, particularly in light of the fact that Argentina had violated several GATT provisions. Although the ECJ held that GATT law did not have direct effect, it also stated that the action would be permissible on the basis of this violation because the regulation itself referred explicitly to GATT law.[102]

---

95. *Id.* ¶¶ 32–35.
96. *Id.* ¶ 52.
97. *Id.* ¶¶ 53–54.
98. *Id.* ¶¶ 82–83.
99. FIAMM, ECJ, *supra* note 3, ¶ 104 (affirming the CFI decision).
100. *Id.* ¶¶ 176, 188.
101. Case C-70/87, Fediol v. Comm'n, 1989 E.C.R. I-1781.
102. Specifically, the regulation referred to the "rules of international law."

In *Nakajima*, a litigant argued that the ECJ's anti-dumping regulation did not comply with the anti-dumping measures found in the GATT.[103] The ECJ found that this regulation was adopted expressly to comply with the EU's WTO obligations, and that the regulation could be examined for legality with regard to WTO obligations on that basis. The *Nakajima* exception has thus been generalized to occasions where the EU intended to implement a particular obligation.

The ECJ has not applied either the *Fediol* or *Nakajima* exceptions in disputes for non-contractual liability.[104] The continued denial of these doctrines (or rather, their very existence to begin with) is somewhat questionable. Advocate General Geelhoed attempted to explain the existence of the *Nakajima* exception by stating that, when the Community has intended to implement a WTO law, the Community "has essentially chosen to limit its own scope of manoeuvre in negotiations by itself 'incorporating' [the] obligation."[105] This explanation suggests that the ECJ is attempting to give deference to the political decisions of the EU in cases where the ECJ feels confident that the EU is attempting to implement a particular obligation. It is important to note that this is not equivalent to a finding of direct effect of a WTO law, discussed extensively below; instead, this explanation purports to rely on the direct effect of EU regulations in both exceptions.[106]

This line of argumentation is somewhat analogous to the approach of American courts, which will only interpret a statute as overriding a treaty if there is clear Congressional intention to do so.[107] That is, although its policy rationale may differ from that of American courts, the ECJ continues to find WTO law inapplicable unless there was an overt intention to implement international law. The deference given to EU political institutions by the ECJ in this case may be seen as ironic since the EU has ostensibly intended to implement all obligations arising out of its membership in the WTO, as WTO ascension itself required approval by the EU's political bodies. However, given the ECJ's reasoning, as noted below, intended to give deference to the workings of EU political institutions, it may not be particularly surprising that the EU has drawn the line at this point.

B. Requirements for Non-Contractual Liability

The requirements for an injured litigant to be successful on a claim for damages against the EU for violation of WTO law are complicated. All such claims begin as non-contractual liability actions (Article 268 (ex-Article 235, TEC) referencing Article 340(2) (ex-Article 288(2), TEC) actions

103. Case C-69/89, Nakajima All Precision Co. Ltd. v. Council, 1991 E.C.R. I-2069, ¶¶ 1–10.

104. Biret, CFI, *supra* note 58, ¶ 64.

105. Case C-313/04, Franz Egenberger GmbH Molkerei und Trockenwerk v. Bunderanstalt, E.C.R. I-6331 (ECJ, delivered Dec. 1, 2005), ¶ 64.

106. Biret, AG Alber, *supra* note 70, ¶ 60.

107. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

in the Treaty[108]), which absent exceptional arguments,[109] are subject to the requirements set out in *Francovich*[110] and further codified in *Brasserie du Pêcheur*[111]and *Bergaderm*.[112] As the ECJ authoritatively summarized in *Brasserie*, non-contractual liability exists when four conditions are satisfied. First, there must be a violation of Community law. Second, the rule violated must be intended to confer rights on individuals. Third, the violation must be sufficiently serious. Fourth, there must be a direct causal link between the breach of a State obligation and the damage sustained by the injured party.[113]

Individual consideration of each requirement will help to clarify the considerable confusion created by the ECJ's decisions on these matters. Specifically, as this Note will explore in its analysis of the second requirement, the "direct effect" prerequisite within the first requirement may not be necessary, a subtle distinction which has been a source of particular difficulty for the ECJ.

1. The First Requirement: A Breach of Community Law

The first *Brasserie* requirement for non-contractual liability—that there be a violation of Community law—is the most difficult to fulfill, not only because it subsumes the hotly contested issue of the direct effect of WTO law in the EU, but also because it incorporates two interrelated requirements that are often blurred together in ECJ decisions.[114] First, private plaintiffs must be able to point out an alleged violation of law to the ECJ by invoking WTO law to begin with, a task often referred to by the CFI and ECJ as "relying on" the law.[115] Second, WTO law, appropriately invoked before the ECJ, must validly serve as a basis for invalidating EU law or

108. Article 340(2) (ex-Article 288(2), TEC) states "In the case of non-contractual liability, the [Community] shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." EC Treaty, *supra* note 37, art. 340(2).

109. *See infra* Part III.D.

110. Joined Cases C-6/90 and C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357 [hereinafter Francovich].

111. Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland, 1996 E.C.R. I-1029 [hereinafter Brasserie]. The case is sometimes also known as *Factortame* III.

112. Case C-352/98, Laboratoires pharmaceutiques Bergaderm SA v. Comm'n, 2000 E.C.R. I-5291.

113. Brasserie, *supra* note 111, ¶ 51. (The ECJ, in this decision, describes there being three requirements (one, the rule infringed must be intended to confer rights on individuals, two, the breach must be sufficiently serious, and three, there must be a direct causal link), however, this three-part rule presumes that there was a "rule of law infringed." Since the existence of and the ability to argue the existence of such a rule of law infringement is at issue in these cases, it is more precise to conceive of there being 4 requirements); *see also* Robert Rebhahn, *Non-Contractual Liability in Damages of Member States for Breach of Community Law*, *in* TORT LAW OF THE EUROPEAN COMMUNITY 179–211 (Helmut Koziol & Reiner Schulze eds., 2008) (noting four requirements in his detailed study of Article 340(2)/ex-288(2), TEC actions).

114. Advocate General Maduro seems to believe this is due to poor wording in the *Portugal* decision. FIAMM, Maduro, *supra* note 94, ¶ 37.

115. Brasserie, *supra* note 111, ¶ 45.

actions.[116] For analytical purposes, the first sub-requirement—that private litigants essentially be able to sue on the basis of an international law provision—is a question about the direct effect of WTO law, and must be fulfilled before the second requirement is reached. The second sub-requirement—that the EU, based on international law in the form of WTO law, can be determined to have acted illegally—is a disputed question about the international legal obligations imposed on the EU by a DSB decision, and the effect of international law within the EU. It is possible to conceive of a situation in which a litigant could "rely on" WTO law before the ECJ and thus meet the first sub-requirement while still failing to meet the second sub-requirement. Such a situation would occur if the ECJ found that the WTO law or DSB decisions invoked did not invalidate EU law because, for example, the EU did not believe it was bound by such sources of law.

International Fruit was the first case to tease out these two interrelated requirements. In that case, the ECJ noted that "[b]efore invalidity can be relied upon before a national court," that is, before EU acts can be determined to be illegal on the basis of international WTO law, "that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts." In the terms outlined above, this means that the first requirement of direct effect must be fulfilled before discussion of the second requirement can begin.[117] In *International Fruit*, the litigant met the second requirement, but failed the first. The ECJ found that "the provisions of [the] agreement have the effect of binding the community"[118]—that is, WTO law ostensibly *could* invalidate EU law—but because "the general agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts,"[119] the litigant could not "rely on" this law before the ECJ. Courts and Advocate Generals have maintained this general analysis at least in name, as most recently seen in the CFI and ECJ's judgment and the Advocate General's opinion in the *FIAMM* case.[120]

With regard to the first sub-requirement of direct effect, *International Fruit* held that consideration must be given to the "spirit, the general scheme and the terms of the GATT" before a finding of direct effect for any given provision.[121] The origins of this requirement stem from *Van Gend*,

116. *Id.*
117. International Fruit, *supra* note 26, ¶ 8.
118. *Id.* ¶ 18.
119. *Id.* ¶ 27.
120. The Advocate General in *FIAMM* stated, "examination of the legality of the conduct of the Community institutions required prior resolution of the question whether WTO rules could be invoked." FIAAM, Maduro, *supra* note 94, ¶ 8. The ECJ quoted the CFI in stating "[b]efore examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation . . . ." FIAMM, ECJ, *supra* note 3, ¶ 45. This language is extremely similar to the *International Fruit* rule.
121. Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395 ¶ 16 (Opinion of Advocate General Saggio) (summarizing *International Fruit*).

where the ECJ stated that, "according to the spirit, the general scheme and the wording of the [EC] Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect,"[122] indicating that, because the EU legal order has such spirit, general scheme, and wording, Treaty provisions—and, later, secondary legislation—could have direct effect. The *Van Gend* court also noted that then-Article 12 in particular "contains a clear and unconditional prohibition which is not a positive but a negative obligation,"[123] and thus had direct effect. This suggests, of course, that an insufficiently clear law would not have direct effect.

Throughout the evolution of this doctrine, much of the ECJ's attention has been focused on discerning the spirit and general scheme of the international law obligation imposed by the WTO. Because of that focus, the ECJ has heretofore paid little attention to the issue of whether the provisions themselves are sufficiently clear and unconditional.[124] This inattention is unfortunate because even if WTO law is found to be of the general sort that can give direct effect, the ECJ could still find that the individual provisions being challenged (such as a DSB decision) do not have direct effect for lack of being sufficiently clear and unconditional. In stark contrast, much of the ECJ's case law on direct effect of EU law in the domestic legal order of member states, including findings that some directives have direct effect in certain circumstances, is predicated on whether the legislation meets these "clear and unconditional" criteria.[125]

The resounding answer to the question of the direct effect of WTO law or decisions of the DSB has been "no," as demonstrated by the cases discussed above. The most frequently recurring explanation of the ECJ, CFI, or various Advocates General in addressing this matter has been a recitation of the ECJ's reasoning in *Portugal*, in which the ECJ stated that WTO agreements and DSB recommendations cannot be invoked because invoking them "would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 . . . of [reaching a] negotiated [settlement] even on a temporary basis."[126] In essence, the ECJ is stating that the DSB gives political organs of member states flexibility and discretion in devising solutions to their explicit violations of the DSB other than implementing new legislation.

This discussion is where confusion between the first and second subrequirement presents itself. In stating that the DSB permits political bod-

122. Van Gend, *supra* note 19, ¶ B.

123. *Id.*

124. EECKHOUT, *supra* note 9 at 314. *See also* Nordeman, *supra* note 18, at 62.

125. *E.g.*, Case C-57/65 Alfons Lütticke GmbH v. Hauptzollamt Sarrelouis, 1966 E.C.R. I-205.

126. Portugal, *supra* note 42, ¶ 40. Although this statement is used explicitly in reference to actions for invalidity of community law, the finding of non-contractual liability of EU institutions requires an illegal community act. As noted previously, the ECJ has continually stated that "WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions." FIAMM, ECJ, *supra* note 3, ¶ 110.

ies wide latitude, it appears that the ECJ is stating that DSB decisions are not themselves binding. This sentiment, however, is directly at odds with the proposition, repeated consistently by the court, that WTO laws generally *are* binding. In fact, Advocate General Maduro aptly pointed out this confusion in his opinion. After affirming that the WTO is "compulsory" and that it "constitute[s] a source of Community legality," (the second sub-requirement),[127] Maduro poses the following question: "[h]ow can an international agreement be a rule of the Community legal system but at the same time not a criterion for reviewing the legality of Community acts?"[128] Or, in the terminology established above, how can the second sub-requirement not be met, if the first sub-requirement is met? Put still another way, how is it that *International Fruit* was correct?

Commentators have pointed out that this debate—whether an obligation exists under international law for a member state to change its offending practice to comply with the DSB's recommendation—has been exhaustively covered. John Jackson is one scholar who has covered the issue.[129] Jackson, after reviewing decades of state practice in the context of GATT and WTO disputes, and after conducting a detailed textual analysis of the Dispute Settlement Understanding, concluded that "there is overwhelming support for the view that the result of an adopted dispute settlement report . . . create[s] an international law obligation to comply with that report."[130]

Advocate General Alber, in his *Biret* opinion, most strikingly set the stage for this debate within the ECJ by declaring that "there is ultimately no alternative but to implement the recommendations or rulings of the DSB. In particular, they cannot be circumvented by negotiation between the parties."[131] Alber summarized this line of reasoning by stating that "[n]on-compliance with a DSB recommendation or ruling may be a commercial policy option. However . . . it is not a lawful option."[132] He also drew comparisons with EU law, noting that just as there is currently no clear way to enforce international law obligations, including the obligation to comply with a DSB recommendation, there was no way to enforce compliance with Community law until the creation of penalty payments under Article 340(2), which was itself only adopted as part of the Maastricht Treaty.[133] Alber's implication is that since it was fairly widely accepted that Community law imposed obligations on member states before the implementation of the Maastricht Treaty in 1993, so too may the DSB's recommendation have binding force. Alber was not alone in his insistence on the direct effect of WTO law; Advocate General Tesauro, in *Hermès*

127. FIAMM Maduro, *supra* note 94, ¶ 23.
128. *Id.* ¶ 24.
129. *See* EECKHOUT *supra* note 9, at 335; *see also* John H. Jackson, Editorial Comment, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 AM. J. INT'L L. 109 (2004).
130. Mendez, *supra* note 16, at 527 (citing Jackson and collecting work).
131. Biret, AG Alber, *supra* note 70, ¶ 81
132. *Id.* ¶ 86.
133. *Id.* ¶ 88.

International,[134] Advocate General Saggio, in *Portugal*,[135] and Advocate General Tizzano, in *Léon Van Parys*,[136] have all advanced similar legal rationales supporting the positions that WTO law should have direct effect.

As discussed above, the ECJ did not adopt this line of argumentation. Its most recent discussion of this issue in *FIAMM* noted that

> A recommendation or a ruling of the DSB finding that the substantive rules contained in the WTO agreements have not been complied with is, whatever the precise legal effect attaching to such a recommendation or ruling, no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed.[137]

This statement summarizes the ECJ's consistent view that DSB recommendations do not have any more ability to confer rights—that is, to have direct effect—than WTO law in a general sense. Moreover, it leaves as an open question what "precise legal effect" such rulings may have with respect to the validity of the Community's actions.

With regard to the second requirement within the first Article 340(2) test—whether or not WTO law can be used as a means to determine the legality of EU legislation—one must ask whether WTO law is within the EU legal order. As noted previously, this matter appears well settled on a plain reading of the EU's ex-Article 300(7), TEC, which explicitly states that international law is binding.[138] ECJ case law confirms this position.[139] As scholars have noted, "whatever controversy there may be over the exact legal status of WTO law within the EC legal order, there is no question about the binding nature of the former."[140] Unfortunately, the ECJ has not delved into this question, other than in the case of the *Nakajima* and *Fediol* exceptions discussed above, in which WTO law indeed served as the basis for invalidation of EU law.[141] It is disappointing, for the sake of analytical clarity, that the ECJ does not adequately distinguish between these two factors. Despite attempts at clarification, it remains frustrating that the ECJ appears to conclude that WTO law within the EU is binding—satisfying the second sub-requirement, but that WTO law fails the first requirement because it permits room for negotiation and political action—suggesting that the law may not be binding after all.

---

134. Case C-53/96, Hermès International v. FHT Marketing Choice BV, 1998 E.C.R. I-3603 (Opinion of Advocate General Tesauro).

135. Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395 (Opinion of Advocate General Saggio).

136. Case C-377/02, Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB), 2005 E.C.R. I-1465 (Opinion of Advocate General Tizzano).

137. FIAMM, ECJ, *supra* note 3, ¶ 129.

138. Ex-Article 300(7), TEC.

139. *E.g.*, Kupferberg, *supra* note 8.

140. GRÁINNE DE BÚRCA & JOANNE SCOTT, THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 5 (Gráinne de Búrca & Joanne Scott eds., 2001).

141. *See* Portugal, *supra* note 42, ¶ 49 (The ECJ stated that the Court can review the legality of the Community measures in question in light of the WTO rules in the *Nakajima* and *Fediol* situations).

2. The Second Requirement: The Rule Breached Must Intend to Confer Rights on Individuals

The second requirement is rarely discussed directly in judgments. Nonetheless, as is clear in the ECJ's holdings on domestic Article 340(2) non-contractual liability actions, a mere finding of illegality of Community acts is not sufficient for the EU to incur non-contractual liability. In the *HNL* case, for example, the ECJ admitted that a Council regulation requiring the purchase of skimmed-milk powder had been found "null and void" via several preliminary rulings.[142] This finding, however, was not sufficient for the plaintiffs, who alleged that they had been injured by this illegal regulation, to obtain damages from the Community. The ECJ stated that

> [T]he finding that a legislative measure such as the Regulation in question is null and void is however insufficient by itself for the Community to incur non-contractual liability for damage caused to individuals under the second paragraph of Article 215 [now Article 340, ex-Article 288, TEC] of the EEC Treaty.[143]

The ECJ then suggested that other *Brasserie*-like requirements, including that the law should be "for the protection of the individual," must be met before damages can be obtained.[144]

The ECJ's lack of discussion on this front is the most frustrating aspect of its reasoning in these actions. In all cases for non-contractual liability arising from WTO or DSB provisions, the ECJ discusses the "direct effect" requirement of the WTO or DSB provision as a necessary predicate for finding liability. However, this is squarely at odds with prior reasoning in Article 340(2) actions, as established by *Francovich*, the foundational case in this area of jurisprudence. In *Francovich*, the ECJ held that provisions of a particular directive were not sufficiently clear or precise to "enable individuals to rely on those provisions before the national courts,"[145] and that it thus failed the direct effect requirement discussed under the first prong of this Note's Article 340(2) analysis. However, *Francovich did* find that the injured plaintiffs could obtain non-contractual liability, stating that "the content of [the] right can be identified on the basis of the provisions of the directive,"[146] thus satisfying the second Article 340(2) requirement as it is laid out in this Note.

The ECJ therefore held in *Francovich* that the conditions for non-contractual liability of EU institutions based on certain provisions are actually *less* stringent than the conditions required for direct effect of these provisions. More specifically, it is possible to obtain liability, which necessitates a finding that the rule breached intended to confer rights on individuals,

142. Joined Cases C-83/76, C-94/76, C-4/77, C-15/77, C-40/77, HNL v. Council and Comm'n, 1978 E.C.R. I-1209 ¶¶ 1, 3 [hereinafter HNL].
143. *Id.* ¶ 4.
144. *Id.*
145. Francovich, *supra* note 110, ¶ 26.
146. *Id.* ¶ 44.

without a finding of direct effect.[147] Whether or not every provision found to have direct effect must also be found to confer rights on individuals is an open question; it does not, however, appear that the ECJ has ever ruled that a provision with direct effect does not also confer sufficient rights upon individuals. It follows logically that there must be a higher threshold for situations in which a private plaintiff attempts to invalidate a law (direct effect required), rather than simply to obtain damages without necessarily invalidating the law (that the rule infringed intended to give rights to individuals). This is so even if the functional equivalent of finding non-contractual liability may be to ultimately change the law. Scholars have noted that this distinction has "created difficulties"[148] and that the ECJ has struggled with this distinction in cases such as *Dillenkofer*.[149]

Scholars have agreed that the ECJ's requirement of direct effect before initiating a non-contractual liability investigation does not make sense, largely because the direct effect requirement and the intended-to-confer-individual-rights requirement are conceptually different.[150] Indeed, even Advocate General Saggio suggested in *Portugal* that "in principle, the right to review the legality of a Community act does not depend on whether the rules invoked as a criterion for determining the legality of that act have direct effect."[151] In essence, there is no requirement of direct effect to satisfy the first prong of Article 340(2) liability—that is, showing the existence of an illegal Community act—so long as all other elements of the Article 340(2) test are present.[152] Thus, the ECJ's conclusion in *International Fruit* that "before invalidity can be relied upon before a [national] court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts" seems to be incorrect in light of *Francovich*, or at least substantially modified thereby.[153]

The only justification for the ECJ's continued discussion of the nature of the WTO obligations and of the *International Fruit* direct effect requirement can be found in the rationale of *Kupferberg*. In that case, the ECJ stated that "the effects within the Community of provisions of an agree-

147. *See* Rebhahn, *supra* note 113, ¶ 9/42.

148. *See* Angela Ward, *More than an 'Infant Disease': Individual Rights, EC Directives, and the Case for Uniform Remedies*, *in* DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE 52–53 (Jolande M. Prinssen & Annette Schrauwen eds., 2004).

149. Joined Cases C-178, C-179, C-188, C-189, C-190/94 Dillenkofer v. Federal Republic of Germany, 1996 E.C.R. I-4845.

150. *See* Alberto Alemanno, Private Parties and WTO Dispute Settlement System 21 (2004) (Cornell Law School Inter-University Graduate Student Conference Papers) (on file with the Cornell Law Library), *also see* Nordeman, *supra* note 18, at 42; Mervi Pere, *Non-Implementation of WTO Dispute Settlement Decisions and Liability Actions*, NORDIC J. COM. L. 1, 31–33 (2004); Philipp Gasparon, *The Transposition of the Principle of Member State Liability into the Context of External Relations*, 10 EUR. J. INT'L L. 605, 619–622 (1999).

151. Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395 ¶18 (Opinion of Advocate General Saggio).

152. *See* Geert A. Zonnekeyn, *The Status of WTO Law in the EC Legal Order:* The Final Curtain?, 34 J. WORLD TRADE 111, 120 (2000).

153. *Id.*

ment concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question."[154] This indicates that *Francovich* may not be relevant in light of international agreements. Even in *Francovich*, however, despite a finding of the lack of direct effect for a particular directive, the ECJ, in its discussion on Article 340(2) actions, cited the landmark direct effect case of *Van Gend* and noted that "Community law is also intended to give rise to rights which become part of their legal patrimony."[155] The relevance of this passage to the holding of the case is not directly apparent, and scholars have criticized the *Francovich* decision as a paradigmatic model of opaque ECJ reasoning.[156] This joint reading of *Francovich* and *Kupferberg*, however, suggests that other international law which may not be intended to give rise to rights that become part of a citizen's legal patrimony in a generalized sense—like the WTO and unlike the EU—may not enable non-contractual liability. *Van Gend* also famously stated that the EU constituted the creation of a "new legal order,"[157] and no similar statement exists with regards to the WTO.[158] An investigation into the general "nature" of the WTO law may therefore be appropriate, as discussed previously.[159]

The ECJ arguably recognized this incongruity in criticizing the CFI in its *Biret* decision. In this judgment, the ECJ, without elaboration, voiced its criticism of the CFI's suggestion that a DSB decision could be taken into consideration only if it was found that the larger agreement—here, the SPS Agreement—was found to have direct effect.[160] Nearly all scholars, however, have interpreted this statement as the ECJ's criticism of the CFI for not investigating whether DSB decisions, distinct from WTO law, have direct effect, and not as criticism for not for delving into the question of direct effect at all.[161]

Advocate General Alber came close to addressing this difficulty when, shortly before referencing *Francovich*, he noted that a claim for damages does not mean "that an individual has a right to require the Community bodies to take a particular course of action," perhaps suggesting direct

154. Kupferberg, *supra* note 8, ¶ 17.

155. Francovich, *supra* note 110, ¶ 31.

156. *See* MITCHEL DE S.-O.-L'E.LASSER, JUDICIAL DELIBERATIONS A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 121–23 (2004).

157. Van Gend, *supra* note 19, ¶ B.

158. *See* Mendez, *supra* note 16, at 525 (collecting cases and noting that comparison with *Van Gend* is contestable because "[c]ommunity norms are embedded in a wholly different institutional setting from those of the WTO" and mere similarity in wording "is not enough for them to have the same meaning").

159. Eeckhout suggests that "[i]t is accepted doctrine that the Court sought to distinguish EC law from international law, in particular as regards the effects which EC law has in the laws of Member States" in its *Van Gend* decision noting the existence of a "new legal order." EECKHOUT, *supra* note 12, at 32.

160. Biret, ECJ, *supra* note 15, ¶ 55–56 (stating that "[s]uch reasoning does not suffice, however, to deal with the plea put forward by the applicant at first instance concerning infringement of the SPS Agreement.").

161. *See* EECKHOUT, *supra* note 9, at 334.

effect. Instead, he noted that "Biret et Cie is merely entitled to seek monetary compensation from the Community provided that the other conditions are met,"[162] by which he likely meant the Article 340(2) requirements alone. Advocate General Maduro, in his *FIAMM* opinion, conscious of the confusion caused by *International Fruit*,[163] proposed that the phrase "direct effect" be dropped from this analysis and replaced with "the ability to rely on WTO law," because the direct effect of international law and domestic law are assessed differently, although a very similar test apparently applies to both.[164] This clarification does not help, given that Maduro failed to address the fundamental incongruity with Article 340(2) claims and *Francovich* directly, and given further that he attempted to redefine the already murky term of "direct effect" in international law,[165] before throwing it out entirely.[166]

At least one scholar has also noted that "the binding nature of DSB decisions," as discussed previously in this Note in the context of direct effect, likely does not "get us any nearer [to] satisfying the 'intended to confer rights' criterion."[167] Other scholars have also suggested that the ECJ's continuing arguments on direct effect arise from a fear that finding non-contractual liability would "lead to granting a *de facto* direct [e]ffect to these rules"[168] and have pointed to the difference between the concept of direct effect and non-contractual liability actions.[169] Unfortunately, it does not appear that the ECJ has dealt with an Article 340(2) claim on the basis of international law provisions outside of GATT/WTO contexts. As such, it is for the moment impossible to compare this line of jurisprudence with how the ECJ might rule on other provisions of international law. It is the case, however, that the ECJ has often recognized the direct effect of such provisions, which indicates that Article 340(2) actions would almost certainly be permissible thereupon.

Presuming that direct effect is not required, there exists at least one WTO dispute in which the DSB specifically noted the existence of a rule intended to protect the rights of individuals: the *Section 301* case.[170] In that case, the WTO noted that the trade system envisioned by the WTO is

162. Biret, AG Alber, *supra* note 70, ¶ 93.
163. FIAMM, Maduro, *supra* note 94, ¶ 26.
164. *Id.* ¶¶ 25-31.
165. Maduro claims that the direct effect of international law means "the ability to rely on it not only before a national court but also before a Community court . . . irrespective of the nature of the action." *Id.* ¶ 29. However this is quite different from the direct effect of community law in national courts, thus likely suggesting why Maduro proposes the term be abandoned (however, it is unclear why he decided to define it to begin with and therefore added to the confusion)!
166. *Id.* ¶ 31.
167. Mendez, *supra* note 16, at 527.
168. Alemanno, *supra* note 150, at 20.
169. *See, e.g.* Fabrizio Di Gianni & Renato Antonini, *DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has Come to an End?*, 40 J. WORLD TRADE 777, 791 (2006) ("an action for the recovery of damages does not seek to annul the unlawful act").
170. Appellate Body Report, *United States–Sections 301-310 of the Trade Act of 1974*, WT/DS152/AB/R (Dec. 22, 1999).

composed "mostly of individual economic operators" and therefore that "[i]t is through improved conditions for these private operators that Members benefit from WTO disciplines."[171] It would not be difficult to conceive of arguments that the disputes at play in *Biret* and *FIAMM* could similarly protect the rights of individuals. However, since the ECJ's case law on this issue with regards to domestic applications is not well developed, it is unclear how the ECJ will decide the question, were it ever to reach it.

3. The Third and Fourth Requirements: The Breach Must be Sufficiently Serious and There Must Exist a Direct Causal Link

The third and fourth requirements—that the breach be sufficiently serious and that there must exist a direct causal link between the breach of the obligation resting on the State and the damages sustained by the injured party—have often been the source of litigation within the EU for violations of "pure" EU domestic law.[172] However, since the ECJ has never even begun a serious discussion of the second requirement—that the rule of law violated is intended to confer rights on individuals—in the context of WTO actions, there is little guidance as to how the ECJ might determine these requirements. In both *FIAMM* and *Biret*, the affected companies suffered large financial losses (with the company in *Biret* going out of business entirely), suggesting that this breach of law might be quite serious.

4. Summary

The insistence of the ECJ on a requirement of direct effect based on *International Fruit* leads to the unfortunate conclusion that, rather than applying a legal standard, the ECJ may be utilizing this requirement as a political tool to uphold its finding that the EU cannot be liable for violations of WTO law. This is disappointing because there are legally sustainable reasons for denying non-contractual damages based on WTO claims. For example, the ECJ could find that the provision in question did not confer sufficient rights upon individuals, as suggested previously.[173] The ECJ might even be able to find a lack of sufficient damages or causation.

The suggestion that the ECJ is engaging in political decision-making has been shared by numerous scholars on this issue.[174] Although this observation may initially be perceived as derogatory by those familiar with the allegations of overtly political or policy-based decision-making in civil law courts or even the United States Supreme Court, it may actually reveal a consequence of the unique manner in which the ECJ functions. In contrast to other civil law adjudicatory systems which feature multiple institu-

171. *Id.* ¶ 7.77. *See also* Pere, *supra* note 150, at 39.

172. *E.g.*, HNL, *supra* note 142 (the ECJ discusses the conditions for a "sufficiently serious breach").

173. However, the EU's jurisprudence on this topic is not developed, and therefore, may be a more shaky ground on which to rest their claim. *See supra* Part III.B.2.

174. *See* Jackson, *supra* note 11, at 377, for further discussion on the Commission and Council's opinions and the ECJ's role in these policy matters.

tions such as a Council of State or specific constitutional courts that deal directly with political questions, the ECJ is a single institution that must pass judgment on all questions, including those of a political nature. Furthermore, unlike the United States Supreme Court, the ECJ has neither the benefit of a "political questions" doctrine, nor the ability to rely on sovereign immunity or discretionary jurisdiction to avoid thorny questions.[175]

Therefore, the ECJ's reasoning in these non-contractual liability cases may be its attempt to create the functional equivalent of a sovereign immunity doctrine, most particularly because its trading partners impose this doctrine in the same circumstances. Although the ECJ's legal reasoning may be flawed, it is not altogether unbelievable that the ECJ, functioning in the context of trading partners who continually deny damages or direct effect, would conclude that this is the only course of action. The fact that the ECJ must make such decisions highlights either the flaws inherent in a single court of general jurisdiction lacking the tools of similar courts like the United States Supreme Court, as some scholars suggest,[176] or the unique nature of the ECJ in contrast to other adjudicatory systems. Merely acknowledging this type of decision making overtly, however, would help to clarify this matter.[177]

C. Non-Contractual Liability Without a Violation of Law

The vast confusion created by the court-made direct effect requirement of WTO/DSB law in Article 340(2) actions is bypassed by argument that damages could still be obtained under Article 340(2) without an illegal act. The injured plaintiffs in *FIAMM* argued that the wording of Article 340(2) does not explicitly mandate that a Community Act must be illegal to warrant damages. Instead, they argued, it requires only that liability will be governed by "the general principles common to the laws of the Member States."[178] Thus, there may be damages without an illegal act if the collective principles common to the laws of the Member States do not preclude damages from being awarded without a finding that of illegality.

Advocate General Maduro was persuaded by this argument in his *FIAMM* opinion. He suggested that establishing no-fault Community liability was within the "general principles" suggested in Article 340(2).[179] Maduro thought that *FIAMM* was a prototypical case for this application because the individuals and institutions were damaged by EU action, yet were cut off from invoking WTO law due to the arguments previously

175. *See* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 552 (1996) (suggesting that certain provisions in the EU Treaty could lead to the creation of an American-like "political questions" doctrine, but acknowledging that this has not occurred).

176. J.H.H. Weiler, *The Judicial Après Nice*, *in* THE EUROPEAN COURT OF JUSTICE 215, 215–16 (Gráinne de Búrca & J.H.H. Weiler eds., 2001).

177. Jackson, *supra* note 11, at 380–81 (proposing a similar ECJ decision-making approach).

178. EC Treaty, *supra* note 37, art. 340(2).

179. *See* FIAMM, Maduro, *supra* note 94, ¶ 56.

discussed.[180]

However, despite going to some lengths about the specific proposed conditions for non-contractual liability,[181] and despite the concerns about justice articulated by Maduro, the ECJ did not accept this argument. Instead, it relied on *Brasserie* and other cases that established that there must be an illegal act to warrant a damages award.[182] The ECJ's dismissal of this point again indicates its refusal to permit damages actions, and its unwillingness to consider radical changes to the jurisprudence it developed in *Portugal*.[183]

D. "Pure" EC Law Principles: Fundamental Rights

Litigants also argue that EU actions have violated "fundamental rights" that the EU should protect, including the principle of legitimate expectations and the freedom to trade. Such rights have been recognized by Advocate General Alber,[184] and by the ECJ in its *Biret* judgment.[185] Although the span of fundamental rights jurisprudence in the ECJ is beyond the scope of this Note, the ECJ's approach to fundamental rights issues—which provides a way separate from international law to claim that an EU institution has violated a fundamental right—is worth noting. The tradition of the ECJ has been to deny the applicability of such rights,[186] consistent with the ECJ's teleological reasoning. Were the ECJ to a find a fundamental rights violation, however, such a finding might be able to substantiate the Article 340(2) illegality prong.

The existence of alternative arguments lends hope for positive developments in future jurisprudence because the EU will likely join the European Convention on Human Rights (ECHR) and its associated Court, as discussed below.[187]

E. Pragmatic Concerns and the Future

One glimmer of hope remaining for injured plaintiffs hoping to obtain damages may be found in the EU's recent adoption of the Treaty of Lisbon. This Treaty gives binding legal force to the Charter of Fundamental Rights of the European Union, which includes provisions for the right of every person to "have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance

180. *Id.* ¶ 58.
181. *Id.* ¶¶ 73–78.
182. *See* FIAMM, ECJ, *supra* note 3, ¶¶ 169–70.
183. *See* Portugal, *supra* note 42, ¶¶ 47–49.
184. Biret, AG Alber, *supra* note 70, ¶ 92.
185. Biret, ECJ, *supra* note 15, ¶ 51("The objective of the WTO agreements is not to create rights for individuals but merely to govern relations between States and regional economic organisations on the basis of negotiations based on the principle of reciprocity.").
186. *Id.*
187. *See infra* Part III.E.

with the general principles common to the laws of the Member States."[188] This is a direct reference to the pre-existing EU Article 340(2). The Charter also provides that every person has a "right to property" as well as other business rights.[189] Commentators have suggested that while this Charter does not create new rights, it does create "the possibility that the rights which it enshrines may be recognized or interpreted by the European Courts in ways that bring more direct benefits to individuals and/or legal persons."[190] If this possibility materializes, the ECJ may be more receptive to fundamental rights claims raised by plaintiffs in these actions.

Of most interest, however, is that the Treaty of Lisbon opens the door to the EU's accession to the ECHR, which establishes the European Court of Human Rights. That court has the power to award damages and can hear cases brought by private parties against signatory states for violations of the rights enshrined in its articles.[191] If the EU becomes a member of the ECHR, private plaintiffs within the EU would be able to proceed with fundamental rights claims against the EU at the European Court of Human Rights. Although the human rights respected by the ECJ and those by the ECHR do not necessarily differ, the ECHR's court is empowered to award damages simply when "the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made."[192] Article 46 of the ECHR notes that opinions of its court are to be considered binding.[193]

Although an analysis of ECHR case law is beyond the scope of this Note, these simplified damages provisions, along with the possibility that a new set of judicial eyes, unbound by the policy concerns of the EU, may examine these issues suggests that plaintiffs who feel that their property or other rights have been violated by the EU's non-implementation of DSB decisions may have another avenue for redress. Injured plaintiffs may be able to point to an adverse decision from the ECJ, such as the *FIAMM* decision, as the very act of the EU that has violated their rights, thus eliminating the need to rely on WTO law or a DSB decision as a basis for their suit. Undoubtedly, layering an additional level of law above the ECJ will almost certainly result in additional complications of this issue that must be played out in the judicial processes.

---

188. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, art. 41(3) [hereinafter EU Charter].

189. *Id.* art. 17.

190. Jacques Bourgeois et. al., *The Lisbon Treaty: The Next Steps Forward for Europe,* WILMERHALE (Dec. 3, 2009), *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9321.

191. EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION DOCUMENT ON THE COURT, 1 (2006), http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf.

192. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], art. 41.

193. *Id.* art. 46.

Although the wide variety of legal arguments suggested in this Note understandably give rise to the possibility that private litigants may be able to obtain damages from the EU for violations of WTO law, it seems extremely unlikely that such a possibility will be recognized at the ECJ or at any national court of the EU. To some, this appears surprising given that other international law treaties have been held to have direct effect within the EU.[194] Indeed, it may not be unreasonable to assert that the EU's choice to deny direct effect to its WTO obligations is a sign of a greater change in the EU's interface with international law generally.

The true answer may be found by considering the EU's own legal history regarding the direct effect of EU law and secondary legislation. In cases such as *Van Gend* and its progeny, the ECJ itself determined that certain treaty provisions or secondary legislation had direct effect and were applicable at the level of the member states.[195] In the WTO context, the EU is but one among many members, and the ECJ could be considered analogous to an EU member state court for the purpose of this analogy. For the EU to unilaterally declare that it would recognize the direct effect of WTO law would be akin to an individual member state of the pre-*Van Gend* EU declaring direct effect for EU law, without any knowledge or expectation that other member states would follow suit. Indeed, much the opposite might be true, since these damages claims are not permitted elsewhere. This clearly would not and did not occur despite the weight of legal arguments, simply because it does not appear to be in the interest of the member state to recognize such law. The infusion of EU law into the national order of EU member states—mainly to invalidate the national law of member states—is not necessarily a welcome event. From the perspective of uniformity of laws, this situation is not desirable, because it would mean that the EU's own interpretation would be at odds with that of virtually every other WTO member state.[196]

However, this analysis may also lead to the opposite conclusion with regard to EU law, in that such an infusion of EU law into the courts of EU member states should be seen as both disempowering and empowering. Direct effect of EU law within member states of the EU affords national courts the ability to review legislative and executive acts of their state on the basis of EU law. This is not an opportunity afforded to national civil law courts on the basis of their own national or constitutional law, as specialized tribunals, such as Councils of State and Constitutional Councils exist in most civil law countries to do such review. A civil law court reviewing the actions of legislative or executive bodies on the basis of national constitutional law would be considered anathema, yet such a review is conducted by national courts on the basis of directly applicable EU law after *Van Gend*. From this perspective, one might assume that

194. *See* Jackson, *supra* note 11, at 376 (noting that "the European jurisprudence starting position is to give direct effect status to all third country treaties").

195. Van Gend, *supra* note 19, ¶ B.

196. *See, e.g.*, Alemanno, *supra* note 12, at 547 (describing the United States' approach).

national courts would jump at the opportunity to expand their influence and wield the new tool of EU law, even if this comes at the price of forcing national courts to invalidate their own laws on the basis of this EU law. Although no member state court assumed the mantle of the direct effect of EU law before *Van Gend* on its own, it is perhaps not inconceivable that some court could have made such a jump.

This analytical structure is not analogous to the EU in the WTO context in that the ECJ does not suffer from the limitations of civil law courts, nor is its judicial power fragmented in different judicial or quasi-judicial bodies. The ECJ has the jurisdiction, sometimes shared with the CFI, and the ability to conduct "constitutional" review of the actions of EU institutions, to judge whether member states are violating EU law, and to judge the validity of EU law. To the ECJ, the imposition of WTO law would not be empowering in the same sense as EU law is to EU member state courts. Whatever further tools would be given by WTO law to invalidate EU legislation are likely unnecessary and come at far too high a cost, namely, that of empowering citizens to invalidate EU legislation, or to practically invalidate it through massive continued damages actions. Thus, from the standpoint of these pragmatic concerns, it seems unlikely that the ECJ will recognize the direct effect of WTO law or the ability to obtain damages from WTO violations at any point. It is further unlikely that the WTO will itself declare its provisions to have direct effect in the courts of member states, as the EU did analogously in *Van Gend*, as it is unclear if this is desirable or even be possible at the level of the WTO[197].

Conclusion

The number of hurdles that an injured private plaintiff must pass through in order to obtain damages for the EU's non-implementation of DSB provisions or violation of WTO law is staggering and complex. Each element in the ECJ's *Brasserie* four-part test for non-contractual liability presents a difficult challenge for plaintiffs to overcome. Furthermore, the first element of this test includes two sub-elements: that the Community act must be illegal, and this illegality must be able to be pointed out by private litigants. It is therefore not surprising that the ECJ has yet to venture further than a discussion of the first element of this non-contractual liability test.

This situation is frustrating for two distinct reasons. First, the complexity of the ECJ's jurisprudence makes the ECJ's decisions on this matter nearly impossible to comprehend for the reader not specialized in this peculiar subset of EU law. The ECJ does not state that it is applying any test in particular in reaching these decisions,[198] let alone tests that derive from two of the fundamental pillars of EU jurisprudence, namely *Francovich/Brasserie* for non-contractual liability and *Van Gend* for direct

197. *See* EECKHOUT, *supra* note 12.

198. Plaintiffs have often complained at the ECJ that the CFI failed to fully explain its opinion on this matter. *See* Biret, ECJ, *supra* note 15.

effect. The ECJ must either presume that the reader is familiar with the dizzying array of hurdles plaintiffs must pass—the vagaries of which do not appear to be covered in the scholarly literature on the subject—or intentionally wish to cloud the issue. Although scholars have pointed out that ECJ reasoning is generally frustrating to unfamiliar readers from the United States,[199] the decisions on these particular matters seem unusually poor.

The fact that readers are unable to penetrate the ECJ's decisions leads to the conclusion that the ECJ must be engaging in political or policy based reasoning, rather than legal reasoning. Although this may very well be the case with the continued denial of the direct effect of WTO law in the EU legal order,[200] and with the denial of non-contractual liability for even legal acts, as was the case in *FIAMM*, the ECJ could certainly improve its credibility on this matter by making its reasoning clearer and more accessible. Since the ECJ cannot rely upon sovereign immunity or the political question doctrine,[201] it is not surprising that the ECJ would be motivated by political concerns; the ECJ's current position on this matter, however, tends to shut down meaningful discussion. The EU's recent adoption of the Treaty of Lisbon, renumbering and rewording Treaty provisions, has removed former Article 300(7), which stated that "[a]greements concluded under the conditions set out in this Article [international agreements] shall be binding on the institutions of the Community and on Member States." The Treaty also substantially reworded the procedures necessary to consummate international agreements with the EU under Article 218. Although these Treaty provisions are quite new, it remains to be seen whether they will usher in a more hostile attitude towards international law. At the very least, it seems that damages claims are even less likely after the elimination of ex-Article 300(7), TEC.

Secondly, and most importantly, this matter is not merely one of academic interest. The problem of the applicability of WTO law in the EU legal order is especially pressing in cases such as *FIAMM*, where the injured parties are those that did nothing wrong, and were not substantively related to the dispute at issue. As discussed above, the injured parties in *FIAMM*—battery producers and sunglass manufacturers from the EU who exported to the US—simply happened, entirely by chance, to be participants in the industries impacted by the EU's WTO dispute, as the United States determined that it would suspend trade concessions on these items imported from the EU. From the standpoint of justice, it would seem only fair to award compensation to these injured parties, as they were simply pawns in a larger game of international politics in which they could not possibly be expected to participate effectively. There are, of course, non-academic concerns on the other side of the debate, the most notable of which found form in the Seattle protests against the WTO in 1999, which

199. *See* LASSER, *supra* note 156, at 3-5.

200. *See* Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655, 664 (1999) ("[T]he grant of direct effect to a legal rule is a political decision.").

201. CHALMERS ET AL., EUROPEAN UNION LAW TEXT AND MATERIALS 414 (Cambridge University Press 2006).

showed that an overbroad application of WTO law can incite anger in a way that the broad expansion of EU law never has.[202]

Despite these concerns, the ECJ does not appear to be ready to accept damages claims in this matter due to the policy reasons set out above. The EU's accession to the ECHR offers perhaps the only legal hope of damages actions being successful. However, until the other WTO members accept actions for damages within their own jurisdictions,[203] or until the WTO itself determines that its rules have direct effect within signatory states—both of which seem unlikely—the injustice suffered by business owners in *FIAMM* and similar cases will probably continue, in line with the policy goals of the EU on the international stage of world trade.

---

202. *See* Allan Rosas, *Portugal v. Council* 37 COMMON MKT. L. REV. 797, 815-16 (2000).

203. *See* Alemanno, *supra* note 12, at 560 (suggesting that the EU could have served as this first mover)