



---

## THE JEAN MONNET PROGRAM

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

Jean Monnet Working Paper 04/05

N'Gunu N. Tiny

**Judicial Accommodation: NAFTA, the EU and the WTO**

NYU School of Law • New York, NY 10012

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© N'Gunu N. Tiny 2005  
New York University School of Law  
New York, NY 10012  
USA

## JUDICIAL ACCOMMODATION: NAFTA, THE EU, AND THE WTO

N'GUNU N. TINY\*

This article began with a simple question: How are regional trade systems responding to the claims of autonomy and supremacy of international trade law made by the World Trade Organisation's dispute settlement authorities in relation to regional trade law? Or, to put it in slightly different terms, how are regional trade dispute settlement institutions reacting to the challenges posed by the Appellate Body in bringing trade regionalism under legal control? *Turkish Quantitative Restrictions*,<sup>1</sup> for example, illustrates a strong claim made by the Appellate Body in favour of the normative supremacy of the world trading system over regional trade systems. From the internal perspective of the World Trade Organisation (WTO) this is not surprising. We should not have expected anything else from the Appellate Body. However, from an external perspective, that is to say, from the standpoint of regional trade systems, such claims, and therefore the reactions to them, are not so straightforward. In this article I will explore some of these reactions.

This article is intended to provide an analysis of the response of the dispute settlement mechanisms within the North America Free Trade Area (NAFTA) and the European Union (EU) to the claims and challenges posed by the Appellate Body. It tries to highlight the way and processes by which such judicial or quasi-judicial institutions mediate claims and conflicts vis-à-vis the WTO. It starts by focussing on what are considered to be the fundamentals of judicial accommodation. It will be argued that NAFTA arbitrators and EU judges have made a strong case for accommodation or, at least, to the awareness of accommodation, because of their concern with normative

---

\* Law Department, London School of Economics; Visiting Scholar, Harvard Law School. An early version of this article was presented at the seminar on Globalisation, Regulation and Governance at the London School of Economics (Feb. 2004), and at the Inaugural Conference of the European Society of International Law, Florence, Italy (May 2004). I wish to thank the conference participants for their valuable comments and suggestions. I would also like to thank Deborah Cass, Damian Chalmers, Gerry Simpson, Francis Snyder, and Gus Van-Harten for their illuminating comments. The usual disclaimer strongly applies.

<sup>1</sup> *Turkey- Restrictions on Imports of Textile and Clothing Products*, Report of the Panel WT/DS34/R, 31 May 1999 and Report of the Appellate Body WT/DS34/AB/R, 22 October 1999, adopted as amended by the Appellate Body Report on 19 November 1999.

coherence and system integrity. Arbitrators and judges alike are driven by the idea of coherence and integrity of law when accommodating competing or conflicting normative claims. This will be followed by a focus on the distinctive character of judicial accommodation. Because of the arbitral nature of NAFTA Panels and the judicial nature of EU courts, the argument continues, arbitrators and judges respectively have a distinct, and perhaps even unique, way of accommodating different claims as compared to other institutions and actors operating within NAFTA and the EU, such as the legislature and trade officials.

Two models of judicial accommodation are contrasted. The NAFTA strategy of judicial accommodation as regards WTO law will be described as an attempt to define a common ground between both trading systems. In attempting to define the common ground, NAFTA Panels<sup>2</sup> have tried to establish a logical and consistent connection, i.e. *external coherence*, between NAFTA and the WTO. Because of the arbitral nature of NAFTA Panels and their formal pragmatic reasoning, the accommodation of WTO law, rules and principles within NAFTA is likely to continue to occur on a case-by-case basis. By contrast, the European courts have mainly focused on the determination or assertion of jurisdictional boundaries between the EU and the WTO. As WTO law forms an integral part of the EC legal order, the EU adjudicator has largely focused on the internal justification and consistency, i.e. *internal coherence*, of its legal reasoning. Because of the adjudicative nature of the European courts – as compared to the arbitral nature of NAFTA Panels – it is possible to discern a long-term strategy of judicial accommodation: the assertion of jurisdictional boundaries. Though each judicial site has its own strategy, institutions and processes, I suggest that judicial accommodation within the global trading system<sup>3</sup> stems from a single source: the policy of each trading system, on the one hand, to mediate and deal with normative and institutional claims and conflicts in order to balance and promote their fundamental values and, on the other, to endorse the plural character of the global marketplace.

---

<sup>2</sup> This article mostly refers to NAFTA Panels under the terms of Chapter 20. See Part I below.

<sup>3</sup> Throughout this article I will use the words *global trading system* and *global marketplace* interchangeably. Both expressions should not be confused with *world trading system*. I use the latter to refer to the GATT/WTO system. The former is used to depict the overall trading system or marketplace, i.e., the WTO, regional trade agreements, domestic states, corporations, individuals, etc.

Judicial accommodation operates within a two-fold problem-solving dimension. The first, which is proactive, prompts courts and court-like institutions to avoid normative conflicts and collisions. It is thus a strategy of conflict avoidance: whenever possible dispute settlement institutions should avoid direct conflicts between the provisions of different trading systems. The second, which is reactive, puts the effort on resolving and accommodating existing claims. It is thus a strategy of dealing with conflicts: when a conflict cannot be avoided it must be resolved through accommodation. Both proaction and reaction have a processual and a substantive character. Let us start with the processual.

A focus on process (the way in which things are done)<sup>4</sup> may be viewed as a way to facilitate accommodation and negotiation. Process, in this sense, is a medium through which systems interconnect; a discursive method through which trade actors and officials, ranging from judges to trade diplomats, can communicate and negotiate. Taking it into account can bring some positive insights to fundamental questions such as institution building and polity building. Hence, even in the presence of distinct and often contradictory material or substantive regulations operating in different trading systems, accommodation could occur if different material norms were informed by similar processes or, alternatively, if actors and officials interacted in a framework of an organised process of communication. Nevertheless, process and discourse have limits, namely regarding issues such as legitimacy, participation, representation and rights, and we must recognize this. They do not determine, for example, which particular interests and values deserve protection from a legal standpoint. This question entails another type of analysis.

The substantive element (what is being done)<sup>5</sup> now turns out to be helpful. It highlights fundamental issues such as free trade, polity/market building or maintenance, coherence, integrity, participation and representation. This perspective may lead to an interest-driven approach,<sup>6</sup> where ideas such as free trade, sovereignty and polity/market

---

<sup>4</sup> D.Z. Cass, "International Business and Commerce", in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003).

<sup>5</sup> Ibid.

<sup>6</sup> By *interests* I mean the primary substantive objectives attached to the construction of the WTO, the EU (namely the EC), and the NAFTA.

building or maintenance are predominant, or to a value-driven approach,<sup>7</sup> where values such as pluralism, coherence, integrity and participation are promoted. Of course there are intermediate approaches. It is not fully correct to state that concerning, say, EC-WTO relations, the European Court of Justice (ECJ) has been construing a pure interest-driven approach or that, concerning NAFTA-WTO relations, Panels have been taking a pure value-driven approach. However, as will be discussed below, we can say that one perspective is chiefly interest-driven while the other is predominantly value-driven.

The aim of this article, however, is not to present a general theory of judicial accommodation but, rather, to highlight the adjudicative practice of accommodating normative claims. It is intended to be a phenomenological approach or a brief story of the practice of judicial accommodation in two acts: the definition of a common ground (NAFTA and the WTO) and the assertion of jurisdictional boundaries between trading systems (the EU and the WTO).<sup>8</sup>

The article will proceed as follows. First, I shall focus on the way in which NAFTA Panels are building a normative common ground regarding WTO law. I argue that through teleological interpretation Panels are trying to accommodate GATT/WTO rules and principles into the NAFTA system. This will be done by highlighting two ambiguous questions, in the sense that there are no clear and definitive answers to these questions in NAFTA, concerning the NAFTA-WTO legal interface: hierarchy of norms, whether NAFTA rules should take priority over WTO law; and jurisdiction, whether NAFTA Panels should consider WTO law. I then attempt to provide an overview and to explain the EU strategy to assert jurisdictional boundaries in relation to the WTO legal system. I shall highlight the variety of existing instruments with which the European courts are trying to improve the effectiveness of WTO law in the European legal order

---

<sup>7</sup> By *values* I mean objectives that are instrumental to the fulfilment of *interests*. Though not primary objectives attached to the construction of the WTO, the EU, and the NAFTA, values are nevertheless instrumental to the achievements of goals like free trade, predictability, and stability of the global trading system.

<sup>8</sup> The regional trade agreements at the core of this article (the EU and NAFTA) were selected according to a three-fold criterion. First, both are voluntary economic and/or political integration agreements. Second, both, though in a different manner, involve some form of transfer of power or authority to a supranational (regional) level. Finally, each regional trade agreement contains elements that allow insights of comparative analysis with the other as well as with the WTO. On the first two elements as criteria for selection of regional trade agreements, see W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge, Cambridge University Press, 1999).

and argue that the European courts' strategy of accommodation has mainly been driven by their concern with the evolving nature, that is to say the open-ended implications, of the WTO. Finally, the concluding part of the article contrasts the different strategies, processes and institutions of accommodation within NAFTA and the EU, and argues that the NAFTA and EU strategies of judicial accommodation stem from the same source and therefore can ultimately be viewed as part of the same phenomenon. I end the article with a few words on the prospects and limits of judicial accommodation.

## I. DEFINING A COMMON GROUND: NAFTA AND THE WTO

Surprisingly perhaps, NAFTA<sup>9</sup> judicial accommodation, at least in the light of the cases analysed in this Part, has mainly been a value-driven process. Panels have been accommodating normative claims through a process oriented by values such as pluralism, coherence and integrity, participation and effectiveness. This is an unexpected trend. As an intergovernmental agreement<sup>10</sup> we should have expected an interest-driven approach where NAFTA Panels would protect interests such as free trade, state sovereignty and market building or maintenance. This is not to say that interests were not present in the process of judicial accommodation. They were, but in a relative way. Where Panels stressed state interests they have counterbalanced them with values such as pluralism and participation in the global trading system. Where they invoked free trade they also called attention to the importance of, say, effectiveness and participation. Values were always strongly present. Two features have influenced judicial accommodation within NAFTA: the specific nature of the dispute settlement system and the commitment by the drafters and negotiators of the treaty to comply with and respect the GATT/WTO legal framework. I review these questions in turn.

The NAFTA dispute settlement system is a decentralized structure composed of a general dispute settlement mechanism plus four special dispute mechanisms with limited

---

<sup>9</sup> North America Free Trade Agreement, Dec. 17. 1992, US.-Can.-Mex., 32 I.L.M. 289 (containing chs. 1-9), 32 I.L.M. 605 (containing chs. 10-22), entered into force January 1, 1994 (hereinafter NAFTA).

<sup>10</sup> Contrary to the EC (not EU), NAFTA does not have international legal personality nor is it a Member, *qua* NAFTA, of the WTO.

jurisdiction and power.<sup>11</sup> The general architecture of the dispute settlement system, providing for all general disputes arising under the terms of Chapter 20, is conceived of as an ad hoc “arbitral procedure that refers determinations to Party governments for political resolution”,<sup>12</sup> where only NAFTA parties can take part in the arbitral proceedings.<sup>13</sup> It is thus a mixture of judicial and political processes, a combination between adjudication and negotiation. The arbitral panels are supervised by the Free Trade Commission – the NAFTA central institution – and administered by the Secretariat. The Chapter 20 panel reports have no direct effect on the domestic legal orders of the state parties. Hence, though the general dispute settlement system has a broad jurisdiction – it has jurisdiction over virtually any subject matter regarding the interpretation or application of the treaty except those dealt with by other special dispute settlement mechanisms – its decisions nevertheless have limited effects.

In addition to the general system there are four separate dispute settlement mechanisms: for investment disputes (Chapter 11), for the review of countervail and antidumping determinations (Chapter 19), for labour disputes (North American Agreement on Labour Cooperation), and finally for environmental disputes (North American Agreement on Environmental Cooperation). These mechanisms are also, generally speaking, ad hoc arbitral panels that issue reports to the disputants. A Chapter 19 panel report, however, replaces domestic judicial review of antidumping or countervailing duty administrative determination and therefore binds domestic legal orders of the state parties and their respective administering agencies.<sup>14</sup> Finally, except for Chapter 11 disputes,<sup>15</sup> only NAFTA parties can take part in the arbitral proceedings.

Accordingly, the very nature of the NAFTA general dispute settlement mechanism under the terms of Chapter 20 – an arbitral system composed of a mixture of judicial and political features – brings judicial accommodation along with political

---

<sup>11</sup> On NAFTA dispute settlement system, see generally M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London and New York, Routledge, 1999, 2<sup>nd</sup> edn.).

<sup>12</sup> F.M. Abbott, “The North American Integration Regime and its Implications for the World Trading System”, in J.H.H. Weiler (ed.), *The EU, The WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford and New York, Oxford University Press, 2000), at p. 172.

<sup>13</sup> Private parties, however, have indirect access and full access in disputes arising under NAFTA Chapters 19 (countervail and antidumping determinations) and 11 (investment disputes) respectively.

<sup>14</sup> Apparently contra, see Trebilcock and Howse, *op. cit.*, supra n. 11, at p. 84.

<sup>15</sup> Chapter 11 arbitral reports, although limited in scope to investment disputes, are legally binding on the disputants and can be enforced in the domestic courts under certain conditions.

accommodation. We cannot refer to NAFTA, when compared for example with the EC legal order, as a pure case of judicial accommodation. However, taking this into account, we conceive of NAFTA Panels under the terms of Chapter 20 as court-like institutions and therefore, in this context, we will refer to them as putative institutions of judicial accommodation. When necessary, I will point out the impact of the political nature of the Panels functioning in my analysis.

The second element that has direct impact on the way judicial accommodation operates is the commitment to comply with and respect the GATT/WTO legal framework, namely Article XXIV of the General Agreement on Tariffs and Trade 1947,<sup>16</sup> the major provision on the regulation of the relationship between the world trading system and systems of regional integration. NAFTA was conceived of in the light of the previous experiences of the GATT as well as the negotiations of the Uruguay Round. The drafters, on the one hand, and the masters of the treaty (the parties), on the other, have attempted to create a preferential trade agreement – a free trade area – intending thus to submit its regulations to a regional treaty rather than to the GATT and the WTO agreements. Since the beginning, drafters and masters, and later the Panels, have tried to avoid direct conflicts and collision with the WTO legal system. Indeed, we can say that there was a commitment by the parties to the treaty to respect the legal framework of the GATT/WTO.<sup>17</sup> This commitment is well highlighted, *inter alia*, by several characteristics of NAFTA. First of all, the dispute settlement mechanisms within the two trading systems often interrelate. Disputes may, in some circumstances, be resolved alternatively under the NAFTA or WTO dispute settlement rules, except where the subject of the dispute is related to health, safety or environmental standards, in which case a party may insist on dispute resolution under NAFTA.<sup>18</sup> Second, NAFTA incorporates, in some areas, substantive provisions or regimes of the GATT/WTO legal system as is the case

---

<sup>16</sup> General Agreement on Tariffs and Trade 1947 (hereinafter GATT) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, *Legal Instruments - Results of the Uruguay Round* vol. 1 (1994), 33 ILM (1994) 1125, at 1143.

<sup>17</sup> The agreement provides that “The Parties to this Agreement, *consistent with Article XXIV of the General Agreement on Tariffs and Trade*, hereby establish a free trade area” (NAFTA Article 101, emphasis added); and that “The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party” (NAFTA Article 103 (1)).

<sup>18</sup> See NAFTA Article 2005.

with, say, provisions on intellectual property rights and safeguard measures. Lastly, NAFTA not only adopts as one of its key tenets the national treatment principle but also clearly states that its meaning should be read in “accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes”.<sup>19</sup>

Despite such a vigorous commitment to comply with WTO rules we must recognize the existence of ambiguities or uncertainty within NAFTA-WTO legal relations. The question of hierarchy of norms and legal systems – which norms or legal order should have supremacy or priority in cases of inconsistency between provisions of the two legal systems – and the issue of jurisdiction – whether or not NAFTA Panels may and should consider WTO law – are leading examples of this ambiguity. The importance of these two questions is highlighted by the fact that the two first cases concerning NAFTA Chapter 20 (dispute settlement) dealt with these two issues. It was no coincidence.

Yet, regardless of their normative and practical significance, there are no clear and definitive rules under NAFTA concerning the questions of hierarchy of norms and jurisdiction. Consider, say, the question of hierarchy of norms. As pointed out by Frederick Abbott, a clear statement of NAFTA law supremacy could lead to a spread of political opposition to the agreement. On the other hand, a clear statement in favour of a multilateral approach could lead, on the contrary, to the opposition of institutions and “interest groups within the region”.<sup>20</sup> He writes:

As a matter of policy, a decision by NAFTA negotiators whether to accord legal priority to the NAFTA or WTO would appear to involve a choice whether to accord a greater degree of attention and concern to more narrow regional economic and political interests, or to broader multilateral interests [...] NAFTA negotiators might have been expected to make a clear choice in this hierarchy of interests. Evidence from the text of the NAFTA and from the early dispute settlement panel reports suggests that no such overarching policy determination was made or that, if it was made, the determination was implemented in an uncertain manner”.<sup>21</sup>

---

<sup>19</sup> NAFTA Article 301(1) (emphasis in the original). The provision further states that “to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement”.

<sup>20</sup> Abbott, *op. cit.*, supra n. 12, at p. 178.

<sup>21</sup> *Ibid.*, at p. 177. But note that NAFTA Article 103 (2) provides that “In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the

Moreover, many challenges surround the question of jurisdiction. I will analyse those questions in some detail in the sections below.

The thesis I will put forward is that, so far, judicial accommodation within NAFTA has mainly focused on the definition of a common ground between NAFTA and the WTO. This common ground has both normative and institutional features. The interaction and negotiation of norms, principles and institutions of both systems are its central devices. This common ground does not render NAFTA-WTO legal relations straightforward but it does shed new light on the relationship between the two regimes.

To begin with, the common ground is formed by inter-institutional dialogue, i.e. the creation of processes of communication between NAFTA and the WTO. Communication between trading systems and their dispute settlement institutions may be formal or informal, more or less organized, instantaneous or ongoing. The EC Treaty, for example, frames the relationship between European national courts and the ECJ. Although judicial practice has been reshaping this relationship, this process of transjudicial communication has occurred and continues to occur within the normative framework of the EC Treaty.<sup>22</sup> There are no provisions either in NAFTA or the WTO Agreement regulating the relationship between their respective dispute settlement institutions. Additionally, inter-institutional dialogue may occur in an organised strategy of communication or in a more informal fashion. In light of the cases analysed below, however, NAFTA Panels have been adopting a communication strategy in relation to WTO institutions in the absence of an organised and formal normative or institutional framework. The reasoning of the analysed case law ultimately points out that inter-institutional communication may continue to occur.

There is, then, an attempt to create a normative grammar or language shared by both trading systems. This operative common language is a constitutive element of the process of judicial accommodation in that there can be no dialogue or communicative

---

inconsistency, except as otherwise provided in this Agreement”. However, as we shall see, this is a question that obscures more than highlight and leaves many questions open to discussion. In addition, there are also special rules on NAFTA-WTO legal interplay such as NAFTA Article 710, 802 (1) and 2005.

<sup>22</sup> On the judicial communication within the EU, see J.G. Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice”, (2003) 38 *Texas International Law Journal* 547.

process without a common and operative normative language. Transjudicial communication – that is, dialogue among supranational courts and court-like institutions – presupposes or, to be more precise, requires a certain type of reasoning based on some internally consistent system of values. Both NAFTA and the WTO share internal substantive values – language and concepts – that constitute the pillars of international trade law, namely principles such as national treatment, most-favoured nation treatment and transparency. Thus, they share a consistent system of values – albeit one on a regional scale and the other at a multilateral level – that allows them to pursue their preliminary task: the liberalisation of international trade.

Finally, there is teleological interpretation and reasoning. The common ground is shaped by an overall effort to assure normative coherence and to preserve the normative and institutional integrity of the global trading system. This has mainly been done through a teleological interpretation of NAFTA rules where the context and purpose of the agreement play a key role. Accordingly, such rules have to be interpreted in the light of NAFTA's main goal: the elimination of trade barriers and the liberalisation of trade. This allows, in turn, the incorporation and accommodation of WTO rules and principles into the regional system.

I shall now begin to highlight and analyse each of the features of this common ground.

#### **A. Hierarchy of Norms and Legal Systems: *NAFTA Tariffication***

The *NAFTA Tariffication* case<sup>23</sup> is about NAFTA-WTO legal relations. The case is an example of GATT/WTO rule and principle accommodation within the NAFTA system. At stake is the question of whether NAFTA rules should take priority over WTO law or, to put it in slightly different terms, which rules should be given prevalence in a case of conflict or inconsistency. This is a *prima facie* question of hierarchy of norms and legal systems. It should be noted, however, that this particular question should not be confused

---

<sup>23</sup> *Tariffs applied by Canada to Certain U.S-Origin Agricultural Products*, Final Report of the Panel, Dec. 2, 1996, Secretariat File No. CDA-95-2008-01 (hereinafter Panel Tariffication Report). On the issue, see generally Trebilcock and Howse, *op. cit.*, supra n. 11, at pp 267-68; Abbott, *op. cit.*, supra n. 12; S. Cho, "Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism", (2001) 42 *Harvard International Law Journal* 419; and J.H.H. Weiler and S. Cho, *The Law of the World Trade Organization Through the Cases* (2004) (internet version at <http://www.jeanmonnetprogram.org/wto/index.html>, visited 1 May 2004).

with the issue concerning whether NAFTA dispute settlement Panels may adjudicate claims invoking WTO law. In this latter case, the question is whether NAFTA Panels should consider WTO law, or even adopted WTO Appellate Body reports, when settling disputes. This is a matter of jurisdiction. They are two interconnected but still distinct questions. This section only deals with the question of hierarchy of norms and legal systems. The next section will analyse the question of jurisdiction.

The case, between the U.S. and Canada, dealt with tariffs within NAFTA. The facts were as follows. Following the Uruguay Round, Canada imposed customs duties (tariffs) on certain U.S.-origin agricultural products. For Canada, those duties were nothing but a mere operation of tariffication allowed by the new rules of WTO law – that is, the transformation or conversion of non-tariff barriers into tariff equivalents – since those rules had been incorporated into NAFTA. For the U.S, on the contrary, those tariffs were in breach of NAFTA provisions, i.e. Canada was applying tariffs contrary to its commitments under the treaty since there was no provision in the treaty allowing Canada to impose such tariffs. The relevant issue in the present case, therefore, is whether or not the tariffs imposed by Canada on certain U.S.-origin agricultural products – following the conversion of non-tariff barriers into tariffs allowed by the new legal framework of the WTO – breach NAFTA provisions.

The U.S. argued that Canada violated NAFTA rules by increasing tariffs on over-quota imports.<sup>24</sup> Canada responded that such tariffs “were imposed in consequence of an obligation to tariffify existing non-tariff barriers to trade in the goods in question pursuant to the WTO Agreement on Agriculture”.<sup>25</sup> Furthermore, Canada argued that under NAFTA the contracting parties had agreed that over-quota trade would be regulated by WTO agreements, while in-quota trade in agricultural goods would continue to be

---

<sup>24</sup> Namely NAFTA Article 302(1) and (2). NAFTA Article 302 provides as follows:

1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.
2. Except as otherwise provided in the Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2.

<sup>25</sup> Panel Tariffication Report, *supra* n. 23, at para. 19. That is, Canada argued that it converted non-tariff barriers to tariff. The WTO Agreement on Agriculture entered into force as between Canada and the U.S. on January 1, 1995 since it is part of the WTO Agreement and was therefore included in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Legal Instruments - Results of the Uruguay Round vol 1, 33 ILM (1994) 1125).

regulated by Canada-United States Free Trade Agreement (FTA),<sup>26</sup> which was incorporated into NAFTA.<sup>27</sup>

In Canada's view there is an interrelationship between the FTA, NAFTA and WTO law (namely the Agreement on Agriculture).<sup>28</sup> Hence, there is a duty, upon the parties and the Panel, to avoid unnecessary conflicts between NAFTA and WTO law.<sup>29</sup> The U.S. also accepted the interrelationship between NAFTA and the WTO but in the light of a different interpretation. It argued for an application of NAFTA provisions (and not WTO law) due to the fact that "under GATT Article XXIV, NAFTA is an exception to the GATT, not subject to it", that is to say, in the event of a conflict of provisions arising from a different legal system NAFTA rules should prevail.<sup>30</sup>

The Panel was confronted with two different conflicting sets of provisions. On the one hand, NAFTA provisions do clearly forbid the increase of tariffs. On the other, WTO law imposes – or at least recognizes a right to – the conversion of non-tariff barriers into tariffs, i.e., the imposition of tariffs. The Panel began by asserting the purpose and objectives of NAFTA: the progressive elimination of trade barriers, namely through the principles of national treatment, most-favoured nation treatment and transparency.<sup>31</sup> It, subsequently, established the central issues of the dispute:

[W]hether the rights and obligations retained under FTA Article 710, as subsequently incorporated into the NAFTA, are limited to those established under the GATT and its related agreements as at the time of the entry into force of the FTA or of the NAFTA, or whether they extend to later established rights and obligations.<sup>32</sup>

---

<sup>26</sup> Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281.

<sup>27</sup> Panel Tariffication Report, supra n. 23, at para. 20.

<sup>28</sup> Ibid., at para. 63.

<sup>29</sup> Ibid., at para. 80.

<sup>30</sup> Ibid., at para. 84.

<sup>31</sup> Ibid., at para. 22.

<sup>32</sup> Ibid., at para. 133. See also para. 132. FTA Article 710 provided that "Unless otherwise specifically provided in this Chapter, the Parties retain their rights and obligations with respect to agricultural, food, beverage and certain related goods under the General Agreement on Tariffs and Trade (GATT) and agreements negotiated under the GATT, including their rights and obligations under GATT Article XI". This provision was subsequently incorporated into the NAFTA by the Annex 702.1 (Incorporation of Trade Provisions) that provides as follow:

1. Articles 701, 702, 704, 705, 706, 707, 710 and 711 of the Canada - United States Free Trade Agreement, are hereby incorporated into and made part of this Agreement, apply as between Canada and the United States.

[...]

After so doing, instead of having adopted a literal interpretation of the relevant provisions, the Panel adopted a teleological approach to the dispute, guided by the intention of the parties and the teleology of the treaties, where the context and purpose of the FTA and NAFTA assumed primary importance. It took the view that the issue “is not resolved simply by reference to the terms of the article itself” but, rather, by reference to the intentions of the parties and the context of the agreement.<sup>33</sup> Accordingly, the Panel held that the conversion of non-tariff barriers to tariffs is not an imposition or obligation under the WTO Agriculture agreement but a right arising from that provision.<sup>34</sup> Finally, the teleological approach carried out made it possible, in the view of the Panel, to harmonize NAFTA and WTO substantive provisions therefore avoiding conflicts of rules between those legal systems. In this perspective, Canada’s measure, the Panel ruled, was considered lawful under the provisions of NAFTA.<sup>35</sup>

I shall now analyse the Panel’s reasoning in further detail and simultaneously highlight its elements and strategies of judicial accommodation in relation to the question of hierarchy of norms and legal systems.

### *1. Teleology*

The central question of the *NAFTA Tariffication* case was, as we recall, whether or not the tariffs imposed by Canada on U.S.-origin products breached NAFTA provisions. If, as implied by the Panel, we were to adopt an interpretation mainly or exclusively based on the words of the relevant provisions, that is to say without taking their teleology into account, the U.S. would have been in a stronger position to win the case. In a literal sense Article 103 of NAFTA prevails over subsequent legislation of the WTO, as was the case of the Agriculture Agreement.<sup>36</sup>

---

4. The Parties understand that Article 710 of the Canada - United States Free Trade Agreement incorporates the GATT rights and obligations of Canada and the United States with respect to agricultural, food, beverage and certain related goods, including exemptions by virtue of paragraph 1(b) of the Protocol of Provisional Application of the GATT and waivers granted under Article XXV of the GATT.

<sup>33</sup> *Ibid.*, at para. 134 et seq.

<sup>34</sup> *Ibid.*, at para. 182-189.

<sup>35</sup> As pointed out by Cho, this ruling “was a unanimous decision that transcended the national loyalties of the five panelists (*op. cit.*, supra n. 23, at p. 463 (footnote omitted)).

<sup>36</sup> But it does not prevail over WTO agreements existing at the time the FTA (or NAFTA) entered into force (Panel Tariffication Report, supra n. 23, at para. 134). See also Cho, *ibid.*, at p. 462.

In contrast, the Panel adopted a teleological approach to the dispute, calling attention to the context and purpose of the FTA and NAFTA.<sup>37</sup> In carrying out a consistent interpretation the Panel accommodated normative claims and values from both trading systems such as the idea of progressive elimination of trade barriers and non-discrimination, on the one hand, and the idea of conversion of non-trade barriers into tariffs on the other hand (*conflict solving strategy or reaction*). This teleological interpretation opened the gate to the accommodation of WTO substantive provisions within the NAFTA legal order and the avoidance of conflicts between those legal systems.<sup>38</sup> The question of higher law, the Panel implied, was to remain open. In a paradigm of the non-hierarchical and horizontal relationship between systems the question of higher law and normative supremacy, if brought to the fore, is to be left open. Legal pluralism is mainly about inclusion and accommodation and less about priority and exclusion.

Continuing its teleological approach, the Panel depicted the GATT “not as a fixed body of law but as one that was capable of developing”.<sup>39</sup> The GATT, the Panel continued, is “an evolving system of law” and something more than “a static set of rights and obligations”.<sup>40</sup> These findings highlight the idea of the GATT/WTO system as an open-ended process of continuous interpretation and reinterpretation. According to this reading, the WTO structure is an evolving system of law engaged and open to continuous negotiation and dialogues, including with regional trade agreements (hereinafter RTAs).

Let us now see, in more detail, the outcomes of this teleological approach.

## ***2. Coherence and integrity***

---

<sup>37</sup> The legal basis is NAFTA Article 102 (2), which provides: “The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law”; and Article 31 of the Vienna Convention on the Law of the Treaties 1969, which provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

<sup>38</sup> Note that para. 201 drew upon a conflict between NAFTA Article 302 (1) and FTA Article 710, i.e., between two NAFTA provisions. The same passage does not mention any conflict between a NAFTA and a WTO provision. For a critical view of Panel’s findings, see D. McNeil, “The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imaging a Tarrying Bargain” (1997) 22 *Yale Journal of International Law* 345 (arguing that the Panel “substituted its own view of substantial justice for a reasonable application of the relevant rules”).

<sup>39</sup> Panel Tariffication Report, supra n. 23, at para. 138. See also para. 134.

<sup>40</sup> Ibid., at para. 139. See also para. 134.

In the Panel's view, NAFTA's main purpose is the elimination of barriers and the facilitation of trade. Those objectives therefore have to be interpreted in light of the global trading system where exceptions to trade liberalisation "must perforce be viewed with caution".<sup>41</sup> This is, in the end, a teleological interpretation that protects and enforces the general rule of integrity of the global trading system. For the Panel, in a context of a non-hierarchical relationship the question of coherence and integrity of different units operating in the global system assumes a central importance. Both NAFTA and the WTO have an ultimate and common goal and therefore their rules must be interpreted and accommodated in order to achieve that purpose. Moreover, and perhaps as the key point, in converting non-tariff barriers to tariffs, the Panel internalised the underlying WTO logic of preference of tariffs over non-tariffs barriers into the NAFTA legal system. This also is a rule that reinforces the ultimate purpose of the global trading system – elimination of trade barriers – and therefore its integrity.

Seen in this light, normative coherence, by establishing logical and consistent connections among trading systems, is a value that must be promoted through the process of judicial accommodation. It means that norms and principles from a legal system or from distinct legal systems have to make sense and fit together when taken as a whole or, in other words, norms and principles must mutually support each other.<sup>42</sup> Normative coherence is particularly relevant in plural systems of law. It is an attempt to "make sense of the diversity of law [...] without giving up its complexity and without attempting to make the law a tensionless normative system".<sup>43</sup> It brings predictability and legal certainty to systems where tension exists among its constituent parts. In this context, coherence – along with values such as consistency, predictability, separation of powers and human rights – is a basic element of the idea of the rule of law and therefore a fundamental value in any legal system. In a field such as international trade law, where there is a plurality of normative sources and legal rules, the need for coherence among different trading systems is of primary significance since the operation of the global marketplace as well as its predictability and legal certainty depends on the way trading

---

<sup>41</sup> Ibid., at para. 122.

<sup>42</sup> The literature on normative coherence is extremely vast. See, generally, A. Peczenik, *On Law and Reason* (Dordrecht, Kluwer Academic Publishers, 1989).

<sup>43</sup> L. Soriano, "A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice", (2003) 16 *Ratio Juris* 296, at p. 302.

systems interact and fit one another. In this sense normative coherence is not an end in itself but a means to an end.

Yet these sets of norms and fundamental principles must be viewed in light of legal pluralism. First, pluralism depicts a situation in which conflicting norms and principles are accommodated without implying its reduction to a single unit. In addition, claims and conflicts must be seen as normal features rather than imperfections of the systems.<sup>44</sup> Second, it implies a situation in which courts are required to justify a decision by reference to a plurality of values. Thus, mutual accommodation does not imply a unitary global trading system. Third, legal pluralism is not an answer to the challenge posed by trade regionalism but, rather, a framework to analyse the relationship between RTAs and the WTO, and a normative tool to mediate claims and conflicts between competing trading systems. It therefore does not provide answers but it does map the way to finding them. Thus, it is not only about outcomes but also about the processes through which claims and conflicts are accommodated and mediated. Finally, pluralism does not imply a universal rule to accommodate claims. Rather, it is only through the experience of particular cases that it is possible to create a sense of appropriateness or correctness of the process of judicial accommodation. As such we can speak about coherence in the global trading system but not, at least for the time being, about a coherent global trading system.

Additionally, it is worth noting that when the Panel held that there should be an interrelationship between NAFTA and the WTO, it implied that the global trading system is something that goes beyond both these trading systems. The Panel pointed out, for example, that it “attaches importance to the trade liberalization background against which the agreements [...] should be interpreted”.<sup>45</sup> This conception implies something more than a mere coexistence of both legal systems. It entails a *partnership*, i.e., a horizontal interaction between “multiple-centred systems in which there is no hierarchy”,<sup>46</sup> or, in other words, a partnership where each trading site has a partial governance project.

---

<sup>44</sup> In this sense, normative coherence is a matter of degree rather than a black-or-white concept.

<sup>45</sup> Panel Tariffication Report, *supra* n. 23, at para. 122.

<sup>46</sup> D. Elazar, “The United States and the European Union: Modes for their Epochs”, in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, Oxford University Press, 2001). As the author explains, the term subsidiarity is not used because it implies a hierarchical and vertical relationship among units or levels of governance.

In short, in the *NAFTA Tariffication* case the Panel acted both as a master of its own functional and normative system and as subsidiary guardian, a treaty partner, of the WTO legal system, balancing two conflicting trends: one defending compliance with WTO law; the other protecting the NAFTA legal order and institutional status quo. The same, *mutatis mutandis*, has happened with the question of jurisdiction to which I now turn my attention.

### **B. Jurisdiction: *Broom Corn Brooms***

*Broom Corn Brooms*,<sup>47</sup> a dispute also concerning NAFTA Chapter 20, this time opposing Mexico and the United States, helps to shed additional light on the Panels' strategy of building a normative common ground for NAFTA-WTO legal relations. After having seen how NAFTA dispute settlement authorities deal with the question of hierarchy of norms and legal systems, it is now appropriate to analyse the question of jurisdiction, i.e. whether NAFTA Panels should consider WTO law.

Let us begin, again, by analysing the factual background. The case concerns the adoption of U.S. safeguard measures (three-year tariff increase) on imports of broom corn brooms from Mexico. In March 4, 1996, the U.S. Cornbroom Task Force – an industry group – complained to the U.S. International Trade Commission (ITC) – the internal structure with the competence to determine whether imports are a substantial cause of serious injury to the domestic industry – “that broom corn brooms were being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing broom corn brooms”.<sup>48</sup> On July 1996 the ITC made its injury determinations basically agreeing with

---

<sup>47</sup> *In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, Final Report of the Panel, Jan. 30. 1998, Secretariat File No. USA-97-2008-01 (hereinafter Panel Safeguard Report). On the question of jurisdiction, see generally Abbott, *op. cit.*, supra n. 12, at p. 186 et seq. This question differs from the issue of which dispute settlement will decide the case, i.e., the question of the appropriate forum to adjudicate a legal dispute or the choice of the dispute settlement forum. On the latter issue see also Abbott, *ibid.*, at p. 182 et seq; and more generally K. Kwak and G. Marceau, “Overlaps and Conflicts of Jurisdiction Between The WTO and RTAs”, paper presented at the Conference on Regional Trade Agreements, World Trade Organization, 26 April 2002 (internet version at [http://www.wto.org/english/tratop\\_e/region\\_e/sem\\_april02\\_e/marceau.pdf](http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf), visited 5 May 2004); and, finally, J. Pauwelyn, “Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions”, (2004) 13 *Minnesota Journal of Global Trade* 231 (referring to NAFTA provisions particularly at 271-273).

<sup>48</sup> Panel Safeguard Report, supra n. 47, at para 8. A second petition was also filed with similar claims.

the domestic industry's claims. After the failure of consultations with Mexico and other countries, on November 28, 1996 the U.S. President adopted safeguard measures for a three-year period.

The parties' main arguments were as follows. Mexico contested the U.S. safeguard measures and centred its position on a single claim: that the U.S. global safeguard measures violate both WTO and NAFTA rules because they "did not correctly define the domestic industry whose economic condition must be explained to determine the existence of serious injury".<sup>49</sup> Mexico argued that not only "U.S. manufacturers of broom corn brooms", as stated by the U.S. Government, but also "U.S. manufacturers of other brooms" should have been included in the concept of "domestic industry". By failing to introduce U.S. manufacturers of other brooms into the category of domestic industry, the U.S. measures violated both NAFTA and WTO rules not only because they were based on an incorrect determination of "domestic industry" but also because, in addition, it failed to determine the appropriate level of "serious injury". Mexico's legal claim was made both under NAFTA (Article 802)<sup>50</sup> and WTO (GATT Article XIX and Article 4(1)(c) of the WTO Agreement on Safeguards)<sup>51</sup> rules.

The U.S. made two preliminary objections to the Mexican legal claim. In the first objection, the one that is relevant for this article, the U.S. alleged that "the Panel had no jurisdiction to adjudicate the conformity of global safeguard measures with GATT/WTO legal requirements". The second objection, which is not relevant here, concerned an alleged failure on the part of Mexico "to give timely notice" of a claim concerning NAFTA Article 803 and Annex 803.3(12).<sup>52</sup> A closer look at the arguments on the question of jurisdiction is called for.

---

<sup>49</sup> Ibid., at para. 22. See also para. 23. Under both NAFTA and WTO rules, a Member may apply global safeguard measures to imported products under certain conditions, namely that the imported product or products are being imported to the territory in question in such increased manner so as to cause "serious injury" to a "domestic industry". As a consequence, the content of "domestic industry" is pivotal to the determination of the validity of a safeguard measure.

<sup>50</sup> This provision, which reserves member governments the right to employ global safeguards authorized by GATT Article XIX and the WTO Agreement on Safeguards, prevents the adoption of global safeguard measures to the products of other NAFTA Parties unless imports from that Party "contribute importantly" to the serious injury.

<sup>51</sup> GATT Article XIX regulates "Emergency Action on Imports of Particular Products".

<sup>52</sup> Panel Safeguard Report, *supra* n. 47, at para. 26.

The U.S. argued that the Panel had no jurisdiction over WTO obligations.<sup>53</sup> Firstly, the U.S. position stated that under the Panel's terms of reference and, more generally, under NAFTA Chapter 20 dispute settlement rules, the Panel's competence is limited to legal claims based on NAFTA obligations.<sup>54</sup> Secondly, the U.S. argued that the Panel might only consider GATT/WTO obligations when an incorporation of those rules into NAFTA occurs. Finally, the U.S. noted that "it was the intention of the parties [in the Treaty] that claims based upon the GATT/WTO safeguard provisions themselves would have to be pursued through the GATT/WTO dispute settlement mechanism".<sup>55</sup> To conclude, the U.S. stated that unless incorporated into NAFTA, Panels could not consider GATT/WTO rules.

Mexico started by pointing out NAFTA Article 2005(1), which states that whenever a dispute arises under both NAFTA and GATT/WTO rules the parties in the dispute have a right to choose either the NAFTA or WTO dispute settlement mechanisms.<sup>56</sup> Then, it noted that "since NAFTA Article 2005(6) provides that once a NAFTA or GATT forum is selected that forum shall be used to the exclusion of the other, a NAFTA forum selected [...] necessarily has jurisdiction to dispose of all overlapping GATT issues involved in that dispute".<sup>57</sup> That is, if the selection of one forum excludes the other, the one selected has to consider the legal norms of both NAFTA and WTO jurisdictions.

What, then, was the Panel's decision? Pragmatically, the Panel held that "it was not necessary to resolve this preliminary objection [the question of jurisdiction], because

---

<sup>53</sup> Namely GATT Article XIX and the WTO Agreement on Safeguards.

<sup>54</sup> Panel Safeguard Report, *supra* n. 47, at para. 27.

<sup>55</sup> *Ibid.* Therefore, it seems that the U.S. accepts more than one jurisdiction - an alternative jurisdiction after the adjudication of the first dispute - to settle cases that arise both under NAFTA and GATT/WTO Agreements. With a similar conclusion, see Abbott, *op. cit.* *supra* n. 12, at p. 187. NAFTA relevant rules, namely Article 2005(6), are inconclusive. Article 2005(1) provides that "Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party"; and Article 2005(6) that "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4".

<sup>56</sup> *Ibid.*, at para. 28.

<sup>57</sup> *Ibid.* Although Mexico is claiming NAFTA jurisdiction to consider WTO law, its legal reasoning seems to imply that, *a contrario*, WTO forum also has jurisdiction, in such overlapping cases, to consider NAFTA law.

it was possible to dispose of the issues in dispute under the NAFTA agreement alone”.<sup>58</sup> For the Panel, NAFTA law, which in this case is substantively identical to WTO law, is sufficient in adjudicating the dispute.<sup>59</sup> On the merits, the Panel held that the U.S. safeguard measures failed to provide “reasoned conclusions on all pertinent issues of law and fact” and therefore constitute a “continuing violation of the United States obligations under the NAFTA”. It then recommended that the U.S. “bring its conduct into compliance with the NAFTA at the earliest possible time”.<sup>60</sup>

## 1. Institutional sensitivity

The claim I will put forward is that although the Panel did not give a definitive answer to the question of jurisdiction, WTO law has played a pivotal role in the legal reasoning of this case. On the one hand, pragmatically, the Panel reasoned that the question of jurisdiction was not necessary to resolve the dispute (*conflict avoidance strategy or proaction*). On the other hand, as will be clearer below, it made extensive use of WTO law and decisions. It therefore closed one door but opened another, albeit a smaller one but one large enough to welcome WTO rules and reasoning.

I am neither criticising the Panel’s pragmatic approach nor proposing an alternative one. The argument here is that such a decision entails a paradox. Even the Panel acknowledged the importance of a clear and definitive answer to the question of jurisdiction. From the perspective of a Panel it would be considerably different to adjudicate a claim based on WTO law along with NAFTA law. In this perspective, NAFTA Panels would be able to take WTO rules, principles and even decisions into

---

<sup>58</sup> Ibid., at para. 50 et seq.

<sup>59</sup> Compare NAFTA Annex 803.3(12) with Article 3.1 of the WTO Safeguards Code. A substantive decision on the question of jurisdiction is indeed a very difficult matter. As pointed out by Abbott, the question may be adjudicated from a point of view of NAFTA text or from a policy perspective. Within the former it seems that the Panels should only consider WTO law if somehow incorporated into NAFTA, which means that in this case Panels would apply NAFTA law, although originated from WTO legal order. Within the latter perspective, i.e. a matter of policy, there are good arguments for both positions. Forum shopping and excessive delays are good reasons to deny such jurisdiction. The harmonization or consistency of jurisprudence and the accommodation of normative claims and conflicts between the two systems are also good reasons to allow NAFTA Panels to consider WTO law. Abbott also argues that if the parties agree on terms of reference that a Panel should consider WTO law and obligations, there is no reason not to accept that. See Abbott, *op. cit.*, supra n. 12, at pp. 187-88.

<sup>60</sup> Panel Safeguard Report, supra n. 47, at para. 78.

account when adjudicating their cases. Seen in this light, the accommodation of both normative systems would be much easier. However, such an approach would also have some drawbacks, one of the most relevant being the fact that it could encourage the WTO Appellate Body to develop a system of judicial review of RTA adjudicatory decisions when and if they interpret and apply WTO law.<sup>61</sup> That is, if NAFTA Panels have formal power to interpret and apply WTO law, the Appellate Body – which considers itself as having the last word on WTO law – will inevitably expand its jurisdiction – be it through a formal or an informal mechanism – so as to review NAFTA Panel decisions when interpreting and applying WTO law.

The Panel was aware of the importance of this question and therefore made two central pronouncements. The first implied that a clear and definitive response to the question of jurisdiction is something that must be addressed by both trading systems in a process of continuous negotiation and renegotiation taking into account other institutions and actors in the political process. In the second message, the Panel made clear that there is a range of ways of ensuring and taking into account WTO law and decisions, such as the recognition of WTO decisions as a normative source for the adjudication of disputes under the NAFTA and the reception of WTO principles within the NAFTA legal order.<sup>62</sup>

The Panel's position is illustrative of a kind of institutional sensitivity,<sup>63</sup> i.e. sensitiveness to other institutions and actors operating in the global trading system, namely the WTO itself. This approach indicates that, in the Panel's view, the issue of overlapping jurisdiction must be addressed in the context of a dialogue or within a process of communication between NAFTA and the WTO. In the Panel's perspective the question of jurisdiction is an issue for the NAFTA-WTO partnership and therefore not a decision to be taken unilaterally by any trading system. Likewise, this decision also entails that a clear and definitive answer to the question of jurisdiction is also a subject that must be addressed by other institutions, such as the political process, and not only by courts or court-like institutions. It is thus not only a question of partnership of institutions but also of partnership of processes. In this sense, the Panel implied that the question of

---

<sup>61</sup> See Abbott, *op. cit.*, supra n. 12, at p. 188.

<sup>62</sup> See Section B.2 of this Part for further development.

<sup>63</sup> On institutional sensitivity within the WTO, see R. Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence", in J.H.H. Weiler (ed.) *The EU, the WTO and the NAFTA* (Oxford, 2000), at p. 62 et seq.

jurisdiction is irreducible in that it cannot be resolved either by a definitive solution or through the exclusion of one trading system by the other.

Yet, institutional sensitivity does not mean restraint or deference. It does not necessarily imply that the Panel has to restrain itself or defer vis-à-vis the WTO dispute settlement mechanism or vis-à-vis other political institutions.<sup>64</sup> It only means that fundamental questions and claims concerning the relationship between the NAFTA and the WTO legal systems must be adjudicated and accommodated in a permanent and plural forum of continuous negotiation and renegotiation.

## **2. Recognition and reception of WTO reports**

As we recall, the substantive issue in dispute was whether or not the U.S. authority correctly defined “domestic industry” and “serious injury”. The Panel noted that the consistency of these definitions with NAFTA law constitutes a fundamental matter.<sup>65</sup> It then held that “the only issue as to the definition of the domestic industry in this case is whether U.S.-made plastic brooms are like or directly competitive with the imported broom corn brooms”, and that “[i]t is the exact meaning and implications of the term like or directly competitive that define the controversy before the Panel”.<sup>66</sup>

After having decided that this case should be resolved under NAFTA law, the Panel made extensive use of GATT/WTO legal decisions. In order to elaborate the concepts of “like product” and “directly competitive” the Panel made a consistent interpretation of NAFTA law using as a term of reference GATT/WTO decisions, in which WTO law appears with a higher level of precision. This approach, it must be noted, was not necessarily a logical consequence of the Panel’s previous statements. The case, the Panel held, was supposed to be adjudicated only under NAFTA law. The Panel’s legal reasoning deserves to be quoted at length. It begins:

---

<sup>64</sup> On the difference between institutional sensitivity, restraint and deference in the context of WTO law, see Howse, *ibid.*

<sup>65</sup> Panel Safeguard Report, *supra* n. 47, at para. 59. It has to be noted that, all else being equal, the narrower the concept of “domestic industry” the more likely the establishment of “injury” of the “domestic industry”.

<sup>66</sup> *Ibid.*, at para 60.

In attempting to perform this analysis, the Panel carefully examined the way in which the “like product” concept had been defined in prior GATT/WTO decisions, and noted, in particular the degree of discretion accorded to governments and panels in applying those definitions. It noted, for example, that, as stated in *Japan-Taxes on Alcoholic Beverages* case, a factor test has been used [...] The Panel also noted that the Appellate Body in the same case had explained the degree of discretion involved in applying the factor test [...].<sup>67</sup>

The Panel has thus made extensive use of WTO legal reasoning, namely GATT/WTO definitions of “like product”. It therefore has constructed NAFTA’s notion of “like product” in a normatively consistent manner with WTO law. So far, albeit surprisingly, it can be said that we should expect that, in general terms, NAFTA Panels construct key trade concepts in light of WTO decisions. This is a feature of its overall effort to bring normative coherence to the global trading system and to create a common grammar for the operation of that system. After all, consistent interpretation is part of a court’s legal reasoning strategy.

The way in which the Panel constructed the terms “like product” or “directly competitive product” in light of WTO legal decisions deserves some observation. It started by recognizing WTO decisions as a normative source for the adjudication of disputes under the NAFTA legal order. This is both a normative and institutional recognition. Although the Panel did not fully explain its reasoning, some general and preliminary remarks can be made. First, recognition implies a form of communication, a language and a discursive space. In the context of NAFTA-WTO legal relations, it implies a common grammar or language. This, however, does not imply the creation of a meta-language. Although systems overlap, each one has its own normative language. As such, recognition implies the previous evaluation of a plural system, the equal value of its constituent parts, and the promotion of diversity. Second, recognition is a form of accommodation of WTO law into the NAFTA system in that it enlarges the NAFTA legal repertoire by introducing WTO law and decisions. Finally, recognition is a process over time, a dynamic and ongoing activity that involves not only courts and court-like institutions but also the political process.

---

<sup>67</sup> Ibid., at para. 66. Cf. also *Japan-Taxes on Alcoholic Beverages*, WT/DS8/R (1996) (Panel Report) and *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R (1996) (Appellate Body Report).

Be that as it may, the Panel left many questions open to discussion and interpretation. What is the legal status of WTO legal decisions? How does the process of recognition work? The Panel did not address such challenges. Yet, if we continue to analyse the Panel Safeguard Report we will observe other ways in which WTO decisions were relevant to this case. It moves from recognition to reception of WTO decisions.

***The Panel held that the U.S. government definition and subsequent application of “like product” was neither legally correct nor incorrect because the legal explanation advanced by that authority “was simply inadequate to permit review of the issue”.<sup>68</sup> To put it simply, the legal explanation of the U.S. authorities was inadequate and did not allow the Panel to reach a conclusion about the correct determination and application of the concept of “like product”. Is that lawful or unlawful? Can the inadequacy of the U.S. legal explanation, per se, violate NAFTA law? Where to find the answer? Here is the Panel’s answer, direct and short:***

A GATT panel confronted a similar situation in the *Polyacetal Resins* case, where it was asked to review an antidumping determination by the Korean Trade Commission (KTC) that failed to make clear the grounds on which the KTC had determined material injury” [...] The *Polyacetal Resins* Panel concluded that the KTC’s failure to make clear the basis of its decision violated the provisions of [...] Antidumping Code.<sup>69</sup>

Thus, the U.S safeguard measures, to the extent that they were not correctly explained, were inconsistent with NAFTA rules, namely Annex 803.3(12).<sup>70</sup>

Only NAFTA rules were applied but it was an application in light of WTO reasoning. This time the Panel did not use a WTO decision in order to construct a legal definition or concept but, rather, to justify why the U.S. insufficient legal explanation

---

<sup>68</sup> Panel Safeguard Report, supra n. 47, at para. 68.

<sup>69</sup> Ibid., at para. 69 and 70. Cf. also *Korea-Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 (1993).

<sup>70</sup> Annex 803.3(12) requires that safeguards measures present “reasoned conclusions on all pertinent issues of law and fact”.

and, consequently, the impossibility of the Panel to reach a conclusion about the accurate definition and application of “like product” violates NAFTA rules. It is not relevant to analyse whether the Panel reached its decision using a consistent interpretation or a more creative judicial reasoning. What is significant is that once more, but in a different style, the Panel used a WTO decision as a legal justification for its own findings, but this time with a specific normative effect: it incorporated into the NAFTA system the underlying principles of due process emerging in the WTO institutions, suggesting that rules and principles of due process developed by the Appellate Body may and should be used as a way of ensuring the consistency of NAFTA with WTO law and a way of strengthening the effectiveness of both legal orders. This is a reception of principles of due process developed by the WTO Panels and the Appellate Body or, in other words, a reception of WTO principles without the creation of particular external obligations for the NAFTA system or subjection to the WTO jurisdiction, i.e. with no direct and formal links.<sup>71</sup>

Yet the Panel had to address a final question. Courts and court-like institutions are passive institutions and therefore legally bounded by claims made by the parties. In *Broom Corn Brooms* Mexico did not claim the inadequacy or insufficiency of the U.S. authorities’ legal explanation. *Quid juris?* Again, the Panel has borrowed its rationale from the WTO decision in *Polyacetal Resins*. In the latter case, the WTO Panel found the Korean measure inconsistent with GATT/WTO law even though the complaining party had not raised such a claim. Accordingly, the NAFTA Panel held that “[i]n the present case [*Broom Corn Brooms*], the panel is compelled to reach the same conclusion”.<sup>72</sup> It is, once more, a WTO decision that justifies and reinforces the Panel’s legal reasoning.<sup>73</sup>

---

<sup>71</sup> This “direct citation” or “express reference” judicial strategy is considered by Anne-Marie Slaughter to be a feature of horizontal transjudicial communications and a pronouncement of an emerging dialogue among transnational courts. A.-M. Slaughter, “A Typology of Transjudicial Communication”, (1994) 29 *University of Richmond Law Review* 99.

<sup>72</sup> Panel Safeguard Report, supra n. 47, at para. 70-72.

<sup>73</sup> Apparently the citation and quotation of WTO reports by NAFTA Panels is not an exclusive feature of this particular case. In the *NAFTA Trucking Case*, the Panel extensively cited and quoted WTO reports (*In the matter of Cross-Border Trucking Services*, Final Report of the Panel, Feb. 6. 2000, Secretariat File No. USA-Mex-98-2008-01). It is not clear, however, from the Panel’s reasoning, on what grounds did the Panel cite and quote WTO past reports. It seems that the rationale for such citation and quotation may stem either from the 1969 Vienna Convention on the Law of Treaties (see para. 220-21 of the *NAFTA Trucking Case*) or from “the GATT/WTO history, liberally cited by the Parties” (para. 260 of the *NAFTA Trucking Case*). However, the citation and quotation of WTO reports in this case, *Broom Corn Brooms*, has a special significance since the NAFTA Panel, at the outset, ruled that WTO law was not necessary in adjudicating the dispute.

Consequently, the Panel concluded that the U.S. must put an end to its continuing violation of NAFTA rules and as a result bring its conduct into compliance with the same rules.

### **C. Evaluation**

*NAFTA Tariffication* and *Broom Corn Brooms* show that, as regards NAFTA-WTO legal relations, conflicts and tension have been conceived of as a natural element – as opposed to an anomaly, an imperfection or a shortcoming – and therefore something that is positively worth dealing with. Ambiguities and the lack of certainty in the legal relationship between these two trading systems along with tension and contradictory normative claims have pushed NAFTA Panels to develop institutions and processes of accommodation in relation to the WTO legal system. The question of hierarchy of norms and legal systems as well as jurisdiction is illustrative of NAFTA's judicial accommodation strategy.

This strategy may well be described as an attempt to define a common ground between the trading systems. This common ground is not formed, however, by meta-rules, principles and institutions but, rather, by the sharing of the cognitive framework of each system. Within it there are, first, processes of communication and consultation, a medium through which systems interconnect. Institutional sensitivity, the teleological approach carried out by the Panel in *NAFTA Tariffication* and, finally, the evolving nature of both systems highlight this feature. There is, then, an effort to create a normative grammar or language, a basic attempt to provide both systems with an operative and common denominator so as to generate dialogue and communication. The construction of key concepts such as “like product” and “directly competitive product” is an example of such effort. There is, finally, an effort to bring normative coherence and integrity to the NAFTA-WTO interplay or, in other words, to establish logical and consistent connections between the systems. The overall effort was put on *external coherence*. External, in this context, means that the Panel's concern was mainly about fitting together distinct or part of distinct legal systems and, by doing so, causing norms and principles to mutually support each other. This was not being done at the expense of the complexity, divergence or tension between systems. Rather, all these features have

remained but are now conceived of as natural elements of that relationship. It was not a convergence trend that drove the Panel's jurisprudence but primarily NAFTA's integrity along with the global trading system's integrity.

Although NAFTA is an intergovernmental agreement and therefore supposed to pursue and protect its parties' interests, there is considerable protection of values such as normative coherence, system integrity, representation and effectiveness. NAFTA's judicial accommodation has been equally, to say the least, value-driven. *NAFTA Tariffication* highlighted the balancing of such interests and values within the NAFTA system. Yet in one sense we can say that this process of accommodation has been facilitated and therefore is less problematic. As compared with, say, the EU, NAFTA and the WTO are trading systems with very modest social concerns. Whenever a Panel is to balance principles and norms from different trading systems it will take into consideration norms, principles and values associated with free trade. Panels do not have to balance, at least in the majority of the cases, between social values and trade values. This is not to suggest, however, that this process of balancing is not per se challenging and multifaceted. Though merely dealing with trade principles and values, accommodating them in practice can be a much more difficult task as NAFTA is more engaged with market maintenance while the WTO is now adopting a market building approach or, at least, an intermediate approach.<sup>74</sup>

To sum up, judicial accommodation in the NAFTA system has mainly been a normative venture where the context and teleology of NAFTA and the reasoning of the WTO adjudicator are taken into account for the purpose of consistent interpretation. In this way Panels are accommodating normative claims and values. Occasionally, they employ a well-defined strategy. In *Broom Corn Brooms*, for example, the Panel has made a strategic use of techniques such as institutional sensitivity, recognition and reception of WTO legal precedents. More often, perhaps, the Panels are able to act on a much more

---

<sup>74</sup> In their *market building* role courts pay special attention to the harmonization of the different national legislation and regulatory frameworks. By contrast, in the *market maintenance* orientation courts have a less activist style and therefore turn their efforts to the regulation of competition and the reducing of uncertainty. On these concepts and their explanation based on institutional alternatives and different moments in the market integration process, see M.P. Maduro, *We the Court: the European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998), especially at Chapter 3.

case-by-case basis, especially when dealing with arbitral Panels where long-term perspective or jurisprudence is less likely to occur, in contrast to courts.

## II. FIXING JURISDICTIONAL BOUNDARIES: THE EU AND THE WTO

Literature on the EU-WTO legal relations is everywhere.<sup>75</sup> This Part does not intend to present a full account of such legal writings. Instead, it will mainly focus on court decisions and the way the European courts, namely the ECJ, are dealing with four major topics concerning the EU/EC-WTO relationship: the European courts' jurisdiction to interpret and apply WTO law, the relationship between the EC and the WTO legal system, the effect of WTO law on the EC legal order and, finally, the status of WTO reports in the Community legal order.

These four major topics, it will be argued, constitute the status of WTO law in the Community legal system. Those questions, although interrelated, are intrinsically different and equally important. However, I will contend that both doctrine and courts, with few exceptions on both sides, have sometimes confused them and have mainly focused on the question of the effect of WTO law on the Community legal order and, within it, on the question of direct effect, that is to say, only on part of the major topics. I will try to shed some light on this neglected issues by redefining what I may call "the fundamental question". Direct effect, important as it may be, is not, per se, the fundamental question. The fundamental question is three-fold. Firstly, it concerns the evolving nature of the WTO legal system, the idea of GATT/WTO as an evolving system of law rather than a static set of rights and obligations. Secondly, it concerns institutional alternatives within the Community and Member States, the different institutional alternatives available so as to grant legal effectiveness to WTO law. Thirdly, it deals with normative and practical effectiveness of WTO law, the set of instruments that give legal effect of WTO law in the Community system.

---

<sup>75</sup> See generally J.H.J. Bourgeois, "The European Court of Justice and the WTO: Problems and Challenges", in J.H.H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford and New York, Oxford, 2000); S. Dillon, *International Trade and Economic Law and the European Union* (Oxford and Portland, Hart Publishing, 2002); and F. Snyder, "The Gatekeepers: The European Courts and WTO Law", (2003) 40 *Common Market Law Review* 313.

Before turning to these issues, it is worth highlighting why and how WTO law challenges the institutions and norms of the EC legal order.

### **A. WTO Challenges to the European Legal Order**

How, or perhaps, more accurately, why does WTO law challenge European law? What is it within WTO law that bothers judges and EC lawyers alike? The underlying debate illustrates four different types of challenges. To begin with, there is no debate at all if the European Courts cannot interpret and apply WTO law. So the first challenge is a basic one: can the European courts (and other Community institutions) apply and interpret WTO law? Assuming that the answer is affirmative one can then enquire into the overall relationship between the systems. Is WTO law part of the EU legal order or is EC law part of the world trading system? Although both systems overlap are they autonomous legal orders? After establishing this overall link between the systems one may further ask, what are the effects of WTO law in the EU legal order? Here, the goal is to understand whether or not WTO law binds EC institutions, whether it is hierarchically superior and, lastly, whether it directly applies in the Community legal order. Finally, one can make a fine distinction within the last question and ask whether decisions from a WTO adjudicator, namely the Appellate Body, bind and directly apply in the Community legal order. So, we have, then, according to the underlying debate, the main issues concerning EU-WTO legal relations: jurisdiction, the relationship between systems, the legal effect of WTO and the status of WTO reports.

I shall now proceed to briefly demonstrate how the courts, step by step, have tackled the challenges posed by WTO law.

### **B. Europe's Legal Response to the WTO Challenges**

I shall set out the European Court's main case law regarding the relationship between EC law and WTO law and, afterwards, analyse some of the main questions. Here, I will follow F. Snyder's thesis of the three overlapping but distinct generations of case law as regard EU-WTO legal relations. He points out that the first generation of case law has greatly expanded the "normative repertoire" available to the European political and judicial institutions. The second generation highlights the impact of the normative

integration between the EC and WTO on individuals and shows that the empowerment of individuals due to WTO law is far from being accomplished and that, rather, the position of individuals has weakened. The third generation of case law illustrates the redesigning of the allocation of power between the EC and Member States in the substantive areas in which WTO law and obligations are applied and the development of the degree of integration among Member States and between the latter and the EC.<sup>76</sup> The four challenges outlined above seem to drive the jurisprudence of the European courts.

The first question concerns jurisdiction. As regards the European courts' authority to interpret and apply WTO law, the ECJ has long ago claimed its jurisdiction to interpret and apply GATT and, since 1995, WTO law.<sup>77</sup> This is not surprising if we take into consideration that this is a *sine qua non* condition for the normative effectiveness of WTO law within the Community legal order, on the one hand, and a natural step towards the construction of processes of communication between the two legal systems, on the other hand.

The second question or challenge concerns the legal interface between the systems. In respect of the relationship between EC law and WTO law, the European courts long ago held that they determine the specific effect of the latter on the former, i.e. they are, to use an expression coined by Snyder, the "gatekeepers". Through case law, the European courts have built a "conceptual framework or lens" in order to "view WTO law and filter its impact".<sup>78</sup> According to the European courts, WTO law is part of the EC legal order and therefore binds Community institutions.<sup>79</sup> Early jurisprudence of the Court of Justice stated that all international agreements concluded by the Community, GATT included, are an integral part of the EC legal order.<sup>80</sup> Still, so far, the courts have not properly clarified the meaning and implications of that statement. Being a part of the

---

<sup>76</sup> Snyder, *op. cit.*, supra n. 75, at pp. 314-315.

<sup>77</sup> See, e.g., Joined Cases 21-24/74, *International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219. On the issue see, generally, Bourgeois, *op. cit.* supra n. 75, at p. 83 et seq. It should be noted that the Commission and the Council also interpret WTO law, and that this aspect should not be underestimated. As put by Snyder, "In theory, the ECJ has the last word in interpreting WTO law for the purposes of EC law. In practice, however, the Commission and the Council also give what often amount in effect to definitive interpretations of WTO law" (*op. cit.*, supra n. 75, at p. 318).

<sup>78</sup> Snyder, *op. cit.*, supra n. 75, at p. 362.

<sup>79</sup> See also Council Decision 94/800/EC of 22 December 1994 that clearly states that the WTO Agreement binds the EC.

<sup>80</sup> Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] ECR 449).

Community legal order can imply a lot of things. It may imply, for example, that the two legal systems are relatively autonomous and that, by means of an act of transposition, WTO law becomes part of EC law. Alternatively, it may also imply that in the field of international trade law there is only one legal system (the EC) and that WTO law is a sub-system part of the EC legal order. The first approach would be like a dualist approach the second being more similar to a monist approach. On the other hand, it is not certain whether WTO law is part of EC law though maintaining its own characteristics or, rather, if it really “becomes” EC law.<sup>81</sup>

Even so, the Court of Justice implied that GATT is hierarchically superior to EC secondary legislation.<sup>82</sup> The same finding has then been extended to WTO law. Earlier, the Court of Justice expressed a similar view when it held that the Community’s international agreements are superior to secondary legislation but not superior to the EC Treaty.<sup>83</sup> The ECJ clearly stated that the EC Treaty “takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT”.<sup>84</sup> It should, however, be noted that from the very beginning the European courts have developed a strategy of conflict avoidance in relation to WTO law.<sup>85</sup> Occasionally, instead of directly rejecting direct effect the European courts have simply stated that the issue was not relevant to the case under analysis. Unless the question was fundamental to the dispute, the European Courts have always tried to avoid it. In addition, case law also highlights a presumption according to which EC legislation is WTO-consistent: unless proven to the contrary, EC law is presumed compatible with WTO law.<sup>86</sup> Finally, by using consistent interpretation the ECJ has

---

<sup>81</sup> In *Polydor* (Case C-270/80, *Polydor Ltd & RSO Records Inc v. Harlequin Record Shops Ltd*, [1982] ECR 329) the ECJ reasoned that, for the purpose of interpretation, international agreements which are part of the EC legal order remains international law; in other words, they do not become EC law. On this point, see *Bourgeois op. cit.*, supra n. 75, at p. 97.

<sup>82</sup> Case C-61/94, *Germany v. Commission*, [1996] ECR I- 3989.

<sup>83</sup> Case C-10/61, *Commission v. Government of the Italian Republic*, [1962] ECR I.

<sup>84</sup> *Ibid.* This is a natural consequence if we consider, first, that the EC legislative institutions and processes are also bound by WTO law and, second, that the binding nature of WTO law derives from the EC Treaty. See R. Uerpmann, “International Law as an Element of European Constitutional Law: International Supplementary Constitutions”, Jean Monnet Working Paper 9/03, Jean Monnet Program, New York University Law School, at p. 9.

<sup>85</sup> Snyder, *op. cit.*, supra n. 75, *passim*.

<sup>86</sup> Case C-177/96, *Belgian State v. Banque Indosuez and Others*, [1997] ECR I-5659; and Case C-122/95, *Germany v. Council*, [1998] ECR I-973.

always tried to avoid direct conflicts between EC secondary law and international agreements.

These remarks bring us to the relationship between the EC and its Member States. For the European courts, if WTO law is part of the EC legal order, national courts are expected to interpret national rules in a consistent manner with WTO law. Additionally, case law shows that WTO law constitutes an instrument for the harmonization of national legislation. Member States must comply with WTO obligations and therefore Community institutions act as a supervisor of Member States' (*qua* Member States) compliance with WTO obligation.<sup>87</sup>

Of greatest interest for the European courts is the question of the effect of WTO law on the Community legal order. European courts' case law has mainly focused on this issue. In *International Fruit*<sup>88</sup> the ECJ made its first attempt to characterize GATT law. It held that individuals could not rely on their national courts to invalidate either a Community or Member State measure on the grounds of GATT law. Thus, GATT is not to be granted direct effect. The Court of Justice based its legal reasoning on the "spirit, the general scheme and the terms of the General Agreement", and issued a set of conclusions that is worth mentioning. First, it held that a Community measure could not be legally challenged on the grounds of GATT law. Second, that the GATT is a negotiation-based or a diplomatic forum. Third, that it lacks clarity, precision and judicial enforcement. Lastly, that direct effect must be analysed in a multilateral perspective and that the Community major trading partners such as the United States and Japan have also denied direct effect to GATT law. Therefore, GATT is to be seen as a flexible instrument.

Nevertheless, the ECJ held that GATT law bound Community institutions. Although the Community was not a contracting party to the GATT, it had assumed, along with Member States, some obligations under the agreement and consequently, the Member States and other GATT contracting parties have recognized this fact. In *SIOT*, for example, the Court of Justice stated that there is an obligation upon the Community to ensure that its institutions respect GATT law when dealing with non-Member States. The

---

<sup>87</sup> Case C- 200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH*, [1998] ECR I-1953; and Case C-355/96, *Silhouette International Schmied GmbH & Co KG v. Hartlauer Handelsgesellschaft mbH*, [1998] ECR I-4799.

<sup>88</sup> *Supra* n. 77.

ECJ wrote, although not fully explaining its reasoning, that the EC is “under the obligation to ensure that the provisions of GATT are observed”.<sup>89</sup>

There are, however, according to the jurisprudence, situations in which individuals (and Member States) can rely on GATT law in order to challenge a Community measure. The *Schluter* case<sup>90</sup> has pointed out the first exception, according to which GATT could enjoy indirect effect in cases of transposition or incorporation of GATT law into the Community legal order. This doctrine was further clarified and elaborated in *Nakajima*,<sup>91</sup> where the Court held that individuals may rely on GATT law when a Community institution implements or intends to implement GATT particular obligations. In *Fediol*<sup>92</sup> the Court added the clear reference exception, stating that it will review Community measures in light of WTO law when and if a Community act expressly refers to specific provisions of GATT. The first exception, also known as the *Nakajima* doctrine, is a situation of transposition; the second, equally known as the *Fediol* doctrine, is a situation of clear reference.<sup>93</sup> Hence, a prima facie non-direct effect WTO provision may acquire “direct effect” status by means of transposition or clear reference.<sup>94</sup>

It was the shift from the GATT to the WTO legal system that directly challenged the legal reasoning of *International Fruit*. The WTO system brought to the fore a different kind of law with a different kind of judicial enforcement. This has brought the ECJ to clarify its position on the question of direct effect. In *Portugal v. Council*<sup>95</sup> the Court of Justice has again denied WTO law of direct effect. It held that WTO law does not provide criteria for evaluating the legality and validity of EC law, and that therefore

---

<sup>89</sup> Case 266/81, *SIOT* [1983] ECR 731.

<sup>90</sup> Case C-9/73, *Carl Schluter v. Hauptzollamt Lorrach*, [1973] ECR 1135.

<sup>91</sup> Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council*, ECR [1991] I-2069. In *Portugal v. Council* (Case C-149/96, *Portugal v. Council* [1999] ECR I- 8395) and in *OGT* (Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I- 3159) the ECJ has interpreted this exception in a narrow fashion. More recently, in *Petrotub* (Case C- 76/00 *Petrotub SA and Republica SA v. Council and Commission*, [2003] I- 79) the ECJ has reaffirmed the transposition exception and advocated a more broad interpretation of that doctrine. On the *Petrotub* case, see G. Zonnekeyn, “The ECJ’s *Petrotub* Judgment: towards a revival of the “*Nakajima* Doctrine?”” (2003) 30 *Legal Issues of Economic Integration* 249 (arguing that though the case is not a landmark ruling it further reinforces the *Nakajima* doctrine, namely by departing from the minimalist approach carried out by the European courts).

<sup>92</sup> Case C-70/89, *Fediol v. Commission*, ECR [1989] 1781.

<sup>93</sup> In *Portugal v. Council* (supra n. 91) the Court has transposed such exceptions from GATT to WTO law.

<sup>94</sup> Snyder, op. cit., supra n. 75, at p. 342 et seq.

<sup>95</sup> *Portugal v. Council* supra n. 91.

litigants cannot challenge the legality or validity of the latter on the grounds of WTO law. However, the Court came up with a new and considerably different legal reasoning, shifting from arguments based on the nature of WTO legal obligations to legal policy reasons, namely reciprocity, which concerns the position adopted by the EC major trading partners towards WTO law, namely the issue of WTO law direct effect, and institutional balance, which deals with the Community political position in the international trade arena or, more precisely, the EC-WTO normative and institutional relations in the area of foreign trade as well as the allocation of decisional power on the question of direct effect between the judiciary and political institutions.

The fourth and last question that drove the European courts' case law regards the legal status of the Panel and Appellate Body adopted reports. In *Germany v. Council*<sup>96</sup> and *Comafrika*<sup>97</sup> the European courts held that GATT unadopted and adopted Panel reports, respectively, do not have direct effect. *Chemnitz*<sup>98</sup> and *Atlanta*<sup>99</sup> cases extended this legal reasoning to WTO reports. The Court of First Instance (CFI) implicitly, in the first case, and the ECJ more directly, in the second, refused to recognize direct effect to Appellate Body reports. Accordingly, WTO reports cannot be invoked in legal actions brought before the European Courts. Yet, in the recent *Biret*<sup>100</sup> rulings the Court of Justice has left open the question whether the EC can be held liable for the non-implementation of WTO adopted reports. As discussed below, if this possibility is to be confirmed in future cases it certainly will improve the level of compliance and effectiveness of WTO law within the EC legal order.

To summarize the European courts' case law on the relationship between EC and WTO law and legal systems, I would say that with the signing of the GATT there was little doubt about its binding nature on the Community legal order. With the creation of WTO there is no doubt: WTO law binds – although we do not know the proper meaning of this particular concept – Community institutions. This is not to say, however, that there

---

<sup>96</sup> Case C-122/95, *Germany v. Council*, [1998] ECR I-973.

<sup>97</sup> Case T- 230/97, *Comafrika SpA and Dole Fresh Fruit Europe Ltd & Co v. Commission*, [1997] ECR II-3031.

<sup>98</sup> Case T- 254/97, *Fruchthandelsgesellschaft mbH Chemnitz v. Commission*, [1999] ECR II- 2743.

<sup>99</sup> Case C-104/97P, *Atlanta AG and Others v. Council and Commission*, [1999] ECR 6983.

<sup>100</sup> Case C-93/02 P, *Biret International SA v. Council* (September 30, 2003); and Case C-94/02 P, *Établissements Biret and Cie SA v. Council* (September 30, 2004), both available at [www.curia.eu.int](http://www.curia.eu.int) (last visited 1 May 2004).

is no problem regarding the effect of WTO law on the Community legal order. The problem exists and enunciating it is very simple: how to give effect to WTO law? Providing an answer is, quite to the contrary, a much more difficult task.

Various legal commentators have critically pointed out that the legal reasoning of the ECJ in *International Fruit* was far from being satisfactory or internally consistent.<sup>101</sup> The Court of Justice was also fully aware of that situation and, accordingly, has initiated a quest to bring internal consistency and normative coherence to its reasoning. Synoptically, the effort to bring normative coherence into the relationship between the systems was not an attempt to establish consistent and logical connections between the EC and the WTO but, rather, a concern with the internal justification or coherence of the European courts' reasoning. One can only understand this fact if we recall that, for the courts, WTO law is part of the EC legal order. Thus, the basic concern was mainly about making WTO law coherent within the Community legal system, that is to say, to promote the absence of conflict within the European judicial discourse. *Portugal v. Council* was, perhaps, the ECJ's biggest attempt to produce an internally consistent rationale. In the end, as we saw, it did not change the WTO legal status within the EC legal order but it has changed its reasoning. A variety of voices have once more criticized this new rationale. Francis Snyder, to mention just one, points out that the *Portugal v. Council* decision was "deeply unsatisfactory" and with "inconsistency of argument", and that the approach of the Court of Justice was "less legalistic" and "more political" in comparison to previous decisions of the European courts.<sup>102</sup> On the other hand, he notes that several questions remain open to debate. Here are a few examples: If WTO is already effective in the EC legal order why not grant direct effect? Is WTO law different from other international agreements? What is the nature of the WTO obligations?<sup>103</sup> These questions, however, do not fall within the scope of this article.

The point I want to stress is of a different nature. After the creation of the WTO, as we have seen, the European courts felt the need to adapt their legal reasoning to the new law and dispute settlement of international trade. Thus, they changed their line of

---

<sup>101</sup> See for example Snyder op. cit., supra n. 75; and Dillon op. cit., supra n. 75. Apparently *contra*: Bourgeois op. cit., supra n. 75, at p. 108 (arguing that the internal logic of the European Courts case law on GATT and WTO law "cannot be disputed").

<sup>102</sup> Snyder, *ibid.*, at p. 329.

<sup>103</sup> *Ibid.*, at p. 332 et seq.

argumentation by turning to new legal policy reasoning such as reciprocity and institutional balance. This is not the right place to fully analyse this shift in approach. Nevertheless, I argue that the European courts have not, perhaps intentionally, addressed the fundamental questions beyond legal policy argumentation. The fundamental question concerning EC-WTO legal relations has only been given partial attention by the European courts and scarce consideration by legal scholarship. To my mind, the question of the effect of WTO law, namely direct effect, should be put in a wider context.

What, it might be asked, are the fundamental questions? The first one concerns the evolving nature of the WTO legal system or, to put it differently, its open-ended implications. The second one concerns institutional alternatives hidden in the direct effect debate. The third deals with the overall effectiveness of WTO law in the European legal order. Let us see now how these questions play out in the background of EU-WTO legal relations.

### **C. Redefining the Fundamental Question**

#### *1. WTO: an evolving system of law*

There is an ongoing debate on whether or not the WTO is a constitutional system or is moving towards a process of constitutionalisation.<sup>104</sup> Here I am not concerned with the problem of whether constitutionalism is the best lens through which we can capture the set of transformations occurring within the GATT/WTO system. For now let us be agnostic on the question of constitutionalism. Still, it is worth declaring that the GATT/WTO system underlines a story of enduring institutional and normative

---

<sup>104</sup> On the constitutional status of the WTO see, generally, D.Z. Cass, “The Constitutionalization of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade” (2001) 12 *European Journal of International Law* 39; and N. Walker, “The EU and the WTO: Constitutionalism in a New Key”, in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001). For a human-rights based approach, see E.-U. Petersmann, *International Trade Law and the GATT-WTO Dispute Settlement System 1948-1996* (London, Kluwer, 1997); and “European and International Constitutional Law: Time for Promoting “Cosmopolitan Democracy” in the WTO”, in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001). For an institutional approach, see J.H. Jackson, *The World Trade Organisation: Constitution and Jurisprudence* (London, The Royal Institute of International Affairs, 1998). For a critical appraisal, see R. Howse and K. Nicolaidis, “Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?”, in M. Verweij and T. Josling (eds.) *Deliberately Democratizing Multilateral Organisation, Special Issues of Governance* (Vol. 16, No. 1 2003); and “Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far”, in R. Porter *et al* (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, Brookings Institution Press, 2001).

strengthening and transformation over decades. The processes of legalisation<sup>105</sup> and judicialisation<sup>106</sup> of the GATT/WTO system is perhaps the most remarkable feature of the transformation of the world trading system. The WTO is a multilateral system of trade governance. More important to my purpose, however, is to stress that such a system is an evolving system of law or, to recall the NAFTA Panel's words, a system that is capable of evolving and that therefore is not fixed or static.<sup>107</sup>

It is the very idea of the WTO as an evolving system of law, I argue, that represents the real WTO challenge to the European legal order. Sara Dillon constructively points out that the very reason for the European courts' scepticism towards WTO law goes beyond reciprocity and institutional balance. Rather, it is the "unpredictable outcomes" of the GATT/WTO legal system and the "unexpected ways" in which it can challenge Community law and measures that justify such a prudent approach as that carried out by the European courts. Dillon clearly states that:

It is impossible to imagine another international trade agreement that could so threaten the regulatory discretion of the Community legislative mechanism; and also impossible to conceive of another international agreement that could provide so many causes of action within which to challenge Community legislation in unexpected and creative ways.<sup>108</sup>

In other words, it is the idea of the WTO as an evolving system of law that has been driving the case law of the European courts. Hence it was the quest for the best way to

---

<sup>105</sup> For the purpose of this article *legalisation* means the process through which GATT, first, and WTO law, later, have expanded into new areas of regulation, gained obligatory character and, last but not least, become more precise (either through the legislative/political process or by judicial interpretation or application). See, generally, *International Organization* Number 54, Volume 3, 2000 (special number on legalisation). Reprinted in J.L. Goldstein, M. Kahler, R.O. Keohane, and A-M. Slaughter (eds.), *Legalization and World Politics* (Cambridge MA, The MIT Press, 2001).

<sup>106</sup> *Judicialisation* is the phenomenon by which a dispute settlement body acquires court-like structures and therefore resolves disputes according to procedural and substantive legal rules; it is also the processes through which agents from an organization or community absorb and assimilate such decisions and practices and accommodate their pattern of behaviour accordingly. The first case is referred to as the *judicialisation of dispute resolution* whereas the second involves the *judicialisation of trade politics*. See A.S. Sweet "The New GATT: Dispute Resolution and the Judicialization of the Trade Regime", in M. Volcansek (ed.), *Law Above Nations: Supranational Courts and the Legalization of Politics* (Florida, Florida University Press, 1997).

<sup>107</sup> See *supra* Part I.

<sup>108</sup> Dillon, *op. cit.*, *supra* n. 75, at p. 384.

deal with these open-ended implications that has preoccupied the European courts.<sup>109</sup> That is, from the perspective of European courts, if the GATT/WTO system is an evolving system of law rather than a static set of rights and obligations, it is for the same courts to filter its wider and unexpected implications and effects in the European legal order. If, on the one hand, the European courts have to balance Community interests and values with WTO interest and values incorporated in WTO law and, on the other, this set of obligations is capable of challenging Community measures and legislation in a variety of unpredictable ways, then it is for the European courts to have the final word on the effectiveness of these obligations in their legal order. Thus, it is this very idea of the WTO as an evolving system that has represented the real challenge to the European courts. This question is not only relevant from a theoretical standpoint but, rather, also has fundamental practical effects. Consider, for instance, the question of institutional balance. Since the evolving nature of the WTO legal system has an impact on the balancing of fundamental values within the Community legal order, the Court of Justice has been aware that this balance of values is something that surpasses the European judiciary and therefore should also be addressed by other Community institutions as well as by Member States. This point deserves careful analysis.

## *2. Institutional alternatives*

Why and how to put the question of direct effect in the wider context of institutional alternatives? Arguments pro and contra direct effect are profuse and we do not need to recall them.<sup>110</sup> It is only important to mention that there are different arguments based on different criteria. One of the reasons for the existence of different arguments based on different criteria has its basis in the implicit institutional choices beyond the question of direct effect. Though the debate is *prima facie* concerned with the question of whether or not WTO law should have direct effect, the primary interest of international lawyers and judges should rely on the question of who should determine whether or not a WTO

---

<sup>109</sup> On the character of WTO obligations see also J. Pauwelyn, "The Nature of WTO Obligations", Jean Monnet Working Paper 1/02, Jean Monnet Program, New York University Law School.

<sup>110</sup> For a discussion see, for example, J.O. Berkley, "The European Court of Justice and Direct Effect for the GATT: A Question worth Revising", (1998) 9 *European Journal of International Law* 626; Lee and Kennedy, "The potential direct effect of GATT 1994 in European Community Law", (1996) 30 *Journal of World Trade* 67; and mainly T. Cottier and K. Schefer, "The Relationship between World Trade Organisation, National and Regional Law", (1998) 1 *Journal of International Economic Law* 83.

specific provision has direct effect or, more generally, the best way to grant effectiveness to WTO law. To put it simply, each side of the debate on direct effect presupposes a different institutional allocation of the power to make such a decision. That is to say, each side is arguing for a different jurisdiction. While some – ideally those who oppose WTO law direct effect – entrust the decision to the political institutions, namely the Council and the Commission, others entrust it to judicial bodies, namely the ECJ. Consider, for example, the above-mentioned doctrine of transposition or clear reference. It is an institutional choice that drives those exceptions since at the end of the day it is up to the Community political institutions to decide, by means of transposition or clear reference, if and when the Court should review Community measures on the grounds of WTO law. It is thus the will of the Community institutions that has the final word on direct effect. Consider, on the other hand, the doctrine of consistent interpretation. As the task of interpreting Community law in the light of WTO law apparently does not involve any changes in the EC legal order this task is mainly entrusted to the European courts.<sup>111</sup>

Different allocation of the decision-making power within different institutional alternatives available is, I believe, a more accurate way to look at the debate on WTO law direct effect. This question is mainly due to the existence of various instruments of granting legal effect to WTO law as well as different Community and Member States institutions to deal with such a question. The effort should therefore be placed on the choice of the institution that will determine whether or not a WTO specific provision has direct effect. Although institutional, this is an issue of substantive or even constitutional character in that institutional choices highlight the impact of international trade on the EC market and the EU polity and the way it challenges the autonomy of that legal order. In this sense, this is a constitutional debate as at stake is the question of the best alternative institution to balance not only free trade interests and values but also a much broader range of social values. Each institutional decision or balancing test has a different kind of impact on the EC market, or as the case may be, in the EU polity. When it comes to applying WTO law, Community institutions and Member States have to balance such

---

<sup>111</sup> For an application of institutional choice in the context of WTO-EC relations, namely the impact of WTO law on European social model, see M.P. Maduro, “Is There Any Such Thing as Free or Fair Trade? A Constitutional Analysis of the Impact of International Trade on the European Social Model”, in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001).

obligations with their own trade interests and social values. However, the outcomes of this balancing process vary from institution to institution since each balances its fundamental interests and values in a very distinct way.

The spectrum of the institutional alternatives available in this particular question is quite large. The first alternative is between the EU and the WTO. As already pointed out, Community institutions, namely the European courts, have already held that they have the final word on the application of WTO law in the EC legal order. The second alternative takes place within the different institutions operating in the European sphere: the Council, the Commission, the Parliament and the judiciary. Here, too, the European courts have already elaborated a set of guidelines: once political institutions establish the (political) relationship between WTO law and the EU law, say, by transposing or referring to the law of the WTO, then “We The Courts” may well accommodate WTO law within the European legal order. The third alternative concerns the division of power between the EU and Member States, a topic that I do not address here.

Yet, the underlying debate has mainly offered what can be labelled as single institutional analysis, the concentration of the debate on the malfunction of a single institution and the presumption of an accurate and ideal performance of the alternative institution.<sup>112</sup> For that reason it ignores the institutional malfunctions of the alternative institutions. The choice, as pointed out by Neil Komesar, must be made between alternative institutions, demonstrating at the same time the relative ability or performance of each. Consequently, those that argue for the political process must analyse not only the merits and malfunctions of the courts but also of the political institutions themselves. Likewise, those that argue for the judicial process should also pay specific attention to the limits of the Courts’ performance. Since there are no perfect institutions the choice will rely upon the best of the imperfect processes or institutions available.

Thus, it is still possible to argue that the EC political institutions should decide whether or not to grant WTO law direct effect, but only after comparing the virtues and malfunctions of those institutions vis-à-vis the Europeans Courts’ performance. The same

---

<sup>112</sup> The seminal work on single institutional analysis and comparative institutional analysis is N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago, University of Chicago Press, 1994).

applies, *mutatis mutandis*, if it is to argue that the Courts should “decide who decides” the question of direct effect.

### 3. *Effectiveness*

Let us start by analysing a different scenario. Consider, for instance, that the WTO is a constitutional order with similar features to the EU, perhaps the strongest argument in favour of direct effect. Does a constitutional perspective of WTO law imply direct effect? Not necessarily. What a constitutional order presupposes is a set of mechanisms that provide legal and practical effectiveness. Ironically, and still considering that the WTO is a constitutional order, we could use the very example of its legal interface with the EC to illustrate this point. Let us focus on a recent statement made by Francis Snyder:

Direct effect is not the only way of creating relations between sites of governance. In the context of WTO-EC relations, it is not as good as a conjunction of clear reference, transposition and consistent interpretation... Together, clear reference, transposition and consistent interpretation may prove nearly as effective as direct effect in integrating WTO law into EC law. Their merits more than outweigh their limitations.<sup>113</sup>

Here, the fundamental question is the one concerning the normative and practical effectiveness of WTO law within the Community legal order. Apart from direct effect, there is a set of instruments that could assure effectiveness, namely clear reference, transposition and consistent interpretation. Direct effect is a way, a good one we should admit, to ensure legal effectiveness of WTO vis-à-vis regional agreements and domestic states, but by no means the only one.

Clear reference doctrine means, in the context of EC law, that whenever there is a specific reference by a Community institution to WTO law, such provisions should take precedence over EC law and constitute a criterion of validity. Through this doctrine WTO law is applied in the Community legal order and, whenever necessary, it takes precedence over EC law and measures. In this perspective, WTO law apparently has a high level of effectiveness. Though private litigants may rely on WTO law in order to challenge a Community measure or legislation it is for the European courts to define the level of

---

<sup>113</sup> Snyder, *op. cit.*, supra n. 75, at pp. 362-63 (footnote omitted).

control of the same measure or legislation and therefore the effectiveness of the WTO law within their legal order. On the other hand, it is very difficult, in practice, to know if a reference made by a Community institution to a WTO provision or obligation is “specific” or “clear”.

Transposition, as indicated by its name, occurs when WTO law is transposed or intended to be transposed into EC law. In this case it should be noted that the binding nature of the norm does not stem from WTO law but, rather, directly from EC law. Accordingly, in the case of a conflict it will involve two Community law provisions, one of which necessarily transposed the WTO obligation. The idea of transposition, however, has some drawbacks. First, it puts too much weight on the “intention” or “will” of the EC institutions instead of focusing on legal obligations. It is therefore a subjectivist construction. Second, there are obligations that though not “express” are nevertheless “clear from the context” but not considered in this exception.<sup>114</sup> Third, as pointed out by Bogdandy and Makatsch, this approach (as well as clear reference) is insufficient as it relies almost exclusively upon the will of EU organs.<sup>115</sup>

Consistent interpretation or indirect effect is the use of teleological interpretation so as to accommodate WTO law within the Community legal system. Thus, EC and Member States courts are, whenever possible required to interpret their respective laws in conformity with WTO law. Consistent interpretation has its own limits: it presupposes some interpretive discretion, a manifest conflict of provisions and is only applied on a case-by-case basis. Yet it also brings some positive insights, namely its flexibility and sensitivity to a particular situation.<sup>116</sup> Betlem and Nollkaemper make a set of remarks on consistent interpretation of international and EC law in national legal orders that is worth mentioning. First, one of the key features of consistent interpretation lies in the fact that it does not require changes and it does not necessarily influence key provisions dealing with the effect of EC law. Second, consistent interpretation is not necessarily an alternative to direct effect; it can operate alongside direct effect and, in doing so, complement it. It logically precedes and takes priority over direct effect. Thus, even if a

---

<sup>114</sup> Ibid., at p. 347.

<sup>115</sup> A. von Bogdandy and T. Makatsch, “Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO law and European Union Law”, in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001).

<sup>116</sup> Snyder, *op. cit.*, supra n. 75, at 364.

norm has direct effect the courts will always try to avoid a direct conflict of provisions by applying the law in light of international law. In addition, consistent interpretation logically presupposes that the norm in question has not been transposed or, at least, has not been properly transposed. Fourth, EC rules used to interpret national law do not need to meet the criteria of justiciability as compared with direct effect. Hence, all norms of EC law may provide criteria for consistent interpretation. Finally, the outcomes of consistent interpretation very much depend on the way the European courts make use of it. They can use it as a mere way of “reconciling interpretation” or in a much more intensive and harmonizing fashion.<sup>117</sup>

Clear reference, transposition and consistent interpretation are instruments for promoting normative coherence and balancing values and interests in the global trading system. Each instrument produces different effects and therefore different achievements. Hence, tools such as transposition, which is an indication of a higher level of normative integration between systems, and clear reference, which is an indication of a “minimal attempt” to grant legal status to the WTO Agreement on the EC legal order, imply different types of relationships between trading systems. The former implies a higher degree of integration while the latter is often used in the context of lower levels of integration in the area or subject applied.<sup>118</sup> In addition, this set of instruments does not pretend to address the relationship between the WTO and RTAs in absolute or exclusive terms. For example, they leave space for the operation of other institutions rather than courts and court-like institutions, such as the European Council and the Commission.

Another element of the level of effectiveness of WTO law in the Community legal order is the legal status of *WTO adopted reports*. As we have seen, the last challenge posed by WTO law is related to the legal status of Panel and Appellate Body adopted reports (WTO reports) on the EC legal order, a situation in which WTO law shows up with a higher level of precision. Some international lawyers have focused on

---

<sup>117</sup> G. Betlem and A. Nollkaemper, “Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistency Interpretation” (2003) 14 *European Journal of International Law* 569.

<sup>118</sup> Snyder, *op. cit.*, *supra* n. 75, at p. 363.

the question of indirect effect of WTO reports while others have focused on the possibility of direct effect of such legal decisions.<sup>119</sup>

Judicial accommodation, if any, can occur at different stages of the decision-making process. As regards WTO reports, it refers to the period after the adoption of a particular measure and, in general, the moment at which that measure has been considered in violation of WTO law by a WTO dispute settlement body. To recall the case law on this issue, the European courts held that GATT unadopted and adopted Panel reports do not have direct effect.<sup>120</sup> The same legal reasoning and finding was subsequently extended to WTO reports.<sup>121</sup> For that reason, WTO reports cannot be invoked in a legal action brought before the European Courts. According to the European Courts' case law, WTO law is an integral part of the EC legal order; it binds Community institutions but lacks direct effect. Does, then, the invocability of WTO reports so as to have direct effect or a similar effect depend on the first two premises – part of the EC legal order and their binding character – or, in a more demanding way, does it depend on WTO law direct effect itself? Put differently, do the particular effects of WTO reports depend on the direct effect of WTO law? Advocate General Mischo, in *Atlanta*, seems to have adopted the latter perspective, arguing that the specific effect of WTO reports would depend on direct effect of WTO law itself. Zonnekeyn, alternatively, argues that direct effect of WTO law is not a fundamental condition to grant specific effects to adopted reports but, rather, it is sufficient that WTO law forms part of and binds the Community legal order.<sup>122</sup> According to Zonnekeyn we should make a distinction between the binding character of adopted reports and their direct effect.<sup>123</sup>

On the question of the binding character of such reports, the European courts have, until recently, not expressly addressed this topic. In *Greece v. Commission*<sup>124</sup> the ECJ reasoned that a decision taken by the Association Council – the institution empowered to adopt decisions within the institutional framework of the EC-Turkey

---

<sup>119</sup> For a brief survey of the literature see G. Zonnekeyn, “The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance”, (2000) 34 *Journal of World Trade* 93.

<sup>120</sup> *Germany v. Council*, supra n. 86; and *Comafrika*, supra n. 97.

<sup>121</sup> *Chemnitz*, supra n. 98; and *Atlanta*, supra n. 99.

<sup>122</sup> Zonnekeyn, op. cit, supra n. 119, at p. 97.

<sup>123</sup> Ibid.

<sup>124</sup> Case 30/88, *Greece v. Commission*, [1989] ECR 3711.

Association Agreement – forms an integral part of the EC acquis from the moment of their entry into force. It is doubtful that, in light of the character and the legal effect of such an agreement as well as the position of the EC in relation to Turkey, such reasoning could be expanded to WTO law.<sup>125</sup> In *Opinion 1/91*, related to a possible creation of the European Economic Area (EEA), the ECJ has clarified that “the decisions of that court [the court that would be created within the EEA] will be binding on the Community institutions, including the Court of Justice [...] in so far as the agreement is an integral part of the Community legal order”. Thus, the ECJ held that an eventual jurisdiction ascribed to that Court would violate the EC Treaty.<sup>126</sup> However, the rationale adopted by the Court of Justice, to the extent that the Court supposed that the EEA Agreement did not enjoy direct effect, seems to support Zonnekeyn’s position, which states that direct effect of WTO law is not a fundamental condition to grant specific effects to WTO adopted reports, since the Court implies that the binding character of judicial or quasi-judicial decisions arising from dispute settlement authorities is not dependent on an eventual direct effect of that agreement. Extending this reasoning to the context of WTO law is again quite problematic. Zonnekeyn correctly argues that such reasoning could not have been applied to “legal” decisions in the framework of GATT 1947 since Panels were not court-like institutions. The extension of the reasoning of *Opinion 1/91* to the context of the WTO is, the author continues, more contentious. He appears to argue that the very same rationale can be applied to the context of WTO reports. In view of that, a set of conclusions follows. First, such reports would bind EC institutions, the judiciary included. Second, the binding character, according to the reasoning of *Opinion 1/91*, does not depend on the direct effect of WTO law. Third, the binding character is based on the fact that the WTO Agreement forms an integral part of the EC legal order. Fourth, such reports can only be invoked in a legal action brought before the European courts if the courts find that EC law or measures have violated WTO law. Lastly, an EC institution’s non-compliance with or non-implementation of adopted reports will lead, as a question of principle, to the liability of the Community under Article 228 EC Treaty.<sup>127</sup>

---

<sup>125</sup> Zonnekeyn, op. cit, supra n. 119, at p. 98.

<sup>126</sup> *Opinion 1/91*, Draft agreement relating to the creation of the European Economic Area [1991] ECR I-6079, at para. 39-40.

<sup>127</sup> Zonnekeyn, op. cit., supra n. 119, at pp. 100-103, 106.

Other international lawyers apparently follow another route. Jacques Bourgeois, for example, argues that from a legal standpoint the question of (1) whether or not WTO reports that did not find that Community institutions or measures have violated WTO law are an integral part of the Community legal order and (2) whether these reports bind EC institutions should remain open. In addition, he also points out that, de facto, such reports constitute an appropriate field to apply consistent interpretation. He further argues that if a proceeding has been initiated but no finding has yet been reached there is no way to enforce WTO law as at this stage the EC still has some options available and, both de jure and de facto, there is no judicial decision. At last, in the case of the adoption of a report that finds that the EC has violated WTO law, the author points out that the issue is controversial but seems to rebuff the possibility of enforceability of such reports on the grounds that the nature of the ECJ ruling is *ex tunc* while decisions of WTO dispute settlement authorities are prospective.<sup>128</sup>

As already mentioned, in the recent *Biret*<sup>129</sup> rulings the ECJ has left open the question whether the EC can be held liable for the non-implementation of WTO adopted reports.<sup>130</sup> In these cases, Biret International, a French trading company, and its subsidiary Établissements Biret and Cie SA brought an action against the Council before the European Courts seeking compensation for damages allegedly suffered as a result of the adoption of EC measures concerning the prohibition on hormone treated beef, prohibitions that had already been ruled WTO-incompatible by a WTO Panel and the Appellate Body in the *Hormones* case.<sup>131</sup> The action was dismissed by the CFI on the grounds that WTO law could not create rights for individuals and that, as a result, private parties could not invoke WTO law before the European courts. The CFI held that WTO

---

<sup>128</sup> Bourgeois, *op. cit.*, supra n. 75, at pp. 120-121.

<sup>129</sup> *Biret*, supra n. 100.

<sup>130</sup> For insight, see for example G.A. Zonnekeyn, "EC Liability for Non-Implementation of WTO Dispute Settlement Decisions - Are the Dice Cast?" (2004) 7 *Journal of International Economic Law* 483 (arguing that the issue of EC liability for non-implementation of WTO decisions was left open by the ECJ); and A. Alemanno, "Judicial Enforcement of the WTO Hormones Ruling within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions?" (2004) 45 *Harvard International Law Journal* 547 (arguing that the ECJ was receptive and has contemplated the possibility of EC liability for non-implementation of WTO decisions and that the Court introduced "an innovative conceptual distinction between the direct effect of WTO rules and reliance on WTO rulings").

<sup>131</sup> *EC-Measures Concerning Meat and Meat Products ("Hormones")*, Report of the Panel WT/DS26/R/USA, 18 August 1997; and *EC-Measures Concerning Meat and Meat Products ("Hormones")*, Report of the Appellate Body WT/DS26/AB/R, 16 January 1998 (adopted 13 February 1998).

law does not have direct effect within the EC legal order and that the lack of direct applicability would also preclude any EC liability for non-implementation of WTO law.<sup>132</sup> Following the Biret's appeal against the CFI rulings, the Court of Justice began by confirming the European courts case law as regards the effect of WTO law on the Community legal order, according to which GATT/WTO law is not to be granted direct effect.<sup>133</sup> The ECJ then pointed out that the legal reasoning of the CFI was manifestly insufficient in that it directly linked and reduced the question of invocability of the WTO adopted report to the question of WTO law direct effect. The Court of Justice implied that these are two different questions and that the CFI should have addressed the issue of the invocability of WTO adopted reports even though it is well known that the European courts case law does not recognize direct applicability of WTO rules.<sup>134</sup> However, the ECJ held that the European measures ruled WTO-incompatible by the Dispute Settlement Body could not lead to EC liability because of the factual circumstances of the case. According to the ECJ, compensation could not be granted because the damages invoked by Biret and its subsidiary occurred before the adoption of the WTO Dispute Settlement Body decision and before the reasonable period of time of 15 months granted to the EC so as to implement the decision.<sup>135</sup> On these grounds, the appeal was rejected. But what, we may ask, if Biret had sought compensation for damages occurred after the adoption of the WTO Dispute Settlement Body decision and subsequent to the reasonable period of time granted for the implementation of the decision? The Court of Justice did not address this particular issue and seems to have left open the question of

---

<sup>132</sup> CFI, Case T-174/00, *Biret International SA v. Council*, [2002] ECR II-17; and CFI, Case T-210/00, *Établissements Biret and Cie SA v. Council*, [2002] ECR II-47.

<sup>133</sup> In these cases Advocate General Alber delivered an Opinion in which he advocated direct applicability of WTO (i) when a WTO Dispute Settlement Body decision declares an EC measure WTO-incompatible and (ii) when the EC fails to comply with the decision within the reasonable period of time accorded for the implementation of the decision. See Opinion of Advocate General Alber, Case C-93/02 P, *Biret International SA v. Council* (15 May 2003); and Opinion of Advocate General Alber, Case C-94/02 P, *Établissements Biret and Cie SA v. Council* (15 May 2003), available at [www.curia.eu.int](http://www.curia.eu.int) (last visited 1 May 2004).

<sup>134</sup> See Alemanno, *op. cit.*, supra n. 130.

<sup>135</sup> The Appellate Body Report and the Panel Report as amended by the Appellate Body were adopted by the WTO Dispute Settlement Body on 13 February 1998. A reasonable period of time of 15 months was given to the EC on 29 May 1998, which expired on 13 May 1999 (*EC-Measures Concerning Meat and Meat Products ("Hormones")*, Award of the Arbitrator WT/DS26/15, 29 May 1998). As Biret was facing judicial liquidation since 1995 it could not seek for compensation, as was the case, for damages occurred after 13 May 1999, the date of expiration of the EC reasonable period of time to comply with the Dispute Settlement Body decision.

EC liability of non-implementation of WTO adopted reports. An eventual adoption of the doctrine of EC liability for non-compliance with WTO adopted reports would certainly constitute an effective inducement mechanism towards EC compliance with WTO law. Yet, we will have to wait for future judgments to have a definitive answer.

Compared to NAFTA, where Panels have referred to WTO decisions in a number of cases, the European courts have barely mentioned WTO reports. This is not to say however that the courts do not take WTO reports into account. They do, but without expressly or formally referring to such decisions. Zonnekeyn refers to this practice as the “reception” of WTO law and principles.<sup>136</sup> I have reserved this term to refer to the explicit mode NAFTA’s Panels are incorporating WTO legal precedents in their system.<sup>137</sup> The ECJ, by contrast, is undertaking a much more implicit or indirect reception of WTO reports in that it is not expressly referring to them. From beginning to end, even in terms of interpretation techniques, the Court of Justice is dealing exclusively with EC law repertoire although enlarged by WTO law. Seen in this particular light, it is a considerably different judicial accommodation strategy when compared to NAFTA. In short, as the Court of Justice is trying to assert the European jurisdictional boundaries in relation to the WTO it does not directly and formally refer to WTO reports since this could imply and indeed blur the jurisdictional boundaries between the two legal systems.

#### **D. Evaluation**

The opening statement of Sara Dillon, which is worth repeating here, illustrates the importance of the EU-WTO legal relations: “the WTO is the largest and most important set of trade obligations with which the EU must deal; at the same time, the EU is the most important counter-model with which the WTO must deal”.<sup>138</sup> Although a counter-model to the world trading system in that it is a regional rather than a multilateral trading system and a system not only with economic but also with broader social concerns, the EU is bound and therefore must fulfil its WTO obligations. There are a variety of ways to fulfil such obligations. If the EU has to comply with the WTO legal system it also has to

---

<sup>136</sup> Zonnekeyn, *op. cit.*, supra n. 119, at p. 106.

<sup>137</sup> See supra Part I.

<sup>138</sup> Dillon, *op. cit.*, supra n. 75, at p. 2.

balance such obligations with its own fundamental interests and/or values. That is why the EU is conceived of as a counter-model to the WTO. As a constitutional system the EU balances its fundamental interests and values as regards the WTO in a much more distinct way. First of all, the European courts have to balance well known Community economic and non-economic interests and values – informed by a particular political, social and economic context – with economic interests and values from an evolving system of law with open-ended implications such as the WTO. As we have seen, judicial accommodation within the EU has mainly been driven by the European courts' concern with the evolving nature of the WTO legal system. Such a system is conceived of as a non-static set of obligations, as a system capable of developing or with an ongoing character and therefore capable of challenging European legislation and measures in unexpected and unpredictable ways.

According to the European courts, as we are in the presence of fundamental interests and values, it is not only for the courts but also for the Community's political institutions, and not only for the EU but also for the Member States, to balance such interests and values in relation to WTO law. As we have seen, this is a question of institutional choices, of different institutional alternatives available so as to grant legal effectiveness to WTO law. Within the EU and Member States there are a variety of different possibilities for allocating the power to decide the effect of WTO law in the European legal order. There are different forms of allocation of the decision-making power within different institutional alternatives available within the EU and Member States. Thus, there is a range of alternative institutions so as to balance Community values in relation to the WTO and therefore each institutional decision or balancing test has different outcomes on the EC market or the EU polity. The balance of interest and values also is a distinct feature when compared to NAFTA in that there are a variety of instruments so as to assure the effectiveness of WTO law in the Community legal order, ranging from clear reference to transposition to consistent interpretation. Each instrument highlights different levels of economic and normative integration between the EC and the WTO and therefore different forms of balancing interests and values.

In summary, then, the EU is a system of economic and political regional integration with broader concerns than those of the WTO.<sup>139</sup> As such, when talking about giving legal status to WTO law in the Community legal order it is worth noting that the EU has to balance such economic interests and/or values with non-economic interests and/or values that equally claim protection in its legal order. As we have seen, generally speaking, this is not the case with NAFTA. This is one of the fundamental features of judicial accommodation within the EU. There are others. Let us make a brief survey of the remaining.

There is, in the first place, a gradual effort to bring normative coherence to the relationship between the EC legal order and the world trading system. As compared to, say, NAFTA, this is a different dimension of coherence. NAFTA has highlighted what I have labelled as external coherence, namely the establishment of logical and consistent connections between two distinct operative trading systems. EU-WTO legal relations highlight a different type of normative coherence, its internal element. Given that WTO law forms an integral part of the EC legal order, the European courts have not mainly focused on the connections between the systems but, instead, on the internal justification or coherence of its legal reasoning concerning the effectiveness of WTO law. From *International Fruit* onwards the European courts have initiated an effort to improve their rationale. This is basically a concern with the consistency and coherence of their own legal order, namely in the sense of absence of conflict. If WTO law is part of the Community acquis it is therefore for the courts to harmoniously give it effect and to advance a logical set of explanations for their choices. Thus, whereas the NAFTA example was about the coherence of trading systems, the EU-WTO case is about the coherence of a trading system: the internal coherent structure of the European legal order, WTO law included.

Secondly, and crucially, case law suggests that European courts have been construing a line of argument based on what we may call the preservation or assertion of European jurisdictional boundaries, the integrity of the system, in relation to the WTO.

---

<sup>139</sup> But see J.H.H. Weiler, "Cain and Abel-Convergence and Divergence in International Trade Law", in *The EU, The WTO and The NAFTA* (Oxford and New York, Oxford University Press, 2000) (arguing that (1) there is a substantive and procedural convergence between the EU and the WTO (and NAFTA); (2) that such a convergence justifies a redefinition of the field of international economic law; (3) and that we are moving towards a common law of international trade).

While interpreting and applying WTO law, Community institutions have been trying to preserve their autonomy and integrity. From the perspective of the European courts the power to decide the most appropriate form to accommodate WTO law within the Community legal order lies in the courts themselves. In this regard, Snyder points out that “the European courts play a crucial role in balancing conflicting interests in an increasing complex configuration of overlapping fields of governance”, and that acting as gatekeepers, the European courts “attempt to maintain jurisdictional boundaries” between the EU/EC and the GATT/WTO legal order. The task, in sum, is to “balance interests and assign priorities”.<sup>140</sup>

Thirdly, and this being a corollary taken from the previous point, the European courts’ approach has been equally procedural. Uerpmann depicts this feature in the following manner:

From the silence regarding Art. 300 (7) EC it may be possible to infer that the ECJ does not construct its arguments around substantial law. The ECJ might prefer instead to use procedural arguments. The wording of the ECJ in stating that the WTO agreements “are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”, may also speak in favour of this. If this statement is understood procedurally the ECJ does not doubt that the Community institutions are substantially bound by WTO law. Rather the scope of review of the ECJ is limited so that the substantial obligation cannot be updated procedurally.<sup>141</sup>

From a substantive point of view there is no doubt: WTO law is an integral part of and therefore binds the Community legal order. However, procedurally the Court of Justice has developed a strategy to limit the scope of WTO law, that is to say, the open-ended implications and the evolving nature of the world trading system. At the same time that the European courts are denying formal provisions of WTO law they are accepting their substantive content, especially when it fits and complements Community constitutional core values, such as a “more precise definition of the distribution of powers between the EC and the Member States”,<sup>142</sup> and the “EC harmonization of national law”.<sup>143</sup>

---

<sup>140</sup> Snyder, *op. cit.*, supra n. 75, at pp. 366-67.

<sup>141</sup> Uerpmann, *op. cit.*, supra n. 84, at p. 21 (footnote omitted).

<sup>142</sup> Snyder, *op. cit.*, supra n. 75, at 350 et seq.

<sup>143</sup> *Ibid.*, at 357-59.

Finally, it is possible to conceive of an EU strategy or scheme of conflict-avoidance. First, unless necessary, the European courts have always avoided characterizing the formal status of WTO law within the EC legal order. Second, the Court of Justice has developed a presumption according to which EC law is assumed compatible with WTO law. Thus, any individual or Member State which claims that EC legislation or an EC measure is inconsistent with WTO law bears the burden of proving such alleged inconsistency (presumption against conflict). Lastly, using interpretation techniques such as clear reference, transposition, and consistent interpretation the courts have, though in limited cases, successfully granted effectiveness to WTO law.

The real question is how to give effect to WTO law and construct an inclusive system of international trade law or, in other words, when and how to use the alternative legal instruments in an attempt to promote effectiveness and inclusiveness. The ECJ has been using normative techniques such as consistent interpretation, clear reference, and transposition in order to give effect to WTO law. The court's jurisprudence illustrates the criteria for the application of each legal instrument but it says little about when to use such techniques and the best way to do so. Thus, the question is: when to use, if at all, clear reference? How to make full use of the potential of consistent interpretation? Finally, and relatedly, how to balance the different tools of effectiveness?

An example may help to highlight some answers. Let us start with a non-legal perspective: imagine that you – the reader – are a non-native English speaker. Assume, then, that you are trying to learn how to use phrasal verbs. How do you know how to use, say, “get together” instead of “meet up”, or “stand by” instead of “stick up for”. By practising or experiencing, I would say. Perhaps, only by learning from other people and, most importantly, by developing your own sense of appropriateness or correctness.<sup>144</sup> There is no theory or general rule so as to guide you through your selection process. Still, you use day-by-day practice in order to come up with the best solution. Let us, now, return to our legal analysis. Only by practice, and this is the point I want to make, can the ECJ develop its own sense of appropriateness or correctness regarding when and how to

---

<sup>144</sup> For a link between practices, standards of correctness, language, and pronunciation, see M. Loughlin, *The Idea of Public Law* (New York, Oxford University Press, 2003), at pp. 29-31. On appropriateness in the field of political science, see for example J.G. March and J.P. Olsen, “The Logic of Appropriateness”, *ARENA WP* 04/09.

use the set of legal instruments capable of giving WTO effect. There is no theory or general rule to guide its action. Only through practice and accumulation of past decisions and legal reasoning will the European courts be able to decide the best way to interpret and apply WTO law. Yet, these practices necessarily have to be in accordance with Community core values, the courts' understanding of the EU constitution, the purposes of the process of integration, the doctrine of institutional balance, the question of effectiveness, and the overall relationship between the EU and the WTO. The European Courts therefore have to adopt a pragmatic approach in which effectiveness and inclusiveness are conceived of not as black-or-white concepts but as open-ended ones. This is, in the end, what judicial accommodation is about.

### III. CONCLUSION– PROSPECTS AND LIMITS OF JUDICIAL ACCOMMODATION

It is now time to summarize and briefly contrast the NAFTA and the EU models of judicial accommodation. Judicial accommodation within NAFTA was regarded as a set of practices shaped by two features: the specific nature of the dispute settlement system and the commitment by the drafters of the treaty to comply with and respect GATT/WTO law. These features, it was argued, have an impact not only on the way judicial accommodation operates but also on the outcomes of the very process of accommodation. Accordingly, and in the light of the case law here analysed, the NAFTA strategy of judicial accommodation as regards WTO law can be described as an attempt to define a common ground between both trading systems. Inter-institutional dialogues, normative common concepts and teleological interpretation all contribute to this common ground. In attempting to define the common ground NAFTA Panels have tried to establish logical and consistent connection, *external coherence*, between NAFTA and the WTO. Through teleological interpretation Panels have balanced free trade and state sovereignty with values such as pluralism, coherence and representation. However, NAFTA Panels did not have to balance such interests with social values such as human rights, labour and environmental issues. Because of the arbitral nature and the formal pragmatic reasoning of the NAFTA adjudicator, the accommodation of WTO law, rules and principles within

NAFTA, although broadly defined as within a common ground, is likely to continue to occur on a case-by-case basis.

By contrast, the idea of WTO as an evolving system of law has been driving Europe's judicial accommodation. The European courts have mainly focused on the determination or assertion of jurisdictional boundaries between the EU and the WTO. As WTO law forms an integral part of the EC legal order, the EU adjudicator has largely focused on the internal justification and consistency, *internal coherence*, of its legal reasoning as regards the effectiveness of WTO law. The EU, as a constitutional legal order, has to contrast WTO economic interests and values not only with its own trade interests but also with its broad range of social values. Moreover, within this balancing process there is not only a variety of institutional alternatives but also a variety of normative instruments so as to grant legal effect to WTO law. Because of the judicial or adjudicative nature of the European courts it is possible to discern, from *International Fruit* onwards, a long-term strategy of judicial accommodation: the assertion of jurisdictional boundaries.

This brief contrast of judicial strategies brings us back full circle to the question of judicial accommodation and to one of our first key premises: that the NAFTA and the EU strategies of judicial accommodation stem from the same source and therefore can ultimately be viewed as part of the same phenomena. Judicial accommodation within both NAFTA and the EU is a strategy or policy, first, to mediate and deal with normative and institutional conflicts and claims and, second, to endorse the plural character of the global marketplace. The judicial accommodation model does not predict or advocate a convergence trend between NAFTA, the EU and the WTO.<sup>145</sup> It is only a general framework or lens through which we may analyse the processes of mediating and dealing with normative and institutional claims and conflicts between trade regionalism and the world trading system. It does therefore presuppose or even require competing and conflicting claims, that is to say divergence, between trading systems. Judicial accommodation presupposes processes of communication between regional trade systems

---

<sup>145</sup> Predicting a convergence between the WTO and RTAs, Cho, op. cit., n. 23. In the same vein, although in the context of the WTO-EU interplay, see J.H.H. Weiler, "Cain and Abel-Convergence and Divergence in International Trade Law"; and "Epilogue: Towards a Common Law of International Trade", both in *The EU, The WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford and New York, Oxford University Press, 2000).

and the WTO. Communication does not necessarily imply convergence among trading systems. Convergence may exist but it is not inevitable, especially when we are talking about a long-term and broad convergence trend. The model here presented must, accordingly, be contrasted not only with those who advocate an unavoidable opposition and permanent conflict between regionalism and multilateralism<sup>146</sup> but also with those who advocate a convergence trend between RTAs and the WTO.<sup>147</sup>

So, what, then, is judicial accommodation about? Judicial accommodation is about pluralism or judicial pluralism: the endorsement of the plural character of the global marketplace by courts and court-like institutions; a marketplace that expresses a heterarchical, non-vertical, and pluralist relationship among different trading systems and an interconnected global marketplace based on cooperation and interrelationship. It is precisely this kind of interplay between systems that demands a better allocation and mediation of conflicting claims that will naturally emerge. The accommodation of conflicts within this pluralist paradigm acknowledges the institutional and normative autonomy or cognitive framework of different trading systems. This explains, for example, the EU strategy in asserting its jurisdictional boundaries as regards the WTO. The European courts did not deny the effectiveness of WTO law in the EC legal order but, as an alternative, they have tried to preserve the existence of the two legal systems and the jurisdictional boundaries between them. It is true, that from an European perspective, the ECJ has the final word on the effectiveness of WTO law on the Community legal order. From a standpoint of the WTO adjudicator, however, this is no longer true. So, an external point of view leads us to a pluralist outlook of the interplay between the EU and the WTO. A similar view may be discerned from NAFTA-WTO legal relations. The construction of the common ground is not an attempt to fully or partially converge both systems but simply an effort to accommodate WTO law into NAFTA. Both systems share a common goal and rationale, which is the elimination of

---

<sup>146</sup> See, for example, L. Thurow, *Head to Head: The Coming Economic Battle among Japan, Europe, and America* (New York, Warner Books Edition, 1992) (suggesting a desegregation of the multilateral trading system into three regional economic blocks and a permanent collision and competition among them).

<sup>147</sup> This is not to say that writers such as Cho and Weiler are wrong in predicting or advocating convergence. It is only to say that prior to the claim of convergence we need to acknowledge the existence of underlying conflict and divergence and then highlight how regional trading systems and the WTO are *in action* dealing with such conflicts.

trade barriers and the liberalisation of international trade, but this task is to be accomplished differently: regionally by NAFTA and multilaterally by the WTO.

Consequently, judicial accommodation is more pluralistic and less coherent. Judicial accommodation is pluralistic in that it acknowledges the interaction and functional position of the different trading systems operating in the global marketplace. Additionally, it promotes a variety of interests and values within each trading system. Thus, judicial decisions are therefore justified by reference to a plurality of interests and values. On the other hand, judicial accommodation is less coherent in that courts, unlike political institutions, are not the most suitable institutions to promote standardization and convergence. The effort to promote external coherence (NAFTA) or internal coherence (the EU) does not mean that the relation between such trading systems is coherent in nature. There is an effort towards coherence<sup>148</sup> but the relationship between systems is also composed of conflicting claims and institutional competition and therefore by incoherence. It is not for the courts and court-like institutions alone or even mainly to promote standardization or harmonization of legal systems since this would bring to the fore the issue of judicial activism and the limits to economic integration. Perhaps, as implied, say, by the ECJ's institutional balance doctrine, political institutions within the Community are able to deal with such issues with increased efficiency and legitimacy. This is a topic for another article.

---

<sup>148</sup> Coherence may be conceived of as an element of the notion of the process of economic (and normative) integration. As put by Karl Deutsch, economic integration is a process of bringing “previously separate units into components of a coherent system” (quoted by E. Stein, “International Integration and Democracy: No Love at First Sight”, (2001) 95 *American Journal of International Law* 489, at p. 494).