INTRODUCTION

In an Opinion delivered on 6 May 1999, Advocate General Mischo briefly focused on the question of the legal status of panel reports (in this particular case an Appellate Body report) adopted by the World Trade Organization’s (‘WTO’) Dispute Settlement Body (‘DSB’) in the European Community (‘EC’) legal order.1 This question has not yet inspired many legal scholars to date and therefore merits some closer attention.2

This comment will focus on the Opinion of the Advocate General and will

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1 Opinion of 6 May 1999 in Case C-104/97 P, Atlanta AG v. Commission and Council, not yet reported in the ECR. At the time of writing only the French version of the Opinion was available.

refer to the factual background of the case where necessary. It will then concentrate on the question of whether WTO panel and Appellate Body reports can be invoked in legal actions brought before the European Court of First Instance (CFI) or the European Court of Justice (ECJ).

1. THE OPINION OF THE ADVOCATE GENERAL

In the case at hand, Atlanta sought the annulment of a CFI judgment rendered on 11 December 1996, rejecting Atlanta’s request for damages based on Article 288 of the EC Treaty (ex Article 215). Atlanta alleged that the WTO-incompatibility of Regulation 404/93, in view of the Appellate Body report of 9 September 1997, justified a claim for damages and emphasized that it was not invoking a breach of substantive WTO rules.

Advocate General Mischo disagreed with the applicant and argued that Atlanta was relying on substantive WTO law, since the Appellate Body report is a mere application (and interpretation) of WTO law. Consequently, the Advocate General considered that Atlanta should have tried to annul the CFI judgment on the ground that the latter did not give Atlanta the possibility of invoking GATT rules. As this argument was not included in Atlanta’s submission, Advocate General Mischo concluded that the appeal was inadmissible.

However, according to the Advocate General, even an explicit referral to an alleged infringement of substantive WTO law in Atlanta’s submission would still not have constituted a valid ground on which to challenge the WTO-incompatibility of Regulation 404/93 as WTO rules cannot be invoked as a ground for annulment before the European courts.

The Advocate General then examined whether the WTO Appellate Body

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3 Atlanta is a German banana trader who has been involved in a number of legal proceedings before the CFI and the ECJ whereby it challenged the EC banana regime.


6 WT/DS27/AB/R, European Communities – Regime for the Importation, Sale and Distribution of Bananas, report of the Appellate Body of 9 September 1997. The Advocate General refers to the Appellate Body report of 25 September 1997. This is the date on which the Appellate Body report was adopted by the Dispute Settlement Body (‘DSB’) as provided for by Article 17.14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘DSU’).

7 Paras 3 to 23 of the Opinion.

report could constitute a ground for liability on the part of the EC. It follows from the case law of the ECJ that to impose liability upon the EC, the law invoked must have ‘direct effect’, i.e. must be able to confer rights on individuals.9

The Advocate General finally argued that a ruling of the Appellate Body does not impose any obligation on the Member whose legislation has been found to be in breach of WTO law to amend its legislation immediately. According to Article 21(3) of the DSU, a Member has a ‘reasonable period’ of time to comply with the ruling of the Appellate Body and to bring its legislation in line with WTO law. Moreover, Article 22 of the DSU gives WTO Members the possibility of maintaining the legislation in force beyond the reasonable period of time if the parties to the dispute have agreed on suitable compensation. Therefore, the Advocate General considered that Atlanta would not be able to rely on the Appellate Body report to invoke a right to damages.10

2. THE INTERFACE BETWEEN DECISIONS OF INTERNATIONAL JUDICIAL BODIES AND EC LAW

According to the Opinion of the Advocate General, the status in EC law of decisions of (judicial) bodies established under the auspices of an international agreement, depends on the status and the effect of the particular international agreement in the EC legal system. This analysis is not entirely correct, as the legal status of decisions emanating from judicial entities established within the framework of an international agreement such as the WTO cannot – as such – be assimilated with the legal status of the agreement itself in so far as that agreement is binding for the EC and forms an integral part of the EC legal order.11

For the purposes of this comment, ‘decisions of bodies established under the auspices of an international agreement’ will refer either to decisions of international bodies administering international agreements or to decisions or judgments of judicial entities established within the framework of an international agreement.

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10 Advocate General Lenz, however, did not exclude liability of the EC under such circumstances albeit under the ‘old’ GATT regime. He argued that one should ‘not exclude the possibility that in exceptional cases an infringement of provisions of GATT might give rise to a liability in damages to the traders concerned. In particular, one might envisage a case where in such a situation the Community makes no use of the possibilities provided for in GATT of freeing itself from its obligations, but agrees that the dispute should be decided by a neutral tribunal, and then however refuses to comply with the decision.’ See paragraph 21 of his Opinion of 16 February 1995 in Case C-469/93, Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA, [1995] ECR I-4533. As Montañà I Mora phrased it, ‘[O]ne may construe this intriguing statement as establishing that the Community’s failure to comply with a World Trade Organization (WTO) panel report might give rise to liability in damages to the traders concerned.’ See M. Montañà I Mora, AJIL (1997), 152, at 155.
Decisions of bodies administering international agreements

Certain international agreements concluded by the EC establish institutions such as an Association Council, empowered to issue recommendations or to adopt decisions. One of the best-known examples is the ‘Council of Association’ set up under the Association Agreement concluded between the EC and Turkey. Under this Agreement, the Association Council has the power to take decisions and each of the parties to the agreement must take the measures necessary to implement the decisions taken. It is important to distinguish between, on the one hand, the binding character of such decisions in the EC legal order and, on the other hand, the direct effect of such decisions.

1. The binding character in the EC legal order

The ECJ decided in Greece v. Council that decisions issued by the Association Council form an integral part of EC law from the moment of their entry into force. They do not necessarily require implementing measures by the EC for their application within the EC legal order. A specific act of the Council is only required if the substance of the particular decision does not allow it to be applied by the courts immediately.

2. Direct effect

Individuals have successfully invoked decisions adopted by the Association Council before their domestic courts in order to invalidate national legislation inconsistent with such decisions. The majority of those cases were referred to the ECJ under Article 234 of the EC Treaty (ex Article 177). The ECJ has held, on several occasions, that those decisions may have direct effect.

Lavranos has argued that the legal effect of decisions taken by the Association Council set up under the EC-Turkey Association Agreement can be assimilated with the legal effects of WTO panel reports, because both the EC and its Member States are signatories to the WTO Agreements as well as to the Association Agreement with Turkey, and because under both agreements a body was established entrusted with the power to take binding decisions. Although those decisions are different in form, they would have the same binding (legal) effect.

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12 See the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey, OJ L 217/3687 of 29 December 1964.
13 See Article 22(1) of the Association Agreement.
16 See N. Lavranos, above n 2.
It is questionable, however, whether panel or Appellate Body reports can be assimilated with decisions taken by the Association Council. Certainly, there are similarities but they do not produce or intend to produce similar legal effects. The panels and the Appellate Body have a judicial function, whereas the Association Council rather acts as a kind of executive, administrative body.

It is also questionable whether decisions taken by the Association Council as a ‘dispute settlement body’ under the Association Agreement would have the same status and/or effect as panel or Appellate Body reports. Presumably not, since the dispute settlement system established in the framework of the Association Agreement with, for example Turkey, does not have the same judicial qualities and characteristics as the WTO dispute settlement mechanism. For example, the jurisdiction of the Association Council is not compulsory and there is no possibility for appeal.

Decisions of judicial/adjudicative-type entities

The ECJ has confirmed that the EC may enter into an international agreement whereby a judicial entity is established, provided that the structure and the jurisdiction of such entities are compatible with the EC Treaty. In 1991, the ECJ gave an opinion pursuant to Article 300 of the EC Treaty (ex Article 228) before the draft agreement on the European Economic Area (‘EEA’) was concluded with the Member States of the European Free Trade Association (‘EFTA’). One of the crucial questions with which the ECJ dealt was whether the EEA Agreement’s system of judicial supervision for the settlement of disputes was compatible with the EC Treaty. Under the EEA Agreement, an EEA Court was proposed with the jurisdiction to interpret and apply the provisions of the Agreement in disputes between the Contracting Parties.

The ECJ declared that the proposed jurisdiction given to the EEA Court was incompatible with the EC Treaty on the following grounds. Since the EEA Court had the competence to interpret the EEA Agreement of which the provisions were identical with the corresponding provisions of the EC Treaty, there was a risk that the EEA Court and the ECJ would make different interpretations, especially since the two agreements had different purposes. Interpretations made by the EEA Court were therefore liable to affect EC law and, subsequently, the EEA court system would be in conflict with the role of the ECJ under Article 220 (ex Article 164) and Article 292 (ex Article 219) of the EC Treaty and therefore the very foundations of the EC.  


18 In a subsequent opinion, the ECJ held that the new provisions of the EEA Agreement on the settlement of disputes were now compatible with the EC Treaty. See Opinion 1/92, Opinion on the revised draft Agreement on the European Economic Area, [1992] ECR I-2821.
However, the ECJ declared that there are certain conditions under which it will be bound by the decisions of another court. After recalling its case law on the binding effect of international agreements concluded by the EC and on its own jurisdiction to interpret those agreements, the ECJ decided that

[W]here, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event the Court of Justice is called upon to rule, by way of a preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.19

Here, the ECJ emphasized the binding character of judicial decisions on disputes between the contracting parties to an agreement for the ECJ where the ECJ is called upon to rule on the interpretation of the agreement.20 Moreover, a closer look at Opinion 1/91 reveals that the ECJ implicitly agreed with the concept that the binding character of judicial decisions on disputes between the contracting parties to an international agreement does not depend on the direct effect of such an agreement. In Opinion 1/91, the ECJ assumed that the EEA Agreement did not have direct effect.21 This did not prevent the ECJ from holding that the decisions of the EEA Court could be binding for the ECJ.

WTO Panel and Appellate Body reports

1. The WTO Agreements are part of the EC legal order
To date, there has been only one case where the ECJ explicitly referred to a GATT panel report. In Dürbeck,22 which concerned imports of dessert apples from Chile, the ECJ was informed by the Commission at the hearing that a GATT panel23 had not found an infringement of Articles I or II

20 P. Eeckhout, above n 2, at 52.
of GATT, as was alleged, and had only marginally criticized the protective measures adopted by the EC. The ECJ therefore rejected the claim based on GATT and decided that

( . . . ) the argument advanced by the plaintiff in the main action that the protective measures in issue are contrary to the commitments entered into by the Community under GATT is not compatible in this case of putting the validity of these measures into question.

It would appear that the ECJ was misinformed, as the GATT panel had found a number of infringements of Article XIII and Article XIX of GATT. As the Dürbeck judgment did not give any guidance as to how the ECJ would qualify the legal status of a (GATT) panel report, it is now essential to assess whether the line of reasoning maintained by the ECJ in Opinion 1/91 also applies to panel and Appellate Body reports adopted under the WTO dispute settlement mechanism.

Under the GATT dispute settlement mechanism – in its pre-Uruguay Round version – it could have been argued that the reasoning of the ECJ in Opinion 1/91 would not have applied because the panels were not ‘court-like’ but rather conciliatory bodies. Since the WTO dispute settlement mechanism is now far more judicial in nature, it can be argued that if the ECJ were to maintain the reasoning of Opinion 1/91, it should be bound by the panel or Appellate Body reports adopted by the WTO Dispute Settlement

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24 The ECJ decided that ‘[A]ccording to the uncontested information on this matter supplied by the Commission during the oral procedure the special GATT group charged with examining the conformity of the Community measures with the General Agreement found that in adopting the protective measures in issue the Commission did not infringe either Article I or Article II of that agreement.’ See paragraph 46 of the judgment. ‘Special GATT group’ is a translation error. The ECJ obviously meant ‘GATT panel’ See also J. H. J. Bourgeois, above n 2, at 13, fn 44.

25 See paragraph 45 of the judgment.


27 The notion ‘panel and Appellate Body reports’ refers to reports adopted by the DSB pursuant to Article 17.14 of the DSU.

28 See M. Montañà i Mora, above n 2, at 175. The ECJ has established the following criteria in order to determine whether a national ‘judicial’ body qualifies as a court or tribunal for the purposes of establishing the ECJ’s jurisdiction under Article 234 of the EC Treaty (ex Article 177): (i) the body concerned must be established by law; (ii) it must be a permanent body; (iii) its jurisdiction must be compulsory; (iv) the procedure before it must be inter partes; (v) it must apply the rule of law; and (vi) it must be an independent body. See, Case C-416/96, Nour Eddline El-Yassini v. Secretary of State for the Home Department, judgment of the ECJ of 2 March 1999, not yet reported in the ECR. Although in a different context, it is submitted that a panel and, undoubtedly, the Appellate Body would satisfy those criteria.

29 The amount of literature devoted to the WTO dispute settlement mechanism is enormous. For a recent contribution, see D. Palmeter and Petros C. Mavroidis, Dispute Settlement in the World Trade Organization. Practice and Procedure (The Hague: Kluwer Law International 1999).
This line of reasoning would be valid regardless of whether the ECJ grants direct effect to the WTO Agreement, since Opinion 1/91 of the ECJ provides that the decisions of a court set up under an international agreement to which the EC is a party would already bind the ECJ ‘in so far as that agreement is an integral part of the Community legal order’. As the WTO Agreement is an integral part of the EC’s legal order pursuant to Article 300 of the EC Treaty (ex Article 228), the EC institutions, including the ECJ, are bound by panel and Appellate Body reports adopted under the WTO dispute settlement mechanism.

However, a WTO panel or Appellate Body report can only be invoked in legal actions before the ECJ in those cases where the panel or Appellate Body has established that certain EC rules or practices are not in conformity with WTO law and has required the EC to bring them into conformity with WTO law. This approach is correct in view of the limited precedential effect of WTO panel or Appellate Body reports which are only binding on the parties to the dispute. This approach has been confirmed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*, where it held that

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30 Petersmann argues that the WTO dispute settlement system has contributed largely to a greater judicialization of the international economic system and could inspire dispute settlement systems in other non-economic areas. See E.-U. Petersmann, ‘Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas’, J Int’l Econ L (1999), 189.

31 Eeckhout argues that ‘[W]here a violation is established the binding character of the agreement and the principle of legality should in my view trump any lack of direct effect.’ See P. Eeckhout, above n 2, at 53. This line of reasoning implies that the direct effect of the WTO Agreement(s) is a *per se* condition which is then ignored.


33 Advocate General Saggio has recently argued that the WTO dispute settlement rules are not capable of limiting the competences of the ECJ for the following two reasons: (i) the WTO dispute settlement rules do not establish a judicial system but rather a conciliatory mechanism for the settlement of disputes (as the DSB is more political in nature and limits itself to the mere adoption of decisions or recommendations from the panels or the Appellate Body) and (ii) the establishment of a judicial body entrusted with the powers, not only to interpret and apply the WTO Agreements, but also to annul Community acts and decisions, would be incompatible with the EC’s legal order and manifestly in breach of Article 220 of the EC Treaty (ex Article 164). See para 23 of the Opinion of 25 February 1999 in case C-149/96, *Portugal v. Council*, not yet reported in the ECR. This line of reasoning is based on a misconception of the WTO dispute settlement mechanism as neither panels, nor the Appellate Body are able to invalidate Community acts. They can merely establish that a Community act infringes WTO law and recommend that the EC should bring its legislation in conformity with those rules. The ‘invocability’ of a panel or Appellate Body report in a legal proceeding before the CFI or the ECJ is a complete different matter.

34 See P. Eeckhout, above n 2, at 53–4.


Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.

2. The binding nature of panel and Appellate Body reports

Finally, this comment will briefly focus on the argument brought forward by the Advocate General according to which a panel or Appellate Body report does not establish an (immediate) obligation for WTO Members to bring their legislation in conformity with WTO law. According to the Advocate General, individuals are not able to derive any rights from a panel or Appellate Body report. This is based on a misinterpretation of the relevant provisions of the DSU. Article 22.1 of the DSU provides that compensation is a purely provisional measure and that ‘(. . .) neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements (. . .).’ Compensation is not a method of settling disputes but simply a temporary instrument to ensure that any benefits accruing to the other members are not nullified or impaired as a result of the failure to comply within the reasonable period of time set in the particular case and that the defaulting party is not encouraged to persist indefinitely in its failure to comply. As Eeckhout phrased it, ‘[T]he DSU’s rules on compensation should (. . .) not act as a barrier to acknowledging that WTO dispute settlement decisions are binding on the Community’s judiciary.’

Thus, adopted panel and Appellate Body reports are binding for the EC and the compensation mechanism cannot not prevent those reports from being invoked in a legal proceeding before the CFI or ECJ. By accepting compensation, the responding country in a dispute, in se, recognizes the binding effect of a panel or Appellate Body report since it accepts that its legislation or other measures adopted by it are in breach with WTO law.

CONCLUSION

The question of the ‘invocability’ of panel and/or Appellate Body reports is a novelty in the case law of the ECJ. This explains why Advocate General Mischo has been very prudent in his Opinion and has taken a rather

37 See also paragraph 29 of the Opinion of Advocate General Tesauro of 13 November 1997 in Case C-53/96, Hermès International v. FHT Marketing Choice, [1998] ECR I-3603. Timmermans has suggested that it cannot in any way be excluded that the compensation may ultimately be a ‘provisoire qui dure’, see C. W. A. Timmermans, ‘The Implementation of the Uruguay Round by the EC’, in The Uruguay Round Results: A European Lawyers’ Perspective (Brussels: European Interuniversity Press 1995), 501–9, at 504. This might certainly be the case, but it would run counter to the spirit and objectives of the WTO dispute settlement mechanism as such. The fact of maintaining the ‘illegal’ measures in force would, in my view, give a right to damages to the European industries directly affected by the sanctions.

38 P. Eeckhout, above n 2, at 55.
conservative approach. He was not prepared to accept any binding legal force emanating from panel or Appellate Body reports in cases brought before the ECJ. However, the case law of the ECJ in Opinion 1/91 makes it clear that the ECJ would be prepared to accept binding interpretations of WTO law by panels or the Appellate Body in cases brought before it. Taking into consideration the legalization of the WTO dispute settlement mechanism, there is no doubt that this is the line of reasoning to be followed.