The Role of National Courts in International Trade Relations

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THE ROLE OF NATIONAL COURTS
IN INTERNATIONAL TRADE RELATIONS

Meinhard Hilf*

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Judicial review with respect to international trade disputes may occur on two different levels. The first level, that of public international law, has been strengthened by the recent World Trade Organization (WTO) agreements and is concerned with serving and protecting the rights and obligations of states. On the second, or national level, individuals may pursue the rights accorded them in their national court systems by the legislation which implemented such international rules.

The potential exists that the rights and interests of both states and individuals may be involved on each level. On the international level, one may discover a hidden dispute involving individual rights.1 And the reverse may be true: a case litigated before national courts may have as its background an existing or upcoming dispute among states.

One example may suffice to demonstrate the problem. With regard to the determination of "injury" within the realm of antidumping, individuals—importers, exporters or the relevant industry—may challenge a determination on the national level. However, a parallel process involving the same substantial question and involving the same interests may simultaneously come before a GATT panel, in which the only parties are the governments of the respective WTO Members.2 While the issues and facts involved in each process are substantially the same, significantly different rules apply in each case. Whereas the national court has at its disposal all the usual judicial tools for verifying the facts presented by the investigating governmental authorities,3 the respective panel is supposed to base its findings only on the relevant facts as they are presented by the administration of the WTO Member which has imposed the antidumping

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2. A telling example may be the Chilled Salmon case under GATT. Panel Report on United States Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 593a (Apr. 27, 1994). For other cases dealt with on both levels see Ernst-Ulrich Petersmann, Settlement of International and National Trade Disputes Through the GATT, in 7 PUPIL 77 (Ernst-Ulrich Petersmann & Gunther Jaenicke eds., 1992).

3. See the detailed rules in Article 6 of the Agreement on Implementation of Article VI of GATT 1994 on evidence to be observed by the investigation national authorities.
duty. Though the panel may call experts under Article 13 DSU, it seems obvious that, given the time constraints, their findings will have a much more limited scope and effect than those of the national authorities. Basically, panels are designed to act as an appellate body and thus not exercise a second full investigation of the factual situation.

These two levels also exist in other fields of international relations where procedures for judicial review are provided and different methods for linking them have evolved. The most prominent examples are the European Community's legal system and the system under the European Convention on Human Rights.

The following study represents a consideration of some aspects of the interaction and linkage between national courts and international dispute settlement bodies. Thus, it will focus on the role of national courts in international trade relations and indicate links with the dispute settlement process on the international level within the WTO.

The relationship between national and international dispute resolution bodies was not a prominent issue in the Uruguay Round debates concerning the enforcement of international trade law rules. However, the positive results of the Uruguay Round have led to a considerable expansion of international trade. In this context, the question of guaranteeing effective legal protection of the rights and interests of the individual in the international trading system is a matter of vital interest, worthy of analysis in order to spur academic discussion.

Part I of this article identifies and analyzes some modern trends in judicial review in the area of international relations. Section Part II then examines and briefly discusses the existence of judicial review for both national and international levels of protection and the possibilities for linking the two. A major part, Part III, is devoted to the specific role of national courts within the WTO system. Finally, Part IV draws conclusions and suggests some means for improving the judicial review offered by national courts and for linking them to the interstate dispute settlement on the international level.

4. See Petersmann, supra note 1, at 1241. See also Chilled Salmon, supra note 2, referring to Article 17.6(j) of the Antidumping Agreement limiting the role of the panel "to determine whether the authorities' establishment of the facts was proper and their evaluation...unbiased and objective." In addition, Article 13 DSU states the right of the panel to "seek information" and to "consult experts." See likewise Article XX of the Agreement on Government Procurement providing for a judicial challenge procedure in case of complaints by suppliers.


I. RECENT TRENDS IN JUDICIAL REVIEW

In national legal systems, as well as in the framework of international trade relations, one may discover some recent trends in protecting the rights of individuals by judicial review. All of these trends reflect an improvement of the various procedures for the effective protection of the rights of individuals.

A. Effective Judicial Review in National Legal Systems

Article 6 of the European Convention on Human Rights (ECHR) sets forth as a fundamental human right an individual's right to access to a fair and impartial judicial system. This right has become most prominent within the case law developed under the ECHR.\(^7\)

This basic guarantee is limited in scope to civil rights and criminal charges. The language suggests that this right does not extend to the field of administrative actions. However, the European Court on Human Rights has applied ECHR Article 6 to some aspects of administrative actions.\(^8\) At its core, ECHR Article 6 constitutes not only a fundamental right, but expresses at the same time a general principle of law. Basic judicial protection of the individual is part of the rule of law (Rechtsstaatsprinzip) which is present in nearly all modern constitutions. Thus, basic judicial protection is guaranteed absolutely within the scope of purely domestic affairs in most modern societies.

However, whenever external or international elements become involved, it is unclear to what extent judicial review by domestic courts is available with respect to state actions which are covered by international rules. Particularly in the field of international trade relations, the basic question is whether individuals—and thus national courts, via the individual's right to judicial review—should be allowed to insert themselves in the realm of international trade relations, especially within the WTO. As examples from the legal systems of the European Community and the United States show, either the national legislature implementing the WTO tends to restrict the role of national courts or these courts themselves tend to show a large degree of judicial self restraint.

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7. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para. 1, 1 Eur. Conv. Hum. Rts. 1, 8.

The fundamental rights issue may be extended to a constitutional right of the individual to do business in international markets. Relevant fundamental rights are the freedom of profession, the right to equal treatment, the protection of property, and the more general right to develop one's own personality and to engage in activities which may be relevant to international trade. Accordingly, courts have derived a fundamental right to export or import in this context. The European Court of Justice (ECJ) in the bananas case of October 5, 1994, referred to the right to property and the freedom to pursue trade or business as part of the general principles of Community law. However, the ECJ held that these rights must be viewed in relation to their social function. Especially in foreign trade relations and agricultural policy, the ECJ acknowledged a specific and broad discretionary power of the Community institutions.

In this context, the ECJ applies a test of proportionality. It would be difficult to conceive that every interference by the public authority may be challenged under the claim of a violation of fundamental rights. This would not be so in the case of an act involving aspects of international trade relations.

This basic protection of fundamental rights within international trade relations is only applicable within a given trade policy. The individual certainly has no right to demand a specific trade policy with regard to foreign markets. However, as soon as the competent authorities establish a specific policy or market-organization, the individual has a right to be treated at least in accordance with the basic rule of non-discrimination.

Another trend relates to the implementation of international rules within domestic legal systems. In the EC as well as other contexts, the

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10. Petersmann, *Limited Government and Unlimited Trade Powers*, supra note 9, at 545 (referring to the respective situation in Germany, Switzerland, the United States, and within the EC).


national judge appears to be the genuine enforcer of international rules. "Deconcentrated enforcement" by national courts tends to be much more effective in protecting individual rights than the international dispute settlement mechanisms which are primarily concerned with the legal disputes among governments rather than with private rights and interests. The effectiveness of international institutions is highly dependent upon an effective implementation of their international rules by and within national legal systems. It is in the self-interest of the WTO and other international organizations who set and apply international rules, that these rules be applied as effectively as possible to the grass-root relations of the individual operators. The more national courts become involved in the implementation of international rules, the more the relevant international institutions will gain domestic political support and thus, legitimacy. Only such support can guarantee effective implementation and faithful compliance in the long run. Such support is essential for the legitimization of new international rules. Accordingly, internationalism should have its firm roots at home.

A further trend concerns the judicial protection of individuals with respect to violations of international trading rules by foreign governments. Judicial review of one's own government's behavior regarding international trading rules is commonly available. However, as discussed below in detail, hardly any member of the WTO allows individuals to base such claims against their own government on GATT law, because GATT law is not considered to be directly applicable. Nevertheless, where its own government is acting unlawfully, the individual usually will find adequate judicial protection under domestic law.

Where acts of foreign governments are at issue, however, judicial protection is not so readily available. Many states still maintain discriminatory rules with regard to foreigners' access to their justice systems. Where an individual has a dispute with a foreign government, three different avenues of relief may be considered:

15. Claus-Dieter Ehlermann, Ein Plädoyer für die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedstaaten, in LIBER AMICORUM PESCATORE 205 (Francesco Capotorti et al. eds., 1987).
16. Hudec, supra note 6, at 358.
The most common method would be to force one's own domestic government to use all instruments at its disposal to pressure the foreign government (for example, U.S. Section 301 or EC Regulation on the New Commercial Policy Instrument (now known as The Trade Barriers Regulation)). This kind of diplomatic protection, which constitutes a more or less aggressive unilateralism in which even national courts can become involved, often raises problems of fair representation of the foreign governments concerned.

The second avenue is to seek redress in the national courts of the foreign state. For example, in the still ongoing Kodak/Fuji case, the Japanese have urged Kodak to pursue its claims before the Japanese Fair Trade Commission and to use all judicial means under Japanese law rather than to look for protection under U.S. law and its authorities.

Finally, an individual may join her own government in pursuing a case before the GATT dispute settlement process. Apparently, an increasing number of governments are becoming willing to let private parties lend support to the drafting of the submissions to the relevant panels. However, joining the government's representation during the oral part of the panel proceedings still seems to be excluded.

These trends seem to suggest an increasing importance of judicial review in international trade relations. However, as will be discussed in Part II, one can observe trends which point in the opposite direction when governments get the impression that their national courts are interfering too intensively with their trade policies.

This increased importance of judicial review in domestic law is reflected in the expansion of binding dispute settlement procedures under public international law. The most recent example of this is the establishment of the War Crimes Tribunals in The Hague. In the field of human


21. The U.N. Security Council established the International Criminal Tribunal for the
rights protection, the international mechanisms for judicial review have gained momentum.\textsuperscript{22} The same can be stated with respect to the international administrative tribunals: more than fifty of about three hundred international governmental organizations have already accepted such jurisdiction for the judicial protection of a total of 120,000–150,000 civil servants.\textsuperscript{23}

The following section will examine whether these recent trends favoring judicial protection of the individual in the general field of international relations are confirmed in the specific field of international trade relations.

B. Effective Judicial Review in International Trade Relations

The facilitation of effective implementation of international trade rules, including increased legal certainty and transparency, was a primary goal of the Uruguay Round.\textsuperscript{24} To the surprise of many, a major success of the Uruguay Round consisted of the considerable strengthening of the rules for international dispute settlement within the WTO.\textsuperscript{25} Governments willingly closed easy escape routes by renouncing their right to veto the establishment of a panel or the adoption of final GATT Council decisions.\textsuperscript{26} The establishment of a standing Appellate Body also underscores the WTO members' strong commitment to legal reform, which will render it more difficult for parties to escape the legal decisions under GATT law.

Despite providing for strengthened GATT rules to ensure effective enforcement of decisions, the Uruguay Round did not, in general terms, address the role of national courts in international trade dispute resolution. This was not surprising, given that virtually no treaties involving public international law provide specific rules for their implementation by national judicial bodies. It is generally recognized, however, that contracting states have a great deal of discretion in how they may choose to respond to their obligations under an agreement.
Despite the absence of an overarching rule, the Uruguay Round agreements do contain a number of specific clauses concerning how each member implements the agreements domestically. These specific clauses are aimed at ensuring a more efficient operation of each agreement by providing for specific administrative and judicial review procedures within the national legal order.\textsuperscript{27} The most detailed provisions to this effect are to be found in Articles 41–50 of the Trade in Intellectual Property (TRIPS) Agreement, providing for “expeditious remedies” to prevent infringements and for a review procedure by national judicial authorities.

However, none of these clauses address the specific role of national courts and the functioning of judicial review with respect to the rights of the individual. This has been left entirely to the discretion of the members of WTO. Furthermore, as will be shown below, under neither U.S. nor EC law are national courts supposed to apply GATT rules directly. However, under certain circumstances, courts do tend to construe national trade law to conform with GATT law.

Before examining in more detail the specific role of national courts in international trade relations, it may be useful to consider other judicial review systems which exist in international and national law, and to determine to what extent the two levels are linked to one another.

II. THE TWO-LEVELS APPROACH OF JUDICIAL REVIEW AND METHODS OF LINKAGE

Aside from international trade law, a vast array of procedures have developed in which individuals have standing on the international level to defend either their individual rights or international rules which have an impact on the individual. Given the number of different international and domestic procedures, and the broad variety of problems which exist regarding coordination or linkage between the two levels, it is nearly impossible to systematize the procedures and their problems. One may demonstrate the possible elements of linkages between the two levels through the use of a sliding scale. One end may be referred to as “no linkage at all,” and the other would contain a model which provides for

\textsuperscript{27} One example is the “Independent Entity” established in 1995 by the WTO, the International Chamber of Commerce and the International Federation of Inspection Agencies and administrated by the WTO, which became operational on May 1, 1996 and which is the first WTO dispute settlement mechanism open to private traders. For further examples see Petersmann, supra note 1, at 1187–88. See also Agreement on Subsidies and Countervailing Measures, art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, reprinted in, GATT Secretariat, \textit{The Results of the Uruguay Round of Multilateral Trade Negotiations} 296 (1994).
complete coordination between the two extremes, with either *ex ante-* or *ex post-*control of the various decisions of national courts on the international level. To be specific, one may distinguish between the following five models or methods of linkage.

**A. No Linkage at All**

A great number of dispute settlement procedures under public international law have no immediate impact on the legal status of the individual. They involve primarily, or exclusively, the interests of states or international organizations. This seems to be the traditional understanding of the GATT dispute settlement procedures, which aim at safeguarding trading rights or opportunities of the contracting parties of GATT, now the Members of the WTO.

As provided under ECHR Article 24 or ECT Article 173 (2), each High Contracting Party or Member State may file claims against each other within an interstate procedure. While the procedures under the ECHR are especially focused on protecting individual human rights, and even the state interests involved under ECT Article 173 (2) may have some indirect impact on the legal situation of individuals, there seems to be practically no link to the parallel process of judicial review on the national level. One exception may be where a national court of a High Contracting Party of the ECHR failed to fulfill its obligation of guaranteeing effective judicial review of the individual. It was precisely in this situation that the Netherlands and others filed a state complaint against Greece under ECHR Article 24.28

Although individuals may have some substantive interests in the outcome of such interstate procedures because the rules in question may eventually be applied under different circumstances in a case before domestic courts, no legal avenue is available to individuals who would seek to influence these interstate procedures. There is no procedural link which might avoid discrepancies in the interpretation of the same legal rule either at the international or national level. Each system seems to be "self-contained," operating without external influences and serving obviously different purposes: inter-state interests on the one hand and the individual's interests on the other.

**B. Consecutively Operating Systems**

Typical examples of this category include some of the international mechanisms for the protection of human rights. The various international

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28. *See Frowein & Peukert, supra* note 8, at 112.
conventions which contain systems for judicial review by an international body in the case of human rights violations generally require prior exhaustion of local remedies. Thus, under ECHR Article 26, an individual may only turn to the European Court of Human Rights (the Court) following the exhaustion of all remedies available under national law.

In these situations there are two links, one substantive and one procedural. From a substantive perspective certain fundamental rights are guaranteed in the international instrument. These rights must be respected within the legal systems of all contracting parties. For example, in most domestic systems the ECHR is directly applicable; in some countries the ECHR even has constitutional stature. Judgments and interpretations given on the international level immediately influence judicial protection on the domestic level. However, if controversies and unresolved issues arise in a specific case pending on the national level, no procedural means exist by which to call for a preliminary ruling on the international level. Rather, all local remedies must first be exhausted before the relevant issue can be brought to the Court. The final decision of an international institution such as the Court cannot overrule the final domestic decision, but the state in question has the obligation to follow the Court’s ruling (restitutio in integrum) and eventually to pay compensation. Despite the absence of a formal hierarchy, the


32. See DIETER KILIAN, DIE BINDUNGSWIRKUNG DER ENTSCHEIDUNGEN DES EUROPÄISCHEN GERICHTSHOF FÜR MENSCHENRECHTE AUF DIE NATIONALEM GERICHTE DER MITGLIEDSTAATER DER KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN, 113 (1994); F RoweIn & PEUKERT, supra note 8, at 450; Albert Bleckmann, Bundesverfassungsgericht versus Europäischer Gerichtshof für Menschenrechte, 22 EuGRZ 387 (1995); PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 146 (1984).
development of international case law will influence future jurisprudence on the national level.\textsuperscript{33}

\textbf{C. Parallel or Alternative Judicial Review}

It would be unusual to find an international or a national system of judicial review which would offer both levels as parallel or alternative means for judicial review. An example of such a system could be the various mechanisms for the protection of human rights. However, these all involve exhaustion of domestic remedies as a prerequisite to seeking redress on the international level. Accordingly, an individual can not bypass the national judicial system.

Under EC law an individual has a multitude of different procedures at his disposal for challenging the legality of acts taken by EC institutions. Nonetheless, the relevant treaties determine with strict precision which level should be pursued first. There are only two minor exceptions. First, the situation may arise in which the Community and a Member State are simultaneously dealing with a presumed infringement of competition law. As a result, the same situation may be dealt with either at the supranational or at the national level. The ECJ has ruled that in exceptional cases such parallel actions may proceed, but that the rule "\textit{ne bis in idem}" would apply in order that the individual involved would not be penalized twice for one offence under the antitrust laws.\textsuperscript{34}

The other situation offering a choice between the jurisdictions of either the ECJ or the courts of a Member State is that of disputes involving contracts under public or private law to which the European Community is a party. Here judicial review is available at the level specified by the contract in question (ECT Article 181).

The North American Free Trade Agreement (NAFTA) offers a choice of two alternative methods for access to judicial review. Under Article 1904(5) of the Agreement, private parties may challenge final administrative determinations in the field of antidumping or countervailing duty actions through either an action before the competent domestic courts or by requesting review by a binational arbitration panel. The latter alternative may save time and money, while appearing more favorable than appearing before a foreign judge.


\textsuperscript{34} Case 14/68, Wilhelm, 1961 E.C.R., 1; Case 7/72, Böhringer, 1972 E.C.R., 1281, 1280.
Once a proceeding is before an arbitration panel, one may not
challenge its final determination in any domestic court. With regard to
future proceedings, the decision of such a panel is not binding authority.
NAFTA, unlike EC law, does not allow domestic courts to ask a panel
or court on the international level for binding preliminary opinions. There
is one embryonic provision allowing the contracting parties of NAFTA
to reach a common interpretation of the Agreement whenever such
interpretation is at issue in a domestic judicial or administrative proceed-
ing.\(^{35}\)

D. Systems of Integrated Judicial Review

A multitude of links between the international and the national levels
may be found in legal systems which aim at integrating certain fields of
state authority. The prime example of this is the European Community.
Certain similar mechanisms in the functioning of judicial review, howev-
er, have also been adopted by the Andean Pact. Two basic features
predominate:

(1) First, the European Community possesses no hierarchical powers
to overrule or nullify any court decisions on the national level. This is
considered to be the main difference between the structure of the Com-
unity and that of a federal system, where, at least in questions of federal
law, a supreme court has authority to overrule lower court decisions.
Even where a national court in deciding a question of EC law violates an
individual's rights, that individual has no procedural standing to challenge
this national decision before any court of the European Community. The
individual's only options are either to informally petition the Commission
to open a procedure under ECT Article 169 against the Member State in
question, or to petition the European Parliament under ECT Article
138(d). These remedies do not seem to be very effective. The EC Com-
misson, despite broad discretion over the use of this procedure, has to
date never brought a claim before the ECJ over a national court decision,
obviously out of deference to the independence of the judiciary.\(^{36}\)
Even if the Commission pursued this procedure, the ECJ would only be
empowered to state that the Member State had violated EC law. In
addition it could also impose financial sanctions against the Member State

\(^{35}\) See North American Free Trade Agreement, art. 2020 (corresponding to the former
FTA art. 1808).

\(^{36}\) Geiger, EG-Vertrag (1995), art. 169 para. 4.
in question under ECT Article 171:3. The individual could then file a claim in the domestic court in question, claiming damages pursuant to state responsibility for its institutions which have violated EC law.

(2) The second basic feature is the guarantee that EC law will be uniformly interpreted and applied throughout the Community. National courts have the opportunity to turn to the ECJ for a preliminary ruling on any question of EC law which arises in a domestic court proceeding. Where the particular national court is deciding in the last instance, it must seek such a preliminary ruling on EC law questions under ECT Article 177. Such ECJ rulings are limited to questions of EC law and are in principle only binding on the court that posed the question. Despite the theoretical limitation on the extent to which such a ruling is binding, its precedential value is in fact of much broader scope since it is obvious that all national courts throughout the Community are obligated to follow ECJ precedents on questions of EC law.

Consequently, national courts are called upon to render decisions based on EC law even though their primary task is to resolve questions of domestic law. In contrast, EC courts never directly decide questions of national law. While there exists a formal separation between the two levels of law, European and domestic, in cases of conflict between the two EC law will always prevail over domestic law in the sense that domestic law will be inapplicable.

E. Individual Involvement on the International Level

Traditionally, judicial review for aggrieved individuals has only been available on the national level, with international procedures being reserved for States. Nevertheless, individuals may have a vital interest in influencing the interstate procedure in view of the possible consequences which it may have for the judicial review provided on the national level. A typical development in this sense took place in the framework of the ECHR, where the position of the individual gradually improved in the course of its jurisprudence.

Even the early cases recognized the individual’s right to participate in the oral hearing before the Court as an assistant of the Commission. In 1982, an applicant was even allowed to act as a party during the


39. The access of individuals to the ECJ under Article 173 to challenge decisions under EC law may not be considered as an international procedure in the given context. EC TREATY art. 173(4).
proceedings whenever a case was submitted to the Court by the Com-
mission or a State. Yet, the present text of the Convention excludes the
individual from directly addressing the Court.

The individual's legal status will be improved with the coming into
force of the amendments to the ECHR, as provided for in Protocol No.
11, signed on May 11, 1994. Article 34 of the envisaged version of the
ECHR, which includes these amendments, entitles the individual to file
a claim before the European Court of Human Rights directly.

Moreover, according to the amended version of ECHR Article 36, as
provided for in Protocol No. 11, the President of the European Court of
Human Rights may allow third parties that have an interest in the results
of a pending procedure to submit written statements or to participate in
oral hearings. Under the European Community's judicial review system
an individual has standing to defend his or her rights before the ECJ
within every preliminary procedure. Only in interstate proceedings, such
as under ECT Article 173:2, or in infringement procedures under ECT
Article 169, does the individual have no standing at all.

Other procedures exist, such as the ICSID Convention's dispute
resolution procedure which explicitly offers the private investor a judicial
forum for disputes with the state with which an investment contract has
been concluded.

III. THE ROLE OF NATIONAL COURTS WITHIN THE WTO

Having reviewed the great variety of methods of linkage within the
two-level-protection of individual rights, a closer look shall be given to
the field of international trade relations within the system of the
WTO/GATT in the following sections.

Generally speaking, the two levels of protection of individual rights
within the WTO framework are similar to those of prior international
structures: a newly reinforced dispute settlement procedure within the
WTO on the one hand, and judicial review by national courts on the
other. As discussed below, almost none of the previously identified links
between these two levels are present within the WTO system. There is
no recognized rule on the exhaustion of local remedies, national courts

40. Rudolf Bernhardt, supra note 29.
41. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4,
1950, art. 48, in 1 EUROPEAN CONVENTION ON HUMAN RIGHTS 42 (H. Miehsler & H. Petzold
eds., 1982).
42. See Art. 34 of the envisaged version of the ECHR including the amendments as
provided for in Protocol no. 11, in: 21 EuGRZ 339, 343 (1994). See also Bernhardt, supra
note 29, at 145.
43. See Convention on the Settlement of Investment Disputes between States and
are unable to call for a preliminary ruling or interpretation from a higher body in cases of unclear rules under GATT, and individuals have no access to the international dispute settlement procedure. This means that there is no institutional linkage between the two levels of judicial protection, creating a danger that divergent interpretations of GATT law will occur at each level.

The following analysis of national courts under the WTO will demonstrate that they have a limited role, because national implementing legislation generally does not allow the courts to apply GATT law directly. This Part will then be concluded by a review of possible options for future development.

**A. The Role of National Courts under WTO Agreements**

WTO Members are obliged to implement WTO agreements and to perform duties according to them. As with most treaties under public international law, Members retain a great deal of discretion over how they choose to implement WTO agreements (through domestic legislation or other means). For example, options include setting up governmental regulatory bodies or conferring private rights of action on individuals. As discussed above, the WTO agreements mention the role of national courts in only a few exceptional cases. It seems that states have mainly exercised their flexibility in choosing implementation methods by adapting their given legislation in the field of international trade and by entrusting their executives with broad discretionary powers in the area of safeguarding trade interests.

**B. The Role of National Courts as Defined in the Implementing Legislation**

The role of national courts with regard to enforcing GATT law can take one of two forms, depending upon which of two avenues a state chooses in formulating its implementing legislation. The choice is between allowing courts to directly apply GATT law in cases involving individual rights, or allowing them to apply GATT law only indirectly. Only in the first instance will the executive handling trade matters be under strict scrutiny by domestic courts. Both the United States and the

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45. See *supra* note 27.

46. For an overview, see generally Jackson & Sykes, *supra* note 19.
European Community have rarely allowed their domestic courts to directly apply GATT law based upon requests from individuals.47

1. Direct Application of GATT Law

There seems to be virtually no national legal system which would consider GATT rules to be directly applicable in domestic law. For example, the EC Council, in the preamble of its Decision of December 22, 1994, on the conclusion of the Uruguay Round agreements, stated that these are, by their nature, not susceptible of being invoked in Community or Member States’ courts.48 In nearly identical terms the U.S. implementing legislation stated that “no provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect” and that no person other than the United States “shall have any cause of action or defense under any of the Uruguay Round Agreements” or challenge “any action or inaction . . . on the ground that such action or inaction is inconsistent” with one of those agreements.49 Likewise, the Japanese courts, in practice, follow the same approach.50 These statements emphasize that the WTO’s establishment should not, in this regard, alter the status quo as it had developed under the GATT since 1947.51

The most prominent example of GATT law not being directly applicable within a national, or in this case supra-national, system is the recent line of ECJ decisions. This approach will be discussed in depth as it involves a number of important aspects which may likewise be considered in the context of the legal orders of other WTO Members.


49. See H.R. 5110, 103d. Cong. § 102(a)(1) (approving the implementing trade agreements concluded in the Uruguay Round of the multilateral trade negotiations); and H.R. 5110 103d. Cong. §103(c)(1)(A) and (B). See also Leebron, supra note 20, at 252. As to the status of GATT in U.S. law prior to the establishment of the WTO, see Hudec, supra note 6, at 356, as well as the less restrictive assessment by Brand, supra note 47, at 506.

50. Yuji Iwasawa, Implementation of International Trade Agreements in Japan, in Hilf & Petersmann, supra note 9, at 299; see Yuji Iwasawa, Constitutional Problems Involved in Implementing the Uruguay Round: Japan, in Jackson & Sykes, supra note 19, at 202.

51. For references on comparative law, see Jackson, supra note 44.
In the case of the EC, the most relevant cases at present concern the import of bananas from other WTO Members. In these cases, EC Regulation No. 404/93 of February 1993, which established a common market organization of the bananas market, had come under attack for protecting the EC-based banana producers and discriminating against third states' producers in violation of general principles of GATT, especially of Articles I, II and III. Here the ECJ confirmed its prior case law, which excludes any direct application of GATT law with respect to individuals. In its judgment of October 5, 1994, the ECJ for the first time considered cases in which Member State governments attacked Council regulations on the ground that they violated existing GATT law. The ECJ ruled that, in spite of ECT Article 228 paragraph 7, which binds the Community institutions to respect international agreements, even Member States outvoted by a majority in the EC Council in the context of a decision under the Common Commercial Policy (CCP) will have no possibility of invoking a violation of GATT law by EC secondary law.

The ECJ adopted this rather radical and restrictive approach based on arguments contained within its prior decisions in this area. The lines of reasoning upon which the decisions are based are open to significant criticism.

a) The Case Law of the ECJ

In summarizing its prior case law, the ECJ reached four basic conclusions:

(1) The provisions of GATT law have the effect of binding the Community, but in assessing the scope of GATT in the Community's legal system and its special features, GATT law cannot be considered to be directly applicable in the domestic legal systems of the contracting parties as this would not correspond to the spirit, legal scheme, and terms of the GATT.

(2) GATT law, according to the principle of negotiations undertaken on the basis of "reciprocal and mutual advantageous arrangements" amongst the contracting parties, is characterized by its great flex-


iability of provisions, by conferring the possibility of derogations and by allowing unilateral measures to be taken in exceptional difficulties.

(3) The rules on the settlement of disputes between the contracting parties—and not concerning individual rights or interests—contain a high degree of flexibility and are aimed also at reciprocal and mutually advantageous solutions.

(4) GATT Article XIX gives the contracting parties power to unilaterally suspend their obligations and to withdraw or modify concessions.

On the basis of these particular features of GATT, the ECJ concluded that neither an individual within the Community, nor a Member State can invoke GATT law in order to challenge the lawfulness of a Community act. According to the Court, it depends entirely on the intent of the Community’s institutions whether in the process of implementation they wanted to expressly refer to specific provisions of GATT, thus giving the Court the possibility to review the lawfulness of the Community act in question. It is not the role of the ECJ or of national courts to determine the commercial policies of the EC with respect to GATT. A continuing process of negotiation has to go on in order to achieve and maintain the reciprocal and mutual advantageous balance under the GATT system. The ECJ thus seems to accept a judicial restraint with respect to the given division of powers in the field of foreign economic relations.

b) Critical Assessment

This previously solidified case law, which is not entirely consistent or even definitive, and only relates to the GATT prior to the WTO, has been criticized by a number of commentators as well as by some national courts.

First, it may be noted that the ECJ does not refuse *ab ovo* the concept of direct application of international agreements. For example, the ECJ has held that treaties with third states which are closely linked to the European Community by an agreement on cooperation or association may be directly applicable. The obvious reason for this is that in these cases, the European Community can rely on the performance of the respective third state within the framework of the given treaty. This

situation may suffice to guarantee the necessary reciprocity in the application of the given treaty. In allowing direct application of such agreements, the ECJ apparently takes no notice of whether the treaty in question contains safeguards clauses, stricter dispute settlement procedures than those of GATT, or is subject to alteration by unanimous decisions.

Structurally, there are no significant differences between the GATT legal system and the third-country treaties which the ECJ is willing to apply directly. The aforementioned elements exist in both—unless one would give a particular consideration to the fact that GATT was based only on a Protocol of Provisional Application recognized so-called "grandfather" rights and had not even been duly signed and ratified by the EC. The ECJ does not put emphasis on these specific features of GATT. Accordingly, the ECJ is subject to criticism for not revealing the basic reasons for its unwillingness to apply GATT law directly. The primary motivation behind the Court’s refusal to directly apply GATT law in the Community on a unilateral basis, is the fact that other WTO Members do not directly apply it. Such a unilateral approach would restrict the ability of those Community institutions that perform executive functions to exercise discretion in handling foreign commercial policy. Even if trade liberalization is done only on a unilateral basis, economic theory predicts welfare gains. In summary, the ECJ’s reasoning seems to be a more policy-oriented approach than one based on strict legal construction.

The case law of the ECJ considerably weakens the effective application of GATT law within the European Community. The famous "grassroots-enforcement" which has contributed to the acceptance and overall success of EC law will not occur with GATT if individuals cannot rely on proper respect for GATT law in the operation of the CCP. A system providing for direct application of GATT law is likely to be less protectionist than a system in which violations of GATT law cannot be challenged before the courts. It has never been argued that direct application of GATT law by the EC courts would lead to more protectionist results as in U.S. courts.

Another criticism relates to the specific institutional structure of the European Community and to the fact that the Community could only become a Member of the WTO simultaneously with its Member States

55. Cf. Iwasawa, in Hilf & Petersmann, supra note 50, at 360; Meng, supra note 53, at 1078.

(Article IX of the Agreement). Thus, where the European Community itself engages in conduct which violates the WTO agreements, EC Member States could find themselves responsible to third states for EC violations because they are signatories along with the Community. This risk is heightened by the fact that the EC Council decides trade matters by a qualified majority and consults the European Parliament on such matters on a voluntary basis only. The ECJ could help prevent EC Member State liability vis-à-vis EC Council actions by accepting the direct applicability of GATT law and by effectuating the higher status with respect to secondary EC law (ECT Article 228 paragraph 7). Finally, by allowing any Member State, when outvoted under ECT Article 113, to bring a claim of a presumable violation of GATT law by the EC Council before the ECJ, the ECJ would grant the necessary legal protection. This legal protection is necessary as all the EC Member States are apparently liable for any violation of GATT law caused by acts of the EC.\textsuperscript{57}

A related argument would refer to the infringement procedure under ECT Article 169, which the EC Commission may initiate against any Member State violating GATT law. If it is accepted that the EC should not be held responsible for GATT violations caused by its Member States, it should likewise be admitted that the Member States should be in a position to defend themselves against GATT violations by EC institutions.\textsuperscript{58}

It should be noted that GATT law and practice have been rather flexible in the past. It has been argued that the overall aim and function of GATT was primarily to create and maintain a mutually advantageous balance in the field of trade relations amongst the contracting parties, irrespective of the interests of individual operators.

Only a process of continuing trade negotiations would probably secure such a balance. However, the general legal principles under GATT Articles I and III are as precise and unconditional as, for example, the respective principles under ECT Article 6, 12 or 30. The mere existence of the authorization to take safeguard measures, or of procedures leading to decisions containing deviating interpretations, do not constitute valid arguments for refusing to apply GATT law directly. Thus the ECJ does accept such direct application within EC law providing for similar

\textsuperscript{57.} Under the practice of GATT never has an EC Member State been addressed under the dispute settlement procedure with respect to measures decided by the EC.

\textsuperscript{58.} But see Christian Timmermans, L'Uruguay Round: Sa mise en œuvre par la CE, 3–4 REVUE DU MARCHÉ UNIQUE EUROPEEN 175, 181 (1994) (not accepting a parallelism between these two legal situations).
procedures in order to respond to exceptional situations as, for example, under ECT Article 36. The same is true with respect to those other treaties which the ECJ has held to be directly applicable in EC law.

No flexibility seems to be left to the discretion of the contracting parties if, in a given dispute, a panel procedure has concluded with a final consent expressed by the GATT Council. The relevant GATT law will then have been stated and clarified. At least in such a situation the ECJ would have safe grounds to apply the relevant GATT law directly.\textsuperscript{59}

The strongest argument for direct application of GATT law may be based on ECT Article 228 paragraph 7, which binds the EC institutions and the EC Member States to any international agreement concluded under the powers of the EC. According to ECT Article 164, the ECJ must guarantee respect for the rule of law as to the application of the entire ECT. How then can the ECJ satisfy this requirement when it would refuse to apply GATT law directly to conflicting EC secondary law?

All in all, the ECJ, as a “national court” within the GATT system, does not play any significant role in providing protection and compliance with GATT obligations. Only when the relevant EC institutions have expressed their clear intent to act in conformity with GATT law is the ECJ willing to respect such an intention by construing EC law in conformity with GATT law.

If EC institutions do not express such an intention, the ECJ seems to follow the approach of the courts of the other contracting parties, which likewise do not follow the concept of direct application. Thus, refusing this concept seems to be more the expression of the principle of reciprocity, which in the end would offer the same degree of political flexibility and discretion as the executives of other GATT contracting parties enjoy. However, the ECJ has never explicitly referred to this concept of “negative reciprocity.”\textsuperscript{60}

Finally, the ECJ has been caught in its own “trap” in that it has recognized that international treaties concluded by the European Community have a higher status than secondary EC law.\textsuperscript{61} Simultaneously admitting direct applicability and higher status of such agreements would mean

\textsuperscript{59} See Hans-Dieter Kuschel, Die EG-Bananenmarktdordnung vor deutschen Gerichten, 6 EuZW 689, 691 (1995) (considering even unadopted Panel reports to be binding, the acceptance of the GATT Council serving only to give permission for measures of retaliation).

\textsuperscript{60} See Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round, supra note 48, at 143.

\textsuperscript{61} Case 181/73, Haegemann II, 1974 E.C.R. 449.
that the ECJ had ruled out any possibility of bending or even breaking treaty law in case of a conflicting imperative interest of the Community. If the higher status and the principle of direct application were joined, the ECJ would always have to rule out any departure from GATT law by nullifying contradicting decisions under secondary EC law. It has been convincingly revealed that in national systems accepting a higher status of treaty law, and thereby affording treaty law a quasi-constitutional status, the relevant domestic courts have often been somewhat, or even entirely, reluctant to recognize the concept of direct applicability of the said agreements.

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c) The Case Law of National Courts of EC Member States

In principle, national courts of EC Member States should follow the jurisprudence of the ECJ and avoid issuing decisions which would necessarily lead to confusion and judicial conflicts. This applies within each area of EC law. Thus, with respect to international agreements concluded under the Common Commercial Policy powers, national court decisions which diverge from ECJ decisions regarding such treaties are unacceptable. The ECJ has unambiguously ruled in the Chiquita Case on December 15, 1995, that national courts are not allowed to apply GATT law directly with respect to individuals.

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However, all EC Member States have been contracting parties to GATT since even before the European Community was recognized as a member "sui generis" in 1968. Under Article IX of the WTO Agreement, the European Community was, for the first time, accepted as a Member to the WTO alongside the EC Member States. Thus, it is argued that, at least prior to the WTO, Member States of the European Community could be held responsible for any violation of GATT law under ECT Article 234 even if this violation would have been caused by the Community. And even under the regime of the WTO, there is joint liability of the Community and its Member States, on understanding that—in the field of its proper exclusive competences—the European Community will have to be addressed in the first resort by other WTO Members. This


63. Case C-469/93, supra note 52, at 118.

64. EC Treaty art. 234: "The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."
requires that national courts of the EC Member States apply GATT law in a manner which avoids any liability of the Community or of the respective Member State. For example, a German Finance Court referred to the ECJ the question whether ECT Article 234 is applicable in the case of GATT. An EC Member State should have the power to fulfill its obligations under GATT law, which takes precedence over the later-in-time secondary EC law. Remarkably, this German Finance Court and the Federal Finance Court which issued an interim decision, held GATT law to be directly applicable and held that the EC regulation on bananas is contrary to GATT law.

It is doubtful that the ECJ will follow this reasoning. Instead, it may be assumed that the ECJ will not accept the argument built on ECT Article 234. Since 1968, when the CCP became effective, it has been common practice under GATT that the Community superseded its Member States in every question relating to the CCP. Thus, in common agreement with its own Member States as well as with the other contracting parties to GATT, the European Community became the relevant actor in all questions relating to the CCP. Any dispute settlement procedures therefore had to be opened, at least in the first resort, against the Community rather than the EC Member States.

Therefore, the ECJ may decide that, at least in the field of exclusive EC competences, the Community will be the only relevant actor within GATT law, which on the whole will not be considered directly applicable. All Member States would have to strictly follow this approach. Even within other WTO agreements such as GATS and TRIPS, for which the EC and its Member States are jointly competent, the ECJ will claim sole jurisdiction to decide whether this law might have direct applicability within the EC.

d) Will the ECJ Accept Direct Applicability Under the New WTO Rules?

The question remains whether the ECJ might change its reluctant approach once the new dispute settlement procedure under the WTO becomes operational, with widespread use and acceptance amongst WTO Members. Why should GATT law not be directly applicable once the Appellate Body has issued final and binding decisions on a regular basis?

66. Ernst-Ulrich Petersmann, The EEC as a GATT Member—Legal Conflicts between GATT Law and European Community Law, in Hilf, supra note 62, at 23, 45.
The always possible negative consensus within the Dispute Settlement Body (DSB) under DSU Article 17 paragraph 14 will be rare and should not be taken into account when qualifying the legal nature of this strengthened dispute settlement procedure. In general, the legislatures in other legal systems, such as the EC Council, have the power to "correct" court decisions if the relevant interpretation relates to the field of secondary legislation and not to the area of constitutional law, or in the case of the EC, to the founding treaties. The WTO Agreement itself provides for binding interpretations in Article IX paragraph 2 by a three-fourths majority of the WTO Members.

As the terminology rightly suggests, the Appellate Body obviously cannot be considered to be a "court" or "tribunal" in the traditional sense, since the latter would act in a more or even fully transparent process and offer a high degree of public access to the proceedings. Thus, the Appellate Body is commonly referred to as a "quasi-judicial mechanism." As to its main constituting features (such as the professional quality of its members, their personal and legal independence or the terms of reference, i.e. the application of the law) or finally the binding effects of the Appellate Body's decisions, there seem to be a number of important guarantees and conditions that the WTO dispute settlement mechanism will establish itself as a reliable and recognized system to assure a rule-oriented observance of the legal disciplines under the WTO.

However, while the dispute settlement mechanism has gained considerable momentum during the first two years, and the first decisions of the Appellate Body have been met with overall acceptance and support, it seems too early to be reassured that this system will guarantee the degree of stability and predictability necessary to advocate with conviction the direct applicability of WTO/GATT law by national courts. Thus, the debate will remain open, and is discussed below in more general terms.


69. See Jackson, supra note 44, at 62.


71. The initial refusal by the United States to accept the panel procedure relating to measures taken under the Helms-Burton Act has created concern as to the viability of the system. However, given the growing importance of the WTO and the growing membership there seem to be likewise growing imperative reasons for a continuing compliance with the rules agreed upon under the WTO.

In all, GATT law will lack a considerable degree of efficiency and even legitimacy if the given trend of non-applicability should continue. However, the practice of applying GATT law indirectly still offers significant potential for effectuating GATT law on the domestic level.

2. Indirect Application of GATT Law

The ECJ will only address arguments based on GATT law where either the WTO requires national courts to apply GATT law—which it does not—or where the EC Council, in adopting EC legislation, chose to fulfill a specific obligation under GATT by referring directly to GATT law. The latter is the case in the field of calculating customs duties, as well as trade barriers legislation and antidumping regulation. The ECJ honored these specific references to GATT law and practice, and ruled that it can be assumed that the EC Council intended the EC legislation to be interpreted whenever possible in a manner consistent with the relevant GATT obligations.

The national courts of EC Member States must follow the ECJ’s case law in applying the relevant EC legislation and GATT law. However, this rule applies not only to those fields considered to fall within the exclusive external powers of the European Community, but also to ECJ cases interpreting the WTO rules for which both the Community and its Member States retain joint competences (e.g., the GATS and TRIPS agreements).

Two different approaches to indirect application of GATT law may be distinguished. First, the national implementing legislation may either adopt the GATT language wholesale, or simply refer to specific elements or parts of GATT law in the legislative history or explanatory statements. In such cases, the national courts will certainly construe the legislation to conform as closely as possible to GATT law. The ECJ has followed this approach most prominently in the field of antidumping. The most conspicuous and oft-cited cases in this regard are Nakajima and Extramat, which together represent a consistent line of jurisprudence.

Second, even without such direct references to GATT law, national courts tend to interpret the relevant implementing legislation in a manner

76. See id; see also Case 358/89, Extramat Industrie SA v. Council of the European Communities, 1991 E.C.R. 1-2501.
which avoids conflicts with existing GATT law. This method is referred to as an interpretation in conformity with GATT law and is well known in regard to general treaty law and in the special case of GATT law. Thus, the case law of U.S. courts has interpreted federal statutes in order to avoid conflicts with GATT law. Courts in Japan are not very "receptive" to applying international law but similarly accept this approach of indirect application of GATT law.

This method of indirect application of GATT law has its merits and may bring about effects similar to those under a system of direct application. Courts always look for specific guidance in the implementing legislation and use their discretion when applying these methods of indirect application. In the given context it is not possible to offer a complete survey of indirect application methods used by domestic courts.

IV. OUTLOOK AND PROPOSALS CONCERNING THE RÔLE OF NATIONAL COURTS IN RELATION TO WTO LAW

A. Two Levels of Judicial Review

Lacking Legal Structure

The foregoing considerations have revealed a judicialization of the international trading system on two distinct levels of international and national protection. If GATT were a self-contained system, as some propose, it certainly would not exclude national judicial procedures. As discussed above, some maintain that GATT needs judicial review on the grass-roots level of national procedures in order to become more effective.

The linkage between these two levels is rather undeveloped and has led to the tentative conclusion that national courts, as well as WTO Members themselves, are interwoven in the international trading system.

77. See Jackson, supra note 47; Fred Morrison & Robert Hudec, Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States, in Hilf & Petersmann, supra note 9, at 91; see also Brand, supra note 47, at 479.

78. See Yuji Iwasawa, Effectuation of International Law in the Municipal Legal Order of Japan, 4 Asian Yearbook of Int'l L. 143, 160 (1994)

79. Thomas Oppermann, Die Europäische Gemeinschaft und Union in der Welthandelsorganisation (WTO), 41 Recht der Internationalen Wirtschaft 919, 928 (1995) (favored as a minimum requirement in order to preserve the legal priority of GATT law with respect to EC law).

80. For further references regarding Japan, see Iwasawa in Jackson & Sykes, supra note 50, at 299.
more in practice than in theory and legal construction.81 There are no clear rules in international trade law which precisely define the role of national courts of a WTO Member in providing access to justice for its nationals. The same is true for foreign nationals from other WTO Members who seek equal judicial protection without discrimination.

Thus, in any given antidumping or TRIPS dispute, private parties may seek relief in national courts of various WTO Members at the same time as their respective governments become involved in a WTO dispute settlement procedure. This likely scenario may illustrate a major reason for hesitating to apply GATT law directly. The fear is that while the latter could lead to a quick solution, the former, should private parties be provided with unrestricted access to national courts in offering challenges under GATT law, could lead to the chaos of private parties filing concurrently pending suits in a wide variety of courts. In such a case, the costs involved could be substantially higher than the presumed benefits of national judicial review.82 Nonetheless, no coherent theory exists for combating forum shopping and for providing fair and nondiscriminatory access to the courts of other WTO Members.83

B. Who Will Be the Best Protector of Individual Trading Rights within the International Trading System?

The thesis of this article is that independent domestic courts would offer the best guarantee of protecting the interests and rights of individual operators, thus making the entire GATT system more effective. However, it may also be argued that (1) governments could provide better and more effective protection of an individual’s rights through the process of negotiations at the international level, that (2) domestic legislatures, in passing the implementing legislation, should be responsible for the protection of the individual’s rights, or that (3) the administrations which execute the respective agreements are best suited to safeguard the rights and interests of the individual.

The various governments which negotiated the Uruguay Round deserve credit for having developed the present WTO system, which represents a successful balance between the contradictory interests of its Members and various market participants.84 This, however, does not

81. STEFAN LANGER, GRUNDLAGEN EINER INTERNATIONALEN WIRTSCHAFTSVERFASSUNG 8, 23 (1995).
82. See generally Jackson, supra note 47.
83. See Petersmann, supra note 1, at 1240.
84. Fred Morrison & Rudiger Wolfrum, The Impact of the Implementation of International Trade Obligations, in Hilf & Petersmann, supra note 9, at 519; Ernst-Ulrich Petersmann,
guarantee a satisfactory implementation and application of the respective agreements. Moreover, these governments have the authority only to negotiate, but not finally conclude, such agreements. The final responsibility for the conclusion of agreements such as those of the WTO lies in the hands of the respective legislatures, which give their consent via the final process of ratification.  

The role of legislatures in passing legislation is a fundamental pillar of democratic government. However, these legislatures may only give or withhold their consent to final trade agreements; they may not alter the contents of an international agreement once it has been negotiated. Therefore, legislatures have increasingly tried to become more involved during the negotiation process, offering their opinions and preferences on the issues under negotiation. Such prior involvement is necessary as the executive must have at least a reasonable expectation that the legislature will ultimately ratify the treaty as negotiated. Legislatures of different WTO Members have also developed techniques to compensate for their reduced influence by enacting implementing legislation to accompany an international agreement.

The U.S. Congress may provide a prime example of a legislature “correcting” agreements negotiated by the executive by means of enacting voluminous implementing laws which may contain more protectionist attitudes.

In contrast, the legislatures of the EC Member States and the European Parliament have exerted practically no major influence on the results negotiated by their respective governments. The same seems to be true for Japan. Accordingly, these legislatures do not seem to have exerted as much influence on the effective implementation of trade agreements as the respective administrations which apply the agreements in daily practice.

It is difficult to generalize regarding the role of the national administrations which apply the WTO agreements. The structure of a state’s

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87. Morrison & Hudec, supra note 77, at 118; Leebron, supra note 20, at 241.

88. See generally Jackson & Sykes, supra note 19 (providing detailed analyses of the respective interests shown by the various legislatures of various WTO Members).

89. See Iwasawa in Jackson & Sykes, supra note 50, at 299.
constitutional system appears to govern the degree of influence its executive body has on the actual implementation of an agreement. In particular, Hudec has highlighted the beneficial and balancing influence of the U.S. administration when confronted with protectionist legislative acts. The administration normally has a more temperate, flexible, rational, and even liberal approach than the U.S. legislature, which appears more influenced by protectionist interests. Furthermore, those administrations which are not up for re-election do in effect have more opportunities to avoid conflicts of interests faced by the legislature.

The administrations of the European Community and other WTO Members may be similar. One may assume that, with regard to the application of international trade agreements, all national administrations are regularly exposed to protectionist rent-seeking interests and, hopefully, also to a monitoring control by the legislature. Due to the lack of direct applicability, administrations are not exposed to a strict control by domestic courts. Given their variety of options and relatively large discretionary powers in implementing WTO agreements, national administrations therefore bear a great deal of responsibility in this area. It seems that no general conclusion can be drawn as to their degree of faithfulness in the implementation of the WTO agreements. The possibility of breaking a treaty is still seen as a political option in cases where an imperative national interest is at stake. Accordingly, it may be questioned whether, in the end, national courts are the best guarantors of an effective and successful international trading system for settling conflicts.

Even with respect to the role of national courts in the implementation of WTO agreements, there is a certain degree of skepticism. Independent courts not responsible to any other institution certainly do have the opportunity to faithfully implement the relevant legislation. However, this is precisely what is considered by some to be the real danger in relying too much on the implementing legislation.

For example, in a system like that of the United States in which the national legislature has tried to "correct" the negotiated agreements by enacting protective legislation, the courts tend to more faithfully implement this legislation than the overarching agreements themselves. Thus, the courts would even apply any "hellfire-and-brimstone" language that may have appeared in implementing acts, leaving themselves no room to
maneuver and moderate such legislative language.92 Again, this skepticism may be particular to the U.S. legal system. It is assumed that a similar tendency does not exist in other WTO Members to the same extent.

Another skeptical analysis concludes that courts generally tend to stay away from foreign trade matters. One particular criticism of the ECJ has been that it allows the EC administration an overly generous margin of discretion in foreign trade matters. However, a closer analysis of ECJ case law, particularly that of its most recent decisions, show that this sweeping criticism is ungrounded. A number of recent ECJ judgments indicate a willingness on the part of the Court to correct the administration even when it is exercising its discretion in foreign trade matters.93 However, it certainly would be difficult to show that this reflects a more general attitude of the ECJ.

Those commentators critical of the courts' willingness to faithfully apply GATT law acknowledge one exception, referring to the application of free market principles, such as those under GATT Article I or III or ECT Article 30. These principles have a different structure in comparison with certain administrative policies such as antidumping, subsidies, or those regarding competition, such as ECT Article 85. For example, only in the case of free market principles does Hudec expect a purposeful judicial application.94

This dichotomy between free market principles and redistributive policies certainly exists. But it is questionable whether the difference between these two categories justifies a different degree of trust in the judicial process. Even in the case of the application of free market principles the judge is often placed in front of divergent concerns of manifold interest groups. For example, in cases involving ECT Article 30, the ECJ has often had to balance conflicting interests such as those of environmental protection,95 social goals,96 and consumer protection.97 Based on the regular application of the principle of proportionality, the principle of free market access must often be balanced against conflicting interests, thereby exposing the ECJ to difficulties similar to those it experiences in ruling on administrative decisions concerning redistributive policies.

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92. Hudec, supra note 90, at 513.
93. See, e.g., case C-25/94 (19.3.1996)—not yet published—concerning the division of competences between the EC and its Member States in the framework of the FAO.
94. Hudec, supra note 90, at 509.
It is therefore maintained that national courts would at least be able to contribute effectively to the efficient application and implementation of GATT law regardless of the policies involved. In addition, the involvement of national courts may be considered to be a sort of compensation for the lack of efficient involvement of national parliaments or for the lack of involvement of individuals and their interests in the process of elaboration and negotiation of the respective rules of international trade law. At any rate, in times of significant and breathtaking change in international trade relations, governments may be better able, and thus more legitimate institutions for developing trade policies than courts The latter would always have to respect a large margin of appreciation in controlling the application of such policies.

C. Prospects for Linking the Two Levels of Judicial Review

Taking into account the various methods of linkage discussed above, there may be at least two viable options for linking the intergovernmental process of dispute settlement under GATT law with the process of judicial review by national courts: a preliminary procedure for giving national courts the possibility to obtain advice or guidance from GATT institutions, or improved access for individuals to the intergovernmental process.

A third possible avenue, that of introducing the principle of exhaustion of local remedies, should be excluded from the outset; GATT disputes concern market disruptions and, by their very nature, must be resolved as quickly as possible. For example, in the case of alleged dumping, it could be extremely harmful if the dumping were to continue until the cumbersome and often time-consuming process of judicial review under national law were concluded. The GATT dispute settlement process should not be taken "hostage" in the hands of national courts. However, in the field of human rights, which involves matters not primarily concerned with inter-state disputes, the international process of

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98. See Meinhard Hilf, Treaty-Making and Application of Treaties in International Trade Law: The Case of Germany, in Hilf & Petersmann, supra note 9, at 240.
99. Hudec, supra note 90, at p. 507.
100. See Jackson, supra note 53, at 320.
101. See Meng, supra note 53, at 1068.
102. Whether this principle as a principle of customary international law is already part of GATT law or due to its dispositive nature has been "destroyed" by the practice constantly followed under the GATT framework is discussed in Pieter Jan Kuyper, The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law, 25 NETHERLANDS Y.B. OF INT'L L. 227, 239 (1994).
103. Petersmann, supra note 1, at 1240.
judicial review may be inaccessible until after the exhaustion of all local remedies.

The first option for preliminary involvement of GATT institutions with respect to procedures pending before national courts presents some difficulties. To date, a preliminary procedure similar to that of ECT Article 177 does not exist on a worldwide basis. On the one hand, there are too many courts amongst the WTO Members. On the other hand, there is no independent court, in the strict sense, on the level of the WTO. If the WTO system would develop further by creating a complete system of judicial review, such preliminary procedures might be possible.

Alternatively, national courts could be provided the opportunity to certify questions to the WTO Members, as represented in a rules committee, in order to get an authentic interpretation of GATT law. Article IX paragraph 2 of the WTO Agreement provides that the Ministerial Conference and the General Council shall have the “exclusive authority to adopt interpretations of the Agreement and the Multilateral Trade Agreement.” These decisions are made by a three-fourths majority of the Members. Another similar procedure is present in the field of the European Community’s social security policy where an Administrative Commission, at the demand of national courts, may give binding advice as to the interpretation of rather complicated rules on social security matters.

A more realistic possibility would be to stay national procedures pending conclusion of an ongoing GATT dispute settlement process, which is now characterized by strict time limits and thus might be much quicker than national procedures. Final decisions from the GATT process might be considered to have a guiding or even binding effect as to the interpretation of GATT law. However, it must be considered that so far in the GATT dispute settlement process, only governments are permitted to bring and even represent cases. Moreover, the rules on factfinding and the parties involved in the GATT dispute settlement process are different than those in national procedures. Nevertheless, the binding effect could relate merely to legal aspects of GATT law rather than the establishment of the relevant facts.

104. Kuschel, supra note 59, at 691.
105. The panel procedure does not provide for public hearings. The members of the panels are not required to be lawyers (see Art. 8 para. 1 DSU referring only to “well-qualified” individuals; in contrast, Art. 17 para. 3 DSU states that members of the Appellate Body should be “persons of recognized authority, with demonstrated expertise in law”).
106. MEINHARD HILF, DIE ORGANISATIONSSTRUKTUR DER EUROPÄISCHEN GEMEINSCHAFTEN 125 (1982).
A second option would consist in giving individuals easier access to the GATT dispute settlement process, or at least to the courts of other WTO Members. The orthodox means by which an individual could gain access to GATT institutions is through his government's traditional diplomatic protection. The government then has discretion regarding the extent to which the individual could be involved in the representation of his case within GATT institutions. The U.S. implementing legislation seems to foresee such situations in that it apparently provides affected private individuals the opportunity to cooperate with the government's team in representing a case to the GATT panel.107

Although it would require reforming the entire WTO system, it is conceivable that there could be a system for direct complaints by individuals to a WTO Court on International Trade. For example, the ICSID procedure under the World Bank system provides a forum for individual complaints against foreign governments. The ICSID system is able to function because its jurisdiction is of rather limited scope.108 In contrast, a similar procedure under the extremely expansive WTO system would necessitate at least some "certiorari" procedure for the work load to be manageable.109

Under the existing system, individuals would benefit from better access to all relevant information and especially to legal sources under the WTO system. Were the WTO Secretariat to establish a sort of "center of information," individuals would gain better access to information and perhaps would then have a forum to which they could address complaints to the Secretariat. Such a center could also assist the WTO Secretariat in fulfilling its obligation to survey the trade policies of WTO Members.

D. Judicial Protection Through Interim Procedures

It is essential that an effective judicial review system include an interim procedure for urgent legal protection. Such procedures are common to the systems of all WTO Members, including the European Community under Art. 186 ECT. Article 50 of TRIPS Agreement explicitly provides for prompt and effective provisional measures which should be granted by the national judicial authorities. The WTO dispute

107. See Leebron, supra note 20, at 250.
108. See Convention, supra note 43, at art.25.
settlement process does not provide for any similar urgent procedure. At most Article 4 paragraph 9 of the DSU states that in case of urgency, including those which concern perishable goods, the parties and the panel as well as the Appellate Body “shall make every effort to accelerate the proceedings to the greatest extent possible.”

The WIPO Mediation and Arbitration Center is considering introducing a “facility for emergency interim arbitral relief” where parties have agreed in their arbitration agreement to apply such a facility.\(^\text{110}\) Within the European Community, such a procedure is discussed in the context of the revisions to the founding treaties whether a uniform, and even exclusive, procedure for interim measures could be introduced within the provisions setting out the powers of the Court of First Instance. However, it seems beyond the reach of the existing WTO system to install an effective and centralized interim procedure on a worldwide basis. The national judicial system could provide a stay of a similar national procedure as long as an urgent procedure under the WTO would be available on demand of the relevant government of the WTO Members.

E. National Courts to Provide Compensation for Their Government’s Failure to Respect GATT Law

WTO Members must fulfill their GATT obligations and perform according to GATT law. This obligation is fundamental and, where the state fails to live up to its duties, cannot be replaced by an obligation to pay compensation, or even by allowing retaliation on the international level.\(^\text{111}\)

In far-reaching case law, the ECJ has developed the principle that Member States are responsible vis-à-vis the individual for non-fulfillment of obligations under EC law. This principle was first developed in the case of the failure to implement an EC directive within domestic law.\(^\text{112}\) Recently, the ECJ broadened the scope of this principle, holding Member States responsible for the non-fulfillment of EC law in general.\(^\text{113}\)

If national courts could develop a similar approach for international obligations under GATT law, it would add considerably to the efficiency of GATT law implementation. Individuals could thereby claim compen-


\(^{111}\) For discussion see Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Finance, 103d Cong. 195 (1994) (statement of John H. Jackson, Professor of Law, University of Michigan).


\(^{113}\) Cases C-46/93 and C-48/93, Brasserie du Pêcheur, 7 EuZW 205 (1996).
sation from their own government if it has not acted in accordance with GATT law. However, it seems that hardly any national court is currently willing to interpret GATT law as creating rights in favor of the individual.

F. The National Judicial Process
Legitimizing the WTO System

In sum, given the various problems discussed above for national judicial processes with respect to their linkage to the international WTO dispute settlement system, it seems that major effort should be made on both national and international levels to provide for more efficient application of GATT law. Not only would such effort enhance the efficiency of the WTO system as a whole, but would likewise greatly strengthen its legitimacy. It is necessary for individuals to accept the WTO system as legitimate, because without individual acceptance, the WTO system will be unable to efficiently solve worldwide problems arising out of the international trading system.

If national courts were empowered to apply GATT law, they would have an important role because it is through them that individuals would be able to protect their rights and interests. The citizens of WTO Members will only accept repercussions from the WTO's international trading system, particularly where they are perceived as negative, if the citizens are confident that their rights and interests are duly protected.

Therefore, future development of the WTO system not only must improve the dispute settlement procedures, but should first concentrate on improving national procedures for protecting individual rights and interests. Only a more effective application of GATT law by national courts will finally lead to a more effective WTO system and its overall acceptance.

Perhaps like the European Community, the WTO should be understood as a system serving in the last resort not only its Members, but mainly the individual operators in the markets, who by their use of economic freedoms bring the abstract rules into real application.


115. See Timmermans, supra note 68, at 509 (urging that the "Chinese walls" between both disciplines will have to disappear, referring to the relationship between GATT law and EC law).