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Private Appeals to WTO Law: An Update

Marco BRONCKERS[1]

At first glance there seem to be few opportunities for private parties to raise objections to government regulation based on World Trade Organization (WTO) law. The WTO still appears to be largely a forum for governments to negotiate or litigate. In fact, there are various ways in which private parties can invite governments to engage with their WTO law obligations, and these are surveyed in this article. First, I illustrate the immediate obstacles facing private parties that want to challenge a government measure on the basis of WTO law. I then take a closer look and discuss different means for private parties to appeal to WTO law, today or perhaps in the not too distant future. There have been several recent developments that suggest that such private complaints should be taken more seriously. This discussion covers the position of private parties before the WTO, before their own government and before domestic courts. To the extent I refer to experiences drawn from a domestic context I will mostly refer to European law, though I have occasion also to mention precedents from US law and Chinese law.

I. AN ILLUSTRATION

The immediate obstacles facing a private party that wishes to raise a WTO claim can best be illustrated by taking an example. Consider the most ambitious legislation of the EC to date, called REACH, a comprehensive set of chemicals legislation, which was only recently enacted.[2] The adoption of REACH has been followed closely by the EC's trading partners, including the United States. The EC has been criticized for taking a unilateral approach to environmental legislation, imposing significant and to some extent unnecessary costs on international trade, arguably discriminating against imports, and undermining intellectual property rights of both domestic and foreign chemical companies. So it is a fair guess that there are some companies out there, including US chemical companies, who are wondering whether or not they can attack at least some parts of this EC legislation on the basis of WTO-based claims.[3]

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[2] Regulation (EC) No. 1907/2006, OJ 2006 L 396/1.

[3] For a relatively mild WTO review of the REACH legislation as finally adopted see Quick, *Zur Vereinbarkeit von REACH mit dem WTO-Recht*, Neues Europäisches Chemikalienrecht (REACH), 23rd Trierer Kolloquium zum Umwelt- und Technikrecht (2007). Earlier drafts of REACH met with a more critical reception. See, e.g., M. Bronckers and P. Charro, *REACH Reviewed under WTO Law*, 2 Journal for European Environmental & Planning Law 3 (2005), 184–194.

The first thing that a US company could consider is to go to Rue de Lausanne 154 in Geneva, knock on the door of the WTO building, and try to get its complaints about REACH onto the agenda of the WTO Dispute Settlement Body. However, that is not possible. Private entities have no direct access to the WTO.

The second thing that this company could consider is to ask the US government to bring its case to Geneva. If the US government would take up the company's case and go to the WTO, this could be seen as an exercise of diplomatic protection. As this doctrine goes, governments usually are deemed to have full discretion to espouse a private complaint, and to take a case to an international tribunal for example. In the United States, though, through the enactment of the US Trade Act 1974, this full discretion of the US government was circumscribed whenever an interested party complained about foreign unfair trade practices. The US executive was instructed by Congress to investigate such a private complaint within certain time limits, and there was even a presumption that the US executive branch should take action, unilateral action if need be, against a foreign measure that was deemed to be unfair. I am referring to a procedure that came to be known as a Section 301 investigation.[4]

From the perspective of private complainants in the United States, this procedure worked rather well in the old days of the GATT. The US government was prepared to take up private cases and to retaliate in order to pressure foreign governments to accommodate the United States. At the same time, Section 301 sparked much controversy, and many US trading partners (including the EC) sought ways to curb these privately inspired, unilateral pressures from the United States.[5] When the WTO was established, the WTO dispute settlement system included the principle that all disputes between WTO Members about the proper implementation of WTO rules had to be resolved multilaterally, before the WTO.[6] It was not long before Section 301 was challenged in the WTO as being a violation of this principle of multilateral dispute settlement, by the EC. In these WTO dispute settlement proceedings, the United States basically committed itself no longer to take unilateral action on the basis of Section 301, effectively avoiding condemnation by the WTO.[7]

As a result it seems that the interest of private industry in the United States to bring WTO-related cases under Section 301 has dwindled. Very few proceedings are now opened under Section 301. US companies appear to have reverted to the old ways of persuading the US government more informally to take up their grievances with foreign trading partners, thereby giving the government more discretion again on how to handle such private complaints.

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[4] See 19 U.S.C. 2411–2420.

[5] The history of Section 301 and the EC response thereto is recounted in M. Bronckers, *Private Response to Foreign Unfair Trade Practices: US and EC Complaint Procedures*, 6 Northwestern Journal of International Law & Business (Winter 1984), 651–759.

[6] See Article 23 WTO Dispute Settlement Understanding.

[7] See WTO Panel Report, *Section 301–310 of US Trade Act of 1974* (WT/DS152/R, 22 December 1999).

But turning again to the US company having grievances about the EC's REACH legislation, this company might also ask itself, could I not go to the EC courts and request that this piece of EC legislation be invalidated on the grounds that it violates WTO law? The short answer is "no".[8] WTO law, with very limited exceptions, is not considered to have direct effect, and cannot be invoked by individuals to challenge EC measures before European courts.[9]

The conclusion of this brief overview therefore seems to be that there is a problem with private enforcement of WTO law. Now what could we think of to improve this situation?

II. A Closer Look

A. Private access to WTO tribunals

First, is it conceivable that private individuals will be granted direct access to WTO tribunals? A review of the WTO dispute settlement system has officially been going on for six, seven years already. Many proposals have been made to improve the system. But the proposal to introduce a private right of access has not really appeared on the WTO negotiating agenda.[10] Governments are simply not considering this option. Business does not seem to be pressing for it either. Instead, business demands for private access focus on dispute settlement mechanisms that are included in bilateral or regional free trade agreements.[11] The reason is not that business would not like to have access to WTO dispute settlement; rather, business appears to have given up on the idea that it is possible to achieve private access in the WTO anytime soon (this points to a larger disconnect perceived by business between its interests and the WTO's mission, which likely is one of the explanations for the current malaise in the Doha Round[12]).

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[8] Microsoft is the US company that has been told most recently by the European courts that it cannot challenge EC measures on the basis of WTO law. See European Court of First Instance, *Microsoft v. European Commission*, judgment of 17 September 2007, recitals 777ff (rejecting Microsoft's appeal against a fine of €497 million imposed by the European Commission for competition law violations committed by Microsoft). See, generally, on this judgment, C. Baudenbacher, *The CFI's Microsoft judgment – Three seconds that changed the IT world*, 9 European Law Reporter 10 (2007), 342.

[9] This case-law has been much debated in legal literature. For recent examples, with references to other writings, see A. von Bogdandy, *Legal Effects of World Trade Organization Decisions Within European Union Law*, 39 Journal of World Trade 1 (February 2005), 45–66; P.J. Kuijper and M. Bronckers, *WTO Law in the European Court of Justice*, 42 Common Market Law Review 5 (2005), 1313–1355. Another problem with such a challenge of the REACH legislation would be that the European courts would not admit private challenges of EC measures with general application. See text below at note 19.

[10] The current chairman of the WTO Dispute Settlement Body, Ambassador Soto, announced in the summer of 2007 that he would soon circulate a compilation of proposals that are currently on the table. See WTO Doc.TN/DS/20 (26 July 2007). As of this writing (November 2007), this compilation has not yet been published, though reportedly it does not include a right to private access either.

[11] E.g., the proposal made by the European industry federation UNICE, *UNICE Strategy on an EU Approach to Free Trade Agreements* (7 December 2006), pp. 8–9, available at: <http://212.3.246.117/docs/1/GGDGHGIAEICLNOCIGPCIMKLEPDBN9DW37Y9LI71KM/UNICE/docs/DLS/2006-01792-EN.pdf>.

[12] The need to define a new mandate for the WTO in substantive terms, to make it more relevant again to governments, companies and citizens generally is discussed in D.P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 Journal of International Economic Law 3 (2007), 483.

When human rights lawyers assess international human rights tribunals, they tend to link the legitimacy of such a tribunal with private rights of access. Yet the fact that there is no right of private access to WTO tribunals, and that there is not even a serious discussion on private rights of access, does not seem to put in question the legitimacy of the WTO dispute settlement process. Private parties may be frustrated, but the lack of private access does not appear to affect the stature of the WTO Appellate Body as being one of the major international tribunals of today.[13] How can this difference in appreciation be explained?

It may be a reflection of the distinction between the two main branches of international law, human rights on the one hand, and international trade or international economic law, on the other hand. In fact, some would undoubtedly worry about the reception of WTO rulings in the event we open up the door to private litigants in the WTO and lose the filter of governments to decide which cases to bring and how to bring those cases. If WTO tribunals would be forced to deal with all sorts of cases, potentially covering large swathes of economic regulation, in the longer run this might lead to a decline in the acceptance of WTO rulings.[14]

Yet the distinction between human rights law and economic law does not satisfactorily explain why private access is admitted, if not considered indispensable, in one branch yet resisted in another branch of international law. After all, particularly with the advent of bilateral investment treaties (BITs) in the 1970s and free trade agreements (FTAs) in the 1990s, we have seen an explosion in dispute settlement arrangements creating private access for private investors in investment-related disputes with the host State.[15] The number of actual cases has expanded substantially as well, notably since the entry into force of NAFTA in 1994. The nature of investor–State disputes has changed too: from being mostly about expropriation and contractual issues pre-NAFTA, to involving more trade-inspired claims such as national treatment since the late 1990s.[16] On the other hand, it is also significant that in recent years, particularly since the advent of the WTO, we have moved from a power- to a rule-based system in

[13] See, e.g., M. Dias Varella, *La Complexité Croissante du Système Juridique International: Certains Problèmes de Cohérence Systémique*, 2 Revue Belge de Droit International (2003), 331, 362, highlighting the importance and increasing legitimacy of the WTO dispute settlement system among international tribunals; L.R. Helfer and A.-M. Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 California. Law Review 1 (2005), 5 and 22 (approving and reinforcing conclusion that WTO tribunals are highly effective and independent).

[14] At present, the WTO dispute settlement system is vibrant and, by most accounts, has enjoyed a high implementation rate. See, e.g., W. Davey, Dispute Settlement in the WTO and RTAs: A Comment, in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006), pp. 347–348 (Davey estimates the rate of successful implementation in the WTO to be 83 percent).

[15] See, generally, Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 Journal of International Economic Law 3 (2007), 725. See also the panel discussion on *Trade and Investment Disputes* (contributions by Ehring, Pauwelyn, Verhoosel, Barutciski and Odumosu) in F. Ortino and S. Ripinsky (eds), WTO Law and Process: Proceedings of the 2005 and 2006 Annual WTO Conferences (London: British Institute of International and Comparative Law, 2007).

[16] See M. Barutciski, in *WTO Law and Process*, ibid., pp. 319–320. According to one recent calculation, of the 14 investment cases brought until 2006 under NAFTA Chapter 11 against the United States, nine could have been brought as trade cases to the WTO. See Pauwelyn, ibid., p. 315.

international trade relations.[17] Furthermore, the scope of trade agreements increasingly extends beyond border control measures such as tariffs. These agreements now routinely cover all types of domestic regulation such as intellectual property protection, taxation, environment and public health related measures, very much like investment standards. (In fact, the scope of ''trade'' agreements has expanded so much over time that a new label, such as 'market access' agreements, would better describe their current coverage.) All of this suggests that the boundary lines between trade and investment issues have become blurred. It is no longer particularly pertinent when considering the question of whether to grant private access to dispute settlement mechanisms in trade agreements that, historically, the objectives of investment agreements and trade agreements were different.[18]

Accordingly, one should envisage some further movement on private access in the context of trade agreements as well. One could forge a limited opening for private complaints in the WTO restricted to certain WTO agreements that create or are more immediately concerned with private rights, such as the TRIPs Agreement or the Government Procurement Agreement. In order to improve the viability of such proposals, one probably should consider further limitations. These could be gleaned from the practice of private litigation before the EC courts. Thus, the European courts only admit private challenges of EC measures that are of direct and individual concern to the aggrieved private party.[19] In other words, the EC courts will not admit direct private challenges of measures having general application. By the same token, if one considers introducing private access to WTO dispute settlement procedures in the area of intellectual property or government procurement for instance, one might exclude legislation or limit such private challenges to government actions in individual cases.

Experience with private challenges of investment-related measures in BITs and FTAs ought to be considered too when crafting private access in particular areas of WTO law. For instance, one might provide for government-to-government binding arbitration procedures at an early stage of the dispute settlement process aimed at preventing frivolous claims.[20] However, the fact that it is easier for private parties so far to have access to investment tribunals may also have something to do with the fact that the remedy obtained in such disputes typically is for governments to pay financial compensation to the private complainants, not an obligation to amend their regulation as is the case to date in WTO disputes.[21] Similarly, European courts relax the standing

[17] John Jackson advocated the move from power- to rule-oriented diplomacy in international trade relations in his pioneering article *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 Journal of World Trade Law 1 (1979). His plea has become reality.

[18] For a contrary view, see A.O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 Journal of Legal Studies (2005), 631 (making sharper distinctions between trade and investment treaties). See also N. DiMascio and J.H.B. Pauwelyn, *Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, American Journal of International Law (January 2008), note 60 (noting growing convergence between trade and investment principles, despite different origins).

[19] See Article 230(4) EC Treaty.

[20] See Choi, as note 15 above, at 740.

[21] This distinction between remedies in WTO disputes and in investment treaties has been highlighted in Dimascio and Pauwelyn, as note 18 above, text at notes 121–122.

requirements for private parties in case they seek damages from the EC institutions to compensate for harm caused by EC regulation rather than the invalidity of such regulation.[22] Thus, as long as the WTO does not envisage financial compensation as a remedy, admissibility requirements regarding private actions in the WTO could be defined more strictly than has been the case so far in investor–State disputes.

Furthermore, in order to make a system of private challenges manageable, such disputes probably should not be handled by regular WTO panels, but by separate and specialized arbiters. Some inspiration may be drawn from the WTO Agreement on Preshipment Inspection, pursuant to which exporters which disagree with findings by an inspection agency must be granted the right to refer the dispute to an "Independent Entity".[23] The WTO created this Entity in 1995, in conjunction with the International Federation of Inspection Agencies and the International Chamber of Commerce.[24] The Entity decided its first case in 2005.[25] Though not exactly reflecting a dispute between a private party and a government, there is some resemblance as the inspection agency could be seen as a representative of the importing government.[26] In addition, having created a separate mechanism to hear disputes between private parties and governments within the WTO, recourse to the WTO Appellate Body should perhaps be envisaged to appeal issues of law, so as to create consistency among arbitral awards and with Appellate Body jurisprudence overall.[27]

B. *AMICUS CURIAE*: ADMITTANCE TO HEARINGS AT THE WTO

A less far-reaching alternative that has been put forward for the WTO is to open the door a little bit, and admit private *amicus* briefs. In other words, while private entities would not be allowed to bring a challenge before the WTO, they would be allowed to express themselves to WTO tribunals about the positions adopted by litigating governments. I have doubts about this proposal.[28] Admitting *amicus curiae* obviously does not help private individuals to get their case before a WTO tribunal. What an *amicus curiae* brief might do is influence the types of arguments that go before a WTO tribunal. However, if one believes that it is not realistic or even desirable at the moment to change the government-to-government character of WTO litigation, then introducing *amicus curiae* creates a system resembling neither fish nor fowl.

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[22] Compare private actions based on Article 288 EC (damages) as opposed to Article 230(4) (invalidity).

[23] See Article 4 WTO Agreement on Pre-shipment Inspection.

[24] See WTO document WT/L/125/Rev. 1 (13 December 1995).

[25] See J. Chakarian-Renouf, *The WTO Independent Entity on Preshipment Inspection Receives its First Case for Review,* 1 Global Trade and Customs Journal 1 (2006), 29. For a second decision, see WTO Doc G/PSI/IE/R/2 (14 November 2006).

[26] See, for instance, fn. 4 to Article 2(20) WTO Agreement on Pre-shipment Inspection.

[27] It is noteworthy that the need for an appeal system is beginning to be felt in private investor–State disputes. See Choi, as note 15 above, at 741.

[28] For another, similarly reticent view see M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?* 5 World Trade Review 1 (2006), 69–101.

Indeed, why are governments so careful when they litigate before the WTO? Part of the explanation is that they are continuously arbitrating differing interests. Before a government submits a position before a WTO tribunal, a lot of debate has gone on; not only with the private industry that may be at the origin of the dispute, but also with other non-governmental and governmental interests. Ultimately, governments may not be prepared to defend a particular position, or only to a certain degree, because they do not want to hurt their position in other WTO disputes, or affect their credibility more generally. If one introduces *amicus curiae*, the right of governments to arbitrate the types of cases and the types of positions they put before the WTO will be compromised. I am not sure that is coherent with the government-to-government character of these cases.

In this connection, I recall that no *amicus curiae*, or private interventions, are allowed either in litigation between EC Member States, between the EC instituitions or between these institutions (notably, the European Commission) and EC Member States before the EC courts. Private entities can only intervene in private challenges of EC measures to the European courts.[29] As mentioned already, such private challenges are only admitted against measures that are of direct and individual concern to an individual.[30] Similarly, I see no objection to allowing *amicus curiae* at the WTO whenever private access would be created in the limited circumstances I have sketched out above.

As always though, such general statements will have to be nuanced in particular circumstances. If a WTO case turns on what a private party has or has not done, a WTO panel is well advised to take the initiative and hear that particular party. Panels have broad-ranging powers to seek information from private parties.[31] However, panels have been (too) reluctant to do so. For example, in *Australian Leather*, the United States brought a successful complaint that the Australian government had provided prohibited export subsidies to the leather producer Howe and Company.[32] The panel did not grant Howe any opportunity to argue that the grant it received was not an export subsidy. This does not seem problematic, to the extent the case turned on a characterization of an Australian government measure. However, when the United States in a follow-on case complained that the Australian government had failed to comply with the earlier ruling by not requiring Howe to repay the prohibited subsidy, the panel again did not hear Howe.[33] This is more troublesome, as it became

[29] See Article 40 Statute of the European Court of Justice.

[30] See text at note 19 above. The European Court's restrictive interpretation of the admissibility requirements regarding private actions has been criticized. See, generally, A. Arnull, *The European Union and its Court of Justice* (2nd edn, Oxford: Oxford University Press, 2006), pp. 69–94. Yet the argument that private *amicus curiae* should be admitted in governmental litigation before the European courts is rarely heard.

[31] See Article 13(1) WTO Dispute Settlement Understanding. This *discretionary* power of panels is to be distinguished from a *right* one might want to accord to private parties to intervene in panel proceedings as *amicus curiae*.

[32] See WTO Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R, 25 May 1999).

[33] See WTO Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States* (WT/DS126/RW, 21 January 2000)

critical for the second panel to determine whether Howe did or did not repay the subsidy.[34]

Meanwhile, for as long as the doors remain shut to private parties, the process at the WTO would be much improved by opening the windows. So far, absent exceptional arrangements between the litigating governments,[35] hearings in WTO disputes are closed to the public (and, curiously, to most other WTO Members). The fact that private individuals cannot even go and see how governments litigate their cases or other cases before the WTO tribunal is a serious mistake in my view. Justice must not only be done but also be seen to be done. It may well be that if they saw what happened in WTO hearings many individuals would lose interest because the way these cases are being litigated is very technical. So be it. But if a case has affected you and you are not allowed to see how this case is litigated you are right to be upset.

In addition, there is a more important role to be played by private entities in pre-litigation reviews at the WTO. Many international organizations, including the WTO,[36] have reviews where the policies of a Member government are analysed periodically. It would be a good idea to include NGOs, including business, in these reviews, at least in the fact-finding phase. This would achieve a couple of things. Other governments would obtain an unfiltered view on the impact of a government's measures; in fact, other ministries of the government that is being reviewed may also hear for the first time that there really is a problem. Better information is likely to improve the quality of these reviews as well, particularly if the WTO Secretariat were to receive more responsibility to draw up the reports.[37]

All of that does not lead, I think, to the problems associated with private access to international tribunals, where positions taken have more immediate impact, become more confrontational, etc. Assigning a role to private individuals in these pre-litigation reviews may therefore be introduced relatively easily. This is unlikely to require a Treaty amendment, and could be decided upon by the relevant committees. It would be but a small step from such instances where members of the TBT Committee have already organized a hearing in the WTO building outside the formal committee structure to listen to private grievances about important pieces of domestic legislation (e.g., such a meeting was held in June 2004 on the initiative of the Mexican government where private representatives, including members of the International

[34] See S. Charnovitz, *Economic and Social Actors in the World Trade Organization*, 7 ILSA Journal of International & Comparative Law (2001), 259, 269.

[35] E.g., the governments litigating the question whether the EC's most recent amendment of its import régime for bananas complied with the relevant WTO ruling agreed to open the WTO Panel hearings in November 2007 to the public. See <www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm>.

[36] Within the context of the WTO one could think of the Trade Policy Review Mechanism, reviews by the TRIPs Council or committees such as the Committee on Technical Barriers to Trade, the Subsidies Committee, etc.

[37] Thus, as one of the few tangible results of the Doha negotiating round so far, the WTO Secretariat is to play a more important role in the review of Regional Trade Agreements by virtue of a new transparency mechanism established in December 2006. See <www.wto.org/english/news_e/news06_e/rta_15dec06_e.htm>.

Council of Chemical Associations, could express their concerns about the EU proposed REACH legislation).

C. Improvements in the domestic legal order

Descending from the international level, one can also conceive of reinforcements of the position of private complainants in the domestic legal order.

1. *Private Complaints About Foreign Government Action*

Private parties always have the possibility to ask their governments informally to intervene on their behalf with a foreign country and seek the removal of measures that adversely affect their interests. But it is seldom easy for a private party to persuade its government to be firm with another country and, if necessary, to commence an intergovernmental dispute. One possible area of improvement, therefore, concerns the development of complaint proceedings, pursuant to which the government's handling of private petitions about foreign illegal measures is subjected to certain procedural guarantees. The more recent experiences with US Section 301, which is falling into disuse as a vehicle for private complaints,[38] may suggest that the instigation of WTO litigation must remain a matter of unfettered governmental discretion. Actually, however, I think that the European experience shows that private complaint proceedings can work.

The European variant of US Section 301 is the Trade Barriers Regulation.[39] The proceedings under this trade instrument are rather interesting. Once a private company has persuaded the European Commission that its complaint about a foreign government measure makes sense, the Commission swings into action. It sends detailed questionnaires to the government concerned that go much further than any questionnaire used, for instance, in the WTO's trade policy review mechanism. The Commission will visit the foreign country concerned on a specific verification mission. The EC officials will not only want to meet with the foreign government's officials on that occasion but also with representatives of the relevant foreign business community. The media become involved, etc. On all such actions the European Commission consults the private complainant. Furthermore, the various steps in a Commission

[38] See text at notes 5–17 above.

[39] EC Regulation 3286/94, OJ 1994, L349/71. See M. Bronckers and N. McNelis, *The EU Trade Barriers Regulation Comes of Age*, 35 Journal of World Trade 4 (August 2001), 427–483. The European Commission has been considering reforms to improve the effectiveness of this instrument. See the *Interim Evaluation of the European Union's Trade Barriers Regulation*, report prepared by the law firm Crowell & Moring for the European Commission (June 2005), available at: <http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125451.pdf>. The Commission continues to receive requests from the European business community to reinforce the Trade Barriers Regulation. See European Commission, *Report on the Public Consultation on the EU Market Access Strategy* (28 February 2007), pp.31–32, available at: <http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133266.pdf>. In December 2007 the Commission proposed an amendment to the Regulation. See *COM/2007/0796 final* http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0796en01.pdf

investigation are subject to time limits, and Commission decisions with which a complainant disagrees are subject to judicial review.[40]

If the Commission after this in-depth investigation believes that the private complaint is well founded, it will initiate WTO dispute settlement proceedings against the foreign country. Yet in several cases the Commission's investigation led to a settlement between the EC and the foreign country before the dispute was brought before the WTO.[41] From the private complainants' perspective settlements are usually the preferred solution, as they save time and money compared to full-fledged litigation. Bringing a complaint under the Trade Barriers Regulation can be an effective tool for private parties to increase pressure on a foreign government and to obtain a more favourable hearing for their position.

These private complaint proceedings therefore do merit a second look, although they may not always help. For example, if a private individual has a problem with a statute enacted by a foreign parliament, the fact that the EC Commission is going to hold hearings or is going to send out a verification team is unlikely to effectuate immediate change. The EC may have to go to the WTO and commence full-fledged litigation, as this would be considered a frontal attack on a foreign law. In other cases, private individuals may have concerns about confidentiality. If they are associated with a government-to-government dispute, companies may be worried that they will become the subject of tax investigations, miss out on government contracts or licences, or be vulnerable to other forms of foreign governmental pressure. For these and other reasons,[42] the majority of cases brought by the EC to the WTO to date did not originate as private complaints under the Trade Barriers Regulation.

Furthermore, when assessing private complaint procedures we have to account for asymmetries. If the EC starts a formal investigation following a private complaint, the foreign country will listen. If the United States does so, people will listen too. However, if a developing country in Africa decides to organize hearings and commences a formal investigation of a supposedly illegal practice of the EC, I am not sure how much attention this investigation would get. Part of the problem is that the current system of remedies in the WTO offers no realistic means for enforcement to developing countries in case a developed country refuses to comply with a WTO ruling. This is a serious problem, which ought to be remedied.[43] In sum, we have to

[40] See CFI, Case T-317/02, *Fédération des industries condimentaires de France v. Commission*, [2004] ECR II-4325 (appeal rejected); annotated by M. Broberg in 43 Common Market Law Review 4 (2006), 1169. See also CFI, T-90/03, *Fédération des industries condimentaires de France v. Commission*, judgment of 11 July 2007 (action for damages rejected), to be annotated by N. Lavranos in American Journal of International Law (April 2008).

[41] A recent example is the settlement reached between the EC and Canada, pursuant to which the latter no longer treated "Bordeaux" as a generic designation for red wine, and recognized "Bordeaux" as a geographical indication of origin to be protected by virtue of Article 22ff TRIPs. See Commission Decision 2004/891/EC, OJ 2004, L 375/29.

[42] For more detail, see Bronckers and McNelis, as note 39 above, at 453–461.

[43] See M. Bronckers and N. van den Broek, *Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement*, 8 Journal of International Economic Law 1 (2005), 101–126. For a contrary view, see J. Nzelibe, *The Case Against Reforming the WTO's Enforcement Mechanism*, Northwestern University School of Law Public Law and Legal Theory Series No. 07-12 (April 2007). In the ongoing review of the WTO Dispute Settlement Understanding, as note 10 above, the Mexican government recently proposed to introduce financial compensation to the benefit of developing countries. See WTO Doc TN/DS/W/91, at 2 (16 July 2007).

recognize that the private complaint procedures we are discussing here may help in some circumstances, may help some countries, but they are not going to help everyone.

For the time being, it is interesting to note that, in addition to the United States and the EC, China is the third jurisdiction that has adopted a private complaints procedure, in 2002.[44] This procedure was modelled in large part after the EC Trade Barriers Regulation.[45] So far, China appears to have initiated only one investigation pursuant to this procedure, on a WTO-based complaint filed by the Jiangsu Province Laver Association about import restrictions maintained by Japan. The case was settled when Japan agreed to change its import régime.[46]

2. *Private Challenges Before Domestic Courts*

To finish this survey, what about "direct effect" of WTO law? Faced with resistance to private access to WTO tribunals, should we not open the gates for private entities to invoke WTO law in domestic courts? That would require a major change from the present situation. It is not only in the EC that individuals rarely if ever can invalidate domestic measures on the basis of WTO law.[47] This is basically the case in all major jurisdictions around the world, including the United States and China, Switzerland being cited as a notable exception.[48] Only few international lawyers are nowadays arguing in favour of direct effect of WTO law, and those who do are careful to propose various limitations.[49]

The European Court of Justice has cited the absence of reciprocity in other jurisdictions as a major consideration not to give direct effect to the WTO.[50] If the European courts were to grant direct effect to WTO obligations unilaterally as it were, this would complicate the efforts of EC negotiators to reach agreement with WTO partners—not only on the resolution of the particular dispute, but also on the development of additional international norms (the ongoing stalemate in the Doha Round illustrates that this concern cannot be lightly dismissed). Another consideration

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[44] For the current regulation, see MOFCOM, Foreign Trade Barriers Investigation Rules (effective 1 March 2005). See <www.chinadaily.com.cn/bizchina/2006-04/18/content_570345.htm>. These Rules replaced MOFTEC's Interim Investigation Rules Regarding Foreign Trade Barriers, in force since 1 November 2002.

[45] See J. Song, *A Comparative Study on the Trade Barriers Regulation and the Foreign Trade Barriers Investigation Rules*, 41 Journal of World Trade 4 (2007), 799.

[46] See MOFCOM, Announcement of Termination of Trade Barrier Investigation on Japanese Management Measures on Laver Imports (No. 10, 2005). See <http://fec2.mofcom.gov.cn/aarticle/laws/200503/20050301240573.html>. Subequently imports of laver from Jiangsu province into Japan reportedly soared by 70 times. Song, ibid., at 828.

[47] See text at notes 8–9 above.

[48] See T. Cottier, "The Judge in International Economic Relations", in M. Monti *et al.* (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Baden-Baden: Nomos, 2007), pp. 99, 120; X. Zhang, *Direct Effect of WTO Agreements: National Survey*, 9 International Trade Law and Regulation 2 (2003), 35.

[49] See Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 Journal of International Economic Law 3 (2007), 529, 536. See, also, Cottier, ibid., at 120–122; N. Lavranos, *The Chiquita and Van Parys Judgments: An Exception to the Rule of Law Case T-19/01*, 32 Legal Issues Of Economic Integration 4 (2005), 449–460; G.A. Zonnekeyn, *EC Liability for Non-Implementation of WTO Dispute Settlement Decisions: are the Dice cast?*, 7 Journal Of International Economic Law 2 (2004), 483–490.

[50] See, e.g., ECJ, Case *Portugal v. Council*, [1999] ECR-8395, recitals 43–45.

militating against direct effect, although not made explicit in the Court's judgments, is that the scope of the WTO agreements is so pervasive that by granting direct effect the European courts would endanger the autonomy of the EC and assign the role of final arbiter over EC regulation to the WTO.[51] Although the European courts could restrict conferring direct effect to a limited number of WTO provisions, so as to avoid such pervasive impact on the EC legal order, any grant of direct effect to WTO law in this view is seen as setting a dangerous precedent. A third consideration, again not articulated in the case-law, is that the European Court of Justice may be backtracking from the position it adopted in the early 1980s, that it had primary competence to decide on the interpretation of international agreements, to the exclusion of the other EC institutions.[52] Indeed, with the increasing density of international norms and the level of implementation they require in the domestic jurisdictions, it is prudent for courts to ask themselves whether the executive or legislature may be better placed to test and replace a particular piece of domestic legislation in view of international norms.[53] Parenthetically it is to be noted that, at least in European courts, FTAs have fared better than the WTO and have sometimes been accorded direct effect.[54]

In exceptional circumstances, though, the European Court of Justice has allowed private parties to challenge the legality of EC measures more or less directly on the basis of GATT, and now WTO law. The Court has created this limited opening for those cases where the EC legislature has explicitly indicated its intentions to implement GATT/WTO law in the relevant legislation.[55] So far, while acknowledging that these intentions might also be found in other areas of EC law, the European courts have only recognized such an explicit intention to implement WTO law in the EC's anti-dumping legislation.[56]

However, the potential impact of WTO law in domestic court litigation does not end with direct effect. In EC law the principle of treaty-consistent interpretation holds promise. As long as a private litigant does not challenge the legality of EC measures on the basis of WTO law, the European courts show themselves quite willing to interpret

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[51] See P. Mengozzi, *Private International Law and International Law*, 292 Academie de la Haye, Receuil des Cours 253 (2002), 316–317.

[52] See ECJ, Case 104/81, *Kupferberg*, [1982] ECR 3641.

[53] See M. Bronckers, "The Relationship of the EC Courts with other International Tribunals: Non-committal, Respectful or Submissive?", in M. Monti *et al.* (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Baden-Baden: Nomos, 2007), pp. 51, 68–69; see also Kuijper, in Kuijper and Bronckers, as note 9 above, at 1317–1323, who seeks a more far-reaching reversal of the *Kupferberg* case-law, and the possibilities it created for direct effect of international agreements, for different reasons (notably as an acknowledgment of the increasing international stature of the EC, with attendant negotiating power).

[54] E.g., ECJ, Case C-265/03, *Simutenkov*, [2005] ECR I-2579 (giving direct effect to provision in the EC–Russia Partnership Agreement of 1997); Case C-469/93, *Chiquita Italia*, [1995] ECR I-4533 (giving direct effect to the Lomé Convention). However, the new generation of FTAs negotiated by the EC include dispute settlement mechanisms that resemble the WTO's. This may become a reason for the European courts to apply their WTO case-law and deny direct effect to these FTAs in the future. See Bronckers, ibid., at 62–66.

[55] See ECJ, Case C-69/89, *Nakajima*, [1991] ECR I-2069 (regarding GATT law). Because of the Court's requirement that the intention to implement GATT/WTO law be explicitly recorded in the relevant legislation, one can quibble as to whether the Court recognizes that GATT/WTO law has "direct" effect in these circumstances.

[56] E.g., CFI, Case T-19/01, *Chiquita*, [2005] ECR II-315, at para. 124.

EC (or, for that matter, national) measures as much as possible in conformity with WTO law.[57] In the EC this case-law is supported as well by those who otherwise oppose "direct effect" of WTO law.[58] In China, the Supreme People's Court has indicated a willingness to interpret domestic measures consistently with WTO law,[59] though at the time of this writing (November 2007) there seems to be no reported case in which a Chinese court has explicitly followed this method of interpreting Chinese law. In the United States, although the principle of treaty-consistent interpretation is more attractively known as the *Charming Betsy* doctrine, recent court rulings appear increasingly unwilling to use WTO law as guidance for the interpretation of domestic law.[60]

Moreover, in cases where treaty-consistent interpretation can provide no solace to a private litigant, because the meaning of the domestic legislation is unequivocal and appears to be in conflict with a provision of international law, a reference to WTO law can still be helpful. Thus, even if the European courts do not explicitly rely on a pertinent WTO ruling in interpreting EC law, it seems a fair guess that they are influenced by WTO precedents and, albeit implicitly, seek to avoid inconsistencies. In one recent case the European Court of Justice invalidated an anti-dumping duty on bed linen, summarily finding that the EC institutions had committed a manifest error of assessment of Community law by having practised "zeroing" in calculating the dumping margin.[61] For this summary finding the European Court of Justice did not rely on the earlier condemnation of the same EC anti-dumping duty, because of the zeroing practice, by the WTO Appellate Body.[62] In fact, the European Court of Justice explicitly declined to review the EC anti-dumping duty against the WTO Anti-

[57] E.g., ECJ, Joined Cases C-477/05 and 448/05, *Thomson Multimedia,* judgment of 8 March 2007 (interpreting Community Customs Code consistently with WTO Rules of Origin Agreement); Case C-245/02, *Anheuser-Busch v. Budvar*, [2004] ECR I-10989, recital 49 (interpreting national trademark law consistently with the TRIPs Agreement). The Court of First Instance recently limited the principle of treaty-consistent interpretation to the interpretation of secondary EC legislation; it declined to review the Commission's interpretation of the EC Treaty against WTO law. See CFI, *Microsoft*, as note 8 above, at para. 798 (refusing to review Commission decision based on EC Treaty competition law provisions against TRIPs Agreement).

[58] Kuijper, in Kuijper and Bronckers, as note 9 above, at 1328–1330.

[59] See Article 9 of the Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases, passed by the 1,239th Meeting of the Judicial Committee of the People's Supreme Court on 27 August 2002, of which an English version can be found at <www.china-lawyer.org/view.asp?id=554>. For an early commentary see Zhang, as note 48 above, at 44; X. Zhang, *Domestic Effect of the Wto Agreement in China—Trends and Implications*, 3 Journal of World Investment 5 (October 2002), 913, 934.

[60] The US Supreme Court recognized the principle of treaty-consistent interpretation in an early case, *Murray v. Schooner "Charming Betsy"*, 6 US (Cranch) 64, 118 (1804). Given the way the WTO Agreements have been implemented in US law, coupled with the deference US courts traditionally give to agency determinations, US courts are more reluctant to appeal to WTO law for guidance. See A. Davies, *Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the* Charming Betsy *Canon,* 10 Journal of International Economic Law 1 (2007), 117.

[61] See ECJ, Case C-351/04, *IKEA*, judgment of 27 September 2007, recitals 55–56 (*IKEA* concerned average to average zeroing). On "zeroing" generally, see E. Vermulst and D. Ikenson, *Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?*, 2 Global Trade and Customs Journal (2007), 231–242.

[62] WTO Appellate Body Report, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, AB-2000-13 (1 March 2001).

dumping Agreement.[63] However, it seems a safe assumption that the European Court's interpretation of EC law was influenced by the disapproval of the same EC measure by the WTO Appellate Body.[64] Similarly, a few months earlier the European Court of Justice gave an interpretation of the EC tariff classification of boneless chicken cuts,[65] which deviated from the traditional interpretation given by EC customs authorities but which was consistent with a WTO Appellate Body ruling which had condemned the latter interpretation.[66] Again, the European Court did not refer to the WTO ruling in its findings, but its judgment can be read as an effort to avoid inconsistencies with the WTO Appellate Body.

These examples go to show that the dialogue of the European courts with WTO tribunals, while muted to date, does exist. One would like to think that the European courts generally tend to pay respect to other international tribunals, but reserve the right to adopt their own course in certain narrowly drawn circumstances (such as the occurrence of new facts subsequent to an international ruling; or compelling domestic policy considerations that require deference to the legislature).[67] By transforming WTO rulings into interpretations of EC law, the European courts keep their hands free to deviate from these WTO rulings if and when the need to do so arises, while avoiding inconsistencies as much as possible.[68]

Furthermore, WTO rules can be useful to private litigants in order to substantiate general principles of law (e.g., the proportionality principle), or open-ended treaty or secondary law obligations (e.g., public health exception to freedom of movement goods principle), also in cases where WTO tribunals have not yet ruled. Again, in their judgments the courts may never refer to a WTO agreement by name, but that does not mean that they have not been swayed to adopt a certain position by the references made by a litigant to corresponding WTO rules. A prominent example to illustrate this point is a judgment of the EFTA Court, which struck down a Norwegian prohibition on imports of vitamin-enriched cornflakes as lacking any rigorous analysis of a public health risk.[69] While never referring to the SPS Agreement, these WTO rules clearly

[63] See *IKEA*, as note 61 above, at recitals 26–35. Note that the Court, in the particular circumstances of this anti-dumping case, distanced itself from its *Nakajima* case law. See text at notes 55–56 above.

[64] For one thing, the European Court of First Instance had declined to condemn a different instance of zeroing (in an asymmetrical price comparison) in an earlier case involving a different product (recordable compact discs). See CFI, Case T-274/02, *Ritek*, judgment of 24 October 2006. Furthermore, Advocate-General Jacobs in another case, involving yet another product (pipes and tubes), referred to the condemnation of zeroing by the WTO Appellate Body in *Bed Linen*, yet he and ultimately the Court of Justice faulted the EC anti-dumping measure for not adequately explaining why the asymmetrical method was chosen. See ECJ, Case C-76/00P, *Petrotub*, [2003] ECR I-79.

[65] See ECJ, Case C-310/06, *FTS International*, judgment of 18 July 2007.

[66] WTO Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, AB-2005-5 (12 September 2005).

[67] See, generally, Bronckers, as note 53 above.

[68] The European Court of First Instance has used a similar transformation technique in respect of customary international law. See, e.g., CFI, Case T-115/94, *Opel v. Austria*, [1997] ECR II-39.

[69] See EFTA Court, Case E-3/00, *EFTA Surveillance Authority v. Norway*, [2000-01] EFTA Ct Rep 75.

inspired the EFTA Court.[70] This judgment, in turn, was cited repeatedly by the European Court of Justice in a landmark case, which introduced a more liberal regime on food additives in the EC.[71] While the EC Court also did not refer to the SPS Agreement, its impact by then was quite apparent to the informed observer.[72]

3. *The Domestic Legislative Process*

Finally, it is clear that WTO law can play an important role in the legislative process. Private entities regularly appeal to WTO law when advocating their views as to how legislation ought to be drafted.[73] When they are well presented, in a timely manner, these arguments tend to carry weight with the EC institutions and EC Member States. One consideration certainly is the ultimate threat of litigation before the WTO, by another government. But the impact of WTO law in drafting legislation goes beyond this in my experience. Governments are not merely concerned about the outcome of litigation if their laws would be challenged before a WTO tribunal. They are also concerned about their credibility in the eyes of other trading partners. If a government is seen as taking its WTO obligations lightly, chances are that its economic interests will be hurt as its trading partners may well adopt a similar, cavalier attitude in response. And, ultimately, if a legislative proposal is shown to be WTO-inconsistent, this can dent its appeal. That proposal simply may not be perceived then as an example of good governance.

III. Conclusion

Private parties do not have direct access to WTO tribunals to challenge foreign government measures. Furthermore, with very few exceptions, domestic courts in WTO Member States will not allow a private party to challenge a government measure directly on the basis of WTO law. However, these two facts do not capture the potential WTO law has for private parties in promoting their regulatory agenda. In view of examples taken from bilateral free trade agreements, and some precedents within the WTO's recent experience itself, it is not unrealistic to expect that more opportunities for private hearings can be added within the WTO—both before disputes are filed, as well as during dispute settlement proceedings. In addition, governments

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[70] See M. Slotboom, *A Comparison of WTO and EC Law: Do Different Treaty Purposes Matter for Treaty Interpretation?* (London: Cameron May, 2006), pp. 162–164.

[71] See ECJ, Case C-192/01, *Commission v. Denmark*, [2003] ECR I-9693. Discussed in M. Bronckers, "Exceptions to Liberal Trade in Foodstuffs: The Precautionary Approach and Collective Preferences", in C. Baudenbacher, P. Tresselt and T. Örlygsson (eds), *The EFTA Court 10 Years On* (Oxford: Hart, 2005), pp. 105–106.

[72] See Slotboom, as note 70 above, at 246–247.

[73] A good impression of how European business seeks to influence EC proposals for autonomous regulation and international agreements by reference to WTO principles is given in R. Quick, *Further Liberalization of Trade in Chemicals—Can the DDA Deliver? A Summary of the Chemical Industry's Position on the Doha Development Agenda*, 1 Global Trade and Customs Journal 1 (2006), 1–19.

would do well to offer procedural guarantees to private complainants who raise WTO-based objections about the regulations of other countries. The European Trade Barriers Regulation offers a good example, which has recently been followed by China. Furthermore, recent case-law of the European courts suggests that, while continuing to resist direct effect of WTO law, these courts use different means of paying attention to relevant WTO rules and rulings at the request of private litigants. Their techniques could be of interest to other jurisdictions as well.

These are salutary developments. As the WTO Panel report on US Section 301 argued:

> [I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[74]
>
> Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the [WTO's] Preamble ... The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators ... Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines.[75]

The WTO Panel delivered this analysis almost 10 years ago; it remains compelling today.

[74] WTO Panel Report, *US—Section 301*, as note 7 above at para. 7.73.
[75] Ibid., paras 7.75–7.77.