ON THE ABSENCE OF DIRECT EFFECT OF THE WTO DISPUTE SETTLEMENT BODY’S DECISIONS IN THE EU LEGAL ORDER

Antonello Tancredi

1. THE DOMESTIC VALIDITY AND RANK OF DECISIONS ADOPTED BY THE DSB IN THE EU LEGAL ORDER

Notwithstanding the quasi-judicial character of the WTO dispute settlement procedure, the WTO Dispute Settlement Body’s (hereinafter DSB) rulings may be considered as binding decisions of International Organizations, at least between the parties to the dispute.¹

This being premised, it is well known that the EC Treaty did not explicitly regulate the legal status and effect of binding decisions of International Organizations within the Community legal order.² As for DSB rulings, they provide no exception to the general rule, established by the EU Courts,³ according to which the decisions taken by bodies or Courts created on the basis of agreements concluded by the EC/EU, insofar as they have a direct link with the underlying agreement, are an integral part of the EU legal system. In this respect, in Biret, the Court of First Instance spoke of “an inescapable and direct link” between the DSB rulings and WTO covered agreements.⁴ In FIAMM and Fedon, the ECJ held that “a DSB decision [...] cannot in principle be fundamentally distinguished from the substantive rules which

² For further discussion, see N. Lavranos, Legal Interaction between Decisions of International Organizations and European Law, Groningen: Europe Law Publishing, 2004, p. 139.
convey such obligations”. From this perspective, then, DSB rulings may be considered as enjoying the same legal status as the WTO agreement (for this reason, we will sometimes make reference to ‘WTO law’ without further specification). All the more so, since the DSB adopted reports are interpretative in nature (pursuant to Articles 3, paragraph 2 and 19, paragraph 2 of the WTO Dispute Settlement Understanding (hereinafter DSU), in fact, they cannot add to or diminish the rights and obligations provided in the WTO covered agreements), while, for instance, the decisions taken by the Association Councils are law-creating.

As a consequence, DSB rulings are binding upon EU institutions and Member States under Article 216 (2) TFEU (former Art. 300 (7) TEC) and enjoy superiority on conflicting acts of secondary legislation and all domestic law of the EU Member States. On the other hand, they rank below the EU Treaty and other sources of EU primary law.

2. Their Internal Effects

One would expect that the superiority of international obligations entails the automatic invalidity of conflicting EU secondary legislation. This is not the case. According to established case law, while the binding character of international agreements is sufficient to use WTO law as a standard for reviewing the legality of Member States’ legislation (in order to preserve the uniform implementation of international duties in the Union’s normative space), the same does not hold true for EU normative acts. In this instance, indeed, direct effect is an additional precondition for using international norms as a yardstick of judicial review in all types of actions (preliminary rulings, annulment proceedings,

