WTO LAW IN LUXEMBOURG: INCONSISTENCIES AND PERSPECTIVES

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1. PRELIMINARY REMARKS

In the seminal judgment Portugal v. Council,1 the European Court of Justice (ECJ) stated that WTO law is not directly enforceable before Community Courts. The ECJ confirmed what it had previously declared in International Fruit Company,2 as to the lack of judicial enforceability of the GATT that was relied upon by the plaintiff.3 In this judgment the Court stated that “before the incompatibility of a Community measure with a provision of international law [such as GATT] can affect the validity of that measure, the Community must first of all be bound by that provision”. Moreover, “before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts”, that is this provision must have direct effect.4

This second prerequisite seems to be reformulated by the ECJ in its recent case-law on the effects of international agreements in a different and wider concept, according to which the Court need not look for an individual right in the international provision at stake in order to use it as a parameter of legality of the European Community (EC) challenged measures.5 In the Court’s own words, this more recent

3 On the issue of direct effect of GATT and WTO see the abundant literature quoted in GATTINARA, “La responsabilità extracontrattuale della Comunità europea per violazione delle norme OMC”, DUE, 2005, p. 111 ff.
4 International Fruit Company, cit. supra note 2, paras. 7 and 8.
concept corresponds to the situation where the Court reviews the legality of acts of the Community institutions in light of the international provisions at stake if, first, neither the nature nor the broad logic of the international agreement precludes that and, second, these provisions appear, as to their content, to be unconditional and sufficiently precise. This behaviour should certainly be welcomed, because it is an attempt to reduce the difference of judicial treatment between EC measures attacked due to their purported incompatibility with international treaties binding upon the EC, and EC measures contested for other reasons, which concern exclusively EC law.

However, this different trend in the case-law of the ECJ on the possible effect of international agreements as a yardstick to assess the legality of EC secondary law does not have any bearings on the domestic relevance of WTO law, which seems to have a different status, still linked to the stance taken by the ECJ in Portugal v. Council. In fact, as the recent judgments Chiquita Brands International and Italy v. Commission of the Court of First Instance of the European Communities (CFI) and Van Parys and FIAMM of the ECJ confirm, WTO law cannot on its own be judicially implemented by the Community Courts. This rule has only two well-known exceptions, according to which the ECJ and CFI can review the legality of EC law in the light of WTO law if, by the challenged measure, the EC intended to imple-

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