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It's alright ma, I'm only bleeding

(A comment on the Fedon jurisprudence of the Court of First Instance)

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Abstract

This paper discusses the *Fedon* case-law of the Court of First Instance. Although at the moment of writing an appeal was pending, the case-law is typical of the restrictive manner in which the European Courts have traditionally interpreted the conditions under which the Community might be obliged to compensate individuals hurt by its actions. In this case, the European Community by failing to comply with a ruling by the Appellate Body of the World Trade Organization (WTO), opened the door for countermeasures against it. Such countermeasures were indeed adopted several months later. The European Community decided not to comply and thus guaranteed a segment of its society (bananas distributors and some bananas producers) a legal 'shield' against competition from other sources. The countermeasures hit, *inter alios*, producers of glasses such as Fedon. Consequently, by not complying with its international obligations, the European Community was *de facto* operating redistribution of income across segments of its society. This paper takes a critical stance against such exercise of discretion both as a matter of principle, and as a matter of legal technicalities.

Keywords

Court of First Instance, Appellate body, WTO, European Community, international obligations

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This paper discusses the *Fedon* case-law of the Court of First Instance. Although at the moment of writing an appeal was pending, the case-law is typical of the restrictive manner in which the European Courts have traditionally interpreted the conditions under which the Community might be obliged to compensate individuals hurt by its actions. In this case, the European Community by failing to comply with a ruling by the Appellate Body of the World Trade Organization (WTO), opened the door for countermeasures against it. Such countermeasures were indeed adopted several months later. The European Community decided not to comply and thus guaranteed a segment of its society (bananas distributors and some bananas producers) a legal 'shield' against competition from other sources. The countermeasures hit, *inter alios*, producers of glasses such as Fedon. Consequently, by not complying with its international obligations, the European Community was *de facto* operating redistribution of income across segments of its society. This paper takes a critical stance against such exercise of discretion both as a matter of principle, and as a matter of legal technicalities.

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A. The facts

Following the lack of implementation of the Appellate Body (AB) report on *EC – Bananas III*[1], the United States requested authorization to impose counter-measures against products originating in the European Community. In the absence of agreement among the two interested parties as to the level of countermeasures, their dispute was submitted to arbitrators[2]. So far, countermeasures in the WTO have taken one form only: suspension of concessions, whereby the injured state imposes trade harm on the author of the illegal act[3].

The arbitrators revised the US request downwards and, subsequently, the WTO (through the DSB, the Dispute Settlement Body) authorized the United States to impose countermeasures of 191,4 million dollars against products originating in the European Community. The United States included in the list of products the concessions on which they suspended products by Fedon[4], an Italian company producing articles of a kind normally carried in the pocket or in the handbag, with outer surface of sheeting of plastic, of reinforced or laminated plastics (cases for eyewear). The United States imposed in April 1999 duties of 100% *ad valorem* on Fedon products[5]. Following negotiations between the European Community and the United States, the former agreed to suspend

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1 For critical remarks on this paper, I am indebted to *Bruno Dewitte* and *Claus-Dieter Ehlermann.*
The EC import regime for bananas was found to be inconsistent with a number of WTO provisions, including Art. I GATT (the notorious MFN, most favoured nation, clause). *EC – Bananas III* is the official abbreviation of the final report, available at www.wto.org.

2 As *per* Art. 22.6 of the WTO Dispute Settlement Understanding (DSU).

3 By adhering to the WTO, a state accepts, among other things, disciplines on its trade instruments: following negotiations to this effect, a ceiling will be imposed on the level of tariffs (for example, 5% *ad valorem* on bananas). Tariff bindings are what is termed in GATT-parlance a *concession*. By suspension of concessions, we understand the process whereby, a state can impose duties higher than the bound level. Suspension of concessions can lawfully take place only following multilateral authorization. The United States had bound at 4.6% *ad valorem* the duties imposed on products of interest to Fedon.

4 Throughout the paper I refer to Fedon (the company) and *Fedon* (the judgment).

5 See the European Court of First Instance (CFI) judgment, T-135/01, on *Fedon vs. Council and Commission* of 14 December 2005 (unpublished). By moving it to 100% *ad valorem*, the United States had imposed an extra duty of 95,4% on *Fedon* products, § 34.

provisionally the high duties imposed on June 30, 2001[6]. During this period, the product market where Fedon participates suffered a considerable damage[7].

Fedon requests that the Commission reimburse the damage suffered during that period as a result of the extra duty imposed on its products[8].

B. The CFI decision

The plaintiff raised two claims before the CFI: **first**, that the European Community had acted illegally (by practising a WTO-inconsistent bananas import regime) which provoked the US countermeasures and, as a result, Fedon suffered trade damage; **second**, that, even assuming that the EC authorities had not acted illegally, Fedon should still be compensated for the damage suffered since, under EC law, the European Community can, under diverging conditions albeit, be held responsible irrespective whether it has committed an illegality or not.

The CFI rejected both claims. With respect to the first claim, it held that there is no illegality on behalf of the EC institutions involved anyway, consequently, since one of the three conditions (commission of an illegal act, damage, causal link between the two) that must be **cumulatively** met is missing, the European Community bears no obligation to compensate (§ 142 of the CFI judgment). With respect to the second claim, the Court first noted that, for the European Community to be held responsible, the damage must result from a (legal) behaviour must be **unusual** and **special**. In the case at hand, the CFI held that the damage suffered by Fedon was not unusual hence, its claim should be rejected.

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6 CFI, T-135/01, *Fedon* (note 5),.§ 45.

7 As evidenced in the EC Commission's own statistics, see CFI, T-135/01, *Fedon* (note 5),§ 46.

8 The exact quantification of the damage by Fedon is included in CFI, T-135/01, *Fedon* (note 5), § 56 (€ 289,242,07 mio., plus interest rate).

C. Why the CFI is wrong

I. The claim on responsability because of an illegal act by the EC institutions

Constant case-law has settled that, for the European Community to incur non-contractual liability, the conduct alleged against the Community institutions must be unlawful, the damage must be real and there must be a causal link between that conduct and the damage complained[9]. **Unlawful conduct** has been further narrowed down to situations where:

«there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals... As regards the requirement that the breach be sufficiently serious, the decisive test for finding that it is to be fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach»[10].

This test has been reproduced *verbatim* in *Fedon* (§§ 81, 82). The CFI rejected the claim that the EC institutions had committed an illegality in the instant case (§ 142). The CFI's reasoning could be summarized as follows: WTO law is no benchmark for the legality of EC law (§ 103) except for two cases: where the European Community intended to execute a particular obligation assumed at the WTO-level, and where EC legislation reflects an explicit referral to WTO law (§ 107). WTO law is not a benchmark for the legality of EC law in any other case since, the incidence of WTO law in various domestic legal orders is asymmetric (§ 104); on the other hand, were the Court to use WTO law as benchmark, it would deprive EC negotiators of important negotiating tools (§ 105). As a consequence, the Court will examine whether we are in presence, in the case at hand, of one of two limited conditions under which WTO law becomes the benchmark to evaluate the legality of EC

9 CFI, T-64/01, *Afrikanische Frucht Compagnie*, Rec. 2004, II-521, § 70.

10 CFI, T-64/01, *Afrikanische Frucht Compagnie* (note 9), § 71.

law. It concludes that this is not the case (§§ 109 – 129 dedicated on the first condition, and § 135 on the second).
In my view, the CFI's judgment is wrong on all accounts. I take each point in turn.

1. WTO law is no benchmark of legality except for two cases

The Court gives two reasons to justify this ruling. The first grounds invoked sounds like a reciprocity argument: I will not, **in principle**, recognize WTO law if you do not do the same; I will do so only in limited, *ex ante un-identified*[11] by my partners, circumstances.
Assuming this is a reciprocity argument, it is not right: any signatory of the WTO must observe its disciplines, by virtue of its adherence to the WTO contract. This much is clear by a mere reading of Art. 26 of the Vienna Convention on the Law of Treaties (VCLT) which reflects the customary principle *pacta sunt servanda*:

«Every treaty in force is binding upon the parties to it and must be performed by them in good faith. »

Those who do not do so risk legal challenges before the WTO, the exclusive forum to adjudicate WTO-covered disputes, as *per* Art. 23.2 DSU. Reciprocity (*non adimplenti contractus*) could be a valid legal reason for violating a bilateral, not a multilateral contract; this much is known in both the EC and the WTO law.
On the other hand, the Court does not cite who are the other trading partners who do not use WTO law as benchmark and how many good guys are required for the European Community to act in good faith as well[12]. Indeed the Court, as in previous cases, did not

[11] As will be made clear infra, the Court will accept that the WTO law is a benchmark to test the legality of EC law only in cases where the European Community intended this to be the case, and in cases where there is explicit reference in EC law to the WTO law. The latter is by definition unknown to the other WTO signatories since such acts take place post signature of the WTO agreement. The former is also in all likelihood, unknown to the rest of the word since in an asymmetry of information-context, detecting intentions could be a quixotic test. This is probably why Art. 26 VCLT imposes a blunt requirement to respect an international treaty and such requirement cannot be further conditioned on any unilateral action.

[12] Recall that this is **not** a discussion about direct effect, a point to which I will return later.

embark on a **comprehensive** analysis of how the trading partners of the European Community receive WTO law in their legal order. As a result we are left wondering as to the basis for Court's decision. We are thus left to suspect that the EC attitude critically depends on the attitude by its transatlantic partner on this score[13]. At the end, the attitude of the European Community will depend on the attitude of others. This attitude is hard to reconcile with Art. 26 VCLT.

2. The European Community did not intent to abide by the DSB decision

Having decided that WTO law is not, in principle, a benchmark for the legality of EC law, the Court moved on to evaluate whether, exceptionally so, this is the case. The first exceptional grounds is provided, as *per* its prior jurisprudence, by the response to the question whether the European Community intent to abide by the international law norm? In this case, the pertinent norm is the DSB[14] decision adopting the WTO Appellate Body (AB) report condemning the EC practices (the *EC – Bananas III* report). In the Court's view, there is an inherent vicissitude in WTO law which distinguishes it from other legal systems: once inconsistency has been established, the author of the illegal act does not have to implement its obligations; it can negotiate some form of compensation (§§ 109, 113). Hence, the European Community did not intend to assume a particular obligation when the DSB decision fell. Were the CFI to grant *Fedon* compensation, it would have had *ipso facto*, so the argument goes, deprived the EC executive (the Commission here) from negotiating a deal with its trading partners (§§ 117-129).

This is hardly logical proposition for many reasons:

First, from a **practical** perspective, a CFI decision in favour of the plaintiff does not have **any** effect on the Commission's discretion:

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[13] On this score, see *John H. Jackson*, Sovereignty, the WTO, and Changing Fundamentals of International Law, 2006, 252ff.

[14] DSB stands for Dispute Settlement Body, that is the WTO organ adopting reports by WTO adjudicating bodies.

Fedon requests money it has already paid the United States from 1999-2001. As of 2001 the United States has stopped imposing the mark-up against Fedon products. The ongoing negotiations between the European Community and the United States focus on the future and not on the past. The European Community committed an illegality and the question is whether it will change its policies. No matter what the European Community decides to do in the future it cannot affect the payments Fedon has made. Hence, on practical grounds the CFI decision is wrong.

Second, the Court mischaracterizes completely the WTO: Art. 22 DSU has a clear preference in favour of property rules (specific performance of the contract). Liability rules are an interim solution[15]. The obligation imposed on the European Community by virtue of the DSB decision, in other words, is to remove the illegal practice; in the meantime, that is, until the moment when compliance has occurred, the European Commission **could** be paying compensation[16]. In this respect, there is no difference between WTO and EC law: indeed the latter also provides for a payment of fines until compliance has been achieved. None of the two legal orders could prejudge when compliance will occur, and many factors (which we could encompass in the term 'opportunity cost of non-compliance') can affect whether and if so, when compliance will occur. Moreover, in contrast to Art. 228 ECT (European Community Treaty), WTO law makes it clear (Art. 22 DSU) that liability rules are an interim solution only, and are meant

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15 The discussion on liability/property rules is also discussed in literature in terms such as the re-balancing/compliance paradigm and has to do with the objective function of the WTO dispute settlement system: is its purpose to compensate those affected by non-compliance (liability, re-balancing), or to ensure execution of the contract (property/compliance)? Art. 22 DSU clearly takes a position in favour of the latter keeping the former as an interim solution. Personally, I side with *Warren Schwartz and Alan O. Sykes* (The economic structure of renegotiation and dispute resolution in the WTO/GATT system, *Journal of Legal Studies* 2002, XXXI: 179, reprinted in: Mavroidis/Sykes (Eds.), The WTO and International Trade Law/Dispute Settlement 2005, 52.) and believe liability rules should be a permanent exit strategy. On this score, see also *Robert Z. Lawrence*, Crimes and Punishment, Retaliation under the WTO, 2003. But see also, for a different opinion, *Jackson* (note 13), 195 ff.

16 See on this issue the pertinent analysis of *Claus-Dieter Ehlermann*, (Reflections on the Process of Clarification and Improvement of the DSU, in: Ortino/Petersmann (Eds.), The WTO Dispute Settlement System 1995-2003, 2004, 105 ff.) as well.

to function as a device persuading WTO Members to eventually comply with their obligations[17]. If the CFI aims to say that all systems with interim liability rules are, because of this idiosyncratic element, systems which do not require specific performance, then, it will have to also think of the implications of this statement for the EC legal order as well.

Third, the Court pays disproportionate attention to the WTO liability rules (compensation) anyway: compensation will be paid only if the defendant agrees to do so. In practice, it has happened only once since 1995[18]. This is not a basic feature of the WTO system, an inherent vicissitude as the Court claims; it is *de facto* rather exceptional.

For all these grounds, the CFI's analysis in this respect makes little sense. More importantly, however, it is indeed disturbing to hear from the Court that an international treaty will be the benchmark if and only if the European Community intended it to be the case. So our partners should now know (by virtue of backwards induction) that, when the European Community signs international treaties, sometimes it **might** and sometimes it **might not** intend to use them as benchmark for its subsequent actions coming under the purview of the international regime to which it voluntarily adhered. Our judges should think about the incentives they provide our (trading) partners with.

3. No express reference to WTO law

This question was much easier for the Court to handle. The Court found nowhere in the relevant EC documents an explicit reference to WTO law. The conclusion, in the eyes of the judges was inescapable. Pause for a moment and reflect on this other exceptional grounds: what are the CFI judges really saying? The EC

[17] To avoid any misunderstandings, I am not claiming here that the WTO law system guarantees respect of the contract. I have argued elsewhere that enforcement critically depends on the identity of the players. I am making a formal argument only since this is exactly what the CFI also did (a formal argument).

[18] See *Gene M. Grossman and Petros C. Mavroidi*s, Would've or Should've? Impaired Benefits Due to Copyright Infringement, US – Section 110(5) Copyright Act, in: Horn/ Mavroidis (Eds.), The WTO Case Law of 2001, The ALI reporters' Studies 2003, 281 ff.

(domestic) law contains no explicit reference to WTO law hence, although the subject-matter of the former in this respect is actually the subject-matter of the latter, the latter is no benchmark for the legality of the former. But is not this construction tantamount to stating that it is on domestic law-grounds that the performance of international obligations will be decided? Such an attitude is clearly in contradiction with yet another customary international law rule enshrined in Art. 27 VCLT:

«A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. »

4. Preliminary conclusion

In a nutshell, the Court excludes the possibility for an international wrong to be a violation in the sense of EC law because of the interim liability rules embedded in the WTO legal system. Despite the factual mistake that the Court committed (by saying yes to Fedon's claims, it does not deprive the Commission of any negotiating tool), this attitude is problematic because, if applied to other regimes with liability rules, it risks constructing EC law in isolation from the EC international obligations: very often, international regimes are subjected to liability rules because of the flexibility that such rules provide. Flexibility in turn incites participation[19]. The customary public international law remedy (*restitutio in integrum*) is a liability rule and is applicable any time execution of the contract is not feasible.

II. The claim on responsibility because of a legal act by the EC institutions

1. The legal test

[19] Property rules have the merit to encourage investment in the regime, assuming a regime has been agreed upon.

The Court first explained (§ 153) that, as *per* constant case-law[20], the European Community can be held responsible for legal actions as well if three conditions have been cumulatively met:

- a damage exists;
- a causal link between the damage and actions by the EC institutions has been demonstrated; and
- the damage is **unusual** and special.

The discussion in *Fedon* hinges on the interpretation of the italicized term (**unusual**), since the Court satisfied itself that a damage indeed existed (§ 162) and a causal link between the damage and the EC bananas import regime had been established (§ 183).

2. Not so unusual

The Court found that the damage suffered by Fedon was not unusual[21] and for this reason rejected the claim of the plaintiff. The Court's finding rests on the definition of the term **unusual** and the inherent vicissitude of the WTO system explained above: damage is unusual, if it is beyond the limits of economic risks inherent in the sector concerned (§ 191). In this case, the risk is not **unusual** because Fedon could have been exposed in this risk by exporting its products in the US market (§ 198) [22]. Why is this case? simply because, there is an inherent vicissitude in the WTO system, which allows for countries to take counter-measures, when they are facing illegality (§§ 194 – 197). Since counter-measures can hit anyone, they can hit Fedon as well.

3. Not so unusual? An unusual understanding of the (un)-usual

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20 See, *inter alia*, CFI, T-184/95, *Dorsch Consult/Council and Commission*, Rec. 1998, II-667, confirmed by the ECJ, C-237/98, Rec. 2000, I-4549, § 19.

21 Because of this finding, it did not proceed to establish whether the damage was special or not (§ 200).

22 At the moment of writing no English translation of the judgment is available. § 198 reads in French: «il s'ensuit que les risques auxquels pouvait être exposée de ce fait la commercialisation par les requérantes de leurs lunettes sur le marché américain ne sont pas à regarder comme étrangers aux aléas normaux du commerce international, en l'état actuel de son organisation ».

So what is the Court saying here? Recall that the starting point of its analysis is the definition of **unusual**, where it implicitly made reference to the distribution of risk across economic sectors. There are many problems with this part of the judgment as well:

First, the Court uses the wrong words (concepts?). Risk is not uncertainty. Risk-distribution pre-supposes knowledge of the probability that an event will occur. No such knowledge exists in a state of uncertainty. Taken literally, the Court decision should be dismissed only on this account, for it is simply impossible for Fedon to calculate the risk of being exposed to counter-measures. The rest of our analysis takes it for granted that what the Court meant was uncertainty.

Second, when it comes to measuring uncertainty, it is only normal that we first establish some reasonable benchmark. Take the facts of *Fedon* as an example: Fedon, in the Court's view, when deciding to export its product to the US market, should have calculated that:

- eventually the European Community will adopt the bananas regime it adopted;
- that it would hurt US interests;
- that the US would decide to challenge the EC regime before the WTO;
- that the GATT first would find against the European Community;
- that the European Community would not comply and would modify instead its regime;
- that the United states would challenge the EC regime again and again;
- that the third EC regime would have been found WTO-inconsistent (this time by a WTO, not a GATT panel);
- that the European Community, would again not comply;
- that the United States would take counter-measures pending compliance;
- and that the US counter-measures would hit Fedon products among the myriad of EC exports to the US market that could potentially be hit.

Importantly, Fedon should accept that it is usual that the importers of bananas-lobby in the EC market is more powerful than the lobbies of producers hit by US counter-measures and that the European Community would prefer to satisfy the former by keeping its illegality intact. I wonder, how many entrepreneurs can foresee

all of the above? And what is the remedy in case they do? Stop exporting? But is not the very purpose of the WTO to liberalize exchanges?

III. Bite the bullet, Fedon (so says the Court)

By keeping the illegality in place the European Community is essentially re-distributing wealth across segments of its society: the bananas-importers (those selling ACP bananas) are not exposed to international competition and thus keep their profits intact; Fedon and those hit by US-countermeasures pay the price of the illegality since they lose export income. If switching (to another export market) costs were meaningless, the harm would have been minimized. Empirical research, however, shows that more often than not this is not the case. This is probably what motivated the complaint by Fedon. And what is the remedy that the Court suggests? None. Fedon should bite the bullet. There is nothing wrong with assigning the competence to the European Community to decide on such issues[23]. This is the essential reason why I do not support direct effect of WTO law, as will be shown in Section 4. It is, however, disturbing to shield the European Community away from any responsibility when through its actions it provokes harm to its citizens.

IV. The Court is aid to the Commission. Should it be?

On numerous occasions in the judgment the Court repeats its resolve not to deprive the EC institutions of an important negotiating tool. To do that, the Court goes so far as to suggest that an international wrong (the WTO finding of inconsistency of the EC bananas import regime) is not wrong as a matter of EC law; all in the name of not depriving an EC institution from a negotiating option. The analysis above shows that the Court was quite over-

[23] See on this issue the pertinent remarks of *Roland Bieber*, Democratic Control of International Relations of the European Union, in: Cannizzaro (Ed.), The European Union as an Actor in International Relations 2003, 105 ff.

zealous in its role of Commission's helper this time since, had it agreed with Fedon it would have not at all prejudiced the Commission's actions: bygones are bygones and the Commission does not negotiate money already paid, but rather the end of the dispute[24]. Saying yes to Fedon, in other words, amounts to no restraint on the European Community's executive branch.

But most importantly, is this the role of the Court? The Court is there to test, *inter alia*, the legality of the actions of the agents of the European peoples, the EC institutions. The Court has established through its case-law an elaborate system[25] to test the legality of their activity. Illegality can take place because either domestic or even international law has been breached. The European Community has signed an agreement whereby it has accepted that WTO adjudicating bodies will have the monopoly of deciding on the legality of actions by all trading partners (Art. 23.2 DSU). This is the contractual promise of the European Community to the rest of the world. Now that the WTO adjudicating bodies have done as much, the Court turns back and says that a wrong in the eyes of the WTO is not a wrong in the eyes of the European Community institutions. It might be a wrong only in two circumstances that the Court, based on its own perceptions (that is, on internal **and not** on international law), accepts to use WTO law as benchmark for testing the legality of EC institutions.

It is true that some actions by the executive are, for good reasons, non-justiciable. In such cases either the legislator, or even the judge explain why this should be the case. The latter will do so when the original contract is incomplete[26]. But are we facing such a situation here? Not at all. Art. 23.2 DSU states the exact opposite: the actions by the Community are to be judged **exclusively** before the WTO. Private traders originating in the European Community,

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[24] Indeed, this is very much in line with the Commission's attitude at the WTO to always support prospective remedies and consistently oppose retroactivity in this respect.

[25] See the relevant pages in *George Bermann, Roger Goebel, William Davey and Eleanor Fox,* European Union Law, 2nd edition, 2002.

[26] Usually this will be the case when the legislative will is expressed in general terms, or by using an indicative list of non-justiciable transactions so as to avoid Type-II errors.

aware of this provision, will legitimately organize their activities expecting that the Community will behave like a *Recshstaat* that it is, in accordance with its international obligations. Yet through *Fedon*, the Court has weakened the legitimacy of Art. 23.2 DSU. This construction of the relationship between EC and WTO law cannot find respectable intellectual refuge in the relationship between national and international responsibility: yes, the Community can pay (liability rules) pending implementation (property rule). Implementation should, however, occur. Moreover, who pays? As stated above, the EC non-compliance amounts to re-distribution of wealth from Fedon to the EC importers of Bananas. It is hardly compatible with the idea of *Rechstaat* to accept that, in the name of an international wrong, we should accept re-distribution of wealth from innocent to bystanders to those providing the motive for the violation.

D. Instead of conclusions: who's afraid of direct effect?

To avoid any misunderstandings, I am not advocating direct effect of WTO law. *Fedon* is not about direct effect, just like the ECJ *Bananas* judgment was not about it either. Fedon has not been arguing that by virtue of a WTO provision it is entitled to a sum of money; Fedon has been arguing that because of actions by the European Community (irrespective whether in breach of its international obligations or not), it has suffered a trade damage. The source of its claim is not WTO law, it is EC actions.

In fact, more generally, I side with *Levy & Srinivasan*[27] who showed why it makes good sense to assign the responsibility to decide on such issues to the central government. Allowing for direct effect of WTO law could jeopardize this endeavour and indeed prove a welfare-reducing strategy. Trade liberalization, in general, is

[27] *Philip Levy and T. N. Srinivasan*, Regionalism and the (Dis-)advantages of Dispute settlement Access, *American Economics Association Papers and Proceedings* (86)2 1996, 93 ff.

welfare enhancing but this does not mean that there are not losers in individual national markets. Assigning the responsibility to a government guarantees (assuming the governments' function is to increase social welfare) that the society as a whole will profit from opening up the market. It is up to the government then to compensate losers.

The point here is that using the WTO law as benchmark for testing the legality of EC actions is dissociated from direct effect altogether. There is some sort of analogy with the *Krajenveld* jurisprudence[28] of the ECJ, where the Court moved away from direct effect-type of considerations to evaluate the legality of Dutch law. *Fedon* could have been the *Krajenveld*-equivalent for using international law to evaluate the legality of EC law. The Court failed to do that. This attitude however, can only incite similar reactions by others and at the end is detrimental to international cooperation. The Court should probably keep in mind that the WTO is probably the only existing paradigm in international relations where cooperation is proved by the dismantling of trade barriers, and where disputes are resolved in a peaceful manner (compulsory third-party adjudication).

[28] On this case-law, see the excellent analysis of *Sacha Prechal*, Direct effect, Reconsidered, Redefined and Rejected, in: Prinssen/Schrauwen (Eds.), Direct Effect, Rethinking a Classic of EC Legal Doctrine 2002, 17 ff. On direct effect more general see the equally compelling analysis in *Bruno de Witte*, Direct Effect, Supremacy and the Nature of the Legal Order, in: Craig/de Búrca (Eds), The Evolution of EU Law 1999, 177 ff.