Global Constitutionalism (2013), 2:2, 237–261 © *Cambridge University Press, 2013*
doi:10.1017/S2045381713000105

EU membership of the WTO: International trade disputes and judicial protection of individuals by EU Courts

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Abstract: The European Union (EU) is embedded in a pluralistic legal context because of the EU and its Member States' treaty memberships and domestic laws. Where EU conduct has implications for both the EU's international trade relations and the legal position of individual traders, it possibly affects EU and its Member States' obligations under the law of the World Trade Organization (WTO law) as well as the Union's own multi-layered constitutional legal order. The present paper analyses the way in which the European Court of Justice (ECJ) accommodates WTO and EU law in the context of international trade disputes triggered by the EU. Given the ECJ's denial of direct effect of WTO law in principle, the paper focuses on the protection of rights and remedies conferred by EU law. It assesses the implications of the WTO Dispute Settlement Understanding (DSU) – which tolerates the acceptance of retaliatory measures constraining traders' activities in sectors different from those subject to the original trade dispute (*Bananas* and *Hormones* cases) – for the protection of 'retaliation victims'. The paper concludes that governmental discretion conferred by WTO law has not affected the *applicability* of EU constitutional law but possibly shapes the actual *scope* of EU rights and remedies where such discretion is exercised in the EU's general interest.

Keywords: accountability; EU law; individual rights; international trade disputes; judicial protection

Introduction

The adoption of international treaties has established individual rights and remedies under international law as well as individual responsibility for certain crimes recognized under international humanitarian and criminal law.[1] Many international treaties have thus had an impact on the scope of

[1] R McCorquodale, 'The Individual and the International Legal System' in M Evans (ed), *International Law* (3rd edn, Oxford University Press, Oxford, 2010) 284–310, 289 ff, 291 ff.

rights, the availability of remedies and the reach of responsibility of individuals[2] through the treaties' domestic application, implementation and enforcement, and/or through the establishment of specific international mechanisms.[3] Also the European Union's (EU) catalogue of individuals' rights and remedies is shaped by such international treaties, either because of its own status as contracting party or because of its Member States' international treaty membership.[4] The envisaged accession of the EU to the European Convention on Human Rights (ECHR) will – despite the already existing overlap in substance between EU fundamental rights and rights under the ECHR – further define the EU's international legal obligation to protect individual rights. Moreover, the EU's membership of the ECHR will enable individuals to rely directly on convention rights to challenge not only Member State but also EU action, and, if need be, to take their case before the European Court of Human Rights (ECtHR).[5] The EU as a legal entity separate from its Member States is thus not only bound by international treaties vis-à-vis other subjects of the international legal order but also subject to rights obligations that can be enforced by individuals through EU domestic and international accountability mechanisms. The EU is therefore embedded in a pluralistic legal context that has evolved not only on the basis of its Member States' constitutional and international commitments,[6] but also because of its own international treaty memberships, which arguably led to an 'expan[sion] [of] the range of voices heard or considered'[7] in the interest of strengthening the position of individuals.

[2] Unless otherwise specified, this paper refers to 'individuals' as comprising both natural and legal persons. While some of the rights, remedies or duties addressed might be more relevant for either natural or legal persons, their legal status within the international and the EU constitutional legal orders discussed here is conceptually comparable and can thus be assessed within the same analysis.

[3] For a discussion of the trend 'towards individualized law-enforcement' and examples of the enforcement in international fora see A Peters, 'Membership in the Global Constitutional Community' in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009), 153–262, 161–6.

[4] With regard to the implications of international human rights treaties see T Ahmed and I de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17(4) *European Journal of International Law* 771–801.

[5] T Lock, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48(4) *Common Market Law Review* 1025–54; JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48(4) *Common Market Law Review* 995–1023.

[6] For a discussion of constitutional pluralism in the context of European integration see M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism: Symposium Transcript' (2008) 2(1) *European Journal of Legal Studies* 325–70.

[7] PS Berman, 'Global Legal Pluralism' (2007) 80(6) *Southern California Law Review* 1155–1238, 1167 ff.

The present paper explores a different angle of global legal pluralism, which does not relate to the increase of rights and remedies of individuals through the EU's accession to international treaties. It recognizes that international treaties can provide an additional legal basis and/or platform for their contracting parties to take or justify governmental action that potentially interferes with existing standards of protection of individuals under the EU legal order.[8] EU measures that are required or authorized by international treaty norms affect both the international treaty regime and the EU legal framework in which they are adopted. Following the approach to legal pluralism as formulated by Berman, such dual effect makes it desirable to search for 'procedural mechanisms, institutions, and practices that seek to manage, without eliminating, hybridity'.[9] From the perspective of the EU's constitutional legal order, it is the European Court of Justice (ECJ) in particular that is empowered to accommodate international law in its judicial review, where appropriate, often ruling on the effects of international law not only for the EU but also its Member States' legal orders.[10] At the same time, and more importantly for this symposium publication, the existence of the dual legal setting, in which EU action is taken, raises questions regarding the source and scope of rights and remedies of affected individuals. While legal pluralism is often understood to provide greater protection of rights,[11] this paper highlights the risk that legal pluralism creates more 'black holes' of accountability and leads to a diminished protection of rights.

On the one hand, the constraining effects of the application of international treaties raise questions of accountability, rights and remedies where EU action is taken to *directly* regulate or govern individuals – such as the targeted sanction regime established by the UN Security Council and

[8] See e.g. climate change measures that the EU can take under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, OJ 2002 L 130/1 and 130/4 (*UNTS*, vol 2303, 148) – see in this context also Advocate General Kokott who recognized in her Opinion of 6 October 2011 in C-366/10, *The Air Transport Association of America and Others* (nyr), para 82, 'that some of the measures taken will be onerous for individuals', even though she considered 'effects such as these [to be] only indirect'.

[9] Berman, 'Global Legal Pluralism' (n 7) 1179.

[10] According to art 216(2) Treaty on the Functioning of the European Union (TFEU), international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. For a detailed discussion of the jurisprudence on the courts and international agreements and the effects of international law in the EU legal order see P Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press, Oxford, 2011) 267–436.

[11] For an analysis of global administrative law as an alternative to domestic models for ensuring accountability in the circumstances of global governance see N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17(1) *European Journal of International Law* 247–78.

Sanctions Committee being implemented at the domestic level.[12] On the other hand, EU action taken in a global context also raises questions of accountability, rights and remedies where it leads *indirectly* to constraints of individuals. While the latter category might be discussed less frequently, the constraining implications for individuals of institutional decisions can be comparable and thus deserve further attention. The present contribution addresses this issue in the context of the EU's membership of the World Trade Organization (WTO), focusing on the applicability and scope of individual rights and remedies where EU action triggered international trade disputes that led to the imposition of retaliatory measures by other WTO members.[13] Given the EU's exclusive competence in most trade matters,[14] the analysis questions neither the EU's legal status as a global actor that is separate from its Member States, nor its capacity to take governmental decisions separately from its Member States that can affect individuals.[15] The paper therefore does not address the level of Member State involvement in EU trade decisions, but focuses instead on issues of institutional accountability of the EU as a legally independent entity taking action through any of its institutions.[16]

The purpose of the paper is threefold. First, it outlines the general implications of the EU's WTO membership for individuals' rights and remedies, distinguishing between the legal positions possibly acquired under the WTO agreements and those rights and remedies conferred upon individuals by EU law. The paper focuses on the relevant case law of the ECJ being the only EU court to decide on the implications and reach of WTO and EU law as a legal benchmark for EU action taken in the context

[12] See also C Eckes, 'Individuals in a Pluralist World: The Implications of Counterterrorist Sanctions' (2013) 2(2)*Global Constitutionalism* Special Issue.

[13] See in particular *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26, WT/DS48, WT/DS320, WT/DS321; and *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Bananas),* WT/DS27. For a more comprehensive study of EU liability in the context of international trade disputes see A Thies, *International Trade Disputes and EU Liability* (Cambridge University Press, Cambridge, 2013).

[14] See art 207 TFEU. For detailed commentary on [now] art 207 TFEU, R Bierwagen in H Smit, P Herzog, C Campbell and G Zagel (eds), *Smit & Herzog on The Law of the European Union*, Vol 3, Rel10-9/2010 Pub 623; MJ Hahn, Commentary on Article 207 TFEU in C Callies and M Ruffert (eds), *EUV/AEUV* (4th edn, CH Beck, Munich, 2011), 2016–87.

[15] See art 47 Treaty on European Union (TEU). For detailed commentary on art 281 EC on the legal personality of the European Community [now replaced by art 47 TEU concerning the EU], G Zagel in H Smit, P Herzog, P Campbell and G Zagel (eds), *Smit & Herzog on The Law of the European Union*, vol 4, Rel10-9/2010 Pub 623.

[16] See art 13 ff TEU for the provisions on Union institutions.

of international trade disputes. The second objective of the paper is to highlight the legal necessity for the ECJ to decide on the *applicability* of rights and judicial protection on the basis of 'pure' EU law, independently of the external or global dimension of EU conduct and the EU's WTO membership. Third, the paper suggests that the WTO and EU legal orders are intertwined to an extent that the layer of WTO law maintains governmental discretion by enabling the EU to temporarily accept retaliation while upholding a breach of WTO law. Where such discretion is exercised in the EU's general interest, the global dimension of the EU action's legitimization therefore possibly shapes the *scope* of rights and remedies under EU law, which should nonetheless be subject to EU judicial review in order to ensure the EU's compliance with the rule of law.

The paper is structured as follows. It begins with introducing the EU conduct triggering WTO disputes as well as their consequences for some traders at the European level, which are at the core of the present analysis. In order to assess the implications for rights and remedies of those traders, the paper identifies different dimensions of EU conduct and places them in the context of both the WTO and the EU legal order. Subsequently, the paper introduces the – for the present purpose – most relevant aspects of the case law of the EU Courts regarding the judicial review of EU conduct in the light of *WTO law and rulings* of the WTO Dispute Settlement Body (DSB) to demonstrate the lack of WTO-related individual rights and remedies before EU Courts. In the last section, the paper distinguishes between the applicability and scope of rights and remedies under *EU law* of those affected by other WTO members' retaliation. Emphasizing the EU dimension of an international trade dispute triggered by the EU and its consequences, the paper thereby focuses on the EU's potential infringement of EU law: the omission of providing internal compensation where a political decision to uphold a breach of WTO law causes damage for some. In this context, the paper also analyses the implications of the EU's scope for manoeuvre granted under an international treaty regime. More specifically, it evaluates the significance of the WTO members' discretion under the WTO dispute settlement system, namely to temporarily accept retaliatory measures while continuing a breach of WTO law, for the scope of individual rights and remedies under the domestic legal order of the EU.

WTO membership, international trade disputes triggered by the EU and their consequences

On 1 January 1995 the Agreement Establishing the World Trade Organization (WTO agreement) and, *inter alia*, the General Agreement on Tariffs and

Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) entered into force for the EU.[17] Hence, not only all Member States of the EU, but also the EU itself has since been a WTO member.[18] The EU represents all its Member States at the WTO[19] and is itself party to disputes before the WTO Dispute Settlement Body (DSB).[20]

The [now] EU adopted legislation regulating its banana and beef market, which the WTO Panels and the Appellate Body held to be non-compliant with the EU's obligations under WTO law in their reports adopted by the DSB.[21] Since the challenged EU legislation was still considered to be in breach of WTO law obligations after the expiry of the implementation period granted by the DSB, and no agreement on satisfactory compensation had been reached, other WTO members were authorized to suspend their concessions or other obligations towards the EU.[22] The USA exercised discretion under Article 22(3) DSU with regard to the sector in which retaliatory measures were to be imposed, and chose a variety of products being imported from EU Member States to the USA, such as batteries, bed linen and paper boxes, to be levied with a 100 per cent *ad valorem* duty when entering the USA.[23] As a consequence, all 'retaliation victims' in the

[17] Council Decision 94/800/EC of 22 December 1994, OJ 1994 L 336/1.

[18] Art XI(1) of the WTO Agreement.

[19] See (n 14). For a general overview on 'the EU and the WTO' see <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/index_en.htm>.

[20] See (n 15). The EU has already been complainant of disputes with Argentina, Australia, Brazil, Canada, Chile, China, India, Republic of Korea, Mexico, Philippines, Thailand and the US. The EU has already been respondent of disputes with Argentina, Australia, Brazil, Canada, Colombia, Ecuador, Guatemala, Honduras, India, Republic of Korea, Mexico, Norway, Panama, Peru, Taiwan (Chinese Taipei), Thailand, US and Uruguay. See disputes by country on <www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> and <http://trade.ec.europa.eu/wtodispute/search.cfm?code=1 and code=2>.

[21] See for an overview of the *Bananas* and *Hormones* cases <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>, <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm>, and <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm>.

[22] Ibid; see for the legal basis of this authorization art 22(2) and (3) DSU.

[23] See Notice of the USTR of 19 April 1999 published in the Federal Register 64 Fed Reg 19,209 (1999), announcing in the Annex final product list in *Bananas* dispute (products included: bath preparations, handbags, wallets and similar articles, felt paper and paperboard boxes, lithographs, bed linen, batteries and coffee or tea makers); Notice of the USTR of 27 July 1999 published in the Federal Register 64 Fed Reg 40,638 (1999), announcing in the Annex final product list in *Hormones* dispute (products included: pork, Roquefort cheese, onions, truffles, dried carrots, liver of goose, fruit juice, chicory, mustard).

Bananas and *Hormones* cases were operating in sectors different from those affected by the EU legislation concerning the banana or beef market, which had been successfully challenged in the international trade dispute.

What makes the situation of retaliation victims interesting for the present study of global legal pluralism and its effects on individuals is that conduct of public authority (here the EU) which caused damage for individuals is relevant under, and regulated by both the WTO and the EU legal order: whereas WTO law requires compliance with WTO law in principle, EU law might justify a breach of WTO law in the EU's general interest; whereas WTO law might enable the EU to temporarily accept retaliation while continuing to breach WTO law, EU law might necessitate internal compensation mechanisms for those affected by retaliation.[24] In any case, the situation of retaliation victims is different from traders negatively affected by other EU policies adopted by the EU institutions on the basis of powers conferred by the Member States: the alleged damage occurred only because of a continuous *breach* of international trade law, which the institutions sustained in the EU's general interest, and not because of the mere exercise of legal discretion provided by competence norms under the EU Treaties. The contested EU conduct consisted not only of (1) EU legislation that infringed primary WTO law, but also (2) the EU's omission to modify its legislation found to be in breach of WTO law and (3) the EU's omission to establish internal compensation mechanism for retaliation victims. The EU conduct infringed the EU's own international obligations under the WTO agreements, affected the EU Member States' capacity to comply with their WTO law obligations, and possibly infringed general principles for the protection of individuals under EU law. Most interestingly in the current context, however, is that in spite of the multitude of relevant layers of law, it is only the EU legal order that provides a system of rights and remedies – as will be elaborated further in the next section of this paper. Affected individuals can challenge EU conduct neither before the WTO DSB, nor before Member State courts. It is only the EU judiciary that has jurisdiction to assess the lawfulness of EU conduct, and determine the applicability and scope of individual rights and remedies, which are at stake in the context of an international trade dispute triggered by the EU.

What then are the immediate implications of the EU's WTO membership for rights and remedies of individuals affected by the consequences of

[24] See T Isiksel, 'Global Legal Pluralism as Fact and Norm', (2013) 2(2)*Global Constitutionalism Special Issue*, who describes global legal pluralism as a condition where 'a given set of actions may be governed by an assortment of legal systems or by none at all', p 171.

international trade disputes triggered by the EU? The WTO agreements neither explicitly require their members to add enforceable trade rights to their domestic catalogues,[25] nor allow individuals to challenge their members' action before the WTO Dispute Settlement Body.[26] As a consequence, even where there is a clear and continuous infringement of WTO law, it is for the domestic or regional legal orders of WTO members to decide on the applicability and scope of individuals' rights and remedies in that context.[27] In the context of the EU legal order, it has thus been left for the ECJ both to decide on the effects of WTO law on the Court's own legality review and to define the reach of EU constitutional law for the protection of individuals in the particular context of international trade disputes. The ECJ got the opportunity to decide on some of these issues on appeal in *FIAMM et al.*[28] In these cases, some of the traders who allegedly suffered damage because of retaliatory measures had claimed compensation[29] from the EU before what is now the General Court of the EU (GC), invoking different legal grounds:[30] they relied on breaches of WTO law, non-compliance with WTO rulings, breaches of EU fundamental rights and other general principles, and the principle of liability in the absence of unlawfulness.[31] The following sections of this paper place the ECJ's *FIAMM et al* decision in the context of established EU case-law on the role of WTO law as a source of rights and remedies in the EU legal order, and the

[25] Different view held by E-U Petersmann, 'The WTO Constitution and Human Rights'; (2000) 3(1) *Journal of International Economic Law* 19–25.

[26] According to the DSU, only Members (states) can request for consultations and seek the establishment of a panel, etc; see e.g. arts 4 and 6 DSU.

[27] See for a discussion of international judicial bodies' dealing with norm conflicts between human rights and other 'sub-regimes of public international law' the contribution to this symposium publication by E de Wet and J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration', (2013) 2(2)*Global Constitutionalism* Special Issue.

[28] C-120 and 121/06 P, *FIAMM et al.* [2008] ECR I-6513.

[29] According to art 268 TFEU, '[t]he Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340'.

[30] According to art 340(2) TFEU, 'the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

[31] See for notification of actions e.g. T-69/00, *Fiamm et al.*, OJ 2000 C 135/30; T-151/00, *Le Laboratoire du Bain*, OJ 2000 C 247/54; T-301/00, *Groupe Fremaux*, OJ 2000 C 355/32; T-320/00, *CD Cartondruck*, OJ 2000 C 355/39; T-383/00, *Beamglow*, OJ 2001 C 61/21; *Giorgio Fedon et al.*, OJ 2001 C-275/10.

reach of EU rights and remedies in a situation that is at least partially shaped by international law.

WTO law and rulings as a source of rights and remedies before the EU Courts

While international treaties have been recognized as an integral part of EU law,[32] WTO law cannot be seen as a source of rights or remedies for individuals, given that the EU Courts have continuously refrained from recognizing in principle the enforceability of WTO law and rulings as a benchmark for the lawfulness of EU conduct before EU Courts. The EU Courts' reasoning is summarized and analysed only briefly in the following paragraphs – in particular as they have been subject to extensive discussion elsewhere.[33]

The EU Courts' reasoning for denying in principle direct effect of WTO law has been in line with the approach taken with regard to the GATT 1947 whose 'spirit', 'general scheme' and 'terms' provided 'great flexibility' and would not allow direct enforcement in courts.[34] According to the ECJ, 'the nature and structure' of the WTO agreements would prevent the Courts from acknowledging direct enforceability of WTO provisions in actions brought by EU Member States[35] as well as natural

[32] Established case law since C-181/73, *Haegeman v Belgian State* [1974] ECR 449, para 4 ff; Case 104/81, *Kupferberg* [1982] ECR 3641, para 13; Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 7; C-344/04, *IATA and ELFAA* [2006] ECR I-403, para 36; C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 82; C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co Inc., Merck Sharp & Dohme Lda* [2007] ECR I-7001, para 31; C-240/09, *Lesoochranárske zoskupenie* [2011] ECR I-1255, para 58. See also art 216(2) TFEU (n 10).

[33] See for an evaluation of *FIAMM* in this respect M Bronckers, 'From "Direct Effect" to "Muted Dialogue"' (2008) 11 *Journal of International Economic Law* 885–98. See also e.g. P Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 *Common Market Law Review* 11–58; M Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 *Common Market Law Review* 601–27; J Jackson, 'Direct Effect of Treaties in the U.S. and the EU, the Case of the WTO: Some Perceptions and Proposals' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, Oxford, 2008) 361–82.

[34] Cases 21-24/72, *International Fruit Company et al.* [1972] ECR 1219, paras 7, 8, 18–28. Case 9/73, *Schlüter* [1973] ECR 1135, paras 27–30; Case 266/81, *Società Italiana* [1983] ECR 731, para 28; Cases 267 to 269/81, *SPI and SAMI* [1983] ECR 801, paras 23 and 31; C-280/93, *Germany v Council* (*Bananas*) [1993] ECR I-4973, paras 105–112; C-469/93, *Chiquita* [1995] ECR I-4533, paras 24–29.

[35] C-149/96, *Portugal v Council* [1999] ECR I-8395, paras 40 ff; C-377/98, *Netherlands v Parliament and Council* [2001] ECR I-7079.

or legal persons.[36] The Courts based their conclusion on the objective not to interfere with the other EU institutions' scope for manoeuvre when adopting or upholding measures that have an impact on both the situation within the EU and outside it.[37] Moreover, the Courts concluded that because of other major trading partners' reluctance to review domestic legislation in the light of WTO law, the EU Courts could not exercise judicial review of EU legislation in the light of WTO law either ('reciprocity').[38] Finally, the EU Courts held that since the DSU gave WTO members the option to agree on mutually acceptable compensation, or to accept retaliatory measures on a temporary basis, the EU's WTO law obligations could not be enforced within the EU legal order.[39]

In the context of compensation actions, the EU Courts had started to deny the right to compensation due to a breach of WTO law in actions brought by traders challenging the EU's conduct leading to international trade disputes, such as importers of bananas or hormone-treated beef directly affected by the legislative measures in question.[40] In doing so, the Courts made no distinction between traders based within or outside the

[36] Joined Cases C-27/00 and C-122/00, *Omega Air* and Others [2002] ECR I-2569, paras 89 ff; Joined Cases C-300/98 and C-392/98, *Dior* [2000] ECR I-11307; Order in Case C-307/99, *OGT* Fruchthandelsgesellschaft mbH v Hauptzollamt Hamburg-St. Annen [2001] ECR I-3159; C-93/02, *Biret International SA v Council* [2003] ECR I-10497; C-377/02, *Van Parys* [2005] ECR I-1465; and several judgments of the GC, such as T-174/00, *Biret International SA v Council* [2002] ECR II-17, para 61.

[37] C-149/96, *Portugal* (n 35), para 46; C-120 and 121/06 P, *FIAMM et al.* (n 28), para 116.

[38] C-149/96, *Portugal* (n 35), paras 43 ff; C-120 and 121/06 P, *FIAMM et al.* (n 28), para 130. For an overview of the effect of WTO law on the rights and remedies of individuals in the USA, Japan and Canada, see Thies (n 13), ch 6, s 6.1.3.

[39] Recently confirmed in C-120 and 121/06 P, *FIAMM et al.* (n 28), paras 117, 130. See also C-149/96, *Portugal* (n 35), para 40; C-377/02, *Van Parys* (n 36), paras 48, 51 ff. Four weeks before the same conclusion was reached by the GC in T-19/01, *Chiquita* [2005] ECR II-315, in the context of an action for damages; according to the GC, 'the DSU does not establish a mechanism for the judicial resolution of international disputes by means of decisions with binding effects comparable with those of a court decision in the internal legal systems of the Member States' (para 162), and since members had, even after the expiry of the implementation period and measures under art 22 DSU, 'place for negotiation' (para 164) '[t]he Community judicature cannot … review the legality of the Community measures in question without depriving Article 21.6 of the DSU of its effectiveness' (para 166). See for a comment N Lavranos, 'The *Chiquita* and *Van Parys* Judgments: An Exception to the Rule of Law' (2005) *Legal Issues of Economic Integration* 449–60; A Steinbach, 'Zur Rechtswirkung von WTO-Streitbeilegungsentscheidungen in der Gemeinschaftsrechtsordnung' (2005) *EuZW* 331–5.

[40] T-18/99, *Cordis Obst und Gemüse Großhandel v Commission* [2001] ECR II-913; T-30/99, *Bocchi Food Trade International v Commission* [2001] ECR II-943; T-52/99, *T. Port GmbH & Co KG v Commission* [2001] ECR II-981; T-3/99, *Bananatrading v Council* [2001] ECR II-2123; C-377/02, *Van Parys* (n 36); T-174/00, *Biret* (n 36).

EU territory.[41] In *FIAMM et al.*, the EU Courts upheld this approach, also with regard to retaliation victims.[42] The Courts required and denied direct effect of WTO law obligations in the context of compensation actions[43] as previously done in the context of actions seeking the annulment[44] of the EU measure in question.[45] The Courts emphasized again their respect for the political scope for manoeuvre of other EU institutions on the international stage.[46] Even after the DSB had identified non-compliance with WTO law obligations and the implementation period expired, the Courts held that the DSU provides WTO members with the flexibility to accept retaliation – even if only temporarily – and that this flexibility should not be interfered with by the Courts' making WTO law obligations enforceable within the EU.[47]

As argued before, it shall be added here that the EU Courts would in principle be in a position to grant compensation for WTO law breaches, even in the absence of direct effect of WTO law.[48] It is claimed that a

[41] The applicant Chiquita was based in the USA, see T-19/01, *Chiquita* (n 39).

[42] T-69/00, *FIAMM and FIAMM Technologies* [2005] ECR II-5393; T-151/00, *Le Laboratoire du Bain* [2005] ECR II-23*; T-301/00, *Fremaux* [2005] ECR II-25*; T-320/00, *CD Cartondruck AG* [2005] ECR II-27*; T-383/00, *Beamglow Ltd* [2005] ECR II-5459; T-135/01, *Giorgio Fedon & Figli S.p.A., Fedon S.r.l. and Fedon America USA Inc.* [2005] ECR II-29*; see for comment and analysis of these cases S A Haack, 'Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG' (2006) *Europarecht* 696–705; M Schmauch, 'Non-Compliance with WTO Law by the European Community: Neither Unlawful Conduct Nor Unusual Damage' (2006) *European Law Reporter* 98–101; A Thies, Case Note (2006) 43 *Common Market Law Review* 1145–68; C-120 and 121/06, *FIAMM et al.* (n 28), para 133; see for comment and analysis in this respect Bronckers, 'From "Direct Effect" to "Muted Dialogue"' (n 33).

[43] Art 268 TFEU (n 29).

[44] Art 263 TFEU.

[45] See e.g. C-93/02, *Biret* (n 36), and C-377/02, *Van Parys* (n 36); this has been confirmed by the GC in T-69/00, *FIAMM* (n 42), AG Maduro in his Opinion of 20 February 2008, paras 25 ff, 30 ff, and the ECJ in C-120 and 121/06, *FIAMM et al.* (n 28), paras 111, 120 ff, 133.

[46] First held in C-149/96, *Portugal* (n 35), para 46 ff; recently confirmed in C-120 and 121/06, *FIAMM et al.* (n 28), paras 119 ff.

[47] See e.g. C-377/02, *Van Parys* (n 36), paras 51, 53; T-19/01, *Chiquita* (n 39), paras 161 ff; AG Léger in C-351/04, *Ikea Wholesale Ltd* [2007] ECR I-7723, para 96; C-120 and 121/06, *FIAMM et al.* (n 28), para 130. See also T Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 *Common Market Law Review* 325–78, 374; T Cottier, 'A Theory of Direct Effect in Global Law' in A von Bogdandy, P Mavroidis and Y Mény (eds), *European Integration and International Co-ordination Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International, The Hague, 2002), 99–123, 111 ff.

[48] A Thies, 'The Impact of General Principles of EC Law on its Liability Regime towards Retaliation Victims after FIAMM' (2009) *European Law Review* 889–913, 892 ff.

successful compensation action does not establish an obligation for the concerned EU institutions to withdraw the EU measure that had caused damage, given that Articles 264 and 266 TFEU – which impose such an obligation – are only applicable to annulment actions and preliminary ruling procedures.[49] However, both Advocate General Maduro in his Opinion[50] and the ECJ concluded that [now] Article 266 TFEU applies in compensation actions by analogy and compels the institutions to take the necessary measures to remedy an identified illegality.[51] Moreover, the ECJ held that 'the prospect of actions for damages is liable to hinder exercise of the powers of the legislative authority whenever it has occasion to adopt, in the public interest, legislative measures which adversely affect the interests of individuals'.[52] In sum, the Courts have considered the financial threat of potential compensation actions to be restricting the institutions as much as successful annulment actions.[53] As a consequence, individuals should not be in a position to rely on a WTO law breach in order to claim compensation from the EU.

Before turning to the significance of 'pure' EU constitutional law for compensation actions brought by retaliation victims, it is pointed out that the EU Court's position summarized above differs from the one it developed in the context of state liability,[54] where direct effect of EU law has not

[49] According to art 264 TFEU, the Court declares measures that have been successfully challenged in an annulment action (or preliminary ruling) void; Art 266 TFEU imposes an obligation on the institution or institutions whose act has been declared void to take the necessary measures to comply with the Court's judgment. See also P-J Kuijper in P-J Kuijper and M Bronckers, 'WTO Law in the European Court of Justice' (2005) 42 *Common Market Law Review* 1313–55, 1335; A Thies, 'Biret and beyond: The Status of WTO Rulings in EC Law' (2004) 41 *Common Market Law Review* 1661–82.

[50] AG Maduro in C-120 and 121/06, *FIAMM et al.* (n 28), para 49; according to Maduro, the political institutions would misconceive the rule of law in the [EU] legal order ('*méconnaitre le principe d'une communauté de droit*') if they upheld the [EU] measure despite the Court's decision of it being unlawful. Without further explanation Maduro concludes that there is an obligation for the EU institutions concerned to end the unlawfulness.

[51] C-120 and 121/06 P, *FIAMM et al.* (n 28), paras 122, 123, 124.

[52] C-120 and 121/06 P, *FIAMM et al.* (n 28), para 121, with reference to prior case law.

[53] Compare e.g. T Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press, Oxford, 2006) 480. Interestingly, however, it seems that AG Maduro does not in principle consider the pressure on the institutions because of financial threat prohibiting the Courts to grant compensation as he is in favour of liability in the absence of unlawfulness to improve good governance and conscientious decision-making of the institutions; see AG Maduro in C-120 and 121/06, *FIAMM et al.* (n 28), para 49, and discussion Thies (n 48) at notes 114 ff.

[54] Which national courts assess (procedural autonomy) in the light of EU law where Member States act within the EU legal order allegedly causing damage for individuals (principles of equivalence and effectiveness); see P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, Oxford, 2011), 241–54, 251 ff.

been considered a prerequisite for successful compensation actions.[55] It would thus be in line with the EU Courts' case law on state liability if the criterion of direct effect of international law were to be waived in the context of EU liability in the future.[56] The question of whether or not the existence of DSB rulings and/or the expiry of the implementation period granted by the DSB have an impact on the scope of the EU Courts' review of EU measures in the light of WTO law would then be subject to the discussion of the EU's 'discretion'[57] when determining a 'sufficiently serious breach' and the 'conferral of rights', which are additional criteria when claiming compensation under state and EU liability rules. It is unlikely, however, that individual WTO law provisions, such as the ones which the EU has infringed in the *Hormones* and *Bananas* disputes, would be considered as 'conferring rights' on those traders operating in other market sectors who are affected by subsequent retaliatory measures imposed by other WTO members.

International trade disputes and EU law before the EU Courts

As has been demonstrated in the previous section of this paper, the EU Courts have denied continuously that WTO law can be relied on in principle by individuals as a source of rights and remedies within the EU legal order. It therefore seems important – in the interest of the rule of law and a complete system of rights and judicial protection within the EU legal order[58] – to evaluate the implications of the EU's own catalogue of rights and remedies in the particular context of international trade disputes. The EU Court's position in that respect has so far been less clear and conclusive than with regard to the lack of direct effect of WTO law, and it thus deserves further attention. As mentioned above, in *FIAMM et al.*, the applicants had relied on infringements of both WTO law and general principles of EU law in order to establish a right to compensation before the EU Courts.[59]

[55] Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357; C-224/01, *Köbler* [2003] ECR I-10239.

[56] For further discussion of this parallelism see B Schoißwohl, 'Haftung der Gemeinschaft' (2001) *ZEuS* 689–730, 700 ff; see for a comment on the *Francovich* decision and its effect on liability rules: W Van Gerven, 'Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (1994) *Maastricht Journal of European and Comparative Law* 6–40.

[57] C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* [2000] ECR I-5291.

[58] The ECJ referred to the Treaty having established 'a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions', which is to be provided by the EU and its Member States' courts; see C-50/00, *Unión de Pequeños Agricultores v Council* [2002] ECR I-677, para 40.

[59] See for reference to the notifications of action (n 31).

Moreover, the applicants asked for compensation because of severe and disproportionate consequences of EU conduct, claiming the existence of an EU liability principle in absence of unlawfulness – or, in the present context more precisely, in case of a 'non-enforceable unlawfulness' under WTO law. The applicants' compensation actions were, however, unsuccessful before the GC and the ECJ (on appeal). This section of the paper claims that whilst the Courts rejected any right to compensation in those cases, the ECJ has left the door open for future compensation actions. While the EU's general interest might justify a political decision that generates an international trade dispute, EU general principles might call for compensation for damage caused by the EU's infringement of WTO law and the subsequent acceptance of retaliation by non-EU states in the knowledge of its consequences. On the basis of the ECJ's reasoning,[60] it is suggested that it is the EU's omission to provide for internal compensation to those natural or legal persons affected by the consequences of international trade disputes,[61] which needs to be assessed against the benchmark of EU general principles and possibly justifies a right to compensation.

In the following paragraphs, the paper provides an overview of the EU Courts' approach to the role of EU law for the legal position of those individuals affected by the consequences of international trade disputes triggered by the EU. In line with the approach taken in *FIAMM et al.*, it distinguishes between (I) the remedy of compensation for alleged breaches of EU law and (II) the EU liability principle in absence of unlawfulness under EU law. First, the paper thereby highlights the need for EU Courts to recognize the applicability of EU rights and remedies independently of the EU conduct's external dimension and international law relevance – and contrary to what the GC arguably did when denying the applicability of general principles of EU law in *FIAMM*.[62] Second, the discussion shows that the scope for manoeuvre of the EU as a WTO member on the international stage might nonetheless have implications for the actual scope of EU rights and remedies that individuals can enforce before the EU Courts. The paper does not aim to provide a conclusive assessment of the reach of particular EU rights but wants to highlight the need for the EU courts to enter a judicial assessment of their implications in principle.

[60] C-120 and 121/06, *FIAMM et al.* (n 28), paras 180 ff.

[61] See above section *WTO membership, international trade disputes triggered by the EU and their consequences* for the different dimensions of EU conduct in international trade disputes.

[62] T-69/00, *FIAMM.* (n 42), para 146; see also discussion below (n 77).

General principles, fundamental rights and the EU remedy of compensation

The EU Courts' review challenged EU conduct in the light of EU law[63] in direct and indirect legal actions brought before them, such as actions aiming at the annulment of EU action,[64] dealing with its interpretation and application of EU law,[65] or seeking compensation.[66] Article 340(2) TFEU provides an entitlement to compensation 'in accordance with the general principles common to the laws of the Member States' to 'make good any damage caused by [the EU's] institutions or by its servants in the performance of their duties'. The EU Courts have referred to this provision both when identifying individual general principles of EU law – which are also relevant in the context of actions dealing with the interpretation of EU law[67] and/or validity of EU measures[68] – and when defining the scope of the EU liability and remedy regime as a whole (see also discussion below (*EU liability in the absence of unlawfulness*)).[69]

According to established case law, the EU can be held liable if there is a sufficiently serious breach of law of a rule conferring rights on individuals, and a causal link between the EU conduct and the damage.[70] In principle, the EU Courts take general principles of EU law into account when assessing Community conduct in the context of compensation actions.[71] Even where they denied a right to compensation because of the lack of a 'sufficiently serious breach', the Courts acknowledged that breaches of general principles could constitute in principle the basis for compensation.[72] In *Vereniging van Exporteurs*, the GC explicitly recognized the principles of proportionality, misuse of powers, equal treatment, the protection of legitimate expectations,

[63] According to art 19 TEU, the EU Courts have to ensure that in the interpretation and application of the Treaties the law is observed.

[64] See art 263(1) TFEU.

[65] See art 267(1) TFEU.

[66] See art 268 TFEU; *above* n 29.

[67] See for discussion of general principles serving as aid to interpretation Tridimas (n 53) 29 ff.

[68] See for discussion of general principles being invoked as grounds of review under [now] arts 263 and 267 TFEU, Tridimas (n 53) 31 ff.

[69] See for a more detailed discussion of the impact of general principles on EU liability Thies (n 48) 889–913.

[70] See e.g. C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm* (n 57), paras 41–43.

[71] Compare discussion of Tridimas (n 53) 477 ff; A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, Oxford University Press, Oxford, 2007) 391 ff.

[72] See e.g for the principle of non-discrimination Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL* [1978] ECR 1209, paras 5, 6; the right to property, the principles of non-discrimination, of equality, and of proportionality, Case 281/84, *Zuckerfabrik Bedburg* [1987] ECR 49; the principles of legal certainty and legitimate expectations, Case 74/74, *CNTA v Commission* [1975] CR 533; the misuse of powers, C-119/88, *AERPO v Commission* [1990] ECR I-2189.

and the right to be heard as being 'for the protection of individuals'.[73] Even though the ECJ has since replaced the requirement of invoked EU law being for the 'protection of individuals' with the current condition of 'conferring rights', the requirements have remained the same.[74]

In *FIAMM*, applicants relied on EU unwritten general principles that are recognized as fundamental rights under EU law and make part of the now legally binding Charter of Fundamental Rights, such as the right to property,[75] or that are at least in the interest of individuals, such as the principles of equality, proportionality, or legitimate expectations.[76] The GC, however, assessed neither the scope of protection of the principles invoked by the applicants, nor their alleged breaches. Instead, the GC ended its legality review with the denial of direct effect of WTO law by stating that the applicants' complaints 'based on breach of the principles of the protection of legitimate expectations and of legal certainty, on infringement of the right to property and to pursuit of an economic activity and, finally, on failure to observe the principle of proper administration *all rest on the premiss that the conduct of which the defendant institutions are accused is contrary to WTO rules*' (emphasis added).[77] The overall applicability of general principles of EU law was thus denied by the GC because of the consequences the enforcement of those principles would have for the EU's international trade relations, i.e. the potential need for the Court to find the contested EU legislation to be unlawful despite the EU's option to accept retaliatory measures on the basis of the DSU of the WTO.

[73] T-481/93 and 484/93, *Vereniging van Exporteurs v Commission* [1995] ECR II-2941, paras 102 ff, with reference to further case law dealing with those principles.

[74] Tridimas (n 53) 35, 488 ff. This replacement took place in C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm* (n 57), where the ECJ replaced the *Schöppenstedt* formula (Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, para 11) in order to harmonize the conditions of state and EU liability.

[75] See e.g. art 16 of the Charter of Fundamental Rights of the EU, according to which '[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognised', art 17(1), which states that '[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss', and art 47 that states that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.

[76] K Lenaerts, P Van Nuffel and R Bray, *Constitutional Law of the European Union* (2nd edn, Thomson and Sweet & Maxwell, London, 2005) 711 ff. See also C-120 and 121/06, *FIAMM et al.* (n 28), para 182.

[77] T-69/00, *FIAMM* (n 42), para 146; with regard to the principle of proportionality see T-383/00, *Beamglow* (n 42), para 162; with regard to the principle of non-discrimination see T-151/00, *Le Laboratoire du Bain* (n 42), para 137, T-301/00, *Fremaux* (n 42), para 137, and T-320/00, *Cartondruck* (n 42), para 142.

The conclusion reached by the GC, however, does not represent the ECJ's general approach where EU conduct has an external dimension. In *Intertanko*, the ECJ assessed the effect of provisions of international agreements on the lawfulness of an EU measure independently of the implications of general principles of EU law. The ECJ assessed the lawfulness of the contested EU directive in the light of the principle of legal certainty, and its specific expression in the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), after having denied the direct effect of the United Nations Convention on the Law of the Sea (UNCLOS).[78]

In *Kadi*, Advocate General Maduro denied in his Opinion the 'supra-constitutional status' of measures implementing Security Council resolutions and thus any 'immunity from judicial review' before the EU Courts.[79] The ECJ followed Maduro's suggestion in its decision, set aside the GC's judgment and annulled the Regulation in question – insofar as it concerned the applicant – identifying breaches of the rights to be heard, to judicial review and to property.[80] The Court held that reviewing EU conduct in the light of fundamental rights 'must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty [now replaced by the TEU and the TFEU] as an autonomous legal system which is not to be prejudiced by an international agreement'.[81] Moreover, the EU judicature must 'ensure the review, in principle the full review, of the lawfulness of all Community [now EU] acts in the light of fundamental rights forming an integral part of the general principles of Community [now EU] law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.[82] It was only with regard to the *scope* of protection of the pertinent fundamental rights that the ECJ acknowledged the necessity to implement Security Council resolutions efficiently by stating that 'the importance of the aims pursued … is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights'.[83]

[78] See C-308/06, *Intertanko* [2008] ECR I-4057, paras 69 ff.

[79] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, Opinion of AG Maduro, paras 28, 40.

[80] Joined Cases C-402/05 P and C-415/05 P, *Kadi et al.* (n 79), paras 348 ff.

[81] Ibid para 316.

[82] Ibid paras 326, 281 ff.

[83] Ibid para 361.

Given that the applicants in *FIAMM* had not challenged the GC's conclusion, the ECJ was not required to address on appeal the question of applicability and scope of general principles in the context of EU liability for unlawful conduct. Yet, the Court concluded its findings on a liability principle in the absence of unlawfulness (see also section *EU liability in the absence of unlawfulness* below), holding that

> as [EU] law currently stands, no liability regime exists under which the [EU] can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the [EU] courts.[84]

This conclusion could be interpreted as excluding any availability of EU remedies with regard to EU conduct in the context of international trade disputes, unless the 'also relevant' WTO law provisions are directly effective. Yet, the ECJ's subsequent remarks in what could be called a form of an *obiter dictum*[85] seem to reiterate the independent applicability of EU general principles, more specifically fundamental rights, being merely shaped in their actual scope of protection by the international context of the contested EU conduct: After having held that the GC erred in law when acknowledging the existence of a liability principle in the absence of unlawfulness, the ECJ stated that '[h]owever, two further points should be made'.[86] First, the Court referred to the discretion of the EU legislature to provide certain forms of compensation for harmful effects of legislation.[87] Second, the Court emphasized that 'it is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures'[88] before turning to remarks – not being relevant for the ECJ's decision – on the actual scope of the rights to property and to pursue a trade or profession. In that context, the Court restated that those rights were not absolute but had to be viewed in relation to their social function; they could be restricted in the light of the objectives of general interest pursued by the EU in the context of a common organization of the market.[89]

The ECJ continued its conclusions on the implications of EU fundamental rights in *FIAMM* by recognizing that different aspects of EU conduct might need to be distinguished in the context of international trade disputes

[84] C-120 and 121/06, *FIAMM et al.* (n 28), para 176.
[85] Ibid paras 180 ff.
[86] Ibid para 180.
[87] Ibid para 181.
[88] Ibid para 182.
[89] Ibid paras 183, 186.

in order to assess possible infringement of rights, or other general principles in the interest of individuals; shifting the attention away from the legislative action found to be non-compliant with the EU's international WTO law obligations to potential obligations of EU institutions under the EU's own constitutional order, the Court stated that

> [i]t follows that a [EU] legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, *perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment*, could give rise to non-contractual liability on the part of the [EU].[90] (emphasis added)

Even though that observation did not affect the outcome of the compensation action in question, the ECJ thereby seems to have left open in principle the possibility to claim compensation due to a potential failure of the EU institutions to comply with an EU law obligation to complement legislative activity with an external dimension by a provision of compensation (within the EU). Yet, it shall be added that the ECJ has already provided some reasoning, which denies the ability of economic operators to 'claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risk of changing circumstances'.[91] The Court also held that 'the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity'.[92] Highlighting the external or WTO law dimension of the *FIAMM* case, the ECJ stated that

> An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time *may be affected and altered by various circumstances and that those circumstances include the possibility, which is moreover expressly envisaged and governed by Article 22 of the DSU, that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO* and will for this

[90] Ibid para 184.

[91] Ibid para 185, with reference to C-280/93, *Germany v Council* (n 34), para 79, and C-295/03 P, *Alessandrini and Others v Commission* [2005] ECR I-5673, para 88.

[92] Ibid para 185, with reference to Case 4/73, *Nold v Commission* [1974] ECR 491, para 14.

> purpose select in its discretion, as follows from Article 22(3)(a) and (f) of the DSU, the goods to be subject to those measures. (emphasis added)[93]

Interestingly, the ECJ thus referred to previous case law on the consequences of EU economic policy decisions for individual traders' activities, without taking account of the specificity of the context of international trade disputes, namely that the changes of the traders' business situations were triggered by a conscious continuation of an established WTO law breach by the EU. Without referring to the situation of a breach of WTO law being established by the DSB, the Court referred to such breach as a 'stance taken' within the WTO, to which other WTO members can react with retaliation. The Court recognized a maintained discretion of the EU institutions under the WTO regime, the exercise of which can lead to justifiable interferences with the legal position of individuals under EU law. More specifically, the ECJ relied on the temporarily available option under the DSU to accept retaliation – which does not end the EU's WTO infringement and the need to bring EU legislation back into compliance with WTO law[94] – to conclude that the scope of the EU rights to property and the freedom to pursue a trade was diminished. While the ECJ largely refrained from recognizing direct effect of (substantive) WTO law (for the benefit of individuals) in order to maintain institutional flexibility, it is exactly through the recognition of this flexibility that the ECJ has accommodated (procedural) WTO law, which ultimately shapes the scope of EU individual rights in the context of international trade disputes.

The ECJ did not make any reference to the other rights and principles for the protection of individuals that retaliation victims had invoked before the GC, namely the right to non-discrimination, legitimate expectations and proportionality. It is claimed here that the actual scope of those principles can only be assessed for each individual case that might be brought by retaliation victims before the ECJ in the future. In principle, it might be difficult to argue that political statements given to other WTO members and concerning the EU's intention to comply with DSB ruling can be regarded as 'assurances' given to retaliation victims that could trigger legitimate expectations that retaliatory measures will be prevented.[95] Moreover, the enforcement of such political statement by the ECJ could oblige the EU institutions to comply with its WTO law obligations, which

[93] Ibid para 186.

[94] Art 22(8) DSU; Eeckhout, 'The Domestic Legal Status of the WTO Agreement' (n 33) 55; Advocate General Alber in his Opinion in C-93/02 P, *Biret* (n 36), para 88; Thies (n 49) 1672; M Bronckers in Kuijper and Bronckers, 'WTO Law in the European Court of Justice', 1342 ff.

[95] See e.g. C-104/97 P, *Atlanta v European Community* [1999] ECR I-6983, para 55.

would undermine the political flexibility established in the EU courts' case law on the effect of WTO law.[96] This would not only be an issue in the context of annulment actions before the EU courts but also most likely lead to the EU courts' conclusion that the international flexibility and 'discretion' prevents a breach of WTO law from being considered 'sufficiently serious' to justify a right to compensation.[97]

It is suggested here, however, that the EU principle of equality might be affected where retaliatory measures against an identifiable group of individuals, which result from a continuous breach of international law, are tolerated in the general interest without the provision of EU internal compensation.[98] While it is the other WTO member's discretion to decide on the products to be affected by retaliation, it is foreseeable for the EU that some of its traders will be affected once the WTO breach is upheld. The GC has therefore recognized the existence of a causal link between the EU conduct and the damage occurring because of retaliation imposed by other WTO members, which is a necessary criterion when claiming compensation from the EU.[99] Once an obligation to provide internal compensation were to be recognized for certain cases in principle, the causal link between an omission to do so and the occurrence of damage would be even more obvious. In procedural terms, it might become necessary for retaliation victims to bring an action for a failure to act first in order to oblige the EU institutions to provide such compensation, rather than bringing a compensation action before the GC.[100]

In sum, it can be inferred from the above case-law analysis that the GC's denial to review EU conduct in the context of international trade disputes against the benchmark of EU general principles does not indicate an

[96] See above section on 'WTO law and rulings as a source of rights and remedies before the EU Courts'.

[97] See for a discussion of EU discretion being shaped also by international law, Thies (n 13) 64 ff, and 112 ff.

[98] See also art 1 of Protocol 12 of the ECHR, according to which the EU might be obliged to redistribute the costs of an international trade dispute in a similar way to the exercise of discretionary power when granting subsidies; see for a discussion of this art, Tridimas (n 53) 73 ff.

[99] According to the GC, '[t]he unilateral decision by [the other WTO member] to impose increased customs duty on imports … originating in the [EU] is not … such as to break the causal link that exists between the damage which the imposition of that increased duty caused to the applicants and the defendants' retention of the banana import regime at issue. … [The conduct of the EU institutions] must be regarded as the immediate cause of the damage suffered', T-69/00, *FIAMM* (n 42), paras 184 and 185. On appeal, the ECJ was not required to address the issue after having denied the basis for any right to compensation in the present context, see C-120 and 121/06, *FIAMM et al.* (n 28), para 190. See for more detailed discussion of the causal link in this context Thies (n 13) 121 ff.

[100] Art 265 TFEU.

alarming development, given that the ECJ has continuously recognized their applicability with regard to the review of any EU conduct. In principle, the rule of law requires compliance with EU law also where EU conduct has an external dimension.[101] At the same time, it has become clear from the case law that both the EU's or Member States' *international obligations* (as in *Kadi*) and the EU's *discretion under international law* (as in *FIAMM*) can have implications for the ultimately enforceable scope of rights and remedies before the EU Courts. In the light of this conclusion of the ECJ in *FIAMM*, it is suggested that the EU conduct's external dimension, or global context, might indeed justify a limited scope of protection of fundamental rights and (other) general principles of EU law where their full enforcement would limit the institutions' scope for manoeuvre within the WTO legal regime. In particular, where the enforcement of the protection under EU general principles would *de facto* lead to the enforcement of WTO law, the established denial of direct effect of WTO law – which the EU Courts have justified on the basis of the EU institutions' flexibility and negotiating power as a member of the WTO[102] – would be undermined. As a consequence, those remedies that would lead to the annulment of contested EU legislation on the basis of EU general principles would need to be limited, while compensation actions could be considered differently.

EU liability in the absence of unlawfulness

The applicants' claim in *FIAMM* for compensation because of the severe and disproportionate consequences of the EU conduct in question, rather than its unlawfulness, remained unsuccessful in the proceedings before the GC and the ECJ. The GC acknowledged in principle the EU liability principle in the absence of unlawfulness where an 'unusual' and 'special' damage was caused by EC conduct, but denied the applicants' right to compensation, as retaliation was 'among the vicissitudes inherent in the current system of international trade'.[103] Despite the appellants' challenging the GC's conclusion in this respect, on appeal the ECJ did not need to examine its validity after having denied the existence of a liability principle in the absence of unlawfulness under present EU law altogether.[104] While

[101] Joined Cases C-402/05 P and C-415/05 P, *Kadi et al.* (n 79), para 283; Compare A Reinisch, 'Entschädigung für die unbeteiligten "Opfer" des Hormon- und Bananenstreites' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 42–51, 44.

[102] See above section *WTO membership, international trade disputes triggered by the EU and their consequences*.

[103] T-69/00, *FIAMM* (n 42), paras 157 ff, 205, 211.

[104] C-120 and 121/06, *FIAMM et al.* (n 28), para 179. See for a critique of this decision and the principle's potential role in the context of international trade disputes Thies (n 13) ch 5.

there is little hope that the ECJ might recognize implications of the principle in the context of international trade disputes in the future, it shall only be mentioned that the ECJ has recently left open again whether or not the EU liability principle in absence of unlawfulness were to be recognized in principle.[105] In any case, it is difficult to imagine that the reach of the WTO law context will affect the one of such EU constitutional law principle that focuses on the EU internal distribution of costs caused by EU conduct.

Conclusion

Eckes has questioned in this issue how 'domestic courts should deal with measures adopted in global governance that are irreconcilable with domestic legal standards' and highlighted the need to 'protect the rights of individuals' while avoiding to 'undermin[e] the functioning of the global net of legal interaction in a complex pluralist world'.[106] Whereas Eckes' analysis concerned a potential clash between 'lawful' global measures and domestic standards, the present paper has focused on the implications of EU conduct in *breach* of WTO law for rights and remedies of individuals. More specifically, this paper has analysed the way in which the ECJ – in its capacity as constitutional court of the multi-layered EU in a pluralist legal context – has accommodated WTO and EU law in actions brought by individual traders affected by the consequences of international trade disputes triggered by the EU. It has thereby taken account of the alleged parallel interference with domestic legal standards for the protection of individuals' rights as well as the fact that the international legal order at stake, more specifically the WTO DSU, does not prevent contracting parties from continuing a breach of WTO law while accepting retaliation.

The WTO legal order does not per se add rights and remedies for natural or legal persons to the EU's legal order. At first sight, the negative outcome of compensation actions brought by *FIAMM* and *Fedon* makes one wonder whether the EU's membership of the WTO even decreases the level of effective judicial protection available under the EU's own legal order, possibly enabling the EU institutions, and thus the EU as a whole, to escape domestic accountability by claiming international trade disputes and their consequences to be purely a matter of international law and

[105] C-414/08 P, *Sviluppo Italia Basilicata SpA* [2010] ECR I-2559, para 141. See M Gellermann, 'Art. 340 AEUV', para 25, in R Streinz, *EUV/AEUV* (2nd edn, CH Beck, Munich, 2012), 2661–79, 2670.

[106] C Eckes, 'Individuals in a pluralist world: The implications of counterterrorist sanctions', (2013) 2(2)*Global Constitutionalism* Special Issue, p 219.

political discretion. However, the ECJ has indicated in its decisions that fundamental rights and (other) general principles of EU law might well justify an entitlement to compensation in the context of international trade disputes, thereby leaving the door open for future cases. More specifically, it could be the omission of EU institutions to provide compensation at the EU level to those affected by retaliation – imposed by other WTO members and tolerated or accepted by the EU in order to uphold the WTO law infringement in the general interest of the EU – which might be in breach of fundamental rights (e.g. the right to non-discrimination) and therefore justify a right to compensation.[107]

Hence, one can hope that the EU legal order itself continues to provide a complete system of rights and remedies for those affected by international trade disputes, which are triggered and prolonged by the EU institutions arguably in the general interest of the EU. Retaliation victims can in principle enforce the EU's catalogue of fundamental rights, including the right to property and effective judicial protection, and general principles in the interest of individuals, such as the principle of non-discrimination, before the EU Courts. The now legally binding Charter of Fundamental Rights, the future accession of the EU to the ECHR and the ECJ's case law on the principle of effective judicial protection[108] should assist in strengthening the position of individuals and possibly necessitate reconsidering the basis for EU accountability altogether, even where EU conduct were to be primarily concerned with the EU's external relations and only collaterally or indirectly affects individuals within the EU legal order.

Even if the legal implications of the EU being bound by WTO law are limited in principle to its relationship with other WTO members and cases before the WTO Dispute Settlement Body, the EU Courts will be expected to apply rights and ensure judicial protection under EU law, not only where Member State but also where EU conduct is challenged. The standing of individuals before the EU Courts should not in principle be affected by the fact that the challenged EU conduct is also relevant to, or regulated by, the WTO legal order. It is suggested, however, that the impact of political discretion under the WTO legal order and the level of general interest claimed by the EU institutions exercising this discretion will continue to define or shape the actual scope of the rights and remedies in question. As a consequence, the EU's discretion under the DSU to accept retaliation might exclude the existence of a 'sufficiently serious breach'

[107] See (n 100) for the possible necessity to bring an action under art 265 TFEU.

[108] A Arnull, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) 36(1) *European Law Review* 51–70.

of WTO law (as integral part of EU law) that needs to be shown when claiming compensation from the EU on that basis. At the same time, however, the discretion provided under the DSU could hardly have implications for the scope of an EU law obligation to set up a fund (or alike) to balance the costs of international trade disputes in the general interest.

In conclusion, even though the two legal orders remain separate – in the sense that non-compliance with WTO law obligations can in principle not be relied on before EU Courts – they are intertwined to an extent that the scope for manoeuvre of the EU's political institutions is enlarged because of the 'global stage' established by the WTO agreements, which enables the EU to justify limitations to its domestic system of accountability. Yet, with regard to the EU's liability in the context of international trade disputes and retaliation, it is submitted that the EU Courts will need to provide a detailed legal reasoning or justification in each individual case, and address the issue of whether or not the temporary acceptance of retaliation, as well as the acceptance of its consequences without providing internal compensation, is in the general interest, and whether the thereby caused constraints of retaliation victims constitutes a proportionate and tolerable interference.[109] On the basis of the ECJ's decision in *FIAMM*, it is highlighted again that the entitlement to compensation of retaliation victims might find its basis not in the non-compliance with WTO law but in the EU's omission to establish internal compensation mechanisms where a WTO law breach is upheld in the EU's general interest, if the omission 'constitute[s], with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.[110]

[109] For arguments brought forward by the applicants see e.g. T-69/00, *FIAMM* (n 42), para 94, and T-320/00, *Cartondruck* (n 42), para 89 (impairment of the rights' substance through retaliation); T-383/00, *Beamglow* (n 42), paras 103 ff (EU's possibilities to avoid damage/paying costs for EU ignoring international obligations). For arguments brought forward by the defendant institutions see e.g. T-320/00, *Cartondruck* (n 42), para 93, and T-383/00, *Beamglow* (n 42), para 112 (no EU interference, merely US suspension of concessions); T-320/00, *Cartondruck* (n 42), para 94, and T-69/00, *FIAMM* (n 42), para 98 (not close to expropriation/impairing substance of right, if interference/necessity to modify business planning justified by market interests).

[110] C-120 and 121/06, *FIAMM et al.* (n 28), para 183, with reference to Case 265/87, *Schräder HS Kraftfutter* [1989] ECR 2237, para 15; C-280/93, *Germany v Council* (n 34), para 78; C-295/03 P, *Alessandrini* (n 91), para 86.