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Kristiyan Evgeniev Stoyanov

Enforcement of the Law of the World Trade Organization in the EU and the US: Is the EU the *odd* one?

Abstract

WTO law does not determine whether the WTO Agreements or the Panel and Appellate Body Reports after their adoption by the DSB generate direct effect. A Swiss proposal to make direct effect a *condition sine qua non* of WTO membership was rejected in the Uruguay Round. As a consequence, WTO Member States rely on domestic constitutional arrangements to decide the extent of direct effect.

The US Congress enacted the Uruguay Round Agreements Act 1994 which precludes claimants from directing enforcing WTO law in US courts. Within the EU, CJEU bars claimants from contesting the validity of EU measures vis-à-vis the WTO Agreements and DSB rulings.

This thesis examines the enforcement of WTO law in the EU and the US in order to determine if the EU is the *odd* one. First, it is examined if the CJEU gave valid arguments to rule out direct effect of WTO law. The answer is that while some points of analysis of the CJEU were flawed, the Luxembourg Court gave overall valid reasons to not allow the WTO Agreements and DSB rulings to be used as a parameter of legality of EU law. Second, despite the generally negative attitude towards WTO law by the CJEU, the judiciary has recognised that WTO law can have indirect effect. On the other side of the Atlantic, the *Charming Betsy* canon requires courts to interpret US law in light of US international obligations. After considering the cases relating to indirect effect of WTO law in the EU and the US it is argued that the EU gives stronger deference to WTO law through the doctrine of indirect effect. Based on this, it is argued that the EU is not the *odd* one.

Enforcement of the Law of the World Trade Organization in the EU and the US: Is the EU the *odd* one?

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Submission for the degree of Master of Jurisprudence

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2019

‘No legal regime is isolated from general international law’ – International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Doc. A/CN.4/L.682, April 13th 2006, para. 193

‘We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts’ – Chief Justice Warren E. Burger in the *Bremen et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), at 9

Table of Contents

List of Abbreviations --- page 4

Publications --- page 6

Statement of Copyright --- page 7

Acknowledgments --- page 8

Chapter 1) Setting the scene --- page 11

1.1) Background --- page 11

1.2) Choice of legal systems --- page 13

1.3) Level of comparison --- page 14

1.4) Method --- page 15

1.5) Disclaimers --- page 17

1.6) Structure --- page 19

Chapter 2) International (trade) law in the EU and the US --- page 20

2.1) Introduction --- page 20

2.2) Institutional set-up --- page 21

2.2.1) Concepts --- page 21

a) Direct effect --- page 21

b) Indirect effect --- page 22

2.2.2) WTO law as a binding international law obligation --- page 23

2.3) International agreements and their effect --- page 25

2.3.1) EU --- page 25

2.3.2) US --- page 27

2.4) In search of a reason for precluding direct effect --- page 30

2.4.1) EU --- page 30

2.4.2) US --- page 32

2.4.2.1) Does URAA provide an adequate protection to US sovereignty? --- page 38

a) Federal law --- page 38

b) State law --- page 41

2.5) Conclusion --- page 43

Chapter 3) Absence of Direct Effect of WTO Law: A Justifiable Response? --- page 45

3.1) Introduction --- page 45

3.2) WTO law and enforcement --- page 45

3.3) Direct effect and Article 22 of the DSU --- page 50

3.4) Substantive reciprocity --- page 52

3.5) In defence of the CJEU's decision to preclude direct effect --- page 53

3.6) Conclusion --- page 61

Chapter 4) Indirect Effect of WTO law in the EU and the US --- page 63

4.1) Introduction --- page 63

4.2) Consistent interpretation of WTO law --- page 64

4.2.1) EU --- page 64

4.2.1.1) Limitations --- page 68

a) Limitation 1 --- page 68

b) Limitation 2 --- page 70

c) Limitation 3 --- page 75

4.2.2) US --- page 76

4.2.2.1) *Charming Betsy* and the URAA --- page 77

4.2.2.2) WTO law pre-implementation --- page 82

4.2.2.3) The position of the NAFTA panels: much ado about nothing? --- page 87

4.2.2.4) Post-implementation --- page 89

4.2.2.5) *Charming Betsy* to state law? --- page 91

4.3) Further exceptions in the EU: any added value? --- page 93

4.3.1) *Fediol* --- page 94

4.3.2) *Nakajima* --- page 96

4.3.2.1 Unjustifiably narrow view on *Nakajima*? --- page 98

4.3.2.2 *Nakajima*: from *LVP* to *Clark* --- page 102

4.4) Conclusion --- page 107

5) Conclusion --- page 110

Bibliography --- page 113

List of Abbreviations

General

AD – Anti-Dumping

ADA – Anti-Dumping Agreement

AG – Advocate General

Art – article

ATBT – Agreement on Technical Barriers to Trade

CB – Charming Betsy

CAFC – Court of Appeals for the Federal Circuit

cf. – confer, compare

ch. – chapter

CoJ – Court of Justice

CJEU – Court of Justice of the European Union

cl. – clause

CVDs – Countervailing duties

DSB – Dispute Settlement Body

DSS – Dispute Settlement System

DSU – Dispute Settlement Understanding

e.g. – exempli gratia, for example

EC – European Community

ed(s) – edition, editor(s)

EFTA – European Free Trade Association

EP – European Parliament

EPA – Environmental Protection Agency

et al. – et alii, and others

etc. – et cetera, and so forth

EU – European Union

GATS

GATT

GC – General Court

ibid – ibidem, in the same location

ICJ – International Court of Justice

IP – intellectual property

MFN – most-favoured-nation

MS – Member State

NCPI – New Commercial Policy Instrument

PCIJ – Permanent Court of International Justice

Reg – Regulation

S – section

SAS – Statement of Administrative Action

Sec – section

para – paragraph

SPS – Sanitary and Phytosanitary Measures

TRIPs – Trade-Related Aspects of Intellectual Property Rights

US – United States

USA – United States of America

URAA – Uruguay Round Agreements Act

USTR – United States Trade Representative

USTR – United States Trade Representative

USMCA – United States–Mexico–Canada Agreement

V – *versus*, against

VCLT 1969 – Vienna Convention on the Law of Treaties 1969

Publications

AJIL – American Journal of International Law

AmUIntlLRev – American University International Law Review

ColumJTransnatlL – Columbia Journal of Transnational Law

CUP – Cambridge University Press

DukeJComp&IntlL – Duke Journal of Comparative & International Law

EJIL – European Journal of International Law

ELJ – European Law Journal

EPL – European Public Law

FordhamIntlLJ – Fordham International Law Journal

GaJIntl&CompL – Georgia Journal of International and Comparative Law

ICON – International Journal of Constitutional Law

ILSAJIntl&CompL – ILSA Journal of International & Comparative Law

IntTLR – International Trade Law & Regulation

ItYBIL – Italian Yearbook of International Law

JIEL – Journal of International Economic Law

JWT – Journal of World Trade

MichJIntlL – Michigan Journal of International Law

MichLRev – Michigan Law Review

OUP – Oxford University Press

TulJIntl&CompL – Tulane Journal of International and Comparative Law

VaLRev – Virginia Law Review

WashLRev – Washington Law Review

YaleJIntlL – Yale Journal of International Law

Statement of Copyright

The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

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Enforcement of the Law of the World Trade Organization in the EU and the US: Is the EU the *odd* one?

Chapter 1) Setting the scene

1.1) Background

After the defeat of the Third Reich in 1945, a number of countries started negotiating, ratifying and implementing different multilateral Treaties with the aim to promote multilateral economic cooperation and liberalisation. Although 56 nations signed the Havana Charter,[1] the refusal of the United States Congress to ratify the treaty put an end to all ambitions to create the International Trade Organization.[2] However, on the 30th of October 1947, 23 countries officially ratified the General Agreement on Tariffs and Trade.[3] Ever since then, numerous geopolitical, economic and cultural changes on the world arena have spurred nations into free trade[4] and in current times of writing there are 302 Regional Trade Agreements in force.[5]

The question whether the WTO Agreements can be enforced in the legal order of their contracting parties ignited a fierce debate. According to the principle of Westphalian sovereignty, each nation has sovereignty over its territory. As a result, nations can establish and join international organisations on their free will, while an international agreement may have direct effect if only this was the contracting parties' intention.[6] Unlike in the European Union (EU) where all Member States (MS) have to accept supremacy of EU law over national law[7] the Members of the WTO have never been under such obligations. To this end, the WTO Agreements are silent on whether their state parties should accord them direct effect. This raised one especially important question – is it possible to enforce the law of the WTO at national level?

[1] Havana Charter for an International Trade Organisation (24 March 1948) UN Doc E/C.2/78.
[2] Daniel Drache, 'The Short but Significant Life of the International Trade Organization: Lessons for Our Time', CSGR Working Paper No. 62/00 November 2000, page 2.
[3] General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 187 [hereinafter GATT 1947]. The World Trade Organization [hereinafter WTO] was established as the successor to the GATT and came into being on 01/01/1995. See: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].
[4] For an overview of international trade institutions evolution see John Linarelli, 'How trade law changed: why it should change again' (2014) 65(3) Mercer law review 621, pages 624 – 659.
[5] Regional trade agreements: facts and figures at <https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts> accessed 12/10/2019.
[6] *Jurisdiction of the Courts of Danzig Advisory Opinion* [1928] PCIJ, (Ser. B), No. 15 (hereinafter *Danzig*).
[7] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

To answer to this question, the United States (US) Congress passed the Uruguay Round Agreements Act,[8] which precluded the direct effect of WTO substantive law[9] and DSB rulings.[10] As for the EU, the Court of Justice of the European Union (CJEU) ruled out direct effect of the WTO Agreements in *Portuguese Textiles* in 1999.[11] In subsequent cases, claimant tried to argue before the CJEU that DSB rulings should not follow the same reasoning. However, the doors to give any sort of direct effect to decisions of the WTO's quasi-judicial body were closed by the CJEU in *Van Parys*[12] and *FIAMM*.[13]

The aim of this thesis is to consider if the EU is the *odd* one. To answer this question, I am going to examine two main sub-research questions. First, I will look at the reasons that the EU gave to preclude direct effect of WTO law and determine if they can be justified. Second, as both the EU and the US recognise some forms of indirect effect, I will then consider which of the two jurisdictions has been more forthcoming in relying on WTO law in their interpretation of domestic law.

By WTO law, I will refer to the WTO Marrakesh Agreement, its annexes and the Agreements included therein, and decisions of the Dispute Settlement Body (DSB). The relationship between these agreements is stipulated in Article II of the WTO Marrakesh Agreement and states that:

> 2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 … are integral parts of this Agreement, binding on all Members.
>
> 3. The agreements and associated legal instruments included in Annex 4 … are also part of this Agreement for those Members that have accepted them, and are binding on those Members.[14]

---

[8] Uruguay Round Agreements Act on December 8, 1994. Pub. L. No. 103-465, 108 Stat. 4813 (1994) [hereinafter URAA].
[9] Uruguay Round Agreements Act, Pub. L. No. 103–465, 109 Stat. 4809 (1994) (codified at 19 USC SS 3501–3624 (1994), section 102.
[10] URAA, section 123.
[11] Case C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I-8395, paras 40 – 52 [hereinafter *Portuguese Textiles*].
[12] Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465, paras 51 – 53 [hereinafter *Van Parys*].
[13] Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) en Giorgio Fedon & Figli SpA, Fedon America, Inc. v. Council of the European Union and Commission of the European Communities* [2008] ECR I-06513, paras 117 – 127 [hereinafter *FIAMM*].
[14] Emphasis added.

The Appellate Body (AB) stated that the WTO Agreement and its 4 main Annexes form a 'single undertaking'[15] and that they form 'an inseparable package of rights and disciplines which have to be considered in conjunction'.[16] Although there are some other important sources of WTO law such as general principles of law and customary international law (CIL), the Agreements are the pedigree of the Organization.[17] Scholars usually refer to the WTO Marrakesh Agreement and its annexes as the 'WTO agreements' and so this paper is not going to deviate from this well-known expression. The main purpose of the WTO panels and the AB is to clarify and interpret WTO substantive law. Those findings become binding when they have been adopted by the Dispute Settlement Body[18] and according to Art. 21.1 of the Dispute Settlement Understanding [hereinafter DSU] '[p]rompt compliance with recommendations or rulings of the DSB [hereinafter DSB ruling or DSB decision] is essential'.[19] When I refer to a DSB ruling, I will expressly specify so.

This chapter sets the scene of the thesis. It will first demonstrate why I chose to consider these two WTO members, the level of comparison, method and then I will explain what is beyond the scope of this thesis. Chapter 1.6 will present a mind map for chapters 2 – 5 and provide an answer to the set research question.

1.2) Choice of legal systems

The well-known juxtaposition among comparative lawyers between apples and oranges holds that countries in which the laws are too different or too similar should not be compared.[20] This possesses the following question: why compare the enforcement of WTO law in the US and the EU? Firstly, the legal effect of WTO law in those two jurisdictions is broadly similar because both deny direct effect but allow indirect effect. Even if other large trading nations such as Canada or Japan were included, the analysis would still remain EU-/US-centred. The obligations that Canada assumed under WTO law

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[15] Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, (21 February 1997), page 18.

[16] Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (25 November 1997) WT/DS56/AB/R as cited in Petros C. Mavroidis, *The Regulation of International Trade: The WTO Agreements on Trade in Goods* (vol. 2 The MIT Press 2016), page 328.

[17] For an excellent explanation of other sources of WTO law see: Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization Text, Cases and Materials* (4th edition, CUP 2017), pages 54 – 64.

[18] The process — Stages in a typical WTO dispute settlement case, 6.4 Adoption of panel reports at < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm> accessed 18/08/2019.

[19] Emphasis added.

[20] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Fourth Edition, OUP 2011), page 45.

appear very similar to the US.[21] Many academics argued that the WTO Agreements have no direct effect in Japan on the basis of several pre-1994 court decisions. Yet, there has been no confirmation by the judicial or legislative branch whether such analogy is correct and the legal effect of WTO law in Japan is not fully clear.[22] Secondly, papers that involve some form of comparative analysis should have institutions that fulfil similar functions and be functionally equivalent.[23] In this respect, while the institutional structure of the EU and the US is not the same, it is not so different. Next, many economists consider the US and the EU to be two of the largest three trade blocs in the world[24] and the present thesis will allow us to look in detail the reasons that they put forward to deny direct effect of WTO law. While this paper does not aim to examine all alleged flaws of the WTO, it will demonstrate why these two WTO members were reluctant to grant direct effect. As ambitious as it may sound, a comparison from this scale may be of interest for aspiring WTO members or nations that have not yet decided whether to allow direct effect or not. Finally, on a purely practical level, the author has access to a variety of sources on US law and EU law and is already familiar with these two legal systems.[25]

1.3) Level of comparison

Studies that involve some form of comparative analysis can be undertaken from either macro or micro perspective. As the name suggests, the former constitutes a more grandiose project and usually requires the comparatist to examine legal systems, legal

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[21] The WTO Agreements were implemented into Canadian law by the World Trade Organization Agreement Implementation Act S.C. 1994, which under Chapter 47, Part I, Sections 5 and 6 precludes private parties from enforcing the WTO agreements as well as Part I of the WTO Implementation Act in a legal dispute without obtaining the prior consent of the Canadian Attorney General. DSB rulings lack direct effect under s. 76, para.1 of the Special Import Measures Act (R.S.C., 1985, c. S-15) (2017, c. 20, s. 90). See Paolo Davide Farah and Giacomo Gattinara, 'WTO Law in the Canadian Legal Order' in Claudio Dordi (eds.) *THE ABSENCE OF DIRECT EFFECT OF WTO IN THE EC AND IN OTHER COUNTRIES* (the Interuniversity Centre on the Law of International Economic Organizations (CIDOIE), Giappicchelli Editore, Turin 2010), pp. 323-330; see also Debra Steger, 'Canadian Implementation of the Agreement Establishing the World Trade Organization' in John H. Jackson and Alan O. Sykes (eds.), *Implementing the Uruguay Round* (Clarendon Press, 1997), pages 243–83.
[22] As decided in *Endo v Japan*, 530 Hanrei Taimuzu 265 (Supreme Court, 36 Shomu Geppo 2242, 1990) Japanese law did not allow direct effect of GATT 1947. See: Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Second Edition, OUP 2006), pages 41 – 43; Yuji Iwasawa, 'Constitutional Problems Involved in Implementing the Uruguay Round in Japan' in John H. Jackson et al., *ibid*., pp. 146, 150–7; Yuji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Clarendon Press, 1998), pages 76 – 77.
[23] Ralf Michael, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006), page 342.
[24] Top Exporters and Importers, 2017, available at <https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/LTST/TradeFlow/EXPIMP/Partner/by-country> accessed 27/01/2019.
[25] Siems lists this as a key reason when determining which countries the comparatist should examine. Mathias Siems, *Comparative Law* (CUP 2014), page 15.

families or legal cultures.[26] By contrast, micro comparison has a narrower scope and under its remit falls *inter alia* analysis of different governmental branches, historical developments,[27] legal rule(s) or legal institution(s).[28] In order to answer the set research question, it will be better to adopt a narrower approach and for this reason the author will proceed with micro comparison.

1.4) Method

A full comparison is not possible in this thesis. While both jurisdictions deny direct effect but allow indirect effect through the principle of consistent interpretation, some exceptions to direct effect that exist in the EU, such as *Nakajima*[29] and *Fediol*,[30] are not present in the US. The so-called borrowed treaty rule in the US remains an academic proposal and is different from *Fediol* and *Nakajima* doctrines.[31] Most importantly, the set research question cannot be answered by conducting a purely comparative analysis. Having said that, some comparison between the two jurisdictions is necessary in order to determine if the EU is the *odd* one. For this reason, the author will take some elements of the comparative functional method without applying it in full.

Like other methods of comparative law,[32] this method has had its supporters[33] and critics.[34] One may also question what the exact definition of functionalism is, since even the well-known work of Zweigert and Kötz[35] which popularised this principle did not provide a workable definition or apply it.[36] The fact that there are many functional methods – rather than one single – and that its boundaries are not pre-determined allows the author to pick and choose those elements that are relevant for this project.[37]

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[26] Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing, 2015), page 102.
[27] Peter de Cruz, *A Modern Approach to Comparative Law* (Kluwer 1993), p. 37.
[28] Such institutions are thought to be courts, administrative organs, legal persons (e.g. private companies limited by shares), etc. See: Jaakko Husa, *Id*.
[29] C-69/89 *Nakajima All Precision Co. Ltd v. Council* [1991] ECR I-2069 [hereafter *Nakajima*].
[30] Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* [1989] ECR -01781 [hereinafter *Fediol*].
[31] see Szilárd Gáspár-Szilágyi, 'The "Direct Effect" of E.U. International Agreements Through a U.S. Lens' (PhD Thesis, Aarhus University 2015), page 409.
[32] For what work may fall under the remit of comparative law and its purpose see Peter de Cruz, *supra* note 27, page 5.
[33] Ralf Michaels, *supra* note 23, page 346.
[34] Jule Mulder, 'New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization' (2017) 18(3) German Law Journal 721.
[35] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr., 3rd edition, OUP 1998), pp. 13 – 47.
[36] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 7 Law and Method 1, page 9.
[37] Ralf Michael, *supra* note 23, page 342.

In order to apply this method, the paper will first describe the effect of WTO law in the legal order of the US and the EU. As a next step, the comparative functional method normally requires from the comparatist to examine and explain similarities and differences. There are different factors that one could potentially examine here and include but not limited to cultural, historical, political, ethical, religious, socio-economic, philosophical, etc.[38] The author will slightly deviate from this structure. The law is similar in the sense that both jurisdictions precluded direct effect of WTO law but permit indirect effect. However, as will be seen below, the reasons that they put forward to preclude direct effect and the effectiveness of indirect effect are not the same. Therefore, to answer the set research question, the author will analyse the reasons that the EU gave to preclude direct effect and then consider which jurisdiction has given stronger effect to indirect effect without seeking for common factors.

Another point of controversy is whether comparative lawyers should conduct policy evaluation and determine which law is 'better'.[39] This element has not been seen as a common characteristic of functionalism by some scholars and in the absence of yardstick it is very difficult to say if the law in country X is 'better' than the law in country Y.[40] However, it is possible to examine if the reasons that the CJEU gave to deny direct effect are justifiable. Similarly, it is also possible to consider in which of the two jurisdictions claimants can make their situation better by relying on indirect effect.

Zweigert and Kötz argue that the political aim behind the unification and harmonisation of the law of legal systems is to eradicate, or reduce, their differences and implement common principles.[41] Older comparatists usually favour such unification, whereas post-modernists tend to be more appreciative of legal culture.[42] To a large extent, the law relating to direct effect of WTO law in these two legal systems has been already unified – i.e. both deny direct effect of WTO law. With regard to indirect effect, it is highly unlikely that in the current political climate the EU or the US will create new avenues for claimants to challenge domestic measures for theirs compatibility with WTO law. However, in Chapter 4 the author will consider the validity of *Nakajima* after the decision of the CJEU in *Clark*,[43] which some authors have considered to abolish the *Nakajima* doctrine. If

[38] Mathias Siems, *supra* note 25, p. 21.
[39] *Ibid.*, page 22.
[40] James Gordley, 'The functional method' in Pier Giuseppe Monateri (eds.), *Methods of Comparative Law* (Edward Elgar, 2015), page 109.
[41] Konrad Zweigert and Hein Kötz, *supra* note 35, page 24.
[42] Jaakkoo Husa, *supra* note 26, page 72.
[43] Joined Cases C-659/13 and C-34/14 *C & J Clark International Ltd v. The Commissioners for Her Majesty's Revenue & Customs* (2016) ECLI:EU:C:2016:74 (hereinafter *Clark*).

answered in the positive, the law in the two legal systems will come close to unification regarding indirect effect. However, full unification would still be impossible because there is nothing to suggest that the *Fediol* doctrine has been overturned.

One of the major difficulties in studies that involve some form of comparative analysis is presented by language barriers and that it is sometimes nearly impossible to translate many legal terms.[44] All judgments and legal documents that the author will use in this thesis were published in English and so there is no language barrier here.[45]

1.5) Disclaimers

There are several disclaimers that I would like to make before I outline the structure of the thesis in sub-chapter 1.6.

1) As stated in chapter 1.1, this thesis will examine direct effect of WTO law. However, I will also make some references to other treaties, such as NAFTA and EFTA, but without aiming to examine their direct effect.
2) Both the EU and its MS have treaty making powers.[46] Some international agreements are binding for MS but not the EU. In the US, the situation is more straightforward because only the federal government is in the position to conclude international agreements.[47] The US is a federation whereas the EU is widely known to be *sui generis*.[48] Nonetheless, the author will refer to the EU as one jurisdiction – the EU is a contracting party (hereinafter CP) to the WTO treaty alongside its MS.
3) The EU and all EU MS are WTO members. Each one of them can be held responsible for non-compliance with WTO law, regardless of division of competences within the EU.[49] Whether an international agreement is classified as a mixed agreement within the European legal order is a matter of EU law, not international law. In the landmark *Opinion 1/94* the CJEU stated that the EU

[44] Roger Cotterrell, ‘Comparative Law and Legal Culture’ in Mathias Reimann (eds.) *supra* note 23, page 722.
[45] For further difficulties in comparative studies between the US Supreme Court and the CJEU see; Gráinne de Búrca, ‘Internalization of international law by the CJEU and the US Supreme Court’ (2015) 13 ICON 987, pages 990 – 991.
[46] Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, (hereinafter TFEU), Article 216(1).
[47] Constitution of the United States [hereinafter US Constitution], Article II, Sec. 2, Cl. 2 and Article I, Sec. 10.
[48] Cf. William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 International Studies Review 367.
[49] Huang Xian Yu, 'The Study of the Conflicts between the European Union (Regional Economies) and the World Trade Organization' 3 International Journal of Social Science and Humanity 206, p 206.

cannot conclude the Uruguay Round Agreements (hereinafter URAs) alone because certain aspects of the Agreements were outside EU's competences or areas where its competences were shared with its MS.[50] Even at present times of writing, under EU treaty law, the EU does not have exclusive competence in all fields that form part of WTO substantive law. For this reason, the WTO treaty is a mixed agreement. Claimants cannot contest the compatibility of an EU measure vis-à-vis WTO law in a Member State's court or before the CJEU if the matter at stake falls in a field in which the EU has exclusive competence or has exercised its legislative competences. However, if the question falls within a field in which an individual MS is competent it may decide whether or not to confer direct effect to the concerned provision. This paper is concerned about the direct effect of WTO law in the EU – those are the fields in which the EU has legislated or has exclusive competence.[51]

4) Almost all important cases regarding direct effect of WTO law were decided prior to the entry of the Treaty of Lisbon.[52] As a matter of convenience, I will use the term European Union (EU) – rather than European Community (EC) – when referring to decisions pre-2009.
5) As will be specified in Chapter 2, the US differentiates between treaties and agreements. This paper will refer to treaties and international agreements between nations and other subjects of international law to have the same status without prejudice to their difference under US law.
6) As the main topic of this thesis is direct effect, the author will briefly look at whether WTO law is binding under international law without aiming to encapsulate the full debate on this topic that exists for over 20 years.
7) Similar to the above point, the paper does not aim to consider all arguments in favour or against direct effect of WTO law because this will not help answering the research question.

[50] *Opinion 1/94 re WTO Agreement* [1994] ECR I-5267.
[51] Case C-337/95 *Parfums Christian Dior SA v Evora BV* [1997] I-06013 [hereinafter *Dior*], para. 48; Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos Lda v. Merck & Co. Inc. (M & Co.) and Merck Sharp & Dohme Lda (MSL)* [2007] ECR I-7001, paragraphs 34 and 47.
[52] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 [Effective since 1/12/2009].

1.6) Structure

This chapter aimed to set the scene for the dissertation. I explained why it I decided to look at the legal effect of WTO law in the EU and the US, outline the level of comparison and stated which elements of the comparative functional method I will use.

The next chapter will start with a discussion on the principles of direct effect and indirect effect, and then make the case that WTO Agreements and DSB rulings are binding for WTO members. In sub-chapter 2.3, I will discuss the effect of international law in the EU and the US. My argument is that it has been difficult to formulate a precise criterion in both jurisdictions as to when an international agreement can have direct effect. Sub-chapter 2.4 examines the legal effect of WTO law in the EU and the US. While the CJEU explicitly said why WTO law cannot have direct effect in the European legal order, the US Congress was not so forthcoming. I claim that the US precluded direct effect of WTO law to protect US sovereignty. My analysis will show that the legislative measure (i.e. the URAA) enacted in response to this concern offers an adequate protection to US federal sovereignty, though individual state sovereignty is vulnerable.

Chapter 3 will critically analyse the reasons that the CJEU gave to preclude direct effect of WTO law. I will make the argument that the EU is not *odd* because the CJEU gave overall valid reasons to bar claimants from using WTO law as a standard of review of EU measures.

In Chapter 4, I will consider which of the two jurisdictions has been more willing to give stronger deference to WTO law through indirect effect. My argument that this was the EU and, on this basis, I will argue that the EU is not the *odd* one. In the penultimate section of chapter 4, I will analyse the effectiveness of *Fediol* and *Nakajima*. I will claim that the CJEU has taken a very narrow view of these doctrines and then criticise the Court for doing so. Some scholars believe that after *Clark* the *Nakajima* doctrine is no longer valid. My argument is that the CJEU did not abolish the doctrine in *Clark* but rather narrowed down its scope.

Chapter 5 concludes.

Chapter 2) International (trade) law in the EU and the US

2.1) Introduction

Without a doubt the Uruguay Round was the largest trade negotiation Round in terms of substantive coverage and participants[1] since the inception of the GATT in 1947.[2] Prior to its enactment, GATT-related disputes were resolved by GATT's rudimentary dispute settlement mechanism which kept much of its original structure for over four decades. Disputes between the US and EU in the 1980s culminated with the reluctance of these two Members to enforce GATT rulings, whilst the inability of the GATT institutions to properly respond weakened the authority of the organisation.[3] In response, the reforms introduced by the Uruguay Round have had a substantial impact on the institutional structure of the WTO. As compared to the old system, the current mechanism for settling disputes is much stricter and – as many commenters observed back in the 1990s – encourages disputes to be resolved by the quasi-judicial institutions in Geneva. The enhanced dispute resolutions system also has many non-strictly legal advantages. WTO members that are perceived as frequent litigators in Geneva raise concerns in the eyes of the international community as to their credibility, global reputation and willingness to abide by WTO rules.[4] However, the internal enforcement of WTO law is a completely different matter and the reforms introduced by the URAs reopened the debate on whether WTO law can have direct effect.

This chapter starts by defining the meaning of direct effect and indirect effect and then makes the case that the WTO Agreements and DSB rulings are binding international law obligations. In sub-chapter 2.3, the author looks at the effect of public international law in the legal order of the EU and the US. While the CJEU gave several reasons to preclude the direct effect of WTO law, the US legislature was not that forthcoming and the URAA is silent on why WTO law cannot be used to review the legality of US law before US courts. Sub-chapter 2.4.2 argues that the direct effect of WTO law was precluded in the US in

[1] At current times of writing, the Doha Round has not been yet completed. The Doha Round, < https://www.wto.org/english/tratop_e/dda_e/dda_e.htm > as accessed on 06/07/2019.

[2] As well summarised by Zhang, the aims for establishing the WTO were '(1) to set and enforce rules for international trade; (2) to provide a forum to negotiate and monitor trade liberalization; (3) to improve policy transparency; (4) and to resolve trade disputes.' See Xin Zhang, 'Implementation of the WTO Agreements: Framework and Reform' (2003) 23 Northwestern Journal of International Law & Business 383, pages 383 – 4.

[3] See: Kendall Stiles, 'Negotiating Institutional Reform: The Uruguay Round, the GATT, and the WTO', (1996) 2 Global Governance 119, pages 121 - 126; Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization, 2013), pages 51 – 54.

[4] Marco Bronckers, 'Private Appeals to WTO Law: An Update' [2008] 42 JWT 245, p. 259.

order to protect US sovereignty. To this end, it is claimed in sub-chapter 2.4.2.1 that the URAA provides an adequate protection to US federal sovereignty, albeit the sovereignty of US individual states remains threatened. After acknowledging the similarities and differences in respect to the direct effect of WTO law in the two jurisdictions in sub-chapter 2.5, the final sub-chapter of this paper concludes.

2.2) Institutional set-up

2.2.1) Concepts

a) Direct effect

In the EU, the principle of direct effect was established in the landmark *van Gend en Loos* (hereinafter *VGL*) ruling.[5] Prior to this case, the relationship between EU law and the national law of the founding six MS was governed by the theories of monism and dualism.[6] In the US, the principle of self-executing treaties dates back to the 18th century.[7] Although each US state has its own constitutional framework, the US Constitution, federal law and treaties concluded by the US have supremacy over state law.[8] To this end, the main point of controversy in the US has been whether international agreements are self-executing and so if they can have direct effect over federal law.

In general, the CJEU has been using the term direct effect to describe the effect of EU law on MS's domestic legal order and so direct effect is linked to the rights of claimants. In the US, the term 'self-execution' was created to describe international agreements which could be enforced in US courts without Congress taking any prior actions. Some argue that in US law 'self-executing' international agreements and 'rights and remedies' stemming from those international agreements are two separate issues.[9] However, for present purpose this author will use the term direct effect to be synonymous to self-executing.[10]

[5] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[6] Eyal Benvenisti and George W. Downs, 'The Premises, Assumptions, and Implications of *Van Gend en Loos*: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions' (2014) 25 EJIL 85, page 88.
[7] *Foster v. Neilson*, 27 (2 Pet.) U.S. 253, 254 (1829).
[8] This is known as the Supremacy Clause. See US Constitution, Article VI, Clause 2.
[9] Szilárd Gáspár-Szilágyi, "A Look at EU International Agreements through a US Lens: Different Methods of Interpretation, Tests and the Issue of 'Rights'" (2014) 39 ELR 601, p. 606.
[10] The late high-profile US jurist Professor Jackson uses the terms self-executing and direct effect as synonymous in one of his contributions on this topic. John H Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals' in Anthony Arnull, Piet Eeckhout, and Takis Tridimas (Eds.), *Continuity and Change in EU Law: Essays in Honour of Sir*

Despite that the conditions for direct effect in the two legal systems are different, it is very important to consider when an international agreement could be said to have direct effect in the EU or the US legal order. If an EU primary or secondary law provision has direct effect in the EU, this provision can be used to set aside MS's national law. Similarly, international agreements that have direct effect can lead to the inapplicability of both EU law and MS's domestic law.[11] The situation is not much different in the US – if an international agreement has direct effect then claimants can use it to set aside federal and state law. Therefore, this paper will adopt the understanding that an international agreement has direct effect if a court of law can use it to set a domestic act; in effect, the domestic act[12] is declared inapplicable due to its inconsistency with the international agreement.[13]

b) Indirect effect

Even if an international legal norm does not have direct effect, it may still have indirect effect.[14] There are two main forms of indirect effect – substantive and procedural. According to the former, the international agreement is used as guide, rather than obligation, and the courts construe domestic law vis-à-vis the concerned international agreement. It also includes circumstances where courts interpret or apply national provisions that refer or aim to implement an international law provision. In contrast, procedural indirect effect includes circumstances where 'courts stay domestic

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Francis Jacobs (OUP 2008). More recently, Professor Peters also used the two terms as synonymous in Anne Peters, *Beyond Human Rights The Legal Status of the Individual in International Law* (Jonathan Huston tr, CUP 2016), page 496.

[11] Piet Eeckhout, *EU External Relations Law* (2nd edition, OUP 2011), page 330.

[12] As Hix noted, domestic acts can include 'laws, regulations, decisions etc.'. see Jan-Peter Hix, 'Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts' Jean Monnet Working Paper 03/13 available at <https://jeanmonnetprogram.org/paper/indirect-effect-of-international-agreements-consistent-interpretation-and-other-forms-of-judicial-accommodation-of-wto-law-by-the-eu-courts-and-the-us-courts-2/>, page 8.

[13] Cf with *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, where the High Court of Australia said that it may be possible to give procedural effect to an international agreement, but in the meantime prevent claimants from obtaining any rights from it without enacting a domestic legislation aimed to transpose the provision in question into national law. See for further commentary André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 *EJIL 105*, page 110.

[14] See Robert Schütze, 'Direct Effects and Indirect Effects of Union Law' in Robert Schütze and Takis Tridimas (eds.), *Oxford Principles of European Union Law. Volume I: The European Union legal order* (OUP, 2018), page 290.

proceedings or remand a case for further consideration because of international law considerations'.[15] This paper will look at substantive indirect effect.

As will be outlined below, both the EU and the US have recognised the principle of consistent interpretation according to which the judicial organ has to interpret in certain circumstances domestic law in light of international law, if possible. Therefore, while direct effect allows a treaty provision to be enforced in the national legal order directly, the consistent interpretation principle can only be enforced through national law and as long as the domestic legal provision is ambiguous. For this reason, the consistent interpretation principle is referred to as indirect effect.[16] Furthermore, the CJEU has also created the principle of implementation.[17] Although WTO law lacks direct effect, it may still be given indirect effect through this principle when the EU intended to implement a WTO provision[18] or if it the EU measure refers to WTO law.[19]

2.2.2) WTO law as a binding international law obligation

Both the EU and the US are signatory parties to the WTO Treaty and as a result they can be held liable by Geneva's quasi-judicial institutions if their actions are found to be in breach of WTO law. The relationship between domestic law and the law of the WTO is governed by Art. XVI(4) of the Marrakesh Agreement, which determines that WTO CP are responsible to bring their 'laws, regulations and administrative procedures' with WTO law.[20] Furthermore, it is a well-established international law principle, confirmed also by the AB,[21] that a nation cannot rely on national law to justify its failure to comply with its treaty obligations.[22] The debate on whether DSB decisions are binding obligations under public international law was not less contentious than the debate on direct effect. One of the strongest supports to the proposition that they are not binding came from Bello who acknowledges that non-compliance is undesirable, though it remains an option for WTO

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[15] Jan-Peter Hix, *supra* note 12, page 10.
[16] G. Betlem and A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14(3) EJIL 569, at 572 as cited in Szilárd Gáspár-Szilágyi, 'The "Direct Effect" of E.U. International Agreements Through a U.S. Lens' (PhD Thesis, Aarhus University 2015), pages 373, 377.
[17] Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections' (2002) 5 JIEL 91, page 104.
[18] *Nakajima.*
[19] *Fediol.*
[20] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
[21] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067, para. 46.
[22] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 [hereinafter VCLT 1969], Article 27.

members.[23] A year later, Jackson criticised Bello's '*realpolitik'* position on international trade law and argued that compliance is required by virtue of obligations stemming from 'trade rules' as well as 'traditional and historical meaning of general international law obligations'.[24]

Needless to say, this debate did not go unacknowledged by the WTO dispute settlement organ. In *Japan – Alcoholic Beverages*, the AB stated that its reports 'should be taken into account where they are relevant to any dispute' and their purpose is to resolve the dispute between the complainant and the respondent. [25] The panel also found that Art. 59 of the ICJ Statute[26] produces the same effect, namely that ICJ decisions are binding only to the parties of the dispute. Having said that, the panel then observed that '[t]his has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible'.[27] Clearly, this last sentence can be seen as to acknowledge the significance of DSB reports in future litigation and so the AB appears to hold the view that they belong to jurisprudence where reliance on previously decided cases has not been something unusual.[28] The Bello – Jackson debate has led to numerous publications that have tried to rather unsuccessfully put an end to the discussion.[29]

The present author will take the position that the WTO Agreements and DSB rulings entail binding commitments under international law for all WTO members.[30] As Jackson argued,

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[23] Bello mainly looks at the political structure of the WTO in Judith Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 AJIL 416. In 2001, she clarified her position and said that she 'continue[s] to regard favorably the GATT/WTO's realistic recognition that it cannot enforce specific compliance. In my view, the DSU therefore provides the two fallback outcomes that, although second best, have the effect of encouraging compliance, discouraging free riders, and, in cases of noncompliance, restoring the overarching balance of rights and obligations that serves as an incentive and reward for continued WTO membership despite imperfect compliance by WTO members*.*' Judith Hippler Bello, 'Book Review' (2001) 95 AJIL 984, 986-87 [emphasis added].
[24] John H. Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of the Legal Obligation' (1997) 91 AJIL 60, p. 61.
[25] Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 8 November 1999 [hereinafter *Japan – Alcoholic Beverages*], p. 14.
[26] Statute of the International Court of Justice (26 June 1945) 3 Bevans 1179; 59 Stat 1055; TS No 993 entered into force 24 October 1945.
[27] *Japan – Alcoholic Beverages*, p. 14, footnote 30.
[28] Simon N. Lester, 'WTO Panel and the Appellate Body Interpretations of the WTO Agreement in US Law' [2001] 35(3) JWT 521, page 527.
[29] For arguments in support of Jackson's position see Yuka Fukunaga, 'Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations' (2006) 9 JIEL 383. In favour of Bello's view: Timothy M. Reif and Marjorie Florestal, 'Revenge of the Push-Me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding' (1998) 32 International Lawyer 755.
[30] See also Chapter 3.2.

this is on the basis of the DSU text and gist of over 15 clauses,[31] context,[32] intent by the parties (preparatory work), nearly six decades of practice and prediction of what the AB would decide should this matter came before it. All of this is further supported by analysis of the dispute settlement system (DSS) and its policy goals.[33] However, as it will be seen below, the relevance of that the WTO Agreements and DSB rulings are binding under public international law is seriously weakened by that they lack direct effect.

2.3) International agreements and their effect

2.3.1) EU

The EU competences[34] are divided into 3 categories: exclusive,[35] shared,[36] or supporting.[37] If the EU wants to conclude an international agreement and the area falls under the EU's competences it can do so by following the procedure enshrined in TFEU Article 218 which outlines the tasks of the different EU institutions and voting procedures.[38] The term 'agreement', referred to in Articles 218 and 219 of the TFEU, encompasses different international agreements such as treaties, conventions, association agreements, etc.[39] International agreements concluded outside the procedure in Art. 218 of the TFEU cannot be made legally binding and so for instance in *France v Commission* the CJEU declared void the agreement reached between the US and the EU as the Commission did not follow the relevant procedure.[40] But if the parties have entered into negotiations and there was no doubt that based on their intention the purpose was not to adopt a legal

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[31] DSU Article 3, paragraph 2; Art. 3 (4) and (5); Art. 3.7; Art. 11; Art. 19.1; Art. 22.1; Art. 21. (6) (1); Art. 22 (1), (2), (8); Art. 26.1 (b), as well as Marrakesh Agreement Art. XVI, para 1 and para 4.
[32] Treaty interpretation of the DSU framework based on the treaty interpretation laid down in Art. 31 of the VCLT 1969.
[33] John H. Jackson, 'International Law Status of WTO DS Reports: Obligation to Comply or Option to "Buy-Out"?' (2004) 98 AJIL 109, page 123.
[34] As stipulated in Art. 5 of the Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01 [hereinafter TEU], the EU 'shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.' This Article also states that the EU must exercise its competences by complying with the principles of proportionality and subsidiarity.
[35] TFEU, Art. 3.
[36] TFEU, Art. 4.
[37] TFEU, Art. 6.
[38] TFEU, Article 218. For agreements concerning exchange-rate system, monetary or foreign exchange regime matters see TFEU, Article 219.
[39] *Opinion 1/75 re Local Cost Standard* [1975] ECR 1355 and VCLT, Article 2(1)(a) as cited in Piet Eeckhout, *supra* note 11, page 195.
[40] Case C-327/91 *France v Commission* [1994] ECR I-3641, paras 37 – 41.

binding document the Commission is not obliged to follow the procedure in the TFEU, Art. 218.[41]

As a subject of public international law, the EU is obliged to comply with the international agreements binding on it by virtue of the *pacta sunt servanda* principle, whereas its obligations towards its international partners must be exercised in good faith.[42] The EU has legal personality[43] and can incur responsibility under international law if its actions are found to be in violation of its international obligations.[44] Primary law also stipulates that agreements which the EU concluded constitute binding obligations on the EU and its MS.[45] The importance to comply with international law was recognised by the CJEU in numerous cases. For instance, in *Haegeman*, the CJEU ruled that international agreements concluded by the EU form an 'integral part' of EU law.[46] This reasoning was later pushed even further and – under current law – MS that failed to bring their domestic law in compliance and implement an international agreement concluded by the EU are also in breach of EU law.[47] Although many of the EU's obligations on the international scene are now enshrined in primary law,[48] the CJEU's case law demonstrates that compliance with public international law has been of crucial importance for the judicial organ.[49]

Nonetheless, a claimant cannot use an international agreement to invalidate EU law if the former lacks direct effect in the European legal order. If the Contracting Parties to the international agreement have not determined if the agreement should have direct effect, the CJEU can decide on this matter.[50] This can be defended from the perspective of preserving the coherence and unity of the European legal order. If MS had the authority to determine that instead of the CJEU, it would have been possible for a provision to get

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[41] For instance, the Guidelines on regulatory cooperation and transparency concluded between the EU and the US were found not to fall within the scope of [now] the TFEU, Article 218. That is because the parties did not intend to enter into legally binding commitments here. Case C-233/02 *Commission v France. Guidelines on regulatory cooperation and transparency concluded with the United States of America* [2004] ECR I-2759, para 43.

[42] VCLT 1969, Article 26.

[43] TEU, Article 47.

[44] See Anne Thies, *International Trade Disputes and EU Liability* (CUP 2013), page 60 who also claims that Art. 26 of the VCLR 1969 codifies CIL. see also: Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655, paras. 49.

[45] TFEU, Article 216(2).

[46] Case 181-73 *R. & V. Haegeman v Belgian State* [1974] ECR 00449, para. 5 [hereinafter *Haegeman*].

[47] See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, (Sixth Edition, OUP 2015), page 356 citing Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325.

[48] See for instance TEU, Art. 3(5) and Art. 21 (1), (2)(b), (2)(h), (3).

[49] For a discussion see: Chirat Keawchaum, 'Judicial Interactions of the WTO's Rulings by the CJEU' (PhD thesis, University of Aberdeen 2017), pp. 26 – 32; Paul Craig et. al., *supra* note 47, pages 355 – 361.

[50] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A* [1982] ECR-03641, para. 17 [hereinafter *Kupferberg*].

direct effect in one MS but not another. Cases in which the CJEU granted or denied direct effect to an international agreement can be seen as an application of the *effet utile* doctrine; EU law becomes more useful if it is applied uniformly in all MS.[51]

According to *VGL*, a provision may have direct effect when it is clear, unconditional and contains a negative obligation. Further to that, the provision should not depend on national measure aimed to implement it and no reservation should have been made by the MS.[52] When the issue comes to direct effect of international agreements, the CJEU has moved away from the classic *VGL* test.[53] In a nutshell, the CJEU will first examine the provision's wording and if they are clear and unconditional. If they meet this standard, the CJEU will examine the agreement's 'purpose, nature, and structure'.[54] Perusal of case law, however, demonstrates that the CJEU has been more reluctant to grant direct effect to international agreements that require deeper 'relations of integration'[55] such as the WTO Agreements, the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[56] Convention on the Rights of Persons with Disabilities,[57] etc. Thus, on more advanced level, the criterion for direct effect of international agreements becomes muddled and to pinpoint one ultimate criterion is incredibly complicated due to different analyses and interpretations of over 40 years of jurisprudence.

Even if an international agreement lacks direct effect, it is still binding for the EU. As one can observe from *IFC*,[58] the CJEU cannot review EU law in light of an international agreement if the latter does not grant individuals' rights.[59] As Maresceau rightly stated, it is '*conditio sine qua non*' for provisions of international agreements to have direct effect as for claimants to obtain some sort of compensation in cases where the EU actions were declared in violation of the former.[60] As WTO law lacks direct effect in the EU, claimants

[51] Nanette A.E.M. Neuwahl, 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law' in David O'Keeffe and Nicholas Emiliou (eds), *The European Union and world trade law: after the GATT Uruguay Round* (Wiley, 1996), pages 318 – 319.
[52] *VGL*, page 13. see also Robert Schütze, the Complete Cases <https://www.schutze.eu/cases-complete/> accessed on 09/08/2019.
[53] Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International, 2008), page 246.
[54] *Ibid*., page 249.
[55] Paul Craig et al., *supra* note 47, page 367.
[56] Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755.
[57] Case C-363/12 *Z v A Government Department* [2014] ECLI:EU:C:2014:159, para 90.
[58] Joined cases 21 to 24-72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219 [hereinafter *IFC*].
[59] Geert A. Zonnekeyn, 'The Latest on Indirect Effect of WTO Law in the EC Legal Order: The *Nakajima* Case Law Misjudged?' (2001) 4 JIEL 597, pages 601 – 602.
[60] Marc Maresceau, 'The GATT in the case-law of the European Court of Justice' in Francis Jacobs (ed.), *The European Community and GATT* (Studies in transnational economic law, 1986), p. 118.

cannot challenge EU measures by relying on WTO law, despite that the WTO Agreements are binding on the EU.

2.3.2) US

While in public international law, there is no difference between treaties, conventions, and agreements, in US law the situation is slightly different. International agreement is the term used to describe any sort of legally binding agreement between the US and another nation or intergovernmental organization.[61] A 'treaty' in US law is an international agreement made pursuant to Article II of the US Constitution.[62] Talks for the conclusion of a treaty may be started by the President or the Secretary of State.[63] Executive Agreements are another form of international agreements and exist in three categories. Congressional-executive agreements are passed by consent of the US bicameral legislature and their legal authority stems from either existing or subsequently enacted legislation.[64] Executive agreements made pursuant to a treaty derive their authority from prior treaties that were ratified by the US, whereas under the US Constitution the President has limited authority to conclude sole executive agreements.[65]

The status of public international law is determined by the US Constitution and pursuant to Art. VI, clause 2, international agreements, which the US concluded, are the 'supreme law of the land'.[66] Many scholars believe that the Founding Fathers of the US Constitution on purposely incorporated this clause as to avoid conflicts with other nations. As all treaties were 'law of the land', the courts were on the apex to enforce them in the absence of legislative action by Congress. The Supremacy Clause also determines that treaties, after being concluded and incorporated in US law, invalidate inconsistent state law.[67] According to Henkin this renders international law after incorporated into domestic law on the same status as federal law and so disputes concerning international law fall under 'the

[61] Stephen P. Mulligan, International Law and Agreements: Their Effect upon U.S. Law, Congressional Research Service RL32528 (2018), p. 3 See: Restatement (Third) of Foreign Relations Law of the United States, § 101 (1987), section 301(1) [hereinafter Third Restatement].
[62] US Constitution, Article II, Section 2, Clause 2.
[63] Third Restatement, section 301(1).
[64] Stephen P. Mulligan, *supra* note 61, p. 6.
[65] *Ibid*., p. 7.
[66] See also *The Paquete Habana*, 175 U.S. 677 (1900) at 700 where Justice Gray held that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction'.
[67] Carlos Manuel Vazquez, 'The Four Doctrines of Self-executing Treaties' (1995) 89 AJIL 695, page 696 as cited in Mustafa T. Karayigit, 'Commonalities and Differences between the Transatlantic Approaches Towards WTO Law' (2008) 35 Legal Issues of Economic Integration 69, page 70.

Law of the United States'. Hence, US federal courts have jurisdiction under Art. III[68] of the US Constitution to preside over cases concerning US international obligations.[69]

But it is a completely different issue if an international agreement is self-executing. Very few authors suggest that Art. VI, cl. 2, of the US Constitution requires treaties to have self-executory status in the US legal order. Courts and many academics have come to different conclusions.[70] In a nutshell, a treaty will be self-executory if it is said so in its text or if Congress need not pass it through an implementing legislation. In contrast, non-self-executory treaties can have any effect within the US legal order if only Congress has passed an implementing legislation.[71] On a more advanced level, especially since *Medellín*,[72] the distinction between self-executory and non-self-executory treaties is much more complicated as it appears that the judiciary implicitly created a new test to establish when a treaty is self-executory.[73] The voluminous literature on this subject has hardly brought much certainty.

Even though international agreements concluded by the US are binding for the US at the international level, it is pretty much clear that they do not immediately create binding obligations for the US at the internal level. In other words, in case of violation the US can incur liability which will be valid at the international level but it will not be possible for the applicant to obtain remedy in US courts because, at the domestic level, the international agreement would not create binding obligations. This will be the case unless Congress implemented the concerned international agreement or if the agreement explicitly states that it has binding effect in the domestic legal order of its CP.[74] Situations in which federal law and international agreements are in conflict are reconciled by the last-in-time rule according to which US federal statute will trump an international agreement if the former was enacted after the latter.[75] With regard to the WTO Agreements, the legislature did not consider them as self-executory and they received domestic effect only when Congress

[68] US Constitution, art. III, § 2.
[69] Louis Henkin, 'International Law as Law in the United States' (1984) 82 MichLRev 1555, pages 1559 – 60.
[70] John H. Jackson in Anthony Arnull et. al., *supra* note 10, page 362.
[71] William J. Aceves, 'Lost Sovereignty? The Implications of the Uruguay Round Agreements' (1995) 19 FordhamIntlLJ 427, p. 461.
[72] *Medellín v. Texas*, 552 U.S. 491 (2008).
[73] Taryn Marks, 'The Problems of Self-Execution: *Medellín v. Texas*' (2009) 4 Duke Journal of Constitutional Law & Public Policy Sidebar 191, pages 208 – 209.
[74] William J. Aceves, *supra* note 71, pages 462 – 463.
[75] Similarly, under the last-in-time-rule, an international agreement that was incorporated by the US will trump federal legislation. In The *Cherokee Tobacco*, 78 U.S. 11 Wall. 616 616 (1870) the Court noted that "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.".

implemented them through the URAA 1994.[76] Despite that the WTO Agreements were incorporated into federal law, section 102 of theirs implementing legislation is clear that WTO treaty law has no direct effect. This means that the US can pass a federal legislation that might be in violation of WTO treaty law. This provision cannot be contested before US courts for its compatibility vis-à-vis the WTO Agreements because the latter do not generate direct effect. Decisions of the DSB are also prevented from having direct effect – these decisions may lead to reversal of US law if only the political branch decides to comply and implements the decisions under URAA implementation procedure.

2.4) In search of a reason for precluding direct effect

2.4.1) EU

The CJEU was more forthcoming to explain why WTO law cannot have direct effect as compared to the US Congress. The CJEU considers that the WTO Agreements do not determine their methods of enforcement[77] and that direct effect would deprive the 'legislative or executive organs' from the possibilities under Article 22 of the DSU to enter into negotiations with the respondent with the view to reach a temporary arrangement to the dispute.[78] This is despite the fact that the DSU shows preference for compliance with WTO law[79] and that compensation[80] and retaliation[81] are non-permanent measures. And indeed it might be in the interests of the EU to offer compensation or accept retaliation but keep its measure temporary unchanged. For instance, in 2000, upon complaint by the Republic of Ecuador and the US against the EU the DSB found the EU conduct incompatible with WTO law. A year later the EU reached settlements with the two complainants, who in return pledged to not suspend their concessions.[82] As the CJEU observed in *Van Parys*, if DSB rulings had direct effect the options to negotiate and reach an agreement would be unavailable. Although this part of the CJEU's reasoning is not immune to criticism, it demonstrates how the CJEU viewed the WTO system.

Reciprocity was also an important factor. Although this was not explicitly stated in *IFC*, scholars speculate that the direct effect of the GATT 1947 was precluded to mirror the

[76] Brandon J. Murrill, 'Dispute Settlement in the World Trade Organization: Key Legal Concepts' (Congressional Research Service 2016), page 1.
[77] *Portuguese Textiles*, para 41.
[78] *Ibid.*, para 40; *Van Parys*, para 48.
[79] *Portuguese Textiles*, para 38.
[80] *Id.*
[81] *Van Parys*, para 44.
[82] Adrian Emch, 'The European Court of Justice and WTO Dispute Settlement Rulings: The End of the Flirt' (2006) 7 Journal of World Investment & Trade 563, page 565.

position taken by other large trade nations.[83] As such, reciprocity in obligations is of paramount importance – the CJEU will look at the effect of the international agreement in the legal system of EU's most important commercial partners before deciding whether it should have direct effect in the EU.[84] Further to that, the CJEU distinguished the WTO Agreements from other agreements that were concluded between the EU and other nations that included 'asymmetry of obligations, or create special relations of integration', whereas the WTO agreements were based on 'entering into reciprocal and mutually advantageous arrangements'.[85] Direct effect would thus deprive the EU of the scope of manoeuvring that other trade nations enjoy[86] and so the lack of reciprocity in this area 'may lead to disuniform application' of WTO law.[87]

In *FIAMM*,[88] the CJEU reiterated its case law on WTO law and stated that the existence of a DSB ruling does not mean that the EU political body intends to adopt a particular measure. As previously stated in *Portuguese Textiles*[89] and *Van Parys*,[90] Members' negotiations are of particular importance in the WTO and so the fact that the period of time allowed for the implementation of the DSB report has expired does not mean that the EU has ran out of possibilities to enter into negotiations. If the DSB had such effect, the EU's rights under DSU Article 22 to enter into negotiations with the respondent would have been restrained and the EU would have been 'deprive[d] of the scope for manoeuvre enjoyed by [its] counterparts'.[91] For this reason, the CJEU firmly rejected any direct effect of DSB rulings within the EU legal order.[92]

The last two decades of the 20th century saw the birth of several forms of indirect effect of WTO law – *Fediol*, *Nakajima*, consistent interpretation.

To start with *Fediol*, the dispute in this case concerned the [then] EU's trade policy instrument which enabled EU exporters to make a complaint to the European Commission in cases in which they considered to have been negatively affected by 'illicit commercial

[83] See Piet Eeckhout, *supra* note 17, page 94 and literature cited therein.
[84] *Portuguese Textiles*, para 43; *Van Parys*, para 53.
[85] *Portuguese Textiles*, para 42.
[86] *Ibid.*, para 46.
[87] *Ibid.*, para 45.
[88] This judgment raised several issues about EU law. For present purposes, the author will look at direct effect of DSB rulings post-implementation.
[89] Para 39.
[90] Para 46 – 47.
[91] *FIAMM*, paras 117 – 119.
[92] *Ibid.*, para 127.

practices'[93] of another country. The claimant submitted that Argentina's practices were in breach of several GATT provisions and that they constituted an 'illicit commercial practice' as understood in GATT law. In response, the Commission argued that its interpretation of 'illicit commercial practice' cannot be reviewed in light of GATT law.[94] The CJEU decided that Article 2(1) of the EU Regulation at stake referred to 'international law' and that 'international law' was a reference to the law of the GATT 1947. Therefore, as the EU legislation referred to 'international law' the Commission should have investigated if Argentina's measures amounted to 'illicit commercial practice' as understood in GATT 1947.[95]

Another well-known exception is *Nakajima* – i.e. the intention principle. As it was the legislature's intention to comply with the AD Code, the claimant in this case could have relied on GATT provisions before the CJEU and challenge the legality of the EU measure in light of the former.[96] However, the threshold for the exception was later slightly hardened by the CJEU. As the CJEU opined in *Portuguese Textiles*, the *Nakajima* doctrine would apply 'where the [EU] intended to implement a particular obligation assumed in the context of the WTO'.[97] This differs from the original formulation of the doctrine in 1991 because the claimant should show that the EU intended to implement a 'particular' WTO obligation.[98]

The final form of indirect effect is the principle of consistent interpretation. The practical effect of this principle is that EU law should be interpreted in conformity with international law; rule which also extends to the WTO Agreements.[99]

2.4.2) US

The cases regarding the legal effect of WTO law in the US are fewer in number as compared to the EU. Historically, some trade-related international agreements have enjoyed direct effect in the US legal order.[100] However, by transporting the Marrakesh

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[93] Regulation No. 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ 1984, L 252/1. [no longer valid], Article 2(1).
[94] Rass Holdgaard, *supra* note 53, p. 314.
[95] *Fediol*, para 19.
[96] *Nakajima*, paras 30 – 31.
[97] Rass Holdgaard, *supra* note 53, p. 316; *Portuguese Textiles*, para 49 (emphasis added).
[98] See Antoniadis who claims that the difference in wording of the exception has led to different outcomes. Antonis Antoniadis, 'The *Chiquita* and *Van Parys* Judgments: Rules, Exceptions and the Law' [2005] 32:4 Legal Issues of Economic Integration 460, page 472.
[99] Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] I-3603, para 28. See further chapter 4.2.
[100] Thomas Cottier and Krista Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law' (1998) 1 JIEL 83, page 107.

Agreement and its annexes into federal law through the URAA,[101] the US legislature left no doubts that WTO law has no direct effect.[102]

DSB decisions are also excluded from having any direct effect in the US legal order.[103] The only way for a DSB ruling to change US law or US agency's measure is if the US agrees to do so and implements it under the URAA's implementation procedure.[104] The judiciary has been reluctant to recognise that DSB rulings are binding obligations under international trade law and considered them in some cases as 'persuasive' but nothing further.[105]

The beginning of the 18th century saw the establishment of some of the most important rules of US constitutional law and *Charming Betsy* was among them.[106] According to this doctrine, the 'law of nations', i.e. international law, may have indirect effect. To quote Chief Justice Marshall

> an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country[107]

However, as it will be argued in Chapter 4, the existence of the *Charming Betsy* doctrine here should not be overstated. The judicial organ has been very reluctant to invalidate US law or agency's determination in light of WTO law and give deference to the doctrine. The doctrine's practical effectiveness has been undermined by *Chevron*'s two-stage test. Under stage 1, the Court must decide if the statute subject to review is clear as well as if there is no more than one acceptable interpretation. If that is the case, the Court must upheld this interpretation and contrary agency's actions would have to be struck down. If the statute is unclear, however, the court will have to proceed to stage 2. Here the judiciary must give effect to any agency's interpretation as long as it is reasonable. In defining reasonable interpretation the Court stated that: "legislative regulations [would be] given

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[101] On their implementation process see: David W. Leebron, 'Implementation of the Uruguay Round Results in the United States' in John H. Jackson and Alan Sykes (eds.), *Implementing the Uruguay Round* (Clarendon Press, 1997), pages 186 – 202.
[102] URAA, Sec. 102.
[103] URAA, Section 123.
[104] For the consultation and implementation procedure see sections 123 and 129 of the URAA 1994.
[105] See *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1288 (CIT 2005) and chapter 4.2.2 for further examples.
[106] Szilárd Gáspár-Szilágyi, *supra* note 16, page 390.
[107] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804) [hereinafter *Charming Betsy* or *CB*] at 118.

controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute".[108] The two doctrines might come in conflict where the agency's interpretation clearly differs from the text of the international agreement and so the *Charming Betsy* doctrine points in one direction and *Chevron* in another. In *Timken*, the claimant argued that, as a result of the WTO dispute settlement decision in *Bed Linen*,[109] the *Charming Betsy* required the US to repeal a US measure due to its inconsistency with US WTO obligations. The Federal Circuit rejected this and so if the two doctrines are in conflict *Chevron* would trump *Charming Betsy*.

Although the URAA 1994 is silent on why WTO law cannot be used as a basis to review US law, many argued that membership of the WTO would encroach on US sovereignty.[110] The necessity to rebut these arguments and demonstrate that US sovereignty has not been violated after the US became a WTO member is further evidenced by enacting the Statement of Administrative Action[111] for the WTO Agreement concerning US Sovereignty.[112] The Statement dedicates a whole Title that aims to demystify these sovereignty concerns by clarifying the relationship between US law and WTO law and, in particular, that the latter cannot be used as a standard of review of US law.

The ambition to protect US sovereignty was taken a step further by the then Senate Majority Leader, Bob Dole. He proposed establishing a WTO Dispute Settlement Review Commission (hereinafter Review Commission) that would have made it compulsory to review DSB rulings adverse to the US. Upon request of the US Trade Representative (hereinafter USTR), the Review Commission could have also reviewed DSB rulings in which the US was applicant.[113] The consequences of an affirmative determination by the Review Commission would have been serious and would have included the option to pass a congressional resolution either asking from the US President to start negotiations with

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[108] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), at 844 [emphasis added; hereinafter *Chevron*].

[109] Appellate Body Report, Europ*ean Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India: Report of the Appellate Body* WT/DS141/AB/R, 12 March 2001 [hereinafter *Bed Linen*].

[110] This issue of sovereignty was also raised numerous times in Congress. See David W. Leebron in John H. Jackson et al., *supra* note 101, pages 209 – 218.

[111] As stipulated in the URAA, the Statement is 'regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.' URAA, sec. 102(d). [hereinafter SAS].

[112] Uruguay Round Trade Agreement, Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes, h.r. doc. no. 316, 103d cong., 2d sess., vol. 1, 1027-1029, 1032-1036 (27 September 1994), [SAA for WTO DSU concerning section 301], 2. Administrative Action a. Panel Reports and U.S. Sovereignty.

[113] 104th Congress, 1st Sess § 3(b)(1) (1995) Section, 4(a)(2).

the view to amend or modify the matter subject to a DSB ruling,[114] or submit a notice of withdrawal from the WTO.[115] Unsurprisingly, Senator Dole described the proposal as 'an insurance policy for our sovereignty',[116] while the perceived threat posed by the WTO on US sovereignty was raised numerous times during the legislation's hearing.[117] The Review Commission might have brought some additional credibility to the WTO because by adopting a DSB ruling the Commission would have shown that these decisions do not lack merit as some commenters suggested back in the 1990s. However, it can be seen that the ultimate purpose here was to give an extra layer of protection to US sovereignty – the Review Commission would have created different treatment for disputes in which the US was respondent.[118] Despite that this proposal was never adopted, the appeal to create such different regime was far from surprising.[119]

There is little doubt that the WTO has no constitutional structure, which consequently cannot classify the panels or the AB as constitutional courts.[120] Due to their functioning to interpret WTO law some argue that they have a constitutional dimension[121] but this is certainly not comparable to a constitutional court.[122] This raises sovereignty concerns because the US has given some authority to an institution that is constitutionally much weaker than the US courts to consider the validity of US law. Direct effect had to be precluded because granting claimants the right to set aside US law by invoking WTO law before US courts would have raised way more serious concerns for US sovereignty.

[114] S.1438, 104th Congress, 1st Sess. (1995) Section, 6(a)(1), (b) (1).
[115] *Ibid.* 6(a)(2), (b)(2).
[116] 141 Cong. Rec. S.16,695 (daily ed. Nov. 3, 1995) as cited in Matthew Schaefer, 'National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?' (1996) 11 Journal of Civil Rights and Economic Development 307, p. 341.
[117] World Trade Organization (WTO) Dispute Settlement Review Commission Act, Hearing before the Committee on Finance, United States Senate One Hundred Fourth Congress, First Session on S. 16, May 10, 1995.
[118] Matthew Schaefer, *supra* note 116, page 344.
[119] To a degree, Dole's proposal was replicated by the Trade Act of 2002 Pub. L. No. 107-210, 116 Stat. 933 (2002), section 2105(b)(3). [hereinafter Trade Act, 2002] Under this legislation, the US Secretary of Commerce, after consultation with the USTR as well as State, Justice, and Treasury Departments, has to issue a report after a DSB decision if it has 'added to obligations, or diminished rights, of the US' under WTO law. see for commentary Elizabeth C. Seastrum, 'Chevron Deference and the Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?' (2003/2004) 13 Federal Circuit Bar Journal 229, pages 233 – 236.
[120] According to Professor O'Donoghue, 'the rule of law, divisions of power and democratic legitimacy must be present to rightly describe a system as constitutionalised'. These features are not clearly present in the WTO. Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP, 2013), page 53.
[121] J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191, page 201.
[122] Xiuyan Fei, 'Direct Effect of WTO Rulings: The Case for Conditional Recognition', (2016) 13 US-China Law Review 491, page 503.

Hence, protection of US sovereignty was of crucial importance for the US when it had to determine the legal effect of WTO law, and there is a strong basis to make the argument that the US precluded direct effect to protect its sovereignty. Using sovereignty as a basis in this context also makes sense because due to the possibility of the concept to have multiple meanings the US legislature did not have to give any other reasons why WTO law cannot be used as a standard of review in US courts. To a degree, using sovereignty here also insulated the US from being subject to a criticism based on purely legal grounds for its decision. As Eeckhout wrote, the issue of direct effect in the US was 'more in the nature of a policy decision inspired by concerns over sovereignty rather than based on a legal reading of WTO law'.[123]

The notion of sovereignty has always been of crucial importance for the US and therefore the US concerns here were unsurprising. After winning the American War of Independence, the Founding Fathers of the US Constitution wrote in its Preamble that '[w]e the people of the United States, do ordain and establish this Constitution'.[124] Chief Justice Jay in *Chisholm v. Georgia* interpreted this line to mean that 'the people' are the sovereigns of the nation. This was different from many European nations where in the 17th century monarchs were considered as sovereigns, whereas 'the people' were viewed as their subjects. Thus, monarchs were not on equal footing with 'the people' in courts of law and elsewhere and enjoyed different types of privileges.[125] In a powerful speech Chief Justice Jay emphasised that:

> … the Revolution, the sovereignty devolved on the people, and they are truly the sovereigns of the country, but they are sovereigns without subjects … and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.[126]

Nearly a century later, it was stated that although sovereignty remains embedded in 'the people' it can be delegated to a US governmental agency.[127] But above all, in the view of

[123] Piet Eeckhout, *supra* note 17, page 95.
[124] My emphasis.
[125] See *Chisholm v. Georgia* 2 U.S. (2 Dall.) 419 (1793), Separate Opinion of Chief Justice John Jay, page 471.
[126] *Ibid*., 472 (Emphasis added).
[127] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

the Founding Fathers, there is nothing more indispensable for the US than its sovereignty[128] forming part of the US Constitution since its first adoption in 1789.[129]

Nonetheless, sovereignty remains a polysemic concept.[130] Much ink has been spilt throughout the centuries by scholars from different academic disciplines, jurists and politicians on the meaning of sovereignty. In *Austria-German Customs Union*,[131] the majority found that a nation would be considered sovereign if its government has the sole right to make decisions in national matters, such as politics, economics, etc, without foreign interference. In contrast, in the minority's view a nation has to be autonomous to be characterised as sovereign. This autonomy gives it the right and ability to exercise its own judgment, which may also include restricting its freedom of actions without interference by another nation.[132] Until date, the WTO has not defined the precise meaning of sovereignty. That being said, the AB once famously stated that in order to derive benefits from a membership of the WTO all WTO Contracting Parties have agreed to exercise their sovereignty in compliance with WTO law.[133] This stance can be understood as that membership is conditional upon transferring some sovereignty to the international Organization. However, it later clarified that WTO law was not ever interpreted by any of the GATT/WTO institutions as to have direct effect and therefore neither the GATT nor the WTO institutions created a new legal order.[134]

With the view to keep the discussion on topic, this paper will adopt the definition of sovereignty provided by Black's Law Dictionary which has been very often referred to by US legal scholars. According to this definition, a sovereign nation is the holder of sovereign power and has international independence without foreign dictation.[135] These two features

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[128] Bob Barr, 'Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task' (2002) 39 Harvard Journal on Legislation 299, 323-24 as cited in T. Alexander Aleinikoff, 'Thinking outside the Sovereignty Box: Transnational Law and the U.S. Constitution', (2004) 82 Tex. L. Rev. 1989, p. 1993. See also Eleftheriadis who argues that sovereignty could be interpreted as a bedrock principle of modern constitutional theory. Pavlos Eleftheriadis, 'Law and Sovereignty (2010) 29 Law and Philosophy 535.

[129] Hugh Evander Willis, 'The Doctrine of Sovereignty Under the United States Constitution' (1929) Articles by Maurer Faculty Paper 1256, page 437.

[130] In the words of Oppenheim, it is "doubtful whether any single word has caused so much intellectual confusion". Lassa Oppenheim, *International Law vol. 1* (Longman, 1905), p. 103 as seen in Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353, page 354.

[131] *Customs Regime Between Germany and Austria*, 1931 PCIJ (ser. A/B) No. 41.

[132] Jonathan T. Fried, 'Two Paradigms for the Rule of International Trade Law' (1994) 20 Can.-U.S. L.J. 39, pages 39 – 40.

[133] *Japan – Taxes on Alcoholic Beverages*, at 15.

[134] Panel Report, *United States – Sections 301 – 310 of the Trade Act of 1974,* WT/DS152/R, adopted 27 January 2000, DSR 2000:II, section 7.72 [hereinafter *US – Sections 301 – 310*].

[135] The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., <https://thelawdictionary.org/sovereignty/> as accessed on 22/04/2019; see also Matthew Schaefer,

are appropriate to be used here because the former best describes the US position on the world stage, while the latter definition is a bedrock concept of the US Constitution. In this regard, supreme power and independence are definitions that underline sovereignty.

2.4.2.1) Does URAA provide an adequate protection to US sovereignty?

a) Federal law

By ratifying the WTO Agreements, the US had to relinquish its powers to pass laws that infringe WTO law. As a result, there is a *prima facie* evidence that sovereignty has been transferred to an intergovernmental body that has the authority to challenge the validity of US law. Upon closer analysis of the current state of affairs, however, the author argues that the URAA provides enough protection to US federal sovereignty.

Under section 301 of the Trade Act of 1974 the US may retaliate whenever the US Trade Representative considers that another nation has threatened US commerce.[136] Meanwhile under WTO law a WTO member may retaliate if only the DSB has given its prior approval. In effect, WTO law could significantly affect US sovereignty as non-US law determines the permissible circumstances. This is further buttressed by the fact that even the customary international law principles that allow a country to take countermeasures before proceeding to arbitration are non-applicable.[137] However, as outlined in the URAA, the WTO Agreements cannot restrict the effect of the Trade Act of 1974, s. 301.[138] Hence, these international law commitments are merely a formality that the US, in theory, may ignore. Certainly, this raises little concerns for US sovereignty because a DSB ruling can have an effect in the US legal order if only the US political branch has decided to implement it. As will be seen in Chapter 4, it is also possible to read that the URAA to precludes the application of the *Charming Betsy* doctrine in respect to WTO law. If that is not enough, Congress also created an internal mechanism to review DSB rulings which guarantees further scrutiny.[139] The only commitment that is binding on internal level under WTO substantive law is that the US has to maintain the concession balance among WTO members, albeit this is justified by the fact that not doing so would cause major

supra note 116, pages 329 – 333 and Laurence E. Rothenberg, 'International Law, U.S. Sovereignty, and the Death Penalty' (2004) 35 Georgetown Journal of International Law 547, page 547, who also use the dictionary meaning of the concept.

[136] Trade Act of 1974 [Public Law 93-618, as amended] [as Amended Through P.L. 115-141, Enacted March 23, 2018].

[137] See *Case Concerning the Air Services Agreement Between France and the United States*, Arbitral Award of Dec. 9, 1978, 18 U.N.R.I.AA. 417, 443-46; Matthew Schaefer, *supra* note 116, page 337.

[138] URRA, s. 102(a)(2).

[139] See chapter 2, page 35.

inconveniences.[140] Thus, if national law is found to be incompatible with public international law it is not invalid under international law. Rather, US law can be brought in consistency with international law if only the US has decided to do so.

The US has some sort of trade relations with countries that are still not WTO Members. This does not prevent the US from imposing trade sanctions when it deems that there is a justifiable reason under the Trade Act of 1974[141] and doing so would be in its national interests. While s. 301 of the Trade Act of 1974 may be seen as a violation of WTO law, there is strong basis to believe that this is not the case and so the Trade Act of 1974 and the WTO agreements may work in parallel.[142] For instance, the US may use DSB findings as a political leverage to justify usage of section 301. In addition, US law does not require from the USTR to take actions when the DSB has not found in favour of the US. Although the US may pursue unilateral actions, this would require great political willingness,[143] albeit this does not mean that the US has lost its sovereignty. In this respect, the URAA offers an adequate protection to US sovereignty because it keeps all options on the table. As a nuclear option, the US can withdraw from the WTO and this decision can be taken unilaterally without seeking permission from other nations or the Organization itself. Most critics of the WTO pointed out at the ability of the WTO to decide on disputes but fail to acknowledge that the US does not consider them binding or that they lack direct effect.[144] This logic also applies to WTO substantive law because it was incorporated into the URAA. As the WTO Agreements do not require direct effect, the US political branch was free to implement the treaty in its domestic legal order by making reservations or not incorporating some of its provisions. While this would have been valid only on the internal level and highly unwanted from international law perspective, the US had this as a legal option.

Another criticism has been that the WTO is run by panellists unaccountable to the US government and for this reason some argued that US sovereignty has been endangered. Given the rather particular way Supreme Court justices are selected in the US, the lack of

[140] Judith Hippler Bello, *supra* note 23, page 418.
[141] Susana Hernandez Puente, 'Section 301 and the New WTO Dispute Settlement Understanding', (1995) 2 ILSAJIntl&CompL 213, page 232.
[142] Cf. with *US – Sections 301 – 310*.
[143] Matthew Schaefer, *supra* note 116, page 338.
[144] John H. Jackson, the World Trading System: Law and Policy of International Economic Relations 95 (1989) as seen in James Thuo Gathii, 'Foreign Precedents in the Federal Judiciary: the Case of the World Trade Organization's DSB Decisions' 34 GaJIntl&CompL 1, page 33.

accountability is even more disturbing for the US.[145] Having US experts on the panel in Geneva could bring great insight knowledge and observe the process goes smoothly. Moreover, the prohibition on US panellists to sit on cases where the US interests are at stake brings further disadvantages because this prevents many high-profile US legal scholars and practitioners from participation. This might be seen as particularly concerning for this country because it has been highly active as both respondent and complainant and so all cases have to be decided by panellists unaccountable to the US.[146] For this reason, it has been argued that sovereignty is affected because the US does not have its own representatives sitting on the panel.[147] Nevertheless, these concerns are highly exaggerated. First, panellists must be people who are independent and so there is no need for the US to get an extra assurance by appointing its own representative.[148] Second, while it is beyond doubt that there are numerous excellent US scholars there is usually little doubt in the expertise of the panellists who were appointed to decide the dispute. It must be also noted that the panellists' main role is to consider the law of the WTO rather than US law. Insight knowledge in US law or the US economy in this case would obviously be useful but is certainly not detrimental. Thirdly, the results of the Uruguay Round negotiations were widely praised for the fact that they totally overhauled the process for resolving disputes between Members. Appointing a US national in the process who might be accountable for his/her actions to the US would contradict one of the reasons behind the reforms in the 1990s. On this basis, despite the fact that DSB panellists are said to be 'faceless',[149] this does not harm US sovereignty to such great degree but instead strengthens the WTO functioning.[150]

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[145] The US Constitution endows the US President to "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court …" See, US Constitution, Article II, section 2 [my emphasis]. After receiving a nomination by the President, candidates normally face hearings before the United States Senate Committee on the Judiciary. After confirmation of the nomination by the Committee, nominees normally testify before the US Senate. See United States Senate, Nominations: A Historical Overview available at < https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm > as accessed on 23/04/2019.

[146] Matthew Schaefer, *supra* note 116, page 333.

[147] For the impartiality of international judges see Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014), pages 126 – 154.

[148] See DSU, Art. 8(1) and (3) and (9).

[149] John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', (1997) 36 ColumJTransnatlL 157, page 13.

[150] It must be also stressed that the US has the power to block AB members from hearing the dispute which in recent times has been happening very often. See Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schot, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', Peterson Institute for International Economics, Policy Brief March 2018.

On international level, as to the US obligations under the WTO agreements, the WTO has led to a shift of powers from the legislative body to the executive rather than encroaching on sovereignty. In other words, the executive plays a key role here as it has the authority to mitigate the effects of a WTO dispute settlement decision by entering into diplomatic talks with the applicant State.[151] This, however, does not raise sovereignty concerns because the US still has the power to negotiate and make the applicant request from the DSB to annul the ruling. As a result, the author can conclude that the US after becoming a Member of the WTO still enjoys independence from the WTO and maintains its status as a supreme power. WTO law may raise general concerns about sovereignty but the US has adopted an adequate protection by enacting the URAA.

b) State law

As for state law, the situation is slightly different. Before ratifying the URAs, the Attorney Generals of 42 US states lobbied the US Government to give assurance that the sovereignty of individual states would be protected.[152] While concerns about US federal sovereignty were raised on various levels, the issue of states sovereignty on the international arena was largely ignored. This is unsurprising because nation's federalism has always been a national concern.[153] Under the Commerce Clause, the federal branch has the power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.[154] Historically, this clause has been considered as imposing restrictions on states' regulatory authority in matters relating to commerce, which includes international trade. Thus, under the Supremacy Clause, federal statutes have supremacy and trump state law.[155]

According to the Tenth Amendment to the US Constitution "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".[156] There is evidence in US case law that courts

[151] Patrick Tangney, 'The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany', (1996) 21 YaleJIntlL 395, page 443.
[152] See: Joseph A. Wilson, 'Section 102 of the Uruguay Round Agreements Act: 'Preserving' State Sovereignty' (2004) 6 Minnesota Journal of Global Trade 401, page 414.
[153] Edward T. Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within Their Territories' [2004] 25(1) Northwestern Journal of International Law and Business 1, page 3.
[154] U.S. Constitution, Article 1, Section 8, Clause 3 (emphasis added).
[155] U.S. Constitution, art. VI, § 1, clause 2.
[156] In other words, the US Constitution lists the powers that states do not have. For instance, states are not allowed to conclude agreements with other subjects of international law or decide on export/import duties. See Amendment X, clauses 1 – 3.

on various levels have been supportive to individual states' autonomy. In *Fry* the Supreme Court interpreted the Tenth Amendment to mean that US states enjoy a sovereign protection and so "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[157] Similarly, in *Garcia*, the judiciary opined that "States unquestionably do 'retain a significant measure of sovereign authority'"[158] and that 'States occupy a special and specific position in our constitutional system'.[159] Subsequent courts also tried to gradually increase the powers to individual states. In doing so, the judiciary tried to make the legal order more constituent with the US Constitution – in the words of Justice O'Connor: "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions".[160] The willingness to support the autonomy of individual states reached a crescendo in *Lopez* where the Supreme Court disapplied a federal legislation that was passed through the Commerce Clause.[161]

More recently, in *Murphy*, the Supreme Court was asked to decide whether the state of New Jersey had the right to strike down federal law that prohibited sports betting.[162] The broader implication of this case is that the Supreme Court interpreted the US Constitution to disallow Congress to impose federal laws without taking into account state's will.[163] As the Supreme Court ruled in favour of New Jersey, the sovereignty of individual states has further increased because from now they will have greater law-making powers.[164]

However, after the US codified the URAs, it appears clear that the Supremacy Clause permits the US to challenge the validity of US state law in light of federal law and the WTO agreements accordingly.[165] On this basis, cases related to WTO law will follow jurisprudence that offers little protection to state autonomy.[166] As seen above, the US

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[157] *Fry v. United States* 42 1 U.S. 542 (1974), 547.
[158] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) at 549.
[159] *Ibid.*, 556.
[160] *New York v. United States*, 505 U.S. 144(1992), 162.
[161] *United States v. Lopez*, 514 U.S. 549 (1995), at 567.
[162] *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. (2018).
[163] Under the anti-commandeering doctrine 'the federal government cannot force state or local governments to act against their will'. See: Mike Maharrey, States Don't Have to Comply: The Anti-Commandeering Doctrine: Dec 28, 2013 <https://tenthamendmentcenter.com/2013/12/28/states-dont-have-to-comply-the-anti-comandeering-doctrine/> accessed on 11.10.2019.
[164] Michelle Minton, 'Supreme Court Gambles with State Sovereignty', December 4, 2017, <https://cei.org/blog/supreme-court-gambles-state-sovereignty> accessed on 19/04/2019.
[165] Julie Long, 'Ratcheting up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements', (1995) 80 MINN. L. Rev. 231, page 242.
[166] See Barry Friedman, 'Federalism's Future in the Global Village' (1994), 47 Vand. L. Rev. 1441, pages 1466 – 1471.

federal government has different options if a federal legislation was found to be inconsistent with WTO law: comply with the measure, accept retaliation, offer compensation, or – as a nuclear option – withdraw from the WTO. If a state's regulation was found contrary to WTO law, the only option for the state is to shift the burden to the federal government.[167] One the one hand, this does not restrict state sovereignty because federal may mitigate the effects of adverse DSB rulings and take recourse to one of the above options. Nonetheless, in reality, it is unlikely that the federal government will tolerate non-compliance by individual states for an indefinite period. In order to respect the federal division of powers, the judiciary has been reluctant to overstep state's autonomy,[168] though this practice is more likely to be disregarded when the US international trade interests are at stake.

In the meantime, states' have legislative powers and certain legislative competence.[169] Pursuant to Article 22(9) of the DSU other WTO state parties may bring challenges against regional or local governments, which includes individual US states. Should the applicant's challenge be successful in Geneva, under the URAA,[170] the USTR may take actions to repeal the conflicting state law. If such decision has been taken, the federal government will enter into negotiations with the recalcitrant state. If the attempt to reach a mutual solution fails, the USTR may commence legal proceedings in federal court. From this it can be concluded that individual states' sovereignty is infringed by the US membership of the WTO as in the best case scenario a US state can keep its law in operation after hard bargaining.[171] Given the disparity in bargaining powers, these negotiations are usually far from an easy task for individual states.

2.7) Conclusion

The concept of direct effect has had different understandings from one jurisdiction to another and is certainly not a black-and-white proposition. This paper will consider direct effect as the ability of claimants to rely on WTO law to set aside a national measure. Indirect effect comes in two main forms: substantive and procedural. This thesis is concerned about substantive indirect, which includes the principle of consistent

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[167] Joseph A. Wilson, *supra* note 152, page 411.
[168] Julie Long, *supra* note 165, page 242.
[169] For instance, heavy industrialised states would be more interested to pass Regulation that safeguards their domestic industry and would want to hinder outward flow from countries that export same goods. Joseph A. Wilson, *supra* note 152, page 407 – 408.
[170] See 3512(b)(1)(C) and (b)(2)(C).
[171] Brandon Johnson, 'Interpreting Uruguay Round Agreements Act Section 102(B)'s Safeguards for State Sovereignty: Reconciling Judicial Independence with the United States Trade Representative's Policy Expertise (2001), 22 MichJIntlL 735, page 748.

interpretation and the principle of implementation. The debate whether DSB decisions constitute binding international obligations exists since the creation of the WTO. It is the author's position that they do on the basis of the DSU, context, preparatory work, previous practices and prediction would be decided if this issue came before WTO's quasi-judicial body as well as DSS' policy goals.[172]

Various provisions in EU primary law demonstrate that international law is of considerable importance for the EU. International agreements that were concluded by the EU following the correct treaty-making procedure are binding. The US is a nation itself and as such there is no doubt that public international law has a tremendous impact on its legal order. According to the US Constitution, Art. VI, clause 2, international agreements 'shall be the supreme law of the land' and form an integral part of US law. However, if an international agreement lacks direct effect, claimants cannot rely on its terms in order to invalidate US or EU law, respectively. The CJEU has not strictly followed its *VGL* test in circumstances in which it had to decide if an international agreement can have direct effect in the European legal order. The Luxembourg Court has been more reluctant to confer direct effect to agreements that required the EU to establish more advanced integration with its treaty partner(s). In the US, it is very difficult to understand when an international agreement can have direct effect because it appears that in *Medellín* the Supreme Court has introduced a new test.

Based on the above analysis, we can also conclude that the US precluded direct effect as to protect US sovereignty from encroachment by WTO law. To this end, URAA provides an adequate protection to US federal sovereignty but state sovereignty remains vulnerable.

[172] In other words, it is claimed that Jackson's view is preferable over Bello's. John H. Jackson, *supra* note 24; John H. Jackson, *supra* note 33.

Chapter 3) Absence of Direct Effect of WTO Law: A Justifiable Response?

3.1) Introduction

Since *Haegeman* international agreements form an integral part of EU law. As the WTO treaty does not determine if its CP must accord direct effect, the Luxembourg Court had to decide on this matter. According to the CJEU's understanding of WTO law, direct effect here would produce counterproductive results as it would deprive the EU from the possibilities afforded under DSU Article 22 to negotiate temporary arrangements with the respondent on a non-permanent basis. Therefore, the WTO Agreements do not determine their methods of enforcement in the legal order of their CP. The CJEU also claimed that the WTO Agreements differ from other agreements to which the EU was a CP because they do not include 'asymmetry of obligations, or create special relations of integration' and are still based on 'entering into reciprocal and mutually advantageous arrangements'. This is known as substantive reciprocity, i.e. the rights and duties that WTO members have under WTO substantive law.[1] In addition, according to the CJEU, the EU would be at disadvantage compared to its most important trade partners had it allow direct effect of WTO law. This will be referred to as judicial reciprocity – the 'approach of the judiciary of the [EU's trade] partners'.[2]

This chapter starts by arguing that the WTO Agreements determine their methods of enforcement and that there is no other alternative to compliance with WTO law. (3.2) Furthermore, direct effect would have not deprived the EU from exercising its rights under Art. 22 of the DSU. (3.3) In sub-chapter 3.4, it is argued that the CJEU substantive reciprocity analysis was flawed. Be that as it may, judicial reciprocity constitutes a valid reason to preclude direct effect of WTO law. (3.5) On this basis, this chapter argues that the EU is not the *odd* one because the CJEU gave overall valid reasons to preclude the possibility of testing the lawfulness of EU law against the benchmark of WTO law.

3.2) WTO law and enforcement

While the CJEU rightly said in *Portuguese Textiles*, *Van Parys*,[3] and *FIAMM*[4] that compensation and retaliation are temporary measures under the DSU, it found that direct effect would frustrate these two options and that the WTO Agreements do not determine

[1] Panos Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), page 277.
[2] *Id.*
[3] Paras 39, 42 – 51.
[4] Para 111.

their methods of enforcement.[5] This stance is slightly contradictory. If payment of compensation and retaliation are non-permanent measures then one may question what measure could be classified as permanent? In the Court's view, direct effect would frustrate the temporary measures. But if, hypothetically, these two measures were frustrated would not that require the EU to comply with WTO law? 'Yes' is the logical answer – if the EU cannot negotiate or offer compensation on a temporary basis, the DSB decision would have to be binding, which demonstrates that compliance with WTO law is mandatory and that the WTO Agreements determine their methods of enforcement. The CJEU[6] stated in *Omega* that:

> … the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions are also authorised, for example settlement, payment of compensation or suspension of concessions…[7]

This position contradicts *Portuguese Textiles* because here the CJEU is saying that compensation or retaliation are alternatives to compliance; it is enshrined in the DSU that these are temporary measures and this was previously acknowledged by the CJEU too. The Panels and the AB are both independent and give their final reports separately from the DSB. The main purpose of the former two institutions is to interpret WTO law and decide if there is violation by the respondent.[8] Compensation is a non-permanent measure available only when it would be impracticable to immediately withdraw the inconsistent measure.[9] The aim of the temporary measures is to put pressure on the respondent, leaving no incentives to avoid compliance with WTO law and ensure that other Members do not lose any accruing benefits stemming from WTO law due to the failure of another party to comply.[10] As such, the injured party can request compensation if immediate compliance is not possible and if the ruling is not implemented 'within the reasonable

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[5] This argument was upheld in different cases. See in particular, *Portuguese Textiles* (para 41), *Van Parys* (paras 39, 42 – 51) and *FIAMM* (para 111).

[6] Joined cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (C-27/00) and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (C-122/00)* (2002) ECR I-02569, para 89 [hereinafter *Omega*].

[7] AG Alber in *Omega* noted that 'all provisions of WTO law are subject to a general reservation which accords the States concerned various possibilities of reacting to a breach'. This is even less convincing as AG Alber did not define what these 'various possibilities' were. *Ibid.*, Opinion of AG Alber, para 94.

[8] A panel or AB report would be adopted unless all WTO members object to it. This procedure is unique. Nikolaos Lavranos, 'The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law' (2005) 10 European Foreign Affairs Review 313, page 318.

[9] DSU, Art 3.7.

[10] Antonello Tancredi, 'EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?' (2004) 15 EJIL 933, page 945.

period of time'[11] whereas '[p]rompt compliance … is essential'.[12] As the DSU determines that compensation is a non-permanent option, the EU cannot leave the WTO-inconsistent measure in force indefinitely and bring the injured party on the diplomatic table as to offer it compensation as a substitute to compliance. If the two parties cannot agree on compensation, the injured party can take recourse to retaliation. Thus, the alternative to retaliation might be compensation but neither of these two temporary measures can be an alternative to compliance.[13]

Some scholars tried to diminish the ultimate effect of DSB decisions on the basis that Art. 22.1 of the DSU expresses preferences – i.e. compensation and retaliation are not 'preferable' to implementation. Weisberger argues that a WTO member should attempt to comply rather than ignore the DSB ruling yet the failure to comply should not to be understood to constitute a breach of WTO law. In this regard, the obligation to comply 'can be fulfilled by an attempt to perform the obligation, rather than a complete performance'.[14] However, this position supposes that it is possible to achieve compliance by trying to comply and this makes little sense. The CJEU in *Van Parys* referred to Article 22.8 of the DSU as part of its reasoning to deny direct effect of DSB rulings. This provision enables the losing party to the dispute to find a solution that is mutually satisfactory for itself and the applicant. One solution might be partial compliance with the decision or financial compensation by the respondent, which will provide some sort of relief to the applicant for the short-term. But even if such settlement was reached, it would be subject to Article 3(5) of the DSU that requires all settlements to be in conformity with WTO law and 'not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements'. There is, as such, little a losing party can do in the long-term apart from bringing its national law into compliance because all settlements reached between the respondent and complainant must be consistent with WTO law. The Court of Justice in both *Van Parys* and *FIAMM* discussed these 'mutually acceptable solution to the dispute' and stated that they must be in conformity with the WTO rules but did not acknowledge their ultimate effect, namely that WTO members have the responsibility to eventually bring their national measures in conformity with WTO law.[15]

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[11] DSU, Art 22.1 and 2. For what may be a reasonable period of time see Art. 21.3 of the DSU.
[12] DSU, Art. 21.1.
[13] Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union Annotation to Case C-149/96, *Portugal v. Council*' (2000) 3 JIEL 441, p. 453.
[14] Marc Weisberger, 'The Application of *Portugal v. Council*: The Banana Cases' (2002) 12 DukeJComp&IntlL 153, pp. 171 – 172.
[15] Adrian Emch, 'The European Court of Justice and WTO Dispute Settlement Ruling - The end of the Flirt' (2006) 7 J. World Investment & Trade 563, page 576.

Regarding the DSU's context and overall purposes, it may be concluded that the options available under DSU Art 22.1 do not constitute legal alternatives once the period of time to implement the DSB ruling has passed. The DSU states that the WTO Agreements are said to be interpreted 'in accordance with customary rules of interpretation of public international law',[16] whereas the AB recognised that Article 31 of the VC 1969 forms part of CIL.[17] The practice to consider an agreement in its context and overall purposes has been not uncommon for the CJEU.[18] As a consequence, the CJEU could have not easily avoided engaging into an analysis based on DSU's context and overall purpose, which would have confirmed that compensation is neither a permanent option nor could last forever.[19]

The fact that implementation of the DSB ruling is a permanent measure, rendering all other options temporary, can be also understood by the role of the DSB in the DSU Article 22.8. In particular, 'the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided'.[20] What else could the DSB keep under surveillance in this context if not compliance with the decision? If there was a different option to permanent compliance, it would likely appear in DSU Article 22.8 and require the DSB to keep it under surveillance too. The fact that this legal provision requires the DSB to keep under surveillance all cases including where the injured party accepted compensation is certainly not coincidental. In addition, the WTO DSS provides 'security and predictability to the multilateral trading system'.[21] If DSB decisions were not binding, one may seriously doubt how and to what degree this can be achieved.[22]

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[16] DSU, Art. 3.2.

[17] Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996, p. 17.

[18] See e.g. Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR 1-8615, para. 35 where the Court said that treaties must be interpreted 'in light of its objectives' and then pointed out at Art. 31 of the VCLT 1969.

[19] Adrian Emch, *supra* note 15, page 577.

[20] Stefan Griller, 'Enforcement and Implementation of WTO law in the European Union' in Fritz Breuss, Stefan Griller and Erich Vranes (eds.), *The Banana Dispute: An Economic and Legal Analysis* (Springer 2003), pages 274 – 276. See also Panos Koutrakos, *EU International Relations Law* (Second edition, Hart Publishing 2015), page 295 citing this position. In response, Eeckhout argued that the CJEU in *Portuguese Textiles* was 'merely saying … it will not act as a judicial enforcer of WTO law … [and] leaving it to political institutions to determine the scope and meaning of the E[U]'s obligations'. Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union - Some Further Reflections' (2002) 5 JIEL 91, page 97 (emphasis added) However, he did not address one of the main issues here, namely that the CJEU found that the WTO agreements do not determine their methods of enforcement and focused on why direct effect would be problematic.

[21] DSU, Article 3(2).

[22] Adrian Emch, *supra* note 15, page 578.

The DSU does not permit negotiations or retaliation to be indefinite and so at some point the respondent will have no other option but comply with WTO law. It may also be added here that by accepting to give compensation the respondent acknowledges that WTO ruling is binding as well as that its measure violates WTO substantive law. Thus, compensation does not enable WTO members to buy the 'right' to violate WTO law.[23] Such position could also be deduced from the arbitrators' decision in the *Banana* case.[24] Although the arbitrators stated that the aim of countermeasures is to 'induce compliance', which renders it as a non-permanent measure, compensation may also be embraced here if the paragraph is read in its overall context.[25] Various other paragraphs read together support the conclusion that WTO rulings are binding. For instance, in *Bed Linen*, the AB stated that if a panel finds that the contested measure is inconsistent with WTO law, under DSU Art. 19.1, it can recommend the respondent to bring its measure in compliance with the WTO agreements. Unless appealed, the DSB will adopt this report by respecting the period set in the DSU, Article 16.4. The respondent then has to comply and if it does not do so the applicant may take recourse to the DSU Article 22.1.[26] This chain of events indeed makes it clear that compliance is compulsory and that the WTO Agreements determine their methods of enforcement.[27]

In general, the main problem comes from that the DSU does not tell us when the respondent has to comply with the DSB ruling[28] and there are different factors that can influence when the respondent will remove the WTO-inconsistent measure. The CJEU seems to suggest in *Portuguese Textiles* and the cases that followed it that systems where non-permanent solutions are possible on temporary basis do not need require specific compliance. Yet, it should be also acknowledged that in certain circumstances the EU, under EU law, could be required to pay fines until it has complied.[29] But even if WTO does not determine when compliance with the DSB decision is supposed to happen that is not to mean that the DSU does not determine its methods of enforcement. The fact that

[23] Geert A. Zonnekeyn, 'The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance – the Banana Experience' (2000) 34 JWT 93, page 104.
[24] Appellate Body Report, *European Communities - Regime for the importation, sale and distribution of bananas - Recourse to arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1997, para 6.3.
[25] Stefan Griller, *supra* note 20, page 275 – 6.
[26] *Bed Linen*, paragraphs 92 – 93.
[27] Piet Eeckhout, *EU External Relations Law* (2nd edition, OUP 2011), page 380.
[28] Thomas Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 CMLR 325, page 374.
[29] Bernard M. Hoekman and Petros C. Mavroidis, 'Bite the Bullet Trade Retaliation, EU Jurisprudence and the Law and Economics of 'Taking One for the Team'' (2014) 20 ELJ 317, pages 323 – 324.

compensation and retaliation are temporary measures would also be in line with the position of countermeasures in public international law, where their main objective is to make the defendant comply with the concerned rule.[30]

In examining *Portuguese Textiles*, Allan Rosas, a judge of the CJEU from 2002 – 2019, recognised that compensation is a 'temporary' option and should happen when withdrawing the original measure would be 'impracticable'. But in his view the CJEU found that compliance with WTO law "is of a 'soft' nature" and so European courts cannot control 'in a manner which could lead to the invalidity of legal acts implying an absence of withdrawal'.[31] Nevertheless, the main idea behind direct effect is to put claimants in a position where they can rely on an international agreement, or decision of a body established under such agreement, to set aside national law. Thus, the judiciary would not have had to police general compliance with WTO law. Its role would have been limited to ruling on if the EU measure was contrary to EU's obligations under international law. Some international agreements have direct effect in the European legal order and the CJEU have used these agreements to set aside EU provisions. If WTO law had direct effect, the CJEU would not have been required to do anything novel or different from adjudicating legal disputes between parties.

3.3) Direct effect and Article 22 of the DSU

While depriving Members of the WTO from the possibilities under DSU Article 22 after the DSB found in favour of the injured party would have discernible disadvantages, it is argued that direct effect of WTO law could not have led to such consequences.

One of the strongest supports of this part of the CJEU decision in *Portuguese Textiles* came from Eeckhout, who argued that after an adverse DSB ruling the respondent is obliged to bring its national law in compliance with WTO law for future. Accordingly, DSB rulings are prospective and a WTO member cannot get compensation for past misconduct.[32] However, according to Eeckhout, the claimant in *Portuguese Textiles* sought for direct effect that was non-prospective. Regardless of whether the complainant makes a claim under TFEU Articles 263 or 267, direct effect of WTO law here would

[30] See Servaas van Thiel/Armin Steinbach, 'The Effect of WTO Law in the Legal Order of the European Community: a Judicial Protection Deficit or a Real-political Solution, or both?' in Michael Lang, Judith Herdin-Winter, Ines Hofbauer-Steffel (eds.) *WTO and Direct Taxation* (Kluwer Law International 2005), page 62.
[31] Allan Rosas, 'Case C-149/96, *Portugal v. Council*. Judgment of the Full Court of 23 November 1999' (2000) 37 CMLR 797, page 809. See also Marc Weisberger, *supra* note 14, page 171, who characterises the obligation to withdraw as 'soft'.
[32] Piet Eeckhout, *supra* note 20, pages 93 – 94.

produce an *ex tunc* annulment effect – comparable to the effect of the EU judicial review procedure.[33] The DSU also says that all disputes start with an initial consultation phase where the complainant and respondent have the opportunity to find a solution that is mutually agreeable, whereas the option to settle disputes before the DSB issues a formal ruling is not excluded.[34] In fact, under DSU Art. 3.7, the preferable option to resolve disputes between WTO members is by finding a 'solution mutually acceptable to the parties'[35] rather than starting legal actions in Geneva.[36] As such, any form of judicial enforcement on domestic level that may lead to an *ex tunc* annulment remains problematic because it would reduce the possibilities to pursue the DSU-preferred mutually acceptable solution to the dispute before the DSB adopts the panel or AB's report.[37]

However, the above arguments are unconvincing. Direct effect of WTO law would not give rise to a right to strike down immediately the conflicting law. In cases in which EU law was declared incompatible by the CJEU, it is possible for the judicial organ to allow the concerned provision to remain in operation until a new measure is enacted.[38] According to Mendez, these prospective judgments will fail to preserve the balance between temporary and permanent measures.[39] But this could happen if only the CJEU declares the EU measure void with immediate effect. It remains an option for the CJEU to request from the EU to repeal the conflicting measure but then give the parties to the dispute time to enter into negotiations, if so requested under DSU Art. 22. This would leave the temporary options (compensation and retaliation) available until the EU has to comply and not prejudice any rights stemming from WTO treaty law. By doing so the CJEU could strike a balance between the rights of the injured party to demand compensation or retaliate and the EU obligation to comply.

If immediate compliance with the DSB ruling is impracticable, the respondent can remove the WTO-inconsistent measure within a 'reasonable period of time'.[40] While some argue

[33] Piet Eeckhout, *supra* note 20, page 94; Antonis Antoniadis, 'The *Chiquita* and *Van Parys* Judgments: Rules, Exceptions and the Law' [2005] 32:4 Legal Issues of Economic Integration 460, page 470; Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, (OUP 2013), page 213.
[34] Statistics show that half of the initiated consultations were resolved without the need to make a request to the DSB decision to consider the dispute. See Peter Van den Bossche, The Law and Policy of the World Trade Organization, (2nd edn, CUP 2008), pages 169, 173, as cited in Mario Mendez, *ibid.*, page 214 .
[35] Under DSU Article 3.7, this solution must also be 'consistent with the covered agreements'.
[36] Mario Mendez, *supra* note 33, p. 214; Allan Rosas, *supra* note 31, page 809.
[37] Mario Mendez, *id.*
[38] Pieter Jan Kuijper and Marco Bronckers, 'WTO law in the European Court of Justice' (2005) 42 CMLR 1313, page 1346.
[39] Mario Mendez, *supra* note 33, page 213.
[40] DSU, Article 21.3.

that because of this 'reasonable period of time' DSB rulings do not become immediately binding, this should not be interpreted as to weaken their general binding nature under international law. The purpose of this 'reasonable period' is to give time to the respondent to remove the conflicting national measure if immediate removal is not practical. And as said above different factors can affect when removing the WTO-inconsistent measure will be practical.[41] As such, compliance with WTO law might be postponed but to do so the requested period to comply shall be consistent with DSU 21(3) (a) – (c). But even if WTO law had direct effect the EU organs would still have the power to come into negotiations with the injured party as to agree on temporary compensation.[42] That is because there is a 'reasonable period of time'. Thus, since the EU has been granted the right to comply within a 'reasonable period of time' direct effect cannot require from the EU to repeal the conflicting measure immediately.[43] Hence, the fear of depriving the EU from the possibilities under Article 22 of the DSU in those circumstances would not exist because the WTO measure does not have to be removed immediately but within a 'reasonable period of time'. The same logic may also be applied to prevent WTO law from having an *ex tunc* annulment effect. It is possible to review the contested EU measure in light of WTO law but then refuse to award compensation to the applicant for past misconduct by reasoning that WTO remedies are prospective under WTO treaty law.[44]

3.4) Substantive reciprocity

The CJEU substantive reciprocity analysis of the WTO Agreements is also flawed. While it is true that WTO members aim to enter into 'reciprocal and mutually advantageous arrangements', perusal of the WTO Agreements demonstrates that some provisions are based on reciprocal trade concessions. One such example is the principle of national treatment[45] requiring from the home market to give the same treatment to the products, services or IP items of another nation as if they were its own. Another example is the most-favoured-nation principle (MFN) precluding nations to discriminate between other trading

[41] Bernard M. Hoekman et al., *supra* note 29, page 323.
[42] Stefan Griller, *supra* note 13, page 453 (emphasis added).
[43] *Id.*
[44] Such is the view of many scholars and has found support in the text of the DSU as well as the AB and panel decisions. Under Art. 19.1 of the DSU, retrospective remedies are considered to be precluded. Under this Article, the panel or AB can recommend that the respondent 'brings its measures into conformity', which prevents the panel/AB to ask from the respondent to pay damages to the injured party for past misconduct. See: Thomas Sebastian, World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness, page 339 and case law cited therein. See also one of the leading papers on the proposition that WTO remedies are non-retrospective. Petros C. Mavroidis, Remedies in the WTO legal system: Between a Rock and a Hard Place 11 EJIL 763.
[45] See Article III of GATT, Article 17 of GATS, and Article 3 of TRIPS.

nations.[46] While there are some exceptions to these principles, they are certainly not trade concessions that one WTO member should give to another to get the same in return and constitute a cornerstone of the WTO agreements.[47] It is enshrined in the preamble of the WTO Marrakesh Agreement that the outcome of the results from concluding the UR negotiations were based on 'reciprocity and mutual advantage' as well as that Members should continue pursuing the Agreement's objectives. While some of the EU's bilateral trade agreements at that time did not include the words 'reciprocal and mutually advantageous arrangements' in theirs preamble, this does not mean that they had no such characteristics.[48] Hence, the CJEU was wrong to conclude that the WTO Agreements are still based 'on the principle of negotiations with a view to 'entering into reciprocal ... advantageous arrangements' because some WTO clauses form an integral part of the WTO regime and deviating from them is possible if only the Member can invoke an exception.

There is little doubt that the WTO Agreements and the Agreement that the CJEU interpreted in *Kupferberg* have their differences, in particular regarding contracting parties and scope.[49] However, it is difficult to understand what does 'asymmetry of obligations' within the context of the WTO agreements mean. The WTO agreements clearly offer some advantages to WTO members categorised as 'developing countries'[50] which certainly makes those agreements asymmetrical.[51] After all, the WTO Agreements were not concluded by the EU and developed countries only and so the CJEU wrongly said that the Agreements do not have 'asymmetry of obligations'. The argument about 'special integration' is not convincing either. There were not many bilateral agreements in the 1990s between the EU and other nations that included provisions relating to the trade of services. Therefore, the GATS established further integration in this respect.[52]

3.5) In defence of the CJEU's decision to preclude direct effect

[46] GATT, Art. I; GATS, Art. 2; TRIPs, Art. 4.
[47] Geert A. Zonnekeyn, 'The status of WTO law in the Community legal order: some comments in the light of the *Portuguese Textiles* case' (2000) 25 ELR 293, page 300.
[48] Steve Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: legal and constitutional issues* (Hart Publishing Ltd., 2001), page 121.
[49] Panos Koutrakos, *supra* note 1, p. 278.
[50] Development: trade and development committe: Special and differential treatment provisions, <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions> accessed 17/10/19.
[51] Piet Eeckhout, *supra* note 20, page 95.
[52] Steve Peers in Gráinne de Búrca et al. (eds), *supra* note 48, page 121.

After several decades of European integration, some scholars suggest that the EU has developed an institutional configuration characterised by the separation of powers doctrine. The most rudimentary form of this doctrine requires separation between the executive, legislative and judicial branches.[53] van den Broaek argues that the CJEU's decision to deny direct effect on the basis of judicial reciprocity offends this doctrine. In his view the decision appears to have been based on political considerations rather than legal grounds and this offends the classic separation of powers doctrine according to which courts should not encroach upon the role of the political institutions.[54] This raises the issue whether the CJEU can rely on reciprocity by EU trade partners as a factor inferred from EU primary law to preclude the direct effect of EU international law obligations.[55]

Nevertheless, the criticism that the CJEU did not base its reasoning on legal grounds is unconvincing. By precluding direct effect, the Court prevented a distortion of the EU institutional balance. The executive and the legislative body, rather than the judicial, are the actors that normally play key role when it comes to diplomatic relations on the international arena.[56] However, had other nations had the authority to challenge EU measures before the EU judiciary, there would have been a shift in international trade matters from the European Commission and the Council to the European Courts.[57] Legal challenges based on WTO law would have been likely and potential applicants were not going to face many legal hurdles to bring them.[58] This would have violated the EU

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[53] Gerard Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 ELJ 304, pages 306 – 308.

[54] Naboth van den Broek, 'Legal persuasion, political realism, and legitimacy: the European Court's recent treatment of the effect of WTO agreements in the EC legal order' (2001) 4 *JIEL* 411, page 438. See also Geert A. Zonnekeyen, *supra* note 47, page 299 writing that judicial reciprocity is 'an assault to the "*trias politica*" principle'.

[55] Stefan Griller, *supra* note 13, p. 456. See also: H. Keller, Rezeption des Völkerrechts, 2003, 700 as cited in Robert Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions' 2003 Jean Monnet Working Paper 9/03, page 21; Mervi Pere, 'Non-implementation of WTO Dispute Settlement Decisions and Liability Actions' (2004) 1 Nordic Journal of Commercial Law 1, page 37.

[56] Francis Snyder, 'the Gatekeepers: the European Courts and WTO Law' (2003) 40 CMLR 313, page 331.

[57] Antonis Antoniadis, 'The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches' (2007) 6 World Trade Review 45, pages 53 – 54.

[58] Prior to the decision in Case C-50/00 *P Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, which was decided 3 years after *Portuguese Textiles*, the scope of 'individual concern' in judicial review procedure was relatively broad and this could have allowed easier standing for applicants in WTO law cases. In cases in which the actions were not brought by private parties, powerful lobbying could have pushed EU Member States to try to challenge EU law for their compatibility with WTO law. Request for preliminary references based on WTO law by EU MS courts were also very likely, especially at times in which the EU was actively enlarging. See Antonis Antoniadis, *Id.*

institutional balance, which was preserved by ruling out direct effect.[59] Moreover, WTO members that do not recognise direct effect of WTO law have full 'scope of manoeuvre'. By contrast, direct effect would have diminished the powers of the EU institutions to implement WTO law that they currently enjoy. Clearly, these are constitutional aspects of the judgments and so the CJEU does not want to 'tie the hands of the EU legislative and executive organs' by giving direct effect or violate the EU institutional balance.[60] To give an example, under Marrakesh Agreement Art. XX (b), a WTO member may depart from its WTO obligations for purposes to protect public health.[61] In *Hormones*, the EU invoked this exception to justify measures that blocked imports of some products originating from the US and Canada. As the DSB ruled against the EU, direct effect could have led to these products entering the EU despite that they were banned after EU's thorough medical examination. Not only this would have restricted the 'scope of manoeuvre' of the EU institutions but may have also placed the Luxembourg Court in the position where it would have had to take decisions on the potential health impacts of certain goods, which is clearly not within its expertise or competences.[62]

Although there are some compelling reasons why the EU political institutions may be in the better position to examine if an international agreement can have direct effect,[63] this should not prevent the CJEU from doing so. The cases regarding direct effect of WTO law may have 'political elements', but one must bear in mind that the CJEU was asked here to decide if the claimant could rely on WTO law to invalidate EU law. As such, the Court was not able to dodge the question or refer the matter to another EU institution. In fact, the CJEU avoided answering the question about direct effect of WTO law on several occasions prior to *Portuguese Textiles*. If the potential to encroach upon the separation of powers doctrine was that concerning, this could have been either raised in the cases pre-*Portugal Textiles* where the CJEU briefly discussed direct effect, but on the facts did not

[59] Francis Snyder, *supra* note 56, page 331.
[60] Piet Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations', (Europa Law Publishing, Groningen 2005), page 15.
[61] WTO Marrakesh Agreement, Art. XX, (b).
[62] Allan Rosas, *supra* note 31, p. 811.
[63] See for example Kuijper who gives the overall democratic legitimisation of the EU legislative power as a reason. Pieter Jan Kuijper et al., *supra* note 38, page 1321. Similarly, the question of direct effect is not what André Nollkaemper a 'politics-free zone'. André Nollkaempe, 'The Duality of Direct Effect of International Law', (2014) 25 EJIL 105, page 124. This may be contrasted with Peters who argues that a constitutional and legal analysis of direct effect of international law are also possible, despite its political nature. Anne Peters, *Beyond Human Rights The Legal Status of the Individual in International Law*, (CUP 2016), page 495 see also Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – For a Direct Effect of WTO Obligations?' (2014) 25 EJIL 151, page 151.

have to confirm or reject it, or the EU legislature would have already determined the legal effect of WTO law by incorporating it in EU primary law.[64]

While the Court pointed out that WTO law lacks direct effect in the legal order of some of the EU's most important trade partners, it was not a secret that some other trading blocks and potential EU commercial partners had adopted different responsibilities under international trade law. Consequently, the CJEU may be criticised because it looked at the effect of WTO law in the legal order of EU's closest trade partners but not in the world as a whole. At that time, the EU's trade strategy was to establish trade relations with other nations too. Pushing this further, the question about judicial reciprocity did not arise when the Luxembourg Court had to consider the direct effect of EU's bilateral agreements with Norway and the Switzerland, respectively. Before 1995, the EU had trade relations with Finland, Austria, and Sweden and they were governed by treaties that had direct effect. This was despite that these three nations were among EU's closest economic partners.[65] The fact that the CJEU was not concerned about reciprocity when it came to these bilateral agreements is surprising. The EU has stronger interests to enforce bilateral agreements as in most cases they liberalise trade even further. Practically, the EU has more to lose if there is a bargaining disparity vis-à-vis the other party, which may happen if the latter does not confer direct effect to the bilateral agreement.[66]

However, the fact that the EU attributed direct effect to certain bilateral agreements or that some other nations did so to WTO law is of little relevance here. Why would the Court be concerned about the legal effect of WTO law in the legal order of a nation with which the EU had less-developed or no trade relations in the 1990s? The CJEU rightly looked at EU's closest commercial partners; after all, these were the nations that could have reaped considerable economic benefits from the EU if WTO law was a parameter of legality of EU law. Thus, the criticism that the CJEU's reasoning belongs to the political rather than the legal sphere also fails to take into account the context in which the CJEU was taking the decisions and that the judiciary could not have ignored the potential negative ramifications

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[64] As Jackson observed, the CJEU has been willing to follow the wishes of other institutions when deciding on direct effect. John H. Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals' in Anthony Arnull, Piet Eeckhout, and Takis Tridimas, (Eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, (OUP 2008), page 377. For cases where the CJEU avoided answering if WTO law can have direct effect see Geert A. Zonnekeyn, 'The *Hermès* Judgment: Reconciling the Principles of Uniform and Consistent Interpretation' (1999) 2 Journal of World Intellectual Property 495, pages 495 – 497.

[65] Steve Peers in Gráinne de Búrca et al. (eds), *supra* note 48, p. 122.

[66] *Id.*

of direct effect for the EU.[67] Most importantly, the EU courts do not take decisions in a vacuum and to come to the most effective outcome they should examine the case from all possible angles. On the facts, the CJEU had to consider, *inter allia*, the economic prosperity of the EU; in doing so, the judiciary could have not examined the case narrowly and disregarded the potential impact of direct effect for the EU. As a result, since most of the EU's closest trade partners refused to allow direct effect, purely legal analysis without taking into account any political considerations, in the author's view, would have been wrong.[68]

Although in *Kupferberg* was enunciated that lack of reciprocity in obligations was not a valid ground to rule out direct effect, in the cases relating to direct effect of WTO law the Court reached different conclusions. This led to the criticism that the CJEU applied the criteria for direct effect of international agreements inconsistently. Gáspár-Szilágyi identified the CJEU's quest to protect the EU legal order from the international legal order as generally problematic and that the Court might have inflicted more harm than good by negatively affecting, *inter alia*, legal certainty.[69] The call for certainty was also made by AG Jacobs who argued that as a matter of policy the CJEU should attempt to review EU law in light of international treaties that are binding on the Union.[70]

However, the Court was not barred from deviating from its decision in *Kupferberg* and find that reciprocity can be a factor for refusing to confer direct effect to WTO law but not some bilateral agreements. Cases are never identical and the CJEU should not narrowly apply the criteria for direct effect of international law for all agreements without examining them in their context.[71] This can be justified on the basis that international trade agreements have different purposes and objectives as compared to other agreements not regulating trade. In this sense, the EU has one type of relations with its commercial partners but others with its non-commercial partners. There was little to bar the Court from deviating from its previous decision in *Kupferberg*, especially since the Treaties do not provide an

[67] This was also the position of the English High Court in *R v Comptroler of Patents, Designs and Trade Marks ex parte Lenznign AG v Courtauld (Fibres) Ltd and others* [1996] RPC 245, page 256 where said that in the absence of judicial reciprocity direct effect 'would produce a lopsided result'.
[68] Fabri argued that the WTO members that deny direct effect represent around 70% of world trade. Hélène Ruiz Fabri, *supra* note 63, page 155.
[69] Szilárd Gáspár-Szilágyi, 'The CJEU: An Overzealous Architect of the Relationship between the European Union Legal Order and the International Order' (2016) 2(1) Revista de Drept Constituțional (bilingual English, Romanian article) 44, page 44.
[70] Case C-377/98 *Netherlands v. European Parliament and Council of the European Union* [2000] ECR I-6229, Opinion of AG Jacobs, para 147.
[71] As Martines claimed, the double-test approach in *VGL* is problematic as a test for direct effect of international law. Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 EJIL 129, page 132.

ultimate criterion when public international law may have direct effect or exclude reciprocity as point of consideration.[72] In order to determine direct effect, the Court has to apply its own judge-made criterion. If this criterion had to be applied narrowly, the Court would have been deprived of flexibility, which is crucial given how fast-paced international relations are. International agreements after all operate under different circumstances that cannot be ignored.[73] In fact, some criticised the CJEU after its decision in *Kupferberg* for being 'politically naïve' and not willing to look whether other nations accorded direct effect.[74]

As the potential direct effect was not determined by the CP of the WTO Treaty, the CJEU took the opportunity to come up with its own reasons for denying direct effect, which means that here the Court did not go against any legally binding political declarations. For a matter of fact, the decision of the CJEU corresponds with the wishes of the Council and the Commission. While the Council Decision and Commission position did not constitute anything different 'than policy statement[s]'[75] and were not binding on the CJEU, they symbolised important statements from the respective EU institutions.[76] Some criticise the CJEU for not giving more consideration to these non-legally binding declarations. Others suggest that the CJEU is not in the position to consider many of the points it did in *Portuguese Textiles*.[77] Bourgeois suggests that the EU adjudicator should seek an advice from the EU institutions in cases relating to direct effect. Yet, if no other private party can challenge the position of the EU institution that was sought for advice one may clearly start doubting the CJEU independence here.[78] In addition, this advice would hardly be legally binding on the CJEU. If the CJEU ignored it, this would then lead to the criticism

[72] Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2001) 21 Yearbook of European Law 263, page 298.
[73] Thomas Cottier, *International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law*, Working Paper No 2009/18 APRIL 2009, page 13.
[74] Marco Bronckers, 'The Domestic Law Effect of the WTO in the EU – A Dialogue with Jacques Bourgeois', in Inge Govaere, Reinhard Quick and Marco Bronckers (eds.), *TRADE AND COMPETITION LAW IN THE EU AND BEYOND* (Edward Elgar, 2011), page 248.
[75] Case C – 149/96 *Portugal v Council* [1999] ECR I – 8395, Opinion of Advocate General Saggio, para 20.
[76] COM(94) 414 final as seen in Judson Osterhoudt Berkey, The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting (1998) 9 EJIL 626, page 631. The Commission's statement was later endorsed by the Council. See 94/800/EC: Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ L 336, 23.12.1994, p. 1–2 [hereinafter 94/800/EC: Council Decision], last recital. In general, the recital was not a legally binding commitment and this proposition is endorsed by many commenters. See: Pieter Jan Kuijper et al., *supra* note 38, page 1345.
[77] Marco Bronckers in Inge Govaere (eds.) *supra* note 74, page 252.
[78] *Id.*

that the judiciary took unilateral decisions by refusing to follow the advice of another institution that might be more competent to make such determination.

Unlike the Court in *Portuguese Textiles*, Saggio AG was unimpressed by arguments based on reciprocity in obligations. In his view, the means available under public international law to yield compliance diminished the importance of judicial reciprocity.[79] Similar argument was advanced by Alber AG who argued that direct effect would not weaken the EU's bargaining powers on the world stage because the EU can start legal proceedings in Geneva if another WTO member does not comply with its WTO obligations.[80] In effect, according to this position, judicial reciprocity is not crucial because the EU may bring compliance even in jurisdictions in which WTO law has no direct effect.[81] That is because the parties to the dispute cannot leave the WTO-inconsistent measure to stay there indefinitely.[82] Nevertheless, the absence of direct effect undermines the importance of WTO's methods to resolve disputes. Even if the DSB rules in favour of the EU in the absence of direct effect the EU will have few, if any, legal avenues to enforce the ruling in the respondent's legal order. Playing down the importance of reciprocity would thus require the EU to rely on the assumption that the respondent party will comply with WTO law in good faith. Although the principle of good faith is customary international law and several provisions of WTO law refer to it, the EU will have to take an extreme amount of risk by relying on this principle and exclude reciprocity from consideration.[83] Moreover, it is not always easy for the EU to take recourse to some temporary measures under WTO law. For instance, retaliating against a long-standing trade partner may cause deteriorating diplomatic relations and the EU should think very carefully before taking such decision. Saggio's reference to public international law methods to bring compliance is problematic as the suspension of a WTO obligation towards another member in the absence of a DSB ruling could amount to a breach of DSU Article 23. Thus, the public international law avenues to yield compliance are not viable and for this reason reciprocity is a factor of paramount importance.[84]

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[79] Case C – 149/96 *Portugal v Council* [1999] ECR I – 8395, Opinion of AG Saggio, paras 18-24. See further: Robert Uerpmann, *supra* note 55, page 19.
[80] Case C-93/02 *P Biret International v. Council* [2003] ECR I-10497, Opinion of AG Alber, paras 85 – 88.
[81] Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465, Opinion of AG Tizzano, para 63.
[82] Mervi Pere, *supra* note 55, page 38.
[83] Andrew D. Mitchell, 'Good Faith in WTO Dispute Settlement', (2006) 7(2) Melbourne Journal of International Law 339, page 339.
[84] Allan Rosas, *supra* note 31, page 812.

Further, it may be added that taking reciprocity into consideration has not been very uncommon for the courts of some EU MS when reviewing the internal effect of public international law. It is important for the CJEU to continue take MS courts into account as to preserve EU's constitutional balance.[85] Of course, MS courts have not applied those reciprocity considerations to all type of international treaties.[86] But the WTO is different in the sense that its main aim is to liberalise trade between nations and it clearly differs from other international treaties.

Some argue that while direct effect of WTO substantive law is problematic, this should not apply for decisions of the DSB. Circumstances where the DSB has found that the EU regime is incompatible can be contrasted with examples where claimants try to rely on direct effect of rulings where the EU was not a party.[87] The fact that a political organ, i.e. the DSB, confirms the findings of a panel or the AB is critical indeed.[88] However, it is difficult to accept that the above reciprocity considerations should not apply to DSB rulings too. There is no rationale for different treatment especially when other WTO members are not ready to offer reciprocal commitments. Even if the post-implementation period of the DSB decision has passed, this would not have changed the situation that much – the EU has no guarantee that in those circumstances its most important trade partners permit direct effect. Despite that the purpose of the WTO quasi-judicial organ is to interpret WTO law, it does not change the character of the WTO agreements in a sense that may allow direct effect.[89] The WTO Agreements are not meant to make national or regional courts the enforcers of WTO law or DSB rulings. History also shows that it has been quite rare for the EU to not comply with a DSB ruling and so at least the EU's record shows that it does not undermine the DSB's authority.[90]

An attempt to find a compromise position between the lack of judicial reciprocity and direct effect of WTO law was tried in *Omega*. The claimants argued in this case that the CJEU should be able to review some WTO provisions as to whether they can have direct effect, despite the CJEU's past jurisprudence. It looks like that the claimant here was trying to

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[85] Panos Koutrakos, *supra* note 1, page 279.

[86] Even though the French Constitution imposes a general reciprocity requirement before a treaty can have direct effect, this has been seen as not to apply for treaties relating to international human rights law. see Marco Bronckers, *supra* note 74, page 250.

[87] Piet Eeckhout, 'The Domestic Legal Status of the WTO Agreement – Interconnecting Legal Systems' (1997) 34 CMLR 11, page 53.

[88] Piet Eeckhout, *supra* note 60, page 17.

[89] Pieter Jan Kuijper et al., *supra* note 38, page 1335.

[90] Alessandra Arcuri and Sara Poli, 'What Price for the Community Enforcement of WTO Law?' (January 1, 2010). EUI LAW Working Paper No. 2010/01, page 22.

persuade the CJEU to review EU law vis-à-vis WTO law on a case-by-case basis and create an exception for some provisions that do not fall within the general rule prohibiting direct effect.[91] Nevertheless, this would have been very problematic and could have created considerable legal uncertainty because one provision was going to have direct effect but not another. When *Omega* reached the dockets of the Grand Chamber, there were three forms of indirect effect and an exception like *Omega* would not have fit in easily here. What would be the purpose of for instance *Nakajima*'s intention exception if some WTO provisions had direct effect? Not surprisingly, the claimant's suggestion was rejected by the AG[92] and then the CoJ. The Opinion of AG Alber went even further and he made an interesting contribution to the debate by arguing that the observance of WTO law should be ensured by the WTO rather than the CJEU or individual MS.[93] In other words, his position appears to be that direct effect may be possible if only the WTO agreements required it from all CP.[94] This was unlikely[95] and even more unlikely at the time of writing.

3.6) Conclusion

The above analysis has shown that the WTO agreements determine their methods of enforcement. There are no other alternatives to compliance with WTO law and compensation and retaliation are temporary options. Even if the CJEU granted direct effect to WTO law, this would not have precluded the EU from exercising its rights under Art. 22 of the DSU. It would have been nothing new for the CJEU to issue a prospective judgment and because there might be 'a reasonable period of time' to comply with the DSB ruling the EU would have still been allowed to take recourse to DSU Art. 22.

The CJEU's substantive reciprocity was unconvincing. There are different provisions in the WTO treaty that can be used to show that the Agreements do have reciprocal trade concessions, two being the principles of national treatment and MFN. Given the different treatment to nations classified as 'developing', the Agreements are also asymmetrical.

Nevertheless, the judicial reciprocity analysis of the CJEU is justifiable. By precluding direct effect of WTO law, the CJEU prevented distorting the EU institutional balance and made sure that the EU's scope of manoeuvring and powers to implement WTO law were

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[91] Francis Snyder, *supra* note 56, page 330.
[92] While AG Alber stated that some of the Agreement on Technical Barriers to Trade (ATBT) were 'perhaps sufficiently precise and unconditional in their wording to be amenable to direct application', in the same paragraph he rejected to accord them direct effect. *Omega*, Opinion of AG Alber, para 96.
[93] *Ibid.*, para 95.
[94] Francis Snyder, *supra* note 56, page 330.
[95] Steve Peers in Gráinne de Búrca et al. (eds), *supra* note 48, page 122.

not weakened. These are constitutional aspects of the judgment that show that the CJEU was not primarily influenced by policy arguments against direct effect. The CJEU rightly looked at if EU's closest commercial partners allow direct effect or not. The CJEU could have not applied the direct effect criterion narrowly and rightly deviated from its previous decision in *Kupferberg*. During the Uruguay Round negotiations the EU was among the stakeholders that insisted on giving the WTO quasi-judicial organ the power to interpret the WTO agreements.[96] Yet, both the Council and the European Commission issued declarations against giving direct effect to WTO law. While these documents were not legally binding, they still symbolise the will of two EU institutions and therefore the CJEU decision not to use WTO law as a criterion for reviewing the legality of EU law corresponds with them. The lack of reciprocity could have not been adequately remedied by the means to resolve disputes under the WTO Agreements, as the AGs suggested, as this would have required from the EU to put too much faith in WTO's capabilities to resolve disputes and that other WTO members would comply with the rulings in good faith. Even though this principle is embedded in both WTO law and CIL, in the absence of direct effect the EU would have little or no possibilities to enforce WTO substantive law or a DSB ruling in the domestic legal order of another nation. Moreover, taking into consideration reciprocity of obligations has been not uncommon for some EU MS and it is good if the CJEU adheres to their practices. The reciprocity considerations are also equally applicable to both WTO rulings and the WTO Agreements whereas the attempt to find a balanced position between direct effect of WTO law and reciprocity in *Omega* would have created more harm than good.

But above all, the EU is not the *odd* one because the concerns it raised when it had to decide the direct effect of WTO law were valid overall and it would have clearly not been in the EU's interest if the CJEU had come to different results.

[96] Bernard M. Hoekman, *supra* note 29, page 326.

Chapter 4) Indirect Effect of WTO law in the EU and the US

4.1) Introduction

As noted in Chapter 1, the Permanent Court of International Justice in *Danzig* ruled that an international agreement can have direct effect as long as this was the intention of its contracting parties. During the Uruguay Round negotiations, the Swiss proposal that would have required from all WTO members to accord direct effect to WTO law was rejected.[1] Not long after, a WTO panel found that the WTO Agreements do not create a new legal order.[2] However, the panellists also noted that the 'position of individuals' is not absolutely irrelevant to the WTO legal regime[3] as well as that the principle of indirect effect is 'rooted in the language of the WTO'[4] and not anything 'novel or radical'.[5]

The purpose of this chapter is to look at indirect effect of WTO law in the EU and the US. The overall answer to the second sub-research question is that the EU has been more willing than the US to give stronger effect to indirect effect of WTO law. As noted in chapter 2, the consistent interpretation principle (i.e. indirect effect) can come into effect if a legal provision is ambiguous, which would require from the judiciary to construe EU/US law in light of WTO law. In effect, the measure at stake receives an interpretation that it would not have had if the principle did not exist.[6] In addition, the CJEU has created two other forms of indirect effect: *Nakajima* (intention exception) and *Fediol* (reference exception).

This chapter starts by analysing the effectiveness of the consistent interpretation principle of WTO in the EU and the US. To presage the below discussion, chapter 4.2.1 shows that the consistent interpretation principle has been well-received. There is evidence that the CJEU has been willing to give deference to WTO law and interpret EU law in light of the latter. The chapter then considers the 3 main limitations to the rule requiring EU law to be interpreted in light of WTO law and advances the argument that the CJEU should abolish these limitations. Chapter 4.2.2 argues that the US courts have taken a very narrow view of the *Charming Betsy* (*CB*) doctrine in cases relating to WTO law. First, doubts remain if

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[1] Claus Dieter Ehlermann, 'On the Direct Effect of the WTO Agreements' in Talia Einhorn (eds.), *Spontaneous Order, Organization and the Law: Roads to a European Civil Society – Liber Amicorum Ernst-Joachim Mestmaecker* (T.M.C. Asser Press 2003), page 414.
[2] Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, (22 December 1999) WT/DS152/R, para. 7.72.
[3] Para 7.73.
[4] Para 7.79.
[5] *Id.*
[6] Sacha Prechal, *Directives in EC Law* (2nd edition, OUP 2005), p. 210 cited in Szilárd Gáspár-Szilágyi, 'The "Direct Effect" of E.U. International Agreements Through a U.S. Lens' (PhD Thesis, Aarhus University 2015), page 377 – 378.

CB survives under the URAA (4.2.2.1) and if state law should be interpreted vis-à-vis WTO law (4.2.2.5). Second, the importance of the few cases in which the US courts gave deference to WTO law by virtue of *CB* is undermined because in those cases the US political body had already decided to comply with WTO law. (4.2.2.2) Furthermore, it appears that the US judiciary has taken the position that a US agency's determination cannot be reviewed in light of a DSB ruling after the US decided to implement this ruling under URAA's implementation procedure. (4.2.2.4) Third, looking at two important decisions of the NAFTA Chapter 19 panels in 4.2.2.3, it is argued that these bi-national panels so-far have been more willing to give stronger deference to WTO law as compared to the US courts.[7]

Sub-chapter 4.3 examines the effectiveness of *Fediol* and *Nakajima* in the EU.[8] As these exceptions are not present in the US, full comparison is not possible in this thesis. The overall argument is that the CJEU has read down these two exceptions to their strictest possible reading and due to the limited circumstances in which these two operate their practical effectiveness is very little. In light of recent case-law, the CJEU appears to continue taking a narrow view of *Nakajima*.

4.2) Consistent interpretation of WTO law

4.2.1) EU

The duty of EU MS to interpret national law in conformity with EU law can be traced back to the 1980s.[9] But the duty of the EU to construe secondary EU law in accordance with international law did not arise until the decision in *Poulsen* where an EU secondary provision was interpreted in light of international law of the sea.[10] The scope of this obligation was later widened by requiring from the CJEU to interpret EU law as consistent with other branches of public international law.[11] As for the WTO Agreements, the CJEU initially used them as an aid to interpret general principles of law.[12] Not long after, the

[7] NAFTA panels' decisions have not been immune to criticism. This paper does not aim to consider this further and NAFTA panels are solely looked at to see how they decided a few cases that also came before US courts.
[8] *Nakajima* was applied also in several cases outside trade law but these cases are not going to be analysed in this thesis. See Szilárd Gáspár-Szilágyi, *supra* note 6, 431 – 443.
[9] Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26.
[10] Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-06019, para 9.
[11] Case C-61/94 *Commission v Germany* [1996] ECR I-03989, para 52.
[12] Case C-200/96 *Metronome Musik GmbH v. Music Point Hokamp GmbH* [1998] ECR I-1953, para 26 [hereinafter *Metronome*]. Prior to that the CJEU tried to employ some sort of consistent reading of EU law vis-à-vis GATT 1947 on several occasions. For analysis see: Geert A. Zonnekeyn, 'The *Hermès*

CJEU in *Hermès* ruled that it has jurisdiction to interpret the TRIPs Agreement as well as that both the Luxembourg Court and MS national courts should apply EU law 'as far as possible, in light of the wording and purpose' of international agreements binding on the EU.[13] This would be the case as long as the international agreement is an integral part of EU law,[14] which is not contingent upon its direct effect in the European legal order.[15]

Many important provisions relating to international trade and economic relations form part of the TRIPs Agreement. Unsurprisingly, there was little doubt that this Agreement would have become an important and frequent subject of litigation in courts.[16] As a result, the ruling in *Hermès* is important because it demonstrates that the CJEU is willing to increase the scope of consistent interpretation and also require MS courts to interpret national law vis-à-vis the TRIPs Agreement, in parallel to their duty to interpret EU law vis-à-vis the Agreement.[17] This also prevented MS from ruling out indirect effect of WTO law. Some scholars argue that the duty of consistent interpretation should be applied by domestic courts to all WTO agreements even in circumstances where the EU has not exercised its legislative competence or if the matter falls within the MS competences. That is because the principle of consistent interpretation stems from EU law rather than WTO law and the latter is an integral part of the former.[18] However, this position has not been followed.[19] Just because an international agreement forms an integral part of EU law does not mean that the EU has law-making powers in all fields. Member States have retained theirs law-

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Judgment: Reconciling the Principles of Uniform and Consistent Interpretation', (1999) 2 Journal of World Intellectual Property 495, page 500.

[13] Case C-53/96 *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998] ECR I-03603, para 28 (hereinafter *Hermès*). See also *Dior*, para 47. To put it in the words of Hix, the CJEU conceives this principle as a 'constitutional obligation'. Jan-Peter Hix, 'Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts' Jean Monnet Working Paper 03/13 available at <https://jeanmonnetprogram.org/paper/indirect-effect-of-international-agreements-consistent-interpretation-and-other-forms-of-judicial-accommodation-of-wto-law-by-the-eu-courts-and-the-us-courts-2/>, page 66.

[14] Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International, 2008), page 310.

[15] See Case C-280/93 *Germany v. Council* (1994) ECR I-4973, Opinion of Advocate General Gulmann, para. 137, and Giacomo Gattinara, 'WTO Law in Luxembourg: Inconsistencies and Perspectives' (2008) 18 ItYBIL 118, page 126.

[16] Piet Eeckhout, *EU External Relations Law* (2nd edition, OUP 2011), page 279.

[17] So far the CJEU interpreted EU secondary law vis-à-vis WTO Agreements such as the ADA, Anti-Subsidy Agreement, and TRIPs. However, it is clear that the agreement-consistent interpretation principle applies to all WTO Agreements and is not limited to those three. see Giacomo Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (BRILL, Studies in EU External Relations, Volume 5, 2011), page 272; Jan-Peter Hix, *supra* note 13, p. 87.

[18] Francis Snyder, 'the Gatekeepers: the European Courts and WTO Law' (2003) 40 CMLR 313, page 355.

[19] Jan-Peter Hix, *supra* note 13, p. 116.

making capacity in certain areas and therefore they should have the right to decide on indirect effect where possible. Otherwise, the division of competences would become blurred for the purposes of indirect effect and this would undermine the very reason of having such division.

The decision in *Hermès* was criticised. The Court's finding that it has competence to interpret the TRIPs Agreement was considered problematic because it might have cautioned MS in concluding mixed agreements and incentivised them to make separate arrangements with non-EU parties, where possible. Member States feared that even in areas in which they retained treaty-making powers they would have been eventually deprived from determining the internal legal effect of the mixed agreement as a result of *Hermès*.[20] Nonetheless, the Commission's position explaining the need to grant exclusive jurisdiction to the EU on the basis of 'expediency'[21] is preferable. Had MS courts had jurisdiction over the TRIPs Agreement, there were three options: either accord direct effect, indirect effect or no effect at all.[22] But in any case if one MS had conferred, for example, direct effect to the Agreement but not others, this would have easily led to different interpretations of the law. Certainly, this would have not been in line with the CJEU's statement in *Opinion 1/94* where it emphasised on the importance of cooperation between MS after the WTO agreements came into effect.[23] For example, prior to *Hermès*, the German government gave direct effect to some elements of the TRIPs Agreement, [24] but the English High Court in *Lenzing* denied it on grounds of UK law as well as EU law.[25] It would have been also difficult to sustain different legal effects, and even in cases in which the matter related to national competence before national courts there was the risk of spill-over to EU law.[26] Post-Lisbon, treaty law determines that the EU has exclusive competence for most provisions of the TRIPs Agreement[27] reducing considerably the

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[20] Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013), page 242.
[21] *Ibid*., page 242.
[22] Piet Eeckhout, *supra* note 16, page 279. It must also be born in mind that the decision in *Hermès* was delivered before the CJEU decision in *Portuguese Textiles*.
[23] *Opinion 1/94* [1994] ECR I-05267, para 109.
[24] *Bundesregierung, Entwurfeines Gesetzes zu den Uebereinkoinmen* vom 15. 4. 1994 zur Errichtung einer Welthandelsorganisation, Deutscher Bundestag, Drucksache 12/7655 (neu) 1994 S. 335, 337, 344, 347.
[25] *R v Comptroller of Patents, Designs and Trade Marks ex parte Lenzing AG v Courtauld (Fibres) Ltd and others* [1997] EuLR, page 260. See further Geert A. Zonnekeyen, *supra* note 12, page 502. Piet Eeckhout, 'The Domestic Legal Status of the WTO Agreement – Interconnecting Legal Systems' (1997) 34 CMLR 11, page 22.
[26] Piet Eeckhout, *ibid*., page 23.
[27] TFEU, Article 207(1). Eeckhout stated that the Lisbon Treaty extended the CCP 'the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property'. Piet Eeckhout, *supra* note 16, p. 279.

possibilities for inconsistencies.[28] But the decision in *Hermès* demonstrates that giving EU exclusive competence over the TRIPs agreement is not only preferable from systematic point of view but is also important for the principle of consistent interpretation.

After delivering the decision in *Hermès*, the CJEU interpreted EU law vis-à-vis WTO law in numerous cases.[29] The effect of applying the principle of consistent interpretation is also significant. In *Asda*, on the facts, the Council had left a margin of discretion to the Commission to define the meaning of certain unclear concepts under Art. 24 of the Union Customs Code by setting out its own criterion.[30] The CJEU examined the criterion chosen by the Commission in light of two international agreements, one of which was the– the Revised Kyoto Convention and the WTO Agreement on Rules of Origin.[31] Although the CJEU did not invalidate the Commission's act, the significance here is that it interpreted the legislative act, which gave authority to adopt the administrative act, vis-à-vis international law.[32] However, in *Petrotub*[33] the CJEU declared the administrative act as incompatible after interpreting EU law in conformity with primary law while the latter was interpreted vis-à-vis WTO law.[34] While it has been debatable whether the CJEU in *Petrotub* did not apply *Nakajima*, the outcome of the judgment is that due to the consistent interpretation principle the CJEU managed to trump an EU institution's application of EU law.[35] Another well-known case where the application of the consistent interpretation principle led to an EU measure annulled was *BEUC*.[36] In this case, the Commission's 'daughter act' adopted under an EU Regulation 'parent Regulation' was found as invalid after interpreting EU law vis-à-vis WTO law.[37]

There is evidence that the CJEU has been also trying to gradually broaden the principle's scope even outside the boundaries of cases relating to WTO law. In *Pfeiffer* the CJEU held that the duty to interpret national law in conformity with EU law requires from the 'national court to consider national law as a whole'.[38] In doing so, domestic courts have to

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[28] Jan-Peter Hix, *supra* note 13, page 117.
[29] Apart from the cases cited in this chapter see also for references Jan-Peter Hix, *supra* note 13, page 75; Mario Mendez, *supra* note 20, pages 227 – 230.
[30] Case C-372/06 *Asda* [2007] ECR I-11223, para 35.
[31] *Ibid.*, para 38 – 39.
[32] Jan-Peter Hix, *supra* note 13, page 122.
[33] Case C-76/00 *P, Petrotub and Republica v. Council and Commission* [2003] ECR I-79 [hereinafter *Petrotub*].
[34] Jan-Peter Hix, *supra* note 13, page 124.
[35] *Id.*
[36] T-256/97 *BEUC v. Commission* [2000] ECR II-101.
[37] See Szilárd Gáspár-Szilágyi, *supra* note 6, p. 384.
[38] Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para. 115.

go ‘beyond merely the provisions enacted in order to implement the directive’.[39] Therefore when a dispute is governed by two national laws, one of which complies with EU law but not the other, the national judicial organ should consider if it has the discretion to apply the former and interpret the latter as not applicable in the case at hand. Other cases can also be used to example that the CJEU has been ready to broaden the principle demonstrating its significance and importance.[40]

The above demonstrates the CJEU’s willingness to give deference to WTO law by virtue of the principle of consistent interpretation. Unfortunately, this willingness has not been unbounded. In addition to the general obligations on courts to respect EU general principles of law[41] or refrain from *contra legem*[42] interpretations, the Luxembourg Court have added further limitations to this principle.[43] The analysis in 4.2.1.1 criticises the existence of these three limitations and the overall argument is that there is no justifiable reason for the CJEU to not abolish them and widen the scope of the agreement-consistent interpretation principle even further.

4.2.1.1) Limitations

a) Limitation 1

First, pursuant to *Microsoft* decision, the principle of consistent interpretation does not require the EU Courts to interpret EU primary law vis-à-vis WTO law.[44] However, this limitation is unconvincing. The principle of consistent interpretation here was extended here it would require from the courts to interpret Union primary law in conformity with WTO law ‘in so far as possible’. As long as the judiciary complies by the principle’s limitations set out above, it would not be possible for the WTO Agreements to trump the hierarchical status of the EU treaties in the EU legal order.[45] Unless the judiciary goes beyond

[39] Monika Niedźwiedź, ‘Joint Competence of the EC and Its Member States as a Source of Divergent Interpretations of the TRIPS Agreement at Community and National Levels’ in Joanna Jemielniak and Przemysław Mikłaszewicz (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer, 2010), page 173.
[40] See also e.g. C-282/10, *Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre (CICOA)* ECLI:C:2012:33.
[41] *Ibid.*, para. 25.
[42] Case C-268/06 *Impact* [2008] ECR I-2483, para 100.
[43] Gáspár-Szilágyi identifies as a limitation that the principle of consistent interpretation has much weaker effect as compared to direct effect. see Szilárd Gáspár-Szilágyi, *supra* note 6, page 383. However, it is the author’s position that this is not a limitation but an application of the principle.
[44] T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para 798. [hereinafter *Microsoft*] The CJEU also stated that the Charter of the United Nations might have primacy over secondary law, but not primary. See Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, paras 307– 309.
[45] If there is no ambiguous EU primary provision, the CJEU cannot take recourse to the consistent interpretation principle. Otherwise, principles such as legal certainty would be affected and so courts

interpreting EU law in conformity with WTO law, there would be no logical reason to differentiate between primary and secondary law and apply the agreement-consistent interpretation principle only to the latter.

The GC ruling in *Microsoft* also demonstrates that the EU has created a regime where all international agreements – and not only those regulating international trade – are on position between primary and secondary law.[46] This contradicts the proposition that under TFEU Article 216(2) all international agreements concluded by the EU constitute binding obligations as there is another legal norm ranked above these international agreements. Unlike direct effect, consistent interpretation offers greater flexibility.[47] As the principle is not a substitute to direct effect, its application would help the EU to demonstrate that it takes international law seriously and reinforce the EU democratic legitimacy[48] without the need to subscribe to commitments that would put the EU in disadvantaged position on the world stage.

Some WTO rules are more detailed and sophisticated than EU primary law provisions and there are treaty provisions whose scope is still not fully clear.[49] In this respect, WTO law may serve as an aid for courts when interpreting primary law.[50] This would also enable the EU to gradually make its rules even more in line with a reputable intergovernmental organisation such as the WTO. The principle of consistent interpretation can also help courts to deviate in an indirect manner from the rule prohibiting them to base their decisions on international law norms.[51] The judicial organs could get the best of both worlds because they would have the opportunity to interpret treaty law in conformity with WTO law but not violate the before-mentioned prohibition. While the CJEU is not under such restriction, this is not the case for the domestic courts of some MS under their national constitutional arrangements.

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cannot give an interpretation that is not possible under the legal provision at stake. see Neuwahl A.E.M., 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law' in David O'Keeffe and Nicholas Emiliou (eds), *The European Union and world trade law: after the GATT Uruguay Round* (Wiley, 1996), page 322.

[46] Sujitha Subramanian, 'EU Obligations to the TRIPS Agreement: EU Microsoft Decision', (2010) 21 EJIL 997, page 1011; Thomas Cottier and Krista Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law', [1998] 1 JIEL 83 at page 89 also make the claim that the consistent interpretation principle should apply to the EU treaties.

[47] Francis Snyder, *supra* note 18, page 364.

[48] *Id*. See Thomas Cottier et al., *supra* note 46, page 90 who link the principle of consistent interpretation with the principle of *pacta sunt servanda*.

[49] Étienne Bassot, 'Unlocking the potential of the EU Treaties: An article-by-article analysis of the scope for action', European Parliamentary Research Service PE 630.353 – January 2019.

[50] Thomas Cottier et al., *supra* note 46, page 90.

[51] *Id*.

In spite of the GC stance in para 798 in *Microsoft*, at least two cases demonstrate that the CJEU has been referring to WTO law to clarify EU treaty law. First, in *Metronome*, the CJEU stated that the 'principle of freedom to pursue a trade or profession' cannot be interpreted without taking into consideration the TRIPs Agreement.[52] Second, in *Petrotub*[53] the CJEU interpreted EU primary law in conformity with the WTO AD Code.[54] These cases demonstrate that interpreting primary law vis-à-vis WTO law has not created many legal difficulties or negatively affected the EU legal order. In *Sólyom* the CJEU stated that EU law must be given interpretation vis-à-vis international law and then continued by interpreting TFEU Article 21 in light of an international law provision.[55] As the facts did not concern WTO law, the CJEU did not comment on its previous decision in *Microsoft* and it will be interesting to see if in future the EU judiciary will follow *Sólyom* in this area. Currently, there is nothing to suggest that the stance of the GC in para 798 in *Microsoft* is no longer valid. But it is regrettable that the GC in *Microsoft* did not explain further the reasons behind its decisions not to widen the agreement-consistent interpretation principle to EU primary law. The lack of explanation can be a reason to believe that even the GC struggled to come up with an argument here and continue its strive to protect EU autonomy from alleged encroachment by international law.

b) Limitation 2

The second limitation to the principle is that the EU Courts are not obliged to interpret EU law in conformity with DSB rulings. Even though it is now clear that DSB rulings have no direct effect, the case law concerning direct effect has little relevance here because the CJEU neither rejected nor recognised such duty.[56] By way of example, in *Shanghai*, the GC read the EU Regulation in conformity with the WTO Anti-Dumping Agreement.[57] While the GC did not impose a duty on future courts to interpret EU law in line with DSB rulings, this interpretation was in conformity with the DSB ruling in *Bed Linen*.[58] The same report was then at stake in *Ritek*, where the Court had to decide whether the EU practice was in conformity with EU's WTO obligations. However, in *Ritek* the GC decided not to rule

[52] *Metronome Musik*, para. 26.
[53] *Petrotub*, paras 57 – 60.
[54] Jan-Peter Hix, *supra* note 13, pages 120 – 121.
[55] *Sólyom*, paras 44 – 52.
[56] See Giacomo Gattinara, *supra* note 15, page 130. Gattinara concludes that despite that the claimant's challenge in *FIAMM* was not successful, this does not preclude other effect of DSB reports. See further Giacomo Gattinara in Enzo Cannizzaro et al., *supra* note 17, page 273.
[57] Case T-35/01 *Shanghai Teraoka Electronic v Council* [2004] ECR II-3663, para 165.
[58] Giacomo Gattinara in Enzo Cannizzaro et al. (eds), *supra* note 17, page 273.

whether it was obliged to follow it and did not interpret EU law vis-à-vis the DSB ruling.[59] In subsequent case law, the EU Courts read EU law as consistent with different DSB rulings but did not recognise this as a duty on future courts.[60]

One of the main reasons behind the hesitation to extent the consistent interpretation principle has been by that primary law is unclear whether decisions of (quasi-) judicial dispute settlement bodies can fall under the scope of TFEU Art. 216(2). Looking at case law, the CJEU in *Sevince* held that 'since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the [Union] legal system'.[61] As the EU is one of the CP to the WTO Treaty, it would follow that DSB rulings constitute binding obligations on it. After all, the purpose of the WTO AB and Panels is to interpret the WTO Agreements. While they have referred to other sources of law, such as customary international law, this should not be seen as to minimise their responsibilities to interpret the WTO Agreements. Thus, DSB decisions are 'directly connected' with the WTO Agreements. Besides, Article 216(2) of the TFEU refers to 'agreements … binding upon the [EU] and on its [MS]'[62] – this can be understood to mean that the concerned international agreement, including decisions taken by the different bodies it created, are binding as a whole. This would be subject to *Sevince* disclaimer that these decisions are 'directly connected', though this is not the case here as WTO law stipulates that panel and AB decisions aim to interpret the WTO Agreements; they cannot 'add to or diminish the rights and obligations provided in the covered agreements'[63] or have law making powers.[64] This logic can be also supported by at least two cases where

[59] Case T-274/02 *Ritek and Prodisc Technology v Council* [2006] ECR II-4305, paras 98-103. In Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007] ECR I-7723 the CJEU made an attempt to interpret EU law in light of the corresponding WTO AB report. see Marco Bronckers, 'Private Appeals to WTO Law: An Update' [2008] 42(2) JWT 245, page 258.
[60] For references of case-law see: Jan-Peter Hix *supra* note 13, pages 94 – 96; Mario Mendez, *supra* note 20, page 228.
[61] Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie* [1990] ECR 3461, para. 9 (emphasis added). This body was established pursuant to the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey [1964] OJ L217/3687 (hereinafter Ankara Agreement) as to decide disputes between contracting parties under this Agreement. See also Giacomo Gattinara, *supra* note 15, page 128.
[62] Emphasis added.
[63] DSU, Art. 3(2) and Art. 19(2).
[64] Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in Enzo Cannizzaro et al., *supra* note 17, page 250.

the judiciary did not differentiate between the status of DSB rulings and the WTO Agreements.[65]

Probably the strongest opposition to extending the duty of consistent interpretation to DSB rulings comes from Hix. He argues that *Sevince* cannot be applied to DSB rulings because the reasoning of the CJEU in this case is related to 'international rule-making' and does not include 'adjudication of specific disputes' by pointing out at Art. 3(2) of the DSU.[66] He also argues that this may explain why in *Opinion 1/91*[67] the CJEU did not make a reference to the principle now found in Art. 216(2) of the TFEU and decided that by concluding an international agreement the EU may give an authority to another judicial organ to take decisions that may be binding on the EU by interpreting and applying Union law. He then compares the envisaged EEA Court to the WTO panels and the AB to conclude that decisions of the former would have had an executory force.[68]

However, Hix's arguments are not persuasive. The CJEU in *Sevince* did not exclude decisions of quasi-judicial bodies capable of 'adjudication of specific disputes' to fall outside the test it created, and so there is no precedent here to exclude DSB rulings. Some scholars claim that decisions of the Council of Association, an institution established under the Ankara Agreement,[69] may lead to the disapplication of national law.[70] While direct effect of DSB decisions would be problematic, the same analysis does not apply to the principle of consistent interpretation. The context between the Ankara Agreement and the WTO Agreements is broadly similar since both were ratified as mixed agreements and so both the EU and its MS are CP, whereas disputes are resolved by a body that has the power to take binding decisions.[71] Therefore, if decisions of a body such as the Council of Association may have direct effect, there is no reason to exclude DSB rulings from the scope of the consistent interpretation principle because the context of the two Agreements is not that different. The CJEU appears to be more receptive in this context to decisions

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[65] In Case C-93/02 P *Biret International SA v Council of the European Union* [2003] ECR I-10497 in para 67 the GC said that 'there is an inescapable and direct link between the decision' and WTO agreements. In *Fiamm* the CoJ opined that 'a DSB decision … cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations' (para 128, emphasis added) see also Antonello Tancredi in Enzo Cannizzaro et al., *supra* note 17, p. 249.

[66] Jan-Peter Hix, *supra* note 13, page 98.

[67] *Opinion 1/91 re Agreement on the European Economic Area* [1991] ECR I-6079, paras. 39 – 40

[68] Jan-Peter Hix, *supra* note 13, page 98.

[69] Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey, OJ L 217/3687 of 29 December 1964.

[70] see Geert A. Zonnekeyn, 'The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance: the Banana Experience' (2000) 34 JWT 93, footnote 22.

[71] Nikolas Lavranos, 'Die Rechtswirkung von WTO panel reports im Europäischen Gemeinschaftrecht sowie im deutschen Verfassungsrecht' (1999) 34 Europarecht 289 cited in *ibid*, page 99.

of bodies such as the Council of Association that are more political in nature as compared to WTO quasi-judicial institutions. Meanwhile, the CJEU has demonstrated reluctance to confer direct effect to decisions of a body with less advanced judicial system and repeatedly said that the WTO is not 'judicial enough'. If the CJEU is so much concerned about this aspect, it is surprising that it has given direct effect to more political body but refused to create a duty to read EU law in consistency with DSB decisions. According to von Bogdandy the CJEU differentiates between decisions of judicial bodies and political bodies and this may explain the reluctance to extent the consistent interpretation principle to DSB rulings. He claims that the CJEU reluctance to do so is permissible because EU law differentiates between 'political and judicial acts'.[72] Nevertheless, a panel or AB decision would materialise if only it gets adopted by the General Council of the WTO. This is a political body and so the process for concluding that a WTO member has violated WTO law is not purely legal.

Furthermore, Hix's analysis of *Opinion 1/91* is primarily based on the premises that the judicial mechanism of the envisaged EEA Court would have been stronger than WTO's quasi-judicial organ. Yet, there are compelling reasons to believe that DSB rulings are binding under international law and apart from certain formalities the main difference is that decisions of the EEA Court would have had 'acquis communautaire'. In procedural terms, the DSB has fairly 'strong checks and balances and procedural guarantees'[73] so it is not as weak as Hix appears it to think. Certainly, it cannot be crossed out because of the AB and panels' ability to adopt recommendations. Hix's argument that the CJEU in *Opinion 1/91* did not refer to the proposition that international agreements concluded by the EU constitute binding obligations on the EU is wrong – in para 37 the CJEU said that 'the measures adopted by institutions set up by [agreements binding on the EU] become an integral part of the Community legal order when they enter into force'.

Another argument against granting consistent interpretation relates to the nature of WTO proceedings, namely that DSB rulings are binding only upon the parties to the dispute.[74] In this regard, one can question on what basis the CJEU should interpret EU law in conformity if the EU was not a party to the dispute.[75] But it is the author's position that this

[72] Armin von Bogdandy, 'Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC' (2005) 39(1) JWT 45, page 57.
[73] Thomas Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 CMLR 325, page 371.
[74] See, *Japan – Taxes on Alcoholic Beverages*, page 13.
[75] Jan-Peter Hix, *supra* note 13, page 99.

argument is not very convincing. True, DSB rulings are binding on the parties to the dispute and such is the position of other international dispute resolution systems such as the ICJ. At the same time, the interpretation of WTO law in these decisions is relevant to all WTO members. The AB and panels have jurisdiction to interpret the WTO Agreements under Arts. 3(2) and 17(6) of the DSU; therefore their clarification and interpretation remains valid not only for the parties to the dispute but beyond.[76] When applying the duty of consistent interpretation, the EU Courts can take only that part from the DSB ruling that clarified the WTO legal provision but not the outcome. This can effectively preserve the principle stipulating that DSB rulings are binding only to the parties of the dispute. The argument against any form of consistent interpretation vis-à-vis DSB rulings on the basis that the EU was not a party to the dispute is also somewhat self-defeating – there is no duty of consistent interpretation for cases in which the EU was the applicant or the respondent.

Recognising the duty of consistent interpretation to apply to DSB rulings would not limit the scope of manoeuvring of the EU legislative and executive institutions.[77] The purpose behind the principle is to apply the law of the EU in conformity with DSB rulings and in the absence of direct they will not trump an EU primary or secondary provision. Thus, since the principle requires from the Court to engage into interpretation that is 'in so far as possible' this will not tie the hands of the legislative and executive organs or require from courts to give deference to interpretations by the DSB in all circumstances. There is little doubt that after the decision in *Hermès* the EU institutions have retained their autonomy and it would make little difference if the agreement-consistent interpretation principle was extended to DSB rulings. In this regard, the argument that the DSB should not jeopardise the autonomy of the EU legal order fails to reconcile between direct effect and consistent interpretation. Bronckers argues that the current state of affairs enables the EU Courts to take all facts together before coming to a decision[78] or conduct different assessment of these facts, which are important considerations especially if new facts appeared.[79] But if new facts were found after the DSB ruling was issued, the CJEU could cite this as a reason

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[76] See Giacomo Gattinara, *supra* note 15, p. 127, and Giacomo Gattinara in Enzo Cannizzaro et al. (eds), *supra* note 17, pages 279 – 281. Cf with Art. WTO Basic Agreement, Art. IX(2)'. For commentary see Simon N. Lester, 'WTO Panel and the Appellate Body Interpretations of the WTO Agreement in US Law' (2001) 35(3) JWT 521 page 529.

[77] Cf. with Giacomo Gattinara, *supra* note 15, page 128.

[78] Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11(4) JIEL 885, page 890.

[79] Marco Bronckers, 'the Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 CMLR 601, p. 622.

and decline to give deference to the consistent interpretation principle. Similarly, if there is a policy reason[80] that does not permit consistent interpretation the judiciary can flag this up too. Thus, the duties and competences of the EU Courts to interpret EU law would not be transferred to another jurisdiction. Similar conclusions may also be drawn from AG Mengozzi's Opinion in *Staatssecretaris* who appears not to find a reason against interpreting EU law vis-à-vis DSB rulings.[81] Sadly, the CJEU did not follow the AG's reasoning in this respect.

c) Limitation 3

The last limitation emerges in several cases where the CJEU is involved into 'muted dialogue' with the tribunals of the WTO.[82] This makes it difficult to track the degree to which WTO law has been relevant. In *FTS International*, the Commission Regulation was found to be incompatible with WTO law.[83] While the Court's interpretation remained in line with the report in *Boneless Chicken*,[84] which condemned the EU measures, the EU judiciary did not cite this ruling in its analysis.[85] WTO law can be useful for the judiciary in different other ways. Even if the EU Courts do not refer to the WTO provisions in explicit terms in their judgments that does not mean they were of no influence.[86] This view may be taken also by the EFTA Court which in *Surveillance Authority* ruled against Norway's practice prohibiting imports on the basis that the nation did not undertake thorough analysis of the risk to public health.[87] The EFTA Court did not refer to WTO law but its ruling may be seen as to have been inspired by the SPS Agreement.[88] *Surveillance Authority* was subsequently cited by the CJEU, including in some important rulings.[89] Therefore, the SPS Agreement had a considerable impact on the CJEU jurisprudence even without always getting cited in its legal analysis.[90]

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[80] Marco Bronckers, *supra* note 78, p. 890.
[81] Case C-376/07 *Staatssecretaris van Financiën v Kamino International Logistics BV* [2009] ECR I-01167, Opinion of Advocate General Mengozzi, para. 51.
[82] The dialogue is considered 'muted' in circumstances where the EU court has not referred to WTO law but it is possible to observe that the court's decision was influenced by it. See Marco Bronckers, *supra* note 78, page 889.
[83] C-310/06 *F.T.S. International BV v Belastingdienst – Douane West* [2007] ECR I-6749, para 35
[84] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, DSR 2005:XIX, 9157, adopted 27 September 2005.
[85] Marco Bronckers, *supra* note 78, pages 889 – 890.
[86] Marco Bronckers, *supra* note 59, page 258.
[87] EFTA Court, Case E-3/00 *EFTA Surveillance Authority v. Norway* [2000-01] EFTA Ct Rep 75.
[88] see Marco Slotboom, *A Comparison of WTO and EC Law: Do Different Treaty Purposes Matter for Treaty Interpretation?* (Cameron May 2006), pp. 162 – 164.
[89] See e.g. Case C-192/01 *Commission v. Denmark* [2003] ECR I-9693.
[90] Marco Bronckers, *supra* note 59, page 259.

One of the claimed advantages of this 'muted dialogue' is that it does not put the EU Courts in a position where they encroach upon the powers of the EU political institutions.[91] The judiciary can take WTO law into consideration and not put the EU political institutions on alert that the laws they have made were eventually interpreted in light of WTO law. However, it is not excluded for the EU legislature to do the opposite and refrain from leaving some provisions more open to different interpretations because of not knowing to what extent the EU courts will be influenced by WTO law. The broader ramification of 'muted dialogue' is also problematic. If the GC is not clear whether it was influenced by WTO law, this will create difficulty for the claimant to track the extent to which pleas on WTO law may work upon appeal. And if the CoJ is not clear either, it will become even more difficult to know whether the judiciary in future will be likely to interpret EU law in light of the concerned WTO provision. The situation would be more transparent and predictable if the EU Courts cite WTO law when they are influenced by it.[92] Cases where the Courts do not explicitly acknowledge the relevance of WTO law do not help to improve the relationship between the WTO and the EU or that the two systems can coexist.[93] Certainly, this cannot strengthen the authority of the DSB reports,[94] which is very important at times when some nations are taking more protectionist policies. This is in no one's interest and creates only confusion for the judiciary, the EU political institutions, traders, WTO members, etc.

4.2.2) US

The reasons behind the inception of the *Charming Betsy* remain unclear.[95] In its early days, the connection between public international law and US law was quite straight-forward and it was relatively easy for courts to apply the doctrine. But over the years, the negative obligation on courts to 'ought never' give interpretation of domestic law that may violate international law has transformed into softer formulation; domestic law has to be interpreted in light of international law 'wherever possible'.[96] In general, US courts have

[91] Giacomo Gattinara, *supra* note 15, page 134.
[92] Nikolas Lavranos, 'The ECJ's relationship with other international courts and tribunals' in Henning Koch, Joseph H.H. Weiler, Karsten Hagel-Sørensen, Ulrich Haltern (eds.), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djoef, 2010), p. 398.
[93] Jan-Peter Hix, *supra* note 13, page 146.
[94] Giacomo Gattinara, *supra* note 17, page 285.
[95] Curtis A. Bradley, 'The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law' (1998) 86 GEO. L.J. 479, pages 492 – 3 who states that the doctrine should be seen in its historical context. Cf with Filicia Davenport, 'The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard with Respect to WTO Agreements' (2005) 15 Fed. Cir. B.J. 279.
[96] Szilárd Gáspár-Szilágyi, *supra* note 6, page 392. See also Restatement (Fourth) of Foreign Relations Tentative Draft No. 2 (March 20, 2017) § 109(1).

tried to avoid inconsistencies between US law and GATT 1947 and continued this practice after the creation of the WTO. This is underpinned by the logic that ‘Congress does not intend to repudiate an international obligation of the United States’ and if a dispute relates to a US legislation and international agreement ‘the courts, regulatory agencies, and the Executive Branch’ will try to give an interpretation that will render both effective.[97] For instance, in *Federal-Mogul*, the US Department of Commerce [hereinafter Commerce] adopted an approach in line with international trade law.[98] As this obligation was not transposed into national law, the claimant argued, *inter alia*, that Commerce’s position was contrary to US antidumping law. The Federal Circuit Court of Appeals (CAFC) sided with Commerce and relied on the *CB* doctrine to dismiss the claimants’ appeal.[99] But *Federal-Mogul* is considered an easy case because WTO law and the agency’s position were not in conflict. Neither was there a conflict between the *CB* and *Chevron* doctrines – *Chevron* required deference to agency’s reasonable interpretation.[100] As such, in *Federal-Mogul*, the US court had more room for manoeuvring as a consequence of the nature of the US statute in question. Since the decision in *Federal-Mogul* in 1995, as will be shown below, US courts have appeared reluctant to give much stronger deference to WTO law by virtue of the *CB* doctrine.

4.2.2.1) *Charming Betsy* and the URAA

Under sec. 102(a)(1) of the URAA ‘[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect’.[101] According to this provision there is little doubt that WTO law lacks direct effect, and so if a conflict between US law and WTO law is irreconcilable the former will trump. Doubts remain, however, if courts can take recourse to WTO law if a conflict between WTO law and US law can be avoided.[102] It is possible to make the argument that sec. 102(a)(1) should not prevent the application of the *CB* doctrine because the purpose of this provision is to rule out direct effect. US statutes that are ambiguous are not necessarily inconsistent with WTO law and so unclear statutory provisions should not be affected by a provision such as s. 102(a)(1) that rules out direct effect. The presence of an unclear statutory provisions may trigger the

[97] *Footwear Distributors and Retailers v. U.S.*, 852 F. Supp. (Ct. Int'l Trade 1994), at 1093.
[98] *Federal-Mogul Corporation v. Unites States*, 63 F.3d (Fed. Cir. 1995), at 1582.
[99] *Ibid*, at 1581 – 1582.
[100] John J. Barceló III "The Status of WTO Rules in U.S. Law" (2006) Cornell Law Faculty Publications Paper 36, page 9.
[101] Emphasis added.
[102] Arwel Davies, ‘Connecting or Compartmentalizing the WTO and the United States Legal Systems? The Role of the *Charming Betsy* Canon’ (2007) 10(1) JIEL 117, page 134.

application of the *CB* doctrine under which US law should not be read as to violate US international obligations, in this case WTO law.[103] This position appears to be not in line with the CAFC in *Corus Staal* where the Court cited this sub-section and stated that 'it is strictly a matter for Congress' if a US statute is not in compliance with WTO law or the URAA and then declined to give deference to a DSB decision.[104]

Historically, the *CB* canon has been used to interpret US law in light of international law, in particular CIL. The WTO Agreements consist of numerous highly technical provisions and differ from broad customary international law principles. In fact, it has been argued that the latter forms part of US law.[105] Therefore, it may not be possible to apply *Charming Betsy* here because this will not be in line with how the courts understood and applied the canon. To simply put, the judiciary has read ambiguous statutory provisions in light of customary international law principles, which are often broad, whereas most provisions of the WTO Agreements are highly technical; based on that, it appears that the *CB* doctrine has not been applied to such difficult and sophisticated provisions.[106] There are two possible counter-arguments here. Firstly, CIL also includes various technical principles and is not always straightforward. The judiciary has read US law in light of CIL principles in different cases as to limit the scope of federal statues[107] and certainly a court cannot find that one provision is more technical than another to preclude the application of *CB*. Second, there is nothing in the words of Chief Justice Marshall in *Charming Betsy* that restricts the doctrine's application to CIL only, and courts have applied the canon with various international agreements relating to different matters such as immigration, diplomatic relations, etc.[108] Both the Third Restatement[109] and the Fourth's Tentative Draft[110] make clear reference to international law evidencing that all sources of public international law should fall within the canon's scope.

[103] Alex O. Canizares, 'Is *Charming Betsy* Losing Her Charm – Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine' (2006) 20 Emory Int'l L. Rev. 591, p. 638.

[104] *Corus Staal BV v. Dep't of Commerce*, 395 F.3d (Fed. Cir. 2005) [hereinafter *Corus Staal*], at 1348 – 9.

[105] For a discussion see Gary Born, 'Customary International Law in United States Courts', (2017) 92 WashLRev 1641, pages 1645 – 55.

[106] Elizabeth C. Seastrum, 'Chevron Deference and the Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?' (2003/2004) 13 Fed. Cir. B.J. 229, page 238.

[107] Curtis A. Bradley, *supra* note 95, p. 490.

[108] *Ibid*, p. 488 – 9.

[109] § 114.

[110] § 109(1).

The effect of the URAA regarding private remedies is addressed under sections 102 (c)(1)(a) and (b). Under sub-sub-para (a), claimants, other than the US, are barred from having 'any cause of action or defense' under the WTO Agreements or the URAA. This can be read as that the US has preserved the monopoly to enforce WTO law for itself and as a result only the US can argue before a court that US law has to be interpreted vis-à-vis WTO law. Thus, the clear prohibition in Section 102(c)(1)(a) on other parties, different than the US, to rely on direct effect of WTO law in litigation can indicate that indirect effect is prohibited too. If Congress did intend to permit indirect effect, given the importance of the *CB* canon and inevitable attempts of claimants to invoke it, this would have been included in the statutory provision. Davies casts doubt on this proposition and argues that the Court in *Timken*[111] accepted that *CB* is a canon developed by US courts and that the consistent interpretation principle does not stem from the WTO Agreements meaning that URAA section 102 (c)(1)(a) does not prohibit indirect effect.[112] However, *Timken* should not be seen as to put an end to the debate here. First, the Court did not specify whether only in this case or in all future cases courts will be ready to accept arguments based on indirect effect of WTO law. The statement was made obiter and is not the ratio of the case. Second, even if we sweep aside the previous argument, *Timken* was decided on Court of Appeals level not by the Supreme Court.[113] It might be binding for lower courts but other CA may depart from it. Unless and until the Supreme Court tackles the issue the CA's decision cannot be seen as binding on all court levels. In fact, this may be precisely one of the reasons why the application of the *Charming Betsy* doctrine in trade remedy cases is still so uncertain.[114] The CIT has 'nationwide jurisdiction over civil actions arising out of customs and international trade laws'.[115] As a result, most cases in which WTO law was at stake were heard before the CIT and claimants have struggled to reach the dockets of the US Supreme Court.[116] Third, in *Timken* the Court gave deference to *Chevron* but not

[111] *Timken Co v US* 354 F.3d (Fed. Cir. 2004) [hereinafter *Timken*], at 1341. Here the Court said that section 102 (c) bars direct effect.
[112] Arwel Davies, *supra* note 102, page 135.
[113] Cf. with the conclusion of the District Court in *U.S. v. Baron Lombardo*, 639 F.Supp. 2d, (D. Utah, 2007) at 1289 that 'the clear language of both the Wire Act and the URAA entirely preclude any application of either of the *Charming Betsy* canon or the broader principle of international comity in this case.'.
[114] Szilárd Gáspár-Szilágyi, *supra* note 6, page 403.
[115] Official website of the Court of International Trade, < https://www.cit.uscourts.gov/ > accessed on 29/10/2019. See also Title 28, Judiciary and Judicial Procedure enacted by act June 25, 1948, ch. 646, §1, 62 Stat. 869, section 1581.
[116] Szilárd Gáspár-Szilágyi, *supra* note 6, page 403.

CB and found the latter as not particularly important on the facts.[117] With these limitations at hand, *Timken* does not fully clarify the current situation.

Sub-sub-section (b) of sec. 102 (c)(1) is even more problematic for making the case that claimants can rely on indirect effect of WTO law. According to sub-sub-section (b), only the US may bring legal challenges

> in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with [WTO law][118]

This constitutes a major hurdle for claimants because by invoking the *CB* doctrine they challenge the actions of a US entity (e.g. US department) as for its compliance with WTO treaty law. The potential counter-argument is that by invoking the *CB* doctrine the claimant grounds their challenge on domestic law.[119] However, this attempt would not be very convincing because it would still constitute a challenge of a US entity in light WTO law, despite that the *CB* doctrine is used to aid the claimant in the challenge.

Turning to the effect of DSB rulings, the only way for a ruling adverse to the US to be implemented into US law is by following the procedure set out in the URAA.[120] In order for the implementation threshold to be satisfied, US law must be in clear violation of WTO law, which here is interpreted by the US political branch.[121] This predisposes the US to continuously pursue protectionist and anti-internationalist interests as enforcement of WTO law is difficult due to numerous procedural hurdles.[122] However, the fact that a DSB ruling can lead to the invalidity of US law only after it was implemented into domestic law may indicate that all other constrictions of interpretation are prohibited and that courts must continue applying the WTO-inconsistent law. Such reasoning can be accepted because the only way for the US practice to be reversed would be by following URAA's

[117] John J. Barceló III, *supra* note 100, page 17.
[118] Emphasis added.
[119] Arwel Davies, *supra* note 102, page 135.
[120] See sections 123 and 129 of the URAA.
[121] David W. Leebron, 'Implementation of the Uruguay Round Results in the United States' in John H. Jackson & Alan O. Sykes (eds.) Implementing the Uruguay Round (Clarendon Press, 1997), page 234 cited in Patrick C. Reed, 'Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality', (2006) 38 Georgetown Journal of International Law 209, page 247.
[122] David W. Leebron, pages 241 – 242, as cited in *ibid.*, pages 246 – 7.

procedure.[123] In *CB*, Justice Marshall said that national law should be interpreted in conformity with ‘the law of nations as understood in this country’. The WTO quasi-judicial body is an organ established under international law that interprets the WTO Agreements and for this reason it is doubtful if it can fall under international law ‘as understood’ in the US – US courts have to give deference to an understanding of WTO law taken by a non-US institution.[124] Such view may be also taken by the CIT in *Tembec* where found that WTO members are free to ignore AB and panel rulings and although ‘compliance is encouraged’ there are other ways to respond to an adverse ruling.[125] This is a strong signal against indirect effect because following *Tembec* one may conclude that violation of a DSB ruling does not ‘violate the law of nations’, and the US would comply if only it wished to do so. If that is the case, the WTO Agreements can be seen as agreements that were ratified and implemented on the basis that the US may decide ‘to do nothing’ and let the complainant retaliate.[126] A counter-argument can be that the purpose of the AB and Panels is to interpret the WTO Agreements and decisions of these two organs cannot ‘add to or diminish the rights and obligations provided in the covered agreements’.[127] Therefore, one can argue here that interpretations taken by panels or the AB can still fall within the scope of the WTO Agreements because they represent the position of a quasi-judicial body interpreting Agreements that are binding on the US.[128]

Very few provisions clearly support the inclusion of the *CB* doctrine. Under sec 102 (a)(2), WTO law cannot be given an interpretation that limits the possible authority to, *inter alia*, US agencies. One possible interpretation here is that this provision precisely makes room for the *CB* doctrine by not limiting their interpretative authority and enabling them to interpret ambiguous statutes in light of WTO law,[129] albeit in the absence of confirmation by the court or legislature this remains an academic interpretation. Practice of more than two decades of litigation shows that the judiciary rarely mentions the URAA supremacy clause and have been reluctant to engage in full analysis of whether the URAA bars the

[123] Justin Hughes, 'AN “AMERICA FIRST” PRESIDENCY, INTERNATIONAL RULE OF LAW, AND THE *CHARMING BETSY* DOCTRINE', Legal Studies Paper No. 2017-16 (2017), page 44.
[124] Elizabeth C. Seastrum, *supra* note 106, page 238.
[125] *Tembec v. United States*, 441 F. Supp. 2d (Ct. Int'l Trade 2006) at 1328.
[126] John D. Greenwald, ‘After *Corus Staal* – Is There Any Role, and Should There Be - For WTO Jurisprudence in the Preview of U.S. Trade Measures by U.S. Courts’, (2007) 39 Georgetown Journal of International Law 199, p. 206.
[127] DSU, Art. 3.2.
[128] In *Hyundai Electronics v. United States*, 53 F.Supp.2d (1999) [hereinafter *Hyundai*] at 1343 the CIT said that the WTO Agreements are binding under international law.
[129] Arwel Davies, *supra* note 102, p. 136.

application of the *CB* doctrine.[130] As noted in Chapter 2, the URAs are non-self-executing.[131] Nonetheless, they are binding under international law and, as Professor Vazquez observed, their non-self-executing status should not render them as irrelevant in cases in which the judiciary is asked to interpret national law in light of the US international obligations.[132] However, the URAA does not tell us whether the application of *CB* is permitted or not which leaves us in a state of quandary.

The above analysis demonstrates that it is possible to read that the application of *Charming Betsy* is excluded under the URAA. US courts are being somewhat reluctant to recognise explicitly that the *CB* canon survives under the URAA. In doing so, they have left the scope of manoeuvring of the US institutions as wide as possible because it is not clear whether arguments based on the *CB* doctrine can be accepted or the courts will take strict interpretation of the URAA. While the CJEU was criticised by many scholars for taking a political decision when precluding the direct effect of WTO law, the US judges here are doing nearly the same thing because they have refused to confirm that indirect effect is not precluded under the URAA.

4.2.2.2) WTO law pre-implementation

DSB decisions that are 'enforced' into domestic law have different legal effect from those that are not. Provided that the *CB* is not excluded under the URAA, to analyse the effectiveness of the doctrine, one must consider the differences between cases pre-implementation as well as post-implementation.[133] In *Allegheny Ludlum*, the Federal Circuit found that Commerce's 'same person methodology' was in violation of the US international obligations. It held, *inter alia*, that the legal provision at stake must be given

[130] Casey Reeder, 'Zeroing In on *Charming Betsy*: How an Antidumping Controversy Threatens to Sink the Schooner' (2006) 36 Stetson L. Rev. 255, p. 282.
[131] Chapter 2.3.2.
[132] Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT'L L. 695, 722-23 (1995), reprinted in John H. Jackson, William J. Davey, Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic* (4th edition, St. Paul, Minn.: West Group 2002), at 101-02. For instance, federal law was interpreted vis-à-vis the UN Protocol Relating to the Status of Refugees, which is non-self-executing, in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) 438-39. See: Alex O. Canizares, *supra* note 103, p. 638.
[133] Pre-implementation includes circumstances where a DSB decision adverse to the US has not been yet implemented into domestic law. Conversely, post-implementation includes cases where a WTO ruling was implemented pursuant to URAA's implementation procedure. As such, a decision can be understood as implemented when a US practice, or indeed agency's measure, has been modified under URAA, sec. 123. If an AD/CVDs determination is implemented this will mean that the US practice has been modified pursuant to sec. 129 of the URAA. See Reed who argues that this distinction becomes blurred in practice. Patrick C. Reed, *supra* note 121, page 240.

an interpretation in light of WTO law and noted an AB report[134] where the US 'same person methodology' was declared contrary to URAA s. 123.[135] Nevertheless, the Federal Circuit decision should not be seen as an invigoration of *CB* because in the Court's own words the 'doctrine is only a guide'. In doing so, the CAFC noted that 'neither the statute nor the legislative history supports the same person methodology under domestic countervailing duty law' and so deference to *CB*, and the AB report accordingly, can be understood as a last resort.[136] In fact, the CAFC hinted that at the core of its analysis was its interpretation of US law[137] and so the WTO ruling may be seen as to supplement the Court's reasoning rather than the ratio of the case. Furthermore, although this was not said in explicit terms, *Allegheny Ludlum* can be understood as a case where the judiciary refused to analyse the case under *Chevron*'s second-step. Probably the Court felt that Congress' intention to 'proscribe all per se methodologies' was explicit enough and so it did not feel the need to proceed to stage two of *Chevron*.[138] Most importantly, by the time the CAFC came to a decision, the Department of Commerce had decided to no longer follow its 'same person' approach and comply with the DSB ruling. The Court did not force the US to adopt WTO-consistent practice by virtue of *CB*.[139] In *Warren Corporation*,[140] the US legislation gave some discretion to the Environmental Protection Agency (EPA) to promulgate certain rules.[141] The claimant argued that in its determination the Agency factored in compliance with WTO law, which was not expressly required under the legislation.[142] The Court gave deference to *Charming Betsy* and said that the canon should be used to 'avoid an interpretation that would put [US law] into conflict with [WTO law]',[143] pointed out at the 'decision of the WTO lurking in the background'[144] as well as that agencies have duty to try avoid interpretations that may lead to violation of WTO law.[145] However, similarly to *Allegheny Ludlum*, in *Warren Corporation* the US government had already decided to

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[134] See Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, (8 January 2003) WT/DS212/AB/R.
[135] *Allegheny Ludlum Corp. v. U.S.*, 367 F.3d 1339 (2004) [hereinafter *Allegheny Ludlum*] at 1348.
[136] *Ibid.*, 1348.
[137] John J. Barceló III, *supra* note 100, p. 13.
[138] Arwel Davies, *supra* note 102, page 130.
[139] John J. Barceló III, *supra* note 100, p. 13. Before the CAFC ruled on the case, Commerce prospectively ended the concerned methodology. Nevertheless, the CAFC considered the methodology 'as applied retroactively'. (*Allegheny Ludlum*, at 1342 – 1343) See Casey Reeder, *supra* note 130, p. 278.
[140] *George E. Warren Corporation v. US Environmental Protection Agency*, 159 F.3d 616 (D. C. Cir. 1998) (hereinafter *Warren Corporation*).
[141] In other words, certain provisions were ambiguous.
[142] *Ibid.*, 623.
[143] *Ibid.*, 624 (Emphasis added).
[144] *Id.*
[145] *Id.*

comply with the DSB ruling.[146] In cases such as *Corus Staal* and *Hyundai Electronics* the courts declined to interpret US law vis-à-vis WTO law even if doing so put the US in violation of its WTO obligations.[147] Therefore, the above cases show that the courts are willing to interpret US law in light of DSB rulings as to invalidate an agency's measure if only the US Government agreed to comply with the pertaining DSB ruling.

Most importantly, US courts appear reluctant to recognise that DSB rulings are binding international obligations[148] and consider them as a 'persuasive authority'.[149] The proposition that DSB rulings may inform courts' decisions may be seen as comparatively important in light of previous statements where they were declared to have no impact.[150] Conversely, the courts are inconsistent in their analysis as to when a DSB ruling would be persuasive and when not. Some commenters divided cases into favourable and not favourable.[151] Gathii's research shows that the CIT has been less willing to give deference to DSB decisions as compared to the CA.[152] This is worrying because cases relating to trade matters start from the lower court. If the CIT is reluctant to give deference to DSB rulings claimants may have better chances for relying on the doctrine on appeal and there is no guarantee that such appeal will be granted. Apart from circumstances where the US agreed to comply with WTO law, it is difficult to see what other factors influenced the judiciary. Some explanation might be that in favourable cases the courts found the panel or AB reasoning more persuasive.[153] However, it is nearly impossible to determine when one Panel/AB report will be more persuasive for the US judiciary than another. For instance, the DSB ruling in *Softwood Lumber*[154] had its critics but supporters too. Yet the CAFC in *Corus Staal* found it as non-persuasive without giving convincing reasons. The few cases where the judiciary harmonised US law in light of WTO law attracted criticism

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[146] Arwel Davies, *supra* note 102, p. 133.
[147] *Id.*
[148] John D. Greenwald, *supra* note 126, pages 206 – 8.
[149] See e.g. *Acciai Speciali Terui S.P.S. v. United States*, 350 F. Supp. 2d 1254, 1264 n.ll (Ct. Int'l Trade 2004); *Usinor, Beautor, Haironville, Sollac Atlauntique, Sollace Lorraine v. United States*, 342 F. Supp. 2d 1267, 1279 & n.13 (Ct. Int'l Trade 2004; *The Pillsbury Co. v. U.S.*, 368 F.Supp.2d 1319 (Ct. Int'l Trade 2005).
[150] E.g. *Hyundai Electronics* at 312; *Serra v Lappin*, 600 Fed.3d. (9th Cir. 2010) the canon is not 'an inviolable rule of general application' at 1198.
[151] In favourable cases, the courts found WTO law as persuasive. By contrast, in not favourable cases, the courts did not defer to WTO law. See Mustafa T. Karayigit, 'Commonalities and Differences between the Transatlantic Approaches Towards WTO Law' 35(1) Legal Issues of Economic Integration 69, page 75.
[152] James Thuo Gathii, 'Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions', (2005) 34 Georgia Journal of International and Comparative Law 2, page 26.
[153] Mustafa T. Karayigit, *supra* note 151, p. 79.
[154] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, P124, WT/DS264/AB/R (11 August 2004).

by scholars. Most notably the CAFC in *Allegheny Ludlum* was criticised for interpreting US law vis-à-vis a DSB ruling that found the US measure to violate the URAA rather than the WTO Agreements.[155] Thus, the CAFC found persuasive an interpretation of US law taken by a non-US quasi-judicial institution.[156] Nevertheless, it is the author's position that this was not particularly controversial because the US was the respondent in the case and subsequently decided to comply.

The US judiciary did not have to decide if DSB rulings can have direct effect and this removed a great burden. Although the URAA is clear in this respect, the statute does not determine if DSB rulings are binding under international law and here the courts answered this in the negative. In the absence of direct effect these rulings cannot invalidate federal or state law. Although the hands of the US courts were more tied in this respect, the fact that they have been unwilling to recognise that DSB rulings constitute binding international commitments demonstrates their reluctance to give stronger deference to WTO law. Recognition of their binding status would have sent an important signal to the US political institutions and would have made it slightly more difficult to ignore a DSB decision. In addition to the conclusion reached in 4.2.2.1, this demonstrates that the US courts are also taking a rather political stance and aim to prevent limiting the scope of manoeuvring of the US political branch. The circumstances were not comparable to the cases in which the legal effect of DSB rulings had come before the CJEU because it would have been unusual if the EU judiciary recognised them to constitute binding obligations in the same time lack direct effect.

The US courts have not referred to the WTO Agreements or the DSU to explain why DSB rulings should not be binding but often claimed that compliance with WTO law should be left to the political branch due to the separation of powers principle.[157] Such reasoning, however, fails to appreciate the different consequences of consistent interpretation and direct effect. Application of the *CB* canon will not lead to implementing a DSB decision and the courts are not interfering with the powers of the political branch. Thus, as Lowenfeld argued, the separation of powers has little significance here and so it is in the US national interest that its own judiciary operates 'under a rule of law, not of politics'.[158]

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[155] Appellate Body Report, *United States – Contravailing Measures Concerning Certain Products from the European Communities*, WD/DS212/AB/R, (9 December 2002).
[156] Filicia Davenport, *supra* note 95, p. 298.
[157] For an analysis relating to the separation of powers principle see e.g. *Corus Staal* at 1349. See also Patrick C. Reed, *supra* note 121, page 243.
[158] Andreas F. Lowenfeld, 'International Decisions and the Task of the Court of International Trade' in Andreas F. Lowenfeld, *The role of government in international trade : essays over three decades* (Cameron May, 2000) as cited in Patrick C. Reed, *supra* note 121, p. 237.

This is particularly correct for the purpose of the consistent interpretation. One can also argue that by finding DSB rulings to lack binding obligations the courts came close to infringe the separation of powers principle. It is possible to decline to interpret US law vis-à-vis a DSB ruling by refusing to comment on its status under international law. By doing the opposite, the courts clearly went into a political field because whether a ruling is a binding international obligation should be decided by the political branch not the courts; such logic can be inferred from the URAA where the political branch prohibited direct effect.

Part of the reluctance of the US courts to give stronger effect to the *CB* doctrine may be explained by their understanding of WTO law. In cases that relate to the US practice of zeroing**,** the courts refused to give deference to WTO law because they consider that the WTO AD Agreement does not prohibit zeroing rendering the US practice not in violation. So for instance in *PAM* the CIT ruled that Commerce's practice of zeroing was valid and the court did not consider the DSB ruling in *Bed Linen* as relevant for the US, despite that in the latter the EU's zeroing methodology was found as WTO–inconsistent.[159] The courts were reluctant to accept the report because the DSB addressed the EU's methodology rather than the US.[160] However, as the CIT acknowledged, the US and the EU zeroing practices were similar. Therefore, the reluctance of the CIT to give deference to the *CB* doctrine and attach any value to the DSB report is apparent in this case. While the WTO system lacks stare decisis, the US was a third party to the *Bed Linen* and because the zeroing practices were similar the conclusions of the DSB could have been applied by the CIT. After all, the application of *CB* would require from courts to interpret US law vis-à-vis WTO law. Going beyond that would offend the basic foundation of this principle. As a result, for the purposes of the consistent interpretation principle it should not matter whether the US was a party to the dispute or not. Unfortunately such logic does not underpin the reasoning of the Court in *Corus Staal* where stated that the DSB decision was not binding and cited *Timken* as to control the situation. However, the difference between the two cases is that the DSB decision at stake in *Corus Staal* was issued against the US.[161] Comparison between the circumstances of the two cases here was unnecessary because the circumstances were different.

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[159] *PAM S.p.A. v. U.S. Dept. of Com.*, 265 F. Supp. 2d (Ct. Intl. Trade 2003) [hereinafter *PAM*] at 1373. For other cases where the US practice of zeroing was upheld see Casey Reeder, *supra* note 130, pages 266, 277.

[160] *PAM*, at 1372.

[161] Patrick C. Reed, *supra* note 121, p. 237.

4.2.2.3) The position of the NAFTA panels: much ado about nothing?

NAFTA Treaty determines that disputes between its Contracting Parties can be resolved under Chapter 19 Bi-National panels.[162] These panels replace national organs in judicially reviewing final anti-dumping (AD)/ countervailing duty (CVD) determinations[163] and constitute binding legal obligations to the parties to the dispute.[164] Under Article 1902 para 1 binational panels will apply the importing party's national AD/CVD law in a way that 'a court of the importing party would otherwise apply' its domestic law.[165] After reaching a decision on the dispute, the panel may uphold or remand the national agency's AD determination.[166] As will be shown below, NAFTA panels have been much more willing to give stronger deference to WTO law.

In *Softwood Lumber*,[167] a NAFTA panel considered whether the US zeroing practice was in conformity with WTO law. In the panellists' view, this was not the case and they dismissed the Federal Circuit ruling in *Corus Staal* where the US judiciary[168] refused to recognise the binding effect of the DSB ruling in *Softwood Lumber*. On the application of *CB*, the panel stated that while the URAA has no direct effect 'it does not strip away from a court … the ability – indeed the responsibility – to consider WTO obligations in assessing the legality of agency action'.[169] To this end, the panellists argued that the CAFC in *Corus Staal* confused 'implementation with persuasion' and that agencies have to construe US law in light of WTO law.[170] Therefore, applying the same law and statutory interpretation the NAFTA panel reached different conclusion on zeroing that was in contradiction with

[162] Chapter 19 of the North American Free Trade Agreement, pmbl., U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA panel]. The United States-Mexico-Canada Agreement (USMCA) will replace NAFTA and the latter's dispute procedure has been incorporated into Chapter 10. At current times of writing, the USMCA has been signed but not ratified by all CP.
[163] Article 1904.
[164] Article 1904, para 9.
[165] Article 1904, para. 2. See Edward Tracey, 'NAFTA Chapter 19 Binational Panel Reviews – Still a Zero Sum Game: The Wire Rod Decision and its Progeny' (2012) 27 AmUIntlLRev 173, p. 188.
[166] Art. 1904, para. 8.
[167] *Certain Softwood Lumber Products from Canada Anti-Dumping Agreement: Final Affirmative Antidumping Determinations*, Secretariat File No. USA-CDA-2002-1904-02, 9 June 2005 [hereinafter *Softwood Lumber*].
[168] *Corus Staal*, at 1349; NAFTA panel, *Softwood Lumber*, at 26.
[169] *Ibid*., at 27.
[170] See Jeffrey W. Spaulding, 'Do International Fences Really Make Good Neighbors? The Zeroing Conflict between Antidumping Law and International Obligations' (2007) 41 New England Law Review 379, page 422, who reaches this conclusion on the basis of the reasoning that: 'the WTO *Softwood Lumber* decision does not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement or any other international legal obligation of the United States for purposes of Charming Betsy. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of Charming Betsy more assuredly correct. Accordingly, the panel ruled that the Commerce Department's otherwise reasonable interpretation under *Chevron* was unreasonable as it violated *Charming Betsy*.' (citation omitted).

what the US courts had previously decided.[171] Another important cases is *Wire Rod*.[172] Against the background in *Corus Staal* and *Timken*, the panel opined that the WTO AD Agreement contains provisions that 'constitute international law' and hence they are binding for the US.[173] More interestingly, the panellists said that it would be unbecoming to give preference for an agency's discretion over compliance with international trade law, where the US entered 'quite willingly' into the treaty at hand.[174] The panel referred to different DSB rulings all supporting the proposition that zeroing violates the AD Agreement[175] and said that giving deference to them would not lead to their 'implement[ion] in either form or substance'[176] but would lead to 'recogni[tion] for this case only, that the totality of AB rulings and other precedents respecting zeroing now definitely regard zeroing as a violation of the [ADA]'.[177] On this basis, zeroing was found as inconsistent with the *CB* requirement to respect international law in circumstances where such interpretation is possible.[178] It is also interesting to note that the panellists found that the URAA bars direct enforcement of WTO rulings against 'statutes, regulations, practices' but in this case the practice of zeroing was not an obligation stemming from statutory law. Instead, Commerce applied this practice based on its own URAA interpretation and application. This was a novel finding that was not made by the courts in *Timken* or *Corus*[179] and demonstrates that the panels are ready to look at the case form different angels before deciding if the DSB findings should be found as relevant or not. This approach is also preferable because the US practice is aligned more closely with WTO law as well as presents a more careful reading of the US obligations. It is relatively easy to see that these two cases present the strongest reliance on the *CB* doctrine to date and are examples in which the panels clearly emphasised the duty of the US to comply with WTO law.

However, the above NAFTA panels' decisions have their limitations. The panel in *Softwood Lumber* had to decide a dispute in which the DSB had already found US law to be in violation of WTO substantive law and so the panel followed this determination. To some extent this minimises the importance of the NAFTA panel's decision because it gave

[171] Jeffrey W. Spaulding, *ibid.*, p. 422.
[172] *Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review*, USA-CDA-2006-1904-04 (28 Nov. 2007) [hereinafter *Wire Rod*].
[173] *Ibid.*, at 38.
[174] *Id.*
[175] *Ibid.*, at 36.
[176] Emphasis added.
[177] Emphasis added.
[178] *Ibid.*, at 38.
[179] Giacomo Gattinara, 'The Relevance of WTO Dispute Settlement Decisions in the US Legal Order' (2009) 36 Legal Issues of Economic Integration 285, page 302.

deference to a previous ruling and did not give clear guidance on more difficult disputes. For instance, what would a domestic court do if the AB finds in a preliminary determination that the US zeroing methodology is impermissible? Options vary – from completely ignoring the determination to utilising it in some way – but the fact that the US courts have taken one view and the NAFTA panels different creates inconsistency and uncertainty.[180] Second, *Softwood Lumber*'s importance may be undercut by the fact that the US had accepted the WTO ruling and so here the panel did not injecting much novelty.[181] If that not enough, under NAFTA law, panels do not bind future panels and this renders the above readings to be 'locked' without much chances to bind future courts.[182]

4.2.2.4) Post-implementation

Case law shows that the threshold for when a decision is implemented is considerably high. The claimant in *Corus Staal* argued that after the DSB had declared the US zeroing practice incompatible with WTO law, the US made the promise to comply with the decision during a meeting with the DSB representatives. The Federal Circuit stated that during the meeting the US had objected to the AB findings that US zeroing measure was incompatible and that the US would have considered how to achieve the aim of the WTO ruling despite its initial promise to comply. Interestingly, the Court said that 'the US had not decided an 'unequivocal adoption' of the WTO ruling'[183] as well as that URAA s. 129 authorises the Executive body's arm, the USTR, to determine 'the extent of implementation' on top of the decision to implement (or not) the DSB report.[184] Undoubtedly, this raised the threshold for when a DSB decision can be considered adopted by the US political branch. By seeking evidence for 'unequivocal adoption', the judiciary created a test with a rather unknown scope. During a meeting with DSB representatives, it is completely normal for the respondent to object to some if not all points of the report. If the respondent eventually agreed to comply, the fact that it initially severely condemned the reasoning should be irrelevant. Not only this favours the defendant's side

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[180] Jeffrey L. Dunoff, 'The Many Dimensions of *Softwood Lumber'*, Legal Studies Research Paper Series No. 2007-24 (2007), p. 23.
[181] Jeffrey L. Dunoff, 'Less than Zero: The Effects of Giving Domestic Effect to WTO law', 6 Loyola University Chicago International Law Review 279, p. 294.
[182] Yet, as Tracey stated, *Wire Rod* can be seen as relevant in *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX 2007-1904-01 (14 April 2010). Edward Tracey, *supra* note 165, page 192.
[183] *Corus Staal* At 1374; see Giacomo Gattinara, 'The Relevance of WTO Dispute Settlement Decisions in the US Legal Order' (2009) 36 Legal Issues of Economic Integration 285, page 303.
[184] *Corus Staal*, at 1349.

but also it should make no difference that the US initially disagreed with the WTO's reasoning as it later decided to implement the report.

Once the US has implemented a DSB ruling adverse to the US under the URAA, the agencies are required to apply the decision consistently. However, it appears that US courts take the position that after implementing a DSB decision, claimants cannot challenge the modified agency's practice for its consistency with the pertinent DSB ruling.[185] This can be contrasted with the NAFTA panel findings in *Softwood Lumber* where stated that after carrying out the implementation procedure in URAA the US agencies determinations could be assessed in light of DSB reports that have been adopted by the US.[186] However, there might be a room for *CB* to apply for instance where there are inconsistencies.[187] Reliance on the *CB* canon would not undermine the dualistic approach of the US to international law since the DSB ruling was implemented under domestic law.[188] As argued in chapter 2, the main reason for precluding direct effect of WTO law in the US was because of sovereignty concerns. However, this logic cannot be applied here because the US Executive Branch agreed to implement the decision. Therefore, there is no difference between a US court decision and a DSB ruling post-implementation as the latter was implemented by a US institution. Therefore, the NAFTA panel conclusions on this matter in *Softwood Lumber* are preferable.

The potential problem of starting legal proceedings after implementing the DSB ruling under the URAA is that this may lead to reopening the proceedings to respond to the claimant's request made pursuant to Art. 21(5) of the DSU.[189] In case of a ruling adverse to the respondent, the URAA's implementation procedure would have to be revisited as to implement the new decision. Such hypothetical scenario cannot be excluded.[190] But if the judiciary has no authority to examine how the US implemented the WTO ruling, the effectiveness of the *CB* doctrine would be extremely limited. The URAA prohibits direct effect, but if the US decided to implement the ruling the courts should at least be able to decide if this happened. Otherwise, some DSB decisions that the US intended to

[185] Such conclusions can follow from *Corus Staal*'s ruling. Patrick C. Reed, *supra* note 121, p. 244. The CAFC decision upheld the findings of the CIT on this matter. Cf. Arwel Davies, *supra* note 102, p. 137.
[186] At 35. see also Giacomo Gattinara, *supra* note 183, page 304; Curtis A. Bradley, '*Chevron* Deference and Foreign Affaris' (2000) 86(4) VaLRev 649, at 670 cited in Szilárd Gáspár-Szilágyi, *supra* note 6, page 402.
[187] Justin Hudges, *supra* note 123, page 45.
[188] Giacomo Gattinara, *supra* note 183, p. 303.
[189] If the parties to a dispute disagree as to whether the responded has implemented the DSB ruling, either the respondent or complainant can make a request under this Article to a panel to review it. Arwel Davies, *supra* note 102, page 138.
[190] *Softwood Lumber*, para 29; *Id*.

implement might be only formally implemented without reaching any concrete results. Leaving it to the political branch to review if the WTO ruling was implemented – in cases where the same political branch was supposed to implement it – would be a contradiction to the separation of powers principle.[191] As Davies points out, the concerns of reopening the proceedings must not be seen as a big hurdle because in some cases it is clear for the parties that the WTO ruling was implemented, or that no legal proceedings under Art. 21.5 of the DSU will follow.[192] Furthermore, one may also put the question whether it is that bad to reopen the proceedings in those circumstances. After all, the purpose of DSU Art. 21.5 is to regulate those circumstances.

In the last few years, US courts have become ever less willing to review agencies' determinations for their compliance not only with WTO law but also in general. For instance, in *Dongbu* the agency argued that its decision to give one interpretation of the US statute during the investigation phase and another interpretation at the administrative review phase was reasonable. The Court rejected this argument and found that the agency did not explain why such different interpretation was reasonable.[193] However, the CIT decision in *United Steel* sheds light on *Dongbu* as partial changes in the interpretation were regarded as not inexessive exercise of an agency's discretion.[194]

4.2.2.5) *Charming Betsy* to state law?

It is not entirely clear whether US courts have to give an indirect effect on state law and interpret ambiguous state law in light of WTO law. Steinhardt argues that the *CB* doctrine should apply when courts are asked to interpret state law vis-à-vis international law because of the Supremacy Clause[195] and the overall interests of the US to ensure that its law – both federal and state – receives a uniform interpretation.[196] Applying the *CB* doctrine to harmonise state law in this context would be preferable from a practical perspective than immediately annulling the provision for inconsistency with international trade law because it is not always straightforward for the state's legislative body to make amendments in the legislation in question.[197] But this preferable option does not reflect

[191] Cf. Mustafa T. Karayigit, *supra* note 151, p. 74.
[192] Arwel Davies, *supra* note 102, page 138.
[193] *Dongbu Steel v. U.S.*, 635 F. 3d. 1363 (Fed. Cir. 2011).
[194] *United Steel v. U.S.*, 823 F. 2d 1346 (Ct. Int'l Trade 2012). See Jan-Peter Hix, *supra* note 13, page 128.
[195] US Constitution, Article VI, Clause 2.
[196] Ralph G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction' (1990) 43 Vanderbilt Law Review 1103, pages 1113-1134 as cited in Jan-Peter Hix, *supra* note 13, page 115.
[197] Szilárd Gáspár-Szilágyi, *supra* note 6, page 400.

reality. According to a traditional interpretation of the well-known *Erie*[198] decision, state law remains a matter for states even when the federal courts interpret it.[199] If a federal court has to interpret state law, it 'must do its best to guess how the state court of last resort would decide the issue'.[200] Nevertheless, state courts are in the position to ignore what federal courts may predict,[201] and given that the situation is not fully clear one cannot expect that every state court in the US will accept that state law has to be interpreted vis-à-vis WTO law by virtue of the *CB* canon.

The genesis of the *CB* doctrine arose in the context of federal law and so from a historical perspective there is no basis to assume that the Supreme Court imposed the obligation to interpret state law vis-à-vis international law.[202] Many scholars regard the *CB* doctrine as setting limitations on the power of federal courts underlined by the doctrine of separation of powers. If so, then one may question on what basis the canon should be relevant for the relationship between state legislatures and state courts.[203] In fact, under the separation of powers principle, state courts are subject to different limitations from federal courts.[204] Thus, although states took into consideration various international law and customary international law provisions in the past,[205] they appear not be under obligation to interpret state law vis-à-vis WTO law.[206] The only form of possibility to improve the situation for claimants who are not granted the right to invoke the WTO Agreements under the URAA 1994 is to persuade the court that state law has to be interpreted in conformity with the URAs implementing legislation.[207] Thus, as long as the URAA text remains unchanged, *CB* will not be relevant because the Supremacy Clause determines that URAA has supremacy over state law and federal law would control the situation. However, if Congress passes a law repealing parts of the federal statute, in this

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[198] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).
[199] Curtis A. Bradley, *supra* note 95, page 534.
[200] *In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.)*, 971 F.2d (2d Cir. 1992).
[201] Curtis A. Bradley, *supra* note 95, p. 534.
[202] Lea Brilmayer, 'Federalism, State Authority, and the Preemptive Power of International Law' (1994) 1994 Supreme Court Review 295 at 334 as seen in Curtis A. Bradley, *supra* note 95, page 535.
[203] Curtis A. Bradley, *supra* note 95, page 535.
[204] One such example may be the fact that the courts of some US states may provide advisory opinions, whereas federal courts are prohibited from giving such advisory opinions. Curtis A. Bradley, *supra* note 95, page 535.
[205] For instance, state courts have invoked international human rights law as an aid to interpreting state constitutional law. In those cases, courts have not cited *Charming Betsy* but have made a conscious choice to interpret state constitutional provisions vis-à-vis international law. See: e.g. *Sterling v. Cupp*, 625 P.2d 123 (Oregon 1981); *Bott v. DeLand*, 922 P.2d 732 (Utah 1996).
[206] Szilárd Gáspár-Szilágyi, *supra* note 6, page 401, who refers to Julian G. Ku, 'The State of New York Does Exist: How the States Control Complicance with International Law' (2004) 82 NC. L. REV. 457.
[207] This, however, will not be possible for DSB rulings.

case URAA, this will trigger the application of the *CB* canon where the claimant will have to rely on indirect effect to make his/her case.

4.3) Further exceptions in the EU: any added value?

Despite the fact that WTO law lacks direct effect in the EU legal order, the CJEU in para 49 of the landmark *Portuguese Textiles* decision upheld the validity of *Nakajima* and *Fediol*. Some scholars have raised doubts whether *Fediol* and *Nakajima* can be considered as exceptions.[208] However, this paper takes the position that these two cases are exceptions because they allow claimants to rely on WTO law, despite the fact that WTO law lacks direct effect.[209] While it is true that by upholding pleas based on one of these exceptions the CJEU is pretty much relying on the EU measure aimed to implement (*Nakajima*) or referring (*Fediol*) to WTO law, this still requires from the judicial organ to rely on an exception to the general rule because the prohibition to direct effect is absolute.

It is not entirely clear why the CJEU created exceptions to the general rule prohibiting direct effect of GATT/WTO law. The easiest explanation is because the CJEU tried to respect the wishes of the EU political institutions. Hence the CJEU did not look for direct effect in *Nakajima* and *Fediol* because the EU political branch expressed desire to comply with GATT law.[210] In other words, the EU political institutions had the intention to implement GATT law in *Nakajima*,[211] whereas in *Fediol* the provision referred to the GATT law, and the CJEU honoured the wishes of the legislature. Had the CJEU blindly relied on direct effect in both cases, as will be seen below, the EU measures at question in *Nakajima* or *Fediol* would have been rendered as useless.[212]

Another possible explanation is that these exceptions enable the CJEU to find some balance between the absence of direct effect of GATT/WTO law and EU's international

[208] For a discussion and further literature see Geert A. Zonnekeyn, 'The ECJ's *Petrotub* judgment: towards a revival of the "*Nakajima* doctrine"?' (2003) 30(3) Legal Issues of Economic Integration 249, page 263.
[209] This would also correspond with the GC decision in *Banatrading* where it referred to these two cases as exceptions. Case T-3/99 *Banatrading GmbH v Council* [2002] ECR 1I-47, para. 49.
[210] Judson Osterhoudt Berkey, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', (1998) 9 EJIL 626, pages 648 – 649.
[211] Cf. with Antoniadis who claims that the GC made a try in T-19/01 *Chiquita Brands and Others v Commission* [2005] ECR II-00315 [hereinafter *Chiquita*] to second-guess the reason behind *Nakajima* on erroneous grounds. See Antonis Antoniadis, 'The *Chiquita* and *Van Parys* Judgments: Rules, Exceptions and the Law' (2005) 32(4) Legal Issues of Economic Integration 460, page 463.
[212] Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2001) 21 Yearbook of European Law 263, p. 287. Cf. with Anne Peters claiming that implementing an international provision of a treaty that otherwise has no direct effect into domestic law is nothing unique. Anne Peters, 'Recent Developments in the Application of International Law in Domestic and European Community Law' (1997) 40 German Yearbook of International Law 9, page 75.

obligations. As stated above, since the decision in *Haegeman* international agreements concluded by the EU form an integral part of the law of the EU. While the CJEU found direct effect problematic, the Court probably tried to find some type of compromise through indirect effect.[213] The judgments may also indicate that some GATT provisions were not as flexible as stated in the *International Fruit Company* decision and while some provisions were 'imprecise' others were 'sufficiently clear and unconditional'.[214] The fact that the CJEU gave arguments potentially weakening its prior jurisprudence may be a signal that the CJEU was continuously searching for some sort of compromise between the lack of direct effect and *Haegeman*'s principle by reviewing the EU actions. As such, the argument that the CJEU tried to position the EU closer to respect its obligation under international law seems pretty convincing because it is not the supremacy of the international agreement that was found relevant but how it was understood by the EU political institutions that intended to implement or referred to the concerned WTO norm.[215]

4.3.1) *Fediol*

In *Fediol* the EU measure at stake referred to 'international trade practices attributable to third countries which are incompatible with *international law* ...'[216] and the CJEU interpreted 'international law' to be a reference to GATT 1947. In doing so, the CJEU disagreed with the Commission's interpretation of the EU measure. Under the [now old] New Commercial Policy Instrument (NCPI),[217] economic agents had to bring evidence that opening an investigation against another GATT member was in the EU's interest and the Commission refused to do so in this case.[218] However, the fact that prospective claimants had to demonstrate that an investigation would have been in the EU's interest can lead to the assumption that the reasons behind the Commission's decision not to open an investigation here might have belonged within the diplomatic and political spheres rather than the purely legal. According to Bronckers and McNelis, it is likely that the CJEU had a

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[213] Piet Eeckhout, *supra* note 16, page 361.
[214] Kees Jan Kutlwijk, *The European Court of Justice and the GATT Dilemma: Public Interest versus individual Rights?*, (PhD Thesis, European University Institute in Florence 1995), page 143; see also Weisberger arguing that *Nakajima*'s application requires to satisfy at least the first stage of the test for direct effect. Marc Weisberger, 'The Application of Portugal v. Council: The Banana Cases' (2002) 12 DukeJComp&IntlL 153, page 176.
[215] Szilárd Gáspár-Szilágyi, 'The "Primacy" and "Direct Effect" of EU International Agreements' (2015) 21 EPL 343, p. 361.
[216] *Fediol*, para 19 [emphasis added].
[217] New Commercial Policy Instrument established under Council Regulation 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJEU 1984 L252/1 [no longer valid].
[218] NCPI, Article 6(1) and Article 3(1) and (2).

sense of that.[219] However, the fact that the CJEU did not take the Commission's highly probable political reasoning into consideration was nothing revolutionary because even in the 1980s there were cases where the CJEU was criticised for its (alleged) judicial activism. If the CJEU narrowly applied the precedent that GATT law had no direct effect,[220] the reference to 'international law' in the EU measure at stake would have been rendered meaningless.[221] In fact, the CJEU's decision can be understood to mean that the European Commission had wrongly interpreted domestic law[222] and so the claimant derived rights from the EU legislation, rather than the GATT, which referred to 'international law'. Such scenario can be compared to the circumstances in which courts are required to look at non-domestic situations governed by non-domestic law.[223] After the CJEU delivered its judgment, one of the main issues was to reconcile it with *International Fruit Company*. The ruling in *Fediol* came at time when economic agents had no clear exception to the absolute prohibition on direct effect of GATT law.[224] Unsurprisingly, this case was heralded as to offer an adequate guarantee to the rights of exporters to judicially review decisions before the CJEU.[225]

In order to invoke *Fediol*'s doctrine post-*Portuguese Textiles* claimants have to show that the EU's measure 'refers expressly to precise provisions of the WTO Agreements'.[226] Even before *Portuguese Textiles*, the CJEU applied *Fediol*'s doctrine inconsistently. In *Germany v Council* (1994) [227] the EU measure made references to GATT law but the CJEU did not apply the exception there, despite that the legislation's references to the GATT 1947 were not less precise than the NCPI's at stake in *Fediol*.[228] This raised doubts how specific the reference to GATT law should have been to satisfy *Fediol*'s threshold. More recently, the CJEU in *LVP* found that recitals 2 – 5 of Reg. 1964/2005, which referred

[219] Marco Bronckers and Natalie McNelis, 'The EU Trade Barriers Regulation Comes of Age' [2001] 35(4) JWT 427, page 449.
[220] Although it would have made no sense for the CJEU to refer to another international agreement, it was still possible for the judiciary to decide that the EU reference to 'international law' was not specific enough and decline to interpret 'international law' to constitute a reference to the GATT.
[221] Piet Eeckhout, *supra* note 16, page 359.
[222] Mario Mendez, *supra* note 20, p. 198.
[223] Fernando Castillo de la Torre, 'The Status of GATT in EEC Law – Some New Developments' (1992) 26 JWT 35, p. 40.
[224] Such concerns were expressed most notably by the EP. Report of 1 September 1981 drawn up on behalf of the Committee on External Economic Relations on the Community's Anti-Dumping Activities (Document 1-422/81) (the "Welsh Report"), p. 14 as cited in Jean-François Bellis, 'Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determination after *Fediol*: The Emergence of a New Admissibility Test' (1984) 21 CMLR 539, p. 551.
[225]Jean-François Bellis, *Id*.
[226] *Portuguese Textiles*, para 49; see also *Omega Air*, para 94.
[227] Case C-280/93 *Germany v Council* [1994] ECR I-4973.
[228] Anne Peters, *supra* note 212, pages 73 – 74.

to the circumstances behind the adoption of the Regulation, do not satisfy *Fediol*'s reference requirement.[229] Pickett et al. examined the case and claimed that the *LVP* decision raised *Fediol*'s threshold. Accordingly, in their view, a reference to Art. 2 of the WTO AD Agreement will not be clear enough because there are several sub-paragraphs.[230] While a clear reference to a particular paragraph can increase the claimant's changes of success, one can raise doubts if recitals 2 – 5 of Reg. No 1964/2005 in *LVP* were clear enough. The EU legislature referred to the context in which the legislation was drafted but there was no reference to a specific WTO provision or a DSB decision to be implemented. *LVP* should be understood as a case where the CJEU declined to widen *Fediol* scope and make it applicable if the recitals of the EU Regulation referred to the context of negotiations undertaken by the EU with other WTO Member(s). But in any case, the CJEU so-far confirmed *Fediol* only within the circumstances concerning anti-dumping[231] and that it most probably is limited to the application of the Trade Barrier Regulation, which expressly references international trade law.[232] The fact that there are not many cases where claimants tried to invoke *Fediol* demonstrates that it has a narrow scope and that it occupies a special position in the European legal order.

4.3.2) *Nakajima*

The *Nakajima* doctrine was created in 1991 but since then the CJEU made it more difficult for claimants to rely on it. Post-*Portuguese Textiles*, under the *Nakajima* doctrine, the CJEU can review the legality of an EU measure vis-à-vis WTO law if the EU intended to implement a particular WTO obligation.[233] The decision to uphold *Nakajima* in *Portuguese Textiles* was for some authors to some degree logically contradictory. That is because the

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[229] C-306/13, *LVP NV v Belgische Staat*, (2014) ECLI:EU:C:2014:2465, para 59 [hereinafter *LVP*].
[230] Eric Pickett and Michael Lux, 'The Status and Effect of WTO Law Before EU Courts' (2016) 11 Global Trade and Customs Law 408, page 419.
[231] Michelle Q. Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28(1) EJIL 273, p. 277.
[232] Piet Eeckhout, *supra* note 16, page 360. Eeckhout refers on page 360 to the TBR instrument established under Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization OJ L349/71. This Regulation is no longer valid and the current law is now found in Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) OJ L272/1. Under Article 17, the latter Regulation states that 'References to the [Regulation (EC) No 3286/94] shall be construed as references to this Regulation'. Eeckhout's position remains unchanged after the enactment of Regulation 2015/1843. Statement by Piet Eeckhout (Personal email correspondence 26.06.2019).
[233] *Portuguese Textiles*, para 49.

EU Council refused to accord direct effect to WTO law in Council Decision 94/800/EC.[234] Yet, by upholding a submission based on *Nakajima* the CJEU gives effect to WTO law.[235] But this contradiction may be understood by that the absence of direct effect of WTO law is mitigated in circumstances in which the EU intends to implement a WTO rule or a DSB decision. Such dualistic approach indeed has its advantages because the EU can choose when to empower WTO law to invalidate an EU measure and when not.[236] Furthermore, the particular statement relating to direct effect of WTO law in Council Decision 94/800/EC was a unilateral statement that may have carried significant political but not strictly legal importance. It did not prevent the EU legislature from passing laws that intended to implement a WTO law commitment or abolish *Nakajima*.[237]

The application of the doctrine outside cases concerning anti-dumping has been difficult. Apart from one case,[238] *Nakajima* has been applied mostly in cases concerning anti-dumping[239] and the CJEU has shown reluctance to apply the exception to other WTO Agreements such as the Agreement on Agriculture,[240] and the TRIPS and the TBT.[241] An attempt to make an explanation why this has been the case was made by De Mey et al. Writing in 2006, they stated that the members of the WTO have agreed on the implementation of the WTO AD Code[242] and so the [then] EU Regulation[243] that implemented it contained an identical structure while some provisions were directly copied and pasted. Furthermore, recital 5 of the EU Regulation stipulated that 'the language of

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[234] See Chapter 3.5.
[235] Pieter Jan Kuijper and Marco Bronckers, 'WTO law in the European Court of Justice' (2005) 42 CMLR 1313, page 1325.
[236] Piet Eeckhout, *supra* note 25, pages 45 – 46.
[237] Szilárd Gáspár-Szilágyi, *supra* note 6, p. 417.
[238] See Case C-352/96 *Italian Republic v Council* [1998] ECR I-6937, para 20. However, the CJEU in this case upheld the validity of the EU Regulation.
[239] For analysis of these cases see Francis Snyder, *supra* note 18, page 343 – 346 and, for a more recent update, Mario Mendez, *supra* note 20, page 232 – 238.
[240] In *Kloosterboer* the CJEU stated that several provisions of the EU Regulation at stake had to be invalidated because of their incompatibility with EU law rather than the WTO Agreement on Agriculture. As Szilárd Gáspár-Szilágyi, *supra* note 6, on page 424 points out, the CJEU was reluctant to apply *Nakajima* because it did not want to extend the *Nakajima* doctrine to the Agreement on Agriculture. See C-317/99 *Kloosterboer Rotterdam BV v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-9863, para 23.
[241] Case C-377/98 *Netherlands v. European Parliament and Council of the EU* [2001] ECR I-7079. See also the Opinion of AG Jacobs analysing why the EU did not intend to implement the Agreements in question. Case C-377/98 *Netherlands v. European Parliament and Council of the EU* [2001] ECR I-7079, Opinion of AG Jacobs, paras 146-58.
[242] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Code 1994).
[243] Council Regulation No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996, L 56/1 [no longer valid].

the new agreements should be brought into Community legislation as far as possible'.[244] This reasoning can also broadly apply to the current EU anti-dumping legislation.[245] As the WTO Contracting Parties have not reached the very same agreement on implementation in other fields, the CJEU has been reluctant to apply *Nakajima* outside cases relating anti-dumping. Having said that, the EU Courts have never said that *Nakajima* is an exception reserved solely for cases concerning anti-dumping, conclusion that may follow also from *Chiquita*.[246] Yet the below analysis will show that the *Nakajima* doctrine has been applied very narrowly by the CJEU.

4.3.2.1 Unjustifiably narrow view on *Nakajima*?

Particularly controversy are cases where the CJEU found that the implementation of a DSB report is not comparable to circumstances where the EU intended to implement the WTO AD Agreement.[247] In *Chiquita*, the GC did not apply *Nakajima* and as a consequence Regulation 2362/98[248] was not reviewed in light of WTO law. This was despite the fact that the DSB had concluded that the EU regime was in breach of WTO law. The GC compared the EU measure at stake and its corresponding WTO rules. According to the GC, the relevant EU measures were on the facts pointing against *Nakajima's* application as they were not precise enough. Thus, despite the fact that the EU adopted Reg. 2362/98 with the intention to comply with WTO law in response to a DSB ruling adverse to the EU, the GC concluded that the EU's intention did not satisfy *Nakajima*'s threshold. In contrast with the then EU AD legislation the GC found that the Regulation at stake 'do[es] not reflect a series of new and detailed rules arising from the WTO Agreements, but introduce measures for managing tariff quotas adopted in the context of the common organisation

[244] The Regulation enacted in 2009 also used the exact same words in recital 3. Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009, L 343. [no longer valid]. Delphine De Mey, Pablo Ibáñez Colomo, 'Recent Developments on the Invocability of WTO Law in the EC: A Wave of Mutilation', (2006) 11 European Foreign Affairs Review Issue 63, page 76.
[245] See Chapter 4.3.2.2.
[246] *Chiquita*, paras 121 – 124.
[247] The GC in *Cordus, Bocchi and Port* rejected the claimants' argument that the EU cannot adopt measures conflicting WTO law if the EU had intended to comply with WTO law. The GC did not apply the *Fediol* or *Nakajima* exceptions here with respect of the AB reports as they lacked 'special obligations' and evidence of intention by the Commission to implement them within *Nakajima*'s sense. Marc Weisberger, *supra* note 214, page 164. T–18/99 *Cordis* [2001] ECR II–913; T-30/99 *Bocchi* [2001] ECR; II–943; T–52/99 *T. Port v Commission* [2001] ECR II–981, para 57. Davies defended the CFI reasoning on the basis that the Regulation did not intend to implement WTO law and so this decision was not as controversial as some have originally thought. See Arwel Davies, Bananas, 'Private Challenges, the Courts and the Legislature' (2001) 21 Yearbook of European Law 299, page 319.
[248] Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, OJ 1998, L 293 [no longer valid].

of the market in bananas'.[249] Although the Court's reasoning in these paragraphs is rather unclear, it appears that the GC found that the EU did not adopt the WTO rules with the aim to abide by specific substantive obligations under the WTO, but eventually bring EU law in conformity with WTO law.[250] In effect, the CJEU upheld its earlier judgment in *Cordus* where said that DSB reports implemented by the EU legislature are not comparable to circumstances where the WTO Agreements were implemented.[251] The Court recognised that the EU still had room for negotiations even after the DSB ruling had been circulated and did not want to close it.[252] Subsequently, in *Van Parys*, the CJEU basically reconfirmed this approach.[253] In particular, the fact that the EU continued to have regime that violated WTO law was a signal that the EU did not want to implement the DSB ruling within the *Nakajima* sense.[254]

However, the above reasoning is weak. After losing the 1997 *Banana* litigation,[255] the EU political institutions amended EU law with the intention to comply before the expiry of the reasonable period of time under the DSB ruling, and Reg. 1637/98 enabled the Commission to bring EU's regime in conformity with the WTO. Recital 2 of its preamble stated that:

> Whereas the [EU]'s international commitments under the WTO and to the other signatories of the Fourth ACP-EC Convention should be met, whilst achieving at the same time the purposes of the common organisation of the market in bananas[256]

Therefore, as the EU adopted different Regulations as to further implement Reg. 1637/98, the above serves as a strong reason to believe that Reg. 2362/98 was adopted to implement WTO law. Similar reasoning can be followed by the AB panel in *Regime for the Importation, Sale and Distribution of Bananas* where the panellists observed that 'in order [the EU] to live up to its WTO obligations ... it had adopted an entirely new banana import

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[249] *Chiquita*, para 169 [my emphasis].
[250] Rass Holdgaard, *supra* note 14, page 318.
[251] Pieter Jan Kuijper et al., *supra* note 235, page 1328.
[252] Rass Holdgaard, *supra* note 14, page 318.
[253] Delphine De Mey, et al. *supra* note 244, p. 79.
[254] *Ibid.*, page 80.
[255] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, (12 April 1999) WT/DS27/RW/ECU. For further discussion of the facts and the decision see Delphine De Mey et al., *supra* note 244, page 77 and Joel P. Trachtman, 'Bananas, direct effect and compliance' (1999) 10 EJIL 655, pages 660 – 667.
[256] Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Regulation (EEC) No. 404/93, OJ 1998, L 210/28 [my emphasis].

regime, as set out in Regulations 1637 and 2362'.[257] *Chiquita* may also be contrasted with the CJEU decision in *Italy v Council* where the claimant successfully invoked *Nakajima*, and the recitals of Regulation 1522/96 at stake stipulated that the Regulation '… was adopted on the basis of agreements concluded with non-member countries following negotiations conducted pursuant to Article XXIV(6) of GATT.'[258] Therefore, there was not much difference in this respect between the recitals of Regulation 1637/98 and the successful *Nakajima* application in *Italy v Council*.[259]

The above circumstances concerning the *Banana* litigation can be contrasted with the *Hormones* litigation where the EU made a political declaration that it would comply but did not until later bring its law in compliance.[260] To put simply, it took some time for the EU legislative body to adopt the necessary legal measures that established a WTO-compatible regime. In contrast, after *Banana*, the EU promised to comply with WTO law and then took legal measures aiming to change EU law before the end of the reasonable period stipulated in the DSB decision.[261] One the one hand, seeking confirmation by the CJEU that the EU intends to implement a DSB ruling may be seen as an excellent opportunity to confirm the authority of Geneva's quasi-judicial body, especially in circumstances in which EU MS disagree whether and how they should comply. On the other, the CJEU may build tension between the political and the judicial branches if it refuses to confirm that the EU aimed to implement a DSB ruling.[262] This approach certainly demonstrates rigidity in the application of the *Nakajima* doctrine, and as Eeckhout stated, *Nakajima* should be applied even in 'more politically charged context' rather than relatively straightforward case law.[263] Otherwise, the *Nakajima* doctrine would have little relevance. According to Eeckhout the application of *Nakajima* did not work out in *Chiquita* because the EU judiciary was not ready to accept that DSB rulings were binding or that the EU had enough scope of manoeuvre within the WTO arena.[264] However, even if the CJEU

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[257] Paragraph 4.56 [emphasis added]; Geert A. Zonnekeyn, 'The Latest on Indirect Effect of WTO Law in the EC Legal Order: The *Nakajima* Case Law Misjudged?' (2001) 4 JIEL 597, page 604.
[258] Delphine De Mey et al., *supra* note 244, page 77.
[259] *Id.*; Mervi Pere, 'Non-implementation of WTO Dispute Settlement Decisions and Liability Actions' (2004) 1 Nordic Journal of Commercial Law 1, page 34.
[260] Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union - Some Further Reflections' (2002) 5 JIEL 91, page 109.
[261] However, as we know, the so-called Banana War did not officially end until 2012. The BBC, Banana war ends after 20 years *The BBC* (8 November 2012) <https://www.bbc.com/news/business-20263308> accessed 21.10.2019.
[262] Piet Eeckhout, *supra* note 260, pages 109 – 110.
[263] *Ibid.*, page 109.
[264] Piet Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations*, (Europa Law Publishing, Groningen 2005), page 16.

believed that the WTO rulings were not binding, this does not answer the question why it did not honour the wishes of the EU political institutions enshrined in EU secondary law. To a degree, the question in *Chiquita* was not primarily concerning the legal status of these DSB ruling but whether the EU institutions intended to comply.

The narrow application of *Nakajima* shows that in cases where the EU might have had the option to enter into negotiations after losing a dispute in Geneva the CJEU seems quite unwilling to give effect to *Nakajima*. Some claim that *Nakajima*'s restrictive approach enables the EU to formulate its commercial policy without being fundamentally restricted by the WTO and its dispute settlement body.[265] In similar vein, it is in the EU's advantage if its own political institutions have an unrestricted scope of manoeuvring on the world stage.[266] While this author believes that direct effect of WTO law would impede EU's scope of manoeuvring on the international trade arena, *Nakajima* should come into effect when the EU voluntarily decided to comply with WTO law and relinquished its ability to manoeuvre.[267] Granting nearly unfettered discretion to the CJEU to decide when the EU has complied and when not, despite the intention of the EU political branch to do so, comes close to violating the institutional balance in the EU. It also provides an escape route for the EU political arm while claimants who try to rely on an EU legislation that aimed to implement WTO law are left without a remedy.[268] Pursuant to *Kupferberg*'s decision the CJEU can determine if an international agreement can have direct effect if this has not been stipulated in its text. However, determining if the EU wanted to comply in a particular case is a completely different matter. The EU courts have been also inconsistent in their analysis and in some cases *Nakajima* was upheld and others not, which creates doctrinal inconsistency. Even in cases where the EU had the intention to implement its WTO obligations and the CJEU upheld such pleas, the judiciary was particularly concerned about the intention of the EU institutions rather than attach any particular legal obligations to comply with WTO law. This is a subjective factor evidencing that 'implementation' has a completely different meaning here from what the word means.[269]

[265] Delphine De Mey et al., *supra* note 244, page 82.
[266] Stefan Griller 'Judicial Enforceability of WTO law in the European Union. Annotation to Case C–149/96 *Portugal v Council'* (2000) JIEL 441 as cited in Geert A. Zonnekeyn, *supra* note 257, page 604.
[267] Eeckhout also considers this to be *Nakajima*'s rationale. Piet Eeckhout, *External Relations of the European Union* (Oxford University Press, Oxford, 2004), p. 319 as cited in Delphine De Mey et al., *supra* note 244, p. 81.
[268] Geert A. Zonnekeyn, *supra* note 208, page 265.
[269] Francis Snyder, *supra* note 18, p. 347.

The CJEU's judicial reciprocity considerations discussed in chapter 3 have been also used in order to defend the judiciary's narrow understanding of *Nakajima*. As the CJEU has no guarantee that the EU's most important WTO partners have the same exception to *Nakajima* – or if they do that it has not been interpreted narrowly – the EU would be disadvantaged by giving wider interpretation to *Nakajima*.[270] This is incorrect. Scholars have tried to link the genesis of *Nakajima* to the obligations of the EU under [now] TFEU Article 216(2). If this logic is correct, then the reciprocity argument here would hinge on that other WTO members have similar provision to Article 216 (2) TFEU. To understand whether other large trade nations have an equivalent provision or if they have given broader interpretation to an exception similar to *Nakajima* is much more onerous and demanding than ascertaining whether WTO law has direct effect in other legal systems. But the CJEU cannot be excused just because it will take further effort to verify all of this and blindly apply judicial reciprocity. This amounts to relying on the assumption that the EU's closest trade partners do not have an exception similar to *Nakajima*. Above all, giving stronger effect to *Nakajima* carries the additional benefit that the EU courts can help the international trading order to become more rule-based and strengthens the authority of the WTO dispute settlement organs.[271]

4.3.2.2) *Nakajima*: from *LVP* to *Clark*

Gáspár-Szilágyi suggests that in *LVP* the CJEU has closed the door to successful *Nakajima* challenges in areas outside AD.[272] However, it is argued that this is incorrect. The claimant in *LVP* argued that the higher tariff rate to which he was subject to[273] did not apply as Regulation 1964/2005 aimed to implement adverse reports against the EU[274] and so the right tariff rate was found in Regulation 404/93.[275] As the CJEU in *OGT*[276] held that

[270] Mario Mendez, *supra* note 20, page 238; Stefan Griller, 'Enforcement and Implementation of WTO law in the European Union' in Fritz Breuss, Stefan Griller and Erich Vranes (eds.), *The Banana Dispute: An Economic and Legal Analysis* (Springer 2003), page 263.
[271] Mario Mendez, *id*.
[272] Szilárd Gáspár-Szilágyi, *supra* note 6, page 420.
[273] Under Article 1 of Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas (OJ 2005, L 316, p. 1), the claimant was charged €176 per tonne. Regulation 1964/2005 is no longer valid.
[274] See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador; and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA ; WT/DS27/AB/RW2/ECU, 7 April 2008 requiring the EU to apply tariff rate set at €75/tone until the EU had concluded negotiations with the other applicants. Eric Picket et al., *supra* note 230, page 417.
[275] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas OJ, 1993, L 47/1 [no longer valid].
[276] C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159.

Regulation 404/93 did not intend to establish a WTO-consistent regime, the claimant had no other option but to convince the Court that the EU aimed to implement its WTO obligations under Regulation 1964/2005.[277] However, the CJEU rejected the applicant's request and did not assume that the EU had the intention to implement its WTO obligations.

It is difficult to see from the recitals of the EU Regulation that the EU wanted to comply with the DSB rulings. Recital 5 stated that after two adverse findings against the EU '[t]he Commission has therefore further modified its proposal in order to rectify the matter'. Hence, this specific sentence does not mean that the Commission was going to implement the adverse decisions, and by setting the tariff rate at €176 per tonne in Art. 1 of Reg. 1964/2005 this was made clear. None of the other recitals of the Regulation contained any specific indications that the EU intended to implement the adverse decisions and so the references to them in the preamble can be understood that they merely sat the context behind the adoption of the Regulation. This decision does not shut the door to challenges outside AD as long as the regulations at stake aim to implement WTO law and differs in this respect from the language chosen in Reg. 1964/2005. The CJEU also pointed out at that the EU was still involved in ongoing negotiations with several WTO state parties and that it did not want to impede the EU's scope of manoeuvring. One possible reading of this sentence is that the CJEU will not find intention to implement an adverse decision if negotiations are ongoing.[278] However, it is unlikely that the CJEU would have taken the same position if the EU legislature incorporated the lower tariff rate in substantive law. Negotiations would have been ongoing but it is doubtful that the CJEU would have disregarded a substantive obligation just to keep EU's scope of manoeuvring. Similarly, in *Clark*[279] the CJEU did not find the Regulation at stake[280] to apply retroactively. However, this was unsurprising in light of the above jurisprudence and that Art. 2 of the Regulation determined the period from when the new WTO-consistent regime had to come into effect. As DSB rulings lack direct effect, the EU has the scope to manoeuvre and decide on when and how to implement.[281]

[277] Eric Pickett et al., *supra* note 230, p. 417.
[278] *Id.*
[279] Joined Cases C-659/13 and C-34/14 *C & J Clark International Ltd v. The Commissioners for Her Majesty's Revenue & Customs* (CJEU, 4 Feb. 2016) (hereinafter *Clark*).
[280] Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community, OJ, 2012, L 237.
[281] Eric Pickett et al., *supra* note 230, page 418.

However, other cases suggest that the CJEU has further narrowed down *Nakajima*'s scope. In *Rusal*, the claimant submitted that the Regulation 1225/2009 was reviewable vis-à-vis the WTO AD Agreement as the former in its preamble stated that it was 'adopted with the aim of transposing into EU law the international obligations'.[282] The CJEU rejected this and held that:

> … it is not sufficient … for the preamble to an EU act to support only a general inference that the legal act in question was to be adopted with due regard for international obligations entered into by the European Union. It is … necessary to be able to deduce from the specific provision of EU law contested that it seeks to implement into EU law a particular obligation stemming from the WTO agreements[283]

While in the past the CJEU may have accepted that intention to implement WTO law enshrined in the preamble of the EU measure was sufficient, it appears that in *Rusal* it raised the threshold by saying that a reference in the preamble is no longer sufficient to satisfy *Nakajima*.[284] Similar position was also taken by AG Kokott who argued:

> [i]t is not sufficient, for the purposes of establishing that the EU legislature does pursue an intention of implementation, for the preamble to an EU act to support only a general inference that the legal act in question was to be adopted with due regard for international obligations entered into by the European Union. It is sufficient … that the context of the EU legal act in question should make it *indubitably clear* that the legislature's intention was to implement a particular and substantively precise WTO obligation and, also, that it should be apparent which provision of which act of secondary law that obligation was intended to implement.[285]

The first sentence, which reconfirms *Nakajima*'s narrow stance, is not as problematic as the second one. According to the AG, the EU legislation should be looked in its context – i.e., 'from the context of the act' – but intention to implement cannot be inferred from the preamble. If this has to be considered, how would it be possible to find an intention to implement without looking at the recitals?[286] The CJEU went further to state that it has to

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[282] Case C-21/14 *P European Commission v. Rusal Armenal ZAO* (2015) ECLI:EU:C:2015:494, para 20 [hereinafter *Rusal*].
[283] *Ibid.*, para 46. [my emphasis].
[284] Scott Winnard, 'The End of the Line? *C & J Clark International Ltd* and the *Nakajima* Exception' (2017) 44 Legal Issues of Economic Integration 197, pp. 203 – 4.
[285] *Rusal*, Opinion of AG Kokkott, para 42 [my emphasis].
[286] Eric Pickett, *supra* note 230, page 418.

be deduced from the EU substantive provision that WTO law was meant to be implemented, but usually the context behind the adoption of regulations is found in the preamble.[287] Thus, by stating that recitals are not enough to satisfy *Nakajima* threshold it appears that both preamble and substantive law should be taken into consideration and not only the latter. However, if the recitals are abundantly clear as to the EU's intention then why would the court has to look at substantive law? Neither the CJEU nor the AG provided any reasons at all why preamble reference might be insufficient to establish intention. Further problem is that we do not know what an 'indubitably clear' intention is and how it differs from the previous cases where *Nakajima* was successfully invoked. This may be understood as that the AG was trying to fold *Nakajima* into *Fediol* because a reference to a particular WTO provision will be 'indubitably clear'. Fortunately, the CJEU only said that the EU legislature must have shown an intention to implement a 'particular obligation' without using the same two words as the AG.

Another issue is whether external circumstances relevant to passing the EU secondary legislation can be relevant for establishing intention to implement. It appears from *Rusal* that external circumstances do not satisfy the CJEU threshold that the EU legislature intended to implement WTO law. Having said that, it is possible to rely on external circumstances in order to demonstrate that the EU did not intend to implement WTO law. Both the AG[288] and the CoJ[289] found that the EU never intended to implement Art. 2 of the WTO AD Agreement into Article 2(7) of the EU Basic Regulation based on the latter's article drafting history.[290] Hartman disagrees with this and states that legislative history should be of relevance for determining intent by the EU.[291] Yet, it is unclear what factors influenced him, and it is the author's view that legislative history should be used only to establish that the EU legislature did not intend to implement WTO law. It is doubtful what circumstances can prove that the EU had the intention to implement a WTO provision if this intention did not materialise later in the substantive law of the EU legislation. The difficulty in formulating a criterion here would most probably give a reason to the CJEU to set a very high threshold. Perhaps inevitably this would deter claimants from relying on it

[287] After all, one of the purposes of the recitals is to determine the reasons why the concerned legislation was adopted. As such, recitals are claimed to be 'general statements' though they cannot trump over substantive provision found in the form of an Article. Tadas Klimas and Jflrate Vaitiukait, 'THE LAW OF RECITALS IN EUROPEAN COMMUNITY LEGISLATION', 15:1 ILSA Journal of International & Comparative Law 62, page 62.
[288] *Rusal*, Opinion of AG Kokkott, para 51.
[289] *Rusal*, para. 53.
[290] Eric Pickett et al., *supra* note 230, p. 418.
[291] Benjamin Hartmann, 'Antidumpingrecht: Berücksichtigung von WTO-Recht bei der Anwendung des Unionsrechts' (2015) EuZW, 759 cited in *id*.

in litigation. In the EU, there are two institutions that usually act as co-legislators – the European Parliament (EP) and the Council. If one of the two institutions intended to comply but not the other how could the Court decide which institution represents the more authoritative position for the purposes of accepting external circumstances? Similarly, if let us say the EP decided to comply but the Council was silent then should the latter's silence be interpreted to constitute an agreement with the other institution?[292] The situation can become more problematic if one of the institutions is clear on its intention to implement while the other came to the opposite view but discussed it less thoroughly. In contrast, if one of the co-legislators demonstrated that it did not intend to implement, it would be easier to bring this as evidence, which would also be in line with the general presumption of the CJEU that the exception does not apply.[293]

While the CJEU did not find a preamble reference to be enough in *Rusal*, the situation for individuals to rely on *Nakajima* has become even less optimistic post-*Clark*. After reiterating its earlier stance regarding the lack of direct effect,[294] the CJEU said that:

> whilst it is true that recital 5 of Regulation No 384/96 states that the language of the WTO Anti-Dumping Agreement should be brought into EU legislation 'as far as possible', that expression must be understood as meaning that, even if the EU legislature intended to take into account the rules of that agreement … it did not, however, show the *intention of transposing* each of those rules in that regulation[295]

The *Clark* case can be contrasted to *Petrotub* where the CJEU said that recital 5 of [then] EU AD Regulation aimed 'to transpose' the WTO AD Code. However, in *Clark* the CJEU backtracked from its previous jurisprudence and concluded that the language used in recital 3 of Regulation 1225/2009 did not amount to valid intention. The main issue here is that the CJEU asked for intention to transpose the WTO measure into EU law. Transposing a measure is much more onerous than intention to implement.[296] The fact that the CJEU opened the statement by saying that 'even if the EU intended' and then added 'show intention to transpose' can cast doubt that the CJEU used implement as a synonym to transpose.

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[292] Eric Pickett et al., *supra* note 230, p. 418.
[293] *Id.*
[294] *Clark*, paras 85 – 86.
[295] *Ibid.*, para 90 [emphasis added].
[296] Scott Winnard, *supra* note 284, pp. 203 – 205.

Some relief might be granted by that the above statement was made obiter, under the heading preliminary observations. In addition, the CJEU did not come to directly abolish *Nakajima* or discuss how the judgment may fit within *Fediol* jurisprudence. This can mean that *Nakajima* is still alive, despite that *Clark*'s intention to transpose is reminiscent to *Fediol*'s clear reference exception. If the CJEU wanted to collate *Nakajima* and *Fediol* into a single exception, one can expect that the CJEU would have done that by using a more explicit language. Since *Nakajima*'s genesis, the EU has been drafting its legislations keeping in mind the potential consequences from claimants trying to invoke the *Nakajima* exception.[297] Legislations enacted pre-*Clark*'s judgment might not be given the interpretation that the EU legislature intended because of the potentially higher threshold. Businesses operating within the EU are negatively affected by this situation because their expectations to rely on WTO law by invoking the narrow *Nakajima*'s doctrine were suddenly even further restricted by the CJEU.[298] *Clark* can also be an indication that the CJEU will get to hear in future more cases and consider if the EU intended to comply.[299] It is very likely that the Luxembourg Court will continue with its strive to protect EU's scope of manoeuvring and read down the exceptions to their strictest possible reading.

The latest EU AD legislation determines that the ADA 'should be reflected in Union legislation to the best extent possible.'[300] Here the legislature wants the EU legislation to reflect the ADA without any deviations. This is more assertive than the previous legislation requiring the ADA '[to have been] brought into Community legislation as far as possible'.[301] This would have required the ADA to be replicated to a certain extent and if there was a clear contradiction between the ADA and the EU legislation the former had to be set aside regardless of EU's intention.

4.4) Conclusion

Based on the above analysis, the author argues that the EU has been more willing to give stronger effect to indirect effect of WTO law as compared to the US. Therefore, the EU is not the *odd* one.

By declaring the TRIPs to fall under the EU exclusive competence and conferring them consistent interpretation, the CJEU has imposed such duty on courts of all EU MS which

[297] Antonis Antoniadis, 'The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches' (2007) 6 World Trade Review 45, p. 75 – 76.
[298] Scott Winnard, *supra* note 284, page 205.
[299] Cf. ibid., page 207.
[300] Regulation 2015/1843, recital 3.
[301] Regulation 1225/2009.

precluded them from ruling out indirect effect of WTO substantive law. This shows that the CJEU has been not reluctant to give broad application of the principle of consistent interpretation. However, it is not certain whether under the *CB* doctrine the US courts have to interpret state law vis-à-vis WTO law. Furthermore, it is possible to read that the URAA bars indirect effect. Such limitations are certainly not present in the EU. Although the consistent interpretation principle does not apply to areas where MS still retain their exclusive competence, this cannot be a valid consideration here and serve as a reason to believe that the EU has been less generous to the effect of WTO law. Rather, it reflects inter-EU constitutional dynamics and as said in chapter 1 this thesis does not consider the effect of WTO law in EU MS's legal order. The importance of the few cases where the US courts annulled an agency's practice by giving deference to WTO law is undercut by that the US political body had already decided to comply. The US judiciary clearly refuses to interpret US law in light of DSB rulings to which the US was not a party and considers DSB rulings not to be binding under international law. This can be easily contrasted with the position of the NAFTA panels which have given stronger deference to DSB rulings. Furthermore, it is questionable if DSB rulings can be seen as to fall within the scope of *Charming Betsy*, albeit the present author argued that they could. In the EU, the courts do not appear to be too much worried if the EU has been a party to a particular dispute for the purposes of this principle and – statistically – has interpreted EU law in conformity with the WTO Agreements and DSB rulings on numerous occasions. This is despite the fact that the CJEU has not recognised the latter as a duty on future courts. Additionally, there is evidence that the CJEU has invalidated an EU institution's determinations by interpreting EU law in light of WTO law. Chapter 4.2.1.1 demonstrated that there are certain limitations to the consistent interpretation principle in the EU and based on the above analysis the author argues that the CJEU should abolish these limitations. The current regime does not require from the EU Courts to apply the principle to EU primary law, though it is argued above that after *Sólyom* the judiciary should reconsider changing its position. Nevertheless, there is no evidence that the US courts ever interpreted the US Constitution in light of WTO law and there is nothing to indicate that they will do so. There is also no evidence that the US courts have been involved into 'muted dialogue' with Geneva's tribunals. While the CJEU was criticised for its practice, this should not be regarded as a very significant consideration because the negative impact of 'muted dialogue' is more related to the relationship between the EU and the WTO.

In the US, it has been an issue if an agency's measure can be reviewed in light of its pertinent DSB decision after it was implemented under the URAA. While this is possible

according to the NAFTA panels, it appears that the US courts have taken the opposite view. This certainly is not the case in the EU and if a decision has been implemented the CJEU can review Commission's non-legislative acts or the actions of a decentralised agency. However, these actors do not have their exact same functional equivalent in the US and, as noted in chapter 1, full comparison is not possible in this paper. For one thing sure, the US courts' reluctance to review determinations post-implementation is flawed and shows rigidity.

Finally, this chapter has demonstrated that the CJEU has read down *Fediol* and *Nakajima* exceptions very narrowly and as a consequence their 'added value' is very little. In fact, the more recent decisions of *Rusal* and *Clark* appear to further narrow down *Nakajima*. As some academics claimed, the CJEU was influenced by reciprocity considerations and also aimed to protect EU's scope of manoeuvring by giving a very narrow reading of *Nakajima*. However, this narrow approach was criticised because the EU here decided to comply with WTO law rendering these considerations as inapplicable.

Chapter 5) Conclusion

The present thesis has examined the enforcement of WTO law in the EU and the US in order to determine if the EU is the *odd* one. This question has had two main sub-research questions. First, could the arguments that the EU put forward to preclude direct effect be justified? Second, has the EU or the US been more willing to give stronger effect to indirect effect?

Chapter 1 sat the scene of the thesis. I decided to consider the effect of WTO law in these two legal systems because the responsibilities that they assumed under WTO law are neither too similar nor too different, their institutions have broadly similar functions and are two of the world's largest trade blocs. A full comparison in this thesis would have not helped answer the set research question. As a result, I used some elements of the comparative functional method to describe the effect of WTO law in the EU and the US and that I was going to answer if the EU is the *odd* one through critical analysis. In terms of level of comparison, the present work would have not benefited by examining whole legal families or legal cultures and for this reason I chose to conduct micro comparison. Finally, chapter one presented several disclaimers and what was beyond the scope of the thesis.

Chapter 2 looked at the effect of international law and WTO law in the US and the EU. The chapter started by defining the concepts of direct and indirect effect. Given that those two concepts have had different meanings in different jurisdictions, it was important to explain what they would mean throughout this thesis. Some doubt whether DSB rulings constitute binding obligations. In sub-chapter 2.2.2, I made the case that they do. Be that as it may, sub-chapter 2.3 then argued that international agreements that lack direct effect cannot be used to invalidate US or EU law. It is not an easy to task to pinpoint when an international agreement can have direct effect in the EU or the US legal order. In the US, the landmark decision of the Supreme Court in *Medellín* has created large uncertainty as to when an international agreement can have direct effect in the US legal order. The CJEU test for direct effect of international agreements has been applied inconsistently. The CJEU was way more forthcoming than the US to explain why WTO law cannot be used as a standard of review of EU law. Based on the analysis in sub-chapter 2.4.2, I argued that the US precluded direct effect of WTO law in order to protect US sovereignty. I then claimed that the URAA offers an adequate protection to US federal sovereignty and so the US has retained its status as a supreme power and enjoys independence from the

WTO. However, the same logic does not apply to US state sovereignty which remains vulnerable from encroachment by WTO law.

Chapter 3 examined the reasons behind the EU refusal to confer direct effect to WTO substantive law and DSB rulings. The CJEU wrongly concluded that the WTO Agreements do not determine their methods of enforcement. Compensation and retaliation are temporary measures and there is no alternative to compliance with WTO law. Direct effect of WTO law would have not prevented the EU from exercising its rights under DSU Art. 22 because the CJEU has the authority to issue prospective judgments and that there might be a 'reasonable period of time' to comply with the DSB ruling. The substantive reciprocity analysis of the CJEU was also flawed because the WTO Agreements do have reciprocal trade concessions, such as the MFN and the national treatment. In addition, the WTO Agreements do have asymmetrical provisions. However, the judicial reciprocity analysis of the Court has been correct. Direct effect of WTO law would have led to distortion of the EU institutional balance and there would have been a shift in international trade law matters from the Commission and Council to the EU courts. This would have also limited the scope of manoeuvring that the EU institutions enjoy, while other WTO members would have had full scope. Given that EU's most important commercial partners have not conferred direct effect, the EU would have been at a disadvantaged position on the international stage had it done so. On this basis, although some of the arguments of the CJEU were criticised, I concluded that the EU is not *odd* because the Luxembourg Court gave valid overall reasons to preclude direct effect of WTO law.

The purpose of Chapter 4 was to examine indirect effect. Based on the analysis in chapter 4, I claimed that the EU has been more willing to give stronger indirect effect to WTO law as compared to the US. The CJEU conceives the principle of consistent interpretation as a constitutional duty that requires international agreements binding on the EU to be interpreted 'as far as possible, in light of the wording and purpose'[1] and the principle applies to all WTO substantive provisions. MS courts should also interpret national and EU law in light of the WTO Agreements unless the concerned provision falls under their exclusive competence. By contrast, it is not fully clear whether the *Charming Betsy* doctrine survives under the URAA. Although the US courts have not ruled it out completely, they have been reluctant to confirm it and several URAA provisions can indicate that the doctrine cannot be applied. Furthermore, it is unclear if state law has to be interpreted in light of WTO law. It is another worry that DSB decisions might not fall

[1] *Hermès*, para 28

under the 'law of nation' proposition so to trigger an application of the *CB* canon. Clearly, no such limitations to the consistent interpretation principle exist in the EU.

Even though the CJEU has shown willingness to interpret EU law vis-à-vis WTO law, this has had its limitations. Courts do not have to interpret the EU treaties vis-à-vis WTO law. However, I demonstrated that there are several cases where the CJEU interpreted EU primary law vis-à-vis WTO law and claimed that the EU should impose this as an obligation on future courts. I also claimed that EU law should be interpreted vis-à-vis DSB rulings because there is evidence that they constitute an integral part of the EU legal order under Article 216(2) of the TFEU as well as meet *Sevince's* criterion. Doing so would not impede EU's scope of manoeuvring on the world stage and also the clarification and interpretation taken by panels and the AB are valid beyond the parties to the dispute. There is also evidence that the CJEU has been involved into 'muted dialogue'. This was criticised for that it creates lack of transparency and legal certainty, inability to pinpoint the full relevance of WTO law as well as difficulties to strengthen the EU-WTO relationship.

But even despite that in the EU there are several limitations to the principle, there is nothing to suggest that the US courts will interpret the US constitution in light of WTO law. The few cases where the US Courts gave deference to DSB rulings were circumstances where the US had already decided to comply with WTO law and it is the courts' position that they are not binding obligations for the US. To this end, NAFTA panels were clearly more willing to give deference to WTO law by virtue of the CB principle. I then examined the relevance of WTO law after it was implemented into the US. I argued that even when the DSB ruling was implemented under URAA's scheme US courts were still reluctant to apply the *Charming Betsy* doctrine and review the US agency's determination in light of the DSB ruling.

With regard to *Nakajima* and *Fediol*, I claimed they have been given unjustifiably narrow reading by the CJEU. As a result, they have had very little practical effectiveness. Some doubts exist whether the former is still valid but my analysis concluded that reliance on *Nakajima* is still possible, though the CJEU further narrowed down its scope.

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