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Judicial Communication between the CJEU and the WTO Dispute Settlement

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by

Michelle Zang*

Abstract

In this paper, 'judicial communication' refers to the reference made by a tribunal, during the process of adjudication, to the decision and/or practice of another tribunal. This contribution looks into the communication between two major international adjudicators, namely, the Court of Justice of the European Union (CJEU) and the Dispute Settlement Mechanism of the World Trade Organization (WTO DSM). The research shows that the communication approach adopted and activities carried out by each of the adjudicators significantly differ from the other; and this is mainly caused by the different perception of the referencing adjudicator towards the law applied and the decisions made by the adjudicator being referenced. While the communication is ongoing, a number of important questions remain unanswered, including the fundamental enquiry as regards the legal basis and consequences of such inter-jurisdiction communication. It is thus the task of the adjudicators involved to elucidate these issues.

Keywords: WTO, CJEU, direct effect, judicial dialogue

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Introduction

Courts are talking to one another all over the world, and there are many types of transjudicial communication among courts across borders.¹ In Europe, the most significant caseload of the Court of Justice of the European Union (CJEU or Court) arises from the preliminary reference mechanism², through which the Court responds to questions raised by domestic courts of the Member States. In the field of human rights, the reasoning and interpretative methodology developed by the European Court of Human Rights have substantively influenced the jurisprudence of the Inter-American Court of Human Rights and the United Nations Human Rights Committee.³ In Latin America, one significant example of the so-called ‘judicial diplomacy’ is the permanent forum of the supreme courts of the Southern Common Market in Latin-America (MERCOSUR) countries for judicial matters relevant to Latin American integration.⁴ Tribunals have found themselves always interacting with the ‘outside’, resisting collapse into or subordination to the outside, but always maintaining a dynamic engagement through interpretation.⁵

Against this background, this paper looks into relevant judicial communication between the CJEU and the WTO Dispute Settlement Mechanism (DSM), two of the most established international adjudicators. In this paper, the term ‘judicial communication’ refers to the reference made by one tribunal, as well as the resulting influence thereof, during the process of adjudication, to the decision and/or practice of the other tribunal. Judicial behaviour of this type does not focus on exchanges in a responsive manner between two adjudicators, but instead underlines the course of deliberation and comparison of the adjudicator with

¹ Slaughter, Anne-Marie, ‘A typology of transjudicial communication’, *University of Richmond Law Review*, 29 (1994): 99.

² Article 267 TFEU: ‘Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon.’

³ Merrills, John Graham, *The development of international law by the European Court of Human Rights*, Manchester University Press, 1995, p. 18–19.

⁴ Oliveira, Maria Angela Jardim de Santa. ‘Judicial diplomacy: the role of the supreme courts in Mercosur legal integration.’ *Harvard International Law Journal Online* 48 (2007): 93–100.

⁵ Teitel Ruti and Robert Howse, ‘Cross-judging: tribunalization in a fragmented but interconnected global order.’ *NYUJ Int’l L. & Pol.* 41 (2008): 959.

respect to the persuasiveness and applicability of the judicial decision made by and/or practice of the other adjudicator.

In this sense, judicial communication serves as a screen filter that scrutinizes the relevance of judicial externality from other jurisdictions. It might be launched by the adjudicator's own initiative or through the claims raised by the disputing parties. It is a posture that occupies a large middle ground on the continuum between resistance and convergence of different jurisdictions; it highlights the weighing process of the adjudicator, in specific cases, as regards the functions and impacts of judicial externality; it denotes the commitments to judicial deliberation but opens to the outcome of either harmony or dissonance.

The central argument of this paper is first, that communication activities between tribunals, e.g. the CJEU and the WTO DSM, are by and large determined by the relationship between them but in a unilateral sense, namely, the perception of one tribunal towards the law applied and the decisions made by the other.⁶ Second, when referring to the decision and practice of another jurisdiction, adjudicators are highly cautious in defining the limited role and function of such judicial externality. The underlying rationale is to safeguard its own autonomy and independence from other jurisdictions. However, this wary approach of adjudicators makes it difficult to envisage under what circumstances external judicial decisions and practice would be used. This in turn leads to certain legal uncertainty and puts at risk the legitimate expectation of the interested parties involved.

This paper is structured as follows. We will first explore the 'unilateral' relationship between the CJEU and the WTO DSM, investigating the perception of each adjudicator towards decisions and practices of the other. More particularly, it looks into the approach of the CJEU towards WTO rules and rulings, and the legal status of EU law and CJEU jurisprudence in WTO dispute settlement. Part II then investigates the current communication activities between the two adjudicators, exploring the judicial approach respectively adopted by the CJEU and the WTO panels and Appellate Body. The final section draws some conclusions. .

⁶ For example, under the preliminary ruling mechanism between the CJEU and the domestic court, the format and extent of the communication, e.g. the type of questions to be asked, the legal effect of the ruling and the procedures to be followed, are designed in line with the principles and structure of the EU legal system. Judicial communication of this type, therefore, cannot be easily envisaged between the CJEU and any other international tribunal as the doctrinal components that support such communication are missing.

I. The relationship between the CJEU and the WTO dispute settlement

A. The approach of the CJEU towards WTO rules and rulings

1. Jurisprudence constante in the lack of direct effect with specific exceptions

Communication activity between adjudicators focuses primarily on judicial decisions and rulings made by one adjudicator, and mainly concerns their functions and influences on their own internal adjudicatory proceedings. However, analysis of communication activity also needs to take into account the norms and principles upon which the decisions and rulings are made. For example, as shown below, the CJEU has grounded its approach towards WTO rulings mainly on its case law on the effect of WTO rules; and the WTO adjudicators, in most cases, consider CJEU case law as part of the EU *acquis* and grant similar legal effects. In other words, studies on communication activity require analysis of both the law applied and the decisions made by the adjudicator; and the former, as is often the case, serves as the essential background, as well as the departure point for the latter. Therefore, before looking into the CJEU's approach towards WTO rulings, the following section will first provide an overview on the effect of the WTO rules in general.

The approach of the CJEU towards WTO rules is embedded in the broader issue of the reception of international law in the EU legal order, including not only the effect but also enforcement of international law within the EU. The EU Treaties do not have a supremacy clause except the provision on the general binding force of international agreements.⁷ The law in this area is primarily developed through the case law. To date, the Court has been fairly positive in granting direct applicability and effect to international agreements concluded by the EU, including association agreements⁸, free trade agreements,⁹ partnership and cooperation agreements¹⁰ and cooperation agreements¹¹.

There are, nevertheless, limited but notable exceptions: the General Agreement on Tariffs and Trade (GATT)/WTO and the United Nations Convention on the Law of the Sea (UNCLOS).¹² The Court consistently upholds the position that the WTO, and its predecessor the GATT 1947, are excluded from the rules used in reviewing the legality of EU laws. During the GATT era, it was the judgments in *International Fruit* and *Germany* that pointed

⁷ Article 216 (2) TFEU provides, Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

⁸ Case C-63/99, *The Queen v Secretary of State for the Home Department*, [2001] ECR I-6369; Case C-235/99, *The Queen v Secretary of State for the Home Department*, [2001] ECR I-6427.

⁹ Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie*, [1982] ECR 3641.

¹⁰ Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR I-2579.

¹¹ Case C-18/90, *Office national de l'emploi v Babia Kziber*, [1991] ECR I-199; Case C-58/93, *Zoubir Yousfi v Belgian State*, [1994] ECR I-1353.

¹² Joint cases 21/72 and 24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, [1972] ECR 1219; Case C-149/96, *Portugal v Council*, [1999] ECR I-8395; Case C-308/06, *Intertanko and others v Secretary of State for Transport*.

up the Court's proposition.¹³ Subsequent to the entry into force of the WTO in 1995, there have been enquiries as to whether the new policy development, especially the brand-new DSM, should lead to a review or even a change of position established by the previous case law. An explicit response from the Court was delivered in the Portuguese textile case, where it was ruled that 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.¹⁴

The foregoing judgments denying direct effect of the WTO did not render the rules thereof irrelevant to EU law. In fact, the Court has constantly underlined the circumstances in which it could carry out the legality review of Community acts in light of the multilateral trading rules.¹⁵ In particular, 'it is only where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO, or where the Community measure refers expressly to the precise provisions of the GATT/WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules'.¹⁶

The above 'side passages' are respectively addressed in the jurisprudence as the implementation exception and the reference exception, notable in the cases of *Nakajima* and *Fediol*. In *Nakajima*, the Court observed that the EC measure under dispute made explicit reference to, and was adopted in accordance with, existing international obligations arising from relevant agreements under the GATT; the Community was therefore under an obligation to ensure compliance with the GATT and its implementing measures.¹⁷ In *Fediol*, the Court opined that the lack of direct effect could not prevent it from interpreting and applying the rules of GATT with reference to a given case, especially where it is called upon to establish whether certain commercial practices should be considered incompatible with those rules.¹⁸ In that case, the GATT provisions formed part of the rules of international law to which the relevant EC law explicitly referred; thus, even without direct effect, the applicants may still rely on the GATT provisions to obtain a ruling on the lawfulness of certain EC measures and decisions.¹⁹ The rationale seems to be that, since the Commission made its decision on the basis of the GATT provisions, the interested party is thus entitled to request the Court to review the legality of the Commission's decision in the light of those provisions.²⁰ Nevertheless, the Court has so far insisted on a very strict approach towards the two exceptions mentioned above. From a practical point of view, the Court only confirmed

¹³ Joint case 21/72 and 24/72, *International Fruit*; Case C-280/93, *Germany v Council*.

¹⁴ Case C-149/96, *Portugal v Council*, para. 47.

¹⁵ Case C-280/93, *Germany v Council*, para. 111; Case C-149/96, *Portugal v Council*, para. 49.

¹⁶ Case C-149/96, *Portugal v Council*, para. 49.

¹⁷ Case C-149/96, *Portugal v Council*, para. 30–31.

¹⁸ Case 70/87, *Fediol v Commission*, [1989] ECR 1781, para. 21.

¹⁹ *Ibid.*, para 19.

²⁰ *Ibid.*, para 22.

the application thereof in the field of anti-dumping and in the context of New Commercial Policy Instrument,²¹ which was succeeded by the so-called Trade Barriers Regulation.²²

As mentioned above, denial of direct effect does not render WTO rules irrelevant to the EU legal system. Besides the two exceptions mentioned above, the relevance of WTO rules is further confirmed by the legal principle of consistent interpretation. As the Court ruled in *Commission v Germany*, the primacy of international agreements over provisions of secondary Community legislation means that such provisions must, insofar as is possible, be interpreted in a manner that is consistent with those agreements.²³ In the GATT/WTO context, this principle does not overrule the law being interpreted; rather, it allows, or requires, the bringing of domestic legislation into conformity as far as possible with WTO obligations.²⁴ From a practical perspective, it indeed guarantees a significant role of the WTO rules in construing the EU law and the law of the Member States.

2. WTO rulings at the CJEU

The foregoing discussion has provided a brief overview of the legal effect of WTO rules within the EU. The question thus arises as to the effect and enforceability of the rulings delivered by WTO adjudicators, i.e. the WTO panel/Appellate Body reports adopted by the Dispute Settlement Body. This question is of particular interest in light of the classic statement of the Court regarding the *Nakajima* exception: ‘where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO...it is for the Court to review the legality of the Community measure in question in the light of the WTO rules’.²⁵ In other words, by complying an unfavourable WTO ruling, is the EU intended to implement a particular WTO obligation and consequently, grant the WTO ruling with direct effect?

Disputes over the effect of WTO rulings started from the ‘banana saga’ between the United States, Latin American countries, and the EU. In September 1997, the WTO Appellate Body issued a report condemning the violation of the EC 1993 regime on the common organisation of the market in bananas. In order to implement the WTO ruling, the EU adopted several regulations amending the 1993 regime, which brought into force the 1999

²¹ Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ, L 252, 20/9/1984, p. 1–6.

²² Regulation 3286/94 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, L 349, 31/12/1994, p. 71–78.

²³ Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, para. 52.

²⁴ Cottier, Thomas. “A theory of direct effect in global law”, in Armin von Bogdandy, Petros C. Mavroidis, Yves Mény (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, London: Kluwer Law International, c2002, p. 109.

²⁵ Case C-149/96, *Portugal v Council*, para 49.

banana regime. However, the compliance of the new regime was once again challenged at the WTO and another unfavourable ruling was later delivered.²⁶

Chiquita, one Italian banana importer, then lodged a case in the Court claiming for compensation from the EU's failure in bringing the 1993 regime in line with WTO law.²⁷ In particular, Chiquita contended that by enforcing the new 1999 import regime, the Community was intending to implement a particular obligation assumed under the first WTO ruling in 1997 and thus the *Nakajima* doctrine on implementation exception should apply.

However, the Court disagreed. It first ruled that as an exception to the principle that individuals may not directly rely on WTO provisions before the Community judicature, the *Nakajima* doctrine must be interpreted restrictively.²⁸ Second, the circumstances of the adoption of the 1999 regime cannot be compared with the basic anti-dumping regulations to which the *Nakajima* case law applied. The new regime did not transpose into Community law rules arising from a WTO agreement for the purpose of maintaining the balance of the rights and obligations of the parties to that agreement; and thus the WTO rulings concerned did not include any special obligations which the Commission intended to implement, within the meaning of the *Nakajima* doctrine.²⁹

Shortly after this decision, a similar claim was raised again in *Van Parys*.³⁰ The applicant, also a European banana importer, brought two actions against the decisions of the Belgian Intervention and Refund Board (BIRB), which refused to issue it with import licences for the full amounts applied for. In its actions, Van Parys submitted that those decisions should be annulled because of the unlawfulness, in light of the WTO rules, of the 1999 banana regime on which those decisions were based.³¹

As the debate continued, the Court eventually elaborated on this issue in great detail in *FLAMM*. The Court observed that the WTO rulings and the substantive WTO rules cannot be fundamentally distinguished from each other, at least for the purpose of reviewing the legality of the conduct of the Community institutions. A recommendation or a ruling of the WTO adjudicator is no more capable of conferring rights upon individuals than those WTO rules, whether in annulment proceedings or an action for compensation.³² As a result, a

²⁶ It has been argued that the EC decided not to comply with this ruling because of an overriding public interest, namely the desire to protect the relative position of the ACP banana exporting countries compared to the so-called dollar-banana countries. See Marco Bronckers, 'From "direct effect" to "muted dialogue": recent development in the European Courts' case law on the WTO and beyond', *Journal of International Economic Law*, (2008) 11, 885–898.

²⁷ Case T-19/01, *Chiquita Brands International Inc., Chiquita Banana Co. BV and Chiquita Italia SpA. V. Commission of the European Communities*, [2005] ECR II-315.

²⁸ *Ibid.*, para. 117.

²⁹ *Ibid.*, para. 168.

³⁰ Case C-377/02, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, [2005] ECR I-1465.

³¹ In that case, the Court first re-confirmed the non-applicability of the *Nakajima* doctrine as established in *Chiquita*. With regard to the issue of direct effect, the Court generally followed the reasoning in *Portugal v Council*. The Court first recalled the considerable importance accorded to negotiation in the WTO dispute settlement system; it further invoked the principle of reciprocity, the lack of which would risk introducing an anomaly in the application of the WTO rules.

³² Joined cases C-120/06 P and C-121/06 P, *FLAMM and others v Council and Commission*, para.120. The Court based this conclusion on two grounds. First of all, the general nature of the WTO agreement, especially the reciprocity and flexibility thereof, has not changed either after

WTO ruling finding a WTO infringement cannot have the effect of requiring a WTO Member to accord individuals a right, which they do not have by virtue of those agreements in the absence of such a ruling.³³

The essence of the above CJEU judgements is as follows: first, the unfavourable WTO rulings do not include any special obligations and the ensuing legislative amendments by the EU, during the compliance process, are not intended for implementation within the meaning of the *Nakajima* doctrine. Therefore, this doctrine does not apply. Second, the legal effect of WTO rulings is inextricably linked to the effect of the WTO rules under dispute.³⁴ Owing to the conventional denial of direct effect, WTO rulings are therefore generally excluded from the rules in the light of which the legality of Community law could be assessed. Indeed, one major reason for denying the direct effect of WTO law in general is the characteristics of its dispute settlement mechanism; it thus should not come as a surprise that the Court has extended this conclusion to encompass the outcome of WTO dispute settlement processes, including panel and Appellate Body reports.³⁵

The survey above has provided a brief overview of the CJEU jurisprudence on the legal effect of WTO rules and rulings. Admittedly, it demonstrates only part of the picture as for the influence the WTO has on the EU judiciary. As shown in the subsequent sections of this paper, the CJEU has indeed interacted with WTO adjudicators and their decisions in a highly subtle fashion, in spite of consistent denial of direct effect in general.

B. EU laws and jurisprudence in WTO dispute settlement

1. Relationship between the CJEU and the WTO DSM

As a customs territory, the EU is a WTO member in its own right, as are each of its Member States. While the EU Member States coordinate their position, the European Commission alone speaks for the EU and its Member States at almost all WTO meetings and negotiations, including dispute settlement. *Status quo* as such leads to a ‘mixed’ position of the Court from the perspective of WTO adjudicators. First of all, it is a ‘domestic’ court of a customs territory with full WTO membership; second, it serves as a judiciary for trade-related disputes among certain WTO Members, i.e. the EU Member States; last but not least, it is an

the ruling has been adopted or after the implementation period has elapsed.³² Even after the expiry of the implementation period, the Community retains the possibility, according to the DSU, to find a mutually acceptable solution. Second, as is apparent from Article 3(2) of the DSU, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the WTO agreements.

³³ Joined cases C-120/06 P and C-121/06 P, *FLAMM and others v Council and Commission*, para. 131.

³⁴ Case C-104/97 P, *Atlanta AG and others v Commission and Council*, paras. 19–20.

³⁵ Snyder, Francis. ‘The gatekeepers: the European courts and WTO law’, *Common Market Law Review*, (2003) 40, 313–367, p.335.

important dispute settlement forum that stands in parallel with the WTO DSM in the network of international adjudication.

The relationship between the DSMs of Regional Trade Agreements (RTAs) and the WTO has been widely debated and continues to be an unsettled issue in international economic law.³⁶ In a number of WTO cases, claims in relation to the rulings and jurisdiction of certain RTA DSMs have been deeply disputed, with most known instance of MERCOSUR and North American Free Trade Agreement (NAFTA).³⁷

It goes beyond the scope of this paper to look into the ongoing debate in detail. However, insofar as the CJEU is concerned, suffice it to say that the jurisdiction-related problems between the RTAs and the WTO would not arise. First, one major cause of the difficulties between the DSMs of the RTA and the WTO is the overlapping jurisdiction on the same or closely related subject matters. A series of WTO disputes have plainly demonstrated the problem. In *Brazil – Retreaded Tyres*, the EU brought the case against the import ban imposed by Brazil on retreaded tyres. During the proceedings, the very focus of dispute is whether the MERCOSUR exemption, i.e. exemption from the prohibition for imports from certain MERCOSUR countries, could be justified under the WTO law by the existing decision issued by the MERCOSUR Panel. In the saga of soft lumber cases between the US and Canada, the same set of US measures was litigated at both NAFTA and the WTO; and parallel proceedings have lasted for decades. In *Mexico – Taxes on Soft Drinks*, concerning certain tax measures imposed by Mexico on beverages with sweetener, Mexico contested the admissibility of the dispute on the ground that the US' claims are inextricably linked to a broader dispute between the two countries related to trade in sweeteners under NAFTA. In Mexico's opinion, under those circumstances, it would not be appropriate for the WTO panel to issue findings on the merits of the US' claims.³⁸

However, jurisdiction overlap is not of concern in the EU-WTO context owing to the so-called 'jurisdictional monopoly' of the CJEU regarding disputes between Member States concerning the application and interpretation of Community law.³⁹ The exclusive jurisdiction of the Court is provided by Article 344 of the Treaty on the Functioning of the Euro-

³⁶ Hillman, Jennifer. 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should WTO Do?' Cornell Int'l LJ 42 (2009): 193; Gabrielle Marceau, Arnau Izaguerri and Vladyslav Lanovoy, 'The WTO's influence on other dispute settlement mechanisms: a lighthouse in the storm of fragmentation', Journal of World Trade 47, 3(2013): 481–574; Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz, 'Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?', WTO Staff Working Paper, ERSD-2013-07, 10 June 2013; Pauwelyn, Joost, and Luiz Eduardo Salles, 'Forum shopping before international tribunals:(real) concerns,(im) possible solutions', Cornell International Law Journal 42 (2009).

³⁷ Relevant WTO disputes: DS 241, *Argentina – Poultry Anti-dumping*; DS 308, *Mexico – Taxes on Soft Drinks*; DS 332, *Brazil – Retreaded Tyres*; DS 264, *US – Softwood Lumber V*.

³⁸ *Mexico – Taxes on Soft Drinks*, Panel Report, WT/DS308/R, para. 7.11.

³⁹ Mackel, N., 'Article 292 (ex-article 219)', in: Léger, P. (ed.), *Commentaire article par article des traités UE et CE*, Dalloz/Bruyant, Paris/Bruxelles, 2000, p. 1874. In similar words: Lasok, K., and Lasok, D., *Law and institutions of the European Union*, Reed Elsevier, 2001, p. 371. The ECSC Treaty contained a similar provision, Article 87 CS. On the difference in wording between this provision and Article 292 EC/193 EA, see Herzog, P., 'Article 219', in: Smit/Herzog, *The law of the European Community: a commentary on the EEC Treaty*, Bender, New York (1976), at 6-170.1-2.

pean Union (TFEU), by which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.⁴⁰ With respect to international agreements concluded by the EU, particularly the dispute settlement forum established thereunder, ‘jurisdictional monopoly’ of the CJEU is clearly demonstrated in the *MOX-plant* case. In that case, the Commission accused Ireland of infringing the jurisdictional exclusivity of the CJEU by instituting proceedings against the United Kingdom under UNCLOS. The Court is of the view that EU Member States *inter se* cannot have recourse to the dispute settlement system of an international convention that falls within the EU competence. The rationale seems to be that where the provisions of international agreements to which the EU is a party come within the scope of EU competence, such provisions not only form an integral part of the EU legal order according to Article 216 (2) TFEU⁴¹, their interpretation and application, as well as relevant assessment of a Member State’s compliance, also fall within the exclusive jurisdiction of the Court.⁴²

It is therefore difficult to envisage the Court allowing disputes between Member States to be brought to the WTO DSM. Furthermore, after the entry into force of the Lisbon Treaty, there is little doubt left as regards the exclusive competence of the EU in WTO-related matters.⁴³ Therefore, unlike most existing RTAs, the EU and CJEU are not facing substantive problems in the division of jurisdiction and competence as regards WTO issues; the exclusive competence in common commercial policy of the EU and judicial monopoly of the CJEU have successfully avoided the jurisdictional conflicts in the EU-WTO context.

2. CJEU judgements at the WTO DSM

Since the EU, as a customs territory, enjoys full membership of the WTO, it should not be a matter of much debate that EU law is treated as municipal law, the treatment of which was clearly explained by the Appellate Body in *India – Patents (US)*:

‘In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. For example, in *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. *The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.* (emphasis added)

⁴⁰ Opinion 1/91 [1991] ECR I-6079, paragraph 35, and Opinion 1/00 [2002] ECR I-3493, paragraphs 11 and 12.

⁴¹ Article 216 (2) TFEU.

⁴² Article 344 TFEU provides that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

⁴³ Articles 3 and 207 TFEU.

... It is clear that an examination of the relevant aspects of Indian municipal law...is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law "as such"; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS Agreement*).⁴⁴

With respect to the evidential function of municipal law, the Appellate Body in *US – Carbon Steel* further concluded that ‘such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, *the pronouncements of domestic courts on the meaning of such laws*, the opinions of legal experts and the writings of recognized scholars.’⁴⁵ (emphasis added)

It is thus clear from the case law above that first, in WTO litigation, municipal law generally serves as evidence for the facts, state practice and conformity of certain domestic laws with relevant WTO obligations; second, judicial exercise of examining municipal law is not to interpret the law concerned but rather to determine whether the municipal law being examined is in compliance with WTO laws; and third, judicial decisions can constitute part of the evidence, clarifying the meaning of the municipal law at dispute.

To date, the EU has, in several WTO disputes, invoked the judgement of the ECJ as part of the evidence in support of its arguments. In *Korea – Alcohol*, the European Communities argued in front of the Panel that the case law of the Court on Article 95 of the EC Treaty regarding internal taxation is relevant for the interpretation of Article III:2 GATT, as both provisions share almost identical wording and a similar purpose.⁴⁶ In *EC – IT Products*, the EU made intensive reference to several case laws on EU customs law, ranging from principles of law application and interpretation to specific standards of tariff classification.⁴⁷ In *EC – Chicken Cuts*, the EU contended that certain case law qualifies "circumstances of conclusion" of the EC Schedule, which is part of the WTO law, within the meaning of Article 32 of the Vienna Convention on the Law of Treaties (VCLT).⁴⁸ In other words, the judgements invoked shall be taken into account when interpreting the relevant WTO rules.

Therefore, in the existing WTO disputes, jurisprudence of the CJEU has mainly demonstrated an evidential function, which by and large responds to its role as a ‘domestic’ court of a WTO member. Only on a few occasions, the WTO panels recognise the Court as a major international judiciary by taking into account its decision as a source of inspiration and authority. As shown in the later parts of this paper, the Panels in *Korea – Procurement*

⁴⁴ Appellate Body Report, *India – Patents (US)*, WT/DS50/AB, paras. 65–66.

⁴⁵ Appellate Body Report, *US – Carbon Steel*, WT/DS213/AB, para. 157.

⁴⁶ Panel Report, *Korea – Alcohol*, WT/DS75/R, WT/DS84/R, para. 7.4.

⁴⁷ Panel Report, *EC – IT Products*, WT/DS375/R, paras. 7.55, 7.150 and 7.1395.

⁴⁸ Panel Report, *EC – Chicken Cuts*, WT/DS269/R, WT/DS286/R, para. 7.390.

and in *US – Gambling* made reference to the relevant CJEU judgments to buttress their own conclusion.

C. Interim remarks

The foregoing discussion has explored the relationship between the CJEU and the WTO DSM, particularly the approach of each adjudicator towards decisions made by the other. With limited exceptions, the CJEU as a rule treats WTO rulings in the same way as WTO rules. They will be taken into consideration only if the Court finds the WTO rules allegedly breached to have direct effect. In other words, WTO rulings are generally excluded from the rules in the light of which the legality of Community law can be assessed.

In the WTO proceedings, the prevalent jurisdiction-related conflicts between the RTAs and the WTO do not cause much concern in the EU-WTO context. As a result of the exclusive competence of the EU and the jurisdiction monopoly of the Court, the two adjudicators are safely driving on parallel tracks with little chance of collision. At the WTO, the Court is mainly considered a member's 'domestic' judiciary with its judgements serving as part of the evidence clarifying the meaning of the law at dispute.

Therefore, the relationship between the CJEU and the WTO adjudicators indicates highly limited communication between them: the Court has shut down the 'main entrance' of direct effect for WTO rulings while WTO panels and the Appellate Body refer to the Court's judgements mainly when they are requested, by the disputing parties, to do so. However, the following section argues that despite the difficulties at the major channel of communication, the two adjudicators have nevertheless developed interaction through other side ways that lead to nuanced influence on the adjudication process.

II. Ongoing communication between the CJEU and the WTO adjudicators

Analysis in this part looks into the current communication activity between the two adjudicators. It has been argued that the format, approach and extent of judicial communication is primarily determined by the perception on one side of the other, i.e. the CJEU's position towards the WTO rules and rulings and the recognition of WTO adjudicators regarding EU law and CJEU judgements. As a result of the substantive difference in this regard, the communication approaches of the two adjudicators vary from each other considerably.

A. The CJEU: from muted dialogue to consistent interpretation?

Recent case law has represented the so-called ‘muted dialogues’ between the CJEU and the WTO Appellate Body.⁴⁹ In a couple of cases, even if the Court does not explicitly rely on the pertinent WTO ruling, it seems a fair guess that the judgements are influenced by WTO precedents and that the Court, albeit implicitly, seeks to avoid inconsistencies.⁵⁰ This practice has been clearly exemplified in the cases of *IKEA* and *FTS International*.⁵¹ In *IKEA*, the Court criticized the zeroing practice of the Commission in the anti-dumping investigation against the bed linen from Egypt, India and Pakistan; and sanctioned the unlawfulness of Regulation 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen.⁵² Even if no explicit reference was made to the same conclusion reached in the previous WTO dispute over the same measure,⁵³ it nevertheless appears that the Court’s interpretation was substantially influenced by the disapproval of the same measure by the Appellate Body.⁵⁴ This influence became even more manifest in *FTS International*, where the Court delivered an interpretation of the Community tariff classification of boneless chicken cuts and overruled the traditional interpretation given by the custom authorities. In fact, such interpretation was also condemned at the WTO in a similar fashion.⁵⁵

Without explicit reference and statement of intention from the Court, ‘muted dialogue’ is no more than speculation from the observers, and the legal consequence of WTO rulings remains unclear except being deprived of direct effect. On the one hand, the emergence of muted dialogue at least suggests that the simple denial of direct effect is no longer sufficient in the light of continuing attempts by the applicants to invoke WTO precedents where the legality of certain EU measures is condemned. On the other hand, however, implicit reference to WTO decisions cannot be considered as a sustainable resolution as it suffers the lack of legal certainty and puts at risk the legitimate expectation of the interested party. In particular, such practice renders a number of important questions unanswered, e.g. in what circumstance, under what conditions and to what extent the relevant WTO rulings would be followed and adopted by the Court.

Therefore, rather than conducting muted dialogue, the Court should engage with WTO rulings in a more explicit manner, with properly defined legal basis and complete legal reasoning. To formalize the communication, one possible solution is to rely on the principle

⁴⁹ Bronckers, Marco. ‘From “direct effect” to “muted dialogue”: recent development in the European Courts’ case law on the WTO and beyond’, *Journal of International Economic Law*, (2008) 11, 885–898.

⁵⁰ *Ibid.*, p.887.

⁵¹ Case C-310/06, *F.T.S. International BV v Belastingdienst*, [2007] ECR I-6749; Case C-351/04, *Ikea Wholesale Ltd v Commissioners of Customs & Excise*, [2007] ECR I-7723.

⁵² Case C-351/04, *Ikea Wholesale Ltd v Commissioners of Customs & Excise*, paras. 55–57.

⁵³ *EC — Bed Linen*, Appellate Body Report, WT/DS141/AB/R.

⁵⁴ Marco Bronckers, p.889.

⁵⁵ *EC — Chicken Cuts*, Panel Report and Appellate Body Report, WT/DS269/R, WT/DS269/AB/R, WT/DS286/R, WT/DS286/AB/R.

of consistent interpretation, the application of which has already been confirmed by the Court insofar as the WTO rules are concerned.

As the Court put it in *Commission v Germany*, the primacy of international agreements over provisions of secondary Community legislation means that such provisions must, insofar as is possible, be interpreted in a manner that is consistent with those agreements.⁵⁶ In *Hermès*, rather than answering the question of direct effect, the Court turned to the duty of the national court to interpret the procedural rules in the light of Article 50 of TRIPS Agreement⁵⁷, part of the WTO package.⁵⁸ In the subsequent *Dior* case, the Court followed the same approach and provided a more explicit statement in this regard. In particular, the Court observed that ‘in a field to which TRIPS applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPS’.⁵⁹ According to the Court, interpreting national legislation in the light of WTO law is an EU law obligation, which should thus be distinguished from the legal effect arising directly from the WTO. That is to say, with regard to the WTO subject matters where the EU has already legislated, it is the EU law that obliges the Court and relevant EU institutions to interpret, as far as possible, the relevant domestic and EU rules in accordance with the WTO law.

Unlike direct effect, consistent interpretation does not overrule the law being contested; rather, it allows, or requires, the bringing of EU legislation into conformity as far as possible with WTO obligations.⁶⁰ It guarantees a significant role of the WTO rules in construing the EU law and the law of the Member States. The duty of consistent interpretation provides a satisfactory alternative to the direct effect of WTO law.⁶¹ While acknowledging that WTO rules are not capable of being enforced in the Community legal order, their undoubted importance to the construction of Community legislation in areas of substantive legislative overlap is thereby restored.⁶² However, the inherent limitations of this principle are also manifest: the relevant EU or national legislation must exist and be sufficiently flexible to be interpreted; there must not be manifest conflict between WTO law and the EU legislation to be interpreted; case-by-case interpretation cannot resolve all problems; and consistent

⁵⁶ Case C-61/94, *Commission v Germany*, para. 52.

⁵⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights, negotiated in the Uruguay Round, introduced intellectual property rules into the WTO trading system for the first time.

⁵⁸ Case C-53/96, *Hermès International v FHT Marketing Choice BV*, [1998] ECR I-3603, para 35.

⁵⁹ Joined cases C-300/98 and C-392/98, *Parfums Christian Dior SA v TUK Consultancy BV and Ascco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, [2000] ECR I-11307, para 49.

⁶⁰ Cottier, Thomas. ‘A theory of direct effect in global law’, in Armin von Bogdandy, Petros C. Mavroidis, Yves Mény (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, London: Kluwer Law International, c2002, p. 109.

⁶¹ Antoniadis, Antonis. ‘The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches’, *World Trade Review*, (2007) 6, 45–87, p.74.

⁶² Koutrakos, Panos. *EU International Relations Law*, Oxford: Hart, 2006, p.288.

interpretation is less effective than direct effect in establishing legal certainty and hence creating confidence among the EU's trading partners.⁶³

As the Court has already recognised the application of consistent interpretation to WTO rules in general, it would not lead to substantive divergence of jurisprudence if the Court extends it to the decisions of WTO adjudicators. In *Anheuser-Busch Inc. v Budějovický Budvar*, the Court expressly adopted the principle of consistent interpretation and followed the rulings of the Appellate Body.⁶⁴ This is a case of preliminary reference from Finland as regards the use of the trademark 'Budweiser'. In that case, the Court confirmed, first, it has jurisdiction in interpreting a provision of the TRIPS Agreement for the purpose of responding to the needs of the judicial authorities of the Member States; and second, that 'since the Community is a party to the TRIPS Agreement, it is indeed under an obligation to interpret its trade-mark legislation, as far as possible, in the light of the wording and purpose of that agreement'.⁶⁵ The Court thus quoted two reports of the Appellate Body for its understanding of relevant TRIPS provisions involved.⁶⁶ Unfortunately, this is so far the only occasion that the Court made explicit reference, on the basis of consistent interpretation, to the WTO jurisprudence.

In a recent case, the Advocate General made this point unambiguous. In his opinion to the Court, it is argued that the principle of consistent interpretation that is inherent in the primacy of international agreements concluded by the EU requires that the interpretation of the relevant WTO law be taken into account in the interpretation of the corresponding provisions of the EU law.⁶⁷ In that case, when interpreting a concept of EU anti-dumping law, the Advocate General made intensive reference to two WTO rulings that shed light on the same concept under the WTO anti-dumping agreement.⁶⁸ Unfortunately, the Court in its judgement did not follow this approach and failed to mention any of the WTO rulings suggested by the Advocate General.

While arguing for formalized and explicit referencing protocol based on consistent interpretation, the point of departure should be unequivocal: the Court is not expected to act as the domestic executor of international judiciary; and WTO rulings, as well as the interpretations established therein, are by no means binding for the purpose of enforcement. Instead, the purpose of reference is interpretation-centred; and the role of WTO adjudicators and their decisions is highly similar to 'source of authority', as discussed below. The introduction of consistent interpretation not only contributes to the enhancing of legal certainty and the safeguarding of legitimate expectation of the interested parties; furthermore, by

⁶³ Snyder, Francis. 'The gatekeepers: the European courts and WTO law', *Common Market Law Review*, (2003) 40, 313–367, p. 364.

⁶⁴ Case C-245/02, *Anheuser-Busch Inc. v Budějovický Budvar*.

⁶⁵ Case C-245/02, *Anheuser-Busch Inc. v Budějovický Budvar*, paras. 41–42.

⁶⁶ Case C-245/02, *Anheuser-Busch Inc. v Budějovický Budvar*, paras. 49 and 67.

⁶⁷ Case C-511/13 P, *Philips Lighting Poland and Philips Lighting v Council*, Advocate General's Opinion, para. 132.

⁶⁸ Case C-511/13 P, *Philips Lighting Poland and Philips Lighting v Council*, Advocate General's Opinion, para. 133.

transforming WTO rulings into interpretations of the Community law, the Court can deviate from these WTO rulings while avoiding inconsistencies as much as possible.⁶⁹

B. WTO adjudicators: from evidence to source of authority?

As mentioned earlier, WTO adjudicators have so far mainly looked into the judgements of the CJEU when the disputing parties invoke the judgements as part of the evidence. In *Korea – Alcohol Beverages*, the European Communities argued in front of the Panel that the case law of the Court on Article 95 of the EC Treaty regarding internal taxation is of relevance for the interpretation of Article III:2 GATT as both provisions share almost identical wording and a similar purpose.⁷⁰ On the opposite side, Korea was generally supportive of utilising EC competition law market definitions for purposes of Article III GATT and invoking relevant Court judgements on the criteria for market defining. In response, the Panel in that dispute concluded the following: ‘we are mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding. Nonetheless, we observe that there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the analysis of non-discrimination provisions and competition law.’⁷¹ In an immediate footnote, the Panel clarified that ‘in finding the relationship of the provisions to each other relevant, we do not intend to imply that we have adopted the market definitions defined in these or other ECJ cases for purposes of this decision.’⁷²

In *EC – IT Products*, the primary disputed issue concerns the customs classification of certain multifunctional apparatus capable of performing one or more functions of scanning, printing and copying; and the central question is whether products as such should be classified as ‘photocopying apparatus’ or alternatively, ‘automatic data-processing machines’. In this regard, the EU made intensive reference to the CJEU case law elaborating several issues of the EU customs law. The EU pointed to several criteria set forth in the *Kip* case. For the Court, what matters are first, the objective characteristics of the products, e.g. the print and reproduction speeds, the existence of an automatic page feeder; and second, whether the copying function is secondary, or equivalent in importance, in relation to the other functions of scanning and printing.⁷³ Along this line of reasoning, the Court arrived at the conclusion that there is definitely the case where certain multifunctional apparatus falls into the tariff category of ‘photocopying apparatus’.⁷⁴ However, the WTO Panel in

⁶⁹ Marco Bronckers, p.890.

⁷⁰ Panel Report, *Korea – Alcohol Beverages*, WT/DS75/R, WT/DS84/R, para. 7.4.

⁷¹ Panel Report, *Korea – Alcohol Beverages*, WT/DS75/R, WT/DS84/R, para. 10.81.

⁷² Panel Report, *Korea – Alcohol Beverages*, WT/DS75/R, WT/DS84/R, footnote 398.

⁷³ Panel Report, *EC – IT Products*, WT/DS375/R, para. 7.1395; Joined Cases C-362/07 and C-363/07, *Kip Europe S.A., Kip (UK) Ltd, Caretrex Logistiek BV, Utax GmbH (C-362/07), Hewlett Packard International S.A.R.L. (C-363/07) v Administration des douanes*, para. 46.

⁷⁴ Joined Cases C-362/07 and C-363/07, *Kip Europe S.A., Kip (UK) Ltd, Caretrex Logistiek BV, Utax GmbH (C-362/07), Hewlett Packard International S.A.R.L. (C-363/07) v Administration des douanes*, paras. 50 and 56. According to the CJEU, if it is apparent, on the basis of its objective characteristics, that the copying function is of an importance equivalent to that of the other two functions, and it proves impossible to determine which function gives the product its essential character, the product at issue should be classified as ‘photocopying apparatus’.

that case held a different position. The Panel, on the grounds that the CJEU criteria are not set out in the HS 1996 Chapter Note, questioned the relevance thereof. In particular, the Panel took issue with the criteria of printing speed and the hierarchical ranking among different functions, as highlighted by the CJEU in *Kip*. For the Panel, multifunctional apparatus as such cannot fall within the category of 'photocopying apparatus' regardless of the primary, secondary, or equivalent nature of the copying function *vis-à-vis* these machines' other functions.⁷⁵

In *EC – Chicken Cuts*, the EU contended that certain CJEU case law qualifies "circumstances of conclusion" of the EC Schedule, part of the WTO law, within the meaning of Article 32 VCLT.⁷⁶ The EU thus requested the Panel and the Appellate Body to take into account the CJEU case law when interpreting the WTO rules under dispute, i.e. certain tariff commitments of the EU. After scrutinising in detail, both the Panel and the Appellate Body were not convinced by the argument that the CJEU judgements invoked were taken into account in the Uruguay Round negotiations with respect to the tariff commitment at issue; and thus constitute the "circumstances of conclusion" under Article 32 VCLT.⁷⁷

In all three disputes where the CJEU judgements were submitted and invoked as part of the evidence, the WTO adjudicators, to a varying extent, dismissed their applicability; and in *EC – IT Products* and *EC – Chicken Cuts*, even arrived at conclusions that substantively differed from those of the CJEU. It is certainly far-fetched to argue that WTO adjudicators are holding a hostile attitude towards decisions from the other jurisdiction. However, the approach is quite clear: any submitted evidence, before being approved and adopted, has to go through the adjudicator's own process of verification regardless of the format, e.g. text of legislation, expert opinion or judicial decisions.

In a number of disputes, the WTO adjudicators made reference to external judicial decisions and practice when searching for inspiration and authority outside the WTO *acquis*. In terms of the involvement of judicial externality, cross-reference as such is distinct from evidence verification discussed above. In the case of cross-reference, recourse to external judgement is launched on the adjudicator's own initiative, instead of being invoked by the dispute participant. It constitutes part of the legal reasoning of the adjudicator, which is willing, rather than requested, to look into decisions and practice from another jurisdiction for the purpose of buttressing its own legal argument. The judiciary being referenced is thus saluted for the persuasiveness and expertise of its decisions without exerting formal binding force on the referencing adjudicator.⁷⁸

⁷⁵ Panel Report, *EC – IT Products*, WT/DS375/R, para. 7.1481.

⁷⁶ Panel Report, *EC – IT Products*, WT/DS375/R, para. 7.390.

⁷⁷ Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, paras. 327, 336 and 346.

⁷⁸ Judicial cross-reference as such is embedded in a broader issue as to the use of non-WTO law, particularly public international law, in WTO dispute settlement. For public international law in general, it has become standard practice for WTO panels and the Appellate Body

On the one hand, WTO adjudicators have often used the judgements made by the PCIJ and the ICJ. One outstanding example, as quoted earlier, is the Appellate Body's reference to the judgement of PCIJ in *Certain German Interests in Polish Upper Silesia* with respect to the treatment of municipal law. It is a typical instance of gap-filling reference as the WTO agreements do not contain any provision as to the treatment and effect of municipal laws. In *Korea – Procurement*, the Panel opined that error in respect of a treaty is a concept that has developed in customary international law through the case law of the PICJ and of the ICJ.⁷⁹ By means of footnote, the Panel named the PICJ case on Legal Status of Eastern Greenland and ICL case concerning the Temple of Preah Vihear.⁸⁰ On the grounds that the elements developed in these cases have been codified in Article 48 VCLT, the Panel considered that there can be little doubt that it presently represents customary international law.⁸¹ In *US – Wool Shirts and Blouses* and when dealing with the issue of burden of proof, the Appellate Body stated that 'various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.'⁸² Here, reference was made towards the judicial practice of the ICJ, rather than a specific judgement.

On the other hand, only in a handful of cases, the panel referred to the case law of the CJEU. In *Korea – Procurement*, the Panel in a footnote invoked the *Racke v Hauptzollamt Mainz* judgement of the 1990s to support its argument that Article 64 VCLT on the specific procedure for invoking invalidity of a treaty should not be recognised as part of customary international law.⁸³ More intensive reference was made in *US – Gambling*, where the Panel quotes the Court case law to buttress the position that 'other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations' and 'regulations targeting Internet gambling appear to us to be as stringent, if not more, than regulations applying to traditional forms of gambling.'⁸⁴ The Panel particularly focused upon the policy balance struck in the jurisprudence between 'a barrier to the freedom to provide services', and social policy concerns, such as prevention of fraud and protection of consumers.

to use non-WTO law when interpreting WTO terms; and the most-mentioned precedent refers to the meaning of 'exhaustible natural resources' as established in *US – Shrimp*. Furthermore, non-WTO law is also used to fill largely procedural gaps in the WTO agreements, which are silent on questions such as burden of proof, standing, representation before panels, the retroactive application of treaties or error in treaty formation. Therefore, in the case of searching for interpretative guidance and that of filling a legal vacuum, reference has often been made to rules of public international law addressing those questions, essentially custom or general principles of law binding on all states. In contrast, direct application of non-WTO rules, i.e. using other sources of international law to decide the merits of a WTO dispute, has never been the case in WTO dispute settlement. Pauwelyn, Joost. 'The Role of Public International Law in the WTO: How far can we go?' *American Journal of International Law* (2001): 535–578; Bartels, Lorand. 'Applicable law in WTO dispute settlement proceedings.' *Journal of World Trade* 35.3 (2001): 499–519.

⁷⁹ Panel Report, *Korea – Procurement*, WT/DS163/R, para. 7.123.

⁸⁰ Legal Status of Eastern Greenland (1933) PCIJ, series A/B, No. 53, p. 22, at p. 71 and dissenting opinion of Judge Anzilotti, at p. 91–92; Case concerning the Temple of Preah Vihear, ICJ Reports 1962, p. 6, at p. 26–27.

⁸¹ Panel Report, *Korea – Procurement*, WT/DS163/R, para. 7.123.

⁸² Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB, p.14.

⁸³ Panel Report, *Korea – Procurement*, WT/DS163/R, footnote 769.

⁸⁴ Panel Report, *US – Gambling*, WT/DS285/R, para. 6.473 and footnote 914.

At this juncture, it is important to note that besides being a domestic court of a WTO member, the CJEU is also widely regarded as one of the most active international judiciaries. These two different functions of the Court are, to varying extents, reflected in the communication activities conducted by the WTO adjudicators. Compared with other international courts such as the PCIJ and the ICJ, the CJEU is, without doubt, less referenced as a source of authority in the legal reasoning of WTO adjudicators, which in most cases treat the Court as the domestic judiciary of the EU and its judgements as part of the evidence in relation to municipal law being disputed.

Concluding remarks

As shown in this paper, judicial communication between the CJEU and WTO adjudicators consists of two parallel tracks. The two tracks, and the communication activities therein, reflect the ‘unilateral’ relationship: the perception of the tribunal at one end in respect of the law applied and the decisions made by its counterpart at the other end. Despite the divergent approach of communication, both the CJEU and WTO adjudicators carefully safeguard their autonomy and independence when dealing with judicial externalities. The communication activities are exclusively based on the premise that the adjudicator initiating reference to the other is by no means bound by the latter.

When dealing with the WTO rules and rulings, the CJEU has consistently followed its classic approach: no direct effect in general but with limited exceptions. The recent emergence of muted dialogue reveals certain insufficiency of this approach but fails to provide a competent solution in terms of legal certainty and clarification. This approach renders the relevance and authority of the WTO rulings with excessive uncertainty and thus puts at risk the legitimate expectation of the interested parties. There is the need for formalized communication protocol on the part of CJEU and one potential departure point and legal basis is the principle of consistent interpretation.

At the WTO dispute settlement, CJEU judgements are, as a rule, treated as part of the evidence in relation to municipal law. On limited occasions, the WTO adjudicator also makes reference to the Court’s decisions and practice as a source of authority for its legal reasoning; by doing so, the Court is recognized as a prestigious international tribunal, rather than a domestic judiciary of trade matters. However, the approach of WTO adjudicators towards the CJEU remains unclear, particularly with regard to the influence of its judgements and practice during the WTO proceedings, as either submitted evidence or external authority.

Being determined by the unilateral perception of the judiciary involved, inter-jurisdiction communication continues to develop and is inextricably linked to a number of legal con-

cepts, such as cross-fertilisation, boundary-crossing and regime fragmentation. What is important for the judiciaries involved is to elucidate the extent, limits and approach of the communication, as well as the legal basis and techniques that such communication is based upon. Given the rise of international courts and tribunals and the growing interaction between different fields of international law, judicial communication can develop into a vibrant exercise. Deliberation and willing communication on the part of adjudicators will not only reduce irrational dissonance among them; they will also foster a process of collective judicial deliberation on a set of common problems and lift the overall quality of their decisions, as well as the perceived credibility of the adjudication system they are embedded in. Therefore, adjudicators involved should thus deal with it with great caution and, necessarily, with a comprehensive, systemic vision.

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