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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

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J.H.H. Weiler, Director

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INDIRECT EFFECT OF INTERNATIONAL AGREEMENTS: CONSISTENT INTERPRETATION AND OTHER FORMS OF JUDICIAL ACCOMMODATION OF WTO LAW BY THE EU COURTS AND THE US COURTS

By Jan-Peter Hix[*]

Abstract

This Working Paper examines the indirect effect of international treaty law on domestic legal orders. The question whether domestic courts should attribute indirect effect to international treaty law is pursued from a normative perspective as well as from the perspectives of international law and domestic constitutional law. Against this backdrop, the different forms and methods of attributing indirect effect to international agreements are explored, including in particular agreement-consistent interpretation and other forms of substantive indirect effect, procedural indirect effect, and factual indirect effect. The above points are illustrated, in particular, by reference to the indirect effect of WTO law in relation to the domestic legal orders of the EU and the US.

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I. INTRODUCTION

The legal status of international law in domestic legal orders, which has traditionally been described by resort to the alternative concepts of monism and dualism, is increasingly understood to require a more nuanced analysis of the interaction between multiple legal orders and legal instruments, which are interlinked and which interact. This interaction can no longer be reduced to the relationship between the international legal order and the legal orders of States, as additional layers - such as supranational legal orders - have emerged. Furthermore, the international legal order itself is fragmented into separate but connected systems, including the UN system, regional legal systems based on international law, and functionally specialized international legal systems in the fields, for instance, of human rights, environmental protection or international trade. With the expansion and segmentation of the international legal order, international judicial bodies have proliferated and gained in importance.[1] The resulting adjudicative diversity is characterized by mutual influences between and among judicial bodies at the State, supranational and international levels.[2]

Taking this larger context into account, the present paper focuses on an aspect of the complex interaction between various legal orders and judicial bodies which has received less attention in legal scholarship: it examines the indirect effect of international treaty law[3] in domestic court proceedings.[4] While the concept of direct effect refers to a

[1] Cf. Yuval Shany, No Longer the Weak Department of Power? Reflections on the Emergence of a New International Judiciary, Eur. J. Int'l L., Vol. 20 (2009), 73 (observing that international judicial bodies have not only increased in number, but also in their jurisdictional power, and reach beyond their traditional dispute settlement functions to new objectives, such as international norm-advancement and the maintenance of co-operative international arrangements).

[2] Cf., in particular, Anne-Marie Slaughter, A Typology of Transjudicial Communications, U. Rich. L. Rev., Vol. 20 (1994), 99.

[3] The indirect effect of customary international law is not within the scope of this paper.

[4] The effects which international agreements exert on and within the contracting parties are of course not limited to legal effects before the domestic courts. In many instances, the primary effect of international agreements concerns the domestic political branches which will endeavor to act in compliance with international agreements or, at the very least, examine the risks involved in acting in a way which may be contested by other contracting parties (cf. in this context Jacques Bourgeois & Orla Lynskey, The extent to which the EC legislature takes account of WTO obligations: Jousting lessons from the European Parliament, in: Allan Dashwood & Marc Maresceau (ed.), Law and Practice of EU External Relations (2008), 202; Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, at 318-320 (pointing out that the Commission and the Council interpret WTO law in the legislative and administrative process.) See also Richard B. Stewart & Michelle Ratton Sanchez Badin, The World Trade Organization and Global Administrative Law, IILJ Working Paper 2009/7 (Global

situation where domestic courts review the legality of domestic rules in the light of an international agreement, the concept of indirect effect refers to a situation where the domestic courts are influenced by an international agreement in the application of a domestic rule. The definition of the concept of indirect effect will be elaborated in Part II of this paper.

The question whether or not domestic courts should attribute indirect effect to an international agreement can be pursued from different perspectives. From a normative perspective, the question relates to the theoretical justification for, and the legitimacy of, attributing indirect effect to an international agreement (Part III). From the perspective of international law, the question is whether the attribution of indirect effect is required as an international law obligation (Part IV). And from the perspective of domestic constitutional law the question can be pursued in the context of the constitutional rules and practices relating to the integration, rank, and effects of international agreements in the domestic legal order (Part V).

Against this backdrop, the different forms and methods of attributing indirect effect to international agreements can be explored in more detail. For this purpose, a distinction is made between substantive indirect effect, which comprises in particular agreement-consistent interpretation of domestic acts in the light of international agreements (Part VI), procedural indirect effect (Part VII) and factual indirect effect (Part VIII). While these forms of indirect effect all point into one direction – namely from the international agreement to the domestic legal order -, other directions in which indirect effects between and among domestic and international judicial bodies can be

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Administrative Law Series), at 16-18 and 24-25 (describing the effect of WTO law on the administrative law and practice of the WTO members). In a larger sense, international legal norms have an even wider range of effects beyond compliance, obedience or interpretation. They can, for instance, transform the legal culture of contracting parties beyond the fields covered by the respective agreement or organization; affect the way domestic constituencies perceive the balance between policy objectives; and create benchmarks for economic operators when taking investment or other business decisions (cf. the possible effects explored by Robert Howse & Rudi Teitel, Beyond Compliance: Rethinking Why International Law Really Matters, N.Y.U. School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 10-08 (February 2010), at pp. 11-17; cf. also Ferdi de Ville, European Union regulatory politics in the shadow of the WTO: WTO rules as frame of reference and rhetorical device, J. Eur. Pub. Pol'y, Vol. 19 (2012), 700, 713 (conceptualizing WTO rules as "a frame of reference constraining domestic actors by influencing what they deem legitimate and as a rhetorical device that domestic actors may use to advance their preferences.")).

established will briefly be addressed as well (Part IX). Part X contains some summary conclusions.

The above points are illustrated by reference to the indirect effect of the Agreement establishing the World Trade Organization (the WTO Agreement).[5] The WTO legal order[6] can be distinguished from most other international legal systems by its strong dispute settlement system. Furthermore, while the WTO is ostensibly a sectorial or thematic organization dealing with trade issues, its actual scope reaches beyond classical norms of international trade, encapsulated in the concepts of national and most-favored nation treatment for trade in goods. It encompasses also the assessment of non-trade barriers against international standards, trade in services (including foreign direct investment in the service sectors), and minimum rules on the protection of intellectual property rights. The references in the WTO agreements to other international agreements or standards set by other international organizations, the open formulation of the general exception clauses, and the occasional recourse by the WTO dispute settlement organs to other relevant rules of international law in the interpretation the WTO agreements further enlarges the legal sphere that the interpretation and application of the WTO agreements may touch on. The combination of the strong WTO dispute settlement system and the wide scope of WTO law has the potential of fundamentally reducing the domestic policy space in fields such as the protection of the environment, consumer protection, public health, and public morals. The issue of the effect of WTO law in domestic legal orders therefore has an important constitutional dimension.

[5] The Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which are included in Annexes 1, 2 and 3 to the WTO Agreement, and – for those members which have accepted them - the Plurilateral Trade Agreements, which are included in Annex 4 to the WTO Agreement, are part of the WTO Agreement in accordance with its Article II(2) and (3). The entirety of these agreements is referred to hereafter as the "WTO Agreement" or the "WTO agreements".

[6] The law of the WTO can be considered to constitute a "legal order" in the sense that it consists of a body of legal rules integrated into a system which is further developed by secondary law adopted by WTO organs and adjudicated in dispute settlement procedures.

The effects of WTO law are illustrated primarily in relation to the EU and the US legal orders.[7] Although other WTO members are increasingly important actors in the WTO, the EU and the US continue to wield considerable influence in the WTO and are among the most frequent users of the WTO dispute settlement system. A comparison of the indirect effect of WTO law in the EU and the US legal orders reveals some similarities, but also some divergent developments in the case-law of the EU and US courts, which will be explored in this paper.

It is hoped that the limited scope of the paper allows for a more thorough analysis of the development of indirect effect in a particular setting, namely that of WTO law before the EU and US courts. It is not excluded that some of the results of this contribution may serve as a building block for a more general theory of indirect effect which could develop gradually on the basis of other thematically limited contributions.

II. A DEFINITION OF INDIRECT EFFECT OF INTERNATIONAL AGREEMENTS

A generally agreed definition of the concept of indirect effect of international law in domestic court proceedings has not yet emerged. Indirect effect is often understood not as an autonomous concept, but as a reservoir for any effect which is not direct. Direct effect, in turn, is a vague concept as well. It has been associated with or distinguished

[7] For a different approach see N'Gunu N. Tiny, Judicial Accommodation: NAFTA, the EU and the WTO, Jean Monnet Working Paper 04/05 (2005) (comparing the effects of WTO law in two "regional trade systems", namely the EU and NAFTA). However, comparing the effects of WTO law in the EU and in the US (rather than NAFTA) appears at least equally justified, because the EU is much more than a regional trade system. The EU has developed into a supranational legal order which is characterized - at least from the perspective of the Court of Justice of the EU - by its primacy over the law of the Member States and the direct effect of many of its provisions which are applicable to the Member States themselves and their nationals (cf. ECJ, Opinion 1/09 of 8 March 2011, n.y.r., para. 65; for a classical text on this development, see Joseph H. H. Weiler, The Transformation of Europe, Yale L. J., Vol. 100 (1991), 2403; for a review of the acceptance of EU law supremacy by the courts of the Member States and its limits, see Paul Craig & Gráinne de Búrca, EU Law - Text, Cases, and Materials, 5th ed., Oxford 2011, 268-296), and has exclusive competencies for most of the fields of foreign trade policy. The present paper refers to the EU legal order as a "domestic" legal order and to the provisions of EU primary law as "constitutional" provisions for ease of reference only and without implying any view on constitutionalism theories of European integration (cf., generally, the contributions in: Gráinne de Búrca & Joseph H. H. Weiler (eds.), The Worlds of European Constitutionalism (2012).

from direct application, self-execution, invocability, justiciability and enforceability, which concepts moreover have different meanings in different legal orders.[8]

For the purposes of this paper, I consider an international agreement[9] to have direct effect in a domestic legal order if domestic courts - even in the absence of any legislative act of transformation - have the power to annul or invalidate a domestic act[10] or to declare a domestic act illegal or inapplicable because of its inconsistency with the agreement (provided that the other conditions for such a course of action are fulfilled).[11]

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[8] Cf. John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, Am. J. Int'l L., Vol. 86(2) (1992), 310 (note 1), 317-318 and 336. According to Jackson, "direct application" is very similar to, although not identical with, "self-executing", and expresses the notion that the international treaty instrument has a direct satutelike role in the domestic legal system. He distinguishes this notion from the notion of invocability, which he understands as a generic term to embrace issues like non-justiciability, lack of definiteness, mootness, political question, standing and ripeness.
As concerns the Union legal order, cf. Hans Peter Ipsen, Europäisches Gemeinschaftsrecht (1972), p. 120 et seq. (distinguishing between indirect and direct applicability of norms, the latter - "unmittelbar anwendbare Normen" or "Durchgriffsnormen" - referring to norms which reach the market citizen directly without the transmission by a national authority, and which are capable of creating subjective rights on which the citizen can rely before national courts); J. A. Winter, Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law, CMLRev. Vol. 9 (1972), 425 (distinguishing "direct applicability" as referring to the method of incorporating Community law into the municipal legal order, from "direct effect" of an act as referring to the act being susceptible of receiving judicial enforcement); David O.A. Edward, Direct Effect: Myth, Mess or Mystery, in: Direct Effect – Rethinking a Classic of EC Legal Doctrine (Jolande M. Prinssen & Annette Schrauwen (eds.) (2002), 3, at 6 and 7 (distinguishing between direct applicability, which establishes whether international law provisions are part of the corpus of law to be applied by the domestic judge, and direct effect, which determines whether the provisions have the necessary characteristics of clarity, precision and directness to enable a judge to apply them at the instance of an individual). Cf. also Alicia Hinarejos, On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?, Eur. L. J., Vol. 14(5) (2008), 620–634; Rass Holgaard, External Relations Law of the European Union, Legal Reasoning and Legal Discourses (2008), 243-345 (using the notion of direct effect as a subcategory of the broader notion of direct invocability); Anca-Magda Vlaicu, The Direct Effect of Treaty Provisions, Lex et Scientia Int'l J., Nr XVI Vol. 1 (2009), 235 (observing that the ECJ uses interchangeably the terms "direct effect", "direct applicability" and "immediate applicability" and that in legal scholarship a broader notion of direct effect (objective direct effect), understood as the capacity of a provision of EU law to be invoked before a national court, is distinguished from a narrower definition of direct effect (subjective direct effect), understood as the capacity of a provision of EU law to confer subjective rights on individuals, which they may enforce before national courts, whereas direct applicability means that a provision of EU law is unconditional and complete and does not require national transposition measures).
[9] Unless otherwise specified (e.g. in the context of the US constitutional distinction between treaties and executive agreements), the terms "agreement" and "treaty" are used hereafter synonymously to refer to a treaty within the meaning of Art. 2(1)(a) respectively of the Vienna Convention on the Law of Treaties, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
[10] A domestic "act" is understood to refer to legislative or administrative legal acts, such as statutes, laws, regulations, decisions etc., or parts thereof.
[11] Such other conditions may include, for instance, that the court has jurisdiction, that the international law provision came into being after the adoption of the relevant domestic act (in legal orders such as the

Whether a domestic act is annulled or invalidated or (only) declared illegal or inapplicable may depend on the procedural or substantive domestic rules to be applied by the court in a particular proceeding. But in all of these situations, international law reaches directly into the domestic legal order and potentially affects the legal status of the domestic act.[12] Indirect effect can thus be defined – in a negative way - as referring to any effect of an international agreement in domestic court proceedings other than direct effect, this latter concept being used to describe a situation where the domestic courts have the power to review the validity, legality or applicability of domestic acts in the light of an international agreement.

By way of a positive definition, an international agreement can be considered to have indirect effect if domestic courts take it into account in order to ascertain the meaning (as opposed to the status) of a domestic act, or are guided (as opposed to obliged) by it in taking procedural decisions. The first alternative will be referred to as substantive indirect effect. It covers in particular cases where domestic courts interpret a domestic act in the light of an international agreement (agreement-consistent interpretation),[13] cases where the courts interpret rules or concepts of treaty law which are referred to or mentioned in domestic laws, and cases where the courts take account of an agreement as persuasive authority in the interpretation of domestic acts. The second alternative

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US, where the later-in-time rule applies), and that private parties or governments may invoke the international law provision (to the extent that the domestic legal order conceives invocability as a separate condition).

[12] Direct effect of an international agreement can be partial. It can be limited to certain parts or provisions of an international treaty (e.g., in the EU, direct effect is limited to those provisions of an international agreement, the content of which is unconditional and sufficiently precise), to the invocation by certain parties or entities (e.g., under the US Uruguay Round Agreements Act, only the US, but not the States or private parties can challenge any action on the ground that such action is inconsistent with WTO law) or to the effects with respect to certain domestic acts (e.g., in the EU, WTO law has direct effect only on domestic laws which were intended to implement a specific obligation assumed by the EU in the context of the WTO).

[13] But some authors consider agreement-consistent interpretation (at least as concerns the obligation of Member States courts to interpret domestic law in conformity with Union law) as an aspect of direct effect or as "minimal direct effect" (cf. Jean-Paul Jacqué, L'obligation d'interprétation conforme in droit communautaire, R.A.E – L.E.A. 2007-2008/4, 715, at 717). See also Aurore Laget-Annamayer, Le statut des accords OMC dans l'ordre juridique communautaire: en attendant la consécration de l'invocabilité, RTD eur., Vol. 4 (2) (2006), 249, at 263 (using the term "invoquabilité minimum" (minimum invocability)). Other authors consider agreement-consistent interpretation as a self-standing category distinct from direct effect and indirect effect; cf. Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), p. 137 et seq. (distinguishing between direct application, indirect application and agreement-consistent interpretation).

will be referred to as procedural indirect effect. It covers in particular cases where courts stay domestic proceedings or remand a case for further consideration because of international law considerations. If indirect effect is defined in a larger sense, a third alternative could be understood to cover cases where domestic courts, in the application of domestic law, refer to international agreements as a factual element or as part of the general normative framework (factual indirect effect). These examples may not be exhaustive. But they capture at least some of the more common methods used by domestic courts in attributing indirect effect to international treaty law. What is common in all these cases is that the rule to be applied by the domestic courts is a rule of domestic law. International law rules may influence the application of the domestic rule, but are not used as independent rules of decision.[14]

Direct and indirect effect share the element that they allow provisions of international agreements to become relevant in domestic legal orders through the action of the domestic judiciary, and can thus been considered as decentralized methods for the enforecment of international agreements.[15] They can be distinguished by the fact that only direct effect may result in an alteration of the status of inconsistent domestic provisions. Indirect effect of international agreements is therefore less intrusive on domestic legal orders than direct effect. This is because indirect effect is subject to the condition that the pertinent domestic provisions are susceptible of being influenced by international law. Where a domestic provision is unambiguous and leaves no room for it to be construed or understood in the light of international treaty law, the international law provision remains without effect and the domestic provision prevails.

Direct effect and indirect effect are not necessarily mutually exclusive. To the extent that a domestic legal order acknowledges both direct and indirect effect of international

[14] Cf. also André Nollkaemper, The Direct Effect of Public International Law, in: Direct Effect – Rethinking a Classic of EC Legal Doctrine (Jolande M. Prinssen & Annette Schrauwen (eds.)) (2002), 157, at 158 and footnote 7 (distinguishing direct effect, where international law provides a rule of decision, from indirect effect, where international law is a means of interpretation of domestic law); 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: The European Union and World Trade Law After the GATT Uruguay Round (ed. Nicholas Emiliou and David O'Keeffe), 1996, 313, 322 ("indirect effect is achieved through construction rather than supremacy - through interpretation rather than application").
[15] Cf. Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012) (generally on decentral enforcement of WTO law in the EU).

agreements, indirect effect can serve as an alternative to direct effect. Under these circumstances, indirect effect is often given priority:[16] the courts will apply the international law provision directly and set aside inconsistent domestic provisions only if it is not possible to avoid a conflict between these provisions by means of indirect effect. To the extent that a domestic legal order does not acknowledge direct effect of international law, indirect effect can serve as an incomplete substitute.

Indirect effects can be conceptualized as vectors, understood as quantities which have direction and magnitude (or intensity). The present contribution focuses on primary vertical effects, which have their initial point in an international agreement (here: the WTO Agreement) and their terminal points in domestic legal orders (here: the EU and the US legal orders) and which have different intensities (e.g. agreement-consistent interpretation has a greater intensity than the use of international treaty law as persuasive authority). In a larger sense, indirect effects can take other directions between and among various legal orders. Inverse vertical effects refer to effects which domestic legal orders, domestic acts, or domestic judgments exert on an international agreement or on its interpretation by judicial bodies established by the agreement. Horizontal effects refer to effects between (rulings of courts of) different domestic legal orders as well as between (rulings of judicial bodies of) different international legal systems. Diagonal effects refer to effects among more than two legal orders or systems, where vertical and horizontal elements are combined. This terminology[17] is intended solely to provide a convenient visualization of the different directions of indirect effects between and among various legal orders. It should not be understood to imply any normative hierarchies between the legal orders concerned.

[16] Cf. Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 114(3) (2003), 569, at 572. Cf. ECJ,. Case C-97/11, Amia, judgment of 24.5.2012 (nyr), para. 27 (priority of consistent interpretation over direct effect of a EU directive in the law of the Member States).

[17] Cf. also Ann-Marie Slaughter, A Typology of Transjudicial Communication, U. Rich. L. Rev., Vol. 29 (1994), 99, at 103-112 (distinguishing between vertical, horizontal, and mixed vertical-horizontal forms of transjudicial communication). The terminology used here is not to be confounded with the terminology used in EU legal doctrine concerning the effect of EU directives in the Member States, where horizontal effect is often used to describe the effect between two private parties.

III. JUSTIFICATIONS FOR, AND LEGITIMACY OF, ATTTRIBUTING INDIRECT EFFECT TO INTERNATIONAL AGREEMENTS

What are the justifications for attributing indirect effect to international law? Is the attribution of indirect effect to international law desirable and legitimate? To what extent are the legitimacy and policy arguments, which have been widely discussed in respect of direct effect,[18] relevant also in respect of indirect effect?

A meaningful response to these questions depends at least partially on the legal orders concerned. For instance, the effect of customary international law may need to be described and evaluated differently from the effect of international treaty law because the domestic branches of government which negotiate and ratify international treaties do not necessarily contribute in the same way to the development of customary international law. And the reception of international law in the domestic order of a dictatorial regime may be subject to a different normative judgment than the effect of international law in democratic societies founded on the rule of law. The following observations explore the justification for and the legitimacy of attributing indirect effect to international treaty law, in particular WTO law. They are susceptible to being tested and refined in subsequent parts of this paper in view of the specific domestic constitutional rules and practices of the EU and the US. These rules and practices determine the relationship between international and domestic law and organize the separation of powers or institutional balance within the respective domestic legal order, which, in turn, informs the proper role of the courts in relation to the legislative and executive branches or functions. The observations focus on the justification for substantive indirect effect, notably agreement-consistent interpretation of domestic rules, it being understood that the attribution of other forms of indirect effect may be founded on different or more specific justifications.[19]

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[18] For a recent contribution to this debate cf. Niels Petersen, Determining the Domestic Effect of International Law Through the Prism of Legitimacy, ZaöRV, Vol. 72 (2012), 223 (studying the perception of legitimacy of international law in the case law of the US Supreme Court, the ECJ and the German Bundesverfassungsgericht).

[19] Cf., for instance, Yuval Shany, Regulating Jurisdictional Relations between National and International Courts, Oxford 2007, p.17-20 (on the policy reasons militating against uncoordinated parallel proceedings in domestic and international courts, including the wastefulness due to the expenditures incurred by the

It will be argued hereafter that the attribution of indirect effect to international treaty law has the potential of (A.) enhancing the coherence and consistency between international and domestic legal orders and reducing normative conflicts, and of (B.) enhancing the effectiveness and uniform application of, and promoting the values enshrined in, international agreements, while at the same time (C.) respecting the domestic constitutional context and values as well as (D.) the separation of powers or institutional balance at the domestic level.[20] While the benefits of attributing indirect effect as discussed in points A. and B. plead in favor of accommodating international law by recurring to this technique, the legitimacy of attributing indirect effect is conditioned on the domestic courts respecting the proper limits spelled out in points C. and D., which may require under certain circumstances that the domestic courts deny indirect effect to international rules or contest decisions of international judicial bodies to the extent that such rules or decisions cannot be integrated into the domestic constitutional framework or would upset the domestic balance of powers.

A. Enhancing the coherence and consistency between international and domestic legal orders and reducing normative conflicts

The attribution of indirect effect of international law in domestic court proceedings represents just one element in an increasingly complicated web of mutual influences between different legal systems. It serves as a method of interconnecting or "coupling"[21]

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disputing parties, the ineffectiveness due to the fact that several tribunals perform essentially the same task, the risk of conflicting judgments, and the practical problems resulting there from). See also Part VII, below.

[20] The points discussed hereafter are not exhaustive. For instance, the effects of WTO law in domestic legal orders can also been explored by reference to "public choice theory", which analyses the collusion of special interest groups and public officials in rent-seeking deals that conflict with the interest of the general public and, under a normative perspective, suggests rules which avoid or minimize such behavior. For a public choice explanation of the lack of direct effect and the limitation of indirect effect of WTO law in the US, see John J. Barceló III, The Paradox of Excluding WTO Direct Effect in U.S. Law, Tul. Eur. & Civ. L. F., Vol. 21 (2006), 147, at 167-172; cf. also Jonathan Turley, Dualistic Values in the Age of International Legisprudence, Hastings L. J., Vol. 44 (1993), 185 (applying public choice theory to the "Charming Betsy" canon of statutory interpretation); Paul B. Stephan III, Barbarians Inside the Gate: Public Choice Theory and International Economic Law, Am. U. J. Int'l L. & Pol'y, Vol. 10(1) (1995), 745 (exploring the application of public choice theory to international economic law).

[21] Cf. Armin von Bogdandy, Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic Constitutional law, I.CON, Vol. 6 (2008), 397, at 398.

international law rules and domestic law rules in a way which reduces – although it does not entirely exclude - possible conflicts between them. Indirect effect, notably through agreement-consistent interpretation, shares similarities with other interpretive canons or methods which enhance the coherence and consistency between different legal systems or different rules within the same legal system.[22] The common denominator is the interpretation of different rules in a way which avoids conflict or renders one of the rules redundant or ineffective. Interpretation of one rule in the light of another, and more specifically interpretation of domestic law in the light of international treaty law – such as WTO law - seeks to give a useful effect to both rules rather than setting aside the domestic rule (direct effect) or ignoring the international rule (no domestic effect). In this sense it is consistent with the interpretative principle of "effect utile".[23] Moreover, coherence and consistency between different sets of rules is in the interest of legal certainty.

Resorting to agreement-consistent interpretation and other forms of indirect effect of international agreements would seem to be a particularly appropriate strategy in an era which is characterized by a multitude of legal systems which are not governed by a clear and generally accepted hierarchical order. Indirect effect of international treaty law is neither dependent on any specific domestic constitutional approach concerning the status of international treaty law in the domestic legal order, nor on any specific legal theory conceptualizing the relationship between domestic and international legal orders. Comparative research has shown that agreement-consistent interpretation is applied by courts acting in a monist constitutional framework as well as by courts acting

[22] E.g. systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, see Part IX.B.2, below, and "constitutional avoidance" or "verfassungskonforme Auslegung", see Part VI.A.1, below. Agreement-consistent interpretation and these other interpretive tools can also be understood as categories falling under the concept of systematic interpretation in a large sense which aims at systemic coherence of norms and values within or across legal systems (cf. also Stefan Grundmann, "Inter-Instrumentale-Interpretation", Systembildung durch Auslegung des Europäischen Unionsrechts, RabelsZ, Vol. 75 (2011), 882, 896, 901, 927, 930).

[23] Cf., from an EU perspective, Pierre Pescatore, Monisme, dualism et "effet utile" dans la jurisprudence de la Cour de justice de la Communauté européenne, in: Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias (ed. by Ninon Colneric, Jean-Pierre Puissochet, Dámaso Ruiz-Jarabo y Colomer, David V. Edwards) (2003), 329 at 341 ("[…] il apparaît que l'avenir pourrait bien appartenir […] à la doctrine de l'effet utile en ce que celle-ci pourrait permettre d'assurer à toutes les règles pertinentes au processus communautaire, quelle que soit leur origine, un effect conforme à leur object et à leur but, au niveau tant des objectifs concrets de chaque règle que des finalités plus fondamentales de l'ensemble").

in a dualist constitutional framework.[24] Furthermore, the attribution of indirect effect to international agreements can in principle be reconciled with both constitutionalist and pluralist concepts. From a constitutionalist perspective, which advocates a hierarchical system in which unified principles govern the different national and international sets of legal norms and the settlement of conflicts between them, it is axiomatic that courts should take account of higher ranking rules and of decisions from judicial bodies established on the basis of higher-ranking rules. But also from a pluralist perspective, which advocates the autonomy of distinct legal orders with different judicial bodies competing in their quest for authority, it is not excluded that courts, in the interpretation of rules of the legal order under which they were established, take account of rules or decisions of other legal orders.[25] The attribution of indirect effect is thus in principle compatible with different domestic constitutional and theoretic concepts of the relationship between international and domestic law, although the respective concepts may influence the foundations, the intensity and the scope of indirect effect.

B. Enhancing the effectiveness and uniform application of, and promoting the values enshrined in, international agreements

Attributing indirect effect to international law helps to ensure respect for, and observance of, international law whenever the domestic legal context makes this possible.[26] Indirect effect shares this consequence with direct effect, although to a lesser extent because it is conditioned by the formulation of the domestic law to be interpreted and by the domestic legal context.

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[24] Cf., e.g., Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, at 1127-1134 (discussing the rationale for the Charming Betsy canon of statutory interpretation under monist and dualist perspectives).

[25] Cf. Nico Krisch, The Pluralism of Global Administrative Law, Eur. J. Int'l L., Vol. 17(1) (2006), 247, at 260 (illustrating this point by reference to the mutual influences between the WTO Appellate Body and EU courts in the application of the precautionary principle and concluding that the "competing accountability mechanisms and superiority claims of different constituencies may thus not result in antagonism, but rather in mutual observation and gradual and pragmatic approximation.")

[26] Among the different rationales for the Charming Betsy canon of statutory interpretation in the US, the respect for international law is highlighted, in particular, by Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, at 1127 et seq.

The effectiveness of international treaty law may be enhanced by agreement-consistent interpretation also in domestic legal orders that deny the direct effect of international treaties. When a domestic court interprets domestic legislation in the light of the provisions of an international agreement, the content of these provisions are indirectly integrated into the domestic legal order and – through the application of the domestic legislation – applied domestically. At the same time, agreement-consistent interpretation can enhance, to a certain extent, the uniform application of the agreement in the contracting parties.[27] For instance, to the extent that the courts of the WTO members interpret their domestic customs legislation, as far as possible, in the light of the WTO rules on customs valuation, the customs authorities of the WTO members will apply the respective legislation - and thus indirectly the WTO rules – in a similar, although not necessarily entirely uniform manner. This would strengthen the predictability of customs evaluation methods across the WTO membership. Providing predictability and security to the multilateral trading system is, of course, also a central element of the WTO dispute settlement system.[28] But the WTO dispute settlement system is not conceived for ensuring the uniformity of the day-to-day application of WTO law in the entirety of the WTO membership. Domestic courts fulfill an important supplementary function as "WTO-courts" by interpreting domestic rules in the light of WTO law and WTO dispute settlement rulings. While agreement-consistent interpretation by different domestic courts may not necessarily come to exactly the same result and thus to full uniformity,[29] it normally at least approximates any different

[27] As concerns the EU, where international agreements concluded by the Union are integrated into the Union legal order and must be taken into account in the interpretation not only of Union law but also of the laws of the Member States by Member States courts, agreement-consistent interpretation also serves the objective of the uniform application of Union law within the Member States.

[28] See Art. 3.2 WTO DSU.

[29] Cf. Jeffrey L. Dunoff, Less Than Zero: The Effects of Giving Domestic Effect to WTO Law, Loy. U. Chi. Int'l L. Rev., Vol. 6 (2008/2009), 279, 308-309 (warning about the risks of inconsistent interpretation by different domestic courts and of displacing the WTO Appellate Body as the authoritative interpreter of WTO law); Piet Eeckhout, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, CMLRev., Vol. 34 (1997), 11, at 50-51 (who doubts – although in the context of discussing direct effect – that it would be desirable to transform domestic courts into day-to-day operators and interpreters of WTO law); and Karen Knop, Here and There: International Law in Domestic Courts, Int'l L. & Politics, Vol. 32 (2000), 501, at 535 (arguing against the assumption or aspiration of domestic interpretation as uniform).

approaches and is therefore preferable to the alternative option for domestic courts to ignore international treaty law in their interpretation of domestic laws.[30]

Moreover, indirect effect may also serve to promote values enshrined in international treaty law.[31] Where an international treaty sets substantive standards which reflect universal or regional values, such as human rights or certain social standards, the interpretation of domestic laws in the light of these values reinforces the penetration of the values into the domestic legal orders of the contracting parties.[32] For those who advocate the human rights functions of the market freedoms and non-discrimination principles established by WTO law, the interpretation of domestic law in the light of WTO law would strengthen the rights of the citizens and contribute to the legitimacy of WTO law.[33] Even if one does not share this constitutional conception of the WTO, it is not contested that the economic disciplines enshrined in the WTO agreements intent to produce market conditions which may benefit individual economic operators.[34] The interpretation of domestic law in the light of these disciplines can therefore benefit the operators without necessarily conferring rights on them.

Whether it is desirable to enhance the effectiveness and uniform application of international agreements and to promote values enshrined in such agreements by interpreting domestic rules in the light thereof depends, of course, to a large degree on

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[30] See Joost Pauwelyn, Europe, America and the 'Unity' of International Law, in: The Europeanisation of International Law, The Status of International Law in the EU and its Member States (ed. Jan Wouters, André Nollkaemper and Erika de Wet) (2008), 205, at 209-210.

[31] An inverse argument has been advanced in the context of indirect effect of Union law in Member States' courts, cf. Leone Niglia, Form and Substance in European Constitutional Law: The 'Social' Character of Indirect Effect, Eur. L. J., Vol. 16, No. 4 (2010), 439, at 440 (arguing that "the judicial discourse of indirect effect [...] has been devised with the purpose of sheltering from the encroachment of Community law the heritage of social rights as developed in the nation state..."). Cf. more generally, Eyal Benveniste, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, Am. J. Int'l L., Vol. 102 (2008), 241 (explaining the references by domestic courts to foreign and international law as an instrument for empowering the domestic democratic process by shielding it from external economic, political and legal pressures).

[32] An example is the decision of the Canadian Supreme Court in Baker v. Canada, [1999] S.C.R. 817. The court interpreted Canadian immigration law in the light of the values embodied in the Convention on the Rights of the Child. Although the Convention had no direct effect in Canada, the court stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" (at para. 70).

[33] Cf. Ernst-Ulrich Petersmann, Welthandelsrecht als Freiheits- und Verfassungsordnung, ZaöRV, Vol. 65 (2005), 543.

[34] Cf. US – Sections 301-310 of the Trade Act 1974, WT/DS152/R, para. 7.72-7.78.

the legitimacy of the international treaty rules and values at stake. The extent to which an international rule, or an international judicial body interpreting and applying the rule, is (perceived to be) legitimate may influence (the willingness of and) the justification for domestic courts to attribute more or less intensive effects to this rule or judicial pronouncement, which, in turn, feeds back into the legitimacy of the international rule.[35] Some cursory observations on the legitimacy of WTO law are therefore necessary in the present context.[36]

From a formal perspective, the WTO legal order was established by an agreement which had been ratified or approved in accordance with the constitutional procedures in the contracting parties and can therefore claim international legality. To the extent that under the constitutional procedures of the contracting parties the domestic parliaments participated in the conclusion of the WTO agreement, as was the case in the EU and the US, the WTO Agreement carries indirect democratic legitimacy, although it has rightly been observed that the parliamentary involvement and interest in the negotiation process was limited in many founding members.[37] Additional strands of justification

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[35] Cf. Sungjoon Cho, The World Trade Constitutional Court (2009), at 48, online at: http://works.bepress.com/cgi/viewcontent.cgi?article=1047&context=sungjoon_cho (arguing that the Appellate Body's adjudication communicates with the domestic legal systems via various forms of internalization including domestic judicial adjudication in the form of treaty-consistent interpretation and that "compliance leads to legitimacy insomuch as legitimacy renders compliance pull").

[36] For a more exhaustive and nuanced analysis cf., in particular, Thomas Cottier, the Legitimacy of WTO Law, NCCR Trade Working Papers 2008/19; Robert Howse, The Legitimacy of the World Trade Organization, in Jean-Marc Coicaud & Veijo Heiskanen (eds.), The Legitimacy of International Organizations (2001), 355; Markus Krajewski, Democratic Legitimacy and Constitutional Perspective of WTO Law, J. World Trade, Vol. 35(1) (2001), 167. A recent overview on the literature relating to this topic is provided by Lena Schneller, Conceptions of Democratic Legitimate Governance in the Multilateral Realm: The Case of the WTO, Living Reviews in Democracy, Vol. 2 (2010), online at: http://lrd.ethz.ch/index.php/lrd/article/viewArticle/lrd-2010-2/27. For a more general framework for the evaluation of the legitimacy of international legal orders, cf. Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, Eur. J. Int'l L., Vol. 15(5) (2004), 907. Under this framework, the principle of international legality establishes an assumption in favor of the authority of international law. The presumption of international authority is rebutted with regard to norms of international law that constitute sufficiently serious violations of countervailing normative principles relating to jurisdictional legitimacy (or subsidiary), procedural legitimacy (adequate participation and accountability) and outcome legitimacy (reaching reasonable results). See also Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in: Ruling the World? Constitutionalism, International Law, and Global Governance (eds. Jeffrey L. Dunoff & Joel P. Trachtman) (2009), 258.

[37] Cf. Markus Krajewski, Democratic Legitimacy and Constitutional Perspective of WTO Law, J. World Trade, Vol. 35(1) (2001), 167, at 176 (describing parliamentary participation in the Uruguay Round negotiations as "almost non-existent", with the exception of the participation of the US Congress); James

rely notably on subsidiarity considerations and output legitimacy. To the extent that WTO law establishes commitments for the reduction of tariffs and principles of non-discrimination through most-favored nation and national treatment requirements, it derives legitimacy from the establishment of equal conditions of competition as well as the reduction of protectionist State policies which, according to most economists, would result in a lesser level of overall welfare at the international level; WTO law thus counterbalances deficiencies at the level of State authority, where interests of third country constituencies are not represented in the democratic process. [38] The establishment and monitoring of the principle of non-discrimination and of the level playing field between States reaches by its very nature beyond the grasp of individual States and can therefore also be justified under subsidiarity considerations. The case for legitimacy of WTO law is more difficult to make where WTO law regulates the exceptions to the non-discrimination principles, for instance on the basis of public morals, health or environmental reasons, and where it provides for positive integration, in particular through the establishment of minimum rules in the field of intellectual property rights or through the recognition of international standards, such as those addressed in the Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures. These provisions can be associated more closely with domestic legislative measures the adoption of which typically requires a balancing with societal interests and values outside the sphere of trade regulation. It is in particular in this context that other, notably procedural, elements need to be resorted to in order to enhance the inclusiveness and hence the legitimacy of WTO law. Among these elements are the continuing efforts to further increase the coherence between WTO law and other parts of international law, the participation of stakeholders and NGOs, and the transparency of WTO law and procedures.[39] Procedural as well as institutional elements

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Bacchus, A Few Thoughts on Legitimacy, Democracy, and the WTO, J. Int'l Economic L., Vol. 7(3) (2004), 667 (arguing that the WTO derives full legitimacy from the democratic legitimacy of (most of its) members and suggesting that the mechanisms established by the US constitution and practice for the participation of Congress in the making of international trade policy could serve as a model for other WTO members. See also Rafael Leal-Arcas, The EU Institutions and their Modus Operandi in the World Trading System, Colum. J. Eur. L., Vol. 12 (2005), 125, at 192-194.

[38] See Thomas Cottier, The Legitimacy of WTO Law, NCCR Trade Working Papers 2008/19, at 14-15.

[39] Cf. the Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO, Addressing institutional challenges in the new millennium (2004), 35-40 (on coherence and

are also essential in enhancing the legitimacy of the rulings under the WTO dispute settlement system. The Dispute Settlement Understanding (DSU) provides for many elements of fair, court-like procedures, including the possibility of appeal. And the WTO Appellate Body has, through its case-law, gradually reinforced its adjudicative legitimacy by further strengthening the fairness, inclusiveness and transparency of the procedures (e.g. by admitting amicus curiae briefs [40] and public hearings upon agreement of the parties [41]), and by applying adjudicative methods which show institutional sensibility to its comparative strengths and weaknesses in relation to other actors at the domestic or international level (e.g., by using deferential standards of review of certain domestic acts).[42]

Although a general assessment of the legitimacy of WTO law is not within the scope of this paper, I would tentatively conclude that WTO law and the WTO dispute settlement system can build on an increasing degree of legitimacy. Enhancing the effectiveness and uniform application of WTO law and promoting the values enshrined in WTO law may therefore in principle be desirable. However, in view of the far-reaching scope and depth of WTO law and the extent to which WTO law penetrates into fields which require balancing with non-trade related policies, its legitimacy may be contested if the domestic constitutional context and values of the WTO members are not duly taken into

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coordination with intergovernmental organizations) and 41-48 (on transparency and dialogue with civil society); but see also Joost Pauwelyn, The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO, Duke Law School Faculty Scholarship Series, Paper 11 (2005) (for a critical account of this Report). On transparency, cf. Peter Hipold, Das Transparenzprinzip im internationalen Wirtschaftsrecht – unter besonderer Berücksichtigung des Beziehungsgeflechts zwischen EU und WTO, EuR 1999, 597 (considering transparency as a central element contributing to legitimacy and a means of effective application of WTO law by the members).

[40] Cf., in particular, US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, at paras. 105-108, and Appellate Body Communication, WT/DS135/9.

[41] Cf., in particular, Communication from the Chairman of the Panels, US — Continued Suspension of Obligations in the EC (Hormones), Canada — Continued Suspension of Obligations in the EC (Hormones), WT/DS320/8, WT/DS321/8 (2005).

[42] See Robert Howse, Adjudicative Legitimacy and Treaty Interpretation in: International Trade Law: The Early Years of WTO Jurisprudence, in: Joseph H.H. Weiler (ed.), The EU, the WTO, and the NAFTA, Towards a Common Law of International Trade? (The Collected Courses of the Academy of European Law, Vol. IX/1, 2000), 35; Robert Howse, Moving the WTO Forward— One Case at a Time, Cornell Int'l L. J., Vol. 42 (2009), 223. For a more general justification of the legitimacy of International courts, cf. Armin von Bogdandy & Ingo Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, Eur. J. Int'l L., Vol. 23 No 1 (2012), 17; Armin von Bogdandy and Ingo Venzke, On Democratic Legitimation of International Judicial Lawmaking, German L. J., Vol. 12 (2011), 1341.

account in the domestic application of WTO law. The attribution of indirect – as opposed to direct – effect to WTO law by domestic courts may assist in addressing these issues.

C. Respecting the domestic constitutional context and values

Indirect effect is an instrument which is sensitive to the context of the domestic legal orders.[43] As will be demonstrated in more detail below, the forms in which indirect effect can be attributed to WTO law by domestic courts are sufficiently flexible to allow for a scale of gradual intensities, depending for instance on the source of the domestic provision at issue (constitutional, legislative, administrative), and to accommodate vital domestic interests. Even where a domestic legal order attributes indirect effect in its strongest form – by imposing an obligation on the courts to interpret domestic acts in conformity with WTO law -, this obligation is mitigated by the qualification that the interpretation finds its limit not only in the clear and unambiguous wording of the domestic provision to be interpreted, but also in the overall constitutional context in which the domestic courts act. Where a domestic legal order attributes indirect effect in a weaker form – by encouraging the interpretation of domestic acts with reference to WTO law as persuasive authority – the domestic courts could engage with WTO dispute settlement rulings and disclose the reasons why they are not persuaded by a particular interpretation given in a particular ruling.

What Marc Amstutz has noted with respect to EU-law consistent interpretation can be transposed also to WTO-law consistent interpretation: agreement-consistent interpretation brings the international legal order and the domestic legal order into relation to each other with a view to achieving compatibility without neglecting the

[43] Cf. Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, at 364.

domestic legal cultures; domestic courts utilize "the properties and peculiarities of their specific legal cultures, as it were 'organically' and not by grafting foreign legal ideas on."[44] In this process, the domestic courts do not act as a simple "conveyer belt" but, as Karen Knop has pointed out, engage in a process of "translation", by adapting the international law rules to the domestic legal system; hence "domestic interpretation may help to legitimate international law through a process of particularization and justification".[45] To the extent that WTO law is still vulnerable to challenges of legitimacy, the domestic courts take part of the legitimacy burden on them by mediating its effects and integrating it into the domestic legal orders (only) within the limits of the legal and constitutional parameters of these orders; in this way the domestic courts can feed into the process of the development of WTO law to the extent that the they provide argumentative justifications for any adaptations required in the domestic context or – as ultima ratio – for declining compliance because of incompatibilities with domestic legal or constitutional rules.[46] In this understanding, treaty-consistent interpretation rests on the balancing of the principles of effectiveness, uniformity and values of international law on the one hand and democratic government and subsidiarity on the other.[47] In a multilayered system of economic governance, certain legitimacy deficiencies at the WTO level can thus be compensated for at the level of the WTO members.[48]

D. Respecting the separation of powers or institutional balance between legislative, executive and adjudicative functions

[44] Cf. Marc Amstutz, In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning, Eur. L. J., Vol. 11 No. 6 (2005), 766, at 775 and 784. Cf. also Joel P. Trachtman, Bananas, Direct Effect and Compliance, Eur. J. Int'l L., Vol. 10(4) (1999), 655, at 677 (arguing that where dispute settlement decisions obtain formal binding legal status, lack of direct effect is a political filter formerly provided by the requirement for consensus in order to adopt panel decisions, and a means to reinforce democratic legitimacy, because democracy is strongest in the State context).

[45] Cf. Karen Knop, Here and There: International Law in Domestic Courts, Int. L. & Politics, Vol. 32 (2000), 501, at 505-506 and 535.

[46] Cf. Armin von Bogdandy and Ingo Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, Eur. J. Int'l L., Vol. 23 No 1 (2012), 7, at 39-40 (with respect to the "disencumbering" role of constitutional organs in deciding about the effect of international law in the domestic legal order).

[47] Cf. Armin von Bogdandy, Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law, I.Con, Vol. 6(3/4) (2008), 397 at 403.

[48] Cf. Thomas Cottier, the Legitimacy of WTO Law, NCCR Trade Working Papers 2008/19, at 12 and 30 (arguing that the WTO and its members are parts of a multilayered system of governance, the legitimacy of which as a whole needs to respond to the different strands of legitimacy).

The question as to what effects domestic courts should attribute to international treaty law can also be explored in the context of the horizontal separation of powers or institutional balance between legislative, executive and adjudicative functions. It is in this light that the rationale, scope and limits of the *Charming Betsy* canon of (agreement-consistent) interpretation have been construed by some U.S. scholars. Curtis A. Bradley, in particular, has argued for a separation of powers conception of this canon, which preserves the proper relationship between the three branches of federal government. [49] Others have noted, more generally, how agreement-consistent interpretation may shift the power from the political branches to the courts. [50] Arguments relating to the separation of powers and the institutional balance have also been employed to justify the denial of direct effect to international agreements in general[51] and to WTO law in particular.[52] Some of these arguments will be reviewed hereafter with a view to demonstrating that they are less persuasive to justify the denial of indirect effect.

The denial of direct effect of WTO law has frequently been based on the particular nature of the WTO agreements. One of these arguments was founded on the importance which the WTO agreements accord to negotiations between the members. In particular, the EU Court of Justice ruled that by giving direct effect to WTO law, the courts would deprive the legislative and executive organs of the contracting parties of the possibility afforded by the DSU of agreeing on mutually acceptable compensation or entering into negotiated arrangements. [53] Other arguments have been founded on the "political questions" doctrine or similar considerations: because of the pervasiveness of WTO law and its considerable potential to influence domestic policies, domestic courts should

[49] Cf. Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, Geo. L. J., Vol. 86 (1997), 479; cf. also Roger P. Alford, Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy, Ohio St. L. Rev., Vol. 67 (2006), 1339. Cf. Part VI.A.1, below.
[50] Cf. André Nollkaemper, National Courts and the International Rule of Law (2011), 143-146 (mentioning, inter alia, that this technique allows courts to overcome otherwise existing hurdles for giving effect to international agreements, such as the lack of transformation or incorporation, the lack of invocability by private parties, or the lack of direct effect of the agreement).
[51] Cf. the general discussion of the policies opposing direct application, by John H. Jackson, Status of Treaties in Domestic Legal systems: A Policy Analysis, Am. J. Int'l L., Vol. 86(2) (1992), 310, at 323-327.
[52] See, in particular, ECJ, Case C-149/96, Portugal v. Council, [1999] ECR-8395.
[53] Cf. ECJ, Case C-149/96, Portugal v. Council, [1999] ECR-8395, paras. 39-40.

defer to the domestic political institutions by not attributing direct effect to WTO law.[54] These arguments are, however, less pertinent with respect to indirect effect. In particular, agreement-consistent interpretation is always subject to the condition that the domestic rules are susceptible to such an interpretation. The legislature is therefore in a position to draft domestic legislation in such a way that its intentions are clearly and unambiguously captured in the text. And the legislature could amend the legislation when it finds that the courts' interpretations are contrary to the legislature's intentions. Even in situations where the courts' interpretation of domestic legislation in the light of WTO law conflicts with divergent interpretations made by the executive branch in the exercise of delegated or implementing powers bestowed on it by the legislature, the courts would not necessarily assume the role of the political institutions or branches of government. Indeed, as a matter of principle, the interpretation of the law is a core function not of the political branches but of the courts.[55]

The EU courts have denied direct effect of WTO law also on the basis of reciprocity considerations, given that in the important commercial partners of the EU, WTO law has no direct effect.[56] In view of the fact that the WTO agreements are based on

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[54] Cf. Paolo Mengozzi, The European Union balance of powers and the case law related to EC external relations, in: Mario Monti et al. (ed.), Economic Law and Justice in Times of Globalisation - Festschrift for Carl Baudenbacher (2007), 207, at 214 and 222-224; Paolo Mengozzi, Les droits et les intérêts des entreprises, le droit de l'OMC et les prérogatives de l'Union européenne: vers une doctrine communautaire des "political questions", Revue du Droit de l'Union Européenne 2/2005, 229, at 236-237; see also Thomas Cotter, International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law, Eur. Const. L. Rev., Vol. 5 (2009), 307, at 315 and 323-326 (arguing for a nuanced doctrine of direct effect of WTO law which takes into account vertical and horizontal separation of powers, and distinguishing between those norms which are suitable for direct effect and those the implementation of which needs to be left for the political process); Marco Bronckers, the Effect of the WTO in European Court Litigation, Tex. Int'l L. J., Vol. 40 (2005), 443, at 446; Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, at 333 (arguing that the "complexity, unpredictability, degree of penetration into domestic law and context" of WTO law would require "a more intricate balance of powers among domestic institutions").

[55] See Pieter Jan Kuijper & Marco Bronckers, WTO Law in the European Court of Justice, CMLRev., Vol. 42 (2005) 1313, at 1330.

[56] Cf. ECJ, C-148/96, Portugal v. Council, [1999] ECR-8395, paras. 43-46. In the case-law of US courts, reciprocity considerations appear not often to be employed with respect to the determination of the self-executing character of international agreements; but see United States v. Postal, 589 F.2d 862, at 878 (5th Cir. Fla. 1979): "The Convention on the High Seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations. This is not to say that by entering into such a multilateral treaty the United States cannot without legislation execute provisions of it, but one would expect that in these

reciprocal and mutually advantageous arrangements, the EU Court of Justice has concluded that attributing direct effect to WTO law in the Union legal order would deprive the legislative or executive institutions of the scope for manoeuver enjoyed by their counterparts in the EU's trading partners.[57] There is also a reciprocity issue in respect of indirect effect.[58] As will be shown in subsequent parts of this paper, the US courts are increasingly reluctant to interpret US law in the light of WTO law and instead defer to interpretations given by the executive branch, while the EU courts consider WTO-consistent interpretation of domestic acts as a (constitutional) obligation.[59] This disparity could lead to concrete disadvantages for European companies if, for instance, the US courts validate a WTO-inconsistent practice of a US executive agency, while the EU courts rule that the same practice applied by the EU institutions infringes domestic legislation as interpreted in the light of WTO law.[60] On the other hand, many other WTO members acknowledge the principle of WTO-consistent interpretation. The situation can therefore be distinguished from the situation pertaining to direct effect, which is denied by most WTO members and where reciprocity considerations therefore carry more weight. Furthermore, the strong WTO dispute settlement system ensures that

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circumstances the United States would make that intention clear. The lack of mutuality between the United States and countries that do not recognize treaties as self-executing would seem to call for as much. Here there was no such manifestation." (internal footnote omitted) Reciprocity considerations are expressly mentioned in Art. 55 the French Constitution of 1958, which provides that the rank of treaties or agreements ratified or approved by France is subject to the other party applying the treaty or agreement, but the case-law of the French courts appears to limit this reciprocity condition (cf. Emmanuel Decaux, Le régime du droit international en droit interne, R.I.D.C. 2-2010, 467, at 490-491).

[57] Although these considerations have been criticized as purely politically motivated, they are defendable with respect to the denial of direct effect, because they are founded on the nature of the WTO Agreement itself. Under this agreement, the rights and obligations of WTO members constitute a delicate balance, which is the result of mutually satisfactory concessions. An asymmetric application of WTO law has the potential to disturb this balance (cf. Antonis Antoniadis, The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches, Word Trade Rev., Vol. 6(1) (2007), p. 45, at 53; Peter Hilpold, Die EU im GATT/WTO-System, Aspekte einer Beziehung "sui generis", 2. ed. (2000), at 262-271). For agreements which do not share these specific characteristics of the WTO Agreement, the EU Court of Justice does not deny direct effect on the basis of reciprocity considerations (cf. ECJ, Case 104/81, Kupferberg, [1982] ECR at para. 18).

[58] See Pieter Jan Kuijper & Marco Bronckers, WTO Law in the European Court of Justice, CMLRev., Vol. 42 (2005), 1313, at 1330.

[59] See Part VI., below.

[60] This is all the more disturbing because the relationship between the trade policies of the EU and the US are characterized by what has been described as a "structural relationship of competitive interdependence" in which they use bilateral, regional and multilateral agreements to protect and advance their respective economic interests and in which, to a significant degree, each defines success in relation to the other (cf. Alberta Sbragia, The EU, the US, and trade policy: competitive interdependence in the management of globalization, J. Eur. Pub. Pol'y, Vol. 17(3) (2010), 368, at 369).

non-compliance is not sustainable in the long run.[61] Finally, in view of the other benefits and justifications for the attribution of indirect effect to WTO law, the issue of reciprocity must be put into context and should not be considered to justify – on its own - the denial of indirect effect.

Another argument that has been advanced against direct effect of WTO law in domestic legal orders relates to the horizontal balance between the political and dispute settlement pillars of the WTO. Direct effect, it was argued, would further weaken the political pillar of the WTO, because it would lead to an increased aggressiveness of WTO members in defending their rights through dispute settlement and to an increase in the number of politically sensitive dispute settlement cases which should better be addressed in the political process.[62] Based on an application of the "exit and voice" theory,[63] which links the success of an organization to the alternative mechanisms of exit (leaving the organization) and voice (addressing problems through negotiations and participation), it was also argued that direct effect would decrease the already limited selective "exit" options for WTO members which would, in turn, increase the pressure for stronger "voice", leading members to insist even more on their veto rights in the political process and to block further negotiated integration within the WTO.[64] However, although indirect effect also limits the policy options of the political branches of WTO members in the application of WTO law, it does not eliminate them. If the domestic legislator enacts legislation which it considers necessary for vital policy reasons, although it is inconsistent with WTO law, and if the legislation is clear and unambiguous, there is no scope for indirect effect. The selective "exit" option is thus not entirely closed and the pressure for stronger "voice" in the WTO political process or for a

[61] For a more general discussion of the limits of the reciprocity argument, see Mattias Kumm, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model, Va. J. Int'l L., Vol. 44(1) (2003), 19, at 28-30.
[62] Cf. Claus-Dieter Ehlermann, Six Years on the Bench of the "World Trade Court". Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, J. World Trade, Vol. 36(4) (2002), 605, at 636-637.
[63] Cf. Albert Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).
[64] Cf. Joost Pauwelyn, The Transformation of World Trade, Mich. L. Rev., Vol. 104(1) (2005), 1, at 50-53; Alessandra Arcuri & Sara Poli, What Price for the Community Enforcement of WTO Law? , EUI Working Paper LAW 2010/01, at 31-33.

more aggressive use of dispute settlement system is less likely than in the case of direct effect.

For similar reasons, indirect effect is also less objectionable than direct effect from the perspective of the "efficient breach" theory. This theory, which has been argued by some scholars to be an essential feature of the WTO dispute settlement system,[65] posits that under certain circumstances a breach of an obligation can be more efficient than the performance of the obligation and that the law should facilitate breach in such circumstances. Independently of the shortcomings of the application of the theory of "efficient breach" in the context of the WTO, where breaches may undermine the rule-based multilateral system as such, the "cost" of which cannot be calculated in purely commercial terms,[66] it can be observed that direct effect may – at least in legal systems where international treaty law is higher ranking than statutory law - prevent the "efficient breach" of WTO law obligations by member governments, whereas indirect effect does not. Indirect effect merely shifts the responsibility to decide on a breach from the executive to the legislative branch. If the legislature of a WTO member considers it appropriate to enact legislation breaching the Member's obligations, it can formulate the pertinent rules in a manner which leaves no room for interpretation by the domestic courts in the light of the WTO agreements.

IV. AN INTERNATIONAL LAW OBLIGATION TO ATTRIBUTE INDIRECT EFFECT TO INTERNATIONAL AGREEMENTS?

Does international law impose a legal requirement according to which domestic courts must attribute indirect effect to international law provisions? More specifically, are domestic courts under an international law obligation to interpret domestic acts in the light of international treaty law?[67]

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[65] Cf. Warren F. Schwartz & Allan O. Sykes, The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization, J. Legal Stud., Vol. 31 (2002), 179.

[66] Cf. John H. Jackson, International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?, Am. J. Int' L., Vol. 98 (2004), 109, at 122; Sungjoon Cho, The Nature of Remedies in International Trade Law, U. Pitt. L. Rev., Vol. 65 (2004), 763, at 783-784.

[67] Other forms of substantive indirect effect, such as the use of international law as persuasive authority, are by their very nature less likely to be required under international law. Procedural indirect effect, such as the stay of domestic proceedings pending the outcome of international proceedings, could only be

States are obliged under international law to perform international agreements which are binding on them and they cannot invoke any provisions of their domestic law in order to justify a failure to perform such agreements.[68] However, without prejudice to particular treaty regimes notably in the field of the protection of human rights, international law is not generally concerned with the question which particular branches of government should discharge of the States' obligation to perform agreements. The effects of international agreements in the domestic legal orders have mostly been considered to fall outside the sphere of international law, although this has been nuanced in more recent doctrine.[69] Some scholars have attempted to found a duty of agreement-consistent interpretation on customary international law or more specifically on the "good faith" principle.

In particular, Gerrit Betlem and André Nollkaemper have argued that "State practice allows one to infer an international duty of courts to interpret, within their constitutional mandates, national law in the light of international law."[70] In referring to State practice, they appear to seek the source of the alleged duty in customary international law within the meaning of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ). It is certainly true that courts in many States apply the principle of consistent interpretation.[71] But independently of whether this amounts to a "common, consistent and concordant" practice, [72] it would be difficult to demonstrate that any such practice is "evidence of a belief that this practice is rendered

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conceived to be required by international law if an international agreement establishes specific obligations in this regard. Cf. Part VII.B, below.

[68] Cf. Art. 26 and 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT).

[69] Cf. André Nollkaemper, The Direct Effect of Public International Law, in: Direct Effect – Rethinking a Classic of EC Legal Doctrine (Jolande M. Prinssen & Annette Schrauwen (eds.)) (2002), 157, and André Nollkaemper, National Courts and the International Rule of Law (2011), 150 (arguing that the concepts of direct and indirect effect straddle the boundaries of international and national law).

[70] Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 114(3) (2003), 569, at 574; but see André Nollkaemper, National Courts and the International Rule of Law (2011), 148-149 (arguing that, while there is no general international law obligation of consistent interpretation, it is possible to construe a general principle of interpretation according to which "within the limits of their domestic powers, national courts should interpret domestic law in conformity with the international obligations of the state").

[71] See part VI.A.1, below.

[72] See Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Merits) [1974] ICJ Rep. 3 at 50.

obligatory by the existence of a rule of law requiring it."[73] On the contrary, the practice suggests that agreement-consistent interpretation is not always understood as rendered obligatory by an international law obligation: US courts, in particular, consider the canon of agreement-consistent statutory interpretation as a guide, which may in certain cases be trumped by other considerations, such as the principle of deference to statutory interpretations given by administrative authorities.[74] But in the absence of *opinio juris* and thus, of international custom, the practice of even a large number of State courts cannot establish any obligation under international law with respect to the principle of consistent interpretation.

John H. Jackson has suggested more specifically that the principle of agreement-consistent interpretation "seems obligatory under customary international law and alternatively (or additively) the Vienna Convention on the Law of Treaties, as part of the 'good faith compliance' obligation of treaty norms".[75] Some judgments of the EU Court of Justice could also be understood in this sense.[76] The principle of good faith is a general principle of law[77] and arguably also a principle of WTO law.[78] In one of its

[73] See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] ICJ Rep. 4, at 44.

[74] Cf., e.g., Corus Staal B.V. v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005). For a more detailed discussion see Part VI.B.1.(b), below.

[75] John H. Jackson, Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals, in: Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs (eds. Anthony Arnull, Piet Eeckhout & Takis Tridimas) (2008), 361, at 367. Cf. also Giacomo Gattinara, Consistent Interpretation of WTO Rulings in the EU Legal Order?, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 269, at 271.

[76] Cf. in particular Case C-308/06, Intertanko, [2008] ECR I-4057, para. 52: "In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions [of secondary EU law] taking account of Marpol 73/78." By contrast, Case C-61/94, Commission v. Germany, [1996] ECR I-3989, cannot be read to support this conclusion. Although the Court held that, in order to interpret a provision of the International Dairy Arrangement concluded within the GATT, account must be taken of the purpose of the agreement, the context of the relevant Article "and the general rule of international law requiring the parties to any agreement to show good faith in its performance" (para. 30), this concerned the interpretation of the international agreement itself. In the context of the interpretation of the relevant Community legislation in the light of the agreement (paras. 52 et seq.), the Court did not refer to any "good faith" argument in order to justify the principle of agreement-consistent interpretation.

[77] Certain Norwegian Loans (France v Norway) (Jurisdiction) [1957] ICJ Rep. 9, 53.

[78] For general contributions on the good faith principle in the context of the WTO, see Marion Panizzon, Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement (2006); Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, Melbourne J. Int'l L., Vol. 7 (2007), p. 339.

emanations as a principle of customary international law[79] it relates to the performance of treaties and is linked to the principle of *pacta sunt servanda*.[80] This principle is codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT) which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." In spite of the absence of a general clause to this effect in the WTO agreements, [81] it is not contested that the WTO members are bound by the international law obligation to perform the WTO agreements in good faith.[82] The problem is not the applicability of this requirement as a matter of international law, but the determination of the content of this requirement. The ICJ understands the good faith requirement in Article 26 as meaning that "the purpose of the Treaty, and the intentions of the Parties in concluding it, […] should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."[83] What it means to apply a treaty "in a reasonable way" is of course not always easy to determine. Would a WTO member act in bad faith if its courts did not directly apply WTO law and WTO dispute settlement

[79] Cf. Case T-231/04, Hellenic Republic v. Commission, 2007 ECR II-63, para. 85: "In that regard, the Court would point out that the principle of good faith is a rule of customary international law, the existence of which has been recognised by the Permanent Court of International Justice established by the League of Nations (see the judgment of 25 May 1926, German interests in Polish Upper Silesia, CPJI, Series A, No 7, pp. 30 and 39), and subsequently by the International Court of Justice and which, consequently, is binding in this case on the Community and on the other participating partners."

[80] The principle of WTO-consistent interpretation has often been linked to the principle of "pacta sunt servanda"; but it is not always clearly stated whether this is meant to imply an international law obligation of agreement-consistent interpretation, or merely as an explanation for the merits of agreement-consistent interpretation. Cf., e.g., Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, J. Int'l Econ. L., Vol. 1 (1998) 83, at 90 (stating that the concept of WTO-consistent interpretation "can assist all members of the WTO alike in honouring the principle of pacta sunt servanda" and that domestic courts "share in the responsibility of all state bodies under the principle of pacta sunt servanda to avoid, to the utmost extent possible, conflicts and clashes with international law and therefore the risks of international disputes and retaliation.")

[81] The WTO agreements contain a number of specific references to the good faith principle in its different emanations. Cf., inter alia, Art. 3.2 DSU (which incorporates the requirement in Art. 31(1) of the VCLT to interpret treaties in good faith); Art. 3.10 DSU (engagement in dispute settlement proceedings in good faith), Art. 4.3 DSU (entering consultations in good faith); Para. 5 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 (good faith in the negotiations).

[82] The Appellate Body generally assumes that WTO members have acted in good faith in carrying out their WTO obligations as required by the principle of pacta sunt servanda (cf. EC — Trade Description of Sardines, WT/DS231/AB/R (2002), 278). But according to the Appellate Body, "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith" (cf. US — Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment), WT/DS217/AB/R, WT/DS234/AB/R (2003), 297). Cf. the discussion of this case by Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, Melbourne J. Int'l L., Vol. 7 (2007), p. 339, at 364-368.

[83] Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits), [1997] ICJ Rep. 7, at 79.

rulings, or if the courts engaged with such rulings but found them unconvincing, or if the courts considered that the interpretation of the provisions of the WTO agreements or of the corresponding domestic implementing rules should be left to the domestic administrative authorities? Is the international law obligation to perform a treaty in good faith, which is addressed to the contracting parties as such, really intended to prescribe that a particular branch of government (the courts) applies a particular method of interpretation (treaty-consistent interpretation)? I do not see any convincing arguments in support such claims. Any contracting party is free to determine the legal means appropriate for performing treaty obligations in good faith.[84] If a domestic court fails to interpret domestic rules in the light of WTO law and confirms a domestic measure which is inconsistent with the obligations resulting from the WTO agreements, the domestic political branches of government should modify the relevant measure in order to bring it unambiguously in line with WTO law. And if the domestic political branches do not do this, the State may be responsible for a substantive infringement of WTO law, independently of any possible infringement of an assumed obligation by the domestic courts to apply treaty-consistent interpretation.[85]

An international law obligation for domestic courts to interpret domestic acts in the light of international treaty law can therefore be established only if an international treaty expressly or implicitly provides specific instructions relating to such domestic effects of its provisions.[86]

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[84] The EU Court of Justice has confirmed this principle when it rejected the "good faith" argument in relation to the question whether direct effect should be attributed to international treaties. It ruled that "according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means" (Case C-104/81, Kupferberg, [1982] ECR 3641, at para. 18; Case C-149/96, Portugal v. Council [1999] ECR I-8395, para. 35). But, as mentioned above, the Court apparently fails to accept this principle when it comes to the attribution of indirect effect (cf. Case C-308/06, Intertanko, [2008] ECR I-4057, para. 52).

[85] In any case, the principle of good faith is not in itself a source of obligation where none would otherwise exist (cf. Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility), [1988] ICJ Rep. 69, at 105.

[86] Cf., with respect to direct effect, Sean D. Murphy, Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 61

The WTO agreements do not specifically address the effect to be given to their provisions in domestic court proceedings of the WTO members. Article XVI(4) of the WTO Agreement states in general terms that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[87] While it is not entirely sure to what extent this provision requires that WTO members bring their general laws and procedures in line with WTO obligations in the absence of any particular application of the laws or procedures,[88] the provision does in any case not appear to be addressed specifically to the domestic courts in the sense that it would require the application of specific rules of interpretation of domestic law. The same conclusion applies to the provisions of the WTO Dispute Settlement Understanding (DSU) relating to the implementation of recommendations and rulings of the Dispute Settlement Body, from which a clear preference for compliance results. Some WTO agreements contain obligations relating to the establishment or the procedure of domestic tribunals or review bodies for the review of certain domestic trade-related measures.[89] Except for Article XX of the plurilateral Agreement on Government Procurement,[90] these provisions do not oblige the domestic tribunals to review the legality of the relevant domestic measures in the light of the WTO agreements and therefore do not impose an obligation to attribute direct effect to the WTO agreements. But it could be considered whether these provisions ought to be construed to implicitly oblige the tribunals to attribute indirect

(concluding that there is no obligation under general international treaty law, customary international law, or general principles of international law for a state to open its courts for invocation by individuals of treaty norms, unless the treaty expressly or by implication provides such a right). Cf. in this context, Danzig, PCIJ Ser. B, No 15 (1928), p. 17-18 ("The very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts").

[87] Cf. also Art. 18.4 ADA, Art. 32.5 ASCM, Art. 22.1 Customs Evaluation Agreement, Art. 9.2 Preshipment Agreement, Art. 8.2(a) Licensing Agreement.

[88] Cf. Sharif Bhuiyan, National Law in WTO Law, Effectiveness and Good Governance in the World Trading System (2007), at 57-62.

[89] In particular, Art. X.3(b) of the GATT 1994 relates to judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters; Art. 13 ADA and Art. 23 ASCM concern judicial review of respectively anti-dumping and countervailing duty measures by domestic judicial, arbitral or administrative tribunals; and Part III of the TRIPS Agreement requires the establishment of specific procedures and remedies for the infringement of intellectual property rights. See also Art. 4 of the Agreement on Preshipment Inspection concerns review procedures by an independent entity.

[90] This Article provides for the establishment of challenge procedures before domestic courts or review bodies, enabling suppliers to "challenge alleged breaches of the Agreement".

effect to the agreements under which they are established. If there is an obligation for WTO members to establish or maintain tribunals and review bodies, e.g., "for the purpose inter alia of the prompt review of administrative actions to final determinations and reviews of determinations [concerning antidumping measures]",[91] it could possibly be argued that, in order to guarantee the effectiveness of such review, the domestic tribunals should take into account the provisions of the WTO Antidumping Agreement when reviewing domestic administrative action. However, the domestic tribunals could also review the domestic antidumping measures solely in the light of the domestic legislation. Such a review would not necessarily be less effective, given that the domestic legislation is supposed to have implemented the Antidumping Agreement. It is therefore doubtful to read into these review provisions of the Antidumping Agreement or other WTO agreements an international law obligation to attribute indirect effect to the provisions of the agreements.[92]

As the textual interpretation of the provisions of the WTO agreements (with the exception of Article XX of the Agreement on Government Procurement) does not determine whether or not domestic courts must attribute more or less intensive effect to the agreements, the question arises whether the nature of the WTO legal order could lead to a different conclusion. This would be conceivable if the WTO legal order could be conceptualized as having developed into a constitutional system.[93] However, any constitutionalist theory of the WTO which would rely on the nature of the WTO legal system in order to support a claim of supremacy as well as direct and/or indirect effect of WTO law in relation to the national constitutional orders of the WTO members

[91] Cf. Art. 13 WTO ADA.

[92] But see Ernst-Ulrich Petersmann, Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit 'Grave Injustice'?, in: The Law and Practice of International Courts and Tribunals, Vol. 8 (2009), 329, at 362 (arguing that the WTO requirements of judicial remedies at national and international levels should be construed as requiring the courts to protect the rule of law not only in relations among governments, but also for the benefit of citizens, for example by interpreting and applying intergovernmental guarantees of equal freedoms, of non-discriminatory conditions of competition and rule of law for the benefit of the citizens concerned and their constitutional rights of access to justice). Cf. also Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 103-104.

[93] Theories of constitutionalism in the context of the WTO have relied, inter alia, on the normative values such as human rights and market freedoms the WTO aims to protect (cf. in particular the contributions by Ernst-Ulrich Petersmann, including: Welthandelsrecht als Freiheits- und Verfassungsordnung, ZaöRV, Vol. 65 (2005), 543).

(similar to the claim made by the EU Court of Justice with respect to the relationship between the EU legal order and the legal orders of the EU Member States) would be difficult to reconcile with the way in which the WTO functions and is perceived to function by its members and its organs.[94] In this context, the WTO panel in *US – Sections 301-310 of the Trade Act 1994* has stated the following: "Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties and their nationals."[95] The panel went on to consider that the denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it, and concluded that "[i]t may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect."[96] The notion of "indirect effect", as used by the panel, captures the conception that the interest of non-governmental stakeholders can be affected by the breach of WTO law and that these interests are therefore virtually present in WTO dispute settlement proceedings,[97] but it does not relate to the concept of indirect effect of WTO law in domestic court proceedings in the sense used here. As concerns, more specifically the implementation of DSB rulings and recommendations, "the well-established principle that 'choosing the means of implementation is, and

[94] See Jeffrey L. Dunoff, Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law, Eur. J. Int'l L., Vol. 17(3) (2006) 647 (providing a critical analysis of the different strands of constitutionalism in the context of the WTO), Jeffrey L. Dunoff, The Politics of International Constitutions: The Curious Case of the World Trade Organization, in: Ruling the World? Constitutionalism, International Law, and Global Governance (eds. Jeffrey L. Dunoff & Joel P. Trachtman) (2009), 178 (arguing that the scholarship on constitutionalism in the context of the WTO is self-defeating); see also Markus Krajewski, Democratic Legitimacy and Constitutional Perspectives of WTO Law, J. World Trade, Vol. 35(1) (2001), 167 (arguing that because of its inherent lack of democratic legitimacy, WTO law cannot serve constitutional functions).
[95] Cf. US – Sections 301-310 of the Trade Act 1974, WT/DS152/R (2000), para. 7.72.
[96] Ibid., para 7.78.
[97] Cf. Robert Howse, Moving the WTO Forward-One Case at a Time, 42 Cornell Int'l L. J., Vol. 223 (2009), 223, at 228.

should be, the prerogative of the implementing Member'" has been recognized in WTO arbitration procedures.[98]

In conclusion, neither customary international law, nor a textual interpretation of the WTO agreements or the nature of the WTO legal order support the proposition that domestic courts are legally obliged, qua international law, to attribute indirect effect to WTO law by interpreting domestic acts in the light of WTO law.

International law does, of course, not preclude the WTO members from creating such an obligation by amending the WTO Agreement or the WTO DSU in order to expressly determine the effect which the courts of the WTO members are to give to WTO law and WTO dispute settlement rulings. Thomas Cottier has explored a scenario under which WTO members could negotiate the obligation to grant direct effect to certain areas of WTO law in a process in which some WTO members may be compensated for the acceptance of this obligation by trade concessions made by others.[99] But he concedes that this would involve a long-term process and is not, at present, a realistic option.[100] Ernst-Ulrich Petersmann has envisaged the possibility of establishing reciprocal WTO commitments on the attribution of indirect effect, which would require domestic courts to interpret domestic trade rules in conformity with the WTO obligations of the member concerned.[101] However, although agreement-consistent interpretation is a less intrusive means of integrating international law into domestic legal orders than direct effect, it is unlikely that the WTO members would agree to an international instrument giving instructions to their domestic courts with respect to the interpretive methods to be applied by them.[102]

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[98] Cf. US – Continued Dumping and Subsidy Offset Act (Byrd Amendment), Arbitration under Art. 21.3(c), WT/DS217/14, WT/DS234/22, para. 52.
[99] Cf. Thomas Cottier, The Legitimacy of WTO Law, NCCR Trade Working Paper No 2008/19, p. 30.
[100] Cf. Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, J. Int'l Econ. L., Vol. 1 (1998) 83, at 117-119.
[101] Ernst-Ulrich Petersmann, Implementation of WTO Rulings: The Role of Courts and Legislatures in the US and other Jurisdictions (EC, China), Columbia University April 2006 Conference on the WTO AT 10, Discussion Paper (first draft) for Session 7, 17.3.2006, at 8, online at: http://www.ila2006.org/Petersmann.pdf.
[102] Cf. also John J. Barceló, The Status of WTO Rules in U.S. Law, Cornell Law School research paper No. 06-004 (2006), p. 31-34 (arguing that negotiated indirect effect seem implausible, not least because of the nature of the commitments under the WTO Agreement and the lack of a "global open market ethos").

V. DOMESTIC CONSTITUTIONAL PARAMETERS FOR ATTRIBUTING INDIRECT EFFECT TO INTERNATIONAL AGREEMENTS

Domestic constitutions increasingly refer to international law, in particular international human rights law, and determine its status within the domestic legal system.[103] But they only rarely address the indirect effect of international law. A notable exception is the Constitution of South Africa of 1996.[104] Its section 233 establishes an obligation for domestic courts to "prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Furthermore, Section 39(1)(b) of the Constitution provides that in the interpretation of the South African Bill of Rights courts "must consider international law".[105] Constitutions of some other countries provide specifically for consistent interpretation in the light of international human rights law and treaties.[106]

It is also conceivable that domestic constitutional provisions prohibit courts from resorting to agreement-consistent interpretation and other forms of indirect effect of

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[103] Cf. Anne Peters, Supremacy Lost, International Law Meets Domestic Constitutional Law, www.icl-journal.com, Vol. 3 (2009), 170, at 171-173. For the EU, cf. e.g. Art. 42(2) and (7) TEU (NATO), Art. 6(3) TEU (European Convention for the Protection of Human Rights and Fundamental Freedoms), Art. 78(1) TFEU and Art. 18 of the Charter of Fundamental Rights of the EU (Geneva Convention of 28.7.1951 and Protocol of 31.1.1967 relating to the status of refugees; cf. also ECJ, Joined Cases C-411/10 and C-493/10, N.S. and M.E. et al., judgment of 21.12.2011, n.y.r., paras. 75 et seq.).

[104] Online at: http://www.info.gov.za/documents/constitution/1996/index.htm (visited on 10 March 2011). Cf. Lourens du Plessis, International Law and the Evolution of (domestic) Human-Rights Law in Post-1994 South Africa, in: New Perspectives on the Divide Between National and International Law (ed. by Janne Nijman & André Nollkaemper), Oxford 2007, 309 (reviewing the case-law of the South African Constitutional Court notably with respect to section 233 and section 39(1)(b) of the Constitution).

[105] "Section 39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
    a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
    b. must consider international law; and
    c. may consider foreign law."

[106] Cf. Art. 10(2) of the Spanish Constitution of 1978, which provides: "The norms relative to basic rights and liberties which are recognized by the constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." (online at: http://www.servat.unibe.ch/icl/sp00000_.html, visited on 10 March 2011); Article 20 of the Romanian Constitution of 1991 provides: "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to and internal laws, the international regulations shall take precedence." (online at: http://www.servat.unibe.ch/icl/ro00000_.html, visited on 10 March 2011).

international law. Such a prohibition would have been introduced in the State Constitution of Oklahoma through a ballot initiative which purported, inter alia, to prevent the courts from considering international law. But a U.S. District Court has enjoined the authorities from certifying the results of this initiative pending the Court's decision on the merits of the case.[107]

In domestic legal orders where agreement-consistent interpretation or other forms of indirect effect of international law are not expressly addressed in the text of the constitution, they have frequently developed through the case-law of the constitutional courts. Such case-law often relies on, or can be assessed against, more general constitutional provisions and practices relating (A.) to the treaty-making powers and procedures as well as (B.) to the integration, (C.) to the rank and (D.) to the effect of treaty law in the domestic legal order.[108] These constitutional parameters - which may influence, but not necessarily determine[109] - the scope of indirect effect to be attributed to international agreements, will be summarized hereafter with respect to the EU and US legal orders (and the status of WTO law within these legal orders). This should set the background for the more detailed discussion of the issue of indirect effect in the subsequent parts of this paper.

A. The negotiation and conclusion of international agreements

[107] See Muneer Awad v. Paul Ziriax, Case No. CIV-10-1186-M, (W. D. Okla., Order of 29 Nov. 2010), affirmed on appeal: 670 F.3d.1111 (10th Cir., 10 Jan. 2012). Cf. Aaron Fellmeth, U.S. State Legislation to Limit Use of International and Foreign Law, Am. J. Int'l L., Vol. 106 (2011), 107 at 112-113, and - for references to similar constitutional amendment proposals in other States - at 111.

[108] Furthermore, general constitutional provisions or principles may also be relevant. For instance, the Indian Supreme Court relied in this context on the "directive principles of State policy" in Part IV of the Constitution, in particular Art. 51(c), which provides that the State shall endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". According to the Court, it is implicit from this provision that "[a]n International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions [of the Constitution] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee" (judgment of 13 Aug. 1997, Vishaka and others v. State of Rajasthan and others, [1997] 3 LRC 361).

[109] Cf. Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 14(3) (2003), 569, at 571 (observing that the principle of treaty-consistent interpretation is often only marginally influenced by constitutional provisions and can be used even when constitutional law otherwise seems to bar application of international law). This is even more the case for less intensive forms of indirect effect, such as the use of international treaty law as persuasive authority.

The Treaty of Lisbon brought about major modifications in the foundations of the EU's external action.[110] It inserted into the reframed objectives of the Union the contribution of the Union "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"[111] and reinforced the aim of coherence between the different foreign policy instruments of the Union, including the common commercial policy.[112] The EU may conclude international agreements within the limits of its external powers.[113] The procedures for the negotiation and conclusion of international agreements by the EU involve the Council of the EU, the European Parliament and the European Commission.[114] The Commission submits recommendations to the Council, which authorizes the opening of negotiations and nominates the Union negotiator. In the field of the common commercial policy, the negotiations are conducted by the Commission within the framework of the negotiating directives which the Council may issue and in consultation with a special committee appointed by the Council. At the end of the negotiations the Council, on a proposal by the Commission, adopts a decision authorizing the signing and, if necessary, the provisional application of the agreement. In most fields, including the common commercial policy, the consent of the European Parliament is required[115] before the Council, on a proposal from the Commission, can conclude the agreement. The WTO Agreement was concluded by the EU, as regards matters within its competence, by

[110] For an overview of the modifications brought about by the Treaty of Lisbon in this field, cf. Ricardo Gosalbo Bono, The Organization of the External Relations of the European Union in the Treaty of Lisbon, CLEER Working Papers 2011/3, 13-37; Jean-Claude Piris, The Lisbon Treaty. A Legal and Political Analysis (2010), at 238-287.

[111] Cf. Art. 3(5) TEU.

[112] Cf. Art. 21(3) TEU, Art. 205 TFEU, Art. 207(1) TFEU.

[113] The Union is founded on the principle of conferred powers, according to which it can 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 (cf. Art. 5(1) TEU). In the field of the common commercial policy, the Union has far reaching exclusive powers which embrace, in particular, changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies (cf. Art. 207 TFEU). The Union's powers for the conclusion of international agreements are set out, in a general manner, in Art. 216(1) TFEU.

[114] Cf. Art. 218 TFEU and, as concerns agreements in the field of the common commercial policy, Art. 207(2) to (4) TFEU.

[115] Although this general requirement, which was introduced by the Treaty of Lisbon, was not yet in place at the time of the conclusion of the WTO Agreement, the consent of the European Parliament was requested and obtained for the conclusion of the WTO Agreement by virtue of the more specific requirements laid down in Art. 300(3) of the former EC Treaty.

Council Decision of 22 December 1994.[116] As the EU's powers were insufficient to cover the full range of issues dealt with in the WTO Agreement,[117] the EU's Member States concluded the Agreement alongside the Union, after having gone through the respective internal procedures of ratification in accordance with their national laws.[118]

Under the US Constitution, the foreign affairs powers are considered to be, in principle, federal powers of the US.[119] These powers are shared between the Congress and the President. Among the enumerated foreign affairs powers of the Congress is the legislative power to regulate commerce with foreign nations.[120] The President has power, by and with the advice and consent of the Senate, to make treaties, provided that two thirds of the Senators present concur.[121] Treaties, to which this procedure applies, are distinguished form executive agreements. These include congressional-executive agreements which are made by the President with the authorization or approval of Congress.[122] Congress acts in those cases with a simple majority of both houses. In view of the fact that congressional-executive agreements are not expressly provided for in the Constitution their constitutionality has been put into question,[123] but the prevailing view

[116] Council Decision of 22.12.1994 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 of 23.12.1994, p. 1.
[117] Cf. ECJ, Opinion 1/94, [1994] ECR I-5267. This continued to be the case also after the amendments introduced by the Treaty of Nice, cf. the Opinion of Advocate General Kokott of 26.3..2009 in Case C-13/07, Commission v. Council (the Commission withdrew the application after the entry into force of the Treaty of Lisbon). The question of the scope of the exclusive competence of the EU in this field after the entry into force of the Treaty of Lisbon has not yet been definitively resolved.
[118] The WTO Agreement was thus concluded as a "mixed" agreement by both the EU and its Member States. The prevailing view appears to be that the Union and its Member States are jointly or jointly and severally liable for the performance of such mixed agreements unless the agreement or a declaration of competence made at the occasion of the signature or conclusion of the agreement clearly indicates which commitments under the agreement were entered into respectively by the Union or the Member States (cf. ECJ, Case C-316/91, Parliament v. Council, [1994] ECR I-625, para. 29; Opinion 2/00, [2001] ECR I-9713, para, 16; cf. also Piet Eeckhout, EU External Relations Law, 2d ed. (2011), at 262).
[119] Cf. Art. I, § 10 of the US Constitution.
[120] Cf. Art. I, § 8 of the US Constitution.
[121] Cf. Art. II, § 2 of the US Constitution.
[122] Cf. Restatement of the Law, Third, Foreign Relations Law of the United States (1987), § 303(2). In addition to congressional-executive agreements, the Restatement mentions executive agreements pursuant to treaty (where the President is authorized by a treaty to make an agreement), and sole executive agreements (where the President makes an international agreement on his own authority), id. § 303(3) and (4).
[123] Cf. Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, Harv. L. Rev., Vol. 108, No. 6 (1995), 1221, at 1249-1278. The courts have declined to take a position on this issue, qualifying it as a non-justiciable political question (cf. Made in

appears to be that congressional-executive agreements can be used, at least in most cases, as an alternative to treaties.[124] The WTO Agreement was negotiated and concluded as a congressional-executive agreement. It was negotiated under the so-called fast track authorization provided for in the Omnibus Trade and Competitiveness Act of 1988.[125] By virtue of this Act, Congress had authorized the President to enter into the Uruguay Round trade negotiations for a specific time period which was subsequently extended. As required by this Act, the President consulted the Congress during the course of the negotiations and submitted the final text of the agreements to Congress together with an implementing bill. The Uruguay Round Agreements Act (URAA)[126] approved and implemented the WTO Agreement.

B. The integration of international agreements in the domestic legal order

The EU Court of Justice has inferred from Article 3(5) of the Treaty on European Union (TEU), according to which the EU is to contribute to the strict observance and the development of international law, that international law is binding on the EU institutions.[127] More specifically, Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) provides that "[a]greements concluded by the Union are binding on the institutions of the Union and on its Member States." The EU Court of Justice has deduced from this provision that such agreements form an integral part of the Union legal order from the moment they enter into force.[128] With the conclusion of

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the USA Foundation v. U.S., 242 F.3d 1300, 1319 (11th Cir., 2000), cert. denied, 534 U.S. 1039 (2001), dismissing an appeal challenging the constitutionality of NAFTA, which was negotiated and approved in a manner similar to the WTO Agreement).

[124] Cf. Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), at 217; Restatement of the Law, Third, Foreign Relations Law of the United States, § 303, comment e); Steve Charnovitz, Using Framework Statutes to Facilitate U.S. Treaty Making, Am. J. Int' L., Vol. 98 (2004), 696; but see John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, Mich. L. Rev., Vol. 99 (2001), 757 (arguing against the interchangeability of, and suggesting different spheres for, congressional-executive agreements and treaties, and stating that treaties would remain indispensible for matters outside the powers of Congress under Art. I of the Constitution).

[125] Publ. L. No. 100-418, § 1102 (1988); amended by Pub. L. No. 103-49 (1993).

[126] Publ. L. No. 103-465 (1994); 19 U.S.C. 3501.

[127] ECJ, Case C-366/10, Air Transport Association of America et al., judgment of 21.12.2011 (n.y.r.), para. 101.

[128] Cf. ECJ, Case 104/81, Kupferberg, [1982] ECR 3641, para. 13; cf. also ECJ, Case 181/73, Haegeman, [1974] ECR 449, para. 5; ECJ, Case C-386/08, Brita, [2010] ECR (Judgment of 25.2.2010, n.y.r.), para.

the WTO Agreement by the EU and its entry into force, the provisions of this Agreement have therefore been integrated in the Union legal order, to the extent that they fall within the EU's competences. In spite of the automatic integration of the provisions of an agreement into the EU legal order it is sometimes necessary for the EU to adopt further acts in order to implement the agreement, if the agreement has no direct effect[129] or if the interaction of the provisions of the agreement with previously adopted acts of secondary Union law needs to be clarified. A package of such acts was adopted by the Council at the same time it adopted the decision on the conclusion of the WTO Agreement. These acts concern the adaptation or replacement of certain import and exports rules, including trade-defense rules, as well as the implementation of WTO provisions in the field of the common agricultural policy and the protection of intellectual property rights.[130] Additional acts were adopted subsequently, including Regulation 1515/2001 on the measures that may be taken by the EU following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.[131]

The Supremacy clause of Article VI of the US Constitution provides that all treaties made under the authority of the US are the "supreme Law of the Land" and that the judges in every State are bound thereby. Congressional-executive agreements are equally considered to be – like treaties – the law of the land.[132] The Supremacy clause is primarily concerned with the primacy of federal US law over the State law. But its wording suggests also that treaties are automatically part of the federal legal order. The

39. Exceptionally, an international agreement can become part of the EU legal order if the EU is bound by it although it has not itself concluded the agreement and is not a party to it. This is the case if the EU has functionally replaced the Member States with respect to the obligations of the agreement (cf. Joined Cases 21 to 24/72, International Fruit Company, [1972] ECR 1219, para. 10-18 (concerning the GATT)). An agreement also becomes part of the EU legal order if the Member States have concluded the agreement in the interest of the EU, after having been authorized by the EU to do so (cf. Rass Holdgaard, External Relations Law of the European Community, Legal Reasoning and Legal Discourses (2008), 202-204). - Particular rules apply with respect to the status of the ECHR in the EU legal order. The TEU aims at a consistent system of human rights protection based on the Charter of Fundamental Rights of the EU, which has the same value as the EU treaties, and the ECHR, to which the EU is not yet a contracting party but must accede. The rights guaranteed by the ECHR, together with the constitutional traditions common to the Member States, constitute general principles of EU law (cf. Art. 6 TFEU).

[129] Cf. Part V.D., below.

[130] Cf. the acts published in OJ 1994 L 349.

[131] OJ 2001 L 201, 10.

[132] Cf. Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), at 217.

status of a treaty as domestic law would thus depend only on its status as a valid treaty made in accordance with constitutional requirements and which is effective under international law.[133] However, the recent opinion of the US Supreme Court in *Medellin* is ambiguous on the question whether a non-self-executing treaty[134] is merely judicially unenforceable, or whether it lacks the status of domestic law.[135] It is therefore not entirely certain whether the WTO Agreement, which is not self-executing, is as such integrated into the federal legal order of the US. In any case, sections 121 to 130 URAA contain detailed provisions on the implementation of the WTO agreements. In particular, sections 123(g) and 129 lay down precise procedural requirements for cases where an adverse finding in a WTO dispute settlement report requires changes in agency regulations or practice.

The question as to whether a (non-self-executing or not directly effective) international agreement is integrated into the domestic legal order may have an impact on the justification for the attribution of indirect effect to the agreement. A constitutional instruction to the courts to consider the agreement as part of the domestic legal order relieves the courts of some of the justificatory burden for attributing indirect effect, because the attribution of indirect effect to the agreement could then be conceptualized as one among other accepted methods of reducing conflicts between different sets of norms within the same (domestic) legal order. However, even if the agreement is not considered to be part of the domestic legal order, the attribution of indirect effect may still be justified for other reasons. In the EU, agreement-consistent interpretation is applied also to some agreements by which the EU is not bound and which are not part of

[133] Cf. Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), at 204.
[134] On the question as to when a treaty is self-executing, see Part V.D, below.
[135] See Jose Ernesto Medellin v. Texas, 552 U.S. 491 (2008) and the analysis by Curtis A. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, Am. J. Int'l L., Vol. 102 (2008), p. 540, at 547-550. Bradley concludes (at 550) that a position according to which a non-self-executing treaty has no domestic legal status at all would be difficult to reconcile with the text of the Supremacy clause. Cf. also William M. Carter, Jr., Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation, Md. L. Rev., Vol. 69 (2010), 344; Carlos Manuel Vásquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, Harv. L. Rev., Vol. 122 (2008), 599, at 648-651.

the EU legal order, but by which the EU Member States are bound.[136] In the US, the argument was made that the *Charming Betsy* canon of (treaty-consistent) statutory interpretation should not apply to non-self-executing treaties, because such treaties had "no legal status in American courts".[137] But as Curtis A. Bradley has pointed out, if the purpose of the canon is the avoidance of unintended violations of the obligations of the US under international law, the domestic status of an agreement would not be decisive for deciding whether to attribute indirect effect to it, as long as the agreement was binding on the US under international law.[138] And in the post-*Medellin* case of *Khan v. Holder*, the 9th Circuit, citing *Charming Betsy*, acknowledged that a statute should be interpreted in a way to avoid conflict with a non-self-executing treaty.[139] In any case, it would appear that US courts do not generally deny the application of the canon to the WTO agreements for the sole reason that they consider the agreements as not being part of the law of the land.

C. The rank of international agreements in the domestic legal order

Agreements which are binding on the EU have primacy over the law of the Member States.[140] They rank between the EU's primary law (in particular the EU Treaties and the

[136] Cf. ECJ, C-308/06, Intertanko, [2008] ECR I-4075, para. 52. (where reference is made to a provision in the EU Treaties on the principle of sincere cooperation between the EU institution and the Member States).

[137] Cf. Fund for Animals, Inc. et al. v. Kempthorne, 472 F.3d 873, 880 (D.C. Cir., 2006) (Kavanaugh, J, concurring): "…basic principles of judicial restraint counsel courts to refrain from bringing the non-self-executing treaty into domestic laws through the back door (by using the treaty to resolve questions of American law). In other words, because non-self-executing treaties have no legal status in American courts, there seems to be little justification for a court to put a thumb on the scale in favor of a non-self-executing treaty when interpreting a statute. Doing so would not reflect the appropriate judicial deference to the Legislative and Executive Branches in determining if, when, and how to incorporate treaty obligations into domestic law."

[138] Cf. Curtis A. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, Am. J. Int'l L., Vol. 102 (2008), p. 540, at 549, note 62; cf. also Rebecca Crootof, Judicious Influence, Non-Self-Executing Treaties and the Charming Betsy Canon, Yale L. J., Vol. 120 (2011), 1784; Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, International Law at Home: Enforcing Treaties in U.S. Courts, Yale J. Int'l L., Vol. 37 (2012), 51, at 89.

[139] Khan v. Holder, 584 F.3d 773, 783 (9th Cir. 2009) (concerning the possibility to interpret the Immigration and Nationality Act in the light of the 1967 UN Protocol Relating to the Status of Refugees).

[140] This is so, because such agreements are an integral part of the Union legal order which itself has primacy over the law of the Member States The primacy of the Union legal order over the law of the Member States has recently been confirmed by the ECJ, Opinion 1/09 of 8 March 2011 (n.y.r.), para. 65 (with further references). See also Declaration No. 17 Concerning Primacy, annexed to the Final Act of the

general constitutional principles of EU law) and the EU's secondary law (i.e. acts adopted by the EU's institutions).[141] The primacy of the EU Treaties and the general constitutional principles of EU law over international agreements follows from Article 218(11) TFEU, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EU Treaties, unless the EU Treaties are revised.[142] The primacy of international agreements over acts adopted by the EU institutions has been inferred from Article 216(2) TFEU, according to which the Union's institutions are bound by international agreements concluded by the Union.[143] The Court thus construes this provision not as expressing merely the international law principle *pacta sunt servanda*, but as establishing, as a matter of Union law, a hierarchy between international agreements and secondary Union law.[144] To the extent that the WTO agreements have been concluded by the EU for matters falling within its competence, their provisions are therefore hierarchically placed between EU primary law and EU secondary law.

In the US, it follows from the Supremacy clause that treaties are superior to state law.[145] It is also accepted that they are inferior to the US Constitution.[146] The relationship between self-executing treaties and acts of Congress is not clearly spelled out in the Constitution.[147] But the issue has been settled by the Supreme Court which has declared

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Intergovernmental Conference which adopted the Treaty of Lisbon. Cf. generally, Jean-Claude Piris, The Lisbon Treaty. A Legal and Political Analysis (2010), at 79-82. For mixed agreements concluded by both the EU and the Member States, the primacy of Union law reaches in principle as far as the agreement falls under the Union's competence. – The primacy of EU agreements over the law of the Member States can also be deduced from Article 216(2) TFEU according to which agreements concluded by the Union are binding upon the Member States.

[141] ECJ, Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351, paras. 306-309.

[142] Cf. id., para. 309.

[143] Cf. ECJ, Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351, para. 307; Case C-308/06, Intertanko, [2008] ECR I-4057, para. 42.

[144] It is not evident that the EU institutions, which conclude international agreements by way of an act of secondary EU law (cf. ECJ, Case C-386/08, Brita, [2010] ECR I-1289, para 39), could not by a subsequent act of secondary EU law, such as a regulation or a directive, adopt different rules which would prevail over the earlier act by virtue of the lex posterior principle. The Court's construction of Article 216(2) TFEU can therefore be understood as a choice in favor of the compliance by the Union with its obligations under international treaty law.

[145] Art. VI, § 2, US Constitution.

[146] Cf. Reid v. Covert, 354 U.S. 1, 16-18 (1957).

[147] While the Supremacy clause provides that both treaties and acts of Congress are the law of the land, so is the Constitution. This would imply that the Supremacy clause is not concerned with the ranking of the

that self-executing treaties and acts of Congress are both Federal law and considered to be equal in status and that in case of conflict their relation is governed by the later-in-time rule: "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."[148] Congressional-executive agreements are mostly considered to equally fall under the later-in-time rule if they are self-executing.[149] To the extent that a treaty or agreement, such as the WTO Agreement, is not self-executing, the later-in-time rule does not appear to apply, because such treaty or agreement cannot supersede federal statutory law.

The differences between the EU and the US legal systems with respect to the rank of an international agreement in the domestic legal order can have an impact on the attribution of indirect effect and in particular agreement-consistent interpretation. In the EU, the constitutional justification for the obligation to interpret domestic secondary law in the light of international agreements can be founded not only on the fact that such agreements are part of the EU legal order, but also on the higher rank of the agreements in relation to EU secondary law.[150] In the US, where the provisions of international agreements have, in principle, the same rank as statutory provisions, the justification for agreement-consistent interpretation and other forms of indirect effect could be founded on other considerations, such as the enhancement of the effectiveness and uniform application of international law or the avoidance of unintended violations of the obligations of the US under international law. In the abstract, the primacy of a

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constituencies of the law of the land. Cf. Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), 210 (considering it to be "anomalous" to accord power to the Congress to disregard a treaty obligation, compel its violation and put the US in default, in particular as regards multilateral treaties of general applicability which establish universal standards.)

[148] Whitney v. Robertson, 124 U.S. 190, 194 (1888). Cf. also Restatement of the Law, 3rd, Foreign Relations Law of the US, § 115(1)(a) and (2).

[149] Cf. Michael John Garcia, International Law and Agreements: Their Effect Upon U.S. Law (Congressional Research Service Report for Congress 2010), at 7; Restatement of the Law, 3rd, Foreign Relations Law of the US, § 115 Comment c.

[150] See Case C-61/94, Commission v. Germany, [1996] ECR I-3939, para. 52.

provision of an international treaty over domestic statutory law is therefore not a necessary condition for the attribution of indirect effect.[151]

D. The direct effect of international agreements in the domestic legal order

The constitutional provisions in the EU and in the US do not contain clear guidance as to the conditions under which international agreements are considered to have direct effect or self-executing character in the respective domestic legal orders. These conditions have mainly developed through case-law.

The EU Court of Justice generally starts by addressing the question whether the contracting parties have expressly agreed on the effect of the agreement in the respective legal orders of the contracting parties.[152] Such express agreement is however rare.[153] In its absence, the Court considers, first, whether the Union is bound by the international treaty, second, whether "the nature and the broad logic" of the treaty does not preclude the attribution of direct effect, and, third, whether "the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise,"[154] these steps not being necessarily examined in the same order. The criteria used by the EU courts under these tests have been formulated in different ways and have not always been consistently applied. In particular, the early case-law on

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[151] On the possible indirect effect of an international agreement on higher ranking domestic constitutional provisions, see Part VI.B.1.(a), below.

[152] Cf. ECJ, Case 104/81, Kupferberg, [1982] ECR 3641, para. 17; Joined Cases C-120/06P and C-121/06 P, FIAMM/Fedon, [2008] ECR I-6513, para. 108; Case C-366/10, Air Transport Association of America et al., judgment of 21.12.2011 (n.y.r.), para. 49.

[153] For an agreement excluding direct effect, see the introductory note in the EC's Schedule, which is an integral part of the GATS Agreement and which states that "[t]he rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons" (cited by Piet Eeckhout, the Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, CMLRev., Vol. 34 (1997), 11, at 34). See also Art. 17(3) of the Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation (OJ 1998 L 42/43), which provides: "This agreement is not self-executing. Each Party shall implement the commitments and obligations arising from this Agreement in accordance with its internal procedures."

[154] See ECJ; Case C-366/10, Air Transport Association of America et al., judgment of 21.12.2011 (nyr), paras. 52-54; Joined Cases C-120/06P and C-121/06 P, FIAMM/Fedon, [2008] ECR I-6513, para. 110. See also ECJ, Case C-308/06, Intertanko, [2008] ECR I-4057, para. 45.

direct effect put emphasis on the question whether the agreement conferred rights on individuals which they could invoke before the court.[155] But such invocability of individual rights does no longer appear to be a necessary criterion in order to attribute direct effect to an agreement,[156] although it may be one of the elements in considering whether the nature and broad logic of the agreement permits or excludes direct effect.[157] On the basis of these criteria, the court has ruled that a large number of agreements concluded by the EU, including association agreements and partnership and cooperation agreements, have direct effect in the EU legal order.[158] However, as concerns the WTO agreements the Court of Justice, building on its case law relating to the GATT 1947[159] and considering also the new features of the WTO agreements, has consistently ruled that, given their nature and structure, those agreements have in principle no direct effect.[160] In *Portugal v. Council*, the Court founded this conclusion on considerations relating to the flexible nature of the WTO agreements, the proper balance of powers between the court and the EU's political institutions, and the lack of

[155] Cf. Joined Cases 21/72 to 24/72, International Fruit Company, [1972] ECR 1219, paras. 7 and 8.
[156] Cf. Case C-377/98, Netherlands v. Parliament and Council, [2001] ECR I-7079, at para. 54 (stating that even if an agreement did not create rights which individuals could rely on directly before the courts, that fact did not preclude review by the courts of compliance of the obligations incumbent on the Union as a party to the agreement).
[157] Cf. Case C-308/06, Intertanko, [2008] ECR I-4057, para. 59-64.
[158] Cf. Francis G. Jacobs, Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice, in: Law and Practice of EU External Relations, Salient Features of a Changing Landscape (ed. Alan Dashwood & Marc Maresceau) (2008), 13. But see ECJ, Case C-308/06, Intertanko, [2008] ECR I-4057, paras. 53-65 (no direct effect of UNCLOS), and Case C-366/10, Air Transport Association of America et al., judgment of 21.12.2011 (n.y.r.), para. 73-78 (no direct effect of Art. 2(2) of the Kyoto Protocol).
[159] See, in particular, Joined Cases 21/72 to 24/72, International Fruit Company, [1972] ECR 1219, paras. 19-27; Case C-280/93, Germany v. Council, [1994] ECR I-4973, paras. 105-110.
[160] For a defense of the denial of direct effect to WTO law, see: Armin von Bogdandy, Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law, I.CON, Vol. 6 (2008), 397, 404-412; Mario Mendez, the Legal Effects of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques, Eur. J. Int'l L., Vol. 21(1) (2010), 83, at 95-97; Antonis Antoniades, The European Union and WTO Law: A Nexus of Reactive, Coactive and Proactive Approaches, World Trade Rev., Vol. 6 (2007), 45; Christof Ohler, Die Bindung der Europäischen Union an das WTO-Recht, EuR Beiheft 2/2012, 137, 148-149. See also Luca Barani, Relationship of the EU Legal Order with WTO law: Studying Judicial Activism, GARNET Working Paper No 70/09 (September 2009), http://www.garnet-eu.org/fileadmin/documents/working_papers/7009.pdf (summarizing the political justifications for the denial of direct effect, apparently shared by the Council and the Commission, and comparing this outcome with the "collusion" between judges, lawyers and legal experts of at the beginnings of the integration process to cover the creative interpretations which gave way to the "transformation of Europe").

reciprocity.[161] The Court added that this conclusion corresponded to the statement in the preamble to the Council decision concluding the WTO agreements, according to which these agreements were not susceptible to being directly invoked.[162] In subsequent judgments the Court has confirmed (1) that even if a WTO dispute settlement decision has found that the EU acted inconsistently with its WTO obligations and if the period of time allowed for the implementation of this decision has expired, the underlying provisions of the WTO agreements cannot be attributed direct effect,[163] (2) that the denial of direct effect applies not only to the provisions of the WTO agreements themselves, but also to WTO dispute settlement decisions,[164] and (3) that the direct effect of WTO law is excluded also in actions for damages.[165] The Court acknowledges, however, that it can exceptionally review the legality of a EU measure in the light of WTO rules in cases where the EU measure was intended to implement a particular obligation assumed in the context of the WTO (the so-called *Nakajima* exception) or where the EU measure refers expressly to precise provisions of the WTO agreements

[161] Cf. ECJ, Case C-149/96, Portugal v. Council, [1999] ECR I-8395, paras 35-47. For a discussion of these grounds, see Part III.D., above.

[162] Cf. ECJ, Case C-149/96, Portugal v. Council, [1999] ECR I-8395, para. 48. The last recital of Council Decision 94/800 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 (OJ 1994 L 336/1), states: "Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member States courts". This recital merely expresses the Council's understanding of the nature of the agreement and should as such not be objectionable. But cf. Pierre Pescatore, Monisme, dualism et "effet utile" dans la jurisprudence de la Court de justice de la Communauté européenne, in: Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias (ed. By Ninon Colneric, Jean-Pierre Puissochet, Dámaso Ruiz-Jarabo y Colomer, David V. Edwards) (2003), 329, at 338 (who thinks that the recital is incompatible with the most fundamental rules of legal technique, a challenge to the Community rule of law, and a failure to respect the international good faith obligation, which should lead to the invalidity under Community and international law of this recital). The fact that the Court has not relied more prominently on this recital may be explained by the fact that recitals do not have legal force in themselves. The question remains how the Court would deal with a case in which the dispositive part of a decision on the conclusion of an agreement contained an article which excludes direct effect of the agreement (see, for instance, Art. 8 of the Council Decision on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (OJ 2011 L 127, p. 1), which reads: "The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.")

[163] Cf. ECJ, Case C-377/02, Van Parys, [2005] ECR I-1465, paras. 38-54.

[164] Cf. ECJ, Joined Cases C-120/06 P and C-121/06 P, FIAMM and Fedon, [2008] ECR I-6513, paras. 125-133.

[165] Cf. ECJ, Joined Cases C-120/06 P and C-121/06 P, FIAMM and Fedon, [2008] ECR I-6513, paras. 120-124.

(the so-called *Fediol* exception).[166] The *Nakajima* exception has been applied in a series of anti-dumping and anti-subsidy cases which did, however, not lead to the annulment of provisions of the EU Basic Anti-Dumping or Anti-Subsidies Regulations.[167] Outside the sphere of the Union's trade defense instruments the Nakajima doctrine was applied, for instance, in *Italy v. Council,*[168] where the Court of Justice reviewed and confirmed the legality of an EU Regulation on the administration of certain tariff quotas for imports of rice in the light of Article XXIV(g) of the GATT, as well as in *Stichting Natuur en Milieu v. Commission*[169] and in *Vereniging Milieudefensie v. Commission*,[170] where the General Court reviewed the legality of an EU Regulation in the light of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and declared the Regulation to be illegal. But in some other cases, including in a number of cases concerning the EU's common market organization for bananas, the EU courts took a restrictive view of the scope of the *Nakajima* exception and denied that the contested Union measures had been intended to implement a particular obligation assumed in the context of the WTO.[171] Whereas the *Nakajima* case-law is rightly qualified as an exception to the denial of direct effect,[172] the so called *Fediol* exception is – under the definition employed here –

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[166] Cf. ECJ, Case C-149/96, Portugal v. Council, [1999] ECR I-8395, para. 49.

[167] Cf. Case C-69/90, Nakajima v. Council, [1991] ECR I-2069, para. 31. The interaction between direct and indirect effect is illustrated by Case C-76/00 P, Petrotub and Republica v. Council and Commission, [2003] ECR I-79, where the ECJ accepted the direct effect of WTO rules (under the Nakajima exception), but avoided the annulment of a provision of the Basic Anti-Dumping Regulation by interpreting it (as well as the obligation to state reasons under Article 253 of the former EC Treaty) in the light of the WTO Anti-Dumping Agreement. The specific anti-antidumping measure was then found to infringe the Basic Anti-Dumping Agreement and Article 253 of the EC Treaty and annulled on this ground. Cf. Geert Zonnekeyn, The ECJ's Petrotub Judgment: Towards a Revival of the "Nakajima Doctrine"?, Legal Issues of Economic Integration, Vol. 30(3), 2003, online at: http://ssrn.com/abstract=1293294.

[168] Cf. Case C-352/96, Italy v. Council [1998] ECR I-6949, paras. 21-23. But cf. Pieter Jan Kuijper & Marco Bronckers, WTO Law in the European Court of Justice, CMLRev., Vol. 42 (2005) 1313, at 1325-1326 (wondering whether this judgment could actually be considered as an application of the Nakajima doctrine, given that the Court limited its review to the question whether the parties had reached an agreement under Article XXIV:6 GATT, without reviewing the substance of the agreement).

[169] Case T-338/08, Stichting Natuur en Milieu and PANE v. Commission, judgment of 14.6.2012 (nyr); the judgment is under appeal to the Court of Justice.

[170] Case-T-396/09, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. Commission, judgment of 14.6.2012 (n.y.r.); the judgment is under appeal to the Court of Justice.

[171] Cf. for instance, Case T-19/01, Chiquita Brands International et al. v. Commission, [2005] ECR II-315, paras. 117-127 and 156-170 (with further references).

[172] Although in the Nakajima case the court stated that the applicants were not relying on the direct effect of the provisions of the WTO Anti-Dumping Code but only on the inapplicability of the EU measure in the light of the WTO Anti-Dumping Code (ECJ, Case C-69/90, Nakajima v. Council, [1991] ECR I-2069, para.

not an exception to the denial of direct effect but an example of indirect effect (through the incorporation of WTO law concepts into the domestic act).[173] As concerns, finally, the question of the direct effect of WTO law on the law of the EU Member States, the EU Court of Justice makes a distinction between cases where the subject matter fall principally within the EU competence and cases where this is not the case. To the extent that the Member States remain principally competent, it is for their courts to decide whether or not to attribute direct effect to WTO law.[174] To the extent that Member States' courts deal with a subject matter with falls within the EU's exclusive competence, they are in principle prevented from applying direct effect to WTO law. However, the EU Commission may rely on the direct effect of WTO law in infringement procedures against a Member State on the ground that the Member State has infringed WTO law.[175] In these cases, the infringement constitutes not only an infringement of the Member State's obligations under WTO law, but also an infringement of the Member State's obligations under EU law, to the extent that the WTO law rule concerned has become an integral part of the EU legal order.[176]

The Supremacy clause of the US Constitution[177] has been construed to mean that a treaty concluded by the US is equivalent to an act of the federal legislature, whenever it

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21). Cf. also Piet Eeckhout, The domestic legal status of the WTO Agreement: Interconnecting Legal systems, CMLRev., Vol. 34 (1997), 11, at 45-46; and Jacques H. J. Bourgeois, The European Court of Justice and the WTO: Problems and Challenges, in: The EU, the WTO and the NAFTA. Towards a Common Law of International Trade? (ed. Joseph H. H.Weiler) (2003), 71, at 117 (considering Nakajima as a case relating to indirect effect)).

[173] Cf. Case 70/87, Fediol v. Commission, [1989] ECR 1781; see Part VI.A.3., below.

[174] See ECJ, Case-431/05, Merck Genéricos, [2007] ECR I-7001, paras. 34 and 47, Joined Cases C-300/98 and C-392/98, Dior, [2000] ECR I-11307, para. 48.

[175] Cf., e.g., Commission v. Germany, [1996] ECR I-3989, (concerning an infringement by Germany of the International Dairy Arrangement, approved on behalf of the Community by Council Decision 80/271/EEC of 10.12.1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1)).

[176] At the same time, an action by a Member State against the EU for infringement of WTO law is excluded because of the denial of direct effect of WTO law. This can put Member States in the awkward position that they must apply the WTO-inconsistent measure by virtue of Union law contrary to their obligations as members of the WTO (cf. Giacomo Gattinara, WTO Law in Luxembourg: Inconsistencies and Perspectives, in: Italian Y.B. Int'l L., Vol. 18 (2008), 117, at 131; Mario Mendez, The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?, CMLRev., Vol. 47 (2010), p. 1719 (on the "twin-track approach to treaty enforcement", where the EU courts apply a high level of judicial scrutiny if the Member States' compliance with international law is challenged, but judicial restraint with respect to the review of the EU acts in the light of international law).

[177] Art. VI, § 2, U.S. Constitution.

operates of itself without the need for an act of the legislature in order to execute it. The distinction between self-executing and non-self-executing treaties was introduced by the US Supreme Court in *Foster v. Neilson*.[178] It has given rise to an ongoing debate on the issues whether there is an assumption for the self-executing or non-self-executing character of treaties[179] and how the self-executing or non-self-executing character of treaties can be ascertained. As concerns this second issue, the Restatement of the Law, Third, Foreign Relations Law of the US, states that an international agreement of the US is non-self-executing "(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required."[180] However, the pertinence of the intentions expressed by the Senate or the Congress, or indeed the executive branch, has been contested by some commentators who consider that the intentions of the contracting parties should be decisive.[181] While the US Supreme Court's opinion in *Medellin* is somewhat ambiguous on this point, Curtis A. Bradley has demonstrated that on balance the Court's decision is best interpreted as

[178] Foster v. Neilson, 27 U.S. 2 Pet. 253, 314 (1829); overruled for other reasons by U.S. v. Percheman, 32 U.S. 7 Pet. 51 (1833).

[179] Cf. John T. Parry, Congress, the Supremacy Clause, and the Implementation of Treaties, Fordham Int'l L. J., Vol. 32(4) (2009), 1209, at 1331-1332 (arguing that there is no general presumption for or against self-execution, but presumptions will arise with respect to different kinds of treaties); Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, Harv. L. Rev., Vol. 122 (2008), 599 (arguing for a presumption that treaties are self-executing, which presumption can be overcome through a clear statement that the obligations in a particular treaty are subject to legislative implementation); Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), at 201 (arguing that there is a strong presumption that a treaty provision is self-executing and that a non-self-executing treaty is highly exceptional); John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, Colum. L. Rev., Vol. 99 (1999), 2210 (in favor of a presumption that treaties are non-self-executing, based in particular on separation of powers considerations and the principle that domestic legislation should be made by democratic processes). The recent opinion of the US Supreme Court in Medellin v. Texas, 552 U.S. 491 (2008) can be read as a rejection of a strong assumption of self-execution, but does not necessarily adopt a reverse assumption neither (cf. Curtis A. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, Am. J. Int' L., Vol. 102 (2008), 540, at 546).

[180] Restatement of the Law, Third, Foreign Relations Law of the US, § 111(3) and (4).

[181] Cf. Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. (1996), 201-202 (considering the tendency of the executive branch and the Senate to declare treaties as non-self-executing, although by their terms and their nature they would be self-executing, as "'anti-Constitutional' in spirit and highly problematic as a matter of law").

endorsing an intent-of-the US approach.[182] In addition to the above-mentioned "*Foster*"-type of non-self-execution, where the treaty itself (together with congressional or executive declarations, as appropriate) determines that implementing legislation is necessary for the treaty to have direct effect before US courts, the term non-self-execution is sometimes also used to describe other reasons why a treaty may not be judicially enforceable. These reasons may include the lack of invocability (because the treaty provisions do not create a private right of action) or the lack of justiciability (because the treaty provisions are drafted in a vague manner or as best-effort obligations that require an initial policy determination of a kind for non-judicial discretion).[183] Whatever terminology one applies in this respect, it is clear that the WTO agreements are not self-executing in the US. US courts cannot review the legality of domestic provisions in the light of these agreements, because the URAA has expressly excluded their direct effect. Section 102(a)(1) URAA provides that "[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."[184] Furthermore, Section 102(a)(2) URAA provides that "[n]othing in this Act shall be construed [...] to amend or modify any law of the United States [....] or [...] to limit any authority conferred under any law of the United States [...] unless specifically provided for in this Act." In the case of a conflict between provisions of the WTO agreements and US domestic law, the domestic law will thus take precedence. Section 102(b) URAA, which deals with the relationship of the WTO agreements to State law, provides for Federal-State consultations, states that no State law or its application may be declared invalid as inconsistent with the agreements, except in an action brought by the US, and prescribes the procedures by which the US can bring an action against a

[182] Cf. Medellin v. Texas, 552 U.S. 491 (2008) and the analysis by Curtis A. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, Am. J. Int'l L., Vol. 102 (2008), 540, at 543-545.

[183] Cf. Carlos Manuel Vásquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, Harv. L. Rev., Vol. 122 (2008), 599, at 629-632. Others consider these concepts to be related to, but distinct from, the question of non-self-execution (cf. David Sloss, When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas, Colum. J. Transnat'l L., Vol. 45 (2006), 20, at 26, note 18 (regarding invocability)). And yet others appear to understand the Foster-type non-self-execution concept as equivalent to the concept of invocability in the sense of not creating a private course of action (cf. William M. Carter, Jr., Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation, Md. L. Rev., Vol. 69 (2010), 344, at 353.).

[184] URAA Sec. 102(a)(1). P.L. 103-465, 19 U.S. C. §§ 3501 et seq..

State for the purpose of declaring a State law or application invalid because of its inconsistency with the agreements. Section 102(c) provides that "[n]o person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, 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 such agreement." The provisions of the WTO agreements have therefore in principle no direct effect in the US legal order and cannot be invoked in order to challenge domestic laws, except by the Federal Government. The URAA also approved a Statement of administrative action[185] which is to be regarded as an authoritative expression by the US concerning the interpretation and application of the WTO agreements in judicial proceedings.[186]

Comparing the US approach with the EU approach for determining the direct effect or self-executing character of an international agreement, it can be observed that the weight given in the US to the intent expressed by the domestic political institutions contrasts which the approach of the EU courts which rely first and foremost on the structure and content of the agreement itself and appear not to give a decisive weight to the intentions of the political EU institutions. From this different standpoint, both the EU and the US courts come, however, to similar conclusions on the denial of direct effect or self-execution of the WTO agreements. Exceptions to the denial of direct effect are acknowledged both in the EU and in the US. In the EU, a limited exception is recognized in cases where the domestic act was intended to implement the WTO agreements. Furthermore, the European Commission can bring an action against a Member State for infringement of WTO law. Similarly, the US Federal Government can bring an action against a State for the purpose of having a State measure declared inconsistent with WTO law.

[185] H.R. Rep. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N 4040.
[186] Cf. section 101(a)(2) and 102(d) URAA.

VI. AGREEMENT-CONSISTENT INTERPRETATION AND OTHER FORMS OF SUBSTANTIVE INDIRECT EFFECT

Substantive indirect effect has been defined as covering situations where domestic courts take international agreements into account in order to ascertain the meaning of domestic law provisions.[187]

The attribution of substantive indirect effect to international treaty law may be conditioned on or guided by the domestic constitutional framework.[188] Furthermore, the attribution of indirect effect may be further addressed in or circumscribed by domestic legislation.[189] The UK Human Rights Act 1998, for instance, incorporates provisions of the ECHR and contains an obligation for the courts to interpret UK law, so far as possible, in a way which is compatible therewith.[190] The EU Regulation which recently amended the EU's basic anti-dumping legislation in order to bring it in line with the WTO Appellate Body report in the *Steel Fasteners* Case[191] states in its recitals that its terms "should be read in the light of the Appellate Body's clarifications".[192] By contrast, the Constitution Restoration Act of 2004 and the American Justice for American Citizens Act of 2004, which have not entered into force, would have forbidden the US federal courts to rely on or employ foreign and international law when interpreting or

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[187] Cf. Part II., above.
[188] See Part V., above.
[189] For examples of statutory language according to which certain statutes are to be interpreted with due regard to, or in compliance with international law, see e.g. John Dugard, South Africa, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 448, at 462-463.
[190] Sec. 3 (Interpretation of legislation) provides:
"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2)This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."
[191] European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R.
[192] Recital 4 of Regulation No 765/2012 of the European Parliament and of the Council amending Council Regulation No 1225/2009 on protection against dumped imports from countries not members of the European Community, OJ L 237 of 3.9.2012, p. 1.

applying the Constitution.[193] The legislator could also exclude or limit the indirect effect of certain specific agreements, for instance at the occasion of the approval or implementation of the agreement.

In addition to being influenced by domestic constitutional and legislative parameters, agreement-consistent interpretation and other forms of substantive indirect effect presuppose that the pertinent international law and domestic law share at least a minimum level of common values and common legal syntax.[194] It does not make sense to interpret the domestic laws of a dictatorial State, which bestows unlimited discretionary powers to a charismatic leader, in the light of international human rights treaties. Similarly, it is difficult to refer to the reasoning of international judicial decisions in order to ascertain the meaning of domestic laws which are drafted and domestically interpreted in accordance with certain religious codes. The conditions which Miguel Poiares Maduro mentions as necessary for the internal pluralism within

[193] The Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004), provided that:
"In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law"; The American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004), provided that:
"Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States". Cf. Elizabeth Bulat Turner, The Relevancy of Foreign Law as Persuasive Authority and Congress's Response to its Use: A Preemptive Attack on the Constitution Restoration Act, Ga. St. U. L.Rev., Vol. 23 (2006), 455. More recently, legislative initiatives in a number of US States have sought to prohibit the use of foreign and international law; cf. Aaron Fellmeth, U.S. State Legislation to Limit Use of International and Foreign Law, Am. J. Int'l L., Vol. 106 (2011), 107.

[194] Cf. also Anne-Marie Slaughter, A Typology of Transjudicial Communications, U. Rich. L. Rev., Vol. 29 (1994), 99, at 125-129 (considering a common judicial identity and methodology as one of the conditions for any judicial communication across legal orders); N'Gunu N. Tiny, Judicial Accommodation: NAFTA, the EU and the WTO, Jean Monnet Working Paper 04/2005, at 9-10, referring to the indirect effect of WTO law on the NAFTA system: "There is, then, an attempt to create a normative grammar or language shared by both trading systems. This operative common language is a constitutive element of the process of judicial accommodation in that there can be no dialogue or communicative process without a common and operative normative language. Transjudicial communication – that is, dialogue among supranational courts and court-like institutions – presuppose or, to be more precise, requires a certain type of reasoning based on some internally consistent system of values. Both NAFTA and the WTO share internal substantive values – language and concepts – that constitute the pillars of international trade law, namely principles such as national treatment, most-favoured nation treatment and transparency."

the EU legal order[195] could to a certain extent also be transposed to the relationship between domestic courts and international courts in general. These conditions concern the "systemic compatibility" (identity of the essential values of the different legal orders),[196] "institutional awareness" (of the fact that certain values may be better achieved by deference to courts of another legal order),[197] and the "sharing of the same hermeneutic framework" (relating to the interpretation of the rules of the other legal system).[198] It is true that these conditions cannot be fully achieved with respect to external pluralism, where, as Maduro has pointed out, "there is no order of orders supported by the commitment to a new political community" and where the domestic court's legitimacy cannot therefore be founded on such broader community in the same way as it is founded within the political and constitutional framework of their own community.[199] But agreement-consistent interpretation is also possible if these conditions are not entirely achieved. The fact that some members of the WTO do not yet have fully functioning market economies or do not systematically apply the interpretive rules of the Vienna Convention on the Law of Treaties does not prevent them from interpreting domestic law in conformity with WTO law. The above-mentioned requirements should therefore be understood not as formally conditioning, but as facilitating judicial accommodation. The more systemic compatibility, institutional awareness and similarity of the hermeneutic framework exist, the more the domestic courts may be willing and able to accommodate international treaty law by giving substantive indirect effect to it.

The following parts will (A.) explore the different forms of substantive indirect effect and will then (B.) examine in more detail the pertinent parameters relating to the

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[195] Cf. Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, Eur. J. Legal Stud. Vol. 1 No 2 (2007), at 17 et seq..
[196] Id., at 17.
[197] Id., at 18.
[198] Id., at 18.
[199] Cf. Miguel Poiares Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in: Ruling the World? Constitutionalism, International Law, and Global Governance (ed. by Jeffery L. Dunoff & Joel P. Trachtman), 2009, p. 356, at 375 (concluding that "in the context of external pluralism, courts must take account of their legal order's external commitments and openness and of the need to negotiate their effectiveness with other jurisdictions. In this respect, what we can demand from them is that they interpret the law, as far as possible, in a manner that minimizes potential jurisdictional conflicts").

international treaty law to be taken account of in the interpretation of domestic rules and (C.) the parameters relating to the domestic rules to be interpreted in the light of international treaty law, before (D.) briefly addressing the transparency of the attribution of substantive indirect effect.

A. Different forms of substantive indirect effect

Domestic courts use different methods in order to take account of international treaty law in ascertaining the meaning of a domestic act. These methods differ in particular with regard to the level of authority which the courts attach to the international agreement. Between the two extremes of attributing direct effect or denying any effect there is a wide range of intermediate possibilities for the courts to take the international agreement or international case-law into account.[200] The courts may be bound to interpret the domestic act so that the domestic act is consistent or at least not in conflict with the agreement, the courts may use such interpretation as a guide, they may refer to the agreement in order to confirm an interpretation of the domestic act reached by other methods of interpretation, they may refer to international treaty law and jurisprudence as persuasive authority, or they may apply international law rules referred to or incorporated in domestic acts. The courts are not always explicit as to the methods they use, and the dividing lines between the methods, which are not mutually exclusive but overlapping, are difficult to establish.

1. Agreement-consistent interpretation

[200] Cf. Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, Va. J. Int'l L., Vol. 43 (2003), 675 (discussing seven models in a "continuum of deference" to international tribunal decisions, reaching from the "full faith and credit model", under which international tribunal decisions are recognized and enforced without review" to the "no deference model" under which international tribunal decisions are irrelevant, the "Charming Betsy model" under which international tribunal decisions can be taken into consideration in statutory interpretation being placed in the middle of the continuum); John H. Jackson, Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals, in: Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs (eds. Anthony Arnull, Piet Eeckhout & Takis Tridimas) (2008), 361, at 366; Sungjoon Cho, The Nature of Remedies in International Trade Law, U. Pitt. L. Rev., Vol. 65 (2004), 763, at 802-808 (discussing different forms of what he calls “indirect recognition" of WTO dispute settlement reports by domestic courts, including the referral to the main holdings of such reports in employing basic legal principles of domestic law, such as the “equal protection” or “due process” clauses).

In many legal orders, domestic courts interpret domestic laws in the light of international agreements. A recent comparative analysis has found functional similarities among the legal systems studied in the principle that courts interpret domestic law to advance conformity with their State's obligations under international law.[201] Courts in many jurisdictions interpret domestic law in order to avoid conflict or promote consistency with international law in general and international agreements in particular, it being understood that international law generally yields to clear and unambiguous domestic legislation. The rationale for this principle may differ from one jurisdiction to another. Commonly, the courts base agreement-consistent interpretation on a presumed intent of the legislature,[202] in particular where the domestic legislation to be interpreted was adopted after the conclusion of the agreement. Some courts, such as the Supreme Court of Canada and the courts of the Netherlands, apply agreement-consistent interpretation also to statutes that predate the treaty obligations in question. This has been explained as a matter of judicial policy, as opposed to an interpretive rule grounded in the actual or presumed intent of the lawmaker.[203] In some jurisdictions, agreement-consistent interpretation is justified by the hierarchically higher rank of the agreement in relation to domestic legislation.[204] It has been noted that, in practice, the

[201] Cf. also on the following observations, Michael P. Van Alstine, The Role of Domestic Courts in Treaty Enforcement – Summary and Conclusions, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) 2009, p. 555, at 593-595. The comparison included Australia, Canada, Germany, India, Israel, the Netherlands, Poland, the Russian Federation, South Africa, the United Kingdom, and the United States. As regards China, cf. Zou Keyuan, International Law in the Chinese Domestic Context, Val. U. L. Rev., Vol. 44 (2010), 935, at 941-942 (referring to the Decision on Certain Issues of Handling Administrative Cases of International Trade, issued by the Chinese Supreme Court in August 2002, and which provides that "when there are two reasonable interpretations in a particular applicable rule from a national law or administrative regulation in the handling of administrative cases of international trade; if one of the interpretation is in conformity with international treaties China concluded or acceded to, then the interpretation in conformity should be applied, except for those on which China has made reservations." As regards Switzerland, cf. Andreas R. Ziegler, The Application of WTO Law in Switzerland, in: Claudio Dordi (ed.), The absence of direct effect of WTO in the EC and other countries (2010), 390, 393, 407-409 (with examples of WTO-consistent interpretation of national law by Swiss courts, which also refer in this context to WTO dispute settlement reports); as regards a number of other jurisdictions, cf. André Nollkaemper, National Courts and the International Rule of Law (2011), 139 et seq., in particular at 148-149.

[202] Cf. the examples given by André Nollkaemper, National Courts and the International Rule of Law (2011), 154-155.

[203] Cf. Gib van Ert, Canada, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss), 2009, 166, at 189; André Nollkaemper, Netherlands, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss), 2009, 326, at 349 et seq..

[204] This is the case for the EU (see below). For other examples cf. André Nollkaemper, National Courts and the International Rule of Law (2011), 151-153.

principle of consistent interpretation, which can be used even when constitutional law otherwise seems to bar application of international law, has proven to be the most important doctrine used by courts to grant effect to international law.[205]

Before analyzing the development, rationale and scope of agreement-consistent interpretation in the EU and the US, the doctrine of agreement-consistent interpretation should be put into the context of similar doctrines of consistent interpretation.[206]

First, in supranational or federal systems, the question of consistent interpretation arises with respect to the relation between supranational or federal law and the law of the Member States or the federated States.

In the supranational legal system of the EU, the Court of Justice has established an obligation of Member States' courts to interpret their respective domestic laws in conformity with Union law.[207] According to the Court, this obligation is inherent in the system of the EU Treaties, since it permits national courts to ensure the full effectiveness of Union law when they determine disputes before them.[208] The obligation is understood as one of the aspects of the specific legal order of the EU, alongside the primacy of the EU legal order over the legal orders of the Member States, the direct effect of EU law in the Member States, and the Member States' liability for

[205] Gerrit Betlem and André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 114 (2003), 569, at 571.
[206] According to Ralph G. Steinhardt (The Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, 1125), each of these "canons of accommodation", which presume the consistency of legal norms, whether within one legal system or among different legal systems "reflects the legitimacy of pluralism in the law-giving institutions in our society and attempts to coordinate their interaction in a pragmatic way…".
[207] For a recent summary of the scope oft this principle see the judgment of the Grand Chamber of the ECJ of 5.9.2012 (n.y.r.), Case C-42/11, Lopes Da Silva Jorge, paras. 53-57. See, generally, Robert Kovar, L'interprétation des droits nationaux en conformité avec le droit européenne, in Mélanges en l'honneur de Jean Charpentier, 2009, 381; Gerrit Betlem, The Doctrine of Consistent Interpretation; Managing Legal Uncertainty, in: Direct Effect, Rethinking a Classic of EC Legal Doctrine (ed. Jolande M. Prinssen & Annette Schrauwen) (2002), 79, and in a slightly different version in: Oxford J. Legal Stud., Vol. 22 (2002), 397; Gerrit Betlem, The principle of indirect effect of Community Law, Eur. Rev. Private L., Vol. 3 (1995), 1; Paul Craig and Gráinne de Búrca, EU Law - Text, Cases, and Materials, 5th ed. 2011, 200-207.
[208] Cf. Case 14/83, von Colson, [1984] ECR 1891, para. 26; Case C-212/04, Adeneler, [2006] ECR I-6057, para. 109.

infringements of EU law.[209] The source of the principle of EU-law-consistent interpretation is thus Union law itself, contrary the source of the principle of consistent interpretation in the light of (other) international law by domestic legal courts, which stems from the domestic legal system or domestic court practice.[210] As concerns the scope and limits of the principle of EU-law-consistent interpretation, the Court of Justice has ruled that this principle applies to the entirety of the provisions of domestic law, whether adopted before or after the relevant provision of EU law; that it requires the courts of the Member States to take the whole body of domestic law into consideration and to apply the interpretative methods recognized by domestic law, with a view to ensuring that the EU law provision in question is fully effective and achieves an outcome consistent with the objective pursued by it; and that it is limited by the general principles of law, such as legal certainty and non-retroactivity, and cannot serve as a basis for the interpretation of national law *contra legem*.[211] The principle of consistent interpretation in conformity with Union law applies also to agreements concluded by the Union. As the provisions of such agreements are integrated into the Union legal order, Member States must interpret their domestic law in the light thereof. This may lead to consistent interpretation at two levels. Member States' courts interpret domestic Member States' law in conformity with secondary Union law which itself is interpreted in conformity with agreements concluded by the Union.[212] Gerrit Betlem and André Nollkaemper have concluded on the basis of a comparative study that the

[209] Cf. Jean-Paul Jacqué, l'obligation d'interpétation conforme en droit communautaire, R.A.E – L.E.A 2007-2008, p. 715. Cf. also Luigi Daniele, Vint-cinq ans d'interprétation conforme: un principe encore en quête de définition? R.A.E. – L.E.A. 2007-2008, 705 at 707-708 (founding EU-consistent interpretation on the principle of sincere cooperation, the obligation and the presumed intention of Member States to implement directives, and the principle of the full effectiveness of EU law).

[210] But see the contrary thesis of those who consider that public international law establishes an international law obligation of consistent interpretation (Part IV, above).

[211] Cf., e.g., Case C-212/04, Adeneler, [2006] ECR I-6057, at paras. 108 to 111, and the prior case-law cited there.

[212] Cf. Case C-335/05, Řízení Letového Provozu, [2007] ECR-4307. In this case, the EU Court of Justice was seized with a preliminary question which had its origin in a proceeding before a German court, which had to decide on the compatibility of a provision of the German Law of 1999 on turnover tax with a provision of the Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes. The German court requested the Court of Justice to rule on the interpretation of this Directive in the light of the most-favoured-nation clause contained in Article II(1) of the GATS. The Court ruled that it was not necessary in this case to interpret the Directive in the light of GATS, because the directive did in any case not prevent the Member States from complying with their obligations under the GATS.

application of EU-law-consistent interpretation, on the one hand, and general agreement-consistent interpretation, on the other, by the courts of the EU Member States is different but similar, and that the differences are one of degree rather than of principle.[213]

In the federal system of the US, by contrast, interpretative principles to reconcile possible inconsistencies between federal law and State law appear to be less clear-cut. It follows from the US Supreme Court's decision in *Parker v. Brown* that federal laws should not be applied to state action in the absence of explicit statements that Congress intended to restrain state actions.[214] More specifically, "federal legislation should not be interpreted to override state regulations concerning matters traditionally within the purview of state government unless no other construction of the federal enactment is possible".[215] It has been suggested that this case law could be understood to reflect a method of "harmonious interpretation", according to which federal and state laws should be interpreted so that they are compatible and that both can be given effect.[216]

As concerns, second, the interpretation of different rules within one and the same domestic legal system, legislation is often interpreted in a way that a conflict with constitutional provisions is avoided. In the EU, secondary Union law is interpreted in such a way as to avoid conflict with primary Union law. The EU Court of Justice has held that "where the wording of secondary [Union] law is open to more than one interpretation preference should be given to the interpretation which renders the

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[213] Gerrit Betlem and André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 14 (2003), 569, at 588; see also Ton Heukels, Von richtlinienkonformer zur völkerrechtskonformen Auslegung im EG-Recht: Internationale Dimensionen einer normhierarchiegerechten Interpretationsmaxime, Zeitschrift für europarechtliche Studien, Vol 3 (1999), 313, 332 (on the similarities between the principles of EU-law-consistent interpretation and interpretation consistent with international law); Rass Holgaard, External Relations Law of the European Communities, Legal Reasoning and Legal Discourses (2008), at 312-313 (noting the similarities of the two concepts, but pointing out that their different rationales and functions may lead to the consequence that the duty of EU-law-consistent interpretation may require more from the Member States' courts than the duty of agreement-consistent interpretation);

[214] 317 U.S. 341, at 350-351 (1943). See also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992): "... assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."

[215] State ex rel. ATSF Railways Co. v. O'Malley, 888 S.W.2d 760, 763 (Mo Ct. App. 1994).

[216] Cf. John E. Tyler III, FELA § 60 v. Ethical Rule 4.2: More Than Meets the Eye in a Conflict between State's Rights and Federal Law, U. Missouri-Kansas City L. Rev., Vol. 69 (2001), 791, at 803.

provision consistent with the [EU] Treaty rather than the interpretation which leads to its being incompatible with the Treaty."[217] Similarly, provisions of secondary Union law are interpreted in conformity with general principles having primary law status, such as the principle of equal treatment.[218] In the US, pursuant to the doctrine of "constitutional avoidance", the courts should construe statutes to avoid constitutional difficulties. The Supreme Court held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[219] In performing this obligation, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[220] In *SKF USA v. United States Customs and Border Protection*,[221] the Federal Circuit applied this doctrine in a case in which the so-called Byrd Amendment,[222] which provided for the distribution of antidumping duties collected by the US to eligible affected domestic producers, was claimed to violate the First Amendment to the US Constitution. The Court construed the Statute in view of its purpose and in order to avoid giving it a meaning which would render it inconsistent with the constitutional protection of expression under the First Amendment. In this case, the Court found this interpretation to be consistent with the statutory language. But it pointed out that "courts are obligated to adopt a saving construction even when the interpretation finds little support in the literal language of the statute".[223] Consistent

[217] Case C-135/93, Spain v. Commission, [1995] ECR I-1651, para. 37; Case 218/82, Commission v. Council [1983] ECR 4063, para. 15.
[218] Cf. Joined Cases C-402/07 and C-432/07, Sturgeon, [2009] ECR I-10923, para. 48. See, more generally, Koen Lenaerts and José A. Gutiérrez-Fons, The Constitutional Allocation of Powers and General Principles of Law, CMLRev., Vol. 47 (2010), p. 1629, at 1636-1638.
[219] See U.S. ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909). Cf. also the concurring opinion in Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936), where Justice Brandeis reviewed the rules developed by the Court with a view to avoiding taking a position on challenges to the constitutionality of acts of Congress (also known as "the Brandeis rules").
[220] DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).
[221] SKF USA v. United States Customs and Border Protection 556 F.3d 1337 (2009).
[222] The Continued Dumping and Subsidy Offset Act of 2000, which had also been declared by the WTO Appellate Body to be inconsistent with the WTO agreements, see U.S. - Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R).
[223] 556 F.3d 1337, at 1349 et seq. (2009), citing United States v. X-Citement Video, Inc., 513 U.S. 64, at 78 (1994); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, at 507 (1979); and International Association of Machinists v. Street, 367 U.S. 740, at 749, 768-69.

interpretation can also play a role below the constitutional level, for instance when administrative regulations are construed in conformity with legislative rules.[224]

It is interesting to note that both the EU Court of Justice and the US Supreme Court have referred to such other forms of consistent interpretation when dealing with agreement-consistent interpretation. The Supreme Court has made the connection between treaty-consistent interpretation and constitutional avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress [...]. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming* Betsy and has for so long been applied by this Court that it is beyond debate."[225] Although this statement has been criticized as a mistaken citation of *Charming Betsy*,[226] it could also be understood to point to the conceptual similarities of the constitutional avoidance canon and the *Charming Betsy* canon according to which statutes should be interpreted so as not to violate international law.[227] In this sense, the EU Court of Justice stated the following in the *International Dairy Agreement* case: "When the wording of secondary [Union] legislation is open to more than one interpretation,

[224] Cf. for the EU, Case C-90/92, Dr Tretter v Hauptzollamt Stuttgart-Ost [1993] ECR I-3569, paragraph 11 (interpretation of an implementing regulation in the light of the basic regulation). While the above examples concern the interpretation of lower ranking domestic rules with higher ranking domestic rules, harmonious interpretation in a larger sense can also be relevant for the interpretation of different domestic rules having the same rank, in order to avoid conflict between these rules and give both sets of rules a useful effect. An example is the judgment of the ECJ of 13.10.2011 (n.y.r) in Joined Cases C-431/09 and C-432/09, Airfield, para. 44 (where the Court stated that "in view of the requirements deriving from the unity and coherence of the legal order of the European Union, the terms used by that directive [Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission] must be interpreted in the light of the rules and principles established by other directives relating to intellectual property.")

[225] DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575(1988) (internal citation omitted).

[226] Cf., e.g., Curtis A. Bradley, Chevron Deference and Foreign Affairs, Va. L. Rev., Vol. 86 (2000), 649, at 687.

[227] Cf. also Roger P. Alford, Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy, Ohio St. L. Rev., Vol. 67 (2006), 1339, 1356 (according to whom the reading of Charming Betsy by the DeBartolo court is consistent with the general purpose of statutory presumptions). An alternative explanation refers to the possibility to "construct a post hoc rational for Charming Betsy as a prophylactic protection of the separation of powers in foreign affairs" (cf. Ralph G. Steinhardt, the Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, 1131; similarly also Curtis Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law, Geo. L. J., Vol. 86 (1997), p. 479, at 527).

preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation [...]. Similarly, the primacy of international agreements concluded by the [Union] over provisions of secondary [Union] legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements."[228] Pieter-Jan Kuijper has conceptualized the influences between the different doctrines of consistent interpretation as "cross-fertilization": the Court of Justice appears to have first borrowed from the principle of agreement-consistent interpretation of international treaty law, which was already applied by several Member States, in order to apply it to EU-law consistent interpretation of Member States' laws, before actually applying this principle to consistent interpretation of EU law in the light of international treaty law.[229] Kuijper concludes that these "notions which originally developed in international law gain as it were an extra twist because they have undergone the influence of the [Union] system, before being applied to the domain of international law. This notion is now applied with added stringency in the international/national law relationship, even by some Member States courts, because they have passed through [Union] law."[230]

The interpretation of EU law by the EU Court of Justice in conformity with international law is an established practice.[231] It concerned initially customary international law in cases where the exercise of anti-trust jurisdiction of the European Commission was limited in conformity with customary international law limits to extra-territorial jurisdiction.[232] As concerns the interpretation of EU law in the light of international

[228] ECJ, Case C-61/94, Commission v. Germany, [1996] ECR I-3989, para. 52 (internal citations omitted).
[229] Pieter-Jan Kuijper, Epilogue: Symbiosis?, in: Direct Effect – Rethinking a Classic of EC Legal Doctrine (eds. Jolande M. Prinssen & Annette Schrauwen) (2002), p. 253, at 267.
[230] Ibid..
[231] See generally, Frederico Casolari, Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 395; Rass Holgaard, External Relations Law of the European Community, Legal Reasoning and Legal Discourses (2008), 306.
[232] ECJ, Case 48/69, Imperial Chemical Industries v. Commission, [1972] ECR 619 (Conclusions of the Advocate General, at 701 et seq.). Cf. Pieter-Jan Kuijper, Epiloque; Symbiosis?, in: Direct Effect – Rethinking a Classic of EC Legal Doctrine (eds. Jolande M. Prinssen & Annette Schrauwen) (2002), p. 253, at 259. On interpretation in the light of customary international law, see also Case C-286/90, Poulsen, [1992] ECR I-6019, para 9. On the development of the case-law see Jan Wouters & Dries Van Eeckhouttee, Giving Effect to Customary International Laws through European Community Law, in:

treaty law, the Court of Justice originally formulated a lenient standard, according to which account "should" be taken of international agreements which may assist in the interpretation of Union legislation.[233] Later, the Court ruled that account "must" be taken, in the application by a Member State of a Union regulation, of the nature of an international agreement concluded by the Union, and it interpreted the Member State's obligations under the regulation in the light of the agreement.[234] The Court based this conclusion on the argument that the agreement was binding on the EU institutions and the Members States and ought to be implemented in good faith.[235] In its judgment in *Poulsen*, the Court stated that an EU regulation ought to be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.[236] In that case, the Court referred to customary international law enshrined in the rules of the a number of international conventions, including the UN Convention on the Law of the Sea. The clearest pronouncement of the principle of agreement consistent interpretation was made in the *International Dairy Agreement* case mentioned above, where the Court ruled that secondary Union law must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Union.[237] Subsequently, the Court of Justice and the Court of First Instance (now: General Court) have applied the principle of agreement-consistent interpretation of EU law in a considerable number of cases.[238]

Direct Effect – Rethinking a Classic of EC Legal Doctrine (eds. Jolande M. Prinssen & Annette Schrauwen) (2002), p. 183, at 186-190. Generally on the status of customary international law in the legal order of the EU, cf. Astrid Epiney, Die Bindung der Europäischen Union an das allgemeine Völkerrecht, EuR Beihelft 2/2012, 25; Theodore Konstadinides, When in Europe: Customary International Law and EU Competence in the Sphere of External Action, German L. J., Vol. 13 (2012), 1177.

[233] ECJ, Case 92/71, Interfood, [1972] ECJ 231, para. 6. Cf. also Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, 356 (according to whom this case demonstrates that there is a very thin line between international norms as an aid to interpretation and the principle of consistent interpretation).

[234] Cf. Case C-142/88, Hoesch, [1989] ECR 3413, paras. 30-33.

[235] Id., para. 30.

[236] Cf. Case C-286/90, Poulsen, [1992] ECR I-6019, para 9.

[237] ECJ, Case C-61/94, [1996] ECR I-3989, para. 52.

[238] Cf., e.g., Case C-341/95, Bettati, [1998] ECR I-4355, para. 20 (concerning the EU's commitments under the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol of 1987 on Substances that Deplete the Ozone Layer, and the second amendment thereto). The Court ruled that EU law must be interpreted consistent with international law, " in particular where [the EU law] provisions are intended specifically to give effect to an international agreement concluded by the [Union]"; Case C-286/02, Bellio, [2004] ECR I-3465, para. 33 (concerning the Agreement on the European Economic

These include cases on the interpretation of EU law and the law of the Member States in the light of the WTO Agreement.[239] The EU courts have in this context taken account not only of the WTO agreements, in particular the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the TRIPS Agreement, but have also referred to WTO secondary law and dispute settlement rulings. The concrete manner in which the EU courts have taken account of WTO law and rulings will be analyzed in more detail in subsequent sections of this paper.

The EU Court of Justice conceives agreement-consistent interpretation as a constitutional obligation resulting from the fact that international agreements concluded by the Union are integrated into the Union legal order and have primacy over secondary Union law.[240] The Court thus appears not so much concerned with separation of powers considerations, but with the establishment of coherence within the EU legal order.[241] In other instances, the Court has founded the interpretation in the light of international law on the presumption that the Union wants to honor its international commitments. [242] Some commentators have justified agreement-consistent interpretation more generally by reference to the principle of respect for international law[243] or by the argument that the courts should avoid placing the country in a position

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Area); Case C-135/10, SCF v Del Corso, judgment of 15.3.2012 (n.y.r.), paras. 51 and 56 (concerning the WTO TRIPS Agreement, the WIPO Performances and Phonograms Treaty and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations); Joined Cases C-57/09 and C-101/09, Germany v. B and D, [2010] ECR I-10979, para. 78 (concerning the 1951 Geneva Convention and other relevant treaties).; Case C-5/11, Donner, judgment of 21.6.12 (n.y.r), paras. 23 and 24 (concerning the WIPO Copyright Treaty).

[239] See, generally, Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 270-303; Gaetano Iorio Fiorelli, WTO as a parameter for the EC Legislation through the "consistent interpretation" doctrine, in: Claudio Dordi (ed.), The absence of direct effect of WTO in the EC and in other countries (2010), 121.

[240] Cf. ECJ, Case C-61/94, [1996] ECR I-3989, para. 52; Case C-228/06, Mehmet Soysal and Ibrahim Savatli, [2009] ECR I-1031, para. 59.

[241] It has been argued that agreement-consistent interpretation by the EU courts of WTO law is not founded on the attempt to establish consistency between the EU and the WTO legal order, but rather to establish consistency within the EU legal order, given that WTO law is an integral part thereof, cf. N'Gunu N. Tiny, Judicial Accommodation: NAFTA, the EU and the WTO, Jean Monnet Working Paper 04/05 (2005), at 39.

[242] Cf. ECJ, Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351, Opinion of the Advocate General, para. 22 (according to whom the interpretation and application of Union law "is guided by the presumption that the [Union] wants to honour its international commitments.")

[243] Cf. Frederico Casolari, Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 395, at 405-407.

of international responsibility and spar the political branches the embarrassment of an international conflict.[244] Finally, in cases where the Union is not bound by an international agreement, but the Member States are, the Court justifies agreement consistent interpretation by reference to the customary principle of good faith, which forms part of general international law, and to Article 4(3) TEU, which establishes the principle of sincere cooperation between the Union and the Member States.[245]

In the US, the interpretive canon according to which domestic law should not be interpreted in violation of international commitments of the US has a longstanding tradition which goes back to the *Talbot* case.[246] The leading case is *Charming Betsy*, decided by the Supreme Court in 1804. In this case, the Court stated that "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."[247] Over the years, the Supreme Court and other Federal and State courts have applied this canon in a considerable number of cases.[248] In *Trans World Airlines*, the Supreme Court referred to "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."[249] The *Charming Betsy* canon has been used by the US courts with respect not only to international treaties, but also to customary international law. In particular, the Charming Betsy canon is referred to in a number of decisions which interpret US statutes as not having extraterritorial or international effects.[250] The *Charming Betsy* canon of interpretation is enshrined in the Restatement (Third) of the Foreign Relations

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[244] Cf. Pieter Jan Kuijper & Marco Bronckers, WTO Law in the European Court of Justice, CMLRev., Vol. 42 (2005) 1313, at 1316.
[245] Cf. ECJ, Case C-308/06, Intertanko, [2008] ECR I-4057, para. 52.
[246] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, at 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations").
[247] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, at 118 (1804).
[248] Cf. e.g., Weinberger v. Rossi, 456 U.S. 25, 32 (1982). Among the more recent cases, cf., In re: Korean Airlines co. Ltd., Antitrust Litigation, 642 F.3d. 685 (9th Cir. 2011), where the Court referred to Charming Betsy in order to confirm its interpretation of the Air Deregulation Act as preventing State regulation of both domestic and foreign air carriers, because the contrary interpretation according to which only domestic air carriers were covered by the Act would be contrary to US treaty obligations mandating non-discrimination.
[249] Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).
[250] E.g., Mc Culloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

law of the US in the following terms: “Where fairly possible, a United States Statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”[251]

The US courts have applied the *Charming Betsy* canon in a number of cases concerning the interpretation of domestic statutory law in the light of the WTO agreements.[252] In particular, the Federal Circuit in *Timken*[253] rejected the argument, that Article 102(c) of the URAA barred the courts from giving indirect effect to the WTO agreements through the *Charming Betsy* canon.[254] In the court's view, this provision barred only the direct effect of WTO law as a rule of decision. In *Federal Mogul* the Federal Circuit expressly held that "GATT agreements are international obligations, and absent express Congressional language to the contrary, statues should not be interpreted to conflict with international obligations." [255] In *Hyundai*, the court acknowledged that the domestic statute should be interpreted in a manner not to conflict with the US's obligations under the WTO Anti-dumping Agreement. It then interpreted the pertinent provision of the Agreement itself (and contrary to the interpretation given by a WTO panel) to conclude that the US Department of Commerce's interpretation was consistent with the Agreement (although the WTO panel had come to the contrary conclusion).[256] But in other cases, it has been considered that the statutory scheme established by the URAA exclude the application of the *Charming Betsy* cannon.[257]

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[251] Restatement (Third), Foreign Relations, § 114.
[252] E.g., The Pillsbury Co. v. U.S., 368 F.Supp.2d 1319 (Ct. Int'l Trade 2005) (interpreting a provision of the Harmonized Customs Schedule of the U.S. consistent with the U.S. Schedule XX annexed to the Marrakesh Protocol to the GATT 1994).
[253] Timken Co. v. U.S., 354 F.3d 1334 , 1341 (Fed. Cir. 2004).
[254] Section 102(c)(1)(B) URAA provides that no person other than the U.S. "may challenge, in any action [...], any action or inaction by any department, agency, or other instrumentality of the United States [...] on the ground that such action or inaction is inconsistent with such agreement." Furthermore, the URAA Statement of Administrative Action (1994 U.S.C.C.A.N. 4040, 4055) states that Section 102(c) "also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Uruguay Round agreements."
[255] Federal Mogul Corporation v. U.S., 63 F.3d 1572, 1581 (Fed. Cir. 1995).
[256] Hyundai Electronics Co. v. United States 53 F. Supp.2d 1334 (Ct. Int'l Trade 1999)
[257] Cf., e.g., U.S. v. Baron Lombardo, 639 F.Supp. 2d 1271, 1289 (D. Utah, 2007): "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." Cf. also Mary Jane Alves, Reflections on the

In any case, the U.S. courts appear to understand the *Charming Betsy* canon not as "an inviolable rule of general application",[258] but as a "guide"[259], which can enter into competition with other canons of construction.[260] Most importantly, a conflict may arise between the *Charming Betsy* canon and the *Chevron* doctrine of deference to administrative agency actions, in situations where a construction of a statute consistent with international treaty law differs from a contrary construction of the statute by administrative agencies applying the statute.[261] This line of cases - as well as contrary decisions by some bilateral NAFTA panels - will be discussed in more detail below.[262]

The rationale for the *Charming Betsy* canon, as well as its proper scope and limits, have been and remain controversial. One line of reasoning goes beyond the avoidance of specific statutory violations of international law to expand the canon to render statutory law consistent with international law in general. Ralph G. Steinhardt, in particular, has founded this understanding of the canon, on two rationales: "the value of compliance with the law of nations, which only exceptionally bases state liability on inadvertence; and the judiciary's respect for coordinate branches of government, to avoid the embarrassment of declaring a statute in violation of international law in the absence of a clear statement of repudiation by Congress." [263] Another line of reasoning links the canon to the assumed intent of the legislator not to infringe international law or to

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Current State of Play: Have U.S. Courts Finally Decided To Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases, Tul. J. Int'l Comp. L., Vol. 17 (2009), 299, 328-333 (arguing that Section 102(c) URAA could be understood as a jurisdictional clause barring the courts from reviewing the consistency of domestic acts with the WTO agreements); John J. Barceló III, The Paradox of Excluding WTO Direct Effect in U.S. Law, Tul. Eur. & Civ. L. F., Vol. 21 (2006), 147, 161-162 (arguing, with reference to Section 102(c) URAA and the URAA Statement of Administrative Action, that Congress appears to have decided to override Charming Betsy); Felicia Davenport, Note: The Uruguay Round Agreements Act Supremacy Clause; Congressional Preclusion of the Charming Betsy Standard with Respect to WTO Agreements, Fed. Cir. B. J., Vol. 15 (2005/2006), 279.

[258] See e.g. Serra v Lappin, 600 Fed.3d. 1191, 1198 (9th Cir. 2010).

[259] Allegheny Ludlum Corp. v. U.S., 367 F.3d 1339, 1348 (Fed.Cir. 2004).

[260] This is, however, not uncontested. See, e.g., Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, Va. J. Int'l L., Vol. 43 (2003), 675, 734-735, 745 (for a mandatory application of the Charming Betsy canon, based on its constitutional underpinnings).

[261] Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).

[262] Cf. Part VI.C.1.(b), below.

[263] Ralph G. Steinhardt, the Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, 1115, 1127-1134.

adopt domestic statutes inconsistent with international law.[264] To the extent that this assumption is not conceived as a normative proposition (the legislator should not intend to infringe international law), but as a factual proposition (the legislator did in fact not intend to infringe international law), its empirical foundation is, however, difficult to establish. It is therefore not surprising that the standards applied by the courts in this context in order to establish congressional intent are widely divergent.[265] Curtis A. Bradley has proposed a different justification and scope of the *Charming Betsy* canon, which he labels the separation of powers compromise. According to Bradley, this conception of the canon ensures the proper constitutional relationship among the three branches of government: "First, it is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States. Second, the canon reduces the number of occasions in which the courts, in their interpretation of federal enactments, place the United States in violation of international law contrary to the wishes of the political branches. Third, by requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President."[266] More recent contributions have suggested to further limit the application of the Charming

[264] Cf. Restatement (Third), Foreign Relations Law, § 155 cmt.a. "[i]t is generally assumed that congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations." Cf. also Chew Heong v. United States, 112 U.S. 536, 540 (1884): "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."

[265] Cf. Michael Franck, The Future of Judicial Internationalism: Charming Betsy, Medellin v. Dretke, and the Consular Rights Dispute, B. U. L. Rev., Vol. 86 (2006), 515 (categorizing the case law on the basis of the strictness of the requirement to demonstrate congressional intent and arguing in favor of "the internationalist standard", according to which courts should require an express statement of intent by Congress to overrule prior treaty law).

[266] Curtis Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law, Geo. L. J., Vol. 86 (1997), p. 479, at 525-526; cf. also Roger P. Alford, Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy, Ohio St. L. Rev., Vol. 67 (2006), 1339 (who understands the Charming Betsy canon as rule of separation of powers).

Betsy canon[267] or to distinguish in the application of the canon between statutes which incorporate Treaty provisions and statutes which do not.[268] Some recent case-law also appears to limit the application of the *Charming Betsy* canon.[269] In *Al-Bihani v. Obama*, the Court of Appeals for the District of Columbia denied *en banc* review of a panel decision which had taken a restrictive view on the role of international law principles in interpreting the 2001 Authorization for Use of Military Force.[270] In two separate concurring statements, Judges Brown and Kavanaugh analyzed the scope of the *Charming Betsy* canon and concluded, inter alia, that the canon can be applied only after traditional interpretive methods have lead to a finding of ambiguity, but not as an "affirmative indicator" of statutory meaning,[271] that "there is no legitimate basis for courts to alter their interpretation of federal statutes to make those statutes conform with non-self-executing treaties" and that the "canon may not be invoked against the Executive to conform statutes to non-self-executing treaties".[272]

Comparing the approach of the EU courts and the US courts, it can be noted that the obligation of agreement-consistent interpretation of EU law in the light of international law, and in particular of the WTO agreements, goes further than the *Charming Betsy* canon of statutory interpretation in the US. While the EU courts consider themselves bound by the obligation of agreement-consistent interpretation, the US courts use the *Charming Betsy* canon as a guide, which can furthermore compete with other canons or principles, requiring notably deference to administrative agencies' determinations.

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[267] Note, The Charming Betsy Canon, Separation of Powers and Customary International Law, Harv. L. Rev., Vol. 121 (2008), 1215, at 1232 (although this note mainly criticizes the use of the Charming Betsy canon with respect to customary international law, it also suggests in a more general manner that "[c]ourts should only exercise the canon after a review of all interpretive sources shows that an interpretation not in violation of international law is at least reasonable").

[268] John F. Coyle, Incorporative Statutes and the Borrowed Treaty Rule, Va. J. Int'l L., Vol. 50(3), 655. This is discussed in more detail in Part VI.A.3., below.

[269] See e.g. Serra v Lappin, 600 Fed.3d. 1191, 1198-99 (9th Cir. 2010), stating that the canon is applicable only "where conformity with the law of nations is relevant to considerations of international comity" and that therefore it was doubtful whether "the courts should ever invoke the Charming Betsy canon in favor of United States citizens".

[270] Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010).

[271] Id. at 7 (Brown, concurring).

[272] Id., at 32 and 36 respectively (Kavanaugh, concurring); but see also Part V.B, above, for opposing views.

2. International agreements and international jurisprudence as persuasive authority, inspiration, or confirmation

Independently of whether domestic courts are bound by an obligation of agreement-consistent interpretation or guided by an interpretive canon of statutory construction to avoid conflict with international agreements, they sometimes take account of international law in a less straight-forward manner. To this effect, they have at their disposal a "toolbox of facultative techniques" to attribute substantive indirect effect to instruments of international law.[273] These techniques include the use of international law as persuasive authority or as a source of inspiration and the reference to international law in order to confirm an interpretation of domestic law reached by other interpretive means.

Persuasive authority is understood as a source which is not binding on the court, but which the court may take into consideration in motivating its decision, if it finds it convincing.[274] Among the arguments for the use of foreign legal sources are not only the "intellectual persuasion", but also the creation of "informal coherence" among different legal orders, in particular when the legal orders contain the same or overlapping rules.[275] Similar to the stare decisis doctrine, which assures "uniformity across time", and the citation of courts from other circuits (within the same federal legal system) as persuasive authority, which assures "uniformity across space",[276] using international law as persuasive authority in the interpretation of domestic law may facilitate uniformity across different - not necessarily hierarchically aligned - levels of international and domestic legal orders. Depending on the circumstances of the case and the inter-linkage between the legal orders involved, this interpretive technique may assist in promoting

[273] Cf. Rass Holgaard, External Relations Law of the European Community (2008), 335.
[274] The persuasiveness of the international rule or jurisprudence can be found not only in the content of the international rule itself, but may also be reinforced by its adaptation to a particular domestic context by the domestic court; international law may thus be used in a similar way as foreign law which the domestic court, although it is not bound by it, may consider persuasive and adapt to the circumstances of a particular domestic case; see Karen Knop, Here and There: International Law in Domestic Courts, Int'l L. Pol., Vol. 32 (2000), 501, at 525 (describing the “blurring of international law into comparative law”).
[275] Cf. Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, Eur. J. L. Stud., Vol. 1, No. 2 (2007), p. 19.
[276] Cf. Chad Flanders, Toward a Theory of Persuasive Authority, Okla. L. Rev., Vol. 62 (2009), 55, 83.

stability, predictability and fairness.[277] A reference to a rule of international law as persuasive authority or as a source of inspiration is easier to justify in cases where the State of the court's jurisdiction is bound by this rule, although such reference is not excluded in other cases. In any case, if a court refers to international jurisprudence as persuasive authority or as a source of inspiration, it should attempt to be exhaustive in the sense that it should not only cite jurisprudence which supports its views, but should also engage with jurisprudence which comes to different results. Otherwise the use of international jurisprudence risks being arbitrary.[278]

US courts and EU courts have at times used international agreements or jurisprudence as persuasive authority, as a source of inspiration, or as an additional argument in order to confirm a conclusion reached by other interpretive means.

In the US, in particular, the reference to international law in this way has given rise to a fierce debate, which is illustrated by divergent views of Justices within the Supreme Court[279] in cases such as *Roper v. Simmons,*[280] where the Supreme Court referred to a UN Convention and to international covenants and stated, with respect to the interpretation of the Eighth Amendment prohibition of cruel and unusual punishment, that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions", or *Lawrence v Texas,*[281] where the Supreme Court referred to the European Convention of Human Rights and a decision of the ECtHR. In other cases, US courts have referred to

[277] Id., p. 85, 86.
[278] Cf. also André Nollkaemper, National Courts and the International Rule of Law (2011), 157 (arguing that there is an element of purposeful interpretation if the domestic courts pick and choose references to international law as persuasive authority in order to support a preferred outcome without also citing divergent international law sources).
[279] Cf. Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in: Ruling the World? Constitutionalism, International Law, and Global Governance (eds. Jeffrey L. Dunoff & Joel P. Trachtman) (2009), 258, at 306-310; Elizabeth Bulat Turner, The Relevancy of Foreign Law as Persuasive Authority and Congress's Response to its Use: A Preemptive Attack on the Constitution Restoration Act, Ga. St. U. L. Rev., Vol. 23 (2006), 455.
[280] Roper v. Simmons, 543 U.S. 551, 578 (2005).
[281] Lawrence v. Texas, 539 U.S. 558, 573 (2003).

international judicial decisions in order to ascertain the content of a rule of international treaty or customary law.[282]

As concerns the weight given by US courts to the WTO agreements, the border line between their use as persuasive authority and the application of the *Charming Betsy* canon is difficult to draw, notably because the *Charming Betsy* canon itself is understood by the courts as a guide which can be trumped by other considerations. Without mentioning *Charming Betsy*, US courts have occasionally referred to the WTO agreements, notably when the executive branch had used provisions of these agreements as "guidance" or for justifying the reasonableness of their action.[283] Regarding more specifically WTO dispute settlement rulings, US courts have occasionally recognized that such rulings may be used to inform the court or as persuasive authority. In *Hyundai*, the US Court of International Trade stated that, while WTO panel reports are not binding on the court, "this does not imply that a panel report serves no purpose in litigation before the court. To the contrary, a panel's reasoning, if sound, may be used to inform the court's decision".[284] But in other cases the courts have refused to engage with pertinent WTO Dispute Settlement rulings and have instead confirmed an interpretation of domestic rules which was incompatible with the interpretation of the corresponding WTO rules as interpreted by WTO panels or the Appellate Body.[285]

The reference to international sources as persuasive or informative appears to be less contested in the EU. In the *SENA* case, for instance, the EU Court of Justice was seized

[282] In Paquete Habana, the US Supreme Court has, in the absence of a treaty governing the matter, referred to prize tribunals, state practice and commentators in order to establish a rule of general international law, 175 U.S. 677 (1900). The references in this case to foreign prize tribunals would, however, not appear to justify the consideration of this case as a model for the use of international jurisprudence as persuasive authority (contra: Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, Va. J. Int'l L., Vol. 43 (2003), 675, 746 et seq.).
[283] Cf. e.g., MacLean-Fogg Co. v. U.S., Ct. Int'l Trade, Slip op. 12-47 of 4.4.2012, Cons. Court No. 11-00209, p. 12-13 (noting that Commerce had looked to Art. 9.4. of the WTO Antidumping Agreement for guidance when promulgating a rule and concluding that Commerce's explanation of promulgating and relying on that rule was reasonable, in particular because the WTO Subsidies and Countervailing Measures Agreement was silent on the issue).
[284] Hyundai Electronics Co. v. U.S., 53 Fed Supp 2d 1334, 1342-43 (Ct. Int'l Trade 1999), where the Court, however, did not follow the WTO panel's reasoning in the case at bar.
[285] Cf. e.g. Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

with a request by a Portuguese court for a preliminary ruling concerning the interpretation of a EU directive, which was inspired by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. [286] Although neither the Union nor Portugal were bound by the Convention - and the obligation of agreement-consistent interpretation did therefore not apply - the Court of Justice found a confirmation of its interpretation of the EU directive in the wording of the Convention. Similarly, although the obligation of consistent interpretation does not, in my view, apply to WTO dispute settlement rulings (as distinguished from the WTO agreements themselves), the EU courts sometimes refer to such ruling in the interpretation of domestic EU law.[287] Where the obligation of agreement-consistent interpretation does apply, as is the case for the WTO agreements itself, WTO law is often not a decisive factor in the interpretation of the relevant provisions of EU law and the EU courts then refer to the provisions of the pertinent WTO agreement merely as an afterthought in order to confirm the conclusions reached by other interpretative means. In the *Nokia* case, for instance, the EU Court of Justice was seized with a reference for a preliminary ruling in which the national (Member State) court had asked a question on the interpretation of the Regulation establishing the Community trademark. The Court of Justice first interpreted the pertinent provision of the Regulation by using traditional methods of statutory interpretation, including the wording in different language versions of the Regulation. In a separate paragraph, introduced by the word “moreover”, the Court then referred to Articles 44(1) and 61 of the WTO TRIPS Agreement, in order to confirm and reinforce its interpretation.“[288]

Such subsidiary or complementary references to international legal sources may in some instances be criticized as merely "decorative" or "ornamentary"; but even where the interpretive result could be achieved without referring to international law, these

[286] Cf. Case C-245/00, SENA and NOS, [2003] ECR I-1251, para. 35.
[287] Cf. Part VI.B.1.(c), below.
[288] Case C-316/05, Nokia, [2006] ECR I-12083, paras. 37 to 40. Cf. also Case C-428/08, Monsanto, [2010] ECR I-6765, paras 70-77 (where the Court, after having given its interpretation of a EU Directive, demonstrates that this interpretation is not affected by Articles 27 and 30 of the WTO TRIPS Agreement); Case C-70/94, Werner, [1995] ECR I-3189, paras. 22-23; and Case C-83/94, Leifer, [1995] ECR, I-3231, paras. 23-24 (where the Court found support for its interpretation of the concept of "quantitative restrictions" used in the EU Export Regulation, in Art. XI of the GATT, which it considered to be "relevant for the purposes of interpreting a [Union] instrument governing international trade").

references may demonstrate the wider context of the legal issues and strengthen the authority of the domestic court's judgment.[289]

3. Interpretation in the light of rules or concepts of international agreements referred to or incorporated into domestic acts

There are many domestic acts which refer in one way or another to international law or international law concepts.

Some Constitutions incorporate references to specific international agreements or to international law more generally. In the EU Treaties, for instance, reference is made to the ECHR[290] and to the Geneva Convention and the Protocol of 1967 relating to the status of refugees.[291]

At the legislative level, a statute may mention in its preamble or in an operative provision that it is intended to implement international law or an international agreement. It may state that the provisions it enacts are to be applied subject to international law, subject to the State's obligations under international law, or subject to the State's obligations under specifically mentioned international agreements. A statute may direct the government or statutory bodies to act on certain matters in a manner consistent with international law, the international obligations of the State, or specifically mentioned international agreements. It may refer to international law obligations or specific agreement obligations of third states, or use concepts of international law such as "national treatment" or "most-favored nation treatment" without otherwise referring to international law.[292]

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[289] Cf. Marek Safjan, The Universalisation of Legal Interpretation, in: Interpretation of Law in the Global World: From Particularism to a Universal Approach in: Joanna Jemielniak & Przemysław Mikłaszewicz (eds.), 2010, p. 107, 115-122 (distinguishing between the genuine, complementary and decorative influences of interpretation applying universal standards).

[290] Art. 6(3) TEU.

[291] Art. 78(1) TFEU and Art. 18 of the Charter of Fundamental Rights of the EU. Furthermore, Article 208(2) TFEU, relating to development cooperation, provides that the "Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations."

[292] Cf. the examples of Australian statutes discussed by Donald R. Rothwell, Australia, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 120, 158-161; David Kretzmer, Israel, in: The Role of Domestic Courts in Treaty Enforcement (see above), 273, 283 f.:

Whereas agreement-consistent interpretation of domestic legislation is founded on a variety of different reasons, including the assumed intention of the domestic legislator, the justification for taking account of provisions or concepts incorporated or referred to in domestic legislation is more straight forward: by including references to international law into the text of the domestic legislation, the domestic legislator has instructed the courts to take the provisions or concepts referred to or incorporated into the domestic act into account.[293] The interpretive weight of the provisions or concepts referred to depends on the general constitutional parameters of the domestic order concerned, on the questions whether the agreements referred to are binding on the State of the domestic court, whether they have direct effect, and whether they would also in the absence of the legislative reference fall under a duty or canon of agreement-consistent interpretation, as well as on the precise wording, context, and purpose of the legislation at issue. It is therefore difficult to capture these cases by one overarching conceptual scheme.

In the US, John F. Coyle has recently made the case that "whereas statutes that incorporate written international law should be read to conform to that law (in

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express reference in legislation stating that an agreement will apply under certain circumstances; statutory reference, e.g. providing for jurisdiction to try persons for crimes if the State has such obligation under international agreements; statutory authorization to administrative bodies to promulgate regulations which incorporate international law. See also the list of non-direct effects mentioned by John H. Jackson, Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals, in: Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs (eds. Anthony Arnull, Piet Eeckhout & Takis Tridimas) (2008), 361, at 366: "statutes incorporate treaty language by reference, saying such treaty language 'shall apply in this case'", "Statutes require government officials to do their task or duty 'consistent with Treaty X or its article Y'", legislative history of a statute may indicate that the statute purports to implement certain treaty obligations, treaty language may articulate policies which influence the interpretation of domestic law, etc..

[293] This can be illustrated., e.g., by U.S. v. Ali Mohamed Ali (Criminal No. 11-0106, D.C. 13.7.2012): The case concerned the indictment of the Defendant for certain acts of piracy and hostage taking outside the territory of the US. The Court applied the Charming Betsy canon in a nuanced manner. With respect to the prosecution for aiding and abetting piracy, the Court ruled that to extend the prosecution to acts not committed on the high seas was in violation of international law and contradicted the pertinent US statute, which expressly authorized the government to prosecute the crime of piracy only to the extent allowed by "the law of the nations", therefore incorporating the jurisdictional rules under international law into the domestic statute. With respect to the prosecution for conspiracy in piracy, which was also considered to be in violation of international law, the statute was ambiguous and the Court did not find an intent of Congress to violate international law. Citing Charming Betsy, the Court therefore dismissed this count for failure to state an offense. By contrast, with respect to the prosecution for hostage taking and conspiracy, which was also considered to be in violation of international law, the Court found that Congress had unambiguously asserted jurisdiction and its intent to violate international law was clear. As Charming Betsy could therefore not apply, the Court upheld this count of the prosecution.

accordance with the borrowed treaty rule), ambiguous non-incorporative statutes should be read merely so as not to conflict with it (in accordance with the *Charming Betsy* canon, properly understood)."[294] He defines an incorporative statute as "any statute that incorporates language or concepts derived from an international treaty": this would include a statute that incorporates a treaty by reference, whose text copies or closely tracks the text of a treaty, or which is otherwise clearly intended to give effect to a particular treaty provision. [295] According to Coyle, a congressional-executive agreement, which has been approved by a majority of both houses of Congress, generally falls within the definition of incorporative statutes, although – as in the case of the WTO agreement - the domestic legal effects may be circumscribed by the terms of the implementing legislation itself.[296] The proposition that a stricter standard is to be applied for the interpretation of incorporate statutes is founded on functional, structural and historic arguments. Among the functional arguments, Coyle mentions that the objective of an incorporative statute is to incorporate into the domestic law of the US provisions which are consistent with an internationally agreed standard laid down in a Treaty. If the implementing rules adopted by the contracting parties diverged, the treaty's objective of creating uniform international standards would be undermined. The political branches enact legislation incorporating the terms of a treaty in order to conform the domestic law to international law, and the courts should give effect to this intention of the political branches.[297] Structurally, Coyle argues, inter alia, that a treaty which has been incorporated by reference into a statute is very similar to a self-executing treaty that received the consent of two-thirds of the Senate.[298] From a historic perspective, Coyle refers to a long tradition in American law of looking to the origins of a rule borrowed from another jurisdiction in order to determine its content and

[294] John F. Coyle, Incorporative Statutes and the Borrowed Treaty Rule, Va. J. Int'l L., Vol. 50:3 (2010), 655, at 664.
[295] Id., p. 664-665.
[296] Id., p. 668. The terminology may be misleading, as the distinction between the agreement and the statute, which is to be interpreted in its light, is blurred. It may be more accurate to state that the act which approves and implements a congressional-executive agreement is an incorporate statute (in its implementing part), rather than the agreement itself. In this perspective, the implementing provisions of the act should be interpreted in the light of the agreement in accordance with the "borrowed treaty rule".
[297] Id., p. 671 et seq.
[298] Id., p. 676.

meaning.[299] Coyle argues that the courts should use the borrowed treaty rule to interpret incorporative statutes to conform to the borrowed treaty, independently of whether the statute clearly conflicts with the treaty and of whether the language of the statute is on its face ambiguous.[300] The presumption that Congress aimed at conforming the statute to the treaty should be rebutted only if there is compelling evidence that Congress intended a different result, for instance by enacting the implementing statute in a way that extends or limits the scope of the treaty domestically.[301]

As regards the effects of international agreements in the EU legal order, the EU Court of Justice also recognizes the particularities of domestic acts which refer to or implement international agreements. Although the Court generally denies direct effect to the WTO agreement, it purports to make an exception for domestic acts which expressly refer to precise provisions of an international agreement or which were intended to implement a particular obligation assumed in the context of the WTO.[302]

The first hypothesis goes back to the *Fediol* case,[303] which should however not be understood as establishing an exception to the denial of direct effect, but as an example of the attribution of indirect effect through incorporation. The case concerned the interpretation of a predecessor regulation to the EU Trade Barrier Regulation.[304] Under that regulation, the European Commission, following a complaint of the Union industry or Union enterprises or a referral by a Member State, initiates procedures which may result – after prior consultation or dispute settlement procedures in accordance with international rules - in the adoption of trade restrictions in response to illicit commercial practices of a third country. In examining complaints by the Union industry or Union enterprises, the Commission must therefore determine, inter alia, whether the third-country practice complained of constitutes an illicit commercial practice in the above sense. And if the Commission's determination is contested before the EU Court of

[299] Id., p. 676-677.
[300] Id., p. 680.
[301] Id., p. 691.
[302] Cf. Case C-149/96, Portugal v. Council, [1999] ECR I-8395, para. 49. Cf. Part V.D., above.
[303] Case 70/87, Fediol v. Commission, [1989] ECR 1781.
[304] Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ L 252 of 20.9.1984, p. 1, in the meanwhile replaced by Regulation 3286/94, OJ L 349 of 31.12.1994, p. 71, as amended.

Justice, the court may need to review the Commission's determination. This was the case in *Fediol*, where the EU Seed Crushers' and Oil Processors' Federation (FEDIOL) had requested the Commission to initiate procedures in view of certain practices of Argentina regarding the export of soya cake to the Union, which FEDIOL considered to be contrary to Articles III, XI and XXIII of the GATT and which would therefore constitute illicit trade practices, defined at that time by the Regulation as any international trade practices which were incompatible with international law or with the generally accepted rules. The Commission rejected the request, inter alia on the ground that these practices did not run counter to any GATT rules. FEDIOL brought an action before the Court of Justice seeking the annulment of the Commission's decision to reject its request to initiate procedures. The Court, first, recalled its case-law according to which GATT provisions were not capable of conferring on citizens of the Union rights which they could invoke before the courts. But it went on to state that it could not be inferred from that case-law that citizens may not rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under the Regulation constituted an illicit commercial practice within the meaning of that regulation. According to the Court, the provisions of the GATT, to which the recitals of the regulation referred, formed part of the rules of international law mentioned in the regulation. And it was therefore for the Court to interpret and apply the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices by third countries should be considered incompatible with those rules and whether they constituted illicit trade practices within the meaning of the regulation. The Court construed the pertinent provisions of the GATT in view of their wording and purpose and found that none of the contested practices infringed those provisions. The Court therefore dismissed FEDIOL's application.[305]

The Court of Justice's understanding of the *Fediol* situation as an exception to the denial of direct effect of WTO law may have been motivated by the fact that in this case, the applicants invoked provisions of the GATT in a case for annulment of a Commission

[305] Implicitly confirmed in Case T-317/02 DICF, [2004] ECR II-4325; cf. Antonis Antoniadis, The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches, Word Trade Rev., Vol. 6 (2007), p. 45, at 73.

measure and that the Court found itself entitled to review the Commission measure having regard to certain GATT rules. However, the applicant's plea, and the Court's review, was not about the question whether the Council regulation or the Commission measure – the denial to initiate procedures under the regulation - infringed the pertinent GATT rules. There is, of course, no rule in the GATT which could have established an obligation for the Commission to initiate proceedings against illicit trade practices of a third country. Rather, the applicant's plea, and the Court's review, was about the Commission's application of domestic legislation. The domestic legislation contained certain conditions for the initiation of procedures which were formulated with reference to the rules of international law and, in the light of its recitals, in particular to the GATT. The Court therefore did nothing more than to interpret and apply the terms "rules of international law" and "illicit trade practices" in the context in which the Regulation itself had used these terms in order to establish one of the conditions for the initiation of procedures. The *Fediol* judgment is therefore better understood as illustrating a particular form of indirect effect of WTO law.[306]

The second hypothesis under which the Court accepts an exception to the denial of direct effect of WTO law, where the EU measure under review was intended to implement a particular obligation assumed in the context of the WTO, goes back to the *Nakajima* case.[307] Independently of the possible direct effect of WTO rules under this hypothesis, the Court also refers to this hypothesis in the context of indirect effect in the form of agreement-consistent interpretation. In *Petrotub*, the Court of Justice referred to the principle that Union legislation must, so far as possible, be interpreted in a manner that is consistent with international law, "in particular where its provisions are intended specifically to give effect to an international agreement concluded by the [Union]".[308] It is, however, not clear what the part of the sentence starting with "in particular" is meant to achieve. It could be understood to mean that in these situations

[306] Cf. also 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: The European Union and World Trade Law After the GATT Uruguay Round (ed. Nicholas Emiliou & David O'Keeffe), 1996, 313, 326.
[307] Case C-69/90, Nakajima v. Council, [1991] ECR I-2069, see Part V.D., above.
[308] Case C-76/00P, Petrotub and Republica v. Council and Commission, [2003] ECR I-79, para. 57; cf. also Case C-341/95, Bettati, [1998] ECR I-4355, para. 20.

the standard applied under the doctrine of agreement-consistent interpretation is particularly strict (similar to Coyle's suggested "borrowed treaty rule" standard). But there are no indications in the case-law that the Court would apply a different standard for attributing indirect effect, in cases where the Union act concerned was intended to implement an obligation under WTO law, as compared to other cases. The part of the phrase starting with "in particular" would therefore appear to be illustrative only and thus redundant.

Whereas *Fediol* and *Petrotub* are examples of indirect effect (though incorporation, referral or intended implementation) of an agreement which is integrated into the EU legal order, another line of cases relates to the attribution of indirect effect to agreements which do not bind the Union itself, but some or all of its Member States. This can be illustrated by the cases relating to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Although the Union was not a party to this Convention, it implemented its provisions through the adoption of internal regulations. In a preliminary ruling on the interpretation of these regulations the Court stated in the *Triton* case that, "since Regulation No 3626/82 and Regulation No 338/97 both apply, as stated in the second paragraph of Article 1 in each case, in compliance with the objectives, principles and (in the case of Regulation No 338/97) provisions of CITES, the Court cannot disregard those elements, in so far as they have to be taken into account in order to interpret the provisions of the regulations."[309]

A slightly different situation gave rise to the *Intertanko*[310] case relating, inter alia, to the Convention for the Prevention of Pollution from Ships (MARPOL), by which the Union was not bound under international law. The case concern the review of EU Directive 2005/35 on ship source pollution and on the introduction of penalties for infringements, [311] which had the objective of incorporating certain provisions of MARPOL into EU law. Article 3(1) of the Directive provided that the Directive "shall apply, in accordance with international law" to certain discharges of polluting

[309] ECJ, Case C-510/99, Tridon, [2001] ECR I-7777, para 25; cf. also Case C-154/02, Nilsson, [2003] ECR I-12733, para 39.
[310] C-308/06, Intertanko, [2008] ECR I-4075.
[311] OJ 2005 L 255/11.

substances. Article 9 of the Directive provided inter alia that "Member States shall apply the provisions of this Directive [...] in accordance with applicable international law [...]". All Member States were bound by MARPOL. The Court stated that it was incumbent upon the Court to interpret the provisions of the Directive taking account of MARPOL.[312] The Court did not refer in this context to the provisions incorporating international law, but to the customary principle of good faith and the EU principle of loyal cooperation.[313] It would thus appear that the Court considered the indirect effect which it was prepared to attribute to MARPOL to be justified by the fact that all Member States where bound by MARPOL and that the principle of sincere cooperation between the EU institutions and the Member States required the Court to interpret the directive in taking account of MARPOL, rather than by reason of the incorporating provisions of the directive.[314] The case shows that the border line between the principle of agreement-consistent interpretation and the interpretation in the light of provisions of an agreement incorporated or referred to in the domestic act is not always easy to establish and that these two forms of indirect effect may overlap in certain cases.

B. The rules of international agreements which are taken into account in the interpretation of domestic rules

In order to interpret a domestic act in the light of an international agreement or international case-law or to take account of international law in other ways, the domestic court must determine the international treaty rule which is applicable to the case, as well as its status and meaning. Because of the increasing fragmentation of the international legal order, the sometimes overlapping jurisdiction of international judicial bodies (judgments of which may give divergent guidance on the interpretation of he applicable rule), and the inherent uncertainties in the interpretation of international law, this is not always an easy task. If a party wishes to rely on the indirect

[312] C-308/06, Intertanko, [2008] ECR I-4075, para. 52.
[313] At the time, Art. 10 TEC, now: Art. 4(3) TEU.
[314] According to Rosas, the requirement to take account of MARPOL does not amount to a requirement of agreement-consistent interpretation, but he concedes that these two forms of indirect effect may be difficult to distinguish in concrete situations; see Allan Rosas, The Status in EU Law of International Agreements concluded by EU Member States, Fordham Int'l L. J., Vol. 34 (2011), 1304, 1341; cf. also Piet Eeckhout, Case C-308/06, CMLRev., Vol. 46 (2009), 2041, 2052-2053.

effect of international agreements, it would be well advised to prepare the ground for the domestic court, in particular if the litigation takes place before a court the experience of which in international law is limited.

As concerns the determination of the applicable treaty rule, it is not excluded that more than one agreement must be taken into account. If a EU court was to interpret - in the light of international law - the provisions of the EU regulations establishing the import regime for bananas, an interpretation consistent with the EU's obligations under the WTO agreements would possibly be incomplete if no account was taken of the EU's obligations under the Cotonou Agreement or other specific agreements concluded by the EU with third countries.[315]

Particular conditions relating to the status of an international agreement may apply to specific forms of substantive indirect effect. For example, to the extent that agreement-consistent interpretation is based on the rationale of the legislator's presumed intention not to violate the State's treaty obligations or on the agreement's integration into the domestic legal order, the recourse to such interpretation may be conditioned on the international agreement at stake being valid and having formally been ratified and entered into force in the State concerned. Therefore, indirect effect is sometimes attributed – as a legal obligation - only after the agreement has become effective and binding on the State concerned, unless there are other considerations justifying this obligation.[316] In any case, once the State concerned has signed an agreement, it is under an obligation to refrain from acts which would defeat the object and purpose of the agreement, even if it has not yet entered into force.[317] Therefore, from the date of signature and all the more from the date of the deposit of the instrument of acceptance

[315] In Case C-377/02, Van Parys, [2005] ECR I-1499, para. 50, the EU Court of Justice, in the context of examining the direct effect of the WTO agreements, noted that in adopting its import regime for bananas, the EU sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States.

[316] In the EU, for instance, the application of the obligation of agreement-consistent interpretation in the light of agreements by which the EU is not bound could be founded on the EU's internal obligation of sincere cooperation with the Member States which are bound by the agreements and/or on the incorporation of provisions of the agreements into EU legislation (cf. ECJ, Case C-308/06, Intertanko, [2008] ECR I-4075, para. 52, Case C-510/99, Tridon, [2001] ECR I-7777, para 25; see also Part VI.A.3., above).

[317] Cf. Art. 18 of the 1969 Vienna Convention on the Law of Treaties.

by a State, this State's courts should abstain from interpreting domestic law in a way which could seriously compromise the realization of the objectives of the agreement.[318] Such pre-effects of international agreements could become relevant in the context of consistent interpretation of WTO law,[319] notably when the WTO agreements are modified and the modification has not yet entered into force,[320] or where the accession of a new member of the WTO has been approved by the WTO but has not yet become effective.

Even where the above conditions for the attribution of indirect effect in the form of an obligatory agreement-consistent interpretation of domestic law are not fulfilled, there may be some scope for the attribution of indirect effect by domestic courts. To the extent that an international agreement, which is not binding on the State within which the domestic court acts, codifies general rules of customary international law, the court may take the substance of the agreement into account, to the extent that the domestic legal order attributes effect to customary international law.[321] Furthermore, an international agreement, and in particular judicial or quasi-judicial decisions of a body established by the agreement, may be taken into account as persuasive authority by domestic courts of States which are not bound by the agreement, to the extent that they illuminate specific issues in a convincing way.[322] Finally, indirect effect can also be attributed to agreements to the extent that they are referred to or incorporated into domestic

[318] For a parallel in the ECJ case-law on the indirect pre-effects of EU directives before the required date of implementation by the Member States, see paras. 23-27 of the Opinion of the Advocate General in Case C-156/91, Hansa Fleisch Ernst Mundt, [1992] ECR I-5567. For a parallel in the case-law on direct pre-effect of the EEA Agreement, based on the international law principle of good faith, as reflected in the EU law principle of the protection of legitimate expectations, cf. Case T- 115/94, Opel Austria, [1997] ECR II-39, paras. 89-95.

[319] But see Court of First Instance, Case T-48/06, Acme Industry v. Council, [1999] ECR II-3089, paras. 31-32, where the Court ruled that the terms of the WTO Anti-dumping Agreement, which contains clear transitional provisions concerning the proceedings to which it applies, where irrelevant for the assessment of a Union act which was excluded by these provisions from the temporal scope of application of the WTO Anti-dumping Agreement.

[320] E.g. the Protocol amending the TRIPS Agreement, which was adopted by Decision of the WTO General Council of 6.12.2005 (WT/L/641), but has not yet entered into force.

[321] Cf. Case C-308/06, Intertanko, [2008] ECR I-4057, para. 51 (and the cases cited there): "[…] as is clear from settled case-law, the powers of the [Union] must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law."

[322] Cf. Part VI.A.2.

legislation, even if the State concerned is not bound by the agreement under international law.[323]

1. The source of the international rules

As concerns the source of the international rule in the light of which domestic law is interpreted, a distinction can be made according to whether the rule is laid down in a provision which is part of the agreement itself (primary treaty law), in an act adopted by a body established under the agreement (secondary treaty law), or in a decision of a judicial body established under the agreement. Furthermore, domestic courts sometimes take account of other acts or practice established within the framework of the international treaty. This distinction can have a bearing on the legitimacy of, and the weight to be attributed to, the rule or practice in the interpretation of domestic acts.

(a) Primary treaty law

The provisions of the WTO Agreement, including its annexes, can be described as primary WTO law. The WTO Agreement has been ratified or approved according to the domestic procedures which, in the EU and the US as well as in many other WTO members, require domestic parliamentary consent.

While the rights and obligations established by the WTO Agreement itself, which sets up the organizational, institutional and procedural structure of the WTO, the Dispute Settlement Understanding (DSU), which lays down the rules and procedures for the settlement of disputes between WTO members, and the Trade Policy Review Mechanism (TPRM), which establishes a mechanism for regular collective appreciation and evaluation of the trade policies and practices of the WTO members, are for the most part not substantive ones which would, as such, have a direct impact on citizens or companies, they may determine or inform the interpretation or application of the substantive provisions of the annexed agreements, of secondary WTO law and of dispute

[323] Cf. Part VI.A.3.

settlement rulings as well as the effect which the respective provisions or rulings are intended to have from the perspective of WTO law.[324]

The substantive provisions of the Multilateral Trade Agreements in Annex 1 to the WTO Agreement, which set out, in particular, the substantive rights and obligations of the WTO members, are frequently invoked before domestic courts. While the Agreement on Implementation of Article VI of the GATT 1994 (often referred to as the WTO Anti-dumping Agreement) and the Agreement on Subsidies and Countervailing Measures have recently been in the focus of attention, domestic courts have also been called upon to attribute indirect effect to other WTO agreements, including the GATT 1994,[325] the Agreement on Rules of Origin,[326] the GATS,[327] and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement),[328] Less frequently, domestic courts have referred to the Plurilateral Trade Agreements which contain rights and obligations for those WTO members that have accepted them.[329]

(b) Secondary treaty law

Secondary treaty law can be defined as consisting of legally binding rules, decisions or resolutions which have been adopted by a body set up by the treaty or by an international organization. These can take different forms and have different effects in the legal orders of the contracting parties, according to the rules of the treaty or organization, the content of the measures, and the respective domestic framework.

[324] Cf. Part IV, above.
[325] E.g., The Pillsbury Co. v. U.S., 368 F.Supp.2d 1319 (Ct. Int'l Trade 2005) (concerning the U.S. Schedule XX annexed to the Marrakesh Protocol to the GATT 1994).
[326] E.g., ECJ, Joined Cases C-447/05 and C-448/05, Thomson Multimedia Sales Europe, [2007] ECR I-2049, paras. 29-31; Case C-373/08, Hoesch, [2010] ECR I-951, para. 40 et seq..
[327] Cf. paras. 41-60 of the Advocate General's Opinion in Case C-335/05, Řízení Letového Provozu, [2007] ECR-4307, and paras. 14 et seq. of the judgment; U.S. v. Lombardo, 639 F.Supp. 2d 1271, 1287 (D. Utah, 2007).
[328] E.g., ECJ, C-53/96, Hermes, [1998] ECR I-3603, para. 28; C-428/08, Monsanto, [2010] ECR I-6765, paras. 70 et seq.; Rotec Industries v Mitsubishi Corp., 215 F.3d 1246 (Fed. Cir. 2000); cf. also on the relevance of the Charming Betsy canon in the context of the TRIPS Agreement: Harold C. Wegner, Injunctive Relief: A Charming Betsy Boomerang, Nw. J. Tech. Intell. Prop., Vol. 4, Issue 2 (2006), 156.
[329] Cf., e.g., Joined Cases C-288/09 and C-289/09, British Sky Broadcasting Group, judgment of 14.4.2011 (n.y.r.), para. 83 (concerning the WTO Agreement on Trade in Information Technology Products).

Under certain conditions, such rules, decisions or resolutions can be attributed indirect effect in a domestic legal order.[330]

Secondary WTO law comprises in particular legally binding decisions of the WTO Ministerial Conference or - in the intervals between meetings of the Ministerial Conference - of the General Council, such as waiver decisions under Article IX.3 and 4 of the WTO Agreement, Protocols of Accession of new WTO members under Article XII of the WTO Agreement, and certain modifications of the WTO agreements under Article X, such as the modification of the TRIPS Agreement.

Under some domestic legal systems, secondary treaty law does not have to go through the full domestic ratification procedure. In the EU, Article 218(9) TFEU provides that the Council, on a proposal from the Commission (or the High Representative) adopts a decision establishing the positions to be adopted on the Union's behalf in a body set up by an agreement when the body is called upon to adopt acts having legal effect.[331] The European Parliament is to be informed,[332] but its consent is not required. This procedure is applied, for instance, with respect to decisions of the WTO Ministerial Conference or General Council concerning the accession of new WTO members[333] and concerning waivers.[334] In the U.S., the establishment of the US position on the adoption of secondary treaty law may depend on the particular statutory scheme. Section 122 of the Uruguay Round Agreements Act (URAA) lays down the internal procedure relating to the decision-making within the WTO. It provides that the US Trade Representative

[330] For instance, according to the case-law of the ECJ, "account must be taken of the wording and purpose of a [UN] Security Council resolution when interpreting the [EU] regulation which seeks to implement this resolution" (Case C-548/09P, Bank Meli Iran, judgment of 16.11.2011 (n.y.r.), para. 104 (and the case-law cited there); Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351, para. 297.

[331] Art. 218(9) TFEU.

[332] Art. 218(10) TFEU.

[333] Cf., e.g., the Council Decision of 14.12.2011 establishing the position to the taken by the EU within the Ministerial Conference of the WTO on the accession of Samoa to the WTO, OJ 2012, L 6/7; cf. also the Opinion of 26.3.2009 of the Advocate General in Case C-13/07, Commission v. Council (concerning the establishment of the EU's position on the accession of Vietnam to the WTO); this case - which had been introduced before the entry into force of the Treaty of Lisbon - was later withdrawn by the Commission and removed from the register of the Court.

[334] Cf., e.g., the Council Decision of 14.12.2011 establishing the position to be taken by the EU within the Ministerial Conference of the WTO as regards a request for granting a waiver in order to give preferential treatment to services and service suppliers of least-developed countries, OJ 2012, L 4/16.

consults with congressional committees before the adoption of decisions creating secondary WTO law and reports to the committees on the decisions taken.[335]

In spite of the more limited domestic parliamentary involvement, the effect of secondary treaty law is often assimilated to the effect of primary treaty law. In the EU, legally binding decisions of bodies set up by an international agreement form, as from their entry into force, an integral part of the EU legal order in the same way as the agreement itself as they are directly connected to the agreement.[336] In the US, it has been stated that rules adopted by international organizations "bear the constitutional authority of Congress or of the treaty-makers who concluded the arrangements" by constitutionally approved processes in the conclusion of the treaty or congressional-executive agreement, and that they are the "law of the land, subject to the U.S. constitution, equal to acts of Congress, and supreme to state law."[337]

To the extent that EU and US courts attribute indirect effect to primary WTO law they have also been called upon to attribute indirect effect to WTO secondary law. For instance, the courts have referred to the Protocol on the Accession of China to the WTO in relation to the interpretation and application of the non-market economy provisions of the respective domestic anti-dumping statutes.[338] In other cases, the applicants have

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[335] Cf. also Giacomo Gattinara, The Relevance of WTO Law in the US Legal System, in: The Absence of Direct Effect of WTO in the EC and in Other Countries (ed. Claudio Dordi), 2010, 275, 289, on how the US accepted the amendment to the TRIPS Agreement in practice.

[336] Cf. Case 30/88, Greece v. Commission, [1989] ECR 3711, at para 13; Case C-192/89, Sevince, [1990] ECR 3461, at para. 9 (concerning Association Council Decisions). Such decisions may have direct effect under the same conditions as those applicable to the agreement itself (see Case C-192/89, Sevince, [1990] ECR I-3461, paras. 14 and 15). For a more detailed discussion of the effects of such decisions, cf. Bernd Martenczuk, Decisions of Bodies Established by International Agreements and the Community Legal Order, in: Vincent Kronenberger (ed.), The European Union and the International Legal Order: Discord or Harmony (2001), 141; Pieter Jan Kuijper, Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law, in: Jan Wouters, André Nollkaemper & Erika de Wet (eds.), The Europeanisation of International Law, The Status of International Law in the EU and its Member States (2008), 87, at 96-102.

[337] Louis Henkin, Foreign Affairs and the US Constitution, 2d ed. 1996, at 261.

[338] Cf. EU Court of First Instance, Case T-498/04, Zhejiang Xinan Chemical Industrial Group v. Council, [2009] ECR II-1969, paras. 117-118 (an appeal against this judgment has been dismissed by judgment of the ECJ of 19.7.12 (n.y.r.) in Case C-337/09 P); Case T-172/09, Gem-Year and Jinn-Well Auto Parts v. Council, judgment of 10.10.2012 (n.y.r.), paras. 122-132; GPX International Tire Corp. v U.S., 645 F.Supp.2d 1231, 1244 n.12 (Ct. Int'l Trade 2009)., Outside the field of anti-dumping, the Federal Circuit has interpreted certain procedural rules published by the US inter-agency Committee for the Implementation of Textile Agreements, in the light of paragraph 242 of the WTO Working Party Report

founded their arguments, inter alia, on decisions of the WTO Ministerial Conference[339] or of other WTO (or former GATT) bodies.[340] In such cases, it may be necessary to examine the legal status of such decisions in order to determine whether they constitute legally binding acts of secondary WTO law.

(c) Decision of international judicial bodies

The status of decisions of international judicial bodies established by treaty law depends both on the particular treaty provisions setting up and governing the activities of the international judicial body and on domestic constitutional or statutory provisions relating to the status of such decisions.[341]

Direct effect of decisions of international judicial bodies remains the exception. The EU Court of Justice has ruled that, under certain limitative conditions, the Union by concluding an international agreement submits to decisions of a court created by the agreement and that the decisions of such court are binding upon the EU institutions

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on the Accession of China, which paragraph was incorporated into the Protocol on the Accession of China (cf. Clause 2.2. of the Protocol and paragraph 342 of the Working Party Report): U.S. Association of Importers of Textiles and Apparel v. U.S., 413 F.3d. 1344 (Fed. Cir. 2005).

[339] See the Report for the Hearing in Case T-199/04, Gul Ahmed Textile Mills Ltd v. Council, paras. 29 et seq.: The applicant alleged that the EU institutions had initiated an anti-dumping investigation in disregard of the commitment made in the WTO Ministerial Decision of 14 November 2001, on implementation–related issues and concerns (WT/MIN(01)17), adopted during the Doha Ministerial Conference, while the defendant Council argued that this Decision was not relevant under the circumstances of the case. The WTO Ministerial Decision stated that "investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed." The Court did not address this issue (judgment of 27.9.2011 (n.y.r.) the Court did not address this issue.

[340] The Federal Circuit, in interpreting a domestic act in a way consistent with the GATT, relied, inter alia, on the "Decision on the Treatment of Interest Charges in the Customs Value of Imported Goods" made by the Committee on Customs Valuation of the GATT; Luigi Bormioli v. U.S., 304 F.3d 1362 (Fed. Cir. 2002).

[341] For an overview see, Cf. Jörg Polakiewicz, International Law and domestic (Municipal) Law, Law and Decisions of international Organizations and Courts, in: R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (www.mpepil.com), paras. 22-40. Cf. also Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, Va. J. Int'l L., Vol. 43 (2003), 675 (proposing a methodology to categorize the treatment by US courts of international judicial decisions according to the degree of deference to be granted to such decisions). But see Heiko Sauer, Jurisdiktionskonflikte in Mehrebenensystemen (2008), at 411, and the English summary at 541-544 (attempting to develop a general theory according to which de lege lata the principle of loyalty obliges judicial bodies in multi-level systems to cooperate by considering and respecting decisions of judicial bodies of other legal orders).

including the Court of Justice.[342] The US Supreme Court examines, in particular, the text of the agreement on the basis of which the international judicial body was established, as well as the negotiation and drafting history and the post-ratification understanding of signatory nations, in order to determine whether the agreement provides for implementation of such decisions through direct enforcement in domestic courts.[343] As concerns more specifically decisions of the WTO Dispute Settlement Body (DSB), the EU courts and the US courts (and probably the courts of most members of the WTO) do not attribute direct effect to them. The EU Court of Justice has ruled in the *FIAMM/Fedon* case, that Union courts cannot review the legality of Union law in the light of DSB decisions relating to provisions of the WTO agreements which are themselves devoid of direct effect.[344] It left, however, open whether such decisions could have direct effect in a situation where the underlying provisions of the WTO agreements have exceptionally direct effect, notably by virtue of the *Nakajima* exception.[345] In the US, section 102(b)(2)(B)(i) URAA provides that WTO dispute settlement reports "shall not be considered as binding or otherwise accorded deference" (in actions brought by the U.S. for the purpose of declaring a State law invalid).[346] Also in other actions, the U.S. courts have uniformly recognized that WTO dispute settlement decisions are not binding on the U.S. courts.[347] This also follows from sections 123(g) and 129 URAA which lay down precise procedural requirements for cases where an adverse finding in a WTO dispute settlement report requires changes in agency regulations or practice. It is

[342] ECJ, Opinion 1/91, EEA I, [1991] ECR I-6079, para. 40.
[343] Cf. Medellin v. Texas, 552 U.S. 491, 506 (2008), (holding that a decision of the ICJ is not automatically binding domestic law). Cf. also Sanchez-Llamas v. Oregon, 548 U.S. 331, 354 (2006): if "treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department, headed by the one supreme Court established by the Constitution" (internal references omitted).
[344] ECJ, Joined Cases C-120/06 P and C-121/06 P, FIAMM and Fedon v. Council and Commission, [2008] ECR I-6513, paras. 125-134. See also the exhaustive arguments against direct effect of WTO dispute settlement rulings in paras. 77-98 of the Opinion of the Advocate General in Case C- 351/04, Ikea, [2007] ECR I-7723. Furthermore, the ECJ has ruled in Case C-533/10, CIVAD, judgment of 14.6.2012 (n.y.r.), that "the fact that the DSB has found that an anti-dumping regulation is not in accordance with the [WTO] anti-dumping agreement does not affect the presumption that such a regulation is lawful [under EU law]."
[345] Joined Cases C-319/10 and C-320/10, X and E BV, judgment of 10.11.2011 (n.y.r.), paras. 35-37.
[346] See, more generally, the URAA: Statement of Administrative Action, 1994 U.S.C.C.A.N. 4040, 4318: "Reports issued by panels or the Appellate Body under the [Dispute Settlement Understanding] have no binding effect under the law of the United States ….".
[347] Cf., e.g., Timken Co v. U.S., 354 F.3d 1334, 1344 (Fed. Cir. 2004); Gilda Ind. v. U.S., 446 F.3d 1271, 1284 (Fed. Cir. 2006).

not within the scope of the present paper to reopen the debate on the denial of direct effect of WTO dispute settlement decisions.[348]

Even in the absence of direct effect, domestic courts will at times consider decisions of international judicial bodies as persuasive authority or refer to such decisions as a confirmation of conclusions reached otherwise, notably in the interpretation of provisions of the agreement under which the judicial body was established. US courts give, "respectful consideration" to the interpretation of an international treaty by a relevant international court. [349] EU courts often show a certain deference to international case-law, not only with respect to the decisions of the ECtHR interpreting the ECHR, which forms one of the bases on which the fundamental rights as general principles of EU law are founded, and the EFTA Court interpreting the EEA Agreement, which contains rules similar to those of the EU Treaties.[350] In particular, US courts and EU courts as well as courts of other WTO members sometimes attribute indirect effect to WTO DSB decisions, be it as persuasive authority, as an aid to interpretation, or otherwise. [351] The intensity of the indirect effect may depend on a number of circumstances. These include the questions whether the WTO dispute related to the same domestic act the validity or interpretation of which the domestic court is to decide

[348] Among the more recent contributions cf., on the one hand, Armin Steinbach, EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists, J. World Trade, Vol. 43, no.5 (2009), 1047 (distinguishing between the unconditional obligation to comply with dispute settlement rulings and the freedom of choice on how to comply, and criticizing the Court's approach to transposing its case law regarding the lack of direct effect of WTO law into the context of an action for damage); and on the other hand, Alessandra Arcuri & Sara Poli, What Price for the Community Enforcement of WTO Law? , EUI Working Paper LAW 2010/01 (arguing that direct effect of dispute settlement rulings is undesirable from an efficiency perspective, having regard notably to a "law and economics" framework for the law of remedies).

[349] Breard v Greene, 523 U.S. 371, 375 (1998); Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006).

[350] Cf., for instance, Case C-34/10, Brüstle, judgment of 18.10.2011 (n.y.r.), paras. 45 and 51, where the Court found support for its interpretation of the EU directive at issue in the interpretation by the Enlarged Board of Appeal of the European Patent Office regarding certain provisions of the Implementing Regulations to the Convention on the Grant of European Patents, which used the same wording as the provisions of the directive. Cf. generally Allan Rosas, With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts, The Global Community Yearbook of International Law & Jurisprudence, Vol. 5 (2005), 203.

[351] As concerns actions by the US federal government for the purpose of declaring a State law invalid for infringing WTO law, the Statement of Administrative Action specifies that while the U.S will not rely on WTO dispute settlement rulings in such actions, the court "could take judicial notice of the panel or Appellate Body report and consider the views of the panel if the court considered them to be persuasive." Statement of Administrative Action, Section B.1.e (p. 16).

on, or to a similar act (of another WTO member); whether the WTO member whose measure the panel or Appellate Body considered inconsistent with WTO law has notified the WTO of its intention to bring its domestic law in conformity with the conclusions of the WTO ruling; and whether the reasonable period of time within which the domestic law has to be brought into conformity with the WTO ruling has already elapsed.

The case-law of the US courts relating to the indirect effect of WTO DSB decisions[352] is not entirely consistent. In one line of cases, the courts have considered such decisions as "persuasive".[353] In *Hyundai Electronics Co.*, the Court of International Trade stated that "a [WTO] panel's reasoning, if sound, maybe used to inform the court's decision".[354] In *Allegheny Ludlum Corp.,* the Federal Circuit considered a WTO Appellate Body report as a "guideline [which] supports the trial court's judgment".[355] After having concluded that neither the domestic countervailing duty statute nor its legislative history supported the use of the so-called same-person methodology for the calculation of a countervailing duty, the Court found additional support for its construction of the pertinent provision of the domestic statute in the fact that it was "consistent with the determination of the WTO appellate panel [sic]"[356] in *US – Countervailing Measures Concerning Certain Products from the European Communities.*[357] Referring to the *Charming Betsy* case-law, the court found that a different interpretation of the domestic statute would contravene the international obligations of the US under the WTO Agreement. The court thus appears to have applied the *Charming Betsy* case law not

[352] Cf., generally, Jeanne J. Grimmett, World Trade Organization (WTO) Decisions and Their Effect in U.S. Law, Congressional Research Service Report for Congress (February 4, 2011); Giacomo Gattinara, The Relevance of WTO Dispute Settlement Decisions in the US Legal Order, in: The Absence of Direct Effect of WTO in the EC and in other Countries (ed. by Claudio Dordi) (2010), 275; James Thuo Gathii, Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions, Ga. J. Int'l & Comp. L., Vol. 34 (2005), 1.
[353] Cf. Koyo Seiko Co. v. U.S., 442 F.Supp.2d, 1360, 1363 (Ct. Int'l Trade 2006); Usinor v. U.S., 342 F.Supp.2d 1267, 1279 (Ct. Int'l Trade 2004).
[354] Hyundai Electronics Co. v. United States 53 F. Supp.2d 1334, 1343 (Ct. Int'l Trade 1999); in that case, the Court did, however, not follow the reasoning of the WTO panel.
[355] Allegheny Ludlum Corp v. U.S. 367 F3d 1339, 1348 (Fed. Cir. 2004).
[356] Id.
[357] WT/DS212/AB/R.

only to the pertinent provisions of the WTO agreements themselves, but to the interpretation given to these provisions by the WTO Appellate Body.[358]

However, in another line of cases, which has become prevalent in the meanwhile at least with respect to the review of administrative action founded on domestic statutes, the US courts have declined to take WTO panel or Appellate Body rulings into account for the interpretation of domestic statutes.[359] A leading case is the judgment of the Federal Circuit in *Corus Staal BV*, which concerned the Department of Commerce's practice of applying "zeroing" in the calculation of anti-dumping duties. The Court held that it "will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme."[360] These cases law will be discussed in more detail below.[361]

The EU courts are increasingly referring to WTO panel or Appellate Body reports in the interpretation of the pertinent provisions of the WTO Agreement.[362] Starting with a brief reference to a GATT panel in 1981,[363] the EU Court of Justice has on several occasions referred to WTO Dispute Settlement reports. In *Anheuser-Busch*,[364] for instance, the Court of Justice relied on the WTO Appellate Body report in *U.S. - Section*

[358] Cf. also George E. Warren Corporation v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998), where the court upheld the change in a rule of the Environmental Protection Agency, which the Agency adopted in order to bring it in line with the GATT as interpreted by a WTO dispute settlement ruling, which the US had chosen to comply with.

[359] A pre-WTO precursor to this line of cases is Suramerica de Aleaciones Laminadas v. U.S., 966 F.2d 660 (Fed. Cir. 1992) (declining to take account of a GATT panel report for the interpretation of a domestic statute).

[360] Corus Staal BV v. Department of Commerce 395 F.3d 1343, 1349 (Fed. Cir. 2005). Cf. also Dongbu Steel, v. U.S., 635 F.3d. 1363, 1368 (Fed. Cir. 2011) and GPX v. U.S, 2011-1107, -1108, 1109 (Fed. Cir. 9.5.2012), n. 2.: "adverse WTO decisions have no bearing on the reasonableness of Commerce's action".

[361] Part VI.D.1.(b), below.

[362] But see ECJ, Case C-351/04, Ikea, [2007] ECR I-7723, Ikea, Part VI.D, below.

[363] Case 112/80, Duerbeck, [1981] ECR 1095, para. 46 (referring to EEC - Restrictions on Imports of apples from Chile, BISD 27 S, p. 98). Based on this sole case, Ernst-Ulrich Petersmann (Multilevel Constitutionalism and Judicial Protection of Freedom and Justice in the International Economic Law of the EC, in: Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs (eds. Anthony Arnull, Piet Eeckhout & Takis Tridimas) (2008), 338, at 352 n. 43) comes to the extraordinary conclusion that the "political EC bodies [...] have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports." Without taking a view on this particular case, I consider this general assertion as unsubstantiated and incorrect.

[364] Case C-245/02, Anheuser-Busch, [2004] ECR I-10989, paras. 67 and 91.

211 of the Omnibus Appropriations Act,[365] in the context of an interpretation of the provisions of the TRIPS Agreement. In *HEKO Industrieerzeugnisse*,[366] the Court of Justice construed the margin of discretion left to the EU Member States under the EU Customs Code in the light of the WTO Agreement on Rules of Origin as interpreted in the WTO Panel report in *U.S.- Rules of Origin for Textiles and Apparel Products*.[367] In *X and X BV*, the Court of Justice recently confirmed that a decision of the WTO DSB can under certain circumstances be invoked for the purposes of the interpretation of EU law; but it found that the decision invoked by the applicants in this case did not support the applicants arguments.[368] Equally, the EU Court of First Instance (now: General Court) regularly refers to WTO disputes, in particular in litigation relating to the EU's trade defense instruments. For example, in *Ritek*,[369] the Court of First Instance referred to the report of the WTO Appellate Body in *EC – Bed Linen*,[370] according to which the method of "zeroing" in the determination of the dumping margin was inconsistent with the WTO Anti-dumping Agreement. The Court discussed in detail the reasoning of the Appellate Body and concluded that the report concerned only the model-zeroing technique in the context of the first symmetrical method, which was at issue in the WTO dispute, and could not be considered to deal with zeroing when it is used in the context of the asymmetrical method, which was at issue in *Ritek*. The Court thus distinguished the case before it from the WTO dispute. In *Reliance*,[371] the Court of First Instance interpreted provisions of the EU's Basic Anti-dumping Regulation and the Basic Anti-subsidy Regulation concerning the final date for the initiation of an expiry review, in the light, respectively, of Article 11.3 of the WTO Anti-dumping Agreement and Article 21.3 of the WTO Anti-subsidy Agreement. In this context, the Court rejected the argument which the applicant drew from the report of the WTO Appellate Body in *US - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from*

[365] WT/DS/176/AB/R.
[366] Case C-260/08, [2009] ECR I-11571, para. 22.
[367] WT/DS/243/R.
[368] Joined Cases C-319/10 and C-320/10, X and E BV, judgment of 10.11.2011 (n.y.r.), paras. 44-50.
[369] Case T-274/02, Ritek Corp. and Prodisc Technology Inc. v. Council, [2006] ECR II-4305, paras. 98-108.
[370] European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS/141/AB/R.
[371] Case T-45/06, Reliance Industries Ltd v. Council, [2008] ECR II-2399, paras. 108 to 110.

Argentina.[372] It did so, first, because one part of the report on which the applicant relied did not concern the interpretation of the relevant phrase in Article 11.3 of the WTO Anti-dumping Agreement, and second, because the other part of the report mentioned by the applicant did nothing more than paraphrasing a paragraph from another Appellate Body report,[373] which confirmed the interpretation reached by the Court and was contrary to the applicant's interpretation. The Court thus confirmed its interpretation by referring to the WTO dispute settlement report.[374] In other cases, the Court referred more generally to the WTO dispute settlement practice, without citing specific cases.[375] In the practice of the EU trade-defense litigation, both the applicants and the defendant often refer to WTO dispute settlement rulings in support of their respective reading of the EU basic Anti-dumping regulation. It also happens that an applicant attacks the imposition of an anti-dumping duty, arguing that the Council should not have relied on WTO dispute settlement rulings in the application of the basic anti-dumping regulation to the specific case.[376]

Comparing the practice of the US and the EU courts, it can thus be concluded that, while both deny direct effect to WTO dispute settlement rulings, the EU courts are more forthcoming in relying on such rulings in the interpretation of the WTO agreements and domestic statutes.

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[372] WT/DS268/AB/RW.

[373] US - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (WT/DS244/AB/R).

[374] Among the recent cases, where the EU General Court referred to WTO dispute settlement rulings for the purpose of interpreting the EU's basic anti-dumping regulation, are T-192/08, Kazchrome v. Council, judgment of 25.10.2011 (n.y.r), paras. 37 and 44 (references to US - Hot-Rolled Steel, WT/DS184/AB/R, and EC - Pipe Fittings, WT/DS219/AB/R)(judgment under appeal in Case C-10/12 P); T-199/04, Gul Ahmed Textile Mills v. Council, judgment of 27.9.2011 (n.y.r.), paras. 56 and 57 (references, inter alia, to Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/R) (judgment under appeal in Case C-638/11 P); T-409/06, Sun Sang Kong Yuen Shoes Factory v. Council, [2010] ECR I-807, para.104 (reference to Egypt - Definitive anti-dumping measures on steel rebar from Turkey, WT/DS211/R); T-156/11, Since Hardware v. Council, judgment of 18.9.2012 (n.y.r.), paras. 80-84, 110-113 (references to Mexico - Definitive Anti-Dumping Measures on Beef and Rice, WT/DS/295/AB/R).

[375] Cf., e.g., Case T-556/10, Novatex v. Council, judgment of 11.10.2012 (n.y.r.), paras. 39-41, 120-125.

[376] Cf. Case T-304/11, Alumina v. Council, OJ 2011, C 226/28-29 (action for annulment of Council Implementing Regulation No 464/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2011 L 125/1, cf. recital 19 of the Regulation)).

In legal literature, it has been argued that the EU courts should go even further in this respect. In spite of the denial of direct effect of dispute settlement rulings, some authors argue that dispute settlement rulings should be considered, at least under certain conditions, to form an integral part of the Union legal order and to oblige the EU courts to interpret domestic measures, as far as possible, not only in conformity with the provisions of the WTO agreements themselves, but also in conformity with such rulings.[377]

I am not convinced that it is legally correct and politically desirable to extend the obligation of WTO-consistent interpretation to WTO dispute settlement rulings.

First, it is not clear on what basis dispute settlement rulings could be considered to form an integral part of the Union legal order. Article 216(2) TFEU, according to which EU agreements are binding on the institutions, is in my view, not applicable to judicial or quasi-judicial decisions.[378] It is true that the Court of Justice has extended this provision to include binding decisions adopted by bodies established under EU agreements, such as Association Council Decisions.[379] But such decisions relate mostly to international rule-making and not to adjudication of specific disputes which, in the case of WTO dispute settlement recommendations and rulings "cannot add to or diminish the rights

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[377] Cf. Giacomo Gattinara, Consistent Interpretation of WTO Rulings in the EU Legal Order?, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 269. According to Gattinara, in interpreting a provision of the WTO agreements on which the WTO dispute settlement organs have already adjudicated, the EU courts "shall apply to these statements [of the panels or the Appellate Body] the principle of consistent interpretation, and respect the statements of panels and the AB, so far as possible" (p. 281). Gattinara argues that the Union must respect the WTO DSU, which is binding on the Union and has primacy over secondary Union law, and the interpretative competence of the panels and the AB defined in the DSU. The WTO dispute settlement reports would thus "represent an integral part of [the Union's] legal order since their adoption by the [Dispute Settlement Body]" (p. 283). Cf. also Giacomo Gattinara, WTO Law in Luxembourg: Inconsistencies and Perspectives, Italian Y.B. Int'l L., Vol. 18 (2008), 117, at 128-130; Oksana Tsymbrivska, WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts, Legal Issues of Economic Integration 37, no 3 (2010), 185.

[378] Cf., e.g., 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, J. World Trade, Vol. 39 (2005), 45, 57; for a different view see, e.g., Nikolaos Lavranos, Die Rechtswirkungen von WTO panel reports im Europäischen Gemeinschaftsrecht sowie im deutschen Verfassungsrecht, EuR 1999, 289 at 296-299; Heiko Sauer, Jurisdiktionskonflikte in Mehrebenensystemen (2008), at 258-259; Antonello Tancredi, On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 248.

[379] See Case C-192/89, Sevince, [1990] ECR 3461, at para. 9; cf. Part VI.B.1.(b), above.

and obligations" under the WTO agreements.[380] It may be for this reason that the Court of Justice, in its Opinion 1/91 on the draft EEA Agreement did not refer to this provision in order to motivate its conclusion that, under certain circumstances, the Union by concluding an international agreement submits to decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions, and that the decisions of such court will be binding upon the institutions including the ECJ.[381] It is not clear from the Opinion on what reasons the Court founded this conclusion (other than the competence and capacity of the EU to conclude international agreements), but it can be observed that the EEA Court was envisaged as a fully independent court the decisions of which had excecutory force, while WTO dispute settlement panel and Appellate Body rulings contain recommendations. Although it cannot be contested that the WTO dispute settlement system has many procedural guarantees which approach it to court proceedings, the conclusions in Opinion 1/91 can therefore not be directly transposed to WTO dispute settlement rulings. Furthermore, the Court qualified its conclusion in the sense that the features of the international court system established by an international agreement must not result in jeopardizing the autonomy of the Union legal order.[382] In view of the wide scope of WTO norms which reach far beyond classical norms of international trade in goods and can potentially impact on most EU policies, including those on public health, energy safety, consumer protection and others, the EU Court of Justice would – in spite of the "so far as possible" qualification - risk abandoning its interpretative competence over large parts of Union law to another jurisdiction, which interprets WTO rules in the framework of the objectives and procedures of the WTO which are different from those of the EU.[383] This could be considered to be a threat to the autonomy of the Union legal order. The particular nature and context of WTO law therefore pleads against imposing on the EU

[380] Art. 3(2) WTO DSU.
[381] ECJ, Opinion 1/91, EEA I, [1991] ECR I-6079, paras. 39, 40.
[382] Id., paras. 30, 35, 47; on the requirement to preserve the autonomy of the EU legal order, cf. also ECJ, Opinion 1/09 (Unified Patent Litigation System) of 8.3.2011, para. 76; Opinion 1/00 (European Common Aviation Area), [2002] ECR I-3493 paras. 12, 21, 26.
[383] Cf. paras. 77-98 of the Opinion of Advocate General Léger in Case C-351/04, Ikea Wholesale Ltd, [2007] ECR I-7723 (arguing that any interpretation of the DSB is governed by the nature of the WTO and the objectives which it pursues, which differ appreciably from those pursued by Union law).

courts an obligation to interpret domestic measure not only consistent with the provisions of the WTO agreements, but also consistent with dispute settlement rulings.

Second, it has been argued that the general interpretation by panels and the Appellate Body of provisions of WTO agreements were generally binding for the clarification of WTO provisions and that the findings that a concrete measure by a WTO member is inconsistent with WTO law were binding only on the parties to the dispute.[384] However, as concerns the general interpretations of WTO law provisions, including in disputes in which the EU was not a party, it is not clear on which basis such interpretations can become an integral part of the EU legal order. While such interpretations may have an important value as precedents,[385] they are not legally binding on the members.[386] As concerns the operative part of dispute settlement rulings, they are the result of an interpretation of WTO rules and of their application to the specific dispute within the framework of the procedural rules and on the basis of the arguments and evidence provided by the parties. If the EU courts were bound by these findings and recommendation, this would come very close to attributing direct effect to the dispute settlement ruling.

In any case, whether or not the EU courts are under a legal obligation to interpret domestic acts to be consistent with WTO dispute settlement rulings (as distinguished from the provisions of the WTO agreement) may be mostly an academic issue and less relevant in practice. If the EU courts were under an obligation to interpret domestic acts to be consistent with dispute settlement rulings, this obligation would be subject to the qualification that it would only apply "as far as possible". As will be demonstrated in a subsequent part of this paper, consistent interpretation is not possible if the rule of WTO law (or the interpretation given in dispute settlement proceedings) does not fit into the constitutional context of the domestic legal order. On the other hand, if the EU

[384] Cf. Giacomo Gattinara, Consistent Interpretation of WTO Rulings in the EU Legal Order?, in: International Law as Law of the European Union (ed. by Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel), 2012, p. 269, 280.
[385] Cf. John H. Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law (2009), pp. 173-177, 192-195.
[386] Cf. US – Final Anti-dumping Measures on Stainless Steel from Mexico, W/DS344/AB/R, para. 158 et seq..

courts were not under a legal obligation to interpret domestic acts in the light of dispute settlement rulings, they could and should nevertheless take such rulings into account and engage with their reasoning.

In this respect guidance could be drawn from the approach of German and UK courts in relation to the effects of the case-law of the European Court of Human Rights (ECtHR). In Germany, the Federal Constitutional Court acknowledges a constitutional duty on German courts to "take into account" the case law of the ECtHR. The German Federal Constitutional Court has ruled in the *Görgülü* case that decisions of the ECtHR cannot be applied by German domestic courts in a schematic way.[387] The domestic courts must integrate such decisions into the relevant partial legal area of the domestic legal system. In doing so the courts must also take account of the fact that the proceedings before the ECtHR did not necessarily give a complete picture of the legal positions and interests involved, in particular if the decision had been taken under an individual application procedure.[388] As long as the applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to an interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECtHR, for example because the facts on which it is based have changed, clearly violates statutory law to the contrary or German constitutional provisions, in particular the fundamental rights of third parties.[389]

The UK Human Rights Act of 1998 requires a court to "take into account" any judgment of the ECtHR in determining any question to which such judgment is relevant. In its judgment in the *Horncastle* case, the UK Supreme Court stated in this context: "The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of

[387] BVerfG, 14.10.2004, 2BvR 1481/04, Görgülü. See also BVerfG, 4.5.2011, BvR 2365/09 et al. "preventive detention". For a critical view on this case law, see Christian Hillgruber, Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren, Juristenzeitung 2011, 861, at 870-872.
[388] BVerfG, 14.10.2004, 2BvR 1481/04, Görgülü, paras. 58 and 59.
[389] Ibid., para. 62.

our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court."[390] In this case, the Supreme Court then went on to justify in great length why it did not follow the ruling of the ECtHR in the cases of *Al-Khawaja and Tahery*,[391] on the interpretation of the fair trial requirement under Article 6(3)(d) of the European Convention of Human Rights in relation to certain aspects of the inadmissibility of hearsay in criminal proceedings. In particular, the Supreme Court considered that the Strasbourg court had not given full consideration to the English law of admissibility of evidence and to the safeguards against an unfair trial for which the common law procedure provides. It considered it appropriate to interpret the pertinent provisions of the domestic Criminal Justice Act of 2003 in accordance with their natural meaning rather than in the light of the judgment of the ECtHR in *Al-Khawaja and Tahery*.[392]

What exactly the requirement of "taking into account" means in this context is subject to discussion.[393] As a minimum, the international case-law, where pertinent, must be addressed by the domestic courts and cannot simply be ignored. It would in this context not appear to be sufficient for the domestic court to state that it disagrees with the reasoning of the international court, without further justifying this. There appears thus to be a methodological or deliberative obligation on the domestic courts to consider and engage with relevant international case-law, rather than an obligation to necessarily follow the results. This obligation of deliberation can be distinguished from the use of

[390] Judgment of 9.12.2009, R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division), [2009] UKSC 14, para. 11 (Lord Phillips).
[391] Al-Khawaja and Tahery v. United Kingdom (2009) 49 EHRR 1.
[392] Subsequently, the Grand Chamber of the ECtHR, in its final judgment of 15.12.2011 in this case, adopted a more flexible approach.. While it confirmed a violation of the ECHR with respect to Tahery's conviction, it found no violation of the ECHR with respect to Al-Khawaja's conviction, in view of the procedural safeguards under UK law which guaranteed the fairness of the proceedings as a whole.
[393] For a discussion of possible alternative understandings of the obligation to "take into consideration" ("Berücksichtigungspflicht") under German constitutional law, cf. Lars Viellechner, Berücksichtigungspflicht als Kollisionsregel, EuGRZ 2001, 203.

international case-law as persuasive authority or an aid to interpretation, the use of which is within the discretion of the domestic courts.[394]

(d) Other emanations or context from international agreements

In addition to primary and secondary treaty law and decisions of international judicial bodies, domestic courts may also take account of other emanations from international organizations or an international treaty system, such as recommendations, preliminary negotiation results, or even unilateral demarches made within the context of an international organization.

For instance, domestic courts may take into consideration non-binding recommendations or other non-binding texts adopted by bodies established by an international agreement, as a means of interpreting the agreement and - as the case may be - any domestic act in the light thereof.[395] The EU Court of Justice has ruled that non-binding recommendations, to the extent that they are directly linked to the international agreement to which the EU is a party, form part of EU law, which the national courts of the Member States are "obliged to take [...] into consideration" in order to resolve domestic disputes.[396] The US Supreme Court has, for instance, been "guided" by the analysis in the legally non-binding UNHCR Handbook on Procedures and Criteria for

[394] In this sense, an obligation to take account of international case-law would be similar to Moran's concept of "influential authority", understood as the mandatory influence of certain values enshrined in international law which the courts - also they are not bound by any corresponding international rule of decision specifying rights and obligations - must take into account in the deliberative process and which must be reflected in the justification for the resulting judgment; cf. Mayo Moran, Shifting Boundaries: The Authority of International Law, in: Janne Nijman & André Nollkaemper (eds.), New Perspectives on the Divide Between National and International Law (2007), p. 163.

[395] Cf. Jörg Polakiewicz, International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts, in: R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (www.mpepil.com), para. 7.

[396] Cf. ECJ, Case C-188/91, Deutsche Shell, [1993] ECR I-363, para. 16-18 (concerning Recommendations adopted by the Joint Committee established under the Convention on a Common Transit Procedure); ECJ, Case C-206/03, Smith Kline Beecham, [2005] ECR I-415, paras. 25-26 (non-binding classification opinions and explanatory notes issued by the World Customs Organisation as an important aid to the interpretation of the EU Customs Code); Case C-135/10, SCF v. Del Corso, judgment of 15.3.2012 (n.y.r.), para. 85 (WIPO glossary can shed light on the interpretation of a concept used in an international convention and in a EU directive). Cf. also, with respect to the EU-law consistent interpretation of the law of the Member States, ECJ, Case C-322/88, Grimaldi, [1989] ECR 4407, paras. 18-19 (according to which the courts of the EU Member States are bound to take non-binding Commission Recommendations "into consideration" in order to decide disputes, "in particular where they are capable of casting light on the interpretation of other provisions of national or Community law".)

Determining Refugee Status, in order to interpret the Protocol Relating to the Status of Refugees, and an act of Congress the primary purpose of which was to bring domestic law into conformity with this Protocol.[397] To the extent that domestic courts take account of such recommendations or other non-binding texts related to an international agreement, they must assess the legal status of such texts in international law, because the domestic interpretative value of such texts cannot go beyond the value which international law attributes to them within the pertinent treaty system itself.

The preliminary results of negotiations within the WTO framework were invoked in the *Hoesch* and *Heko* cases before the EU Court of Justice, which concerned the tariff code classification of certain products under the EU Customs Code. In order to justify the classification adopted by the national authorities, the EU Commission had suggested to take account of the so-called "list rules" which set out the provisional results of the negotiations in the context of the harmonization work in the WTO Committee on Rules of Origin set up by the Agreement on Rules of Origin. The Commission did of course not suggest that these negotiation results were legally binding, but it asked the Court to take them into account in order to ensure, "uniformity in the application of the customs regulations and conformity in the application of those regulations with the [Union]'s obligations within the framework of the World Trade Organisation".[398] According to the Commission, the list rules, which had been agreed with the representatives of the Member States in the EU Customs Code Committee, provided concrete criteria in order to satisfy the condition set out in Article 2 of the Agreement on the Rules of Origin, according to which, when issuing administrative determinations of general application, the requirements to be fulfilled must be clearly defined. The Court accepted that, "the list rules drawn up by the Commission contribute to the determination of the non-preferential origin of goods", although it added that those rules did not have binding

[397] Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 438 and n.22 (1987) (stating that, although it does not have the force of law and does not bind the INS, "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform").
[398] Case C-373/08, Hoesch Metals and Alloys, [2010] ECR I-951, para. 33. see also Case C-260/08, HEKO, [2009] ECR I-11571, para. 19.

legal force and that the content of those rules must therefore be compatible with the rules of origin as set out in the domestic legislation.[399]

Unilateral declarations or demarches by governments of WTO members have also been referred to in domestic litigation, although more as an afterthought or a confirmation rather than as an independent element in the interpretation of domestic acts. In *Petrotub*,[400] the EU Court of Justice stated that the conclusion it had reached by way of WTO-law-consistent interpretation of domestic EU legislation "coincides in essence with the international assurances given in the communication of 15 February 1996 from the Commission to the secretariat of the WTO Committee on Anti-Dumping Practices, according to which the explanation referred to in Article 2.4.2. of the 1994 [WTO] Anti-dumping Code will be given directly to the parties and in regulations imposing anti-dumping duties." In *SKF USA*,[401] the US Court of Appeals for the Federal Circuit construed the domestic statute relating to the so-called Byrd Amendment in view of its purpose and in order to avoid giving it a meaning which would render it inconsistent with the constitutional protection of commercial speech under the First Amendment. The Court found that the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the anti-dumping laws by initiating or supporting anti-dumping proceedings. While the government had denied this purpose in its representations at oral argument, the Court noted that the government's position in these proceedings was at odds with the government's position in the proceedings before the WTO, where the Byrd Amendment had been the subject of dispute settlement proceedings.[402]

Finally, there have been domestic court cases in which the parties, or governments acting as amicus curiae, have unsuccessfully attempted to persuade the court to rule on a particular issue in accordance with what these parties or governments considered to be in conformity with WTO law, by pointing the court to the possibility that WTO

[399] Case C-373/08, Hoesch Metals and Alloys, [2010] ECR I-951, para. 39; see also Case C-260/08, HEKO, [2009] ECR I-11571, paras. 20 and 21.
[400] Case C-76/00P, Petrotub, [2003] ECR I-79, para. 59
[401] SKF USA v United States Customs and Border Protection, 556 F.3d 1337 (Fed. Cir. 2009).
[402] Ibid., at 1352, citing in footnote 24 the Panel Report in US - Continued Dumping and Subsidy Offset Act of 2000, para. 4.502, WT/DS217/R, WT/DS234/R, which recorded the US government position.

dispute settlement proceedings could be initiated should the court not follow this suggestion.[403]

2. The objective, nature and content of the international rules

Whereas the attribution of direct effect to an international treaty rule often depends on the nature of the international agreement, the ambiguity or determinateness of its provisions or the question whether it is intended to confer rights on individuals, this is not necessarily the case for indirect effect.[404] But the objective, nature and content of the international treaty rule may have an impact on the interpretive process when domestic courts interpret domestic law in the light of such rule.

It may be necessary for domestic courts to determine whether the pertinent provision of an international agreement, the agreement itself, or the agreement-system of which the agreement forms a part, requires,[405] excludes or limits, by virtue of international law, the attribution of indirect effect to it. While some treaties expressly exclude the direct effect of their provisions, it is probably very rare that a treaty expressly excludes indirect effect. But it is conceivable that the very nature of treaty does not lend itself to such effect. If the objective of the international agreement is clearly limited to specific inter-governmental obligations, the scope for agreement-consistent interpretation may be limited.[406]

If an international agreement provides for minimum standards, this particular feature of the agreement must be taken into account in interpreting domestic law in its light. In

[403] An example is Goss v. Man Roland Druckmaschinen, 434 F.3d 1081, 1090 footnote 5 (8th Cir. 2006). In this case, the Government of Japan had filed an amicus brief, contending that the domestic measure at stake – the Anti-dumping Act of 1916 – , as construed by the lower court, was inconsistent with the US's obligations under the WTO Anti-dumping Agreement. Japan threatened that it may have no choice but to seek authorization from the WTO DSB to impose its own countermeasures against the US, which could result in a buildup of protectionist measures that could threaten to disrupt trade and commerce between nations. The Court dealt with this in a footnote where it concluded that any potential international ramifications "could not transform the 1916 Act into something it is not. Following our judicial duty, our resolution of the intent requirement under the 1916 Act is based on American law and not foreign policy."
[404] Cf. also Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 14, No. 3 (2003), 569, at 577; Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 280.
[405] Cf. Part IV, above.
[406] E.g. an agreement on the financial contribution of the contracting parties to an international fund.

this case, more far reaching provisions of domestic law cannot be reduced, by way of consistent interpretation, to the lower standards which the international agreement provides for as a minimum.[407]

Furthermore, the more the international rule is specific, precise, unambiguous and complete, the more it has the potential to determine the meaning to be given to the domestic rules. On the other hand, such specific, precise, unambiguous and complete international rules may be more difficult to integrate into the domestic legal rules, as they leave little or no margin to be adapted to the particular text or context of the domestic rules.

As concerns WTO law, many of the provisions of the WTO agreements are quite precise,[408] while others are of a more general nature. The courts sometimes point to the general or incomplete nature of certain rules of WTO law, when they interpret domestic rules in the light thereof. The EU Court of Justice acknowledged, in the course of the interpretation of a domestic directive in the light of the WTO Agreement on Rules of Origin, that this Agreement "establishes, for the present, only a harmonisation work programme for a transitional period." The Court went on to state that, "[s]ince that agreement does not constitute complete harmonisation, the WTO's members enjoy a margin of discretion with regard to the adaptation of their rules of origin", and concluded that, when interpreting the relevant provisions of the EU Customs Code, the courts of the Member States may have recourse to alternative methods, provided that this does not result in an alteration of the relevant provision.[409] In another case the Court of Justice interpreted certain domestic rules in the light of Articles 41, 42 and 47 of the WTO TRIPS Agreement and concluded that those provisions, while requiring the effective protection of intellectual property rights and the establishment of judicial

[407] Cf. André Nollkaemper, National Courts and the International Rule of Law (2011), 139-140.
[408] Cf. Piet Eeckhout, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, CMLRev., Vol. 34 (1997), 11, at, 26-27; Pierre Pescatore, Monisme, dualism et "effet utile" dans la jurisprudence de la Court de justice de la Communauté européenne, in: Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias (ed. By Ninon Colneric, Jean-Pierre Puissochet, Dámaso Ruiz-Jarabo y Colomer, David V. Edwards), 2003, p. 329 at 337 (stating that all of the fundamental articles of the GATT are sufficiently concrete and precise).
[409] Cf. Case C-373/08, Hoesch Metals and Alloys, [2010] ECR I-951, para. 40; see also Case C-260/08, HEKO, [2009] ECR I-11571, para. 22.

remedies, did not contain any provisions which would require that the domestic rules are interpreted to impose any specific obligation to communicate personal data in the context of civil proceedings.[410]

Another distinction could be drawn between agreements, or provisions thereof, which establish individual rights, and other agreements. It has been suggested that those of the WTO agreements, which closely relate to individual rights, such as the TRIPS Agreement, could possibly receive different treatment in the domestic legal orders than the other agreements.[411]

3. The Interpretation of the international rules

If a domestic court is to interpret domestic law in the light of international treaty law, it must ascertain the meaning of the treaty rule at issue and thus interpret it. Although the partial codification of interpretative principles by the 1969 Vienna Convention on the Law of Treaties (VCLT)[412] has not put to rest the longstanding debate on the methods of interpretation of international treaties,[413] it often serves as a starting point in this regard.

Section 3 VCLT deals with the interpretation of international treaties between States. According to Article 31(1) VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) VCLT lists the elements comprising the context of a treaty for the purpose of its interpretation. Article 32 VCLT contains supplementary means of interpretation to which recourse may be had under the

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[410] ECJ, Case C-275/06, Promusicae, [2008] ECR I-271, para. 60.
[411] Cf. Giacomo Gattinara, The Relevance of WTO Dispute Settlement Decisions in the US Legal Order, in: The Absence of Direct Effect of WTO in the EC and in other Countries (ed. by Claudio Dordi) (2010), 275, 320.
[412] The 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, which is not yet in force, follows the same principles of interpretation as the 1969 VCLT.
[413] Among recent contributions, cf. Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (ed.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010); the contributions in: Eur. J. Int'l L., Vol. 21 No 3 (2010), 507 (Symposium: The Interpretation of Treaties - A Re-examination); the contributions in: Revue Générale de Droit International Public, Vol. 115 No 2 (2011), 291 (Dossier: "Les techniques interprétatives de la norme internationale"; and the Review Article by Michael Waibel, Demystifying the Art of Interpretation, Eur. J. Int'l L., Vol. 22 No 2 (2011), 571.

conditions set out there. Although this has been contested by some scholars,[414] the predominant view appears to be that the canons of interpretation enshrined in the VCLT reflect customary international law.[415] This has also been confirmed by judgments of the International Court of Justice (ICJ).[416]

As concerns in particular the interpretation of the WTO Agreement, Article 3(2) of the DSU provides that the WTO dispute settlement system serves to clarify the provisions of the covered WTO agreements "in accordance with customary rules of interpretation of public international law."[417] The WTO Appellate Body has acknowledged that the general rule of interpretation contained in Article 31(1) VCLT as well as the rules of Article 32 VCLT have attained the status of customary or general international law and therefore form part of the 'customary rules of interpretation of public international law' which the Appellate Body must apply pursuant to Article 3(2) of the DSU.[418]

A recent comparative study has concluded that, although there is little conformity with respect to the role of the interpretive rules of the VCLT in the application of treaty-based law by domestic courts, substantial similarities exist on the influence of the VCLT both in States with monist systems and in States with dualist systems and almost irrespective of whether the States have ratified the VCLT.[419] While the courts in some States apply the VCLT methods of interpretation by directly referring to the VCLT or to customary international law embodied in the provisions of the VCLT, others interpret treaty-based law in a manner largely consistent with these provisions, although without referring to

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[414] Cf. Jan Klabbers, Virtuous Interpretation, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), p. 17, at 323-31.

[415] Cf. Malgosia Fitzmaurice and Panos Merkouris, Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), p. 153 et seq..

[416] Cf., e.g., Territorial Dispute (Libya v. Chad), Judgment of 3.2.1994, [1994] ICJ Rep. 6, at para. 41; Kasikili/Sedudu Island (Botswana v. Namibia), Judgment of 13.12.1999, [1999] ICJ Rep. 1045, at para. 18 (both with respect to Art. 31 VCLT).

[417] See also Article 17.6(ii) of the WTO Anti-dumping Agreement.

[418] US - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, p. 17; Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11AB/R, p. 10.

[419] Michael P. Van Alstine, The Role of Domestic Courts in Treaty Enforcement – Summary and Conclusions, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 555, at 585-587. The comparison included Australia, Canada, Germany, India, Israel, the Netherlands, Poland, the Russian Federation, South Africa, the United Kingdom, and the United States.

the VCLT, and yet others appear to have developed canons of treaty interpretation independently of, and sometimes different from those laid down in the VCLT. The choice of interpretive methods can be influenced by (and have an impact on) the allocation of powers between the courts and the other branches of government. For instance, if the courts rely on evolutionary, purposive or teleological interpretations, the link to the original will of the political branches which have concluded the agreement may be weaker than if the courts rely on a textual interpretation. If the courts rely in their interpretation of international treaties on the interpretation given by the Ministry of Foreign Affairs,[420] the executive branch retains the interpretive power.

The EU courts have ruled that the interpretative rules laid down in the VCLT are binding upon the Union institutions and form part of the EU legal order to the extent that they express rules of customary international law. The fact that neither the EU nor all of its Member States are parties to the VCLT is therefore considered to be irrelevant. EU courts thus often refer to and apply the VCLT interpretive rules in the construction of agreements concluded by the Union.[421] In the *Brita* case, the EU Court of Justice confirmed and summarized its case-law in this respect.[422] As concerns, in particular, the

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[420] The ECtHR has declared this method, as practiced at the time by France, as contrary to the independence and impartiality of the courts (Beaumartin v. France, 15287/89, judgment of 24.11.1994, paras. 34-39), and the French courts have subsequently acknowledged that they are not bound by interpretations given by the Minister of Foreign Affairs (cf. Emmanuel Decaux, Le régime du droit international en droit interne, R.I.D.C. 2-2010, p. 467, at 491-492.

[421] In some cases, however, the ECJ limited itself to referring to the text of the pertinent provisions of an international agreement without applying the other interpretive principles listed in the Vienna Convention. For a critical analysis of the judgment of the ECJ in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla et al., [2010] ECR I-1493, see Sergo Mananashvili, Zur europarechtlichen Auslegung der "Wegfall der Umstände"-Klausel der Genfer Flüchtlingskonvention - Der Fall Salahadin Abdulla e.a. gegen Bundesrepublik Deutschland, ZEuS (2011), 283 (arguing that the courts' understanding of the "cessation of circumstances" clause of the Geneva Convention relating to the Status of Refugees is inconsistent with the result the court would have obtained if it had correctly applied the interpretive methods prescribed by the Vienna Convention).

[422] See ECJ, Case C-386/08, Brita, [2010] ECR I-1289:

> "39 … In addition, having been concluded by two subjects of public international law, the EC-Israel Association Agreement is governed by international law and, more specifically, as regards its interpretation, by the international law of treaties.
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> 40 The international law of treaties was consolidated, essentially, in the Vienna Convention. Under Article 1 thereof, the Vienna Convention applies to treaties between States. However, under Article 3(b) of the Vienna Convention, the fact that the Vienna Convention does not apply to international agreements concluded between States and other subjects of international law is not to affect the application to them of any of the rules set forth in that convention to which they would be subject under international law independently of the convention.

interpretation of the WTO agreements by EU courts, the EU Court of First Instance (now: General Court) has stated in *Reliance* that "a treaty under international law, such as the WTO Anti-Dumping and Anti-Subsidy Agreements, must, in accordance with Article 31(1) of the Vienna Convention on the Laws of Treaties [...] 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'."[423] In a number of cases, the EU courts have delivered comprehensive interpretations of provisions of the WTO agreements. In *Schieving Nystad*,[424] for instance, the EU Court of Justice interpreted Article 50 of the WTO TRIPS Agreement in the light of the context of other provisions of the TRIPS Agreement, of its purpose, and of the authentic language versions of the Agreement.

The US courts are more ambivalent with respect to the use of the interpretive rules laid down in the VCLT, of which the US is not a contracting party. While the US Supreme Court very rarely refers to the Vienna Convention,[425] other federal courts sometimes refer to the Convention as a restatement of customary rules.[426] US courts apply various canons of treaty interpretation some of which differ substantially from the rules of the Vienna Convention. In *Air France v. Saks*, the Supreme Court stated that "treaties are

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41 It follows that the rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organisation, such as the EC-Israel Association Agreement, in so far as the rules are an expression of general international customary law. Consequently, the EC-Israel Association Agreement must be interpreted in accordance with those rules.

42 In addition, the Court has held that, even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order (see, to that effect, *Racke,* paragraphs 24, 45 and 46; see, also, as regards the reference to the Vienna Convention for the purposes of the interpretation of association agreements concluded by the European Communities, Case C-416/96 *El-Yassini* [1999] ECR I-1209, paragraph 47, and Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35 and the case-law cited).

43 Pursuant to Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In that respect, account is to be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties."

[423] Case-45/06, Reliance v. Council and Commission, [2008] ECR II-2391, para. 100.

[424] ECJ, Case C-89/99, Schieving-Nijstad, [2001] ECR I-5851.

[425] Cf. Weinberger v. Rossi, 456 U.S. 25 (1982) (footnote 5, referring to the Vienna Convention with respect to the definition of the word "treaty" under principles of international law); Sale v. Haitian Centers Council, 509 U.S. 155, 191 (1993) (Blackmun, dissenting) (referring to Art. 31(1) of the Vienna Convention).

[426] E.g. Croll v. Croll, 229 F.3d 133, 145 (2d Cir. 2000) (referring to Art. 31(1) of the Vienna Convention).

construed more liberally than private agreements, and, to ascertain their meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. The analysis must begin, however, with the text of the treaty and the context in which the written words are used."[427] Furthermore, treaties should be construed "in a manner consistent with the shared expectations of the contracting parties."[428] On the other hand, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[429] The courts appear to have broad discretion in choosing whether to apply internationalist interpretive tools, which promote the common interests of all treaty parties, or nationalist tools, which give greater weight to the unilateral interest of the US.[430] Evan Criddle has criticized the US courts' "schizophrenic treaty jurisprudence that vacillates capriciously between conflicting nationalist and internationalist paradigms".[431] He defends the use of the Vienna Convention, inter alia, by pointing out that it offers a framework for more effective dialogue between domestic, foreign, and international tribunals in developing transnational treaty regimes, because the Convention's principles and structure provide "a universal legal grammar that may facilitate more effective communication, cooperation, and decisional uniformity among domestic courts and foreign and international tribunals [...] and "situates U.S. courts within a global interpretive community, providing a gateway to this community's expectations, values, and interests."[432]

It can thus be concluded that the WTO Dispute Settlement organs as well as the EU courts apply in principle similar rules of interpretation when construing the provisions of WTO law, while the US courts follow a more flexible approach.

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[427] Air France v. Saks, 470 U.S. 392, at 396-397 (1985) (internal citations omitted).
[428] Id., at 399.
[429] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982); cf. also Abbott v. Abbott, 560 U.S.___(2010), Slip Opinion p. 12.
[430] Cf. David Sloss, United States, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 504, at 522; David Sloss, When do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan* and *Sanchez-Llamas*, Colum. J. Transnat'l L., Vol. 45 (2006), 20, at 32-33
[431] Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation, Va. J. Int'l L., Vol. 44:2 (2004), 431, at 499.
[432] Id., at 497-408.

But even where the rules of interpretation applied are the same, this does not mean that international judicial bodies (such as the WTO dispute settlement organs) would necessarily come to the same results as domestic courts when interpreting a particular provision of an international agreement, nor that domestic courts from different contracting parties would come to the same result.

To start with, the interpretation of legal texts is by its very nature not an exact science and the provisions of Articles 31 and 32 VCLT are formulated in a rather open-ended fashion. The WTO Appellate Body has often applied these provisions as a sequence of separate rules which are addressed one after the other. But it has also observed that the principles of interpretation set out in Article 31 and 32 VCLT "are to be applied in a holistic fashion" and that "treaty interpretation is an integrated operation, where the interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise".[433] Other judicial organs may be more inclined to pick and choose among the interpretative principles under Articles 31 and 32 VCLT it being understood that the supplementary means of interpretation can be used only under the conditions laid down in Article 32 VCLT. Even within the WTO dispute settlement system, the construction of a particular WTO law provision by a panel is sometimes trumped, on appeal, by a different interpretation given by the Appellate Body. In some cases, the Appellate Body overturned panel rulings precisely because the panel failed to observe the principles of treaty interpretation laid down in the VCLT and therefore came to a different result.[434] As concerns more particularly the interpretation of the WTO Anti-dumping Agreement, its Article 17.6(ii) appears to acknowledge that its interpretation in accordance with the principles of Article 31 and 32 of the VCLT may lead to more than one permissible interpretation.

Furthermore, different "interpretive communities" may approach the text to be interpreted with different background assumptions based on their respective training,

[433] US – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, para. 268.
[434] E.g. US - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 114-122.

experiences and languages.[435] Also, the interpretation of an international agreement by a judicial organ may be subject to particular rules, practices or policies stemming from the context of the legal order under which the respective courts are established.[436] The WTO Appellate Body's "judicial policy of interpretation" was described by one of its former members as a strict constructionist and literal approach, and explained inter alia by the heritage of the former GATT, which was not an international organization, did not have autonomous organs, and depended on the consensus of the contracting parties in reaching decisions collectively.[437] While this description of the WTO Appellate Body's judicial policy may not do justice to the Appellate Body's jurisprudence,[438] which often goes beyond a literal interpretative approach and relies, in particular, on "the fundamental principle of effectiveness",[439] it illustrates the fact that the context of the

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[435] Cf. Jan Klabbers, Virtuous Interpretation, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), 17, at 31.

[436] Cf. Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, Int'l & Comp. L. Q., Vol. 60 (2011), 57, at 74-81 (on the "hybridization of international and national law through domestication" (at 80)).

[437] Georges Abi-Saab, The Appellate Body and Treaty Interpretation, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), p. 100, at 105 et seq..

[438] Cf. the analysis of the "judicial constitutionalization" brought about by the Appellate Body, by Deborah Z. Cass, The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade, Eur. J. Int'l L., Vol. 12 (2001), 39; and the references to the Appellate Body's "evolutionary interpretation" and its "politically balanced interpretation", by Brigitte Stern, Interpretation in International Trade Law, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), 111, at 119 and 125. Cf. also Sungjoon Cho, The World Trade Constitutional Court (2009), at p. 24, available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1047&context=sungjoon_cho (arguing that that the Appellate Body's preoccupation with textual interpretation, even when it in fact adopts teleological interpretation, attests to its endeavors to avoid being accused of overreaching its mandate under the DSU); and Joseph H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, J. World Trade, Vol. 35 (2001), 191, 206 (arguing that the "almost obsessive attempts of the Appellate Body to characterize wherever possible the normal wide-ranging, sophisticated, multifaceted and eminently legitimate interpretations of the Agreement as 'textual' resulting from the ordinary meaning of words is another manifestation of the internal-external legitimacy paradigm", i.e. the dissonance between the internal legitimacy (relating to the internal actors such as the delegations in Geneva, the secretariat, the panels, etc.) and external legitimacy (relating to the States and their organs, corporations, NGOs, citizens etc.). For an exhaustive analysis of the Appellate Body's practice in interpreting the WTO agreements, see Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (2009).

[439] Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Section G. See also Malagosia Fitzmaurice & Panos Merkouris, Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention

WTO legal order informs the Appellate Body's interpretative methods. As domestic courts act in a different context and may need to "translate norms from one community to another",[440] the concrete means by which they apply the interpretative rules of the VCLT are not necessarily the same.

The interpretation of WTO law by judicial bodies established under different international or domestic legal orders may therefore result in divergent results and the unifying effect of the application of the same rules of interpretation is thus limited. It would be all the more important that domestic courts interpret WTO law by taking into consideration WTO dispute settlement rulings[441] or judgments of courts of other contracting parties to the WTO.[442] In this manner, domestic courts should in most cases be able to ascertain the meaning of the treaty rule in the light of which they are to interpret domestic acts, although a margin of interpretation of the pertinent treaty rule may in some cases remain and the indirect effect of this rule is therefore inherently limited. An example is the decision of the US Court of International Trade in *Hyundai.*[443] The Court referred to the WTO panel report in *US - DRAMS from Korea*[444] and conceded that WTO dispute settlement rulings, although not binding, could be used to inform the court's decision. However, it then interpreted itself the pertinent provision of the WTO Anti-dumping Agreement and concluded that the US measure was not inconsistent with the obligations of the US under the Agreement, although the panel had come to the contrary conclusion.

C. The domestic rules which are interpreted in the light of an international agreement

International treaty rules can in principle have indirect effects on the whole body of domestic law. However, the source of the domestic rule which is to be interpreted in the

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on the Law of Treaties: 30 Years on (2010), 100, at 179 et seq.; Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, Eur. J. Int'l L., Vol. 21 (2010), 605, 635-639.

[440] Cf. Karen Knop, Here and There: International Law in Domestic Courts, Int'l L. & Pol., Vol. 32 (2000), 501, 504.

[441] Cf. Part VI.B.1.(c), above.

[442] See Part IX.B.1., below.

[443] Hyundai Electronics Co. v. United States, 53 F. Supp.2d 1334 (Ct. Int'l. Trade 1999)

[444] US - Anti-Dumping Duty on Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R.

light of a rule of international law, as well the objective, nature and content of the domestic rule may determine, condition or limit the effects to be attributed by domestic courts to the international treaty rule. The following sections will illustrate this (1) in relation to the source of the domestic rules at issue and (2) in relation to the objective, nature and content of the domestic rules at issue. On this basis (3) the methods used by domestic courts in the interpretation of the domestic rules (in the light of international treaty rules) and their limits will then be examined.

1. The source of the domestic rules

(a) Domestic Federal/Union rules and State/Member State rules

In federal legal systems such as the US or supranational legal systems such as the EU, the principles regarding the indirect effect of international agreements on the State or Member State legal order may have some particularities compared with the indirect effect on the federal or supranational legal order.[445]

Divergent views have been expressed in US doctrine on the question whether international treaty law can have an indirect effect on State law. While some commentators argue that the supremacy clause of the US Constitution and the US interest in uniform interpretation with respect to international law could justify the conclusion that the *Charming Betsy* canon should be applied also in the interpretation of State law,[446] others doubt this because, according to them, the canon is based on particular federal separation of powers concerns.[447]

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[445] As concerns international responsibility for compliance with WTO law, Article XXIV:12 GATT provides that each Member must take such reasonable measures as may be available to it to ensure observance of the provisions of the agreement by the regional and local governments and authorities within its territories (see also the similar provision of Art. 22(9) DSU, Art. 13 SPS Agreement, Art. 3(4) and (7) TBT Agreement, and Art. I(3) GATS). This is further substantiated in the Understanding on the Interpretation of Article XXIV of the GATT 1994 (para. 12), according to which every member is "fully responsible" for complying with the GATT. In Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, paras. 7.400-7.406, the WTO panel found that the Federative Republic of Brazil was ultimately responsible for ensuring that its constituent states respect Brazil's WTO obligations. This would suggest that in federal legal systems the federal state is ultimately responsible for the compliance with WTO law, but it does not impose specific obligations on the federal courts in this regard.

[446] Cf. Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, Vand. L. Rev., Vol. 43 (1990), 1103, at 1113-1134, note 45.

[447] Cf. Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, Geo. L. J., Vol. 86 (1997), 479, at 533-536.

In the EU, the indirect effect of provisions of international agreements concluded by the Union, such as the WTO agreements, on the Member States can be explained by the particular supranational set-up of the European Union. The distribution of competences between the EU and its Member States determines to what extent the Member States' courts are obliged, under EU law, to attribute indirect effect to these provisions. If a provision of an international agreement falls within the exclusive competence of the EU or if the EU has internally exercised shared competences in this matter, the Member States' courts are obliged to interpret national law in a way which is consistent with this provision. In these cases, the provision of the agreement is integrated into the EU legal order and its uniform application must be ensured.[448] It is for this reason that the EU Court of Justice has ruled that the courts of the Member States must interpret national law in the light of the TRIPS Agreement where the EU has already enacted internal legislation for the subject matter concerned.[449] Furthermore, the obligation of WTO-consistent interpretation of national law by the courts of the Member States is also relevant in a situation where a provision of the TRIPS Agreement can apply both to situations falling under EU and under national law.[450] To the extent that WTO law provisions have been integrated into the EU legal order, the obligation for the courts of the Member States to interpret their national law consistent with these WTO law provisions can thus also be founded on the obligation of the Member States' courts to interpret national law consistent with EU law.[451] By contrast, Member States' courts are not required to interpret national law in the light of the WTO Agreement if the national measure does not fall within the scope of Union law. It has been critically remarked that

[448] Cf. ECJ, Case 104/81, Kupferberg, [1982] ECR 3641, para. 14, where the Court ruled that it followed from the Union nature of such provisions that "their effect in the [Union] may not be allowed to vary according to whether their application is in practice the responsibility of the [Union] institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State, which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the [Union]."

[449] ECJ, Case C-53/96, Hermes, [1998] ECR I-3603, para. 28; Joined Cases C-300/98 and C-392/98, Dior, [2000] ECR I-11307, para. 47; Case C-89/99, Schieving-Nijstad, [2001] ECR I-5851, para. 35, 54.

[450] ECJ, Case C-53/96, Hermes, [1998] ECR I-3603, paras. 28, 32; Joined Cases C-300/98 and C-392/98, Dior, [2000] ECR I-11307, para. 35.

[451] Cf. Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, at 354-356 (pointing also out that, whereas indirect effect in the context of EU-Treaty-consistent interpretation is a complement to direct effect, it is a substitute for direct effect in the context of WTO-law-consistent interpretation.)

making the attribution of indirect effect of WTO law on the laws of the Member States dependent on the scope of the EU's competences may lead to divergent interpretations in particular in the sphere of the TRIPS Agreement.[452] But in view of the fact that with the entry into force of the Treaty of Lisbon, the Union has acquired exclusive competence for most provisions of the WTO agreements, including arguably many of the provisions of the TRIPS Agreement,[453] any such possible inconsistencies have been greatly reduced.

Finally, it should be noted that even if the EU is not bound by an international agreement, because it is not a party thereto and has not functionally succeeded the Member States in this regard, agreement-consistent interpretation by EU courts can nevertheless result from the Union's obligations in relation to the Member States, founded on the principle of sincere cooperation, if Member States are bound by the agreement.[454]

(b) Domestic constitutional, legislative or administrative rules

International treaty law can have an indirect effect on different categories of domestic rules which can broadly be distinguished, for the purposes of this paper, as being of a constitutional, legislative or administrative (or executive) nature.[455]

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[452] On the risk of divergent interpretations of the TRIPS Agreement in particular with regard to direct effect, but taking into account the principle of consistent interpretation, see 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: Interpretation of Law in the Global World: From Particularism to a Universal Approach in: Joanna Jemielniak & Przemysław Mikłaszewicz (eds.), Interpretation of Law in the Global World: From Particularism to a Universal Approach (2010), 167; cf. also Piet Eeckhout, The domestic legal status of the WTO Agreement: Interconnecting Legal Systems, CMLRev. Vol. 34 (1997), 11, at 20-23 (arguing, before these judgments were rendered, that a mixed approach to domestic legal status is "undesirable, artificial and perhaps unworkable").

[453] But see the Opinion of 31.1.2013 of the Advocate-General in Case C-414/11, Daiichi Sankyo, paras. 40-81 (on the limitation of the Union's exclusive comptence in the field of the TRIPS Agreement to those provisions which concern the "commercial aspects" of intellectual property within the meaning of Art. 207 TFEU).

[454] Cf. ECJ, C-308/06, Intertanko, [2008] ECR I-4075, para. 52.

[455] Furthermore, domestic courts may refer to an international treaty in order to interpret concepts or terms used in other international agreements; cf. Part IX.C., below.

As concerns, in the first place, domestic constitutional rules, which are generally ranked above international treaty law,[456] a general obligation for domestic courts to interpret the constitutional provisions in a way consistent with international treaty law would be difficult to establish. As Anne Peters has pointed out in this context, "[i]n a strictly legal positivist and schematic perspective, a hierarchically inferior norm cannot have an impact on the reading of a 'higher' norm."[457]

But this does not exhaust the issue. Indirect effect of international treaty rules on domestic constitutional rules can be founded, in some instances, on constitutional interpretative instructions or on the incorporation of certain treaty law rules in the constitutional rules themselves. As has been demonstrated above, some national constitutions expressly provide for the interpretation of their provisions in the light of (some) international law rules.[458] Depending on the formulation of such clauses, they may impose on domestic courts an obligation of agreement-consistent interpretation or at least an obligation to take international agreements into account in the interpretation of the constitutional provisions. Other constitutions incorporate international treaty law into the constitutional provisions without expressly referring to their status or effect. As mentioned above,[459] in EU primary law, for instance, reference is made to the ECHR and to the Geneva Convention and the Protocol of 1967 relating to the status of refugees.

Even in the absence of such constitutional instructions or references, international agreements are sometimes used as guidance or persuasive authority in the process of clarifying constitutional provisions which are formulated in an open way. In Germany, for instance, where treaty law is transposed by an act of the federal legislature and has the status of a federal statute, the German Federal Constitutional Court has ruled that the guarantees of the European Convention on Human Rights and the case-law of the European Court of Human Rights serve, on the level of German constitutional law, “as guides to interpretation in determining the content and scope of fundamental rights and

[456] This is also the case in the US and the EU legal systems; cf. Part V.C., above.
[457] Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, icl-journal, Vol. 3 (2009), p. 170, at 181.
[458] See Part V., above.
[459] See Part VI.A.3.

constitutional principles" of the German Basic Law.[460] To cite Anne Peters again: "Through the practice of consistent interpretation, international law exercises an *indirect effect* on national constitutional law. The practice of voluntary acceptance of the guiding authority of international law over constitutional law contributes to constitutional harmonization. This is not an end in itself, but appears useful, not least for adapting old constitutions to contemporary social problems."[461]

The possibility to refer to international treaty law as a guidance for the interpretation of constitutional provisions has occasionally also been acknowledged by EU and US courts.

In this sense, US courts have referred to international law to inform their interpretation of ambiguous provisions in the US Constitution, without implying however any obligation to do so. Such references, which have been fiercely contested, were considered by the courts to be "instructive" for the interpretation of the relevant constitutional provision.[462] The courts do not refer in this context to the more far-reaching *Charming Betsy* canon.[463]

EU courts have also referred to international treaty law in the interpretation of EU primary law. In *Defrenne*, for instance, the Court of Justice referred to the ILO Convention on Equal Pay in the context of its interpretation of an EU primary law provision in the field of social policy.[464] In a recent judgment, the Grand Chamber of the Court of Justice has gone further by appearing to suggest that the principle of agreement-consistent interpretation (and the interpretation in the light of customary rules of international law) applies also to EU primary law and that the courts are

[460] BVerfG, Oct. 14 2004, 2BvR, 1481/04, Görgülü, para 32.
[461] Anne Peters, The Globalization of State Constitutions, in: New Perspectives on the Divide Between National and International Law (eds. Janne Nijman & André Nollkaemper) (2007), 251, at 303.
[462] Roper v. Simmons, 543 U.S. 551, 575 (2005): "[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'". Cf. Part VI.A.2, above.
[463] It has been argued that, while the Charming Betsy canon has no place in the interpretation of individual liberties guaranteed under the Constitution, it could play a role in the interpretation of the constitutional foreign relations clauses, such as the provisions on treaty-making powers and war-making powers: "One may well argue that courts should avoid interpretations of [such] constitutional provisions [...] that undermine the ability of the Executive to conduct foreign affairs consistent with international obligations"; see Roger P. Alford. Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy, Ohio St. L. Rev., Vol. 67 (2006), 1339, 1374.
[464] Cf. ECJ, Case C-43/75, Defrenne, [1976] ECR I-455, para. 20.

therefore obliged to interpret provisions of EU primary law in the light of international treaties (and of customary rules of international law).[465] The General Court had previously held that the principle of agreement-consistent interpretation does not apply to the interpretation of EU primary law and that the courts were therefore not obliged to interpret EU primary law in the light of international agreements, such as the WTO agreements.[466] In any case, the courts are not prevented from referring to WTO law in order to clarify EU primary law provisions. This can be illustrated by two examples. In *Petrotub,*[467] the applicants had requested the annulment of an anti-dumping measure adopted by the Council because the Council had not adequately stated the reasons why it had applied the so-called asymmetrical method in order to calculate the dumping margin. The EU Court of Justice first recalled its case-law according to which Union legislation must so far as possible be interpreted in a manner that is consistent with international law. The Court then found that "the fact that it was not expressly specified in [the EU Anti-dumping legislation] that the explanation required by Article 2.4.2 of the 1994 Anti-dumping Code [of the WTO] had to be given by the [Union] institutions in the event of recourse to the asymmetrical method may be explained by the existence of Article 190 of the Treaty [now Article 296 TFEU]. Once Article 2.4.2 is transposed by the[Union], the specific requirement to state reasons laid down by that provision can be considered to be subsumed under the general requirement imposed by the Treaty for acts adopted by the institutions to state the reasons on which they are based."[468] The

[465] Cf. judgment of the ECJ of 16.10.2012 (n.y.r.), Case C-364/10, Hungary v. Slovak Republic, paras. 44-52: The Court interpreted Art. 21 TFEU in the light of international customary law governing diplomatic relations and of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. The Court concluded that "the fact that a Union citizen performs the duties of a Head of State is such as to justify a limitation, based on international law, on the exercise of the right of free movement conferred on that person by Article 21 TFEU).

[466] Cf. Case T-201/04, Microsoft v. Commission, [2007] ECR II-3601, para. 798: "The Court holds that the principle of consistent interpretation thus invoked by the Court of Justice applies only where the international agreement at issue prevails over the provision of Community law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC [now: Art. 102 TFEU]." But see Cf. Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, J. Int'l Econ. L., 1 (1998) 83, at 89; and Sujitha Subramanian, EU Obligations to the TRIPS Agreement: EU Microsoft Decision, Eur. J. Int'l L., Vol. 21 (2010), 997, 1011 (in favor of applying the principle of consistent interpretation also to rules of the EU Treaty).

[467] ECJ, Case C-76/00 P, Petrotub and Republica v. Council and Commission, [2003] ECR I-79.

[468] Ibid., at para. 58.

Court concluded that an anti-dumping measure having recourse to the asymmetrical method must in particular contain, "as part of the statement of reasons required by Article 190 of the Treaty, the specific explanation provided for in Article 2.4.2. of the 1994 Anti-dumping Code"[469] and that the contested anti-dumping measure failed to give such explanation. It would thus appear that the Court construed the general and open text of the constitutional provision of Article 190 of the Treaty, which states – in its present version – that "legal acts shall state the reasons on which they are based [...]", by taking account of the specific explanation requirement under the WTO Anti-dumping Agreement. Another instance where a EU court referred to WTO law in the interpretation of EU primary law – in this case human rights based on general principles of law – was the *Metronome* case. The Court of Justice, after having referred to the WTO TRIPS Agreement, stated that "the general principle of freedom to pursue a trade or profession cannot be interpreted in isolation from the general principles relating to protection of intellectual property rights and international obligations entered into in that sphere by the [Union] and the Member States."[470]

Finally, since international agreements concluded by the EU form an integral part of the EU legal order, which (at least from the perspective of the EU courts) has primacy over the whole body of the law of the Member States, the courts of the Member States are obliged, by virtue of EU law, to interpret domestic law, including the constitutional law of the Member States, in a manner consistent with the provisions of agreements concluded by the EU.[471]

As concerns, in the second place, the indirect effect of international treaty rules on domestic legislative and administrative rules,[472] it is easier to justify in legal orders, such

[469] Ibid., at para. 60.
[470] Case C-200/96 Metronome Musik v. Music Point Hokamp, [1998] ECR I-1953, para. 26.
[471] Cf. Rass Holgaard, External Relations Law of the European Community (2008), 309.
[472] In view of the different set-up of the distribution of powers or functions in the EU and the US, the distinction between legislative or statutory measures, on the one hand, and administrative or executive measures, on the other, is not always easy to make.
For instance, trade defense measures imposing definitive anti-dumping duties have been adopted in the EU by the Council as regulations and have been characterized by the EU Court of Justice as "legislative in nature and scope", although anti-dumping proceedings "are similar in several aspects to an administrative procedure" (ECJ, Case C-76/01 P, Eurocoton, [2003] ECR I-10091, paras. 73 and 69, respectively). This will change with the implementation of the Treaty of Lisbon. Under the TFEU in its version resulting from

as the EU, where international agreements have primacy over secondary (legislative and administrative) domestic rules, than in legal orders, such as the US, where international agreements have, in principle, the same rank as federal statutory rules. Furthermore, the intensity of indirect effect of international treaty law on domestic legislative and administrative rules is often influenced by how the domestic courts conceive the proper role of the courts when reviewing measures adopted respectively by the legislative or the executive branches.

In both the EU and the US legal systems, the courts show some deference to the legislator, in particular when it comes to politically charged or economically complex issues.[473] This is also reflected in the doctrines of agreement-consistent interpretation of domestic legislation which is required only "in so far as possible". If a domestic legislative rule is drafted in clear and unambiguous language, it is not susceptible to a contrary interpretation in the light of international treaty rules. By contrast, where the legislator incorporates or refers to international treaty rules in a domestic legislative act, the courts would need to take these rules into account in the interpretation of the

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the Treaty of Lisbon, legislative acts are defined as those acts which are adopted by legislative procedure (cf. Art. 289 TFUE). The ordinary legislative procedure consists in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on proposal from the Commission. The special legislative procedure consists of the adoption of a regulation, directive or decision by the European Parliament with the participation or the Council, or by the latter with the participation of the European Parliament. Non-legislative acts include delegated acts or implementing acts (cf. Art. 290 and 291 TFEU). In the US, the Constitution confers on Congress legislative powers. Art. I, § 1, of the Constitution provides that “all legislative powers” granted in the Constitution are vested in the Congress, which consists of the Senate and the House of Representatives. The legislative powers are set out principally in Article I, § 8, which includes the power “to regulate Commerce with foreign Nations”. Legislative powers are distinguished, in particular, from executive powers, which, according to Article II, § 1, of the Constitution, are vested in the President. An act of Congress may create agencies. And it may "use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution", Hampton & Co. v. U.S., 276 U.S. 394 (1928) concerning the Tariff Act of 1992 which vested certain powers in the President to change import duties in function of the domestic cost of production.

[473] Cf. Allan Rosas, Separation of Powers in the European Union, the Int'l Lawyer, Vol. 41, No. 4 (2007), 1033, at 1039-1040 (concluding that the ECJ shows deference to the Union legislator, in particular in the application of the principle of proportionality); Piet Eeckhout, Case C-308/06, CMLRev., Vol. 46 (2009), 2041, at 2057 (arguing that “the EC legislature should be allowed a measure of discretion in construing the Community’s international obligations, and in ensuring compliance” and that the court should be more ready to attribute direct effect to international agreements, but more reluctant to find a breach by legislative measures). For a critical view on the traditional approach of deference to political branches, cf. Eyal Benvenisti, Reclaiming Democracy. The Strategic Uses of Foreign and International Law by National Courts, Am. J. Int'l L., Vol. 102 (2008), 241, at 245-247.

domestic act. Even where the domestic legislation does not incorporate or refer to international treaty rules, the courts sometimes justify the recourse to agreement-consistent interpretation by the assumed intention of the legislator to respect the international commitments of the country concerned.

The issue becomes more complex when the executive branch applies domestic legislation by adopting administrative or executive acts based on legislative empowerment. When the courts review such administrative or executive acts, the question arises to what extent they should defer to the executive branch's interpretation of the legislative act. In this context, it can be relevant whether the executive's interpretation of the domestic legislation took account of international treaty rules or case-law.[474]

In the EU, the courts show deference to the EU institutions' assessment of complex economic, technical, or scientific realities in the adoption of administrative acts.[475] But this does not prevent the EU courts from interpreting the legislative act, on the basis of which the administrative act is adopted, in the light of the EU's international obligations. In some cases, the EU courts first interpret the domestic legislative act in the light of the EU's international obligations and then determine whether the application of the act by the Commission complies with the act or stays within the limits of the discretion which the act, as interpreted, still allows for its application. In other cases, the courts first determine whether the Commission has acted within the margin of

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[474] Cf. André Nollkaemper, National Courts and the International Rule of Law (2011), 158 et seq. (pointing out that the principle of consistent interpretation can interact in these circumstances with principles of domestic administrative law, such as the principle of reasonableness and the principle of legitimate expectations).

[475] Cf. ECJ, Case C-373/08, Hoesch, [2010] ECR I-951, paras. 61 and 62 (internal citations omitted):

"61 It is appropriate to recall, secondly, that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine [...].

62 Furthermore, it is settled case-law that the determination of the existence of injury to the Community industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been manifest error in the appraisal of those facts or misuse of powers [...]."

As concerns the scope of judicial review over administrative rule-making, cf. Alexander H. Türk, Oversight of Administrative Rulemaking: Judicial Review, Eur. L. J., Vol. 19 (2013), 126.

appreciation left to it by the legislative act and then determine whether the Commission's act is in line with the EU's international obligations. In *Asda*, the Court of Justice stated that "the Commission has, in exercising the power conferred upon it by the Council for the implementation of Article 24 of the [Union] Customs Code, a margin of discretion which allows it to define the abstract concepts of that provision with reference to specific working or processing operations [...]."[476] The court then mentioned specific criteria which may be regarded as falling within the margin left by Article 24 of the Customs Code, before finding support for the relevance of these criteria in the International Convention on the Simplification and Harmonisation of Customs Procedures and the WTO Agreement on Rules of Origin.[477] Recalling that Union legislation must, so far as possible, be interpreted in a manner that is compatible with international agreements concluded by the EU, the Court concluded that the criterion chosen in the Commission's act was not incompatible with Article 24 of the EU Customs Code and that the Commission had not exceeded its implementing powers under the Customs Code.[478] The institutions' discretion in the interpretation and application of EU legislation is, however, not unlimited. The *Petrotub* case shows that the Court is prepared under certain circumstances to invalidate an administrative act as incompatible with EU legislation as construed in the light of EU primary law, which in turn is construed consistently with WTO law.[479] It is thus not excluded that the principle of agreement-consistent interpretation can trump the principle of deference to the EU institutions in their application of EU legislation. The EU courts appear to adjudicate such cases as a matter of course without there being a exhaustive doctrinal discussion of the relation between these two principles.

In the US, Congress may prohibit judicial review of agency action by explicitly establishing such exclusion in the language of a statute.[480] Where this is not the case, the

[476] ECJ, Case C-372/06, Asda, [2007] ECR I-11223, para. 35.
[477] Ibid., paras. 38 and 39.
[478] Ibid., paras. 40 and 41.
[479] ECJ, Case C-76/00 P, Petrotub and Republica v. Council and Commission, [2003] ECR I-79.
[480] Cf. U.S. v. Babcock, 250 U.S. 328 (1919). The Administrative Procedure Act prohibits judicial review over agency action committed to agency discretion by law (5 U.S.C. 701(a)(2)). The Supreme Court accepts that agency acts falling within that scope are not subject to judicial review; Lincoln v. Vigil, 508 U.S. 182 (1993).

courts generally defer to the executive branch's interpretation of ambiguous statutory language. The leading case is *Chevron*, where the US Supreme Court has ruled as follows:[481] "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Examination of the question whether the statute is clear is generally referred to as "step one" of the *Chevron* doctrine and examination of the question whether the agency's interpretation is a permissible construction of the statute as "step two", while the preliminary question whether the agency has administered the statute (and whether *Chevron* applies) is sometimes referred to as "step zero".[482]

The relationship between the *Chevron* doctrine (of judicial deference to the interpretation of statutes by the executive branch) and the *Charming Betsy* canon (of statutory interpretation to avoid conflict with international law) has been extensively discussed by US courts and analyzed in legal doctrine.[483] In particular, there were suggestions that the *Charming Betsy* doctrine should be applied in step one of *Chevron*, by taking the international commitments of the US into account in determining the

[481] Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, at 842-43 (1984) (footnotes omitted).
[482] In U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001), the Supreme Court ruled that "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Otherwise, a more limited level of deference, such as Skidmore deference (Skidmore v. Swift & Co., 323 U.S. 134 (1944)) applies.
[483] Cf., e.g., Curtis A. Bradley, Chevron Deference and Foreign Affairs, Va. L. Rev., Vol. 86 (2000), 649, at 685-690.

"unambiguously expressed intent of Congress".[484] Others have suggested to apply the *Charming Betsy* canon in step two of *Chevron*, arguing that a "permissible construction of the statute" must take the international commitments of the US into account.[485]

The most prominent cases where this issue was decisive concern the review of executive actions of the Department of Commerce and the US International Trade Commission in the application of the US trade remedy legislation,[486] and more specifically in the judicial review of anti-dumping measures based on the "zeroing" methodology in the calculation of anti-dumping margins. These cases, which have been decided against the background of the particular statutory framework of the Uruguay Round Agreements Act (URAA) and the decisions of the WTO Dispute Settlement Body (DSB), have been exhaustively described and discussed elsewhere.[487] A brief summary may therefore be

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[484] Cf., e.g., Catherine E. Sweetser, Deference to Administrative Agencies in Interpreting Treaties: Chevron, Charming Betsy, and Global Decisionmaking, unpublished paper (Sept. 2010), available at: http://works.bepress.com/catherin_sweetser/1, at 24; cf., e.g., Salant Corp. v. U.S., 86 F.3d 1301, 1306 (Ct. Int'l Trade 2000) (looking at the text and legislative history, including the GATT Valuation Code, under Chevron Step 1).

[485] Cf., e.g., Alex O. Canizares, Is Charming Betsy Losing her Charme? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine, Emory Int'l L. Rev., Vol. 20 (2006), 591, 641-42, 648; cf. e.g., George E. Warren Corporation v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998)

[486] The Department of Commerce is responsible for the determinations made under the antidumping and countervailing duty laws, except for the determination of injury, which is made by the US International Trade Commission (USITC). The Court of International Trade (Ct. Int'l Trade) exercises judicial review of final Commerce and USITC decisions. Appeals are heard by the Court of Appeals for the Federal Circuit (Fed. Cir.). The US Supreme Court can exercise discretionary review of decisions of the Fed. Cir. if a party files a writ of certiorari. The standard of review generally applied by the Ct. Int'l Trade (or the Fed. Cir) to findings of Commerce or the USITC is the “substantial evidence” standard, according to which the Court will affirm an antidumping or countervailing duty decision unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

[487] Jeffrey L. Dunoff, Less Than Zero: The Effects of Giving Domestic Effect to WTO Law, Loy. U. Chi. Int'l L. Rev., Vol. 6 (2008/2009), 279: John J. Barceló III, The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, Tul. Eur. & Civ. L. F., Vol. 21 (2006), 147; Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, Fordham Int'l L. J., Vol. 24 (2001), 1533; Patrick C. Reed, Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality, Geo. J. Int'l L., Vol. 38 (2006), 209; John D. Greenwald, After Corus Staal - Is there any Role, and Should there be - for WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?, Geo. J. Int'l L., Vol. 39 (2007), 199; Jeffery W. Spaulding, Do International Fences Really Make Good Neighbors? The Zeroing Conflict Between Antidumping Law and International Obligations, New England L. Rev., Vol. 41 (2007), 379; Mary Jane Alves, Reflections on the Current State of Play: Have U.S. Courts Finally Decided To Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?, Tul. J. Int'l & Comp. L., Vol. 17 (2009), 299; Casey Reeder, Zeroing in on Charming Betsy: How an Antidumping Controversy Threatens to Sink the Schooner, Stetson L. Rev., Vol. 36 (2006), 255; Arwel Davies, Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon, J. Int'l Econ. L., Vol. 10

sufficient here. In *Timken v. U.S.,* [488] the Federal Circuit, applying *Chevron*, found that the statute did not directly speak to the issue of zeroing and concluded that the zeroing practice of Commerce was based on a reasonable interpretation of the relevant statutory language. The court accepted that the URAA did not prevent it from considering an action based on US law as construed so as to avoid a conflict with international obligations. But the Court was not convinced by the applicant's argument that the statute should be interpreted so as to be consistent with WTO law as determined by the WTO Appellate Body in the *EC - Bed Linen* report,[489] which had declared zeroing as inconsistent with the WTO Anti-dumping Agreement. The Court distinguished *Bed Linen* and remarked that the report was not sufficiently persuasive. In *Corus Staal I*[490] the court went even further and stated that no deference was accorded to WTO cases: "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted as per Congress' statutory scheme." This was confirmed in C*orus Staal II*,[491] regarding the use of zeroing in administrative reviews, which the WTO Appellate Body had in the meanwhile equally found to be inconsistent with the WTO Anti-dumping Agreement.[492] In subsequent decisions, the Federal Circuit stated that it "refrains from commenting on international body decisions unless and until they have been adopted pursuant to the specified statutory scheme. Unless and until that happens, this court has nothing to review."[493] And it emphasized that "[t]he determination whether, when, and how to comply with the WTO's decision on 'zeroing', involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch."[494] It has thus become clear that, due to the general deference

(2007), 117; Alex O. Canizares, Is Charming Betsy Losing her Charme? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine, Emory Int'l L. Rev., Vol. 20 (2006), 591.

[488] Timken Co. v. U.S., 354 F.3d 1334 (Fed. Cir. 2004).

[489] EC - Anti-Dumping Duties of Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R.

[490] Corus Staal BV. v. Dept. of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

[491] Corus Staal BV. v. U.S., 502 F.3d 1370, 1372-74 (Fed. Cir. 2007).

[492] U.S. - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R.

[493] NSK Ltd. v. U.S., 510 F.3d 1375, 1380 (Fed. Cir. 2007).

[494] Koyo Seiko Co., Ltd v. U.S., 551 F.3d 1286, 1291 (Fed. Cir. 2008). Cf. also Andaman Seafood Co., Ltd v. U.S., 675 F.Supp.2d 1363, 1373 (2010) (where the court relied on the fact that the URAA was "expressly

to agency interpretations of statutory provisions and to the specific statutory scheme established by the URAA, the courts would not overrule Commerce's zeroing practice and that the growing number of WTO dispute settlement reports, which had declared this practice to be inconsistent with WTO law, would not even be considered in this regard. However, once the political branches had decided to comply with and implement WTO reports in accordance with the statutory scheme set up by the URAA, they were obliged do so in a consistent manner. For this reason, the Federal Circuit held in *Dongbu* that Commerce had failed to explain why it was reasonable, under *Chevron* Step 2, to interpret the ambiguous statutory provision differently for the original investigation phase, where it had abandoned zeroing, and the administrative review phase, where it had been continuing zeroing.[495] In the meanwhile, the Court of International Trade has accepted additional reasoning provided by Commerce. It held that Commerce had a wide latitude in deciding how to comply with WTO law and may often move incrementally in this regard. The partial change (with respect to original investigations, but not with respect to review proceedings) was held not to amount to an abuse of discretion.[496]

In the zeroing cases, as well as elsewhere, the courts appear to be reluctance to invalidate, by applying the *Charming Betsy* canon of statutory interpretation, agency determinations based on statutory empowerment.[497] The *Charming Betsy* canon is mostly relied on by the courts in order to confirm agency determinations, in cases where this canon and *Chevron* deference point into the same direction. The was, for instance, the case in *Bormioli*, in which the plaintiff had challenged a determination by Commerce, which was intended to implement a GATT decision. The Federal Circuit upheld Commerce's determination and stated that "we think that the statute must be

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designed so as to preserve the independence of U.S. law from adverse decisions of the DSB until such time as the political branches decide that, of the options available to the United States under the WTO Agreements, a change in U.S. law and/or policy or methodology is most appropriate").

[495] Dongbu Steel v. U.S., 635 F.3d. 1363 (Fed. Cir. 2011); cf. also JTEKT Corp. v. U.S., 642 F.3d 1378 (Fed. Cir. 2011).

[496] United Steel v. U.S., 823 F.Supp.2d 1346 (Ct. Int'l Trade 2012), on appeal to the Fed. Cir., CAFC Court No. 2012-1248; cf. also Grobest v. U.S., 853 F.Supp.2d (Ct. Int'l Trade 2012); Fischer v. U.S., CIT Slip Op. 12, Court No. 11-00321 (6.12.2012).

[497] But see Caterpillar v. U.S., 941 F.Supp. 1241 (Ct Int'l Trade 1996).

interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history".[498]

Some of the bi-national panels established under NAFTA Chapter 19 have relied more strongly on WTO law and WTO dispute settlement rulings, in spite of the fact that these panels are supposed to apply the domestic law of the importing party and to exercise the same standard of review and the general legal principles as a court of the importing party.[499] The bi-national panel in *Software Lumber*,[500] which had previously considered - in line notably with the Federal Circuit decision in *Timken* - that the zeroing of negative dumping margins was a permissible construction of the US anti-dumping statute, reversed course after the WTO DSB had adopted the Appellate Body report in the WTO *Softwood Lumber* case, which found that the application of zeroing in this investigation violated the US's obligations under the WTO Anti-dumping Agreement.[501] The panel considered that an otherwise permissible agency interpretation that passes *Chevron* step 2, is nevertheless contrary to the statute if it conflicts with international obligations of the US. In applying the *Charming Betsy* canon, the panel stated that the

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[498] Luigi Bormioli Corp, Inc. v. U.S., 304 F.3d 1362, 1368 (Fed. Cir. 2002). Cf. also, Federal Mogul Corporation v. U.S., 63 F.3d 1572, 1581-1582 (Fed. Cir. 1995), concerning a GATT decision; George E. Warren Corporation v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998).

[499] The provisions of the WTO Antidumping and Countervailing Duty Agreements are in substance incorporated into NAFTA. Article 1902.1 provides that each party reserves the right to apply its domestic law including relevant statutes, legislative history, regulations, administrative practice and judicial precedents. Article 1902.2 of NAFTA provides that any changes to the domestic laws must be consistent with Article VI GATT, the AD Agreement and the SCM Agreement, and with the trade-liberalization objectives of NAFTA. Article 1904 of NAFTA provides that appeals from the administrative agencies of the contracting parties are referred to a five-person binational panel, which is composed of trade experts who are nationals of the parties whose citizens where interested parties in the antidumping or countervailing duty proceedings before the administrative agencies. The process replaces the court process of the NAFTA country imposing the duties (Art.1904.11). The panels apply the domestic law of the contracting party, except in the case of Mexico where the provisions of the GATT, the AD Agreement and the SCM Agreement are incorporated directly into national law. The panels must exercise the same standard of review and the general legal principles that a court of the importing party otherwise would apply to a review of a determination of the investigating authority (Art. 1904.5). While the panel may uphold the final determination, or remand it for action not inconsistent with the panel's decision (Art. 1904.8), the panel lacks authority to reverse the determination. A panel decision cannot be appealed, but a review may take place under narrow conditions in the extraordinary challenge procedure set out in Annex 1904.13. More generally on the influence of the reasoning and findings of WTO dispute settlement rulings on NAFTA Chapter 19 panels, Jorge A. Huerta-Goldman, Trade Remedies Disputes - Reciprocal Relationship between WTO and NAFTA Tribunals, in: Shaping Rule of Law Through Dialogue - International and Supranational Experiences (eds. Filippo Fontanelli, Giuseppe Martinico & Paolo Carrozza) (2010), 319.

[500] In the matter of certain softwood lumber products form Canada: final affirmative antidumping determination, Panel decision of 9 June, 2005, USA-CDA-2002-1904-02.

[501] U.S. - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R.

WTO decision established "with considerable authority" that the use of zeroing was in breach of the US's obligations under WTO law. It further considered that the provisions of the URAA had no preclusive effect after he US had acknowledged in its Section 129 determination that the measure was inconsistent with WTO law, although this determination had not yet become effective. Similar arguments were employed by the bi-national panels in *Carbon and Certain Alloy Steel Wire Rod*[502] and in *Stainless Steel Sheet and Strip in Coils*.[503] The Chapter 19 NAFTA panel process and its results have been widely criticized, in particular by US lawyers,[504] but a number of constitutional challenges against this process have been unsuccessful.[505] While the attempts of these panels to reconcile *Chevron* with *Charming Betsy* were in my view laudable in principle, it was indeed questionable whether the panel approach which appeared to contradict the case-law of the US federal courts could be sustainable in the long term. In more recent decisions, bi-national panels appear to accept that, in cases concerning measures adopted by the US, they must align their reasoning on the precedents of the US federal courts and that in these cases Federal Circuit decisions are binding on them.[506]

In conclusion, both the EU courts and the US courts take in some instances account of WTO law and WTO dispute settlement rulings, in the interpretation of domestic acts, while at the same time showing a certain measure of deference to the political branches. In cases where the executive's interpretation and application of domestic legislation differs from the interpretation in the light of the WTO agreements and WTO dispute settlement practice, the EU courts (and some of the NAFTA Article 19 bi-national panels) give greater weight to WTO-consistent interpretation, whereas the US courts

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[502] Carbon and Certain Alloy Steel Wire Rod from Canada, 2nd Administrative Review, Panel Decision of 28.11.2007, USA-CDA-2006-1904-04.
[503] Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review, Panel Decision of 14.4.2010, USA-MEX-2007-1904-01.
[504] Cf. the dissenting views of two panelists in Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review, Panel Decision of 14 April 2010, USA-MEX-2007-1904-01; Cf. also the dissenting opinion of Judge Wilkey, in the Extraordinary Challenge Committee Review (under the US-Canada Free Trade Agreement) of the panel decision In the matter of: Certain Softwood Lumber Products form Canada, ECC-94-1904-01USA.
[505] See, e.g., Made in the USA Foundation v United States, 242 F.3d 1300, 1319-1320 (11th Cir. 2001).
[506] Cf., in particular, Carbon and Certain Alloy Steel Wire Rod from Canada, Panel decisions of 11.5.2012 and of 25.10.2012, USA-CDA-2008-1904-02.

tend to validate the executive's interpretation as long as it is judged to be a reasonable construction of the domestic statute.

2. The objective, nature and content of the domestic rules

In addition to the source of domestic rules in the normative hierarchy of the domestic legal order, the objective, nature and content of the domestic rules which are to interpreted in the light of an international agreement can also have a bearing on the methods for attributing indirect effect.

As demonstrated above, if the objective of the domestic rule is to implement an international agreement or if the domestic rule expressly or implicitly refers to or incorporates terms or concepts of an international agreement, the attribution of indirect effect is easier to justify on the basis of the distribution of powers between the branches of government or institutions of the domestic legal order concerned, than if the domestic rule is not directly related to an international agreement.[507] In interpreting domestic rules of this kind, the domestic courts may be justified to give greater weight to an international agreement which is implemented by, referred to in, or incorporated into the domestic rule, be it under the "borrowed treaty rule" in the U.S.[508] or the *FEDIOL* case-law in the EU.[509]

Without prejudice to the above observations on domestic rules which contain precise references to international rules, domestic rules which are formulated in an open or ambiguous manner or which contain general legal terms or concepts such as, for instance, "fairness", "proportionality", or "good faith" are more susceptible to being influenced by international rules than domestic rules which are clear and unambiguous or relate to technical specifications etc.. The less specific, precise, unambiguous and complete the internal rule is, the more open it is to being interpreted in the light of international rules. This mirrors the above observation that the more specific, precise,

[507] Cf. Part VI.A.3., above.
[508] Cf. John F. Coyle, Incorporative Statutes and the Borrowed Treaty Rule, Va. J. Int'l L., Vol. 50:3 (2010), 655.
[509] Cf. ECJ, Case 70/87, Fediol v. Commission, [1989] ECR 1781.

unambiguous and complete the international rule is, the more it has the potential of determining the meaning to be given to the domestic rule.[510]

Another distinction can be made between domestic rules which regulate primarily a public law relationship between the State and a private party, on the one hand, and domestic rules which regulate a private law relationship between private parties. Whereas direct effect of international law may be limited in the latter constellation, depending on the nature of the international law rule, there are no obstacles in principle to attributing indirect effect also in such situations.[511] An example is the interpretation of domestic intellectual property law in the light of the WTO TRIPS Agreement in litigation between the right holder and the right user.[512] Subject to the general limitations on the interpretation of domestic rules in the light of international law, including the limits imposed by the necessity to respect the principles of legal certainty and non-retroactivity, indirect effect can thus in principle also apply with respect to domestic private law rules.

3. The interpretation of the domestic rules and the limits of substantive indirect effect

Domestic courts interpret domestic acts in accordance with interpretative rules, principles and practices which differ from one domestic legal order to the other. In particular, it has been observed that the EU courts and the US courts pursue a different approach to interpretation.[513] The interpretation of EU law by the EU courts is governed by text, context and telos.[514] The Court of Justice has spelled out the "characteristic

[510] Cf. Part VI.B.2, above.
[511] For a more exhaustive discussion of the legal relationships governed by the practice of consistent interpretation, see Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 14 (2003), 569, 578-582.
[512] The preamble to the WTO TRIPS Agreement recognizes that "intellectual property rights are private rights".
[513] Cf. Koen Lenaerts, Interpretation and the Court of Justice: a Basis for Comparative Reflection, Int'l Lawyer, Vol. 41 (2007) 1011, 1014.
[514] Cf., e.g., ECJ, Case 280/04, Jyske Finans, [2005] ECR I-10683, para. 34: "It should be borne in mind that, in determining the scope of a provision of Community law, its wording, context and objectives must all be taken into account [...]." For a recent analysis of the interpretive methods used by the ECJ, cf. Jürgen Schwarze, Artikel 19 EUV, in: Jürgen Schwarze (ed.), EU-Kommentar, 3d ed. (2012), Rn. 33-39;

features of [Union] law and the particular difficulties to which its interpretation gives rise."[515] The teleological interpretation has traditionally played a prominent role in the interpretation of EU law by the EU Court of Justice. It is not limited to the telos of the specific provision to the interpreted, but extends to the "constitutional telos"[516] of the Union legal order which is conceived as an autonomous legal order founded on the principles of supremacy and direct effect in relation to the legal orders of the Member States, complemented by the principle of Member State liability for infringement of Union law. In the US a distinction between the interpretation of the US Constitution and the interpretation of federal statutory law is frequently made. Statutory interpretation relies, in particular, on the text, context and structure of the statutory provision as well as on general rules or canons, which are, however usually subordinated to an interpretation in line with a clearly expressed congressional purpose.[517]

Where the interpretive rules of a domestic legal order comprise the principle of the attribution of substantive indirect effect to international law in general or the principle of agreement-consistent interpretation in particular, these principles may compete with other interpretative rules, principles and practices. Once domestic courts have ascertained the meaning of the pertinent provision of an international agreement, by interpreting it in accordance with the interpretive principles of international law, the result cannot therefore simply be transplanted into the domestic context.

Guilio Itzcovich, The Interpretation of Community Law by the European Court of Justice, German L. J., Vol. 10 (2009), 537; Sean Van Raepenbusch, Droit institutionnel de l'Union européenne (2011), 474-478.

[515] ECJ, Case 283/81, [1982] ECR 3415, paras. 17-20. The Court observed in this context that a comparison of the different language versions which are all authentic may be necessary, "that Community law uses terminology which is peculiar to it", "that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States", and that "law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

[516] Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, Eur. J. Legal Studies, Vol. 1 No. 2 (2007), p. 5 (defending the teleological method of interpretation as the most appropriate for the EU legal order).

[517] For a compilation of relevant case-law on statutory interpretation see CRS Report for Congress, Statutory Interpretation: General Principles and Recent Trends, Updated August 31, 2008 (by Yule Kim).

First, the attribution of indirect effect of international treaty law on domestic rules is, in principle conditioned on the existence of relevant domestic rules.[518] To the extent that an international agreement has not been implemented domestically and that, furthermore, no domestic rules exist in the domain covered by the international rule, the scope for indirect effect of the international rule is limited. The practice of some courts to "create" domestic rules in such cases,[519] may be criticized for overstepping the bounds of the judicial role in relation to the legislator.

Second, even where pertinent domestic rules exist they may be formulated in a way which leaves no room for their interpretation in the light of the international rule. This does not pose a problem if an unambiguous domestic rule is in line with the pertinent international rule. For instance, the EU General Court found in two recent judgments that a certain provision of the EU's basis anti-dumping regulation was "completely unambiguous" and could therefore not be interpreted in the light of the WTO Accession Protocol of China, but it added that, in any case, the provision would not be contrary to the Protocol.[520] By contrast, if a domestic rule is clearly and unambiguously inconsistent with the international rule, a conflict arises. In this case, the courts must ignore the international rule and apply the domestic rule, unless the international rule has direct effect. Whether or not a particular provision of domestic law is susceptible to being interpreted in the light of an international agreement is a matter of appreciation on which different courts may come to different conclusions.[521] While some courts would

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[518] Cf. 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: The European Union and World Trade Law After the GATT Uruguay Round (eds. Nicholas Emiliou & David O'Keeffe) (1996), 313, 322. Relevant domestic rules are not necessarily limited to those which implemented the international agreement (cf., in the context of EU-law-consistent interpretation of domestic laws of the EU Member States, Luigi Daniele, Vint-cinq ans d'interprétation conforme: un principe encore en quête de définition? R.A.E. – L.E.A. 2007-2008, 705, at 709 (referring, inter alia to ECJ, C-106/89, Marleasing, [1990] ECR I-4135).

[519] Cf. Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l L., Vol. 14, No. 3 (2003), 569, at 583 (reporting that the Dutch Hoge Raad interpreted the Dutch Code on Criminal Procedure, which established an exhaustive list of the grounds for suspension of charges, in the light of the ECHR and effectively added a new ground).

[520] Judgments of the General Court of 10.10.12 (n.y.r.) in Cases T-170/09, Shanghai Biaowu v. Council, para. 89; and T-172/09, Gem-Year v. Council, para. 132.

[521] For a discussion on the criteria for limiting the recourse to agreement-consistent interpretation, see House of Lords, In Re S and Others, 14.3.2002, per Lord Nicholls of Birkenhead, para. 40 (concerning the interpretation of the Children Act of 1989 in the light of the ECHR, by virtue of the Human Rights Act

not proceed to agreement-consistent interpretation of a domestic rule which on the face of it is unambiguous, others may find a latent ambiguity in this rule.[522] For instance, the Supreme Court of Canada, in interpreting a Canadian statute in the light of the GATT 1947, which the statute was meant to implement, expressly rejected the "suggestion that recourse to an international treaty is only available where the provisions of the domestic legislation is ambiguous on its face".[523] In the US, the *Charming Betsy* canon of statutory interpretation is qualified in the sense that the statute ought not be construed to violate an international agreement "if any other possible construction remains"[524] or "where fairly possible".[525] In some rare instances, US courts have gone very far in interpreting a statute to conform with international obligations of the US. An example is *U.S. v. The Palestine Liberation Organization*. In this case, the court interpreted the Anti-Terrorism Act in the light of the US's obligations under the Headquarters Agreement with the United Nations. It ruled that the Act was inapplicable to the PLO Mission to the United Nations, in spite of the fact that the Act provided that PLO offices located in the US had to be closed notwithstanding any provision of law.[526] But

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1998): "The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms."

[522] Cf. also André Nollkaemper, National Courts and the International Rule of Law (2011), 142-143 (who distinguishes three types of consistent interpretation: interpretation of an ambiguous domestic law, interpretation of a domestic law the wording of which allows for it (although it is not necessarily ambiguous), reviewing the exercise of discretion by the executive when the domestic law does not dictate a specific outcome).

[523] National Corn Growers Association v. Canada (1990) 2 SCR 1324, at 1373; cf. Gib van Ert, Canada, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 166, at 192 et seq.

[524] Cf. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, at 118 (1804).

[525] Restatement (Third), Foreign Relations Law of the US, § 114.

[526] U.S. v. The Palestine Liberation Organization, 695 F.Supp. 1456, 1468 (S.D.N.Y. 1988). The court required "the clearest expression on the part of Congress" that the Act was intended to overrule the provisions of the Headquarters Agreement, but did not find such expression in the case at hand. Cf. also Roeder v Islamic Republic of Iran, 646 F.3d 56, 61 (D.C. Cir. 2011) (where the court stressed: "Our focus is not on the best reading [of the statute]. Legislation abrogating international agreements 'must be clear to ensure that Congress - and the President - have considered the consequences' ...").

generally, US courts would not apply the *Charming Betsy* canon in the absence of ambiguity in the language of the statute and in the congressional intent.[527] In the EU, the obligation of agreement-consistent interpretation reaches only "so far as is possible".[528] Whether or not agreement-consistent interpretation is "possible" in this sense is again subject to judicial appreciation. In *Řízení Letového Provozu*, the Advocate General came to the conclusion that an interpretation of a EU Directive in the light of the GATS was not possible in view of the clear wording of the directive.[529] By contrast, in the *Intertanko* case before the EU Court of Justice,[530] the Advocate General "stretched the principle [of agreement-consistent interpretation] to the limits."[531] The applicants in this case had contested the validity of a EU directive because they considered it to be contrary to the MARPOL Convention. The Convention prohibits polluting discharges into the sea. This prohibition is however not applicable to discharges resulting from damage to the ship, unless the owner or master acted with “intent or recklessly and with knowledge that damage would probably result”. The EU directive enacted this exception for cases where the owner or master acted with “intent, recklessly or by serious negligence”. The Advocate General first construed “serious negligence” on the basis of a systemic interpretation and taking into account the legislator’s intention, and concluded that this concept is stricter than the one permitted under MARPOL. She then referred to the obligation of agreement-consistent interpretation and stated that this method of interpretation must be given priority over other methods of interpretation.[532] While she recognized that the obligation of agreement-consistent interpretation does not allow an interpretation contra legem, she found that in many Member States the concept of “serious negligence” could be understood restrictively in the sense of “recklessness” within the meaning of MARPOL. She concluded that "[t]his interpretation would not

[527] For a restrictive reading of the Charming Betsy canon, cf., e.g., Serra v. Lappin, 600 Fed.3d. 1191, 1191 (9th Cir. 2010) (stating that the Charming Betsy canon "comes into play only where Congress' intent is ambiguous" and concluding that this was not the case because the statute unambiguously gave the attorney-general discretion over prisoners pay grades).
[528] Cf. ECJ, Case C-61/94, Commission v. Germany, [1996] ECR I-3989, para. 52.
[529] Cf. paras. 59-60 of the Advocate General's Opinion in Case C-335/05, Řízení Letového Provozu, [2007] ECR-4307.
[530] Case C-308/06, Intertanko, [2008] ECR I-4057.
[531] Piet Eeckhout, Note on Case C-308/06, CMLRev., Vol. 46 (2009), p. 2041 at 2047.
[532] Cf. para. 108 of the Opinion of the Advocate General in Case C-308/06, Intertanko, [2008] ECR I-4057.

fully exhaust the wording of the directive since knowledge that damage will probably result is not normally necessary for serious negligence. However, it would in any event remain within the bounds of the wording."[533] It was not necessary for the Court to take a view on this interpretation because the case turned on the validity of the directive and the court found that the Union was not bound by MARPOL. Piet Eckhout argues that the absence of an attempt of consistent interpretation by the Court could possibly be explained by the consideration that the Court - contrary to its Advocate General - was not convinced that it was possible to interpret the directive in conformity with MARPOL.[534]

Third, even where the domestic rule leaves room for interpretation, its text might differ from the text of the pertinent rule of the international agreement. In this case, the courts must consider whether the text of the domestic provision can embrace the meaning of the provision of the agreement. This is, for instance, the case with respect to the domestic trade defense legislation in the EU and the US which to a large extent copies from the respective texts of the pertinent WTO agreements, but occasionally contains divergent wording.

Fourth, even where the domestic rule can embrace the meaning of, or is textually identical with, the pertinent rule of the international agreement, its context and purpose may be different from the context and purpose of the rule of the international agreement.[535] This may be less likely where the domestic act was intended to implement a particular treaty obligation or refers to, or incorporates provisions of, an international agreement. But where these circumstances are not given, domestic legislation often pursues a variety of different objectives. For instance, when domestic courts are called upon to interpret domestic veterinary or phytosanitary legislation or technical

[533] Ibid., para. 110.
[534] See Piet Eeckhout, Note on Case C-308/06, CMLRev., Vol. 46 (2009), p. 2041 at 2056.
[535] Cf. BVerfG, 4.5.2011, BvR 2365/09 et al. ("preventive detention"), para. 92 (noting that similarities in the texts of the international agreement and the domestic rule must not conceal differences which result from the respective context of the instruments). Cf., generally, Ernst-Ulrich Petersmann, JIEL Debate: Methodological Pluralism and its Crititcs in International Economic Law Research, J. Int'l Econ. L., Vol. 15 (2012), 921, at 943 (stating that "legal and judicial conceptions and interpretations of essentially the same legal rules may legitimately differ and dynamically evolve depending on their legal context and on the interaction between judicial and political bodies and the other legal actors concerned").

regulations in the light of the WTO SPS and TBT Agreements, they cannot necessarily assume that the domestic legislation is primarily founded on trade-related objectives, as distinguished from public health or internal market objectives. Similarly, domestic legislation in the field of intellectual property rights may have been amended in order to comply with the minimum standards established by the WTO TRIPS Agreement. But this does not necessarily mean that the legislation is primarily concerned with trade-related aspects of intellectual property rights. Furthermore, domestic legislation may be intended to implement or take account of the objectives of more than one international agreement. In *Van Parys* the EU Court of Justice pointed out that the implementation of WTO obligations must be reconciled with the Union's obligations in relation to the ACP countries as concerns the EU import regime for bananas.[536] It is thus not excluded that a domestic act is to be interpreted in the light of several different international agreements. If follows from these examples that WTO-consistent interpretation of domestic legislation cannot always be reduced to transposing the interpretation of the corresponding WTO law provision to the interpretation of the domestic act. This aspect was neglected by the EU Court of First Instance (now: the General Court) in its general observations on interpretative methods in the *Reliance* case, where it interpreted certain provisions of the EU anti-dumping and anti-subsidy legislation in the light of WTO law. As mentioned above, the Court correctly stated that the WTO Anti-dumping and Anti-subsidies Agreements must be interpreted in accordance with the rules laid down in Article 31 of the Vienna Convention. But the Court then went on to state that "that rule of interpretation corresponds to the rule applied by the [Union] judicature when called upon to interpret a provision of [Union] law. Thus, the Court of Justice has repeatedly held that, in interpreting a provision of [Union] law, it is necessary to consider its wording, its context and its aim [...]."[537] While this is certainly correct in the abstract, it cannot be implied that the rules of interpretation under international law and Union law would necessarily lead to the same results.[538] Indeed, according to settled case-law of the Court of Justice, "a mere similarity in the wording of a provision of one of the

[536] Cf. ECJ, Case C-377/02, Van Parys, [2005] ECR I-1465, para. 52.
[537] CFI, Case T-45/06, Reliance Industries Ltd v. Council, [2008] ECR II-2399, para. 101.
[538] Cf. also Piet Eeckhout, EU External Relations Law, 2d ed. (2011), at 316 (characterizing the Court's statement in Reliance as "misleading").

Treaties establishing the [Union] and of an international agreement between the [Union] and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the Treaties. […] [T]he extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the [Union] with a non-member country depends on, *inter alia,* the aim pursued by each provision in its own particular context. A comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard."[539] The leading case is the *Polydor* judgment of the Court of Justice.[540] The case concerned the interpretation of a provision on the elimination of restrictions on trade in an agreement between the Union and Portugal (before Portugal's accession to the EU). The wording of these provisions was identical in substance to the corresponding provisions in the EU Treaties. But the Court ruled that this was not a sufficient reason for transposing to the provisions of the agreement the interpretation of the corresponding provisions of the EU Treaties.[541] According to the Court, the considerations which led to the interpretation of the provisions of the EU Treaties did not apply in the context of the relations between the Union and Portugal.[542] The EU Treaties aimed at the creation of a single market, provides for instruments in order to achieve the uniform application of Union law and the abolition of legislative disparities. By contrast, the purpose of the agreement between the Union and Portugal was to consolidate and extend the economic relations between the parties, in particular by liberalizing trade in goods. The Court concluded that in the context of the agreement restrictions on trade in goods could be considered to be justified in a situation in which their justification would not be possible within the Union. While this case concerned the interpretation of provisions of an agreement by comparison to provisions of EU primary law, the same principles would also apply in comparison to EU secondary law. In some recent cases, however, the EU Court of Justice appeared to be increasingly ready to interpret terms and concepts (such as the non-discrimination principle) of international agreements in line with the interpretation

[539] ECJ, Case C-162/00, Pokrzeptowicz-Meyer, [2002] ECR I-1049, paras. 32 and 33.
[540] ECJ, Case 270/80, Polydor, [1982] ECR 329.
[541] Id., para. 15.
[542] Id., para. 18.

of identical or similar terms and concepts of Union law.[543] For the present purposes it is sufficient to note that the context and purpose of a domestic rule may be different from the context and purpose of an international rule and that it may therefore be necessary to take any such differences into account when the domestic rule is interpreted in the light of the international rule.

Finally and in more general terms, the interpretation of domestic rules in the light of an international agreement or international case-law has to be grounded in the domestic constitution's overall interpretative context.[544]

The domestic interpretative context includes the accepted rules, principles or canons of interpretation prescribed or permitted by the domestic legal order concerned. Those are not necessarily set aside by the recourse to agreement-consistent interpretation. Depending on the domestic legal order concerned, agreement-consistent interpretation may or may not be accepted as taking precedent over (some of) these other rules, principles or canons or add to them.[545] The effectiveness of agreement-consistent interpretation may also depend on the question as to what extent the accepted interpretive methods in the relevant domestic legal allow for interpretations going beyond or even against the wording of statutory provisions.[546] Often, agreement-consistent interpretation is used within the framework of other interpretative principles. In the *Since Hardware* case, for instance, the EU's General Court, when addressing the first prong of the first ground of the application, recalled that for the interpretation of a provision of EU law, its text and context as well as the objectives pursued by the

[543] Cf. e.g., ECJ, Case C-265/03, Simutenkov, [2005] ECR I-2579; cf. also Francis G. Jacobs, Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice, in: Law and Practice of EU External Relations, Salient Features of a Changing Landscape (ed. Alan Dashwood & Marc Maresceau) (2008), 13, at 24-31; Francis G. Jacobs, The Internal Effects of the EU's International Agreements and the Protection of Individual Rights, in: A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood (eds. Anthony Arnull et al.) (2011), 529, 536-537.

[544] See Armin Von Bogdandy, Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law, I.CON, Vol. 6, Nr 3&4 (2008), p. 397, at 403.

[545] Cf. Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 281-282 (arguing that WTO-law-consistent interpretation - as a "Vorzugsregel" - has priority over other interpretive principles in construing EU and Member States laws).

[546] Cf. Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 283-287 (arguing for a far-reaching EU law obligation of WTO-law-consistent interpretation which may in some circumstances even include an interpretation contra legem to the extent that this is not excluded by the respective domestic interpretive methods).

regulation concerned have to be taken into account.[547] In the interpretation of the text of the provision (of the EU's basic anti-dumping regulation) the Court referred also to certain provisions of the WTO Anti-dumping Agreement and the GATT 1994 and concluded that the interpretation advanced by the applicant did not result from the text of the basic anti-dumping regulation or the WTO provisions.[548] It then proceeded to interpret the provision of the anti-dumping regulation within its context and its objective,[549] before examining in detail, and rejecting, the arguments founded by the applicant on the interpretation of WTO rules by the WTO Appellate Body.[550] When examining the third prong of the first ground of the application, the Court inter alia recalled the principle of agreement-consistent interpretation and concluded that the contested act was in conformity with the conclusions reached in the WTO Appellate Body report and that the text of the EU's basic anti-dumping regulation was drafted in terms which left the possibility open for the EU institutions to follow the approach taken by the Appellate Body without infringing the basic-regulation. [551] This judgment demonstrates how the court refers to WTO rules and jurisprudence in the context of other interpretative methods.

In a wider sense, the domestic interpretative context includes not only the domestic interpretative rules or canons, but also the entirety of the domestic (constitutional) legal order and legal traditions. This can be illustrated by the UK Supreme Court's judgment in *Horncastle*,[552] which relied on the particular features of the common law criminal procedure in order to reject the ECtHR's interpretation of the fair trial principle which had largely developed in the context of civil law jurisdictions. The German Federal Constitutional Court has ruled that decisions of the ECtHR cannot be applied by German domestic courts in a schematic way, but must be integrated into the relevant partial legal area of the domestic legal system.[553] According to this Court, the content of

[547] Case T-156/11, Since Hardware v. Council, judgment of 18.9.2012 (n.y.r.), para. 67.
[548] Id., paras. 68-75.
[549] Id., paras. 76-77.
[550] Id., paras. 78-86.
[551] Id., paras. 108-113.
[552] R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division), [2009] UKSC 14, see Part VI.B.1.(c), above.
[553] BVerfG, 14.10.2004, 2BvR 1481/04, Görgülü,, see Part VI.B.1.(c), above.

the provisions of the European Convention on Human Rights must be "re-thought" in an active process of reception, in order to be incorporated into the context of the German constitutional legal order, and the case-law of the ECtHR must be carefully fitted into the existing, dogmatically differentiated national legal order.[554] Even in the context of EU-law-consistent interpretation of the domestic law of the EU Member States, where the EU Court of Justice has inferred from the primacy of EU law over the law of the Member States far reaching interpretive obligations of the Member States' courts, it is acknowledged that the domestic courts can only act within the limits of the interpretive methods recognized by domestic law and of general legal principles such as the principle of legal certainty.[555]

Similar limits should also apply to the interpretation of US law and EU law in the light of WTO law. The insistence of the US courts on the statutory scheme established by the URAA for the implementation of WTO dispute settlement rulings and the discussions on the relationship between the *Charming Betsy* canon, on the one hand, and the *Chevron* standard of deference to reasonable interpretations by the administrative agencies, on the other,[556] demonstrate the need for consistent interpretation to be grounded in the overall domestic interpretive framework. Also in the EU, where WTO-consistent interpretation is an obligation resulting in particular from the primacy of international agreements over secondary EU law, it is not excluded that cases may arise in which the

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[554] BVerfG, 4.5.2011, BvR 2365/09 et al. ("preventive detention"), paras. 92 to 94

[555] Cf. ECJ, Joined Cases C-397/01 to C-403/01, Pfeiffer et al., [2004] ECR I-8835, para. 116: “if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the [EU] directive; ECJ, Case C-212/04, Adeneler, [2006] ECR I-6057, para. 110: "It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem” (internal citation omitted). As concerns in particular the limits with respect to the application of general principles of law and with respect to the imposition of obligations on individuals, Betlem and Nollkaemper have observed that EU law is more developed than international law; cf. Gerrit Betlem & André Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation, Eur. J. Int'l. L., Vol. 14, No. 3 (2003), 569, at 589.

[556] Cf. Part VI.C.1.(b), above.

application of EU primary law principles could limit the possibility to recur to WTO-consistent interpretation.

Where domestic courts do not respect the abovementioned limits, the legitimacy of agreement-consistent interpretation is at stake. In particular, the courts would risk arrogating to themselves powers which the constitutional framework had attributed to other branches of government.[557] Furthermore, to the extent that the interpretation of domestic rules in the light of international treaty rules cannot be justified within the interpretive and constitutional principles of the domestic legal order, it cannot yield the desired effect of reducing inconsistencies between the international and domestic legal order. On the contrary, applying agreement-consistent interpretation in such situations risks concealing a normative conflict between the respective legal orders, which - in the absence of direct effect - can be solved only by amending the respective rules in accordance with the applicable legislative or other procedure at the domestic level or at the international level.[558] Domestic courts should in these circumstances neither conceal the conflict by pretending to accommodate the international treaty rule within the domestic legal order, nor ignore the conflict by not mentioning the international treaty rule at all, but openly expose the reasons why the domestic interpretive or constitutional principles prevent the domestic rule to be interpreted in the light of the international rule.[559] In this sense, the possibility of contestation is the necessary counterweight to the principle of accommodation of international treaty law by domestic courts.

D. Transparency in the attribution of substantive indirect effect

The attribution of indirect effect to international treaty law by domestic courts can be more or less explicit. In some cases, domestic courts recall the principles according to which they take account of international law, and refer to the particular treaty rule or international case-law, in the light of which they interpret domestic laws.

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[557] Cf. also André Nollkaemper, National Courts and the International Rule of Law (2011), 161 et seq. (on the constitutional allocation of powers and the limits of agreement-consistent interpretation).
[558] Cf. Marc Desens, Auslegungskonkurrenzen im europäischen Mehrebenensystem, Probleme und Lösungsmöglichkeiten exemplifiziert anhand von Normenkollisionen zwischen Grundfreiheiten und nationalen Gesetzen, EuGRZ 2011, 211, 213 (arguing for "Methodenehrlichkeit" or methodological honesty).
[559] See also Part VI.D, below, on transparency.

In other cases, where there are no such explicit references, it can nevertheless be assumed that the courts were aware of the underlying treaty law issues and attempted to avoid inconsistencies or conflict between the international and the domestic legal orders. For instance, where agreement-consistent interpretation would lead to a particular interpretation of a domestic statute it is not excluded that a domestic court interprets the domestic statute in the same way by other interpretative means, without expressly relying on or referring to the international agreement.

Such implicit substantive indirect effect can also be observed with respect to WTO law.[560] In the *IKEA* case,[561] the EU Court of Justice was asked whether certain EU anti-dumping measures against imports of cotton-type bed linen originating, inter alia, in India and Pakistan were invalid in the light of the WTO Anti-dumping Agreement, as interpreted by the WTO Appellate Body,[562] and in the light of the EU basic anti-dumping regulation. The Court of Justice concluded, first, that the legality of the EU measures, which the WTO Appellate Body had declared as incompatible with the WTO Anti-dumping Agreement, could not be reviewed in the light of the WTO Anti-dumping Agreement in this particular case.[563] The Court then reviewed the legality of the measures in the light of the EU basic anti-dumping regulation. It found, in particular, that the recourse to the method of "zeroing" in the determination of the dumping margin was incompatible with the regulation. The Court founded this conclusion on the wording of the regulation, which made no reference to the practice of zeroing and required the EU institutions to make a "fair" comparison between the export price and

[560] Cf. the example given by Nupur Chowdhury, The (Absence of) Direct Effect of WTO Law: Current Developments within the Indian Legal System, in: Claudio Dordi (ed.), The absence of direct effect of WTO in the EC and other countries (2010), 331, 344. Chowdhury cites a judgment of the High Court of Calcutta (Dimminaco A.G. v. Controller of Patent, Designs and ors. IPLR 2002 July 255) in which the court struck down a decision of the Patent Office which had rejected the patentability of a process of preparation of an infectious vaccine. The Court considered the interpretation of the domestic law by the Patent Office as too restrictive. Although the Court did not refer to India's obligations under the WTO TRIPS Agreement, Chowdhury considers "it does seem quite apparent that the Court must have been aware of the TRIPs Agreement and India's obligations under this. The fact that the TRIPs obligation does not expressly negate patenting for living organisms would probably have had some influence in the court's judgment."

[561] Case C-351/04, Ikea Wholesale v. Commissioners of Customs & Excise, [2007] ECR I-7723.

[562] European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R.

[563] Case C-351/04, paras. 27-35.

the normal value.[564] Although the Court did not interpret the regulation in the light of the WTO Anti-dumping Agreement or the ruling of the WTO Appellate Body, the Court's judgment was consistent with that ruling on this point.[565]

In *F.T.S. International*[566] the EU Court of Justice had to respond to a reference for a preliminary ruling concerning the validity of a customs tariff classification of boneless chicken cuts by the European Commission under the Combined Nomenclature. The applicants in the main proceedings had pleaded that the Commission's classification was inconsistent with a ruling of the WTO Appellate Body,[567] while the Commission had argued that this was irrelevant in the absence of direct effect of WTO rules. The Court invalidated the Commission Regulation by interpreting the EU customs classification rules in the same way as the WTO Appellate Body. The Court thereby avoided a conflict with WTO law, without, however, referring to or relying on the Appellate Body ruling.[568]

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[564] Case C-351/04, paras. 50-57.

[565] However, the Court of Justice did not follow the reasoning and conclusions of the Appellate Body with respect to another point, relating to the use of single producer data for selling, administration and general costs and profit in the calculation of the constructed normal value.

[566] ECJ, Case C-310/06, F.T.S. International BV v. Belastingdieset – Douane West, [2007] ECR I-6749.

[567] EC-Customs Classification of Frozen Boneless Chicken Cuts, WT/DS/269/AB/R, WT/DS/268/AB/R, and Corr.1.

[568] Cf. also Joined Cases C-288/09 and C-289/09, British Sky Broadcasting Group, judgment of 14.4.2011 (n.y.r.), concerning the tariff classification of so-called "set-top boxes" with a communication function and a hard disk drive, where the Court referred to the principle of consistent interpretation (para. 83), but not to the WTO panel report in European Communities and its Member States - Tariff Treatment of Certain Information Technology Products, WT/DS375/R, WT/DS376/R and WT/DS377/R; Case T-113/06, Marine Harvest Norway, v. Council, judgment of 21.3.2012 (n.y.r.), and Case T-115/06, Fiskeri og Havbruksnaeringens Landsforening, judgment of 21.3.2012 (n.y.r.), where the Court did not refer to the panel report in European Communities - Anti-Dumping Measure on Farmed Salmon from Norway, WT/DS337/R. Cf. also Case C-313/04, Egenberger, [2006] ECR I-6331, as an example of implicit direct effect of WTO law. In this case, the EU Court of Justice was seized with questions concerning the validity of Commission Regulation (EC) No 2535/2001 laying down detailed rules for applying Council Regulation (EC) No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas. The referring court asked in substance whether certain of these arrangements were invalid because they were contrary to Community law, in particular to the principle of non-discrimination, and contrary to Article XVII(l)(a) of GATT and Article 1(3) of the WTO Agreement on Import Licensing Procedures. In the procedure before the Court of Justice, the Court's Advocate General argued that the arrangements were in violation of Union law. Furthermore, according to the Advocate General, some of the contested arrangements were in violation of the GATT and should be declared invalid also for this reason. The Court avoided this latter issue. It ruled that the arrangements were invalid on the ground that they were discriminatory under Union law. In view of this ruling, the Court considered that it was not necessary to rule on the question relating to the invalidity of the arrangements for violation of the GATT and the WTO Agreement on Import Licensing. This let one commentator to the Wittgensteinian remark that "[w]hat the ECJ cannot speak of, it passes over in silence" (see Magnus Schmauch, Eur. L. Reporter, No 11 (2006), p. 475-476).

The non-explicit respect of the WTO Dispute Settlement rulings by domestic courts could be considered to form part of what Marco Bronckers calls a "muted dialogue" between the WTO judicature and the domestic courts.[569] Bronckers considers that the EU courts generally tend to pay respect to other international tribunals,[570] but reserve the right to adopt their own course in certain narrowly drawn circumstances such as the occurrence of new facts subsequent to an international ruling or compelling domestic policy considerations that require deference to the legislature.[571] Such "pragmatic approach" of the EU courts may certainly have the advantage of not tying the hands of the EU in the international arena.[572] But it comes at a price. To the extent that the dialogue between domestic courts and international courts is "muted", there is a lack of transparency and legal certainty with respect to the relation between the pertinent international and domestic legal order. If domestic courts interpret domestic acts in the light of international law or come to the same result solely on the basic of domestic law, an explicit reference to international law may strengthen the legitimacy of both systems by demonstrating that the two systems can coexist in a coherent manner.

In cases where a domestic court declines to attribute indirect effect to international rules and jurisprudence it is even more important that it motivates this in a transparent manner. The reason for not taking into account international law can result from a narrow understanding of the principle of consistent interpretation or from the above mentioned inherent limits in the application of this principle.[573] Under these

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[569] Marco Bronckers, From Direct Effect to 'Muted Dialogue' - Recent Developments in the European Courts' Case Law on the WTO and Beyond, J. Int'l Econ. L., Vol. 11(4) (2008), 885.
[570] Marco Bronckers, Private Appeals to WTO Law: An Update, J. World Trade, Vol. 42(2 (2008), 245, at 257-259. Bronckers points out that, even in the absence of direct effect and where agreement-consistent interpretation is not possible due to the unequivocal meaning of a domestic legislation which appears to be in conflict with a provision of WTO law, applicants in domestic proceedings might be well advised to refer to those provisions of WTO law or WTO dispute settlement practice which are in their favor, because the courts at least in the EU can be assumed to be influenced by WTO rules and precedents and implicitly tempted to avoid conflict, or because such rules and precedents may be useful to private litigants in order to substantiate general principles of law (such as the principle of proportionality) or open-ended EU treaty or secondary law provisions (such as the public health exception to freedom of movement of goods).
[571] Marco Bronckers, Private Appeals to WTO Law: An Update, J. World Trade, Vol. 42(2) (2008), 245, at 258; Marco Bronckers, From Direct Effect to 'Muted Dialogue' - Recent Developments in the European Courts' Case Law on the WTO and Beyond, J. Int'l Econ. L., Vol. 11(4) (2008), 885, at 889-890.
[572] Giacomo Gattinara, WTO Law in Luxembourg: Inconsistencies and Perspectives, Italian Y.B. Int'l L., Vol. 18 (2008), 117, at 134.
[573] Cf. Part VI.C.3., above.

circumstances, the domestic courts should explain why the domestic rule at stake is not susceptible of being interpreted in the light of the international rule or why the court is not convinced by the persuasiveness of a pertinent ruling of an international tribunal.

In the context of the relation between WTO law and domestic law, an explicit reasoning by the domestic courts may be understood to be implicitly addressed to the political institutions within the courts' domestic legal order or to the WTO organs. In cases where the domestic courts find that they cannot take account of WTO rules or rulings because unambiguous, WTO-inconsistent domestic legislation prevents them from doing so or because the domestic principles require deference to the executive branch's (WTO-inconsistent) interpretation and application of an ambiguous statute, the domestic political institutions may be encouraged to modify the legislation or the executive practice in order to bring it into conformity with WTO law.[574] In exceptional cases where a domestic court brings forward convincing arguments that the interpretation of WTO law given in a dispute settlement ruling is legally deficient or incompatible with fundamental domestic constitutional values, the WTO dispute settlement organs may be encouraged to change course.

VII. SPROCEDURAL INDIRECT EFFECT – EFFECT OF INTERNATIONAL JUDICIAL PROCEEDINGS ON DOMESTIC PROCEDURAL DECISIONS

The borderline between substantive indirect effect and procedural indirect effect is not always easy to draw. Substantive indirect effect includes situations where the domestic courts interpret domestic procedural laws with a view to ascertain their meaning in the light of international law. By contrast, procedural indirect effect does not relate to the interpretive effect of international law. It describes the influence of international law or international legal proceedings on the application of domestic procedural laws. In particular, procedural indirect effect may occur when domestic courts (A.) stay domestic proceedings pending the outcome of international proceedings, (B.) remand the case to

[574] Cf. also Arwel Davies, Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon, J. Int'l Econ. L., Vol. 10 (2007), 117, 143-149 (arguing that where the courts are prevented from giving indirect effect to WTO law resulting in the annulment of agency action, the courts should nevertheless refer to the WTO law and dispute settlement rulings in order to signal their disapproval of the agency's interpretation).

the domestic administrative authorities for consideration of international law, or (C.) resort to other measures to organize the proceedings in order to allow the parties to comment on, and the court to properly take into consideration, the outcome of international proceedings. Depending on the circumstances, procedural indirect effect may be relevant as a preliminary, procedural step which helps the domestic courts to create the conditions for a meaningful application of substantive indirect effect.

The establishment of more formal procedures which would allow domestic courts to seek an opinion or a ruling from an international court on the interpretation of an international agreement, such as the preliminary ruling procedure under Article 267 of the TFEU,[575] is not further pursued here, because it does not appear to be relevant in the context of the WTO.[576] Nor are formal "jurisdiction-regulating rules"[577] such as *lis alibi pendens* or *res judicata* dealt with because they would not fall under the concept of "indirect" procedural effect. The present part concentrates instead on some examples of flexible procedural rules, the application of which is normally within the discretion of the domestic courts.

A. Stay of domestic procedures

The stay or suspension of a domestic proceeding can be envisaged in cases where the subject matter of the domestic case overlaps with the subject matter of a proceeding pending before an international judicial body. The objective of the stay would be to wait

[575] The EU Court of Justice has recently highlighted the importance of this procedure in order to ensure the correct application and uniform interpretation of Union law in the Member States. See Opinion 1/09 of 8.3.2011 (n.y.r.), at paras. 83-85. Cf., generally, Jürgen Schwarze, Artikel 267 AEUV, in: Jürgen Schwarze (ed.), EU-Kommentar, 3d ed. (2012).

[576] Some authors have explored the question whether procedural mechanisms should be established which would allow or oblige domestic courts to stay domestic proceedings in order to submit questions on the interpretation of WTO law to a WTO court or body for an advisory opinion or a preliminary ruling (cf. Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union (2012), 341-346; Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, J. Int'l Econ. L., Vol. 1 (1998), 83, at 116 and 118) or to the WTO membership for an authentic interpretation by the WTO Ministerial Conference or WTO General Council pursuant to Article IX.2 of the WTO Agreement (cf. Meinhard Hilf, New Frontiers in International Trade: The Role of National Courts in International Trade Relations, Mich. J. Int'l L., Vol. 18 (1997), 321, at 353). But such suggestions are not realistic at present.

[577] Cf. Yuval Shany, Regulating Jurisdictional Relations between National and International Courts (2007), (distinguishing such formal rules, p. 145-164, from flexible jurisdiction-regulating rules founded notably on considerations of judicial comity, p. 165 etc.).

for the outcome of the international proceeding in order to enable the domestic court to take this outcome into consideration in the final judgment in the domestic case.

Proceedings before the WTO dispute settlement organs, on the one hand, and before domestic courts in the EU or the US on the other, can in principle proceed concurrently.[578] In the relation between the pursuit of remedies at the level of the WTO and at the domestic level, there is neither a legal requirement of the exhaustion of local remedies,[579] nor a legal requirement of the exhaustion of international remedies. The fact that a case is pending before domestic courts does not prevent WTO dispute settlement proceedings from being initiated.[580] Conversely, the fact that a government has brought proceedings before the WTO does not legally prevent the government or private parties from initiating or pursuing domestic proceedings.[581]

Simultaneous and overlapping proceedings before domestic EU or US courts and the WTO dispute settlement organs are in fact quit frequent, in particular in the field of trade defense measures. In the domestic context, economic operators affected by the measure (for instance because their exports are subject to duties) bring a case against the EU or the US for the annulment of the measure on the ground that it violates

[578] Cf. John M. Ryan, Interplay of WTO and U.S. Domestic Judicial Review: When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and Under U.S. Law, Do the Respective Decisions and Available Remedies Coexist or Collide?, Tul. J. Int'l & Comp. L., Vol. 17 (2009), 353 (examining different situations of parallel WTO and US proceedings).

[579] Cf. Sharif Bhuiyan, National Law in WTO Law – Effectiveness and Good Governance in the World Trading System (2007), at 20-23 (with further references also to some earlier different views); Meinhard Hilf, New Frontiers in International Trade: The Role of National Courts in International Trade Relations, Mich. J. Int'l L., Vol. 18 (1997), 321, at 352 (arguing against the introduction of a rule of exhaustion of local remedies because WTO disputes concern market disruptions which must be resolved quickly). In different contexts, the principle of the exhaustion of local remedies can either be prescribed by international treaty law (cf., e.g., Art. 35(1) of the ECHR as amended by Protocols 11 and 14) or by the customary international law of the exhaustion of local remedies in cases of diplomatic protection (see, e.g., Interhandel case, [1959] ICJ Rep. 6, at 27).

[580] There does not appear to be explicit WTO case-law in this regard, but cf., in this context, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, at para. 57 (confirming that the panel had no discretion to decline to exercise its jurisdiction, although the measure was also subject to review before a NAFTA panel); Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other Items, WT/DS/56/R, at para. 6.68 (where the panel ruled that a WTO-inconsistent measure violated WTO obligations regardless of whether the member provides a remedy for such violations in its domestic legal system).

[581] Cf. Canadian Lumber Trade Alliance and others v. U.S. and others, 517 F.3d 1319, at 1336 (stating that the Government of Canada did not seek to litigate the same claim in two fora, because in the WTO Canada claimed that a US act violated international law, whereas before the US courts, Canada claimed that the act violated domestic US law).

domestic law and/or WTO law. In the WTO context, the WTO member affected by the measures (for instance the country from which the products subject to duties are exported) initiates WTO dispute settlement proceedings against the WTO member (the EU or the US) which had adopted the measure, on the ground that the measure is inconsistent with the WTO member's obligations under the WTO agreements. The affected exporting industry may have an interest to pursue the domestic-court route while at the same time requesting their government to pursue the WTO route, because both routes have advantages and disadvantages for them.[582]

The domestic rules governing court procedures in the EU and in the US grant a margin of discretion to the courts in their decisions on whether or not to stay proceedings under such circumstances. In the EU, the rules of procedure of the Court of Justice and those of the General Court[583] provide for the possibility of a stay of procedure. The General Court can order a stay, inter alia, at the joint request of the parties or in other cases when the proper administration of justice so requires. While the courts do not appear to have resorted to this possibility in order to stay the procedure pending the outcome of WTO dispute settlement proceedings, these provisions would arguably allow such course of action. In the US, the power to stay proceedings is considered to be inherent in the court's power to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.[584] Among the competing interests to be weighed and balanced in this regard are the plaintiff's interest and potential prejudice, the burden on the defendant, the burden on the court, the burden on nonparties and the public interest. These principles have been applied, among other "abstention" doctrines, to foreign parallel proceedings, where litigation is pending in a US court and in a court of a foreign country, although generally US courts are reluctant

[582] Cf. Gregory W. Bowman, Nick Covelli, David A. Gantz & Ihn Ho Uhm, Trade Remedies in North America (2010), at 544-545 and 547-548. For an empirical investigation of WTO members' decisions whether to challenge US Trade Remedies in the WTO, see Chad P. Brown, Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged? World Bank Policy Paper 3540, March 2005.
[583] Art. 55 Rules of Procedure of the Court of Justice; Art. 77 Rules of Procedure of the General Court.
[584] Cf. Landis et al. v. North American Co., 299 U.S. 248, at 254-255 (1936).

to stay a domestic action pending resolution of a foreign action.[585] They can also be applied where proceedings are pending before a judicial body established by an international agreement.[586]

An example of an US court staying domestic proceedings pending WTO dispute settlement proceedings is *Resco Products v. Bosai Minerals Group and CMP Tianjin*.[587] In this case, the plaintiff alleged that the defendants had violated the Sherman Act[588] by conspiring to fix prices of certain bauxite originating in China. The defendants argued that the case was to be dismissed, inter alia, because the act of state doctrine would prohibit the court from declaring the defendants' restrictions on the trade of bauxite unlawful, given that the minimum export prices had been imposed by the Chinese authorities. During the course of the proceedings before the US District Court, a WTO panel was established, on request by the US Trade Representative (USTR).[589] In the WTO proceeding, the US asserted inter alia that by requiring that the export prices for bauxite had to respect a minimum price China acted inconsistently with the GATT 1994 and the Protocol on the Accession of China to the WTO. The District Court stayed the proceedings before it pending the WTO proceedings. It noted that the issues before it and those pending in the WTO proceedings were similar. Although the court recognized that decisions adopted by the WTO DSB were not binding, it found that the findings of fact and conclusions of law to be made by the WTO panel might simplify the analysis of the act of state doctrine in the case before the court. Under those circumstances, the court considered it to be prudent to await the resolution of the WTO proceedings. It stated that there was a possibility for a conflict in decisions that may be avoided if a stay was issued. Furthermore, the potential conflict between the judicial and executive branches could implicate separation of powers concerns if decisions of the court were to embarrass the executive branch, represented by the USTR in the WTO proceedings, in

[585] See generally Austen L. Parris, Duplicative Foreign Litigation, 78 Geo. Wash. L. Rev. 237, at 247-250 (2010).
[586] It has been suggested to amend the pertinent statutory provisions in order to expressly provide that litigation before the US Ct. Int'l Trade may be stayed pending a decision in WTO dispute settlement proceedings. Cf. Patrick C. Reed, Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality, Geo. J. Int'l L., Vol. 38 (2006), 206, at 248-249.
[587] W.D. Pennsylvania, Civil Action No. 06-235, Decision of 4 June 2010.
[588] 15 U.S.C. § 1.
[589] China – Measures Related to the Exportation of Various Raw Material, WT/DS394.

the conduct of foreign affairs. The court thus stayed the proceedings in view of the factual indirect effect of WTO rulings.

Another example concerns the parallel proceedings before two GATT 1947 panels and the US Court of International Trade (CIT), in which a US measure relating to the imposition of a countervailing duty on non-rubber footwear from Brazil was contested. In the domestic case (*Footwear Distributors and Retailers of America v. United States*),[590] the CIT had stayed the proceedings pending the reports of the GATT panels. After the end of the second panel proceeding, which concluded that the countervailing duty measure was inconsistent with the US's obligations under the most-favored nation clause of Article I:1 GATT 1947, the court dissolved the stay and gave the parties an opportunity to supplement their original submissions. In its decision on the merits the court discussed the development of the *Charming Betsy* canon of statutory interpretation[591] but found, in particular on the basis of concerns relating to the constitutional balance of powers, that the GATT panels, however cogent their reasoning, could not lead to the precise domestic judicial relief which the plaintiff sought.[592] It concluded that the challenged measure was in accordance with US law and not inconsistent with the international obligations of the US.[593]

Whether the stay of domestic proceedings pending the outcome of WTO dispute settlement proceedings is desirable depends on the circumstances of the case and the degree of substantive indirect effect which the courts attribute to WTO panel or Appellate Body reports.

As concerns, first, the circumstances of the case, the extent of the overlap of the issues before the court and before the WTO dispute settlement organs may be relevant. If both proceedings relate to the same contested measure and if the same issues are at stake,[594]

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[590] 852 F. Supp. 1078 (Ct. Int'l Trade 1994).
[591] Murray v. the Charming Betsy, 2 Cranch 64, 118 (1804).
[592] 852 F. Supp. 1078 , at 1096 (Ct. Int'l Trade 1994).
[593] Id., at 1098.
[594] Even if the same measure is under review at WTO and domestic level, the issues raised may be different. A recent example of such parallel proceedings is the Fasteners case. The Council of the EU had adopted anti-dumping duties (Regulation No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJ 2009 L 340, p.

a stay of proceedings may be more justified than if there is only an overlap relating to the general interpretation of a provision of the WTO agreements. Issues of timing may also be relevant. In many cases, the WTO dispute will be decided faster than the domestic case. But this is not necessarily always so.[595] In particular, if an appeal is brought before the WTO Appellate Body or if the domestic case is adjudicated in an expedited procedure,[596] the domestic proceedings may be ripe for judgment before the Appellate Body report is issued. In this situation, the applicant before the domestic court could be negatively affected by a stay of proceedings, for instance because of the continued application of anti-dumping or countervailing duties.

Second, the desirability of staying domestic proceedings pending the outcome of WTO dispute settlement proceeding depends on the substantive effects which the domestic courts attribute to WTO dispute settlement reports. If such reports have no effect at all in the domestic legal order it would not make sense to stay the domestic proceedings. If the reports have direct effect and the domestic courts would thus be bound by them, a stay of proceedings could be argued to be justified in principle.[597] And if the reports have

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17). Chinese exporters brought actions for annulment of the measure before the EU General Court. In parallel, the government of China initiated WTO dispute settlement proceedings against the measure as well as the pertinent provision of the EU's basic anti-dumping regulation. The WTO Appellate Body declared the EU measure and the provision of the basic anti-dumping regulation to be incompatible with WTO law (EC – Definitive anti-dumping measures on certain iron or steel fasteners from China, WT/DS397AB//R). The EU General Court, however, dismissed the actions, which concerned the same measure but related to different issues, in its judgments of 19.4.12 (n.y.r.), Case T-162/09, Würth and Arnold Fasteners (Shenyang) v. Council; and of 10.10.12 (n.y.r.), Case T-150/09, Ningbo Yonghong Fasteners v. Council; Case T-170/09, Shanghai Biaowu High-Tensile Fastener and Shanghai Prime Machinery v. Council; Case T-172/09, Gem-Year and Jinn-Well Auto-Parts (Zhejiang) v. Council. In the meanwhile, the EU has amended its basic anti-dumping regulation to bring it in line with WTO law (Regulation No 765/2012, OJ L 237 of 3.9.2012, p. 1).

[595] See, for instance, the case concerning US measures on steel plate from India, where the US CT. Int'l Trade rendered its decision in May 2001 (Steel Authority of India, Ltd. v. United States, Slip Op. 01-60) and the WTO panel its report in June 2002 (US – Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R) (referring to the decision of the US Court at para. 7.98)

[596] In some recent cases anti-dumping cases before the EU General Court, the applicants have requested and obtained adjudication under the expedited procedures pursuant to Article 76a of the Rules of Procedure of the General Court, for reasons of particular urgency. Cf. Case T-466/07, Osram v. Council, Order of the President of 5 Sept. 2008, para. 5; Case T-206/07, Foshan Shunde Yongjian Houswares & Hardware Co. Ltd v. Council, [2008] ECR II-1, paras. 25-26.

[597] However, even under these circumstances it could still be argued that a stay of proceedings should be avoided. Cf. Antonis Antoniadis, The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches, World Trade Rev., Vol. 6(1) (2007), 45, at 70-71 (arguing that a finding of consistency by the domestic courts, followed by a finding of inconsistency by the WTO bodies, would shift

indirect effect in the domestic legal order, in the context of consistent interpretation or as persuasive authority, a stay of the domestic proceedings may possibly be justified in some cases because it would demonstrate that the domestic courts engage with WTO dispute settlement reports before taking decision on the merits. However, even under these circumstances, it remains uncertain whether the dispute settlement report would have a decisive impact on the decision of the domestic court. If the domestic laws were formulated in an unambiguous manner which would not allow them to be interpreted in the light of the results of the WTO dispute settlement proceedings, the domestic court could in any case be obliged to render a judgment which is inconsistent with the WTO dispute settlement report. For all of these reasons, the decision on a possible stay of domestic procedures pending the outcome of WTO dispute settlement proceedings is best left to the discretion of the domestic courts.

B. Remand to the administrative agency without reversing the agency's decision

US courts reviewing administrative agency action may remand the matter to the agency for further proceedings without reversing the agency's decision. The US Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit frequently employ this option in antidumping and countervailing duty cases in order to seek further explanations from the agency.[598] Jane A. Restani and Ira Bloom have suggested that "[i]f the Court is uncertain whether the agency has given adequate consideration to matters of international law, it should consider remand to the agency with appropriate direction."[599] More specifically they have proposed that in cases where the court is reviewing an administrative decision and subsequently to the decision a (conflicting) WTO dispute settlement report has been adopted, the domestic court should consider remand of the case to the agency for consideration of the dispute settlement report.[600]

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to the Union institutions the responsibility to comply with the DSB recommendation and remedy the situation as they would have done in the absence of the domestic court decision).

[598] Cf. Gregory W. Bowman, Nick Covelli, David A. Gantz & Ihn Ho Uhm, Trade Remedies in North America (2010), at 176 (also observing that remand is a typical feature of modern US administrative law).

[599] Cf. Jane A. Restani and Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, Fordham Int'l L. J., Vol. 24 (2001), 1533, at 1544.

[600] Ibid., at 1545.

Patrick C. Reed has proposed that the statutory provisions governing the procedures of the CIT should be amended to expressly provide for this possibility which is in any case inherent in the court's powers.[601] In practice, however, the CIT only rarely remands a matter to an agency for further explanations regarding WTO law. An example is *Usinor and others v. U.S.*.[602] In this case, the CIT remanded an anti-dumping review determination of the US International Trade Commission because the Commission had not discussed possible inconsistencies of the determination with the WTO Anti-dumping Agreement. The Court instructed the Commission to discuss on remand, "as part of its overall duty to administer the antidumping laws in accordance with its international obligations",[603] the possible constructions of the Anti-dumping Agreement, which provides that imports from one particular country, which are below a numerical threshold and therefore negligible, should normally not be a cumulated with imports from other countries under investigation. The Court ruled that "[t]he Commission may ultimately conclude that departing from the Antidumping Agreement's numerical test is consistent with the Antidumping Agreement [...]. In this event, the Commission must discuss and explain how and why the numerical test is not applicable in this instance. In the alternative, the Commission must further discuss how and why its position is irreconcilable with the Antidumping Agreement and the impact of the [Statement of Administrative Action to accompany the Uruguay Round Agreements] on the proper interpretation of the statute. The Commission may not simply disregard the Antidumping Agreement by loosely invoking court decisions that stress the primacy of domestic law where a conflict with international law arises. Rather, it must first expressly identify and analyze such a conflict before relying on those decisions."[604]

Such a course of action appears desirable, in particular in domestic legal orders which apply a large measure of deference to reasonable determinations of agencies, as is the case in the US. To the extent that the courts refrain from replacing the administrative

[601] Cf. Patrick C. Reed, Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality, Geo. J. Int'l L., Vol. 38 (2006), 206, at 249.
[602] Usinor and others v. U.S., 26 C.I.T 767 (19 July 2002).
[603] Id., at 778.
[604] Id., at 778.

agency's interpretation of domestic laws by their own interpretation (in the light of international law), it should at least be ensured that the agency was aware of, and has engaged with, potentially conflicting international law. This does not necessarily amount to an obligation for the agencies to interpret the domestic law in the light of international law, but it puts the burden on the agency to give adequate reasons for its decisions.

The provisions governing the procedures of the EU Court of Justice and the EU General Court do not provide the possibility for the courts to remand implementing acts to the political institutions for further action. If the act lacks an adequate statement of reasons relating to pertinent international law issues, the EU courts could consider annulling the act for breach of the duty to state reasons; and if the courts find that the act infringes domestic legislation as interpreted (by the courts themselves) in the light of an international agreement or an international judicial decision, they may annul the act for substantive reasons.

C. Other measures for the organization of the proceedings

Domestic courts may also use less formal procedural means in order to allow the parties to comment on, and the court to properly take into consideration, the outcome of relevant international judicial proceedings. If the domestic proceedings are already at an advanced stage when a relevant decision of an international judicial body intervenes, the domestic courts may, depending on the rules and practice governing their procedures, give the parties the occasion to submit further written observations on the international decision, have the decision discussed at the hearing, or – if the hearing has already taken place - reopen the oral part of the procedure in order to convene another hearing. The EU General Court has occasionally resorted to such measures in cases where WTO dispute settlement reports had been issued during the course of the domestic proceedings. In the *Salmons* case,[605] the General Court allowed the parties to present additional written submissions commenting on a WTO panel report relating to the

[605] Cf. judgment of the General Court of 21.3.2012 (n.y.r.) in Case T-115/06, Fiskeri of Havbruksnæringens Landsforening e.a. v. Council (action for annulment of Council Regulation (EC) No 85/2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway (OJ 2006 L 15, p. 1)).

measure under review by the court.[606] In the *Hynix* case,[607] where the WTO panel report *EC -Countervailing Measures on DRAMs from Korea*[608] came out after the written procedure before the General Court had been closed, the Court wrote to the parties in order to request them to inform it at the hearing about the inference they would draw from the panel report. Such procedural means put the parties in a position to comment not only on the effects which the underlying provisions of the WTO agreements and the dispute settlement report should be given in the domestic proceedings, but also on the substance of the case. In particular, the parties may establish distinctions between the pleas brought forward in the WTO dispute and in the domestic litigation or between the text of the WTO law provisions at issue and the relevant domestic trade defense legislation, and they may rely on, or attempt to refute, the legal conclusions reached by the WTO panel or Appellate Body. Procedural or organizational measures of this kind appear to be at the discretion of the court. But they are desirable and may even be required in order to guarantee a fair procedure if the court intends to take account of the respective dispute settlement reports in its judgment.

VIII. FACTUAL INDIRECT EFFECT – INTERNATIONAL AGREEMENTS AS AN ELEMENT OF THE FACTUAL OR NORMATIVE CONTEXT FOR THE APPLICATION OF DOMESTIC LAW

The weakest form of indirect effect occurs when domestic courts, in the application of domestic law, use international treaty law as an element of the factual or normative context. Such effect may be described as factual indirect effect. The effect is indirect in the sense that the courts do not directly apply an international treaty rule, but domestic rules. The effect is weaker than substantive indirect effect (where domestic courts are influenced by international treaty law in the interpretation of domestic law) and procedural indirect effect (where domestic courts are influenced by international

[606] EC - Anti-Dumping Measure on Farmed Salmon from Norway, WT/DS337/R (2007).
[607] Case T-383/03, Hynix Semiconductor Inc. v. Council (action for annulment of Council Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, OJ 2003, L 212, p. 1). The case was later discontinued and removed from the register (see Order of the President of the Sixth Chamber of the Court of First Instance of 17.11.2008).
[608] EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, WT/DS299/R (2005).

judicial proceedings in their decisions on the further steps to be taken in domestic proceedings): when domestic courts take account of international treaty law as a matter of fact or context, it is only in a wider sense that international law influences or affects the courts' decisions. Independently of the terminological issues, it may be useful to briefly review some of the situations where WTO law is referred to by the courts in the EU and which fit neither within the concepts of substantive or procedural indirect effect, nor within the concept of direct effect.[609]

Among the cases in which EU courts have taken account of WTO law as part of the factual or normative context in applying (as distinguished from interpreting) EU law are *Emesa Sugar* and *T.Port*.[610] In *Emesa Sugar*[611] the Court of Justice had to decide, inter alia, on the proportionality of a Council decision which had introduced tariff quotas and modified the cumulation-of-origin rules for the import of sugar into the EU from the overseas countries and territories which depend constitutionally on certain EU Member States. The Court concluded that the Council was entitled to take the view that the contested measures were necessary in order to avoid the disturbance of the EU's common market organization for sugar and that the contested measures were therefore proportionate. It reached this conclusion on the basis of an evaluation of the market conditions for sugar, which were determined by the rules of the EU's common market organization and by certain rules of the WTO agreements (concerning, for instance the limitations for subsidized sugar exports).[612] WTO law was thus referred to as an element in the normative context of the common agricultural policy for the purpose of the application of the proportionality principle. In its judgment in *T.Port*,[613] the Court of First Instance (now: General Court) had to rule on an action for non-contractual damages based on the allegation that the applicant had suffered damage as a result of

[609] For an example of factual indirect effect of an international treaty other than the WTO Agreement, cf. the Opinion of the Advocate General in Case C-533/08, TNT Express Nederland, [2010] ECR I-4107, where the Geneva Convention on the Contract of International Carriage of Goods by Road is used as "legal and factual background" to the interpretation of a EU regulation (para. 77), although there was no obligation of consistent interpretation in this regard (para. 84).
[610] Cf. Francis Snyder, The Gatekeepers: The European Courts and WTO Law, CMLRev., Vol. 40 (2003), 313, at 316 and 324 (referring to the Emesa Sugar and T.Port cases).
[611] Cf. Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, [2000] ECR I-675.
[612] Id., para. 56.
[613] Cf. Case T-1/99, T.Port v. Commission, [2001] ECR II-465.

licensing requirements for bananas imported into the EU. These requirements had been introduced by a Commission Regulation which was intended to implement the Framework Agreement on Bananas (which had been incorporated into the EU's GATT 1994 Schedule). Although the Commission Regulation had already been declared to be invalid in an earlier judgment,[614] the applicant still had to prove that it had suffered any actual damage. In order to determine whether the applicant had adduced sufficient proof as to the existence and extent of the alleged damage, the Court considered that the advantages resulting for certain operators from parts of the Framework Agreement on Bananas could have been offset by disadvantages resulting from other parts of the Agreement.[615] It concluded that the applicant had not proven that the Agreement and the Regulation intended to implement it had actually led to any damage on the part of the applicant. The cost-benefit analysis in the light of the Agreement was thus performed by the Court in order to assess whether one of the EU law conditions for non-contractual liability (the existence of damage) was fulfilled in this case. In both of these cases, the courts did neither review the legality of EU measures in the light of WTO law (direct effect), nor interpret EU law in the light of WTO law (substantive indirect effect), but used elements from the WTO agreements as factual or normative context for the purpose of the application of EU law.[616]

The judgments of the EU courts in the FIAMM/Fedon cases[617] may also illustrate this point. The applicants in these cases had claimed compensation from the EU for damage

[614] Cf. Joined Cases C-364/95 and C-365/95, T.Port, [1998] ECR I-1023.
[615] Cf. Case T-1/99, T.Port v. Commission, [2001] ECR II-465, paras. 66-67.
[616] Elements of WTO dispute settlement practice have also been used to this effect. In his Opinion of 14.10.2008, (Case C-42/07, Liga Portuguesa de Futebol Profissional, [2009] ECR I-7633, at paras. 273 and 274 of the Opinion, as well as footnotes 112 and 113), Advocate General Bot examined whether under EU law a Member State could legitimately restrict the freedom to provide lotteries and off-course betting on the internet to protect consumers and maintain public order. In this context he relied, inter alia, on the risks of practices as described by the US in a WTO dispute and mentioned (at footnote 113) that "[i]n view of these risks to public order and the dangers of on-line games to consumers, the Appellate Body of the WTO found that the restrictive measures taken by the United States of America were necessary for the protection of public morality and the maintenance of public order (see the Report of the Appellate Body of the WTO, United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, 7 April 2005, paragraph 327)."
[617] Cf. the judgments of the Court of First Instance in Cases T-69/00 FIAMM v. Council and Commission, [2005] ECR II-5393, and T-135/01 Fedon v. Council and Commission, [2005] ECR II-2; and, on Appeal, the judgment of the Court of Justice in Joined Cases C-120/06 P and C-121/06/ P, FIAMM and Fedon v. Council and Commission, [2008] ECR I–6513. For a critical analysis of the substantive issues involved in

which they had allegedly suffered as a result of the imposition by the US of retaliatory measures (suspension of tariff concessions), authorized by the WTO, in response to the non-compliance by the EU with its obligations under the WTO agreements. The applications were based, first, on a claim that the Union had incurred non-contractual liability by reason of its unlawful failure to comply with the provisions of the WTO agreements and with a decision of the WTO Dispute Settlement Body (DSB). In this respect, the EU courts ruled in both instances that the application was unfounded because the courts could not, in the circumstances of the case, review the legality of the Union's conduct in the light of WTO law. The dismissal of this claim was thus founded on the lack of direct effect of WTO law. For the present purposes, the second claim, which was based on non-contractual liability of the Union for conduct not shown to be unlawful, is more interesting. A non-fault based non-contractual liability regime is not expressly provided for in the EU Treaties. The EU courts had previously limited themselves to specifying some of the conditions under which such liability could theoretically be incurred in the event of the principle of Union liability for lawful acts being recognized in Union law.[618] These conditions comprised the existence of damage, the existence of a causal link between the damage and the conduct concerned, and the unusual and special nature of the damage. In the FIAMM/Fedon cases, the Court of First Instance ruled that a non-fault liability regime existed in the Union legal order, but that the aforementioned conditions were not fulfilled in these cases. According to the Court of First Instance, the damage incurred by the applicants was not unusual in nature, in particular because the possibility of the suspension of tariff concessions was a risk inherent in the international trading system, and the applicants ought to have been aware of the possibilities provided for in this regard by the WTO DSU. The Court of

these cases, cf. Marco Dani, Remedying European Legal Pluralism – The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders, Eur. J. Int'l L., Vol. 21(2) (2010), 303; Armin Steinbach, EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists, J. World Trade, Vol. 43(5) (2009), 1047; Giacomo Gattinara, WTO Law in Luxembourg: Inconsistencies and Perspectives, Italian Y.B. Int'l L., Vol. 18 (2008), 117, at 119-123. Cf. also Alberto Alemanno & Fabrizio Di Gianni, Non-contractual liability of the Community regarding WTO obligations: Where do we stand?, in: The Absence of Direct Effect of WTO in the EC and in other Countries (ed. by Claudio Dordi) (2010), 136 (analyzing the development of the case-law on non-contractual liability regarding WTO obligations up to the FIAMM/Fedon judgments of the CFI, but not yet the judgment of the ECJ on appeal).

[618] Cf., in particular, Case C-237/98 P, Dorsch Consult v. Council and Commission, [2000] ECR I-4549, para. 19.

Justice found that the Court of First Instance erred in law when affirming the existence of a regime providing for non-contractual liability of the Union on account of the lawful pursuit by it of its activities falling within the legislative sphere.[619] In both instances, the claim for damages resulting from non-fault liability was thus dismissed, although for different reasons. However, if the Union legal order had recognized the existence of a non-fault liability regime for legislative acts in the circumstances of the case – as the Court of First Instance had supposed – or if the case had concerned a non-legislative act and the Court of Justice had accepted a non-fault regime for non-legislative acts under these circumstances, the conduct of the Union, its condemnation by the DSB, the authorization given by the DSB to the US to impose retaliatory measures, and the effect of these measures on the applicants would have been considered as factual elements which the courts would have taken into consideration in the application of the EU law conditions for non-fault liability. This does not mean that these factual elements would not have required a legal analysis. In particular, the question whether there was a direct causal link between the non-compliance of the Union with the decision of the DSB and the damage incurred by the applicants, or whether the causal link was interrupted by a discretionary decision of the US authorities to impose retaliatory measures, may have necessitated a legal analysis, including an assessment of the different steps in WTO dispute settlement authorizations for retaliation. But such legal analysis would not have comprised the question whether the Union measure was lawful in the light of WTO law or not. Nor would the courts have interpreted EU law in the light of WTO law. WTO law would have been considered as factual and normative context.

An example from the US is the recent decision of the Federal Circuit in *Tianrui Group v. ITC*.[620] In this case, the Federal Circuit confirmed a determination by the International Trade Commission (ITC) that the importation of certain products from China could be

[619] The ECJ qualified this statement by stating that no non-fault liability regime exists for such conduct of the EU institutions "in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts" (Joined Cases C-120/06 P and C-121/06/ P, FIAMM and Fedon v. Council and Commission, [2008] ECR I–6513, para. 176). The Court thereby arguably conditions the denial of the existence of a non-fault liability regime on the absence of direct effect of the agreement concerned. For a further discussion of this point, cf. Giacomo Gattinara, WTO Law in Luxembourg: Inconsistencies and Perspectives, Italian Y.B. Int'l L., Vol. 18 (2008), 117, at 121-122.
[620] 661 F.3d 1322 (Fed. Cir. 2011).

blocked. These products were produced by using a process protected by US trade secret law and were therefore considered to be in violation of Section 337 of the US Tariff Act which prohibits, under certain circumstances, unfair methods of competition and unfair acts in the importation of products into the US. One of the issues was whether the ITC was authorized to apply the domestic trade secret law in a situation where the misappropriation of the trade secret took place in part in a foreign country. The court ruled that the presumption against extraterritoriality did not apply in this case because the Act expressly addresses the importation of products and thus an inherently international transaction, that the unfair activity which took place abroad was relevant only to the extent that the imported products causes injury to the domestic industry, and that the legislative history of the Act supported these conclusions. The court rejected the argument that the determination would cause interference with Chinese law. It did not find any relevant conflict between the principles of trade secret law of China and the ones applied in the US. In this context, the court noted that China had acceded to the WTO TRIPS Agreement and that there were "no relevant difference between the misappropriation requirements of TRIPS article 39 and the principles of trade secret law applied by the administrative law judge in this case."[621] The reference to the TRIPS Agreement was thus not used in order to interpret the domestic US law in the light thereof, but as normative context in the application of this law to conduct which took partially place abroad.[622]

Another type of factual indirect effect is illustrated by antitrust litigation in US courts, in which Chinese exporters, who were accused of fixing the export prices to the US, argued that their trade association, which had directed them to coordinate the prices, was under the control of the Chinese government and that any price fixing could therefore

[621] Id., 1332-1333.
[622] Another example is Crosby v. National Foreign Trade Council, 530 U.S. 363, 383-86 (2000). In this case, the issue was whether a State law of Massachusetts, which prohibited its agencies from purchasing goods and services from companies which had business with Burma, was invalid because it infringed the Supremacy clause of the US Constitution. In its analysis of whether the State law was preempted by a federal law on sanctions against Burma, the Court concluded that the State law stood in the way of the objectives of the federal law. In this context, the Court took into account complaints lodged in the WTO by the EU and Japan, which had claimed that the State law infringed the WTO Government Procurement Agreement.

not be attributed to the exporters.[623] In one of the cases, discussed above in relation to procedural indirect effect,[624] the court stayed the domestic proceedings in order to await the outcome of a WTO dispute settlement proceeding, in which the complainants (including the US) alleged that the Chinese government administered minimum export prices through the trade associations.[625] Although the WTO dispute settlement ruling was not directly relevant for the interpretation of the US antitrust law (and the substantive indirect effect of the ruling was therefore not an issue), it could inform the US courts about the relevant Chinese laws and the factual circumstances surrounding the Chinese trade associations and thereby help the courts in the application of the US antitrust laws as well as the act of state, foreign government compulsion and international comity doctrines.

[623] In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546 (E.D.N.Y. 2008); Resco Products v. Bosai Minerals Group, W.D. Pennsylvania. Civil Action No. 06-235, Decision of 4 June 2010; Animal Science Products v. China National Metals & Minerals Import & Export Corp., 702 F. Supp. 2d 320 (D.N.J. 2010). For an exhaustive discussion of these cases, see Dingding Tina Wang, When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exports, Colum. L. Rev., Vol. 112 (2012), 1096, 1142 (concluding that "[i]n antitrust cases involving a foreign government's role, U.S. courts should consider the executive branch's conduct of and position in WTO litigation with that foreign government, if any, and look to whether arguments and findings in the WTO case inform or persuade").

[624] Resco Products v. Bosai Minerals Group, W.D. Pennsylvania. Civil Action No. 06-235, Decision of 4 June 2010; see Part VII.A., above.

[625] China - Measures Related to the Exportation of Various Raw Material, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.

IX. FROM ONE-DIRECTIONAL VERTICAL INDIRECT EFFECT TO MUTUAL JUDICIAL ACCOMMODATION

As the previous parts of this contribution have shown, domestic courts may play an important role in accommodating international law and avoiding or reducing conflicts with international law, in particular through the attribution of indirect effect to international agreements. This role may be facilitated if domestic courts do not conceive it as a one-way process in which they are at the receiving end of whatever international courts or judicial bodies may determine to be the law in accordance with their respective international legal system. It is therefore appropriate to briefly explore the effects between and among different legal orders, other than the one pointing from the international legal order to domestic legal orders. These other effects include (A.) effects of domestic legal orders on international legal orders, (B.) effects between different domestic legal orders or between different international legal systems, and (C.) combined vertical and horizontal effects which could be described as diagonal. The following observations will not address the mutual influences among legal orders at the level of law-making and the administration of the law, but will focus on influences among courts and judicial bodies, in particular in the context of the WTO and the EU and US legal orders.[626]

[626] For a more general description and analysis of mutual judicial influences among courts from different legal orders, cf., in particular, Anne-Marie Slaughter, A Typology of Transjudicial Communications, U. Rich. L. Rev., Vol. 29 (1994), 99 (analyzing the forms, the degree of engagement, the functions and the preconditions, as well as the causes and consequences of communications between courts of different legal orders); Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, Geo. L. J., Vol. 93 (2005), 487 (conceiving domestic courts as mediators between international and domestic legal norms and emphasizing the role of domestic courts as participants in the process of developing international law); Eyal Benveniste, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, Am. J. Int'l L., Vol. 102 (2008), 241 (explaining the references by domestic courts to foreign and international law as an instrument for empowering the domestic democratic process by shielding it from external economic, political and legal pressures); Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, Int'l & Comp. L. Q., Vol. 60 (2011), 57 (analyzing the interpretation of international law by domestic courts, which refer to decisions of other domestic courts, and emphasizing the dual role of domestic courts as enforcers and creators of international law); Rudi Teitel & Robert Howse, Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order, Int'l L. & Pol., Vol. 41 (2009), 959 (demonstrating how interpretive openness and mutual references between tribunals established by different international legal orders may serve to qualify or dissipate the threat of fragmentation and enhance the legitimacy of international law). See also Francis G. Jacobs, Judicial Dialogue and the Cross-Fertilization of Legal systems: The European

A. Inverse vertical indirect effect: International judicial bodies engaging with, taking account of, or deferring to domestic law

International judicial bodies bear a part of the responsibility for avoiding or reducing potential conflicts with domestic legal orders. Depending on the relevant legal framework under which they are established, international judicial bodies can recur to a number of methods or attitudes in order to engage with, take account of, or defer to domestic law and practice. These may include the application of jurisdictional limitations, the exhaustion of local remedies principle, the engagement with domestic court decisions notably in the establishments of the facts, deferential interpretative methods and deferential standards of review and proportionality standards (by according to the domestic actors a margin of appreciation),[627] and the resort to general principles of the law of the contracting parties or the emergence of a consensus in their laws as an interpretive aid or in order to fill gaps or reduce ambiguities in the international legal system.[628] Such methods can contribute to encouraging compliance with, or obedience to, international adjudication by domestic actors. To the extent that international judicial bodies review measures of a democratically accountable domestic

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Court of Justice, Tex. Int'l L. J., Vol. 38 (2003), 547 (describing the role of the EU Court of Justice with respect to cross-system judicial influences within the EU and externally); Merris Amos, The Dialogue between United Kingdom Courts and the European Court of Human Rights, Int'l & Comp. L. Q., Vol. 61 (2012), 557 (providing a nuanced account of the mutual influences between UK courts and the ECtHR and analyzing the impact on the legitimacy of the judgments of both jurisdictions).

[627] Cf. Yuval Shany, Toward a General Margin of Appreciation Doctrine in International Law? Eur. J. Int'l L., Vol. 1(5) (2006), 907 (describing the growing acceptance by many international courts of the margin of appreciation doctrine, offering guidance for its future application, and justifying the doctrine in terms of institutional advantages, democratic accountability, fairness in attributing responsibility, and inter-institutional comity); Janneke Gerards, Pluralism, Deference and the Margin of Appreciation Doctrine, Eur. L. J., Vol. 17 (2011), 80 (reviewing the application of the margin of appreciation doctrine by the EU courts and the ECtHR and pleading for a more structured doctrine of deference based on notions of procedural democracy).

[628] As concerns the resort to the general principles common to the law of the Member States by the EU Court of Justice, cf. Koen Lenaerts and José A. Gutiérrez-Fons, The Constitutional Allocation of Powers and General Principles of EU Law, CMLRev., Vol. 47 (2010), 1629.as concerns the use of comparative data for persuasive or informational purposes in the case-law of the ECtHR, cf. Kanstantsin Dzehtsiarou and Vasily Lukashevich, Informed Decision-Making: the Comparative Endeavours of the Strasbourg Court, Netherlands Q. Hum. Rts, Vol. 30(3) (2012), 272.

legislator, judicial deference may also be justified by considerations of democratic legitimacy.[629]

It would stretch the notion of (inverse) indirect effect too far if it was understood to embrace the above mentioned methods in their entirety. But this notion may capture at least situations where domestic law and practice, including domestic court decisions, are used in international judicial proceedings (1) as facts in order to determine the content of the domestic measure to be reviewed, (2) as subsequent State practice or otherwise in the interpretation of the pertinent rule of the international treaty or (3) as parameters to be taken into account in the application of the pertinent treaty rule to the contested domestic measure.[630] Some of the methods used by international judicial bodies in this context are functionally similar to methods used by domestic courts in order to attribute indirect effect to international law, in that they aim at reducing conflicts between the relevant international and domestic legal rules. Just as domestic courts can resort to agreement-consistent interpretation only if the domestic law leaves some interpretative margin, international judicial bodies can resort to accommodating strategies in the interpretation and application of international law only if the international law is not clearly and unambiguously breached by the domestic measure under review. This will be briefly illustrated with respect to the effects of domestic law in WTO dispute settlement proceedings.

First, in order for an international judicial body to review the compatibility of a contested domestic measure with international treaty law, the judicial body must determine the content of the contested measure. As a general principle, international judicial bodies conceive domestic laws as facts.[631] This is also the case in the context of

[629] Cf. Andreas von Staden, The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review, Jean Monnet Working Paper No 10/2011.
[630] Furthermore, the discretionary stay or delaying of proceedings by an international court in order to await the outcome of a parallel domestic court proceeding can be considered to fall within the notion of inverse procedural indirect effect. For an early example cf. e.g. Case Considering the Administration of the Prince of Pless (Germany v. Poland), 1933 PCIJ Serie A/B No 52, at 16 (preliminary objection) and No 57 (prorogation)). Cf. Yuval Shany, Regulating Jurisdictional Relations between National and International Courts (2007), 44, 178 et seq. (arguing that the discretion of the international or the domestic court to stay proceedings in cases of parallel proceedings should be exercised on a case-by-case basis).
[631] Cf., e.g., Certain German Interests in Polish Upper Silesia (Merits), (1926), PCIJ Ser. A No. 7, at 19.

WTO dispute settlement proceedings.[632] Evidence regarding the meaning of a provision of domestic law may be drawn, inter alia, from domestic judicial decisions.[633] For instance, in *US – Anti-Dumping Act of 1916*, the WTO panel considered in a very detailed manner the various decisions rendered by US courts in connection with the contested domestic provision, with a view to determining which was the most convincing and dominant interpretation of the domestic provision.[634] Domestic judicial decisions can thus have a factual (inverse) indirect effect on the WTO proceedings. Another remarkable case is *US – Hot Rolled Steel*,[635] where the Appellate Body was confronted with an ambiguous provision of the US Tariff Act of 1930. One interpretation of the provision would have resulted in its inconsistency with the WTO Anti-dumping Agreement, whereas the other would not have. The Appellate Body first acknowledged that a definitive interpretation of the provision had not yet been established by US courts. Taking account of the explanations submitted by the US party, the Appellate Body then went on to examine the provision and concluded, that "if and to the extent that it is interpreted in a manner consistent with our reasoning, as set forth in paragraphs 203 to 208 of this Report, we see no necessary inconsistency between the

[632] The law of the respondent WTO member will be treated as WTO-consistent until proven otherwise, the burden of proof lying with the applicant (cf. US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr. 1 (2002), para. 157). The use of domestic law as a question of fact in WTO dispute settlement proceeding is extensively discussed by Sharif Bhuiyan, National Law in WTO Law, Effectiveness and Good Governance in the World Trading System (2007), at 207-243.

[633] Cf. US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr. 1 (2002), para. 157.

[634] Cf. US – Anti-Dumping Act of 1916 (Complaint by EC), WT/DS136/R (2000), paras. 6.52-59, 6.134-62; US – Anti-Dumping Act of 1916 (Complaint by Japan), WT/DS162/R (2000), paras. 6.51-58, 6.152-81. Cf. also EC – Customs qualification of frozen boneless chicken cuts, Award of the Arbitrator under Article 21.3(c) DSU, WT/DS269/13 and WT/DS286/15, paras. 57-63, where the arbitrator critically engaged with judgments of the ECJ (Case C-175/82, Dinter, [1983] ECR 969, and Case C-33/92, Gausepohl-Fleisch, [1993] ECR I-3047) on which the EC had relied in order to request more time for the implementation of the recommendations. The arbitrator pointed out that "[a]lthough arbitrators under Article 21.3(c) are not called upon in the normal course of their duties to pronounce on the meaning of municipal law, I am of the view, expressed above, that I am not permitted in the circumstances of this case simply to accept the European Communities' understanding of the relevant ECJ cases. This is so because this understanding is argued by the European Communities in an attempt to discharge its burden of persuading me that action outside the domestic decision-making process of the European Communities is necessary for implementation of the recommendations and rulings of the DSB in this dispute" (ibid. (Award of the Arbitrator), Fn. 80).

[635] Cf. US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS/184/AB/R (2001).

[…] provision, on its face, and the Anti-Dumping Agreement."[636] This can be understood as an invitation by the Appellate Body to the US courts to interpret the contested domestic provision in a way consistent with the pertinent provisions of the WTO Anti-Dumping Agreement (as interpreted by the Appellate Body) and thus to attribute indirect effect to WTO law. In this way the Appellate Body avoided a conflict between WTO law and the contested US measure by anticipating an agreement-consisting interpretation by the domestic courts. Similarly, if a panel or the Appellate Body have based a finding of inconsistency of an ambiguous domestic rule on a pattern of prior WTO inconsistent domestic court decisions, it is possible that the subsequent WTO-consistent interpretation of the rule by domestic courts can constitute a means of complying with the adverse WTO dispute settlement ruling.[637] In more general terms, where interpretative discretion allows the domestic authorities (including the domestic courts) to determine the meaning of a domestic rule of general application in a way which is consistent with WTO law, the distinction between mandatory and discretionary domestic measures of general application can thus still play a role.[638]

Second, domestic law and practice, including domestic court decisions, can influence the interpretation of international treaty law in general and of the WTO agreements in particular.[639] This is the case where provisions of the WTO agreements explicitly or

[636] Ibid., para. 208

[637] Cf. in this context, the general statement by the arbitrator in Brazil – Retreaded Tyres who acknowledged that implementation through the judiciary was not a priori excluded from the range of permissible action that could be taken to implement DSB rulings and bring about compliance with a member's obligations (Brazil – Measures Affecting Imports of Retreaded Tyres, Arbitration under Art. 21.3(c) of the DSU, WT/DS332/16, para. 68). This arbitration did not, however, concern consistent interpretation. It related to Brazil's claim that an expected ruling by the Federal Supreme Court of Brazil was the only effective means to prevent lower courts from granting injunctions resulting in an infringement of Brazil's obligations under the WTO dispute settlement ruling.

[638] Cf. Nicolas Lockhart & Elizabeth Sheargold, In Search of Relevant Discretion: The Role of the Mandatory/discretionary Distinction in WTO Law, J. Int'l Econ. L., Vol. 13(2) (2010), 379, at 410-419. See also Jing Kang, The Presumption of Good Faith in the WTO 'As Such' Cases: A Reformulation of the Mandatory/Discretionary Distinction as an Analytical Tool, J. World Trade, Vol. 46 (2012), 879, at 898, 902 et seq. (arguing for a rebuttable presumption that a WTO member will interpret discretionary legislation consistently with its WTO obligations).

[639] The interpretive methods used in this respect can of course not simply mirror the methods applied by domestic courts. For instance, it is in principle not meaningful for international judicial bodies to inverse the method of agreement-consistent interpretation by interpreting international law to render it consistent with domestic law. Cf. US – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (2009), para. 273 (finding that it was not relevant whether the treaty could be interpreted consistently with a particular member's municipal law or with municipal laws of members).

implicitly refer to domestic law.[640] Domestic law and practice may also play a role in the interpretation of the WTO agreements to the extent that it establishes an agreement of the parties through subsequent State practice pursuant to Article 31(3)(b) VCLT.[641] Furthermore, domestic law and practice may be relevant in establishing the "circumstances of the conclusion" of the WTO agreements, which may be taken into account as a supplementary means of interpretation under Article 32 VCLT. In the interpretation of the GATT Schedules of a Member, for instance, domestic customs legislation as well as domestic court judgments of the Member concerned may constitute such circumstances of the conclusion of the treaty.[642] As concerns more specifically the interpretation of the WTO Anti-Dumping Agreement, its Article 17.6(ii), 2nd sentence, provides that "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."[643] The WTO dispute settlement organs would thus defer to the interpretation given by the respondent party to the extent that it is permissible within the meaning of Article 17.6(ii). Outside the scope of the WTO Anti-Dumping Agreement, a similar result can be reached by the application of the *in dubio mitius*

But the WTO panels and Appellate Body could, for instance look at domestic court decisions, which review the same domestic action which is contested before the WTO, for their persuasive value; cf. John M. Ryan, Interplay of WTO and U.S. Domestic Judicial Review: When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and Under U.S. Law, Do the Respective Decisions and Available Remedies Coexist or Collide?, Tul. J. Int'l & Comp. L., Vol. 17 (2009), 353, 387.

[640] Cf. Daniel Lovric, Deference to the Legislature in WTO Challenges to Legislation (2010), at 79-81.

[641] Cf. Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), [1999] ICJ Rep. 1045, at 1075-1076. Cf. also EC – Customs Classification of Certain Computer Equipment, WT/DS/62/AB/R, WT/DS/67/AB/R, WT/DS68/AB/R, at para. 90 (where the Appellate Body refers to "subsequent practice").

[642] Cf. EC – Customs Classification of Certain Boneless Chicken Cuts, WT/DS 269/AB/R, WT/DS286, at paras. 308-309.

[643] The Appellate Body stated in this context that "[t]he function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail." (US – Continued Existence and Application of Zeroing Methodology (2009), WT/DS350/AB/R, para. 272.) On the problems inherent in the assumption that the interpretation in accordance with the VCLT would not lead to a single correct interpretation, cf. Malgosia Fitzmaurice & Panos Merkouris, Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement, in: Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (2010), 153, at 179 et seq..

principle.[644] Although the WTO dispute settlement organs do not apply this principle in any consistent way, the Appellate Body referred to it in *EC - Hormones*. This case concerned, inter alia, the interpretation of Article 3.1 of the WTO SPS Agreement, which provides that sanitary and phytosanitary measure must in principle be "based on" international standards. The Appellate Body rejected the panel's conclusion that such measures must "conform to" international standards. In this context, the Appellate Body observed, that "[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations."[645]

Third, when reviewing the WTO-conformity of domestic measures, WTO panels and the Appellate Body may under certain circumstances defer to domestic evaluations and policy choices, by means notably of deferential standards of review and a deferential application of the proportionality test.[646] The WTO agreements contain only incomplete guidance with respect to the standard of review in WTO dispute settlement proceedings.[647] In spite of the large WTO dispute settlement practice and scholarly

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[644] Cf. Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Advisory opinion), [1922] PCIJ Ser. B, No. 1, at 25 ("if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted"). Cf. also The Case of the S.S. Lotus (France v. Turkey) [1927] PCIJ Ser. A., No. 10, at 18 ("Restrictions upon the independence of States cannot therefore be presumed"). For a recent critical account of the development and the use of this principle by international tribunals, cf. Christophe J. Larouer, In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts, Cornell Law School Inter-University Graduate Student Conference Papers (2009), Paper 22, online at: http://scholarship.law.cornell.edu/lps_clacp/22; cf. also John H. Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law (2006), 184-185 (criticizing the application of this principle in the context of the WTO).

[645] EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, at para. 165.

[646] Cf. Andreas von Staden, The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review, Jean Monnet Working Paper No 10/2011 (promoting judicial standards of review based on "normative subsidiarity" and concluding that "at least some deference is recognized as explicitly or implicitly indicated by key trade norms" of the WTO agreements, at p. 36).

[647] According to Art. 11 DSU, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". As concerns anti-dumping cases, Art. 17.6(i) of the Anti-Dumping Agreement provides, that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and

analysis of this issue,[648] there is still a lack of clarity in this respect. The standards of review, and their justification, depend on several parameters, including the type of the contested domestic measure, the nature of the specific WTO obligation at stake, the underlying facts, and the nature of the evidence.[649] Andrew T. Guzman has suggested a normative test, according to which the determination of the appropriate standards of review turns on a weighting of the advantages and disadvantages inherent in a stricter review by the WTO adjudicatory bodies, which are supposed to be unbiased in their interpretation of WTO agreements, and a more lenient, deferential standard of review of acts adopted by domestic authorities, which have more factual knowledge and experience and are more responsive to domestic priorities and preferences.[650] Among the more controversial points in this context is the dispute settlement practice relating to risk assessment and risk management, where the WTO adjudicatory bodies appear to apply a stricter standard of review with respect to the merits of the relevant science, and a more deferential standard of review with respect to the risk tolerance or the appropriate level of protection.[651] As concerns the standards relating to the application of necessity, proportionality and balancing concepts incorporated in provisions of the WTO agreements,[652] Daniel Lovric's recent analysis concludes that the WTO dispute settlement organs have been generally, with a few notable exceptions, respectful of

objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned".

[648] Among the more recent contributions cf. Sharif Bhuiyan, National Law in WTO Law, Effectiveness and Good Governance in the World Trading System (2007), 144-206; Andrew T. Guzman, Determining the Appropriate Standard of Review in WTO Disputes, Cornell Int'l L. J., Vol. 42 (2009), p. 45; Daniel Lovric, Deference to the Legislature in WTO Challenges to Legislation (2010), 87-95.

[649] Cf. Sharif Bhuiyan, National Law in WTO Law, Effectiveness and Good Governance in the World Trading System (2007), 191-199.

[650] Andrew T. Guzman, Determining the Appropriate Standard of Review in WTO Disputes, Cornell Int'l L. J., Vol. 42 (2009), 45.

[651] Id., at 68-73, analyzing, in particular: EC - Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R; EC – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS294/R; Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R.

[652] Cf., for instance, the general exception clauses in Article XX GATT 1994 and Art. XIV GATS as well as several provisions in the SPS Agreement (e.g. Art. 2(2), Art. 5(6)) and the TBT Agreement (e.g. Art. 2(2)). Cf. also Andrew D. Mitchell, Legal Principles in WTO Disputes, 2008 (paperback ed. 2011), 177, and in particular Table B, pp. 178-180 (listing provisions of the WTO agreements which contain elements of necessity, proportionality, least trade restrictiveness, and commensurability).

domestic legislative decisions about proportionality and show considerable deference to the domestic legislature in this regard.[653]

B. Horizontal indirect effect: Influences between different domestic legal orders or different international legal orders

1) Effects between different domestic legal orders

Domestic courts occasionally refer to judgments of courts of other countries for informative purposes or as persuasive authority.[654] In particular, when interpreting and applying provisions of an international agreement, domestic courts are increasingly looking at how courts of other contracting parties have interpreted and applied the agreement.[655] Such comparative insight may be sought by a domestic court in order to assist it in assessing the effect to be given to the agreement in the domestic legal order or in considering the substantive interpretation to be given to the provisions of the agreement.

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[653] Cf. Daniel Lovric, Deference to the Legislature in WTO Challenges to Legislation (2010), at 142-162.

[654] In the EU, references to foreign judgment are mostly found in the Opinions of the Advocates General, rather than in the judgments of the EU courts. Cf., e.g., Opinion of Advocate General Maduro in Case C-42/02, Commission v. Netherlands, [2004] ECR I-11375, para. 34, note 54 (referring in respect of the requirements for reliance on the precautionary principle to the deferential attitude adopted by US courts with regard to studies conducted by the regulatory authorities, on the one hand, and the detailed assessment carried out by the WTO Appellate Body in connection with the WTO SPS Agreement, on the other hand). On the influence of US Supreme Court case-law in the jurisprudence of the EU Court of Justice, cf. Koen Lenaerts, Interpretation and the Court of Justice: A Basis for Comparative Reflection, Int'l Lawyer, Vol. 41(4) (2007), 1011, at 1027-1028.
In the US, the courts occasionally refer to foreign and international sources. Cf., for instance, Lawrence v. Texas, 539 U.S. 558, 573 (2003), and Roper v. Simmons, 543 U.S. 551, 576-577 (2005) (both referring to UK and international law). On the recourse to foreign law in the interpretation of the US Constitution, cf., on the one hand, Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, Harv. L. Rev., Vol. 119 (1) (2005), 109 (considering the cautious use of foreign and international law as a legitimate interpretive tool), and on the other, Roger P. Alford, Misusing International Sources to Interpret the Constitution, Am. J. Int'l L., Vol. 98(1) (2004), 57 (criticizing, in particular, the haphazard and selective use of international and foreign sources).

[655] Cf., in particular, Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, Int'l & Comp. L. Q., Vol. 60 (2011), 57; Michael P. Van Alstine, The Role of Domestic Courts in Treaty Enforcement – Summary and Conclusions, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 555, at 591.

As concerns the effect of an agreement in the domestic legal order, comparative references have been employed by domestic courts in order to justify, on the basis of reciprocity considerations, the denial of bindingness or direct effect of certain international agreements or international judicial decisions. In the US, the Supreme Court found its ruling that ICJ judgments are not binding US law confirmed by the fact that the applicant had not submitted evidence of any foreign courts which would consider such judgments as binding in domestic law.[656] And in the EU, the Court of Justice referred to the absence of direct effect of WTO law in the domestic legal orders of the EU's major trading partners as one of the reasons to deny direct effect of WTO law in the domestic legal order.[657] On the other hand, the fact that the principle of treaty-consistent interpretation is acknowledged and applied by the courts of many countries may be referred to by a domestic court as one of the arguments to justify the application of this principle.[658]

As concerns the substantive interpretation of treaty provisions, judgments rendered by courts of other contracting parties may be taken into consideration by a domestic court if it considers the interpretation given in such judgments to be persuasive.[659] US courts give to such foreign judgments "considerable weight."[660] And Justice Scalia has

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[656] Medellin v. Texas, 552 U.S. 491, 516 (2008).

[657] Cf. ECJ, C-148/96, Portugal v Council, [1999] ECR-8395, paras. 43-46, and the discussion on reciprocity in Part III.D., above.

[658] Cf. High Court of Australia, NBGM v. Minister for Immigration and Multicultural Affairs and Anor, [2006] HCA 54, per Kirby, J., para. 17, criticizing the limitation of the scope of treaty-consistent interpretation by the majority of the High Court , which he considered to "fly in the face of long established general principles for the construction of municipal legislation referring to treaty provisions which have been ratified by the nation concerned. They are contrary to the long-standing authority of this Court and of other courts of high authority throughout the common law world." Cf. also Donald R. Rothwell, Australia, in: The Role of Domestic Courts in Treaty Enforcement – A Comparative Study (ed. David Sloss) (2009), 120, at 155-156.

[659] Cf., e.g., House of Lords, Bartle and the Commissioner of Police for the Metropolis and Others, ex parte. Pinochet, 24.3.1999, [2000] 1 AC 147, Lord Hope of Craighead (who, in the interpretation of a provision of the Torture Convention refers to judgments of US courts, which he considers persuasive, after having argued that in international law there is a need for clarity on this point and that "[t]he general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states").

[660] Air France v. Saks, 470 U.S. 392, 404 (1995); see also Abbott v. Abbott, 560 US___(2010), Slip Opinion, pp. 12-14 (examining decisions of the courts of England, Israel, Austria, South Africa, Germany, Canada and France, which interpret the Hague Convention of 1980 on the Civil Aspects of International Child Abduction. Another illustration of this principle is the interpretation of the provisions of the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, where the Supreme Court has taken judgments rendered by courts of other signatories of the Convention

recognized, in an otherwise sceptical speech about the use of foreign law by US courts, that the interpretation of treaty provisions by foreign courts can be relevant to the interpretation of the same treaty provisions by domestic courts, and hence the interpretation of a domestic statute implementing the treaty.[661] Several reasons plead in favor of this comparative approach. First, foreign judicial treaty constructions may help to establish the original understanding of the contracting parties.[662] Second, a uniform or consistent interpretation of a treaty by the courts of the contracting parties can be assumed to correspond to the intent of the contracting parties, in particular where the treaty aims at establishing uniform rules or standards.[663] The uniform or consistent interpretation and application of the treaty by the courts of the contracting parties can thus enhance the objectives of the treaty and further its effective application.[664] Third, if a domestic court refers to, and engages with, treaty interpretations given by the courts of other contracting parties it demonstrates the "courtesy of respectful consideration"[665] and encourages the foreign courts to equally take account of this court's interpretation in future cases before the foreign courts. Even if a domestic court considers that the

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into consideration: see, e.g., El Al Israel Airlines Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 173-174 (1999), Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 550-551 (1991). But see Olympic Airways v. Husain, 540 U.S. 644 (2004), and the dissenting opinion of Justice Scalia (criticizing the majority decision's failure to give serious consideration to how the courts of other contracting parties have resolved the legal issues at stake).

[661] Justice Antonin Scalia, International Law in American Courts, Speech to the American Enterprise Institute, Washington, D.C. (February 22, 2006), online at: www.joink.com/homes/users/ninoville/aei2-21-06.asp (visited on 13 Dec. 2010): "The object of treaties is to have nations agree on a particular course of action, and if I'm interpreting a provision of a treaty which has already been interpreted by several other signatories, I am inclined to follow the interpretation taken by those other signatories, so long as it's within the realm of reasonableness. I mean, if they've taken an absolutely unreasonable interpretation, of course I wouldn't follow it. But where it's within the bounds of the ambiguity of the bounds contained in the text, I think it's good practice to look to what other signatories have said, otherwise you're going to have a treaty that's interpreted different ways by different countries, and that's certainly not the object of the exercise. I also think that foreign law is sometimes relevant to the meaning of an American statute; for example, if the statute is designed to implement a treaty provision, the interpretation of that treaty provision by foreign courts is relevant to what the treaty means, and hence, relevant to what the American statute implementing the treaty means."

[662] Cf. Olympic Airways v. Husain, 540 U.S. 644 (2004), dissent by Justice Scalia, at 660.

[663] Ibid.

[664] But see Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, Am. J. Int'l L., Vol. 102 (2008), 241 (arguing that, rather than enhancing the effectiveness of the international treaty, domestic courts may use references to judgments from other jurisdictions in order to forge judicial coalitions as an instrument of empowering the domestic democratic processes by shielding it from forces of globalization which are perceived as jeopardizing domestic policy objectives such as the protection of public health).

[665] Cf. Olympic Airways v. Husain, 540 U.S. 644 (2004), dissent by Justice Scalia, at 661.

interpretation of an international treaty by a court of another contracting party is not persuasive, it may explain the reasons which lead it to a different interpretation. In this way, it may engage in a common endeavor of the courts of the contracting parties to develop the most appropriate interpretation of the treaty.

On the other hand, domestic courts from different legal orders do not necessarily apply identical methods in the interpretation of international treaties and may need to adapt any interpretive results to the specific domestic legal and constitutional framework.[666] The unifying effect of comparative treaty interpretation is therefore inherently limited. Furthermore, the interpretation of a treaty in the light of foreign case-law is only effective if it avoids a selective use of the foreign sources. The parties before the domestic courts have an interest in screening relevant foreign court decisions and presenting them to the court in their pleadings only to the extent that such decisions help their case. Although foreign judgments on international treaty law are becoming increasingly accessible through the internet,[667] domestic courts may not always be fully informed about foreign case-law. Even if they are, domestic courts must avoid picking and choosing those foreign judgments which support their preferred interpretation of the treaty, while ignoring contrary interpretations given by other foreign courts.

As concerns the interpretation of WTO law, domestic courts of the WTO members do not appear to frequently refer to judgments rendered by domestic courts of other members. This could be explained by the fact that the recourse to comparative WTO law interpretation is less useful for domestic courts to the extent that they can seek guidance in the authentic interpretations given by the WTO dispute settlement organs. Furthermore, it may be difficult for domestic courts to obtain an overview over foreign

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[666] See Part VI.C.3, above.

[667] See, e.g., the Refworld collection on refugee case law at: http://www.unhcr.org/refworld/category,LEGAL,,,,,0.html; and the other sources mentioned by Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, Int'l & Comp. L. Q., Vol. 60 (2011), 57, at 58, footnotes 8 and 9. See also the information system established under Art. 106 of the Agreement on the European Economic Area (OJ 1994 No L 1, p. 3): "In order to ensure as uniform an interpretation as possible of this Agreement, in full deference to the independence of courts, a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice of the European Communities and the Court of First Instance of the European Communities and the Courts of last instance of the EFTA States shall be set up by the EEA Joint Committee. […]."

case-law on the interpretation of WTO law. Although the WTO agreements contain wide-ranging transparency, notification and review requirements,[668] there is no publicly accessible register which would collect all WTO-relevant domestic judgments. Because of the large number of WTO members and the wide range of subject matters covered by the WTO agreements, it would in any case be difficult to establish a complete compilation of the interpretation and application of WTO law by domestic courts. Finally, domestic courts may be reluctant to rely on foreign case-law because they want to preserve their autonomy in the interpretation of WTO law which often touches on important domestic interests. In spite of all this, there may be scope for a cautious comparative approach to the interpretation of at least those provisions of WTO law on which WTO dispute settlement practice is lacking and which are of a more technical nature and less politically charged.

A procedural framework to strengthen the horizontal dimension in the interpretation of international treaty law by domestic courts has been proposed by Julian Hermida.[669] His "transjudicial vision" of a "participatory model" would require that, where a decision by a domestic court depends on the interpretation of an international agreement, the court must give adequate notice to all parties to the agreement and accept the intervention of any party that applies to intervene. Furthermore, "guidelines should include the express obligation for the forum court to take into account and decide in accordance with the prevailing and most persuasive arguments of law as arising from the participation of the intervening states, as well as from the adversarial presentation of arguments made by the parties to the controversy."[670] This does, however, not appear to be a realistic option with respect to WTO law. While the intervention of interested

[668] Cf., e.g., Art. X.1 of GATT 1994 which provides that, inter alia, judicial decisions of general application pertaining to the classification or the valuation of products for customs purposes, or rates of duty, taxes or other charges, or requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, procession, mixing or other use shall be published. A Recommendation adopted by the GATT Contracting Parties in 1964 provides that the contracting parties should forward promptly to the secretariat copies of, inter alia, the decisions and rulings of the kind described in paragraph 1 of Article X (cited in WTO, Analytical Index: Guide to GATT Law and Practice, Geneva 1995, at p. 300). The Ministerial Decision on Notification Procedures (1994) establishes a central registry of notifications.
[669] Julian Hermida, A new model of application of international law in national courts: A transjudicial vision, Waikato L. Rev. (2003), online at: http://austlii.edu.au/nz/journals/WkoLRev/2003/3.html.
[670] Id., at 10.

contracting parties may be provided for in substantially integrated treaty systems with a limited number of contracting parties or members, it is not feasible in the context of less integrated multilateral legal systems with a wide membership, such as the WTO. Furthermore, the proposal to oblige domestic courts to decide in accordance the "most persuasive arguments", begs the question how the persuasiveness of the arguments and the compliance with this obligation should be objectively assessed.

2) Effects between different international legal orders

International treaty law is composed of many different treaties and treaty systems which overlap substantially without providing clear conflict rules. Some of these often sectorially or functionally specialized treaty systems have established international tribunals or judicial bodies the jurisdiction of which reflects the limited functions of the system concerned. The resulting fragmentation of international law and adjudication poses challenges for the coherence and legitimacy of the international legal order. These challenges can be addressed at the treaty-making level, but also through interpretive and procedural means.[671] The interpretation of the rules of one treaty in the light of another, where appropriate, may reduce conflicts and contribute to "defragmentation through interpretation." [672] Furthermore, where different international tribunals interpret the same rule of international law in a similar manner, the legitimacy of the rule will be strengthened.[673] Even where different international tribunals disagree on the interpretation of a particular rule, an open engagement with opposing interpretations can advance the progressive development of international law.[674] In this sense, a commitment by international tribunals to "openness in the project of legal

[671] In addition, the fragmentation of international law can also be reduced if the law applicable to a dispute is understood to include not only the particular treaty at issue, but also all other international law binding on the parties. Cf. Joost Paulwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, Mich. J. Int'l L., Vol. 25 (2004), 903, at 910-913.
[672] Cf. Anne van Aaken, Defragmentation of Public International Law Through Interpretation: A Methodological Proposal, Ind. J. Global Legal Stud., Vol. 16(2) (2009), p. 483 (proposing the use of constitutional interpretive methods, in particular the balancing approach, to mitigate the tension between different international treaties).
[673] Cf. Bruno Simma, Universality of International Law from the Perspective of a Practitioner, Eur. J. Int'l L., Vol. 20(2) (2009), 265, at 279.
[674] Ibid.

hermeneutics", including through the engagement with rulings of other international tribunals, while not necessarily leading to harmonization, may dispel the threat of fragmentation. [675] Finally, if parallel proceedings are pending before different international judicial bodies, a number of procedural strategies – including considerations of comity which may lead to the suspension of the proceedings by one of the judicial bodies - may be applied in order to avoid inconsistent results.[676] All these forms of mutual interpretative or procedural influences between different international treaty systems and tribunals can be captioned by the notion of horizontal indirect effect of treaty law at the international level.

Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which gives expression to the objective of "systemic integration", provides that the interpretation of a treaty must take into account "any relevant rules of international law applicable in the relations between the parties".[677] To the extent that international tribunals integrate rules from other specialized treaty systems into their own functionally limited system the overall legitimacy of the international legal order can be reinforced. Such interpretation would address at least partially the issue that the fragmentation of international law is problematic in the light of the requirement of generality which demands that rule-making should be open to competing perspectives and should not

[675] Cf. Rudi Teitel & Robert Howse, Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order, Int'l L. & Pol., Vol. 41 (2009), 959, at 989-990. For a stock-taking and analysis of the practice of international courts to refer to, cite, and engage with, rulings from other international courts, see Michael Nunner, Kooperation internationaler Gerichte: Lösung zwischengerichtlicher Konflikte durch herrschaftsfreien Diskurs (2009).

[676] C. Bruno Simma, Universality of International Law from the Perspective of a Practitioner, Eur. J. Int'l L., Vol. 20(2) (2009), 265, at 284-286. In the Swordfish cases parallel proceedings were pending – and were suspended – both before the WTO (Chile – Measures affecting the Transit and Importation of Swordfish) and ITLOS (Case concerning the conversation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean (Chile v. EU), List of Cases No. 7, Order of 16 Dec. 2009, concerning the discontinuance and removal from the list of cases). The parties have in the meanwhile reached an amicable settlement (cf. the Understanding concerning the conservation of swordfish stocks in the South Eastern Pacific Ocean, OJ 2010, L 155, p. 3).

[677] Cf., in particular, Case concerning Oil Platforms (Iran v. U.S.A.), Merits, [2003] ICJ Rep. 161, para. 41. For a recent review of the application of this provision by international judicial bodies see: Philippe Sands & Jeffery Commission, Treaty, Custom and Time: Interpretation/Application? In: Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (eds. Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris) (2010), p. 39-58, and specifically with respect to the case-law of the ECtHR: Vassilis P. Tzevelekos, The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration, Mich. J. Int'l L., Vol. 31 (2010), 621.

prejudge or preclude any relevant aspect from the point of view of a particular functional perspective.[678] The rationale underlying systemic interpretation under Article 31(3)(c) VCLT has been explained by the International Law Commission Study Group on Fragmentation of International Law as follows: "All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole."[679] In this regard, it has also been observed that "states, when creating new rules of international law, do not aim at violating their obligations under other pre-existing rules, but rather intend to operate within this framework."[680] This assumption recalls the legislative intent rationale for agreement-consistent interpretation, which postulates that states, when adoption domestic legislation, cannot be assumed to aim at violating their obligations under international treaty law.[681] Systemic integration also shares its limits with agreement-consistent interpretation, in that inconsistencies cannot always be "interpreted away."[682]

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[678] See Armin von Bogdandy & Ingo Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, Eur. J. Int'l L., Vol. 23 No 1 (2012), 7, at 23 and 36-38. Cf. also Christoph Möller, Fragmentierung als Demokratieproblem, in: Strukturfragen der Europäischen Union (Claudio Franzius, Franz C. Mayer & Jürgen Neyer (eds.)) (2010), 150, at 154 et seq. (on democratic generality, but exposing also the limits of the negative correlation between fragmentation and democracy).

[679] Cf. UN General Assembly**,** A/CN.4/L.682 (13 April 2006), International Law Commission, 58th session, Geneva, 1 May-9 June and 3 July-11 August 2006, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, at para. 414 (internal italics omitted).

[680] Cf. Bruno Simma, Universality of International Law from the Perspective of a Practitioner, Eur. J. Int'l L., Vol. 20(2) (2009), 265, at 276.

[681] Cf. also Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation, Va. J. Int'l L., Vol. 44:2 (2004), 431 at 456 ("Just as the Charming Betsy canon instructs courts to presume that Congress intends to avoid conflicts with international law, the Vienna Convention encourages courts to read treaties against the backdrop of international law unless parties explicitly signal otherwise.")

[682] Cf. Joost Paulwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, Mich. J. Int'l L., Vol. 25 (2004), 903, at 907.

The need for a unitary view of international law is particularly acute in the context of the WTO, as Joost Pauwelyn has pointed out.[683] The establishment of other regional or bilateral trade regimes is increasing, many disputes litigated under other - not trade-focused - treaties have also a trade angle, and WTO disputes often touch on non-trade issues and can have important political and social ramifications. By avoiding to isolate the trade-centered rules of the WTO and interpreting them instead in the light of other international law rules, the WTO dispute settlement organs can contribute to integrating non-trade rules and values into the WTO context. However, the interpretation of WTO law by WTO panels and the Appellate Body is confined not only by the jurisdictional limits imposed by the WTO Dispute Settlement Understanding, but also by the substantive – trade centered - rules of the WTO agreements. Beyond the integration of provisions of treaties and standards which are expressly incorporated in, or referred to, in the WTO agreements,[684] there is only a limited scope for WTO panels and the Appellate Body to integrate non-trade concerns through the interpretation of the WTO agreements. The main venue for such interpretation appears to be in the concretization of the exception clauses of the GATT 1994 and the GATS.[685]

Although WTO panels and the Appellate Body have frequently referred to general international law and rules of treaty interpretation, they have been less forthcoming

[683] Id., at 905.
[684] See, in particular, the references to intellectual property rights conventions in the TRIPS Agreement (for a discussion of the interpretive relationship between the TRIPS Agreement and the incorporated conventions, cf. Susy Frankel, WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property, Va. J. Int'l L, Vol. 46 (2006). 365, 402-410). WTO panels occasionally seek and obtain “factual information” from the WIPO on the negotiating history, subsequent development, and intended scope of provisions of intellectual property rights conventions (cf., e.g., US – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R (2001), paras. 1.8 and 8.11-8.13). See also the references to international standards in the TBT and SPS Agreements. Annex A of the SPS Agreement refers to the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention. In EC - Trade Description of Sardines (WT/DS231/AB/R (2002), paras. 219-227), the Appellate Body ruled that Codex Alimentarius standards were to be taken into account under the SPS Agreement even if they had not necessarily been adopted by consensus. This can lead to a situation where such standards must be taken into account and develop legal significance under WTO law also for States which were opposed to the standards (cf. Joel P. Trachtman, The World Trading System, the International Legal System and Multiple Choice, Eur. L. J., Vol. 12(4) (2006), 469, at 481 (raising the question of democratic legitimacy of the use of such standards)).
[685] Cf., in particular, Article XX GATT 1994 and Article XIV GATS.

with respect to substantive provisions of other treaties.[686] An example for the interpretation of WTO law in the light of other substantive treaty rules is *US – Shrimp*. In this case the Appellate Body interpreted the terms "exhaustible natural resources" in the light of provisions of the 1982 UN Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").[687] However, in *EC – Biotech Products*,[688] the panel adopted a restrictive approach to the use of Article 31(3)(c) VCLT. In this dispute, the EU had argued that the Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the Biosafety Protocol) should be taken into account in the interpretation of the pertinent provisions of the WTO agreements as "any relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) VCLT.[689] The panel disagreed. It construed the requirement that the other relevant rules of international law must be "applicable in the relations between the parties" as meaning that these rules must be applicable in the relation between all WTO members,[690] which was not the case with respect to the Convention on Biological Diversity and the Biosafety Protocol. In *EC and certain Member States - Large Civil Aircraft*, the Appellate Body appeared to consider a more nuanced approach according to which account should be taken of a member's international obligations, while it must also be ensured that the interpretation of WTO law among all members be consistent and harmonious.[691] In this case, however, the question of the scope of Article 31(3)(c) VCLT was not decisive because the Appellate Body found that the Agreement invoked by the EU was not "relevant" within the meaning of this Article. Whatever understanding of Article 31(3)(c) VCLT prevails, the scope of systemic integration of treaty-law within the context of the

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[686] Cf. Anja Lindroos & Michael Mehling, Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO, Eur. J. Int'l L., Vol. 16(5) (2006), 857, at 876-877. For an exhaustive analysis of the relevant WTO dispute settlement practice, cf. Panagiotis Delimatsis, The Fragmentation of International Trade Law, J. World Trade, Vol. 45(1) (2011), 87, at 98-111.
[687] US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 128-132.
[688] EC – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R.
[689] Id., at para. 7.52.
[690] Id., at para. 7.68.
[691] EC and Certain Member States - Measures Affecting Trade in Certain Large Civil Aircraft, WT/DS/316/AB/R, at paras. 845 and 846.

WTO has in practice been limited. In some disputes, where the WTO dispute settlement organs construed provisions of the WTO agreements by reference to other international treaties, the other treaty rules were used as context,[692] as a supplementary means of interpretation, or as providing evidence of the intent of the parties or of the ordinary meaning of the provisions of the WTO agreements.[693] For instance, in *US – Foreign Sales Corporations* the WTO Appellate Body determined the meaning of the term "foreign-source income" in footnote 59 to the SCM Agreement by taking account of a considerable number of international treaties and instruments, from which it deduced the emergence of widely recognized principles of taxation.[694]

Whereas the above examples illustrate the horizontal indirect effect of other treaties on WTO law, the horizontal effect may also work in the opposite direction, i.e. from WTO law to other international treaty law. The resort to WTO law in the interpretation of NAFTA law by arbitral panels acting under Chapter 20 of the NAFTA can serve as an example.[695] In *Cross-Border Trucking Services*, the arbitral panel interpreted the national treatment requirement for cross-border services under the NAFTA provisions by referring, inter alia, to similar national treatment obligations under the GATT as

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[692] In EC – Customs Classification of Frozen Boneless Chicken Cuts, WTO/DS269/AB/R, WTO/DS/286/AB/R, para. 194 and note 384, the Appellate Body considered that there was broad consensus among the GATT contracting parties to use the Harmonized System, which is administered by the World Customs Organization, as the basis for their WTO Schedules, that this agreement constituted 'context' under Article 31(2)(a) VCLT for the interpretation of the WTO agreements, and that it was therefore not necessary to determine whether the Harmonized System constitutes a relevant rule of international law under 31(3)(c) VCLT. More generally on the organizational and legal interaction between the WTO and the WCO, Marina Foltea, The WTO-WCO: A Model of Judicial Institutional Cooperation?, World Trade L., Vol. 46(4) (2012), 815.

[693] Cf., UN General Assembly**,** A/CN.4/L.682 (13 April 2006), International Law Commission, 58th session, Geneva, 1 May-9 June and 3 July-11 August 2006, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, at para. 445. Cf. also Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (2009), 375 et seq. (demonstrating that the WTO Appellate Body has often avoided a reference to Article 31(3)(c) VCLT, and has motivated the use of rules of other international treaties by reference to other principles of interpretation).

[694] Cf. US - Tax Treatment for "Foreign Sales Corporations" (Article 21.5 - EC) (2002), WT/DS108/AB/RW, paras. 141-145.

[695] The NAFTA contains a general mechanism for the settlement of disputes between the parties in Chapter 20 (Articles 2003 et seq.) as well as specific dispute settlement mechanisms concerning, in particular, trade-defense measures (Chapter 19) and investment measures (Chapter 11). Chapter 19 dispute settlement is discussed in Part VI.C.1.(c), above, together with domestic judicial review, because it replaces domestic judicial review in the NAFTA parties.

construed by a GATT panel.[696] Furthermore, the arbitral panel observed that the general exception in Article 2101(2) of the NAFTA was similar to the language of Article XX of the GATT, and relied in this context on GATT and WTO dispute settlement practice.[697] N'Gunu N. Tiny has described and analysed how NAFTA arbitral panels have accommodated WTO law and WTO dispute settlement practice, in carrying out a consistent interpretation of NAFTA provisions in the light of objectives shared by WTO and NAFTA law.[698] He points out that "the Panel acted both as a master of its own functional and normative system and as subsidiary guardian, a treaty partner, of the WTO legal system, balancing two conflicting trends: one defining compliance with WTO law; the other protecting the NAFTA legal order and institutional status quo."[699] And he further observes the effort by the NAFTA panels to "bring normative coherence and integrity to the NAFTA-WTO interplay, in other words, to establish logical and consistent connections between the systems.[700] The consequences of the horizontal indirect effect of WTO law on other agreements are particularly important if these other agreement have direct effect domestically or establish a private course of action. This will be illustrated in the next section.

C. Diagonal indirect effects – Combining vertical and horizontal influences between legal orders

Where vertical and horizontal effects between legal orders are combined, one could speak about diagonal effects.[701] Some of the situations described above as vertical or horizontal would in a larger sense fit into this category. For instance, the interpretation

[696] NAFTA Arbitral Panel Established Pursuant to Chapter Twenty – In the Matter of Cross-Border Trucking Services, Final Panel Report (2001), Sec. File No. USA-MEX-98-2008-01, para. 251.
[697] Ibid., paras. 260-270.
[698] N'Gunu N. Tiny, Judicial Accommodation: NAFTA, the EU and the WTO, Jean Monnet Working Paper 04/05 (2005).
[699] Ibid., at 17.
[700] Ibid., at 26.
[701] An example is the Judgment of the ECJ In Case C-135/10, SCF v Del Corso, judgment of 15.3.2012 (n.y.r.), paras. 50 and 56, where the Court states that, although the EU is not bound by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the "Rome Convention"), this Convention can produce "indirect effects" within the EU, through the WIPO Performances and Phonograms Treaty (the "WPPT"), by which the EU is bound, with the result that secondary EU law is to be interpreted not only in the light of the WPPT, but also in the light of the Rome Convention.

of WTO law by domestic courts, which take account of the interpretations of WTO law by domestic courts of other contracting parties,[702] does not have only a horizontal dimension (between the domestic courts), but also a vertical one (between the domestic legal orders and the WTO legal order). Furthermore, to the extent that the WTO dispute settlement organs take account of substantive rules of another treaty in the interpretation of WTO law (horizontal dimension),[703] these other rules may influence domestic legal orders through the indirect effect of WTO law (vertical dimension).

Similarly, where the provisions of the WTO agreements influence the interpretation of other international treaties, these provisions may influence domestic legal orders through the effect of these other treaties.[704] In particular, it can be assumed that the EU Court of Justice would interpret WTO rules and concepts incorporated into bilateral agreements between the EU and its trading partners in the light of the corresponding provisions of the WTO Agreement.[705] The direct effect which the EU Court of Justice attributes to many of these bilateral agreements could thus extend to those provisions which incorporate or refer to WTO rules and concepts.[706] Furthermore, WTO rules and concepts can develop effects in the US and elsewhere through binding and enforceable arbitral awards in Investor-State Arbitration under Chapter 11 NAFTA or under Bilateral Investment Treaties, to the extent that arbitral tribunals interpret and apply these treaties in the light of WTO law.[707] Ari Afilalo has demonstrated that if investment

[702] See Part IX.B.1, above.
[703] See Part IX.B.2, above.
[704] For a more general contribution, cf. Jean D'Aspremont, The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order, in: The Practice of International and National Courts and the (De)-Fragmentation of International Law (eds. A. Nollkaemper & O.K. Fauchald) (2012), p. 141, 153 (arguing that domestic courts, when interpreting domestic rules in conformity with an international obligation, should interpret the pertinent international law rule in conformity with other relevant international law rules).
[705] In what Antonis Antoniadis calls the "proactive" approach of the European Union to WTO law, the Union has concluded a large number of Association Agreements, Partnership and Association Agreements, Trade and Development Agreements, Stabilization and Association Agreements, Free Trade Agreements, as well as sectorial agreements which incorporate or contain detailed references to WTO law. Cf. Antonis Antoniadis, The European Union and WTO law: a nexus of reactive, coactive, and proactive approaches, Word Trade Rev., Vol. 6(1) (2007), 45, at 78-82.
[706] Ibid., at 80. On the possible consequences, cf. also Claudio Dordi, The direct effect of the agreements concluded by the EU: some inconsistencies in ECJ case law?, in: Claudio Dordi (ed.), The absence of direct effect of WTO in the EC and in other countries (2010), 1, at 9 and 10.
[707] Cf. Jürgen Kurtz, The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents, Eur. J. Int'l L., Vol. 20(3) (2009), 749 (describing and criticizing the inconsistencies in the

treaties import WTO rules into the investment realm and make them available to private parties, "thereby giving WTO law 'back-door direct effect' or ' indirect direct effect', the investment system's legitimacy may be challenged."[708]

Another example for (muted) diagonal indirect effect is the implicit influence of provisions of the WTO SPS Agreement – via a judgment of the EFTA Court – on the EU Court of Justice. As Marco Bronckers observed,[709] the EFTA Court, which struck down certain Norwegian import prohibitions as lacking any rigorous analysis of public health risk and thus violating the provisions of the EEA Agreement,[710] can be assumed to have been inspired by the rules of the WTO SPS Agreement, although it did not expressly refer to them. This judgment of the EFTA Court was, in turn, cited by the EU Court of Justice when it ruled in favor of a more liberal EU regime on food additives.[711] The EU Court of Justice thus interpreted domestic EU rules by taking account of a ruling of a court of one legal order (the EEA legal order), which was inspired by another international legal order (the WTO legal order).

X. CONCLUSIONS

The present paper has examined the indirect effect of international agreements on domestic legal orders. This was illustrated, in particular, by reference to the indirect effect of WTO law on the domestic legal orders of the EU and the US.

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methods used by investment arbitration tribunals in the interpretation of national treatment requirements by reference to WTO law and jurisprudence); Gaetan Verhoosel, The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law, J. Int'l Econ. L., Vol. 6(2) (2003), 493 (arguing that investors may seek relief from, and damages for, WTO-inconsistent measures to the extent that WTO law is applicable or serves as interpretive context in Investor-State Arbitration); Ari Afilalo, N.Y.U. J. Int'l L. & Pol., Vol. 34 (2001), 1 (demonstrating that the rules on investment arbitration pursuant to Chapter 11 NAFTA threaten to establish a system of state liability for violations of general trade in goods rules under NAFTA and WTO law, which would lead to an inappropriate constitutionalization of NAFTA).

[708] Ari Afilalo, Old Paradigms, New World Order: Rethinking Investment Treaties (Draft 6 Apr. 2011, on file with the author), 33.

[709] Cf. Marco Bronckers, Private Appeals to WTO Law: An Update, J. World Trade, Vol. 42(2) (2008), 245, at 258-259; Marco Bronckers, From Direct Effect to 'Muted Dialogue' - Recent Developments in the European Courts' Case Law on the WTO and Beyond, J. Int'l Econ. L., Vol. 11(4) (2008), 885, at 890-891. For a more general analysis of the mutual influences between the EU courts and the EFTA Court, cf. Carl Baudenbacher, The EFTA Court, the ECJ, and the Latter's Advocates General – a Tale of Judicial Dialogue, in: Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs (eds. Anthony Arnull, Piet Eeckhout & Takis Tridimas) (2008), 90.

[710] See EFTA Court, Case E-3/00, EFTA Surveillance Authority v. Norway, [2000-01] EFTA Ct Rep. 73.

[711] See Case C-192/01, Commission v. Denmark, [2003] ECR I-9693, at paras. 53 and 25.

Part II defined indirect effect - in a negative way - as referring to any effect of an international agreement in domestic court proceedings other than direct effect, this latter concept being used to describe a situation where the domestic courts have the power to review the validity, legality or applicability of domestic acts in the light of an international agreement. By way of a positive definition, an international agreement was considered to have indirect effect if domestic courts take it into account in order to ascertain the meaning of a domestic act (substantive indirect effect) or are guided by it in taking procedural decisions (procedural indirect effect). In a larger sense, indirect effect would also cover cases where domestic courts, in the application of domestic law, refer to international agreements as a factual element or as part of the general normative framework (factual indirect effect).

Part III discussed possible normative justifications for the attribution of indirect effect. It concluded that, to the extent that the attribution of indirect effect to international treaty law (and more specifically, WTO law) respects the domestic constitutional context and values and the separation of powers or institutional balance at the domestic level, it can be considered to constitute a legitimate tool for reducing normative conflicts by strengthening the coherence and consistency between international and domestic legal orders, and for enhancing the effectiveness and uniform application of, and promoting the values enshrined in, international agreements.

The subsequent two parts looked at indirect effect from the perspectives of international law and of domestic constitutional law, respectively. Part IV found that neither customary international law in general, nor the "good faith" principle in particular, establish an international law obligation for domestic courts to interpret domestic acts in the light of international treaty law. Such obligation can be established only if an international agreement expressly or implicitly provides specific instructions relating to such domestic effects of its provisions, which is not the case for the WTO agreements. The international legal order thus generally leaves the choice of the means and methods of complying with international rules to the respective domestic legal orders.

Within each domestic legal order, the justification for, the scope of, and the methods used for the attribution of indirect effect to international agreements are to a certain

extent determined or influenced by the respective domestic constitutional framework. Part V described the relevant constitutional provisions and practices relating to the negotiation and conclusion of international agreements as well as to the integration, the rank and the effect of treaty law in the EU and the US legal orders. In the EU, international agreements are considered to constitute an integral part of the Union legal order and to rank between EU primary law and EU secondary law. There also seems to be an assumption that an agreement has direct effect, unless it expressly or implicitly excludes such effect. In the US, the effect of agreements in the domestic legal order depends, in particular, on the question whether they are self-executing or not. The answer to this question appears to be based not only on the terms and nature of the agreement itself, but at least also on the expression of congressional intent. To the extent that agreements are self-executing, they have the same rank as federal statutes and in case of inconsistencies the later in time will prevail. Both the EU courts and the US courts conclude that the WTO Agreement has no direct effect, except in limited and narrowly defined categories of cases. The EU courts come to this conclusion primarily on the basis of the structure and nature of the WTO agreements, while the US courts rely on the congressional intent expressed in the Uruguay Round Agreements Act.

The following parts then dealt with substantive indirect effect, procedural indirect effect and factual indirect effect of international agreements. Part VI demonstrated that domestic courts have a variety of different methods at their disposal in order to attribute substantive indirect effect to international agreements. These methods reach from a stringent obligation of agreement-consistent interpretation of domestic acts to the non-obligatory possibility for domestic courts to take account of international treaty law as persuasive authority or as a source of inspiration. The rationale for attributing substantive indirect effect to international treaty law as well as its scope and limits differ from one country to another. In this context, relevant considerations relate to the proper balance between the domestic branches of government, the assumed intent of the domestic legislator not to infringe international law, the question whether the domestic legislator has incorporated terms and concepts of international agreements into domestic acts, and - where international agreements are integrated into the domestic legal order - the necessity to achieve coherence within that legal order. In the EU,

secondary Union law must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Union (including the WTO agreements). In the US, the *Charming Betsy* canon of statutory interpretation provides that statutory law is to be construed, where fairly possible, so as not to conflict with international agreements of the US. Whereas the EU courts consider themselves bound by the obligation of agreement-consistent interpretation, the US courts use the *Charming Betsy* canon as a guide which can compete with other canons or principles, requiring notably deference to determinations made by administrative agencies. This explains why the EU courts are in general more forthcoming in relying on WTO law in their interpretation of domestic acts than the US courts, which have recently upheld the interpretation of statutes by administrative agencies although the interpretations appeared to be inconsistent with WTO law. This part then categorized the particular features of the international rules (which are taken into account in the interpretation of domestic rules), and of the domestic rules (which are interpreted in the light of the international rules) in order to analyze how these features - the source, objective, nature and content of the rules - determine or influence the way in which substantive indirect effect unfolds in different situations. In this context, the interpretive methods applied by domestic courts in the interpretation of the relevant international and domestic rules were also analyzed in order to demonstrate the inherent limits of the substantive indirect effect of international agreements on domestic acts. In particular, it was argued that in cases where the interpretation of domestic law in the light of international treaty law cannot be justified within the constitutional and interpretive principles of the domestic legal order, domestic courts should openly expose the reasons for this. In this sense, the possibility of contestation is the necessary counterweight to the principle of accommodation of international treaty law by domestic courts.

The influence of international law or international legal proceedings on the application by domestic courts of domestic procedural laws (procedural indirect effect) was addressed in Part VII. In particular, domestic courts may stay domestic proceedings pending the outcome of parallel and overlapping proceedings before an international judicial body (such as a WTO panel or the WTO Appellate Body). Although the rules governing the procedures before EU courts and US courts do not exclude the possibility

for the courts to stay a domestic proceeding in these circumstances, it was argued that the desirability of such a course of action depended on the particular circumstances of the cases involved and that the decision as to whether to stay the domestic proceeding or not should be left to the discretion of the domestic court. Other forms of procedural indirect effect concern cases where a domestic court remands the case to the domestic administrative authorities for consideration of international law and cases where the domestic court resorts to measures of procedural organization in order to allow the parties to comment on, and the court to properly take into consideration, the outcome of international proceedings.

Part VIII dealt with the factual indirect effect of international agreements in situations where domestic courts use international treaty law (including WTO law) as an element of the factual or normative context for the application of domestic law.

Whereas the indirect effect of international treaty law on domestic legal orders concerns the influences of the international legal order on a domestic legal order, Part IX enlarged the picture by addressing other indirect effects between and among legal orders, including the influence of domestic legal orders on the international legal order, influences between different domestic legal orders, and influences between different international legal systems. The techniques applied by the courts in this context often show functional and structural similarities with techniques used by domestic courts to attribute indirect effect to international law.

The paper attempted to demonstrate that indirect effect is a complex concept which embraces a multitude of different situations. The multi-faceted nature of this concept does not lend itself to any single, overarching conclusion. Whether and to what extent the attribution of indirect effect to international agreements is legally possible and normatively desirable depends to a large degree on the various parameters of the relevant international and domestic rules at issue in a specific case.

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