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JUDICIAL INTERACTIONS AROUND WTO DISPUTE SETTLEMENT: SOVEREIGNTY AND DEFERENCE

Xiuyan Fei
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Abstract

This thesis explores the issues of sovereignty and deference involved in the judicial actions around WTO dispute settlement, focusing on two research questions that whether the WTO tribunals have infringed the WTO Members’ sovereignty and whether the Members’ courts have appropriately responded to WTO rulings. The WTO tribunals’ approach to national law interpretation and national courts’ approaches to WTO rulings are selected to instance the research questions. Accordingly, the thesis is divided into two parts. The first part is about the WTO tribunals’ characterization of national law interpretation and the methods of interpretation. National law is usually considered as within the domain of a state, so is national law interpretation. If national law interpretation is characterized as a question of law, it means that the WTO tribunals would undertake a de novo review of national law. If characterized as a question of fact, it implies that the WTO tribunals should attribute deference to the legislating states’ interpretation of their own law. Likewise, the methods employed by the WTO tribunals to interpret national law should correspond to the characterization of national law interpretation. By examining the characterization and the methods, the WTO tribunals approach to national law interpretation will be disclosed. The second part is about direct effect and indirect effect of WTO rulings in national courts. The EU and the US are selected as examples to provide the basis of discussion. Both the EU and the US courts deny direct effect of WTO rulings, and the denial brings about negative effects. Meanwhile, there are also justifications for the denial. How to understand the denial of direct effect deserves consideration. As to indirect effect of WTO rulings, the EU courts recognize indirect effect under certain circumstances. While the US courts seem resistant to indirect effect. Why the EU and the US courts provide different degrees of respect and deference to WTO rulings also deserves examination. By research in the first and second parts, a full picture about the scenario of judicial interactions around the WTO dispute settlement will be revealed.
Statement of Original Authorship

I hereby certify that the submitted work is my own work, was completed while registered as a candidate for the degree stated on the Title Page, and I have not obtained a degree elsewhere on the basis of the research presented in this submitted work.
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I am indebted to my supervisor Professor Joseph A McMahon for his constant and generous support for the past four years. Without his support, I cannot have finished the thesis today. Professor McMahon is not only knowledgeable, but also good at enlightening his students, and good at explaining theories in a useful and simple way. I do not only benefit from our formal meetings, but also benefit from our casual talks. I thank him for his guidance, for his academic advice, for his patience, and for his help.

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Abbreviation List

ADA: (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (commonly referred to as the 'Anti-Dumping Agreement')
SCM: (WTO) Agreement on Subsidies and Countervailing Measures
CJEU: Court of Justice of the European Union
DSB: (WTO) Dispute Settlement Body
DSS: WTO dispute settlement system
DSU: (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes
EC: European Communities
EU: European Union
EU Courts: The Court of Justice and the General Court
GATS: (WTO) General Agreement on Trade in Services
GATT 1947: General Agreement on Tariffs and Trade 1947
GATT 1994: (WTO) General Agreement on Tariffs and Trade 1994
GPA: (WTO) Agreement on Government Procurement
GC: General Court (part of the Court of Justice of the European Union)
ICJ: International Court of Justice
ILC: International Law Commission
Marrakesh Agreement: Agreement Establishing the World Trade Organization
PCIJ: Permanent Court of International Justice
SPS: Agreement (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures
TBT: Agreement (WTO) Agreement on Technical Barriers to Trade
TEU: Treaty on the European Union
TFEU: Treaty on the Functioning of the European Union
TRIMS: Agreement (WTO) Agreement on Trade-Related Investment Measures
TRIPS: Agreement (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO: World Trade Organization
Chapter 1. Introduction

The thesis examines the judicial interactions between the WTO tribunals and national courts so as to explore the tension between nation-state sovereignty ideas and the need for multilateral solutions in a cooperative manner.¹ In particular, whether the WTO tribunals respect the Members’ sovereignty and attribute deference to the Members, and whether national courts respect the WTO rulings and provide deference to the WTO tribunals, are two pertinent research questions which form a complete picture about the judicial interactions around the WTO dispute settlement. National law interpretation in the WTO tribunals and WTO rulings in the national courts are selected to instance the research questions. National law is usually considered as within the domain of a Member’s sovereignty, so is its interpretation. National law interpretation in the WTO tribunals involves the deferential issue, the extent to which the WTO tribunals may defer to national courts’ interpretation of their own law. Likewise, the WTO rulings specify the obligations that a losing Member should perform, and the WTO rulings in the national courts test the degree of respect that a Member pays to the WTO tribunals. Therefore, both selective areas are sovereignty-sensitive, and concerned with the tension and cooperation between the WTO tribunals and national courts.

This chapter is an introduction to the thesis and divided into three sections. Section I illustrates why the terms of ‘judicial interaction’ and ‘deference’ are selected, rather than ‘judicial dialogue’ and ‘comity’. This section also delineates the concept of sovereignty, which the WTO tribunals may not want to infringe, while national courts are eager to safeguard. Section II introduces the process of the WTO dispute settlement mechanism (DSM) and elaborates on the features of the DSM. Section III identifies and articulates the research questions, and further explains why national

law interpretation in the WTO tribunals and WTO rulings in the national courts are selected as the interfaces to reveal the judicial interactions around the WTO dispute settlement.

1.1 Rhetoric and Concept

The thesis is related with the rhetoric of two pairs of words: ‘judicial interaction’ and ‘judicial dialogue’, ‘comity’ and ‘deference’. Which word is an accurate expression to describe the relationship and engagement between the WTO tribunals and national courts deserves examination and consideration. In addition, the concept of sovereignty is also crucial for the thesis, since it is embedded in sovereignty that the Members participate in WTO-related matters and it is the concern about losing sovereignty that the Members may criticize the WTO judicial activism. Therefore, the following section will at first distinguish the two pairs of words and explain why the author selects to use ‘judicial interaction’ and ‘deference’, and then delineate the concept of sovereignty.

1.1.1 Judicial Interaction and Judicial Dialogue

‘Judicial interaction’ is a general term, which refers to the episodes of contacts (either intentional or casual) and all sorts of intersections between courts, regardless of whether the courts are national, international or supranational. While ‘judicial dialogue’ is a specific term, which refers to an exchange of ideas between courts so as to reach common understandings. As a metaphor, ‘judicial dialogue’ implies that all

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3 Ibid, the European University Institute, p. 39.
interlocutors are treated as equals and entitled to speak.\textsuperscript{4} A genuine ‘judicial dialogue’ bears the characteristics of voluntariness of engagement, bi-directionality, and lack of superiority.\textsuperscript{5} The scope of ‘judicial dialogue’ is much smaller than that of ‘judicial interaction’.

In the context of the WTO, it is questionable whether there are genuine judicial dialogues between the WTO tribunals and national courts. The WTO tribunals are not the appellate courts for the Members; however, they have the capacity to review the decisions of national courts in the circumstances where national courts’ reasoning or judgment is concerned with a Member’s compliance with WTO law.\textsuperscript{6} In such circumstances, the WTO tribunals treat national courts not as equals, and their engagement with national courts is not out of voluntariness, but for the dispute settlement only. Another striking fact is that the WTO tribunals have never referred to national courts’ decisions in relation to the interpretation of WTO law. It seems the engagement between the WTO tribunals and national courts are not bi-directional or reciprocal. Therefore, it may not be appropriate to classify the WTO tribunals’ consideration of national courts’ decisions as judicial dialogues. From the standpoint of national courts, different types of engagement with the WTO tribunals are involved and the distinction should be made among them. For example, a national court may have to deal with some WTO rulings on which the complainants base their pleas. Under this circumstance, national court’s engagement with the WTO tribunals is neither out of voluntariness, nor is it reciprocal. Such engagement is difficult to be classified as a judicial dialogue. In contrast, a national court may voluntarily refer to


\textsuperscript{6}For example, in \textit{US – Section 110(5) Copyright Act}, the Panel took into account the US federal courts’ interpretation of the exemptions set out in Section 110(5) of the US Copyright Act in order to examine the US consistency with its obligations under the TRIPS Agreement. See Panel Report, \textit{US – Section 110(5) Copyright Act}, WTO/DS160/R.
WTO jurisprudence to improve the legitimacy of its decisions, especially in the circumstances where the interpretation of WTO law is involved. Such reference is likely to be classified as a kind of judicial dialogues. However, considering the fact that the WTO tribunals have never referred to national courts’ jurisprudence for the sake of promoting the legitimacy of their decisions, national courts’ voluntary reference to WTO rulings is mono-directional and thus cannot be classified as judicial dialogues.

Therefore, rare interactions between the WTO tribunals and national courts are qualified as judicial dialogues. Nevertheless, with the development of legal practice and legal theory, a number of judicial interactions in future may be qualified as judicial dialogues, and ‘judicial dialogue’ per se may be redefined. But for the current situation, ‘judicial interaction’ is an accurate expression to describe the ongoing engagement between the WTO tribunals and national courts.

1.1.2 Comity and Deference

‘Comity’ originated from the development of choice-of-law and was designed to solve conflict of laws. 7 The meaning of comity is elusive and its application is uncertain. 8 It is mainly concerned with ‘the respect that sovereign nations ... owe each other’, 9 and denotes a set of ideas about sovereign-sovereign relations that courts should take into account when deciding transnational disputes. 10 Different scholars may hold different conceptions of ‘comity’. For example, Paul defines comity by its function that ‘to supplement and supersede other rules of private international law, and to limit the power of domestic courts to hear cases, apply law, and enforce judgements based on an evaluation of the relative importance of competing foreign and domestic

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9 Ibid.
public interests. Ramsey claims that the concept of comity should be abandoned due to its obscurity and insists on replacing ‘comity’ with four doctrines of international litigation, which are ‘recognition of judgements’, ‘proof of foreign law’, ‘extraterritorial application of U.S. law’, and ‘enforcement of foreign law’. ‘Comity’ is a word of multiple dimensions. It may serve not only as a principle of deference to foreign law and foreign courts, but also as a justification for restricting domestic courts’ jurisdiction. In essence, comity helps moderate the frictions among sovereign states and contributes to the harmony of international legal order.

Deference is related with the weight and respect which courts may attribute to the decisions of other institutions, as well as the allocation of authority between the courts and other institutions. Dyzenhaus has proposed two concepts of deference: ‘deference as submission’ and ‘deference as respect’. ‘Deference as submission’ requires judges to have a positivist view of and submit to the intention of the legislature. ‘Deference as respect’ requires judges to show a respectful attention to the reasons contained in the decisions of the legislature, of another court, or of an administrative agency. Dyzenhaus argues that ‘deference as respect’ is the appropriate principle to deal with the relationship between the courts, the legislature and administrative agencies. Dye seconds and claims that ‘deference as respect’ is the suitable standard that the WTO tribunals should adopt. In essence, deference is rooted in public international law and functions to handle the relationship between courts and other institutions. The extent to which a court may attribute deference

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11 See Paul, supra n. 7, p. 27.
12 See Ramsey, supra n. 8, p. 952.
14 See Paul, supra n. 7, p. 54.
17 Ibid.
18 Ibid.
depends on the overall context such as the expertise of the primary decision-makers and the policy concerned.\textsuperscript{21}

By comparison, it is visible that ‘comity’ and ‘deference’ are intertwined with regard to the respect that a court may attribute to other institutions. ‘Comity’ \textit{per se} may serve as a principle of deference. Nevertheless, ‘comity’ originated from private international law, while ‘deference’ is rooted in public international law. ‘Deference’ has been more often used together with the terms of ‘standard of review’ and ‘margin of appreciation’,\textsuperscript{22} and also used in the context of the WTO.\textsuperscript{23} Thus the author selects ‘deference’ to illustrate the interactions between the WTO tribunals and national courts.

\subsection*{1.1.3 Sovereignty}

Sovereignty is an old and hotly disputed term. Some authors consider that the discussion about sovereignty is antiquated or that the concept of sovereignty should be discarded,\textsuperscript{24} whilst others defend it as the key principle of international law.\textsuperscript{25} Since

\begin{footnotesize}
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\item \textsuperscript{21}Aileen Kavanagh, ‘Defence or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed.) \textit{Expounding the Constitution: Essays in Constitutional Theory} (Cambridge, 2008), 203.
\item \textsuperscript{22}See Lukasz Gruszczynski and Wouter Werner (eds.) \textit{Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation} (Oxford, 2014).
\item \textsuperscript{23}It is noteworthy that Lovric used ‘deference’ to describe the respect that the WTO tribunals may attribute to the WTO members’ legislature. See Danial Lovric, \textit{Deference to the Legislature in WTO Challenges to Legislation} (Wolters Kluwer 2009).
\item \textsuperscript{24}For instance, according to Henkin, “sovereignty” is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology.’ See Louis Henkin, ‘Human Rights and State Sovereignty’ (1995) 25 Georgia Journal of International and Comparative Law 31, 31. For Lowenfeld, ‘The concept of sovereignty was misleading even when it was announced in the 16\textsuperscript{th} century.’ See Andreas F Lowenfeld, ‘Sovereignty, Jurisdiction, and Reasonableness: A Reply to AV Lowe’ (1981) American Journal of International Law 629, 629. For Falk, ‘[s]overeignty is as morally obsolete as it is factually inaccurate.’ See Richard A. Falk, \textit{Law, Morality, and War in the Contemporary World} (Princeton University Press 1963), 29.
\item \textsuperscript{25}For example, Lupel considers ‘states continue to be the principle actors in international affairs’ and sovereignty deserves further analysis and consideration. See Adam Lupel, \textit{Globalization and Popular Sovereignty: Democracy's Transnational Dilemma} (Routledge 2009), 2. Brand posits that international law requires ‘a more complete understanding of a state’s exercise of sovereign power’. See Ronald A Brand, ‘Sovereignty: The State, the Individual, and the International Legal System in the Twenty First
\end{enumerate}
\end{footnotesize}
our world still consists primarily of states, considering that sovereignty and equality of states is the basic constitutional doctrine of the law of nations, we cannot yet abandon sovereignty. Sovereignty is embedded in the people that compose a state, and every state’s sovereignty is supreme before national law and equal before international law. From the angle of practical application, sovereignty is related to a state’s sovereign capacity in dealing with internal and external issues, which is different to the extent of each state’s capability. The following text will briefly review the origin of sovereignty, delineate Westphalian sovereignty, canvass the challenges to Westphalian sovereignty and then focus on analyzing different understandings of sovereignty today, and finally make a conclusion.

1.1.3.1 Original Concepts of Sovereignty

The word sovereignty emanates from the Latin word ‘super’ (meaning ‘over, above’) which evolved in the middle age into ‘superanus’ and later into the French ‘Soverain’. It was introduced by the authors of the late Middle Ages as an instrument to postulate the independence of Emperor and Pope, the bearer of sovereignty was the Pope and the Church, and the Emperor was exercising this sovereignty. Later, the bearer of the sovereignty was declared to be the ‘people’ (populus), although nothing more than the mass of the subjects. From the sixteenth to the nineteenth centuries, the theories about sovereignty had a common characteristic that all alike admitted the contractual basis as the foundation of the sovereign power. Sovereignty, originally used to describe the relationship between mankind and the creator, evolved to describe the relationship between the king and the citizens. Meanwhile, the

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27 Ibid.
29 Ibid, 36.
The supremacy of sovereignty evolved from ‘limited’, due to its subordination to divine and natural law, to absolute, ‘unlimited freedom and supreme authority’. The following text will briefly introduce the theories of Jean Bodin, Thomas Hobbes, John Locke, Jacques Rousseau, who were the representatives during this period.

Jean Bodin held that sovereignty was the absolute and perpetual power vested in a commonwealth; it was not restricted by positive law but by divine and natural law. Meanwhile, sovereignty was indivisible and there could not be two supreme powers. Sovereign power could not be shared between Church and State nor overruled by Pope or Emperor. For Bodin, the sovereign contract was established between the ruler and the subjects, namely, the ruler contract.

Thomas Hobbes believed that sovereignty stemmed from a social contract between all men within a delimited territory; sovereignty and its subjects were created simultaneously, all rights were transferred by the terms of the contract to the sovereign. For Hobbes, all law (including natural, divine or customary law) derived only from the sovereign and the rule of an absolute sovereign was the only legitimate form of government.

John Locke posited that popular sovereignty was a principle of right. He rested the sovereignty on the people’s rights to institute government for the purpose of protecting their interests, and to resist any government that violated that purpose. Meanwhile, Locke considered the political society as established by a fundamental law, the legislature, which was the supreme governmental power. As for Locke, the legislative body, the sovereign among the governmental powers was the absolute,

30 See Perrez, supra n. 26, 17; Brand, supra n. 25, 285.
32 Lupel, supra n. 25, 12.
namely governmental sovereign; the civil or political society which instituted the legislature was called political sovereign.\textsuperscript{35}

Jacques Rousseau articulated a more directly participatory model of popular sovereignty - more radically democratic than Locke but simultaneously closer to Hobbes and Bodin in its absolutism. According to Rousseau, sovereignty was nothing but the expression of the general will. The people were sovereign in that they were the authors of the law. As a member of the people, each individual was both subject and sovereign. In so far as the people were sovereign, legitimate legislation must involve their direct participation in the legislative process. Sovereignty could not be delegated; thus true laws could be made only by the people themselves.\textsuperscript{36}

In conclusion, the concept of sovereignty had different meanings and implications for different scholars. Bodin considered sovereignty as a ruler contract, while Hobbes claimed that sovereignty was a social contract. As for Locke and Rousseau, they promoted the concept of popular sovereignty. Nevertheless, Locke’s understanding of absolute sovereignty was a principle of right that limited the Hobbesian understanding of absolute sovereignty. Rousseau in effect transferred the place of absolute sovereignty from the person of the monarch or governing body to the general will of the people as a whole. Sovereignty is an evolving concept and the following text will introduce Westphalian sovereignty.

1.1.3.2 Westphalian Sovereignty

Westphalian sovereignty, originating from the Peace of Westphalia that was concluded in 1648, was considered as having laid down the basis for an international system with a view of promoting the independence of sovereign states.\textsuperscript{37} It described the arrangement of the international political arena on the division of the world into

\textsuperscript{35} Lupel, supra n. 25, 31; Ibid, p. 124.
\textsuperscript{36} Lupel, supra n. 25, 14.
\textsuperscript{37} See Perrez, supra n. 26, 39.
territorially exclusive units and included the right to exclude external actors, whether other states or international organizations, from interfering in domestic political structures. The Peace of Westphalia precipitated the creation of nation-states as the ‘standard item of social organization’ and became ‘the voice of civilization’. Emphasizing the inviolability of borders rather than the freedom of individuals, in the tradition of classical international law the idea of national-sovereignty came to dominate the legal theories of international states’ organization for close to three hundred years. Westphalian sovereignty now stands for the notion of the absolute right of the sovereign to exclude external actors from domestic authority.

1.1.3.3 Post-Westphalian Sovereignty

A. Challenges to Westphalian Sovereignty

In the twentieth century, global interdependence in security, trade, finance, crime, health and environmental issues has limited the feasibility of state sovereignty; thus, traditional Westphalian sovereignty has been challenged mainly from two perspectives: human rights protection and economic integration.

From the perspective of human rights protection, in the twentieth century, two World Wars occurred. After World War I, people became to realize that the unconstrained liberty of states was self-destructive and the understanding of sovereignty as absolute was a threat to the international community. After World War II, the United Nations (UN) was founded in order to prevent and intervene in conflicts between nations and proclaimed to make future wars impossible or limited. With the adoption of the UN

41 Perrez, supra n. 26, 46.
42 Article 1 of the Charter of the United Nations: The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the
Charter (Charter), a new order with important changes in international law was introduced. The Charter has affirmed the shift of paradigm from sovereignty as unlimited authority to sovereignty within and subject to international law. Meanwhile, it confirms that sovereignty inherently includes the respect of the other's sovereignty. The Charter gives the Security Council the power to issue binding decisions and to see to their enforcement, and it also exempts all matters which the Security Council determines to be a threat to or a breach of peace or an act of aggression, from the principle of non-intervention.

In addition to the Charter, additional important documents include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These instruments are generally referred to as the ‘International Bill of Rights’, and they are supplemented by a network of multilateral human rights treaties, resolutions and declarations with more limited or focused subjects.

Since the atrocities of the Holocaust, the Nuremberg trials, and more contemporaneously, following the atrocities that took place in Kosovo, Rwanda and other regions, international human rights protection has surfaced as a challenge to the autonomy implicit in state sovereignty. Meanwhile, humanitarian intervention has become familiar to the international community. It poses the question of whether prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...

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44 See Arts. 24 and 25 of the Charter and Chapter VII.
45 See Arts. 2(7) and 39 of the UN Charter.
it is right to violate a country’s sovereignty in the name of halting ethnic persecution and protecting human rights.

In 2001, the UN sponsored the International Commission on Intervention and State Sovereignty (ICISS), which produced a report named *The Responsibility to Protect*, concluding that ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.’\(^4^9\) The ICISS clearly stated that such responsibility existed in ‘obligations inherent in the conception of sovereignty’; ‘the responsibility of the Security Council, under Article 2(4) of the Charter, for the maintenance of international peace and security.’\(^5^0\) It is obvious, if a country is in chaos as serious as that mentioned in the report, sovereignty is not enough to prevent the other countries or organizations from entering its territory to help restore the peace and order. The justification of appropriate humanitarian intervention is further confirmed by the resolution adopted by the General Assembly.\(^5^1\) Therefore, it is more and more likely that, in order to protect human rights, appropriate humanitarian intervention is legal under international law. That is severely challenging and transforming the concept of sovereignty.

From the perspective of economic integration, nowadays international trade and commerce, multinational business, electronic telecommunications (telephones, satellites, the internet), transoceanic shipping and transcontinental transport, transnational organization, global travel and tourism, space exploration, increasing awareness of the world as a whole – all that and much else is said to be creating a global marketplace and cosmopolitan society that is bypassing and perhaps even


\(^{5^0}\) Ibid.

displacing the sovereign state and the state system. The global market entails the ceding of sovereignty understood as the actual capacity of public authorities to control or determine behavior and outcomes on their territory to global markets or market actors.

Responding to the global economy, some international trade/economic organizations have been created. The expansion of their functions has undeniably restricted an individual country’s sovereignty to certain extent. The most typical example is the increasingly extensive involvement of the world’s three leading economic institutions the World Bank (WB), the International Monetary Fund (IMF) and the WTO in domestic economic affairs of their members. It is not denied that the states have transferred or allocated part of their sovereignty to international institutions or governance mechanisms. With the creation of those organizations, newly established international tribunals, such as WTO tribunals, have the authority to decide whether a state has complied with the related trade treaties, thus the member states’ economic autonomy has been severely challenged.

Global market players, such as multinational corporations, are able to frustrate those efforts of governments to direct the economy and society that are at odds with the free operation of global markets. They may have the power to bargain with the government to promulgate favorable regulations by using the threat of transferring their investment to another state. That is especially true for the underdeveloped countries that highly depend on the foreign investment. Private companies may also take on public functions such as setting standards or providing health care, which may

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55 See Howse, 63. It is noted that global market players may also obstruct the governments’ efforts to liberalize and open up certain markets for the sake of their own interests.
blur the clear line between the public and private sectors.\textsuperscript{56} Regarding the International Centre for the Settlement of Investment Disputes, private investors can challenge the legality of the conduct of the invested states, which is also challenging the states’ sovereignty.

\textbf{B. Understandings of Post-Westphalian Sovereignty}

Since various challenges to the traditional Westphalian sovereignty have arisen, scholars responding to such challenges have expressed different views on the concept of sovereignty. To avoid being lost in a variety of concepts of sovereignty, preliminary observations are made that sovereignty has multiple dimensions, which should be understood from different perspectives. For instance, from the perspective of natural law, sovereignty is stressed in its moral sense and inherent character, which is more related with the question what sovereignty should be. From the angle of practical application, sovereignty signifies its practical existence and operation, which is more related with a state’s sovereign capacity. Scholars may focus on a specific angle or a mixture of several angles to acquire their conceptions of sovereignty. The following text will elaborate and analyze some representative concepts of sovereignty, and finally make a conclusion.

From the angle of sovereign foundation, Robert Jackson restates the notion of popular sovereignty that the authority of the final word resides in the political will or consent of the people of an independent state.\textsuperscript{57} Adam Lupel states that ‘popular sovereignty remains an integral principle of modern political thought and democratic practice. It signifies the general principle that ‘the people’ broadly defined, play a central role in constituting, steering and occasionally transforming the laws and institutions that govern their lives. The controlling reason for the foundation of law


and government is the protection of individuals and groups from the abuses of power common to conditions of lawlessness. Robert Jackson’s and Adam Lupel’s popular sovereignty signifies that the legitimacy of law and government rests upon the people, which can be traced back to Locke and Rousseau.

From the angle of the formation of a polity, Ian Brownlie posits that law is where the dynamics of state sovereignty are reflected, and defines the aspects of sovereignty regarding the relationship between the states and organizations, and insists that states are equal and have legal personality. In addition, he describes the principal corollaries of states' sovereignty and equality as:

1. a jurisdiction, prima facie exclusive, over a territory and the permanent population living there;
2. a duty of non-intervention in the area of exclusive jurisdiction of other states; and
3. the dependence of obligations arising from customary law and treaties on the consent of the obligor.

Brownlie has identified sovereignty and equality as the foundation of international law; meanwhile, he stresses sovereignty as an attribute of a state. For Brownlie, it seems if the three corollaries are not simultaneously satisfied, a state-like entity cannot claim sovereignty. In addition, considering the second corollary, namely, a duty of non-intervention, sovereignty per se requires the compliance with the obligation of non-intervention. Brownlie’s sovereignty is a mixed understanding from both perspectives of natural law and practical application.

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58 Lupel, supra n. 25, 6.
59 Ian Brownlie, Principles of Public International Law (4 edn, Oxford University Press 1990), 287.
60 Ibid.
From the angle of meaning and denotation, Stephen Krasner describes sovereignty as ‘organized hypocrisy’ and there are at least four different meanings of sovereignty, as follows:

International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.61

Krasner focuses more on the practical application of sovereignty and fleshes out the connotation of sovereignty. Walker criticizes Krasner for the reason that Krasner’s four different meanings of sovereignty are ‘not logically coupled, nor have they covaried in practice.’ 62 In addition, Walker considers Krasner’s idea of interdependence sovereignty tends to ‘succumb to the fallacies of description and abstraction’, and the other three meanings are not discrete.63 I agree with Walker that the four meanings are not completely complementary. However, I also think there are values in Krasner’s concept of sovereignty, for Krasner provides descriptions of sovereignty in different dimensions, which enriches our understanding of sovereignty.

From the angle of the relationship between states and international institutions, John Jackson argues that the traditional Westphalian concept of sovereignty no longer

61 Krasner, supra n. 38, 3-4.
63 Ibid, 8.
represents an adequate understanding of sovereignty in today’s globalized world and he identifies a new notion of sovereignty which he refers to as ‘sovereignty-modern’. Jackson claims that ‘sovereignty-modern’ is a newer, more pragmatic and more empirically based, approach to reconsidering the core concept and roles of sovereignty. He promotes to adopt the power allocation analysis to scrutinize the ‘core sovereignty’ concepts that involve the monopoly of power for the nation-state and its logical derivative of state-consent requirements for new norms. In fact, the purpose of Jackson’s theory about the sovereignty is to respond to the challenges of sovereignty by international economic institutions, especially by the WTO.

From the humanitarian perspective, Richard Falk states there is a clear trend away from the idea of unconditional sovereignty and toward a concept of responsible sovereignty. Governmental legitimacy, regarding the exercise of sovereignty, requires the adherence to minimum humanitarian norms and the effectiveness of the act to protect citizens from acute threats, in order to be considered as valid. For Falk, sovereignty is not absolute.

C. Conclusion

In conclusion, every concept of sovereignty is a way of understanding and interpreting our social reality. Some concepts may be more sensible than others; however, all our understandings and interpretations are, to some extent, contingent on the changes of

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66 As to the dimensions of power allocation analysis, Jackson indicates that both ‘horizontal’ and ‘vertical’ power allocations are involved hereof. ‘Horizontal’ power allocations refer to the separation of powers within a government entity (legislative, executive, judiciary, ect.) and division of powers among different international organizations; ‘Vertical’ power allocations refer to vertical power allocations between the governments and their joint international organization. Ibid, 72, 77.
our social reality. In the Middle Ages when the concept of sovereignty was born, sovereignty was mainly used to deal with two levels of social relationship, which were the relationship between the state and the citizen, and the relationship between and among states at the international level. Now our society involves three levels of relationship, which include the relationship between individuals and international law, in addition to the two levels of social relationship which existed in the Middle Ages. Under this circumstance, an appropriate understanding of sovereignty should be multidimensional and comprehensive, which is capable of interpreting our three-level social relationship. Sovereignty has divorced divine law and refers to popular sovereignty, which is rooted in the people and for the people, and is process-focused in representation and deliberation. Each state’s sovereignty is supreme before national law and equal before international law. However, each state’s capability of exercising sovereignty is different, given their different sizes, populations, economic and military powers. It is worthwhile to study the process of a state’s exercise of sovereignty, and this thesis is part of the efforts to study the WTO Members’ exercise of sovereignty in the context of the WTO.

1.2 The WTO Dispute Settlement System

The WTO dispute settlement system is considered as the jewel in the crown of the WTO. Dispute settlement is one of the most important functions of the WTO, in that it clarifies the legal obligations under the WTO agreements. It seems the WTO dispute settlement system (DSS) operates with high efficiency, and more than 400 complaints

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68 See Brand, supra n. 25, 286.
69 It is noted that in the areas of human rights law and humanitarian law, individuals are not only the objects, but also the subjects, and individuals have direct access to the international courts/tribunals in those areas. See Francisco Orrego Vicuña, ‘Individuals and Non-State Entities before International Courts and Tribunals’ (2001) 5 Max Planck Yearbook of United Nations Law 53, 55.
70 See Lupel, supra n. 25, 131.
have been initiated under the WTO DSS.\textsuperscript{72} For the period from the establishment of WTO in January 1 1995 to January 1 2013, the panels have circulated 150 reports and the Appellate Body has circulated 91 reports.\textsuperscript{73} It is the DSU that codifies the WTO DSS and provides a single dispute settlement mechanism applicable to all current WTO agreements.\textsuperscript{74} The following of part of this chapter will introduce the processes of WTO dispute settlement and elaborate the features of WTO DSS.

\subsection{1.2.1 The WTO Dispute Settlement Process}

The WTO dispute settlement process may include four stages, depending on whether the parties to the dispute can agree at each stage, or whether they agree with the panel’s report. The four stages in sequence are consultations, panel proceedings, appellate review, and implementation/compliance, which will be introduced as follows.

Consultations

According to Article 4.5 of the DSU, consultation is a necessary stage if a Member wants to initiate a case under the DSU.\textsuperscript{75} A Member is obligated to proffer adequate opportunity for consultation regarding the measure at issue; thus, a request for consultations in writing is required and it shall include the reasons for the request, the measures at issue, and the legal basis for the complaint.\textsuperscript{76} In addition, the Member must notify the DSB and the entire WTO membership of its request of consultations.
and the nature of its complaint.\textsuperscript{77} If any other Member, other than the consulting Members, considers it has a substantial trade interest in the consultations being held, it may inform the consulting Members and the DSB, and request to join the consultations.\textsuperscript{78} If the consulting Members fail to settle the dispute within 60 days after the date of the receipt of the request for consultations, the complaining party may request the establishment of a panel.\textsuperscript{79}

Panel Proceedings

If the complainant requests to establish a panel, a three-person ad hoc panel shall be established to hear the case. The respondent cannot block the establishment of the panel, unless the Dispute Settlement Body (DSB) decides by consensus not to establish the panel.\textsuperscript{80} Based on the matter referred to the DSB, the panel’s terms of reference shall be drawn up by the Chairman of the panel in consultation with the parties to the dispute and circulated to all Members.\textsuperscript{81} In addition to the parties to the dispute, any other Member may participate in the panel proceedings as a third party if it has a substantial interest in a matter before the panel and notifies its interest to the DSB.\textsuperscript{82} Third parties may submit written submissions to the panel.

The panel’s function is to 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, and make such findings as will assist the DSB in making the recommendations and in giving the rulings.\textsuperscript{83} Considering

\textsuperscript{77} Ibid.
\textsuperscript{78} Art. 4.11 of the DSU.
\textsuperscript{79} Art. 4.7 of the DSU. According to Article 4.8 of the DSU, for the cases of urgency, it is a 20-day consultation period after the date of the receipt of the request for consultations, during which if a solution to the dispute cannot be reached, the complaining party may request the establishment of a panel.
\textsuperscript{80} Art. 6.1 of the DSU.
\textsuperscript{81} Art. 7.1, 7.3 of the DSU.
\textsuperscript{82} Art. 10.2 of the DSU.
\textsuperscript{83} Art. 11 of the DSU.
the circumstances of the case, the panel may seek information and technical advice from any individual or body to help it analyze certain aspects of the matter. An interim report shall be issued to the parties, and the parties may request the panel to review some aspects of the interim report before circulation of the final report to the Members. It is supposed to take no more than nine months for the panel to issue its final report. Unless a party to the dispute notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report, the panel report shall be adopted.

Appellate Review

A standing Appellate Body has been established by the DSB, which is composed of seven persons, three of whom shall hear any one case. If either party to the dispute disagrees with the panel’s findings or conclusions, it may appeal to the Appellate Body. An appeal is limited to issues of law and legal interpretations covered in the panel report. Third parties cannot appeal a panel report, but they may continue to participate in the appellate proceedings by making written submissions. The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel, and its report shall be adopted by the DSB unless the DSB decides by consensus not to adopt the report. The Appellate Body is supposed to take no more than 90 days to issue its final report. A panel or the Appellate Body shall recommend the Member whose measures have been found inconsistent with its WTO obligations to bring the WTO-inconsistent measures into conformity with the relevant WTO obligations.

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84 Art. 13 of the DSU.
85 Art. 15.2 of the DSU.
86 Art. 12.9 of the DSU.
87 Art. 16.4 of the DSU.
88 Art. 17.2 of the DSU.
89 Art. 17.6 of the DSU.
90 Art. 17.4 of the DSU.
91 Art. 17.3-4 of the DSU.
92 Art. 17.5 of the DSU.
agreement.  

Implementation/Compliance

Once a panel report or an Appellate Body report is adopted by the DSB, the report is granted legal effect and binds the parties to the dispute. “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”

Considering the practicability of correcting the WTO-inconsistent measures, the Member concerned shall have a reasonable period of time to comply. Implementation of adopted recommendations or rulings is under the surveillance of the DSB.

If the complainant disagrees with the measures taken by the respondent to comply with the recommendations and rulings, the complainant or the respondent may resort to the original panel for adjudication. The panel is supposed to circulate its report within 90 days after the date of referral to it. The parties to the compliance dispute may also appeal the panel report to the Appellate Body. If the respondent fails to implement the recommendations and rulings, the complainant may request the respondent to provide compensation. If no satisfactory compensation has been agreed within 20 days after the date of the expiry of the reasonable period of time, the complainant may request authorization from the DSB to suspend the application to the respondent of concessions or other obligations.

93 Art. 19.1 of the DSU.
94 Art. 21.1 of the DSU.
95 Art. 21.3 of the DSU. The reasonable period of time shall be: (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement, (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.
96 Art. 21.6 of the DSU.
97 Art. 21.5 of the DSU.
98 Ibid.
under the WTO agreements.\footnote{Art. 22.2 of the DSU.} That suspension may also be called a retaliatory measure. However, a Member employing retaliatory measures should observe the following principles: (a) the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) in which the panel or the Appellate Body has found a violation or other nullification or impairment; (b) if the complaining party considers it is not practical or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to retaliate in other sectors under the same agreement; (c) if the complaining party considers it is not practical or effective to retaliate under the same agreement, and if the circumstances are serious enough, it may seek to retaliate under another covered agreement.\footnote{Art. 22.3 of the DSU.} As for any dispute that arises from the level of suspension or the principles of retaliation, the Member concerned may refer the matter to the original panel for arbitration.\footnote{Art. 22.6 of the DSU.}

1.2.2 Features of the WTO Dispute Settlement System

Comparing WTO DSS with that under the GATT, WTO DSS is characterized by the changes brought about by the rule of negative consensus and the establishment of the Appellate Body. Under the GATT, both procedures of the establishment of a panel and the adoption of a panel report required consensus of Contracting Parties, which means that the losing party was able to block both procedures and paralyze the DSS under the GATT. In contrast, under the WTO DSS, both the establishment of a panel and the adoption of a panel report or an Appellate Body report are pursuant to the rule of negative consensus, which means one Member’s consent, including the winning party’s consent, is adequate.\(^{103}\) Therefore, it seems there is no obstacle that

may frustrate smooth operation of WTO DSS. In order to safeguard against possible errors of panel rulings, the Appellate Body was created under the WTO to assure legal correctness.  

Considering the following facts—that a complainant can unilaterally refer a dispute to the WTO, the DSU codifies the procedural rules, that third parties may intervene in the case without getting the consent of the parties to the dispute, that the parties to the dispute are free to appeal to the standing Appellate Body, and that precedents are highly respected by the panels and the Appellate Body, the WTO DSS functions more like a court, distinguishing it from arbitral tribunals. However, WTO DSS is different from either the civil law system or the common law system. In other words, it is a hybrid of the civil law and the common law. In addition, WTO DSS is also characterized by its judicial independence, which means WTO DSS is free from the influence of the parties to the dispute and the political institutions under WTO. The following section will elaborate on the two features of WTO DSS: its status as a hybrid of the civil law and the common law, and its judicial independence.

A Hybrid of the Civil Law and the Common Law

The civil law and the common law are two most important legal systems worldwide. The vital distinguishing attributes between them are in terms of “legislation” and “judicial decisions”. For the civil law, the main source or basis of the law is legislation, which is codified in a systematic manner; there is no binding rule of

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105 It is an undeniable fact that a panel is established on an ad hoc basis, which may derogate the adjudicative character of WTO DSS. However, as other parameters listed in the text, the WTO DSS is more like a judicial system. See Iwasawa, supra n. 103, 290. Raj Bhala, ‘The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)’, (1998-1999) 14 Am U Int’l L Rev 845, 848.

precedent and courts are not bound to follow previous judicial decisions.\footnote{Ibid, 424, 426.} In contrast, judicial decisions are the basis of the common law; precedents are binding and the doctrine of stare decisis provides stability and continuity in the common law system.\footnote{Ibid, 425.} Regarding the WTO DSS, the DSU codified the procedural rules and the covered agreements are the applicable law, which bears the main attribute of the civil law. Meanwhile, adopted panel’s reports and the Appellate Body’s reports have precedential value in the WTO dispute settlement, which exhibits the main attribute of common law, although no doctrine of stare decisis exists in the WTO DSS.

Regarding the rules and procedures for WTO dispute settlement, Article 1.1 of the DSU provides that the DSU applies to the disputes brought pursuant to consultation and dispute settlement provisions of covered agreements.\footnote{Art. 1.1 of the DSU: The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")...} The covered agreements include \textit{Agreement Establishing the World Trade Organization} (WTO Agreement), all the multilateral trade agreements and plurilateral trade agreements annexed to the WTO Agreement.\footnote{Multilateral trade agreements include \textit{Multilateral Agreements on Trade in Goods} (GATT), \textit{General Agreement on Trade in Services} (GATS), \textit{Agreement on Trade-Related Aspects of Intellectual Property Rights} (TRIPS), and the DSU. Plurilateral trade agreements include \textit{Agreement on Trade in Civil Aircraft}, \textit{Agreement on Government Procurement}, \textit{International Dairy Agreement}, and \textit{International Bovine Meat Agreement}. The applicability of the DSU to the plurilateral trade agreements is subject to the adoption of a decision by the parties to each agreement which may set out special or additional rules or procedures of dispute settlement.} In fact, the DSU has established an integrated dispute settlement system, and the DSU is a coherent system of rules and procedures for dispute settlement under the covered agreements.\footnote{Appellate Body Report, \textit{Guatemala – Cement I}, WT/DS60/AB/R, 2 Nov. 1998, para. 64.} As for the special or additional rules stipulated in Article 1.2 of the DSU,\footnote{Art. 1.2 of the DSU: The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In}
stated that they applied only in the case of “inconsistency” or a “difference” between these rules and the provisions of the DSU:

[If there is no ‘difference’, then the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail. A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them. An interpreter must, therefore, identify an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that the latter prevails and that the provision of the DSU does not apply.113

Therefore, special or additional rules provided in Article 1.2 of the DSU only apply in special circumstances, and a panel or the Appellate Body has an obligation to identify “an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement” before resorting to Article 1.2. Article 1.1 is the general provision governing the rules and procedures of the WTO dispute settlement.

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Regarding the applicable law in the WTO dispute settlement, according to Articles 7.1 of the DSU, the parties to the dispute should specify relevant provisions of the covered agreements as the legal basis to initiate a dispute. In addition, Article 23.1 of the DSU stipulates a panel’s or the Appellate Body’s jurisdiction is restricted to the issues arising from the covered agreements. Therefore, the covered agreements are the applicable law for the WTO dispute settlement. Although WTO law is not isolated from general international law, and Article 3.2 of the DSU points out there is interaction between the covered agreements and customary rules of interpretation of public international law, customary international law only applies to the extent that no conflict or inconsistency with the covered agreements occurs.

Thus, in the context of the WTO dispute settlement, the DSU and the covered agreements are the sources of law, the main attribute of the civil law. However, considering the precedential value of the panel reports and the Appellate Body reports, the WTO DSS also presents the main attribute of the common law.

In the literature, some scholars consider there is a powerful precedential effect in WTO jurisprudence but, nevertheless, no stare decisis thereof. On the other hand,

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114 Article 7.1 of the DSU: Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

115 Art. 23.1 of the DSU: When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.


117 See Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law (Cambridge 2006), 177. The Consultative Board to the Director-General Supachai Panitchpakdi in their report states that some degree of "precedent" concepts motivates the WTO dispute settlement process; however, prior cases are not totally binding on subsequent panel cases. See Report on the Future of the WTO: Addressing Institutional Challenges in the New Millennium, p. 52, available at <http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf> last accessed May 1, 2013. Palmeter and Mavrdis states ‘adopted
some other scholars hold a radical review of the operation of stare decisis in WTO jurisprudence. For example, Bhala states that “a de facto doctrine of stare decisis operates in Appellate Body jurisprudence”, and advocates introducing a de jure doctrine of stare decisis into the Appellate Body jurisprudence. Blackmore also promotes the benefits of stare decisis for the WTO DSS and stresses the eradication of no-precedent rule in the WTO jurisprudence. Although the scholars’ perspectives are different, they all admit the Appellate Body reports are influential for subsequent cases.

In reality, it is common for the parties to the dispute to cite previous cases to support their claims, and also common for the panels and the Appellate Body to cite previous cases to support their conclusions. Until now, it seems there is no case that has not cited previous cases in the WTO dispute settlement system. As the Appellate Body is the second and final level of view of panel decisions, their jurisprudence is significant for analyzing legal status and value of previous cases.

In fact, the Appellate Body emphasizes the important influence of previous cases on subsequent cases, especially the importance of their own jurisprudence. However, they have never explicitly acknowledged the doctrine of stare decisis in their jurisprudence. In Japan – Alcohol Beverages II, the Appellate Body discussed the status of the adopted panel reports as follows:

Adopted panel reports are an important part of the GATT acquis. They are

reports have strong persuasive power and may be viewed a form of nonbinding precedent’, which is agreed and supported by Peter Van den Bossche. See David Palmeter and Petros C Mavroidis, ‘WTO Legal System: Sources of Law, The’ 92 Am J Int’l l 398, 401; Peter Van den Bossche, The law and policy of the World Trade Organization: text, cases and materials (Cambridge University Press 2005) 56.


often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.\textsuperscript{121}

In the \textit{US – Stainless Steel (Mexico)}, on one hand, the Appellate Body did not admit that their reports were binding.\textsuperscript{122} On the other hand, the Appellate Body stressed the importance of the panels following its jurisprudence. Its elaboration is as follows:

\begin{quote}
The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.\textsuperscript{123}
\end{quote}

Therefore, no matter whether there is a de facto doctrine of stare decisis in the WTO jurisprudence, it is prudent to conclude that, without compelling reasons to the contrary, the Appellate Body jurisprudence should be followed. To a large extent, this reflects the main feature of the common law.

\textbf{Judicial Independence}

Judicial independence is important for justice and democracy,\textsuperscript{124} and an independent judiciary “provides the single greatest institutional support for the rule of law.”\textsuperscript{125} WTO DSS is independent from the influence of the parties to the dispute, as well as

\textsuperscript{122} Appellate Body Report, \textit{US – Stainless Steel (Mexico)}, WT/DS344/AB/R, para.158.
\textsuperscript{123} Ibid, para.161.
free from the influence of the DSB/General Council/Ministerial Conference,\textsuperscript{126} the political bodies of the WTO. The following will examine judicial independence under WTO from the perspectives of procedure and substance.

In the aspect of procedures, due to the rule of negative consensus, the defendant cannot block the establishment of a panel. Although the panel reports and the Appellate Body reports are not called “decisions” or “rulings”, and they come into effect under the condition that they are adopted by the DSB, again, due to the rule of negative consensus, the winning party’s consent is adequate for the adoption of the reports. Thus, it is de facto automatic for the reports to be effective and binding. As to the selection of panelists, it is explicitly required that the panelists’ independence should be highly valued.\textsuperscript{127} A panel cannot be composed of the persons who are the citizens of the parties or the third parties to the dispute, unless it is agreed otherwise.\textsuperscript{128} As to the selection of the Appellate Body members, the DSB is responsible for selecting seven members to establish a standing Appellate Body,\textsuperscript{129} who cannot be affiliated with any government.\textsuperscript{130} Therefore, there is no way for the parties to the dispute to impair the independence of the members of the panel and the Appellate Body. In addition, the DSB cannot interfere with the adjudicative process on the basis of the DSU rules.\textsuperscript{131}

In the aspect of substance, Article 11 of the DSU requires the panels to “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

\textsuperscript{126} In fact, the DSB, the General Council, and the Ministerial Conference are the same body, composed of representatives of all the Members. Art. IV:1-3 of WTO Agreement.
\textsuperscript{127} Art. 8.2 of the DSU.
\textsuperscript{128} Art. 8.3 of the DSU.
\textsuperscript{129} Art. 17.1 of the DSU.
\textsuperscript{130} Art. 17.3 of the DSU.
agreements". Thus the panel’s assessment should be independent and free from the influence of the parties to the dispute. The panel indeed holds to this independence requirement, stating that “[a] panel’s interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute” and the parties’ common assessment in relation to a particular issue should not be in and of itself dispositive.

In addition, Article 13 of the DSU grants the panels unconstrained right to “seek information and technical advice from any individual or body which it deems appropriate”. That provides the panels with a powerful tool to get more resources to generate facts that have been independently evaluated, so as to make an objective assessment. The Appellate Body in the US – Shrimp stressed the panels’ authority in this aspect:

It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.

Therefore, the panels are capable of making an objective and independent assessment of the matter before it. It is not denied that there is an element that may frustrate the independence of the panels. The panels are assisted by the officials of the WTO Secretariat, who do not exclusively work for the panels. Those officials, who assist the panels, perform primarily other tasks, receive different professional training and obtain different experience, which probably affects the quality of their

132 Art.11 of the DSU.
135 Art.13 of the DSU.
137 Art.27.1 of the DSU.
work provided for the panels and further affects the work of the panels. However, there is no strong voice claiming or evidence to prove that the panels’ independence is severely impaired by this.

As to the independence of the Appellate Body, former Director-General Ruggiero stated:

As the highest judicial authority in the WTO dispute settlement system, it is extremely important that the Appellate Body be a completely independent and impartial judicial body, free from all political influence. This is why you have been given an independent secretariat, separate from the Secretariat of the WTO. Maintaining and preserving your independence is absolutely fundamental to the credibility and integrity of the dispute settlement system and of the WTO itself.

It seems there is no reason for the Appellate Body not to work independently. However, there is the accusation that the Appellate Body is likely to be especially attentive to the views of the USA and the EU. In fact, that accusation does not hold water, because developing countries are more frequently involved in the WTO dispute settlement and some small countries have won the cases.

Ironically, the Appellate Body performs their task so independently that there are

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142 For example, Antigua and Barbuda, as the complainants in US – Gambling (DS285), won against the US.
practically no checks on its decisions. That poses serious questions, such as whether the Appellate Body has exceeded their authority and whether the Appellate Body has infringed the Members’ sovereignty. As far as the interpretation of WTO agreements is concerned, even if the General Council disagrees with the Appellate Body’s interpretation, it is difficult for the General Council to make authoritative interpretations so as to reverse or constrain the Appellate Body’s interpretation, because the adoption of an authoritative interpretation requires three-fourths majority of the Members, a power which has never been utilized in practice.

1.3 Judicial Interactions between the WTO Tribunals and National Courts

‘The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.’ In fact, the GATT 1994 and other covered WTO agreements are such contracts as mentioned above, which provide multilateral trading rules, but which are incomplete. Pursuant to Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WTO Members have delegated the settlement of disputes over the application of these contracts to the panels and the Appellate Body under the WTO Dispute Settlement Body (DSB). In these circumstances, problems arise, such as how much sovereignty have WTO Members delegated to the panels and the Appellate Body? Have the WTO adjudicators been deferential to the Members

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144 Smith, supra n. 140, 77.
147 Ibid.
when dealing with sovereignty-related issues? As for the WTO rulings, is there any leeway for the Members to retrieve the sovereignty that has been delegated under the WTO agreements? Do national courts respect WTO rulings? Have national courts been deferential to WTO rulings when approaching WTO-related issues?

This thesis will examine deferential issues involved in judicial interactions around the WTO dispute settlement from two perspectives: national law interpretation in WTO tribunals and WTO rulings in national courts. The first perspective will explore the deference that the WTO adjudicators attribute to the Members in the process of dealing with the issue about interpretation of national law, which will unearth the friction between the WTO tribunals’ power and the Members’ sovereignty. The second perspective will examine the effects of WTO rulings in national courts regarding a Member’s judicial implementation of WTO rulings. It will shed light on, the extent to which a Member may grant deference to WTO rulings and whether national courts are defiant towards WTO rulings.

1.3.1 Sovereignty and Deference: From the Perspective of National Law Interpretation in WTO Tribunals

National law is within the domain of a state’s internal sovereignty, and it ‘governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus.’\(^{148}\) It is well accepted that national law cannot be used to justify a state’s failure to perform a treaty or its international obligations.\(^{149}\) As for WTO Members, it is incumbent on them to comply with WTO agreements, and they cannot invoke their national law to justify their violation of WTO agreements. What often happens in the WTO dispute settlement is an accusation that a Member’s national law is inconsistent with WTO agreements.\(^{150}\)

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\(^{150}\) For example, in *US – Section 301*, the European Communities claimed that Section 301 of the US law
Under these circumstances, the WTO tribunals have to examine the meaning of national law, in that both parties may have different understandings of the law at issue. Therefore, how the WTO tribunals approach the issue of national law interpretation may affect a Member’s sovereignty in interpretation of its own law.

National law interpretation in the WTO dispute settlement system is concerned with two issues: classification of national law interpretation, and the methods adopted by the WTO tribunals to examine the meaning of national law. Both issues are related with the question of how much deference the WTO tribunals should attribute to a Member’s interpretation of its own law. Meanwhile, both issues are anchored by the allocation of power between WTO Members and the WTO, in other words, the extent of sovereignty delegated by the Members to the WTO determines the extent of deference that should be given to the Member.

As to the classification of national law interpretation, it poses the question whether national law interpretation should be classified as a question of law or the question of fact. Usually, a question of law is subject to de novo review, which means the measure at issue is under intrusive review and little deference shall be provided to the litigants’ claims. However, a question of fact is not. In EC – Hormones, the Appellate Body made distinction between facts and law as follows:

> The determination of whether or not a certain event did occur in time and space is typically a question of fact...Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or

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was inconsistent with Art. 23.2 of the DSU; in US – 1916 Act, the European Communities claimed that the US 1916 Act was inconsistent with the GATT 1994; in China – Intellectual Property Rights, one accusation was that China’s Copyright Law was inconsistent with TRIPS Agreement.

152 Ibid.
inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue.\textsuperscript{153}

There are three key words that should be highlighted in the Appellate Body’s statement, which are ‘question of fact’, ‘fact finding process’, and ‘legal issue’. If we use ‘national law’ to replace ‘a certain event’ in the Appellate Body’s statement, it seems the following conclusion is inferred: the determination of the existence of national law is a question of fact; the determination of the credibility and weight that should be given to the national law in dispute is part and parcel of the fact finding process, in other words, as far as the issue of national law interpretation is concerned, the assessment of the elements to establish the meaning of national law in dispute is part of fact finding process; the consistency or inconsistency of national law in dispute with WTO agreements is a legal issue. Therefore, according to the Appellate Body, there is a clear division between the question of fact and the question of law, and national law interpretation is classified as ‘fact finding process’. The only question that may appear is what ‘fact finding process’ means.

Based on \textit{Black’s Law Dictionary}, in the context of international law, ‘fact finding’ refers to ‘[t]he gathering of information for purposes of international relations, including the peaceful settlement of disputes and the supervision of international agreements. Examples of fact finding include legislative tours and the acquisition of information required for making decisions at an international level.’\textsuperscript{154} In the context of WTO dispute settlement, the fact finding process is the process through which a panel formulates its conclusions with respect to the facts of a case, and the process at the end of which conclusions are drawn with regard to auxiliary and elementary propositions, so as to determine whether a claim under WTO agreements has been

\begin{footnotesize}
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\item[\textsuperscript{154}] Henry Campbell Black and Bryan A. Garner, \textit{Black’s law dictionary} (8\textsuperscript{th} edn., West Group 2004), 629-630.
\end{itemize}
\end{footnotesize}
proved. Thus, national law interpretation is part of the fact finding process through which the meaning of national law is established and at the end of which conclusions are drawn regarding whether the consistency or inconsistency of national law at issue with WTO agreements has been proved.

In US – Section 301 Trade Act, the Panel explicitly stated that they were ‘called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations.' In addition, the Panel also specified that the rules on burden of proof for the establishment of facts applied to the interpretation of Sections 301-310. Therefore, the Panel classified national law interpretation as the question of fact. It seems the Panel’s classification of national law interpretation is consistent with the Permanent Court of International Justice’s (PCIJ) jurisprudence, because in Certain German Interests in Polish Upper Silesia, the PCIJ pointed out that national laws were merely facts, which expressed the will of States and constituted the activities of States. However, it is confusing if we compare the Panel’s classification of national law interpretation with the Appellate Body’s classification in US – Section 211 Appropriations Act. The Appellate Body stated that:

[T]he municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an

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157 Ibid.
assessment is a legal characterization by a panel.\textsuperscript{159}

It is not clear in the Appellate Body’s statement with regard to the circumstances under which national law serves as evidence of facts, or serves as evidence of compliance or non-compliance. Therefore, it is difficult to expect when a panel’s assessment of national law is a legal characterization. According to Article 17.6 of the DSU, the Appellate Body’s review is ‘limited to issues of law covered in the panel report and legal interpretations developed by the panel’. Thus if national law interpretation is a question of fact, it cannot be reviewed by the Appellate Body, except that a factual issue is elevated to be a question of law. In \textit{EC – Hormones}, the Appellate Body pointed out that whether or not a panel had made an objective assessment of the facts before it, was also a legal question which, if properly raised on appeal, would fall within the scope of the appellate review.\textsuperscript{160} In fact, the Appellate Body did review the Panels’ assessment of national law.\textsuperscript{161} On the one hand, the Appellate Body stated that the Panel did not interpret national law ‘as such’;\textsuperscript{162} On the other hand, the Appellate Body appeared to interpret national law as if it were interpreting WTO law.\textsuperscript{163} Therefore, it seems confusing about the classification of national law interpretation and difficult to clarify how much deference the WTO tribunals attribute to a Member’s interpretation of its own law.

Following the issue of classification of national law interpretation, a further question is about the methods which are employed by the WTO tribunals to establish the meaning of national law. Different methods involve different degrees of scrutiny, which specifically reflect the extent of deference that is attributed to a Member. It is a

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\textsuperscript{161} For example, in \textit{India – Patents}, the Appellate Body reviewed the Panel’s assessment of India’s legal regime for patent protection of pharmaceutical and agricultural chemical products. In \textit{US – 1916 Act}, the Appellate Body reviewed the Panel’s assessment of the US 1916 Act.
\textsuperscript{163} Matthias Oesch, \textit{Standards of Review in WTO Dispute Resolution} (Oxford University Press 2003), 200-201.
\end{flushleft}
pity that the DSU does not provide any guidance regarding the methods about national law interpretation, except Article 11 which requires ‘an objective assessment of the matter’. It is notable that Article 3.2 of the DSU specifies that the WTO tribunals should interpret WTO agreements according to customary rules of interpretation of public international law.\textsuperscript{164} Given that both categories of interpretation, national law interpretation and treaty interpretation, are related with legal interpretation, it is sensible to compare the methods about national law interpretation with that about treaty interpretation. The similarities and differences in the methods of both categories of interpretation will shed light on whether the WTO tribunals treat national law interpretation the same as treaty interpretation which is characterized as a legal question.

1.3.2 Sovereignty and Deference: From the Perspective of WTO Rulings in National Courts

Once WTO rulings are made, the rulings will impact the WTO Members’ sovereignty, especially for the losing party. According to Article 21.1 of the DSU,\textsuperscript{165} prompt compliance with the rulings is essential for effective resolution of disputes and the losing party is supposed to take actions to correct its measures that are found violating WTO law. WTO rulings also involve interests of private economic operators and consumers, which has implications for the relationship between the WTO and individuals, as well as the relationship between states and individuals.\textsuperscript{166} WTO rulings in national courts are concerned with two respects of effects: direct effect and indirect

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\textsuperscript{164} Art. 3.2 of the DSU: The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

\textsuperscript{165} Art. 21.1 of the DSU: Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

\textsuperscript{166} Brand, \textit{supra} n. 25, 288.
effect. If WTO rulings have direct effect, it means individuals can directly rely on WTO rulings to initiate a complaint before national courts. As regards indirect effect, it refers to all forms of effect except direct effect. Direct effect and indirect effect of WTO rulings reflect national courts’ attitudes towards WTO rulings and a Member’s sovereign capacity in dealing with different levels of social relationship. The following text will take the EU and the US as examples to illustrate the issue of WTO rulings in national courts.

As for the US, the United States General Accounting Office (GAO) in its report states that the flexibility in responding to WTO rulings protects US sovereignty. The GAO does not consider WTO rulings are compulsory, and claims the WTO cannot ‘strike down’ the US laws or require the US to modify its laws, regulations, or policies. It admits compliance is the preferred way of implementing WTO rulings; however, it insists that compensation or retaliation, designed to protect sovereignty, is an option available for a Member.

In the name of protecting sovereignty, the US drafted the *WTO Dispute Settlement Review Commission Act* (Act) and established the WTO Dispute Settlement Review Commission (Commission) to review WTO rulings. According to the Act, the Commission shall review all the adopted panel reports and the Appellate Body reports that are adverse to the US. In addition, it shall also review any other adopted panel reports and the Appellate Body reports upon request of the US Trade Representative. The Commission’s scope of review covers the following four aspects: (a) whether the panel or the Appellate Body exceeds its authority or terms of reference; (b) whether the panel of the Appellate Body has added to the obligations of or diminished the rights of the US under WTO agreements; (c) whether the panel or

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168 Ibid.
169 Ibid.
170 Section 16 (104th) of WTO Dispute Settlement Review Commission Act.
171 Ibid, Section 4(a)(1).
the Appellate Body acts improperly according to the procedures set out in the applicable WTO agreement; and (d) whether the panel’s or the Appellate Body’s report deviates from the applicable standard of review.\textsuperscript{172} If the Commission makes an affirmative report regarding any aspect mentioned above, the US President may be authorized to undertake negotiations to amend or modify rules and procedures of the DSU.\textsuperscript{173} Moreover, if the number of affirmative reports amounts to three, the US may withdraw from the WTO.\textsuperscript{174} Therefore, the US priority is to protect the US rights and sovereignty, rather than promoting multilateral cooperation in the WTO. It seems unlikely that the US courts would defer to WTO rulings.

In the context of the EU, there is no corresponding review procedures about adverse WTO rulings as that exist in the US. None provisions of the EU law have stipulated the legal effect or legal status of WTO rulings in the EU. Thus how the EU courts deal with WTO rulings seems completely a matter within the EU courts.

It seems WTO rulings do not have direct effect in the EU legal system. Take the case of \textit{Ikea Wholesale} for example. Advocate General (AG) Leger in this case supported the view of the Council of the European Union and the European Commission that WTO rulings were not binding on the Court of Justice of the European Union (CJEU).\textsuperscript{175} AG Leger further stated that if WTO rulings were to be binding, they would threaten the EU’s autonomy in pursuing its own objectives.\textsuperscript{176} Specifically, AG Leger considered although the texts of the relevant provisions of the EU basic anti-dumping regulation were similar with that of the corresponding rules of the WTO \textit{Anti-Dumping Agreement} (ADA), the objectives of the basic regulation were different from that of the ADA. Different objectives might result in different approaches to and methods of

\begin{itemize}
  \item \textsuperscript{172} Ibid, Section 4(a)(2).
  \item \textsuperscript{173} Ibid, Section 6(a) and 6(b).
  \item \textsuperscript{174} Ibid.
  \item \textsuperscript{175} Opinion of Advocate General Leger, C-351/04 \textit{Ikea Wholesale}, [2007] ECR I-07723, para.77.
  \item \textsuperscript{176} Ibid, para.79.
\end{itemize}
the interpretation of similar texts.\textsuperscript{177} In addition, AG Leger considered the nature of the EU was also different from the ADA. Therefore, AG Leger opined that if letting WTO rulings bind the CJEU, it would jeopardize the EU’s legal sovereignty.\textsuperscript{178} The CJEU did not directly discuss the effect of WTO rulings in the EU legal system or explore the rationale thereof. However, it held that if there was no intention of the EU regulations to give effect to WTO rulings, WTO rulings could not be used as the legal basis to determine the dispute in the EU legal system.\textsuperscript{179} Only one case cannot prove whether WTO rulings have direct effect in the EU legal system. However, the tension and friction arising from WTO rulings within the EU legal system are obvious.

Therefore, the issue of WTO rulings in national courts is sovereignty-sensitive. Whether national courts actively respond to WTO rulings may determine whether there are sound judicial interactions between the WTO and the Members. The degree of deference that national courts attribute to WTO rulings is a focal issue, which affects the effects of WTO rulings and the cooperation between the WTO and the Members.

\textsuperscript{177} Ibid, paras. 81-85.
\textsuperscript{178} Ibid, para. 87.
\textsuperscript{179} C-351/04 \textit{Ikea Wholesale}, [2007] ECR I-07723, para.35.
Part I: National Law Interpretation in WTO Tribunals
Chapter 2. The Characterization of National Law Interpretation

The WTO dispute settlement, to some extent, is kind of international constitutional judicial review, in that the WTO tribunals are requested and required to adjudicate the consistency of national measures\(^1\) with WTO law, especially in terms of the WTO tribunals’ review of ‘as such’ claims\(^2\).\(^3\) However, as far as the constitutional settings and the considerations underlying the judicial review are concerned, judicial review in the WTO legal regime (WTO judicial review) distinguishes itself from that in a domestic context (domestic judicial review). The distinctions are mainly reflected in the following four respects. First, domestic judicial review operates under domestic constitutional law, whereas WTO judicial review operates exclusively under international law. The WTO legal regime is a weak constitutional setting on the basis of contractual relations among the WTO Members.\(^4\) Second, WTO judicial review is almost exclusively vertical judicial review,\(^5\) which does not include balance of powers and checks and balances present in a domestic review.\(^6\) In contrast, domestic judicial review entails not only vertical judicial review, but also horizontal review. Therefore, WTO judicial review is more rigid and potentially more intrusive than domestic judicial review.\(^7\) Third, the standards of review are

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\(^1\) The measures challenged in the context of the WTO dispute settlement include traditional legal documents, such as laws and regulations, as well as measures taking the form of practice or guidelines, and other actions. Alan Yanovich and Tania Voon, ‘What is the Measures at Issue?’ in Andrew D Mitchell (ed), Challenges and Prospects for the WTO (Cameron May 2005), 163.

\(^2\) ‘As such’ claims are the claims of inconsistency with WTO law against the measures like legislation or administrative regulation as such, independently from the measures’ application in specific instances. In US – 1916 Act, the Appellate Body specified that a Member could bring ‘as such’ claims to the WTO dispute settlement. Appellate Body Report, US – 1916 Act, WT/DS136/AB/R, para. 83.


\(^4\) Thomas Cottier and Matthias Oesch, ‘The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework’ in Thomas Cottier, Petros Constantinios Mavroidis and Patrick Blatter (eds), The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO (University of Michigan Press 2003), 296, 299.


\(^6\) See Cottier and Oesch, supra n. 4, 296.

\(^7\) Ibid, 299.
different. Under the WTO judicial review, the standard of review is reflected in Article 11 of the DSU and Article 17.6 of the Antidumping Agreement, and these two provisions result in the same standard of review which is to make an objective assessment of matters at issue.\(^8\) Under the domestic judicial review, different states’ courts may adopt different standards of review to deal with different matters at issue.\(^9\) Fourth, compared with the implementation of the decisions of domestic review, WTO has weaker and less direct means to control if and how a Member may comply with its rulings.\(^10\) Therefore, the WTO judicial review has its own characteristics, and it is influenced by the context in which the WTO dispute settlement system (DSS) is operating. Meanwhile, it demonstrates that a term used in the international law, such as WTO ‘judicial review’, may have different connotations from that used in the domestic context, although it is undeniable that many terms and principles of international law stem from those of national law and they share some similar characteristics.\(^11\)

Under domestic judicial review, sharp differentiation between the questions of law and the questions of fact have been made, because the former is subject to full review, while the latter is usually attributed deference.\(^12\) Under the WTO judicial review, whether to characterize national law interpretation as fact or law, is also a concern that is related with how much deference that should be attributed to the legislating states. It seems law/fact distinction in international legal context is thornier than that in domestic legal context, considering the relatively shorter

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\(^9\) For example, in the United States, the *Chevron* doctrine is adopted by the federal courts to review the federal administrative agencies’ interpretations of law, and ‘substantial evidence standard’ is applied in the anti-dumping and countervailing cases. In the Switzerland, *de novo* review is applied in the competition law cases. See Cottier and Oesch, *supra* n. 4, 293.


\(^12\) Ray A Brown, ‘Fact and Law in Judicial Review’ (1943) 56 Harvard Law Review 899, 899.
history about the development of international jurisprudence. As to the concept of deference involved in judicial review, it is difficult to articulate a fine-grained schema of deference standards.\textsuperscript{13} In both domestic and international legal contexts, deference doctrines are not fixed or uniform.\textsuperscript{14} In fact, the degree of deference in any particular case is dependent on the overall context as determined by a number of different factors, such as the expertise of the primary decision-maker, the policy context in which the decision is reached, whether the court is more or less likely to reach the right decision, and so on.\textsuperscript{15}

This chapter will examine and analyze the characterization of national law interpretation in the WTO dispute settlement. Since the Appellate Body often refers to the Permanent Court of International Justice’s (PCIJ’s) ruling in the case of \textit{Certain German Interests in Polish Upper Silesia} to support its approach to national law,\textsuperscript{16} and considering the significant influence of the International Court of Justice’s (ICJ) jurisprudence on international legal theory and practice, it is necessary at first to review the PCIJ’s and ICJ’s characterization of national law interpretation. Therefore, the structure of this chapter is as follows. Section II elaborates on the distinction between questions of law and questions of fact, which will provide background knowledge for the analysis of the characterization of national law interpretation in the following two sections. Section II examines the PCIJ/ICJ’s jurisprudence on the characterization of national law interpretation, to


\textsuperscript{15} Aileen Kavanagh, ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscoft (ed), \textit{Expounding the Constitution: Essays in Constitutional Theory} (Cambridge University Press 2008), pp. 184, 203.

\textsuperscript{16} In \textit{India – Patents}, the Appellate Body referred to the PCIJ’s ruling in \textit{Certain German Interests in Polish Upper Silesia} to support its approaches to handling national law, which was further invoked by the Appellate Body in the following cases to deal with national law. See Peter Van den Bossche and Werner Zdouc, \textit{The Law and Policy of the World Trade Organization} (3rd edn, Cambridge University Press 2013), 65.
which was referred by the WTO tribunals. Section III reviews relevant WTO cases about the WTO tribunals’ characterization of national law interpretation and analyzes the WTO tribunals’ characterization. Section IV makes comments on the WTO tribunals’ characterization and discloses that national law interpretation is a mixed question of law and fact.

2.1 Distinction between Questions of Law and Questions of Fact

Facts are the predicate facts upon which a legal decision is ultimately based. They are usually related with the questions such as ‘who did what, where, when, how, why, with what motive or intent’. Facts provide the description about the events and the activities involved in a case. Questions of fact are answered by evidence and sound inferences from the evidence. Laws are the legal standards that are applied to a case, and questions of law also include the interpretation about how those legal standards are to be understood. Usually questions of law are answered by statute, precedent, and policy. A judge’s application of law to fact is not mechanically like a computer’s application of a program to the data, and the distinction between law and fact is thorny.

2.1.1 Rationales and Parameters Underlying Law/Fact Distinction

In order to understand the law/fact distinction, it is primarily important to make clear the rationales underlying it, and those rationales will further clarify the

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21 Scheppelle, supra n. 19, 42.
22 See Broadbent, supra n. 20, 173.
criteria to distinguish law from fact. First, the law/fact distinction helps to clarify the institutional framework of courts.\textsuperscript{25} In a jury trial, the judges decide the questions of law and the jury decides the questions of fact.\textsuperscript{26} That is due to our traditional belief that judges are experts in law, and they have possessed the skill and expertise in matters of legal reasoning.\textsuperscript{27} Likewise, twelve lay jurors are believed better qualified to determine the fact as to whether their peers are telling the truth, given our deeply-rooted traditional holding of peer-review.\textsuperscript{28} Furthermore, the law/fact distinction serves to clarify different functions of trial courts and appellate courts, as well as the scope of review by appellate courts.\textsuperscript{29} Questions of fact are usually determined and fixed by trial courts, which are not allowed to appeal.\textsuperscript{30} Appellate courts are authorized only to review and examine the legal issues appealed. That is due to the fact that appellate courts do not have the parties or witnesses present, so that they do not have the chance to hear oral arguments or first-hand testimony, not to mention making eye contact with the parties or witnesses.\textsuperscript{31} In addition, the division of the functions between trial courts and appellate courts contributes to the efficiency of dispute settlement. If appellate courts are allowed to take the procedures the same as the trial courts, it means repetitive work will be done and justice may be delayed. Second, questions of law and questions of fact carry different weight for future cases.\textsuperscript{32} Questions of

\textsuperscript{25} Scheppele, supra n. 19, 42.

\textsuperscript{26} It is noted that not every case goes to the jury trial at the first instance. As for the first non-jury instance, it is the judge that decides the facts as well as the law. In addition, some countries do not have jury trials at all. For example, China does not have jury trials. However, China has a regulation that specifies that a lay person shall be designated to join the decision-making at the first instance for some special cases. The lay person functions like a judge and has a five-year term of office. See Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors.

\textsuperscript{27} See Scheppele, supra n. 19, 42; Brown, supra n. 12, 921; Richard B Bilder, ‘The Fact/Law Distinction in International Adjudication’ in Richard B Lillich (ed), Fact-finding before International Tribunals: Eleventh Sokol Colloquium (United States, Transnational Publishers 1992), 96.

\textsuperscript{28} Warner, supra n. 17, 104.

\textsuperscript{29} Bilder, supra n. 27, 96.

\textsuperscript{30} See Scheppele, supra n. 19.

\textsuperscript{31} Warner, supra n. 17, 104. As Warner pointed out, the advent of video trial records challenge this assumption.

\textsuperscript{32} See Warner, supra n. 17, 42; Bilder, supra n. 27, 96.
fact are particular to individual cases and judgments of fact do not have prudential/precedential value for future cases. In contrast, questions of law may transcend particular cases, and judgments of law may become precedents that are binding for recurring cases.33 Therefore, legal judgments contribute to ‘the corpus of what is called law, while factual judgments simply sort out what has happened in individual cases’. 34 Conversely, we may infer from the perspective of precedential effect to identify whether it is a question of law or fact. For example, if the judgment of a matter will be respected and followed in the latter cases, this matter is a question of law.

Therefore, according to the rationales underlying the law/fact distinction, the following four parameters should be taken into account when examining whether a matter is law or fact: (1) Whether the matter is within the judicial notice. As the judges decide the questions of law, if a matter is within the judicial notice and requires the application of legal skills and legal expertise, it is a question of law. Otherwise it is a question of fact. (2) Whether the matter is pleaded and proved like a fact.35 As for the matter at issue, if a certain standard of proof is required to initiate a case or the rule on burden of proof for the establishment of facts is required to follow in the process of the dispute settlement36, it is a question of fact. (3) If a matter is allowed to appeal, it is probably a question of law. However, if the trial courts’ assessment of facts is so wrong that inappropriate assessment of facts may result in appellate review.37 (4) Whether a court’s decision on a matter has the force of stare decisis in recurring cases.38 If the decision has the force of

33 Ibid.
34 See Scheppel, supra n. 19, 43.
36 See US – Sections 301, WT/DS152/R, para. 7.18.
37 See Art. 11 of the DSU.
38 See Scheppel, supra n. 19.
stare decisis, that decision is about a question of law.\textsuperscript{39}

\subsection*{2.1.2 Limitations of Law/Fact Distinction}

Although the rationales and elements as to the law/fact distinction have been elaborated as above, the reality of distinguishing law from fact is much more complicated. On the one hand, whether a matter is characterized as a question of law or a question of fact is in itself an artificial question of law, and the characterization is based more on the history of the problem or the psychology of the judge, rather than on the logic or nature of things.\textsuperscript{40} A case in point is the characterization of foreign law in civil litigation. Regarding the same issue of characterization of foreign law in domestic context, English courts consider foreign law as a question of fact, but in contrast, the US courts take it as a question of law.\textsuperscript{41} Their different approaches to foreign law are only explainable by their different historical or psychological judicial culture. On the other hand, under certain circumstances, law and fact are interchangeable, which means that fact may go upward into law and law may go downward into fact. Take the doctrine of negligence for example. At the very beginning, whether one was guilty of negligence due to his/her omitting to look at or listen for an approaching train when crossing a railroad track, was a question of fact. However, frequent occurrence of the same event under similar circumstances enabled the courts to apply a rule of law as to negligence \textit{per se}. It is in this manner that negligence as a question of fact was upraised as a question of law.\textsuperscript{42} In contrast, \textit{the United Nations Declaration on the Rights of Indigenous People}, which is usually considered as the

\textsuperscript{39} It depends on the characteristics of a country’s legal system. Some countries, like China, they do not have the rule of \textit{stare decisis} at all. Even in common law systems, not every decision on a question of law will become a precedent.

\textsuperscript{40} Nathan Isaacs, ‘The Law and the Facts’ (1922) Columbia Law Review 1, 12; Scheppele, \textit{supra} n. 19, 43.

\textsuperscript{41} Sofie Geeroms, \textit{Foreign Law in Civil Litigation: A Comparative and Functional Analysis} (Oxford University Press 2004), 89.

\textsuperscript{42} See John Proffatt, \textit{A treatise on Trial by Jury: Including Questions of Law and Fact} (Hurd and Houghton 1876), 356.
sources of international law, was taken as factual evidence in the WTO dispute settlement.43 That is similar with the scenario that foreign law is treated as a question of fact by English courts. Therefore, depending on different circumstances under which a matter is raised, a question of law may become a question of fact.

In addition to the complicated scenarios of law/fact distinction stated above, some matters cannot be neatly classified as law or fact. Thus, mixed questions of law and fact may appear. However, some scholars seem to disagree with so-called ‘mixed questions of law and fact’.44 They claim that the term of ‘mixed questions of law and fact’ lacks clarity and coherence, and law and fact never mix but intermingle.45 I agree with them that law comes from the sovereign and fact comes from the subject, therefore, law and fact are at different altitudes and unable to form a completely new compound.46 However, I insist on using the already accepted term of ‘mixed questions of law and fact’ to describe the hybrid of law and fact. It is noted that mixed questions of law and fact are possible to be unmixed.47 In order to illustrate my point that the terms of ‘question of law’ and ‘question of fact’ are not adequate to expound the complicated matters, I will take the characterization of foreign law in English courts48 as an example.

2.1.3 Mixed Questions of Law and Fact: Taking Foreign Law in English Courts as an Example


45 Ibid.

46 See Warner, supra n. 17, 101.

47 Warner unmixed the mixed questions of law and fact in his article All Mixed up about Mixed Questions.

48 English courts treat foreign law as fact, which is similar with the ICJ’s factual approach to domestic law. In the author’s opinion, they commit the same mistake that they ignore the normative element of foreign law and domestic law, and they also ignore the judges’ legal skill and experience that contributes to the assessment of foreign law and domestic law.
English courts treat foreign laws as facts and their approach to foreign law is expressed in four principles. First, foreign laws are facts and beyond judges’ judicial notice; Second, as facts, foreign laws are proved by the parties; Third, the pleading of foreign law is the same as that of other facts, and hence the party who relies on foreign law must expressly plead it; Fourth, if foreign law is not pleaded or adequately proved, a court will apply English law. Underlying English courts’ approach to foreign laws, two theories are used for justification. One is the doctrine of comity, which proclaims that ‘the laws of every nation have force only within the national boundaries and beyond that they are applied merely as a matter of comity toward the foreign sovereign and not by virtue of their own authority’. The other is the vested rights theory of Dicey, which states that ‘the courts do not apply foreign law at all, not even voluntarily; rather they recognize and enforce rights which have been acquired under a foreign law and the question of whether a given right claimed by a party has been created by the law of another country is a matter of fact to be pleaded and proved as any other fact’. However, English courts’ approach to foreign law is inconsistent and the characterization of foreign law is confusing, which will be elaborated as follows.

There is no doubt that English courts adopt a factual approach to foreign law in terms of the pleading and proof of foreign law, and hence a party who elects to rely on foreign law should plead particulars of that law and prove the content by evidence. However, the paradox appears that matters of foreign law are decided by the judges, which is against the rule that the questions of fact should be

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52 There are exceptions to the proof of foreign law. For example, if the foreign law at issue is notorious, it will be deemed as within the judicial notice of the judges and the parties do not have the obligation to prove it. Ibid, 339.
53 Fentiman, *supra* n. 49, 61.
54 Questions of foreign law was originally decided by the jury, however, it was changed by statutes.
decided by the jury. Moreover, questions of foreign law are allowed to appeal as if they are questions of law.\textsuperscript{55}

In the case of \textit{Guaranty Trust Corp. of New York v. Hannay}\textsuperscript{56}, the English Court of Appeal not only allowed the appeal of American law, but also made an independent interpretation of American case law. The facts of the case were as follows. The plaintiffs insisted that the draft at issue was unconditional; however, the defendants claimed that the draft was conditional. It was American law that governed the draft at issue. Both the plaintiffs and the defendants had the witnesses to support their assertions. As to an American case involved hereof, the witnesses of the plaintiffs gave evidence that the decision of Noyes J., sitting as judge of the Circuit Court of the United States for the Southern District of New York, on the conditional nature of the draft, was incorrect in American law and inconsistent with other authorities.\textsuperscript{57} The defendants’ witnesses gave evidence to the contrary.\textsuperscript{58} The Court of Appeal stated that American law was a question of fact; however, they were not bound by the decisions of any foreign judge and they would make their own assessment regarding the correctness of Noyes J.’s decision.

First, the Court of Appeal considered there was a flaw in Noyes J.’s legal reasoning, in that his decision was not based on any independent reasoning of a learned judge, nor did he take into account the \textit{Negotiable Instruments Law}. Therefore, the Court of Appeal considered the authorities, on whom Noyes J. relied, did not establish the proposition. Therefore, the Court of Appeal disagreed with Noyes J.’s decision.\textsuperscript{59} Second, as to the question whether the decision of Noyes J. was approved by the New York Court of Appeals, the Court of Appeal pointed out that there was no similarity between the document before the New York Court of

\begin{itemize}
\item \textsuperscript{55} See para. 15 of the \textit{Administration of Justice Act 1920}, para. 69(5) of the \textit{Supreme Court Act 1981}, and para. 68 of the \textit{County Courts Act 1984}.
\item \textsuperscript{56} \textit{Fentiman, supra n. 49}, 4.
\item \textsuperscript{57} \textit{Guaranty Trust Corporation of New York v. Hannay} [1918] 2 K.B. 623.
\item \textsuperscript{58} Ibid, 638.
\item \textsuperscript{59} Ibid.
\end{itemize}
Appeals and that before Noyes J., therefore, the decision of the New York Court of Appeals was of no assistance for the decision of Noyes J.\textsuperscript{60} In conclusion, the Court of Appeal held that the decision of Noyes J. was inconsistent with the American authority and the draft at issue was unconditional.\textsuperscript{61} In this case, the Court of Appeal appeared to take a factual approach to foreign law, by stating that they must examine the decision of Noyes J. ‘as a question of fact upon the evidence’.\textsuperscript{62} Meanwhile, they also showed respect for the authority of American law, by saying that they felt bound to take the decision of the New York Court of Appeals ‘as an authoritative statement of the law by the highest tribunal in the State of New York, and should not feel myself at liberty to question it in an English Court’.\textsuperscript{63} However, the Court of Appeal was not a passive arbiter of the evidence, and their inherent skill and expertise in matters of legal reasoning was actively engaged. Hence, the Court of Appeal did not examine American law the same as other facts.

There are other cases that reveal the English Court of Appeal tends to make independent interpretations of foreign law, independently of the expert evidence and of the court of first instance.\textsuperscript{64} Judges’ inherent skill and expertise contribute to their assessment of foreign law. In this respect, assessing foreign law is distinct from other technical areas dependent on expert opinions.\textsuperscript{65} Compared with the cases involving scientific processes, building techniques, or maritime practice, judges are unlikely to have the same inherent feel for those issues.\textsuperscript{66} It is sometimes counter-intuitive to claim that judges regard foreign law as anything

\textsuperscript{60} Ibid, 645.
\textsuperscript{61} Ibid, 647.
\textsuperscript{62} Ibid, 638.,
\textsuperscript{63} Ibid, 644.
\textsuperscript{64} In the case of \textit{Princess Paley Olga v. Weiz}, the Court of Appeal independently interpreted Russian law. In the case of \textit{Dalmia Dairy Industries Ltd. V. National Bank of Pakistan}, the Court of Appeal independently interpreted Indian law. In the case of \textit{Kuwait Oil Tanker Company SAK v. Al Bader}, the Court of Appeal independently interpreted Kuwaiti law. See Geeroms, \textit{supra} n. 41, 313–319.
\textsuperscript{66} Ibid.
but laws. Therefore, English courts’ approach to foreign law is not consistent. They do not always adopt a purely factual approach to foreign law, especially in terms of interpretation of foreign law.

2.1.4 Concluding Remarks

As far as the characterization of foreign law is concerned, either question of law or question of fact is not adequate to solve it. In truth no legal system treats foreign law strictly as fact or law, but rather as a mixed question of law and fact. Specifically, the existence and formulation of foreign law are factual matters, which depend on the evidence which is presented by the parties; however, as to the assessment of foreign law that requires judges' inherent skill and expertise, it is more of a question of law.

In conclusion, whether a matter is treated as a question of law or a question of fact is not itself a question of fact, but an artificial question of law. The law/fact distinction may be based on historical and psychological elements, rather than logical grounds. A mixed question of law and fact, as a borderline between law and fact, is a useful tool to analyze complicated issues such as the matters of foreign law. As to the elements that should be taken into account when analyzing whether a matter is law or fact, the core is whether a matter requires the analysis by means of legal skills and legal knowledge, which distinguishes a legal professional's work from a layperson’s work.

The above elaboration on the distinction between questions of law and questions of fact provides analytical tools to scrutinize the appropriateness of the PCIJ/ICJ’s characterization of national law interpretation, as well as the WTO tribunals’

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67 Ibid.
68 Geeroms, supra n. 41, 362.
69 Fentiman, supra n. 65, 401–402.
70 Isaacs, supra n. 40, 11 – 12.
71 Ibid, 8, 12.
characterization of national law interpretation. As the WTO tribunals’ reasoning on their approach to the issue of national law substantially rely on the PCIJ/ICJ’s reasoning, it is rational to analyze the PCIJ/ICJ’s approach beforehand. Therefore, the following section will review the PCIJ/ICJ’s approach to the issue of national law, and analyze whether their saying is coherent with their doing.

2.2 The PCIJ’s/ICJ’s Ambiguous Characterization of National Law Interpretation

The PCIJ’s statement about its characterization of national law in German Interests in Polish Upper Silesia has become the dictum that is frequently quoted by the WTO tribunals. The PCIJ’s statement is as follows:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

From this statement, the PCIJ clearly took national law as facts by its statement that ‘municipal laws are merely facts’. It seems not disputable that national laws are facts from the perspective of its consistency with international law. Because when national law becomes the disputed object, it is not the applicable law which will be used to measure the legality of the disputed object. Thus its normative

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74 German Interests in Polish Upper Silesia, PCIJ Ser. A No. 7 (1926) para. 52.
character may substantively disappear.

As to the interpretation of national law, the PCIJ’s proposition was ambiguous. It should be emphasized that national law and national law interpretation are two different concepts. National law is more concerned with national law’s physical existence in the form of legal elements such as the text, the legislative history, the legislative object and purpose, the legislature, and so on. In contrast, national law interpretation is more related with mental activity in the form of legal reasoning and legal assessment made on the basis of legal elements. Therefore, from the PCIJ’s statement that ‘municipal laws are merely facts’, the conclusion cannot be drawn that the PCIJ characterized national law interpretation as fact.

In order to get some clues about the PCIJ’s position, it is necessary to analyze its statement that ‘[t]he Court is certainly not called upon to interpret the Polish law as such’. Two terms herein require attention, which are ‘called upon’ and ‘as such’. The PCIJ definitely was not ‘called upon’ to interpret national law, because according to Article 38 of the Statute of the Permanent Court of International Justice, its principal function was to apply public international law to adjudicate international disputes. It is noteworthy that the PCIJ did not unequivocally state that they would not interpret national law under any circumstances. As to the qualifier ‘as such’, it was not clear why the PCIJ selected this rhetoric. ‘As such’ might imply that the PCIJ noted they were not entitled to authoritatively interpret national law in the same way as national courts, but they might interpret national law under some exceptional circumstances. When the examination on the

75 Article 38 of the Statute of the Permanent Court of International Justice: The Court shall apply (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States. (2) International custom as evidence of a general practice accepted by law. (3) The general principles of law recognized by civilized nations. (4) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary rules for the determination of rules of law.
77 Bhuiyan, supra n. 73, 213–214.
meaning of national law requires an assessment on national law’s application and legal effect, national law’s normative character will be considered. Under this circumstance, national law is different from other facts which lack normativity. Therefore, national law interpretation may not be a pure factual question. Without discreet analysis of specific cases, any mechanic reference to the PCIJ’s ambiguous proposition on the characterization of national law interpretation is hasty.

2.3 The WTO Tribunals’ Characterization of National Law Interpretation

2.3.1 Characterization: A Question of Law

The WTO tribunals seized the first opportunity to refer to the PCIJ’s dictum about the characterization of national law interpretation in German Interests in Polish Upper Silesia. In India – Patents (US), India argued before the Appellate Body that the Panel erred in its treatment of India’s national law, because the Panel did not assess Indian law as a fact, but took it as a question of law and interpreted it. The Appellate Body made reference to Brownlie’s proposition that national law might be treated by an international tribunal in several ways, and stated that national law might serve as evidence of facts and also as evidence of compliance or non-compliance. As to the distinction between the evidence of facts and the evidence of compliance or non-compliance, the Appellate Body directly quoted the PCIJ’s dictum to support the distinction. The Appellate Body’s original statement is as follows:

It is clear that an examination of the relevant aspects of Indian municipal law ... is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to

78 Ibid, 216.
79 This is the first case concerned with the characterizations of national law and national law interpretation in the WTO dispute settlement.
80 AB Report, India – Patents (US), WT/DSS0/AB/R, para. 64.
81 Ibid, para. 65.
make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law ‘as such’; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement.\footnote{Ibid.}

There was a flaw in the Appellate Body’s statement. It was the method of the Panel’s assessment of Indian law that was appealed by India. However, from the words of ‘solely for the purpose of’, it was from the perspective of purpose that the Appellate Body defended the Panel’s approach. In fact, the Appellate Body did not substantively address India’s accusation. In addition, the Appellate Body copied the PCIJ’s expression of ‘not...interpret Polish law as such’ and stated ‘the Panel was not interpreting Indian law ‘as such’’. The Appellate Body did not analyze the substance of the PCIJ’s expression or scrutinize whether the PCIJ’s proposition held water. In other words, the Appellate Body mechanically referred to the PCIJ’s proposition and took it as a convenient refuge to refute India’s accusation. The question whether the Panel actually interpreted Indian law was not solved.

The Appellate Body’s jurisprudence in \textit{India – Patents (US)} was quoted by the subsequent WTO tribunals. In \textit{US – Section 301 Trade Act}, when the Panel was examining the US national law’s consistency with WTO law, it referred to the Appellate Body’s jurisprudence and also developed the jurisprudence. The Panel considered that they were interpreting relevant provisions of WTO law, rather than interpreting ‘US law “as such”’.\footnote{The Panel stated: ‘In this case, too, we have to examine aspects of municipal law, namely Sections 301 – 310 of the US Trade Act of 1974. Our mandate is to examine Sections 301 – 310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in \textit{India – Patents (US)}, interpret US law ‘as such’, the way we would, say, interpret provisions of the covered agreements.’ See Panel Report, \textit{US – Section 301 Trade Act}, WT/DS152/R, para. 7.18.} The Panel further stated that they would establish
the meaning of US law as factual elements and their conclusion about the meaning of US law was factual findings.\textsuperscript{84} So in this case, the Panel characterized national law and national law interpretation as questions of facts.

In the subsequent case of \textit{US – Section 211 Appropriations Act}, the Appellate Body developed its jurisprudence in \textit{India – Patents (US)}, and distinguished the scenarios in which national law served as evidence of facts from those in which national law served as evidence of compliance or noncompliance with international obligations. The Appellate Body explicitly pointed out that an assessment of national law for the purpose of determining its consistency with international obligations was a legal question and within the scope of appellate review.\textsuperscript{85} Therefore, in the context of WTO dispute settlement, national law interpretation was characterized as a legal question. This jurisprudence has been consistently followed in the subsequent cases.\textsuperscript{86}

Furthermore, the Appellate Body distinguished the characterization of national law interpretation from that of legal elements, which are used to assess the meaning of national law. In \textit{China – Publications and Audiovisual Products}, the Appellate Body, on the one hand, restated that national law interpretation was subject to

\textsuperscript{84} The Panel stated that ‘[w]e are, instead, called upon to establish the meaning of sections 301 – 310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations ... It follows that in making factual findings concerning the meaning of Sections 301 – 310 we are not bound to accept the interpretation presented by the US.’ Ibid.

\textsuperscript{85} The Appellate Body stated that ‘the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or noncompliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel’s assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.’ See Appellate Body Report, \textit{US – Section 211 Appropriations Act}, WT/DS176/AB/R, paras. 105–106.

\textsuperscript{86} For example, in \textit{China – Auto Parts}, as regards the US claim that a panel’s interpretation of national law was a factual question in WTO dispute settlement, the Appellate Body quoted its jurisprudence in \textit{US – Section 211 Appropriations Act} and restated that national law interpretation was a question of law. Appellate Body Report, \textit{US – Auto Parts}, WT/DS339/AB/R, paras. 224–225 and footnote 308.
appellate review, and on the other hand, stated that the evidence of how a national law was applied, the opinions of experts, administrative practice, or pronouncements of domestic courts, was a factual matter.

In conclusion, in the early period of WTO dispute settlement, the WTO tribunals did not make a clear proposition on the characterization of national law interpretation. They were cautious in dealing with the issue of national law and attempted to promote the legitimacy of their decisions by reference to the PCIJ’s dictum. In US – Section 301 Trade Act, the Panel used to characterize national law interpretation as a question of fact. Nevertheless, since US – Section 211 Appropriations Act, the WTO tribunals have been confident and consistently characterized national law interpretation as a question of law.

2.3.2 Analysis of the Characterization

With regard to the characterization of national law interpretation before WTO tribunals, according to the parameters underlying law/fact distinction which have been expounded in Section 2.11, it is not qualified as a pure legal question. First, since the WTO adjudicators are ‘international judges’ and come from different countries, national law and its interpretation are not supposed to be within the WTO judicial notice. Second, the WTO adjudicators’ interpretation of national law is for the WTO dispute settlement only, and do not have precedential values for the legislating states. Therefore, the issue of national law interpretation bears the characteristics of a question of fact. The ensuing question is whether the characterization has been manipulated by the WTO tribunals so as to enable the Appellate Body to review the panels’ national law interpretation. In order to answer this question, it is necessary to scrutinize how the issue of national law interpretation is pleaded and how the meaning of national law is established. The following text will examine the pleading and proof of national law interpretation, and the deferential issue involved in the process of interpretation of national law.

87 Appellate Body Report, China – Publications and Audiovisual Products, para. 177.
88 Ibid.
89 According to Article 17.6 of the DSU, the appellate review is limited to the questions of law. So if national law interpretation is characterized as a question of fact, the Appellate Body shall not have authority to review it.
2.3.2.1 Pleading and Proof

A notable fact is that whether the Members’ judiciary has correctly interpreted national law is not within the scope of the WTO dispute settlement. In other words, how national law should be interpreted in the context of national law is not admitted to the WTO tribunals. The dispute on national law interpretation before WTO tribunals is how national law should be interpreted in the context of WTO law, and the WTO tribunals’ adjudication on national law interpretation is for the dispute settlement only. The pleading of national law interpretation is not independent, but dependent on the pleading of national law with regard to its consistency with WTO law.

From the perspective of pleading and proof, national law interpretation in the WTO dispute settlement is treated as a question of fact. The WTO tribunals do not have the obligation to investigate or solicit expert opinions on the meaning of national law. The party who asserts that another party’s national law is inconsistent with WTO law, bears the burden of introducing evidence and proving the meaning of national law. \(^90\) Specifically, if the claimant accuses that the respondent’s national law is inconsistent with relevant obligations under WTO law, the claimant bears the burden of proving its accusation. The respondent may claim its national law provides something different from what the complainant accuses. However, the respondent may wait and watch until the claimant has furnished adequate evidence to raise a presumption that its accusation about the respondent’s national law is sound. \(^91\) If the claimant is successful in raising the presumption, the respondent bears the burden to prove its national law means something else. Thus, any party is responsible to prove what it claims.

As to the forms of proof, the WTO tribunals are open to accept different types of

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\(^91\) Bhuiyan, *supra* n. 73, 210–211.
evidence, which include the text of national law, legislative intent, relevant laws, statements of the representatives, decisions of domestic courts, and so on.\textsuperscript{92} Regarding the weight given to different forms of evidence, it is difficult to conclude which evidence is more important. The text of national law is the starting point for national law interpretation, but the text alone may not establish the meaning of national law unless the meaning and content of national law is clear on its face.\textsuperscript{93} The WTO tribunals enjoy a margin of discretion in weighing different forms of evidence and their assessment is not limited exclusively to the text of national law.\textsuperscript{94} For example, in \textit{US – 1916 Act}, in order to decide whether the US 1916 Anti-Dumping Act fell within the scope of the WTO Anti-Dumping Agreement, the Panel stated that they would look at all relevant aspects of national law, and they consecutively examined the text of the 1916 Act, the US case law, and the historical context and legislative history.\textsuperscript{95} In a word, the WTO tribunals are passive in seeking evidence to prove the meaning of national law, but they are active in making a balanced assessment of all the evidence.

\textsuperscript{92} In \textit{US – Carbon Steel}, as to the forms of proof about national law interpretation, the Appellate Body stated as follows: ‘The Party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.’ Appellate Body Report, \textit{US – Carbon Steel}, WT/DS213/AB/R, para. 157.


\textsuperscript{94} The Appellate Body in \textit{Dominican Republic –Cigarettes} stated: we agree with Honduras that consideration of the express wording of the text of legislation establishing a measure is a fundamental element of an assessment of that legislation. That said, however, we see no merit in the proposition advanced by Honduras that a panel must limit itself, in considering a claim against legislation as such, exclusively to the wording of legislation itself. Indeed, in \textit{US – Carbon Steel}, the Appellate Body recognized that different types of evidence may support assertions as to the meaning and scope of an impugned measure. A panel enjoys a margin of discretion in weighing such evidence, commensurate with its role as trier of fact. Appellate Body Report, \textit{Dominican Republic – Import and Sale of Cigarettes}, WT/DS302/AB/R, para. 112.

2.3.2.2 Deference

Deference is an important issue with respect to the characterization of national law interpretation. A deferential standard is usually employed when reviewing a question of fact; while a non-deferential standard, *de novo*, is applied when reviewing a question of law. 96 According to the WTO tribunals’ characterization of national law interpretation - a question of law - little deference should be paid to the legislating states. A crucial question is whether the WTO tribunals have actually attributed little deference to the legislating states. In order to answer this question, six cases are selected and will be examined. These cases are divided into two categories: one category is about the cases in which the legislating states won on the points about their own interpretation of national law, and the other category of the cases are those in which the legislating states lost on their interpretation of national law. By examining these two categories of cases, the interplay among ‘deference’, ‘characterization of national law’ and ‘adjudication result’ will be revealed.

A. Deference in the Cases in Which the Legislating States Won

In *US – Section 301 Trade Act*, the EC accused Section 304 of the US Trade Act of 1974 mandated the US Trade Representative (USTR) to make a ‘unilateral’ determination on whether another WTO Member had violated US rights under the WTO prior to exhaustion of DSU proceedings, which was against Article 23.2(a) of the DSU. 97 The Panel examined the language of Section 304, a Statement of Administrative Action (SAA), the US statements before the Panel, and the USTR practice under Section 304. It concluded that Section 304 was discretionary and might create the presumption violation; 98 however, the SAA, as an important interpretative element in the construction of the statutory language of Section 304, together with the statements made by the US, could curtail the discretion under Section 304 so as to remedy any inconsistency with the DSU. 99 Thus the

98 Ibid, paras. 7.31-7.61.
Panel found that Section 304 was not inconsistent with Article 23.2(a) of the DSU. In this case, the Panel heavily relied on the US’ representations. It is notable that before the Panel’s examination of Section 304, the Panel stated ‘any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law.’ In this case, the Panel characterized the interpretation of US law as a factual question and actually attributed deference to the US’ representations. Had deference not been granted, Section 304 might have been found inconsistent with the DSU. Nevertheless, the Panel was discreet in deciding to give deference to the US’ representations, because the Panel took into account that the representations were ‘solemnly made’ and the representatives ‘had full powers to make such representations’. Therefore, the Panel did not blandly provide deference to the US.

In *Canada – Pharmaceutical Patents*, the EC complained that Section 55.2(1) of the Canadian Patent Act imposed *de jure* discrimination against pharmaceuticals. The EC raised two distinct allegations of discrimination from the perspectives of the legislative history and the actual effects of Section 55.2(1). Canada defended the legality of Section 55.2(1) on the basis of the text, relevant case-law and formal declaration made on the interpretation of Canadian law.

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100 The Panel stated: The representations and statements by the representatives of the US appearing before us were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel’s second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect. We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. Panel proceedings are part of the DSU dispute resolution process. It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSU, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could be presumed. Ibid, paras. 7.122–7.123.

101 Ibid, para. 7.19.

102 The Panel stated that ‘[w]e are, instead, called upon to establish the meaning of Sections 301-310 as factual elements’. Ibid, para. 7.18.

103 The parties did not appeal the Panel’s findings, so the Panel’s findings were final for this case.

104 Neither party appealed the Panel’s findings.


106 Ibid, para. 7.96.
law. The Panel provided deference to the Canada’s representations and held that the EC failed to present sufficient evidence to establish its claim. In essence, it was the EC’s failure to satisfy the burden of proof that resulted in the deference given to Canada. This case reflects that in the circumstance where there is any suspicion or uncertainty about the meaning of national law at issue, the dispute shall be resolved in favor of the sovereignty of the legislating state.

In US – Hot-Rolled Steel, Japan claimed that the captive production provision of Section 711(7)(C)(iv) of the US Tariff Act of 1930 was, on its face, inconsistent with relevant articles of the Anti-Dumping Agreement. The issue was whether the US could require the US International Trade Commission (USITC) to ‘focus primarily’ on the merchant market in its analysis of market share and of factors involving financial performance, and thus the interpretation of ‘shall focus primarily’ in the US law was the key to this issue. The Panel examined the ordinary meaning of ‘focus’ and ‘primarily’, and the context of the provision. In addition, the Panel also took into account the Statement of Administrative Action (SAA) as to the interpretation of the provision. The Panel concluded that the captive production provision was not as such inconsistent with the Anti-Dumping Agreement.

The Appellate Body noted that the US explained the meaning of the words ‘shall focus primarily’ in a variety of ways and the interpretation of the captive production provision was not definite as a matter of US law. It further noted that

107 Ibid, paras. 7.97, 7.99.
108 The Panel stated that ‘the Panel took note that its finding of conformity on this point was based on a finding as to the meaning of the Canadian law that was in turn based on Canada’s representations as to the meaning of that law, and this finding of conformity would no longer be warranted if, and to the extent that, Canada’s representations as to the meaning of that law were to prove wrong.’ Ibid, para. 7.99.
112 Ibid, para. 186.
113 Ibid, para. 187.
the captive production provision was discretionary and did not mandate the USITC to attach special weight to the state of the merchant market in the final determination.\textsuperscript{115} The Appellate Body reviewed the explanations made by the US as to the interpretation of the provision, and concluded ‘if and to the extent that it is interpreted with our reasoning’, the captive production provision was as such consistent with the Anti-Dumping Agreement.\textsuperscript{116} In this case, the Appellate Body relied explicitly on responses and statements given by the US to the questions posed by the Panel and the Appellate Body,\textsuperscript{117} and provided deference to the US. It seems the Appellate Body was not confident of its conclusion about the interpretation of the provision, considering its statement of ‘if and to the extent that it is interpreted with our reasoning’. The Appellate Body’s approach to national law interpretation in this case is consistent with the Panel’s approach in Canada – Pharmaceutical Patents, in the aspect that the suspicion or uncertainty about the meaning of national law was resolved in favor of the sovereignty of the legislating state.

In conclusion, as for the cases in which the legislating states won on the points of their interpretations of national law, the WTO tribunals did provide deference to the legislating states. A common characteristic in those cases was that national laws at issue were not mandatory, but rather discretionary. Thus those national laws left room for WTO-consistent interpretation. According to the rule of burden of proof that any party bears the burden to provide proof as to its claims, it is not the legislating states’ burden to prove WTO-inconsistency of their national law. When the counterparts of the legislating states fail to establish the accusations of national law, it is nothing wrong for the WTO tribunals to adjudicate that the legislating states win.

\textsuperscript{115} Ibid, para. 203.
\textsuperscript{116} Ibid, paras. 203–208.
B. Deference in the Cases in Which the Legislating States Lost

In *India – Patents (US)*, the US argued that the current Indian system for the receipt of mailbox applications for pharmaceutical and agricultural patents was not adequate to implement its obligations under Article 70.8(a) of the TRIPS. The Panel examined the Indian legal regime, and pointed out that Indian current administrative practice about mailbox applications created a certain degree of legal insecurity, because it required Indian officials to ignore mandatory provisions of the Indian Patents Act 1970. The Panel did not consider that two Indian Supreme Court rulings provided by India upheld the validity of Indian current administrative practice, nor did it opine that India’s commitment to seek legislative changes before the expiry of transitional period could remedy legal insecurity during the transitional period. Thus the Panel concluded Indian current mailbox system was inconsistent with Article 70.8 of the TRIPS. The Appellate Body agreed with the Panel’s approach to Indian law and confirmed the Panel’s finding.

Two points are noteworthy in this case. The first point is the mandatory character of Indian Patent Act that was, on its face, inconsistent with WTO obligations. Both the Panel and the Appellate Body stressed that Indian administrative practice about mailbox application could not cure WTO-inconsistency of Indian Patent Act, thus they refused to give the benefit of doubt regarding the status of Indian mailbox system under Indian law. The second point is that India appealed the Panel’s application of the burden of proof in assessing Indian national law. India argued the US merely raised ‘reasonable doubts’ about a violation of TRIPS before the burden shifted to India. The Appellate Body turned to the mandatory character of Indian Patent Act to confirm that the US had provided adequate

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118 Panel Report, *India – Patents (US)*, WT/DS50/R, para. 2.3.
119 Ibid, para. 7.35.
120 Ibid, paras. 7.36–7.38.
121 Appellate Body Reports, *India – Patents (US)*, WT/DS50/AB/R, para. 70.
122 Ibid, para. 72.
123 Ibid, para. 73.
evidence as to its claim on the lack of legal security about Indian administrative practice.\textsuperscript{124} Therefore, the mandatory character of Indian Patent Act was critical for the WTO tribunals’ refusal of providing deference to India’s interpretation of its own law.

In \textit{EC – Trademarks and Geographical Indications (Australia)},\textsuperscript{125} Australia claimed that geographical indicates (GIs) for products originating in a third country could not be registered in the EC unless the third country met the conditions in Article 12(1) of Council Regulation (EEC) No. 2081/92 of 14 July 1992 (Regulation), which required the third country to have adopted a system equivalent to that in the EC and this was contrary to WTO obligations.\textsuperscript{126} The Panel examined the text of Article 12,\textsuperscript{127} the relative provisions in the Regulation,\textsuperscript{128} and the preamble to the Regulation and the April 2003 amending Regulation,\textsuperscript{129} took into account the statements made by executive authorities of the EC which contained interpretations of the Regulation,\textsuperscript{130} and noted there was absent of relevant case-law that might support EC’s interpretation.\textsuperscript{131} Finally, the Panel concluded that the meaning and content of the Regulation, together with the amending Regulation, on their face, supported Australian claim.\textsuperscript{132}

One interesting point in this case is that both parties referred to the EC statements. On the one hand, Australia presented various EC statements about interpretations of the Regulation, and one of them was given weight by the Panel.\textsuperscript{133} The Panel held that the statement by the EC in September 2002 to the Council for TRIPS

\textsuperscript{124} Ibid, para. 74.
\textsuperscript{125} This case was not appealed.
\textsuperscript{126} Panel Report, \textit{EC – Trademarks and Geographical Indications (Australia)}, WT/DS290/R, para. 7.89.
\textsuperscript{127} Ibid, para. 7.113.
\textsuperscript{128} Ibid, paras. 7.117–7.118.
\textsuperscript{129} Ibid, paras. 7.119–7.124.
\textsuperscript{130} Ibid, paras. 7.127–7.137.
\textsuperscript{131} Ibid, para. 7.126.
\textsuperscript{132} Ibid, para. 7.125.
\textsuperscript{133} Ibid, para. 7.127.
(2002 Statement) was clear in its contents and official in the way it was delivered, and supported Australia’s interpretation of the Regulation.\textsuperscript{134} The EC did not agree with the weight given to 2002 Statement, because the EC opined that the intention of 2002 Statement was not primarily to explain the EC system for the protection of geographical indications and this Statement did not take into account amendments made in April 2003.\textsuperscript{135} The Panel pointed out that 2002 Statement was clear in its interpretation of the Regulation and was not incompatible with the April 2003 amending Regulation.\textsuperscript{136} On the other hand, the EC referred to a statement the EC made to the Council for TRIPS in June 2004 (2004 Statement) in the days before the first substantive meeting of this Panel.\textsuperscript{137} By such reference, the EC tried to interpret the words of ‘[w]ithout prejudice to international agreements’ of the introductory phrase of Article 12(1) to reclassify the applicability of the conditions in Article 12(1), so as to rebut Australia’s interpretation of the Regulation.\textsuperscript{138} The Panel considered even if the EC’s reference to 2004 Statement was successful in subjecting the conditions in Article 12(1) to the terms of GATT 1994 and the TRIPS Agreement, Article 12(1) still applied to the WTO Members who did not have equivalent protecting systems for GIs as that in the EC.\textsuperscript{139} Thus the Panel was not persuaded by the EC’s interpretation. Although the EC failed to rebut Australia’s claim, the Panel did provide weight to the EC’s 2002 Statement. In fact, the EC’s 2004 Statement was not consistent with its previous 2002 Statement. Therefore, it was the contradiction between the EC statements that prohibited the Panel from providing deference to the EC’s interpretation of its own law.

In \textit{China – Intellectual Property Rights},\textsuperscript{140} the parties disagreed on the proper interpretation of Article 4(1) of China’s Copyright Law. The US claimed that Article

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} Ibid, paras. 7.127–7.130.
\item \textsuperscript{135} Ibid, para. 7.131.
\item \textsuperscript{136} Ibid, para. 7.132.
\item \textsuperscript{137} Ibid, para. 7.134.
\item \textsuperscript{138} Ibid.
\item \textsuperscript{139} Ibid, para. 7.135.
\item \textsuperscript{140} This case was not appealed.
\end{itemize}
\end{footnotesize}
4(1), on its face, denied immediate and automatic protection to certain works of creative authorship.\textsuperscript{141} The Panel stated it was mindful that, ‘objectively, a Member [was] normally well-placed to explain the meaning of its own law.’\textsuperscript{142} Then, the Panel examined the text of Article 4(1), the relative articles of the Copyright Law, a letter sent from Chinese Supreme People’s Court to a provincial High People’s Court about ‘the \textit{Inside Story} case’, and a written reply from the National Copyright Administration of China to the Supreme People’s Court about the \textit{Inside Story} case,\textsuperscript{143} and supported the US’ claim.\textsuperscript{144} A major reason for the Panel’s reluctance to provide deference to China was that China’s statements as to interpretation of Article 4(1) were contradictory.\textsuperscript{145}

In conclusion, as for the cases in which the legislating states lost, the legislating states’ failure on the points of the interpretations of their own laws was not due to the WTO tribunals’ reluctance to provide deference. Their failure should be analyzed according to specific scenarios of the cases. In \textit{India – Patents (US)}, it was the mandatory character of Indian Patents Act that resulted in India’s failure. In \textit{EC – Trademarks and Geographical Indications (Australia)} and \textit{China – Intellectual Property Rights}, the same situation occurred that the legislating states’ statements about the meaning of their own laws were contradictory. The WTO tribunals were not passive in deferring to the legislating states’ interpretation of their own law, but rather making independent assessment of national law on the basis of the evidence furnished by the parties.

\textbf{2.3.3.3 Concluding Remarks}

According to the analysis of above two categories of the cases, it is visible that the WTO tribunals have indeed provided deference to the legislating states, especially

\textsuperscript{142} Ibid, para. 7.28
\textsuperscript{143} Ibid, paras. 7.34–7.51, 7.54.
\textsuperscript{144} Ibid, para. 7.50.
\textsuperscript{145} Ibid, see paras. 7.55–7.56.
under the circumstances where there is suspicion or uncertainty about the meaning of national law. As regards the relationship between ‘deference’ and ‘characterization of national law interpretation’, the WTO tribunals did not spend a lot of effort to expound it, nor did they link ‘deference’ with ‘characterization of national law interpretation’. Whether the WTO tribunals provide deference to the legislating states is determined by the overall circumstances of the dispute. They tend to provide deference to the legislating states if the national law at issue is discretionary. As for the mandatory national law that is on the face inconsistent with WTO law, the WTO tribunals are strict in requiring the legislating states to provide paramount evidence to prove the legality of national law.

It is notable that the WTO tribunals’ interpretation of national law is an independent assessment made on the basis of evidence furnished by the parties, which is not related with the question whether they should attribute deference is to the legislating state. A dilemma arises that on the one hand, the WTO tribunals characterize national law interpretation as a question of law; on the other hand, national law interpretation is pleaded and proved as a question of fact, and deference has been attributed to the legislating states under some circumstances. Therefore, in order to solve the dilemma, reconsideration about the characterization of national law interpretation is required.

2.4 Comments

The issue of characterization of national law interpretation by the WTO tribunals has important implications for the proper allocation of power between national and international levels. In other words, the characterization of national law interpretation in the WTO dispute settlement has important consequences for the legislative sovereignty of WTO Members’ parliaments, as well as for the competence of other domestic constituencies that are engaged in the

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146 Bhuiyan, supra n. 73, 11.
interpretation and application of national laws, e.g. domestic courts, administrative agencies, etc.\textsuperscript{147} If national law interpretation is characterized as a question of fact, it means the WTO tribunals should attribute more deference to the legislating states. However, if national law interpretation is characterized as a question of law, it means that the WTO tribunals may freely interpret national law and conduct a \textit{de novo} review the meaning of national law. As national law is commonly believed as within the domain of a state’s internal sovereignty,\textsuperscript{148} how could WTO Members tolerate the WTO tribunals’ intrusion into their backyard by free interpretation of their national law? The Members’ outcry over the WTO’s infringement on their sovereignty is the concern that the WTO tribunals bear in mind. That is the reason why in \textit{India – Patents (US)} the Appellate Body stated in an ambiguous way that ‘the Panel was not interpreting Indian law ‘as such’’, and referred to Brownlie’s proposition and the PCIJ’s dictum to support its approach to national law interpretation.

It is noteworthy that the PCIJ/ICJ has never explicitly characterized national law interpretation as a question of law. However, as for the Appellate Body, since the case of \textit{US - Section 211 Appropriations Act}, they have characterized national law interpretation as a question of law. Therefore, the Appellate Body’s reference to the PCIJ’s dictum cannot provide rationale for its practice any more. Why did the Appellate Body deviate from the PCIJ’s dictum? That is partly due to their different dispute settlement structures. Since the PCIJ/ICJ is of one instance, there is no problem as to whether national law interpretation is subject to appellate review. The PCIJ/ICJ has the leeway to manipulate the rhetoric to characterize the issue of national law interpretation, so as to avoid the states’ criticism of sovereignty infringement.\textsuperscript{149} In contrast, the WTO dispute settlement is of two instances, so the

\textsuperscript{147} Ibid.
\textsuperscript{149} The PCIJ/ICJ explicitly characterizes national law as a question of fact, but they have not expressed an explicit proposition on the characterization of national law interpretation.
question appears as to whether the Appellate Body is authorized to review the Panels’ findings on national law interpretation. According to Article 17.6 of the DSU, only questions of law are subject to appellate review. Thus if the Appellate Body wants to review the issue of national law interpretation, it has to characterize national law interpretation as a question of law. The Appellate Body has indeed characterized national law interpretation as a question of law and has in fact reviewed the issue of national law interpretation. However, considering the fact that national law interpretation is pleaded and proved as a question of fact, and deference is also attributed to the legislating states under some circumstances, characterizing national law interpretation as a legal question is not sensible.

As what has been analyzed in Section 2.1, to characterize a matter either as a legal question or as a factual question may not be adequate to reflect the nature of the matter. A mixed question of law and question should be employed to characterize complicated issues. National law interpretation before international tribunals is such a complicated issue, which involves both factual and legal matters. On the one hand, the evidence of the meaning of national law, such as the existence of national law, contents, legislative history and purpose, domestic courts’ interpretation of national law, administrative agencies’ application of national law, and so on, is a factual matter. On the other hand, an international court/tribunal’s assessment of the meaning of national law is a legal matter, which requires the application of the legal professionals’ inherent skills and expertise, and this mental work, in the form of assessment, is nothing different from the assessment of the meaning of international law except in the aspect of proof. From the perspective of international judges, they are supposed to know international

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150 Article 17.6 of the DSU: An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
152 Ibid.
When assessing the meaning of international law, international judges have judicial notice of international law and their knowledge about international law is internal to them; in contrast, when assessing the meaning of national law, international judges do not have judicial notice of national law, so their knowledge about national law, depending on the evidence provided by the parties, is external to them. However, as for legal interpretation, no matter whether the object of interpretation is national law or international law, a precondition is that the meaning of the law at issue is not straightforward, which causes different or contradictory understandings on the meaning. Under this circumstance, judges’ knowledge about the law at issue is limited, even for the scenario of international judges’ interpretation of international law. In addition, no matter whether international judges are interpreting international law or national law, they are, usually, not the drafters of that law, so they are neutral assessors for either international law or national law. There is something common between international law interpretation and national law interpretation, in terms of the application of judges’ inherent legal skills, legal expertise, legal sense and legal instincts. Therefore, characterizing national law interpretation as a mixed question of law and fact, does not only reflect its legal character as something common with international law interpretation, but also reflects its factual character that the proof of national law is beyond the judges’ control.

As regards the characterization of national law interpretation in the WTO dispute settlement, the WTO adjudicators may not have realized the intractable problems involved in law/fact distinction, so they fell into fixed thinking modes of characterizing a matter either as a legal question or as a factual question. In fact, the WTO tribunals’ actual approach to national law interpretation is to take it as a mixed question of law and fact. On the one hand, the WTO tribunals have applied the same rule on pleading and proof for national law with that for other facts. On

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the other hand, the Appellate Body has reviewed the issue of national law interpretation, who may be more capable of dealing with national law interpretation than the panels, especially when a panelist is a non-lawyer.\footnote{Robert Howse, ‘The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power’ in Cottier T and Mavroidis PC (eds), The Role of the Judge in International Trade Law (The University of Michigan Press 2003) 21.}

A notable problem is that no provision has authorized the WTO tribunals to interpret national law, and it is a flaw that no provision stipulates how the WTO tribunals should deal with such a sensitive issue. Given the fact that the WTO tribunals have been authorized to adjudicate the disputes about national law, in order to perform their function and effectively solve the dispute, it should be implied that they have been granted the power to interpret national law. However, such power is limited in both purpose and scope.\footnote{Bhuiyan, supra n. 73, 217.} The WTO tribunals’ interpretation of national law is for the WTO dispute settlement only, and their interpretation is not of direct effect in domestic context.\footnote{Ibid.} Meanwhile, deference should be provided to the legislating states when the meaning of national law is in suspicion or uncertainty. The WTO tribunals’ interpretation of national law, in substance, is reinterpretation of national law, on the basis of the evidence provided by the parties. Therefore, national law interpretation should be characterized as a mixed question of law and fact, a borderline between law and fact.
Chapter 3. The Methods of National Law Interpretation: A Comparison with Treaty Interpretation

In the WTO legal regime, there is no provision setting out how national law should be approached, except Article 11 of the DSU which stipulates that ‘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…’\(^1\) Therefore, if a dispute concerning the meaning of a WTO Member’s national law arises, the only guidance for the WTO tribunals to deal with national law interpretation is Article 11 of the DSU, which is to make an objective assessment of national law. It is a pity that ‘an objective assessment’ is too abstract, without any instruction on what elements should be considered or what techniques may be employed with respect to national law interpretation. However, treaty interpretation is not strange for panels and the Appellate Body. Article 3.2 of the DSU explicitly stipulates that panels and the Appellate Body should clarify the WTO agreements in accordance with customary rules of interpretation of public international law.\(^2\) As treaty interpretation and national law interpretation are both concerned with legal interpretation, it is sensible to review how the WTO tribunals deal with treaty interpretation, and make comparison about their approaches to treaty interpretation with national law interpretation. The similarities and differences drawn from the comparison

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1. Art. 11 of the DSU: Function of Panels The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

2. Art. 3.2 of the DSU: The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
will shed light on how the particular issue of national law interpretation is dealt with in the WTO dispute settlement.

This chapter is divided into three sections. Section I expounds the WTO tribunals’ approaches to treaty interpretation. Nevertheless, comments on the appropriateness about their approach are beyond this chapter. Section II examines the methods employed by WTO tribunals to interpret national law. Landmark cases are selected and examined in order to disclose the methods of national law interpretation. Section III compares the methods of national law interpretation with that of treaty interpretation. By such interpretation, the characteristics of national law interpretation will be revealed.

3.1 The Methods of Treaty Interpretation

According to Article 3.2 of the DSU, WTO panels and the Appellate Body are to interpret provisions of WTO agreements in accordance with the customary rules of interpretation of public international law.³ It is recognized by the Appellate Body that Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) are the codified ‘customary rules of interpretation of public international law’.⁴ In addition to Articles 31 to 33 of the VCLT, non-codified customary rules of interpretation of public international law are also employed by the WTO tribunals, such as the principle in dubio mitius,⁵ the principle of effective treaty interpretation,⁶ the concept of evolutionary meaning,⁷ and so on.

³ Ibid.
⁵ If the meaning of a term is ambiguous, that interpretation should be preferred which is less onerous to the party assuming an obligation. Appellate Body Report, EC – Hormones, WT/DS26/AB/R, footnote.154.
3.1.1 Codified Principles of Treaty Interpretation: Articles 31-33 VCLT

Articles 31 to 33 of the VCLT, drafted by the International Law Commission (ILC), codified the basic principles of treaty interpretation, on which there was general consensus among states. They respectively cover ‘general rule of interpretation’, ‘supplementary means of interpretation’ and ‘interpretation of treaties authenticated in two or more languages’. According to the ILC, Article 31 VCLT was authentic means of interpretation, compared with Article 32 VCLT which was supplementary means of interpretation, so there was a limited hierarchy

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9 Art. 31 General rule of interpretation
1. A treaty shall 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
10 Article 32 Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.
11 Art. 33 Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.
between Article 31 VCLT and Article 32 VCLT. As for Article 31 VCLT per se, it should be read as a whole and no legal hierarchy existed among the elements of interpretation herein; it was ‘considerations of logic’ that guided the ILC to arrange the elements of interpretation in Article 31 VCLT in such order: ‘text’, ‘context’, and ‘subsequent agreement’ and ‘subsequent practice’. As for Article 33 VCLT, the ILC considered that efforts should be made to reconcile the texts of the treaties authenticated in different languages; therefore, harmonious interpretation was preferred. In fact, to a large extent, WTO panels and the Appellate Body follow the ILC’s approach to treaty interpretation, which is to employ a holistic approach to treaty interpretation provided by Article 31, refer to supplementary means of interpretation provided by Article 32 VCLT when there is doubt as to the meaning obtained on the basis of Article 31 VCLT, and try to make harmonious interpretation according to Article 33 VCLT with respect to the treaty in different authentic languages.

3.1.1.1 Article 31 VCLT: A Holistic Approach to Treaty Interpretation

The WTO tribunals have adopted a textual approach to treaty interpretation and generally adhere to a holistic approach contained in Article 31 VCLT. ‘General rule of interpretation’ set out in Article 31 VCLT was taken as the basic principle of interpretation ‘that the words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose’. More specifically, ‘the elements referred to in Article 31 - text, context and object-and-purpose as well as good faith - are to be viewed as one

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13 Van Damme, supra n. 8, 620.
14 See International Law Commission, supra n. 12.
15 Ibid, 225.
holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.'

It is notable that, in some cases, WTO panels and the Appellate Body deviated from the holistic approach, and applied a sequential approach by overreliance on the text and reducing the importance of the purpose and object of a treaty. For instance, in *US – Shrimp*, the Appellate Body stated ‘[w]here the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.’

It is obvious that the Appellate Body considered the object and purpose of a treaty as inferior to the text, and would secondly took into account the object and purpose only when the meaning of the text was unclear. In *EC – Chicken Cuts*, the Panel followed the Appellate Body's approach in *US – Shrimp* and stated ‘the object and purpose should be considered after the treaty interpreter has determined the meaning of the words constituting the treaty obligation in question when read in their context.’

In *US – Gambling*, when the Appellate Body was examining whether ‘online gambling and betting services’ was within the category of ‘other recreational services’ or ‘sporting services’ of the United States’ Schedule to the GATS, it turned to the object and purpose of the GATS only when it considered an examination of the term ‘other recreational services (except sporting)’ could not solve the problem.

Scholar Federico Ortino described the Appellate Body’s behavior as follows: ‘since the ‘text’ and ‘context’ are not helpful, let us look at the ‘object and purpose’.’

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Further attention should be paid to the Appellate Body’s endorsement of the holistic approach to treaty interpretation. In *US – Continued Zeroing*, the Appellate Body explicitly the importance of insisting on a holistic approach.\(^\text{23}\) In a recent case *China – GOES*, when the Appellate Body was interpreting Article 3.2 of the *Anti-Dumping Agreement* (ADA) and Article 15.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), it first examined the framework of and the logic among the paragraphs of Article 3 of the ADA and Article 15 of the SCM Agreement,\(^\text{24}\) and then examined the text and context of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, in conjunction with the objective of Articles 3 and 15 discerned from the paragraphs thereunder.\(^\text{25}\) The Appellate Body was indeed employing a holistic and integrated approach to treaty interpretation on the basis of general rule of interpretation contained in Article 31 VCLT.

As for the holistic approach adopted by the WTO tribunals, one feature is their frequent recourse to dictionaries to examine the ordinary meanings of a term, which was criticized by some scholars that the Shorter Oxford Dictionary had become one of the covered agreements.\(^\text{26}\) In fact, the Appellate Body noted the limitations of the dictionaries and stated again and again that ‘dictionary meanings

\(^{23}\) The Appellate Body stated: The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. Nor do multiple meanings of a word or term automatically constitute ‘permissible’ interpretations within the meaning of Article 17.6(ii). Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise. Appellate Body Report, *US – Continued Zeroing*, WT/DS350/AB/R, para.268.


\(^{25}\) Ibid, para.154.

leave many interpretive questions open’. 27 Furthermore, it pointed out that equating the ‘ordinary meanings’ with the meaning of words as defined in dictionaries was too mechanical. 28 In a recent case US – Anti-Dumping and Countervailing Duties, when the Appellate Body was interpreting the term of ‘public body’ in Article 1.1(a)(1) of the SCM Agreement, it pointed out that potential meanings provided by dictionary definitions regarding the term of ‘public body’ were rather broad, 29 and successively examined the meaning of ‘public body’ in its context, the object and purpose of the SCM Agreement, 30 and relevant articles in the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts as ‘relevant rules of international law’ in accordance with Article 31(3)(C) VCLT. 31 Therefore, the criticisms on the WTO tribunals’ overreliance on dictionaries may not accurately reflect their jurisprudence. 32

3.1.1.2 Article 32 VCLT: Supplementary Means of Interpretation

Compared with Article 31 VCLT, Article 32 VCLT is strictly secondary. 33 According to the text of Article 32 VCLT, it is limited to circumstances where the application of Article 31 VCLT ‘leaves the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’. 34 According to the Appellate Body, if the meaning of a term is clear after application of Article 31 VCLT, it does not need

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31 Ibid, paras.304, 305.
32 See Van Damme, supra n. 8, 624.
34 See Art.32 VCLT, supra n. 10.
to resort to Article 32 VCLT;\textsuperscript{35} in contrast, if the meaning is ambiguous, it is appropriate and necessary to turn to Article 32 VCLT.\textsuperscript{36}

As for the supplementary means of interpretation, Article 32 VCLT does not define them exhaustively. The Appellate Body in \textit{EC – Chicken Cuts} posited that Article 32 VCLT ‘states only that they \textit{include} the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.’\textsuperscript{37} In \textit{EC – Hormones}, the Appellate Body applied the interpretative principle of \textit{in dubio mitius} as a ‘supplementary means of interpretation’.\textsuperscript{38} It seems the WTO tribunals may employ any relevant instrument to interpret the term in dispute according to Article 32 VCLT. In this aspect, the Appellate Body made the following clarifications regarding the relevance of a circumstance that is qualified as a supplementary means of interpretation:

\begin{quote}
In our view, the relevance of a circumstance for interpretation should be determined on the basis of objective factors, and not subjective intent. We can conceive of a number of objective factors that may be useful in determining the degree of relevance of particular circumstances for interpreting a specific treaty provision. These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted;
\end{quote}

and whether or how it was used or influenced the negotiations of the treaty.\textsuperscript{39}

It is noteworthy that the circumstances of conclusion of the treaty, especially negotiating history, are quite often used as supplementary means of interpretation. For example, in \textit{EC – Computer Equipment}, when the Appellate Body was interpreting the EC’s Schedule LXXX, it considered the Panel erred in not examining the \textit{Harmonized System} and its \textit{Explanatory Notes} as the historical background against which the EC’s Schedule LXXX was negotiated.\textsuperscript{40} In \textit{US – Export Restraints}, the Panel examined the negotiating history of Article 1 of the \textit{SCM Agreement} when interpreting the term of ‘financial contribution’.\textsuperscript{41} In \textit{China – Audiovisual Services}, the Appellate Body confirmed that the Panel was correct in examining certain circumstances of the conclusion of the treaty when interpreting the term of ‘Sound recording distribution services’ in China’s GATS Schedule.\textsuperscript{42}

In all, recourse to Article 32 VCLT is not mandatory and ‘supplementary material does not have the same weight as the material of the agreement itself’.\textsuperscript{43} The major function of Article 32 VCLT is to confirm the meaning of a term discerned from the application of Article 31 VCLT.

\textbf{3.1.1.3 Article 33 VCLT: Harmonious Interpretation Concerning Plurilingual Treaties}

According to the \textit{Agreement Establishing the World Trade Organization}, authentic texts of WTO agreements in English, French and Spanish languages are equally authentic,\textsuperscript{44} which was respected by the Appellate Body.\textsuperscript{45} Article 33 VCLT is

\textsuperscript{40} See Appellate Body Report, \textit{EC – Computer Equipment}, WT/DS62/AB/R, paras.86, 89.
\textsuperscript{44} The final clause of the \textit{Agreement Establishing the World Trade Organization}: DONE at Marrakesh.
employed by WTO panels and the Appellate Body to deal with the interpretation regarding the same term in different authentic texts, and therefore the spirit of harmonious interpretation underlying Article 33 VCLT is respected in the WTO jurisprudence.

In *India – Quantitative Restrictions*, when the Panel was interpreting the word of ‘thereupon’ in the Ad Note to Article XVIII:11 of the *GATT 1994*, it considered ‘immediately’ was the most appropriate meaning and that interpretation was consistent with the Spanish and French versions of the Agreement.\textsuperscript{46} In *Chile – Price Band System*, the Appellate Body considered the Panel erred in interpreting the Spanish and French versions of the term of ‘ordinary customs duty’ to mean something different from the ordinary meaning of English version of that term, because the Panel’s interpretation was inconsistent with the rule of interpretation codified in Article 33(4) VCLT which stipulated that the meaning that best reconciled the authentic texts should be adopted.\textsuperscript{47} In a recent case *China – Auto Parts*, when the Panel was interpreting the term of ‘on their importation’ in Article II:1(b) of the *GATT 1994*, it hesitated to determine whether the term carried ‘a temporal connotation’ or ‘a relational one’.\textsuperscript{48} Therefore, the Panel examined the term in French and Spanish texts, followed the Appellate Body’s jurisprudence that the same terms of a treaty were presumed to have the same meaning in each authentic text and the meaning that simultaneously gave effect to all the terms of the treaty in each authentic language should be preferred, and concluded the only ‘simultaneous’ ordinary meaning of ‘on’ in each authentic text indicated that ‘on their importation’ was proximate to ‘a temporal meaning’.\textsuperscript{49}

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\textsuperscript{46} Panel Report, *India – Quantitative Restrictions*, WT/DS90/R, para.5.196.  
\textsuperscript{49} Ibid, para.7.165.
Therefore, when the meaning of a term is ambiguous, the WTO tribunals may refer to each authentic text to get a joint meaning shared by different texts pursuant to the rule of interpretation stipulated in Article 33 VCLT. As for the different meanings that appear in different authentic texts, harmonious and consistent interpretation is required.

3.1.2 Non-Codified Principles

In addition to the principles of interpretation codified in Articles 31 to 33 VCLT, the WTO tribunals have equally applied the principles of interpretation which are not codified in the VCLT (non-codified principles). That signals a more flexible approach to treaty interpretation. The application of non-codified interpretative principles, such as the principle in dubio mitius, the principle of effective treaty interpretation, the concept of evolutionary meaning, is going to be introduced as follows.

In Dubio Mitius

In EC – Hormones, the Appellate Body took the principle in dubio mitius as a ‘supplementary means of interpretation’. As for the Panel’s interpretation of Article 3.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Appellate Body considered the Panel erred in ‘read[ing] Article 3.1 as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations’, because the Panel’s interpretation was inconsistent with the principle of in dubio mitius, which required that the meaning of less onerous to the

50 Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (Oxford University Press, 2009), 56.
51 See Van Damme, supra n. 8, 635.
party assuming an obligation should be preferred regarding the ambiguous meaning of a term.\(^53\)

It seems only in *EC – Hormones*, the Appellate Body supported the application of *in dubio mitius*. In subsequent cases, such as in *US – Line Pipe*, the United States claimed the Panel disregarded the principle *in dubio mitius* when interpreting Article 2.1 of the *Agreement on Safeguards*,\(^54\) while, the Appellate Body did not address this point and interpreted Article 2.1 on the basis of Articles 31-33 VCLT.\(^55\)

In *China – Audiovisual Services*, China claimed that the Panel should have applied the principle *in dubio mitius* to interpret China’s GATS commitment on ‘Sound recording services’,\(^56\) while, the Appellate Body stated ‘even if the principle of *in dubio mitius* were relevant in WTO dispute settlement, there is no scope for its application in this dispute’.\(^57\) Therefore, the prospect for the application of *in dubio mitius* is unclear in WTO dispute settlement, and it is noteworthy that *in dubio mitius* has been criticized as a threat to the future of international law.\(^58\)

Principle of Effective Treaty Interpretation

The principle of effective treaty interpretation has been frequently used by WTO panels and the Appellate Body. As early as in the first case adjudicated by the Appellate Body, the following statement was made: ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.’\(^59\) That jurisprudence was followed by the

\(^{53}\) Ibid, para.165.


\(^{55}\) Ibid, paras.134-177.


\(^{57}\) Ibid, 411.


Appellate Body in subsequent cases.\textsuperscript{60} In \textit{US – Offset Act}, the Appellate Body explicitly stated that ‘the internationally recognized interpretative principle of effectiveness should guide the interpretation of the \textit{WTO Agreement}’.\textsuperscript{61} According to this principle, not only every term of a treaty must be given a meaning, but also that all WTO covered agreements must be read as an inseparable package and interpreted harmoniously.\textsuperscript{62}

The principle of effective treaty interpretation usually accompanies the application of other interpretative principles.\textsuperscript{63} The Appellate Body considered this principle flowed from the general rule of interpretation set out in Article 31 VCLT and agreed with the ILC’s position that ‘[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.’\textsuperscript{64} The Panel in \textit{US – Gambling} also stated that the requirement of ‘good faith’ interpretation underlying Article 31 VCLT could be correlated with the principle of effective treaty interpretation and all terms of a treaty must be given a meaning.\textsuperscript{65}

In addition to the principles of in dubio mitius and effective treaty interpretation, the WTO tribunals apply other non-codified interpretative principles, such as the concept of evolutionary meaning,\textsuperscript{66} the principle of legitimate expectations,\textsuperscript{67} and so on. It is hasty to conclude whether non-codified interpretative principles is


\textsuperscript{62} Appellate Body Report, \textit{Argentina – Footwear (EC)}, WT/DS121/AB/R, para.81.

\textsuperscript{63} Van Damme, \textit{supra} n. 8, 638.


\textsuperscript{66} See Van Damme, \textit{supra} n. 8.

secondary or inferior to the codified interpretative principles set out in Articles 31-33 VCLT, because non-codified principles may be qualified as general customary international law and are usually simultaneously applied in conjunction with codified principles.

3.2 The Methods of National Law Interpretation

In order to disclose the WTO tribunals’ methods of national law interpretation, the following text will examine relevant WTO cases, which are India – Patents, US – 1916 Act, US – Section 301 Trade Act, and China – Auto Parts. The reason of selecting these cases is that in these cases, the issue of interpretation of national law arises from the disputes regarding different WTO covered agreements. India – Patents is concerned with Trade-Related Aspects of Intellectual Property Rights (TRIPs), US – 1916 Act is concerned with Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA), US – Section 301 Trade Act is concerned with Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and China – Auto Parts is concerned with General Agreement on Tariff and Trade 1994 (GATT 1994). As these cases are related with different WTO covered agreements, whether the WTO tribunals may adopt different approaches to deal with national law interpretation will be uncovered.

3.2.1 India – Patents (US)

Panel Proceedings

In India – Patents (US), one issue in dispute was whether the current India system for the receipt of mailbox applications for pharmaceutical and agricultural patents was adequate to implement its obligations under Article 70.8(a) of the TRIPS. In order to honor that obligation, the President of India promulgated the Patents (Amendment) Ordinance 1994 (the Ordinance) to amend the Patents Act 1970 to
provide a means for the filing and handling of the applications for pharmaceutical and agricultural patents on 31 December 1994. However, the Ordinance lapsed on 26 March 1995, and a Patents (Amendment) Bill 1995 that was intended to give permanent legislative effect to the Ordinance failed to pass the Rajya Sabha (Upper House) and therefore lapsed with the dissolution of the 10th Lok Sabha (Lower House).

The United States, as the complainant, argued that, with the lapse of the Ordinance, no formal mailbox system existed in India. According to Sections 5, 12 and 15 of the Patents Act 1970, once the application for pharmaceutical and agricultural patents was filed with the Patent Office, the Controller should forward the applications to the examiners who would ultimately reject them for unpatentable subject matter. The United States stated, without cancellation of the automatic forwarding and rejecting mechanism and changes to the legislation, India failed to comply with Article 70.8 of the TRIPS.

India responded that, although the Ordinance had lapsed, it administratively continued to receive applications for pharmaceutical and agricultural patents and was deferring their examination. India stated that the Executive had such power to act in accordance with Article 73(1)(a) of the Indian Constitution and two Supreme Court opinions supported this point. Meanwhile, in order to prove the sound operation of the Indian mailbox system, India provided the number of applications received from the United States’ companies under its filing system for pharmaceutical and agricultural patents.

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68 Panel Report, India – Patents (US), WT/DS50/R, para. 2.3.
69 Ibid, para. 2.5.
70 Ibid, para. 4.1.
71 Ibid, para. 4.3.
72 Ibid, para. 4.6.
73 Ibid, para. 4.8.
The Panel firstly analyzed the nature of the obligations under Article 70.8 and concluded that in order to determine whether India had taken the action necessary to implement its obligations, they ‘need to examine whether the current Indian system for the receipt of mailbox applications can sufficiently protect the legitimate expectations of other WTO Members as to the competitive relationship between their nationals and those of other Members, by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications.’

Secondly, the Panel examined the mechanism for implementing the obligations. The Panel did not question Indian prerogative to choose the means of implementing its obligations under Article 70.8, and stated that the lapse of the Ordinance did not automatically mean India failed to comply. It was stressed that India was obligated to ensure the legal security and predictability for patent applications from other WTO Members under Article 70.8. In particular, the Panel examined relevant legislation, Section 12(1) and 12(2) of the Patents Act 1970, and held that the nature of those sections was mandatory in that they required the Controller to refer the patent applications to an examiner and required the examiner to reject the patent applications for pharmaceutical and agricultural products due to the lack of patentability. Therefore, the Panel concluded that there was a certain degree of legal insecurity considering the mandatory character of the regulation. What is more, the Panel posited that the legal insecurity was further compounded by the lapse of the Ordinance. Next, the Panel analyzed the legal insecurity that might arise from judicial orders sought by a competitor for the rejection of patent applications. As regards the evidence of two Supreme Court opinions submitted by India, the Panel thought that evidence could only prove

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74 Ibid, para. 7.31.
75 Ibid, para. 7.33.
76 Ibid, para. 7.35.
77 Ibid, para. 7.36.
that Indian administrative practice with respect to the handling of pharmaceutical and agricultural pent applications was not unconstitutional, and could not prove that the administrative practice would be supported by a court, given its apparent contradiction with mandatory legislation. As for India’s commitment to make legislative changes before the end of the transitional period available to it, considering that there was no sufficient legal basis for preserving novelty and priority, the Panel insisted that doubt on the eligibility of patent protection would remain during the transitional period. The Panel also examined the evidence of actual number of patent applications for pharmaceutical and agricultural products submitted by India. The Panel considered that the people applied for patent protection would be more than that number if there had been an appropriate mailbox application system. Finally, the Panel found Indian mailbox system lacked legal security and failed to comply with Article 70.8.

Appellate Body Proceedings

On appeal, India argued the Panel did not assess the Indian law as a fact, but directly interpreted Indian law, which was against the approach that previous panels adopted regarding the issues of national law. India insisted that the benefit of doubt regarding its mailbox system should be given to India and much more deference should be provided to the Indian authorities’ interpretation of its own law.

The United States did not directly argue whether it was appropriate for the Panel to take Indian law as fact or interpret Indian law, but rebutted that the Panel had properly applied burden of proof and standard of review regarding the assessment.

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78 Ibid, para. 7.37.
79 Ibid, para. 7.38.
80 Ibid, para. 7.39.
of the consistency of Indian law with Article 70.8 of TRIPS. The United States stated that giving India the benefit of doubt regarding Indian authorities’ interpretation of their own law did not mean accepting their interpretation unquestionably and India’s argument was not consistent with ‘an objective assessment’ required by Article 11 of the DSU.

The Appellate Body adopted the same approach as the Panel, firstly analyzing the obligations under Article 70.8 and then examining the operation of Indian mailbox application system. As regards whether Indian law should be taken as fact or issue of law, the Appellate Body referred to the case of *Certain German Interests in Polish Upper Silesia* from the Permanent Court of International Justice, and specified that municipal law might serve as evidence of facts and might also serve as compliance or non-compliance with international obligations. It is a pity that the Appellate Body did not distinguish when municipal law might serve as evidence of facts or evidence of compliance, or provided any guidance about how to characterize municipal law as evidence of facts or evidence of compliance. The Appellate Body supported the Panel’s approach towards Indian ‘administrative instructions’ and stated that the Panel did not interpret Indian law as such.

The Appellate Body examined the text of relevant provisions of the Patents Act, and confirmed the Panel’s proposition that those provisions were mandatory and the ‘administrative instructions’ at issue were inconsistent with the mandatory provisions of the Patents Act, thus the ‘administrative instructions’ might fail a legal challenge under the Patents Act. Therefore, the Appellate Body supported the Panel’s finding that India’s ‘administrative instructions’ for receiving mailbox applications were inconsistent with Article 70.8.

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82 Ibid, para. 16.
83 Ibid, para. 17.
84 Ibid, para. 65.
85 Ibid, paras. 69, 70.
As far as the approach to Indian law was concerned, the Panel and the Appellate Body saw eye to eye with each other, because both of them examined the text of relevant provisions of India’s Patents Act and identified the mandatory character of the Patents Act. Meanwhile, both the Panel and the Appellate Body assessed the operation of the India’s legal system and concluded India’s ‘administrative instructions’ would not survive a legal challenge under the Patents Act. It is fair to say the Panel and the Appellate Body made their findings on the basis of their own examination of India’s legal system, and they neither accepted India’s interpretation of its own legal system nor took the United States’ arguments without consideration. In essence, the Panel and the Appellate Body adopted de novo review regarding Indian measure at issue.

3.2.2 US - 1916 Act

Panel Proceedings

In US – 1916 Act, one issue in dispute was whether the US 1916 Anti-Dumping Act fell within the scope of Article VI of the GATT 1994 and Anti-Dumping Agreement, and therefore was subject to the disciplines under Article VI of the GATT 1994. The 1916 Act was enacted by the US Congress under the heading of ‘Unfair Competition’ in Title VIII of the Revenue Act of 1916 and it prohibited a form of international price discrimination.86

The EC claimed the 1916 Act was within the scope of Article VI of the GATT 1994 (Article VI), because the applicability of the 1916 Act corresponded to the definition of dumping under Article VI and US case-law on the 1916 Act revealed that the 1916 Act had been applied as an anti-dumping statute.87

87 Ibid, para. 6.5.
The United States argued the 1916 Act was an anti-trust statute, because it did not address dumping within the meaning of Article VI but a much narrower form of international price discrimination with an anti-trust objective, which was supported by the legislative history and the subsequent case-law.\textsuperscript{88}

The Panel firstly examined the scope of Article VI GATT and then assessed whether the 1916 Act fell within the scope of Article VI GATT. Regarding the scope of Article VI GATT, the Panel concluded that a law counteracting ‘dumping’ as defined in Article VI:1 would fall within the scope of Article VI.\textsuperscript{89} Since the Panel’s examination of the GATT is not the focus of the chapter, the following will review how the Panel examined the 1916 Act \textit{per se} in detail.

The Panel initially analyzed the approach that they might use to assess the 1916 Act. It noted the DSU did not provide how panels should address domestic legislation and the only relevant provision was Article 11 which required panels to make an objective assessment of the facts of the case. The Panel referred to Article 3.2 of the DSU and held that they had the authority to develop their own approach on the basis of the practices adopted by international tribunals in similar circumstances.\textsuperscript{90} The Panel confirmed the importance of the text in assessing the meaning of the 1916 Act. Meanwhile, it noted the respect that should be shown to the interpretation made by US courts or other US authorities in order to truly understand how the 1916 Act was actually understood and applied by the US authorities. In addition, the Panel took into account the long history of the 1916 Act, and the historical context and legislative history which would shed light on the intent and meaning of the 1916 Act.\textsuperscript{91} Therefore, the Panel successively examined the text, historical context and legislative history, and the US case-law relating to the 1916 Act.

\textsuperscript{88} Ibid, para. 6.10.
\textsuperscript{89} Ibid, para. 6.107.
\textsuperscript{90} Ibid, paras. 6.40.
\textsuperscript{91} Ibid, para. 6.48.
As for the text of the 1916 Act, the US argued that the 1916 Act contained more requirements than those of ‘dumping’ regulated by Article VI of the GATT 1994. The US claimed that the additional requirements targeted specific forms of price discrimination in an anti-trust context, and the existence of an anti-trust objective regulating cross-border price discrimination removed the Act from the scope of Article VI.\textsuperscript{92}

The Panel noted that the 1916 Act contained a transnational price discrimination test and the test included requirements similar to those of Article VI.\textsuperscript{93} From the angle of the definition of ‘dumping’ and the price comparison, the Panel considered that both the 1916 Act and Article VI were about the comparison of the price in the home country with that in the country of production or in a third country.\textsuperscript{94} Although the comparable price in the 1916 Act might refer to the price in the ‘principal markets’ of ‘other foreign countries to which they are commonly exported’, which might not be the ‘highest comparable price for the like product for export to any third country in the ordinary course of trade’ found in Article VI:1(b), the Panel did not think that comparison made the 1916 Act significantly different from the criteria contained in Article VI:1 in nature.\textsuperscript{95} Although the 1916 Act did not specify any regulation about ‘constructed’ normal value, the Panel considered that the lack of such regulation only made the scope of the Act ‘narrower’ than the definition of ‘dumping’ in Article VI:1 GATT, and the ‘narrower’ scope of the 1916 Act should fall within the comparably broader scope of Article VI.\textsuperscript{96} From the perspective of the intent of the transnational price discrimination addressed by the 1916 Act, the Panel admitted that some elements of the intent were more of the type used in an anti-trust context. However, the Panel held that no evidence was furnished to prove that the intent alone could establish the

\textsuperscript{92} Ibid, paras. 6.111, 6.116.
\textsuperscript{93} Ibid, para. 6.108.
\textsuperscript{94} Ibid, para. 6.108.
\textsuperscript{95} Ibid, para. 6.109.
\textsuperscript{96} Ibid, para. 6.109.
existence of the transnational price discrimination under the 1916 Act, and therefore the intent per se was not adequate to make the 1916 Act fall outside the scope of Article VI. 97 As for the United States’ argument that the anti-trust objective of the 1916 Act should exclude it from the scope of Article VI, the Panel did not consider that the objective pursued by the Member could determine the applicability of Article VI GATT. 98 The Panel held unless there was an overlap between the 1916 Act and Article VI GATT, and that overlap satisfied the definition of ‘dumping’ contained in Article VI:1, the 1916 Act should be subject to the disciplines of Article VI and the United States’ categorization of its own law did not matter. 99

As for the historical context and legislative history of the 1916 Act, the US referred to a district court decision in Zenith III (1980), in which the court used the same term regarding ‘the products to be compared’ in the 1916 Act as the one used in Section 2 of the Clayton Act – a competition statute. In addition, the US also referred to the statement of Representative Claude Kitchin to prove that the 1916 Act was intended to supplement or complement the rules applicable to US products in an anti-trust context and therefore it was an anti-trust law not subject to the disciplines of Article VI. 100

The Panel did not consider the purpose of the decision in the Zenith III case was to differentiate the 1916 Act from the 1921 Antidumping Act in terms of product comparison. 101 Meanwhile, the Panel noted that the US court conclusion was not directly based on the legislative history of the 1916 Act, but was deduced from the

97 Ibid, para. 6.113.
99 Ibid, para. 6.115, 6.117.
100 The Representative Claude Kitchin stated: ‘We believe that the same unfair competition which now applies to the domestic trader should apply to the foreign import trader.’ Ibid, paras. 6.124, 6.128.
101 Ibid, para. 6.125.
intent of the US Congress’ interpretation about the purpose of the 1916 Act.\textsuperscript{102} The Panel agreed that the scope of the product comparison in the 1916 Act interpreted by the court might be broader than that of Article VI. However, the Panel did not consider that would affect the satisfaction for the definition of Article VI:1 GATT.\textsuperscript{103} As regards the US reference to the statement of Representative Claude Kitchin, the Panel took into account it, as well as the statement of US Secretary of Commerce William Redfield. The Panel noted that both statements referred to the same issue about the applicability of ‘unfair competition’ rules, and concluded that the definition of transnational price discrimination used by the US Congress in the 1916 Act was understood as ‘dumping’ at that time and no distinction was made between anti-trust and anti-dumping when the 1916 Act was enacted.\textsuperscript{104}

As for the US case-law, the Panel firstly clarified that they would respect the formal hierarchy of court decisions in the US federal system, allocated more weight to a final judgment than to an interim or ‘interlocutory’ decision, and paid more attention to the substantive meaning than the ‘face value’ of related terms.\textsuperscript{105} Meanwhile, the Panel pointed out the categorization of the 1916 Act as an anti-trust law or anti-dumping law by the US courts was not decisive in determining the 1916 Act with respect to WTO-compatibility and would not consider any other test than the transnational price discrimination test.\textsuperscript{106} Then the Panel examined relevant cases at the US Supreme Court and circuit courts.

Regarding the cases at the Supreme Court, the Panel noted that the Supreme Court was never called upon to interpret the text of the 1916 Act. However, the Panel noted that in Cooper Case which was highlighted by the United States, the

\textsuperscript{102} Ibid, para. 6.126.
\textsuperscript{103} Ibid, para. 6.127.
\textsuperscript{104} Ibid, para. 6.129, 6.130.
\textsuperscript{105} Ibid, paras. 6.56, 6.57, 6.59.
\textsuperscript{106} Ibid, para. 6.134.
Supreme Court described the 1916 Act as ‘supplemental’ to the Sherman Act (a competition statute) and also referred to the 1916 Act as ‘the antidumping provisions of the Revenue Act of 1916’. The Panel did not consider that case provided much guidance on the interpretation of the 1916 Act in that the Supreme Court did not make an explanation of the reasons to support its statement on the interpretation of the transnational price discrimination test.

Regarding the cases at the circuit court level, the Panel mainly examined the case of *Zenith III* (1980), *Brooke Group* recoupment test and interlocutory decisions.

As to *Zenith III* (1980), the US relied heavily on the statements contained in this case and other similar statements, and argued that the 1916 Act should be interpreted similarly to the Robinson-Patman Act – an anti-price discrimination act. The Panel considered that those statements were related with the legislative intent, but not relevant to this case. According to the Panel, how the US courts addressed transnational price discrimination test was crucial for this case and no clear evidence in those cases could prove the price discrimination test of the 1916 Act was applied differently from the Act itself. The Panel also examined the historical context and legislative history about *Zenith III* as well as other decisions referred to by the United States, and concluded that some US courts had interpreted the transnational price discrimination test as ‘dumping’ within the meaning of Article VI GATT.

As to the *Brooke Group* recoupment test, the US claimed that since the 1986 Third Circuit Court of Appeals decision *In Re Japanese Electronic Products III* and the 1993 Supreme Court decision in *Brooke Group Ltd. V. Brown & Williamson Tobacco Corporation*, the courts had applied the *Brooke Group* recoupment test to the
According to the Panel, the *Brooke Group* recoupment test had two criteria which required the complainant to establish that the prices complained of were below an appropriate measure of its rival’s costs and to demonstrate that the competitor had a reasonable prospect of recouping its investment in below-cost prices. The Panel did not consider both criteria would prohibit Article VI GATT from being applied to the 1916 Act. In addition, the Panel held that there was lack of adequate evidence to show that the *Brooke Group* recoupment test had been consistently followed by courts in relation to the establishment of the price discrimination.

As to the interlocutory decisions, the EC raised two judgments of *Geneva Steel* and *Wheeling Pittsburgh* to support its claim; while, the US claimed the interlocutory decisions should not be considered by the Panel considering that they were neither final nor conclusive under US law. The Panel posited that those two interlocutory decisions were relevant to this dispute because they addressed in detail the origin, objectives and practical operation of the 1916 Act, and they were subsequent to the *Zenith* cases and the Supreme Court decision in the *Brooke Group* case. The Panel noted that the court in *Geneva Steel* used the word ‘dumping’, and assumed the court’s use of the word ‘dumping’ was conscious and ‘dumping’ thereof bore the same meaning as the one used in Article VI:1 of the GATT 1994. The Panel also took into account some other reasoning in *Geneva Steel*, which confirmed its understanding of the US case-law. The Panel found that both decisions in the *Geneva Steel* and *Wheeling Pittsburgh* rejected the application of *Brooke Group* recoupment test to certain aspects of the 1916 Act.

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112 Ibid, para. 6.147.
113 Ibid, para. 6.148.
115 Ibid, para. 6.156.
117 Ibid, para. 6.158.
118 Ibid, para. 6.159.
119 Ibid, para. 6.160.
which confirmed its previous conclusion that some districts did not apply the *Brooke Group* recoupment test to claims under the 1916 Act.\(^{120}\)

In conclusion, the Panel held that the text of the 1916 Act supported the conclusion that the transnational price discrimination test in the 1916 Act fell within the definition of ‘dumping’ of Article VI:1 of the GATT 1994, and the legislative history and the US court decisions provided no contradictory evidence to negate its understanding about the text of the 1916 Act.\(^{121}\) Therefore, the Panel concluded that Article VI applied to the 1916 Act.

**Appellate Body Proceedings**

On appeal, the US claimed the 1916 Act was not subject to Article VI GATT because it did not specifically target ‘dumping’, but targeted anti-competitive conduct.\(^{122}\) The EC argued, from the perspective of the interpretation of Article VI, the US mischaracterized the Panel’s findings without support in the text, context or WTO case-law about Article VI.\(^{123}\)

The Appellate Body firstly analyzed the scope of Article VI and concluded it applied to any ‘specific action against dumping’ of exports.\(^{124}\) Then it assessed whether the 1916 Act regulated ‘specific action against dumping’ of exports and therefore fell within the scope of Article VI.\(^{125}\)

The Appellate Body examined the text and intent of the 1916 Act. Regarding the text, it pointed out that the 1916 Act provided for civil and criminal proceedings and penalties, which required the presence of the constituent elements of ‘dumping’. The Appellate Body considered that the civil and criminal proceedings

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\(^{120}\) Ibid, para. 6.161.
\(^{121}\) Ibid, paras. 6.163-6.165.
\(^{123}\) Ibid, para. 29.
\(^{124}\) Ibid, para. 126.
\(^{125}\) Ibid, para. 127.
and penalties contained in the 1916 Act were ‘specific action against dumping’.\textsuperscript{126} Therefore the Appellate Body found 1916 Act fell within the scope of Article VI GATT. Regarding the intent of the 1916 Act, the Appellate Body agreed with the Panel that it did not affect the applicability of Article VI.\textsuperscript{127} Therefore, the Appellate Body supported the Panel’s finding that Article VI applied to the 1916 Act.

Comparing the Appellate Body’s assessment with the Panel’s, the difference was that the Appellate Body only considered the text and ‘intent’ of the 1916 Act, while, the Panel’s assessment was more detailed because the Panel also considered the legislative history and US case-law about the 1916 Act. The Appellate Body and the Panel shared the same view that the subjective ‘intent’ or the US characterization of its own law did not affect the applicability of Article VI. Therefore, the Appellate Body and the Panel did not provide much deference to the US interpretation of its own law, but focusing on their own objective assessment of the US law.

\textbf{3.2.3 US – Section 301 Trade Act}

Panel Proceedings

In \textit{US – Section 301 Trade Act}, one issue in dispute was whether Section 304, under the Title III, chapter 1 of the United States Trade Act of 1974, violated Article 23.2(a) of the DSU. In order to examine the consistency, the meaning of Section 304 should be established beforehand. The EC claimed that Section 304 mandated the US Trade Representative (USTR) to make a ‘unilateral’ determination about whether another WTO Member violated WTO obligations and that determination might be made before the DSB adopted a report regarding the same issue, and thus Section 304 was inconsistent with Article 23.2(a) of the

\textsuperscript{126} Ibid, para. 130.
\textsuperscript{127} Ibid, para. 132.
The US contended that Section 304 determinations were made on the basis of WTO dispute settlement proceedings and the USTR only had the discretion to make a determination pursuant to WTO adjudication result, therefore, no violation would occur.

In order to assess the consistency of Section 304 with Article 23.2(a) of the DSU, the Panel successively examined the text of Section 304, US Statement of Administrative Action (SAA), US statements before the Panel, and USTR practice under Section 304.

As to the text of Section 304, the Panel considered that the USTR in certain cases was obligated to make a unilateral determination regarding whether the US rights were being denied before the completion of DSU proceedings. Meanwhile, the Panel noted that the USTR was granted a wide discretion to determine the content of the determination and no one could compel him/her to make a determination that the US rights under the WTO Agreement were denied. In conclusion, the Panel believed Section 304 mandated the USTR in certain cases to make a unilateral determination on whether US rights under the WTO Agreement were denied before the WTO proceedings. Considering the obligations regulated by Article 23 of the DSU, the Panel considered Section 304 constituted a prima facie violation of the DSU.

As to the SAA, which was submitted by the US President to Congress regarding the US legislation implementing the results of the Uruguay Round, the Panel took it as an important interpretative element in the construction of the text of Section

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129 Ibid, para. 7.30.
130 Ibid, para. 7.31.
131 Ibid, para. 7.31.
132 Ibid, para. 7.32.
133 Ibid, para. 7.57.
According to the text, US Administrations would base any section 301 determinations about the violation or denial of US WTO rights on WTO rulings. The Panel considered that the SAA had the legal effect which could be relied upon by both domestic and international actors, and future Administrations would also follow it. Therefore, the Panel concluded that the SAA effectively and lawfully curtailed the discretion of the US Administration in such a way that the US Administration would never adopt a determination of inconsistency before the adoption of DSB findings.

As to the US statements before the Panel, the Panel considered the statements confirmed and strengthened the US commitments in the SAA. The US statements explicitly provided that ‘in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the Trade Representative would not be able to make a determination that U.S. agreement rights have been denied’. The Panel examined the US statements from different perspectives. Regarding the content, the Panel considered the US statements was not a new US policy, but a pre-existing US policy and commitment made in a domestic setting into an international forum. Regarding the manner in which the US Statements were made, the Panel considered there was nothing casual that would derogate the effect. Regarding the authority of the representatives who made the US Statements, the Panel considered that they had full power and authority to make such statements. Regarding the legal effect, the Panel considered the US statements could be relied upon not only by the EC and the third parties, but also

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134 Ibid, para. 7.133.
135 Ibid, para. 7.112.
136 Ibid, para. 7.111.
137 Ibid, para. 7.112.
138 Ibid, para. 7.115.
139 Ibid, para. 7.116.
140 Ibid, para. 7.121.
141 Ibid, para. 7.122.
142 Ibid, para. 7.123.
by all WTO Members.\footnote{Ibid, para. 7.124.} In all, the Panel held that the total effect of the SAA and the US Statements had provided the guarantees that would ensure the USTR of making a determination consistent with Article 23.2(a).\footnote{Ibid, para. 7.126.}

As to the USTR practice under Section 304, the US submitted a record that the Trade Representative had never submitted a Section 304(a)(1) determination of inconsistency which was contrary to Article 23.2(a).\footnote{Ibid, para. 7.128.} The Panel invited the EC and third parties to submit the evidence of relevant cases and found no evidence was sufficient to overturn the US record of compliance of Section 304 with Article 23.2(a).\footnote{Ibid, paras. 7.129, 7.130.}

In conclusion, although the Panel considered that the text of Section 304 constituted a \textit{prima facie} violation of Article 23.2, however, it found that the SAA and US statements cured the inconsistency, which was supported by the record of the USTR practice under Section 304. This case was not appealed.

In this case, the Panel was cautious of establishing the meaning of Section 304. When the Panel was examining the text of Section 304(a), it carefully used the term ‘as a matter of fact’ several times.\footnote{Ibid, para. 7.31.} The Panel respected the interpretation of Section 304 made by the US authorities and reviewed all the factors about Section 304, thus the Panel did not substitute its own assessment for that of the US authorities.

\subsection*{3.2.4 \textit{China} – \textit{Auto Parts}}

In the Appellate Body’s proceedings of \textit{China} – \textit{Auto Parts}, one issue that arose was whether China’s charge imposed on knocked-down (CKD) and semi-knocked-
down (SKD) kits under Decree 125 was an ordinary customs duty under Article II of the GATT 1994 or an internal charge under Article III of the GATT 1994.

Three provisions are concerned with CKD and SKD kits, which are as follows:

Article 2(2) of Decree 125 provides: Automobile manufacturers importing completely knocked-down (CKD) or semi-knocked-down (SKD) kits may declare such importation to the Customs in charge of the area where the manufacturer is located and pay duties, and these rules shall not apply.  

Article 21(1) of Decree 125 provides: Imported automobile parts shall be characterized as complete vehicles if one of the following applies: (1) imports of CKD or SKD kits for the purpose of assembling vehicles.

Article 56 of Chapter XI of Policy Order 8 provides: Auto parts shall be determined to have the character of a complete assembling in the following cases: complete assemblies imported in their constituent parts (completely knocked-down), or assembles and/or systems imported dismantled into several key parts (semi-knocked-down). Whenever imported key parts attain or exceed the stipulated quantity they shall be characterized as Imported Assemblies.

It was notable that in the Panel’s proceedings, the parties did not dispute whether the charge imposed on CKD and SKD kits should be classified as an ordinary customs duty or an internal charge. The Panel considered that Article 2(2) of Decree 125 provided an option for the importers to import CKD or SKD kits under regular customs procedures, and thus under that circumstances, the charge on CKD and SKD kits could be considered as an ordinary customs duty under Article II.

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148 The full name of Decree 125 was Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles.


150 Ibid, para. 218.

151 Ibid, para. 218.
of the GATT 1994.\textsuperscript{152} All the complainants, the US, the EC and Canada, agreed with the Panel’s characterization of the charge on CKD and SKD kits and claimed that the charge was inconsistent with China’s obligation under Article II:1(a) and (b) of the GATT 1994.\textsuperscript{153} China, as the respondent, focused its argument on the claim that the charge on CKD and SKD kits was consistent with its obligation under its Schedule of Concessions, so China did not disagree that its charge on CKD and SKD kits was an ordinary customs duty.\textsuperscript{154}

On appeal, China claimed that the Panel erred in classifying its charge imposed on CKD and SKD kits under Decree 125 as an ordinary customs duty under Article II of the GATT 1994, which was not reconciled with the Panel’s finding that the charge imposed under Decree 125 was an internal charge under Article III of the GATT 1994.\textsuperscript{155} Canada and the US considered that whether the charge on CKD and SKD kits was an ordinary customs duty or an internal charge depended on the importers’ option of the import procedures, in other words, if the importers invoked Article 2(2) of Decree 125 to import\textsuperscript{156} CKD or SKD kits under regular customs procedures, the charge would be an ordinary customs duty and paid upon importation; in contrast, if the importers did not invoke Article 2(2) of Decree 125, the charge would be an internal charge subject to the internal requirements set out in Decree 125.\textsuperscript{157}

The Appellate Body began its analysis from the text of Article 2(2) of Decree 125. It considered the text of ‘these rules’ in the Article 2(2) referred to Decree 125 itself, and the whole text of Article 2(2) provided an option to automobile manufacturers who imported CKD and SKD kits to declare such importation and pay duties.\textsuperscript{158}

\textsuperscript{152} Panel Report, China – Auto Parts, WT/339/R, para. 7.77.
\textsuperscript{153} Ibid, para. 7.636.
\textsuperscript{154} Ibid, para. 7.650.
\textsuperscript{155} Appellate Body Report, China – Auto Parts, WT/DS339/AB/R, para. 222.
\textsuperscript{156} Ibid, para. 235.
\textsuperscript{157} Ibid, paras. 223, 228.
\textsuperscript{158} Ibid, paras. 231, 232.
However, the Appellate Body did not consider that Article 2(2) indicated the contents of ‘declaration’ nor did Article 2(2) provide the legal basis for the ‘duties’ to be paid by the importers concerning CKD and SKD kits. Therefore, the Appellate Body held that Article 2(2) did not form a textual basis as establishing a new or special customs procedure.¹⁵⁹ In the view of the Appellate Body, all the provisions of Decree 125 established a regime for both the administrative procedures and the charge applied to auto parts that were characterized as complete vehicles.¹⁶⁰ The Appellate Body continued to examine the text of Article 21 of Decree 125. It considered Article 21 was a definitional provision and listed the criteria for the imported auto parts which must be characterized as complete vehicles, and Article 21(1) and Article 56 of Chapter XI of Policy Order 8 identified CKD and SKD kits imported for the purpose of assembling vehicles as one sub-set of the imported auto parts which must be characterized as complete vehicles.¹⁶¹ The Appellate Body did not agree with the Panel that Article 21(1) was the legal basis for the obligation to pay the charge on CKD and SKD kits.¹⁶² The Appellate Body agreed with the Panel that Article 2(2) provided an option for the automobile manufacturers who imported CKD and SKD kits. Nevertheless, the Appellate Body disagreed on the scope of the option. The Appellate Body could not understand why the Panel considered the charge imposed on CKD and SKD kits under Article 2(2) of Decree 125 was different from other charge imposed on auto parts under Decree 125. Given the fact that the Panel did not provide explanations of characterizing the charge on CKD and SKD kits under Article 2(2) as an ordinary customs duty, the Appellate Body considered the Panel erred in construing Decree

¹⁵⁹ Ibid, para. 232.
¹⁶⁰ Ibid, para. 235.
¹⁶¹ Ibid, para. 237. It was notable that the charge imposed on the auto parts which were taken as the importation of complete vehicles was characterized as an internal charge by the Panel.
¹⁶² Ibid, para. 237.
125 and characterizing the charge on CKD and SKD kits as an ordinary customs duty.\textsuperscript{163}

3.2.5 Concluding Remarks

In conclusion, the WTO tribunals may take into account the elements such as the text, relevant case-law, legislative history, object and purpose, statements made before the Panel or the Appellate Body, and administrative practice, when interpreting national law. There is no formula as to whether all the elements mentioned-above should be examined simultaneously or a specific sequence of examination of those elements should be followed. Likewise, it is difficult to conclude which element will be given more weight in the assessment of national law. The text may be the most important element because it is the starting point for the assessment of national law. However, no conclusion is drawn as regards the hierarchy among those elements.

As to the importance of the text, it is an indispensable element for national law interpretation. In China – Auto Parts, the Appellate Body provided preponderant importance to the text of Article 2(2) and 21(2) of Decree 125. The meaning of the text is not always straightforward. When the text is ambiguous, other elements such as the legislative history and domestic jurisprudence have to be referred to. For example, in US – 1916 Act, the Panel examined the legislative history and the US case-law to identify the meaning of the 1916 Act. As regards the scenario in which the text alone constitutes a \textit{prima facie} violation of the WTO agreements, the violation is possible to be cured by other elements such as the statements made before the Panel in US – Section 301 Trade Act.

As to domestic case-law, the Panel respects the legal effect and status of a case in the domestic legal regime. For example, in US – Section 301 Trade Act, the Panel

\textsuperscript{163} Ibid, paras. 243-245.
stated that it would respect the hierarchy of court decisions in the US federal system and more weight would be given to a final judgment than an interim or interlocutory decision. Nevertheless, a domestic court’s interpretation of its own law is of limited impact for WTO panels’ assessment of the meaning of national law.

As to legislative history, it is usually used to identify the intent or objective of national law at issue. For example, in US – 1916 Act, the US argued the legislative history of the 1916 Act demonstrated that the 1916 Act addressed a much narrower form of international price discrimination with an anti-trust objective. In US – FSC I (21.5), the US contended that the legislative history indicated the Act ‘was intended and designed’ to serve as ‘a measure to avoid double taxation’. The Panel in US – 1916 Act also stated that the legislative history of an act of the US Congress was an important tool for US Courts to identify the ‘intent of Congress’.

As to the object and purpose of national law, although the WTO tribunals take them into account when assessing the meaning of national law, it seems they are not given too much weight. For example, in US – 1916 Act, the Panel stated that even though the 1916 Act might pursue anti-trust objectives, no express indication in the legislative history specifying the price discrimination in the 1916 Act should be understood in anti-trust context. It is confusing that in some cases the legislative intent was considered relevant, while, in some other cases it was considered irrelevant. In Japan – Alcohol II, the Appellate Body stated that it was irrelevant that protectionism was not an intended objective, in contrast, in

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165 Ibid, para. 6.134.
166 Ibid, para. 6.10.
169 Ibid, para. 6.123.
170 Appellate Body, Japan – Alcohol II, WT/DS8/AB/R, p. 28.
Canada – Periodicals, the Appellate Body stated that the very design and structure of Canada’s Excise Tax Act was to afford protection to domestic periodicals.¹⁷¹

As to the statements made by national authorities, they played an important role in identifying the meaning of national law. In US – Section 301 Trade Act, the Panel considered that the statements made before it confirmed and strengthened the SAA, and the statements and SAA jointly provided the guarantees which would ensure the USTR of making a determination consistent with Article 23.2(a) of the DSU.¹⁷² In Canada – Pharmaceuticals, the Panel stated that its finding on the meaning of Canadian law was established on the basis of Canada’s representations as to the meaning of that law.¹⁷³ It is noteworthy that the WTO tribunals are discreet in giving deference to the statements. For example, the Panel in US – Section 301 Trade Act examined the credibility of the United States’ statements¹⁷⁴ and the Panel in Canada – Pharmaceuticals assessed the credibility of both parties’ comprehension on Canadian law.¹⁷⁵

As to the administrative practice, how much weight that might be given by the WTO tribunals depends on how authoritative the administrative practice is in national legal system. In US – Section 301 Trade Act, the Panel considered that the US SAA prevailed over the text, and the SAA and the statements jointly cured the text’s prima facie violation. In US – Export Restraints, the Panel explicitly stated that the SAA constitutes authoritative interpretive guidance for the statute.¹⁷⁶ However, in India – Patent, the Panel did not consider Indian administrative practice of handling pharmaceutical and agricultural patent applications could survive a court challenge, due to the mandatory character of India’s Patents Act

1970.\textsuperscript{177} The reason underlying the Panels’ different treatment of the United States’ SAA and India’s administrative practice of mailbox application is rooted in different weight of the SAA and India’s administrative practice in their legal system. The SAA was approved by the US Congress and considered as an authoritative expression regarding the interpretation of relevant US law;\textsuperscript{178} however, India’s administrative practice may be overruled by a court. Although Indian Minister made a statement to claim that Indian authorities would respect the administrative practice and that statement would put Indian Government under the obligation of ‘estoppel’, however, no sufficient evidence could support India’s administrative practice could survive a judicial challenge.\textsuperscript{179}

In essence, in the process of national law interpretation, which element will be considered and how much weight will be given by the WTO tribunals depend on the specific circumstances of the case. As far as the parties’ arguments are concerned, it is not definite that deference will be given to the legislating states’ interpretation of their own law. The WTO tribunals are active in assessing the legal elements and making their own interpretation of national law pursuant to Article 11 of the DSU. As regards the four cases reviewed above, although they are concerned with different WTO covered agreements, the WTO tribunals did not adopt different approaches to national law interpretation with respect to different WTO covered agreements.

### 3.3 Compare National Law Interpretation with Treaty Interpretation

By comparison, the similarities and differences between the methods of national law interpretation and that of treaty interpretation will be disclosed. Light will also be cast on the characteristics of the issue about national law interpretation.

First, as regards national law interpretation, there is no explicit regulation providing how the meaning of national law should be established in the WTO legal regime. Article 11 of the DSU may be relevant; however, considering the abstract expression of ‘objective assessment’, this Article is of limited use. A striking fact is that national law should not be interpreted differently from how it is actually interpreted by the legislating state. With respect to treaty interpretation, Article 3.2 of the DSU explicitly sets out the meaning of the provisions of WTO agreements should be clarified in accordance with customary rules of interpretation of public international law, and Articles 31-33 VCLT have been recognized by the Appellate Body as customary rules of interpretation of public international law. The WTO jurisprudence about treaty interpretation is more mature than that about national law interpretation.

Second, the WTO tribunals claim to adopt a holistic approach to treaty interpretation, as well as to national law interpretation. However, the connotation of ‘a holistic approach’ with respect to treaty interpretation is different from the one concerning national law interpretation. In the context of treaty interpretation, according to Article 31 VCLT, the text, context and object-and-purpose are compulsory elements which shall be examined simultaneously and treated as equally important, no matter whether the text per se is clear on its face. Nevertheless, as to national law interpretation, which legal elements should be taken into account depend on the circumstances of each case. In addition, the

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180 See Art. 11 of the DSU.
182 See Art. 3.2 of the DSU.
183 It is notable that the Appellate Body in US – Countervailing and Anti-Dumping Measures (China) held that a holistic approach to national law interpretation should be adopted. In particular, the Appellate Body stated ‘a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies...an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization.’ Appellate Body Report, US – Countervailing and Anti-Dumping Measures (China), WT/DS449/AB/R, 7 July 2014, para. 4.101.
weight attributed to each element in the process of national law interpretation is determined by the weight of the element posited in the legislating legal regime. While as to treaty interpretation, given that Article 32 VCLT is secondary to Article 31 VCLT, the element of legislative history addressed by Article 32 VCLT may be less important that the one in national law interpretation.

Third, the methods of interpretation correspond to the characterizations of objects of interpretation. As to national law interpretation, the WTO tribunals respect the legal regimes of the legislating states and their task is to find out how national law is actually interpreted in the legislating states. Under some circumstances, the WTO tribunals may defer to the legislating states’ statements as to interpretation of national law. It seems the WTO tribunals’ interpretation of national law is a process of fact-finding. Nevertheless, national law interpretation is not a pure factual question, because the WTO tribunals are not passive in deferring to the legislating states’ interpretation of their own law. The WTO tribunals apply their legal knowledge and legal instinct to their assessment on the evidence of legal elements furnished by the parties so as to make their own interpretation. Therefore, the WTO tribunals’ interpretation of national law resembles the characteristics of both a legal question and a factual question. In contrast, treaty interpretation is a pure legal question. The WTO tribunals interpret WTO law pursuant to customary rules of interpretation of public international law, and they do not need to rely on the parties’ provision of evidence or defer to any party’s statements. In essence, the methods of legal interpretation reflect the characteristics of objects of interpretation.
Part II: WTO Rulings in National Courts
Chapter 4. WTO Rulings in National Courts: Denial of Direct Effect

4.1 Introduction

As to the legal status of WTO rulings\(^1\) in national courts, it directly denotes the jurisdic- tional interactions between WTO tribunals and national courts, and further connotes the relationship between WTO law\(^2\) and national law, which is embedded in the relationship between international law and national law. Dualism and monism are two well-known approaches used to address the relationship of international law and national law.\(^3\) However, neither dualism nor monism explains the relationship between international law and national law adequately or satisfactorily.\(^4\) Since the second half of 20\(^\text{th}\) century, international law does not purely regulate the relations of States, but rather it penetrates into the domestic legal realm and may directly influence individuals’ legal rights and obligations, thus the function of international law is not distinctively separate from that of national law.\(^5\) It is well recognized that a State cannot justify its violation of international law by referring to its national law.\(^6\) However, it is not settled the extent to which

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\(^1\) In this thesis, WTO rulings are used to refer to the recommendations and decisions made by WTO panels to the extent that are not appealed and made by the Appellate Body, which are also adopted by the Dispute Settlement Body.

\(^2\) In this thesis, WTO law is used to refer to all the agreements that constitute the entirety of the WTO legal treaty provisions and which include the Marrakesh Agreement, its four annexes, Members’ schedules of commitments, and the commitments included in WTO accession protocols.

\(^3\) Dualism stresses the doctrinal distinction between international law and national law. International law is perceived to deal with the relations between States, while, national law is perceived to regulate the relations of the States’ citizens among each other and the relations of the citizens with their States. International law and national law exist separately and cannot replace or overrule each other. In case of a conflict between international law and national law, it is the national court that determines which law applies, given the dualist’s presumption of the supremacy of the State. Monism assumes that international law and national law form one single legal order and international law can be applied directly within the national legal order. See James Crawford, SC and FBA, Brownlie’s Principles of Public International law (8th edn, Oxford University Press 2012), 48-49; Malcolm N. Shaw, International law (6th edn, Cambridge University Press 2008), 131-132.


\(^5\) Yuval Shany, Regulating Jurisdictional Relations between National and International Courts (Oxford University Press 2007), 12.

\(^6\) See Shaw, supra n. 2, 133. Art. 26 of the Vienna Convention on the Law of Treaties: Every treaty in
international law has effect and whether international law is directly applicable in the national legal regime. Neither is it settled about the question of the relationship between WTO law and national law. The Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) has prescribed that each Member shall ensure its laws, regulations and administrative procedures consistent with its obligations under WTO law.\(^7\) However, WTO law does not specify its legal status in national law, or the legal status of WTO rulings in national courts.

WTO rulings are the recommendations and decisions made by WTO panels and the Appellate Body concerning WTO Members’ compliance with their WTO obligations. The rulings will become legally binding on the parties to the dispute, as adopted by the Dispute Settlement Body (DSB) by reverse consensus.\(^8\) According to Article 21.1 of the DSU, prompt compliance with WTO rulings is essential to ensure effective resolution of disputes to the benefit of all Members. In practice, implementation of WTO rulings is usually considered as a matter within a Member’s political discretion, rather than a matter of judicial enforcement of the rule of international law.\(^9\) This Chapter examines and analyses national courts’ denial of granting direct effect\(^10\) to WTO rulings. Direct effect is a sovereignty-sensitive issue, because it implies supremacy\(^11\) and is concerned with

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\(^7\) Art. 16.4 of the Marrakesh Agreement.


\(^11\) Marco Bronckers, ‘From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the
constitutionalism, the rule of law, separation of powers and checks and balances, and democracy. Most WTO Members have denied direct effect of WTO rulings, and the EU and the US are prime examples in this respect. The EU and the US are selected in this chapter to analyze the soundness of national courts’ jurisprudence about denial of direct effect of WTO rulings, not only because they have initiated the greatest number of WTO cases and thus have the richest experience of handling WTO rulings, but also because their national courts’ approaches to WTO rulings are influential and likely to be instructive for other WTO members.

As to the structure of this Chapter, Section I is an introduction to the topic of this chapter. Section II describes the issue about direct effect of WTO law in the EU and the US courts, which will provide background knowledge for the analysis of denial of direct effect of WTO rulings. Section III examines the EU and the US jurisprudence and focuses on the reasons for their denial of direct effect of WTO rulings. Section IV describes an academic debate concerning the legal effects of WTO rulings, contextualizing analysis of the denial. Section V analyzes negative effects of the denial of direct effect, and section VI elaborates on the justifications for the denial of direct effect. Section VII attempts to propose that conditional direct effect should be given to WTO rulings under certain circumstances.

4.2 Denial of Direct Effect of WTO Law

WTO law does not require the Members to give direct effect to WTO law. A Swiss proposal to grant direct effect to WTO law was rejected during the Uruguay Round.
negotiations.\textsuperscript{14} According to the WTO jurisprudence, the Members are free to determine whether WTO law has direct effect in national law.\textsuperscript{15} In general, most of the WTO Members, such as the EU, the US, China, India, Japan and Canada, have denied direct effect of WTO law.\textsuperscript{16}

The US explicitly prescribes that WTO law does not have direct effect. The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act of 1994 (URAA) confirms Section 102 of the URAA, which specifies that except the US governments, private parties cannot challenge the US law or the act of the US federal and state governments as inconsistent with WTO law, and the US law prevails over WTO law.\textsuperscript{17} Therefore, that US law explicitly stipulates that WTO law does not have direct effect, which is also confirmed by the US courts.\textsuperscript{18}

Since it is clear-cut for the US courts to deny direct effect of WTO law, there is no necessity to discuss the US case-law. The following text will discuss the EU case law about the grounds for denying direct effect of WTO law and the two exceptions that recognized direct effect.

The EU, unlike the US, has no explicit regulation that denies the direct effect of WTO law. According to the Council Decision of 94/800/EC on the Uruguay Round

\textsuperscript{14} Claus-Dieter Ehlermann, ‘On the Direct Effect of the WTO Agreements’ in Ernst Joachim Mestmäcker and Talia Einhorn (eds), Spontaneous Order, Organization and the Law: Roads to a European Civil Society: Liber Amicorum Ernst-Joachim Mestmäcker (T.M.C. Asser 2003), 414.

\textsuperscript{15} In US – Section 301 Trade Act, the Panel stated: 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 or Members and their nationals. Panel report, US – Section 301 Trade Act, WT/DS152/R, para. 7.2. Also see Panel Report, US – Softwood Lumber V, WT/DS264/R, footnote 53.


\textsuperscript{18} The US Court of International Trade (CIT) in the \textit{Hyundai Case} stated that ‘the Uruguay Round Agreements, including the Antidumping Agreement, “are not self-executing and thus their legal effect in the United States is governed by implementing legislation”’. 23 C.I.T. 302, 53 F.Supp.2d 1334, 1343. Also see the \textit{Usinor Case} 28 C.I.T. 1107, 342 F.Supp.2d 1267, 1280 and the \textit{Norsk Case} 472 F.3d 1347, 1360.
negotiations, there is some interpretative room to give direct effect to WTO law.\textsuperscript{19} According to Article 300(7) of the EEC Treaty\textsuperscript{20}, international agreements are binding on the EU and on the Member States, and the international agreements concluded by the EU are an integral part of the EU legal order, which are directly applicable before national courts. However, WTO law is an exception which is not an integral part of the EU legal order, and cannot be directly invoked by individual parties to initiate a lawsuit,\textsuperscript{21} except for the two exceptions recognized by the Court of Justice of the European Union (CJEU) in \textit{Fediol} and \textit{Nakajima}.\textsuperscript{22}

During the GATT period, from the case of \textit{International Fruit}\textsuperscript{23} in the 1970s to the case of \textit{Germany}\textsuperscript{24} in the 1990s, the CJEU’s jurisprudence was consistent in their denial of direct effect of the GATT law. The CJEU agreed that the GATT provisions were binding on the EU. However, considering the spirit, the general scheme and the terms of the GATT, the CJEU held that the GATT provisions could not be relied on to challenge the legality of the EC act or decisions.\textsuperscript{25} The major reason for the CJEU’s denial of direct effect was based on its opinion that the GATT was a flexible system. The CJEU stated that the GATT was ‘based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements”’

\textsuperscript{19} The preamble of Decision 94/800/EC states: ‘Whereas, by its nature, the Agreement establishing World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.’ Since the term of ‘not susceptible to’ does not mean ‘prohibit’, the preamble is possible to be interpreted as in some (exceptional) circumstances, WTO law can be directly invoked and directly effective.
\textsuperscript{20} Article 300(7): Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.
\textsuperscript{22} See Fabrizio Di Gianni and Renato Antonini, ‘DSB Decisions and Direct Effect of WTO Law: Should the EC Courts Be More Flexible when the Flexibility of the WTO System Has Come to an End?’ (2006) 40 Journal of World Trade 777, 777. The details about the jurisprudence in these two exceptions will be discussed in the following text.
\textsuperscript{23} C-21/72 \textit{International Fruit Company and Others v Produktschap voor Groenten en Fruit} [1972] ECR 1219. It was the first case that was approached by the CJEU in terms of direct effect of the GATT law. Also see John Errico, ‘WTO in the EU: Unwinding the Knot’ (2011) 44 Cornell International Law Journal 179, 183.
\textsuperscript{25} \textit{International Fruit}, supra n. 23, para. 20 and \textit{Germany}, ibid, paras. 104-105.
and its provisions were characterized by ‘the great flexibility’, especially
considering ‘the possibility of derogation’ that the contracting parties might take to
handle exceptional difficulties and dispute settlement.\textsuperscript{26} The CJEU emphasized the
GATT’s characteristic of ‘flexibility’, by referring to the term of ‘sympathetic
consideration’ and ‘consultation’ to describe the operation of the GATT.\textsuperscript{27} In
addition, the CJEU pointed out that a contracting party might ‘unilaterally’ suspend
the obligation and withdraw or modify the concession before or after consulting
the contracting parties depending on the urgency of the matter.\textsuperscript{28} Therefore, the
CJEU concluded that the GATT provisions were not unconditional and thus not
capable of conferring rights on the EU citizens which they could invoke before the
courts.\textsuperscript{29}

However, the CJEU recognized two exceptions in which private parties could
initiate a lawsuit against the EU conducts on the basis of the GATT law.\textsuperscript{30} In \textit{Fediol}
and \textit{Nakajima}, both of which were about the annulment of EU decisions, the CJEU
established that where the relevant measure referred explicitly to a precise
provision of the GATT law or where the EC intended to implement a particular
obligation assumed in the context of the GATT, the CJEU had the jurisdiction to
review the EU measure on the basis of the GATT law.\textsuperscript{31} These two exceptions have
been followed by the CJEU in the WTO period.\textsuperscript{32}

During the WTO period, although the CJEU considered the WTO differed
significantly from the GATT in terms of the strengthened dispute settlement
mechanism, the WTO dispute settlement was still based on the ‘the principle of
negotiations with a view to “entering into reciprocal and mutually advantageous

\textsuperscript{26} \textit{International Fruit}, supra n. 23, para. 21 and \textit{Germany}, supra n. 24, para. 106.
\textsuperscript{27} \textit{International Fruit}, supra n. 23, para. 22 and \textit{Germany}, supra n. 24, para. 107.
\textsuperscript{28} \textit{International Fruit}, supra n. 23, paras. 25-26 and \textit{Germany}, supra n. 24, para. 108.
\textsuperscript{29} \textit{International Fruit}, supra n. 23, para. 27 and \textit{Germany}, supra n. 24, paras. 109-110.
\textsuperscript{30} \textit{Errico}, supra n. 23, 190.
\textsuperscript{31} See C-70/87 \textit{Fediol v Commission} \ [1989] ECR 1781, paras. 19-22; C-69/89 \textit{Nakajima All Precision
arrangements”. In addition, the CJEU also analyzed the WTO system from the perspectives of reciprocity considerations and scope of maneuver. The CJEU opined that no principle of reciprocity was established in the implementation of WTO law, and thus if they granted direct effect to WTO law and other WTO Members did not, the lack of reciprocity in the implementation of WTO law would lead to ‘disuniform application of the WTO rules’. Furthermore, the CJEU considered if it was refrained from applying national law which was inconsistent with WTO law, the EU’s legislative and executive organs’ scope of manoeuver that was enjoyed by their counterparts, would be deprived. The CJEU also made a striking statement that the purpose of WTO was to ‘govern relations between States or regional organisations for economic integration and not to protect individuals’. Therefore, the CJEU denied direct effect of WTO law.

In conclusion, the US and the EU, in general, deny direct effect of WTO law. Specifically, the reason for the US denial is that the provisions of the US law, the SAA and Section 102 of the URAA, have explicitly prohibited direct effect. Since no express provision of the EU law prohibits direct effect of WTO law, it is possible for private parties to bring a lawsuit against the EU measure on the basis of WTO law, according to the exceptional rules set out in Fediol and Nakajima.

4.3 Denial of Direct Effect of WTO Rulings

Although most WTO Members do not recognize direct effect of WTO rulings, it is difficult to disclose the nuanced differences among the Members’ approaches to WTO rulings and the rationales underlying those approaches. The focus of this section is to examine the EU and the US cases and analyze their judicial approaches to WTO rulings. For analysis, the cases are to be divided into two

34 See Portuguese, supra n. 32, paras. 44-45.
35 See Portuguese, supra n. 32, para. 46 and Omega Air and Others para. 90.
categories: one category is about violation claims about the methodology of ‘zeroing’ used in the calculation of dumping margins, and the other is about compensation claims concerning WTO rulings.

4.3.1 Judicial Responses to the WTO Rulings on ‘Zeroing’

The WTO dispute about ‘zeroing’ first appeared in the case of EC – Bed Linen, in which India accused the EU’s application of ‘zeroing’ methodology\(^{37}\) to calculate the dumping margins in an anti-dumping investigation into certain imports of cotton-type bed linen from India, which was prescribed in the Council Regulation No 2398/97, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The Panel and the Appellate Body decided that ‘zeroing’ as applied by the EU was WTO-inconsistent, because it prevented fair average-to-average comparisons required by Article 2.4.2 of the Anti-Dumping Agreement.\(^{38}\) In the subsequent cases, the Appellate Body ruled that zeroing methodology as such used in weighted-average-to-weighted-average comparisons in original investigations,\(^{39}\) in transaction-to-transaction comparisons in original investigations,\(^{40}\) and as applied in sunset review, periodic reviews and new shipper reviews,\(^{41}\) were WTO-inconsistent. However, the WTO tribunals have not yet ruled on the validity of

\(^{37}\) In this dispute, ‘zeroing’ could be described as follows: first, the EC identified a certain number of ‘models’ or ‘types’ of Indian bed linen as the product under investigation. Second, the EC calculated a weighted average normal value and a weighted average export price for each of the models. Third, the EC compared the weighted average normal value with the weighted average export price. For some models, if normal value was higher than export price, by subtracting export price from normal value, the subtraction was taken as a ‘positive dumping margin’ for each model. For other models that normal value was lower than export price, by subtracting export price from normal value, the subtraction was established as a ‘negative dumping margin’ for each model. Fourth, the EC set any ‘negative dumping margin’ as zero. Then, the EC added up all the ‘positive dumping margins’ and the zeroes, divided that sum by the cumulative total value of all the export transactions involving all the models of the product under investigation, and the quotient was an overall margin of dumping. See Panel Report, EC – Bed Linen, WT/DS141/R, 30 October, 2000, para. 6.102; and Appellate Body Report, EC – Bed Linen, WT/DS141/AB/R, 1 March, 2001, para. 47.


zeroing applied in asymmetrical comparisons.\textsuperscript{42} With the circulation of WTO rulings, private parties in the EU and the US initiated complaints against the relevant authorities’ application of zeroing methodology with reference to the WTO rulings.

4.3.1.1 The EU Judicial Responses to the WTO Rulings on ‘Zeroing’

\textit{Ritek and Prodisc Case}

In 2002, Ritek Corporation and Prodisc Technology (Ritek and Prodisc), two Taiwanese companies, applied to the General Court for annulment of Council Regulation (EC) No 1050/2002 of 13 June 2002, which imposed a definite anti-dumping duty and provisional duty on imports recordable compact discs originating in Taiwan.\textsuperscript{43} One of their pleas was that the Council’s application of zeroing was in breach of Article 2 of the EU basic anti-dumping regulation (basic regulation). In fact, neither the Anti-Dumping Agreement nor the basic regulation addressed the practice of zeroing, and the complainants in essence based their plea on the WTO ruling on zeroing in \textit{EC – Bed Linen}.\textsuperscript{44} In particular, the complainants stated that the WTO tribunals’ condemnation of zeroing technique in the context of the first symmetrical method in \textit{EC – Bed Linen} applied to the present proceedings, and the zeroing methodology applied by the Council could not be justified either by Article 2.4.2 of the Anti-Dumping Agreement or Article 2(11) of the basic regulation.\textsuperscript{45}

The General Court firstly did not consider it necessary to express whether the EU institutions were bound by a WTO ruling.\textsuperscript{46} It then analyzed the Appellate Body’s

\textsuperscript{42} Ivo Van Bael and others, \textit{EU Anti-Dumping and Other Trade Defence Instruments} (Kluwer Law International 2011), 135.
\textsuperscript{43} T-274/02 \textit{Ritek and Prodisc Technology v Council General Court} [2006] ECR II-4305.
\textsuperscript{44} Ibid, para. 90.
\textsuperscript{45} Ibid, para. 91.
\textsuperscript{46} The General Courts stated that ‘without even needing to rule on whether the Community judicature is bound by the recommendations and decisions contained in the reports of the Dispute
reasoning about zeroing and the applicability of the Appellate Body’s reasoning to this case. The General Court distinguished the facts before the Appellate Body from the facts before them. It considered that the Appellate Body’s reasoning about zeroing was developed in connection with the first symmetrical method, which was a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions; and the Appellate Body emphasized the word ‘all’ in its reasoning, which suggested that the authorities of the importing country might make a selection of the export transactions to be compared with the normal value in the asymmetrical method.\footnote{Ibid, para. 100.} As to this case, the zeroing technique was used in the asymmetrical method, which was not prohibited either by Article 2.4.2 of the Anti-Dumping Agreement or Article 2(11) of the basic regulation.\footnote{Ibid, paras. 101-103.} In addition, the General Court held that the Appellate Body limited the scope of its ruling about zeroing to the first symmetrical method with the statement that ‘as applied by the European Communities in the anti-dumping investigation at issue in this dispute’.\footnote{Ibid, para. 104.} Therefore, by distinguishing the facts, the General Court did not consider the WTO ruling of \textit{EC – Bed Linen} would apply to this case. The General Court’s jurisprudence was confirmed by itself in the subsequent case of \textit{Far Eastern New Century}, in which the use of zeroing in asymmetrical comparisons was permissible.\footnote{T-167/07 \textit{Far Eastern New Century v Council} [2011] ECR II-94.}

In this case, a noteworthy point was that the General Court was reluctant to express its views on whether WTO rulings were binding on the EU judicature.\footnote{Also in the case of \textit{Far Eastern New Century}, the General Court made similar statement that ‘without it being necessary to rule on whether a Court of the European Union is bound by reports of the WTO Appellate Body’. Ibid, para. 154.} Given its detailed analysis of the WTO ruling of \textit{EC – Bed Linen} and the distinction of facts about zeroing, it is inferred that the General Court’s statement about the
complainants’ wrong reliance on the WTO ruling of *EC – Bed Linen*\(^{52}\) did not refer to the wrong reliance on the WTO ruling *per se*, but referred to the wrong reliance due to different contexts of zeroing.\(^{53}\) The General Court seemed not deny the binding effect of the WTO ruling of *EC – Bed Linen*. However, this case did not imply that WTO ruling would have direct effect, because the accusation was directly based on the breach of the basic regulation, but not on the WTO ruling.\(^{54}\) In addition, the General Court noted the fact that Article 2(11) of the basic regulation transposed into Community law Article 2.4.2 of the Anti-Dumping Agreement.\(^{55}\) That transposition might be the reason why the General Court gave much consideration to the WTO ruling of *EC – Bed Linen*.

**Ikea Case**

Ikea, a retailer of household goods in the United Kingdom, relying partly on the WTO ruling of *EC – Bed Linen*, requested the Commissioners of Customs & Excise (the Commissioners) to reimburse the anti-dumping duties paid in its imports of bed linen from Pakistan and India, which was stipulated in Regulation 2398/97.\(^{56}\) The case was finally brought by the High Court of Justice of England and Wales to the CJEU for a preliminary ruling for the following two questions: (1) Whether Regulation 2398/97 was valid in the light of the Anti-Dumping Agreement as interpreted by the WTO ruling of *EC – Bed Linen*; and (2) Whether Regulation 2398/97 was valid in the light of the basic regulation.

As regards the first question, the United Kingdom submitted that the WTO ruling of *EC – Bed Linen* was the sole basis of the complaint; considering the prospective effect of the WTO rulings and retroactive effect of the CJEU’s rulings, if the CJEU based its rulings on the WTO rulings, that would be contrary to the principles that

\(^{52}\) *Ritek and Prodisc*, supra n. 43, para. 108.

\(^{53}\) Ibid, para. 106.

\(^{54}\) Ibid, para. 26.

\(^{55}\) Ibid, para. 5.

formed the basis of Regulation No 1515/2001. The Council and the Commission claimed that WTO rulings were not binding on the CJEU, and Regulation 2398/97 was not vitiated with respect to the EU law solely on the ground of WTO rulings. The CJEU firstly recalled its case-law that WTO law was not the benchmark used to evaluate the validity of the EU measures, except where the EU had intended to implement a particular obligation under the WTO law or where the EU measure referred expressly to the precise provisions of the WTO law. The CJEU then analyzed relevant articles of Regulation 1515/2001, from which the CJEU inferred that the EU did not intend to give effect to a specific obligation under the WTO law and Regulation 2398/97 could not be reviewed on the basis of the Anti-Dumping Agreement. Therefore, the CJEU refused to assess the validity of Regulation 2398/97 in the light of the WTO law or WTO rulings.

As regards the second question, Ikea, in addition to invoking relevant articles of the basic regulation, referred to the WTO ruling of EC – Bed Linen to support its claim. The Commission and the Council argued that the provisions of Regulation 2398/97, constituting practices in force for many years, had not been declared invalid by the EU Courts. The CJEU did not consider wrong about the Community institutions’ calculation of the normal ‘constructed’ value of the product under investigation and the determination of the existence of injury. As to the practice of zeroing used to establish the dumping margin, the CJEU noted that the basic regulation made no reference to it. However, the CJEU opined that zeroing negative dumping margins was resulted from the modification of the price of the

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57 Council Regulation No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.
58 *Ikea*, supra n. 56, para. 27.
59 Ibid, para. 28.
60 Ibid, paras. 29-30.
61 Ibid, paras. 31-35.
63 Ibid, para. 39.
64 See ibid, paras. 49, 64.
export transactions, which was inconsistent with Article 2(11) of the basic regulation.\textsuperscript{65} So the CJEU, in the light of the regulation, came to the same conclusion as the WTO tribunals’ conclusion about the invalidity of zeroing. A question appeared that why the zeroing practice which was in force for many years, was not invalid until the WTO tribunals’ condemnation of it in \textit{EC – Bed Linen}.

Therefore, although Regulation 2398/97 had been decided by the WTO tribunals as inconsistent with the Anti-Dumping Agreement, the CJEU did not refer to the WTO ruling of \textit{EC – Bed Linen}, but rather analyzed the validity of Regulation 2398/97 in the light of EU law. So the CJEU’s intention was visible, which was to insulate its own legal reasoning and legal assessment from that of the WTO ruling. However, a question was raised: was it a coincidence that the CJEU and the WTO tribunals draw the same conclusion about ‘zeroing’?\textsuperscript{66}

\textbf{4.3.1.2 The US Judicial Responses to the WTO Rulings on ‘Zeroing’}

In the US, both \textit{Timken} case and \textit{Corus} case were concerned with the practice of ‘zeroing’ and the complainants’ accusations partly relied on the WTO ruling of \textit{EC – Bed Linen}. The following text will introduce both cases and make comments.

\textit{Timken Case}

\textit{Timken}, before the US Court of International Trade (CIT), was a consolidated action on cross-motions for the Department of Commerce’s (DOC) anti-dumping decisions about Tapered Roller Bearings (TRBs) from Japan.\textsuperscript{67} One accusation from foreign

\textsuperscript{65} Ibid, paras. 55-56.

\textsuperscript{66} Bronckers considered there was a muted dialogue between the CJEU and the WTO tribunals, and the CJEU’s conclusion about ‘zeroing’ was influenced by the WTO rulings. See Marco Bronckers, ‘Private Appeals to WTO Law: An Update’ (2008) 42 Journal of World Trade 245, 258. Also see Bronckers, ‘From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the European Courts’ Case Law on the WTO and Beyond’, \textit{supra} n. 11, 890.

\textsuperscript{67} \textit{Timken Co. v. United States} CIT, 26 C.I.T. 1072, the judgment was made on September 5, 2002, 1231.
TRBs producers Koyo Seiko Ltd. and Koyo Corp. of America (collectively ‘Koyo’) was that the DOC violated its international obligations by zeroing the margins on negative-margin transactions when calculating Koyo’s weighted average dumping margins. The DOC argued that US law prohibited private parties from challenging government action on the basis of WTO law. The CIT stated that Koyo did not bring the action under the WTO law, but rather arguing that the DOC’s application and interpretation of US law violated its international obligations under WTO law. As to the substance of the US practice of zeroing, the CIT, by distinguishing the facts of this case from that of EC – Bed Linen, rejected Koyo’s accusation for the following two reasons. First, it was the EU zeroing practices that were decided illegal in EC – Bed Linen, not the US zeroing practice. In addition, according to the SAA, the CIT had no authority to determine the extent of similarities between the EU and the US zeroing practices. Second, EC – Bed Linen involved a comparison made during an anti-dumping investigation, of weighted averages for export prices and normal value, while this case involved a comparison made during an administrative review, of weighted-average normal values to transaction-specific export prices. Therefore, the EC – Bed Linen did not inform the CIT on the issue of Koyo’s claim.

The case was appealed to the Federal Circuit. Koyo argued that the Charming Betsy canon should be employed to interpret the term of ‘fair comparison’ in the US Law, which meant that zeroing was not allowed in the light of EC – Bed Linen. The Federal Circuit firstly confirmed that Koyo had standing to challenge the DOC’s

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68 Ibid. The Timken Company (Timken) was a domestic producer, who was on the opposite side of Koyo.
69 Ibid, 1242-1243.
70 Ibid, 1238.
71 Ibid.
72 Ibid, 1243.
73 Ibid.
74 Timken Co. v. United States Federal Circuit, 354 F.3d 1334, the judgment was made on March 17, 2004, 1343-1344.
practice of zeroing, because ‘Koyo brought this action under US law under the assumption that it would be interpreted so as to avoid a conflict with international obligations’. Then the Federal Circuit analyzed the merits of Koyo’s appeal. It applied the Chevron deference for the DOC’s interpretation of ‘fair comparison’ and refused to overturn the zeroing practice in the light of EC – Bed Linen.

Corus Case

In 2003, before the CIT, it was a consolidated action on cross-motions for the DOC’s anti-dumping investigations about certain hot-rolled steel flat products from the Netherlands. Corus Staal BV and Corus Steel USA Inc. (collectively ‘Corus’) argued that the DOC’s practice of zeroing was an unreasonable interpretation of the US statute under the Charming Betsy doctrine, because it was inconsistent with the Anti-Dumping Agreement, given its similarity with the zeroing methodology involved in EC - Bed Linen which had been condemned by the WTO Appellate Body. The CIT considered that this case, arising from an anti-dumping investigation, different from Timken case which involved an administrative review, was similar with EC – Bed Linen. However, the CIT did not held that EC – Bed Linen could be the basis for striking down the DOC’s zeroing methodology for the following four reasons: (1) the SAA provided that WTO rulings did not have binding effect under the US law; (2) WTO rulings only had limited precedential value and were binding only upon the countries to the dispute; (3) deference should be provided to the DOC’s interpretation, but not to the WTO tribunals’ interpretation that was of non-binding nature; (4) zeroing should have been prohibited by the Congress if the Congress so chose, given the long-time practice of zeroing.

75 Ibid, 1341.
76 Ibid, 1341-1345.
77 Corus Staal BV v. United States Dep’t of Commerce CIT, 27 C.I.T. 388, the judgment was made on March 7, 2003, 397-398.
78 Ibid, 399.
79 Ibid, 399-400.
On appeal, Corus further referred to two WTO cases of *US – Corrosion-Resistant Steel* and *US – Softwood Lumber* in which the US zeroing practice was decided by the Appellate Body as inconsistent with the Anti-Dumping Agreement. The Federal Circuit referred to its jurisprudence in *Timken*, and restated that WTO rulings were ‘not binding on the United States, much less this court’. In addition, the Federal Circuit made it clear that whether (or how) to implement WTO rulings was within the exclusive province of the political branches, and WTO rulings without the Congress’ adoption had no binding effect.

In 2005, before the CIT, Corus Staal BV’s (Corus) again challenged the DOC’s zeroing methodology applied in the first administrative review of an anti-dumping duty order of hot-rolled steel from Netherlands. This time Corus relied on changed facts that the DOC had issued preliminary and final determinations to implement the WTO ruling of *US – Softwood Lumber*, and argued that zeroing was no longer reasonable, not in the light of the WTO ruling, but on the basis of the DOC’s reinterpretation of its policy in the wake of the adverse ruling of *US – Softwood Lumber*. The CIT again rejected Corus’ accusation by limiting the legal effect of *US – Softwood Lumber* as narrow as possible, and offered three reasons. Firstly, the implementation procedure of *US – Softwood Lumber* was not completed and the USTR had not directed the DOC to implement the WTO ruling in full. Secondly, it was the zeroing ‘as applied’ to Canadian lumber that was the issue determined by the Appellate Body, but not general methodology of zeroing ‘as such’; even if the general methodology was at issue, the US law provided that the DOC’s determinations had prospective effect only, so the WTO ruling of *EC – Softwood*

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80 395 F.3d 1343 *Corus Staal BV, Et Al. V. Dept. of Commerce, Et Al.* Federal Circuit, 395 F.3d 1343, the judgment was made on January 21, 2005, 1348.
81 Ibid.
82 Ibid, 1349.
84 Ibid, 784-785.
Lumber would not retroactively affect the DOC’s determinations.\textsuperscript{85} Thirdly, the DOC’s zeroing was used in individual-to-individual transaction methodology, but not in weighted-average-to-weighted-average methodology in which context zeroing was condemned by the Appellate Body.\textsuperscript{86} In sum, the CIT explicitly insulated its adjudication from that of the WTO, and denied the legal effect of the WTO ruling except the scenario where the US Government specifically committed to correcting its non-compliance with regards to ‘a past determination’.\textsuperscript{87}

Subsequently, Corus initiated several complaints against the DOC’s zeroing. One of its complaints was made to the Federal Circuit in 2007, by referring to the new WTO ruling of \textit{US – Zeroing (EC)}\textsuperscript{88} in which the Appellate Body condemned the US zeroing ‘as applied’ in the administrative reviews\textsuperscript{89} and meanwhile the DOC announced that it would abandon the use of zeroing in conjunction with average-to-average comparisons.\textsuperscript{90} The Federal Circuit confirmed its previous jurisprudence and the DOC’s practice of zeroing, restating that they would ‘not attempt to perform duties that fall within the exclusive province of the political branches’, and provided deference to the DOC.\textsuperscript{91}

In both \textit{Timken} and \textit{Corus}, the US courts have tried to narrow the legal effect of WTO rulings by distinguishing the facts before them from those before the WTO tribunals. In addition, they insisted that the implementation of WTO rulings was within the exclusive province of the political branches, so they refused to provide deference to the WTO rulings. By providing generous deference to the DOC, the US courts were passive in assessing the validity of the DOC’s zeroing methodology. In contrast, it is sympathetic with Corus’ constant failure in efforts to complain

\textsuperscript{85} Ibid, 786.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid, 786-787.
\textsuperscript{88} Appellate Body Report, \textit{US – Zeroing (EC)}, WT/DS 294/AB/R.
\textsuperscript{89} Ibid, para. 263.
\textsuperscript{90} Corus Staal Bv V. U.S. Federal Circuit, 502 F.3d 1370, the judgment was made on September 21, 2007, 1373.
\textsuperscript{91} Ibid, 1375.
against the zeroing methodology. It is visible that some private parties, such as Timken and Corus, cannot benefit from WTO rulings due to the denial of direct effect.

In comparison, the EU and the US courts adopted the same approach to the WTO tribunals’ condemnation of zeroing, in terms of refusing to take WTO rulings as the benchmark to review relevant domestic measures. They both tried to insulate their adjudications from that of the WTO rulings. However, comparing the results of the EU case of Ikea with that of the US cases of Timken and Corus, the CJEU condemned the EU’s zeroing practice which had been in force for many years and refused to attribute deference to the EC executive branches; in contrast, the US courts confirmed the DOC’s zeroing methodology by providing generous deference to the executive bodies. It was inferred that the CJEU’s jurisprudence was influenced by the WTO rulings through the muted interactions with WTO tribunals;\(^\text{92}\) while in contrast, the US courts articulated a vocal rejection of the WTO rulings and practically rejected the guidance of relevant WTO rulings.

4.3.2 Private Parties’ Compensation Claims Concerning WTO Rulings

As to the WTO rulings which adjudicated a Member’s measure was inconsistent with WTO law, some private parties in the EU tried to invoke those WTO rulings to get compensation for their damages arising from the WTO-inconsistency of the EU measure. It is notable that those compensation claims did not occur in the US, and the chance for private parties to win the cases was slim. The following text will examine the EU compensation claims concerning WTO rulings. Three landmark cases Biret, Van Parys and FIAMM&Fedon will be reviewed in detail. It is disclosed that the EU courts do not grant direct effect to WTO rulings, and they mechanically attach the legal effects of WTO rulings to those of WTO law.

4.3.2.1 Biret: Judicial Responses to the WTO ruling of EC - Hormones

This was an early case brought to the EU courts about private parties’ compensation claims concerning WTO rulings. This case appeared after the WTO tribunals’ condemnation of the EU measures that prohibited the exports to the European Community of beef and veal treated with certain hormones. The EU was granted 15 months as a reasonable period of time to comply with its WTO obligations. After the expiry of the reasonable period of time, the Commission adopted Directive 2000/C 337 E/25 to maintain the prohibition on the use of oestradiol $17\beta$ as a permanent measure and on the use of five other substances as a temporary measure. So the EU prohibition on the importation of beef and veal from other countries, especially from those of the US origin, was maintained.

The applicant, Biret International SA (Biret International), was a French company trading in various agri-foodstuffs, in particular meat. It initiated a complaint to the General Court, arguing that the EU was liable in respect of its being placed in judicial liquidation and seeking compensation for the damages arising from the EU’s prohibition on the importation of beef and veal.

According to the EU case-law, one condition for the EU to incur non-contractual liability was that the conduct alleged against the EU must be unlawful. The applicant based its accusation about the invalidity of the EU’s measures on the SPS Agreement, and distinguished this case from Portugal v Council in two aspects: first, the EU measures in this case were expressly condemned by the WTO ruling, and second, the EU’s breach of its WTO obligations was not temporary or negotiable, due to the EU’s adoption of Directive 2000/C 337 E/25 to maintain the

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94 Ibid, para. 15.
95 Ibid, para. 23.
96 A number of conditions must be met for the EC to incur non-contractual liability: ‘the conduct alleged against the institutions must be unlawful, the existence of damage must be shown, and there must be a causal link between the alleged conduct and the damage.’ Ibid, para. 45.
97 Ibid, para. 46.
The General Court did not address whether the WTO rulings might independently determine the validity of EU measures at issue, but attached the legal effects of WTO rulings to WTO law. It reviewed the case-law that WTO law did not have direct effect, except the two exceptions in which the EU intended to implement a particular obligation under the WTO or where the EU measure expressly referred to the precise provisions of WTO law. The General Court did not consider this case corresponded to either of these two exceptions, and thus decided that the applicant could not rely on an infringement of the SPS Agreement.

The applicant appealed the case to the CJEU. The CJEU criticized the General Court’s reasoning for the lack of sufficiency to deal with the applicant’s accusation about infringement of the SPS Agreement. However, the CJEU did not address whether the applicant suffered damages as a result of the EC’s failure to implement the WTO ruling. The CJEU reviewed the facts that the applicant went into liquidation before the adoption of the Appellate Body report and did not allege any damages occurring after the expiry of the reasonable period of time, thus concluded that the EU did not incur liability. From that review, the CJEU concluded the General Court was right in finding that the EU measures did not infringe the SPS Agreement.

As regards this case, some scholars considered the CJEU left open the possibility that private parties might rely on WTO rulings to obtain damages if the EU had explicitly expressed its intention not to comply with WTO rulings within a

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98 Ibid, para. 56.
99 Ibid, paras. 61-63.
100 Ibid, paras. 64-65.
102 Ibid, para. 56.
103 Ibid, paras. 63-64.
104 Ibid, para. 65.
reasonable period of time. In fact, the CJEU closed the door for private parties to base their claims on WTO rulings in subsequent cases. The CJEU’s jurisprudence in this case was not very persuasive. The CJEU confused the conditions to establish the EU’s non-contractual liability. It is stipulated that three conditions must be established for the EU to incur non-contractual liability, which are ‘illegality of the conduct alleged against the EU institutions, actual damage and the existence of a causal link.’ The relationship among those three conditions is parallel, and one condition cannot be used to substitute or negate another condition. The purpose of the applicant’s accusation about the EU’s infringement of the SPS Agreement was to establish the first condition about illegality of the EU measures. The CJEU’s analysis about whether any damages occurred after the expiry of the reasonable period of time was about the second condition. The CJEU relied on the second condition to confirm the General Court’s conclusion about the first condition, which was not sensible. In addition, although the CJEU criticized that the General Court should have analyzed the legal effects of relevant WTO rulings, the CJEU itself also failed to make such analysis.

4.3.2.2 Van Parys and FIAMM & Fedon: Judicial Responses to the WTO Ruling of EC – Bananas III

In 1997, the Appellate Body in EC – Bananas III found that certain elements of the EU banana trading regime were inconsistent with WTO law. The EU informed the DSB that it would respect its international obligations, and a reasonable period of

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106 Biret, supra n. 101, para. 51.

107 Ibid, para. 57.

108 In 1993, the EU adopted Regulation No 404/93 that established a banana trading regime preferential for certain African, Caribbean and Pacific States (ACP States). In 1996, the US and some other WTO Members brought an action to the DSB and complained about Regulation No 404/93. C-377/02 Van Parys [2005] ECR I-1465, paras. 1, 12-13; C-120/06 P, C-121/06 P FIAMM and Others v Council and Commission [2008] ECR I-6513, paras. 13-16.
time was set by arbitral award as expiring on 1 January 1999. In 1998, the EC adopted two regulations in order to comply with the WTO ruling. However, the US considered the new EU banana trading regime was inconsistent with WTO law and the WTO ruling, and requested the DSB to authorize the suspension of trade concessions. In 1999, the DSB authorized the US to levy customs duties on imports from the EU, and the US imposed import duties on various products, including batteries and other products. In 2001, the EC and the US concluded a memorandum of understanding about the EU banana import regime, and the US terminated its retaliation.

As regards the WTO ruling in the *EC – Banana III, Van Parys* and *FIAMM & Fedon* were two cases about compensation claims concerning the EU banana trading regime. In both cases, the complainants attempted to prove the invalidity of the EU conduct by relying on the WTO ruling of *EC – Banana III*, but they both lost their cases. Two points are noteworthy. First, Van Parys was a company engaged in the importation of bananas, so it was a direct victim of the EU banana trading regime; whereas, FIAMM and Fedon were two companies whose business

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109 *FIAMM & Fedon*, ibid, paras. 16-17.

110 Regulation 1637/98 of 20 July 1998 altered the banana trading regime with the purpose to honor ‘the Community’s international commitments under the [WTO]’. Regulation 2362/98 of 28 October 1998 laid down detailed rules for the implementation of Regulation 404/93, which became applicable on 1 January 1999. Ibid, paras. 18-19.


112 Van Parys was a corporation established in Belgium and engaged in the importation of bananas into the EC from Ecuador. Van Parys brought two actions before the Raad van State against the decisions of the Belgian Intervention and Refund Board (BIRB) that refused to issue it with import licenses for the full amounts applied for. Its major argument was that the EC regulations about banana trading regime were inconsistent with relevant provisions of WTO law. The Raad van State referred to the CJEU for a preliminary ruling. *Van Parys*, *supra* n. 108, the judgment was made on 1 March 2005, para. 36.

113 FIAMM and Fedon were two Italian companies, whose business activities related to stationary batteries, and spectacle cases and associated accessories. Their products were subject to the increased customs duty imposed by the US as retaliation concerning the WTO ruling of *EC – Bananas III*. They brought complaints to the General Court, and their major argument was that the EC had incurred non-contractual liability by the failure of the Council and the Commission to bring the banana trading regime into conformity within the reasonable period of time set by the DSB. The General Court dismissed their claims. They appealed the cases to the CJEU, and one of their pleas was that the General Court’s judgments was unfounded as far as concerns their argument about direct effect of the WTO rulings. *FIAMM & Fedon*, *supra* n. 108, para. 29-31, 58.
had nothing to do with bananas, so they were innocent victims due to the US retaliation from the EC – Banana III. Second, the CJEU in Van Parys indirectly analyzed the issue about direct effect of WTO rulings, while in Fiamm & Fedon the CJEU directly analyzed it. The following text will examine the CJEU jurisprudence about direct effect of WTO rulings.

In Van Parys, the CJEU did not address the issue about direct effect of WTO rulings, but analyzed the plea from the perspective of WTO law and its case-law. The CJEU considered that the EU’s undertaking to comply with the WTO rules after the adoption of the Appellate Body report did not constitute a particular obligation in the context of WTO law, and the undertaking was not capable of justifying an exception to rely on WTO law before the EU courts.\(^\text{114}\) First, the CJEU stated the expiry of the reasonable period of time did not exhaust the possibilities for the EU to find a solution to the dispute, and to require courts to refrain from applying domestic law that was inconsistent with WTO law would deprive the legislative or executive organs of the room of maneuver.\(^\text{115}\) Second, the CJEU held if the EU granted direct applicability to WTO law whereas the most important commercial partners of the EC did not, that lack of reciprocity would result in an anomaly in the application of WTO law.\(^\text{116}\) Therefore, the CJEU concluded that individuals could not plead before a court that the EU legislation was incompatible with WTO law, even if the WTO rulings had found WTO-inconsistency of the EU rules.\(^\text{117}\)

In Fiamm & Fedon, the CJEU followed the jurisprudence of Van Parys that WTO law could not be relied upon by private parties where the WTO rulings had found the EU legislation was incompatible with WTO law even if the reasonable period of time had expired.\(^\text{118}\) Furthermore, the CJEU indicated that there was no basis to

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\(^\text{114}\) Van Parys, supra n. 108, para. 41.
\(^\text{115}\) Ibid, paras. 41-52.
\(^\text{116}\) Ibid, para. 53.
\(^\text{117}\) Ibid, para. 54.
\(^\text{118}\) Fiamm & Fedon, supra n. 108, paras. 84, 117-119.
distinguish the issue about direct effect of WTO rulings from that of WTO law, because the WTO rulings could not be fundamentally distinguished from the substantive rules of WTO law. Therefore, the CJEU completely barred private parties from basing their complaints on WTO rulings.

From the cases of Van Parys and FIAMM & Fedon, it was concluded that the room of maneuver for the legislative or executive bodies, and lack of reciprocity in the aspect of judicial implementation of WTO rulings, were two important considerations for the CJEU to deny the direct effect of WTO rulings. As for these two cases, a question arose from the fact that the EU concluded a memorandum of understanding about the banana trading regime with the US in 2001, which was before the date when Van Parys and FIAMM and Fedon brought the complaints to the CJEU, therefore, was it necessary for the CJEU to take into account the room of maneuver for the legislative or executive bodies? Another question appeared that whether it was fair for Van Parys and FIAMM and Fedon to bear the damages arising from the EU banana trading regime, especially given the fact that the business of FIAMM and Fedon had nothing to do with bananas.

4.3.3 Concluding Remarks

From the courts’ perspective, both the EU and the US courts denied direct effect of WTO rulings. Their common approach to deny the influence of WTO rulings was to distinguish the facts before them from that before the WTO tribunals. However, the difference was that the CJEU in IKEA did not provide deference to their executive bodies and condemned the EU executive branches’ application of zeroing, but the US courts provided deference to their executive bodies and confirmed the validity of zeroing.

Other differences and similarities also existed in the US and the EU courts’

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119 Ibid, para. 126.
120 Ibid, para. 129.
nuanced attitudes towards and the grounds for the denial of direct effect of WTO rulings. The US courts were explicit in stating that WTO rulings were ‘not binding on the United States, much less this court’. In contrast, the EU courts never explicitly stated that WTO rulings were not binding on them. There were two major reasons for the US courts’ denial of direct effect of WTO rulings. First, Section 102 of the URAA explicitly provides that WTO rulings do not have binding effects under the US law and individuals cannot challenge whether the US law is consistent with WTO law. Second, the US courts excluded the implementation of WTO rulings from their province. The CJEU attached the legal effects of WTO rulings to WTO law. It held that WTO rulings were not fundamentally different from that of WTO law; therefore, WTO rulings did not have direct effect, given the fact that WTO law could not have direct effect. Another two major reasons for the EU courts’ denial of direct effect of WTO rulings were from the considerations of room of maneuver for the legislative or executive bodies and lack of reciprocity. The CJEU pointed out that ‘the most important commercial partners’ of the EU excluded WTO law from the rules that were used to review the legality of their domestic law, and such lack of reciprocity would risk in introducing an anomaly in the application of WTO law if the EU granted direct effect of WTO law. It was possible that the US was one of ‘the most important commercial partners’ referred to by the CJEU. In contrast, the US courts never expressed the concern about lack of reciprocity in the implementation of WTO rulings. By comparison, it was revealed that the EU courts were cautious in concluding non-direct-effect of WTO rulings, but the US courts were bold to express WTO rulings were not binding. Nevertheless, the EU and the US courts shared the same propositions that non-direct-effect of WTO law affected, if not determined, the legal effect of WTO rulings, and that the room of maneuver should be left for their executive bodies. In addition, both the EU and the US courts considered their executive bodies’ commitments to implement

121 Van Parys, supra n. 108, para. 53.
adverse WTO rulings did not constitute a particular WTO obligation and could not be relied upon by private parties to attack the validity of the domestic measures. From the private parties’ perspective, they were eager to invoke WTO rulings to prove the invalidity of the domestic measures. However, they did not directly base their claims on WTO rulings, but rather on relevant national law. For example, in the US, Koyo complained that the DOC’s application and interpretation of US law was not consistent with the international obligations under WTO law, and Corus argued that the DOC’s application of zeroing was an unreasonable interpretation of the US statute under the *Charming Betsy* doctrine. In the EU, Ritek and Prodisc complained the Commission’s application of zeroing was in breach of Article 2 of the basic regulation, and Ikea requested relevant authorities to reimburse the anti-dumping duties pursuant to Regulation 2398/97. Only FIAMM and Fedon submitted a plea about the direct effect of WTO rulings, but that plea was only subsidiary to another complaint.\(^{122}\) It was disclosed that those private parties welcomed WTO rulings and were eager to invoke WTO rulings to safeguard their interests.

In the light of the foregoing, the following questions arise. What is the nature of WTO rulings? How can we understand the legal effects of WTO rulings? Are the legal effects of WTO rulings definitely attached to the legal effects of WTO law? How can we understand a Member’s commitment to implement WTO rulings? Does that commitment have any legal effects? From the perspective of the rule of law in international and national contexts, how should we understand the issue of direct effect of WTO rulings? From the political perspective, such as from institutional or democratic perspective, is the WTO mature enough to bear direct

\(^{122}\) FIAMM’s assertion about the direct effect of WTO rulings took up two paragraphs of an application of 177 paragraphs, and Fedon’s assertion was contained in a footnote. They simply stated that if direct effect and the resulting status of a rule protecting individuals were not to be accepted in the case of WTO law, they should be as regards decisions of the DSB. *FIAMM & Fedon*, *supra* n. 108, paras. 93–94.
effect of WTO rulings? How should we understand sovereignty involved in the judicial implementation of WTO rulings? The following text will try to answer those questions.

4.4 An Academic Debate Concerning Legal Effects of WTO Rulings

Bello and Jackson are two prominent and representative voices in the debate on the legal effects of WTO rulings. Bello used to consider WTO rulings were not binding in the traditional sense, because under the WTO dispute settlement mechanism, the WTO did not have jailhouse or policemen, and there was no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. Bello claimed that the WTO was dependent on the members’ voluntary compliance, and the flexibility provided by the WTO system accommodated the national exercise of sovereignty. Jackson, on the contrary, insisted that WTO rulings were binding in the traditional international law sense. He considered that WTO rulings established an international law obligation on the losing party, who was required to change its measure in order to comply with WTO rulings. In addition, Jackson held that the losing party did not have much flexibility in choosing the forms of implementation, because ‘compensation’ or ‘retaliation’ was only a fallback in the event of non-compliance. Bello’s arguments were not compelling. She clarified her point and finally agreed with Jackson’s view that the WTO obligations were binding.

According to Article 22.1 of the DSU, compensation and retaliation are only temporary measures, and full implementation of WTO rulings to bring a measure

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124 Ibid.
126 Ibid, 60.
127 Ibid, 61.
into conformity with WTO law is preferred. Bello considered that due to the lack of central enforcement agencies, the WTO obligations were not binding but rather dependent on the Members’ voluntary compliance. It should be noted that lacking central enforcement agencies is the common character of international law, and that lack should not be used as the reason to deny the binding nature of international law, but rather as the reason why the enforcement of international law relies heavily on the actions of national agencies. WTO rulings are indeed different from national rulings in several aspects, such as the binding degree, precedential effects, judicial implications, and the forms of enforcement of the rulings. However, those differences cannot prove WTO rulings are not binding. It rather reminds us that attention should be paid when dealing with WTO rulings and national rulings.

WTO rulings, compared with primary obligations to comply with WTO law, entail secondary obligations that the parties should honor. The designation of implementing WTO rulings as secondary does not imply that the obligations to comply with WTO rulings is less important than that to comply with WTO law, in that the designation is merely a helpful way of expressing a distinction between the contents of WTO law and the results of the breach of WTO law. Without appropriate enforcement of secondary obligations, primary obligations will not be met as well. However, attention should be paid to different contexts of WTO rulings and WTO law. WTO rulings arise from the Members’ disputes, produced by the panels and the Appellate Body in the light of WTO law, and are only binding on

\[129\] Article 22.1 of the DSU.
the parties to the dispute. In contrast, WTO law is an incomplete contract among sovereign countries, and it is a complex set of rules dealing with a broad spectrum of issues, such as tariffs, quotas, and food safety. The major part of WTO law was concluded during the Uruguay Round negotiations and with the ongoing Doha Round negotiations, new agreements may be reached in the near future. Amendments to and authoritative interpretations of WTO law should be made pursuant to strict rules prescribed in WTO Agreement. Each Member bears the obligations to keep its national law in conformity with WTO law. Therefore, although both WTO rulings and WTO law are binding, their legal effects have different dimensions, given their different origins, formations, and the scopes of applicability.

In all, WTO rulings are binding on the parties to a dispute and create legitimate expectations among WTO Members. However, the question whether WTO rulings are of direct effect remains unresolved.

4.5 Negative Effects of the Denial

The EU and the US courts’ denial of direct effect of WTO rulings illustrates the lack of cooperation between WTO tribunals and domestic courts, and the lack of coherent jurisprudence transferring from the WTO legal context to domestic legal context. It is striking that the innocent victims of FIAMM and Fedon could not get compensation for the damages arising from the EU’s failure to implement WTO rulings, and more striking that the US courts directly stated that WTO ruling ‘were not binding on the United States, much less this court’. Given the fact that what is

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133 See Bossche and Zdouc, supra n. 8, 310.
135 Bossche and Zdouc, supra n. 8, 35.
136 Articles IX and X of the Marrakesh Agreement.
137 Article XVI:4 of the Marrakesh Agreement.
138 Bossche and Zdouc, supra n. 8, 51.
illegal at the WTO tribunals may be legal at the domestic courts, the following questions are raised. What are the legal effects of WTO rulings? Are WTO law and WTO rulings authoritative? Have WTO rulings created legitimate expectations? The following text will elaborate on negative effects of the denial from both international and national legal perspectives, with a starting point of a brief analysis of the legal effects of WTO rulings.

4.5.1 Negative Effects at the International Level

According to Article 3.7 of the DSU, the aim of the WTO dispute settlement is to secure a ‘positive’ solution to a dispute. Neither the panel nor the Appellate Body has explained what kind of solution is qualified as a ‘positive’ solution. However, pursuant to *pacta sunt servanda* required by Article 26 of the Vienna Convention on the Law of Treaties (VCLT), it is inferred that good faith should be attached to a WTO Member’s implementation of WTO rulings in consideration of a positive solution. Good faith is one of the fundamental principles of international law. It entails the elements of *pacta sunt servanda*, honesty, fairness and reasonableness. Meanwhile, it instructs a state to properly exercise inherent rights and obligations, and provides a limitation on a state’s sovereignty. The

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139 For example, the practice of zeroing, although it is illegal decided by the Appellate Body, is legal at the US courts. See previous text about the US judicial responses to the WTO Rulings of zeroing.

140 Art. 3.7 of the DSU: Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.


142 O’Connor, 118.

143 Steven Reinhold, ‘Good Faith in International Law’ (2013)
touchstone of good faith is honesty, which is a subjective state of mind. The denial of direct effect of WTO rulings raises doubts about a Member’s good faith in performance of WTO obligations.

First, it seems against the principle of good faith for national courts to exclude the implementation of WTO rulings from their purview. As for the US and the EU, the US courts considered the implementation of WTO rulings as out of their business and WTO rulings were not binding on them; the EU courts, in order to leave room of maneuver for their legislative or executive bodies, also excluded direct effect of WTO rulings from their adjudicating scope. Since the judiciary is a state’s organ, national courts are not immune from the obligations to observe WTO law and WTO rulings. The US courts’ statement that WTO rulings were not binding on them undermined the good faith of other US organs’ commitments to comply with WTO rulings. The Appellate Body has explicitly indicated that the US bore responsibility for the acts of all its organs, including the judiciary. The arbitrator in Brazil – Retreaded Tyres also stated that implementation through the judiciary could not be a priori excluded from the range of permissible action in implementing WTO rulings. In addition, other WTO Members, such as the EU, stated implementation and enforcement of WTO obligations was also a responsibility of the judiciary who was responsible for judicial review of the actions of the state. However, it is ironic that on the one hand, the EU promoted to let the judiciary bear the responsibility to implement WTO obligations, and on the other hand, the EU courts refused to review the EU legislative or executive measures in the light of WTO rulings. It seems the EU’s statement of letting the judiciary bear the WTO obligations was promoted for other WTO members, not for the EU. As for the US


Mitchell, supra n. 141, 107.


Art. 21.3 Arbitration Report, Brazil – Retreaded Tyres, WT/DS332/16, para. 68.

courts, their consideration that implementation of WTO rulings was not within their purview is also against the principle of good faith in performance of a state’s obligations. Although the US law provides that WTO rulings do not have binding effects under the US law, it has been well recognized that national law cannot be used to justify the violation of international law. Therefore, from the perspective of WTO law, the US law cannot be used to justify the US courts’ decisions which are inconsistent with WTO rulings.

Second, without analysis of different parameters of legal effects, it is hasty for national courts to attach the legal effects of WTO rulings to that of WTO law. One reason for the EU courts’ denial of direct effect is due to the lack of direct effect of WTO law. The EU courts did not analyze in substance whether the legal effects of WTO rulings differ from that of WTO law, but arbitrarily concluded that the legal effects of WTO rulings were not fundamentally distinguished from that of WTO law. It is not denied that, as secondary obligations under WTO rulings, without breach of primary obligations contained in WTO law, the obligations to implement WTO rulings will not occur. To some extent, the legal effects of WTO rulings are dependent on that of WTO law. However, attention should be paid to different parameters in understanding the nature of legal effects, which at least contains two facets in terms of broadness and intensity. From the perspective of broadness, WTO law is generally applicable to all the WTO Members; while WTO rulings only bind the parties to a dispute. So the legal effects of WTO rulings are narrower than that of WTO law. However, from the perspective of intensity, for the parties to a dispute, WTO rulings may be more penetrating than WTO law, in that WTO rulings are more specific and clear in addressing the WTO obligations which the parties should perform, not to mention additional intensifying effects incurred by a losing party’s commitment to comply with WTO rulings. Direct effect is more

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148 See Shaw, supra n. 2, 133.
related with the legal parameter of intensity that to what extent WTO rulings penetrate a Member’s national legal system. Therefore, without discreet analysis of legal effects of WTO rulings, the EU courts’ denial of direct effect of WTO rulings is not sound.

Third, the lack of reciprocity in recognizing direct effect of WTO rulings tends to result in ‘prisoner’s dilemma’. The EU courts were cautious of pointing out that their most important commercial partners did not grant direct effect to WTO law. Considering the fact that the US courts indeed stated that WTO rulings were not binding on them, it is inferred that the US attitude towards WTO rulings fueled the EU courts’ denial of direct effect of WTO rulings. Given that the EU and the US are two of the most influential economies in the world and their demonstration effect, other WTO Members might be more hesitant to recognize direct effect of WTO rulings.

In summary, arbitrary denial of direct effect of WTO rulings is against the principle of good faith. It fuels the disputants to resort to politics as the final resolution to solve WTO disputes, which may lead to endless negotiations and damage the international rule of law. In addition, the denial of direct effect also insulates sound interactions between WTO tribunals and national courts, which aggravates the separation of WTO law and national law.

4.5.2 Negative Effects at the National Level

Although national courts want to insulate their jurisprudence from that of WTO tribunals, WTO rulings have been frequently referred to by private parties to prove invalidity of national measures. National courts’ denial of direct effect of WTO rulings is possible to deprive private parties of the interests protected by WTO rulings, and also to damage a state’s judicial independence.

First, as regards individuals’ interests protected by WTO rulings, the EU courts did
not recognize it and stated the purpose of the WTO was not to protect private parties. That does not make sense. According to the Preamble to the WTO Agreement, the objectives of the WTO include increase of standards of living and attainment of full employment for the sake of individuals.\textsuperscript{150} Thus the Members should take into account private parties’ interests when dealing with WTO issues. Due to the denial of direct effect, the security and predictability provided by WTO rulings for the multilateral trading system is also undermined, which may increase private business operators’ transaction costs. Moreover, the denial indicates that no judicial remedies are available for those individuals, including private business operators and consumers, to recover damages arising from the Members’ trade battle at the WTO. Therefore, the denial of direct effect may frustrate private parties’ efforts to rely on WTO rulings to defend their interests.

Second, the denial of direct effect may undermine the principle of a Member’s judicial independence. Both the EU and the US courts, without deliberate reasoning, considered implementation of WTO rulings was not their purview, so they declined to review national measures in the light of WTO rulings. It is understandable that according to the principle of separation of powers, each branch ‘must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches’.\textsuperscript{151} Thus national courts should not engage in implementation of WTO rulings since the implementation is usually considered a matter falling within the notion of foreign relations. However, national courts have to adjudicate the disputes concerning the validity of national measures which are brought indirectly on the basis of the WTO rulings. Thus

\textsuperscript{150} The Preamble to the Marrakesh Agreement: Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

\textsuperscript{151} M. J. C. Vile, Constitutionalism and the Separation of Powers (Liberty Fund, Inc. 1998).
national courts may find themselves in an awkward position. On the one hand, national courts do not have the authority to review their legislative or executive organs’ actions concerning the implementation of WTO rulings; while on the other hand, they have to deal with WTO-rulings-related claims. Such a dilemma challenges the judicial independence of national courts.

In conclusion, the denial of direct effect of WTO rulings may produce negative effects at both international and national levels, supporting the case for its recognition by national courts. However, there are considerations justifying the denial. These are addressed in the following section.

4.6 Justifications for the Denial

Although denial of direct effect has negative effects, to require members to recognize direct effect of WTO rulings is neither well-founded nor feasible. It is a common practice that decisions of international judicial bodies do not have direct effect, except under certain circumstances.\(^{152}\) Direct effect implies supremacy, and goes to the heart of fundamental constitutional questions both at the WTO and domestic levels.\(^{153}\) The Appellate Body, although has a constitutional dimension due to its *de facto* power of interpreting WTO law,\(^{154}\) is not qualified as a constitutional court, because the members do not intend to submit that much sovereignty to the WTO tribunals so as to enable the Appellate Body to play a constitutional function. Also the WTO judges do not consider WTO tribunals function as a constitutional court. Meanwhile, the WTO lacks the institutional structure and democratic legitimacy that will qualify the Appellate Body as a constitutional court. As the Appellate Body is not a constitutional court, its rulings should not be granted direct effect that directly penetrates national legal order. Thus it is justified for national courts to deny direct effect of WTO rulings, except in exceptional circumstances or where a member state is willing to do so. The following text will elaborate the justification of denial of direct effect from the perspectives of the intent, institutional structure, and democratic legitimacy.


4.6.1 Justification: From the Perspective of the Intent

Neither the WTO Members nor the WTO adjudicators intended to grant direct effect to WTO rulings. This inference can be drawn from the Uruguay Round negotiations and the practice of WTO tribunals.

Compared with the GATT power-based mechanisms, the WTO dispute settlement system (DSS) is judicialized and rule-oriented.\(^{155}\) Introduction of the reverse consensus—which prevents a Member from blocking establishment of panels or the adoption of panel and AB reports, was an important reform for the WTO DSS.\(^{156}\) Reverse consensus was designed to cure the abuses under the GATT DSS, and it was connected with the creation of the AB. One Canadian negotiator recalls that during the Uruguay Round negotiations the creation of the AB was proposed in order ‘to get the big guys, particularly the Americans and the Europeans, to sign onto this [the reverse consensus]. That’s how people came up with the AB. It was to ensure adoption of panel reports.’\(^{157}\) Thus the proposal to establish the AB was a bargaining chip to secure the support of big economies for reverse consensus, and not to create a constitutional court.

According to the DSU, the WTO DSS ‘serves to preserve the rights and obligations of the Members under the covered agreements, and to clarify the existing provisions of those agreements,’\(^{158}\) and its primary function is to achieve a satisfactory settlement of the disputes between the Members.\(^{159}\) The establishment of panels depends on the requests made by the complaining

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\(^{155}\) See Matsushita, Schoenbaum & Mavroidis, \textit{supra} n. 25, at 108.


\(^{157}\) Ibid.

\(^{158}\) See Art. 3.2 of the DSU.

\(^{159}\) See Art. 3.4 of the DSU.
Member.\(^{160}\) Nothing in the DSU suggests that WTO tribunals should function like a constitutional court to review the appeals from national courts or to take an initiative and review national law. In addition, WTO tribunals may suggest ways in which the losing party could implement WTO rulings, but these are only suggestions with no binding effect.\(^{161}\) Since the suggestions are not binding, the specific measures that are taken to implement WTO rulings are a matter of national law. Judicial implementation of WTO rulings is not required.

In *US – Section 301 Trade Act*, the Panel noted that specific obligations, creating rights for individuals, might follow from WTO rulings. However, it did not take a position on whether WTO rulings create direct effect for individuals.\(^ {162}\) The panel took into account the clash that might occur between a Member’s WTO obligations and internal constitutional principles, thus concluded it was within national courts’ domain to determine whether WTO obligations had direct effect.

Neither the WTO founders, nor the WTO adjudicators intended to attribute direct effect to WTO rulings. The text of the DSU itself is not particularly helpful on this point. The WTO tribunals are explicit in not taking a position on direct effect, and consider national courts more competent to determine this issue pursuant to their internal constitutional principles.

\(^{160}\) See Art. 6 of the DSU.

\(^{161}\) See Art. 19.1 of the DSU. The AB also stated that ‘Suggestions made by panels or the Appellate Body pursuant to Article 19.1 of the DSU regarding ways of implementation form part of panel or Appellate Body reports adopted by the DSB in previous proceedings. The DSU does not expressly address the question of the legal status of suggestions that form part of a report adopted by the DSB, nor does it specify the legal consequences when a Member chooses to implement DSB recommendations and rulings by following a suggestion for implementation. A Member may choose whether or not to follow a suggestion. The use of the term “could” in Article 19.1 clarifies that Members are not obliged to follow suggestions for implementation.’ Art. 21.5 Appellate Body Report, *EC – Bananas III*, WT/DS27/AR/RW/USA, para. 321.

4.6.2 Justification: From the Perspective of Institutional Structure

The WTO institutional structure was not designed to resemble a constitutional framework. WTO law was neither framed with an intention of becoming a world trade constitution, nor does it provide a system of checks and balances among the WTO organs. The AB was not empowered to function as a constitutional court. Thus the legal effects of WTO rulings are not comparable with those of a national constitutional court. In fact, WTO tribunals have been criticized for judicial activism. Due to the lack of separation of powers within the WTO, and the lack of horizontal and vertical checks and balances within the WTO system, the denial of direct effect of WTO rulings is reasonable.

At the horizontal level, the WTO Ministerial Conference and the DSB do not have effective checks on WTO tribunals. Due to the reverse consensus, the DSB would find it very difficult, if not impossible, to reject or reverse panel’s or the AB’s findings and recommendations. As for the AB’s interpretation of WTO law, it can be amended or reversed by the Ministerial Conference and the General Council by means of an amendment to or an authoritative interpretation of the covered agreements. In practice the WTO political organs’ response to WTO rulings is

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165 The WTO Ministerial Conference is at the apex of the WTO institutional structure. It is composed of representatives of all the Members and it meets at least once every two years. It has the power to decide all the matters under the Multilateral Trade Agreements. The General Council of the WTO, also composed of representatives of all the Members, is responsible for day-to-day management of the WTO and exercises the full power of the Ministerial Conference in the intervals between meetings of the Ministerial Council. The General Council also convenes as the Dispute Settlement Body (DSB), as well as the Trade Policy Review Body (TPRB). See Art. IV of the Marrakesh Agreement.
166 Arts. IX:2 and X of the Marrakesh Agreement.
muted due to the consensus rule of decision-making. Thus there are no effective political checks on WTO tribunals. Meanwhile, the actions of the WTO political organs are not subject to the review of WTO tribunals. There are no judicial checks on the WTO’s political organs.

At the vertical level, a Member’s legislative and executive measures are under the review of WTO tribunals, if those measures are challenged by other Members as inconsistent with WTO law. However, a review begins only when a Member brings a case. There are no direct interactions between WTO tribunals and national courts. Unlike in the EU, there are no preliminary rulings in the WTO. The WTO tribunals’ review of national measures is not qualified as vertical separation of powers between the WTO and the Member States. The review’s exclusive purpose is dispute settlement and WTO rulings only bind the parties to the dispute. Although WTO tribunals have borrowed some constitutional doctrines such as the proportionality analysis, those doctrines are only narrowly applied in analysis of exceptional clauses set out in WTO law, and also dependent on the contingency of a Member’s reference to exceptional clauses. Furthermore, the WTO lacks a demos and constituencies that form the foundation of a constitutional structure. Thus the WTO is not a constitutionalized entity.

Compared with national constitutional structures and the EU institutional framework, the WTO is a much less integrated entity that lacks horizontal and vertical separation of powers. Due to the lack of checks on WTO tribunals, it would be ill-advised to grant direct effect to WTO rulings.

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168 *Ibid* 82-83.

4.6.3 Justification: From the Perspective of Democratic Legitimacy

The analysis of the WTO institutional structure shows that the WTO political organs do not constrain the WTO tribunals. Similarly, WTO Members’ national parliaments exercise no control over them. Thus WTO tribunals are a dynamic engine which lacks effective control. Attributing direct effect to WTO rulings would be therefore risky.

From the substantive perspective, the WTO tribunals are authorized to settle the disputes among WTO Members. The tribunals often have to adjudicate on competing values and strike a balance between free trade objectives and non-trade concerns such as health, labor standards, environment protection and human rights. However, since WTO tribunals are distanced from national constituencies and not answerable to national parliaments, WTO rulings may not reflect local preferences, and may lead to a democratic deficit. A case in point is EC – Biotech, which concerned the EC and its Members’ regulatory control on genetically modified organisms (GMOs). The US complained that the control on GMOs restricted their exportation of agricultural and food products, which was against relevant provisions of WTO law. The complexities of the case posed serious challenges to the legitimacy of the panel’s adjudication. According to Howse and Horn, the first challenge was ‘the limits of science, or technocratic regulatory controls, to protect against risk as perceived by real people’. Although the EC control on GMOs was partly motivated by the public concerns about the safety of GMOs, it should be based on science and risk assessment, which tested the Panel’s

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171 See Trachtman, supra n. 74, 637.


margin of deference and sensitivity as regards the risk assessment that was involved with divergent scientific views and the limits of the existing techniques.\textsuperscript{174} The second challenge was the WTO adjudicators’ response to public feelings about food, which are related not only to physical health but also to spiritual concerns.\textsuperscript{175} The third challenge related to public distrust in multinational corporations. The food industry might have possessed more information about the risks of GMOs, however, the Panel was unable to summon industry witnesses or impose a duty of disclosure on any potential witnesses.\textsuperscript{176} The final challenge was the controversy relating to the policies towards GMOs. The dispute before the Panel was the one about GMOs between the EC and the US; however, a broader debate about the desirability, costs, and benefits of GMOs as a strategy for development and food security in developing countries was more striking. Thus the case tested the Panel’s cooperation with broader international GMOs’ regulation.\textsuperscript{177} It raises a fundamental question whether it was legitimate for WTO tribunals to adjudicate the dispute.\textsuperscript{178}

From the procedural perspective, the question arises whether the WTO tribunals are competent to decide on their own procedures. This is well-illustrated by the controversy relating to \textit{amicus curiae} briefs, which position is not explicitly addressed by the DSU or by the Working Procedures for Appellate Review. In US – Shrimp, the first case raising this issue, the AB considered that the WTO tribunals had the authority to decide not to seek, accept or reject \textit{amicus curiae} briefs.\textsuperscript{179} Some WTO Members protested, arguing that allowing non-governmental organizations (NGOs) and individuals to submit briefs would result in asymmetry,

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{174} Ibid.
  \item\textsuperscript{175} German philosopher Feurbach used to state that ‘We are what we eat’. People may link food with ethical, religious or spiritual misgivings. Ibid 51-52.
  \item\textsuperscript{176} Ibid 52.
  \item\textsuperscript{177} Ibid 53.
  \item\textsuperscript{178} Ibid 82.
\end{itemize}
\end{footnotesize}
since WTO Members could partake in proceedings only if they acted as third parties in the dispute.\textsuperscript{180} In EC – Asbestos, pursuant to Rule 16(1) of the Working Procedures, the AB adopted an additional procedure to deal with \textit{amicus curiae} submissions. It indicated that the additional procedure was ‘for the purposes of this appeal only’.\textsuperscript{181} In reaction, some Members requested the General Council to convene a special meeting to discuss the matter.\textsuperscript{182} A majority of the WTO Members considered it unacceptable for the AB to accept and consider \textit{amicus curiae} briefs; however, the General Council did not make any decision. The AB did not follow the opinions of the majority of WTO Members.\textsuperscript{183} In EC – Sardines, the AB confirmed their authority to receive and consider \textit{amicus curiae} briefs submitted by individuals and NGOs. Moreover, the AB also considered a brief from a Member who was not a third party in the case.\textsuperscript{184} This case shows that the General Council does not have significant control over WTO tribunals. The question arises whether it is legitimate for the AB to decide its procedures against the view of the large majority of WTO Members.

Whether substantively or procedurally, the WTO tribunals have to deal with legal ambiguities and legal gaps. Since the chain of delegation to WTO tribunals on behalf of Member States principals is so long, WTO rulings may be against the will of the majority of WTO Members. Under these circumstances, appropriate political checks on WTO tribunals are advisable. However, due to the lack of institutional balance and the difficulty for WTO political organs to make a decision, WTO tribunals’ operation is not closely controlled by the Members. Furthermore, given that the Members do not have an intention to attribute direct effect to WTO

\begin{itemize}
\item \textsuperscript{181} Appellate Body Report, \textit{EC – Asbestos}, WT/DS135/AB/R, para. 51.
\item \textsuperscript{182} The meeting took place on 22 November 2000.
\item \textsuperscript{183} WTO doc. WT/GC/M/60, para. 31.
\end{itemize}
rulings, it is not legitimate to require the Members to do so in their domestic legal orders.

4.7 An Option: Conditional Direct Effect of WTO Rulings

The negative effects of and the reasons justifying the denial of WTO rulings co-exist. For the sake of protecting individuals’ interests promoting international rule of law and fighting against negative effects, an option of attributing conditional direct effect to WTO rulings is proposed for the Members’ consideration. In particular, if a losing Member commits to comply with a WTO ruling and does not do so within the reasonable period of time, private parties should be allowed to rely on WTO rulings to initiate a complaint against the relevant national authorities in the national courts. However, if the defendants have good reasons to justify their non-compliance with WTO rulings, they should be immune or partly immune from the obligations to comply with WTO rulings in the national legal context. Whether the defendants are immune or partly immune from the obligations should depend on national courts’ proportionality analysis in weighing and balancing different factors, such as the complainants’ losses, causality between the losses and non-compliance with WTO rulings, public interests, allocation of the costs among economic actors, or the State’s budget.

The scope of the proposed option of conditional direct effect is narrow. First, it is not argued that every Member should grant conditional direct effect to the WTO rulings in every case, but rather that conditional direct effect only applies to the parties to the dispute with respect to the ruling in that dispute. Second, it is not argued that a losing Member should fully compensate private parties’ damages arising from the national authorities’ non-compliance with a WTO ruling. Pursuant to proportionality analysis, national courts may order national authorities to make partial compensation, depending on the circumstances of each case. Third, national authorities’ immunity from their obligation to comply with a WTO ruling
in national legal context does not affect a Member’s obligations in WTO legal context, which means that a Member is still bound by the WTO ruling in the international legal context.

This proposal is mainly based on two considerations: (1) the characteristics of WTO rulings qualify them to have direct effect; and (2) the positive effects deriving from conditional direct effect outweigh the negative effects. First, WTO rulings satisfy two objective criteria under which national courts can grant direct effect to international obligations: clarity and completeness.¹⁸⁵ In relation to ‘clarity’, WTO rulings are the results of a dispute settlement process, and entail specific recommendations and rulings concerning the obligations that the parties should perform. What concerns ‘completeness’, a losing Member has committed itself to comply with WTO rulings thus those WTO rulings, to a larger extent, are final and complete. Although the losing Member may try to find room for maneuver and continue to negotiate after the expiry of the reasonable period of time, endless negotiations should not be accepted as an appropriate means of implementation of WTO rulings. The difficulty is that the WTO rulings do not satisfy the subjective criterion of ‘intent’, because WTO Members did not grant them direct effect.

Compared with WTO law, WTO rulings are more precise and pertinent, and directly bind the parties to the dispute. Most of the negative effects arising from direct effect of WTO law will not materialize in case of conditional direct effect of WTO rulings. According to Oliveira, the disadvantages of Brazilian courts’ attributing direct effect to WTO law are as follows: ‘(1) a flood of individual cases, (2) diverse and inconsistent rulings among domestic courts within Brazil, (3) domestic courts’ interpretation of WTO rules different from the international and foreign

¹⁸⁵ As for the WTO rulings, ‘clarity’ means whether WTO rulings are clear and precise about the obligations that a member should perform. ‘Completeness’ means whether the content of WTO rulings is sufficiently complete to be given direct effect. See Nollkaemper, ‘The Duality of Direct Effect of International Law’ (2014) 25(1) Eur. J. Int’l L. 105, 115.
interpretation of trade rules, and finally (4) disequilibrium in international trade’s concessions and rights.¹⁸⁶

The second and the third disadvantages would not apply to conditional direct effect. WTO rulings entail the interpretation of relevant provisions of WTO law, and they are clear and specific about the obligations that a losing Member should perform, thus no diverse, inconsistent, or deviated national rulings will occur. Regarding the first point, it is unlikely that WTO-related cases would pour national courts. Different from the general applicability of WTO law, WTO rulings are pertinent and address only specific legal issues, thus fewer private parties are affected by WTO rulings than those affected by WTO law. As for the fourth disadvantage, conditional direct effect benefits a Member’s internal political and judicial checks and balances, and exhibits its respect for international rule of law. The prisoner’s dilemma in the implementation of WTO rulings should be solved and national courts are called upon to positively cooperate with the WTO tribunals.

Moreover, conditional direct effect will provide a judicial remedy for private parties, who are not direct participants of the WTO but whose interests are affected by a Member’s non-compliance with WTO rulings. It will also provide an opportunity for national courts to check national authorities’ non-compliance with WTO rulings and to fight against government failures. In addition, conditional direct effect will push national authorities to be more serious about their commitments to comply with WTO rulings, which has the potential of improving the international rule of law and also of enhancing security and predictability for economic operators.

At the same time, conditional direct effect will enhance the power of national courts. That may disturb original balance established between a Member’s political and judicial organs, and may also open national courts to the criticisms by politicians. Yet, conditional direct effect is not automatic or unadaptable, because it allows national authorities to provide evidence to justify their non-compliance with WTO rulings. It also allows national courts to balance different values and interests involved in the implementation of WTO rulings. Note is taken that the WTO Members’ interests may clash, and different Members may attach different importance to the same issue due to their various cultural and societal differences. At the same time, the conditional direct effect entails a safety valve that is activated by national courts’ proportionality analysis. The inconsistency between WTO rulings and national rulings is likely to appear, when national courts conclude that non-compliance with WTO rulings is justified in national legal context. However, this outcome may be better than national courts’ arbitrary denial of direct effect of WTO rulings, i.e., better than the US court’s finding that WTO rulings were ‘not binding on the United States, much less this court’. In fact, conditional direct effect is likely to improve the legitimacy of national rulings, because it requires national courts to listen to the parties, to deliberately and impartially make decisions in relation to WTO rulings.\footnote{This proposal of conditional direct effect is based on Cottier’s theory of multilayered governance, which provides that higher levels of law do not always prevail.\footnote{As all layers of governance are prone to failure, checks and balances need to cut both ways.} Conditional direct effect of WTO rulings would provide a chance for national courts to check national authorities’ non-compliance with WTO rulings and WTO law. The function of double checks entailed in conditional direct effect would be activated by national courts’ proportionality analysis. The inconsistency between WTO rulings and national rulings is likely to appear, when national courts conclude that non-compliance with WTO rulings is justified in national legal context. However, this outcome may be better than national courts’ arbitrary denial of direct effect of WTO rulings, i.e., better than the US court’s finding that WTO rulings were ‘not binding on the United States, much less this court’. In fact, conditional direct effect is likely to improve the legitimacy of national rulings, because it requires national courts to listen to the parties, to deliberately and impartially make decisions in relation to WTO rulings.\footnote{This proposal of conditional direct effect is based on Cottier’s theory of multilayered governance, which provides that higher levels of law do not always prevail.\footnote{As all layers of governance are prone to failure, checks and balances need to cut both ways.} Conditional direct effect of WTO rulings would provide a chance for national courts to check national authorities’ non-compliance with WTO rulings and WTO law. The function of double checks entailed in conditional direct effect}}
effect does not only demonstrate national courts’ respect for WTO rulings,\textsuperscript{190} but also takes into account a Member’s sovereignty. In addition, conditional direct effect reflects the philosophy of tolerance. Tolerance is an essential component for a democratic and civilized society,\textsuperscript{191} which corresponds to the theory of multilayered governance. Conditional direct effect entails national courts’ tolerance of WTO rulings’ piercing effect on national legal order, and it also entails WTO tribunals’ tolerance of national authorities’ justification of non-compliance with WTO rulings in the national legal context. The boundary of those two categories of tolerance is that the national authorities’ justification of non-compliance with WTO rulings only applies at national level and will not affect a Member’s WTO obligations at international level. The essence of conditional direct effect is to mildly intensify the piercing effect of WTO rulings so as to strengthen the cooperation between WTO governance and national governance.

However, given that the Doha Round negotiations do not progress successfully and the Members are hesitant to further promote multilateral cooperation under the WTO regime, it seems not realistic to require the Members to attribute ‘conditional direct effect’ to WTO rulings. In addition, in order to avoid creating new incentives for the Members to fully exploit the WTO dispute settlement mechanism in ways that might undermine the WTO as a whole, the attribution of ‘conditional direct effect’ to WTO rulings should not be compulsory, but only an option for the Members’ consideration.

\textsuperscript{190} In no way does national courts’ arbitrary denial of direct effect of WTO rulings express their respect for WTO rulings. In-depth and deliberate analysis of WTO rulings indeed shows a serious attitude towards and respect for WTO rulings.

\textsuperscript{191} Here ‘tolerance’ stresses the meaning of ‘a fair, objective, and permissive attitude toward those whose opinions, practices, race, religion, nationality, etc., differ from one’s own; freedom from bigotry.’ Richard Pimentel, \textit{The Philosophy of Tolerance}, http://www.philosophynews.com/page/The-Philosophy-of-Tolerance.aspx (accessed 29 July 2014).
Chapter 5. WTO Rulings in National Courts: Indirect Effect

5.1 Introduction

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 or Members and their nationals.¹

--The Panel of the WTO Dispute Settlement Body

Rulings of either the panel or the Appellate Body in disputes brought within the World Trade Organization (WTO) have never required the parties to the dispute to interpret national law in conformity with these rulings; nor does any provision of WTO law have such a requirement. So, WTO rulings are not accorded direct effect and whether a Member’s national courts decide to interpret national law in the light of WTO rulings is thus completely a matter of national law. It seems national courts have discretion and flexibility in dealing with the indirect effect of WTO rulings, and their willingness is the nexus through which the WTO rulings are effective or ineffective in national law. The questions around ‘national courts’ willingness’ include, i.e., what elements may affect the willingness of national courts, under what circumstances national courts are willing to attribute indirect effect to WTO rulings, whether it is a completely subjective matter for national courts to attribute indirect effect to WTO rulings. Regard must also be had to other considerations of legal integration, rank, and institutional balance in national legal order.

This article seeks to explore the attitude of courts in the European Union (EU) and

the United States (US) to the interpretation of national law with regard to WTO rulings, and the reasons underlying their approaches. It argues that whether a national court interprets national law in light of WTO rulings is determined by the resilience of a Member’s legal system. The more resilient a Member’s legal system is, the more possible it is for the national judges to defer to WTO rulings and the less challenging of the WTO rulings for the Member’s judicial authority. The degree of the resilience of a Member’s legal system is related with the factors of a Member’s available legal tools, legal framework, political considerations, and so on.

The structure of the article is as follows. With Section I as the introduction, Section II examines the EU courts’ approach to the interpretation of the EU law with WTO rulings, and concludes that the EU courts have granted derivative superiority to WTO rulings and interpret the EU law in light of WTO rulings in the areas of anti-dumping and anti-subsidy. Section III analyzes the US courts’ approach to the interpretation of the US law with WTO rulings, and summarizes that the US courts selectively apply the Charming Betsy doctrine and are reluctant to defer to WTO rulings. Section IV offers reasons underpinning the EU and the US courts’ approaches, which expounds that different legal interpretative tools and legal frameworks in the EU and the US are the major reasons that lead to different approaches of the EU and the US courts. Section V is the conclusions.

5.2 The EU Courts’ Approach

5.2.1 Introduction to the Principle of Consistent Interpretation

In the EU, there is the principle of consistent interpretation that was initially applied to the interpretation of national law in conformity with EU law. As early as in 1984, the Court of Justice of the EU (CJEU) in Von Colson held that ‘national courts are required to interpret their national law in light of the wording and the
purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.2 In *Marleasing* the CJEU further addressed the principle of consistent interpretation as follows: ‘in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive...’.3 Later in *Commission v Germany*, the CJEU broadened the applicability of consistent interpretation with regard to public international law, and explicitly stated the provisions of EU secondary legislation should be interpreted consistent with international agreements.4 In a subsequent case of *Commune de Mesquer*, the CJEU confirmed the applicability of consistent interpretation of national law with public international law, and modified its previous statement in *Marleasing* by stating:5

... in applying national law, whether the provisions in question were adopted before or after the directive or derive from international agreements entered into by the Member State, the national court called on to interpret that law is required to do so, as far as possible, in the light of the wording and the purpose of the directive.

Thus it has been established that national law should be interpreted in the light of public international law.6

WTO law is within the domain of public international law and the CJEU considers

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5 Case C-188/07, *Commune de Mesquer* [2008] ECR I-4501, para. 84. Emphasis added.
consistent interpretation is also applicable with WTO law.⁷ For example, the CJEU in Herms stated:⁸

Since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts ... when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs Agreement.

As regards WTO rulings, the CJEU does not explicitly state whether the principle of consistent interpretation is applicable.⁹ Nevertheless, the EU courts refer to WTO rulings when interpreting national law, especially in the areas of anti-dumping and anti-subsidy. The questions to what extent WTO rulings affect the interpretation of national law, whether there are parameters that shape the EU courts’ reference to WTO rulings, and whether the reference to WTO rulings is qualified as consistent interpretation, are worth examination and consideration. The following text will examine the EU case-law in this respect.

5.2.2 The EU Courts’ Application of Consistent Interpretation with regard to WTO Rulings

Three cases, Shanghai Teraoka Electronic, Transnational Company, and Novatex, are selected to specifically address the EU courts’ interpretation of the EU law with

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⁸ Case C-53/96, Hermès International v FHT Marketing Choice [1998] ECR I-3603, para. 28. Other examples include the case of Reliance Industries, in which the General Court stated that ‘the above provisions of the Basic Anti-Dumping and Anti-Subsidy Regulations must be interpreted, in so far as is possible, in the light of the corresponding provisions of the WTO Anti-Dumping and Anti-Subsidy Agreements.’ Case T-45/06, Reliance Industries v Council and Commission [2008] ECR II-2399, para. 91.
⁹ Gattinara supra n. 7.
regard to WTO rulings. The analysis will focus on the role that the WTO rulings play in the process of interpretation and the parameters that shape the EU courts’ reference to WTO rulings.

In *Shanghai Teraoka Electronic*, the General Court (GC) found it necessary to interpret the term of ‘dumped imports’ contained in Article 3 of the EU basic anti-dumping regulation.\(^\text{10}\) The GC first analyzed the plain meaning of ‘dumped imports’, then examined the relevant context and the object and purpose of Article 3, and arrived at the meaning that ‘dumped imports’ did not cover imports by an exporting producer who did not engage in dumping.\(^\text{11}\) The GC further considered the case-law and the WTO ruling in *EC – Bed Linen* so as to confirm its interpretation.\(^\text{12}\) Attention is paid to the GC’s original expression that ‘the interpretation is consistent with that given to the WTO Agreement in [EC – Bed Linen] report, the findings of which were accepted by the Council’.\(^\text{13}\) Two points are noteworthy. Firstly, in this case, the cited WTO ruling was used to confirm the GC’s interpretation of ‘dumped imports’, thus they served as supplementary means of interpretation. Secondly, the GC noted the cited WTO ruling had been accepted by the Council, leaving open the question of whether it would have referred to WTO rulings that were not accepted by the Council. Nevertheless, note is taken that the EU was a party to *EC – Bed Linen* and bound by the WTO ruling in *EC – Bed Linen*.

In *Transnational Company*, the GC had to interpret Article 3(6) and (7) of the EU’s basic anti-dumping regulation\(^\text{14}\) in order to determine whether there was a

\(^{10}\) Case T-35/01, *Shanghai Teraoka Electronic v Council* [2004] ECR II-3663, para. 158.

\(^{11}\) Ibid, paras. 159-162.

\(^{12}\) Ibid, paras. 163, 165.

\(^{13}\) Ibid, para. 165.

\(^{14}\) Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community. Article 3(6) provides “It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.” Article 3(7) provides “Known
sequential requirement for the causation analysis of the injury involved in the anti-dumping determinations. Specifically, whether the Commission should examine the impact of the dumped imports and of other known factors on the EU industry before going on to conclude there was a causal link between the imports and the dumping, or whether the Commission should first examine whether the injury was caused by the imports, and then - if the causal link was established – whether other factors might have contributed to the injury to such an extent that they broke the causal link.

The GC examined the wording of Article 3(6) and (7), their purpose and their context in turn. According to the wording, the GC stated that the Commission was obligated to assess whether the dumped imports were causing material injury to the EU industry and whether all the other known factors were injuring the EU industry at the same time as the dumped imports. According to the purpose, the GC posited the Commission was obligated to separate and distinguish the injurious effects of the dumped imports from those of other factors. The GC did not arrive at a conclusion about the meaning of Article 3(6) and (7) in the light of the wording and the purpose, until it examined the context. Regarding that context, the GC indicated that Article 3(6) and (7) of the basic Regulation represented the transposition of Article 3.5 of the WTO Anti-Dumping Agreement (ADA) into EU law, thus reference to Article 3.5 of the ADA and relevant interpretations made by factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.”

16 Ibid.
17 Ibid, paras. 30-32.
18 Ibid, para. 30.
19 Ibid, para. 31.
WTO tribunals was necessary.\textsuperscript{20} In that connection, the GC pointed out that WTO law was not directly applicable, except under exceptional circumstances where the EU had intended to implement a particular obligation in the WTO context or where the EU measure referred expressly to the precise provisions of WTO law.\textsuperscript{21} Considering recital 5 to the basic Regulation, the GC further stated that the basic Regulation transposed into EU law the rules laid down in the ADA.\textsuperscript{22} Thus the GC held the provisions of the basic Regulation should be interpreted consistently with the corresponding provisions of the ADA.\textsuperscript{23} It is noted that the GC did not explicitly recognize direct applicability or direct effect of the ADA, but did recognize that the principle of consistent interpretation was applicable with regard to the ADA. As to the interpretations of the ADA contained in WTO rulings, the GC did not consider that they were binding on the Court; nevertheless, the GC stated that the lack of binding effect did not prevent them from referring to those interpretations ‘as in the present case’.\textsuperscript{24} Thus the GC referred to the WTO ruling in \textit{US – Hot-Rolled Steel}, in which the Appellate Body found ‘investigating authorities had to make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they had to separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.’\textsuperscript{25} Based on the WTO jurisprudence, the GC concluded that Article 3(6) and (7) did not require the Commission to make sequential analysis of the factors that were of injurious effects.\textsuperscript{26}

In this case, the GC took relevant WTO ruling as the context for the interpretation of the basic Regulation. Since the GC did not arrive at the meaning of Article 3(6) and (7) after examining the wording and the purpose, it relied on the WTO

\textsuperscript{20} Ibid, para. 32.
\textsuperscript{21} Ibid, para. 33.
\textsuperscript{22} Ibid, para. 34.
\textsuperscript{23} Ibid, para. 35.
\textsuperscript{24} Ibid, para. 36.
\textsuperscript{25} Ibid, para. 37.
\textsuperscript{26} Ibid, paras. 38-40.
jurisprudence to make the interpretation. So in this case the GC applied the principle of consistent interpretation with WTO rulings. Attention is paid to the fact that before referring to the relevant WTO rulings, the GC analyzed the relationship between the EU basic anti-dumping Regulation and the WTO ADA, and pointed out the EU Regulation transposed the ADA into EU law. That transposition provided the groundings for the GC’s reliance on the WTO ruling in _US – Hot-Rolled Steel_, in which the EU was a third party. This may explain the GC’s cautious expression of ‘as in the present case’, which revealed that the GC would not have referred to the WTO ruling if WTO law had not been transposed into EU law.

In _Novatex_, the applicant argued that, by interpreting Article 3(2) and Article 6(b) of the EU basic anti-subsidy Regulation in accordance with Article 14 of the WTO Agreement on Subsidies and Countervailing Measures (SCM), the appropriate interest rate should be the rate available on the market at the time when the loans were contracted and not that which applied during the investigation period, particularly in the case of a fixed-rate financing. The applicant’s argument was mainly based on the WTO rulings cited by it. Thus the GC had to interpret Article 3(2) and Article 6(b) in order to decide the meaning of ‘appropriate interest rate’.

The GC first examined the wording of Article 3(2) and Article 6(b), and posited that the wording did not indicate or imply whether the appropriate interest rate should be the one in force at the time when a long-term loan was negotiated. Then the GC continued to examine the WTO rulings cited by the applicant. The GC did not

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27 Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidized imports from countries not members of the European Community. Article 3(2) states “a benefit is thereby conferred.” Article 6(b) provides “a loan by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain on the market. In that event the benefit shall be the difference between these two amounts.”


29 Ibid, para. 120.

30 Ibid, para. 119.
consider those WTO rulings directly addressed the issue in this case, \(^{31}\) nor were the tenses of the verbs used in relevant parts of the cited panel reports considered enlightening. \(^{32}\) The GC analyzed the applicant’s understandings of the Appellate Body report that was relied on by the applicant, and considered the applicant’s understandings were incorrect due to the inconsistency between the understandings and the ordinary meaning of the text of Article 14 of the SCM. \(^{33}\) According to the GC, the Appellate Body had not limited the analysis of financial contribution to the time when the financial contribution concerned was granted, but permitted the advantage to be calculated either at the time of granting of the financial contribution or at a subsequent time. \(^{34}\) Thus the GC concluded the applicant’s argument could not be upheld. \(^{35}\)

In this case, the relevant WTO rulings were the major basis for the GC’s interpretation of the EU basic anti-subsidy Regulation. The problem before the GC was that those WTO rulings did not directly address the interpretation at issue, thus how to understand the WTO rulings was determinative. Although the GC came to different conclusions from the applicant’s, it could not be concluded that the GC’s understandings were prejudiced, because the GC neutrally pointed out the mistake in the applicant’s conclusions which were incompatible with the ordinary meaning of the text of Article 14 of the SCM. From the GC’s analysis of the WTO rulings, it is fair to conclude in this case the WTO rulings played a primary role in the interpretation of EU law.

In summary, the above three cases exhibit the importance of relevant WTO rulings for the GC’s interpretation of EU law. It is noted that WTO rulings have played different roles in each case. In *Shanghai Teraoka Electronic*, the GC used the WTO

\(^{31}\) Ibid, para. 122.
\(^{32}\) Ibid, para. 123.
\(^{33}\) Ibid, para. 124.
\(^{34}\) Ibid.
\(^{35}\) Ibid, paras. 124-125.
ruling as supplementary material to confirm its interpretation of the term of ‘dumped imports’. In *Transnational Company*, the GC used the WTO ruling as the context for interpretation of the EU anti-dumping basic Regulation. In *Novatex*, the GC mainly relied on the WTO rulings to make the interpretation. No matter whether those WTO rulings served as supplementary material, the context or the major source of interpretation, it is revealed that the GC would like to respect WTO rulings and use relevant WTO rulings as guidance for their interpretation. For these three cases, the GC *de facto* applied the principle of consistent interpretation with WTO rulings.

However, attention is paid to different scenarios about the particular WTO rulings cited in those three cases. In *Shanghai Teraoka Electronic*, the cited WTO ruling was about a dispute to which the EU was a party and the ruling was also accepted by the Council. In *Transnational Company*, the cited WTO ruling was about the case in which the EU was not a party; nevertheless, the GC indicated Article 3(6) and (7) of the EU Regulation at issue represented the transposition of Article 3.5 of the WTO ADA, which exhibited the relevance of the transposition to the reference to pertinent WTO rulings. These two cases suggest the GC tend to refer to the WTO rulings that have some connection with the EU, either by the Council’s acceptance of relevant WTO rulings or by the EU law’s transposition of WTO law. Regarding the case of *Novatex*, the judgment did not write out which specific WTO cases were cited, so it is not clear about whether there was any relevance or what kind of relevance there was between the cited WTO rulings and the EU. More cases need to be examined in order to deduce the parameters that shape the EU courts’ application of consistent interpretation with WTO rulings.

Two further cases are worthy of note. In *Gul Ahmed Textile Mills*, the CJEU referred to the WTO ruling in *EC – Footwear (China)* to confirm its interpretation drawn from the wording of Article 3(7) of the EU Regulation No 384/96, the anti-dumping
Finally, in *Reliance Industries* the GC interpreted the word of ‘date’ in Article 11(2) of the EU basic anti-dumping Regulation and Article 18(1) of the basic anti-subsidy Regulation, in a manner consistent with its interpretation by the WTO tribunals. As a preliminary observation, the GC noted that the preambles to both Regulations indicated their intention to transpose into EU law as far as possible the rules contained in the WTO ADA and SCM.

It appears that certain connections between the cited WTO rulings and the EU law at issue are preconditions for the EU courts to interpret EU law in light of WTO rulings. Those connections may be the fact that the EU is a party to the cited WTO rulings or the fact that the cited WTO rulings are about the WTO law that has been transposed into EU law. According to the CJEU’s statement that ‘[a] DSB decision, which has no object other than to rule on whether a WTO member’s conduct is consistent with the obligations entered into by it within the context of the WTO, cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations’, it is inferred that the EU courts attached the legal effects of WTO rulings to that of WTO law and they would not grant WTO rulings stronger legal effects than WTO law. Given the fact that all the cases found relevant are in the areas of anti-dumping and anti-subsidy law, together with the fact that

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36 Case C-638/11P *Council v Gul Ahmed Textile Mills* [2013] ECR I-732 paras. 28, 32. See also case C-260/08, *HEKO Industrieerzeugnisse* [2009] ECR I-11571. This case was about rules of origin, and the CJEU was required to interpret the term ‘substantial processing or working’ in Article 24 of the Customs Code. Before the CJEU substantively interpreted the term, it referred to the WTO ruling in *US – Textiles Rules of Origin* (DS243) to confirm its position that the WTO Members enjoyed a margin of discretion concerning the adaptation of their rules of origin. As for the CJEU’s interpretation of the term, the CJEU did not refer to any WTO rulings. Thus this case exhibited nothing more than the CJEU’s respect for WTO rulings.

37 Case T-45/06, *Reliance Industries* [2008] II-02399. The GC firstly took into account the rule of treaty interpretation applied by WTO tribunals, and then stated that rule of interpretation corresponded to the rule applied by the EU judicature when called upon to interpret a provision of EU law. The GC referred to *New Shorter Oxford Dictionary* to examine the meaning of ‘date’, used relevant provisions of WTO law as the context, and took into account the aim of relevant provisions of WTO law to get the final meaning of ‘date’. It is noted that reference to dictionaries is notorious for WTO tribunals’ interpretation of WTO law. *Reliance Industries*, paras. 100-106.

38 Ibid, para. 89.

the EU courts considered the EU basic anti-dumping and anti-subsidy Regulations transposed into EU law as far as possible the rules contained in the ADA and SCM, it seems safe to conclude that the EU courts have applied the principle of consistent interpretation with WTO rulings in these areas. Attention is paid that the application of consistent interpretation with WTO rulings is not based on the presumed superiority of WTO rulings, but based on the EU law’s transposition of WTO law. That explains why the GC in Transnational Company referred to the WTO ruling in which the EU was only a third party. The EU courts’ approach to WTO rulings is distinguished from their approach to WTO law, in that they generally apply consistent interpretation with regard to all the provisions of WTO law and do not require relevant transposition. Although the EU courts apply the principle of consistent interpretation differently with regard to WTO rulings and WTO law, the EU jurisprudence per se is logical and coherent, for the EU courts have never put WTO rulings at the same level with WTO law. Thus the EU courts’ application of consistent interpretation with WTO rulings does not affect the internal soundness of the EU jurisprudence, nor does it damage the EU judicial authority.

40 The GC’s original words are ‘it is clear from the preambles to the Basic Anti-Dumping Regulation (recital 5) and to the Basic Anti-Subsidy Regulation (recitals 6 and 7), that the purpose of those regulations is, inter alia, to transpose into Community law as far as possible the new and detailed rules contained in the WTO Anti-Dumping and Anti-Subsidy Agreements…’ Reliance Industries, supra n. 8, para 89.
41 See the above analysis of Transnational Company, in which the GC referred to the WTO rulings in US – Hot-Rolled Steel. The GC also stated that ‘although the interpretations of the Anti-Dumping Agreement by the WTO’s Dispute Settlement Body cannot bind the Court in its assessment as to whether the contested regulation is valid...there is nothing to prevent the Court from referring to them, where – as in the present case...’ Transnational Company, para. 36.
42 About the EU courts’ position on the legal effects of WTO rulings and WTO law, see the text associated with n. 43. Here I reserve my opinion. I think a national court should distinguish the legal effects of WTO rulings in different scenarios. For the WTO rulings in which a WTO Member is a disputing party, those rulings are directly binding on the Member; otherwise, the WTO rulings are not binding. Note is taken that the issue of precedential value of WTO rulings is also relevant for analysis of legal effects of WTO rulings.
5.3 The US Courts’ Approach

5.3.1 Introduction to the Charming Betsy Doctrine

In the US, Charming Betsy is considered as a principle of statutory interpretation, which requires that ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.’ According to Article VI of the US Constitution, international law is inferentially considered as US law, thus Charming Betsy can work to incorporate international law into US law. This principle was enshrined in Restatement (Third) of the Foreign Relations Law of the United States. Nevertheless, Chevron is a competing doctrine with Charming Betsy. As regards the meaning of Chevron, the Supreme Court made the following statements:

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

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44 Article VI of the US Constitution provides that ‘[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.’
46 “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.” Restatement (Third) of the Foreign Relations Law of the United States, § 114.
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.\textsuperscript{47}

The \textit{Chevron} doctrine entails two-step analysis. The first step is for the court to ascertain whether the meaning of the statute is clear or ambiguous; if the meaning is ambiguous, then the court goes to the second step which is to examine whether the agency’s interpretation is reasonable.\textsuperscript{48} If the agency’s interpretation is reasonable, the court must defer to the agency’s interpretation.\textsuperscript{49} The reason for the attribution of deference to an agency’s interpretation is 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.’\textsuperscript{50} As for the second step of the analysis, the \textit{Charming Betsy} doctrine may come to compete with the \textit{Chevron} doctrine regarding which doctrine is applicable to the interpretation of the ambiguous statute. The competition may result in a clash under the circumstances where an agency’s interpretation of the statute conflicts with relevant international law. In contrast, harmonious application of both doctrines may also occur if the agency’s interpretation is consistent with international obligations.\textsuperscript{51}

\textsuperscript{49} ‘[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.’ \textit{Chevron USA, Inc. v National Resources Defense Council Inc}, supra n. 49, 844.
\textsuperscript{50} \textit{GTS Industries SA v United States}, (2002) 182 F. supp. 2d 1369, 1373.
\textsuperscript{51} It is noted that the competition between \textit{Charming Betsy} and \textit{Chevron} only occurs when the Congressional intent about the law at issue is ambiguous. Otherwise, \textit{Chevron} will not be applicable.
5.3.2 The US Courts’ Application of *Charming Betsy* with regard to WTO Rulings

Since WTO disputes often involve challenges to a member’s administrative agency actions, WTO rulings may contain interpretations of national administrative measures. Thus the US courts have to deal with the relationship between *Charming Betsy* and *Chevron* regarding the administrative measures that have been interpreted by WTO tribunals.\(^{52}\) In that context, two lines of cases exist in the US. The first line is about the cases in which *Chevron* trumps *Charming Betsy* and deference is attributed to an administrative agency’s interpretation. The second line is about the cases in which *Charming Betsy* is applied and the US law at issue is interpreted in the light of WTO rulings.\(^{53}\) The following text will delineate the cases under these two lines.

Regarding the first line of cases, under the influence of WTO rulings’ condemnation of ‘zeroing’, a series of cases were initiated to accuse the validity of zeroing practice\(^{54}\) that was applied by the US Department of Commerce (DOC) to calculate the dumping margins in anti-dumping determinations. In *Timken*, before the US Court of Appeals Federal Circuit (Federal Circuit), the complainant, Koyo, argued the DOC unreasonably interpreted Section 1677(35) to allow for zeroing.\(^{55}\) In the light of the WTO ruling in *EC – Bed Linen*, Koyo referred to *Charming Betsy* and asked the Federal Circuit to interpret the term of ‘fair comparison’ in Section

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\(^{54}\) “Zeroing” is a method of calculating weighted average dumping margins. It works as follows: the DOC first determines a dumping margin for US sales of a particular product by comparing the transaction price with the weighted average ‘normal value’ of that product. The DOC then aggregates the dumping margins for all US sales below normal value. Regarding all US sales made above normal value, the DOC assigns a dumping margin of zero. Thus, when the DOC calculates the weighted average dumping margin, the dumping margins for sales below normal value are not offset by ‘negative dumping margins’ for those sales made above normal value. *Corus Staal Bv v. U.S.* Federal Circuit, (2007) 502 F.3d 1370, 1372.

1677b(a) in a manner consistent with the US international obligations. The Federal Circuit disagreed with Koyo and found the DOC’s zeroing practice was a reasonable interpretation of the US statute. Firstly, the Federal Circuit agreed with the DOC’s position that Section 1677b(a)(1)-(8) was an exhaustive list and the ‘fair comparison’ requirement contained in this Section did not impose any requirements for calculating normal value beyond those explicitly established in the statute. Secondly, without any detailed analysis of the WTO jurisprudence, the Federal Circuit explicitly stated the WTO ruling in EC – Bed Linen was not persuasive. In contrast, the Federal Circuit posited the DOC’s ‘longstanding and consistent administrative interpretation [wa]s entitled to considerable weight.’ Thirdly, the Federal Circuit confirmed the Court of International Trade’s (CIT) distinction between EC – Bed Linen and this case for the following two reasons: (1) the US was not a party to EC – Bed Linen, and (2) EC – Bed Linen dealt with an antidumping investigation rather than an administrative review as that appeared in this case. The Federal Circuit stressed that the absence of the US as a party to EC – Bed Linen was an important distinction. Thus the Federal circuit applied Chevron and decided the DOC’s interpretation of the statute to allow for zeroing was reasonable. As what the Federal Circuit stated in the case, it ‘accorded particular deference’ to the DOC’s interpretation.

In Corus, before the Federal Circuit, the complainant Corus initiated a similar complaint as that which was raised in Timken, arguing the DOC’s interpretation of

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56 The US Code Section 1677b(a) provides ‘a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value should be determined as follows: (1) Determination of normal value...’

57 Timken (Federal Circuit), supra n. 55, 1343.

58 Ibid, 1344.

59 Ibid.

60 Ibid, 1339.

61 Ibid, 1344.

62 The Federal Circuit’s original expression was that ‘[i]n deed, we have accorded particular deference to Commerce in antidumping determinations.’ Ibid, 1342.
the US statute to allow for ‘zeroing’ was not reasonable under the Charming Betsy doctrine.\footnote{Corus Staal BV, Et Al. V. Dept. of Commerce, Et Al, (2005) 395 F.3d 1343, 1347.} Two points in this case are noteworthy. Firstly, in order to avoid the precedential effect of Timken, Corus distinguished this case from Timken for the reason that this case was about anti-dumping investigations, rather than anti-dumping reviews that were involved in Timken.\footnote{Ibid, 1347.} In fact, Corus’ reason for the distinction was exactly the same as that was used by the Federal Circuit in Timken to distinguish Timken from EC – Bed Linen. However, the Federal Circuit disagreed with Corus’ distinction, which means it overthrew its previous distinction in Timken. The Federal Circuit stated that the true distinction between anti-dumping investigations and anti-dumping reviews was that the former compared the average US price with the average normal value, while the latter compared the US price with the monthly average normal value on an entry-by-entry basis.\footnote{Ibid.} The Federal Circuit continued to state that both anti-dumping investigations and reviews fell under Section 1677(35)(A) and its decision in Timken addressed the DOC’s interpretation of Section 1677(35).\footnote{Ibid.} Thus the Federal Circuit confirmed the precedential effect of Timken and concluded that ‘zeroing’ was a reasonable interpretation under Chevron.\footnote{Ibid.} Secondly, Corus referred to the WTO rulings in EC – Bed Linen, US – Corrosion-Resistant Steel Sunset Review and US – Softwood Lumber V to support its argument.\footnote{Ibid, 1348.} Different from Timken, in this case Corus cited the WTO rulings in which the US was a party. It is noted that in Timken, the Federal Circuit indicated that the absence of the US as a party to EC – Bed Linen distinguished Timken from EC – Bed Linen, and thus the Federal Circuit denied the persuasive effect of the WTO ruling in EC – Bed Linen. It seemed difficult for the Federal Circuit to deny the persuasive effects of the cited WTO rulings in US – Corrosion-Resistant Steel Sunset Review and US – Softwood Lumber V. However,
the Federal Circuit held those WTO rulings were not adopted as per Congress’ statutory scheme, so it rejected those WTO rulings as non-binding.\textsuperscript{69} In conclusion, the Federal Circuit applied \textit{Chevron} and provided ‘substantial deference’ to the DOC’s interpretation.\textsuperscript{70}

From \textit{Timken} to \textit{Corus}, it is obvious that \textit{Chevron} trumped \textit{Charming Betsy} regarding their applicability to the interpretation of the US statutes. Meanwhile, it is revealed that the Federal Circuit preferred to use the technique of ‘distinction’ in order to deny the relevance and persuasive effects of WTO rulings. ‘Distinction’ was in fact manipulated and the standard of ‘distinction’ was capricious. If ‘distinction’ did not work, the Federal Circuit had the last shift that the cited WTO rulings would not be binding unless they were adopted as per Congress’ statutory scheme. It seems the Federal Circuit’s final purpose was to circumvent relevant WTO rulings and to defer to the DOC’s interpretation.

Regarding the second line of cases, the US courts applied \textit{Charming Betsy} and interpreted the US statutes consistently with relevant WTO rulings. However, these cases did not prove the application of \textit{Charming Betsy} was linked to the supremacy of WTO rulings or the respect for international obligations.

In \textit{Warren}, the petitioners requested the US Court of Appeals District of Columbia Circuit (DC Circuit) to review a rule promulgated by the Environmental Protection Agency (EPA) in 1997 (1997 Rule) to implement the anti-dumping provision of reformulated gasoline programme established by the Clean Air Act Amendments of 1990.\textsuperscript{71} The 1997 Rule stemmed from the 1994 Rule, which treated domestic refiners, foreign refiners and importers differently. The WTO ruling in \textit{US – Gasoline} held that the 1994 rule violated the anti-discrimination norm of the GATT 1994.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{69} Ibid, 1349.
\item \textsuperscript{70} Ibid, 1346, 1349.
\item \textsuperscript{71} George E. Warren Corporation v US Environmental Protection Agency, (1998) 159 F.616, para. 1.
\item \textsuperscript{72} Ibid, para. 7.
\end{itemize}
In order to implement the WTO ruling, the EPA promulgated the 1997 Rule that allowed each foreign refiner either to accept the statutory baseline or to petition the EPA for permission to establish an individual baseline. The petitioners argued the 1997 Rule was beyond the EPA’s statutory authority, and one reason supporting their argument was that the EPA considered factors other than air quality under Section 7545(k)(8). In other words, the petitioners accused that the EPA should not have taken into account the adverse WTO ruling in promulgating the 1997 Rule.

The DC Circuit applied two-step analysis of *Chevron* to examine the accusation. At the first step, it posited the text or structure of Section 7545(k)(8) did not indicate whether the Congress intended to preclude the EPA from considering factors other than those listed in the Section. Then the DC Circuit went to the second step to analyze whether the EPA’s interpretation of Section 7545(k)(8) was permissible. Here the DC Circuit incorporated *Charming Betsy* into the second step analysis of *Chevron*. It indicated the EPA’s consideration of other factors was supported by the said WTO ruling and congruent with the Supreme Court’s instruction to avoid an interpretation that would put a law of the US into conflict with a treaty obligation of the US. Thus the DC Circuit supported the EPA’s interpretation of Section 7545(k)(8).

In *Allegheny*, a dispute before the Federal Circuit was about the interpretation of

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73 *ibid*, paras. 7-8.
74 Section 7545(k)(8) provides: (A) In general - Within 1 year after November 15, 1990, the Administrator shall promulgate regulations applicable to each refiner, blender, or importer of gasoline ensuring that gasoline sold or introduced into commerce by such refiner, blender, or importer (other than reformulated gasoline subject to the requirements of paragraph (1)) does not result in average per gallon emissions (measured on a mass basis) of (i) volatile organic compounds, (ii) oxides of nitrogen, (iii) carbon monoxide, and (iv) toxic air pollutants in excess of such emissions of such pollutants attributable to gasoline sold or introduced into commerce in calendar year 1990 by that refiner, blender, or importer. Such regulations shall take effect beginning January 1, 1995.
75 *Warren*, supra n. 71, paras. 9, 22.
76 *ibid*, para. 22.
77 *ibid*, paras. 25-26.
Section 1677(5)(F). The DOC and the domestic producers (collectively, Allegheny) argued the interpretation of the Section allowed the application of the same-person methodology to analyze whether a post-privatization corporation retained the pre-privatization subsidies. The DOC’s theory about the same-person methodology was as follows: the subsidy created a financial liability that belonged to and resided in the corporation itself, not the owners of the corporation and that the transfer of ownership through sales of stock could not extinguish liability for past countervailable subsidies. Thus the DOC treated transfers of ownership through sales of stock differently from through sales of assets. The Federal Circuit disagreed with the DOC.

The Federal Circuit firstly expressed that *Chevron* was not applicable to this case, because the Congress had spoken directly to the issue of whether the DOC might treat sales of stock differently from sales of assets. Thus the Federal Circuit did not defer to the DOC’s interpretation. By examining the statutory language, the legislative history and the precedent of *Delverde III*, the Federal Circuit agreed with the trial court regarding the deficiencies underlying the same-person methodology. The Federal Circuit also considered the *Charming Betsy* doctrine.

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78 Section 1677(5)(F): A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailing subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm’s length transaction.

79 The DOC applied the same-person methodology to analyze whether a post-privatization corporation was the same corporate person as pre-privatization corporation. If it was the same corporate person, it would be inferred that the post-privatization corporation had retained the pre-privatization subsidies. The same-person methodology examined the pre- and post-privatization entities in the light of the following four elements: the continuity of general business operations, the continuity of production facilities, the continuity of assets and liabilities, and the retention of personnel. *Allegheny Ludlum Corp. v United States*, Federal Circuit, (2004) 367 F.3d 1339, paras. 7, 12.

80 Ibid, para. 22.


82 The deficiencies included that ‘a distinction between a transfer of ownership involving stock and assets would elevate form over substance’; and the same-person methodology was ‘a *per se* rule for all practical intents and purposes, completely ignoring the complexity inherent in a privatization.’ ibid, paras. 23-36.
supported its conclusion that sales of stock and sales of assets should be equally treated, in that the WTO ruling in *US – Countervailing Measures on Certain EC Products* decided that the same-person methodology violated Section 123 of the Uruguay Round Agreements Act (URAA).  

In summary, although *Charming Betsy* was applied in *Warren* and *Allegheny*, it could not prove *Charming Betsy* was a useful tool to provide deference to WTO rulings. In *Warren*, *Charming Betsy* was incorporated into the second step analysis of *Chevron* for the sake of supporting the EPA’s interpretation, rather than to provide deference to the WTO ruling. In *Allegheny*, it was because the Congressional intent was clear that the Federal Circuit did not apply *Chevron*; otherwise, the Federal Circuit would have followed two-step analysis of *Chevron* and deferred to the DOC’s interpretation. *Charming Betsy* would not trump *Chevron* if the Congressional intent was ambiguous. Disregarding the scenario as that in *Warren* where an administrative agency’s interpretation is consistent with relevant WTO rulings, the following two scenarios should be distinguished concerning the US law interpretation. The first scenario is where the Congressional intent is ambiguous and *Chevron* is applied; the second one is where the Congressional intent is clear and *Charming Betsy* is applied. It seems the first scenario is more likely to happen because a statute with ambiguous Congressional intent is more likely to be ambiguous, and thus *Chevron* is more likely to be applied. According to Gathii’s extensive survey of the US case-law, the US courts are more likely to defer to an administrative agency’s interpretation, rather than the interpretations contained in relevant WTO rulings.  

In conclusion, *Chevron* is the dominant doctrine for the US law interpretation, and *Charming Betsy* is subordinate.  

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83 Ibid, para. 39.  
84 Gathii, *supra* n. 53, 5-6.  
85 Mustafa T Karayigit, 'Commonalities and Differences between the Transatlantic Approaches
Another noteworthy point is that the US jurisprudence is contradictory regarding the application of *Charming Betsy* and *Chevron*. The Federal Circuit’s analysis of the standard of ‘distinction’ is capricious, which is problematic for the US jurisprudence. It is also noted that in *Warren*, the DC Circuit stressed Section 7545(k)(8) did not require the non-list factors to be ignored; however, in *Timken*, the Federal Circuit stressed Section 1677b(a)(1)-(8) did not require non-list factors to be considered. Such contradictory jurisprudence reflects the challenge of WTO rulings to the US judicial authority and poses a question that how the US courts may coordinate their rulings with WTO rulings.

### 5.4 The Reasons Underpinning the EU and the US Courts’ Approaches

In the light of above analysis, the EU courts are faithful in interpreting EU law in conformity with WTO rulings in the areas of anti-dumping and anti-subsidy, and their jurisprudence is logical and coherent. However, the US courts selectively applied *Charming Betsy* with WTO rulings and their jurisprudence is contradictory. It is worth investigating the reasons underlying their different approaches. Firstly, it seems the EU principle of consistent interpretation is the counterpart of the US *Charming Betsy*; however, they are different in terms of origin, purpose, and vitality. Those differences partly explain why the EU consistent interpretation is adequate to deal with the relationship between national law interpretation and WTO rulings, while, *Charming Betsy* is not.
Consistent interpretation originated in Von Colson in 1984 and the CJEU designed it to deal with the relationship between an EU Member State’s national law and EU law.\footnote{Paul P. Craig and Gráinne De Búrca, EU Law: Text, Cases, and Materials (4th edn), Oxford University Press (Oxford 2007), 427.} The CJEU’s purpose was to ensure the EU directives would be given some effect despite the lack of direct effect, and to assert a measure of control to ensure legal uniformity and legal integration.\footnote{Ibid.} Subsequently, the applicability of consistent interpretation was broadened to deal with the relationship between the EU secondary legislation and public international law. Since WTO law is considered as within the domain of public international law, consistent interpretation is also applicable with WTO law. It is noted that consistent interpretation is dynamic and applied as such by the EU courts. Regarding the relationship between an EU Member State’s national law interpretation and EU law, the applicability of consistent interpretation is governed by EU law, and it is up to the CJEU, not the EU Member State’s courts, to determine the effect of EU law. In contrast, concerning the relationship between EU law interpretation and public international law, the applicability of consistent interpretation is governed by national law, and it is up to the EU courts, not international courts, to determine the effect of public international law.\footnote{Usually public international law, including WTO law, is silent on the validity and the effects of international law in the national legal order. While, consistent interpretation of national law with EU directives is required by the CJEU. Betlem and Nolkaemper, supra n. 6, 572-573.} The rationale underlying those two different scenarios of consistent interpretation is coherent, which are to respect the supremacy of higher law and to implement the obligations under higher law.\footnote{The rationales underlying consistent interpretation is disclosed by the EU case-law. It is not disputable that the EU directives are superior to the EU Member States’ national law. In Von Colson, the CJEU stated ‘[i]t is for the national court alone to rule on that question concerning the interpretation of its national law. However, the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation, is binding on all the authorities of Member States’. Von Colson, paras. 25-26. Regarding the superior position of international agreements, the CJEU in Commission v Germany stated ‘the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is
When the EU courts interpret EU law in conformity with WTO rulings under the condition that relevant WTO law has been transposed, the rationale under such scenario of consistent interpretation is the derivative superiority of the WTO rulings arising from relevant WTO law that is applied in those rulings. Whether the EU law has transposed relevant WTO law determines whether relevant WTO rulings shall be taken into account in national law interpretation, which is coherent with the EU jurisprudence that consistent interpretation with public international law is governed by national law. Thus the principle of consistent interpretation suffices to deal with the relationship between national law interpretation and WTO rulings.

*Charming Betsy* originated in *Murray v The Schooner Charming Betsy* in 1804, and the US Supreme Court designed it to avoid national law’s potential conflicts with international law. In the early 19th century, the US was a weak country, and the Supreme Court was aware that the US government had a strong desire to avoid violations of international law, due to the fear that a violation might entangle the US in war. The primary consideration of *Charming Betsy* was the US weakness in relation to the European powers. Thus when *Charming Betsy* was born, its essence was that the US courts spontaneously restricted the US extraterritoriality in order to avoid war. Note is taken that international law in the 19th century mainly regulated the relations between states and was not as intrusive as international law today which has penetrated into the domestic legal realm. So,
the original purpose of *Charming Betsy* was different from the EU consistent interpretation which was designed for legal uniformity and legal integration. The growth of *Charming Betsy* was not positive, which coincided with a decline in its cogency.\(^95\) In many cases where *Charming Betsy* was concerned, the US judges ignored *Charming Betsy* completely.\(^96\) In addition, the Restatement (Third) of the Foreign Relations Law of the United States provides justification for the US courts to reject *Charming Betsy* by the conditional statement that *Charming Betsy* is applicable ‘[w]here fairly possible’.\(^97\) The conditional statement of ‘[w]here fairly possible’ leaves room for the US judges to circumvent the applicability of *Charming Betsy*, which aggravates certainty and predictability of *Charming Betsy*. Meanwhile, the Congress could rule out the applicability of *Charming Betsy* by designation that specific legislation be exempt from reconciliation with international law.\(^98\) Furthermore, as stated above, *Chevron* may come to compete with *Charming Betsy* regarding their applicability to national law interpretation. Thus *Charming Betsy* per se is not sound, and its applicability is uncertain.\(^99\)

Therefore, compared with the principle of consistent interpretation in the EU, *Charming Betsy* is old and vulnerable. Different from consistent interpretation that was designed for legal uniformity and integration, *Charming Betsy* was originally designed as a brake on the territorial reach of the US law.\(^100\) Without development and adaptation, *Charming Betsy* does not suffice to deal with the challenges arising from international law at today, not to mention the challenges arising from WTO law and WTO rulings that entail penetrating effects into internal legal realm.

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\(^96\) Ibid.

\(^97\) ‘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.’ Section 114 of the Restatement (Third).

\(^98\) Williams, *supra* n. 95, 697.

\(^99\) Bradley, *supra* n. 52, 490.

\(^100\) Leiner, *supra* n. 45, 1.
Secondly, the EU and the US legal frameworks that govern the issues of WTO law and WTO rulings are different. The EU legal framework allows the EU courts to deal with WTO issues flexibly. However, the US legal framework has tied up the US courts’ hands before the courts have to tackle WTO issues. Those differences explain why the US jurisprudence is more problematic regarding the effects of WTO rulings on national law interpretation, while, the EU jurisprudence is more coherent.

Regarding the EU legal framework, Article 216(2) of the Treaty on the Functioning of the EU provides that ‘[a]greements concluded by the EU are binding on the institutions of the Union and on its Member States.’ According to this Article, the CJEU has recognized the binding effect of international law. In addition, the CJEU in Haegemen stated that the provisions of an international agreement, ‘from the coming into force thereof, form an integral part of Community law’. Although there is a question about whether WTO law forms part of the EU legal order, the EU courts have not denied that WTO law is binding on the EU. Although there is a suspicion about whether WTO law is directly applicable, there is no suspicion that no provisions of EU law have prevented the EU courts from interpreting national law in conformity with WTO law. Since EU law does not explicitly stipulate whether the EU courts may interpret national law in conformity with WTO rulings, consistent interpretation with WTO rulings is an issue.

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101 Ex Article 300(7) TEC.
103 Case C-181/73, Haegemann v Belgian State, [1974] ECR 449, para. 5.
105 The recital to the Council Decision 94/800/EC of 22 December 1984 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) provides that ‘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’. In fact, the CJEU has consistently denied direct effect of WTO law, except for the recognition of two exceptions in Fediol and Nakajima.
completely within the domain of the EU courts. Since the CJEU has played an important role ‘as a motor of European integration’ and there is room for the CJEU to pursue its pro-integration preferences,\(^\text{106}\) it is not a surprise that the CJEU and other EU courts have interpreted EU law consistent with relevant WTO rulings under certain conditions.

Regarding the US legal framework, Section 102 of the URAA stipulates 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.’ This Section is the ‘supremacy clause’\(^\text{107}\) that explicitly forbids the US courts to defer to WTO law concerning the conflicts between the US law and WTO law.\(^\text{108}\) As regards the legal effects and implementation of WTO rulings, Section 123(g)(1) of the URAA provides:\(^\text{109}\)

> In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until...

According to Section 123(g)(1), implementation of WTO rulings is completely a matter within the domain of the political branches, who may decide not to amend the US law that is illegal under WTO rulings. Thus there is little room for the US

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\(^{109}\) There follows a list of items that requires the Trade Representative to consult congressional committees, relevant private sector advisory committees, and the head of relevant department or agency to decide whether, and if so, in what manner to implement WTO rulings.
courts to play a role in dealing with the relationship between the US law and WTO rulings, for the US courts ‘may not order an agency to adjust its interpretation of an ambiguous statute to conform to a WTO ruling’.\footnote{John J Barcelo III, ‘The Paradox of Excluding WTO Direct and Indirect Effect in US Law’ (2006) 21 Tul. Eur. & Civ. L.F. 147, 164.} It is understandable from the perspective of the separation of powers that the issues about WTO rulings have been excluded from the domain of the US judicial branch. However, when a private party initiates a complaint that an agency’s interpretation of the US law is unreasonable on the basis of 

Charming Betsy, the private party may use relevant WTO rulings as the groundings of the US international obligations in its complaint, thus the issues about WTO rulings will be indirectly brought to the courts.\footnote{This scenario happens such as in the cases of Timken and Corus analyzed above.} Under this circumstance, the US courts are in a dilemma because on the one hand, they do not have (full) power to deal with WTO rulings, and on the other hand, they have to decide the issues about WTO rulings. That partly explains why the US jurisprudence is not coherent in applying Charming Betsy to interpret national law with respect to WTO rulings.

By comparing the EU and the US legal frameworks, it is revealed that the EU courts have more power than US courts to tackle the issues about WTO rulings. As the CJEU is robust in promoting legal integration, it is natural for the CJEU to interpret national law in conformity with WTO rulings under certain conditions. However, the US legal framework entails a paradox between the separation of powers and judicial independence concerning the approaches to WTO rulings, thus the US courts are unable to appropriately handle the relationship between national law interpretation and WTO rulings.

5.5 Conclusions

In conclusion, this article has examined the EU and the US courts’ approaches to the interpretation of national law with regard to WTO rulings. Comparatively
speaking, the EU courts are receptive to WTO rulings, and interpret the EU law in light of WTO rulings in the areas of anti-dumping and anti-subsidy. The EU courts’ application of the principle of consistent interpretation is coherent, and the WTO rulings in the areas of anti-dumping and anti-subsidy are granted derivative superiority due to the transposition clauses contained in the EU anti-dumping and anti-subsidy basic regulations. In contrast, the US courts are reluctant to grant indirect effect to WTO rulings and selectively apply the *Charming Betsy* doctrine with WTO rulings. It seems the US courts are more likely to shut out the effect of WTO rulings by employing the *Chevron* doctrine to provide deference to an agency’s interpretation of the US law. However, a noticeable fact is that the US courts’ selective application of *Charming Betsy* disturbs the coherence of the US jurisprudence, which finally damages the US judicial authority.

The reasons underpinning the EU and the US courts’ different approaches are due to the different degrees of resilience of their legal systems. The EU legal system appears more resilient than the US legal system. In the EU, the principle of consistent interpretation is relatively young, from its birth it was designed for legal uniformity and legal integration, and its applicability has been broadened from consistent interpretation of national law with EU law to public international law, as well as WTO law. The EU is a supranational union and the EU courts are the creatures of a treaty rather than a constitution.\(^\text{112}\) Without explicit prohibition, the EU courts have room to pursue pro-integration preferences. In contrast, in the US the doctrine of *Charming Betsy* is old, which was designed for restricting the US extraterritoriality in order to avoid war, and it is applied without cogency. In addition, the provisions in the URRA explicitly exclude the issues about WTO law and WTO rulings from the domain of the US courts, thus the US courts are unable to keep independent when dealing with WTO rulings, given the concern about the

separation of powers. A question beyond this article is how a WTO Member may improve the resilience of its legal system in order to handle the relationship between international rule of law and national rule of law.
Chapter 6. Conclusions

This thesis has explored the issues of sovereignty and deference involved in the judicial interactions around WTO dispute settlement, by research on the WTO tribunals’ approach to national law interpretation and national courts’ approaches to WTO rulings. It is revealed that there are obstacles to the judicial interactions, which are unlikely to be solved in the near future. The research contributes to the literature on sovereignty and deference involved in the WTO dispute settlement, and also has implications for the thinking about emerging legal issues brought about by WTO-related multilayered governance.

6.1 Sovereignty and Deference in the WTO legal Context

The WTO is an intergovernmental organization and focuses on global trade regulation.\(^1\) WTO law plays some constitutional functions with ‘certain WTO guarantees of freedom, non-discrimination, rule-of-law and safeguard measures – not only in *intergovernmental* relations, but also inside countries for the protection of private rights against protectionist abuses of government powers – only in very imperfect ways, for instance, in the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS) which requires member states to “accord the treatment provided for in this Agreement to the nationals of other member states”.'\(^2\) Thus, sovereignty in the context of WTO is concerned with three levels of social relationship, which are the relationship between private parties and the states at the national level, the relationship between and among the WTO member states at the international level, and the delicate relationship between private parties and the WTO.\(^3\) The relationship between private parties and the WTO is not in the

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3 The relationship between private parties and the WTO is delicate, due to the fact that although
typical sense of national law or international law, also beyond the reach of Westphalian sovereignty.\(^4\)

The WTO governance is not constitutional governance, in that the WTO lacks a vertical division of powers or a formal separation of powers doctrine.\(^5\) However, it is notable that WTO law and other trade regulatory instruments form part of an emerging system of multilayered governance.\(^6\) Under this circumstance, different regulatory layers, i.e., the WTO, national governments, national courts, and other international regulatory bodies, may interact in a mutually supportive way, and may also interact in a conflicting way.\(^7\) It is positive for the WTO and the Members to work together to promote national and cosmopolitan interests. However, different regulators may have divergent and competing interests and values, and the WTO governance is not an exception.

The WTO disputes entail the clashes between the Members, as well as the clashes between the WTO tribunals and the Members. The WTO tribunals’ approach to national law interpretation may directly influence the sovereignty of the Members. Likewise, the WTO rulings in national courts may directly reflect the Members’ attitudes towards the WTO tribunals. Whether the WTO tribunals are sensitive to the Members’ sovereignty and whether national courts are active in cooperating with the WTO tribunals, are testing whether the WTO governance will go further. As regards the judicial interactions between the WTO tribunals and national courts, ‘deference’ is an important concept which is related with ‘sovereignty’, and also a tool which can be employed to calibrate the degree of respect that the WTO

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\(^4\) Westphalian sovereignty was used to deal with the relationship between the state and citizen at the national level, and the relationship between and among states at the international level.


\(^7\) Ibid.
tribunals and national courts pay to each other.

6.2 Judicial Interactions

6.2.1 The WTO Tribunals’ Approach to National Law Interpretation: Sovereignty-Sensitive

The reason why the author selected national law interpretation as one of the research areas is that national law is believed as within the domain of state sovereignty, so is national law interpretation. The WTO tribunals have to interpret national law when disputes about the meaning of national law appear. National law interpretation is one of the most sovereignty-sensitive issues before the WTO tribunals. The WTO tribunals’ approach to national law interpretation, to a large extent, reflects whether the WTO tribunals have paid proper respect to the Members’ sovereignty.

The answer to the first research question whether the WTO tribunals have infringed the Members’ sovereignty, is ‘no’. The author does not argue that the WTO tribunals have appropriately dealt with sovereign issues in every case, but argue that with the example of national law interpretation, the WTO tribunals, in some degree, respect the Members’ sovereignty and have attributed deference to the legislating states where appropriate.

Chapter 2 and Chapter 3, as the first part of the thesis, examine the WTO tribunals’ approach to national law interpretation. Although the WTO tribunals have claimed to characterize national law interpretation as a question of law, their actual approach to national law interpretation is to take it as a mixed question of law and fact. On the one hand, the WTO tribunals’ interpretation is dependent on the evidence of legal elements provided by the parties, which exhibits the characteristic of a factual issue. The legal elements are the facts, which include the text, the purpose, relevant regulations, the Members’ case-law, legislative history,
and so on. On the other hand, the WTO tribunals independently make interpretation of national law by application of their legal skills and legal knowledge, which presents the characteristic of a legal issue. The method of interpretation employed by the WTO tribunals is to undertake a holistic assessment of all relevant legal elements. The WTO tribunals take into account the Members’ sovereignty and respect the legislating states’ legal regimes. Deference has been attributed to the legislating states especially under the circumstances where the meaning of national law is in suspicion or uncertainty.

Nevertheless, a problem arises with respect to the WTO tribunals’ approach to national law interpretation. The WTO tribunals have claimed to characterize national law interpretation as a question of law, which is inconsistent with their actual approach that is to treat national law interpretation as a mixed question of law and fact. Thus the author argues that WTO tribunals should clarify their jurisprudence that national law interpretation is a mixed question of law and fact in future.

Another problem is concerning the legitimacy of WTO tribunals’ interpretation of national law. Given that no provision of WTO law authorizes the WTO tribunals to interpret national law, doubts arise as to whether the WTO tribunals have such authority to do so. The author argues that the theories of ‘justiciability’ and ‘implied power’ justify the WTO tribunals’ interpretation of national law. However, it is notable that the WTO tribunals’ interpretation of national law is different from national courts’ interpretation of national law. In essence, the WTO tribunals’ interpretation of national law is reinterpretation, which is for the WTO dispute settlement only and should not have precedential effect in national legal regime.

6.2.2 National Courts’ Approaches to WTO Rulings: Resistant or Receptive?
As to the second research question whether the Members’ courts have appropriately responded to WTO rulings, the author tends to answer ‘no’. With the EU and the US as examples, Chapter 4 and Chapter 5 examine the effect of WTO rulings in national courts. It seems different Members may adopt different approaches to WTO rulings, and even for one Member, its courts may attribute different degrees of deference to WTO rulings under different circumstances.

As regards the direct effect of WTO rulings, both the EU and the US courts deny it. On the one hand, there are negative effects of such denial. At the international level, arbitrary denial of direct effect of WTO rulings is against the principle of good faith. It fuels the disputants to resort to politics as the final resolution to solve the disputes, which may lead to endless negotiations and damage the international rule of law. In addition, the denial of direct effect also insulates sound interactions between the WTO tribunals and national courts, and further aggravates the separation of WTO law and national law. At the national level, the author argues that by arbitrary denial of direct effect of WTO rulings, the effects of WTO law cannot smoothly reach the bottom of the society, thus the individuals’ losses arising from national authorities’ inappropriate performance of WTO obligations cannot be compensated, and the independence of judicial review is also possible to be frustrated. On the other hand, there are reasons to justify national courts’ denial of direct effect of WTO rulings. First, neither the Members nor the WTO adjudicators have intended to grant direct effect to WTO rulings. Second, due to the lack of separation of powers within the WTO, and the lack of horizontal and vertical checks and balances on the WTO tribunals, the denial of direct effect is reasonable. Third, considering the fact that neither the WTO political organs nor national parliaments have checks on the WTO tribunals, it seems WTO rulings lack democratic legitimacy to have direct effect.

It is noteworthy that the EU and the US courts’ attitudes towards the denial of
direct effect of WTO rulings are different. The US courts explicitly stated that WTO rulings were ‘not binding on the United States, much less this court’. In contrast, the EU courts never explicitly stated that WTO rulings were not binding on them. One reason for the EU courts’ denial of direct effect is due to the consideration of lack of reciprocity that their important commercial partners do not recognize direct effect. Comparatively speaking, the US courts are resistant to WTO rulings, while, the EU courts are benign towards WTO rulings.

From the considerations of protecting importers’ and consumers’ interests and promoting the international rule of law, the author attempts to propose that the Members may consider attributing ‘conditional direct effect’ to WTO rulings. Specifically, if a losing Member commits to comply with WTO rulings and does not do so within the reasonable period of time, private parties should be allowed to rely on WTO rulings to initiate a complaint against relevant national authorities in their national courts; however, if the defendants (national authorities) have good reasons to justify their non-compliance with WTO rulings, they will be immune or partly immune from the obligations to comply with WTO rulings in national legal context. Whether the defendants are immune or partly immune from the obligations depends on national courts’ proportionality analysis in weighing and balancing different elements, such as the complainants’ losses, causality between the losses and non-compliance with WTO rulings, public interests, allocation of the costs among economic actors, the state’s budget, and so on. However, given that ‘conditional direct effect’ may create new incentives for the Members to fully exploit the WTO dispute settlement mechanism in ways that might undermine the WTO as a whole, whether to attribute ‘conditional direct effect’ to WTO rulings should not be compulsory, but only an option for the Members’ consideration.

As regards indirect effect of WTO rulings, the EU courts are receptive to WTO rulings and would like to attribute indirect effect to WTO rulings in certain legal
areas. In contrast, the US courts are reluctant to attribute indirect effect to WTO rulings. The EU courts attach the effect of WTO rulings to that of WTO law, and attribute different degrees of effect of WTO rulings in different areas. In the areas of anti-dumping and anti-subsidy law, relevant WTO rulings have derivative superiority deriving from relevant WTO law which has been transposed, and the EU courts interpret EU law in conformity with WTO rulings. In the area of intellectual property protection, the Court of Justice of the European Union (CJEU) takes into account the fact that in EU terms the TRIPs Agreement is a mixed agreement, the CJEU has established its authority to interpret TRIPs Agreement for the purpose of preliminary rulings. When the CJEU interprets TRIPs Agreement, it emphasizes the importance of consistent interpretation among an EU Member State’s national law, EU law and the TRIPs Agreement, and refers to WTO rulings in the same way as it refers to its own case-law. In contrast, when the US courts interpret the US law, they selectively apply the Charming Betsy doctrine and seldom defer to WTO rulings. The US courts are more likely to apply the Chevron doctrine to provide deference to the US administrative agencies’ interpretation. In addition, potential WTO rulings in the US courts may serve as factual context with deterrent effect.

The reason for the EU and the US different attitudes towards and approaches to WTO rulings is not because of indirect effect of WTO rulings per se, but because of different legal interpretive tools and different legal frameworks with respect to the EU and the US. Regarding the interpretive tools, the principle of consistent interpretation in the EU was designed for legal uniformity and legal integration, and it could be adapted to solve the issue about indirect effect of WTO rulings. The EU courts have broadened the applicability of consistent interpretation of national law with EU law to public international law, as well as to WTO law. In contrast, the Charming Betsy doctrine in the US was designed for restricting the US extraterritoriality in order to avoid war, and is not flexible enough to deal with legal
integration with regard to WTO rulings. Regarding the legal frameworks, the EU is a supranational union and the EU courts are the creatures of a treaty rather than a constitution. Without explicit prohibition, the EU courts have room to pursue pro-integration preferences. In contrast, the provisions in the Uruguay Round Agreements Act (URAA) explicitly exclude the issues about WTO law and WTO rulings from the domain of the US courts, thus the US courts are difficult to circumvent explicit stipulation so as to independently deal with WTO rulings.

In conclusion, comparatively speaking, the EU courts are receptive to WTO rulings, while, the US courts are resistant to WTO rulings. The EU courts’ jurisprudence is coherent from their denial of direct effect of WTO rulings to their attribution of indirect effect to WTO rulings. The rationale underlying their approach is that the effect of WTO rulings is attached to that of WTO law, thus the effect of WTO rulings is not stronger than that of WTO law. Since WTO law in the EU in general does not have direct effect, nor do WTO rulings. Regarding the areas where relevant WTO law has been transposed, the EU courts interpret EU law in the light of relevant WTO rulings. In contrast, the US courts’ jurisprudence seems problematic. The US courts selectively apply the Charming Betsy doctrine, which may result in conflicts and incoherence in their jurisprudence. In comparison, WTO rulings do not arouse serious problems for the EU courts or heavily frustrates the EU judicial sovereignty. However, it seems WTO rulings are challenging the coherence of the US jurisprudence and undermining the US judicial sovereignty.

6.3 The Obstacles to Judicial Interactions

From the perspective of national law interpretation, since national courts are not capable of participating in the WTO dispute settlement, the WTO tribunals do not have direct interactions with national courts. The legislating states may furnish national courts’ decisions to the WTO tribunals so as to defend their own interpretation of national law. Whether the WTO tribunals have the chance of
engaging with national courts depends on whether the legislating states offer the
evidence of national case-law, and also depends on whether there is relevant case-
law available in the legislating states. As to the national case-law which has already
been admitted to the WTO tribunals, the WTO adjudicators respect the hierarchy
of court decisions in the legislating states’ legal systems and more weight would be
given to a final judgment than an interim or interlocutory decision.

From the perspective of WTO rulings in national courts, most Members deny direct
effect of WTO rulings. Such denial may insulate sound judicial actions between the
WTO tribunals and national courts. As far as indirect effect of WTO rulings is
concerned, the Members may deny indirect effect and not interpret national law in
the light of relevant WTO rulings. Therefore, the obstacles to judicial interactions
from the side of national courts are visible. However, national courts should not be
blamed for the obstacles, because judicial interactions are concerned with the
design of the WTO framework, as well as a Member’s legal regime. The Members
have not been prepared to fully welcome WTO rulings and the situation is not yet
mature to attribute direct effect to WTO rulings.

6.4 Observations on Emerging Legal Issues about the WTO

The first observation is that the distinction between a question of law and a
question of fact is thorny. Although law/fact distinction is an old topic, new
scenarios about law/fact distinction have appeared, such as the characterization of
national law interpretation before WTO tribunals and the characterization of WTO
rulings before national courts. The thesis has addressed the characterization of
national law interpretation before the WTO tribunals, but has not yet analyzed the
characterization of WTO rulings before national courts. The fact appears that in the
EU courts, WTO rulings are not just facts, because the EU courts may interpret EU
law in the light of WTO rulings. Under this circumstance, WTO rulings not only have
persuasive value, but also seem to play the function of the applicable law. In the
US courts, WTO rulings are just the facts with deterrent effect. Therefore, different courts may treat WTO rulings differently and also characterize the issue of WTO rulings in different ways. It deserves further research in this respect.

The second observation is concerning the problem how to connect international rule of law with national rule of law. This thesis has partly addressed this issue by examining direct effect and indirect effect of WTO rulings in the EU and the US courts. However, more cases in other countries should be examined and analyzed, especially with respect to the countries that have different social systems, such as China. It is noted that the WTO tribunals have to interpret national law in order to assess whether national law is WTO-consistent. In this context, the WTO tribunals should consider and indeed have considered the Members’ case-law. On the contrary, when national courts apply WTO-related national law, national courts may also have to examine the WTO jurisprudence in order to comply with the obligations under WTO law. Therefore, a question is raised as to whether national courts have the obligation to examine relevant WTO jurisprudence before they apply WTO-related national law. Another noteworthy point is that the CJEU indeed interprets the TRIPs Agreement for the purpose of preliminary rulings. Regarding national courts’ interpretation of WTO law and the WTO tribunals’ interpretation of national law, the extent to which a court/tribunal should take into account another court/tribunal’s jurisprudence deserves research.

There are also other issues that require further consideration. For example, why the US courts are resistant to WTO rulings, considering the fact that the US was one of the major designers of the WTO. With regard to the scenario of indirect effect of WTO rulings in the US courts, it is a question whether WTO rulings are an ‘incoming tide’\(^8\) out of the US control. In addition, further comparative study is

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8 ‘Incoming tide’ originated in Lord Dennings’ statement that ‘[t]he treaty does not touch any of the matters which concern solely the mainland of England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European
necessary in order to cast light upon the issue about direct/indirect effect of international judgments, such as comparing the effect of WTO rulings with that of arbitral awards under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.’ Bulmer Ltd & Anor v. J. Bollinger SA & Ors, [1974] EWCA Civ 14, para. 5.
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