
Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement

Michelle Q. Zang*

Abstract

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

1 Introduction

Courts are talking to one another all over the world, and there are many types of judicial communication among courts across borders.¹ In Europe, the most significant caseload of the Court of Justice of the European Union (CJEU or the Court) arises from the preliminary reference mechanism,² through which the Court responds to questions raised by domestic courts of the member states. In the field of human rights,

* Post-doctoral Research Fellow, PluriCourts, University of Oslo, Oslo, Norway. Email: qingzi.zang@gmail.com. An early version of this article was published online in the Geneva Jean Monnet Working Paper Series, no. 03/2016.

¹ Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* (1994) 99.

² Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon (TFEU), [2010] OJ C83/49, Art. 267: 'Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon.'

the reasoning and interpretative methodology developed by the European Court of Human Rights has substantively influenced the jurisprudence of the Inter-American Court of Human Rights and the United Nations Human Rights Committee.³ In Latin America, one significant example of the so-called ‘judicial diplomacy’ is the permanent forum of the supreme courts of the Southern Common Market in Latin America (MERCOSUR) countries for judicial matters relevant to Latin American integration.⁴ Tribunals have found themselves always reaching out to, and entangled with, the ‘outside’, resisting collapse into, or subordination to, the outside but always maintaining a dynamic engagement through interpretation.⁵

Against this background, this article looks into the judicial communication between the CJEU and the Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO), two of the most established international adjudicators. In this article, the term ‘judicial communication’ refers to the reference made by one tribunal, during the process of adjudication, to the decision and/or practice of the other tribunal. Judicial behaviour of this type does not focus on exchanges in a responsive manner between two adjudicators but, instead, underlines the course of deliberation and comparison of the adjudicator with respect to the persuasiveness and applicability of the judicial decision or practice of the other adjudicator. It might be launched by the adjudicator’s own initiative or through the claims raised by the disputing parties. Judicial communication occupies a large middle ground on the continuum between resistance and convergence, highlighting the weighing process of the adjudicator in regard to the external sources in appropriate cases, denoting commitments to judicial deliberation but open to the outcome of either harmony or dissonance with those sources.

The central arguments of this article are twofold. First, communication activities between adjudicators – for example, the CJEU and the WTO DSM – are by and large determined by the relationship between them but in a unilateral sense – namely, the perception of one tribunal towards the law applied, and the decisions made, by the other.⁶ Second, when dealing with the decision and practice of another jurisdiction, adjudicators are highly cautious concerning the role and function of such judicial externality in their own adjudication process. The communication process reveals a mixed approach of the adjudicator involved both to open up to judicial externality

³ J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1995), at 18–19.

⁴ Jardim de Santa Oliveira, ‘Judicial Diplomacy: The Role of the Supreme Courts in MERCOSUR Legal Integration’, 48 *Harvard International Law Journal Online* (2007) 93.

⁵ Ruti and Howse, ‘Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order’, 41 *New York University Journal of International Law and Policy* (2008) 959.

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

and to be reluctant to do so. However, this wary approach of the adjudicator renders a number of important questions unsolved, including the fundamental enquiry in regard to the legal basis and consequences of such inter-jurisdiction communication.

Therefore, this article is structured in the following way. To start with, discussion will explore the ‘unilateral’ relationship between the CJEU and the WTO DSM. The first part focuses on the approach of the CJEU towards WTO rules and rulings, while the second part examines the legal status of the EU law and CJEU jurisprudence at the WTO DSM. The third part of the article then investigates the current communication activities between the two adjudicators, exploring the judicial approach respectively adopted by the CJEU and the WTO panels and the Appellate Body. The final part concludes.

2 The Approach of the CJEU towards the WTO Rules and Rulings

The approach of the CJEU towards WTO rules and rulings, the issue of the direct effect thereof in particular, has long been discussed and debated in literature.⁷ For the purpose of this article, a brief review and summary on this issue is nevertheless essential – the Court’s approach not only explains the manner in which it communicates with the WTO DSM, but it also sketches out the scope and boundaries of such judicial activity.

A Jurisprudence constante in the Lack of Direct Effect with Specific Exceptions

The approach of the CJEU towards WTO rules and rulings is embedded in the broader issue of the reception of international law in the European Union (EU) legal order, including not only the effect, but also the enforcement, of international law within the EU. The EU treaties do not have a supremacy clause except for the provision on the general binding force of international agreements,⁸ and the law in this area is primarily developed through the case law. According to the CJEU, it is up to the Court to decide within its jurisdiction the applicability and effect of the international agreements

⁷ Kuijper, ‘Conclusion and Implementation of the Uruguay Round Results by the European Community’, 6 *European Journal of International Law (EJIL)* (1995) 222; Eeckhout, ‘The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems’, 34 *Common Market Law Review (CMLR)* (1997) 11; Cottier, ‘Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union’, 35 *CMLR* (1998) 325; Trachtman, ‘Bananas, Direct Effect and Compliance’, 10 *EJIL* (1999) 655; Griller, ‘Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*’, 3 *Journal of International Economic Law (JIEL)* (2000) 441; Rosas, ‘Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective’, 4 *JIEL* (2001) 131; Snyder, ‘The Gatekeepers: The European Courts and WTO Law’, 40 *CMLR* (2003) 313; Kuijper and Bronckers, ‘WTO law in the European Court of Justice’, 42 *CMLR* (2005) 1313; Bronckers, ‘From “Direct Effect” to “Muted Dialogue”: Recent Developments in the European Courts’ Case Law on the WTO and Beyond’, 11 *JIEL* (2008) 885.

⁸ TFEU, *supra* note 2, Art. 216(2) provides: ‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.’

concluded by the EU, if the parties to the agreement have not enclosed the clause to that effect.⁹ To date, the Court has been fairly positive in granting direct applicability and effect to international agreements, including association agreements,¹⁰ free trade agreements,¹¹ partnership and cooperation agreements¹² and cooperation agreements.¹³ Nevertheless, there are limited but notable exceptions: the WTO, together with its predecessor, the General Agreement on Tariffs and Trade (GATT), and the United Nations Convention on the Law of the Sea (UNCLOS).¹⁴

In the case of the WTO, the Court consistently holds the position that the WTO, and its predecessor, the GATT 1947, are excluded from the rules in the light of which the legality of EU law can be accessed. During the GATT era, it was the judgments in *International Fruit* and *Germany* that pointed towards the Court's proposition.¹⁵ Subsequent to the entry into force of the WTO in 1995, there had been enquiries as to whether the new policy development injected at the Uruguay Round, especially the brand new DSM, should lead to a review, or even a change, of position established by the previous case law. An explicit response from the Court was delivered in the Portuguese textile case, where it was ruled that 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.¹⁶ This judicial interpretation also goes in line with the negotiation position taken by the EU executive branch – namely that it is clear from the preamble to Council Decision 94/800 concerning the conclusion of the Uruguay Round 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 State courts'.¹⁷

⁹ 'Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties' and 'only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community'. Case C-104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, [1982] ECR 3641, para. 17.

¹⁰ Case C-63/99, *The Queen v. Secretary of State for the Home Department*, [2001] ECR I-6369; Case C-235/99, *The Queen v. Secretary of State for the Home Department*, [2001] ECR I-6427.

¹¹ *Hauptzollamt Mainz*, *supra* note 9.

¹² Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR I-2579.

¹³ Case C-18/90, *Office national de l'emploi v. Bahia Kziber*, [1991] ECR I-199; Case C-58/93, *Zoubir Yousfi v. Belgian State*, [1994] ECR I-1353.

¹⁴ Joint Cases 21/72 and 24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219; Case C-149/96, *Portuguese Republic v. Council of the European Union*, [1999] ECR I-8395; Case C-308/06, *Intertanko and Others v. Secretary of State for Transport*, [2008] ECR I-4057. General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194; UN Convention on the Law of the Sea 1982, 1833 UNTS 3.

¹⁵ *International Fruit*, *supra* note 14; Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I-4973.

¹⁶ *Portugal v. Council*, *supra* note 14, para. 47.

¹⁷ Council Decision 94/800/EC, OJ 1994 L 336, at 1–2; see also *Portugal v. Council*, *supra* note 14, para. 48.

Nevertheless, the foregoing judgments denying direct effect of the WTO did not render the rules thereof irrelevant to EU law. In fact, the CJEU has constantly underlined the circumstances where it could carry out the legality review of the Community act in light of the multilateral trading rules.¹⁸ In particular:

it is only where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO, or where the Community measure refers expressly to the precise provisions of the GATT/WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.¹⁹

The ‘side passages’ above are respectively addressed in the jurisprudence as the implementation exception and the reference exception, which are notable in the cases of *Nakajima*²⁰ and *Fediol*.²¹ Nevertheless, the Court has so far insisted on a very strict approach towards the two exceptions. From a practical point of view, the Court only confirmed the application thereof in the field of anti-dumping and in the context of the New Commercial Policy Instrument,²² which was succeeded by the so-called Trade Barriers Regulation.²³

B WTO Rulings at the CJEU

The foregoing discussion has provided a brief overview of the legal effect of WTO rules within the EU. A question thus arises as to the effect and enforceability of the rulings delivered by WTO adjudicators – that is, the WTO panel/Appellate Body reports adopted by the Dispute Settlement Body. This question is of particular interest in light of the classic statement of the Court quoted above: ‘[W]here the Community intended to implement a particular obligation assumed in the context of the GATT/WTO ... it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.’²⁴ In other words, is the EU intended to implement a particular WTO obligation in the *Nakajima* sense when complying with an unfavourable WTO ruling?

¹⁸ *Germany v. Council*, *supra* note 15, para. 111; *Portugal v. Council*, *supra* note 14, para. 49.

¹⁹ *Portugal v. Council*, *supra* note 14, para. 49.

²⁰ In *Nakajima*, the Court observed that the EC measure at dispute made explicit reference to, and was adopted in accordance with, existing international obligations arising from relevant agreements under the GATT; the Community was therefore under an obligation to ensure compliance with the GATT and its implementing measures. Case 69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, [1991] ECR I-2069; *Portugal v. Council*, *supra* note 14, paras 30–31.

²¹ In *Fediol*, the Court opined that the lack of direct effect could not prevent it from interpreting and applying the rules of GATT with reference to a given case, especially where it is called upon to establish whether certain commercial practices should be considered incompatible with those rules. In that case, the GATT provisions formed part of the rules of international law to which the relevant EC law explicitly referred; thus, even without direct effect, the applicants may still rely on the GATT provisions to obtain a ruling on the lawfulness of certain EC measures and decisions. The rationale seems to be that, since the Commission made its decision on the basis of the GATT provisions, the interested party is thus entitled to request the Court to review the legality of the Commission’s decision in the light of those provisions. Case 70/87, *Fediol v. Commission*, [1989] ECR 1781, paras 19–22.

²² Council Regulation 2641/84, OJ 1984 L 252, at 1–6.

²³ Council Regulation 3286/94, OJ 1994 L 349, at 71–78.

²⁴ *Portugal v. Council*, *supra* note 14, para. 49.

Litigations over the direct effect of WTO rulings started from the ‘banana saga’ between the USA, Latin American countries and the EU. In September 1997, the WTO Appellate Body issued a report condemning the violation of the 1993 regime on the common organization of the market in bananas of the European Community (EC).²⁵ Afterwards, the EU consequently adopted several regulations amending the 1993 regime and brought into force the 1999 banana regime.²⁶ However, the compliance of the new regime was once again challenged at the WTO, and another unfavourable ruling was later delivered.²⁷

Chiquita, one Italian banana importer, then lodged a case in the CJEU claiming for compensation from the EU’s failure in bringing the 1993 regime in line with WTO law.²⁸ In particular, Chiquita contended that by enforcing the new 1999 import regime the EC was intended to implement a particular obligation assumed under the first WTO ruling in 1997 and, thus, that the *Nakajima* doctrine on implementation exception should apply. However, the Court disagreed. First, it ruled that as an exception to the principle that individuals may not directly rely on WTO provisions before the Community judiciary, the *Nakajima* doctrine must be interpreted restrictively.²⁹ Second, the circumstances of the adoption of the 1999 regime cannot be compared with the disputed EC measures to which the *Nakajima* case law applied. The 1999 regime did not transpose into Community law rules arising from a WTO agreement for the purpose of maintaining the balance of the rights and obligations of the parties to that agreement, and, thus, the WTO rulings concerned did not include any special obligations that the Commission intended to implement, within the meaning of the *Nakajima* doctrine.³⁰

Shortly after, a similar issue was raised again in *Van Parys*.³¹ The applicant, also a European banana importer, brought two actions against the decisions of the Belgian Intervention and Refund Board, which refused to issue it with import licences for the full amounts applied for. In its actions, Van Parys submitted that those decisions should be annulled because of the unlawfulness, in light of the WTO rules, of the 1999 banana regime on which those decisions were based.³² As the debate continued,

²⁵ WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III) – Report of the Appellate Body*, 9 September 1997, WT/DS27/AB. The common market organization for bananas, as established by Council Regulation 404/93, OJ 1998 L 210, replaced the various national banana import regimes previously in place in the EC’s member states. Subsequent EC legislation, regulations and administrative measures implemented, supplemented and amended that regime.

²⁶ Council Regulation 1637/98, OJ 1998 L 293, at 32.

²⁷ WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Report of the Article 21.5 Panel*, 12 April 1999, WT/DS27/RW/ECU.

²⁸ Case T-19/01, *Chiquita Brands International Inc., Chiquita Banana Co. BV and Chiquita Italia SpA. v. Commission of the European Communities*, [2005] ECR II-315.

²⁹ *Ibid.*, para. 117.

³⁰ *Ibid.*, para. 168.

³¹ Case C-377/02, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)*, [2005] ECR I-1645.

³² In that case, the Court first re-confirmed the non-applicability of the *Nakajima* doctrine as established in *Chiquita*. With regard to the issue of direct effect, the Court generally followed the reasoning in *Portugal v. Council*. The Court first recalled the considerable importance accorded to negotiation in the World Trade Organization (WTO) dispute settlement system; it further invoked the principle of reciprocity, the lack of which would risk introducing an anomaly in the application of the WTO rules.

the CJEU eventually elaborated on this issue in great detail in *FIAMM*. The Court observed that the WTO rulings and the substantive WTO rules cannot be fundamentally distinguished from each other, at least for the purpose of reviewing the legality of the conduct of the Community institutions.³³ As a result, a WTO ruling finding a WTO infringement cannot have the effect of requiring a WTO member to accord individuals a right that they do not have by virtue of those agreements in the absence of such a ruling.³⁴

The essence of the above CJEU judgments includes the following. First, the unfavourable WTO rulings do not include any special obligations, and the ensuing legislative amendments by the EU, during the compliance process, are not intended for implementation within the meaning of the *Nakajima* doctrine. Second, the legal effect of WTO rulings is inextricably linked to the effect of the WTO rules under dispute.³⁵ Owing to the conventional denial of direct effect, WTO rulings are therefore generally excluded from the rules in the light of which the legality of Community law can be assessed.

3 EU Laws and Jurisprudence in WTO Dispute Settlement

A *The Relationship between the CJEU and the WTO DSM*

As a customs territory, the EU is a WTO member in its own right, as are each of its member states. While the EU member states coordinate their position, the European Commission alone speaks for the EU and its member states at almost all WTO meetings and negotiations, including dispute settlement. *Status quo*, as such, leads to a 'mixed' character of the CJEU from the perspective of WTO adjudicators. First of all, it is a 'domestic' court of a customs territory with full WTO membership – that is, the EU. Second, it functions as a judiciary for trade-related disputes among the EU member states, standing in parallel with the WTO DSM in the network of international adjudication. The relationship between the DSMs of regional trade agreements (RTAs) and that of the WTO has been widely debated and continues to be an unsettled issue in international economic law.³⁶ In a number of WTO disputes, claims in relation to

³³ Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Others v. Council and Commission*, [2008] ECR I-6513, para. 120. The Court based this conclusion on two grounds. First of all, the general nature of the WTO Agreement, especially the reciprocity and flexibility thereof, has not changed either after the ruling has been adopted or after the implementation period has elapsed. Even after the expiry of the implementation period, the Community retains the possibility, according to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401, to find a mutually acceptable solution. Second, as is apparent from Article 3(2) of the DSU, recommendations and rulings of the Dispute Settlement Body (DSB) cannot add to, or diminish, the rights and obligations provided in the WTO agreements. Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) 1994, 1867 UNTS 154.

³⁴ *FIAMM*, *supra* note 33, para. 131.

³⁵ Case C-104/97 P, *Atlanta AG and Others v. Commission and Council*, [1999] ECR I-6983, paras 19–20.

³⁶ Hillman, 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should WTO Do', 42 *Cornell International Law Journal* (CILJ) (2009) 193; Marceau, Izaguerri

the rulings and jurisdiction of certain RTA DSMs have been deeply disputed, with the best-known instance being that of MERCOSUR and the North American Free Trade Agreement (NAFTA).³⁷

It goes beyond the scope of this article to look into the ongoing debate in detail. However, insofar as the CJEU is concerned, suffice it to say that the jurisdiction-related problems between the RTAs and the WTO would not arise. First, one major cause of the difficulties between the RTAs and the WTO is the overlapped jurisdiction on the same, or on inextricably linked, subject matters. Thus, the RTA parties that are also members of the WTO might have different views regarding the proper, or the best, forum for the dispute between them. In the saga of the soft lumber case between the USA and Canada, the same set of US measures was litigated at both NAFTA and the WTO, and parallel proceedings have lasted for decades. In *Mexico – Taxes on Soft Drinks*, which concerned certain tax measures imposed by Mexico on beverages with sweeteners, Mexico contested the admissibility of the dispute on the ground that the USA's claims were inextricably linked to a broader dispute between the two countries related to trade in sweeteners under NAFTA. In Mexico's opinion, under those circumstances, it would not be appropriate for the WTO panel to issue findings on the merits of the USA's claims.³⁸

However, the jurisdiction overlap is not of much concern in the EU–WTO context because of the so-called 'jurisdictional monopoly' of the CJEU over disputes between member states.³⁹ The exclusive jurisdiction of the Court is provided by Article 344 of Treaty on the Functioning of the European Union (TFEU), by which member states undertake not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein.⁴⁰ With respect to international agreements concluded by the EU, particularly the dispute settlement forum established thereunder, the CJEU's 'jurisdictional monopoly' is clearly demonstrated in the *MOX Plant* case.⁴¹ In that case, the Commission accused Ireland of infringing the jurisdictional exclusivity of the Court by instituting proceedings

and Lanovoy, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation', 47 *Journal of World Trade* (2013) 481; C. Chase *et al.*, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements: Innovative or Variations on a Theme?', WTO Staff Working Paper ERSD-2013-07, 10 June 2013; Pauwelyn and Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)possible Solutions', 42 *CILJ* (2009) 56.

³⁷ Relevant WTO disputes: *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, DS241; *Mexico – Tax Measures on Soft Drinks and Other Beverages*, DS308; *Brazil – Measures Affecting Imports of Retreaded Tyres*, DS332; *United States – Final Dumping Determination on Softwood Lumber from Canada*, DS264. North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993).

³⁸ WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages – Report of the Panel*, 7 October 2005, WT/DS308/R, para. 7.11.

³⁹ Mackel, 'Article 292 (ex-article 219)', in P. Léger (ed.), *Commentaire article par article des traités UE et CE* (2000) 1874. In similar words, see K. Lasok and D. Lasok, *Law and institutions of the European Union* (2001), at 371.

⁴⁰ Case 1/91, *Robert Wieschemann, as trustee in bankruptcy of Schiffswerft Garmersheim GmbH, of Kaiserslautern v. Commission of the European Communities*, [1991] ECR I-6079, para. 35; Case 1/00, *Opinion pursuant to Article 300(6) EC*, [2002] ECR I-3493, paras 11, 12.

⁴¹ Case C-459/03, *Commission of the European Communities v. Ireland*, [2006] ECR I-4635.

against the United Kingdom under UNCLOS. The Court was of the view that EU member states, *inter se*, cannot have recourse to the dispute settlement system of an international convention that falls within the EU competence. The rationale seems to be that where the provisions of international agreement, to which the EU is a party, come within the scope of EU competence, such provisions not only form an integral part of the EU legal order according to Article 216(2) of the TFEU,⁴² but their interpretation and application, as well as the relevant assessment of a member state's compliance, also fall within the exclusive jurisdiction of the Court.

It is therefore difficult to envisage the scenario where the CJEU would allow a dispute between the member states to be brought to the WTO DSM. After the entry into force of the Treaty of Lisbon, there was little doubt left regarding the exclusive competence of the EU in WTO-related matters.⁴³ In other words, unlike most RTAs, the EU is not facing significant problems in the division of jurisdiction and competence in regard to WTO issues; the exclusive competence in common commercial policy of the EU and the judicial monopoly of the CJEU have successfully avoided the jurisdictional conflicts in the EU–WTO context.

B *CJEU Judgments in the WTO DSM*

As mentioned above, there are two possible standings of the CJEU in front of the WTO adjudicators: first, a 'domestic' court of the EU as a WTO member and, second, an 'international' judiciary of trade disputes among certain nation states. First, as a domestic court, the CJEU interprets and applies the EU law, which at the WTO DSM is generally taken as 'municipal law' of the disputing member. In *India – Patents (US)*, the Appellate Body observed that:

in public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations.⁴⁴

As for the role of the domestic court, the Appellate Body in *US – Carbon Steel* further considered that:

such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, *the pronouncements of domestic courts on the meaning of such laws*, the opinions of legal experts and the writings of recognized scholars.⁴⁵

⁴² TFEU, *supra* note 2, Art. 216(2).

⁴³ *Ibid.*, Arts 3, 207. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306.

⁴⁴ WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products – Report of the Appellate Body*, 16 January 1998, WT/DS50/AB/R, paras 65–66.

⁴⁵ WTO, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany – Report of the Appellate Body*, 19 December 2002, WT/DS213/AB, para. 157 (emphasis added). Therefore, insofar as the municipal law is concerned, the WTO case law has shown the following points. First, in WTO litigation, municipal law generally serves as evidence for the facts, state practice

Therefore, the CJEU judgments, as judicial decisions of a domestic court, serve as part of the evidence, clarifying the meaning of the municipal law under dispute.

Second, as an international judiciary with jurisdiction in trade disputes, the CJEU and its judgments might be taken into account by the WTO adjudicators as a source of authority. Indeed, WTO panels and the Appellate Body have very often made reference to external judicial decisions and practice when searching for inspiration and authority outside the WTO *acquis*. Such a search is generally addressed as judicial cross-reference that is embedded in the broader issue on the use of non-WTO legal sources in WTO dispute settlement, particularly public international law.⁴⁶ Among the cross-references made by the WTO adjudicators, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) are the most mentioned judiciaries, the case law and practice of which have been quoted on a great number of occasions with regard to a wide range of legal issues.

One outstanding example is the Appellate Body's reference to the judgment of the PCIJ in *Certain German Interests in Polish Upper Silesia*, with respect to the treatment of municipal law.⁴⁷ It is a typical instance of a gap-filling reference as the WTO agreements do not contain any provision as to the use and role of municipal laws in dispute settlement. In *Korea – Procurement*, the panel opined that error with respect to a treaty is a concept that has developed in customary international law through the case law of the PCIJ and the ICJ.⁴⁸ By means of a footnote, the panel named the PCIJ case, *Legal Status of Eastern Greenland*, and the ICJ's *Case Concerning the Temple of Preah Vihear*.⁴⁹ On the ground that the elements developed in these cases had been codified in Article 48 of the Vienna Convention on the Law of Treaties (VCLT), the panel considered

and conformity of domestic measures with the WTO obligations; second, judicial exercise of examining municipal law is not to interpret the law concerned but rather to determine whether the municipal law being examined is in compliance with WTO laws and, third, judicial decisions can constitute part of the evidence, clarifying the meaning of the municipal law at dispute. See also WTO, *United States – Section 211 Omnibus Appropriations Act of 1998 – Report of the Appellate Body*, 1 February 2002, WT/DS176/AB/R, para. 106; WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body*, 19 December 2014, WT/DS436/AB/R, para. 168; WTO, *China – Measures Affecting Imports of Automobile Parts – Report of the Appellate Body*, 12 January 2009, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, paras 225–245; WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body*, 19 January 2010, WT/DS363/AB/R, para. 177; WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC – Fasteners) – Report of the Appellate Body*, 28 July 2011, WT/DS397/AB/R, paras 294–296.

⁴⁶ Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' 95(3) *American Journal of International Law* (2001) 535; Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35(3) *Journal of World Trade* (2001) 499.

⁴⁷ *India – Patents (US)*, *supra* note 44, paras 65–66. *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 1925, Series A, No. 6.

⁴⁸ WTO, *Korea – Measures Affecting Government Procurement – Report of the Panel*, 19 June 2000, WT/DS163/R, para. 7.123.

⁴⁹ *Legal Status of Eastern Greenland*, 1933 PCIJ Series A/B, No. 53, at 22, 71, 91–92 (dissenting opinion of Judge Anzilotti); *Case Concerning the Temple of Preah Vihear*, Judgment of 26 May 1961, ICJ Reports (1962) 6, at 26–27.

that there could be little doubt that it presently represented customary international law.⁵⁰ In *US – Wool Shirts and Blouses* and when dealing with the issue of burden of proof, the Appellate Body stated that ‘various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof’.⁵¹ Furthermore, in the search for the meaning of ‘customary international law’, the Appellate Body confirmed Articles 31 and 32 of the VCLT and Article 51 of the International Law Commission’s Articles on State Responsibility as recognized principles of customary international law with substantial sources from the ICJ case law.⁵²

The mixed standing of the CJEU at the WTO DSM therefore resulted in the equally mixed approach of the panels and the Appellate Body when dealing with the CJEU judgments and practice. The following part will then explore in detail the *status quo* of the communication between the two adjudicators.

4 Ongoing Communication between the CJEU and the WTO DSM

The foregoing discussion has explored the relationship between the CJEU and the WTO DSM, particularly the approach of each adjudicator towards the decisions made by the other counterpart. As a rule, the CJEU treats WTO rulings in the same way as WTO rules: they are not recognized as being directly effective in the EU unless the Court has found the WTO rules allegedly breached to have direct effect. In other words, WTO rulings are generally excluded from the norms in the light of which the legality of Community law could be assessed. In the WTO proceedings, the prevalent jurisdiction-related conflicts between the RTAs and the WTO do not cause much concern in the EU–WTO context. Because of the exclusive competence of the EU and the jurisdiction monopoly of the Court, the two adjudicators are safely driving on parallel tracks with little chance of collision. At the WTO, the Court can be considered to be a domestic court of the EU and/or an international judiciary among certain nation states.

Based on these observations, discussion in this part will look into the ongoing communication between the CJEU and the WTO DSM. Research in this part demonstrates that the format, approach and extent of judicial communication is primarily determined by the relationship shown in the previous discussion – that is, the CJEU’s

⁵⁰ *Korea – Procurement*, *supra* note 48, para. 7.123. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁵¹ WTO, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US – Wool Shirts)* – Report of the Appellate Body, 23 May 1997, WT/DS33/AB, at 14.

⁵² WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body*, 20 May 1996, WT/DS2/AB/R, n. 34; WTO, *Japan – Alcoholic Beverage II – Report of the Appellate Body*, 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, n. 17; WTO, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea – Report of the Appellate Body*, 8 March 2002, WT/DS202/AB/R, n. 256. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83, 3 August 2001.

position towards the WTO rules and rulings and the recognition of the WTO adjudicators regarding EU law and CJEU judgments. As a result, the communication activities of the two adjudicators vary from each other considerably.

A *The CJEU: From Muted Dialogue to Consistent Interpretation?*

Recent case law has presented the so-called ‘muted dialogues’ between the CJEU and the WTO Appellate Body.⁵³ In a couple of cases, even if the Court does not explicitly rely on the pertinent WTO ruling, it seems a fair guess that the judgments are influenced by WTO precedents and, albeit implicitly, seek to avoid inconsistencies.⁵⁴ This practice is clearly exemplified in the cases of *IKEA* and *FTS International*.⁵⁵ In *IKEA*, the Court criticized the zeroing practice of the Commission in the anti-dumping investigation against bed linen from Egypt, India and Pakistan and, thus, sanctioned the unlawfulness of Regulation 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen.⁵⁶ On the one hand, the Court did not mention, nor did it make any reference to, the earlier WTO ruling where the same EU Regulation was condemned.⁵⁷ On the other hand, however, by adopting the same legal reasoning and interpretation, the Court appeared to be substantially influenced by the disapproval of the same Regulation by the Appellate Body.⁵⁸

Influence of this type became even more manifest in *FTS International*, where the CJEU delivered its interpretation of the Community tariff classification of boneless chicken cuts and overruled the traditional interpretation given by the customs authorities.⁵⁹ In fact, the Community classification at issue had already been litigated at the WTO, and the judgment of the Court assimilated the relevant WTO rulings to a great extent.⁶⁰ Even if the Court has consistently denied the direct effect of WTO rules and rulings, making the position crystal clear that it does not bear the obligation to enforce the reports of WTO panels and the Appellate Body, the practice of muted dialogue nevertheless shows the Court’s strong willingness to coordinate with the relevant WTO rulings when it comes to interpretation.

The emergence of muted dialogue has revealed certain inadequacy of the existing case law. The simple denial of direct effect is no longer sufficient in the light of

⁵³ Bronckers, ‘From “Direct Effect” to “Muted Dialogue”’: Recent Development in the European Courts’ Case Law on the WTO and Beyond’, 11 *JIEL* (2008) 885.

⁵⁴ *Ibid.*, at 887.

⁵⁵ Case C-310/06, *FTS International BV v. Belastingdienst*, [2007] ECR I-6749; Case C-351/04, *IKEA Wholesale Ltd v. Commissioners of Customs and Excise*, [2007] ECR I-7723.

⁵⁶ *IKEA Wholesale v. Commissioners*, *supra* note 55, paras 55–57. Council Regulation 2398/97, OJ 1997 L 332, at 1–17.

⁵⁷ WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Appellate Body*, 12 March 2001, WT/DS141/AB/R, paras 74–77.

⁵⁸ Bronckers, *supra* note 53, at 889.

⁵⁹ Case C-310/06, *E.T.S. International BV v. Belastingdienst*, [2007] ECR I-6749, paras 28–33.

⁶⁰ WTO, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts) – Report of the Appellate Body*, 27 September 2005, WT/DS269/AB/R, WT/DS286/AB/R. WTO, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Panel*, 27 September 2005, WT/DS269/R, WT/DS286/R.

continuing attempts by the applicants to invoke WTO precedents. The question thus becomes: is this muted practice a plausible solution? The answer is probably not. Without explicit reference and statement of intention from the CJEU, muted dialogue is no more than just speculation from the observers who have closely followed and compared the relevant decisions of both the Court and the WTO DSM. It is an observation on a case-by-case basis, rendering the relevant judicial practice with considerable uncertainty. In other words, muted dialogue suffers the lack of legal certainty and puts at risk the legitimate expectation of the interested party – that is, under what circumstance, on what conditions and to what extent would the relevant WTO rulings be followed and adopted by the Court. More importantly, it renders a number of fundamental questions unanswered in relation to inter-jurisdiction communication, particularly in regard to its legal basis and consequences. Rather than conducting muted dialogue, the Court should have engaged and interacted with WTO rulings in a more explicit manner, with properly defined legal basis and complete legal reasoning. One possible way to formalize the communication is to rely on the principle of consistent interpretation, the application of which has already been confirmed in the Court's case law.

As the CJEU put it in *Commission v. Germany*, the primacy of international agreements over provisions of secondary Community legislation means that such provisions must, insofar as is possible, be interpreted in a manner that is consistent with those agreements.⁶¹ In *Hermès International*, rather than answering the question of direct effect, the Court turned to the duty of the national court to interpret the procedural rules in light of Article 50 of the TRIPS Agreement,⁶² which is part of the WTO package.⁶³ In the subsequent *Dior* case, the Court followed the same approach and provided a more explicit statement in this regard. In particular, the Court observed:

in a field to which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.⁶⁴

According to the Court, interpreting national legislation in the light of WTO law is an EU law obligation, which should thus be distinguished from the legal effect arising directly from the WTO. That is to say, with regard to the WTO subject matters where the EU has already legislated, it is the EU law that obliges the Court and relevant EU institutions to interpret, as far as possible, the relevant domestic and EU rules in accordance with the WTO law.

⁶¹ Case C-61/94, *Commission of the European Communities v. Federal Republic of Germany*, [1996] ECR I-4006, para. 52.

⁶² Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994, 1869 UNTS 299. The TRIPS Agreement was negotiated in the Uruguay Round and introduced intellectual property rules into the WTO trading system for the first time.

⁶³ Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, [1998] ECR I-3603, para. 35.

⁶⁴ Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v. TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV*, [2000] ECR I-11307, para. 49.

Unlike direct effect, consistent interpretation does not overrule the law being contested; rather, it allows, or requires, the bringing of EU legislation into conformity as far as possible with WTO obligations.⁶⁵ It guarantees a significant role for the WTO rules in construing the EU law and the law of the member states. The duty of consistent interpretation provides a satisfactory alternative to the direct effect of WTO law.⁶⁶ It acknowledges that WTO rules are not capable of being enforced in the EU legal order but restores their undoubted importance to the construction of EU legislation.⁶⁷ However, the inherent limitations of this principle are also manifest: the relevant EU or national legislation must exist and be sufficiently flexible to be interpreted; there must not be manifest conflict between the WTO law and the EU legislation to be interpreted; case-by-case interpretation cannot resolve all problems and consistent interpretation is less effective than direct effect in establishing legal certainty and, hence, creating confidence among the EU's trading partners.⁶⁸

Since the CJEU has already recognized the application of consistent interpretation to WTO rules in general, it would not lead to substantive divergence of jurisprudence if the Court extended the application to the rulings of WTO adjudicators. In *Anheuser-Busch Inc. v. Budějovický Budvar*, the Court expressly adopted this principle and followed the rulings of the Appellate Body.⁶⁹ This is a case of preliminary reference from Finland in regard to the use of the trade mark 'Budweiser'. In this case, the Court confirmed, first, that it has jurisdiction in interpreting a provision of the TRIPs Agreement for the purpose of responding to the needs of the judicial authorities of the member states and, second, that 'since the Community is a party to the TRIPs Agreement, it is indeed under an obligation to interpret its trade-mark legislation, as far as possible, in the light of the wording and purpose of that agreement'.⁷⁰ The Court thus quoted two rulings of the Appellate Body for its understanding of the relevant TRIPs provisions involved.⁷¹ However, this is so far the only occasion in which the Court has made reference explicitly to WTO jurisprudence; since then, only implicit reference has been speculated – that is, the practice of mutated dialogue.

In the recent case of *Philips Lighting v. Council*, the Advocate General made this point unambiguous. In his opinion to the Court, it was argued that the principle of consistent interpretation that is inherent in the primacy of international agreements concluded by the EU requires that the interpretation of the relevant WTO law be taken into account in the interpretation of the corresponding provisions of the EU law.⁷²

⁶⁵ Cottier, 'A Theory of Direct Effect in Global Law', in A. von Bogdandy, P.C. Mavroidis and Y. Mény (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002) 109.

⁶⁶ Antoniadis, 'The European Union and WTO Law: A Nexus of Reactive, Coactive, and Proactive Approaches', 6 *World Trade Review* (2007) 45, at 74.

⁶⁷ P. Koutrakos, *EU International Relations Law* (2006), at 288.

⁶⁸ Snyder, 'The Gatekeepers: The European Courts and WTO Law', 40 *CMLR* (2003) 313, at 364.

⁶⁹ Case C-245/02, *Anheuser-Busch Inc. v. Budějovický Budvar*, [2004] ECR I-10989.

⁷⁰ *Ibid.*, paras 41–42.

⁷¹ *Ibid.*, paras 49, 67.

⁷² Case C-511/13 P, *Philips Lighting Poland and Philips Lighting v. Council*, judgment of 8 September 2015, not yet reported (ECLI:EU:C:2015:553), Advocate General's Opinion, para. 132.

In this case, when interpreting the concept of ‘a major proportion’ in EU anti-dumping law, the Advocate General made intensive reference to two WTO rulings that shed light on the same concept under the WTO Anti-Dumping Agreement, namely the panel report in *Argentina – Poultry Anti-Dumping Duties*⁷³ and the Appellate Body report in *EC – Fasteners (China)*.⁷⁴

Subsequently, in the judgment of 8 September 2015, the CJEU followed the same legal reasoning and adopted the same interpretation of ‘a major proportion’ that was issued by the Appellate Body in *EC – Fasteners (China)* but without any reference to it.⁷⁵ It therefore remains unclear to what extent the Court has actually endorsed the proposition of the Advocate General. Is the Court simply in agreement with the Appellate Body’s specific interpretation quoted by the Advocate General or, even further, is it willing to apply the consistent interpretation principle insofar as WTO rulings are concerned in general? At the very least, *Philips Lighting v. Council* demonstrates another instance of the muted dialogue practice.

While arguing for formalized communication with the WTO DSM based on consistent interpretation, the point of departure should be unequivocal. The CJEU is not expected to act as the domestic executor of international judiciary, and WTO rulings, as well as the interpretation established therein, are by no means binding for the purpose of enforcement. It is the natural corollary of the lack of direct effect of the WTO rulings. The consistent interpretation principle plays out under, and its function is limited to, the circumstance where the Court is facing a similar, or the same, legal issue that the WTO adjudicators have already solved. Such a circumstance includes, but is not limited to, the classic ‘enforcement scenario’ where the same EU measure is being disputed in both Luxembourg and Geneva.

In other words, the purpose of communication is interpretation focused, and the role of the WTO adjudicators and their decisions is highly similar to the ‘source of authority’, which is discussed later in this article. The introduction of the consistent interpretation principle not only contributes to enhance the legal certainty and to safeguard the legitimate expectation of the interested party, but it also transforms the applicable interpretations developed by the WTO adjudicators into that of the EU law. By doing so, the CJEU keeps its hands free to deviate from these WTO rulings while avoiding inconsistencies as much as possible.⁷⁶ Ultimately, this principle is able to serve as the solid legal basis for the Court’s communicating activities with the WTO DSM and, in the meanwhile, guarantees a clear picture of the somehow ‘limited’ legal impact it might have.

B WTO Adjudicators: From Evidence to Source of Authority?

As mentioned earlier, the mixed perception of WTO adjudicators towards the CJEU results in the equally mixed approach of the panels and the Appellate Body when

⁷³ WTO, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel*, 22 April 2003, WT/DS241/R.

⁷⁴ *Ibid.*, para. 133. *EC – Fasteners (China)*, *supra* note 45; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201.

⁷⁵ *EC – Fasteners (China)*, *supra* note 45, paras 411–418.

⁷⁶ Bronckers, *supra* note 53, at 890.

dealing with the CJEU judgments. As decisions of the ‘domestic’ court of the EU, the CJEU judgments mainly serve the evidential function, clarifying the meaning of EU law and attesting the compliance or non-compliance thereof with the WTO rules. As an ‘international’ court among the EU member states, the Court stands as the source of authority, with its judgments facilitating the adjudication process of the WTO.

So far, WTO adjudicators have mainly looked into the judgments of the CJEU under the circumstance where the dispute participant invoked the judgments as part of the evidence. In *Korea – Alcohol Beverages*, the European Community argued in front of the panel that the case law of the Court on Article 95 of the Treaty Establishing the European Community (EC Treaty) regarding internal taxation is of relevance for the interpretation of Article III:2 of GATT since both provisions share almost identical wording and a similar purpose.⁷⁷ On the defendant side, Korea was generally supportive of utilizing competition law market definitions for the purposes of Article III of GATT, invoking a relevant judgment of the Court on the criteria for market defining under competition law. In response, the panel in that dispute concluded that:

we are mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding. Nonetheless, we observe that there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the analysis of non-discrimination provisions and competition law.⁷⁸

In an immediate footnote, the panel clarified that ‘in finding the relationship of the provisions to each other relevant, we do not intend to imply that we have adopted the market definitions defined in these or other ECJ cases for purposes of this decision’.⁷⁹

In *EC – IT Products*, the major issue under dispute concerned the customs classification of certain multifunctional apparatus capable of performing one or more functions of scanning, printing and copying, and the central question was whether such products should be classified as ‘photocopying apparatus’ or, alternatively, as ‘automatic data-processing machines’. In this regard, the EU made intensive reference to the CJEU case law, elaborating several issues of the EU customs law. The EU pointed to several criteria set forth in the *Kip* case. For the Court, what mattered, first, were the objective characteristics of the products – that is, the print and reproduction speeds and the existence of an automatic page feeder – and, second, whether the copying function was secondary, or equivalent in importance, in relation to the other functions of scanning and printing.⁸⁰ Along this line of reasoning, the Court arrived at the

⁷⁷ WTO, *Korea – Taxes on Alcoholic Beverages – Report of the Panel*, 17 February 1999, WT/DS75/R, WT/DS84/R, para. 7.4 (i). Treaty Establishing the European Economic Community 1957, 298 UNTS 3, as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 37 ILM 56 (1997), and now known as the Treaty Establishing the European Community (EC Treaty).

⁷⁸ *Korea – Alcohol Beverages*, *supra* note 77, para. 10.81.

⁷⁹ *Ibid.*, n. 398.

⁸⁰ WTO, *European Communities and Its Member States – Tariff Treatment of Certain Information Technology Products (EC – IT Products) – Report of the Panel*, 21 September 2010, WT/DS375/R, para. 7.1395; Joined Cases C-362/07 and C-363/07, *Kip Europe SA, Kip (UK) Ltd, Caretrex Logistiek BV, Utax GmbH (C-362/07), Hewlett Packard International SARL (C-363/07) v. Administration des douanes*, [2008] ECR I-9489, para. 46.

conclusion that there is definitely the case where certain multifunctional apparatus falls into the tariff category of 'photocopying apparatus'.⁸¹ However, the WTO panel in *EC – IT Products* held a different position. The panel, on the ground that the criteria developed by the CJEU were not set out in the Harmonized System 1996 chapter note, questioned the relevance thereof. In particular, the panel took issue with the criteria of printing speed and the hierarchical ranking among different functions, as highlighted by the CJEU in *Kip*. For the Panel, multifunctional apparatus as such cannot fall within the category of 'photocopying apparatus' regardless of the primary, secondary, or equivalent nature of the copying function *vis-à-vis* these machines' other functions.⁸²

In *EC – Chicken Cuts*, the EU contended that specific CJEU case law constitutes 'circumstances of conclusion' of the EC Schedule, part of the WTO law, within the meaning of Article 32 of the VCLT.⁸³ The EU thus requested the panel and the Appellate Body to take into account the CJEU case law when interpreting the WTO rules under dispute – that is, certain tariff commitments of the EU. After scrutiny in detail, both the panel and the Appellate Body were not convinced by the argument that the CJEU judgments were taken into account in the Uruguay Round negotiations with respect to the tariff commitment at issue, and, therefore, they could not be considered the 'circumstances of conclusion' under Article 32 of the VCLT.⁸⁴

In all three disputes where the CJEU judgments were submitted and invoked as part of the evidence, the WTO adjudicators, to a varying extent, dismissed their applicability and, in *EC – IT Products*, even arrived at conclusions that substantively differed from those of the Court. It is certainly far-fetched to argue that the WTO adjudicators are holding a hostile attitude towards decisions from the other jurisdiction. However, their approach is quite clear: any submitted evidence has to be attested under the adjudicator's own process of verification regardless of the format – for example, legislation text, expert opinion or judicial decisions. At least in the three disputes mentioned above, the CJEU judgments were not approved by the adjudicators as valid evidence, as argued by the participants.

The other venue of communication between the CJEU and the WTO DSM lies in the latter's activity of external cross-reference. As mentioned earlier, in a number of disputes, the WTO adjudicators have made reference to external judicial decisions and practice when searching for inspiration and authority outside the WTO *acquis*. Cross-reference as such is distinct from the evidence verification discussed above. In the case of cross-reference, recourse to external judgment constitutes part of the legal reasoning of the adjudicator, which is willing, rather than asked, to look into decisions and

⁸¹ *Kip Europe SA*, *supra* note 80, paras 50, 56. According to the CJEU, if it is apparent, on the basis of its objective characteristics, that the copying function is of an importance equivalent to that of the other two functions, and it proves impossible to determine which function gives the product its essential character, the product at issue should be classified as 'photocopying apparatus'.

⁸² *EC – IT Products*, *supra* note 80, para. 7.1481.

⁸³ *Ibid.*, para. 7.390.

⁸⁴ *EC – Chicken Cuts – Report of the Appellate Body*, *supra* note 60, paras 327, 336 and 346.

practice from another jurisdiction for the purpose of either fulfilling the procedural gap or buttressing its own legal argument. The judiciary being referenced is therefore saluted for its persuasiveness and expertise without formal binding force on the referencing adjudicator.

Only in a handful of disputes so far have the WTO adjudicators made external reference to the judgments of the CJEU. In *Korea – Procurement*, the panel was of the view that a finding of justifiable error in treaty formation might normally be expected to lead to the application of Article 65 of the VCLT. However, Article 65 on the specific procedure for invoking invalidity of a treaty does not seem to belong to the provisions that have become customary international law.⁸⁵ In support of its conclusion, the panel mentioned the Court's *Racke v. Hauptzollamt Mainz* judgment⁸⁶ in the 1990s.⁸⁷

A more intensive reference can be found in *US – Gambling*, where the panel quoted the CJEU's case law to buttress the position that 'other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations' and that 'regulations targeting Internet gambling appear to us to be as stringent, if not more, than regulations applying to traditional forms of gambling'.⁸⁸ The panel looked into two specific judgments of the Court in relation to gambling regulation. In *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, the Court considered that the particular features of lotteries justified national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, to maintain order in society in regard to the manner in which lotteries are operated, the size of the stakes and the allocation of profits they yield and to decide whether to restrict or prohibit them.⁸⁹ In *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others*, the Court was dealing with the national legislation that authorized the operation of gambling-related activities solely in casinos, permanent or temporary gaming areas created by decree or law. According to the Court, although such legislation constituted a barrier to the freedom to provide services, it was compatible with the EC Treaty in view of the concerns of social policy and the prevention of fraud. In particular, the Court highlighted, *inter alia*, that the considerations underlying the legislation at issue concerned 'the protection of consumers, who are recipients of the services and the maintenance of order in society'.⁹⁰

As mentioned earlier, through external cross-reference, judgments and practice of other international judiciaries have undertaken a significant role in the WTO dispute settlement process, with significant examples in the PCIJ and the ICJ. Even if cross-reference is no longer an uncommon practice in WTO adjudication, there is nevertheless

⁸⁵ *Korea – Procurement*, *supra* note 48, n. 769.

⁸⁶ Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] ECR I-03655.

⁸⁷ *Ibid.*, n. 769.

⁸⁸ WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling) – Report of the Panel*, 20 April 2005, WT/DS285/R, para. 6.473, n. 914.

⁸⁹ Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039.

⁹⁰ Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others*, [2003] ECR I-8621.

one question that is worth asking but that remains unclear: what is the legal basis for such inter-jurisdiction communication conducted by the WTO adjudicators? In this regard, WTO jurisprudence and adjudication practice are not of much help since the panels and the Appellate Body have never explicitly linked their cross-references to any provision of the WTO agreements. In fact, no WTO agreements stipulate the rules regarding under what circumstance and to what extent panels and the Appellate Body should, or are entitled to, look into the jurisprudence and practice of other judiciaries as well as the effect thereof.

So far, *status quo* has demonstrated two functions of inter-jurisdiction reference, namely procedural gap-filling and legal reasoning strengthening.⁹¹ The function of gap-filling refers to the use of external jurisprudence and practice in the area that the WTO *acquis* does not cover, and it relates exclusively to procedural matters. For example, the written rules governing dispute settlement before international courts and tribunals are largely silent with regard to evidentiary issues. As a consequence, pronouncements by international courts and tribunals have become a primary source for guidance on the principles that govern the treatment of evidence in international dispute settlement proceedings.⁹² In *US – Wool Shirts and Blouses*, the Appellate Body's reference to the ICJ when dealing with the issue of burden of proof plainly demonstrated this point.⁹³ The other function of inter-jurisdiction reference in legal reasoning strengthening means that external cross-reference is made by WTO panels and the Appellate Body for the purpose of consolidating their own legal arguments. As shown in *Korea – Procurement* and *US – Gambling*, relevant CJEU judgments were quoted by the panel in each dispute as the source of authority for their propositions that 'Article 65 VCLT should not be considered as part of customary international law'⁹⁴ and that 'gambling activities could be limited or prohibited for public policy considerations'.⁹⁵ Arguably, both functions of cross-reference hardly lead to any impact upon the substantive outcome of the dispute.⁹⁶

In sum, the majority of communication with the CJEU so far has taken the form of evidence verification, and only in a handful of cases have the WTO panels engaged with the Court's case law through cross-reference. As for the outcome of the communication, the WTO adjudicators have always carried out a strict scrutiny over the Court's case law when it is submitted as part of the evidence. In most identified disputes, they have dismissed the Court's judgments as valid evidence, and the panel in *EC – IT Products* even discarded the Court's interpretation of the EU law under dispute.⁹⁷ In the case of cross-reference, the CJEU's jurisprudence has been much less

⁹¹ Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' 37(6) *Journal of World Trade* (2003) 997, 998.

⁹² Wolfrum, 'International Courts and Tribunals, Evidence', in *Max Planck Encyclopedia of Public International Law* (2006); G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (2015), at 121.

⁹³ *US – Wool Shirts and Blouses*, *supra* note 51, at 14.

⁹⁴ *Korea – Procurement*, *supra* note 48, n. 769.

⁹⁵ *US – Gambling*, *supra* note 88, para. 6.473, n. 914.

⁹⁶ Pauwelyn, *supra* note 91, at 998.

⁹⁷ *EC – IT Products*, *supra* note 79, para. 7.1481.

invoked compared to the PCIJ and the ICJ, and the existing references have had a very limited impact on the substantive outcome of the WTO disputes. Given the two functions of inter-jurisdiction reference analysed above, filling procedural gaps can hardly influence the substantive merits of the disputes,⁹⁸ and, as a source of authority, invoking judicial externality serves only as ‘supporting proof’ of what the adjudicator is willing to uphold.

5 Concluding Remarks

Judicial communication between the CJEU and the WTO adjudicators consists of two tracks running in parallel but in opposite directions. The two tracks and the communication activities therein are by and large determined by the ‘unilateral’ relationship – the perception of the adjudicator at one end with respect to the law applied and the decisions made by its counterpart at the other end. When dealing with the WTO rules and rulings, the CJEU has consistently followed its classic approach: no direct effect in general but with limited exceptions. The recent emergence of muted dialogue reveals certain insufficiency in this approach, but it fails to provide a competent solution in terms of legal certainty and clarification. There is a need for a formalized communication protocol with a clearly defined legal basis and complete legal reasoning, and one potential departure point is to introduce the principle of consistent interpretation. In WTO dispute settlement, the CJEU judgments are, as a rule, treated as part of the evidence elaborating the meaning of municipal law or its compliance with WTO rules. On limited occasions, the WTO adjudicator has made reference to the Court’s decisions and practice as a source of authority in buttressing its legal reasoning. However, the fact that the WTO treaty text and jurisprudence has not provided any guidelines for inter-jurisdiction cross-reference leaves great uncertainty and puts at risk the legitimate expectation of the interested parties involved. In other words, it remains unclear, or even difficult to envisage, under what circumstances and to what extent external judicial decisions and practice would influence the pending proceedings.

While communications from both sides are ongoing, the adjudicators involved nevertheless have shown a very cautious approach when dealing with judicial externality. The muted dialogue practice of the CJEU, to a certain extent, indicates the intention of the Court not to disclose the relevant WTO rulings as a source of authority. In addition, it has often been seen from the WTO DSM that the CJEU judgments are regularly checked, questioned or even discarded as submitted evidence; in the case of cross-reference as a source of authority, the impact the quoted judgments have had upon the substantive merits of the dispute is highly limited, if at all. Such a cautious approach of openness reveals the wary attentiveness of the adjudicator to safeguard his or her own autonomy and independence during the interaction with other jurisdictions. As a consequence, while inter-jurisdiction communication assists the adjudication to a great extent, the ultimate influence it has upon the outcome thereof is under the strict control of the adjudicator.

⁹⁸ Pauwelyn, *supra* note 89, at 998.

Given the rise of international courts and tribunals and the growing interaction between different fields of international law, judicial communication can develop into a vibrant exercise that is of significant importance for international legal systems. In light of international adjudication as a whole, judicial communication is inextricably linked to a number of legal concepts – for example, cross-fertilization, boundary crossing and regime fragmentation. The study in this article has revealed the pressing need for adjudicators to elucidate the extent, scope and approach of the communication, as well as the legal basis, techniques and consequence involved.