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2 WTO Law and Domestic Law

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1. Introduction

The relationship between WTO law and domestic law is a two-way relationship. The WTO legal order is shaped by what its members have developed as their trade laws over the years. For example, today's WTO antidumping (AD) disciplines are what they are due to the experience of WTO members with this instrument over more than 100 years.¹ In the Uruguay Round, members negotiated—on the basis of their pertinent experiences with their own and foreign laws—new international standards, to which they promised allegiance:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.²

As members undertook to abide by their WTO obligations, all state organs have to ensure that their respective actions do not entail the international responsibility of their state. WTO organs will be exposed to domestic law first in the context of reviews of domestic law in the Council³ and in a multitude of specialized sub-structures of the Council, such as, for example, the Committee on Technical Barriers to Trade (TBT Committee) established pursuant to Article 13 of the Agreement on Technical Barriers to Trade.⁴ Most importantly, though, it is the regular task of both Panels and the (p. 32) Appellate Body to examine whether the rights of the complaining member have really been affected by another member's laws and regulations, as alleged by the complaints. Drawing on the decision by the Permanent Court of International Justice (PCIJ) in *Certain German Interests in Polish Upper Silesia*,⁵ the Appellate Body has recognized that the domestic law of WTO members, for the purposes of Appellate Body procedures, may serve as evidence of facts and of state practice. The state of play is well summarized in the two following excerpts from two Appellate Body reports:

The...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. When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization...⁶

[A] panel's assessment of the meaning and content of a Member's municipal law is subject to appellate review in order to determine whether the panel erred in its finding regarding the consistency of the Member's municipal law with the WTO agreements. For example, in *China - Auto Parts*, the Appellate Body examined one provision of a Chinese Decree, focusing on the text and context of the relevant provision in the Decree and the overall "structure and logic" of the Decree, so as to determine whether the legal characterization by the panel was in error. At the same time, Article 17.6 of the DSU places some constraints on the Appellate Body's review of some elements of a panel's analysis of municipal law. Where, for instance, a panel resorts to evidence of how a municipal law has been applied, the opinions of experts, administrative practices, or pronouncements of domestic courts, the panel's findings on such elements are more likely to be factual in nature, and the Appellate Body will not lightly interfere with such findings.⁷

The question of how the WTO adjudicative organs deal with domestic law will be examined in greater detail in Chapter 4. This chapter rather focuses on how the domestic legal orders of three WTO members—with which the authors are familiar—position themselves vis-à-vis WTO law. As will be seen, the results are surprisingly similar, despite the significant differences that exist in these jurisdictions with regard to the relationship between treaty law and domestic law.

Before we address, in most general terms, how the European Union (EU), Japan, and the United States implement WTO law in their domestic legal order, some general remarks from the perspective of public international law may be helpful:

- First, pursuant to Article II:2, the WTO Agreement with its annexes is 'binding on all Members'. As indicated earlier, Article XVI:4 of the WTO Agreement mandates that members shall ensure the conformity of their laws, regulations, and administrative procedures with the substantive obligations contained in the Annexes of the (p. 33) WTO Agreement. That includes the obligation to eventually change, if necessary, domestic legislation that has been held by the Dispute Settlement Body (DSB) not to be in conformity with the member's WTO obligations.
- Second, if a state falls short of this obligation, it acts—in diplomatic WTO parlance—in a WTO-incompatible manner. The more robust language of the law of state responsibility would call such non-performance of a treaty obligation an internationally wrongful act.⁸ That the full performance may be legally impossible, for example due to a decision of the jurisdiction highest court, is technically irrelevant.⁹
- Third, it is up to each member of the WTO to determine, within the above parameters, how to implement the obligations undertaken in the WTO Agreement (and its annexes). Thus, WTO law may or may not be given direct effect or may or may not enjoy primacy *within the domestic legal order*.¹⁰

We now consider how the EU, Japan, and the United States implement their WTO obligations into their domestic legal orders. These three legal orders happen to be the home jurisdictions of the authors and serve as examples of how the obligation to observe WTO norms may be carried out.

2. The European Union

The EU is a regional international organization established by now 28 Member States through two treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).¹¹ It distinguishes itself from other international organizations in that Member States have attributed it with competences that may either a priori render pertinent state activity incompatible with EU law ('exclusive competences',

TFEU Article 3) or may, through the use of such legal title, pre-empt the states from continuing to act or legislate ('shared competences', TFEU Article 4). The latter may lead to an exclusive EU *external* competence even in the area of shared *internal* competences, pursuant to TFEU Article 3(2). Union law enjoys primacy over the laws of Member States¹² and may have direct effect.¹³ Member State (p. 34) courts will not apply their domestic law to the extent that it is incompatible with directly applicable EU law.¹⁴ Because of these unique features, the EU and its governance is sometimes described as quasi-federal.

The Union legislators are, on a co-equal footing, the directly elected European Parliament and the Council of the European Union; the latter is composed of the representatives of the governments of Member States. Hence, the Union only uses its competences to the extent that its Member States deem this appropriate and politically advantageous.¹⁵

Both the EU and its Member States are members of the WTO (cf. Arts. IX:1, XII:2 WTO Agreement); in fact, the Union and most of its Member States are original (founding) members of the WTO. This consolidates prior practice: All Members of what was then the European (Economic) Community¹⁶ had been contracting parties of the General Agreement on Tariffs and Trade (GATT), whereas the Community, established ten years after the GATT entered into force, never formally joined the ranks of the GATT contracting parties. However, the Union (and its predecessor) have, since 1957, been attributed with the competence for the external economic relations of the EU (common commercial policy (CCP)). In fact, this competence, now enshrined in TFEU Articles 206 and 207, was for a long time the only significant EU foreign relations power and remains in many ways the most important one.

Both within the Union and in GATT practice, the *exclusive* competence of the Union became undisputed from the mid-1960s¹⁷ and the EU was treated as a *de facto* contracting party of the GATT, both with regard to negotiations¹⁸ and to dispute settlement.¹⁹ This was due not least to a line of decisions by the Court of Justice of the European Union (ECJ) that interpreted the CCP as an interface to international economic law: the Union's competence had to be interpreted, on that view, in a dynamic way that allowed optimal representation of the newly created subject of international law that was the EU.²⁰ The Union's executive organ, the EU Commission, represented the Union (and for possible residual competences) the Member States in all GATT disputes and in all multilateral rounds of trade negotiations, including the Uruguay Round, where it exercised, together with other leading trading nations, significant leadership and influence.²¹

(p. 35) Due to the significantly widened coverage of the WTO Agreement, the ECJ rejected in Opinion 1/94 an interpretation of the CCP—which at the time only mentioned trade in goods—that would have given the Union the exclusive competence for all WTO subject matters, in particular the regulation of trade in services and trade-related intellectual property rights.²² Rather, from the perspective of EU law, the WTO Agreement had to be concluded as a so-called *mixed agreement*, as the Union was exclusively competent for trade in goods and some aspects of GATS and TRIPS, whereas the majority of General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) regulations still fell within the competence of the Member States.²³

Accordingly, both the EU and its Member States became original members of the WTO.²⁴ However, the TFEU now in force (Treaty of Lisbon) has widened the scope of the CCP, and addresses specifically trade in services and intellectual property rights. As a consequence, the competence of the EU under TFEU Article 207 is again in parallel with the subject matter covered by the multilateral trade regime, now administered under the auspices of the WTO.²⁵ This is an interesting return to the situation which pertained before the conclusion of the Uruguay Round, when the EU had exclusive competence under the CCP for all GATT matters. However, it should be added that for some aspects, residual

competences are claimed by the Member States.²⁶ The fact that (p. 36) the Member States, and not the Union, finance the WTO has, however, been explicitly rejected by the ECJ as a legal basis for Member State competence.²⁷

2.1 Treaty powers of the Union

The Union only has the powers attributed to it by the TEU and the TFEU; matters not attributed to the EU remain within the Member States' competence.²⁸ For the purposes of current WTO law, the Union has exclusive competence for all matters covered by WTO agreements, with some exceptions related to administrative and criminal law, as well as with regard to services involving the transborder movement of natural persons (mode 4).²⁹ The TFEU allocates to the Commission the role of proposing internally treaty negotiations and, upon issuance of a mandate by the Council, to negotiate. However, the Member States, and in particular their executives, remain crucial due to their control of the EU Council: the Commission may only engage in negotiations pursuant to a 'mandate' that determines the pertinent terms of reference, and it is the Council which concludes the treaties. Since 2009, this requires prior approval by the Parliament;³⁰ on that basis, Parliament has successfully acquired an important role already during the negotiations.³¹ In addition, the Council and Member States' representatives accompany, via the so-called 'Article 207 committee' all CCP negotiations, both from Brussels and on the spot (*sur place*) and make sure that the negotiating process is in line with the political will of the Council.³²

Insofar as the WTO is concerned, the central provision authorizing the negotiation and conclusion of multilateral trade agreements is TFEU Article 207(1):

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

(p. 37) As the competence of the Union is exclusive,³³ Member States are no longer competent to engage in WTO negotiations.³⁴ This does not mean that Member States have become irrelevant; to the contrary, *their* political will determines what the Union may legally commit to: the Council is composed of Ministers of the Member States and it is the Council that has, by law, the first and last word with regard to foreign relations activities of the Union.

As a consequence of the attribution of external competences to the Union,

each time the [Union], with a view to implementing a common policy envisaged by the [TFEU], adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.³⁵

Against this background, the participation of the EU Member States in an eventual conclusion of the WTO negotiating round will require some (internal) legal effort. However, this would seem to be a surmountable obstacle: one possibility is the use of TFEU Article 2(1).³⁶ In any case, the ECJ mandates 'close cooperation between the Member States and the [Union] institutions, both in the process of negotiation and conclusion and in the

fulfilment of the commitments entered into. That obligation flows from the requirement of unity in the international representation of the [Union].³⁷

2.2 The relationship between WTO law and the legal regime of the EU

International agreements concluded by the Union become an integral part of the EU's legal order, hierarchically positioned between founding treaties (in particular TFEU and TEU) and ordinary ('secondary') legislation.³⁸ Pursuant to TFEU Article 216(2), agreements concluded by the EU are binding upon both the institutions of the Union and its Member States. This also applies to the GATT and the WTO.³⁹

(p. 38) On that basis, the Court has deduced an obligation to interpret EU law in light of the WTO obligations in order to ensure, whenever possible, a treaty-consistent interpretation of EU legislation.⁴⁰

When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation. Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.⁴¹

What happens, however, if the efforts to reconcile an EU statute⁴² with one of the WTO agreements fail? If the ECJ were to apply its usual *modus operandi*, the answer would be straightforward: as treaties concluded by the EU are an integral part of the Union legal order and occupy a rank above regular ('secondary') laws,⁴³ the former would have to cede to WTO law, provided it was directly applicable. As the WTO Agreement does not specify whether it ought to be directly applicable or not, it is, according to well-established ECJ jurisprudence, the Court's prerogative to determine whether that effect should be attributed to an agreement. The pertinent track-record of the ECJ would seem to favour the granting of direct effect.⁴⁴

However, individuals and Member States asking for annulment of GATT-incompatible secondary legislation have received different answers. Pursuant to the (p. 39) Court of Justice's jurisprudence, an international agreement will only be granted direct effect, if its provisions are 'capable of conferring rights on citizens of the Community which they can invoke before the courts.'⁴⁵ In its *International Fruit Company* decision of 1972, the Court refused to attribute this quality to *any* provision of GATT. This seems surprising when comparing, for example, the provisions of Article II, III, or XI with similar provisions in the TFEU or in the free trade agreements concluded by the Union which all have been recognized as having direct effect.⁴⁶ The Court based its view on the GATT's substantive and procedural flexibility, as manifested in its escape clauses and exceptions and the diplomatic nature of the dispute settlement mechanism.

The ECJ's refusal to attribute even the possibility of direct effect of GATT's multilateral trade law was again put to the test when the WTO came into existence. Several Advocate-Generals expressed the view that the WTO's new Dispute Settlement Understanding (DSU) had changed the factual basis underlying the refusal of granting direct effect to GATT/WTO law.⁴⁷ After all, no international dispute settlement procedure comes even close to the WTO's highly effective—and, as we know with the benefit of hindsight, highly successful—dispute settlement mechanism.

However, in its decision to conclude the Uruguay Round agreements, the EU Council—which at that time had the monopoly on deciding whether to enter into a treaty relationship—had stated 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’.⁴⁸ Of course, this statement, contained in a piece of secondary law, did not have the legal force to determine how higher-ranked law—such as the Union’s primary law—and international law, was to be interpreted by the Union’s highest court. Nevertheless, the view of the executive branch that it was not for the EU to grant direct effect when major trading partners, most notably the United States in the Uruguay Round Agreements Act,⁴⁹ were refusing to do so, significantly influenced the outcome of the case.

(p. 40) In *Portugal v Council*, Portugal sought to annul a Council Decision on market access for textile products originating in India and Pakistan. Deviating from the conclusions of the Advocate-General, the Court reiterated its *International Fruit* jurisprudence that

‘the GATT rules are not unconditional and...an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT’⁵⁰

and applied it without further ado to the WTO agreements, thus rejecting the notion that EU legislation should be subjected by Union courts to the benchmark of WTO law.⁵¹ In its reasoning, the Court relies heavily on its *International Fruit* precedent and questions whether the changes introduced by the DSU have altered the inherently diplomatic nature of the Geneva dispute settlement mechanism.⁵² The real reason for its reluctance to recognize direct effect, however, becomes evident when the Court points to the Council statement on direct effect.⁵³ The Court rightly points out that the Council only followed the example of the Union’s major trading partners. As none of them had given direct effect to WTO law, it was not the judiciary’s role to weaken the position of Union negotiators by granting third parties a benefit for which other WTO members could arguably extract an additional benefit: contrary to its normal jurisprudence with regard to international treaty law, the Court links reciprocity and direct effect.⁵⁴

Two exceptions to the Court’s refusal to grant direct effect should be mentioned for the sake of completeness: if a Union act expresses the Union’s intention to implement a particular WTO obligation (*‘Nakajima exception’*)⁵⁵ or if the Union act in question refers to specific provisions of a WTO agreement (*‘Fediol exception’*),⁵⁶ the Court will review the legality of a Union legislative act or other measure against the benchmark of the WTO Agreement referred to in the Union act. However, as it is in the hands of the Union legislator whether it wants that exposure to additional legal control by the Union courts, those exceptions have proven to be of limited practical relevance.⁵⁷

The ECJ has also rejected giving direct effect to WTO rules as concretized by adopted WTO Panel and Appellate Body Reports,⁵⁸ even after the ‘reasonable period of time’ pursuant to DSU Articles 21.3, 22.2 had expired.⁵⁹ The same applies to the DSB decisions.⁶⁰ In the absence of judicial adaptation, it is up to the Union legislators to (p. 41) change EU laws, when and if the DSB accepts report by a Panel or the Appellate Body that views Union law as being not compatible with its obligations under the WTO Agreement.⁶¹

3. Japan

The Japanese Constitution provides that treaties and established international law should be given due respect.⁶² The relevant constitutional provision has been interpreted to signify the supremacy of a treaty or customary international law.⁶³ Treaties and customary international law should, therefore, prevail over contrary domestic laws.⁶⁴ The GATT enjoyed treaty status in the Japanese legal system because it was signed by the Cabinet as a

treaty and approved by the *Diet*. The WTO Agreement enjoys treaty status for the same reason. When a conflict arises between a provision in a WTO agreement and a provision of domestic law, the WTO provision should be interpreted as supreme.⁶⁵ What is doubtful, however, is whether the WTO agreements have direct effect in the Japanese legal order.⁶⁶

In the *Kyoto Necktie* case,⁶⁷ the issue of direct effect of the GATT arose in connection with the 1976 Raw Silk Price Stabilization Law, which established a price-stabilization scheme for domestically produced raw silk.

To effectively operate this price-stabilization programme, it was necessary also to restrict the import of raw silk because the programme would be disrupted if raw silk from abroad were allowed to come in freely when the domestic price was low. Thus, the law was amended to designate a government entity, the Silk Business Agency, as the sole importer of raw silk in Japan. This programme was designed to protect domestic raw silk producers, and the price of raw silk in Japan soared to about twice the world price.

But although raw silk imports were restricted, silk fabric imports were not. As a result, European manufacturers purchased raw silk in China and South Korea, the two major producing countries, and produced silk ties for sale in Japan at low prices.

Japanese fabric producers challenged the Raw Silk Price Stabilization Law under GATT Article XVII:1(a), which stipulates that each contracting party agrees that a state-trading agency under its control should operate its transactions on the basis of (p. 42) commercial considerations only in terms of price, quality, and availability. GATT Article II:4 also stipulates that, whenever a tariff concession under the GATT has been made for a commodity that is an object of state trading, a contracting party shall not sell the commodity in the domestic market at a price above the actual import price plus the applicable tariff.

The Japanese fabric producers argued that the Silk Business Agency was a state-trading agency, and since the agency was not allowed to sell imported raw silk in the domestic market below the stabilization price, the sales policy envisaged in the legislation violated GATT Articles II and XVII.

The Kyoto District Court rejected this argument and gave the following reasons for upholding the validity of the legislation:

The exclusive importership and the price stabilization system under consideration... are designed to protect the business of raw silk producers from the pressure of imports for a while, and this has the same substance as the emergency measure permitted under article XIX of the GATT. Even though it is reasonable to state that, judging from the nature of such an emergency measure, there should be a limit to the duration of it, such a limit should not be regarded as absolute. Since this duration should be decided in relation to the duration of the pressure of imports, article 12-13-2 of the law providing for enforcing the exclusive importer arrangement for a while cannot be regarded as unreasonable.

Regarding the effectiveness of GATT Articles in relation to domestic laws, the Court stated:

A violation of a provision of GATT pressures the country in default to rectify the violation by being confronted with a request from another member country for consultation and possible retaliatory measures. However, it cannot be interpreted to have more effect than this. Therefore, it cannot be held that the legislation in question is contrary to the GATT and null and void.

Thus, the Kyoto District Court denied the direct effect of the GATT in Japanese law and refused to apply the established principle of Japanese constitutional law that treaties may override statutes, even those enacted later in time. The plaintiffs appealed this judgment to both the Osaka High Court⁶⁸ and the Supreme Court,⁶⁹ but in both instances the appeal was summarily dismissed. The Supreme Court simply approved the reasoning of the lower court.⁷⁰

The validity of the Court's holding on the relationship between the GATT and a domestic regulation is rather dubious. The Court held that the import restriction in question would be held lawful since the same kind of measure would be allowed under GATT Article XIX. However, Article XIX requires that a country invoking a safeguard measure find 'serious injury' caused by an increase in imports. In this case, however, not only was 'serious injury' not found, but there was no procedure in the law to find such an injury.

(p. 43) Moreover, the Court seems to imply that the fact that a domestic law is contrary to a provision of the GATT will not affect the validity of the law in Japan, although it may trigger a request for consultation or even retaliation by another GATT member country. This view seems to ignore the relevant provision of the Constitution, which provides that a treaty and established rules in international law should be accorded due respect, as well as the established legal interpretation in Japan that a treaty overrides a contrary domestic law regardless of the order in which the treaty and the domestic law were enacted.⁷¹

Nevertheless, the decision of the Kyoto District Court in the *Chinese Silk* case is remarkably consistent with similar cases interpreting the GATT in the European Union and the United States. In Japan, in spite of the Constitution, which gives primacy to international law, WTO law will not be accorded direct effect, and, in the event of conflict with domestic law, the domestic law will prevail.

4. The United States

4.1 Overview of US law

A treaty binding the United States under international law will typically be called either a 'treaty' or an 'executive agreement' pursuant to US law.⁷² For the purposes of US constitutional law, a 'treaty' is ratified by the President after receiving the advice and consent of two-thirds of the members of the US Senate.⁷³ The President alone, in contrast, can conclude an executive agreement.⁷⁴ In the context of trade agreements, this executive agreement power normally stems from an authorization by Congress, either granted before negotiations or granted after having taking note of the negotiation results.⁷⁵ The President also has 'inherent power' of uncertain scope to enter into executive agreements.⁷⁶ The power to conclude executive agreements is not explicit in the US Constitution, but has developed in state practice and has received approval by the US Supreme Court.⁷⁷ The choice of when to use the treaty power or when to use the executive agreement power is unclear under present constitutional doctrine.⁷⁸ In practice, the President makes the choice, but this is often the subject of controversy.⁷⁹

(p. 44) In the United States, trade agreements are virtually always treated as executive agreements, and, after the conclusion of the Uruguay Round, the President chose to treat the WTO Agreement as an executive agreement. Congress had authorized the negotiation and approval process in advance under a procedure known as 'fast track'. Under the fast-track process, Congress approved legislation authorizing the President to enter into trade negotiations and agreed to consider the necessary implementing legislation under a special legislative process.⁸⁰ The process was as follows. First, the bill implementing the executive agreement could not be amended once it was introduced. Second, the appropriate legislative committees and Congress had to vote on the bill within a certain period. Third, the bill would be voted 'up' or 'down' by each House of Congress. The Uruguay Round

results were approved, pursuant to this process, through the approval of the Uruguay Round Agreements Act (URAA) in December 1994.⁸¹

The function of the US 'fast-track' procedure for international trade agreements is not only to facilitate Congressional review and approval, but also to reassure negotiating partners that any trade agreement they negotiate with the United States will not be subjected to Congressional amendments that would necessitate the relaunch of the complex (and often multilateral) negotiation process. Fast-track authority, most recently called 'trade promotion authority', is therefore essential for the President to even engage in serious trade negotiations.

4.2 The relationship between WTO law and US law

Do the WTO agreements have direct effect in the domestic legal order of the United States? US constitutional practice recognizes a distinction between self-executing and non-self-executing international agreements. Both treaties and executive agreements can be self-executing,⁸² in which case, they have direct effect as part of US domestic law because of the constitutional provision that 'treaties', together with the Constitution and US laws, shall be 'the Supreme Law of the land'.⁸³

Whether a particular treaty is self-executing is a matter of considering the terms in question. If the terms of a treaty give it direct effect, the treaty is self-executing. If the terms indicate that further legislation is needed for direct effect, the treaty is non-self-executing.⁸⁴ In addition, some provisions of a treaty may be self-executing, while other provisions are non-self-executing. In US law, multilateral trade agreements such as the GATT have never been held to be self-executing, and leading scholars agree that the GATT is a non-self-executing agreement.⁸⁵

(p. 45) In the URAA, Congress settled the question of direct effect: section 102 of the Act provides that 'no 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'.⁸⁶ This provision means that the WTO agreements have no direct effect in the US legal order.

This provision also means that decisions rendered by WTO dispute settlement Panels and the Appellate Body have no direct effect on US law. The URAA thus confirmed the *status quo ante*. In *Footwear Distributors and Retailers of America v United States*,⁸⁷ the US Court of International Trade refused to give direct effect to a GATT Panel decision: 'However cogent the reasoning of the GATT panels..., it cannot and therefore does not lead to the precise domestic, judicial relief for which the plaintiff prays'.⁸⁸ The US Court of International Trade has also concluded that WTO dispute settlement reports have no binding effect on a US court.⁸⁹

Because neither the WTO agreements nor dispute settlement decisions can directly affect existing US law, it follows that laws passed by Congress after the WTO Agreement and the URAA will be given full effect in domestic law and US courts, even if there is a conflict between such laws and a WTO agreement. US courts have noted that an unambiguous US law prevails over international law in the event of a conflict between the two.⁹⁰ However, US courts will not lightly come to such a conclusion, as they subscribe to the view that, 'absent express language to the contrary, a statute should not be interpreted to conflict with international obligations'.⁹¹

With regard to *US state law*, the URAA similarly provides that:

No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.⁹²

Thus, while under US constitutional law even an executive agreement based solely upon the President's foreign affairs power prevails over inconsistent state law, a US official or court can declare state law that conflicts with the United States' WTO obligations invalid, if the federal government has brought an action.⁹³

The United States has thus adopted a dualistic approach to the WTO Agreement. From the US constitutional perspective, the WTO Agreement is an executive (p. 46) agreement and constitutes a binding international obligation of the United States. It is not directly effective, however, in the domestic legal order. Its implementation depends upon its transformation by the US Congress into domestic law. No private claimant may assert any cause of action or defence directly under any of the WTO agreements before a US tribunal.⁹⁴ Thus, in the United States, the legal issues arising under the WTO agreements will be decided under US legislation, both federal and state, regardless of whether the result is consistent with international law. It is the responsibility of Congress and the President to ensure conformity between US and WTO law.

5. Conclusion

As the foregoing suggests, the European Union and United States, for very different reasons, have a complex relationship between their domestic legal systems and WTO law. Neither of them recognizes the direct effect of the WTO agreements or decisions of the WTO Dispute Settlement Body (DSB). Both require the implementation of WTO norms in their domestic legal orders as a necessary condition for giving internal validity to their internationally legally binding WTO obligations.

In the case of the European Union, this is all the more striking: generally speaking—that is, with the most notable exception being the WTO Agreement—the European Court of Justice allows individuals to invoke provisions of international agreements, even if this is not reciprocated by the other contracting party.⁹⁵ Time and again, this has resulted in 'ordinary' laws being declared invalid, due to the well-established hierarchical positioning of international agreements in the EU legal order below the constitutional (TFEU and TEU) but above the ordinary law sphere.⁹⁶

Japan provides another example of the difficulty many WTO members have in reconciling their principled position that international treaties take precedence over domestic laws from the day of their enactment or approval⁹⁷ with the real world where, as we have learned from the Appellate Body, people 'live, work, and die' and states do not want the Appellate Body to limit their foreign economic policy more than it already does. The cases of the United States, Japan, and the EU show that WTO norms will only be applied by domestic courts after internal implementation and that direct effect of DSB decisions in the domestic legal orders of WTO members is—to the best of our knowledge without exception—not recognized.

Footnotes:

¹ The first proper antidumping legislation was the Canadian Act to Amend the Customs Tariff 1897, 4 Edw VIII, 1 Canada Statutes 111 (1904).

² WTO Agreement, Art. XVI:4.

³ For example, in the context of the Trade Policy Review Mechanism pursuant to Annex 3 of the WTO Agreement.

⁴ WTO Doc G/TBT/1/Rev.10 Page 20: '(ii) *Timing of Notifications*...In 1995, the Committee agreed that when implementing the provisions of Articles 2.9.2, 3.2 (in relation to Article 2.9.2), 5.6.2 and 7.2 (in relation to Article 5.6.2), a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account.' An example are the notifications by Australia and New Zealand of their proposals to introduce plain packaging of tobacco products; see, e.g., WTO Doc. G/TBT/N/NZL/62 (24 July 2012).

⁵ *Certain German Interests in Polish Upper Silesia, Germany v Poland*, Merits, Judgement, (1926) PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25 May 1926.

⁶ *China—Auto Parts* (Appellate Body), para. 225; see also *India—Patents (US)* (Appellate Body), para. 65.

⁷ *China—Publications and Audiovisual Products* (Appellate Body), paras. 177-8.

⁸ Art. 2 of the International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts (Elements of an internationally wrongful act of a State): 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.' That this may also be a treaty-based obligation follows from Art. 12 (Existence of a breach of an international obligation): 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'

⁹ Art. 27 (first sentence) VCLT (Internal law of States, rules of international organizations and observance of treaties): 'A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.'

¹⁰ As a matter of international law, international treaty obligations, of course, trump conflicting domestic laws, as Art. 27 of the Vienna Convention on the Law of Treaties (VCLT) shows.

¹¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union can be found in the EU's official gazette, the *Official Journal* C 83, 30.3.2010. For an excellent overview of the EU's legal order cf. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 5th edn. (Oxford: Oxford University Press, 2011).

¹² Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

¹³ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁴ cf. Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, 21.

¹⁵ Whereas the standard decision-making procedure laid down by the TFEU is now by qualified majority, it will only be on the most rare of occasions that the Council decides otherwise than by consensus.

¹⁶ The Union shall replace and succeed the European Community, TFEU, Art. 1(3).

- 17** cf. *Opinion 1/78 International Agreement on Natural Rubber* [1979] ECR 2871; *Opinion 1/75 Understanding on Local Cost Standard* [1975] ECR 1355.
- 18** Juan Marchetti and Petros Mavroidis, 'From Reluctant Participant to Key Player: EU and the Negotiations of GATS' in Inge Govaere, Reinhard Quick, and Marco Bronckers, eds., *Trade and Competition Law in the EU and Beyond* (Cheltenham: Edward Elgar, 2011) 48–96.
- 19** Ernst-Ulrich Petersmann, 'The GATT Dispute Settlement System as an Instrument of the Foreign Trade Policy of the EC' in Nicholas Emiliou and David O'Keefe, eds., *The European Union and World Trade Law: After the GATT Uruguay Round* (Chichester: Chancery Wiley Law Publications, 1996) 253–77.
- 20** Case 8/73 *Hauptzollamt Bremerhaven v Massey Ferguson* [1973] ECR 897; Case 41/76 *Donckerwolke v Procureur de la République* [1976] ECR 1921, *Opinion 1/75* [1975] ECR 1355.
- 21** Patrick Messerlin, 'The Influence of the EU in the World Trade System' in Amrita Narlikar, Martin Daunton, and Robert M. Stern, eds., *The Oxford Handbook on The World Trade Organization* (Oxford University Press, 2012) 213–34.
- 22** *Opinion 1/94* [1994] ECR I-5276.
- 23** Jacques Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession' (1995) *Common Market Law Review* 763–87.
- 24** WTO Agreement Arts. IX:1, XII:1.
- 25** In Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECR 2013-00000, the ECJ decided that Art. 27 of TRIPs fell within the field of the CCP. In addition, in Case C-137/12 *Commission v Council* [2013] ECR 2013-00000, the ECJ found that the signing of the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access fell within the exclusive competence of the EU. Furthermore, the CCP now also covers, pursuant to TFEU Art. 207(1), foreign direct investment (FDI). See Marc Bungenberg and Christoph Herrmann, eds., *European Yearbook of International Economic Law, Special Issue: Common Commercial Policy after Lisbon* (Berlin: Springer, 2013) and in particular with regard to remaining Member States' competences: Wolfgang Weiß, 'Common Commercial Policy in the European Constitutional Area—EU External Trade Competence and the Lisbon Decision of the German Federal Constitutional Court' in Bungenberg and Herrmann, eds., *European Yearbook of International Economic Law, Special Issue* (2013) 29 *et seq.*
- 26** These alleged competences have so far been irrelevant for WTO practice. They concern inter alia rights emanating from TFEU Art. 79(5) ('This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'). Also with regard to customs administration, Art. 33 ('Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission') clearly presupposes a degree of Member State autonomy not affected by the exclusive EU competences on CCP and the Customs Union. Another remaining competence of Member States may exist in the areas regulated by TRIPs Art. 41 (enforcement measures); see in this respect the conclusions of the Advocate-General in Case C-13/07 *Commission of the European Communities v Council of the European Union* [2009] who discusses how the obligations pursuant to TRIPs Art. 61 can be implemented. Finally, the various balance of payments exceptions in the WTO Agreement can, at least for those Member States whose currency is not the Euro, only be activated by the Member States themselves, as TFEU Arts.

143 and 144 only regulate the conditions under which such exceptional measures may be taken.

27 The ECJ rejected the argument that ‘mixity’ of the WTO Agreement (which it accepted for other reasons) was a consequence of the fact that Member States contribute to the WTO budget. The Court distinguished the *International Rubber* case (*Opinion 1/78* [1979] ECR 02871), which held that the EC and its Member States enjoyed joint competence in the negotiation of an agreement setting up a *financial policy instrument*, whereas the WTO Agreement entails the obligation to contribute to an operating budget: *Opinion 1/94* [1994] ECR I-5276, at I-5395; cf. Alan Dashwood, ‘Mixity in the Era of the Treaty of Lisbon’ in Christophe Hillion and Panos Koutrakos, eds., *Mixed Agreements Revisited* (Oxford: Hart Publishing, 2010) 351.

28 TEU Art. 5(2).

29 cf. TFEU Art. 207(6).

30 TFEU Arts. 218(6), 218(10).

31 The Parliament has been granted far-reaching concessions by the Commission in the Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304; see, however, Council Statement—Framework Agreement on relations between the European Parliament and the Commission [2010] OJ C287/1; see Youri Devuyt, ‘The European Parliament and International Trade Agreements: Practice after the Lisbon Treaty’ in Inge Govaere, Erwan Lannon, Peter Van Elsuwege, and Stanislas Adam, eds., *The European Union in the World—Essays in Honour of Marc Maresceau* (Leiden; Boston: Martinus Nijhoff, 2014) 171.

32 TFEU Art. 207(3).

33 See TFEU Art. 3(1): ‘The Union shall have exclusive competence in the following areas: ... (e) common commercial policy’.

34 The areas where the Member States remain competent have so far not been the subject of negotiations. Even then, though, the Member States would ask the Commission to represent them.

35 Case 22/70 *Commission v Council* [1971] ECR 263, 274; cf. TFEU Art. 2(1): ‘When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.’

36 See Michael Hahn and Livia Danieli, ‘You’ll Never Walk Alone: The European Union and its Member States in the WTO’ in Bungenberg and Herrmann, eds., *European Yearbook of International Economic Law, Special Issue* (2013) 49–63.

37 *Opinion 1/78*, at I-5420.

38 The ECJ’s pertinent jurisprudence starts with Case 181/73 *Haegeman v Belgium* [1974] ECR 449, which it further developed in Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a. A.* [1982] ECR 3641.

39 Constant jurisprudence since Joined Cases 21 to 24/72 *International Fruit Co. v Produktschap voor Groenten en Fruit* [1972] ECR 1219, where the Court established in the *first part* of the decision that the then Community was bound by the GATT which formed an integral part of the Union legal order; the decision is better known for the rejection of any direct effect in the *second part*, see also Case C-69/89 *Nakajima v Council* [1991] ECR 2069.

40 cf. Marco Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) *Journal of International Economic Law*, 885, 888.

41 Case C-61/94 *Commission of the European Communities v Federal Republic of Germany (International Dairy Arrangement)* [1996] ECR I-3989, para. 52; similar passages can be found in Case C-76/00 P *Petrotub SA and Republica SA v Council and Commission* [2003] I-79, para. 57; Case C-431/05 *Merck Genéricos—Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007] ECR I-7001, para. 35.

42 Which are called 'regulations' or 'directives' (the latter being framework laws), cf. TFEU Art. 288. With regard to EU secondary legislation implementing international agreements, see Art. 207(2) which is the legal basis for adopting internal implementing measures for international agreements. The provision of Art. 291 regulates the implementing powers of the Commission; cf. Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 that lays down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55, Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures [2014] OJ L18 and Regulation (EU) No 38/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the granting of delegated and implementing powers for the adoption of certain measures [2014] OJ L18; see Till Müller-Ibold, 'Common Commercial Policy after Lisbon: The European Union's Dependence on Secondary Legislation' in Bungenberg and Herrmann, eds., *European Yearbook of International Economic Law, Special Issue* (2013) 145-62.

43 cf. TFEU Art. 288.

44 See, for example, Case C-327/02 *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055; Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579. This even applies to trade agreements; see Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a. A.* [1982] ECR 3641, paras. 16, 17. In particular, the Court rejected the argument that direct effect should only be accorded if the other contracting parties would accord the same status in their domestic legal orders. Such a view would, according to the ECJ, not be compatible with a good faith interpretation of an international agreement. The Advocate-General's opinion that the bilateral free trade agreement between the Union and another country was as 'flexible' as the GATT and should not be given direct effect was rejected; *ibid.* 3674.

45 Joined Cases 21, 22, 23, and 24/72 *Int'l Fruit Co. v Produktschap voor Groenten en Fruit* [1972] ECR 1219, para. 8.

46 Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg* [1982] ECR 3641.

47 Opinion of AG Alber of 15 May 2003 in C- 93/02 P *Biret International v Council* [2003] ECR I-10497. On the same lines, AG Tizzano in his Opinion of 18 November 2004 in C-377/02 *Léon Van Parys NV v Belgisch Interventie-en Restitutiebureau* [2005] ECR I-1465.

48 Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L336, 11th recital in the preamble. This is now becoming a routine clause in the EU's trade agreements, see cf. the decision regarding the signing/conclusion of recent bilateral trade agreements, such as the one with the Republic of Korea (Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional

application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127, Article 8) and with Colombia and Peru (Council Decision 2012/735/EU of 31 May 2012 on signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member State, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/1, Article 7), where the Council added a provision specifying that: ‘The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals’.

49 See section 4 of this chapter.

50 As restated in Case 280/93 *Germany v Council* [1994] ECR I-4973, at I-5073, para. 110.

51 Case C-149/96 *Portuguese Republic v Council* [1999] ECR I-8395, 8436-440, paras. 34-48.

52 *Ibid.* para. 36 *et seq.*

53 *Ibid.* para. 48.

54 *Ibid.* paras. 43-5.

55 Case C-69/89 *Nakajima All Precision Co. v Council* [1991] ECR I-2069.

56 See Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission* [1989] ECR 1781, paras. 19-22 (hereinafter: *Fediol v Commission*). An application of this doctrine is Case C-89/99 *Schieving-Nijstad v Groeneveld* [2001] ECR I-340 (holding that TRIPs Art. 50.6 must be respected by officials of EU/EC Member States).

57 But see, for example, in Case C-76/00 P *Petro tub SA and Republica SA v Council and Commission* [2003] I-79, paras. 56 *et seq.*, 64.

58 Case C-94/02 *Établissements Biret et Cie SA v Council of the European Union* [2003] ECR I-10565, para. 64 *et seq.*

59 Case C-377/02 *Léon Van Parys NV v Belgisch Interventie-en Restitutiebureau (BIRB)* [2005] ECR I-1465, para. 51; Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council of the European Union and Commission of the European Communities* [2008] ECR I-6513, para. 117.

60 *FIAMM* [2008] ECR I-6513, para. 127 *et seq.*

61 See, for example, Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community [2012] OJ L237, p. 1, through which the adopted reports in the dispute *EC—Fasteners (China)* were implemented.

62 Kenpō (Japanese Constitution) Art. 98(2).

63 See, for example, Yuji Iwasawa, ‘Constitutional Problems Involved in Implementing the Uruguay Round in Japan’ in John H. Jackson and Alan O. Sykes, eds., *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997) 137, 146.

64 *Japan v Sakata*, 13 Keishū (Sup Ct Crim Cases Rep) 3225 (Sup Ct, 16 December 1959). In this case, a person was indicted for trespassing on a US Air Force installation in Japan. The indictment was brought under the Criminal Special Measures Law (Law No. 138 of 1952), which provides for the punishment of anyone who trespasses on the property of US bases in Japan, to implement the Status of Forces Agreement and the Security Treaty between the United States and Japan. The defendant’s counsel argued that this law, the agreement, and the treaty conflicted with Art. 9 of the Constitution, which prohibits Japan

from exercising military power for solving international conflicts. The court allowed the indictment to stand.

65 Yuji Iwasawa, 'Constitutional Problems Involved in Implementing the Uruguay Round in Japan', in John H. Jackson and Alan O. Sykes, eds., *Implementing the Uruguay Round* (Clarendon Press, 1997), n. 63 at 173.

66 Ibid.

67 *Endō v Japan*, 530 Hanrei Taimuzu 265 (Kyoto Dist. Ct., 29 June 1984).

68 Judgment of 25 November 1986, Osaka High Court, 634 Hantei 186.

69 Judgment of 6 February 1990, Supreme Court, 36 Shomu Geppo 2242.

70 Ibid. 2245.

71 Kenpō, n. 62 at Art. 98, para. 2.

72 Restatement (Third) of the Foreign Relations Law of the United States, § 111 (1987) (hereinafter: Restatement).

73 US Const. Art. II, § 2.

74 *United States v Belmont*, 301 US 324 (1937); *United States v Pink*, 315 US 203 (1942).

75 See John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text of National and International Regulation of Transnational Economic Relation*, 5th edn. (Thomson/West, 2008) 97–9 and the two most instructive memoranda to Ambassador Michael Kantor, US Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: *Whether the GATT Uruguay Round must be Ratified as a Treaty*, sent on 29 July and 22 November 1994 (published, inter alia, at <http://www.justice.gov/olc/gatt.htm#N_2_>).

76 See *ibid.*

77 See cases cited in n. 15.

78 See US Dept of State, *Handbook on Treaties and Other International Agreements* (1985) para. 721.3.

79 When the WTO Agreement was submitted to Congress as an executive agreement, many argued that it should be submitted as a treaty under US law. See *The World Trade Organization and US Sovereignty: Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong. (1994). However, the President's power to conclude a trade agreement was upheld in court. *Made in USA Foundation v United States*, 56 F. Supp 3d 1226 (N.D. Ala. 1999).

80 For a full explanation, see John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results' (1997) *Colum. J. Transnat'l L.* 37, 157, 168–9.

81 The Uruguay Round Agreements Act (URAA), Pub.L. 103-465, 108 Stat. 4809, enacted December 8, 1994.

82 See *Foster v Neilson*, 27 US 253, 314 (1929); *United States v Pink*, n. 74. See also Restatement, n. 72, § 111.

83 US Const. Art. VI, § 2.

84 *Foster v Neilson*, n. 82; see John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) *Am. J. Int'l L.* 86, 310, 320.

- 85** John H. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (1967) *Mich. L. Rev.* 66, 249; Robert E. Hudec, 'The Legal Status of GATT in the Domestic Law of the United States' in Meinhard Hilf, Francis G. Jacobs, and Ernst-Ulrich Petersmann, eds., *The European Community and GATT* (Kluwer, 1986) 187; Ronald A. Brand, 'The Status of the General Agreement on Tariffs and Trade in United States Domestic Law' (1990) *Stan. J. Int'l L.* 26, 479.
- 86** 19 U.S.C.A. § 3512(a)(1) (1999). See also U.S.S. Rep. No. 103-412, at 13 (1994) (noting that the Uruguay Round Agreements 'are not self-executing and thus their legal effect in the United States is governed by implementing legislation').
- 87** *Footwear Distributors and Retailers of America v United States*, 852 F. Supp 1078 (Ct. Int'l Trade 1994).
- 88** *Ibid.* 1096.
- 89** See *Hyundai Electronics Co. v United States*, 53 F. Supp 2d 1334, 1343 (1999).
- 90** See, for example, *Hyundai Electronics Co.*, 1343.
- 91** See, for example, *Hyundai Electronics Co.*, 1344 (citing *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64 (1804)).
- 92** 19 U.S.C.A. § 3512(b)(2) (1999).
- 93** GATT Art. XXIV:12 requires contracting parties to take 'reasonable measures' to ensure observance by local and regional governments. This provision has generated an ambiguous jurisprudence in the United States. For a thorough summary and analysis, see Hudec, 'The Legal Status of GATT', n. 85 at 219-25. Now, WTO Agreement Art. XVI:4 mandates conformity of all US domestic legislation (both at federal and state level) to the WTO agreements. See 19 U.S.C.A. § 3512(c) (1999) (implementing this obligation into US law).
- 94** 19 U.S.C.A. § 3512(c) (1999).
- 95** cf. Case C-327/02 *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055; Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579.
- 96** cf. Case C-344/04 *The Queen on the application of: International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, at para. 35: '[TFEU Art. 216(2), ex-] Article 300(7) EC provides that "agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States". In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation'. Decision C-61/94 *Commission v Germany* [1996] ECR I-03989, which the Court referred to, had stated, at para. 52: 'Similarly, 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 consistent with those agreements.'
- 97** See, for example, Constitution of Costa Rica Art. 7.