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International Law programme

DIRECT EFFECT OF THE WORLD TRADE ORGANIZATION LAW IN THE LEGAL SYSTEM OF THE EUROPEAN UNION

Master Thesis

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Vilnius, 2015

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LIST OF ABBREVIATIONS

AB	Appellate Body
CJEU	Court of the Justice of the European Union
DSB	Dispute Settlement Body
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on the Tariffs and Trade
SPS	Agreement on the Application of Sanitary and Phytosanitary measures
TFEU	Treaty on the Functioning of the European Union
TRIPS	The Agreement on Trade-Related aspects of Intellectual Property Rights
WTO	World Trade Organization

INTRODUCTION

Each member of the World Trade Organization has to act according to internationally recognized trade rules. Hence the EU, as one of the biggest players in the WTO field[1], is also bound by the law of WTO[2]. In order to ensure smooth and fair trade between the nations it is undoubtedly important to ensure that these rules are applied equally and the essence of WTO is not distorted by significantly different interpretation of the players of WTO.

The creation of WTO was based on idea that a huge international organization will be able to unify legal systems of WTO Member States and trade system will be changed into a platform where traders are bound by recognized trade rules and issues related with trade will be handled much easier[3]. However, even though a lot of changes were introduced by transforming GATT 1947 into WTO 1995, the legal status of WTO law did not change much in the context of the EU law[4]. The concept of direct effect has been widely discussed between legal scholars – some of them stated that constant denial of direct effect can diminish the effect of the WTO; while others are claiming that WTO provisions do not contain necessary elements to be announced as directly effective and still the direct effect of WTO law is denied within the EU legal system[5].

In determining the influence of WTO within the EU legal order several aspects play a crucial role. First of all, two concepts have to be separated, namely direct applicability and direct effect, as sometimes in the legal literature they are equalized. The concept of directly effective WTO law for a long time was a subject of discussions and even though the CJEU keeps denying the directly effective nature of WTO rules, the discussion is still ongoing. However, the CJEU affirmed that there are two exceptions under which the legality of EU measures might be reviewed. Notwithstanding, these exceptions are very narrowly applied within the EU legal order.[6] On the other hand, it might be concerned as a big achievement bearing in mind that the concept of direct effect as well as exceptions did not receive much attention in the legal systems

[1] Moschella M., Weaver C. Handbook of Global Economic Governance: Players, Power and Paradigms. Routledge, 2013, p. 60.
[2] Case C-61/94 Commission of the European Communities v. Federal Republic of Germany [1996] ECR I-03989, para. 30; [accessed on 23 February 2015]; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0061&from=EN>
[3] La Chimia A. Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law. Hart Publishing, 2013, p. 366.
[4] Nsour M. F. A. Rethinking the World Trade Order – Towards a Better Legal Understanding of the Role of Regionalism in the Multilateral Trade Regime. Sidestone Press, 2009, p. 192.
[5] Huarte Melgar B. The Transit of Goods in Public International Law. Hotei Publishing, 2015, p. 135.
[6] Qureshi A. H. Interpreting WTO Agreements: Problems and Perspectives. 2nd edition. Cambridge University Press, 2015, p. 172-173.

of other WTO players. Add to this, the case law of the CJEU regarding directly effective WTO provisions gave a foundation for other international treaties to claim the recognition of directly effective nature. It should be noted, that even though the CJEU has been denying the direct effect of WTO law, it does not mean that WTO law within the EU legal order has no effect at all. Indirect effect might be assumed as an instrument which could protect from inconsistency between WTO and EU law[7] and the recent cases within the EU show that a lot depends on the actions of EU institutions. It is clear that the legal status of the WTO law in the EU depends on how the CJEU is interpreting the WTO law in its decisions. All in all, it might be noted that the concept of directly effective WTO law was the beginning of the discussion regarding the general effect of WTO in the EU legal system.

Problematic aspects raised in the research

"Quite simply, what is in the end the use of making law, also international law, designed to protect private parties, if these private parties cannot rely on it?"- Jacques Bourgeois[8].

Hence, direct effect can be named as an instrument[9] which might protect legitimate interests of individuals before a domestic court[10]. For many years denial of directly effective WTO law was concerned as the main issue between WTO and EU legal order. The moot point might be identified not only that the CJEU provided rather narrow explanation why WTO law does not contain elements to be directly effective but also other issues which flow out of denial of direct effect. Namely, direct effect, exceptions and indirect effect are closely related as they all seek to ensure proper functioning of WTO law within the EU. Exceptions from general denial of direct effect as well as indirect effect might be named as an attempt to ensure fulfilment of WTO obligations and this is why direct effect cannot be separated from other aspects of WTO role in the EU. This thesis mainly is focused on the issues which came out directly from the denial of direct effect - not criticising the view of the CJEU but rather criticising the narrow interpretation and avoidance to answer the question on the importance of WTO law in the EU legal system.

[7] Martinico G., Pollicino O. The Interaction Between Europe's Legal Systems – Judicial Dialogue and the Creation of Supranational Law. Edward Elgar Publishing, 2012, p. 100.
[8] Eeckhout P. The Domestic Legal Status of the WTO Agreements: Interconnecting Legal Systems. Common Market Law Review, 1997, p. 53. (Cited from: Lester S., Mercurio B., Davies A. World Trade Law: Text, Materials and Commentary. 2nd edition. Bloomsbury Publishing, 2012, p. 114).
[9] Nollkaemper A. The Duality of Direct Effect of International Law. The European Journal of International Law, Oxford University Press, Vol. 25, No. 1, 2014, p. 214; [accessed on 7 January 2015]; available at <http://www.ejil.org/pdfs/25/1/2465.pdf>
[10] Aalto P. Public Liability in the EU Law – Brasserie, Bergaderm and Beyond. Hart Publishing, 2011, p. 160.

The problematic issue in this thesis is found as a result of chain reaction: starting with the fact that direct effect of WTO law was denied within the EU; going further that exceptions are applied very narrowly; and ending with indirect effect which is not always followed.[11] Hence, it might be assumed that WTO law, as a whole, is treated in a discriminatory way in the EU legal system in a sense that effect of WTO is avoided. To conclude, it is highlighted that the main problem of the topic in this thesis is that the effect of WTO law is accepted within the EU; however, as it will be revealed, it is not always followed by EU institutions. Denial of direct effect of WTO law made influence on other aspects which intends to ensure the functioning of WTO rules in the EU. In order to highlight the problematic issues of this topic the researcher will go through the case law of the CJEU and later the researcher will analyze possible reasons of a limited effect of WTO provisions in the EU legal system.

Relevance of the topic

In the context of international law the conception of directly effective WTO is comparitively not a new one. The concept of direct effect first came into a day light in 1972 together with *International Fruit* case[12]. Since that time the CJEU, which has the power to interpret provisions of international treaties[13], didn't go beyond its' own frames – interpretation of direct effect is rather repetition of Courts' previous case law without broader elucidation of reasons of denial. Even though the criticism regarding the denial of direct effect and the interpretation of the CJEU was highlighted, the CJEU didn't change its approach concerning the possibility to rely on the WTO law before the domestic court. Here the EU is not the only major player of the WTO who keeps denying the direct effect – other WTO members such as USA, Canada, China and Japan also do not accept the concept of direct effect.[14]

Even though the direct effect of the WTO law was discussed by scholars years ago, questions are arising not only for the citizens of the EU but also for other private parties from the Member States of the WTO. Add to this, grounds on which the CJEU accepted to review the legality of the EU measures have been used in order to prove directly effective nature of other

[11] Feichtner I. The Law and Politics of WTO Waivers – Stability and Flexibility in Public International Law. Cambridge University Press, 2012, p. 162.
[12] Joined cases C-21-24/72 International Fruit Company NV and others v. Produktschap voor Groenten en Fruit [1972] ECR I-00411; [accessed on 9 February 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0041&from=EN>
[13] Broberg M., Fenger N. Preliminary References to the European Court of Justice. 2nd edition. Oxford University Press, 2014, p. 123.
[14] Ruiz Fabri H. Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations? The European Journal of International Law, Oxford University Press, Vol. 25, No. 1, 2014, p. 155; [accessed on 14 March 2015]; available at <http://www.ejil.org/pdfs/25/1/2458.pdf>

international agreements, such as *Aarhus Convention*. This shows that the topic is relevant and questions have to be answered in order to have a clear background on requirements of direct effect as well as exceptions so that individuals would be aware when and under what exact conditions they are able to rely on WTO law before a domestic court. This might be considered as a practical value of the thesis, as it reveals what is the interplay between all forms of the effects of the WTO law.

Because of strict and rather narrow interpretation on the direct effect, the international community became curious by raising questions what are the real reasons of denial of the direct effect. Nowadays it is under the question whether the EU is not trying to protect its identity by not conferring its rights in trade field to international organization which was created in order to ease up the process of trade and to make sure that issues are solved without delay. To conclude, the idea of protectionism in our society seems to be closely related with the denial of direct effect. All these issues need to be discussed in order to make clear view regarding the WTO law within the EU legal order.

Novelty of the topic

WTO is relatively not a new derivative with its own history so the conception of direct effect of WTO rules has been discussed by both sides – those who support direct effect of the WTO and those who deny it. As this master thesis shows, there is quite a long list of legal scholars who have been analyzing the influence of the WTO law in the EU legal system. The CJEU by creating the case law[15] also made a huge input regarding the concept of directly effective WTO law in the EU. Advocates General[16] by presenting independent legal opinions on cases brought before the CJEU helped to develop the understanding of WTO law within the EU.

However, even though the concept of directly effective WTO law has been discussed, it has influenced the importance of exceptions of denial of direct effect and indirect effect as well; and thus not much attention is being paid to the interplay between them. The general approach of the CJEU towards WTO law reveals that the EU denies the effect of WTO provisions in much broader scope, with the meaning of exceptions and indirect effect. The gap in the legal literature might be identified as the lack of research on the interplay between all components of the effect

[15] Such as: Case C-26/62 *Van Gend en Loos*, Joined cases C-21-24/72 *International Fruit case*, Case C-104/81 *Kupferberg* and others *(researchers' comment).*

[16] Such as: Advocate General *Albert* – opinion on the CJEUs' decision in case C-94/02 Biret; Advocate General *Maduro* – opinion on the CJEUs' decision in case C-120/06 and C-121/06 FIAMM; Advocate General *Geelhoed* – opinion on the CJEUs' decision in case C-313/04; Advocate General *Saggio* in case C-149/96 Portugal v. Council and others *(researchers' comment).*

of WTO law – direct effect, exceptions and indirect effect. The discussion on directly effective WTO nature as well as on general effect of WTO law is ongoing and it is confirmed by recent cases which will be analyzed in this master thesis.

The object of the thesis

Legal obstacles related with the limited effect of the WTO law within the EU.

The aim of the thesis

The goal of this thesis is to clearly identify the grounds why direct effect of WTO law was denied and to reveal the reasons why direct effect was given such a limited role within the EU. Moreover, one of the aims is to determine the present effect and its scope of WTO in the EU, bearing in mind that WTO law was given a limited effect as a result of a chain reaction which is found in denying the effect of WTO not only through the concept of direct effect but also through exceptions and indirect effect.

Tasks of the thesis

1. To reveal the difference between direct applicability and direct effect of WTO law;
2. To determine what composes the concept of direct effect and to identify potential reasons why directly effective nature of WTO law is denied;
3. To analyze the scope of exceptions under which the WTO law might be used to review the validity of the EU measures and to evaluate the changes;
4. To outline the essence of indirect effect and to examine how it influenced the effect of the WTO law within the EU.

Statements to be defended

The CJEU is limited with its reasoning over denial of direct effect of WTO law within the EU legal system and narrow interpretation gave a foundation to seek for a sufficient effect through exceptions and indirect effect. The effect of WTO law is slowly getting recognized within the EU; however, it seems that EU still tends to refuse the influence of WTO law.

Methodology

Master thesis is based on several methods in order to reveal and examine the problematic issues related with the effect of WTO law within the EU:

1. Historical method: to highlight the changes before and after the WTO was established;

2. Linguistic method: to examine concepts in legal terms and to evaluate the interpretations presented by scholars and the CJEU;

3. Comparative method: is used in entire research in order to reveal differences and similarities in CJEU s' case law regarding direct effect and instruments directly related with it;

4. Analytical method regarding the scientific literature: to examine the articles and periodicals of legal scholars and other legal documents;

5. Case-analysis method: to demonstrate the tendencies of the CJEU on the reasoning of denial of direct effect of WTO rules as well as exceptions;

6. Logical-analytical method: to summarize the conclusions and recommendations regarding the effect of WTO law within EU legal system.

The structure of the thesis

This master thesis is divided into four main chapters each of which is divided into several smaller sections.

The first chapter reveals how WTO law is incorporated into EU law and what place the law of WTO has into the EU legal order – this chapter is purposeful in order to create general view about the relationship between the EU and WTO. As in the legal literature concepts of direct applicability and direct effect sometimes are equalized, the essence as well as the difference between these two concepts is presented in the first chapter.

In the second chapter the examination of the denial of direct effectly WTO law is presented. This chapter includes identification and the analysis of the grounds why directly effective WTO nature was rejected in the majority of the cases within the EU legal system. Add to this, second chapter reveals that not only legal reasons were taken into consideration in rejecting the directly effective nature of the WTO.

The third chapter presents so called exceptions of denial of directly effective WTO law, in a sense that there are two conditions under which it is possible to review the validity of the EU measures. What is more, recent cases concerning two exceptions are presented.

In the last, forth chapter of this master thesis the concept of indirect effect is analyzed. Importance of indirect effect and the EU institutions interplay is examined with a link to the potential reasons why EU measures are still found as inconsistent with WTO obligations.

Finally, the thesis is summarized with conclusions and recommendations.

1. ROLE OF THE WTO IN THE EU

In the legal literature regarding the direct effect of WTO law, two relevant notions were used – direct applicability and direct effect. In some legal sources it was equalized[17] with a meaning that provisions of international agreement can be invoked before a domestic court[18]. It is true that these two concepts might sound similar from the linguistic standpoint; however, concepts are different because of their nature[19] and influence within the EU legal order. For this reason it is undoubtedly useful firstly to analyze these concepts separately and after together in order to make a distinction between them. Direct applicability, as a concept, also has a certain importance within the EU; however, it might be considered as a less important derivative comparing with direct effect.

1.1 The concept of direct applicability

The notion 'direct applicability' for the first time was used by the Permanent Court of International Justice in 1928 where it was introduced in Jurisdiction of the Courts of Danzig Advisory opinion as a concept which "*[...] shows that its provisions are directly applicable as between the officials of the Administration*"[20]. The evaluation from linguistic point is relevant in order not to interpret and use the conception of direct applicability in a misleading way. Word 'applicability' in the legal context is described as a law, which applies[21]. Notion 'directly' shows that there is no need for further steps to be taken in order to incorporate a particular act into domestic law. It could be named as automatically incorporated norms as constitutional procedure is skipped because the most important moment is that the legal act came into force in international law level[22]. The concept of direct applicability is broadly analyzed in the EU law context. Legal acts, such as Founding Treaties and other instruments attached to these treaties were granted with direct application[23] in order to ensure equal and effective application of the EU law[24]. Whenever a new state expresses its will to join the EU, EU law become directly

[17] Foster N. Foster on EU Law. 4th edition. Oxford University Press, 2013, p. 161.
[18] Shelton D. International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion. Oxford University Press, 2011, p. 393.
[19] Gillespie A. The English Legal System. 4th edition. Oxford University Press, 2013, p. 120.
[20] Focarelli C. International Law as Social Construct: The Struggle for Global Justice. Oxford University Press, 2012, p. 342.
[21] Herbst R. Dictionary of Commercial, Financial and Legal Terms. Translegal, 2012, p. 61.
[22] Slaughter A. M., Stone Sweet A., Weiler J. The European Court and national courts – doctrine and Jurisprudence. Bloomsbury Publishing, 1998, p. 86.
[23] Jedrzejowska I. Constitutional Terminology in Transition: The Drifting Semantics of the Supranational Discourse under Negotiation. BWV Verlag, 2011, p. 144.
[24] Berry D. S. Caribbean Integration Law. Oxford University Press, 2014, p. 203.

applicable[25] – it forms a part of domestic law of the country in question. Concept of directly applicable EU law is defined as provisions which take effect in the legal systems of the member states without the need for further enactment[26]. As it is clear, direct applicability does not require adopting a positive act to ensure the enforceability of the act. The positive act in a national law might be described as a piece of legislation which gives the effect to Community law or international treaty.[27] The direct applicability is used in article 288 of the TFEU, with the meaning that regulations are directly applicable in all Member States. This provision was the one which clearly used the notion 'directly applicable' in a sense of EU law without expressly granting the same applicability to international agreements.

In the field of international law the notion is more or less the same – it is a procedural operation. It might be assumed that acts which are directly applicable do not require special procedure or issue of piece of legislation but it is still of a procedural nature. The main point about the notion of direct applicability is that it has a legal consequence in the domestic law so there is no further need for transposition of particular international agreement into domestic law[28]. The issue related with direct applicability in the context of international law is that for a long time it was used in parallel with notion directly effective. Protractedly the interpretation of direct applicability was rather narrow and just after some cases[29] reached the CJEU, the concept of direct applicability was separated from the notion of direct effect. It is highlighted that legal acts which are concluded by the Union form an integral part of the EU law[30] and EU law is directly applicable in the Member States[31]. Hence, from the standpoint of the WTO law it leads to the presumption that as a part of EU law, WTO provisions are directly applicable. It is affirmed by legal scholars who defined that WTO law is directly applicable in the EU legal system as there was no act of transposition when WTO law became an integral part of EU law[32]. It is not debatable question within the EU scene and it is clear that Member States of the WTO have to comply with their international obligations.

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[25] Wagner E., Bech S., Martinez J.M. Translating for the European Union Institutions. 2nd edition. Routledge, 2014, p. 107.
[26] Kent P. Law of the European Union. 4th edition. Pearson Education, 2008, p. 66.
[27] Kaczorowska A. European Union Law. 3d edition. Routledge, 2013, p. 302.
[28] Ward R., Akhtar A. Walker & Walker's English Legal System. 11th edition. Oxford University Press, 2011, p. 121.
[29] Such as: Case C-26/62 *Van Gend en Loos*, Joined cases C-21-24/72 *International Fruit* and others *(researchers' comment).*
[30] Kuijper P. J., Wouters J., Hoffmeister F., De Baere G., Ramopoulos T. The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor. Oxford University Press, 2011, p. 930.
[31] Aust A. Handbook of International Law. 2nd edition. Cambridge University Press, 2010, p. 438.
[32] Van den Bossche P., Zdouc W. The Law and Policy of the World Trade Organization. 3d edition. Oxford University Press, 2013, p. 66.

However, even though WTO law is a part of EU law that does not put a lot of weight on the concept of direct applicability. It's rather of a preparatory nature before going into details of the concept of direct effect. The importance of the concept of direct applicability can be perceived as being relevant in incorporation process to domestic law and as forming a separate unit from direct effect. Regarding the direct applicability of WTO law the main question may arise whether it will be directly effective as well. In order to answer this question the concept of direct effect has to be examined and as will be discussed in more detail below, both concepts have completely different influence into the EU legal system.

1.2 The concept of direct effect

In democratic society every individual has a right to defend himself and his rights before the court. Right to a fair trial[33] is one of the main rights included in the Convention for the Protection of Human Rights and Fundamental Freedoms. In order to ensure effective protection of one's interests, individuals are entitled to rely directly on provisions of some international documents such as European Convention on Human Rights or Covenant and Civil and Political Rights. It already became a classical expression that direct effect might be used as a powerful weapon[34] against a state or another private party before a domestic court.

Dividing the concept of direct effect into sections in order to highlight the meaning of each component, the essence of the notion is revealed. As it was mentioned before, notion 'direct' leads to the meaning that an action is done without delay or evasion; straightforward[35]. 'Effect' is described as an obligation which is actually enforced[36]. The word 'effective' is defined as in operation at a given time[37]. In the context of WTO, direct effect means that individuals can base a legal claim on WTO law in the domestic legal order[38]. More precisely, direct effect is described as situation when a private person in a state (or Union, respectively) may base a claim in, and be granted relief from, the domestic courts of that state against another

[33] The Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222; [accessed on 20 March 2015]; available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf >
[34] Van den Bossche P., Zdouc W., *supra* note 32, p. 67.
[35] Hoey M. Lexical priming – A new Theory of Words and language. Routledge, 2012, p. 209.
[36] Nollkaemper A. National Courts and the International Rule of Law. Oxford University Press, 2012 p. 117.
[37] Report of the Appellate Body on 2012 January 30 in China – Raw Materials Related to the Exportation of Various Raw Materials, AB – 2011 – 5, para. 356; [acceded on 24 March 2015]; available at <https://www.wto.org/english/tratop_e/dispu_e/394_395_398abr_e.pdf >
[38] Feichtner I., *supra* note 11, p. 272.

private person or the state on the basis of the states' obligations under an international treaty[39]. However, as well as other international agreements, WTO Agreement does not include the description of the direct effect and going through annexes of the WTO, the notion of direct effect is also absent.

The EU treaties also remain silent on the reception of international law[40]. Besides all attempts to formalize the notion of direct effect, there is no generally accepted definition of the principle of direct effect[41] and it is up to the CJEU to make a conclusion if the treaty provision contains all necessary elements to be directly effective[42]. The CJEU, as one of most important institutions of the EU, has to act neutral[43] when the discussion turns on the matter of direct effect of international agreements and thus the WTO law. The notion 'direct effect' is not new as it was first time examined by the CJEU in *Van Gend en Loos*[44] in 1963. Even though this case is found within the EU context without link to WTO law, it is particularly important for the determination of the scope of direct effect. *Van Gend en Loos* was a Dutch company which imported chemicals, particularly urea formaldehyde from Germany. Dutch authorities found the chemicals to be a subject of 8 % import tax. *Van Gend en Loos* objected to such decision of the Dutch authorities and asked the Court to rule on the issue whether individuals have a right to rely on EEC Treaty before a domestic court. In other words, the question was whether EEC Treaty can be regarded as directly effective. The CJEU answered in an affirmative way and stated that article in question produces direct effects and created individual rights which national courts must protect. The term used in this case was '*directly applicable'* instead of '*directly effective'* with the meaning that individuals can rely on these provisions before a court. *Van Gend en Loos* is particularly important case because the CJEU formally provided requirements for treaties to be announced as directly applicable – its' nature and purpose grants rights to individuals and the wording is found as clear, precise and unconditional. Firstly, the CJEU declared that to be directly effective it is necessary to consider the spirit, the general scheme and the wording of the provisions. The Court highlighted the fact that the preamble of the EEC Treaty refers not only to governments but to peoples[45]. This was based on the reference in the preamble and it might be

[39] Lester S., Mercurio B., Davies A. World Trade Law: Text, Materials and Commentary. 2nd edition. Bloomsbury Publishing, 2012, p. 112.
[40] Klabbers J. International Law. Cambridge University Press, 2013, p. 289.
[41] Kaczorowska A., *supra* note 27, p. 266.
[42] Isenbaert M. EC Law and the Sovereignty of the Member States in Direct Taxation. IBFD, 2010, p. 125.
[43] Kochenov D., De Burca G., Williams A. Europe's Justice Deficit? Oxford, Hart Publishing, 2015, p. 353.
[44] Case C-26/62 NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration [1963] ECR I-1; [accessed on19 March 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=EN>
[45] *Ibid*., p. 12.

regarded as a fulfilment of the first criteria. It should be noted that *Van Gend en Loos* was not constructed in a complex manner and thus the identification of its purpose and spirit was evaluated without going deeply into details. This part of examination is crucial in determination process of directly effective agreement because if the requirement would be to identify the provision which expressly confer rights to citizens, it would reduce the number of agreements which can have direct effect.[46] As it will be highlighted in subsequent case law of the CJEU, evaluation of the intention of the treaty might be found as a problematical aspect. Moreover, the Court assessed that the wording of the article in question was clear and unconditional[47] and thus there was no reason to doubt of directly effective EEC Treaty nature. Requirement for clarity of the provision is a complex issue as often agreements lack the preciseness.[48] The criteria for the precise and clear wording are found to be clear not only to the extent to which it is addressed but also in terms of concrete content[49]. Unconditional nature of the agreements is found when the provision is not a subject for further legislation action and is independent from the intervention of another body.[50] Requirement of unconditional nature was examined more into details in subsequent case law[51] of the CJEU where it was stated that the provision might be directly effective if the functioning of the provision does not depend on future actions. To conclude, the Court found that both criteria were satisfied: purpose of the EEC Treaty was expanded to create rights to individuals and provisions were constructed in a clear and unconditional way to be directly effective. The achievement of *Van Gend en Loos* is undeniable as there was a need for a clear set of conditions in order to prove directly effective nature of GATT/WTO Agreements. This case determined that the treaty would be affirmed as directly effective if the nature of the treaty is capable of conferring rights on citizens and provision is clear and unconditional. From the first glance the assessment of direct effect might not look difficult in order to determine if the particular Agreement is capable of being directly effective; however, the subsequent case law of the CJEU showed opposite tendencies.

Since the first case when the principle of direct effect was introduced for the society, discussions were growing fast. The main issue is rather narrow and imprecise interpretation by

[46] Martines F. Direct Effect of International Agreements of the European Union. The European Journal of International Law, Oxford University Press, Vol. 25, No. 1, 2014; [assecced on 22 March 2015]; available at <http://ejil.oxfordjournals.org/content/25/1/129.full.pdf+html>
[47] Huarte Melgar B., *supra* note 5, p. 13.
[48] Hartley T. C. The Foundation of European Union Law. 8th edition. Oxford University Press, 2014, p. 210.
[49] Schomann I., Jagodzinski R., Boni G., Clauwaert S., Glassner V., Jaspers T. Transnational Collective Bargaining at Company Level: A New Component of European Industrial Relations. ETUI, 2012, p. 242.
[50] Turner C., Storey T. Unlocking EU law. 4th edition. Routledge, 2014, p. 155.
[51] Case C-12/86 Meryem Demirel v. Stadt Schwäbisch Gmünd [1987] ECR I-03719, para. 14; [accessed on 20 February 2015]; available at <http://eur-lex.europa.eu/resource.html?uri=cellar:0c24007e-e7b6-425a-8710-6121fdfc8eaf.0002.03/DOC_2&format=PDF>

the CJEU which leads to the confusion when assessing whether provisions of the WTO are capable of being directly effective. Direct effect within the WTO law field was first assessed in case *International Fruit* in 1972[52]. International Fruit Company was an apple importer from third countries and claimed that Community Regulations 459/70, 565/70 and 686/70 infringed GATT rules. These Regulations embodied certain restrictions such as licenses and quotas on apples from third countries and *International Fruit* company asked whether the validity of these Regulations could be challenged relying on GATT rules. This was the very first case which concerned directly effective GATT rules and thus the decision was greeted with curiosity. Firstly, the CJEU highlighted the same fact as in *Van Gend en Loos* that in order to rely on the provisions of international agreement, it has to be capable of conferring rights on citizens.[53] For this purpose it was necessary to apply so called two – stage test[54] in order to prove directly effective nature of the GATT. The CJEU accepted the fact that the test is necessary; however, it appeared that it is extremely complex to satisfy these conditions. The CJEU started with the examination of general characteristics of GATT and found that "[...] because of great flexibility, being based on principle of negotiations and on reciprocal and mutually advantageous arrangements, the GATT is incapable of conferring rights to individuals"[55]. This was embodied under the expression of the spirit, general scheme and the terms. The criteria of spirit, general scheme and terms lead to the evaluation of the intention of the parties when the treaty was signed. According to the law of treaties, in the text of the treaty or other related documents should be a clear proof what the initial intention of the parties was[56]. It is not required for the treaty to express precisely that the essence of the spirit and the scheme is to confer rights to individuals but as *Van Gend en Loos* case shows, the direct link to individuals might help in the process of proving that the treaty aims to confer rights in a broader scope than just governments. Add to this, the wording also plays a significant role and its importance was highlighted in subsequent CJEU case law rather than in *International Fruit* case. As it was highlighted in aforementioned case, preciseness and unconditional nature of the provision has to be assessed on case-by-case basis[57] and each situation is unique because of the formulations. Preciseness is found as unambiguous expression leaving a small room for manoeuvre in interpretation of the

[52] Joined cases C-21-24/72, *supra* note 12.
[53] *Ibid*., para. 8.
[54] Orakhelashvili A. Research Handbook on the Theory and History of International. Edward Elgar Publishing, 2011, p. 329.
[55] Martines F., *supra* note 46, para. 21.
[56] Dorr O., Schmalenbach K. Vienna Convention on the Law of Treaties – A Commentary. Springer Science & Business Media, 2011, p. 662.
[57] Narlikar A., Daunton M., Stern R. M. The Oxford Handbook on the World Trade Organization. Oxford University Press, 2012, p. 619.

provision. Unambiguous nature of the provision would be at least a partial guarantee[58] that the CJEU will pay more attention to the whole treaty in deciding whether it gathers all elements necessary for direct effect. To conclude, it should be noted that the CJEU in *International Fruit* decision was not very comprehensive in analyzing each component into the details. Hence, it was expected that the concept of direct effect will be developed in other cases and requirements will be presented in a broader scope. However, subsequent case law shows that *International Fruit* case reasoning became a tool which was used in almost all later cases by rejecting the nature of directly effective WTO law. This case served as an example of a very first case where direct effect of WTO law was rejected and broader opinion of the CJEU and arguments on each criterion will be analyzed in the following chapter.

Even though direct effect might help individuals to protect their interest[59], many Member States of the WTO are not willing to entitle individuals with such a right. Add to this, legal scholars now are divided into two camps – those who support the enforcement of direct effect of WTO law and those who still deny it[60]. The proponents of direct effect hold the opinion that the principle of direct effect helps to correct the asymmetries in the political process[61]. From the practice of the CJEU it could be noted that the Court avoided the issue of the direct effect of WTO rules[62] so the attempt to ignore an explicit question made the supporters of the direct effect express their dissatisfaction towards the CJEU rulings. Besides legal scholars' stance by supporting direct effect of WTO law, international community throw accusation shadow on the institutions of the EU because of protectionist nature regarding the field of trade. By not complying with the rules of the WTO it might be assumed that the EU protects its Member States and shows the unwillingness to transfer more rights to the WTO[63]. Thus supporters of directly effective WTO law like Prof. Dr. Thomas Cottier might be considered as one of the most famous scholars and he held the opinion that direct effect undoubtedly would serve in a favour of individuals[64]. With this approach also agrees another well-known scholar Prof. Dr. Jacques Bourgeois; he adds that the grounds on which the direct effect was denied lacks legal

[58] Holland J., Webb J. Learning Legal Rules. 8th edition. Oxford University Press, 2013, p. 364.
[59] Dragomir L. European Prudential Banking Regulation and Supervision: The Legal Dimension. Routledge, 2010, p. 333.
[60] Criticism towards direct effect regarding WTO law was expressed by John Jackson, Steve Peers, Jan Peter Kuijper, Piet Eeckhout (sometimes as having intermediate position) and others (*researchers' comment*).
[61] Van den Bossche P., Zdouc W., *supra* note, p. 67.
[62] De Burca G., Scott J. The EU and the WTO: Legal and Constitutional issues. Hart Publishing, 2001, p. 113.
[63] More precise interpretation on this point will be revealed in section 2.3 of the thesis *(researchers' comment)*.
[64] Cottier T. The Challenge of WTO law: Collected Essays. Cameron May, 2007, p. 293.

reasoning[65]. Other supporters of directly effective WTO law such as Professor Joel P. Trachtman and other legal scholars have criticized the CJEU because of unwillingness to consider changes in WTO. The researcher notes that supporters presented their arguments from different standpoints – some tend to blame the CJEU on relying on political reasons; while others do not agree with the statement that the nature of the WTO is not found as conferring rights on individuals. It might be pointed out that the arguments of the legal scholars depend on their research field as well as on the fact, which Member State of the WTO they present. It is not surprising bearing in mind that the concept of direct effect in the EU is developed in rather a high level comparing with other main WTO players. On the other hand scholars who held the opinion against direct effect of WTO rules within EU legal order are more focused on the interpretation of the CJEU. According to Dr. John Howard Jackson, who is one of the most famous critics of direct effect, allowing for an international treaty law to be superior to federal legislation might be dangerous to the idea of democracy and even though J. Jackson acknowledges that governments have an obligation to abide by international commitments they undertake, direct effect is not necessary to ensure it[66]. Another scholar which is not so forthright against direct effect is Prof. Steve Peers who concluded that "[...] the denial of direct effect of WTO law was justified because of the lack of reciprocity with other trading partners"[67]. It is important to highlight that other main WTO players such as US, Japan, China and Canada consider WTO law to be non-self-executing[68] and thus direct effect is not granted to WTO rules. Add to this, critics agree with the statement of *International Fruit* case where the Court specified that GATT does not fulfil necessary requirements to be directly effective. However, this decision was greeted with less criticism comparing to the later practice because the reasoning and arguments against direct effect of the CJEU was still not formed. Indeed, when GATT 1947 was transformed into WTO 1995, it reopened the debate over the effect of GATT rules[69] and even though scholars hoped for a new approach of the CJEU to arrive or at least a broader interpretation regarding the concept of direct effect, none of this happened. This became a reason why the international society, lawyers and scholars began the discussion whether the denial of direct effect is related to the attempt of the EU to protect its integrity.

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[65] Bronckers M. The domestic Law Effect of the WTO in the EU – a Dialogue with Jacques Bourgeois. International Law Annual 2013; [accessed on 16 March 2015]; available at <http://www.spilmumbai.com/uploads/article/pdf/the-domestic-law-effect-of-the-wto-in-the-eu-%E2%80%93-a-dialogue-with-jacques-bourgeois-17.pdf>

[66] Lester S., Mercurio B., Davies A., *supra* note 39, p. 115.

[67] Hilpold P. Book Reviews. European Journal of International Law, Issue Vol. 14 (2003) No. 1, p. 204; [accessed on 11 April 2015]; available at < http://www.ejil.org/pdfs/14/1/406.pdf>

[68] De Santa Cruz Oliveira M. A. J. International Trade Agreements Before Domestic Courts – Lessons from the EU and Brazilian Experiences. Springer Science & Business Media, 2015, p. 145.

[69] De Burca G., Scott J., *supra* note 62, p. 113.

As long as the concept of direct effect is interpreted by the CJEU in order to reveal most controversial aspects of it, discussion will last. The bright side of it is that the solutions are born during the discussion and it might help to reveal the answer if the direct effect of WTO law is necessary and whether it will be useful for individuals in the context of the EU. Bearing in mind that other WTO members not only refused to recognize direct effect but also struggle with broader interpretation on directly effective WTO law, the EU might be regarded as the most promising actor in future development of the direct effect.

1.3 Connection between direct applicability and direct effect

WTO law and its importance in the context of the EU depends on how effective the rules of the WTO law are. As international law seeks to protect individuals and their legitimate rights and interests[70], individuals should be able to rely on international agreement provisions before a domestic court. It has to be assessed what is the tie between direct applicability and direct effect and the main question is whether the provision will contain a direct effect if the international agreement is directly applicable within the EU. In other words, is it a guarantee for a provision to be directly effective if the agreement itself is directly applicable?

In the legal theory expressions 'directly applicable' and 'directly effective' might lead to confusion[71] in concluding that both mean possibility to directly rely on a particular provision before a domestic court. From the linguistic point it is not always easy to see what the exact differences between these two concepts are; but it is a fact that they have a different influence into a field of international law. For a long time both concepts were mixed with conferring the same meaning to both of them. In famous *Van Gend en Loos* case the main question regarding the direct effect was also formulated by using the term direct applicability. Just in 1972, together with *International fruit* case, the notion 'directly effective' was introduced by *Advocate General Mayras* and formally entered the vocabulary[72]. These two concepts have been discussed separately in previous sections and further both concepts will be analyzed together in order to determine the main differences and why both are important within the EU legal system.

[70] Fassbender B., Peters A. The Oxford Handbook of the History of International Law. Oxford University Press, 2012, p. 319.
[71] McLeod I. Legal Method. Palgrave Macmillan, 2013, p. 80.
[72] Opinion of the Advocate General Mayras on 25 October 1972 in Joined Cases C-21/72 to 24/72 International Fruit Company NV and others v Produktschap voor Groenten en Fruit [1972] 1230; [accessed on 9 May 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CC0021&from=EN>

Two concepts are recognized as being independent on one hand but with strong mutual ties on another. Both concepts are very close related because direct applicability of the WTO law will lead to the issue whether individuals have a right to rely on WTO law before domestic courts in order to challenge the act of the Community[73]. It can be highlighted that direct applicability functions in its entire scope – to whole legislation, while direct effect examines also a particular provision. The essence of direct applicability is more of procedural nature while direct effect is related more with practical functioning of WTO provisions[74]. When the treaty or agreement is adopted by the EU, its legal place is determined as well – if it is directly applicable within the EU legal order. It is confusing when the courts do not use the term direct effect but rather describe a provision of EU law as being directly applicable[75] in a sense that the provision gives rise to rights enforceable by individuals before the national court[76]. If the right to rely on WTO law before the domestic court will be granted to individuals is a question to the CJEU[77]. Bearing in mind article 216 of the TFEU which deals with international treaties neither direct applicability nor direct effect concepts are mentioned in the text. Going further, article 288 of the TFEU states that regulation should be directly applicable but there is nothing about direct effect. Article 216 of the TFEU is relevant here as WTO is an international agreement which is legally binding within the EU and thus forms an integral part of the EU law. Respectively, it might be concluded that international agreements acquire the same or at least adequate status as the law of EU contains. Therefore, WTO Agreement was directly applicable in the EU as there was no formal incorporation. The crucial point is that the provision of the international treaty might be incorporated into domestic law without formal transposition and be valid in a particular country but it does not mean that it is capable of conferring rights on individuals in order to rely on the provisions before a domestic court when challenging a particular measure.[78] In other words, direct applicability of international agreements only makes them capable of having direct effects[79]. Determination of directly effective WTO provisions has to be carried on case-by–case basis and if the conditions for international agreement are fulfilled individual would be able to rely on the particular provision of an international agreement before the domestic court.

[73] Dubowski T. Bialystok Law Books: Constitutional Law of the European Union. Temida 2, 2011, p. 165.
[74] Finch E., Fafinski S. Legal Skills. 4th edition. Oxford University Press, 2013, p. 26.
[75] Reinisch A. Essentials of EU Law. 2nd edition. Cambridge University Press, 2012, p. 154.
[76] Foster N. EU Law Directions. 4th edition. Oxford University Press, 2014, p. 222.
[77] Tatham A. F. Central European Constitution Courts in the Face of EU Membership: the Influence of the German Model in Hungary and Poland. Martinus Nijhoff Publishers, 2013, p. 230.
[78] Liefaard T., Doek J. E. Litigating the Rights of the Child – the UN Convention on the Rights of the Child in Domestic and International Jurisprudence. Springer Science & Business Media, 2015, p. 106.
[79] Schutze R. European Constitutional Law. Cambridge University Press, 2012, p. 338.

The examination of these two concepts showed that there are rather many situations where the concepts are given the same meaning; however, the preciseness in the legal context is crucial and thus it should not be equalized. For the final remarks, direct applicability might be described as a formality in the procedural level; while direct effect always needs a deep analysis as it is capable of conferring rights on individuals. It is noted that the concept of direct applicability does not receive as much of attention in the EU legal system as the concept of direct effect. It is intelligible approach bearing in mind that a lot depends on directly effective WTO provisions while direct applicability is not a very controversial issue. This is clear from the approach of the CJEU and as it will be seen in next chapter, the question whether individuals should be able to rely on WTO law has attained a particularly high level of discussions not only within the EU but also in the whole WTO Member States' context.

To conclude, it still happens that two concepts, namely direct applicability and direct effect are equalized. Even famous scholars use the notion direct applicability to express that individuals are able to rely on WTO provisions before a domestic court. The separation of these two concepts should be considered as the first point which is highlighted in the topic of direct effect because preciseness in legal context is crucial. Concept of direct effect receives comparatively more attention from legal scholars as it is capable of conferring rights on individuals. However, in some cases lack of attention from the CJEU was noticed. The concept of direct effect should hold sufficiently meaningful position within the EU legal order because it is a tool which seeks for beneficial outcomes for all WTO Member States. This tool has been developed by the CJEU for over 50 years; however, the case law revealed that the examination of the CJEU is rather passive and without taking into consideration the fact that trade in general is constantly in a progress.

2. DENIAL OF DIRECT EFFECT WITHIN THE EU

The second chapter is focused on the grounds why direct effect was denied within the EU and what could be the reasons of that. It is particularly important to assess what are the requirements for WTO provisions to be directly applicable because as it will be revealed, the CJEU applies the two-stage test for WTO law differently comparing with other international agreements. Add to this, there are unsolved issues between the Member States of the WTO which sometimes end with adversely consequences because the direct effect in certain situations is found as a weapon in a political scene. This chapter presents comparatively protected EU legal system by its institutions which results in incompatible legal norms and thus adversely affected trade system.

2.1 Grounds on which the direct effect of WTO law is denied

It has been under a long discussion what status the act of the EU should have in order to challenge it by relying on WTO law. It is a controversial issue regarding the relationship between WTO law and the EU law and thus each Member States' national law as it is described by the fundamental principle that international law prevails over domestic law.[80] WTO law as a part of international economic law forms a part of international public law[81] in the sense of trade field. Here the CJEU stepped in with a statement that the issue of direct effect is within the EU law field and it is not a matter of the domestic law[82]. The case law[83] of the CJEU shows that the place of the WTO law, as it is not only organization but also international agreement, is described as being above the secondary EU law but does not determine if it is at the same level with the primary law of the EU. According to the hierarchy of EU law[84], the law of the WTO does not have the same weight as treaties, protocols and EU rights' charters so it cannot be equalized with the primary law of the EU – its' rather below the primary and above the secondary law.

To be directly effective a provision has to be in a line with the set of criteria, set out first time in a case *Van Gend En Loos.* The importance of this case is highlighted by the

[80] Slomanson W. Fundamental Perspectives on International Law. 6th edition. Cengage Learning, 2010, p. 17.
[81] Babu R. R. Remedies under the WTO Legal System. Martinus Nijhoff Publishers, 2012, p. 99.
[82] Nollkaemper A., *supra* note 9, p. 106.
[83] Case C-311/04 Algemene Scheeps Agentuur Dordrecht BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam [2006], ECR I-00609, para. 28;[accessed on 3 April 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=57305&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=101881>
[84] Foster N., *supra* note 76, p. 116 (figure 4.1).

establishment of the test, whether a provision can be granted a direct effect. Subsequent case law of the CJEU adds that the provision might be directly effective if the functioning of the provision does not depend on future actions[85]. The test of direct effect in a trade field later was used in many other cases as a background for determining the existence of direct effect[86]. Later the CJEU explained test more precisely, stating that the first step involves an assessment of the international agreement as a whole[87]. Direct effect is always analyzed on case-by-case basis with taking into consideration the case law of the CJEU and the main point is to assess whether the denial is well-reasoned and to determine what was missing that the concept of direct effect was rejected. Regarding the WTO law, each member shall ensure the conformity of its regulations and administrative procedures with its obligations as provided in the annexed agreements[88]. Within the EU legal system the CJEU has a power to rule over the disputes arising within its jurisdiction. One of the courts' duties is a proper interpretation of EU and international law and what is the most relevant aspect for the WTO law is the opinion of the CJEU if the legality of acts adopted by the EU can be challenged. Regarding the concept of direct effect, the CJEU constantly denied the possibility to rely on relevant provisions of the WTO law before a domestic court[89]. The CJEU mainly relied on the statement that the purpose and the nature of the agreement is not in a line with the requirements to grant direct effect and provisions are not sufficiently precise, clear and unconditional. Besides two – stage test there are few more points established by the CJEU which are not purely formal requirements for the provision to be directly effective, however the CJEU takes it into consideration when examining a particular case. More precisely, reciprocity is not a principle established by the CJEU but rather the question under discussions which took a relevant place into a courts' ruling. The CJEU has ruled on many cases[90] concerning the possibility to directly invoke WTO provisions in order to challenge acts of the EU and the reasoning, as a tendency, didn't change much during the years as grounds of denial were found in the very first cases of the CJEU. Discussions among scholars already last for years and it shows that there is a need for clarity regarding the reasons of denial. Each ground has to be assessed in order to determine the influence of direct effect on other instruments which ensures the compatibility of WTO and EU law.

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[85] Case C-12/86, *supra* note 51, para. 14.
[86] Turner C., Storey T., *supra* note 50, p. 158.
[87] Schutze R. European Union Law. Cambridge University Press, 2015, p. 81.
[88] Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, art. XVI:4; [accessed on 18 April 2015]; available at <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf>
[89] Cottier T., Veron P. Concise International and European IP Law: TRIPS, Paris Convention, European Enforcement and Transfer of Technology. Kluwer Law International, 2011, p. 11.
[90] Such as: Case C-104/81 *Kupferberg*, Case C-149/96 *Portugal v. Commission*, Case C-377/02 *Van Parys (researchers' comment).*

2.1.1 Purpose and the nature of the Agreement is not in the line to grant direct effect

It is useful to examine not only the relationship between the EU and WTO law but also the relationship between the cases which were presented by the CJEU as they provide the reasons and explanation of each ground. According to two-stage test developed by the CJEU, the test of international agreement being directly effective is determined as being stricter[91] comparing with the test which is applicable for assessing directly effective EU law. The CJEU in its case law examined whether the Community is bound by WTO provisions and whether the purpose and the nature of the WTO Agreement reflects the view that it was intended to confer rights to citizens of the Union which is the first stage of the test.

The purpose of the agreement has a huge importance in the interpretation process, as the interpretation has to be carried out in the light of the object and the purpose of the agreement[92]. The purpose of the agreement is often described in the preamble of the agreement[93] and it is particularly true regarding WTO law. It is affirmed by an example of TRIPS Agreement, which preamble contains the formulation of its objectives[94]. Add to this, not only preamble is relevant but also the text of the treaty, preparatory work and annexes as it all creates the general view on the purpose of the treaty[95]. It is acknowledged that WTO does not contain a single and undiluted purpose but rather a variety of different objects and purposes[96]. The object and the purpose of the WTO is described as formed in an overly broad manner[97] and the AB in its decisions required to identify the purpose in a context of the particular chapter of the WTO law. Despite that, the main formulation of goals of the WTO law is embodied in the preamble of the WTO[98] which is constructed with a broad purpose of facilitating the implementation, administration, and operation of, and furthering the objectives of the WTO agreements while in GATT 1947, its' initial purpose was considered as being more narrow which aimed to lower the tariffs[99]. The purpose of the WTO, as organization, is expressed in a very broad way with a promising

[91] Kaczorowska A., *supra* note 27, p. 326.
[92] Pires de Carvalho N. The TRIPS Regime of the Patent Rights. Kluwer Law International, 2010, p. 76.
[93] Corten O., Klein P. The Vienna Conventions on the Law of Treaties: A Commentary. Oxford University Press, 2011, p. 188.
[94] Pires de Carvalho N., *supra* note 92, p. 79.
[95] Walker G. K. Definitions of the Law of the Sea: Terms Not Defined by the 1982 Convention. Martinus Nijhoff Publishers, 2011, p. 49.
[96] Qureshi A. H., *supra* note 6, p. 29.
[97] Conrad C. R. Processes and Production Methods in WTO Law: Interfacing Trade and Social Goals. Cambridge University Press, 2011, p. 97.
[98] Babu R. R., *supra* note 81, p. 464.
[99] Choudhury B. Public Services and International Trade Liberalization: Human Rights and Gender Implications. Cambridge University Press, 2012, p. 52.

statement that its primary purpose is to open trade for the benefit of all[100]. To conclude, it is noted that the purpose of the agreement is a matter of interpretation and thus the preciseness in the agreement regarding the purpose is required in order to ensure appropriate determination of the initial purpose.

The nature of the agreement explains what kind of agreement it is. In order to reveal the nature of the WTO law it is relevant to compare the GATT 1947 and WTO as it highlights how the nature of the agreement has changed. To start with, the WTO expanded its scope by becoming a permanent institution[101] and the nature of the GATT changed in a way that WTO became a well – structured organization with its own dispute settlement system[102]. The establishment of WTO could be called as a supreme achievement in trade field since the World War II. The attempt to establish organization which would deal with trade rules[103] in 1947 turned out to be just in the level of negotiations as the organization never was created *de jure*. Even though it was not established according to all requirements it did function *de facto*. The absence of formally created and recognized organization with its substantive aim and objectives might be one of the reasons why the European Community didn't want to accept the direct effect of GATT rules. However, since 1995, when WTO 1995 became a successor of GATT 1947, the opinion of the CJEU didn't change much even though there was a reason to expect modifications. And thus, the nature of the WTO might be described as a permanent while the GATT 1947 was based on provisional basis[104]. The nature of the WTO is also found to be expanded in its application field, bearing in mind that in GATT era, the agreement covered just goods or tangible products[105] while WTO included also services and intellectual property[106]. The nature of the WTO also was strengthened by more strict rules on waivers, rejecting the previous practice regarding allowed waivers for developed countries to adopt openly protectionist measures and leaving a room for manoeuvre of collective waivers[107]. For the final remarks it

[100] Kondlo K. Perspectives on Thought Leadership for Africa's Renewal. Africa Institute of South Africa, 2014, p. 237.
[101] Sup Lee E. World Trade Regulation – International Trade under the WTO Mechanism. Springer Science & Business Media, 2012, p. 14.
[102] Reid E. Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience. Bloomsbury Publishing, 2015, p. 202.
[103] More than 50 countries were negotiating on the idea to create International Trade Organization which would have a status of the agency of the United Nations in 1947, Cuba *(researchers' comment)*.
[104] Barbour E. C. Trade Law: An Introduction to Selected International Agreements and U.S. Laws. Diane Publishing, 2010, p. 2.
[105] Schaffer R., Agusti F., Dhooge L., Earle B. International Business Law and Its Environment. 8th edition. Cengage Learning, 2012, p. 239.
[106] Daug A. Thoughts from the Mountaintop: Essays on Philippine History and other Magical Realisms. Lulu Enterprises, 2012, p. 73.
[107] Feichtner I., *supra* note 11, p. 64-65.

might be concluded that the WTO developed during the years and the nature of the WTO was strengthen from different standpoints which created more strict and balanced system with a link to more beneficial trade for both Member States and individuals who exceptionally are affected by trade rules. As both the purpose and the nature has been analyzed above, it is worth to examine why the changes in WTO did not convince the CJEU to take different attitude towards WTO law and why the Court denied the directly effective nature of the WTO agreement relying on the argument that the purpose and the nature was not in the line to grant direct effect.

Regarding the issue of conferring rights on citizens, the first case concerning direct effect of GATT 1947 law was *International Fruit case* and as well as in *Van Gend en Loos* the Court highlighted that in order to grant a direct effect to GATT rules, it is necessary to evaluate the spirit, the general scheme and the terms[108]. This evaluation links to the indication whether the agreement intended to be applicable by the individuals[109]. It already became a cornerstone[110] the reasoning provided by the CJEU in *International Fruit* case "*GATT, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties*"[111]. The Court held the opinion that direct effect may not be granted to the agreements which contain the provisions from which the parties may unilaterally withdraw – in this case, according to the Court, the great flexibility of the GATT 1947 and the possibility for the contracting parties to withdraw and derogate from their obligations[112]. In its subsequent case law[113] the Court described GATT 1947 as being too flexible to be directly effective with the link to the derogations and waivers. The Court pointed out - provisions which are too flexible in order to confer rights for individuals cannot be directly effective. Bearing in mind the recent position of the EU, that the EU institutions are bound by international agreements, and thus override acts of the EU[114], only to the extent that "[...] the 'nature and broad logic' of a treaty does not bar its

[108] Case C-26/62, *supra* note 44, para. 5.
[109] Chiti E., Mattarella B. G. Global Administrative Law and EU Administrative law – Relationships, Legal Issues and Comparison. Springer Science & Business Media, 2011, p. 372.
[110] The CJEU relying on the same arguments denied the existence of direct effect of WTO law in its following case law *(researchers' comment).*
[111] Joined cases C-21-24/72, *supra* note 12, para. 21.
[112] De Santa Cruz Oliveira M. A. J., *supra* note 68, p. 142.
[113] Case C-280/93, para. 110.
[114] Case C-308/06 International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport [2008] ECR I-04057, para. 42; [accessed on on 21 March 2015]; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68315&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=162564>

binding effect, insofar as conventional provisions are 'unconditional and sufficiently precise' [...]"[115], just then the direct effect might be granted. Relying on this attitude, the rules on international agreement seem to be clear and as at that time there were no more similar cases on direct effect of GATT 1947 law, it was not possible to compare cases and to establish the essential points why the concept of direct effect was denied. Generally in international agreements there are no exact provisions which clarify this issue and thus the Court has to issue a ruling regarding this question. The CJEU has a duty to determine if the agreement as a whole[116] is capable to create rights for individuals. The Court in its case law held the opinion that "*[...] the WTO Agreement is not in principle among the rules in the light of which the Court is to review measures of the Community institutions*"[117]. Therefore, the Court excludes WTO Agreement from being directly effective because it did not generate subjective rights for individuals which they could invoke[118]. In general, the CJEU held that even though the Community is bound by WTO Agreement, its purpose and nature cannot be equated to be in the line to grant the direct effect.

The WTO is also described as based on 'collective intentionality' of its members to establish mutually advantageous trade rules and dispute settlement procedures[119]. According to this description of the WTO it would be difficult to imagine that mutually advantageous rules do not confer rights to citizens. And thus after the creation of the WTO, the main point was to assess whether the CJEU will take into consideration essential changes of it and so *Portugal v. Council*[120] case was brought before the Court. This case in the legal literature is also known as *Portuguese Textile* case where Portugal brought an action for annulment of the decision adopted by the Council claiming that the decision was contrary to WTO rules. The Council decision concerned the Memoranda of Understanding between the EC, Pakistan and India on market access for textile products. This case is particularly relevant because Portugal claimed that due to huge changes in newly established WTO, the Court has to evaluate the directly effective nature of the WTO separately from former GATT 1947. Add to this, exceptions of general denial of

[115] Francioni F., Bakker C. The EU, the US and Global Climate Governance. Ashgate Publishing, 2014, p. 146.
[116] Hollis D. B. The Oxford Guide to Treaties. Oxford University Press, 2012, p. 112.
[117] Joined Cases C-300/98 and 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. 43-44; [accessed on 23 March 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61998CJ0300>
[118] Ruiz Fabri H., *supra* note 14, p. 157-158.
[119] Jones K. Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach. Oxford University Press, 2015, p. 240.
[120] Case C-149/96 Portuguese Republic v. Council of the European Union [1999] ECR I-08395; [accessed on 25 March 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61996CJ0149>

direct effect were found in this case; however, the CJEU took this chance to rule on WTO effect and it might be regarded as a bold step bearing in mind that the Community was waiting for a broader evaluation on the effect of WTO within the EU legal system. To start with, the CJEU once again confirmed that it has a jurisdiction[121] to decide on the matters of the case regarding the effect of international agreement within the EU legal order[122]. Even though more flexible approach of the CJEU was expected, the changes into the system of WTO with reducing the flexibility of it did not change the attitude of the Court[123] – the CJEU noted that it accepts the fact that the GATT 1947 has changed dramatically when it was transformed into WTO in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties[124]; however it was held that WTO like GATT 1947 is found "*[...]on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements" and is thus distinguished [...] from the agreements concluded between the Community and non-member countries [...]*[125]. Generally the CJEU stated that the nature of the WTO Agreement is not among those which might be granted with direct effect as the nature of the WTO is still very similar to GATT 1947. Hence, the claim in this case was dismissed. The researcher notes, that negotiated nature of the agreement is apprehensible step, bearing in mind how huge WTO is. However, the contracting parties as well as representatives of the WTO do not oppose to the fact that it was based on negotiations but rather highlight the statement that negotiations will help to achieve the best results which are favourable for both developed and developing countries. According to the opinion of the CJEU, denial of direct effect was also due to the fact that GATT was an outcome of negotiations but it didn't prevent the parties to negotiate over the establishment of the WTO. As President *John Fitzgerald Kennedy* said "*Let us never negotiate out of fear. But let us never fear to negotiate*"[126], contracting parties were aware that CJEU may once again reject the direct effect but it was considered that better structured dispute settlement mechanism and organization itself as well as less flexible provisions will turn a new page of direct effect regarding WTO law.

To conclude, if the evaluation of the agreement as a whole reveals that international agreement creates rights to individuals in the same manner as the EU legislation creates, the

[121] Case C-104/81 Kupferberg, para. 17.
[122] Case C-149/96, *supra* note 120, para. 34.
[123] *Ibid*., para. 94.
[124] *Ibid.*, para. 36.
[125] *Ibid.*, para. 42.
[126] Speech of John F. Kennedy on the inauguration as the 35th President of the United States, 20 January 1961,Washington D.C. *(researchers' comment).*

agreement can be announced as being directly effective. However, this is not the case within the WTO law as the CJEU kept denying directly effective nature of the agreement even after fundamental changes in the organization. Furthermore, this is just one side of the medallion which was examined by the CJEU; there are several other elements as clarity and unconditional nature, which play a significant role in evaluation of directly effective WTO rules.

2.1.2 Provision is not sufficiently clear, precise and unconditional

In the EU legal system the question regarding the direct effect is examined in the same scope as international agreements – it has to be sufficiently clear, precise and unconditional[127]. It is necessary to examine whether the provisions are constructed in a clear and precise way in order to give rise to individual rights[128]. The difference is that the CJEU did not explain whether WTO provisions contain these elements in such a broad scope as it was explained in purely EU legal acts level. The specific provision has to hold all those elements in order to be announced as directly effective by the CJEU. The Courts' assessment also includes the wording and the structure of the provision which reflects the answer on provisions' effect. And thus the examination is handled on a specific provision rather than on the general view on the agreement.

The importance of *Van Gend en Loos* case is that it provided the Community with the description, what a particular provision shall contain in order to be directly effective – it has to be sufficiently clear, precise and unconditional. In the same case the Court highlighted that provision is held as perfectly clear if it creates specific unambiguous obligations. According to the CJEU case law[129] the provision has to be clear and precise in a sense that the formulation and the meaning of the provision is not ambiguous and leads to the interpretation which was the initial intension to the date when a particular agreement was concluded. The CJEU explained the scope of clarity and preciseness of the provision when the obligation that it imposes is set out in unambiguous terms[130]. Advocate General *Jacobs* analyzed a precise nature of the provision in direct applicability context by stating that it has to be evaluated in the content of the provision

[127] Berry E., Homewood M. J., Bogusz B. Complete EU Law – Text, Cases and Materials. Oxford University Press, 2013, p. 84.
[128] Dimopoulos A. EU Foreign Investment Law. Oxford University Press, 2011, p. 302.
[129] Such as: Case C-43/75 Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena [1976] ECR I-00455; [accessed on 29 March 2015]; available at <http://curia.europa.eu/juris/liste.jsf?language= en&jur= C,T,F&num=43-75&td=ALL>
[130] Jaremba U. National Judges as EU Law Judges: The Polish Civil Law System. Martinus Nijhoff Publishers, 2013, p. 67.

which must be capable of clear and precise interpretation[131]. Clear and precise provision might be described through linguistic evaluation of the text of the provision. If the primary evaluation on preciseness of the provision leads to ambiguous meaning there should be a reference to sources for interpretation[132]. In order to evaluate each provision of the WTO Agreement as being clear, precise and unconditional every decision of the Court is important. Even so, the CJEU did not provide a broad and complete answer regarding WTO provisions by not evaluating specific provisions. After *Van Gend en Loos* the Court received *International Fruit* case where the evaluation of the particular provision was skipped. The Court then stated that there is no point of assessing whether the provision contains all elements in order to be directly effective and this statement might be under a criticism because the reasoning of the Court would be valuable in examining the general issue of direct effect.

Unconditional character of the provision is described as not being a subject for further implementation measures[133] by the institutions of the Community or by the Member States[134]. And thus if the provision is according to *Van Gend en Loos* conditions, it is legally complete and consequently capable of producing direct effects[135]. Indeed, according to the very first ruling on the concept of direct effect there should be all components to constitute a directly effective provision. Examining the case law of the CJEU regarding the direct effect of WTO law, it is clear that the Court relied on its decision in *Van Gend en Loos* as the same test was applied in other cases such as *Germany v. Council*[136] where it was revealed that not only individuals but also Member States, as subject to international law, cannot rely on GATT provisions in order to challenge the validity of EU legislation[137]. This case will be discussed more into the detail in following section of the thesis; and what regards preciseness and unconditionality of the provision, it is worth to point out that the CJEU held that "*[...]special features [...] show that the GATT rules are not unconditional[...]".*[138] Here the lack of unconditionality was referred as

[131] Opinion of Advocate General Jacobs on 26 September 2000 in case C-150/99 Svenska Staten v. Stokholm Lindopark AB and Stokholm Lidopark AB v. Svenska Staten [2000] I-497, para. 44; [accessed on 8 February 2015]; available at<http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de864983f6591944599938e9e3f5f0f678.e34KaxiLc3eQc40LaxqMbN4Ob38Le0?text=&docid=45672&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=186188>
[132] Wild A. CAS and Football: Landmark Cases. TMS Asser Press, 2012, p. 212.
[133] Berry D. S., *supra* note 24, p. 204.
[134] Pistone P. Legal Remedies in European Tax Law. IBFD, 2009, p. 47.
[135] Robinson G. Optimize European Union Law. Routledge, 2014, p. 47.
[136] Case C-280/93 Federal Republic of Germany v. Council of the European Union [1994] ECR I-04973; [accessed on 29 March 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db65d56939246d43c090b0a8d59f20047d.e34KaxiLc3qMb40Rch0SaxuLax50?text=&docid=99082&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=762136>
[137] Koutrakos P. European Foreign Policy: Legal and Political Perspectives. Edward Elgar Publishing, 2011, p. 101.
[138] Case C-280/93, *supra* note 136, para. 110.

possibility to derogate from obligations and because of a flexible nature of the provisions[139]. Because of variety of GATT exceptions and particularly the fact that a party may offer compensation instead of complying with Panels' recommendations the unconditional nature of the GATT was rejected[140]. It is recalled that criteria for unconditional nature was applied strictly comparing with the applicability to EU legislation[141]. Add to this, the relevance of this case might be revealed on the standpoint that at the time of the case before the Court, Germany did not address explicitly the issue of the direct effect but rather stated that a Community Regulation was not in the line with GATT rules. The Court issued a ruling in a very similar manner without precisely determining the question of direct effect. Add to this, it is well-known that the CJEU in the case law regarding directly effective WTO provisions avoided[142] answering this question. The Court highlighted its explanations from other cases, claiming that if individuals cannot rely on particular GATT provisions, the Court itself is also not bound by taking GATT rules into consideration when assessing the legality of the Union act. This shows that the CJEU denied direct effect without explicitly saying so; at the same time explaining its position on the same grounds from its other cases. In this case the CJEU stated that the GATT Agreement itself failed to conform to the precondition of the international agreement to be in a character of unconditional[143] in order to be invoked before a domestic court and made a link to the spirit, general scheme and terms of the GATT, which was found not in the line to grant direct effect. For the final remarks it might be noted that the CJEU evaluates critically every component as well as the way it was reached; and thus to comply with the standards of the CJEU is a challenge.

The later decisions appeared under the magnifier as the direct effect was granted to other international agreements[144]. Add to this, WTO Agreement is not considered as being significantly different from other agreements which were granted with direct effect[145]. Under the

[139] *Ibid.*, para. 106.
[140] Reinisch A., *supra* note 75, p. 75-76.
[141] Barnard C. Albors –Llorens A., Gehring M. W., Schutze R. Cambridge Yearbook of European Legal Studies: 2012 – 2013. International Specialized Book Services, 2013, p. 55.
[142] Thies A. International Trade Disputes and EU Liability. Cambridge University Press, 2013, p. 23.
[143] Welfens P. J. J., Ryan C., Chirathivat S., Knipping F. EU–ASEAN Facing Economic Globalisation. Springer Science & Business Media, 2008, p. 196.
[144] By judgment of the Court of the First Instance the EEA Agreement was granted with direct effect in case Case T-115/94 Opel Austria GmbH v. Council of the European Union, Judgment of the Court of First Instance, [1997] ECR II-00039, paras. 94-95 *(researchers comment)*; [accessed on 7 February 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994TJ0115>
[145] Opinion of Advocate General Alber on 15 May 2003 in case C-93/02 [2003] ECR I-10497; [accessed on 24 January 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CC0093&from=EN>

different facts more cases[146] were brought before the CJEU with a question whether individuals are able to rely on WTO law before the domestic law. The opinion of the CJEU would be more precise if there would be a broader interpretation of WTO provisions and the fact that there is a lack of Courts' reasoning makes it difficult to clearly define which provisions of WTO law contain all elements of being directly effective. It is a generally accepted approach that the interpretation skills of the CJEU [147] are relevant in order to expound the essence of the provision.

2.1.3 The lack of reciprocity

Reciprocity in the context of international law is found as a general principle[148]. The principle of reciprocity refers to a balance of mutual benefits and obligations between the contracting parties[149]. Reciprocity might be seen as a tool which is found when one party agrees to take certain measures or refrain from it if another party agrees to take similar actions in return[150]. The issue related with the reciprocity within the WTO context is found by the CJEU, even though it is regarded as a question under analysis rather than a principle on which the CJEU relies when interpreting WTO law within the EU legal system. In the context of WTO law it is rather widespread approach between the Member States that the WTO law will not be granted with direct effect unless at least a part of main WTO players will grant it. The denial of direct effect might be considered as a chain reaction where the crucial element is not to confer rights to individuals if other trading partners refuse to do the same. This refusal might be seen as political ground rather than a legal and the possibility for WTO law to be granted with direct effect within the major part of WTO members seems to be illusionary as in some legal systems it is clearly stated that WTO provisions does not contain the effect. It is still under discussion whether it could be regarded as legal ground when the obligation to perform the agreement is undeniable regardless the acceptance of direct effect by other countries.

Even though reciprocity is not recognized as a ground why directly effective WTO provisions are denied, it is still taken into account by the CJEU. Reciprocity element acquired

[146] Such as: Joined Cases C-267/81, C-268/81 and 269/81 Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI) [1983] ECR I-00801; [accessed on 16 February 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT /?uri=CELEX:61981CJ0267>
[147] Cuthbert M. Q&A European Union Law – 2011-2012. Routledge, 2013, p. 47.
[148] Zimmermann A. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary". Oxford University Press, 2011, p. 748.
[149] Herdegen M. Principles of International Economic Law. Oxford University Press, 2013, p. 188.
[150] He J. The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chinese Large Civil Aircraft Industry. Routledge, 2015, p. 54.

new shades with *Kupferberg*[151] case. In *Kupferberg* the CJEU did not examine the nature and the wording of the Agreement from the basis of the particular provision but rather highlighted the principle of reciprocity. This case concerned imposed tax on imported port wine from Portugal which at that time was non-EU Member State. It was claimed that the imposed tax was contrary to Free Trade Agreement between the Union and Portugal where two main provisions in question had their origin in Article III of GATT. To start with, the CJEU affirmed that Union is bound by GATT; however, the nature of the Agreement and particularly its reciprocity, flexibility and open-endedness prevented it from being directly effective[152]. It is a controversial case in a sense that the Court assessed the essence of the principle of reciprocity and found that principle of reciprocity is not necessarily breached if the domestic court refused to grant direct effect to the particular provision. The CJEU made a very confusing statement saying that "*[...] The fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement*".[153] It might be assessed that the CJEU showed its approach by saying that denial of direct effect by one group of parties does not mean the lack of reciprocity in principle, but lack of reciprocity as regards judicial application could lead to a 'disuniform' application of the WTO rules[154]. The ruling in *Kupferberg* shows that in order to fulfil all obligations mandatory by an international agreement, direct effect is not obligatory. It means that for full and effective execution of obligations the direct effect is not necessary if it is replaced by other means which are capable of creating the same effect. From the legal point of view the requirement for reciprocity might look more like political statement with taking care more about the approach of other countries but not about individuals for whom relying directly on WTO provisions might help to protect their interests.

Moreover, another aforementioned case *Portugal v. Council* is characterized as being irreplaceable on the issue regarding the assessment of reciprocity in the sense of direct effect of WTO law. The CJEU confirmed its decision reached in *Kupferberg* regarding the concept of reciprocity and relied on the lack of reciprocity to deny directly effective WTO provisions. The CJEU in case *Portugal v. Council* stated that "*it is common ground, moreover, that some of the*

[151] Case C-104/81 Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A. [1982] ECR I-03641; [accessed on 18 January 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0104&from=EN>
[152] Chalmers D., Davies G., Monti G. European Union Law – Cases and Materials. 2nd edition. Cambridge University Press, 2010, p. 653.
[153] Case C-104/81, *supra* note 151, para. 18.
[154] Eeckhout P. EU External Relations Law. 2nd edition. Oxford University Press, 2011, p. 349.

contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law".[155] The CJEU noted that reciprocity is necessary in order to avoid uneven degrees of enforcement of WTO rules, which would occur as other main players of the WTO and thus the major trading partners of the EU[156] rejected the concept of directly effective WTO provisions[157]. The CJEU didn't point out what trading partners were denying direct effect of WTO law but statistics show that in general the major trading countries are USA, Russian and China[158]. Now there are 160 members in the WTO and up to the date, the biggest players of the WTO do not recognize the possibility for private parties to rely directly on WTO provisions before their domestic courts. Without doubts WTO rules would be more effective if the Member States of the WTO would recognize them as directly effective. The US might be named as a main trading partner of the EU[159]. The US by denying the direct effect of WTO provisions relies on the Uruguay Round Agreement Act which was later codified in the US code, more precisely with the statement "*[...] 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"*[160]. Before the WTO, the directly effective provisions of the GATT were found within the US in the case *Territory of Hawaii v. Henry MY Ho*[161] where the domestic act was found inconsistent with the GATT by the individual who invoked GATT rules before the Hawaii Court. Even though the provisions of WTO now are not directly effective but the US courts, such as US Court of International Trade[162], use WTO norms in domestic interpretation. So it might be evaluated that there is an influence in the US courts of the WTO law, even though direct effect is expressly denied. Comparing approach of the US and the EU it is clear that US left no space to develop the concept of direct effect by clearly stating in its Code that direct effect of WTO law is not accepted while in the EU there is a slight possibility to prove that a particular provision is capable of being directly effective. Another huge Member State of the WTO is China which as well refused to recognize direct effect of WTO law[163] but

[155] Case C-149/96, *supra* note 120, para. 43.
[156] De Santa Cruz Oliveira M. A. J., *supra* note 68, p. 145.
[157] Bronckers M., *supra* note 65, p. 886.
[158] Eurostat 2013 ; [accessed on 13 February 2015]
<http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf>
[159] Farrell J. E. The Interface of International Trade Law and Taxation. IBFD, 2013, p. 32.
[160] U.S. Code "Relationship of agreements to United States law and State law", Title 19, Chapter 22,Subchapter I, §3512 (a) (1).
[161] Supreme Court of Hawaii, 41 Haw 565 (1957), No. 3078.
[162] Cho S. The Social Foundations of World Trade. Cambridge University Press, 2015, p. 191.
[163] Narlikar A., Daunton M., Stern R. M., *supra* note 57, p. 618.

according to its Accession Protocol the country is responsible for ensuring the conformity of domestic law and WTO law by revising domestic legislation. Add to this, China is under the obligation to systematically revise the domestic laws' conformity with WTO law[164] and so to avoid future conflict between the laws. It might be concluded that the approach regarding the direct effect does not substantially differ between main WTO players. Grounds on which countries refused to grant direct effect to WTO provisions are almost the same and the absence of the case law in some countries makes it difficult to analyze whether there is a chance for WTO provisions to be directly invoked before a domestic court. On the other hand, the concept of direct effect in the EU is regarded as being the most developed comparing with other main WTO players as the case law in some Member States is absent. The EU is also unique in a way that its Court have described that there is a slight chance for WTO provisions to become directly effective in assessing the validity of the EU measure. Beyond questions, possibility to rely on WTO law before the Court is very limited and even might be considered as more theoretical than practical possibility. Nevertheless, the fact that the CJEU accepted that under very few circumstances it is possible to rely on WTO rules in order to review the lawfulness of EU legislation shows that the legal dialogue between the EU law and WTO law is still ongoing and it will be discussed more into detail in the next chapter.

The principle of reciprocity is sometimes called even a commercial policy issue[165] when behaviour and adoption of measures is based on other trading partners' approach. After *Portugal v. Council* case, the later decisions by the CJEU contained a reason of lack of reciprocity as a ground to deny direct effect of WTO law even though it is not a formal requirement for international agreement. *Portugal v. Council* and *Kupferberg* decisions showed that the substantive modifications didn't change not only the decision to deny direct effect of WTO Agreements but also a reasoning on which the CJEU relied in this case. Even though the main argument for denying direct effect was taken from *International Fruit* case, the Community was given with a new consideration on the lack of reciprocity. It could be noted that the determination of lack of reciprocity brought even more confusion in the field of directly effective WTO law. It is still under the question whether the reciprocity should take a predominance role in examination of direct effect as other international treaties, such as human rights treaties does not consider this ground as being important. The crucial point is that a party is bound by the agreement and it has to perform its obligations in a good faith regardless whether other Member

[164] Shelton D., *supra* note 18, p. 171.
[165] Opinion of Advocate General Alber, *supra* note 145, para. 102.

States accept directly effective WTO law. Hence, it is not surprising that international community started to consider what else has to be improved in the system of WTO law in order to treat WTO provisions as directly effective. It seems that grounds which were analyzed in this chapter did not convince that WTO is capable of conferring rights to citizens and thus the discussions started whether the CJEU have been acting purely on neutral basis when directly effective WTO law within the EU legal order was denied.

2.2 Case law of the CJEU regarding the direct effect: coherent interpretation or protection of integrity?

The CJEU, sometimes called as a monopolist[166] has rather a long list of cases where the direct effect of WTO law was concerned. The number of cases helps to reveal not only the main grounds and reasoning of the CJEU but also the reasons under the surface. While the scholars are rising up the discussions regarding the reasons of denial, it is reasonable to examine what are the tendencies of the CJEU of refusing to grant direct effect. It is already known that the CJEU has an approach not in a favour of direct effect which leads to consideration if the CJEU is really acting as a neutral party or the criticism towards the CJEU is just a provocation which is aimed to scathe the permanent interpretation of the Court. The approach of the CJEU from the GATT 1947 to WTO era will be useful in identifying whether the CJEU relied on the same grounds in order to ensure the continued and well-reasoned interpretation or it was just a misleading cover with the aim to secure the powers of the EU in a trade field.

Together with the development of technology and the growth of the need to create internationally recognized trade rules, the idea came to set the basis not only for goods but also for services and intellectual property. Closing the transformation from GATT 1947 to WTO 1995, the permanent trade body was a goal of Uruguay's round, changing the nature of provisionally applicable GATT.[167] A whole package of changes was introduced before the WTO came into force and thus the CJEU has been widely criticized because of again rejecting direct effect of WTO law. It is not a surprise bearing in mind that the WTO has strengthened the faint points of the GATT 1947 such as dispute settlement mechanism, waivers and safeguards[168] so the approach of the CJEU should have changed as well. GATT 1947 was not constructed well enough to get the international recognition and its nature and structure was heavily criticised for

[166] Bianchi A., Peat D., Windsor M. Interpretation in International Law. Cambridge University Press, 2015, p. 152.
[167] Farrell J. E., *supra* note 159, p. 23.
[168] Trachtman J. P. Bananas, Direct Effect and compliance. The European Journal of International Law, Vol. 10, No. 4, 1999, p. 663; [accessed on 20 December 2014]; available at <http://ejil.org/pdfs/10/4/605.pdf>

a great level of flexibility[169]. The CJEU held that the WTO Agreements are different from GATT 1947, in particular in so far as they radically alter the dispute settlement procedure[170]. However, in the aforementioned case *Portugal v. Council*, the CJEU acknowledged that there have been some changes[171] but it is not enough to grant direct effect for the provisions of the WTO law.

After the creation of the WTO when the decisions of the CJEU were presented, considerations regarding the nature and the role of the CJEU started. It might be presumed that the CJEU dictated its requirements and informally required changes in order to grant direct effect for the provisions of the WTO but once it was changed, the CJEU again rejected the request, by relying on the same grounds as in the era of the GATT 1947. *Dr. Kees Jan Kuilwijk* claimed that the unwillingness of the CJEU to adopt a new approach taking into consideration the changes into the GATT showed the protectionist nature of the CJEU. What is more, *Dr. Kuilwijk* claims that the Court did not explain its decision broadly and that leads to the conclusion that the Court avoided to answer the submitted question regarding the direct effect when restructured organization appeared.[172] Hence, it can be considered as protectionist nature of the CJEU manifests not only because the decisions after the WTO 1995 were based on the same reasons but also that the CJEU did not show its intent to present a broader and more detailed grounds on denial of direct effect.

The protectionist nature of the CJEU might be evaluated through the case law of the CJEU where the direct effect was denied even after the issue of decision by the DSB[173]. Direct effect of DSB decisions and direct effect of WTO law in general are two different concepts which are under a great importance and which supplements each other. Even though the issue regarding the direct effect of DSB decisions is a separate topic with its rather broad case law[174], it is worth to briefly mention what place these decisions have within the EU legal order – its' direct effect is also denied. Add to this, the refusal to grant direct effect after the DSB decisions might show that the CJEU tries in all possible ways not to give more power to the WTO and so not to grant the right for individuals to challenge the EU legislature before the domestic court. It

[169] Woods L., Watson P. Steiner & Woods EU Law. 12th edition. Oxford University Press, 2014, p. 128.
[170] Thies A., *supra* note 142, p. 24.
[171] Case C-149/96, *supra* note 120, para. 36.
[172] Kuilwijk K. J. The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights? Nexed Editions Academic Publishers, 1996, p. 39.
[173] Ulrich Fastenrath U., Geiger R., Khan D. E., Paulus A., Von Schorlemer S., Vedder C. From Bilateralism to Community Interest: Essays in Honour of Hudge Bruno Simma. Oxford University Press, 2011, p. 1013.
[174] Such as: Case C-377/02 Leon Van Parys; Case C-351/04 Ikea Wholesale and others *(researchers' comment)*.

is confirmed by *Banana war* cases[175] which could be undoubtedly named as the most significant and controversial saga of cases. One of many banana cases was *Germany v. Council*[176] where Germany challenged the validity of Regulation 404/93[177] which gave the advantageous treatment to exporters of banana from African, Caribbean and Pacific countries. The Regulation was harmful not only to Latin American countries but also to German undertakings because a big part of German importers were at a similar situation as American "Chiquita". However, the CJEU stated that Germany cannot invoke GATT rules in order to challenge the validity of the Regulation. The decision of the CJEU was not properly implemented within the EU and thus the US imposed retaliatory economic measures against the EU. It is a paradox because German undertakings were affected by those measures even though they were the ones who tried to challenge the Regulation. This case is an example how a potentially protectionist behaviour in the end of the day harms not only the one who is adopting the legislature of a protectionist nature but consumers and importers as well. After more than 20 years parties reached the consensus and thus the *Banana war* was finally over as the DSB was informed about mutually agreed solution in 2012.[178] However, it might be concluded that the consequences undoubtedly affected both EU and Latin American countries and highlighted the fact that sometimes the CJEU decisions are with a strong link to protectionism.

Another issue regarding the denial of direct effect is strongly connected with different treatment of international agreements within the EU. The issue is not consistent denial of direct effect of WTO law but it is inconsistent with the CJEU practice regarding other international agreements.[179] It is highlighted that according to the CJEU, WTO law should be distinguished from other international agreements because of its negotiated nature[180]. Comparing WTO Agreement with other international agreements which also bind the EU, firstly the applicability of the aforementioned two-stage test of direct effect has to be checked[181]. As it was already analyzed in previous sections, the test for direct effect is applied in order to assess the directly

[175] Case T-19/01 Chiquita Brands International, Inc., Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities, Judgment of the Court of First Instance, [2005], ECR II-00315; [accessed on 24 March 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49905&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=166885>
[176] Case C-280/93, *supra* note 136.
[177] Council Regulation No. 404/93 of 13 February 1993 on the common organization of the market of bananas, OJ L 47/1;[accessed on 2 April 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993R0404&from=EN>
[178] Schaffer R., Agusti F., Dhooge L., Earle B., *supra* note 105, p. 254.
[179] Fogdestam Agius M. Interaction and Delimitation of International Legal Order. Martinus Nijhoff Publishers, 2014, p. 206.
[180] Wolfrum R., Stoll P. T., Kaiser K. WTO – Institutions and Dispute Settlement. Martinus Nijhoff Publishers, 2006, p. 185.
[181] Schutze R., *supra* note 87, p. 84.

effective nature of international agreements taking into consideration the nature, purpose, spirit or general scheme of the agreement as well as evaluation whether the provision contains a clear, precise and unconditional obligation. Comparing WTO Agreement with other international trade agreements, bilateral association or cooperation agreements, the essential attention was focused on clarity and unconditional nature[182] of the provisions rather than on the structure, aim and purpose of the agreement. From this point it might be concluded that while the WTO provisions have to be in a line with both conditions, bilateral trade agreements were subject just to the second requirement, namely clarity and unconditional nature. The approach of the CJEU regarding WTO Agreement and other trade agreements such as *Yaounde* or *Lome* Conventions leads to the conclusion that bilateral agreements are treated more favourably as they are examined less strictly and thus the purpose did not preclude bilateral agreements from being announced as directly effective[183]. At this point double standards might be identified – the negotiated nature of the WTO shouldn't be an obstacle to grant direct effect because in order to reach a solution, where 160 Member States are bargaining, a higher level of flexibility is required. In the international level WTO is considered as one of the most successful international organizations[184] as it covers a very broad scope of areas[185] and thus it is not surprising that certain decisions which are advantageous for all Member States are reached by negotiations. It might be concluded that the nature of the WTO is considered as an obstacle to grant direct effect in the EU legal system while the examination of the purpose and the nature of bilateral agreements are no longer meaningful in the scope of the direct effect[186].

2.3 Political aspects of denying direct effect

It is undoubtedly important to reveal all reasons why the direct effect is denied – both legal and political. It might be presumed that denial of the concept of direct effect regarding WTO law within the EU is not only because the Agreement itself does not fulfill the requirements of the established two-stage test but also because there are unsolved political issues between main players of the WTO. The denial of direct effect by the CJEU sometimes is described as a political question[187] and there are no doubts that it happens that trade is mixed

[182] Court of Justice of the European Union. The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case-law. Springer Science & Business Media, 2012, p. 716.
[183] *Ibid.*, p. 718.
[184] Narlikar A., Daunton M., Stern R. M., *supra* note 57, p. 29.
[185] Snyder G. F. The EU, the WTO and China: Legal Pluralism and International Trade Regulation. Hart Publishing, 2010, p. 172.
[186] Govaere I., Lannon E., Van Elsuwege P., Adam S. The European Union in the World: Essays in Honour of Marc Maresceau. IDC Publishers and Martinus Nijhoff Publishers, 2014, p. 59.
[187] Schutze R., *supra* note 79, p. 339.

with political relationships as trade barriers became a powerful weapon between countries. Aforementioned *Banana war* cases might be as an example of conflicting economic policies between the EU and US. The denial of direct effect by other WTO members, named as a lack of reciprocity, might also be assessed as a political ground.

The CJEU has an exclusive jurisdiction in order to ensure uniform interpretation of both EU and international law. According to article 267 of the TFEU, the CJEU has a power to interpret international treaties and to rule over the effect of a particular international treaty. Everything depends on the interpretation of the CJEU and if the law of the WTO would be directly effective, the legislation adopted by the EU institutions could be challenged before the Court if it is not in the line with WTO provisions. Here the CJEU, as one of the most important institutions of the EU[188], has to act in a neutral way. However, the Court sometimes is called as a political actor[189] and it is logical bearing in mind how closely all EU institutions are related. It would be not in a favour of the EU to adopt a legislature which could be easily challenged in its courts. It is noticed that the reasoning for denial of direct effect in CJEU case law, such as in case *Portugal v. Council*, has a conjunction with political institutions of the EU as they would lose the scope for manoeuvre in the implementation of WTO rules[190]. The CJEU, which should be as a watchdog[191] against unlawful legislation within the EU is considered as being not purely impartial when interpreting international treaties and thus constant denial of direct effect of WTO law could preclude the conclusion that by rejecting directly effective WTO provisions the Court ensures indisputable prevalence of EU legislation even when it is unlawful.

The ground of lack of reciprocity was presented by the CJEU in its case law[192] and held that as the other main WTO players are unwilling to confer direct effect to WTO law, the CJEU did not grant it as well. The main idea of it was that if the EU would give a direct effect to WTO law, the Union would be in a less favourable position comparing with other countries which denies direct effect. According to *Advocate General Alber*, granting a direct effect to WTO law while other trading partners refuse to do the same would put the country which accepted the direct effect into a weak position in the WTO[193]. By this the CJEU ensures the protection for the

[188] Kaczorowska A., *supra* note 27, p. 136.
[189] Dawson M., De Witte B., Muir E. Judicial Activism at the European Court of Justice. Edward Elgar Publishing, 2013, p. 1.
[190] Eeckhout P., *supra* note 154, p. 375.
[191] Cloots E. National Identity in the EU Law. Oxford University Press, 2015, p. 63.
[192] Case C-104/81, *supra* note 151, para. 18.
[193] Opinion of Advocate General Tizzano on 18 November 2004 in case C-377/02 Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB) [2004] ECR I-1478, para. 66; [accessed on 3 May 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CC0377&from=EN>

EU in the process of trade negotiations together with the ground that one-sided acceptance would make a chaos in the interpretation of WTO rules. The issue regarding the reciprocity occurs in case of comparison of different international treaties – it would be difficult to imagine the same situation in human rights field. It might be assumed that a decision to reject the directly effective provisions of human rights instruments would be heavily criticised, relying on the argument that other parties to the agreement did not grant the direct effect as well. Add to this, examination shows that instruments which were created to protect individuals do not express the condition of reciprocity and it leads to the conclusion that reciprocity argument is directed exclusively to WTO law. Considering the case law of the CJEU, the principle of reciprocity is not considered as an obstacle[194] to grant direct effect. The importance of this Courts' argument has to be highlighted because of the political nature. There could be accentuated three tendencies of how the CJEU treats the principle of reciprocity - in its practice the CJEU might be described as inconsistent as in some of the cases, such as *International Fruit* case, the requirement for reciprocity was not mentioned at all; in *Kupferberg* the Court noted that if some courts do not accept the concept of direct effect while other do, that does not mean a lack of reciprocity; and in some other cases like *Portugal v. Council* the Court highlighted the importance of reciprocity stating that the lack of reciprocity might lead to uneven application of WTO rules. To the date, the reciprocity principle is not affirmed to be a requirement for a provision to be directly effective but it plays a significant role in the field of trade between EU and other WTO members. It might be interpreted as a political ground that in a case of acceptance the direct effect, the CJEU would lose its control over the interpretation of WTO law.

It might be noted that the EU has a leading role[195] in determining the effect of WTO law within the domestic law as other WTO members still take the opinion of CJEU into consideration when assessing WTO role in their legal systems. The EU has the most developed case law regarding the directly effective WTO law and it is showed by *Nakajima* and *Fediol* – situations, when the WTO rules can be used in examination of lawfulness of EU legislation. It is at a particular level of importance as these two cases induced intense discussions[196] all over again and thus both exceptions will be analyzed in next chapter. Hence, it might be concluded

[194] Gattini A. Between Splendid Isolation and Tentative Imperialism: the EU's Extension of its Emission Trading Scheme to International Aviation and the CJEU's Judgement in the ATA case. International and Comparative Law Quartely, Vol. 61, Issue 04, 2012, p. 987; [accessed on 1 April 2015]; available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=8727243&jid=ILQ&volumeId=61&issueId=04&aid=8727241&bodyId=&membershipNumber=&societyETOCSession=>

[195] Capannelli G., Kawai M. The Political Economu of Asian Regionalism. Springer Science & Business Media, 2014, p. 136.

[196] Mendez M. The Legal Effects of EU Agreements. Oxford University Press, 2013, p. 211.

that the reinforcement of the effect of the WTO provisions within the EU legal system would possibly encourage other WTO players to consider WTO law as an instrument which also seeks to protect individuals from illicit trade practices. However, firstly political questions between the countries have to be solved and the clear lines between political issues and trade should be fixed.

All in all, as it was revealed in this chapter, a new explanation or at least a broader interpretation was expected from the CJEU as denying both GATT 1947 and WTO 1995 on the same arguments was not fair after essential changes were introduced in 1995. The controversial issue is that neither the changes nor criticism on the very narrow interpretation on the reasoning of denial the direct effect draw more attention of the CJEU on this particularly problematic issue. This chapter highlighted the problem that the test for directly effective WTO law is unequally applied and thus WTO provisions are precluded from the functioning in its entire scope. The effect of WTO law should not become a weapon between countries which have political issues because in such situations individuals are harmed the most. Add to this, reciprocity should not be taken into consideration as it is based exclusively on political grounds. What is more, comparatively developed case law on directly effective WTO law within the EU might be considered as a message for the trade world that the effect of WTO provisions should be strengthened.

3. A SLIGHT POSSIBILITY TO RELY ON WTO PROVISIONS

The CJEU provided the whole trade world with two rulings where under specific conditions it was possible to review the validity of the EU legislation. As the case law will reveal, the CJEU accepts the exceptions in a very strict scope. However, there are cases where the CJEU affirms the applicability of exception under certain conditions and it is useful to examine what conditions have to be fulfilled in order to reach such effect. This chapter highlights the recent approach of the CJEU on expanding the applicability of exceptions to other fields rather than just WTO law. Thus it will be revealed that the effect of WTO is constantly developing and even thought the discussions on what effect the WTO should be given within the EU legal system already lasts for years, it is proved that possibility to rely on WTO law remains a topic for discussion.

3.1 Phenomenon's: Fediol and Nakajima

Even though the CJEU constantly denied the direct effect of WTO law, there is a light in the end of the tunnel – the CJEU accepted two scenarios when the WTO law can be used in order to review the lawfulness of EU acts. The difference between approach of the CJEU before and after *Fediol*[197] and *Nakajima*[198] is that in those two cases the Court decided not to take into consideration the grounds of the concept of direct effect but rather relied on other grounds[199]. These two exceptions of general denial of direct effect might be prescribed as the attempt of the CJEU to show that denial of directly effective WTO law is not based on political grounds and that the WTO agreements are not treated in a discriminatory way in comparison to other agreements. It is undoubtedly a huge step for WTO law to be accepted as a tool under which it is possible to review the validity of EU act while no other main WTO members grant the same effect. However, at the first glance it might be misleading presumption as the subsequent case law of the CJEU reveals that it is complicated to apply the grounds of exceptions in other situations.

[197] Case C-70/87 Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities [1989] ECR I-01781; [accessed on 3 April 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CC0093&from=EN>

[198] Case C-69/89 Nakajima All Precision Co. Ltd v Council of the European Communities [1991] ECR I-02069; [accessed on 3 April 2015]; available at <http://eur-lex.europa.eu/resource.html?uri=cellar:0a6fe706-8876-4d4c-b30b-b87acfcf334b.0002.03/DOC_2&format=PDF>

[199] Ruiz Fabri H., *supra* note 14, p. 159.

The examination includes two significantly important cases: *Fediol* and *Nakajima.* Both decisions were issued in GATT era, before the WTO was created, however, as the case law[200] of the CJEU shows, exceptions are found to be within the WTO scope as well. *Fediol* case gives a reference to a situation where the measure explicitly refers to WTO provisions; while *Nakajima* case constitutes that the validity of the Union act might be assessed if there is an intention to implement a particular WTO provision. After the decisions of these two cases were presented, the CJEU was rephrasing both exceptions in the subsequent cases, such as *Germany v. Council*, where the concept of directly effective WTO treaties was rejected. It is under the question if these two cases might be called as exceptions bearing in mind that the impact of these cases regarding WTO law does not mean strict direct effect of WTO provisions where individuals would be able to invoke its provisions before a domestic court but rather a chance to test the validity of a particular EU act. However, as *Fediol* and *Nakajima* situations show, the WTO law is given with a huge importance comparing with cases where the direct effect was denied without going deeply into details so in this context it will be equated as exceptions.

To start with, crucial points from *Fediol* case have to be highlighted. The case concerned illicit commercial practices of Argentina and thus the EEC Seed Crushers and Oil Processors Federation, simply known as *Fediol*, asked the Commission to take measures against export practices of Argentina. *Fediol* claimed that illicit practice of Argentina is found in different taxation between raw materials and processed production of soya, more precisely, between raw soya beans and soya meal or oil[201]. Add to this, *Fediol* claimed that imposed quantitative restriction on soya beans also should be concerned as illicit commercial practice. More precisely, *Fediol* claimed that commercial practice of Argentina was contrary to GATT rules. However, the Commission issued a decision to reject *Fediols'* request to initiate a procedure regarding commercial practices of Argentina. According to the Regulation 2641/84[202] Member States of the Community had a right to apply for the examination of certain possibly illicit commercial practices. As it is seen from the facts of the case, *Fediol* before the CJEU particularly claimed for the annulment of decision and not for examination of Argentina commercial practices. According to the Commission, GATT lacked direct effect to confer rights

[200] Case C-93/02 Biret International SA v. Council of the European Union [2003] ECR I-10497, para. 63; [accessed on 5 April 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48647&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=167779>

[201] Nuesch S. Voluntary Export Restraints in WTO and EU law: Consumers, Trade Regulation and Competition Policy. Peter Lang, 2010, p. 112.

[202] Council Regulation No. 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices [1984] OJ L 252; [accessed on 12 April 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31984R2641&from=EN>

on individuals and thus the action was announced as inadmissible. At this point the CJEU remembered that "*[...] the Court has certainly held, on several occasions, that various GATT provisions were not capable of conferring on citizens of the Community rights which they can invoke before the Courts"*[203]. Notwithstanding, the CJEU highlighted that the Regulation explicitly referred to GATT rules and thus the lack of direct effect of GATT provisions was not found as an obstacle for the CJEU to review the validity of the EU act. The CJEU stated that "*[...] The GATT provisions form part of the rules of international law to which Article 2(1) of that regulation refers, as is borne out by the second and fourth recitals in its preamble, read together"*.[204] Hence the CJEU found that individuals should be able to rely on GATT rules because of the preamble of the Regulation 2641/84 as there was a reference to GATT rules. It should be noted that even though the CJEU found in this particular case that individuals have a right to rely on GATT provisions in order to review the validity of the EU act, if the act explicitly refers to GATT provisions, the contested measures by *Fediol* were not found as illicit commercial practice[205]. *Fediol* case made a huge input into the field of WTO law and as will be seen in the next section of this chapter, the chance to claim for the possibility to review the lawfulness of EU legislation relying on *Fediol* exception was taken.

Indeed, another possibility to rely on WTO rules is found in case *Nakajima*. *Nakajima* was a name of the Japanese company which manufactured printers only for export to Europe. Relying on the Regulation 2423/88 the Council imposed 12 % anti-dumping duty on the production of *Nakajima. Nakajima* objected such decision and brought an action before the CJEU by claiming that imposed anti–dumping duty is void. According to *Nakajima*, certain provisions of the Regulation were incompatible with GATT provisions, which contained a rule for fair comparison between the export price and the normal value in the determination of dumping. Thus *Nakajima* asked the CJEU for an annulment of the Regulation. The CJEU firstly affirmed its previous rulings that GATT does not confer rights on individuals which can be relied on before the CJEU [206]. However, the claim of *Nakajima* was based not on the grounds of direct effect[207] but rather on the ground to review the legality of the Regulation[208]. Hence, the CJEU noted that "*[...]Anti-Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement and the recitals in the preamble to which specify that it is designed*

[203] Case C-70/87, *supra* note 197, para. 19.
[204] *Ibid.* para. 20.
[205] Nuesch S., *supra* note 201, p. 113.
[206] Case C-69/89, *supra* note 198, para. 67 (a).
[207] *Ibid.*, para. 28.
[208] De Santa Cruz Oliveira M. A. J., *supra* note 68, p. 138.

to "interpret the provisions of [...] the General Agreement" and to "elaborate rules for their application in order to provide greater uniformity and certainty in their implementation" "[209]. In later paragraphs the CJEU, relying on the preamble of the Regulation, found that it was adopted in accordance with GATT rules. It follows the conclusion of the CJEU that "*[...]the new basic regulation [...] was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with General Agreement and its implementing measures".*[210] More precisely, the CJEU affirmed the possibility to review the measure of the Community under the conditions such as it was found in *Nakajima* case. The CJEU adopted a favourable decision for *Nakajima* and so gave a foundation for a new precedent within the EU.

Indeed, as both initial cases on reviewing the legality of the EU act were presented, the case law of the CJEU on *Nakajima* exception could be regarded as being broader in comparison with *Fediol* exception. One of the reasons could be named that a scope of *Nakajima* exception is a subject to a broader interpretation. Contrary to *Nakajima*, *Fediol* is constructed narrowly – it allows challenging the lawfulness of the EU act in case of explicit reference to a WTO provision and requires direct link between challenged act of the EU and WTO law. The subsequent cases[211] presented before the CJEU might serve as an example that there are more attempts to challenge the validity of the EU act relying on more open to interpretation *Nakajima* exception. Grounds presented in each case did not remain just a theory – there were attempts to challenge the validity of the EU acts. However, subsequent cases reveal that it is extremely difficult for the rules of the WTO to get the effect within the EU and a proof of it could be enormously small amount of the cases brought before the CJEU.

Hence, *Fediol* and *Nakajima* could be named as a huge victory in WTO law context; however, it did not change the approach towards previous case law of the CJEU[212]. In that regard the direct effect of the WTO law within the EU legal system is still denied with leaving just a small room for invoking WTO rules in assessment of the EU acts. It is noticed that even though

[209] Case C-69/89, *supra* note 198, para. 29.
[210] *Ibid*. para. 31.
[211] Case T-317/02 Fédération des industries condimentaires de France (FICF) and Others v. Commission of the European Communities, Judgment of the Court of the First Instance [2004] ECR II-04325; [accessed on 10 May 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49756&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=125690>
[212] Vooren B., Wessel, R. R. Wessel "EU External Relations Law – Text, Cases and Materials", 2014, p. 305.

exceptions are legally recognized, the interpretation of the Court is rather narrow[213]. It is undoubtedly important to evaluate each of the grounds in both legal and political contexts as the possibility to use WTO has such a limited scope that political intentions might be perceived. To conclude, *Fediol* and *Nakajima* cases brought a new wave of discussion between WTO members which again highlighted the importance of WTO law.

3.1.1 Measure explicitly refers to a WTO provision

The first ground when the WTO law might be used is to be found in *Fediol* case with the link to the condition that a particular EU measure which validity is tested should explicitly refer to a WTO provision. According to the interpretation of the CJEU on this case it leads to a conclusion that direct effect is valid[214] if a particular EU act expressly refers to WTO provision. If this condition is met the CJEU will review the measure even though in general the legal instrument, such as WTO Agreement, is recognized as incapable of having direct effect[215] within the EU legal system. In practice of the CJEU there were a particularly low number of cases which were similar to *Fediol*[216]. However, in practice the reasoning in *Fediol* is considered as a less controversial issue comparing with the ground presented in *Nakajima*[217]. Notwithstanding, few crucial points have to be determined and assessed in order to clarify the scope of this ground.

The first scenario when the WTO law might be used in order to assess EU acts' legality seems to be clear and straightforward. From the linguistic approach it might be concluded that a measure described in *Fediol* case should contain exact and precise wording and contain a clear link to a particular WTO provision. If the measure in question gives the reference to a particular WTO provision it could be regarded as explicit reference. In the EU legal system such a reference to WTO rules is rather frequent case considering EU food safety measures as these measures often are to be found with a link to SPS Agreement.[218] The influence of WTO law, particularly SPS Agreement, in the EU legal order might be specified as shaping the food

[213] Fenwick M., Van Jytsel S., Wrbka S. Networked Governance, Transnational Business and the Law. Springer Science & Business Media, 2014, p. 78.
[214] Farrell J. E., *supra* note 159, p. 31-32.
[215] Wolfrum R., Gatzschmann I. International Dispute Settlement: Room for Innovations? Springer Science & Business Media, 2013, p. 352.
[216] Mendez M., *supra* note 196, p. 248.
[217] Eeckhout P., *supra* note 154, p. 360.
[218] Szajkowska A. Regulating Food Law. Wageningen Academic Publishing, 2012, p. 142.

policy.[219] *Fediol* case might be named as one of the most significant cases of the CJEU because of two important aspects. Firstly, a huge achievement was made in *Fediol* case as the CJEU did not upheld the argument of the Commission that the GATT provisions are not sufficiently precise and unconditional and thus individuals cannot rely on its provisions in order to challenge the validity of the Community measure. Here the CJEU made a distinction between its previous case law and *Fediol* case where a new ground emerged. More precisely, the reasoning which was provided in *International Fruit* case was dismissed as the *Fediol* case distinguish itself with the statement that it expressly refers to international law and thus GATT 1947 rules. Secondly, in *Fediol* case it was once again affirmed that GATT 1947 lacks direct effect but the New Commercial Policy Instrument which referred explicitly to international trade policies and thus GATT 1947 gave a ground for the exception. At this point it is highlighted that in order to rely on the *Fediol* exception, the ground might be seen from a broader point of view. In other words, a particular EU measure might refer not only to a particular WTO provisions but be treated in a broader scope with the link to international law. As it was already mentioned the WTO law constitutes a part of public international law and thus the possibility to rely on GATT rules was given in *Fediol* case where the reference was made into international trade policies. More precisely, the CJEU affirmed that GATT is a part of international law[220]. It leads to a logical conclusion that the very first case where GATT 1947 rules were used to review the validity of the EU act, it did not mentioned precisely that the EU measure should expressly refer to a GATT/WTO provision but the broader scope with the meaning of international trade field might be regarded as acceptable by the CJEU. Therefore the CJEU held the opinion that the provision will be also given the effect of *Fediol* exception when it refers to international law and not only to GATT/WTO provisions.

Going out of the WTO law field, it is worth to examine *Fediol* and *Nakajima* exceptions in other fields. Namely it is *Aarhus Convention* which brought both exceptions under a spotlight again. The CJEU submitted the decision on joined cases in 2015, where the attention was focused on *Aarhus Convention,* which is related with environmental issues and it aims to give right to receive environmental information as well as to participate in environmental decision making.[221] This recent decision of the CJEU[222] shows that the Court still takes *Fediol* exception

[219] Downes C. The Impact of WTO SPS Law on EU Food Regulations. Springer Science & Business Media, 2014, p. 165.
[220] Case C-70/87, *supra* note 197, para. 19.
[221] Fitzmaurice M., Ong D., Merkouris P. Research Handbook on International Environmental Law. Edwards Elgar Publishing, 2010, p. 288.
[222] Joined Cases C-401/12 P to C-403/12 Council of the European Union, European Parliament, European Commission v. Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht [2015]; [accessed on 18

into consideration in order to review the validity of the EU measure and *Fediol* is examined even in situations which were not directly related with trade field. *Aarhus Convention* joined cases *C-401-403/12* are undoubtedly important not only because *Fediol* ground was discussed but also because the Court assessed whether the Convention and particular provision contain necessary elements developed by the CJEU in order to be announced as directly effective. In other words, under the Courts' assessment fall both the general concept of direct effect of international agreements and two rare exceptions. It is important to note how the direct effect of *Aarhus Convention* developed through years and it is crucial to note that even it was out of WTO scope, it presents how the courts considered *Fediol* exception in that context.

The CJEU made a new ruling in joint cases *C-401-403/12* in 2015 were it was stated that, firstly, the provision in question did not contain unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals[223] and thus the conditions are not met. Hence, the idea of directly effective provisions of the *Aarhus Convention* was rejected. Again, the CJEU did not expand the frames of its interpretation in determining the elements necessary for directly effective provision and the lack of broader interpretation is still obvious. Secondly, it was under debates whether it is possible to review the legality of EU measure relying on *Fediol* exception in the context other than WTO treaties. As a rule, *Fediol* ground was used only in the context of WTO law. However, there might be situations which ran parallel to *Fediol* when the EU act expressly refers to an international instrument such as *Aarhus Convention*. In this decision issued in the beginning of 2015, the CJEU explicitly stated in its case law that the exception developed in *Fediol* case is not to be applied outside of the scope of the GATT[224]. The Court also highlighted the statement that the *Aarhus Convention* did not contain an explicit reference to provisions of an international agreement[225] and thus situation cannot be compared with *Fediol* case. Thus, *Aarhus Convention* was recognized as incapable of being directly effective and *Fediol* exception in this case was dismissed as well. However, the decision of the CJEU shows that the issue regarding direct effect of international agreements is still relevant and directly effective provisions have to be assessed on case-by-case and article-by-

April 2015]; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=178340>

[223] *Ibid.*, para. 55.

[224] *Ibid.*, para. 38.

[225] *Ibid.*, para. 58.

article basis.[226] Add to this, in this case arguments against *Fediol* exception were presented by the Council of the European Union, European Parliament and European Commission and it could be regarded as indicator that EU institutions still hold *Fediol* principle as a powerful instrument within the EU legal system.

As direct effect of WTO law cannot be equalized to the measure which explicitly refers to a WTO provision it might be seen as a judicial review[227] of the EU legislation. Possibility to rely on WTO law on this ground purely depends on what a specific EU measure contains. For the last remarks it might be noted that even though *Fediol* ruling is held as an exception to general denial of direct effect of WTO law, it is a very limited and conditional concept where everything depends not only on the structure and aim determined in the specific provision but also on EU law. The EU legislative institutions hold everything in their hands as they are responsible for new legislature where it is up to them to create new measures and incorporation of provision which refers explicitly to WTO law remains under the control of the EU. And thus it might be concluded that the effect of WTO law within the EU legal system entirely depends on EU law. More precisely, the provisions of the WTO are taken into consideration in a context of *Fediol* exception just when the EU legislature institutions express such an acceptance in a particular measure.

3.1.2 Intention to implement a specific WTO provision

Few years after decision in *Fediol* was presented, the CJEU submitted another ground clarifying when the validity of the EU act might be reviewed – it is *Nakajima* case. The CJEU stated that the second exception of general denial of direct effect is the situation when there is an intention in the instrument of the EU to implement a specific WTO provision. *Nakajima* exception, even though it seems to be more complex, was examined by the CJEU more times than *Fediol* exception. However, a broader case law on the same ground as *Nakajima* exception does not lead to a clear view what is the scope of *Nakajima* exception. It might be noted that case law of the CJEU is rather ambiguous[228] regarding the determination of a particular set of requirements which have to be fulfilled in order to review the lawfulness of the EU act under the *Nakajima* exception. As well as *Fediol* case, *Nakajima* in legal literature is generally called as an

[226] Opinion of Brussels Bar lawyer Geert van Calster in Joined Cases C-401/12 to C-403/12 on 14 January 2015; [accessed on 3 May 2015]; available at <http://gavclaw.com/2015/01/14/court-of-justice-dismisses-vereniging-milieudefensie-in-air-quality-appeal-aarhus-not-always-the-jawbreaker-in-judicial-review/>
[227] Zhang X. International Trade Regulation in China: Law and Policy. Bloomsbury Publishing, 2006, p. 324.
[228] Snyder G. F., *supra* note 185, p. 188.

exception; however, it does not mean that the CJEU accepts WTO Agreement as directly effective. There are several essential issues regarding *Nakajima* exceptions which will be analyzed further.

Starting with the linguistic point it might be noted that *Nakajima* ground is structured in a complex way as it is not precisely described what composes 'the intention of the EU act'. Add to this, it has to be determined how the provision should be evaluated in order to show that the Community intended to implement a particular provision of the WTO. In other words, two most essential conditions have to be determined – intention and specificity. The case law concerning these two elements is rather narrow and thus it is complicated to provide a comprehensive examination of both elements. General Advocate *Geelhoed* shortly examined both intention and specificity[229] and it helps to reveal the essential points which have to be evaluated. In order to reveal the intention, it is necessary to examine the characteristics of a particular EU act[230]. One of the characteristics of the EU act which has to be examined is the purpose of the act as it gives a chance to determine the initial intention. According to Advocate General *Geelhoed*, the intention might be described in a way that the Community has essentially chosen to limit its own scope of manoeuvre in negotiations by itself incorporating the obligation.[231] Advocate General *Geelhoed* also noted that in order to rely on *Nakajima* exception, the intention to implement should be assessed from the point of an objective comparison of the content of the EC provision and the WTO obligation which shows that the provision 'effectively results in the implementation or incorporation of the WTO obligation into Community law'[232]. Regarding *Nakajima* case, the intention of the Regulation was determined in the light of its purpose and the reference to the intention is to be found in its recitals in the preamble. In other international agreements, such as Agreement on International Humane Trapping Standards[233] the intention of the contracting parties is clear as the Agreement includes the provision stating that agreement itself is not self-executing and that parties will implement the obligations in accordance with its

[229] Case C-313/04 Franz Egenberger GmbH Molkerei und Trockenwerk v. Bundesanstalt für Landwirtschaft und Ernährung [2006] ECR I-06331; [accessed on 28 April 2015]; available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-313/04>
[230] Holdgaard R. External Relations Law of the European Community: Legal Reasoning and Legal Discourses. Kluwer Law International, 2008, p. 317.
[231] Opinion of Advocate General Geelhoed on 1 December 2005 in case C-313/04 Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung [2005] ECR I-2241, para. 61; [accessed on 24 January 2015]; available at <http://old.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CC0065:EN:PDF>
[232] Snyder G. F., *supra* note 185, p. 188.
[233] Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation [1986] OJ L 42/43; [accessed on 30 April 2015]; available at <http://www.fur.ca/files/AIHTS.pdf>

internal procedures[234]. Hence this Agreement might serve as an example where the initial intention of the agreement is clearly described in final provisions. However, it is true that intention is the element which falls under the discussion and it is not easy to determine what the real intention was. The examination of the intention of the parties might include other factors as well, such as behaviour of the parties in enforcement of the legal instrument in its domestic system. The researcher highlights the necessity to examine agreement as a whole in order to reveal the intention of the parties instead of focusing on a very strict assessment when seeking to identify precise paragraph where the intention should be prescribed.

Another crucial element which has to be examined is the specificity of the provision. The EU act has to express an intention to implement a particular WTO provision which is to be understood in a broader was that it might be either one specific provision or a specific group of provisions[235]. It might be concluded that 'a particular provision or a group of provisions' have to be formulated in a way which clearly and precisely connects EU acts with WTO Agreement. If it is clear from the context of the EU instrument which particular provision was intended to be the object of implementation, there is huge chance to prove that the initial intention was to implement WTO provision. However, if the EU act contains a provision with an ambiguous expression of which exact provisions should be implemented, it might be complicated to challenge the validity of the EU act. It is well-known that the *Nakajima* exception is applied very strictly and so the latter element requires precision. Even so, the researcher highlights the fact that in case where implementation exception is at stake, the Court seems to be open for a discussion of the specificity and it might be regarded as a positive attitude of the CJEU towards implementation exception.

In order to reveal the application scope of *Nakajima* exception as well as to highlight the importance of exceptions' existence within the EU legal system, case law of the CJEU will be analyzed. Probably the best-known case which confirms the reasoning presented in *Nakajima* is *Petrotub*[236]. The success in *Petrotub* is called as a rare exception[237] bearing in mind that there are several cases which unsuccessfully tried to challenge the validity of the EU act before the CJEU. The case concerned anti-dumping duties which were put on imports of seamless pipes and

[234] *Ibid*., article 17, para. 3.
[235] Opinion of Advocate General Geelhoed, *supra* note 231, para. 73.
[236] Case C-76/00 Petrotub SA and Republica SA v. Council of the European Union [2003] ECR I-00079; [accessed on 4 March 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47954&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=128423>
[237] Cannizzaro E., Palchetti P., Wessel R. A. International Law as Law of the European Union. Martinus Nijhoff Publishing, 2011, p. 128.

tubes of iron of non-alloy steel originating in Romania and other countries and thus *Petrotub* production fell under the scope of anti-dumping duties. This case shows the essence of the *Nakajima* exception – it was accepted that the validity of the contested regulation might be reviewed. More precisely, the CJEU affirmed that the intention to implement a particular provision might be assessed in the light of preamble which reveals the purpose of the regulation. It was found in the preamble that "[...] in view of the extent of the changes arising from the 1994 Anti-Dumping Code and to ensure an adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new agreements into Community legislation to the extent possible".[238] The CJEU in *Petrotub* affirmed that *Nakajima* conditions were satisfied as the purpose was to transpose into EC law rules contained in the WTO Anti-dumping Agreement. In *Petrotub* intention might be highlighted in a sense that Council Regulation 384/96[239] was adopted in order to amend the act regarding anti-dumping. The achievement of this case might be seen not only in annulment of the EU measure[240] but also that *Petrotub* managed to get compensation where the size of it was determined as a fair compensation. The connection point of these two cases is to be found in the intention element which was determined in the recitals. It leads to the conclusion that the CJEU affirmed *Nakajima* exception and even admitted unlawful EU measure by granting the compensation which might be regarded as willingness of the CJEU to confer more rights into the hands of private parties.

Going to subsequent case law regarding the implementation exception, it is worth to point out *Huvis*[241] case. *Huvis* was a South Korean company which produced and exported polyester staple fibres. *Huvis* claimed for the annulment of a particular provision of the Council Regulation which imposed a definitive anti-dumping duty on imports of exported polyester staples. Firstly, it affirms the conclusions which were reached in *Nakajima* and *Petrotub* regarding the intention to implement a particular provision. The Court found out that "*[...] the Community adopted the basic regulation in order to meet its international obligations arising from the 1994 Anti-dumping Code. Furthermore, by means of Article 2(10) of the basic regulation, it intended to implement the particular obligations laid down by Article 2.4 of that*

[238] Council Regulation No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1995] OJ L 056, preamble 5th recital; [accessed on 10 May 2015]; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R0384:en:HTML>
[239] *Ibid.*
[240] Mendez M., *supra* note 196, p. 302.
[241] Case T-221/05 Huvis Corp. v. Council of the European Union [2008] ECR II-00124; [accessed on 5 May 2015]; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67251&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=129133>

code"[242]. This case might be described as a complementary point for *Nakajima* exception. The input of *Huvis* case regarding the implementation exception and the reason why it appeared under the magnifier is the scope of the annulment of the EU measure. If the conditions laid down in *Nakajma* are satisfied and the measure is successfully challenged, there is a question to what scope the measure will be annulled. It would be a tenable conclusion that the particular EU act is annulled only to such extend insofar as it concerns the applicant[243]. In general, after the decision is issued by the CJEU, EU institutions must follow the decisions of the Court. As it was noted in case *Huvis*, Union has to annul the exact provision which is determinated by the Court while leaving the rest of the particular act unchanged as the whole act was not challenged before the Court. More precisely, the Court held that "*Article 2 of the contested regulation must be annulled to the extent to which the anti-dumping duty imposed on exports into the Community of goods produced and exported by the applicant"*[244]. *Huvis* case might be named as the one which managed to show that the CJEU is not a gatekeeper in the context of the EU law and thus admits that the EU legislation might be challenge if there is a serious ground for that. This partly denies the widespread approach that the CJEU acts as a political actor. It might be concluded that *Nakajima* exception together with *Huvis* decision form a new approach as the main objective is not to challenge whole act of the EU and thus diminish the influence of the EU in the WTO field but rather to highlight the problem of clashing laws and to shape a broader approach of the CJEU.

As it can be seen from previous cases, the CJEU has showed that the Court is willing to take WTO law into consideration when reviewing EU legislation if cases are in the line with *Nakajima* exception. However, there are several cases[245] which unsuccessfully tried to use *Nakajima* exception. Generally *Nakajima* exception was used in the context of anti-dumping field with just few cases outside it. Comparing two exceptions, *Fediol* and *Nakajima*, the latter one was examined under the *Aarhus Convention* scope more into details as the *Fediol* was not found in the case and hereby rejected. *Aarhus Convention*, which is found to be in environmental law field, from the first glance seems not to have any common points with *Nakajima* exception. The researcher notes that the scope of implementation exception and its use in a broader field than just WTO law is a particularly relevant aspect which might reveal how the implementation principle is seen by the CJEU in other contexts and how it might influence the effect of the WTO

[242] *Ibid.*, para. 75.
[243] Van Bael I., Bellis J. F., Van Bael & Bellis. EU Anti-dumping and Other Trade Defence Instruments. Kluwer Law International, 2011, p. 621.
[244] Case T-221/05, *supra* note 241, para. 103.
[245] Case C-149/96, *supra* note 120; Case T-19/01, *supra* note 175.

law within the EU legal order. For this reason analysis of the interplay between *Nakajima* exception and newly decided case on *Aarhus Convention* is presented further.

There are several cases which concerned *Aarhus Convention* and starting with 2012, the General Court decided on a case *T-338/08*[246] where the applicants indirectly questioned the validity in the light of the *Aarhus Convention* of a particular provision of the EU Regulation 1367/2006[247]. This Regulation was a consequence of article 9 of the *Aarhus Convention* as the Regulation was adopted to meet EUs' international obligations. In the preamble of the Regulation the recital refers expressly to article 9 of the *Aarhus Convention* and relying on the case law[248] which also considers *Aarhus Convention* it should be noted that aforementioned Regulation is intended to implement that provision. What is more, it was taken into consideration that in a hierarchy of legal acts in the EU legal system, international agreements rank between secondary and primary EU law. According to this, the General Court stated that the EU is bound by *Aarhus Convention* and as EU secondary legislation provisions were not in the line with Convention, EU legislation regarding the particular question was an object of annulment. In other words, the General Court decided that *Nakajima* doctrine can be applicable out of the frames of WTO law and thus expanded application of *Nakajima* exception to *Aarhus Convention*. It was a huge achievement for *Nakajima* exception as the General Court showed the willingness to be open for a broader interpretation.

However, after this decision the arguments of the General Court turned out into huge discussions between legal scholars. Thus the decision of General Court was appealed by the European Commission before the CJEU by stating that the General Court erred[249] in applying *Nakajima* exception and highlighted the argument that *Nakajima* case law has never been applied by the Court outside the field of WTO Agreements and thus such an extension should be

[246] T-338/08 Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission [2012]; [accessed on 2 May 2015]; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=123824&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=130048>

[247] Council Regulation No. 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Decision – making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13; [accessed on 2 May 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1367&from=EN>

[248] Case C-240/09 Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky [2011] ECR I-01255;[accessed on 3 May 2015]; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=130864>

[249] Commission decision of 18.7.2012 on the submission of an appeal before the Court of Justice, Brussels, C (2012), 5070, para. 5.

avoided. Hence, the European Commission asked for the annulment[250]. Notwithstanding, in order to reveal the input of *Aarhus Convention* joined cases *C-401-403/12* into WTO law, it is necessary to go through all statements made by the CJEU.

Now the attention of the society is focused on a very recent case which was decided in the beginning of 2015, when the CJEU issued its decision regarding the European Commissions' appeal on the case regarding the *Aarhus Convention*[251]. The CJEU on joined cases *C-401-403/12* rejected the view that *Nakajima* doctrine can be found outside the WTO law scope. Hence, the CJEU began its assessment from the grounds – starting from general test of directly effective instrument to implementation principle. Firstly, the CJEU started with a general assessment of the concept of directly effective international agreement. Once again it was affirmed that according to article 216 (2) of the TFEU, international agreements have a binding nature in the EU. According to the CJEU, the provision of *Aarhus Convention* on which the General Court relied when annulling EU Aarhus Regulation, were not sufficiently precise and unconditional in order to confer rights to individuals and thus it lacked direct effect to be relied on for an action of annulment. In the appealed case it was found that the applicant is NGO and since only members of the public who 'meet the criteria, in any, laid down in national law' are entitled to exercise the rights provided under the particular provision of *Aarhus Convention*, this provision is a subject for adoption of a subsequent measure[252]. However, Advocate General Jaaskinen held an opposite opinion, claiming that the nature of the provision in question was rather mixed[253], which is common characteristic in environmental law, and it should be treated as sufficiently clear. In this way the Advocate General Jaaskinen suggested that the provisions of *Aarhus Convention*, even of the mixed nature, should be treated as directly effective on the grounds of general test for directly effective international agreements. However, the opinion of the Advocate General which was issued in May of 2014 did not make a huge impact on the decision of the CJEU as it was declared that the provision of *Aarhus Convention* has failed to satisfy necessary provisions. Comparing the arguments presented by both the CJEU and the Advocate General it is fair to agree with the latter opinion because the broader approach regarding the mixed provision might benefit individuals who suffer from harmful EU legislation. Hence, it is logical that more applications would be presented before the CJEU if there would be a case-law regarding directly

[250] Commission decision of 18.7.2012 on the submission of an appeal before the Court of Justice, Brussels, C (2012), 5069, Article 1; [accessed on 6 May 2015]; available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C200832/correspondence/frPartyComDecToAppeal18Jul12.PDF>

[251] Joined cases C-401-403/12, *supra* note 222.

[252] Joined cases C-401-403/12, *supra* note 222, para. 55.

[253] Opinion of Advocate General Jaaskinen on C-401-403/12, *supra* note 226, para. 79.

effective mixed provisions. Add to this, the CJEU by rejecting directly effective nature of mixed provisions run the risk to induce the discussions of the protectionism nature of the CJEU as individuals are left with no room for manoeuvre when they think their interests have been infringed.

The second aspect which has been highlighted by the CJEU is the applicability of *Nakajima* principle in the present case *C-401-403/09*. It was acknowledged that the issue in *Nakajima* case was linked to the antidumping system, which is extremely dense in its design and application, in the sense that it provides for measures in respect of undertakings accused of dumping practices[254]. As for the present case, it was noted that contracting parties have a broad margin of discretion when defining the rules for the implementation of the 'administrative or judicial procedures'. Hence the CJEU concluded that the General Court made an error and highlighted the most important aspect in the case that *Nakajima* exception as well as *Fediol* was justified solely by the particularities of the WTO and GATT Agreements[255]. The CJEU affirmed the opinion of the Advocate General *Jaaskinen,* as he highlighted in his opinion that "[...] the General Court was wrong to seek to justify the review of legality on the basis of an exception established in Nakajima [...] given that that judgment is a consequence of the case-law within the case-law relating to the GATT and WTO agreements, which is particular to that area of law"[256]. To conclude, the CJEU took the view of the European Commission in its decision that *Nakajima* exception is rather exceptional[257] and there could be no broader interpretation on implementation exception. Notwithstanding, the general concept of cases related with *Aarhus Convention* and *Nakajima* exception might be seen from two different perspectives - the approach of the General Court was a bold step, it can be evaluated as an attempt to make a broader interpretation on interpretation principle and an effort to show for the society that both exceptions, even though they are very rare, might have a sufficiently great weight in the interpretation procedure of the CJEU. On the other hand, the CJEU stepped back and made boundaries on the applicability of the exceptions – it is only to the extent to WTO law. Thus at this point the CJEU brought clarity which in general is missing within the EU.

For the final remarks it might be pointed out that *Nakajima* as well as *Fediol* doctrines were usually reviewed in light of the GATT and the WTO Agreements and as the CJEU and

[254] *Ibid.*, para. 59.
[255] *Ibid.*, para. 49.
[256] *Ibid.*, para. 54.
[257] Schoukens H. Access to Justice in Environmental Matters on the EU Level after the Judgements of the General Court of 14 June 2012: Between Hope and Denial? Nordic Environmental Law Journal [2014], p. 24;[accessed on 6 May 2015]; available at <http://nordiskmiljoratt.se/haften/NMT%252c%2022%20aug%20%282%29.pdf>

legal scholars accepts this approach[258], it is important to receive CJEU decisions concerning WTO cases which contain implementation exception in order to clarify the tendencies when the Court is willing to accept *Nakajima* exception. After the last decision of the CJEU which concerned both exceptions, it might be concluded that is a huge achievement for the exceptions to be invoked in other fields than WTO and even though it was dismissed, it shows that the scope of the exceptions is still relevant. Add to this, the possibility of invoking *Nakajima* exception on other grounds than WTO law should not be entirely dismissed because from the very beginning it was highlighted that exceptions should be applied restrictively but still the exceptions were analyzed in other than WTO fields. Moreover, the approach of the CJEU towards implementation exception is developing and even though the CJEU clearly rejected exceptions' applicability out of WTO scope, a broader application field of exceptions would be a huge help in order to compare and to narrow down the future possibility to invoke *Fediol* or *Nakajima* exceptions before the Court.

3.2 CJEUs' practice regarding the exceptions: are there any changes?

Bearing in mind the history regarding the denial of general concept of direct effect, exceptions in WTO law field seem to be one step ahead in a sense that the interpretation of the CJEU on *Fediol* and *Nakajima* is still developing. As direct effect of the WTO law was dismissed from the very beginning, clear reference and implementation exceptions might be regarded as more complex concepts because there is no coherent opinion of the CJEU towards the exceptions. It should be noted that a small amount of cases regarding *Fediol* and *Nakajima* exceptions is not a surprise, as above-mentioned cases reflect the view that the conditions are very strict and the CJEU requires a particular level of preciseness in the exceptions.

The evaluation of a joined case *Aarhus Convention* also seems to be a complex issue. First of all, it could be presumed that the CJEU rejected the applicability of *Fediol* and *Nakajima* exceptions outside the scope of WTO law because if the applicability of the exceptions would be affirmed regarding *Aarhus Convention*, there would be a great possibility that the exceptions would be invoked also in other fields of international law. In such a case, the case law of the CJEU regarding *Fediol* and *Nakajima* exceptions in the context of other fields of international law would be compared with the case law in WTO law context. It would be contrary to the policy of the CJEU because it was stated that the exceptions might be applied in a very

[258] Barnard C. Albors –Llorens A., Gehring M. W., Schutze R., *supra* note 141, p. 57.

restrictive situations[259]. However, analysis of *Fediol* and *Nakajima* exceptions in other fields of international law might help to narrow down the reasons why the scope of both exceptions in the WTO field has such a limited role and why there are very few cases where the exceptions were affirmed. Even though the CJEU stated that exceptions are found exceptionally within WTO field, the process how this decision was reached brought more clarity over the effect of exceptions. The CJEU took into consideration *Fediol* and *Nakajima* exceptions in the context of environmental law and it would be erroneous to exclude the possibility that in the future the CJEU will go back to the problem of exceptions and its interpretation in other international law fields. The constant development of approach of the CJEU regarding general interpretation of international law within the EU legal system leads to the conclusion that in the future there might be situations which would run parallel to *Fediol* or *Nakajima* exceptions. The willingness of the CJEU to analyze the scope of the exceptions shows the developing approach of the Court and even if the directly effective WTO law will never be recognized, there is a great chance to expand the applicability of the exceptions so private parties could easier protect their legitimate interest before the Court.

The fact that the CJEU receives and examines the exceptions under different circumstances is a positive sign because the exceptions might be evaluated from different standpoints. First of all, *Fediol* and *Nakajima* exceptions have a very narrow interpretation scope and thus the CJEU cannot provide the Community with a broader interpretation and it could be seen as an obstacle for further applicability of *Fediol* and *Nakajima* exceptions. However, there are some changes because as *Petrotub* or *Huvis* cases revealed, each case brings something new in the context of exceptions. Even though the input of each new case might be considered as minimal, it still supplements the doctrines of *Fediol* and *Nakajima*. Bearing in minds what was assessed in previous sections of this chapter it leads to the conclusion that there are some changes in the decisions of the CJEU. It might be a complex task to determine essential changes but the comparison of the case law regarding the exceptions reveals that changes are introduced systematically. Add to this, when the first cases regarding the directly effective WTO entered the CJEU it took years to affirm and develop the applicability of exceptions and thus it leads to the conclusion that there always have been aspects which were developed by the CJEU. For this reason the effect of WTO law within the EU will always remain a debatable topic.

[259] Qureshi A. H., *supra* note 6, p. 172.

3.3 Importance of direct effect within the EU

After the aforementioned case law of the CJEU it is logical to presume that the biggest advantage of directly effective WTO law would be granted to individuals who found themselves harmed by an unlawful EU act. This might be named as the most common ground for those who advocate the direct effect of WTO law[260] and besides this; there are more reasons why directly effective WTO law can be regarded as a useful instrument within the EU legal system. Even though the important aspect of direct effect might be seen as a hypothetical question, undoubtedly it helps both to identify the gaps of trade in the EU legal system and to encourage the legal discussion over the issue of directly effective WTO law.

Starting with identifying the possible advantages of directly effective WTO provisions, the first logical presumption might be named as an attempt to ensure more effective[261] WTO rules. Without doubts, if the effect would be granted to WTO law, its provisions would enjoy a better position in the domestic law and thus would serve as a pillar in protecting the rights of individuals. At this stage WTO law might be compared with some other international agreements which are granted with direct effect[262], such as European Convention on Human Rights or International Covenant on Civil and Political Rights, which are particularly created in order to protect individuals. Without doubts, the issue related directly with human rights is a very sensitive topic in the society; however, it would be incorrect to reject the WTO Agreement as an instrument which does not create conducive provisions for the individuals. It is clear that a lot depends on trade situation in the country, even the welfare of the individuals. Thus it might be found as a very contentious factor because WTO law do benefit private parties directly[263] and internationally recognized trade rules were created in order to make trade system fair and smooth – here private parties might be named as the ones who are especially affected by it as they undoubtedly feel the consequences of changes in trade. Even though WTO does not create and does not wish to create human rights, WTO agreements impact on human rights[264] is undisputed and as international human rights agreements do not require reciprocity, the WTO agreement should be treated in no less favourable manner. Importance of directly effective WTO law might be prescribed with the link to the situation when individuals would be able to challenge the harmful EU act and get a compensation for their loss. As *Petrotub* case shows the possibility to

[260] Nuesch S., *supra* note 201, p. 317.
[261] Trebilcock J. M. Advanced Introduction to International Trade Law. Edward Elgar Publishing, 2015, p. 30.
[262] Liefaard T., Doek J. E., *supra note* 78, p. 106.
[263] Bronckers M., *supra* note 65, p. 33.
[264] Oberleitner G. Global Human Rights Institutions. John Wiley & Sons, 2013, p. 43.

get compensation exists but it is considered as a very rare case and thus it is not easy to prove that individual has a right to claim for compensation. As for now, even though the WTO provisions influence individuals directly, they are prescribed from taking the advantage from it in case of their rights infringement. This is a paradox bearing in mind the essence of WTO Agreement which was created in order to make trade more smooth and transparent. Effective WTO provisions would undoubtedly bring more complaints before the CJEU and this would make a broader case law which might help in identification process of the gaps in both the WTO and the EU legal order.

EU in the context of the WTO can be named as one of the main players[265] so its influence in trading system is considered as being at a high level. It is not surprising bearing in mind that the EU has created a common trade policy which leads to the EU as a single actor in WTO law field. Add to this, the EU accounts for 17% of global trade[266] which makes the EU a very competitive trader. However, even being one of the driving forces in the trade field, the EU has been cast with a shadow of doubts for behaving in a protectionist nature while rejecting the direct effect of WTO law. More precisely, the protectionist nature in the EU might be seen in two fields: firstly, by constant denial of directly effective WTO rules within the EU legal system and so trying to protect the integrity of the EU; and second, by adopting measures which goes not in the line with the provisions of the WTO, which might create obstacles for fair trade. These two issues undoubtedly have a negative effect for both the EU and its trading partners.

It is true that the EU does not want to grant effect for WTO law unless other countries will grant it. It is presumed that if the EU would accept directly effective WTO provisions while other countries don't, it would create an uneven situation where the EU producers would face less favourably position in the dispute procedure because they would not have a chance to rely on WTO rules. However, there were some propositions how this issue might be solved. Conditional direct effect was discussed by the scholar *Judson Osterhoudt Berkey*[267], with the meaning that granting direct effect to WTO provision should be assessed on case-by-case basis, taking into account if other countries involved in the dispute recognize directly effective WTO law. Notwithstanding, conditional direct effect was named as the instrument which would subtract the rights given by the WTO Agreement and thus the concept of conditional direct effect was not developed. Add to this, it might lead to the conclusion that conditional direct effect is

[265] Qingjiang K. China-EU Trade Disputes and Their Management. World Scientific, 2012, p. 124.
[266] Moschella M., Weaver C. *supra* note 1, p. 60.
[267] Osterhoudt Berkey J. The European Court of Justice and Direct effect for the GATT: A Question worth Revisiting. The European Journal of International Law, Oxford University Press, Vol. 9, No. 4, 1998; [accessed on 16 October 2014]; available at <http://ejil.org/pdfs/9/4/692.pdf>

again based on political grounds and thus it does not correspond to the general issue of directly effective WTO provisions. Even more, arguments presented by the legal scholars regarding the direct effect, leads a researcher to the presumption that the importance and influence of WTO law should be highlighted through expanding the scope of exceptions within the EU legal order instead of revising more political grounds for granting direct effect to WTO law.

Moreover, the importance to grant WTO law with a wider discretion of direct effect could be seen in the results of the EU measures. As the practice of the EU shows, namely *Seal Products*[268] case which will be analyzed in the next chapter, adoption of a measure which is contrary to WTO provisions and has a protectionist shade, harms not only countries which were banned from placing seal products on the EU market but also the domestic producers and consumers. In such a case the importance of the direct effect of WTO law sometimes is called as a weapon[269] against a protectionist Member States of the WTO. Directly effective WTO provisions would prevent from the enforcement of harmful EU measures and so the importance of direct effect within the EU might be evaluated as a need against unnecessary trade obstacles. In case of expanding the standards for exceptions applicability in the CJEU, even without accepting directly effective WTO Agreement as a whole, it would be possible to prevent more trade subjects from infringement due to an unlawful trade practices. The economy and thus trade is closely related with political issues between the countries and hence the broader scope of directly effective WTO law would prevent the domestic producers, importers and consumers from unnecessary damage. It should be highlighted that within the EU legal order the importance of directly effective WTO law have already reached the stage where the political reasons for denying direct effect gets an inferior position and a need to at least minimally expand the possibility to use WTO provisions before the court is obvious.

All in all, this chapter again confirmed the statement that the EU has comparatively highly developed approach regarding the effect of WTO law as two exceptions of general denial of directly effective WTO provisions were adopted within the EU. Fediol exception which is used when the EU measure explicitly refers to a WTO provision seems to be constructed not in a very complex manner but the case law showed that there is extremely low number of cases where the right to rely on Fediol doctrine was proved. Another exception Nakajima is used to review the validity of the EU measure if it intended to implement a specific WTO provision. It is noticed that Nakajima doctrine receives more attention within the EU and there are more cases which were

[268] DS369 EC – Seal Products II, 1 December 2014.
[269] Maduro M., Azoulai L. The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty. Bloomsbury Publishing, 2010, p. 13.

based on Nakajima exception. The doctrine of Nakajima was again a subject under the discussions when in the beginning of 2015 the CJEU issued a decision where the scope of Nakajima was examined in the context out of the trade field. More precisely, Aarhus Convention was precluded from relying on Nakajima and the CJEU stated that these two exceptions are exclusively applied within the WTO law. Hence, the analysis showed that CJEU still takes both exceptions into consideration and it was clarified that directly effective WTO law is still developing in the EU legal system.

4. INDIRECT EFFECT AS A TOOL TO GRANT MORE WEIGHT TO WTO LAW

The purpose of this chapter is to examine the concept of indirect effect relying on the case law of the CJEU. Within the EU legal order the attention was mainly focused on direct effect and thus indirect effect was not an object of huge discussions. However, it is essential for the proper functioning of the WTO law that the CJEU would adopt decisions in accordance to WTO law. As it will be revealed, there are still some cases where the CJEU decisions are incompatible with WTO law and by the adverse consequences are affected not only other countries but also private parties. Add to this, more issues are arising in the EU legal act adoption process.

4.1 Concept of indirect effect

Bearing in mind the denial of directly effective WTO provisions and a very narrow acceptance of exceptions, it might be assumed that WTO law does not have an effect within the EU legal system. However, it is not true. The WTO law surely has its weight in the EU legal order and the case law[270] of the CJEU regarding the concept of indirect effect is rather broad and comprehensive. From a first glance it might look that direct and indirect effects are opposite concepts but they are connected as both make an influence into domestic law. Regarding the WTO law, indirect effect could be described as being even more relevant because it makes an influence in a broader scope while exceptions are rather rare. Indirect effect is capable of ensuring that EU measures will contain provisions which are in a line with WTO law and thus reduce the possibility of clashing rules.

The definition of indirect effect which would be internationally recognized is still absent. However, the definition was developed by the CJEU. In the EU legal system institutions which are responsible for legislation should take WTO law into consideration when adopting new measures; while the CJEU, which is bound to reach a decision by acting as a neutral party, has to interpret EU legislation consistently with WTO law[271] and thus it is known as an instrument of consistent interpretation[272]. Hence, it is clear that consistency with WTO rules is achieved in two ways. The essence of the concept of indirect effect is not to highlight the

[270] Case C-92/71 Interfood GmbH v. Hauptzollamant Hamburg-Ericus [1972] ECR 231; [accessed on 3 May 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61971CJ0092&from=EN>; Case C-61/94, *supra* note 2.
[271] Thies A., *supra* note 142, p. 62.
[272] Boschiero N., Scovazzi T., Pitea C., Ragni C. International Courts and the Development of International Law: Essays in Honour of Tullio Treves. Springer Science & Business Media, 2013, p. 883.

importance of the WTO Agreement in the EU legal system but rather to ensure the fulfillment of the obligations. It might be misleading to assume that indirect effect will diminish the importance and legal capacity of the domestic law. Particularly, indirect effect seeks to harmonize[273] domestic law and international obligations in order to avoid damage in case of infringement of international treaties. Talking about WTO law, as a whole, it receives a special attention in a sense that it includes a number of agreements which all are integral parts of the WTO. More precisely, if one agreement, such as GATS, is a subject of interpretation it has to be consistent with the interpretation of other agreements[274]. The tendencies of the CJEU regarding indirect effect will be discussed further with a broader analysis of the case law. As from another standpoint, EU legislative institutions play a significant role in the indirect effect field. More precisely, for the doctrine of indirect effect the interplay between EU institutions have a crucial importance in order to prepare a consistent legislature with international law. EU legislative institutions, in order to avoid future discrepancy between EU and WTO law, have to take certain measures into consideration. As for legislation process, exchange of information between the institutions might help to adopt a harmonious law[275]. The pre-legislation phase requires for consultations between certain subdivisions of EU institutions[276], particularly consultations in the WTO field or exchange of information might be handled with a help of the Legal Service which is a part of the General Secretariat of the Council[277]. Hence, advices and proposals of the Legal Service might be one of the ways how to ensure the legality and conformity of the EU acts with international obligations[278]. Add to this, the exchange of information with particular subdivisions of the WTO[279] might fill the gaps in preparatory works of new EU measures and to ensure that trade will not be restricted with unnecessary obstacles. It should be highlighted that consistency with international obligations entirely depends of the activity of the EU – if certain institutions are willing to adopt an advantageous measures for all, the cooperation is a necessity. To conclude, it should be highlighted that EU should seek to adopt harmonious legislation regarding WTO provisions not only to avoid discrepancy between laws but also because it influences the effectiveness of WTO law. Compliance with WTO law is particularly relevant for private parties,

[273] Maduro M., Tuori K., Sankari S. Transnational Law – Rethinking European Law and Legal Thinking. Cambridge University Press, 2014, p. 89.
[274] Xiong P. An International Law Perspective on the Protection of Human Rights in the TRIPS Agreement. Martinus Nijhoff Publishers, 2012, p. 135.
[275] Cygan A. Accountability, Parliamentarism and Transparency in the EU. Edward Elgar Publishing, 2013, p. 29.
[276] De Waele H., Kuipers J. J. The European Union's Emerging International Identity: Views from the Global Arena. Martinus Nijhoff Pubishers, 2013, p. 85 – 86.
[277] Piris J. C., Woon W. Towards a Rules-Based Community: An ASEAN Legal Service. Cambridge University Press, 2015, p. 127.
[278] Kosta V., Skoutaris N., Tzevelekos V. The EU Accession to the ECHR. Hart Publishing, 2014, p. 339.
[279] De Waele H., Kuipers J. J., *supra* note 276, p. 86.

because as the case law of the CJEU shows, they are the ones who are adversely affected by inconsistent EU measures. If the domestic legal act is consistent with international obligations under the WTO law, it might be presumed that the goal of indirect effect is at least partly achieved as the legal instrument ensures fair balance between domestic and international law.

The instrument of consistent interpretation is found in a broad field of international law. Human rights treaties undoubtedly are respected within the EU in a sense that some of them are even granted with the direct effect. As well as in WTO law, human rights are ensured within the EU legal order through the consistent interpretation. Similar to what was stated in the case law of the CJEU, the European Court of Human Rights ruled that in case of ambiguous terms of the domestic law, the Court must choose the interpretation which is most in harmony with the requirements of the Convention for the protection of Human Rights and Fundamental Freedoms and which avoids any conflict of obligations[280]. As for the EU, it is highlighted in the Lisbon Treaty that the Community should seek to achieve the most favourable result by cooperating and promoting smooth and transparent international trade[281]. Hence, there is no significant difference of consistent interpretation between WTO law and human rights law as the main goal is harmonized rules in the domestic law level. In general, indirect effect is acknowledged as an instrument which is necessary in interpretation of international law within the EU legal system in order to prevent from harmful and protective legislation.

It should be noted that the concept of direct effect is accepted not only within the EU legal system – other main WTO member states also affirms it. As for example the US – in its case law[282] it is stated that the court should interpret its domestic rules according to the obligations under the international agreement in case of ambiguous domestic law. Bearing in mind the ambiguity of the provision, the US chose to interpret the provision in a way which is consistent with WTO law[283]. The tendency of granting the WTO law with at least indirect effect might be assumed as an attempt to reduce the tension after the general denial of direct effect. Partly, it is true; however, the practice shows that not only within the EU or the US but also within other WTO members legal systems indirect effect is sometimes avoided.

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[280] Case Al-Jedda v. United Kingdom [GC], no. 27021/08, § 102, ECHR 2011; [accessed on 14 April 2014]; available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612#{%22itemid%22:[%22001-105612%22]}>

[281] Hix J. P. Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts. New York University, Jean Monnet Working Paper Series, JMWP 03/13 [2013], p/ 36; [accessed on 11 March 2011]; available at <http://www.jeanmonnetprogram.org/papers/13/documents/Hix.pdf>

[282] Murray v. The charming Betsy, 6 U.S. 64, 1804.

[283] Lester S., Mercurio B., Davies A., *supra* note 39, p. 129.

As exceptionally for the EU, it might look that the concept of indirect effect should be the solution for the ongoing issues between EU and WTO; however, the practice of the CJEU shows that indirect effect is sometimes not conferred with enough weight and it causes new challenges within the EU legal system. Even though the concept of indirect effect is relatively not new, the subsequent practice of the CJEU has to be assessed from the grounds in order to identify main factors and the newest issues arising because of inadequate interpretation of WTO law.

4.2 Approach of the CJEU towards indirect effect

Without doubts, legal analysis on indirect effect is a result of the CJEU. It gives the framework, how the indirect effect should be evaluated in different circumstances. As there is a standing line of indirect effect approach in the CJEU case law, it leads to the conclusion that it is affirmed as a doctrine of indirect effect. If measures adopted within the EU were interpreted in the light of WTO Agreement, it leads to the conclusion that the WTO law made an impact in the EU legal system.

The case law of the CJEU exclusively in EU law field provided the definition of indirect effect in a sense that a national court must interpret the national law in the light of the wording and purpose of the EU act[284]. Regarding the WTO law, the definition of indirect effect does not differ, it's rather just adapted to international law field – domestic courts are bound to interpret domestic rules consistently with obligations under the WTO Agreement[285]. The CJEU in its decisions stated clearly regarding both direct and indirect effects that WTO Agreement does not have direct effect, however a particular measure is required, as far as possible, to be interpreted *"[...] in the light of the wording and purpose of the relevant provisions of the WTO Agreement [...]"*[286]. To be more precise, it is worth to notice that both *wording* and the *purpose* are closely interconnected. The purpose is defined by a precise wording, so it would be clear what goal the agreement intents to achieve. In order to clarify the purpose, the preamble[287] of the particular agreement is used as a core stone. Linguistic clarity plays an important role in the interpretation

[284] Hargreaves S., Homewood M. J. EU Law Concentrate – Law Revision and Study Guide. 3d edition. Oxford University Press, 2013, p. 34.
[285] Narlikar A., Daunton M., Stern R. M., *supra* note 57, p. 613.
[286] Case C-245/02 Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik [2004] ECR I-10989, paras. 54-55; [accessed on 20 April 2015]; available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49670&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=135185>
[287] Case C-218/01 Henkel KGaA [2004] ECR I-01725, para. 59; [accessed on22 April 2015]; available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48914&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=174822>

of the agreement and the wording of the agreement has to reflect the ordinary meaning[288]. The linguistic assessment might seem to be logical and not complex; however, the case law of the Court shows that indirect effect is also a problematic issue within the EU legal system.

The CJEU has ruled on rather many cases where the indirect effect was assessed. One of the first cases before the Court was *Interfood*[289], where the German undertaking imported apricots from Spain and made an application for customs clearance for free circulation. The authorities found an average sugar content of 9.2 % by weight and the apricots were put under tariff heading 20.06 as containing added sugar which levied custom duty at the rate of 22.4 %. Apricots were regarded as added with sugar if it exceeds 9 %. *Interfood* claimed that no sugar was added and it was only apricots' natural sugar. The German undertaking asked to rule the CJEU on the interpretation of tariff subheadings of the Common Customs Tariff. The CJEU stated that *"[...] since agreements regarding the Common Customs Tariff were reached between the Community and its partners in GATT the principles underlying those agreements may be of assistance in interpreting the rule of classification applicable to it [...]"*[290]. Hence, the CJEU stated that interpretation of the domestic law should be seen from the angle of international agreement. However, the statement of the Court might be described as not sufficiently clear, as the phrase '*may be of assistance'* implies that it is up to the Court if international law will be used as a ground in interpretation process. The CJEU concluded in *Interfood* case that apricots fall under the contested tariff as natural or added sugar were under the same category. The ruling of the CJEU did not highlight the principle of consistent interpretation but rather gave a foundation for it. It might be evaluated as a cautiousness of the Court; however it is not surprising bearing in mind that it was just the very beginning of the principle of indirect effect within the EU legal system. Because of a vague ruling of the CJEU the clarification was needed and so more cases were brought before the CJEU.

Werner[291] case might be described as more comprehensive and sometimes in the legal literature *Werner* case is called as the first case where the CJEU applied principle of indirect effect[292] regardless that *Interfood* case was a first attempt, even not explicit, to rule on indirect

[288] The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 31, para. 1; [accessed on 11 February 2015]; available at <https://treaties.un.org/doc/Publication/UNTS /Volume%201155/volume-1155-I-18232 English.pdf>
[289] Case C-92/71, *supra* note 270.
[290] Case C-92/71, *supra* note 270, para. 6.
[291] Case C-70/94 Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany [1995] ECR I-03189; [accessed on 22 April 2015]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0070&from=EN>
[292] Cottier T., *supra* note 64, p. 316.

effect of international obligations. In *Werner* case the object was licence for vacuum-induction equipment export from Germany to Libya. German authorities rejected the application of German company for licence because it was assumed that exported equipment might be adopted for military use. Even though the main question before the Court was whether Common Commercial Policy has a capacity to regulate import of products in order to ensure public security in other country, the principle of indirect effect was found in a way that the Court supported its finding with a reference to GATT rules. Here the CJEU applied the principle of indirect effect by stating that "*[...] GATT is considered to be relevant for the purpose of interpreting a Community instrument governing international trade [...]"*[293]. The Court upheld the position of limiting export as both domestic and WTO laws were in compliance. In this case the CJEU was more precise and brought clarity regarding the principle by ruling that GATT was relevant for interpretation. However, the CJEU lacked the interpretation on the scope of GATT relevance in the present case. Still, the importance of *Werner* might be seen from the point that the doctrine of indirect effect was developing. However, the ruling did not cover all discussable points of indirect effect and thus *Werner* ruling is not considered as a core stone regarding the indirect effect as in its subsequent case law the CJEU provided the Community with the broader interpretation on this principle.

Probably the biggest impact into the doctrine of indirect effect was found in case *Commission v. Germany*[294]. To start with, the Commission claimed that Germany failed to fulfil its obligations under the EC Treaty by authorizing the importation under inward processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the International Dairy Agreements concluded under GATT. This case can be regarded as a core stone in the doctrine of indirect effect because the CJEU ruled in a very comprehensive and explicit way by stating that "*When the wording of the 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 the secondary Community legislation means that such provisions must, as far as is possible, be interpreted in a manner that is consistent with those agreements"*[295]. As for WTO law, the Court has to give the preference to the international treaty and thus WTO Agreement. The

[293] Case C-70/94, *supra* note 291, para. 23.
[294] Case C-61/94, *supra* note 2.
[295] *Ibid.*, para. 52.

preference or the primacy is found in a way that the interpretation would to be consistent with international obligations[296]. It is agreed between the legal scholars that previous attempts to rely on GATT/WTO provisions seems to be very cautious[297] while *Commission v. Germany* decision might be regarded as a huge step forward for the concept of indirect effect. Indirect effect also can be described as a duty of CJEU[298] and thus international obligations cannot be avoided or breached. It leads to the conclusion that the CJEU summarized all its previous decisions regarding indirect effect and build a stable and unambiguous ground for it. The development of indirect effect shows that now in the interpretation process of the domestic rules, WTO Agreement should be taken into consideration as the indirect effect requires.

From the line of presented cases it is clear how the CJEUs' practice developed during the years – from a timid expression of indirect effect to reference to GATT/WTO provisions in interpretation process and a more comprehensive explanation of the general doctrine of indirect effect. Together with the development of the Courts' approach it might be seen how the doctrine of indirect effect was confirmed. However, even though it seems to be clear that consistency of domestic and international rule should be a priority for both EU legislative institutions and the CJEU, the subsequent EU measures seem to be adopted far from conformity with international obligations and the reasons for that might be found as of protectionist or simply political nature.

4.3 Importance of indirect effect

The CJEU established the doctrine of indirect effect and it looks that the Court made it clear – domestic measures have to be in a line with international obligations. However, as the recent practice shows, it does not always works in reality - there were several measures adopted by the EU which were inconsistent with WTO law[299]. Thus the importance of indirect effect can be evaluated from two standpoints – indirect effect might be considered as counterweight for denial of direct effect as it reduces the possibility of confrontation between EU and WTO law; on the other hand, even there is an explicit case law of the Court, it cannot prevent from the adoption of WTO inconsistent measures, which are still to be met in the EU legal order. Hence, both will discuss further in order to identify ongoing gaps regarding indirect effect within the EU legal order.

[296] Nuesch S., *supra* note 201, p. 115.
[297] Mendez M., *supra* note 196, p. 198.
[298] Quinn G., De Paor A., Blanck P. Genetic Discrimination – Transatlantic Perspectives on the Case for a European – Level Legal Response. Routledge, 2015, p. 269.
[299] Fitzmaurice M., Maljean – Dubois S., Negri S. Environmental Protection and sustainable development from Rio to Rio +20. Martinus Nijhoff Publishers, 2014, p. 369.

Indirect effect might be called as a tool which seeks to keep the fair balance between EU law and WTO rules[300] without explicitly saying so. Interpretation or adoption process seems to be more good faith expression when taking into consideration WTO provisions[301]. In the legal literature indirect effect is described as an elegant way to solve the problems when the international instrument lack direct effect[302] and it is true bearing in mind that the indirect effect is considered as developed within the EU legal system. As it was mentioned before, both the CJEU and EU legislative institutions are bound to take WTO into account when adopting or interpreting a domestic measure and it works in the major part of the cases. Indirect effect might be evaluated as a guarantee[303] to WTO provisions that all new EU measures will be consistent with its international obligation and those which are ambiguous will be interpreted in compliance with WTO law. The question arises whether this guarantee actually works for consistent EU measures. The previously mentioned cases the CJEU show that indirect effect principle was upheld in the interpretation process; however, more issues arise in the adoption of new measures where it is up to the EU legislative institutions to decide whether particular WTO provisions will be analyzed before final adoption of the EU measure.

The importance of taking WTO law into consideration before new EU measure is issued might be examined through the approach that inconsistent measure could harm traders and create trade obstacles. The tool of indirect effect might prevent from such situations if pre-legislative procedure is performed correctly. Aforementioned case concerning *Seal Products* placing on the market could serve as an example how compatibility between EU measures and WTO obligations was breached. Importation of seal products into the EU was restricted relying on the argument that seals are hunted by using cruel methods. According to the adopted Regulation 1007/2009[304], seal products were placed on the market only from Inuit communities which hunted seals by traditional methods. Canada and Norway were claiming that the new Regulation was contrary to WTO law. Before the Regulation was issued, the EU justified their actions under the moral concerns for the protection of animals. It is highlighted that the EU has a right to decide whether a particular good or service conform the moral values of the EU. However, this example is used in order to show that inconsistent EU measure could adversely affect traders.

[300] Woods L., Watson P., *supra* note 169, p. 120.
[301] Gruszczynski L., Werner W. Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation. Oxford University Press, 2011, p. 37.
[302] Vooren B., Wessel R., *supra* note 212, p. 238.
[303] De Santa Cruz Oliveira M. A. J., *supra* note 68, p. 184.
[304] Council Regulation No. 1007/2009 of 16 September 2009 on trade in seal products [2009] OJ L 286/36; [accessed on 19 April 2014]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R1007&from=EN>

This situation shows that circumstances changed – not only producers from other WTO Member States were adversely affected but also Inuit communities from Greenland. The reason for that is simple – countries which produced seal products were unable to sell it within the EU and the prices in the world market dropped down due to big amount of the seal products. Then the Inuit community was adversely affected as they had to sell their production at a lower price. Add to this, seals are not regarded as endangered species. It leads to the conclusion that the EU adopted measure which is inconsistent with WTO law and with possibly protective intention but the final result was that the worlds' market was distorted and the EU measure adversely affected its own producers. This very recent case, withdrawn by mutually agreed solution on December 2014 involves more debatable points than mere avoidance of consistent interpretation in legislation process. The foundation for the Regulation is found within Belgian and Dutch ban on seal products placing on the market. The EU, instead of challenging its Member States harmful acts chose to support it by the new Regulation regardless that it was contrary to WTO law. The importance of indirect effect is identified in this case by stating that if from the very beginning responsible legislative institutions were evaluating the situation according to WTO obligations, the damage might have been reduced. Moreover, adoption process of a new measure has a crucial role in order to avoid such situations which are clearly not in the line with WTO Agreement.

The importance of consistent interpretation within the EU should be seen as a most convenient way to make sure that EU measures will not be challenged by other WTO member states. This requires probably less effort than to solve a case before the Court and a proper procedure of consistent interpretation might be named as a tool which protects individuals from an unnecessary damage caused by the measures of protective nature. Both the CJEU and EU legislative institutions should always take WTO law into consideration and if the interpretation is contrary to the WTO law the question arises whether there is a need for internationally recognized trade rules is the members of WTO can freely adopt or rule in an inconsistent way. It is true, that within the EU legal order there still are inconsistent measures; however, the understanding that these measures harm the trade system seems to reach the attention of the EU. Rather limited and strict opinion of the CJEU regarding the direct effect of WTO law leads to the conclusion that the approach on direct effect is compensated with a broad and comprehensive concept of indirect effect of WTO law. It should be noted that the concept of indirect effect within EU legal order gets under the spotlight as it is the way to avoid the question about directly effective WTO law. It would be logical to conclude, that the strict opinion on the lack of direct

effect in the EU is not going to change; while the concept of indirect effect could be recognized as a powerful tool to get EU measures into the compliance with WTO law without a need to fulfil extremely complex conditions under *Fediol* or *Nakajima* exceptions.

To conclude, indirect effect might be considered as the tool which is capable of ensuring the conformity of EU legal acts with WTO obligations. While the CJEU denied directly effective WTO law and exceptions are applied narrowly, indirect effect seems to be an appropriate way to secure the conformity. However, more issues are arising in the process of adoption of EU legislation and thus the EU legislative institutions should analyze legal acts conformity with WTO law more. As it was revealed, consequences of inconsistent measures adversely affect not only the trading partners but consumers as well and it might became a huge problem if the legal acts of the EU will be found as inconsistent with WTO law.

CONCLUSIONS AND RECOMMENDATIONS

1. The comprehensive evaluation on the difference between the direct applicability and direct effect is presented by Advocates General and the research reveals that the notion 'direct applicability' was used in a same meaning as 'direct effect' till 1972 with few exceptions in the subsequent case law. After analysis of the case law of CJEU regarding directly effective WTO law the positive aspect is seen as both concepts are used in a proper way and the influence of each in the EU legal system is highlighted separately. However, it is noticed that in a part of legal literature scholars still do not consider the separation of two concepts as being relevant.

2. The assessment of the case law of the CJEU as well as the analysis of the legal scholars' opinions revealed that the CJEU tends to reject directly effective nature of the WTO law by relying on political reasons which are not considered as legal and sufficient ground. The fact that the CJEU relies on other than legal reasons of denial leads to the conclusion that the approach of the CJEU is an attempt to deny directly effective WTO law in all possible ways. Therefore, the researcher is of the opinion that the CJEU in its cases should revise the effect of WTO law in the light of the fact that individuals are directly connected with the effect of WTO norms in a sense that they are adversely affected by WTO-inconsistent EU law.

3. The evaluation of rather rare cases where the validity of the EU act was reviewed by relying on the grounds of exceptions revealed that the CJEU considers the exceptions as a powerful instrument. It was evaluated from the point of limited applicability of the exceptions and the attempt to use exceptions out of the trade field which was dismissed by the CJEU. The case law analysis disclosed the tendency that there are more attempts to rely on exceptions and it is evaluated as indication that exceptions are still developing. Therefore, according to the researcher, the CJEU should at least partly expand the application scope of the exceptions as there is a clear need to protect interests of individuals and thus the growing attempts to rely on the exceptions will undoubtedly encourage the legal discourse within the EU legal order.

4. After analysis of the case law of the CJEU concerning indirect effect the research provides that consistent interpretation is mostly followed in the interpretation procedure and thus the appropriate compatibility between EU legal acts and WTO law in ensured. However, the EU legislative institutions still adopt WTO-inconsistent measures which are not always justified. Therefore, EU legislative institutions together with its interior legal divisions should improve communication and exchange of information whether EU legal acts will be consistent with WTO law.

5. Accordingly, the researcher concludes that the statement of defence is confirmed – the effect of WTO law is reached by using the exceptions and indirect effect and thus it is a consequence of the unwillingness of the CJEU to expand the interpretation field of direct effect in order to comply with the developing WTO law system. The analysis of the case law revealed that each new case brought before the CJEU regarding the effect of WTO left its input. As a result, the effect of WTO slowly developed during the years and thus strengthened its position within the EU legal order.

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ANNOTATION

In this Master Thesis the influence of WTO law within the EU legal order was analyzed, particularly the direct effect of WTO provisions which is denied by the CJEU. Discussions why directly effective WTO law is denied are still ongoing and the analysis of the case law of the CJEU reveals that double standards are applied for WTO law. As the research showed, even though the direct effect of WTO provisions is denied, WTO law undoubtedly has an impact within the EU legal system. It is seen from the standpoint of two conditions when it is possible to rely on WTO rules in order to review the validity of EU legislation and through the consistent interpretation. The statement was presented that rather limited interpretation on the direct effect of WTO law encouraged to seek sufficiently sturdy effect by using the alternatives for direct effect. However, as it was revealed in this Master Thesis, WTO provisions are still avoided and infringed by EU legislative institutions as well as the CJEU.

The first chapter of this Master Thesis examines two concepts – direct effect and direct applicability. The issue of equalization of these concepts regarding WTO law is highlighted. The second chapter analyzes the grounds and reveals both legal and political reasons why directly effective WTO law is denied within the EU legal system. The third chapter confirms that under certain conditions it is possible to rely on WTO provisions in order to review the lawfulness of EU acts. The last, fourth, chapter highlights the importance of consistent EU measures adoption and interpretation with WTO law.

Keywords: direct effect of WTO law, case law of the CJEU, two-stage test, exceptions, consistent interpretation.

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ANOTACIJA

Šiame Magistro baigiamąjame darbe analizuojama PPO teisės įtaka ES teisinėje sistemoje, ypač PPO teisės tiesioginio veikimo neigimas ESTT praktikoje. Diskusijos dėl PPO nuostatų tiesioginio veikimo vis dar tebevyksta ir ESTT praktika atskleidžia, kad PPO teisės tiesioginiam veikimui yra taikomi dvigubi standartai. Tyrimas parodo, kad nors tiesioginis PPO nuostatų veikimas yra paneigtas, tai nereiškia, kad PPO teisė neturi įtakos ES teisinėje sistemoje. Tai galima įžvelgti įvertinus dvi sąlygas kuomet įmanoma remtis PPO nuostatomis norint peržiūrėti ES teisės aktų teisėtumą bei atsižvelgus į nuoseklaus aiškinimo sistemą. Teiginys, kad PPO teisės tiesioginis veikimas yra aiškinamas ribotame kontekste paskatino siekti efekto, kuris būtų pakankamai tvirtas bei pasiektas naudojantis tam tikromis tiesioginio veikimo alternatyvomis. Visgi, šiame magistro baigiamajame darbe atskleidžiama jog PPO normos vis dar yra pažeidžiamos ES teisėkūros institucijų ir ESTT.

Pirmojoje Magistro baigiamojo darbo dalyje yra nagrinėjamos dvi sąvokos – tiesioginis veikimas bei tiesioginis taikymas. Yra pabrėžiamas šių sąvokų suvienodinimas PPO teisės kontekste. Antroje dalyje yra analizuojami pagrindai, kuriais remiantis tiesioginis PPO teisės veikimas buvo paneigtas ES teisinėje sistemoje bei teisinės ir politinės to priežastys. Trečiojoje dalyje yra patvirtinama, kad esant tam tikroms sąlygoms bei remiantis PPO nuostatomis galima inicijuoti įvertinimą ar ES teisės aktas yra teisėtas. Paskutinioji, ketvirtoji dalis pabrėžia jog yra svarbu atsižvelgti į PPO teisę priimant bei aiškinant ES teisės aktus.

Raktiniai žodžiai: tiesioginis PPO teisės veikimas, ESTT pratika, dviejų etapų testas, išimtys, nuoseklus aiškinimas.

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SUMMARY

In this Master Thesis the concept of direct effect and its importance within the EU legal order was analyzed. Directly effective WTO law was denied since 1972 and even though huge changes were introduced in the process of transformation from GATT to WTO, it did not modify the opinion of the CJEU. In order to evaluate if WTO provisions might be directly effective, two-stage test established by the CJEU was applied. Even though WTO Agreement binds the Community, the CJEU decided that the purpose and the nature of the Agreement were not constructed to confer rights on citizens which they could invoke before the court. It is noticed that private parties are especially affected by EU measures which are inconsistent with WTO law and thus it shows that individuals should be able to rely on WTO provisions before the court. The second part of the test reveals that provision has to be sufficiently clear, precise and unconditional and the examination is carried on case-by-case basis. What is more, the CJEU made confusion by denying the direct effect of WTO law on the lack of reciprocity basis while it is not considered as a principle of the assessment but rather a debatable question. The discussions on directly effective WTO nature are still ongoing because direct effect was granted to other international agreements which were not considered as being significantly different from WTO. However, the CJEU affirmed that under certain conditions it is possible to review the validity of the EU acts, namely when the measure explicitly refers to a WTO provision and when it was intended to implement a WTO provisions. It was highlighted that the CJEU did not change its approach regarding the denial of directly effective WTO law but rather agreed that it is not necessary to fulfill conditions of the test if one of aforementioned conditions are found. Moreover, the effect of WTO law within the EU legal order might be seen through the assessment of the concept of indirect effect, when WTO law has to be taken into consideration in legislation procedure as well as in the interpretation of the CJEU. After the analysis was conducted, it was confirmed that while the directly effective WTO law was denied, exceptions as well as indirect effect were used as alternatives in order to achieve sufficient effect of WTO law in the EU legal system. However, in order to ensure appropriate functioning of the WTO law within the EU, firstly EU institutions should take decisions responsibly as to avoid possible infringement of individuals' rights.

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SANTRAUKA

Magistro baigiamajame darbe išanalizuotas tiesioginis PPO veikimas bei jo svarba ES teisinėje sistemoje. Nuo pat 1972 metų tiesioginis PPO normų veikimas buvo atmestas ir nors įvyko didelės permainos įsteigiant PPO, tai nepakeitė ESTT požiūrio dėl tiesioginio PPO teisės veikimo. ESTT įtvirtino dviejų pakopų testą, kuris yra skirtas įvertinti ar PPO normos yra tiesiogiai veikiančios. Nors ir pripažįstama, kad PPO susitarimas yra privalomas ES institucijoms ir valstybės narėms, ESTT nusprendė, kad PPO sutarties prigimtis neturi elementų, būtinų suteikiant teisę privatiems asmenims remtis PPO teise prieš nacionalinį teismą. Pažymėtina, kad privačios šalys yra itin paveikiamos esant prieštaravimams tarp ES teisės aktų bei PPO normų, taigi privatūs asmenys turėtų turėti teisę remtis PPO teise norint apginti savo teises. Antroji testo dalis atskleidžia, kad norma turi būti pakankamai aiški, tiksli ir besąlyginė bei nagrinėjimas turi būti atliekamas atsižvelgiant į konkrečios bylos aplinkybes. ESTT sukėlė diskusijas kuomet paneigė tiesioginį PPO nuostatų veikimą remiantis abipusiškumo stoka. Pažymima, jog abipusiškumas nėra laikomas principu, o labiau analizuojamu klausimu, tačiau ESTT jį svarstė tiesioginio veikimo apimtyje. Taip pat, diskusijos tebesitęsia, kadangi tiesiginis veikimas buvo pripažintas kitiems tarptautiniams susitarimams, kurie nėra laikomi iš esmės besiskiriantys nuo PPO susitarimo. ESTT patvirtino, kad esant tam tikroms sąlygoms yra galima ginčyti ES teisės aktus: kuomet ES teisės aktas nukreipia tiesiogiai į PPO teisę arba kai ES teisės aktas buvo priimamas su ta intencija, jog įgyvendins konkretų PPO įsipareigojimą. Pažymima, jog ESTT nepakeitė savo požiūrio dėl paneigto tiesioginio PPO nuostatų veikimo, tačiau patvirtino kad nėra būtina atitikti testo keliamus reikalavimus jei bent viena minėta sąlyga yra randama ES teisės akte. PPO teisės poveikis ES teisinėje sistemoje yra įžvelgiamas ir netiesioginio veikimo institute, kai yra atsižvelgiama į PPO nuostatas ES teisėkūros procese bei kuomet ESTT aiškina PPO nuostatas. Atlikus analizę, buvo patvirtinta, kad paneigus tiesioginį PPO normų veikimą, išimtys bei netiesioginis veikimas buvo įvertinami kaip alternatyvos siekiant užtikrinti pakankamą PPO teisės efektą ES teisinėje sistemoje. Siekiant užtikrinti tinkamą PPO normų funkcionavimą ES, pirmiausiai ES institucijos turi atsakingiau priimti sprendimus stengiantis išvengti galimų privačių šalių teisių pažeidimų.

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