Journal of International Economic Law, 2021, **24**, 724–737
DOI: https://doi.org/10.1093/jiel/jgab042
Advance Access Publication Date: 14 December 2021
Original Article

OXFORD

Three Decades of the *Nakajima* Doctrine in EU Law: Where Are We Now?

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ABSTRACT

Under the *Nakajima* doctrine, the Court of Justice of the European Union (CJEU) can review the legality of a European Union (EU) measure in the light of the World Trade Organization (WTO) agreements if the EU legislature intended to implement a particular obligation assumed in the context of those agreements. This article argues that *Nakajima* remains a valid exception to the lack of direct effect of WTO law in the EU. Section II highlights the CJEU's restrictive interpretation of *Nakajima*. Section III shows that in recent case law the CJEU continues to take a narrow interpretation of *Nakajima*, although the CJEU has been reluctant to abolish it altogether. This section also analyses the feasibility of establishing the intention to implement WTO law based on external circumstances (Section III.B) and demonstrates *Nakajima*'s significance beyond EU law (Section III.C). Section IV criticizes the CJEU's combination of *Nakajima* and the principle of interpreting EU law in consistency with international law. Section V concludes.

I. INTRODUCTION

The direct effect of international agreements has long been a bone of contention in the law of the European Union (EU). Following the decision in *Kupferberg*, the Court of Justice of the European Union (CJEU) can determine the legal effects within the EU legal order of provisions of an international agreement concluded by the EU if this has not been settled by its Contracting Parties.[1] As the World Trade Organization (WTO) community rejected the Swiss proposal to give direct effect to WTO law in national law during the Uruguay Round negotiations,[2] the CJEU had to determine if WTO law can generate direct effect in the EU legal order. The answer of the CJEU was no—neither the WTO agreements[3] nor panel/Appellate Body (AB) reports adopted by the WTO Dispute Settlement Body (DSB)[4] can have direct effect within the EU

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The author is very grateful for Durham University for making the article Open Access.

[1] ECJ, Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A* (1982) ECR-03641, para 17 (*Kupferberg*).

[2] Claus Dieter Ehlermann, 'On the Direct Effect of the WTO Agreements', in Talia Einhorn (ed.), *Spontaneous Order, Organization and the Law: Roads to a European Civil Society—Liber Amicorum Ernst-Joachim Mestmaecker* (The Hague: T.M.C. Asser Press, 2003) 414.

[3] ECJ, Case C-149/96 *Portuguese Republic v Council of the European Union* (1999) ECR I-8395, paras 40–48 (*Portuguese Textiles*).

[4] ECJ, Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)* (2005) ECR I-1465, paras 51–54 (*Van Parys*); Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) en Giorgio Fedon & Figli SpA, Fedon*

legal order.[5] Nonetheless, the CJEU recognizes two exceptions[6] to the no-direct effect of WTO law rule—the *Fediol* doctrine[7] and the *Nakajima* doctrine.[8] Established prior to the creation of the WTO in 1995, these two doctrines enable the CJEU to review the legality of an EU measure in the light of the WTO agreements if the former refers to a precise provision of the WTO agreements (*Fediol* doctrine) or the EU legislature intended to implement a particular WTO obligation (*Nakajima* doctrine).

Recent case law of the CJEU raises questions about the continuing relevance of the *Nakajima* doctrine and, in particular, three important issues. Firstly, in what circumstances can a *Nakajima* review be conducted and is the threshold established in *Portuguese Textiles* in terms of intention to implement a particular WTO obligation into EU law still valid?; secondly, should the CJEU take external circumstances to passing the EU legislation, such as its drafting history, into account in its analysis of whether the EU legislature intended to implement WTO law into EU law?; thirdly, should *Nakajima* and the consistent interpretation principle[9] be mixed or should they continue to be applied separately?

The purpose of this article is to analyze the current relevance of the *Nakajima* doctrine in EU law.[10] Section II summarizes the *Nakajima* jurisprudence and demonstrates that the CJEU has interpreted the doctrine narrowly. In Section III, the article analyzes recent cases concerning *Nakajima*. Even though the CJEU continues to favor a restrictive interpretation of *Nakajima*, it has—rightly—declined to abolish it in several recent cases (Section III.A). This means that under the *Nakajima* doctrine the CJEU can review the legality of an EU measure in the light of the WTO agreements if the EU legislature intended to implement a particular obligation assumed in the context of the WTO agreements. Section III.B argues that the CJEU should not accept circumstances external to the adoption of the EU legislation in its intention analysis, and Section III.C demonstrates the significance of *Nakajima* beyond the EU's legal order. Section IV looks at few cases in which the CJEU mixed *Nakajima* and the principle of interpreting EU law in consistency with international law and argues that this is an undesirable development. Section V concludes.

America, Inc. v. Council of the European Union and Commission of the European Communities (2008) ECR I-06513, paras 117–127 (*FIAMM and Fedon*).

[5] *Portuguese Textiles* and *Van Parys* led to an avalanche of academic commentary. For literature critical on the CJEU in these cases, see Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council', 3 Journal of International Economic Law 441 (2000); Naboth van den Broek, 'Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order', 4 Journal of International Economic Law 411 (2001); Cf Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections', 5 Journal of International Economic Law 91 (2002); Allan Rosas, 'Case C-149/96, *Portugal v. Council*. Judgment of the Full Court of 23 November 1999', 37 Common Market Law Review 797 (2000). For a good summary of the debate see Panos Koutrakos, *EU International Relations Law*, 2nd ed. (Oregon: Bloomsbury Publishing, 2015), 295–301; Henri de Waele, *Legal Dynamics of EU External Relations Dissecting a Layered Global Player*, 2nd ed. (Berlin: Springer, 2017), 88–90.

[6] Some scholars questioned whether it is appropriate to consider *Nakajima* and *Fediol* as exceptions or indirect effect. See Geert A. Zonnekeyn, 'The ECJ's *Petrotub* Judgment: Towards a Revival of the "*Nakajima* doctrine"?' 30(3) Legal Issues of Economic Integration 249, 263 (2003). The present article, however, does not aim to reopen this debate and will refer to *Nakajima* and *Fediol* as exceptions. They are a form of indirect effect as well. This will also correspond with various decisions of the CJEU where it was stated that the two doctrines are exceptions. See most recently ECJ, Case T-228/17 *Zhejiang Jndia Pipeline Industry v Commission* (2019) ECLI:EU:T:2019:619, para 102 (*Zhejiang Jndia*).

[7] ECJ, Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* (1989) ECR 1781, paras 19–22 (*Fediol*).

[8] ECJ, Case C-69/89 *Nakajima All Precision Co. Ltd v. Council* (1991) ECR I-2069, para 31 (*Nakajima*).

[9] According to this principle, EU secondary law provisions must be interpreted, as far as possible, in the light of international agreements binding on the EU. (ECJ, Case C-61/94 *Commission v Germany* (1996) ECR I-03989, para 52) Within the WTO context, the CJEU in *Hermès* applied for first time that principle to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). ECJ, Case C-53/96 *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* (1998) ECR I-03603, para 28 (*Hermès*).

[10] This paper will focus only on the cases that relate to WTO law. For a commentary on the decision of the CJEU not to extend the application of *Fediol* and *Nakajima* to the Aarhus Convention, see Szilárd Gáspár-Szilágyi, 'The Relationship between EU Law and International Agreements. Restricting the *Fediol* and *Nakajima* Exceptions in Vereniging Milieudefensie', 52(4) Common Market Law Review 1059 (2015).

II. A BRIEF HISTORY OF THE *NAKAJIMA* DOCTRINE

While *Nakajima* came into existence in 1991, the CJEU in *Portuguese Textiles* modified the criterion for applying the doctrine. Following *Portuguese Textiles*, an EU measure can be reviewed for its compliance with WTO law if the EU intended to implement a particular obligation assumed in the context of the WTO.[11] This differs from the original formulation of the doctrine, as the applicant has to demonstrate that the EU intended to implement a *particular* WTO obligation, not merely that the EU intended to comply with WTO law which has been the prior standard.[12] The case law post-*Portuguese Textiles* demonstrates not only a rather confusing application of *Nakajima* but also the CJEU has interpreted the doctrine narrowly.

Much ink was spilled prior to *Portuguese Textiles* by academics and practitioners on whether the CJEU would accord direct effect to WTO law. Alongside this question, the CJEU also had to consider whether the *Nakajima* doctrine had any application after the advent of the WTO and the case of *Italian Republic v Council*[13] presented a good opportunity for this question to be addressed. Following the accession of Austria, Finland, and Sweden to the EU, the latter was required under the General Agreement on Tariffs and Trade 1947 (GATT) Article XXIV(6) and Understanding paragraph 5 *et seq.*[14] to conduct negotiations with several WTO members. These negotiations concerned 'compensatory adjustments required as a result of the increase in certain customs duty rates ensuing from the application of the Common Customs Tariff by the three new Member States'.[15] After the negotiations, the EU concluded agreements with Australia and Thailand, which were approved by Council Decision 95/592,[16] and later adopted Regulation 1522/96[17] following those agreements. Italy brought judicial review action before the CJEU[18] for the annulment of Articles 3, 4, and 9 of Regulation 1522/96 for their alleged violation of GATT Article XXIV(6) and Understanding paragraph 5 *et seq*. According to the CJEU, this case warranted a *Nakajima* review as the EU intended to implement a particular obligation within the WTO context. This was because, by adopting Regulation 1522/96, the EU intended to implement the results of the agreements concluded with Australia and Thailand.[19] Therefore, the CJEU proceeded with a review of Regulation 1522/96, Articles 3, 4, and 9 in terms of their compatibility with GATT Article XXIV(6) and Understanding paragraph 5 *et seq*.[20]

A second case that has been viewed as a successful application of *Nakajima* is *Kloosterboer Rotterdam*.[21] The applicant challenged Commission Regulation 1484/95[22] for its compatibility with its parent Council Regulation 3290/94.[23] Advocate General (AG) Ruiz-Jarabo Colomer found the *Nakajima* doctrine relevant to this case.[24] In his view, the main reason behind the

[11] *Portuguese Textiles*, above n 3, para 49.
[12] *Nakajima*, above n 8, para 31.
[13] ECJ, Case C-352/96 *Italian Republic v Council* (1998) ECR I-6937.
[14] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (hereinafter Understanding).
[15] *Italian Republic v Council*, above n 13, para 2.
[16] Council Decision of 22 December 1995 concerning the conclusion of the results of negotiations with certain third countries under GATT Article XXIV:6 and other related matters, OJ 1995 L334/38.
[17] Council Regulation (EC) No 1522/96 of 24 July 1996 opening and providing for the administration of certain tariff quotas for imports of rice and broken rice, OJ 1996 L 190/1.
[18] Pursuant to Article 263 of Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47 (TFEU), the CJEU can review the legality of EU legal act.
[19] *Italian Republic v Council*, above n 13, para 20.
[20] Ibid, para 21.
[21] Case C–317/99 *Kloosterboer Rotterdam* (2001) ECR I–9863.
[22] Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC, OJ 1995 L 145/47.
[23] Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, OJ 1994 L 349/105.
[24] *Kloosterboer Rotterdam*, above n 21, Opinion of Ruiz-Jarabo Colomer, paras 28–38.

intention to amend Council Regulation 3290/94 was to implement, *inter alia*, provisions of the WTO Agricultural Agreement[25] into EU law. As Article 5(1)(b) of the Agricultural Agreement provides the establishment of the relevant import prices on cost, insurance, and freight prices basis—a rule that was subsequently enshrined in the parent Council Regulation 3290/94—the daughter Commission Regulation 1484/95 was not allowed to derogate from it. As such, the Commission had to adopt implementing rules in compliance with Council Regulation 3290/94, which was not the case here. AG Ruiz-Jarabo Colomer also found support of this interpretation in *EC—Measures affecting the importation of certain poultry products*,[26] which dealt with the same matter as in *Kloosterboer Rotterdam*. The CJEU agreed with the Opinion of the AG in this case.[27] While the CJEU did not cite the *Nakajima* doctrine, this case can be viewed as an example of a successful *Nakajima* review. As the Council Regulation was adopted to implement, *inter alia*, Article 5(1)(b) of the Agriculture Agreement, the CJEU found that the daughter Commission Regulation was in violation of the parent Council Regulation.[28] However, as is shown below, in most other cases the CJEU has declined to conduct a *Nakajima* review.

Particularly controversial is a set of cases in which the CJEU ruled that the implementation of DSB reports in EU legislations[29] is not comparable to circumstances where the EU intended to implement the WTO Anti-Dumping Agreement (ADA).[30] In *Chiquita*,[31] the applicant requested compensation from the European Union after having incurred financial losses due to the decision of the EU to maintain in force Regulation 2362/98[32] regarding imports of bananas.[33] The applicant tried to invoke *Nakajima* and persuade the Court that by adopting Commission Regulation 1637/98[34] the EU 'intended to implement a particular obligation assumed in the WTO context'.[35] One of the main purposes of Regulation 1637/98 was to enable the European Commission (Commission) to establish through several legislations—one of which was Regulation 2362/98—a legal regime compatible with WTO law after having lost the litigation in *Bananas III*. As such, the applicant in *Chiquita* did not seek the direct effect of WTO law but rather argued that the EU legislation had to be reviewed in terms of its compatibility with WTO law as the EU intended to implement and comply with the DSB ruling against it. However, the (now) General Court (GC) declined to review Regulation 2362/98 for its conformity with the EU's WTO law obligations.

To reach this conclusion, the GC compared Regulation 2362/98 with the EU anti-dumping legislation in relation to which *Nakajima* review had been conducted in previous case law. The GC found that '[t]he circumstances of the adoption of Regulation No 2362/98 cannot be compared with those of the adoption of the anti-dumping basic regulations to which the *Nakajima*

[25] Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

[26] WTO Appellate Body Report, *European Communities—Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 13 July 1998.

[27] *Kloosterboer Rotterdam*, above n 21, paras 23–36.

[28] Francis Snyder, 'The Gatekeepers: The European Courts and WTO Law', 40 Common Market Law Review 313, 344 (2003); Piet Eeckhout, *EU External Relations Law,* 2nd ed. (Oxford: Oxford University Press, 2011) 362.

[29] Under EU law, the two treaties are primary law, whereas legally binding acts, such as Regulations, Directives, etc., are secondary law.

[30] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 OJ 1994 L 336/103.

[31] ECJ, T-19/01 *Chiquita Brands and Others v Commission* (2005) ECR II-00315 (*Chiquita*).

[32] Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, OJ 1998 L 293/32 (no longer in force).

[33] In WTO Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591 (*Bananas III*) was found that certain provisions of Regulation 2362/98 were incompatible with WTO law.

[34] Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas, OJ 1998 L 210/28 (no longer in force).

[35] *Chiquita*, above n 31, para 116.

case-law applied'.[36] To that end, Regulation 2362/98 'do[es] not reflect a series of new and detailed rules arising from the WTO Agreements',[37] nor had the EU aimed to implement specific substantive WTO treaty obligations; instead, the EU's obligation to comply with the DSB decision was of a general character and aimed to bring EU law gradually into conformity with WTO law.[38] Subsequently, in *Van Parys*, the CJEU followed this approach and ruled that the results of DSB decisions implemented in EU legislation are not comparable to the implementation of the WTO ADA. The EU continued to maintain a WTO non-compliant regime and the EU legislature did not intend to implement the DSB ruling within the *Nakajima* sense.[39]

The CJEU decision not to conduct a *Nakajima* review in *Chiquita* and *Van Parys* sparked a number of negative reactions in the academic community. After the AB decided against the EU in *Bananas III* in 1997, the Council of the EU decided to amend the [then] EU basic anti-dumping legislation and bring EU law in line with WTO law.[40] As noted above, Council Regulation 1637/98 was the parent Regulation through which the Council instructed the Commission to adopt the implementing rules required to achieve this aim, via several daughter Regulations, which included Commission Regulation 2362/98. In order to support the proposition that the Commission Regulation was in breach of parent Regulation 1637/98 and consequently in violation of WTO law, Chiquita argued that the desire of the Council to implement and comply with WTO law was manifested in recital 2 of the parent Regulation. According to this recital:

> Whereas the Community's international *commitments under the WTO and to the other signatories of the Fourth ACP-EC Convention should be met*, whilst achieving at the same time the purposes of the common organisation of the market in bananas.[41]

As the EU later adopted several regulations to further implement Regulation 1637/98, it is possible to read recital 2 of this Regulation so that it mandated the Commission through Regulation 2362/98 to further implement the EU's WTO obligations into EU law. Additionally, as Professor Eeckhout argues, it is not difficult to identify the 'particular obligations' that the Council of the EU intended to meet—the text is clear that these were the obligations arising from the DSB decision in *Bananas III*, which was adverse to the EU.[42] Similar reasoning also follows from a Panel report stating that 'in order [for the EU] to live up to its WTO obligations … it had adopted an entirely new banana import regime, as set out in Regulations 1637 and 2362.'[43]

The decision in *Chiquita* can be contrasted with *Italian Republic v Council* discussed above, where the CJEU conducted a *Nakajima* review. Read together, the preamble of Regulation 1522/96 at stake in *Italian Republic v Council* indicates that this Regulation was adopted on the basis of Council Decision 95/592 and with the intention to implement WTO law into EU law. In particular, the preamble of Regulation 1522/96 stipulates that:

[36] Ibid, para 168 (my emphasis).
[37] Ibid, para 169 (my emphasis).
[38] Ibid, paras 167–170. See Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Netherlands: Kluwer Law International, 2008), at 318; see also Piet Eeckhout, above n 28, at 363, who argues that the EU in *Chiquita* intended to comply with WTO law.
[39] *Van Parys*, above n 4, paras 42–53.
[40] Piet Eeckhout, above n 5, at 109.
[41] My emphasis.
[42] Piet Eeckhout, above n 28, at 364.
[43] WTO Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, paragraph 4.56 (emphasis added); see Geert A. Zonnekeyn, 'The Latest on Indirect Effect of WTO Law in the EC Legal Order – The *Nakajima* Case Law Misjudged?' 4 Journal of International Economic Law 597, 604 (2001).

> Whereas, under the negotiations conducted pursuant to GATT Article XXIV (6) in the wake of the accession of Austria, Finland and Sweden to the European Union, it was agreed to open from 1 January 1996 annual import quotas for 63 000 tonnes of semi-milled and wholly milled rice covered by CN code 1006 30 at zero duty and for 20 000 tonnes of husked rice covered by CN code 1006 20 at a fixed duty of ECU 88 per tonne.

The CJEU considered that the EU's intention to implement WTO law was evident and that the above sentence resembled the preamble of Council Decision 95/592,[44] which states that the EU entered into negotiations under GATT Article XXIV:6 with Australia, Chile, Japan, New Zealand, and Thailand, and that the negotiations have resulted in the conclusion of agreements with those WTO members. While Regulation 1637/98 at stake in *Chiquita* did not name which DSB ruling sought to be implemented, it did state that the EU obligations under WTO law should be met. How, otherwise, could the EU's 'international commitments under the WTO' be met, if not by complying with WTO law? Recital 2 is not ambiguous or less concrete regarding the EU's intention than the preamble of Regulation 1522/96 at stake in *Italian Republic v Council*. As such, although there were few differences between the recitals of Regulation 1522/96 and Regulation 1637/98 with respect to the EU's intention to comply with WTO law, the text of the latter was insufficient to trigger the application of *Nakajima*.[45] Furthermore, unlike in *Hormones*,[46] where the EU made a political declaration that it would comply with WTO law but did not until later bring EU law in compliance, the EU in *Bananas* intended to comply with WTO law and took legal measures to amend EU law.[47]

III. CURRENT STATUS OF THE *NAKAJIMA* DOCTRINE

This Section looks closely at several recent decisions concerning *Nakajima* and argues that the CJEU is reluctant to abolish the doctrine (Section III.A). This section also argues that the CJEU should not accept circumstances external to the passing of the EU legislation in the intention analysis (Section III.B) and demonstrates the significance of *Nakajima* beyond an EU regional context (Section III.C).

A. *Nakajima*—from *Rusal Armenal* to *Zhejiang Jndia*

In *Rusal Armenal*,[48] the CJEU found that the EU did not intend to implement a particular WTO obligation created by Article 2 of the WTO Anti-Dumping Agreement into Article 2(7) of basic regulation 1225/2009.[49] According to recital 3 of basic regulation 1225/2009, the WTO ADA 'should be brought into Community legislation as far as possible'. In the view of the CJEU, however, it is not sufficient that the preamble of the EU legislation supports a general inference that it was adopted by the EU to take into account its WTO law obligations in order for the EU measure to be reviewed vis-à-vis the WTO agreements; rather, a review would be possible if it could be deduced from the contested EU law provision that it intends to implement a particular

[44] As stated above, Council Decision 95/592 aimed to approve the agreements the EU concluded with Australia and Thailand after Austria, Finland, and Sweden joined the EU.

[45] See further Delphine De Mey and Pablo Ibáñez Colomo, 'Recent Developments on the Invocability of WTO Law in the EC: A Wave of Mutilation', 11 European Foreign Affairs Review 63, 77–9 (2006).

[46] WTO Panel Report, *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998 (*Hormones*).

[47] Piet Eeckhout, above n 5, at 109.

[48] ECJ, Case C-21/14 P *European Commission v Rusal Armenal ZAO* (2015) ECLI:EU:C:2015:49 (*Rusal Armenal*).

[49] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L 343/51 (no longer valid). The current legal framework is enshrined in Article 2.7 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ 2016 L 176/21, which does not substantially differ from Article 2.7 of the previous legal act.

obligation stemming from the WTO agreements.[50] The significance of this decision according to some commentators is that it puts an end to the possibility to establish intention to implement WTO law into EU law based on the preamble of EU legislation.[51] However, the below analysis shows that *Rusal Armenal* should not be understood in such a way.

Firstly, recital 3 of basic regulation 1225/2009 states that the ADA should be brought into EU law 'as far as possible'.[52] This recital does not require the ADA to be transposed word by word into EU law.[53] Even though some provisions of the ADA have been transposed into the basic anti-dumping regulation, the former lacks direct effect in EU law. The proposition that the basic anti-dumping regulation does not have to transpose the ADA into EU law word by word was also made in *Petrotub*, where the CJEU ruled that the ADA should be transposed 'as far as possible'.[54] Therefore, the preamble of basic regulation 1225/2009 did not prevent the Court in *Rusal Armenal* from carrying out a closer examination as to whether the legislature intended to create a specific approach for the EU in Art. 2(7).

Secondly, the CJEU in *Rusal Armenal* focuses on whether the EU legislature in Article 2(7) of Regulation 1225/2009[55] aimed to create a specific framework within the EU legal order or to implement Article 2 of the WTO ADA into EU law. The CJEU affirmed the former. Examining the relationship between Article 2(7) of Regulation 1225/2009 with the WTO ADA is beyond the scope of this paper. However, the CJEU did not put an end to the possibility of finding intention to implement WTO law from the preamble of EU legislation, if the substantive provision does not aim to create a specific legal regime on the EU legal order. Therefore, *Rusal Armenal* is best understood as a decision where the CJEU concluded that the EU legislature did not intend to implement Article 2 of WTO ADA in Article 2(7) of Regulation 1225/2009 rather than an attempt to raise the threshold for invoking *Nakajima*. In any case, raising the *Nakajima* standard of review by requiring applicants to demonstrate the legislature's intention based only on substantive law, but not the preamble, is undesirable. In some circumstances, the legislature's intention might be abundantly clear from the recitals of the EU legislation and so it will be unnecessary to establish intention based on substantive law as well.

There are several cases post-*Rusal Armenal* that show the CJEU is unwilling to change its understanding of *Nakajima*. In *C & J Clark International Ltd*, the Court ruled that:

> … recital 5 of Regulation No 384/96 states that the language of the WTO Anti-Dumping Agreement should be brought into EU legislation 'as far as possible', that expression must be understood as meaning that, even if the EU legislature intended to take into account the rules of that agreement … it did not, however, show the *intention of transposing* each of those rules in that regulation [citing *Rusal Armenal*, para 52].[56]

[50] *Rusal Armenal*, above n 48, paras 46, 50–54. A similar position was taken by AG Kokott who stated in her Opinion that the EU legal act should be examined in its context, albeit intention to implement WTO law cannot be deduced from a general inference in the preamble of the EU legal act. See *Rusal Armenal*, above n 48, Opinion of AG Kokott, para 42.

[51] See Scott Winnard, 'The End of the Line? *C & J Clark International Ltd* and the *Nakajima* Exception', 44 Legal Issues of Economic Integration 197, 199–203 (2017). See also Eric Pickett and Michael Lux, 'The Status and Effect of WTO Law Before EU Courts', 11 Global Trade and Customs Law 408 (2016), at 418–9.

[52] According to basic regulation 2016/1036, under recital 3, the ADA 'should be reflected in Union legislation to the best extent possible'. It is submitted that this new formulation does not lead to any changes.

[53] As stated by Winnard, transposing an obligation is more onerous obligation than implementing it as the former requires 'precise rule replication'. Scott Winnard, above n 51, at 203.

[54] ECJ, Case C-76/00 P, *Petrotub and Republica v. Council and Commission* (2003) ECR I-79, paras 54–63 (*Petrotub*).

[55] Article 2(7)(a) lays down the methodology for determining normal value for imports originating from non-market economy (NME) countries and footnote 6 lists countries that the EU considers NMEs. Under Article 2(7)(b), normal value in anti-dumping investigation concerning imports from a NME country could be determined in accordance with paragraphs 1–6 basic regulation 1225/2009, which is the method for determining dumping in market economies, if only certain conditions are met by the undertaking(s) subject to the investigation. Article 2(7)(c) then lays down the conditions an undertaking must comply with to be considered that it operates under market economy conditions.

[56] ECJ, Joined Cases C-659/13 and C-34/14 *C & J Clark International Ltd v. The Commissioners for Her Majesty's Revenue & Customs* (2016) ECLI:EU:C:2016:74, para 90 (emphasis added) (*C & J Clark International Ltd*).

As stated above, intention to transpose a WTO measure into EU law is a more onerous obligation than intention to implement that WTO measure. Nonetheless, the above statement should not be understood as an attempt to harden *Nakajima* standard by requiring applicants to demonstrate that the EU intended to transpose WTO law. Instead, in this paragraph, the CJEU supports the proposition in *Rusal Armenal* that the EU legislature intended to introduce a specific legal regime for the EU in Article 2(7) basic regulation 1225/2009.[57] As a result, there was no intention by the CJEU to further restrict the doctrine by making *Nakajima* review possible only if claimants were able to demonstrate intention by the legislature to transpose WTO law into EU law. Claimants can still request the CJEU to activate its competence to review the legality of an EU measure in the light of the WTO agreements if the EU intended to implement a particular WTO obligation, which, according to the CJEU, is not the case in Article 2(7) of Basic Regulation 1225/2009. Furthermore, the CJEU in *C & J Clark International Ltd* did not directly abolish the doctrine or discuss how *Nakajima* with a potentially higher threshold would differ from the *Fediol* exception. Such discussion had been expected because, as Winnard argues, it is difficult to imagine what else, other than a direct reference to WTO law, could amount to intention to transpose.[58]

The CJEU, however, continues to advocate a strict interpretation of the *Nakajima* doctrine. In *Zhejiang Jndia*, the applicant submitted that, according to the AB report in *EC—Fasteners (China)*,[59] the derogation permitting WTO members to calculate normal value of Chinese imports under point 15 of Part I[60] of the Protocol on the Accession of China to the WTO (the Protocol)[61] expired on 11 December 2016. The applicant further argued that the European Commission had already acknowledged that the derogation in point 15(d) of the Protocol expired on 11 December 2016 based on certain press articles and working documents of the Commission, as well as statements made by its services that EU law had to be amended in order to bring the EU legal regime into conformity with WTO law.[62] Thus, the applicant attempted to rely on point 15 of the Protocol to challenge the legality of the contested regulation as it applied the method enshrined in Article 2(7) of Regulation 1225/2009. In effect, according to the applicant, the Commission should have calculated normal value for products imported from China under Article 2(1)–(6) of Regulation 1225/2009.[63]

According to the CJEU, this was not enough to satisfy the *Nakajima* threshold and to review the legality of the contested regulation vis-à-vis point 15 of the Protocol.[64] Recognizing China as a market economy has been a subject of fierce debate.[65] Even if the Commission released statements that may indicate its endorsement of the proposition that the derogation expired in December 2016, it does not show that the EU intended to implement WTO law and calculate normal value of products originating from China based on Article 2(1)–(6) of Regulation

[57] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L 343/51 (no longer valid).

[58] Scott Winnard, above n 51, at 204.

[59] WTO Appellate Body Report, *EC—Fasteners (China) Appellate Body Report, European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, para 289.

[60] Under point 15(a)(ii) of the Protocol, the importing WTO member can use a methodology not based on a strict comparison with domestic prices or costs in China when determining price comparability under Article VI of the GATT 1994 and the ADA.

[61] Accession of the People's Republic of China, Decision of 10 November 2001 (Doc. No. WT/L/432, 23 November 2001).

[62] *Zhejiang Jndia*, above n 6, para 89.

[63] Ibid, paras 84–92. As noted above, Article 2(1)–(6) relate to the determination of dumping for imports from market economy countries. By contrast, Article 2(7) lays down the legal framework for the determination of dumping from non-market economy countries.

[64] *Zhejiang Jndia*, above n 6, paras 105–106.

[65] See on this topic, e.g., Ming Du and Qingjiang Kong, 'Explaining the Limits of the WTO in Shaping the Rule of Law in China', 23 Journal of International Economic Law 885 (2020); Ming Du, 'China's State Capitalism and World Trade Law', 63 (2) International and Comparative Law Quarterly 409 (2014); Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment', 5 The Chinese Journal of Comparative Law 345 (2017).

1225/2009. Such decision would have significant consequences and satisfying *Nakajima*'s standard requires more than demonstrating that the Protocol had to be approved by the EU in the form of a decision. The reasoning in *Zhejiang Jndia* is also in line with the Court's narrow interpretation of *Nakajima* and demonstrates that the old formulation of *Nakajima* is still valid and the doctrine can be applied if the EU intended to implement a particular obligation stemming from the WTO agreements.[66] Importantly, this case also confirms the approach of earlier cases that the EU legislature intended to adopt an approach specific to the EU in Article 2(7) of basic regulation 1225/2009.[67]

Last but not least, the paper deserves a few words about the implications of the CJEU decision in *Commission v Hungary (Higher education)*.[68] In this case, the CJEU found that the General Agreement on Trade in Services[69] forms part of EU law and that the European Commission can start infringement proceedings against Hungary for non-compliance with that Agreement.[70] As the EU can incur international liability for a Member State's failure to comply with WTO law, the CJEU confirms that the European Commission has the authority to launch infringement proceedings to try to prevent such failure. Giving this green light to the Commission is likely to increase the number of cases where WTO law is used in litigation in future. Such a development is not only likely to increase the relevance of WTO law in the EU and its application by the CJEU but the increased litigation is also bound to affect the jurisprudence surrounding indirect effect of WTO law in the EU. In *Commission v Hungary (Higher education)*, the CJEU also stated that its rulings concerning infringement of WTO law by an EU Member State (MS) could not constitute a shield to avoid compliance with DSB rulings, nor create any binding effect on other WTO members.[71] As such, the CJEU is mindful not to interfere with the WTO legal order while potentially conferring an additional avenue on the Commission to police compliance with WTO law within the EU legal order.

B. Further implications of *Rusal Armenal*: external circumstances

Recent case law touches on whether external circumstances to passing an EU legislation, such as the drafting history of a particular provision, can be used to establish an intention on the part of the EU legislature to implement WTO law into EU law. It appears from *Rusal Armenal* that the answer is no. Nevertheless, it might be possible to rely on external circumstances to demonstrate that the EU did not intend to implement a WTO provision into EU legislation. This conclusion flows from *Rusal Armenal*, where the Advocate General[72] and the CJEU[73] found that, based on the drafting history of Article 2(7) Regulation 1225/2009, the EU legislature did not intend to implement Article 2 ADA into EU law.

The main difficulty in establishing—based on external circumstances—that the EU intended to implement WTO law is formulating workable criteria, which most likely would be a reason for the CJEU to set a high threshold. A high threshold would deter potential claimants from relying on external circumstances in litigation. Moreover, given the reluctance on the part of the CJEU to take a broad interpretation of *Nakajima*, it is hard to believe that the CJEU would

[66] Ibid, para 100.
[67] Ibid, paras 102–103. As noted in the beginning of this Section, Article 2(7) of Regulation 2016/1036 is not substantially different from Article 2(7) of Regulation 1225/2009. See above n 52.
[68] ECJ, Case C–66/18 *Commission v Hungary* (2020) ECLI:EU:C:2020:792, para 93.
[69] General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
[70] *Commission v Hungary (Higher education)*, above n 68, para 93. Under Article 258 of the TFEU, the European Commission may start infringement proceedings against a Member State if the former considers that the latter has failed to fulfill an EU treaty obligation.
[71] Ibid, para 91.
[72] *Rusal Armenal*, above n 48, Opinion of AG Kokott, para 51.
[73] *Rusal Armenal*, above n 48, para 53.

readily accept that the EU legislature intended to implement a particular WTO obligation, if this intention had never materialized in the text of the EU legislation itself.

There are two institutions in the EU that normally act as co-legislators: the European Parliament and the Council of the EU. If only one of the two institutions intended to implement WTO law, how can the CJEU decide which institution represents the more authoritative position for the purposes of accepting external circumstances? Similarly, if, for instance, the European Parliament had the necessary intention but the Council was silent, should the latter's silence be understood as agreement with the position of the other institution?[74] The situation could become even more problematic if one of the two co-legislatures is clear on its intention to implement a WTO law commitment while the other came to the opposite view but discussed the issue less thoroughly.

Nor should the CJEU take into consideration in its intention analysis external circumstances that the EU did not have the intention to implement WTO law because many, if not all, of the problems identified above would be present too. For example, it is possible to imagine a scenario whereby one of the EU co-legislatures had the necessary intention but the other remained silent, or where the drafting history is ambiguous, making it very difficult to establish one way or the other the EU's intention based on external circumstances.

In sum, the CJEU should not be prevented from finding that the EU intended to implement a particular WTO obligation even if the legislature's intention was not explicitly clear in the drafting history of that legislation. This is, naturally, subject to the condition that there is evidence of intention to implement WTO law in the EU legal act, such as to satisfy the *Nakajima* threshold.

C. Significance of *Nakajima* beyond the EU

The CJEU has shown receptiveness to international law in its jurisprudence and, as de Búrca points out, the judicial organ of the EU has been viewed to contribute through its case law to the EU's image of an actor committed to multilateralism and observance of public international law.[75] The cases in which the CJEU has upheld the validity of *Nakajima* are an important development beyond the EU regional context and have significance for the WTO. Although the principle of indirect effect has been given a significant attention in the EU, it is not alien to WTO jurisprudence—not long after the inception of the Organization, a panel stated that indirect effect is 'rooted in the language of the WTO'[76] and not anything 'novel or radical'.[77] Despite the CJEU's strict interpretation of indirect effect throughout the years, the fact that a major trade bloc like the EU maintains and applies that principle has important significance for the WTO. The cases where the CJEU applied indirect effect of WTO law help strengthen the relationship between the WTO and the EU and is evidence that the two systems can coexist. This further strengthens the authority of WTO rules, helps their integration into EU law,[78] and contributes to a rules-based trading order[79] as the WTO rules are indirectly applied in the EU. Demonstrating the ongoing significance of WTO rules and their application in the legal order

[74] Eric Pickett et al., above n 51, at 418.

[75] Gráinne de Búrca, 'Internalization of International Law by the CJEU and the US Supreme Court', 13 International Journal of Constitutional Law 987 (2015). See also on this topic Petros C. Mavroidis & Carlo M. Cantore, 'Another One BITes the Dust: The Distance between Luxembourg and the World is Growing after Achmea', European University Institute, Robert Schuman Centre for Advanced Studies (Global Governance Programme Working Paper No. RSCAS 2018/47, 2018); Carlo Maria Cantore, 'Lookin' out my backdoor – The CJEU and the selective acceptance of international tribunals', 67 Estudios de Deusto: revista de la Universidad de Deusto 41 (2019).

[76] WTO Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted on 27 January 2000, para 7.79.

[77] Ibid.

[78] Jan-Peter Hix, 'Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts, Jean Monnet Working Paper 03/13, (2013), at 16.

[79] Mario Mendez, *The Legal Effects of EU Agreements* (Oxford: Oxford University Press, 2013), at 238.

of a major trade bloc is particularly welcome in times when states are increasingly adopting protectionist policies and the WTO AB is non-operational.[80] Hopefully, the decision of the EU to maintain indirect effect of WTO law may serve as an example to other states that have not yet determined the extent of indirect effect in their legal order, so that they might consider doing so in future.

IV. *NAKAJIMA*, CONSISTENT INTERPRETATION, OR BOTH?

The duty of EU Member States to interpret, wherever possible, national law in conformity with EU law can be traced back to the 1980s,[81] and, as stated at the beginning of this article, the first application of the consistent interpretation principle within the WTO context was in *Hermès*, where the CJEU interpreted an EU secondary law provision vis-à-vis the TRIPS Agreement. Although both consistent interpretation and *Nakajima* can be considered exceptions, they are different in scope. As Eeckhout argues, *Nakajima* is different from the consistent interpretation principle as it is 'much more sensitive, and even subversive, from the perspective of non-recognition of the direct effect of WTO law' and may be relied on if there is a conflict between EU law and WTO law.[82] By contrast, an applicant cannot rely on the consistent interpretation principle if it is impossible to interpret an EU provision in conformity with WTO law.[83]

Despite the differences between consistent interpretation and *Nakajima*, the CJEU in at least two cases blended the two exceptions.[84] In *Reliance Industries*, the Court first noted that there was intention to implement Article 11.3 ADA and Article 21.3 Agreement on Subsidies and Countervailing Measures into, respectively, Article 11(2) basic anti-dumping[85] and Article 18(1) basic anti-subsidy[86] regulations. For this part, the Court relied on *Nakajima* to determine the legislature's intention.[87] The Court then found that the EU law provisions at stake must be interpreted as far as possible in light of their corresponding WTO law norms.[88] Similarly, in *EuroChem*, the Court acknowledged that the EU legislature intended to implement Article 2.2.1.1 ADA into Article 2(5) Regulation 1225/2009 by relying on *Nakajima*[89] and then examined if the latter legal provision could be interpreted in light of the former.[90] No reasons behind the decision to mix *Nakajima* and the consistent interpretation principle in the above cases were given by the Court. For instance, it would have been possible for the Court in *Reliance Industries* to consider whether the provisions of the basic regulations could be interpreted vis-à-vis WTO law without even mentioning *Nakajima* or establishing the legislature's intention.

It is very unlikely that blending *Nakajima* and consistent interpretation will make it easier for claimants to rely on the indirect effect of WTO law. Although the CJEU has applied the

[80] For analysis of the AB crisis and proposed solutions, see Henry Gao, 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement', 24 Journal of International Economic Law 534 (2021).

[81] ECJ, Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* (1984) ECR 1891, para 26.

[82] Piet Eeckhout, above n 5, at 105.

[83] In EU law, this is also known as interpretation *contra legem*: an EU provision cannot be interpreted vis-à-vis a provision of an international agreement in a way that clearly goes against the wording of the former provision. See ECJ, Case C-168/95 *Arcaro* (1996) ECR 4705.

[84] Mario Mendez, above n 79, at 233–8; Szilárd Gáspár-Szilágyi, above n 10, at 1061.

[85] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56.

[86] Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community, OJ 1997 L 288.

[87] ECJ, Case T-45/06 *Reliance Industries Ltd. v. Council and Commission* (2008), II-2399, paras 87–90.

[88] Ibid, para 91.

[89] ECJ, Case T-84/07 *EuroChem MCC v Council* (2013) ECLI:EU:T:2013:64, para 77.

[90] Ibid, para 78. That said, the Court decided that interpretation of EU law in light of the ADA was impossible in this case. See Ibid, paras 82–83.

consistent interpretation principle less narrowly than *Nakajima*,[91] there have been further limits. In addition to the general limits to the consistent interpretation principle,[92] the CJEU has added two further limitations when interpreting EU law vis-à-vis WTO law.

First, the principle of consistent interpretation does not require the courts to interpret the EU treaties in light of international agreements binding on the EU, including the WTO agreements.[93] However, unless the judiciary goes beyond interpreting EU law in conformity with WTO law and fails to respect the limitations to the consistent interpretation principle, there is no reason to differentiate between EU treaty and secondary law.

Some WTO rules are more detailed and sophisticated than some EU treaty law provisions, and the scope of some treaty provisions is still not clear.[94] In this respect, WTO law may serve as an aid for courts when interpreting EU treaty law.[95] The principle of consistent interpretation can also help courts to deviate indirectly from the rule prohibiting them from taking decisions based on international law norms.[96] It also means that the judicial organs could achieve the best of both worlds, in that they would have the opportunity to interpret the EU treaties in conformity with WTO law but not infringe the above principle. While the CJEU is under no such restriction according to EU treaty law, such restrictions apply to the domestic courts of some EU MS under their national constitutional arrangements.

The second limitation is that the EU Courts are not obliged to interpret EU law in conformity with DSB rulings. Even though DSB rulings lack direct effect within the EU legal order, the CJEU neither rejected nor recognized that EU law should be interpreted, wherever possible, in light of DSB rulings.[97]

One of the principal reasons behind the hesitation to extend the consistent interpretation principle has been that EU treaty law is unclear on whether decisions of (quasi-) judicial dispute settlement bodies can fall under the scope of Article 216(2) TFEU.[98] Under this article, '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

Pursuant to *Sevince*, decisions that are 'directly connected with the Agreement to which they give effect … form an integral part … of the [Union] legal system,'[99] and one of the main tasks of the WTO panels and Appellate Body is to interpret the WTO agreements.[100] While in various decisions the panels and the AB have made references to other sources of law, such as customary

[91] Mario Mendez, above n 79, at 234–48.

[92] As summarized by Professor Schütze, the principle requires courts to interpret the law 'as far as possible' and cannot go beyond that; there must be ambiguous legal provision; courts of EU MS can interpret the law 'in so far as … given discretion to do so under national law' (*Von Colson*, above n 81, para 28); the consistent interpretation principle 'is limited by the general principles of law which form part of [EU] law and in particular the principles of legal certainty and non-retroactivity' (Case 80/86 *Kolpinghuis* [1987] ECR 3969, para 13 [emphasis added]). See further Robert Schütze, *European Union Law*, 3rd ed. (Oxford: Oxford University Press, 2021), 178–84.

[93] ECJ, T-201/04 *Microsoft Corp. v Commission* (2007) ECR II-3601, para 798.

[94] See Étienne Bassot, 'Unlocking the potential of the EU Treaties: An article-by-article analysis of the scope for action', European Parliamentary Research Service PE 630.353—January 2019.

[95] Thomas Cottier and Krista Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law', 1 Journal of International Economic Law 83, 90 (1998).

[96] Ibid, See also Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', 60 International & Comparative Law Quarterly 57 (2011).

[97] See Giacomo Gattinara, 'WTO Law in Luxembourg: Inconsistencies and Perspectives', 18 Italian Yearbook of International Law 118, 130 (2008).

[98] Jan-Peter Hix, above n 78, at 97; Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Boston/Leiden: Martinus Nijhoff: BRILL, Studies in EU External Relations, 2011) vol. 5, at 250.

[99] ECJ, Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie* (1990) ECR 3461, para 9 (emphasis added). See also the CJEU in *Deutsche Shell* stating that 'measures emanating from bodies which have been established by an international agreement of that type, and which have been entrusted with responsibility for its implementation, are directly linked to the agreement which they implement, they form part of the Community legal order'. ECJ, Case C-188/91 *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* (1993) ECR I-363, para 17. See also Giacomo Gattinara, above n 97, at 128.

[100] See Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body', 21 European Journal of International Law 605, 606–8 (2010).

international law, this does not weaken their responsibility to interpret the WTO agreements. As such, panel/AB reports, once adopted by the DSB, are 'directly connected' with the WTO agreements and meet the condition laid down in *Sevince*.[101] Moreover, the Court in *Biret* stated that 'there is an inescapable and direct link between the [DSB] decision' and the WTO agreements[102] and few years later in *FIAMM and Fedon* opined that 'a DSB decision … cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations'.[103] Therefore, there is a basis to extend the consistent interpretation principle because there is a direct link between DSB reports and WTO treaty law and because the Court's case law supports this proposition.

In addition, Article 216(2) TFEU states that international '*[a]greements concluded by the Union are binding* upon the institutions of the Union and on its Member States'.[104] This paragraph can be read to mean that the international agreement concerned and the decisions by the different bodies it created are binding on the EU and its MS. Such logic is subject to the *Sevince* principle that these decisions are 'directly connected', yet the WTO panels and the AB cannot 'add to or diminish the rights and obligations provided in the covered agreements'[105] and they lack law-making powers.

It is true that panel and AB reports adopted by the DSB are binding only upon the parties to the dispute. Nonetheless, the interpretations of WTO law by the panels and the AB in these decisions are valid not just for the parties to the dispute but also for all other WTO Members.[106] The EU Courts can interpret EU law in light of the DSB ruling by taking into consideration only that part of the decision that clarified the WTO legal provision and not the outcome and in this way preserve the principle stipulating that DSB rulings are binding only to the parties of the dispute. In any case, the fact that the EU Courts are not obliged to interpret EU law vis-à-vis DSB rulings in which the EU was the applicant or the respondent is a significant limitation and, as argued above, should be reconsidered by the CJEU in future cases.

Fortunately, there is evidence to suggest that the CJEU continues to acknowledge that *Nakajima* and the consistent interpretation principle are different in scope and that they operate under different conditions.[107] Yet the fact that the CJEU has applied them together as a mix in some cases may increase the willingness to do this again in future litigation. If the Court sticks to this approach, there is the real possibility of blurring the differences between the two exceptions or introducing more uncertainty in this area of law. Given the Court's tendency to interpret *Nakajima* narrowly and the obfuscating application over the years, such a scenario cannot be excluded. It is also very unlikely that the mix between *Nakajima* and consistent interpretation will bring more favorable conditions for claimants to rely on indirect effect.

Finally, apart from the mix between consistent interpretation and *Nakajima*, there are some cases in which the CJEU has been involved in what Bronckers calls 'muted dialogue' with the WTO panels and the AB.[108] For instance, in *FTS International*, a Commission Regulation

[101] See also Antonello Tancredi in Enzo Cannizzaro et al., above n 98, 249.
[102] ECJ, T-174/00 P *Biret International SA v Council of the European Union* (2002) ECR I-00017, para 67 (emphasis added).
[103] *FIAMM and Fedon*, above n 4, para 128 (emphasis added).
[104] My emphasis.
[105] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (hereinafter DSU), Art. 3(2) and Art. 19(2).
[106] See Giacomo Gattinara, above n 97, 127, and Giacomo Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order?' in Enzo Cannizzaro et al., above n 98, at 279–81. But see also Harlan G. Cohen, 'Culture Clash: The Sociology of WTO Precedent', in Frese Amalie and Julius Schumann (eds), *Precedent as Rules and Practice: Introduction* (C.H.Beck/Hart/Nomos, 2021).
[107] See, e.g., Case C–511/13 P *Philips Lighting Poland SA Philips Lighting BV v Council* (2015). ECLI:EU:C:2015:206, Opinion of AG Bot, para 132; *Zhejiang Jndia*, above n 6, paras 109–117.
[108] The dialogue is 'muted' where the CJEU has not referred to WTO law but it is possible to observe that the Court's decision was influenced by it. See Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond, 11 Journal of International Economic Law 885 (2008), at 889.

was found to be incompatible with its parent Regulation.[109] While the Court's interpretation remained in line with the AB report in *EC—Chicken Cuts*,[110] the CJEU did not cite this report in its decision.[111] A second example is the European Free Trade Association (EFTA) Court decision in *Surveillance Authority*.[112] While the EFTA Court did not make references to WTO law, parts of the decision may be seen to have been inspired by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[113] *Surveillance Authority* was subsequently cited by the CJEU, including in a hugely important decision.[114] Therefore, the SPS Agreement had an impact on the CJEU jurisprudence even without always getting cited in the case law. This 'muted dialogue' has been seen as a 'more pragmatic approach'[115] that does not tie the hands of the CJEU.[116] By the same token, it is difficult to keep track of the cases that involve 'muted dialogue' when no WTO agreement or DSB ruling has been mentioned by the Court.[117] One can also add that 'muted dialogue' is a weak form of indirect effect because an applicant cannot plead 'muted dialogue' before a court and expect EU law to be influenced by a WTO agreement or DSB ruling. Nevertheless, 'muted dialogue' is a tool that allows the CJEU to strengthen the influence of WTO law in its jurisprudence and in doing so render EU law further in line with WTO law.

V. CONCLUSION

In 2005, Professor Bronckers wrote that the *Nakajima* case law was at a crossroads: firstly, to maintain the status quo and continue the narrow understanding of the doctrine; secondly, to eliminate the exception; or thirdly, to broaden its scope.[118] This article shows that the CJEU opted to maintain the status quo.

Not long after the inception of the WTO, the CJEU in the landmark *Portuguese Textiles* altered the scope of application of *Nakajima* and, as Section II has shown, the CJEU favored a restrictive interpretation of the doctrine.

Having examined the recent cases concerning *Nakajima*, this article demonstrated that the CJEU continues to favor a restrictive interpretation. To this end, the CJEU can still review the legality of an EU measure in light of the WTO agreements if a claimant can show that the EU legislation intended to implement a particular WTO obligation into EU law. It remains possible to find intention to implement WTO law from the preamble of EU legal act but not if the legislature intended to create a specific legal regime for the EU. In addition, the CJEU should not take into consideration circumstances external to the adoption of the EU legislation in the intention analysis.

Finally, applying *Nakajima* and the consistent interpretation principle together is a worrying development. Not only could this bring about more uncertainty, but it is also highly unlikely that claimants will benefit from more favorable conditions in which they can rely on indirect effect of WTO law.

[109] ECJ, Case C-310/06 *F.T.S. International BV v Belastingdienst—Douane West* (2007) ECR I-6749, para 35.
[110] WTO Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts (EC—Chicken Cuts)*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, DSR 2005:XIX, 9157, adopted 27 September 2005.
[111] Marco Bronckers, above n 108, at 889–90. See also Mario Mendez, above n 79, at 230.
[112] EFTA Court, Case E-3/00 *EFTA Surveillance Authority v Norway* (2000–2001) EFTA Ct Rep 75.
[113] WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 1867 U.N.T.S. 493.
[114] ECJ, Case C-192/01 *Commission v. Denmark* (2003) ECR I-9693. See further Marco Bronckers, above n 108, at 891.
[115] Giacomo Gattinara, above n 97, at 134.
[116] Marco Bronckers, above n 108, at 890.
[117] Mario Mendez, above n 79, at 230.
[118] Marco Bronckers, 'The Effect of the WTO in European Court Litigation', 40 Texas International Law Journal 443, 446–7 (2005).