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THE CJEU AS THE GATEKEEPER OF INTERNATIONAL LAW: THE CASES OF WTO LAW AND THE AARHUS CONVENTION

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Abstract As the gatekeeper of international law, the CJEU determines the effects not only of international agreements but also decisions of compliance review bodies. This article analyses the Court's engagement with rulings of the WTO dispute settlement bodies (DSB) and findings of the Aarhus Convention Compliance Committee (ACCC). These case studies demonstrate the varied toolkit used by the CJEU to forge relationships with external regimes, while maintaining the EU's autonomy. The CJEU considers DSB reports and ACCC findings selectively and implicitly, demonstrating a qualified openness to international law and a reluctance to engage in a meaningful dialogue with international quasi-judicial bodies.

Keywords: Union, international law, CJEU, WTO, Aarhus Convention, direct effect, consistent interpretation, autonomy.

I. INTRODUCTION

In light of global interdependence, the Court of Justice of the EU (CJEU)[1] is often asked to determine the EU's position in the world, including by examining the conformity of EU and Member State action with international law. The CJEU acts as the 'gatekeeper' of international law, determining the effects of international agreements in the EU legal order.[2] In this role, the CJEU engages with various external actors, including third country applicants, international courts, and compliance review bodies established under international agreements, thus increasingly emerging as a transnational

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[1] 'CJEU' refers both to the Court of Justice (ECJ) and the General Court (GC) in accordance with Article 19(1) of the Treaty on European Union (TEU). In certain instances, separate references will be made to the individual Courts. When it is not necessary to distinguish between the two courts, references will be made to the 'CJEU'.

[2] M Cremona and A Thies, 'Introduction' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 2; F Snyder, 'The Gatekeepers: The European Courts and WTO Law' (2003) 40 CMLRev 313.

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actor. The ways in which the CJEU formulates relations with actors outside the EU affects its legitimacy and credibility as well as that of the EU more generally.

This article explores the CJEU's relationship with a particular set of external actors, which influence its reasoning in different ways. In particular, the article explores the interaction of the CJEU with decisions of quasi-judicial bodies[3] charged with interpreting and reviewing compliance with international agreements to which the EU is a party. It focuses on rulings by the World Trade Organization (WTO) dispute settlement bodies (DSB) and findings and recommendations of the Aarhus Convention Compliance Committee (ACCC) which oversees the implementation of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention). The analysis assesses the nature of the Court's interaction with these external bodies, focusing on how it engages with their decisions and not how they engage with CJEU case law.

The article focuses on the WTO and Aarhus regimes as case studies of international legal regimes to which the EU is a party alongside the Member States, and which have been variably integrated into the EU legal order through the CJEU's gates. The differences between the two regimes, including the legal nature of DSB rulings and ACCC findings, enable a broader mapping of the different mechanisms used by the CJEU in engaging with international law and a comprehensive assessment of the CJEU's reasoning in qualifying its effects.

The subject matters and memberships of these two regimes are inherently different. On the one hand, the WTO is a truly multilateral global regime that embodies free trade obligations, particularly relevant in inter-State relations. The multilateral complexity and political nature of the WTO regime create a reluctance to recognise its effects within the EU legal order in an attempt to maintain the allocation of powers within the EU and preserve political discretion in handling the EU's external relations. On the other hand, the Aarhus Convention is a regional, largely European project, which establishes procedural rights that seek to alter the relationship between individuals and civil society with public authorities in the environmental field. The sensitive constitutional aspects raised by the Aarhus Convention, particularly as regards standing before the CJEU, also qualify the extent of Aarhus obligations for the EU institutions.

In discerning the influence of international decisions on the CJEU, these two examples present distinct interest and analytical opportunities, given that despite their stark differences the CJEU's approach exhibits similar attitudes as to their effects. The WTO and Aarhus regimes are often identified as

[3] A term similarly used and drawn from C Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Organisations' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press 2013).

problematic and 'exceptional' cases as the CJEU has been reluctant to recognise their legal effects within the EU legal order.[4] While in many respects, the CJEU's gatekeeping approach can be characterised as restrictive, this article demonstrates ways in which these regimes, and particularly their interpretation by the relevant compliance review bodies, indirectly influence the CJEU.

The article is structured as follows. Section II presents the role of the CJEU in determining the effects of international agreements in the EU legal order. Using the case studies of WTO law and the Aarhus Convention, the analysis explains key judicial mechanisms through which the CJEU determines the influence that these agreements can have in the EU legal order, rejecting their direct effect, while enabling their qualified effects through consistent interpretation. Against this background, Section III examines the CJEU's interaction with, and the varying degrees of influence of, DSB rulings and ACCC findings. This examination demonstrates a gradual progression in the CJEU's engagement with international decisions, the divergent ways of determining their effects for the Member States, compared to their effects at the EU level, and argues in favour of a more explicit dialogue with external oversight bodies. Section IV draws together the key gatekeeping strategies, identified in relation to the two case studies, through which the EU forges relations with actors within and outside the EU and argues for a more explicit and systematic engagement with decisions of external oversight bodies. Section V concludes.

II. EFFECTS OF INTERNATIONAL AGREEMENTS IN THE EU LEGAL ORDER AND THE ROLE OF THE CJEU

The EU has long been committed to international law, with international agreements concluded by the EU considered an integral part of the EU legal order.[5] Since the Lisbon Treaty, the EU's external action values include a commitment to 'the strict observance and the development of international law'[6] and 'respect for the principles of the United Nations Charter and

[4] In relation to WTO agreements, among others: M Mendez, 'The Application of International Law by the Court of Justice of the European Union' in CA Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019); M Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?' (2007) 44 CMLRev 601; and in relation to the Aarhus Convention: E Chiti, 'EU Administrative Law in an International Perspective' in C Harlow, P Leino and Gd Cananea (eds), *Research Handbook of EU Administrative Law* (Edward Elgar 2017); L Ankersmit, 'An Incoherent Approach Towards Aarhus and CETA: The Commission and External Oversight Mechanisms' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019); H Schoukens, 'Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?' in C Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019).

[5] Case 181/73 *R & V Haegeman v Belgian State* EU:C:1974:41; Case C-162/96 *Racke v Hauptzollamt Mainz* EU:C:1998:293, para 45.

[6] Art 3(5) TEU.

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international law.'[7] Additionally, Article 216(2) TFEU specifies that agreements concluded by the EU with third countries or international organisations are binding on the institutions and the Member States. As the final arbiter on the interpretation and validity of EU law, the CJEU has confirmed its jurisdiction to determine the internal effects of international agreements when this has not been settled by the contracting parties to the agreement.[8] The CJEU thus acts as a gatekeeper of the effects of international law and determines the relations of the EU with external legal systems, insisting that this should be done in a manner that maintains the autonomy of EU law.

In this context, the EU's autonomy emerges as a means of controlling the influence of external legal norms in order to ensure the unity and uniformity of the EU legal order.[9] The CJEU's insistence on autonomy from international law is evident, *inter alia* in its opinions on prospective international agreements that would involve an external oversight mechanism,[10] and in the famous *Kadi* litigation.[11] The EU's autonomy serves different purposes, including maintaining the allocation of powers by preserving the discretion of political institutions as being primarily responsible for shaping the EU's external relations[12] as well as preserving the CJEU's own jurisdiction to interpret, and review the legality of, EU law.[13] This article demonstrates that the CJEU's engagement with external bodies' rulings in the context of WTO law and the Aarhus Convention can also be partly explained from an autonomy perspective, particularly relating to the self-referential character of the EU legal order.[14] Some degree of autonomy is necessary as it can arguably enhance the CJEU's legitimacy in delivering reason-based decisions rooted in EU law.[15] However, too much autonomy and isolation from international law, particularly when the CJEU does not openly take external

[7] Art 21 TEU.

[8] Case C-104/81 *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA* EU:C:1982:362, para 17; Case C-149/96 *Portugal v Council* EU:C:1999:574, para 34.

[9] R Barents, *The Autonomy of Community Law* (Kluwer Law International 2013); M-L Öberg, 'Autonomy of the EU Legal Order: A Concept in Need of Revision?' (2020) 26 EPL 705.

[10] Among others, Opinion 2/13 *on the Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:2014:2454; Opinion 1/09 *on the Creation of a Unified Patent Litigation System* EU:C:2011:123; and, albeit with some more openness to investor–State dispute settlement under specific conditions, Opinion 1/17 *on the Comprehensive Economic and Trade Agreement* EU:C:2019:341.

[11] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* EU:C:2008:461.

[12] On the EU's external autonomy see, among others, JWV Rossem, 'The Autonomy of EU Law: More is Less?' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence, the EU Legal Order under the Influence of International Organizations* (Springer 2013); J Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018).

[13] C Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' in M Cremona, A Thies and RA Wessel (eds), *The EU and International Dispute Settlement* (Hart Publishing 2016).

[14] On the self-referential aspect, see Barents (n 9) 262–3.

[15] Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' (n 13).

decisions into account, can harm the EU's credibility and go against the rule of law.[16]

The CJEU's approach initially presented great openness to international law with quasi-automatic recognition of international agreements,[17] but gradually it has become more restricted.[18] While not necessarily becoming 'international law unfriendly',[19] its approach is more nuanced and restricted towards international law.[20] Within this context, WTO law and the Aarhus Convention provide representative examples of this perceived reticence, while demonstrating the more implicit ways of engaging with international law norms and accommodating their indirect and controlled influence. The CJEU thus emerges not as an isolated actor but as an actor that carefully controls the degree of influence of external norms and oversight bodies, in ways that determine and are determined by the CJEU's relations with other EU institutions and with the Member States.

In the context of WTO law and the Aarhus Convention, the effects of international law and the CJEU's role as gatekeeper are primarily determined through two mechanisms. On the one hand, the CJEU may review the legality of EU or Member State action on the basis of international law in cases where the latter is deemed to have direct effect (Section A). This amounts to a full admission of international law which itself becomes a legality benchmark. On the other hand, EU law, and its effects for the Member States, could be interpreted in line with international law through consistent interpretation (Section B). This amounts to a more qualified incorporation of international law and has been more widely used.

A. Direct Effect: Legality on the Basis of International Agreements

The CJEU has consistently rejected direct effect of WTO agreements, both for challenging the legality of EU acts,[21] and in cases involving national law in

[16] On the CJEU's reluctance to openly engage with external decisions, see Eckes, 'The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations' (n 3); RA Wessel and S Blockmans, 'The Legal Status and Influence of Decisions of International Organisations and Other Bodies in the European Union' in P Eeckhout and M López Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016); C Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar 2018) Ch 2.

[17] P Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' in P Eeckhout and M López Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016) 333–43.

[18] For an overview, see Mendez, 'The Application of International Law by the Court of Justice of the European Union' (n 4).

[19] C Eckes, 'International Law as Law of the EU: The Role of the ECJ' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2011).

[20] G de Búrca, 'International Law before the Courts: The EU and the US Compared' (2015) 55 VaJIntlL 685.

[21] In relation to GATT 1947 Cases 21–4/72 *International Fruit Company* EU:C:1972:115; Case C-280/93 *Germany v Council* EU:C:1994:367. In relation to WTO Agreements, *Portugal v Council* (n 8).

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areas in which the EU has legislated.[22] The reluctance of the CJEU relates to the nature and structure of the WTO system, which is based on negotiations and reciprocity. Recognising direct effect of WTO agreements would lead to a 'disuniform application of the WTO rules' and weaken the EU's negotiating position, particularly towards other major trading partners that do not grant such effects to WTO rules in their national legal orders.[23] This is particularly in light of the nature of the WTO dispute settlement system, which provides for negotiations in order to agree on mutually acceptable compensation.[24] Granting direct effect means that the signatory party would no longer be able to take into account a subsequent lack of reciprocity in the implementation of the agreement by other parties. This can be contentious in relation to certain types of international regimes,[25] particularly in the multilateral context of the WTO.[26] The systems and structure of the WTO, which largely rely on reciprocity among the contracting parties, justify the CJEU's approach, which rightly avoids acting as a 'judicial enforcer' of WTO law in a rigid manner that would not allow for political flexibility.[27]

From a constitutional perspective, the extent to which it is appropriate to grant direct effect depends on the nature of the rights at issue. In relation to WTO law, there are objections as to whether applicants affected by alleged violations of WTO law and DSB decisions should have the right to challenge the legality of EU acts and/or seek redress in the form of damages. Both the WTO DSB[28] and the CJEU[29] have rejected the existence of a general right to trade with third countries, which further explains and justifies the CJEU's reluctance to grant direct effect to WTO provisions. When such provisions, however, are specifically implemented by EU acts or have been the subject of a decision of a DSB decision, as discussed below in Section III.A, the CJEU's reluctance becomes less justified.

[22] For example, Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia* EU:C:1995:435.

[23] *Portugal v Council* (n 8) paras 40 and 45.

[24] ibid para 38.

[25] M Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?: An EU View on Bilateral Trade Agreements' (2015) 18 JIEL 655.

[26] The CJEU's restrictive approach towards WTO agreements might seem inconsistent with its more open approach to recognising direct effect of different kinds of trade agreements, which have overwhelmingly been found capable of having direct effect. However, in relation to bilateral trade agreements, the EU's political control is greater, and the norms contained in such agreements usually have similar counterparts in EU law which the Court feels more comfortable extending externally. On this, see M Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) Ch 3; Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' (n 17) 196.

[27] Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' (n 17) 375–8; S Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart Publishing 2001).

[28] Panel Report, *United States – Taxes on Automobiles*, WT/DS31/R, adopted 11 October 1994, paras 3.27, 3.115. See PJ Kuijper and M Bronckers, 'WTO Law in the European Court of Justice' (2005) 42 CMLRev 1313, 1332.

[29] Case C-55/75 *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof* EU:C:1976:8, para 14; Case C-122/95 *Germany v Council* EU:C:1998:94, paras 54–66.

In this context, the Court constructed a narrow exception, akin to direct effect and referred to as the 'implementation principle',[30] according to which the CJEU can review the legality of EU measures on the basis of WTO law in two possible scenarios. First, the *Fediol* situation can arise 'when the EU act at issue refers explicitly to specific provisions of WTO agreements'.[31] Second, the *Nakajima* situation concerns instances when the 'EU intends to implement a particular obligation assumed in the context of WTO agreements'.[32] This dual exception is seen by the Court as the 'result of the EU legislature's own intention to limit its discretion in the application of the WTO rules',[33] to which the CJEU gives effect. In principle, this exception could compensate for the CJEU's restrictive approach to the direct effect of WTO law. In practice, however, this exception is narrowly applied, mostly in the anti-dumping field,[34] and the Court often considers that the situations before it do not fall within the exception.[35] The Court has also refused to apply the exception to DSB decisions, or outside the WTO field.[36]

Contrary to the rejection of direct effect of WTO law as a whole, the CJEU has only rejected the direct effect of specific provisions of the Aarhus Convention, while presumably leaving the door open for other provisions. First, the CJEU has rejected the direct effect of access to justice provisions. Notably, the CJEU has rejected the direct effect of Article 9(3) of the Convention, which creates a right of access to justice for members of the public to challenge acts or omissions contravening environmental law. In *Slovak Brown Bear I*, the Court found that Article 9(3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals.[37] Its implementation depends on subsequent national measures given that only members of the public, who meet the criteria laid down in national law, would have access to justice.[38] On the basis of similar reasoning, the Court rejected the direct effect of Article 9(4), stipulating that review procedures should not be prohibitively expensive, and Article 9(5) which requires each

[30] Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' (n 17) 357–65.

[31] Case C-70/87 *Fediol v Commission* EU:C:1989:254, paras 19–22; Joined Cases C-120/06 P and C-121/06 *FIAMM* EU:C:2008:476, para 112; Case C-93/02 *Biret International v Council* EU:C:2003:517, para 53; Case C-377/02 *Léon Van Parys* EU:C:2005:121, para 4; Case C-21/14 *Commission v Rusal Armenal* EU:C:2015:494, paras 40–1.

[32] Case C-69/89 *Nakajima v Council* EU:C:1991:186, paras 29–32; *FIAMM* (n 31) para 112; *Biret* (n 31) para 53; *Van Parys* (n 31) para 4; and *Rusal Armenal* (n 31) paras 40–1.

[33] *Rusal Armenal* (n 31) paras 40–1.

[34] E Pickett and M Lux, 'The Status and Effect of WTO Law Before EU Courts' (2016) 11 GT&CJ 408. An example of a rare annulment of EU law on the basis of WTO law is Case C-76/00 *Petrotub and Republica v Council* EU:C:2003:4.

[35] For example, Case C-351/04 *Ikea Wholesale v Commissioners of Customs & Excise* EU:C:2007:547. More recently, Case C-592/17 *Skatteministeriet v Baby Dan* EU:C:2018:913.

[36] For a rare example of its application beyond WTO agreements, as regards customary international law, *Racke* (n 5).

[37] Case C-240/09 *Lesoochranárske zoskupenie VLK ('Slovak Brown Bear I')* EU:C:2011:125, para 45.

[38] ibid.

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party to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to justice.[39]

Secondly, the CJEU has rejected the direct effect of Article 4(4)(c), which establishes one of the exceptions for access to information. This was attributed partly to its imprecise and conditional nature. It was also attributed to the reference to 'national legislation' in Article 4(1) of the Convention. In the eyes of the Court, this rendered the Convention's framework for access to information 'manifestly designed with the national legal orders in mind' and not regional economic integration organisations such as the EU.[40] The CJEU emphasised that the EU exhibits 'specific legal features' that should be taken into account when interpreting the requirements of the Convention.[41]

The CJEU effectively distinguished the EU as a party to the Aarhus Convention in a way that was not necessarily intended at the international level. This amounts to a superficial and formalistic understanding of international obligations. It is often the case that international agreements will refer to 'States' and 'national' legislation without purposely limiting the obligations to actual States as opposed to regional economic international organisations.[42] It is not common practice to require a specific indication that international obligations apply equally to the EU, something which would complicate its participation in international organisations further.[43] The EU's specific characteristics justified a deviation from the strict application of international rules, reasoning denoting the CJEU's broader insistence on maintaining the autonomy of EU law.

The inherently different nature of WTO agreements and the Aarhus Convention may partly explain the CJEU's different approach in relation to the extent to which it has rejected their direct effect. At the same time, the different nature of the rights they grant, while potentially justifying the approach of the CJEU in relation to WTO law, demonstrates that there are significant arguments in favour of granting direct effect to the Aarhus Convention. By its nature, the Aarhus Convention is more likely to create individual rights that warrant protection through judicial review. As Advocate General (AG) Jääskinen put it:

> [u]nlike, for example, the WTO Agreement, the Aarhus Convention is not therefore based on reciprocal and mutually advantageous arrangements…. It is

[39] Case C-543/14 *Ordre des barreaux francophones et germanophone v Council* EU:C:2016:605, paras 55–6.

[40] Case C-612/13 *ClientEarth v Commission* EU:C:2015:486, para 40.

[41] ibid para 42.

[42] K Rath, 'The EU Aarhus Regulation and EU Administrative Acts Based on the Aarhus Regulation: the Withdrawal of the CJEU from the Aarhus Convention' in C Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019).

[43] L Ankersmit and B Pirker, 'Review of EU Legislation under EU International Agreements Revisited: Aarhus Receives Another Blow' (*European Law Blog*, 17 November 2015) <http://europeanlawblog.eu/?p=2999>.

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> not a technical example of an agreement …, but in fact the expression of a human right to the environment in its most solemn form.[44]

Regrettably, the lack of direct effect of provisions of the Aarhus Convention is not similarly compensated through the WTO implementation principle, which the Court of Justice (ECJ) has specifically refused to apply in the Aarhus context. The issue arose in two cases concerning the scope of the administrative review procedure under Article 10 of the Aarhus Regulation,[45] which the EU adopted as a way of complying with Article 9(3) of the Aarhus Convention. This procedure enables environmental NGOs to ask for internal review of EU administrative acts or omissions violating environmental law.[46] Given the lack of direct effect of Article 9(3), the cases focused on whether limiting this mechanism to administrative acts of *individual* scope[47] could be assessed on the basis of the Aarhus Convention through the implementation principle. The ECJ, reversing the decisions of the General Court (GC), limited the implementation principle developed in the WTO context considerably, holding that 'those exceptions were justified solely by the particularities of the agreements that led to their adoption'.[48] Unlike *Fediol*, the ECJ considered that Article 10 of the Aarhus Regulation does not explicitly refer to Article 9(3), which itself does not confer rights on individuals to invoke international provisions.[49]

This approach is problematic on the basis of the *Fediol* judgment, given that the Aarhus Regulation makes multiple references to the Aarhus Convention.[50] Requiring a specific reference to the international agreement in the provision in question is overly restrictive.[51] Also, the Aarhus Regulation was found not to implement a 'specific' obligation in accordance with *Nakajima*. Contrary to the anti-dumping regime at issue in *Nakajima*, which is 'extremely dense in its design and application', Article 9(3) of the Aarhus Convention grants a broad margin of discretion to parties to determine the conditions of administrative and judicial procedures.[52] Although WTO law is indeed very different from environmental issues, 'the sharp dichotomy between both policy spheres does

[44] Joined Cases C-401/12 to C-403/12 *Vereniging Milieudefensie* EU:C:2014:310, Opinion of AG Jääskinen, paras 88–9.

[45] Joined Cases C-401/12 to C-403/12 *Vereniging Milieudefensie* EU:C:2015:4; Joined Cases C-404/12 and C-405/12 *Stichting Natuur en Milieu* EU:C:2015:5.

[46] Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community Institutions and bodies [2006] OJ L264/13, art 10.

[47] ibid art 2(1)(g).

[48] *Vereniging Milieudefensie* (n 45) para 57; *Stichting Natuur en Milieu* (n 45) para 49.

[49] *Vereniging Milieudefensie* (n 45) para 58; *Stichting Natuur en Milieu* (n 45) para 50.

[50] Regulation 1367/2006 (n 46) Preamble and art 1.

[51] S Gaspar-Szilagyi, 'The Relationship between EU Law and International Agreements: Restricting the Application of the Fediol and Nakajima Exceptions in Vereiging Milieudefensie' (2015) 52 CMLRev 1059; Schoukens (n 4).

[52] *Vereniging Milieudefensie* (n 45) para 59; *Stichting Natuur en Milieu* (n 45) para 52.

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not appear wholly justified' in limiting the effects of different international agreements.[53]

Notably, in these cases the ECJ rejected the implementation principle on the basis of internal considerations, relating to the division of competences between the EU and the Member States, rather than international norms. According to the ECJ, the Convention's obligations on access to justice fall primarily within the scope of national law.[54] As further demonstrated below in Section II.B, the Court thus shifts the responsibility of honouring international obligations to the Member States[55] and to the EU political organs, implicitly urging them to amend the Aarhus Regulation if they wish to expand this administrative mechanism. The relationship of the CJEU with external regimes is therefore determined by its internal relationships with the Member States and the EU political institutions. As discussed below, in the Aarhus context, despite the rejection of the implementation principle, the CJEU employed different mechanisms in giving effect to Article 9(3) in relation to the Member States through a combination of the principle of consistent interpretation and the EU constitutional law principles of supremacy and effectiveness.

B. Consistent Interpretation: A More Subtle and Flexible Engagement with International Agreements

The extent to which the CJEU is closed to these particular regimes is not only determined by direct effect but also by a more 'subtle' way of integrating international law[56] through consistent interpretation of EU law in the light of international law. Consistent interpretation is inherently limited to 'so far as possible'[57] and provided that the provision of EU law allows for more than one interpretation, in line with the international agreement, without amounting to a *contra legem* interpretation.[58] Nonetheless, it provides a promising and less contentious mechanism, qualifying the CJEU's initial rejection of agreements that lack direct effect, while maintaining flexibility both for the political institutions and for the CJEU.

In relation to WTO agreements, the CJEU has often employed consistent interpretation. This was initially recognised in relation to the Agreement on

[53] Schoukens (n 4) 96.

[54] *Vereniging Milieudefensie* (n 45) para 60; *Stichting Natuur en Milieu* (n 45) para 52.

[55] I Hadjiyianni, 'Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention and Its Incorporation in the EU Legal Order' (2020) 26 EPL 889.

[56] M Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11 JIEL 885, 897.

[57] See, for example, Case C-61/94 *Commission v Germany* EU:C:1996:313, para 52; Case C-53/96 *Hermès v FHT* EU:C:1998:292, para 28.

[58] See Case T-12/17 *Mellifera v Commission* EU:T:2018:616, para 87. This was confirmed on appeal in Case C-784/18 *Mellifera v Commission* EU:C:2020:630. See also Case C-465/16 *Council v Growth Energy and Renewable Fuels Association* EU:C:2018:794, Opinion of AG Mengozzi, para 198.

Trade-Related Aspects of Intellectual Property (TRIPS Agreement).[59] Over the years, it has been expanded to other agreements to the point that the CJEU 'rarely hesitates' to apply consistent interpretation in giving effect to WTO law.[60] This practice demonstrates how the CJEU is more open to WTO law than might be initially thought in light of the exclusion of direct effect. As regards the Aarhus Convention, while the CJEU has indicated that its provisions have a 'normative effect' in the EU legal order,[61] the parameters and legal obligations that stem from this are unclear.

The CJEU has confirmed the relevance of the Aarhus Convention in interpreting obligations for the Member States, particularly in the context of relevant secondary legislation adopted to ensure consistency with Aarhus obligations.[62] Even outside the scope of EU secondary legislation, the CJEU has relied on the Aarhus Convention to limit the procedural autonomy of the Member States in setting rules for access to national courts. Article 9(3) of the Convention, which relates to access to justice to challenge possible violations of environmental law has not been specifically implemented in the Member States through EU legislation and therefore the interpretation of the Aarhus Convention by the CJEU has played a central role. Notably, in *Slovak Brown Bear I*, the CJEU confirmed its jurisdiction to interpret Article 9(3) even if the Aarhus Convention covers a policy field of shared competence, albeit largely covered by EU law, and irrespective of the fact that Article 9(3) has not been specifically regulated by EU legislation.

Establishing its jurisdiction to interpret Article 9(3) has enabled the CJEU to develop clear obligations for national courts that restrict the discretion inherent in Article 9(3) of the Aarhus Convention through the medium of consistent interpretation. In particular, the Court limited national procedural autonomy by interpreting Article 9(3) in conjunction with the EU law principle of effectiveness, which provides that national procedural rules must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[63] It required the national court, in the fields covered by EU environmental law, 'to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'.[64] Similarly, the CJEU confirmed that national courts are to consistently interpret national procedural rules in light of Article 9(4) so that judicial procedures are not prohibitively expensive.[65]

[59] For example, *Hermès v FHT* (n 57); Case C-89/99 *Schieving-Nijstad* EU:C:2001:438.
[60] P Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 356.
[61] Case C-182/10 *Solvay* EU:C:2012:82, para 27.
[62] See, for example, Case C-279/12 *Fish Legal and Shirley* EU:C:2013:853; Case C-204/09 *Flachglas Torgau* EU:C:2012:71; Case C-71/14 *East Sussex County Council* EU:C:2015:656; Case C-442/14 *Bayer* EU:C:2016:890; Case C-236/08 *Djurgården* EU:C:2009:631C.
[63] *Slovak Brown Bear I* (n 37).
[64] ibid para 50.
[65] Case C-470/16 *North East Pylon v An Bord Pleanála* EU:C:2018:185, paras 57–8.

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The CJEU further clarified in *Protect Natur* that if consistent interpretation is not possible, the national court is to disapply the national procedural rule,[66] in accordance with the principle of supremacy of EU law.[67] The CJEU read Article 47 of the Charter of Fundamental Rights on the right to an effective remedy 'in conjunction' with Article 9(3) of the Aarhus Convention in requiring national courts to ensure broad access to justice for environmental NGOs.[68] Interestingly, the applicability of the Charter was based on the implementation of the Aarhus Convention, which forms an integral part of the EU legal order. A Member State is deemed to be implementing EU law in accordance with Article 51(1) of the Charter when it lays down procedural rules applicable to matters referred in Article 9(3) of the Aarhus Convention, in this case relating to water protection. Notably, the incorporation of the Aarhus Convention in the EU legal order and its recognition by the Court as an integral part of the EU legal order enabled the CJEU to require more of the Member States than it would have otherwise been able to.[69]

Furthermore, the CJEU has indicated that the Aarhus Convention must be taken into account when interpreting the Aarhus Regulation, given that the Regulation contributes to the implementation of Aarhus obligations by EU institutions and bodies.[70] However, the impact of Article 9(3) on access to justice in environmental matters at the EU level has been restricted by the inherent limits of consistent interpretation. In *Mellifera*, the CJEU held that it was not possible to interpret the scope of the Aarhus Regulation consistently with Article 9(3), which does not allow parties to limit access to justice to particular kinds of acts, in order to expand the administrative review procedure established by Article 10.[71] This would amount to a *contra legem* interpretation, given the clear definition of administrative acts under the Regulation, which limits the scope of the review procedure to acts of individual scope.[72] In this case, the Commission Implementing Regulation extending the approval period of the active substance 'glyphosate' was considered an act of general scope that could not form the subject of a request for internal review. It did not amount to a marketing authorisation by a specific applicant, but rather regulated the approval processes of plant protection products with that substance by Member State authorities. The CJEU thereby demonstrated the limits of consistent interpretation, deferring to the legislature to expand the scope of the Aarhus Regulation if desired.

[66] Case C-664/15 *Protect Natur* EU:C:2017:987, para 55.
[67] ibid paras 56–7.
[68] ibid para 45.
[69] Hadjiyianni (n 55).
[70] Case C-673/13 *Commission v Stichting Greenpeace Nederland and PAN Europe* EU:C:2016:889, para 61; Case T-685/14 *European Environmental Bureau v Commission* EU:T:2015:560, para 31; Case T-565/14 *European Environmental Bureau v Commission* EU:T:2015:559, para 31.
[71] Case T-12/17 *Mellifera v Commission* (n 58); Case C-784/18 *Mellifera v Commission* (n 58).
[72] Regulation 1367/2006 (n 46) art 2(1)(g).

The CJEU's gatekeeping strategies therefore play a crucial role in maintaining the balance of powers among the EU institutions. The boundaries of consistent interpretation contribute to shaping not only the EU's relations with external regimes but also the CJEU's relations with other EU institutions. The limits of judicial interpretation, together with the pressure created by the ACCC findings on the EU's compliance with Articles 9(3) and 9(4) of the Convention,[73] led to the European Commission's proposed amendments to the Aarhus Regulation in October 2020. The proposed amendments go beyond the limits of consistent interpretation and expand the kinds of acts that can form the subject of internal review to acts of general scope, including acts adopted on the basis of non-environmental legal bases and pursuing non-environmental objectives.[74]

In this context, in January 2021 the GC reiterated the obligation to interpret the Aarhus Regulation in light of the Aarhus Convention.[75] The case concerned a request for internal review of a decision by the European Investment Bank (EIB) to fund the construction of a biomass power general plant in Spain. In line with the Aarhus Convention and its objective to ensure wide access to justice in environmental matters, the GC adopted a broad interpretation of the requirement for an administrative act to be adopted 'under environmental law' in accordance with the Aarhus Regulation.[76] Even though the legal basis on which the EIB's decision was based did not directly aim at achieving the objectives of EU environmental policy, the GC considered that the general requirements governing its activities, requiring it to take into account environmental criteria in determining the eligibility of projects funded by it, rendered the decision one taken under environmental law in a broad sense. This was partly based on Article 9(3) and 9(4) of the Aarhus Convention, which require for all acts of public authorities potentially violating environmental law to be amenable to administrative or judicial review, irrespective of their legal basis or objectives.

The timing of this decision is important given that it reflects the amendments proposed by the European Commission, and endorsed by the Council at the time, for administrative acts under the Aarhus Regulation not to be limited to those taken 'under environmental law'. The CJEU's gatekeeping role is thus reactive and may be explained by its effort to maintain the allocation of powers within the EU and respect legislative intentions. For similar reasons, in relation to

[73] Findings and Recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the EU (adopted 14 April 2011); Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the EU (adopted 17 March 2017).

[74] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies' COM (2020) 642 final.

[75] Case T-9/19 *ClientEarth v European Investment Bank* EU:T:2021:42.

[76] Regulation 1367/2006 (n 46) art 2(1)(g).

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decisions of external oversight bodies, the CJEU often applies consistent interpretation in implicit ways, without considering itself bound by them.

III. VARYING DEGREES OF INFLUENCE OF EXTERNAL DECISIONS ON THE CJEU: MEANINGFUL INTERACTION OR NON-ENGAGEMENT?

The effects of decisions taken by international compliance review bodies within the EU legal order can take different forms. On the one hand, they can function as legality benchmarks, particularly when they concern the EU, with the CJEU enforcing them by judicially setting aside incompatible legislation. Recognising such effects of external decisions is far-reaching and has controversial political connotations, which largely explain their lack of direct effect. On the other hand, international decisions, whether involving the EU as signatory party to the agreement or other parties, function as interpretative devices and can influence the interpretation of EU law and international agreements by the CJEU. As with international agreements, engagement with international decisions as interpretative devices is less controversial, both from a constitutional and political perspective.

The EU's commitment to the strict observance of international law cannot be achieved by ignoring the decisions of international bodies set up to oversee the implementation of international agreements and contribute to the evolution of the relevant regime.[77] Taking into account external decisions ensures that the EU's commitment to international law is dynamic, reflecting the evolution of the international agreement as shaped by the relevant oversight body. As Jans puts it, '[i]n a globalised legal order there is not one master! It is about jurisdictional pluralism, communication, dialogue, strength of arguments, competition and acceptance, based on a set of common values and common standards', as developed in the relevant international agreement.[78]

In principle, the Court has accepted that it might be bound by decisions of a court 'created or designated by … an agreement as regards the interpretation and application of its provisions'.[79] In practice, it has been reluctant to automatically interpret EU law in line with international law. When the CJEU is purporting to interpret international agreements as an integral part of the EU legal order, this should be done in light of 'relevant interpretative criteria existing in the legal order they originally belong to, i.e. international law'.[80] In accordance with

[77] In relation to ACCC findings, Schoukens (n 4). In relation to WTO decisions, Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (n 56).

[78] JH Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law. A Case Study on The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' in JH Jans, R Macrory and A-MM Molina (eds), *National Courts and EU Environmental Law* (Europa Law 2013) 166.

[79] Opinion 1/91 *on the EEA* EU:C:1991:490, para 40.

[80] A Tanzi and C Pitea, 'The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by EU Member States' in M Pallemaerts (ed),

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the Vienna Convention on the Law of Treaties, these may include relying on interpretations developed by the relevant compliance review mechanism of the agreement.[81] Both ACCC findings on compliance with the Aarhus Convention[82] and WTO decisions on inter-State disputes,[83] fulfil an interpretative function at the international level. However, the CJEU's reasoning for taking into account international decisions is not usually founded on such international law arguments. It rather stems from the EU law principle of consistent interpretation in the light of international agreements,[84] which itself is based on the hierarchy of legal norms in the EU and the binding nature of international agreements in accordance with Article 216(2) TFEU.

The stark differences between the binding nature of DSB decisions and ACCC findings, enable the analysis to identify a variety of gatekeeping strategies and lines of reasoning employed by the CJEU in engaging with external decisions. Although DSB decisions are generally considered to be legally binding,[85] albeit strictly on the parties to the dispute,[86] the CJEU has clarified that upholding these decisions internally is not a matter within the purview of the Court's jurisdiction, at least by recognising direct effect of such decisions. This is mainly to preserve the political room for manoeuvre by the executive and legislature in deciding how best to comply with WTO obligations that inherently allow for political compromise among WTO parties.

The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law (Europa Law 2011) 379–80.

[81] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31–3.

[82] J Ebbesson *et al.*, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014) 224–5. ACCC findings can be considered as authoritative interpretations, as subsequent practice, or as agreement, in accordance with VCLT arts 31(3)(a) and 31(3)(b). See Tanzi and Pitea (n 80); E Fasoli and A Mcglone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 NILR 27.

[83] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 14.

[84] *Commission v Germany* (n 57) para 52.

[85] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, art 3(7) and art 19. Both academic and judicial opinion on the effect of DSB decisions is divided. On the legally binding side: JH Jackson, 'The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation' (1997) 91 AJIL 60; JH Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?' (2004) 98 AJIL 109; Case C-93/02 *Biret International v Council* EU:C:2003:291, Opinion of AG Alber; Case C-377/02 *Van Parys* EU:C:2004:725, Opinion of AG Tizzano. On the non-legally binding side: Pickett and Lux (n 34); *Van Parys* (n 31); *FIAMM* (n 31); Case C-351/04 *Ikea Wholesale* EU:C:2006:236, Opinion of AG Léger.

[86] DSU (n 85) arts 22(1) and 22(2). The DSU incorporates a clear preference for bringing the contested measure into conformity with WTO rules, identifying compensation measures as temporary alternatives.

In contrast, ACCC findings are not considered legally binding, given the nature of the ACCC as a 'non-confrontational, non-judicial and consultative' compliance mechanism.[87] Nonetheless, ACCC findings are usually endorsed by the Meeting of the Parties and they are relevant 'for compliance and implementation of the Convention'.[88] As such, they have been relied upon by national courts of contracting parties.[89] In practice, compliance with ACCC findings is not dependent on their soft-law nature, but on the content of the findings and the domestic circumstances of the party.[90] On the one hand, their non-legally-binding nature may explain the lack of explicit engagement of the CJEU with ACCC findings. On the other hand, the non-judicial nature of the ACCC is less threatening to the CJEU's autonomy,[91] which could more openly engage with ACCC findings, through consistent interpretation.

This section demonstrates the CJEU's incremental explicit reliance on WTO DSB rulings, which amounts to a more open and constructive interaction with international law. Most of these explicit interactions are discretionary and are not based on an obligation for the CJEU to take them into account. Furthermore, the CJEU's interaction with both DSB rulings and ACCC findings takes the form of 'muted dialogue' or implicit influence, including through the opinion of AGs, demonstrating how consistent interpretation may be variably used to engage with different kinds of external decisions. 'Muted dialogue' largely consists of speculations based on a 'fair guess' that the CJEU is influenced by DSB decisions,[92] giving rise to 'unacknowledged consistent interpretation'.[93] While the CJEU's implicit engagement with external decisions demonstrates that it is not as closed as may be initially thought, explicitly engaging with them in order to explain its reasoning more constructively contributes to the development of EU law in line with its international commitments.

A. WTO DSB Reports

The CJEU's engagement with DSB reports varies and reflects four types of gatekeeping strategies. First, the CJEU rejected the direct effect of DSB reports in the form of legality benchmarks. Secondly, in the context of

[87] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention) art 15.

[88] *Aarhus Implementation Guide* (n 82) 224.

[89] For example, *Venn v Secretary of State for Communities and Local Government and Others* [2014] EWCA Civ 1539, para 13; Federal Supreme Court of Switzerland, *Birdlife Appeal* 2015, Case 2c_1176/2013, paras 4.3.4 and 4.3.6; *Dermstadt* BVerwG, 7 C 21.12, para 34.

[90] G Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 TEL 211.

[91] Ankersmit (n 4).

[92] Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (n 56).

[93] Mendez, *The Legal Effects of EU Agreements* (n 26) 249. This includes cases which make reference to DSB reports and those which make no such reference.

infringement proceedings raising questions relating to the rule of law backsliding in Hungary, the CJEU recently recognised an obligation to interpret a WTO agreement in light of relevant DSB reports. Thirdly, the CJEU has increasingly been relying explicitly on DSB reports in interpreting EU law in their light, albeit selectively and without recognising an obligation to do so. Fourthly, the CJEU is often implicitly influenced by DSB reports through 'muted dialogue'.

1. *Rejecting direct effect*

While the CJEU initially left the door open for a distinct consideration of the legal effects of DSB reports,[94] this door was subsequently firmly closed, as the Court clarified that a DSB ruling on a WTO obligation, which itself does not have direct effect, cannot be distinguished from that rule.[95] The lack of direct effect of WTO law as a whole thus necessarily excludes direct effect of DSB decisions as these are 'inextricably linked' in the eyes of the Court.[96] The CJEU has consistently refused to examine the compatibility of EU law with WTO decisions[97] even if the specific measures have been the subject matter of a WTO dispute that confirms incompatibility.[98] This is to allow for the possibility of WTO parties negotiating compensation, as permitted by the DSU, and to preserve the room for political manoeuvre.[99] The CJEU's approach is explicable in terms of maintaining the allocation of powers between the judicial branch, responsible for reviewing the interpretation and legality of EU law, and the executive and legislative branches, which are primarily responsible for conducting the EU's external relations. Given the nature of the WTO system, which provides alternative remedies in the form of compensation or retaliatory action, granting direct effect to DSB decisions is a demanding way of ensuring good faith application of international law, but is not required by WTO or general international law.[100]

However, not finding direct effect even after a reasonable time has elapsed, limits the effects of WTO law in ways that may call into question the EU's commitment to the strict observance of international law,[101] and international law principles, including the principle of *pacta sunt servanda*.[102] The CJEU's restrictive approach to the admission of WTO law and DSB rulings

[94] *Biret* (n 31) para 57.
[95] *FIAMM* (n 31) para 128.
[96] MQ Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 EJIL 273.
[97] *FIAMM* (n 31) para 129.
[98] *Van Parys* (n 31); Peers (n 27). And more recently Case C-207/17 *Rotho Blaas Srl v Agenzia delle Dogane e dei Monopoli* EU:C:2018:840.
[99] *Van Parys* (n 31) para 53.
[100] A Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2011).
[101] *Biret,* Opinion of AG Alber (n 85); *Van Parys*, Opinion of AG Tizzano (n 85); N Lavranos, 'The Chiquita and Van Parys Judgments: An Exception to the Rule of Law' (2005) 32 LIEI 449.
[102] Eeckhout, *EU External Relations Law* (n 60); Peers (n 27).

within the EU legal order to a large extent stems from its reluctance to review compatibility with an external body of law and its desire to maintain the autonomy of the EU legal order.[103] However, when autonomy is used to reject the legal effects of decisions by external oversight mechanisms, including WTO dispute rulings, there is a 'clear and present danger that the autonomy of EU law is extended beyond its proper remit'.[104]

EU courts should at least apply the implementation principle in reviewing the compatibility of EU legislation with WTO law, which seeks to comply with a WTO dispute ruling. However, the interpretation of this principle has been restricted to situations where EU legislation expressly refers to or implements WTO law.[105] Any amendments to secondary legislation following a DSB report do not fall within the *Nakajima* exception as this represents compliance with a 'general' and thus not a 'particular' obligation,[106] given that DSB decisions only make recommendations for EU legislation to be brought in conformity with the decision, without specifying exactly how to do so.[107] In line with this reasoning, regrettably, it is unlikely that a DSB decision would ever amount to a 'particular' obligation.[108]

There are valid concerns about the abuse of WTO compatibility review before the CJEU by third country parties, without engaging in negotiations for compensation with the EU[109] and thereby limiting the EU's negotiating power. However, there seems to be a lacuna in the judicial protection of interests which are affected by EU legislation that has been found to be incompatible with WTO commitments. This lacuna may be partly addressed through consistent interpretation of EU law and WTO agreements in light of DSB reports, particularly in situations where the EU's bargaining power is not threatened.

2. An obligation to consistently interpret international agreements for the Member States

Given that the CJEU often interprets EU law in the light of WTO provisions, extending consistent interpretation to DSB rulings would not amount to a 'substantive divergence' in the CJEU's jurisprudence.[110] However, for a long time, the CJEU was reluctant to rely on DSB decisions. In more recent years, the

[103] J Wouters, J Odermatt and T Ramopoulos, 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014). See also *Ikea Wholesale* (n 35) paras 76–98.

[104] Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' (n 17) 201.

[105] *Fediol* (n 31); *Nakajima* (n 32).

[106] Case T-19/01 *Chiquita Brands International v Commission* EU:T:2005:31, paras 114–5 and 156–70.

[107] Joined Cases C-659/13 and C-34/14 *Clark and Puma* EU:C:2016:74, paras 96–7.

[108] This is evident most recently in Case C-592/17 *Skatteministeriet v Baby Dan* EU:C:2018:913, paras 66–75; *Rotho Blaas* (n 98) paras 50–6.

[109] Peers (n 27).

[110] Zang (n 96).

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CJEU has been gradually engaging more and more with DSB decisions. This is the case both with DSB decisions concerning EU measures as well as decisions concerning measures of other WTO parties.

The most recent and notable example of the CJEU's explicit engagement with DSB reports, which may signal a change from the CJEU's previous approach, emerged in October 2020 in the context of infringement proceedings against Hungary.[111] The Court was required to determine whether conditioning the operation of foreign higher education institutions in Hungary on (a) concluding an international agreement between Hungary and the university's country of origin and (b) offering genuine teaching activities also in the State of origin, infringed the General Agreement on Trade in Services (GATS). The specific issue raised by Hungary's higher education law had not been the subject of WTO dispute settlement proceedings establishing infringement of the GATS. Therefore, this case did not concern the enforcement of a DSB report before the CJEU. According to the Court, this case presented a novel question in the relationship between EU and WTO law, concerning whether the CJEU could interpret the GATS or whether the DSB had exclusive jurisdiction.[112] The CJEU set limits to the effects of its decisions, clarifying that they cannot influence other WTO Members nor affect the assessment that might be carried out by the DSB subsequently. On this basis, neither the EU nor the Member States can rely on a CJEU judgment to avoid their obligation to comply with a DSB report.[113]

Furthermore, while recognising and maintaining the limits on the possibilities to rely on WTO law to review the legality of EU acts, both in actions for annulment and in non-contractual liability cases, the Court differentiated the implications of WTO law compliance in the context of infringement proceedings. Given that the GATS forms an integral part of the EU legal order, the Commission has to ensure that Member States comply with their international obligations, thereby enabling the EU to avoid incurring international liability under the WTO dispute settlement system.[114] In this context, the Court held in unequivocal terms that it is bound to take into account DSB decisions. In particular, it noted that:

> the general international law principle of respect for contractual commitments (pacta sunt servanda), laid down in Article 26 of the Vienna Convention on the Law of Treaties … means that the Court *must*, for the purposes of interpreting and applying the GATS, take account of the DSB's interpretation of the various provisions of that agreement. In addition, should the DSB not yet have interpreted the provisions concerned, it is for the Court to interpret those provisions in accordance with the customary rules of interpretation of international law that are binding on the Union, while observing the principle, set out in Article 26, that that international agreement should be implemented in good faith.[115]

[111] Case C-66/18 *Commission v Hungary* EU:C:2020:792. [112] ibid paras 76–7.
[113] ibid para 91. [114] ibid para 66. [115] ibid para 92 (emphasis added).

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It then went on to rely explicitly on WTO reports interpreting multiple provisions of the GATS relevant for the particular case.[116]

The CJEU's explicit reliance on DSB reports in interpreting the GATS in this case signals a different approach from that which the Court had previously taken in two important ways. First, the Court recognised a legal obligation ('must') to take into account DSB reports interpreting various provisions of the GATS, effectively deferring to the DSB's interpretation and only engaging in an independent interpretation of provisions that had not yet been interpreted internationally. As discussed in Section III.A.4 below, the CJEU has tended to avoid acknowledging any direct reliance or consideration of DSB reports whilst according them a degree of implicit influence. Alternatively, and as discussed in Section III.A.3 below, in those limited number of cases which have expressly considered DSB reports, the Court has implied that it was not obliged to do so, and it did so at its discretion. Secondly, the legal obligation to take into account DSB reports in this particular case was grounded on principles of international law—the principles of *pacta sunt servanda* and good faith—and not as a corollary of the EU law principle of consistent interpretation in the light of international agreements emanating from CJEU case law and Article 216(2) TFEU, as was previously the case.[117]

Notably, as in *Slovak Brown Bear I* and *Protect Natur* in the Aarhus context, analysed in Section II.B, the CJEU is more willing to spell out international obligations when determining the effects of international law for the Member States than for the EU institutions. This could be partly attributed to the fact that in such cases the CJEU is directly engaging with the international agreement rather than interpreting EU legislation within which the political institutions' choices regarding the international agreement have already been determined.

The CJEU's willingness to rely more openly on the GATS and relevant DSB reports may also be partly explained by the extraordinary context of the specific case, which raised serious issues of academic freedom and, more broadly, concerns about the rule of law in Hungary. The so-called 'Lex-CEU' amendment to Hungary's higher education law forced the Central European University, founded by a Hungarian–American liberal philanthropist now at odds with Viktor Orbán's government, to relocate from Budapest to Vienna. Within this context, the CJEU relied on WTO law obligations and their interpretation by the DSB to strengthen the persuasiveness of its own judgment and ultimately to force Hungary to comply. The Court was notably more open to the impact of international law, including by relying on the GATS as an integral part of the EU legal order,[118] to establish the applicability of the Charter of Fundamental Rights.[119]

[116] ibid paras 107–8.
[117] See case law cited at (n 123).
[118] Case C-66/18 *Commission v Hungary* (n 111) para 69.
[119] ibid para 213.

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Furthermore, the approach of the Court in this case may be explained by its involving infringement proceedings, an enforcement mechanism increasingly used by the Commission to address rule of law backsliding in certain Member States, including repeatedly Hungary.[120] Infringement proceedings are inherently different from legality challenges to EU law on the basis of WTO law, which may weaken the EU's bargaining power in the international trade system. Ensuring that Member States comply with their international obligations may strengthen rather than weaken the EU's bargaining position[121] and protects the EU from incurring international liability should WTO proceedings be launched against a Member State at the WTO.[122]

These reasons may to a certain extent justify the CJEU's different approach in giving effect to WTO obligations in these circumstances. However, applying different standards of review to the binding effects of DSB reports for the EU institutions than those applied to their effects for the Member States can create inconsistencies both internally and externally. The Court's failure to discuss the implications of the international law principles of *pacta sunt servanda* and good faith when determining the effects of DSB reports in the context of the EU's own obligations leads to unjustifiable double standards. The EU is not a different kind of Member of the WTO; it is equally bound by DSB reports and this should be reflected in the CJEU's approach.

3. *Discretionary reliance on DSB reports*

Even before the *Lex CEU* case, the CJEU had been increasingly referring to DSB decisions when interpreting or reviewing the legality of EU legislation in fields covered by WTO agreements, albeit without recognising a legal obligation to do so either as a matter of EU or international law.[123] Rather, it indicated that there is 'nothing to prevent the Court from referring to them'

[120] The Commission has used the infringement proceeding route to raise rule of law issues in Hungary relating not only to higher education but also the migration and asylum system (Case C-808/18 *Commission v Hungary* EU:C:2020:1029) and issues of financing NGOs (Case C-78/18 *Commission v Hungary* EU:C:2020:476). On the use of infringement proceedings to deal with rule of law concerns see, for example, Scheppele *et al.*, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 YEL 3.

[121] CI Nagy, 'Does WTO Law Protect Academic Freedom? It Depends on How You Use It' (2021) 25(1) ASIL Insights <https://www.asil.org/insights/volume/25/issue/1/does-wto-law-protect-academic-freedom-it-depends-how-you-use-it>.

[122] Case C-66/18 *Commission v Hungary* (n 111) paras 82–4. The EU could incur international liability for a wrongful act in case of a finding of incompatibility against an EU Member State by the DSB due to its exclusive competence in the common commercial policy field.

[123] Case T-304/11 *Alumina* EU:T:2013:224, para 30 and Case T-192/08 *Kazchrome* EU:T:2011:619, paras 32 and 36–8; Joined Cases T-558/12 and 559/12 *Changshu City* EU:T:2015:237, para 86; Case T-274/02 *Ritek* EU:T:2006:332, para 98; Case C-260/08 *HEKO Industrieerzeugnisse* EU:C:2009:768, para 22; Case T-409/06 *Sun San Kong* EU:T:2010:69, paras 103–4. More recently, see Case C-436/18 *Shanxi v Commission* EU:C:2019:643, para 37.

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where a relevant provision of EU law has to be interpreted.[124] This was sometimes done in response to the applicant's reliance on DSB reports and to clarify that the CJEU's own interpretation of the legality of EU law was consistent with DSB reports.[125] Notably, before making any explicit reference to DSB decisions, the CJEU has always referred to the EU law principle of consistent interpretation in the light of international agreements, which served to justify indirectly engaging with DSB decisions.[126]

In tracing the CJEU's practice in referring to DSB decisions and its own understanding about their use, a few examples merit closer analysis. In *Anheuser-Busch*, a case arising from a preliminary reference from Finland on the use of the trademark Budweiser, the CJEU clarified that, given that the EU is a party to the agreement, it had an obligation to consistently interpret EU legislation in light of the TRIPS Agreement as far as possible.[127] When doing so, the CJEU clarified that 'the members of the WTO are under an obligation to protect trade names'. The CJEU referred to a relevant DSB decision, citing it in the form of 'see also', which indicates that the CJEU considers such reports as a relevant consideration that may indirectly support its own conclusion.[128] The Court also explicitly relied on a DSB decision in *HEKO Industrieerzugnisse*, when asked to determine the EU's discretion to apply different criteria for rules of origin.[129] While acknowledging an obligation to interpret EU law in the light of WTO Agreements, the CJEU clarified that the Agreement on Rules of Origin only establishes a harmonisation work programme for a transitional period. This interpretation was supported by a relevant WTO Panel Report which specified that WTO Members are free to determine the criteria that confer origin.[130]

These two cases were subsequently identified by the ECJ as examples of references to WTO decisions supporting its own interpretation of WTO Agreements,[131] providing some insight into its understanding of its relationship with external oversight bodies. In this case, the ECJ had to determine the interpretation of 'salted' for the classification of boneless, frozen and salted chicken meat under a common customs tariff. It clarified that a DSB decision *may*, 'in certain circumstances' be invoked for the purposes of interpreting Union law.[132] Regrettably, it did not clarify what these circumstances might be or whether this amounts to a legal obligation, equivalent to its obligation to interpret EU legislation in the light of WTO law provisions. While the parameters of such an obligation have been

[124] *Kazchrome* (n 123) para 36.
[125] For example, *Shanxi* (n 123) para 37.
[126] Case C-465/16 *Council v Growth Energy and Renewable Fuels Association* EU:C:2018:794, Opinion of AG Mengozzi, para 199.
[127] Case C-245/02 *Anheuser-Busch* EU:C:2004:717, paras 41–2.
[128] ibid para 91. See also para 67.
[129] *HEKO Industrieerzeugnisse* (n 123) para 22.
[130] ibid.
[131] Joined Cases C-319/10 and C-320/10 *X and X BV v Inspecteur van de Belastingdienst* EU:C:2011:720, para 45.
[132] ibid para 46

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partially clarified in the *Lex CEU* case, the political circumstances of that case and the fact that it concerned an infringement procedure may limit its precedential effect. The CJEU's approach of indirectly engaging with DSB reports will most likely remain relevant.

4. *Implicit influence of DSB reports through 'muted dialogue'*

While the CJEU's increasingly explicit engagement with DSB decisions is a welcome development, it should not be overstated. The influence of DSB reports often happens implicitly, with the CJEU exhibiting 'interpretative fidelity'[133] towards the DSB without acknowledging it. Particularly in the anti-dumping field, the CJEU's implicit engagement with DSB reports is evident most recently in relation to two issues in *Giant (China)*.[134] First, the ECJ implicitly relied on guidance in DSB reports when interpreting the term 'necessary information' under Article 18(1) of Regulation 1225/2009 relating to the rules on non-cooperation of interested parties in anti-dumping investigations. In particular, the Court implicitly relied on DSB reports interpreting the term under Article 6.8 of the Anti-Dumping Agreement, when holding that necessary information should be assessed in light of the specific circumstances of each individual investigation and not in the abstract.[135] It also implicitly embraced the DSB's approach when holding that necessary information consists of information held by an interested party that is requested by the authority responsible for anti-dumping investigations for the purpose of making determinations.[136] In both these respects, the ECJ implicitly relied on relevant DSB reports referred to by AG Mengozzi,[137] as is evident from the similarity in the language used, but without, however, referring either to the DSB reports or to the specific paragraphs in which the AG relied on the reports.

Secondly, in the same case, in a grey area between 'muted' and explicit dialogue, the ECJ confirmed the GC's decision requiring the Council to demonstrate that there was a genuine risk of circumvention on the basis of properly substantiated claims in order to justify a refusal to grant an individual anti-dumping duty. In reaching this conclusion, the GC relied on specific DSB reports which indicated that the risk of an individual anti-dumping duty being ineffective could not in itself justify imposing a

[133] J Scott, 'European Regulation of GMOs: Thinking about Judicial Review in the WTO' (2004) 57 Current Legal Problems 117.

[134] Case C-61/16 *European Bicycle Manufacturers Association (EBMA) v Giant (China) Co Ltd* EU:C:2017:968.

[135] ibid para 49.

[136] ibid para 57.

[137] Case C-61/16 *EMBA v Giant (China)* EU:C:2017:615, Opinion of AG Mengozzi, paras 47–8. The AG referred to Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 October 2005, and Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008.

countrywide duty on exporting producers.[138] The ECJ referred to the fact that the GC had relied on DSB reports without itself engaging or explicitly relying on them or on the relevant paragraphs of the GC's decision.[139] The ECJ's lack of explicit engagement with the DSB reports is problematic, particularly given that the applicants questioned the correctness of the GC relying on the particular DSB reports in question.

Other examples of the implicit influence of DSB reports include *Ikea Wholesale*, where the CJEU applied the same reasoning and interpretation of the 'zeroing' technique for the application of anti-dumping regulation as had the DSB, but without referring to the relevant DSB ruling.[140] Another is *FTS International*, where the CJEU adopted the interpretation of an AB report on the tariff classification of boneless chicken cuts and overruled the traditional interpretation of customs authorities, but again without referring to the DSB report.[141] In *Philips Lighting*, the CJEU followed relevant WTO rulings and endorsed the AG's approach which heavily relied on them,[142] again without explicitly endorsing this reliance or referring to the DSB decisions itself.[143]

While examples of 'muted dialogue' may demonstrate some willingness to coordinate with WTO rulings, they are hardly constructive and can lead to legal uncertainty, leaving the affected parties guessing as to the influence that such decisions might have on the CJEU in individual cases. As Eeckhout puts it, 'it is questionable whether the concept of dialogue is at all apposite where courts do not even discuss other case law in their decision … a genuine judicial dialogue … can only take place through the reasoning of their decisions'.[144] While better than ignoring the interpretations of the relevant external oversight body, such implicit reliance on external decisions does not amount to a genuine engagement with international law. Whilst it

[138] Case T-425/13 *Giant (China) Co Ltd v Council* EU:T:2015:896, para 84. The GC referred to Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC – Fasteners)*, WT/DS397/R, adopted 3 December 2010, and Appellate Body Report, WT/DS397/AB/R, adopted 15 July 2011.

[139] *EMBA v Giant (China)* (n 134) para 82.

[140] *Ikea Wholesale* (n 35). The CJEU was implicitly influenced by Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001. See Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (n 56) 889.

[141] Case C-310/06 *FTS International* EU:C:2007:456. The CJEU was implicitly influenced by Appellate Body Report, *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 12 September 2005, and Panel Report, *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R, adopted 30 May 2005. See Zang (n 96) 284.

[142] Case C-511/13 *Philips Lighting Poland and Philips Lighting v Council* EU:C:2015:206, Opinion of AG Bot. The AG referred to Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 22 April 2003, and Appellate Body Report, *EC – Fasteners* (n 138).

[143] Case C-511/13 *Philips Lighting* EU:C:2015:553. See Zang (n 96) 286–7.

[144] Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' (n 17) 201.

seems that the CJEU does not completely disregard the decisions of others, it does not appear as a court that is open and transparent about the international foundations of and external influences upon its reasoning. Masking its reliance on external decisions in order to reinforce the self-referential character of the EU legal order creates an impression of a court that is unjustifiably reluctant to openly interact with international quasi-judicial bodies. While the Court is sometimes more open to and explicit about the influence of international decisions in forging relations with the Member States, it maintains its reluctance when determining the international obligations of the EU itself.

Overall, the CJEU's engagement with DSB rulings has evolved considerably over time, becoming closer to a genuine interaction with external decisions, albeit one which is not usually based on a legal obligation to take them into account. This does not necessarily mean that the CJEU will follow the interpretations of the DSB, or the arguments put forwarded by applicants on the basis of them. As Bronckers notes, '[b]y transforming WTO rulings into interpretations of EC law, the European Courts keep their hands free to deviate from these WTO rulings if and when the need to do so arises, while avoiding inconsistencies as much as possible'.[145] The CJEU develops its own understanding and determines whether such interpretations are relevant and applicable to the facts before it,[146] engaging with external decisions, either explicitly or implicitly, in ways which respond to the particularities of the case before it. However, selectively relying on international decisions, or not being transparent about such reliance, can harm the EU's credibility and raise questions concerning its commitment to the rule of (international) law. Moreover, the CJEU's interaction with ACCC findings is much less evident and by no means so explicit, demonstrating further shortcomings in the CJEU's selective and variable engagement with international law.

B. ACCC Findings and Recommendations

In light of the CJEU's refusal to give direct effect to WTO DSB decisions, which are generally considered to be internationally legally binding, it would be surprising for the CJEU to recognise ACCC findings as legal benchmarks for reviewing EU or Member State action. This issue has not been dealt with by the CJEU to date. Indeed, the ECJ has not explicitly engaged with ACCC findings, either as regards the EU's compliance or as interpretative devices, thus demonstrating how the CJEU and the ACCC 'operate autonomously in

[145] Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (n 56) 890.

[146] *Ritek* (n 123) para 98; *HEKO Industrieerzeugnisse* (n 123) para 22; Case T-45/06 *Reliance Industries v Council and Commission* EU:T:2008:398, paras 108–9.

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parallel' in interpreting the Aarhus Convention.[147] Nonetheless, the CJEU engages with ACCC findings in a variety of ways, ranging from (1) a lack of influence on the EU's compliance with access to justice provisions to (2) indirect implicit influence through reliance on the Aarhus Implementation Guide and on AG opinions, which themselves refer to ACCC findings.

1. *Non-engagement with ACCC findings on EU compliance*

It should be recalled that the ACCC criticised the EU's compliance with Articles 9(3) and 9(4) of the Convention in 2011 and in 2017, due to its restrictive interpretation of standing requirements under Article 263(4) TFEU, based on the *Plaumann* formulation,[148] and the narrow scope of the Aarhus Regulation.[149] To date, it has been impossible for the parties to the Convention to reach a consensus on the ACCC's latest findings concerning the EU's compliance with the Convention, given that the EU Council called upon the parties to the Aarhus Convention to 'take note of' the findings, rather than endorsing them as is usually the case.[150] Simply taking note of them would undermine the authority of the Meeting of the Parties and the compliance mechanism as it would be unclear whether any legal or political consequences would follow from a finding of non-compliance by the ACCC. At the time of writing, the decision on whether to endorse the ACCC findings has been deferred to the next Meeting of the Parties, scheduled for October 2021,[151] and will likely be determined on the basis of the amendments to the Aarhus Regulation agreed upon by the EU institutions in trialogues in July 2021.

The CJEU's non-engagement with the ACCC findings of non-compliance by the EU with the access to justice provisions of the Convention is evident first in relation to the 2011 findings and recommendations. In *Testbiotech*, when interpreting the scope of judicial review of the administrative review procedure under Article 12 of the Aarhus Regulation, the CJEU did not refer to the ACCC's 2011 findings. The ACCC had indicated that review of the substance of the administrative act, and not merely of the written reply to the request for an internal review, was required.[156] Coming to the opposite conclusion, and without referring to the ACCC findings, '… the Grand Chamber must have certainly been aware of the fact that its reserved

[147] Á Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in DL Shelton *et al.* (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 133. [148] Case 26/52 *Plaumann v Commission* EU:C:1963:17, 107.
[149] ACCC Findings and Recommendations on Compliance by the EU (Part I) and (Part II) (n 73).
[150] Draft decision VI/8f concerning compliance by the European Union with its obligations under the Convention ECE/MP.PP/2017/25 (30 June 2017).
[151] 'Report of the sixth session of the Meeting of the Parties to the Aarhus Convention' (Budva 11 September–13 September 2017) para 62.

approach … might further the ongoing non-compliance at EU level with the access to justice requirements'.[157]

Following the 2017 ACCC findings,[152] the CJEU had an opportunity to revisit its interpretation of 'administrative acts' under the Aarhus Regulation. In this context, the GC rejected the applicants' claim that a narrow interpretation of administrative acts was incompatible and no longer permitted following the ACCC findings. Specifically, the GC clarified that:

> [i]n any event, assuming that those recommendations are binding on the Contracting Parties to the Aarhus Convention, they are, as the Commission rightly observed, only a draft and, … that draft was not adopted by that committee until 17 March 2017, which was after the date on which the contested decision was adopted. It is not necessary therefore to answer the question whether, as the Commission maintains, making reference to the Aarhus Convention Implementation Guide, the recommendations of the Aarhus Convention Compliance Committee were to be adopted by the meeting of the Parties, provided for in Article 10 of the Aarhus Convention, or whether that was not necessary, as the applicant maintains.[153]

The GC thus avoided determining the legal status of ACCC findings and whether there was an obligation on the CJEU to rely on such findings, even after their adoption by the ACCC or their eventual endorsement by the Meeting of the Parties. The above paragraph represents the only explicit reference to ACCC findings by the CJEU. Regrettably, on appeal, the ECJ neither mentioned the ACCC findings nor commented on the applicants' allegations that the GC wrongly held that the ACCC findings could not influence the interpretation of the Aarhus Regulation.[154] The ECJ instead focused on the interpretation of administrative acts of individual scope and reiterated that the Aarhus Regulation was in conformity with the Convention given the discretion left to signatory parties under Article 9(3).

The limits of judicial interpretation and the CJEU's approach to the effects of the Aarhus Convention, which cannot influence the interpretation of Article 263 (4) TFEU regarding direct access to the CJEU,[155] have partly shaped the political reaction to the ACCC findings. The Commission highlighted that, given the CJEU's exclusive competence to interpret the treaties, the political institutions cannot tell the CJEU how to interpret Article 263(4). Conforming with the ACCC findings should instead be achieved by amending the internal review mechanism under the Aarhus Regulation[156] and emphasising access to national courts, which can result in indirect access to the CJEU as a result of

[152] ACCC Findings and Recommendations on Compliance by the EU (Part I) and (Part II) (n 73).
[153] Case T-12/17 *Mellifera* (n 58) para 86. [154] Case C-784/18 *Mellifera* (n 58).
[155] This is because international agreements do not have primacy over treaty articles, Case T-600/15 *PAN Europe and Others v Commission* EU:T:2016:601.
[156] The Commission subsequently proposed relevant amendments, COM (2020) 642 (n 74).

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Article 267 TFEU.[157] The CJEU's gatekeeping approach therefore influences political engagement with external decisions, leaving it to the political organs to integrate the ACCC's findings within the EU to the degree they consider most appropriate.

2. *Implicit influence of ACCC findings through the Aarhus Implementation Guide and AG Opinions*

To date, the CJEU has not expressly engaged with ACCC findings on the interpretation of Article 9(3) of the Aarhus Convention, even when it was not the subject of the findings. In *Slovak Brown Bear I* and *Protect Natur*, analysed above in Section II.B, while the CJEU reached a similar conclusion to that of the ACCC concerning the scope of the discretion afforded by Article 9(3), it did not refer either to ACCC findings on compliance by Belgium or the Aarhus Convention Implementation Guide, which incorporated these findings.[158] Conversely, both AG Sharpston in *Protect Natur*,[159] and the Commission in its interpretative notice,[160] referred to the relevant part of the Implementation Guide. A jurisprudential dialogue and international law-oriented reasoning would be very beneficial in interpreting Article 9(3) to create a level playing field as regards the requirements of the Convention for all contracting parties.[161] At the same time, this may explain why the CJEU is reluctant to base the obligations for Member States on international law considerations. If the CJEU relies on international law arguments, including ACCC findings, when establishing access to justice obligations for the Member States, then similar considerations would bind the EU itself. Instead, by grounding national obligations on EU principles governing the relationship between the EU and national legal orders, such as the principles of effectiveness and supremacy, the CJEU can differentiate EU obligations in accordance with international law.

The CJEU's approach is more nuanced, and arguably more open to international law in relation to other provisions of the Aarhus Convention, further demonstrating the importance of the policy context in determining the effects of international law obligations. Nonetheless, interaction with the ACCC to date appears exclusively in the form of a 'muted' dialogue, possibly through reliance on the Aarhus Implementation Guide. The Guide is a soft-law instrument, prepared at the request of the Meeting of the Parties by

[157] Commission, 'Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters' SWD (2019) 378 final.

[158] ACCC findings and recommendations with regard to Communication ACCC/C/2005/11 concerning compliance by Belgium (adopted 16 June 2006) para 35; *Aarhus Implementation Guide* (n 82) 198.

[159] Case C-664/15 *Protect Natur* EU:C:2017:760, Opinion of AG Sharpston, para 81 and fn 75.

[160] Commission Notice on Access to Justice in Environmental Matters [2017] OJ C275/1, 19.

[161] Tanzi and Pitea (n 80) 381.

independent experts, some of whom have also served as members of the ACCC. It is meant to provide a reference point for legislators and governments in applying the Convention and draws, inter alia, on ACCC findings.[162] By referring to the Guide and by following AG opinions which themselves increasingly refer to ACCC findings, the CJEU is indirectly influenced by ACCC findings, demonstrating that the Court is more open to external influences than might initially be apparent. However, this influence is not usually clearly discernible, which indicates the reluctance of the Court to openly engage with external oversight bodies.

The CJEU has engaged with the Implementation Guide when interpreting provisions relating to all three pillars of the Convention. It has relied on the Implementation Guide in cases involving Articles 9(2)[163] and 9(4)[164] on access to justice; Article 4(4)(d) in relation to the definition of 'information relating to emissions into the environment'[165] and Article 2(2)(b) on the interpretation of public authorities in the context of access to information under relevant EU law;[166] and finally in relation to Article 8 of the Convention and the requirements for public participation in the drafting of laws.[167] Reference to the Guide can, therefore, be considered a frequent practice. As to Guide's legal status, the CJEU has clarified that:

> [w]hile the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.[168]

The CJEU engages with the Implementation Guide at its discretion. In practice, the Guide is sometimes used to support the CJEU's interpretation of Aarhus provisions when applying EU law.[169] However, the CJEU has also crafted its own understanding of the Aarhus Convention. For example, the CJEU departed from the Guide's suggested interpretation on public participation requirements under Article 8 of the Convention concerning their applicability to situations where public authorities are drafting 'laws'.[170] It did so on the basis that the Guide's interpretation 'cannot be derived from the wording' of Article 8 of the Convention.[171]

The CJEU avoids referring to ACCC findings, even as interpretative devices when the CJEU is developing 'broadly similar principles'.[172] This was the case

[162] *Aarhus Implementation Guide* (n 82) 9. This is the case only with the second edition, published in 2014. The first edition was published in 2000, before the creation of the ACCC.
[163] Case C-570/13 *Gruber* EU:C:2015:231.
[164] Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2013:221.
[165] *Stichting Greenpeace* (n 70). [166] *Fish Legal* (n 62). [167] *Flachglas Torgau* (n 62).
[168] *Solvay* (n 61) para 27.
[169] For example, *Gruber* (n 163); *Edwards* (n 164); *Fish Legal* (n 62).
[170] *Aarhus Implementation Guide* (n 82) 49. [171] *Flachglas Torgau* (n 62) para 36.
[172] Ryall (n 147).

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in *Edwards*, as regards Article 9(4). The Court relied on the Implementation Guide when determining that the costs 'must not be so expensive as to prevent the public from seeking review in appropriate cases'[173] and adopted a similar approach to that of the ACCC in requiring the national court to take into account the public interest in environmental protection when assessing whether costs are prohibitive. Contrary to the ECJ, AG Kokott explicitly relied on ACCC findings to support her conclusion that due account must be taken of the public interest in environmental protection.[174] While the ECJ's approach 'resonates' with the ACCC's approach,[175] this can only be inferred implicitly through a process akin to 'muted dialogue'.

Contrary to the CJEU's reluctance to engage directly with ACCC findings, AGs have increasingly engaged in a more open dialogue with the ACCC. To date, ACCC findings have been referred to in eleven opinions by six different AGs.[176] AGs consistently recognise that ACCC findings are not legally binding but offer 'useful guidance'.[177] Being aware of and engaging with ACCC findings does not necessarily amount to following them when interpreting corresponding EU law provisions. For example, AG Kokott diverted from an interpretation of Article 6(1)(b) of the Convention that would have required transposition of specific requirements on public participation. She crafted her own interpretation by examining closely different linguistic versions of the Convention and its drafting history.[178]

Three of the most recent Aarhus-related cases illustrate the complex ways in which the CJEU may indirectly interact with ACCC findings, including by following AG opinions, whilst demonstrating its clear reluctance to do so openly. First, in *Alain Flausch*, AG Kokott referred to multiple ACCC findings when examining Greek rules implementing the Directive on Environmental Impact Assessment (EIA) and requirements on public participation.[179] The ECJ did not refer to either the Aarhus Convention or the Implementation Guide.[180] While it followed the AG's opinion on several points, the ECJ did not rely on any of the paragraphs that made reference to

[173] *Edwards* (n 164) para 34.
[174] Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2012:645, Opinion of AG Kokott, para 44.
[175] Ryall (n 147).
[176] Case C-115/09 *Bund für Umwelt* EU:C:2010:773, Opinion of AG Sharpston; *Edwards*, Opinion of AG Kokott (n 174); Case C-72/12 *Gemeinde Altrip and Other* EU:C:2013:422, Opinion of AG Villalón; *Vereniging Milieudefensie*, Opinion of AG Jääskinen (n 44); Joined Cases C-404/12 P and C-405/12 P *Stichting Natuur en Milieu* EU:C:2014:309, Opinion of AG Jääskinen; Case C-137/14 *Commission v Germany* EU:C:2015:344, Opinion of AG Wathelet; Case C-529/15 *Folk* EU:C:2017:1, Opinion of AG Bobek; Case C-243/15 *Lesoochranárske zoskupenie VLK* EU:C:2016:491, Opinion of AG Kokott; Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* EU:C:2018:972, Opinion of AG Kokott; Case C-280/18 *Alain Flausch* EU:C:2019:928, Opinion of AG Kokott; Case C-826/18 *LB and Others v College van burgemeester en wethouders van de gemeente Echt-Susteren* EU:C:2020:514, Opinion of AG Bobek.
[177] *Alain Flausch*, Opinion of AG Kokott (n 176) para 30.
[178] *Lesoochranárske zoskupenie VLK*, Opinion of AG Kokott (n 176) para 66.
[179] *Alain Flausch*, Opinion of AG Kokott (n 176).
[180] Case C-280/18 *Alain Flausch* EU:C:2019:928.

ACCC findings. Although the ECJ is likely to have been influenced by ACCC findings on the meaning of 'effective' public participation in certain respects, it did not expressly acknowledge this. The Court also deviated from the ACCC findings indicating that notification regarding public participation on the internet is not by itself sufficient to comply with the requirements of the Convention on effective notification of the public concerned.[181] As Moules notes, '[g]iven that the public participation obligations in the EIA Directive were enacted by the EU in order to implement the requirements of the Aarhus Convention … decisions of the ACCC concerning the nature and extent of those requirements are relevant and ought to be followed'.[182] When the Court deviates from ACCC findings concerning specific provisions of the Aarhus Convention without acknowledging or justifying its doing so, this can lead to legal uncertainty as to what is required by the Convention for the affected parties.

Secondly, in *Inter-Environnement Wallonie*, AG Kokott invited the Court to revisit its previous case law so as to consider the extension of industrial production of electricity by a nuclear station for ten years as requiring an EIA and triggering related public participation requirements.[183] Shortly before the AG's opinion, the ACCC had decided that a similar project constituted an 'update' to the operating conditions of the plant, thereby triggering public participation requirements under Article 6(10) of the Convention.[184] The AG suggested three different ways for achieving an interpretation requiring public participation, two of which relied on the Aarhus and Espoo Conventions, either through direct effect[185] or through consistent interpretation.[186] The CJEU, while avoiding a divergent interpretation from that of the ACCC, opted for the third option, by interpreting the extension of the specific project as a 'change' to a project that presented risks similar to those posed by the project itself under the EIA Directive,[187] thereby triggering public participation requirements as a matter of EU law. While recognising that the EIA Directive was intended to take into account the Aarhus Convention, the ECJ did not find it necessary to answer questions regarding consistent interpretation,[188] thereby also avoiding engagement with ACCC findings.

Thirdly, in *LB v College van burgemeesrter*, concerning the scope of Article 9(2) of the Aarhus Convention, AG Bobek referred to relevant ACCC findings when concluding that Article 9(2) did not allow parties to make access to justice

[181] Findings and Recommendations with regard to communication ACCC/C/2014/99 concerning compliance by Spain (adopted 19 June 2017).
[182] R Moules, 'Significant EU Environmental Cases: 2019' (2020) 32 JEL 161, 164.
[183] *Inter-Environnement Wallonie*, Opinion of AG Kokott (n 176) fn 18.
[184] Findings and recommendations with regard to communication ACCC/C/2014/104 concerning compliance by the Netherlands (adopted 21 January 2019).
[185] *Inter-Environnement Wallonie*, Opinion of AG Kokott, (n 176) paras 118 and 121.
[186] ibid para 111.
[187] ibid paras 76–80.
[188] Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* EU: C:2019:622, paras 163–4.

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by the 'public concerned'[189] dependent on whether they took part in the decision-making process.[190] The ACCC findings had considered a similar condition under Czech law as violating Article 9(2).[191] In January 2021, the ECJ also reached the same conclusion, holding that access to justice under Article 9(2) cannot be made conditional on whether the public concerned had participated in the procedure.[192] The ECJ's reasoning was explicitly based exclusively on earlier CJEU case law which demonstrated that the effectiveness of 'wide access to justice' under Article 9(2) would be threatened if environmental NGOs were only allowed to challenge decisions falling under the scope of Article 6 of the Convention if they had participated in the decision-making process.[193] The ECJ thereby reached the same conclusion as the ACCC without acknowledging reliance on its findings. It also made no reference to the AG's opinion which relied on the relevant ACCC findings.

These three examples demonstrate the CJEU's clear preference to rely on internal considerations over external decisions when interpreting international provisions, even in situations where these would strengthen its own approach. While in some policy fields the case law of external oversight bodies, such as that of the European Court of Human Rights in the context of fundamental rights protection, could be said to have been subsumed within the CJEU's case law and therefore relying on earlier CJEU case law rather than external decisions may still amount to a form of dialogue with external courts,[194] the same cannot easily be said in relation to the Aarhus Convention and its interpretation by the ACCC.

Legal certainty concerns arise given that national courts, the CJEU, and the ACCC, all have a role in applying Aarhus provisions, potentially leading to conflicting interpretations and fragmentation. While the preliminary reference procedure may 'eliminate, or at least reduce, the scope for divergent interpretations by the CJEU and the national courts',[195] a corresponding mechanism of coordination does not exist in relation to interpretations by the CJEU and the ACCC, particularly due to the CJEU's reluctance to engage with ACCC findings. At the very least, an explicit engagement with ACCC findings in a fashion similar to the engagement with the Implementation Guide would be a welcome development. This would not prevent the CJEU from diverging from the ACCC's interpretations when applying EU law, but it would require it to explain such divergence. The progressive engagement

[189] The public concerned is defined in Article 2(5) of the Convention as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; … non-governmental organizations promoting environmental protection … shall be deemed to have an interest'.
[190] *LB v College van burgemeester,* Opinion of AG Bobek (n 176).
[191] Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic (adopted 2 October 2012) para 78.
[192] Case C-826/18 *LB v College van burgemeester* EU:C:2021:7.
[193] ibid para 59.
[194] Amalfitano (n 16) Ch 2.
[195] Ryall (n 147).

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with WTO DSB decisions discussed above demonstrates that the influence of external decisions on the CJEU is dynamic and exists to different degrees. Despite the CJEU's long-standing engagement with WTO law, it was a long time before it started explicitly to refer to DSB decisions and, even then, the influence of DSB reports still often emerges only through muted dialogue. This suggests that whilst ACCC findings might not appear explicitly in the CJEU's reasoning, this does not mean that they do not influence it.

IV. THE CJEU'S GATEKEEPING STRATEGIES AND RELATIONAL IMPLICATIONS

The CJEU's role as the gatekeeper of international law in the EU legal order shapes and is shaped by its relations with other EU institutions, the Member States, and external quasi-judicial bodies. Also, the CJEU's engagement with international law is to some extent driven by policy-specific considerations, which explains the different reasoning employed in qualifying the effects of different international agreements and the decisions of their oversight bodies. Mapping the different gatekeeping strategies employed by the CJEU in the two dissimilar international regimes of WTO law and the Aarhus Convention reveals some common trends that lead to a broader understanding of the CJEU as a transnational relational actor.

A. Rejecting Direct Effect and Flexibly Applying Consistent Interpretation: Forging Relations with the EU Political Institutions

Denying direct effect to the WTO regime and the provisions of the Aarhus Convention demonstrates the CJEU's reluctance to fully integrate international agreements into the EU legal order through their direct invocation before Member State courts or the CJEU. This approach is explicable in terms of maintaining the allocation of the judicial, executive, and legislative powers of the EU in external relations. The CJEU's gatekeeping strategies demonstrate how the integration of international law in the EU legal order determines not only the EU's relations with external regimes and third countries but also the Court's relations with the EU institutions, qualifying the effects of international law in order to maintain the institutional balance within the EU.

Arguably, direct effect presents the greatest threat to the autonomy of the EU legal order, which the political institutions have sought to control by pre-emptive declarations. Granting direct effect to provisions of an international agreement restricts any discretion accorded by the agreement to the signatory party. This is evident in relation to provisions of the Aarhus Convention, particularly relating to access to justice, which would limit the procedural autonomy of signatory parties as to the administration of justice within their internal legal orders. Upon acceding to the Aarhus Convention, the EU declared that 'the Community institutions will apply the Convention within

the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention' and in light of 'the exercise of EU competence, which is, by its nature, subject to continuous development'.[196] The EU's complex administrative structure, which involves a careful and dynamic division of competences with the Member States, thus complicates the EU's participation in such agreements.

Also, and in a different way, granting direct effect to provisions of international agreements means that the signatory party can no longer take into account a lack of reciprocity in the implementation of the agreement by other parties. Within this context, when acceding to the WTO regime, the EU political institutions declared that the rights conferred by the GATS would not have self-executing effect, and so would not confer directly rights to individual persons,[197] as well as clarifying that the WTO agreement could not be directly invoked before EU or Member State courts.[198] The CJEU's approach in rejecting the direct effect of WTO agreements and provisions of the Aarhus Convention should thus be seen in light of these political qualifications concerning their effects in the EU legal order. The CJEU's rejection of direct effect of WTO agreements and provisions of the Aarhus Convention confirms the executive's choices on the international scene. Denying direct effect to international agreements or provisions thereof, however, does not amount to a complete rejection of international law. The CJEU has instead employed more flexible tools to engage with these international agreements.

Consistent interpretation can, sometimes and to a certain extent, provide an alternative route of integrating international law in the EU legal order. However, the interaction with international law through consistent interpretation is inherently more qualified and is limited by the contours of 'as far as possible' and by precluding interpretation that would be *contra legem* to the wording of EU legislation. The Court thereby respects the discretion exercised by the lawmaker when formulating the relevant legal obligation and leaves to them the task of amending legislation to comply with international obligations should this be necessary.

Maintaining the separation of powers in the EU also drives the CJEU's approach to the findings by external bodies that the EU has infringed, or is infringing, international law obligations. It does so by restricting the extent to which judicial review by the CJEU can serve as an external accountability

[196] Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Aarhus Convention [2005] OJ L124/1, Annex on Declaration by the European Community in accordance with art 19 of the Convention.

[197] Schedule of Specific Commitments of the European Communities and their Member States under GATS, GATS/SC/31, 15 April 1994, Introductory Note, para 3.

[198] Council Decision 94/800 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations [1994] OJ L336/1.

mechanism enabling applicants to hold the EU to account. The CJEU's role is limited in order to preserve political discretion as to the most appropriate response to an external decision finding that the EU is not complying with an international agreement, for example, by amending EU secondary legislation as evident in the recent proposal to amend the Aarhus Regulation or by negotiations with other signatory parties, as in the WTO regime.

As regards decisions of external oversight bodies concerning the interpretation of international agreements, while an obligation to consistently interpret EU law in the light of external decisions is not clearly and consistently endorsed, the CJEU occasionally relies on such decisions on the basis of consistent interpretation in the light of international rules, particularly in the WTO context. Most recently, the CJEU recognised that it is bound by DSB reports when interpreting a WTO agreement as a matter of international law. The *Lex-CEU* case thus demonstrates a different approach to the interpretation of EU law in the light of DSB reports; an approach that is willing to recognise reliance on international decisions as a legal obligation. However, whether this will have an effect beyond the context of the specific infringement proceedings against Hungary, involving serious concerns regarding academic freedom, remains to be seen.

Furthermore, the varied toolkit employed by the CJEU to control the effects of international agreements demonstrates that certain mechanisms may be more appropriate than others for specific policy fields. In the Aarhus context, having rejected the tool of the implementation principle, which seems to be confined to the WTO context and applied strictly, the CJEU made use of different tools to ensure the enforcement of international obligations by Member States, arguably expanding their scope through the incorporation of the agreement in the EU legal order.

B. Interpreting and Applying International Agreements as an Integral Part of the EU Legal Order: Forging Relations with the Member States

Although in many ways, the CJEU may seem to be limiting the internal effects of international law, the incorporation of international agreements as integral parts of the EU legal order in some ways strengthens the obligations stemming from international law, particularly for the Member States. Both in relation to the GATS, as emerges from the *Lex CEU* case, and in relation to the Aarhus Convention, as emerges from *Protect Natur*, the incorporation of international agreements in the EU legal order creates additional obligations for the Member States as contracting parties to the international agreements, both in terms of the enforcement mechanisms that can hold them to account in relation to their international obligations (preliminary references and infringement proceedings) and in terms of the scope of the obligations, which may be combined with EU constitutional law principles and can trigger the applicability of the Charter of Fundamental Rights. This particularly emerges

in relation to cases involving issues relating to fundamental rights, procedural autonomy, and the rule of law in the Member States. While policy considerations relating to such constitutionally important issues in the relationship between the EU and the national legal orders may explain and justify the Court's more open approach to integrating international law considerations in cases involving Member State compliance, its approach demonstrates certain inconsistencies that are not sufficiently justified.

The CJEU has a tendency to differentiate between the effects of international agreements and decisions for the Member States and their effects for the EU. In *the Lex CEU* case, the Court pointed to the context of infringement proceedings and the need for the Commission to enforce international obligations against the Member States. It also highlighted the international liability that the EU itself might incur. However, at the same time, it grounded its reliance on DSB reports on the international law principles of good faith and *pacta sunt servanda*, without justifying why these international law principles do not equally require the CJEU to take into account interpretations of relevant agreements by external bodies when interpreting the international obligations for the EU in annulment proceedings. In a different way, in *Slovak Brown Bear* and *Protect Natur* the Court insulated the EU, and itself, from an approach to Article 9(3) of the Aarhus Convention that would force the CJEU to ensure wide access to justice for environmental NGOs to uphold EU environmental law, by combining international obligations with the constitutional law principles of supremacy and effectiveness that govern the relations between the EU and the national legal orders. The incorporation of the international agreement in the EU legal order created additional obligations for the Member States above and beyond what the international agreement may have itself required.

The Court's varying approach as to the effects of international agreements and decisions for the Member States is partly explained by the division of competences in specific policy fields and the legal character of international obligations. Although the different legal characters of WTO DSB reports and ACCC findings have not influenced the Court's approach when rejecting their direct effect, it may have influenced the Court's perception as to whether it should take them into account. In the *Lex-CEU* case, the Court drew attention to the legally binding nature of DSB decisions, highlighting the requirements under the DSU for members to comply with WTO rulings, and the possibilities for the EU to incur international liability for a wrongful act due to a legal finding of incompatibility with WTO rules by the DSB.[199] The legal bindingness of external decisions and the ensuing liability that the EU might incur as a result of its exclusive competence in the common commercial policy field played a significant role in the Court's reasoning. On the other hand, in the context of the Aarhus Convention, the non-binding nature

[199] Case C-66/18 *Commission v Hungary* (n 111) paras 82–4.

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of ACCC findings and the lack of liability for the EU as a result of a Member State's infringement of the Aarhus Convention in the context of shared competences may have influenced the Court's non-reliance on the Aarhus Convention and ACCC interpretations of specific provisions of the Convention as discussed above in Section II.B.2, rather preferring to ground its reasoning on EU internal considerations.

C. Muted Dialogue and the Need for a More 'Vocal' Engagement with External Decisions: Forging Relations with International Quasi-Judicial Bodies

Overall, despite some instances of explicit reliance on external decisions, particularly in relation to WTO DSB reports, the Court's reluctance to openly and systematically rely on decisions of external oversight bodies remains a prevalent gatekeeping strategy. Nonetheless, external decisions seem to influence the CJEU even when this is not explicitly acknowledged, in the form of 'muted dialogue'. In light of the difficulty of tracing cases in which the CJEU has implicitly followed external decisions, particularly when no reference is made to them, the examples given above are intended to demonstrate a wider trend in the CJEU's jurisprudence. Expanding the methodological analysis on 'muted dialogue', developed previously in relation to WTO law and human rights cases, to map the implicit engagement of the CJEU with ACCC findings, enables the identification of how emerging trends are and could be transposed to different policy contexts in the Court's case law.

The CJEU's engagement with international law should not be limited to the wording of the agreement but be informed by the broader context in which it operates. This context changes over time, often influenced by decisions of external oversight bodies. The CJEU's engagement with WTO DSB decisions has shown that the CJEU's interaction with external decisions is not static and has evolved over time, with an increasing trend of explicitly relying on DSB reports. Considering the considerable work of the ACCC on the interpretation of the Aarhus Convention, an agreement aiming to enhance procedural justice in environmental matters, the CJEU should more openly interact with ACCC findings when delivering judgments on Aarhus-related matters. The indirect influence of ACCC findings through reliance on the Aarhus Implementation Guide and on AG opinions, which themselves increasingly refer to ACCC findings, demonstrates that the CJEU is already influenced by ACCC findings to a certain degree. This, however, does not amount to a meaningful and genuine engagement with the ACCC. Explicit engagement with ACCC findings is needed to make clear the extent to which the CJEU relies on its interpretation, whilst respecting the CJEU's exclusive jurisdiction to determine the exact effects of the Convention within the EU legal order.

The reluctance to openly engage with external oversight bodies and the different standards of review applied in relation to the effects of international law and decisions for the Member States call into question the coherence and consistency of the Court's approach. Insisting on an autonomous interpretation of EU law, with selective and implicit engagement with international rulings, which seems more demanding of Member States than it does of EU institutions, does not necessarily lead to better-reasoned decisions. The application of unjustifiable double standards calls into question the EU's conformity with international law. Decisions of external oversight bodies on overlapping issues should be taken into account by the CJEU as relevant considerations in cases involving interpretation and implementation of international agreements, both towards the EU as a contracting party and towards the Member States. In this way, the CJEU can uphold the EU's commitment to the strict observance of international law under Article 3(5) of the TEU and in accordance with principles of international law under Article 21 TEU. Furthermore, explicitly engaging with decisions of external oversight bodies enables the CJEU to more meaningfully influence external oversight bodies, by 'inviting' those external bodies to engage with the CJEU's own judgments in response.

For these reasons, the CJEU should leverage opportunities to engage in constructive judicial dialogue with the oversight bodies tasked with applying the specific agreements. This does not necessarily mean that the CJEU has to follow the exact interpretation adopted by those bodies, but expressly engaging with such external decisions would be a constructive contribution to the development of transnational governance at the crossroads of multiple applicable legal frameworks. It might also strengthen the CJEU's own conclusions by reinforcing and validating the CJEU's own approach, as in the context of the infringement proceedings against Hungary. Alternatively, when departing from the international approach, the CJEU can use the international decision as a reference point to explain and justify its divergent approach in the specific circumstances of the case before it. Ignoring or refusing to acknowledge relevant international decisions in cases clearly involving international law influence isolates the Court from its international counterparts. Also, when deviations from international decisions are not doctrinally justified by the CJEU, the affected parties are unsure as to the effects of international decisions in individual cases, creating legal uncertainty.

V. CONCLUSION

This article has considered what might, at first sight, appear to be the CJEU's opposition to the entry of WTO law and the Aarhus Convention in the EU legal order. By rejecting their direct effect, while selectively enabling their integration through the more flexible mechanism of consistent interpretation, and in the case of WTO law through the implementation principle, the CJEU has

demonstrated a qualified openness to these international agreements. By jointly analysing WTO law and the Aarhus Convention, this article has highlighted the varied toolkit of gatekeeping strategies used by the CJEU to determine the effects of international law. This does not necessarily lead to a complete rejection of international law but rather consists of a carefully crafted consideration of the extent to which international law should be integrated into the EU legal order in individual cases within the boundaries of the EU treaties, while forging relationships with various actors within and outside the EU. At the same time, the article has demonstrated that the CJEU usually avoids explicitly acknowledging the influence of international decisions in an effort to preserve the EU's autonomy. This raises questions as to the EU's commitment to international law and creates legal uncertainty as to its effects in individual cases.

By engaging with external decisions and sometimes crafting its own understanding of the agreement in question and of the decision itself, the CJEU can meaningfully contribute to the development of international law. Through consistent interpretation, the CJEU can be respectful of external oversight bodies and the commitments of the Member States and the EU under the relevant agreements, while at the same time not surrendering its exclusive jurisdiction to decide on the effects of such decisions in the EU legal order. Consistent interpretation of EU law in accordance with international law thus provides a suitable mechanism for integrating international law into the EU legal order and is a means which is less threatening to the EU's autonomy, including as a less radical and more flexible avenue for judicial dialogue. As evidenced in the CJEU's practice, consistent interpretation is not always expressly and purposefully applied. Questions are thus raised as to the extent to which implicit dialogue with external judicial decisions can amount to meaningful and constructive integration of international law in the EU legal order. For the emergence of a true dialogue, the CJEU needs to acknowledge its reliance on, or departure from, decisions of external quasi-judicial bodies. Express engagement with decisions of international compliance review bodies can more systematically provide the parameters of the interaction between the EU legal order and external legal orders and contribute to enhancing the EU's credibility in respecting international law.