



## International Comparative Jurisprudence



### APPLICATION OF THE WTO AGREEMENTS IN NATIONAL COURTS: COMPARATIVE ASPECTS OF WORLDWIDE AND LITHUANIAN JUDICIAL PRACTICES

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**Abstract.** This article analyses the main World Trade Organization (WTO) agreements: the 1994 GATT agreement and the agreements on the determination of the customs value and customs origin of goods. It also describes the problems involved in granting the direct effect of this external legislation in the Republic of Lithuania from the time of its accession to the WTO in 2001 and entry into the European Union (EU) in 2004. The article seeks to answer the question of whether the external WTO legislation should be recognised as legal acts in the national legal system, with the capability for direct application in judicial proceedings. The article also considers whether individual persons can invoke the WTO agreements at a national level (in national courts) to protect their legitimate rights and interests in international trade operations. In addition, it includes an analysis of practices followed by judicial authorities in the EU and countries in other regions, including the individual EU member states. The analysis leads to the conclusion that, unlike the case law of the Court of Justice of the European Union, the practices and experience of the Republic of Lithuania are essentially based on the provision that these sources of law could be directly applied at a national level in judicial cases related to the taxation of international trade operations. Analysis of the relevant issues is based on both theoretical (analysis and synthesis, systematic analysis) and empirical methods (the statistical analysis of data, the evaluation and textual analysis of documents – in particular, decisions of national courts and the Court of Justice of the European Union (CJEU)).

**Keywords:** international trade, international economic law, international customs law, WTO law, WTO agreements, GATT agreement

#### Introduction

In the context of globalisation in the modern world, international trade remains one of the most important and dynamic factors in the global economy. It is clear and has been highlighted by various researchers that no country in the world can, in the current climate, achieve economic growth without being active in the processes of international trade (Bernatonytė, 2011; Laurinavičius et al., 2014). From a legal perspective, the specific public relationships linked with international trade and its associated regulations are based on the mutual compatibility of various states and are addressed by all global trading partners in line with certain general principles. These were approved in the Uruguay Round in 1994 and were enshrined in the provisions of international economic law – in the form of the WTO agreement and its annexes (see the Law of the Lithuanian Republic on the ratification of the General Agreement on Tariffs and Trade (GATT 1947) and the Final Act of the Uruguay Round of multilateral trade negotiations, 2001), particularly the General Agreement on Tariffs and Trade (GATT), which presents a single regulatory framework for international trade (WTO law).

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It should be noted that the modern legal concept of international trade includes not only classical trade in tangible assets (goods), such as raw materials and finished products, but also trade in services (Folsom et al., 2012) and facets relating to intellectual property rights (Laurinavičius et al., 2014). In general, the regulatory system for trade in services and intellectual property rights is defined in two specific WTO agreements: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, considering the specificity and diversity of the legal sources mentioned above (as some of them regulates specifically the trade in goods and others – trade in other assets), this article further analyses only the trade in goods and its taxation through customs duties. These are regulated by the provisions of the GATT and agreements that set the rules for its application. Those include the Agreement on Rules of Origin, the agreements on the implementation of articles VI and VII of the GATT (regulating the customs valuation of goods and application of anti-dumping customs duties). The Agreement on Rules of Origin contains general provisions for determining the customs origin of goods – that is, the state considered the goods' country of origin for customs purposes. This factor determines which type of customs duties – conventional (regular) or preferential (reduced) – should apply to imported goods. Accordingly, the Agreement on Implementation of Article VII of GATT regulates the determination of goods' customs value that is used as the basis for calculating customs duties, with the majority of such duties worldwide based on customs duty rate that is generally charged on the value of goods irrespective of material considerations (*ad valorem*) (see, for example, Bakker and Belema, 2009).

However, to implement such state obligations and develop a well-functioning international trade system based on the guidelines cited, it is important to ensure the effective application of the WTO's arrangements in the legal systems of individual states. Thus, the international law of treaties obliges participants (such as countries and/or international organizations) in international relations to follow the major contemporary principle of “*pacta sunt servanda*”, which means that every treaty in force is binding on the parties to it and must be performed by them in good faith (Jakulevičienė, 2011). In addition, the doctrine of international law states that, in a general sense, the implementation of any international treaty and its impact on the national legal system depends on the legal nature of the treaty itself (Economides, 2004). Some treaties can be directly applied in national legal systems (including national courts), ensuring that their rights and obligations are provided to individual persons, whereas the application of other treaties requires the adoption of specific national legislation. In this regard, both legal theorists and practitioners widely debate whether the national (domestic) law of individual states should ensure the direct effect of WTO agreements. According to Herdegen (2013), this issue is usually linked to the application of WTO law by domestic authorities and national courts in relation to restrictive trade measures contested at a national level.

Hence, the WTO agreements can be considered as self-executing measures that have all the necessary characteristics allowing the possibility of their direct application into national judicial proceedings. Alternatively, they can be considered as agreements that bind states only at an international level (ensured by the WTO dispute settlement procedure) and do not confer rights to individuals, that they can enforce before national courts. In other words, the fundamental question is whether the WTO agreements are associated only with rights and obligations of states and other subjects of international law, such as international organisations, or whether the agreements cover the rights or obligations of individuals (entities) that can be applied as part of national law under a national mechanism for implementation, such as judicial proceedings in national courts.

It is clear that improper implementation of the WTO agreements may cause a violation of international obligations, create interstate trade conflicts, and even impose possible international sanctions under WTO law that could harm national economic interests. To address the questions identified above, this article therefore presents an analysis of legal practice in the Republic of Lithuania and compares it with that of other countries and the EU in relation to the application of the WTO agreements. Issues related to applying these agreements are widely discussed in foreign research (see Jackson, 2006; Matsushita, 2015; Van den Bossche and Zdouc, 2013; Herdegen, 2013) and EU legal doctrines (see Lux, 2007; Lyons, 2008; Eeckhaut, 2011; Bonavita, 2012 and others). However, these authors usually deal with examples of the practice in the most economically important countries, such as the US, China and the EU as a single entity (from the perspective of the EU as customs and economic union). The legal doctrine does not therefore currently provide a consistent and comprehensive comparative analysis of judicial case law in other

individual states. This article aims to fill a gap in the examples of jurisprudence mentioned above by providing a systematic overview of national judicial practice throughout the world (see chapter 1), particularly in the Baltic region – with the Republic of Lithuania a relatively new member of the WTO and GATT based trading system (since 2001) and of the EU itself (see chapter 2). The analysis seeks to answer the problematic question of whether external legislation (the WTO agreements) should be recognised as legal acts in the national legal system, with the capability for direct application in judicial proceedings. It also considers the arguments about whether individual persons can invoke the WTO agreements at a national level to protect their rights and interests in relation to international trade operations (subchapter 1.1). In addition, it includes an analysis of practices followed by judicial authorities in the EU and other countries (subchapters 1.2-1.3), and compares and describes the problems of defining the status of WTO law and granting direct effect to the WTO agreements in the Republic of Lithuania from the time of the country's accession to the WTO in 2001 and entry into the EU in 2004 (subchapters 2.1-2.2).

It is important to note that there are no in-depth studies on these issues in Lithuanian legal doctrine or other social sciences. Some individual authors, such as Rimkus (2005), Rakauskienė (2006), Bernatonytė (2011)), have considered key issues in the process of integration into the WTO, but they have studied mainly economical aspects of integration, and haven't provided legal analysis of these issues. The question of the legal significance of these international treaties in the Lithuanian legal system has not been analysed (particularly with regard to the development of national judicial case law on the application of the WTO agreements). It should be noted that the problem of applying WTO law in Lithuanian legal doctrine has been examined only when the practices of the EU itself have been discussed – for example, in relation to the application of decisions of WTO dispute settlement bodies – but the national (Lithuanian) legal practices and context were not investigated or even mentioned in such studies (see Daukšienė, 2011). This fact backs up the novelty and relevance of the research presented in this article, which is oriented towards presenting the national situation in relation to the practical application of WTO law in the national courts after the Republic of Lithuania joined the WTO and EU. For this reason, the authors outline only the main aspects of foreign judicial practice among different WTO members and EU member states to the extent necessary for the identification of main trends and concepts, and to formulate a basic framework for comparative analysis of relevant Lithuanian practice. The analysis is based both on theoretical (analysis and synthesis, systematic analysis) and empirical methods (statistical analysis of data and textual analysis of documents – in particular, the decisions of national courts and the Court of Justice of the European Union (CJEU)).

## **1. Application of WTO law by national courts: general insights on worldwide and European Union practices**

### **1.1. The legal status of WTO agreements in national law: differences between monistic and dualistic theory**

One of the main features of WTO law is that the WTO (as an international organisation) does not require its members to give direct effect to it, leaving it up to members to decide how to fulfil their WTO obligations (see Article XVI (4) of the WTO Agreement (2001)<sup>3</sup> and the WTO dispute settlement practice, namely the case *United States – Sections 301-310 of the Trade Act of 1974*, Panel Report (adopted 22 December 1999) WT/DS152/R)). The method that any WTO member state uses to incorporate WTO law into its domestic system depends on its constitution and traditions, as well as many political considerations. Such a situation therefore creates problems in terms of practical interpretation. The relationship and interaction between the WTO law and domestic (national) legal system is also linked to prevailing doctrine, which defines the status of international and national law (Jackson, 1992; Matsushita et al., 2015). Under the doctrine of dualism, the application of norms of international law at a national level requires the translation of international into national law, usually through an act of a state's legislative body (Jackson, 2006). The monistic approach, in contrast, allows international laws to be integrated directly into the domestic legal system and even to prevail in cases for which domestic laws would be inconsistent. Even if domestic laws are adopted, international law can still be directly applied and adjudicated in national courts (Matsushita et al., 2015). However, in the theory of modern international treaty law, both the monistic and dualistic approaches are criticised as being outdated. It is argued that the increased role of international law means that national courts increasingly apply

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<sup>3</sup> Article XVI (4) of the WTO Agreement stipulates in general that “each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”.

international legal regulations, even when these regulations are not a part of domestic law, with the distinction between monism and dualism losing meaning when the application of international regulations in the national legal system is evaluated (Jakulevičienė, 2011).

We should therefore stress that nowadays at a practical level (for example, in judicial proceedings), many countries, including the EU as a single entity, its individual member states and the US<sup>4</sup>, employ a “mixed” monist-dualist approach to international law (Wilson, 2014). This approach is based on the distinction between self-executing and non-self-executing international treaties (Jackson, 2006). Self-executing treaties that have the possibility of being directly applied can be automatically incorporated into national law as soon as they enter into force in any state, without the need for separate national measures to give them legal power (Economides, 2004). In this respect, we agree with Fischer (2008) that there are two main practical ways in which the problem of the supremacy of the WTO agreements and their conformity with internal (national) law could be solved at the level of nations. First, a state can incorporate the agreements into its system of laws as self-executing treaties (a method usually defined as a “monistic model”) so they have direct effect. Alternatively, it may hold the position that the agreements should be considered non-self-executing. In such case they are applied only under certain circumstances, usually only in cases when there are multiple possible interpretations of national legislation that incorporates them into domestic law – (a method defined as a “dualistic model”). The constitutions of individual states usually stipulate the rules on how the distinction between self-executing and non-self-executing treaties (agreements) should be drawn (Jakulevičienė, 2011). Although there is a discourse on the exact content of the definitions “self-executing” and “direct effect” in comparative law, these two concepts are regarded as comparable and substantially similar (Jackson, 2008). If the provisions and content of a certain international agreement therefore consist of clear and precise obligations for which implementation does not require an acceptance of special legal acts or any additional enforcement measures, it can be stated that it also possesses the feature of direct effect.

## **1.2. Judicial practices towards the application of WTO agreements in the national legal systems of non-EU member states**

We should note that there is a tendency for the world’s main trading partners and major players in the world trade system (such as the US, EU member states, China, Japan and Canada) not to grant WTO law direct effect, (Herdegen, 2013; Van den Bossche and Zdouc, 2013; Zivicnjak, 2012; Karayigit, 2008). In judicial practice of the above-mentioned countries, decisions on the applicability of the WTO agreements are usually based on the argument that the agreements are too vague to be applied directly and that their provisions are related only to the rights and duties of states, therefore, they cannot be invoked by individual persons (Aldawsari, 2014; Gattinara, 2009). One of the main examples of such an approach of not granting the WTO law direct effect is the practice traditionally followed by the US legal system. As Reed (2006) notes, WTO law is implemented in the US through the amendment of existing federal statutes that would otherwise be inconsistent with the WTO agreements, and through creating entirely new provisions of law. A certain domestic source of law, such as the Uruguay Round Agreements Act (1994), sets out the relationship of WTO agreements with US domestic law, disallowing direct application of the WTO law. As Barcelo III (2006) points out, US national courts are precluded from directly relying on WTO law and must apply unambiguous national law that clearly violates WTO norms and disregards the WTO agreements and rulings. In addition, private litigants cannot bring actions based on WTO law.

In the US, the question of the relevance of WTO law in domestic litigation only arises in situations for which domestic law is ambiguous and allows for several different interpretations. In such situations, two doctrines of statutory interpretation (the so-called *Chevron* and *Charming Betsy* doctrines) are invoked (Wilson, 2014). Under the *Charming Betsy* doctrine, US courts should interpret ambiguous federal statutes in a way that makes them compliant with the country’s international obligations, thus giving international law indirect effect. The *Chevron* doctrine states that when a national court determines that a statute (source of national legislation) is ambiguous with regard to the

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<sup>4</sup> According to Alves (2009), while the US allows for some international treaties to have a direct effect, the WTO Agreements are an exception as the US has specifically declared the WTO law as non-self-executing and took a dualistic approach to implementing the WTO obligations in its domestic legal system.

legislator's intent, the court is required to defer to any interpretation stated by the federal US agency charged with its implementation that the court finds reasonable, even if it is contrary to WTO law (the WTO agreements). As Barcelo III (2006) states, the *Chevron* doctrine usually trumps *Charming Betsy*, meaning that the court will defer to the federal agency's interpretation of a domestic statute. The same observation can be made about the practices of judicial authorities in Canada, because Canada has a constitutional system that in general does not recognise the direct effect of international agreements, and the country has also chosen not to provide individual judicially enforceable rights on the basis of international trade agreements (since the time it joined the WTO – see, for example, Schaefer, 1997). The type of dualist approach to the WTO agreements followed in the US and Canada has also been applied in the Republic of South Africa. There, the WTO agreements were incorporated into national legislation by using transformation method (what is typical to the countries that choose the dualistic system): the country's parliament adopted special national legislation to bring national law into compliance with the agreements (although, as L. Smit (2007) mentions, it did not include all the WTO law). Accordingly, the application of the WTO agreements became subjugated and controlled by national legislation, limiting the possibilities for its direct effect and its direct application as the courts may use national regulations instead of the rules laid down directly in the WTO agreements (Sohn, 2007).

Other economically important countries, such as Japan and Russia, seem to follow the line on the application of the WTO agreements (specifically the GATT Agreement) formulated by the CJEU and applied in the EU<sup>5</sup>. They therefore generally reject the direct application of the agreements *in corpore*, but allow certain exceptions for cases in which it could be directly applied. For example, in the so-called *Necktie* case in Japan, the district court's decision not to allow invocation of some of the GATT provisions was later supported by the country's Supreme Court (Karky, 2011). Accordingly, despite some criticism in academic sources (see, for example, O'Neill, 2005), the Japanese Supreme Court's latest practice on the application of the GATT in Japan follows the position taken by the CJEU in case C-149/96, Portugal v. Council Council of the European Union, 1999<sup>6</sup>. The practices of Russia, a relatively new WTO member state that joined the organisation only in 2012, confirm that courts in the Russian Federation steer away from the US approach of not allowing the direct application of WTO law. Instead, it appears to be paving the way towards a model in which courts can analyse specific provisions of the law and choose which are directly or indirectly applicable in Russia. As Wilson (2014) observes, such practice was formulated immediately after the country joined the WTO in 2012 in the so-called "*Patent Fees Cases*". This model resembles the CJEU approach to WTO law cited above, generally rejecting its direct application but allowing certain exceptions for cases in which it could be directly applied.

An alternative practice is followed by a comparatively small number of countries. Among European countries, Switzerland traditionally follows and promotes a monistic doctrine for the application of WTO law, and has allows its direct applicability and enforceability in domestic courts (Petersmann, 1997; Karky, 2011). Similar practices have also been respected in Taiwan, where jurisprudence upheld the direct effect of WTO agreements in Taiwan's legal system and most case laws have tended to apply the laws directly (Liu, 2009). The monistic approach, which leaves a great deal of discretion to domestic courts to apply the WTO agreements, is used in South Korea (Sohn, 2007) and has recently started to be used in India (Aldawsari, 2014). These countries' judicial practices provide examples of cases in which the national courts directly apply and examine the WTO norms as domestic laws, or directly rely on WTO law to analyse the constitutionality of previously adopted national legislation (as it was quite recently did in the *Novartis* case in the Supreme Court of India). Argentina's Supreme Court has also confirmed a monistic interpretation of the WTO agreements in several of its rulings – and has stated that in the case of contradiction between a provision of domestic law and one of WTO law, the latter overrides and replaces the former (see de Santa Cruz Oliveira, 2015). The similar practices have also been observed in other major countries and economies of Latin America, such as Brazil and Mexico (Sohn, 2007).

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<sup>5</sup> A detailed analysis of the CJEU's position on the application of the WTO agreements in the EU and its member states is provided in subchapter 1.3. of this article

<sup>6</sup> In this case, the CJEU ruled that "having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions" – see judgement of the court of 23 November 1999 in case C-149/96, Portugal v Council, 1999, para. 47

### 1.3. Judicial practices towards the application of WTO agreements in the legal system of the EU and its member states

An evaluation of the problematic aspects cited above also requires an examination of the experience of the EU as a single entity (economic and customs union) and its individual member states in relation to application of the WTO agreements (namely the GATT Agreement) in their legal systems. In this regard, it is pertinent to note that the EU implements the Common Commercial Policy, the primary objective and content of which consists of measures designed to regulate trade with third countries outside the region, and which falls within the exclusive competence of the EU (see case C-137/12, *Commission v. Council*, 2013). It should be emphasised the Court of Justice of the European Union (CJEU) has pointed out in its jurisprudence (see cases C-21 to 24/72, *International Fruit Company and Others v. Produktschap voor Groenten en Fruit*, 1972, paras. 14-18; C-38/75, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, 1975, para. 16; and C-267 to 269/81, *Amministrazione delle Finanze dello Stato v. SPI and SAMI*, 1983, para. 19) that the EU as a single legal entity has replaced the individual member states in legal relations resulting from the provisions of the GATT agreement.

It should also be noted that as set out in Article 216, paragraph 2 of the Treaty on the Functioning of the European Union (2012), international agreements concluded by the EU are binding on the EU's institutions and member states. In line with CJEU jurisprudence used in the famous cases of *Haegeman* and *Kupferberg*, international treaties concluded by the EU form an integral part of EU law (see cases C-181/73, *Haegeman v. Belgian State*, 1974, paras. 5-6, and C-104/81, *Hauptzollamt Mainz v. C. A. Kupferberg and Cie KG*, 1982). Their direct effect is therefore realised if the nature or structure of an international treaty's provisions is compatible with the characteristics to be directly applied. Such relative openness of the EU to international law within its own legal order has led some commentators (for example, Eeckhaut, 2011) to state that a presumption of the direct effect of international law exists in the EU. As described by Uerpmann-Witzack (2010) and Cannizzaro (2012), the relationship of EU law to international law can be explained as being based on monistic theory, which represents the general philosophy of the European legal order. This therefore leads to a discussion of whether private litigants in the EU may be able to use WTO law to invalidate EU law or obtain damages under the EU's provision on non-contractual liability (Errico, 2011). CJEU cases that relate to the application of WTO law reflect this discussion, with the litigants having long contested the legality of secondary EU legislation that provided measures restricting international trade (Bronckers, 2008; Perisin, 2011).

In deciding on this question, the CJEU has repeatedly pointed out that individual rules in the WTO agreements do not have the necessary characteristics to consider them directly applied (self-executing) (see cases C-149/96, *Portugal v Council*, 1999, para. 47; C-377/02, *Leon Van Parys v. Belgisch Interventie-en Restitutiebureau*, 2005, para. 39; C-361/11, *Hewlett-Packard Europe BV v. Inspecteur van de Belastingdienst/Douane West, kantoor Hoofddorp*, 2013, para. 57; C-306/13, *LVP NV v. Belgische Staat*, 2014, para. 44; and C-21/14 P, *Commission v. Rusal Armenal*, 2015, paras. 38-40). An importer or exporter is therefore be entitled to rely on WTO rules only when the EU institutions had planned to implement a particular obligation assumed under the GATT using EU legislation, such as the anti-dumping regulation (see case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, 1991), or when EU legislation provides a clear reference to the legal provisions of the GATT agreement (see case C-70/87, *Fediol v. Commission*, 1989). The jurisprudence of the CJEU that was formulated in these cases (case C-69/89, *Nakajima*, and C-70/87, *Fediol*) is usually described as the *Fediol* and *Nakajima* doctrines and, as mentioned in relevant scientific studies (see, for example, Daukšienė, 2011), these doctrines defines a comprehensive and finite list of possible exceptions for application of the WTO agreements in judicial disputes in which the legality of national and EU legal regulations (acts) is under review or contested. As noted by de Mey and Colomo (2006), and observed by Advocate General Kokott (see the opinion of Advocate General Kokott delivered on 23 April 2015 in Case C-21/14, *Commission v. Rusal Armenal*, 2015, para. 38), over the long term these exceptions to official practice followed by the CJEU have almost exclusively been applied in the field of anti-dumping. Only in this area of legal regulation has the CJEU considered that the agreement on the implementation of Article VI of the GATT lays down very detailed rules. As Eeckhaut has noted, these tendencies can be interpreted in such a way as indicating that

GATT/WTO law is a notable apparent exception to general presumption on the direct effect of international law in the legal order of EU (Eeckhaut, 2011).

Under CJEU case law, in other cases the primacy of international treaties (namely, the WTO agreements) concluded by the EU over secondary Community legislation means only that this legislation must be interpreted in a manner that is consistent with these agreements (see case C-373/08, *Hoesch Metals and Alloys GmbH v. Hauptzollamt Aachen*, 2010, para. 40). This rule is particularly important in cases in which the scope of application of EU legislation is unclear (see case C-280/93, *Germany v. Council*, 1994, paras. 110-111). Such interpretation is important in the sense that EU legislation (for example, the Community Customs Code (1992) and later the Union Customs Code (2013)) has mostly directly transferred many of the rules set out in WTO agreements such as the Customs Valuation Agreement and Anti-Dumping Agreement (as observed by Lux (2007)). However, the CJEU's jurisprudence has so far not provided an interpretation under which the right of an individual applicant to initiate a dispute based directly on the provisions enshrined in the WTO agreements could be recognised. Thus, according to Lyons (2008) and Herdegen (2013), the CJEU has been reluctant to recognise that any of the rights set out in these agreements has the capability to be directly applied. Some scholars, such as Seyad, have criticised this practice as outdated and archaic because, for example, it denies the right of an individual to claim damages from the EU if he or she suffers any loss because of a breach of WTO rules. Others, such as Lyons (2008), defend it by pointing to the fact that the WTO agreements set only the basic parameters for international trade. Meanwhile, international trade between the EU and third countries outside the region is being developed on the basis of multilateral or bilateral preferential trade agreements, the direct effect of which in the EU legal system is universally recognised by the CJEU (see case C-188/91, *Deutsche Shell v. Hauptzollamt Hamburg-Harburg*, 1993; and C-308/06, *Intertanko and Others v. Secretary of State for Transport*, 2008, para. 42).

In the practices and jurisprudence formulated by the CJEU, the WTO agreements are therefore not recognised as having a direct effect in general, and under the doctrine of consistent interpretation, their legal effect is usually realised only in the process of the interpretation of EU law (as an additional source (measure) for the interpretation of EU law and the national law of member states, see case C-53/96, *Hermès International v. FHT Marketing Choice*, 1998). From a theoretical and practical point of view, this raises the question of how much this CJEU practice must be followed by EU member states' courts in their national legal systems. In addressing this issue, attention is usually drawn to the fact that it is down to the national law of each individual WTO member to determine the effect of WTO law within the domestic legal order (Sennekamp and van Damme, 2014). On the other hand, as recently interpreted by the CJEU in the case of *Daiichi* (C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon*, 2013, para. 61), every agreement that, as a matter of WTO law, forms part of the WTO Agreements, necessarily corresponds to what constitutes the Common Commercial Policy under EU law. According to Van Damme (2015), the implication here is that the EU has the competence to determine the direct effect of the WTO agreements, and this legal aspect is therefore no longer recognised as belonging under the competence of member states. Under this interpretation, that means the national courts of member states are not free to decide on the possible direct effect of WTO law and might need to revise their previous case law in this respect (Van Damme, 2015). As stated by Leal-Arcas (2005), the analysis of previous CJEU practice also leads to the conclusion that in cases for which an international agreement (such as the WTO agreements) has no direct effect under an objective test, contracting parties (such as EU member states) have no obligation to allow its enforcement in national courts. According to Kuijper and Bronckers (2005), the CJEU does not recognise the possibility of an internal review by member states of legal acts based on WTO rules (the fact that the WTO agreements do not confer on citizens of the Community rights that they can invoke before the courts was recognised as early as the 1970s in the *International Fruit Company* case – see case C-21 to 24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, 1972, paras. 14-18). This means that WTO law can be relied on neither before the CJEU nor before national courts, including among both individual and privileged applicants (see the opinion of Advocate General Maduro delivered on 20 February 2008 in joined cases C-120/06 P and C-121/06 P, *FIAMM and Fedon*, 2008, paras. 28 and 29).

This practice (i.e. that WTO law cannot be relied on before national courts) is essentially followed by the national courts of EU member states, in which, as El Boudouhi (2015) notes, the national legal order itself seems to recognise the concept of “limited invocability” with respect to international norms that are binding on the EU in general, but do not have certain characteristics allowing them to be directly applied. National courts therefore usually decide that the provisions of the WTO agreements can be directly applied only in exceptional cases: firstly, if national legislation refers to WTO law and secondly, if that provision gives specific rights that individuals may rely on in judicial proceedings (Herdegen, 2013; Bonavita, 2012). From a historical perspective, it is important to note that the Italian courts have questioned such a position, holding that different EU member states might take different positions on the GATT’s legal effect and that the GATT Agreement could not be considered a Community act. Such a position was set out in preliminary questions to the CJEU formulated in the SPI and SAMI cases (cases C-267 to 269/81, *Amministrazione delle Finanze dello Stato v. SPI and SAMI*, 1983). Similar activities were reported in Germany, where domestic courts followed the practice of recognising the direct applicability and enforceability of at least part of WTO law (i.e. the direct effect of TRIPS Agreement was recognized) (see Petersmann, 1997). Nevertheless, from the 1980s, Italy’s *Corte di Cassazione* (Court of Cassation) started to follow the CJEU’s line on the GATT’s legal status, thereby reversing earlier case law on the matter (O’Neill, 2005). No similar tendencies to apply WTO law directly have been mentioned as applicable in Germany (Karky, 2011).

All in all, while the general relationship between EU and public international law can be explained as being based on monistic theory, in analysing the specific application of WTO law as an individual institute or branch of public international law we propose to define the routine practice of the CJEU and national courts of the EU member states as being based on a mixed (coordinative) model<sup>7</sup>. This model includes elements of both monistic and dualistic approaches, and regulates the application of WTO law in judicial cases. Under this model, WTO law in general is not directly applicable (its direct effect is not recognised), except in certain exceptional cases in which the relevant WTO agreements and their specific provisions are recognised as being sufficiently specific to give rights and duties to individual persons (in contrast with the pure dualistic model, which is quite widespread worldwide outside the EU (in the practice of national courts) and considers the WTO agreements as non-self-executing treaties in all cases). According to the EU-based model, WTO law should also be treated as directly applicable in judicial cases for which the relevant rules of domestic and EU law make direct reference to the WTO agreements and indicate that they can be applied.

## **2. Characteristics of Lithuanian judicial practice in the application of the WTO agreements**

### **2.1. Problematic aspects of the status of the WTO agreements as a source of law in Lithuania’s legal system after the country’s entry into the WTO and EU**

Under the Constitution of the Republic of Lithuania (Article 138, para. 3, 1992), international treaties ratified by the country’s Seimas (Parliament) are an integral part of the nation’s legal system. This provision means that such treaties should be applied as laws of the Republic of Lithuania (as presented in the Constitutional Court of Lithuania’s conclusion of 24 January 1995, 1995), so their provisions can be directly applied, and that they have priority (supremacy) in the case of conflict with national law (see, for example, the ruling of the Constitutional Court of Lithuania of 5 September 2012 on the prohibition for a person who was dismissed from office under impeachment proceedings to be elected a member of the Seimas, 2012). As highlighted by Vadapalas (2006), the conclusion from these constitutional provisions is that Lithuania has selected a monistic model for the definition of the relationship between national and international law (including EU primary law). This opinion is also backed up by Kūris (2008).

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<sup>7</sup> As already noted (see subchapter 1.1. of this article), this model is based on the distinction between self-executing and non-self-executing international agreements and/or their specific provisions that are treated differently: they may (or may not) have a direct effect in national legal systems depending on their exact legal nature. Therefore, the possibility of their direct application in national judicial proceedings, depends on the legal nature of an agreement and its individual provisions (whether it confers rights to individuals that may be enforced before national courts; see also Economides, 2004, and Jakulevičienė, 2011).



Thus, Lithuania sees the *pacta sunt servanda* principle of international law as being a constitutional principle that impels the country to comply with its international obligations. It is argued that this principle offers a constitutional solution to the problem of applying law in the event of a collision of legal regulations (Jarašiūnas, 2008). Such a concept has been repeatedly applied in case law, such as by the Senate of the Supreme Court of Lithuania (as the highest judicial authority) in ruling No. 5 of 13 June 1997 on the application of laws governing the adoption of court decisions and the order of their layout (Lithuanian case law. Reviews, consultations, decisions, rulings (civil law and civil procedure) (1991-1999), 2000). In this case, the Supreme Court explained to the national courts that international treaties, as well as conventions and protocols, to which the Republic of Lithuania had acceded were an integral part of the national legal system and should be applied directly. Analogous rules were also established in national laws governing the taxation of international trade, such as various versions of the Law on Customs of the Republic of Lithuania (2004, Article 108; 2016, Article 28, para. 3) and the Law on Tax Administration (2004, Article 5). These rules establish the privileged status of ratified international treaties and declare that they take precedence over national tax law.

However, as early as 1995, Lithuania's Constitutional Court, in its opinion on the European Convention on Human Rights (conclusion of the Constitutional Court of Lithuania of 24 January 1995, 1995) stated that international agreements, including the Convention, do not apply equally in separate spheres of legal activity. Hence, the specific methods and forms of their application may also be established by the laws of the Republic of Lithuania. On the other hand, unlike constitutional sources of law in many other countries (Jakulevičienė, 2011), neither Lithuanian legal doctrine (Radušytė, 2001; Rimkus, Lučinskienė, 2010; Limantė, Augustauskaitė, 2016) nor the Constitution of the Republic of Lithuania provide a specific interpretation of which specific international treaties concluded by the country should be considered self-executing. Such regulations are also absent in the 1999 Law on International Treaties of the Republic of Lithuania (see, for example, articles 11-12 of the law). The practical answer of whether WTO agreements under Lithuanian national law should be considered self-executing and directly applicable in judicial proceedings or, alternatively, non-self-executing and not directly applicable, therefore lies in an analysis of Lithuanian judicial practice. It can be seen that to ensure conformity with WTO law under the organisation's dispute settlement practice, a WTO member "bears responsibility for acts of all its departments of government, including its judiciary" (see United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, Appellate Body Report (adopted 8 August 2009) WT/DS322/AB/RW, para. 182).

It should be emphasised that after the restoration of Lithuania's independence on 11 March 1990, among the core components in the process of political and economic reform was the goal of integrating into the WTO and of creating conditions for a stable and reliable foreign trade policy to gain the confidence of foreign trade partners and investors (Rimkus, 2005). The process of joining the WTO ended on 31 May 2001, when Lithuania became the organisation's 141st member. On 24 April of that year, the Seimas had ratified all legal documents relating to accession to the WTO (Law of the Lithuanian Republic on the ratification of the General Agreement on Tariffs and Trade (GATT 1947) and the Final Act of the Uruguay Round of multilateral trade negotiations, 2001) and notified the WTO Secretariat that Lithuania had fulfilled all legal procedures necessary to become a full member. It can be noted that integration into the WTO has been associated with additional obligations for Lithuania in the sphere of foreign trade (in terms of the regulation of both tariff and non-tariff measures). Since 2001, this has led to changes in a variety of tax, customs and insurance laws, the reduction of import duties on key agricultural and food products, and reductions in conventional customs tariffs on industrial goods. The integration has also influenced the elimination of non-tariff trade restrictions for the import of some alcoholic beverages, sugar and petroleum products (Rakauskienė, 2006; Bernatonytė, 2011). However, this practical approach does not answer the question regarding the legal significance and status of the WTO agreements in Lithuania's internal legal system – that is, whether they should be regarded as self-executing treaties that can be directly applied, for example, by the national courts.

To answer this question, empirical research on national judicial practice was carried out with the help of the official Lithuanian case-law database, INFOLEX (2017). The research identified more than 10 cases in which Lithuania's highest judicial authorities made referrals to WTO law (the GATT and other GATT-related annexes of the agreement on the founding of the WTO) – in particular, the Agreement on Customs Valuation (see Agreement on the application

of Article VII of the GATT (Annex 1A of the Agreement on the founding of the World Trade Organization, 2001)). In essence, these all related to the taxation of international trade, involving issues linked to the administration and calculation of customs duties. They were examined exclusively in the Supreme Administrative Court of Lithuania (SACL), the highest national judicial authority empowered to deal with disputes arising in the sphere of public administration (disputes with tax authorities). At the same time, it should be noted that the courts of general (civil) jurisdiction, such as the Supreme Court of Lithuania, did not apply the GATT agreement and its annexes in their practices, and considered only issues with regard to application of the TRIPS Agreement. However, the specific features of this WTO agreement (TRIPS Agreement) fall beyond the scope of this article and are not analysed in detail.

## **2.2. The evolution of Lithuanian judicial practice with regard to the application of WTO agreements: issues relating to compatibility with practices followed by the EU and its other member states courts**

An analysis of Lithuanian case law from the time the Republic of Lithuania became a member of the WTO leads to the conclusion that immediately after joining the organisation (2001–2008), the Lithuanian courts did not recognise the possibility of the WTO agreements having a direct effect. The national courts maintained this position before 2008 despite the WTO agreements being ratified by the law of the Seimas in 2001 (see Law of the Lithuanian Republic on the ratification of the General Agreement on Tariffs and Trade (GATT 1947) and the Final Act of the Uruguay Round of multilateral trade negotiations, 2001). Formally, such ratification could potentially give these agreements privileged status in line with the Constitution of Lithuania (1992; Article 138, para. 3), and they could be accorded priority in the case of conflict with national law.

However, Lithuanian judicial practice shows that the courts recognised the WTO agreements as applicable only when national rules (such as the Customs Code of the Republic of Lithuania, 1996) provided direct reference to their application in certain situations (for example, in customs valuation cases) (see the Supreme Administrative Court of Lithuania (SACL), 20 November 2003 ruling of the panel of judges in administrative case No. A<sup>2</sup>-1154/2003, 2003; the 26 January 2004 ruling of the panel of judges in administrative case No. A<sup>4</sup>-13/2004, 2004; the 1 February 2005 ruling of the panel of judges in administrative case No. A<sup>4</sup>-163/2005, 2005; and the 1 February 2005 ruling of the panel of judges in administrative case No. A<sup>7</sup>-92/2005, 2005). In these types of SACL case, the Court based its position on the regulations of Article 32 of the Customs Code of the Republic of Lithuania, which made direct reference to the application of methods for customs valuation set out in Article VII of the GATT. The Court repeatedly ruled that in the absence of the possibility of determining the customs value by other alternative methods established in national law, this should be determined according to data collected in the Republic of Lithuania. However, the Court also stated that the determination of customs value should be completed using instruments that comply with the agreement on the application of Article VII of the GATT (2001) and the provisions of its general principles. In this way, Lithuania's national courts recognised, for example, that the customs value of imported goods can be determined using data in the Customs Department PREMI database.<sup>8</sup> However, according to the explanations of the SACL, the determination of a customs value that is not based on the transaction value method should have been based on the value of imported goods that is most favourable to the importer – in other words, the lowest possible customs value should be chosen (see the Supreme Administrative Court of Lithuania, 30 April 2004 ruling of the panel of judges in administrative case No. P<sup>14</sup>-64/2004, 2004). This approach follows the same rules as those enshrined in the agreement on the application of Article VII of the GATT. It can thus be stated that the judicial practice of Lithuania's national courts coincided with the practice of the CJEU, which also follows the line that litigants are entitled to rely on WTO rules only when an EU institution had the intention of implementing a particular obligation assumed under the GATT using the EU legislation itself (see the case *Nakajima All Precision Co. Ltd v. Council of the European Communities*, 1991).

Nonetheless, qualitative changes in this area took place from 2008, when national judicial authorities started to rely on WTO law to define the general rights and obligations of persons (taxpayers) in the sphere of legal relations arising from the application of customs duties. For example, the SACL ruled that for cases in which customs authorities had

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<sup>8</sup> A database used by national customs authorities that details the market prices of imported products

reasonable doubt about the declared value of goods and the accuracy of the customs value, the burden of proof shifted to the importer (see the Supreme Administrative Court of Lithuania, 31 January 2008 ruling of the panel of judges in administrative case No. A<sup>756</sup>-140/2008, 2008; the 30 December 2009 ruling of the panel of judges in administrative case No. A<sup>3</sup>-1709/2009, 2009; the 27 October 2010 ruling of the panel of judges in administrative case No. A<sup>575</sup>-1340/10, 2010; and the 18 January 2011 ruling of the panel of judges in administrative case No. A<sup>575</sup>-144/2011, 2011).

This position was based on reference to the Interpretations of the WTO Technical Committee on Customs Valuation (decision No. 6.1). This approach to WTO law was completely new, because the WTO's interpretations and recommendations on customs valuation were applied not only in specific cases, such as when there were no clear national rules on it; they were also used to define the general duties of persons participating in international trade operations, even though the Community Customs Code (1992; see Article 29) itself regulated procedures for the valuation of goods for customs purposes in detail. The stance of the courts was based on the idea that because Lithuania was a member of the WTO and had ratified the GATT agreement, the provisions of WTO law (including soft-law rules prepared by WTO institutions) should be considered as binding and should therefore be followed. It can thus be stated that in this case, national judicial authorities recognised the direct effect of WTO law and applied the rules directly. This represented a departure from the practice of the CJEU and even the Constitutional Court of the Republic of Lithuania in the ruling of 27 January 2005 (case No. 4/02, 2005), in which WTO law was primarily used only to interpret the legal nature and essence of national and EU legal regulations that already existed (Community Customs Code). The SACL also upheld a completely analogous position in one of its newest cases examined in 2016 (see the Supreme Administrative Court of Lithuania, 22 March 2016 ruling of the panel of judges in administrative case No. A<sup>214</sup>-261/2016, 2016). Meanwhile, in terms of CJEU practice relating to the application of WTO law, the WTO agreements are not interpreted as laying down the rights and duties of an individual person that can be invoked in specific judicial cases. The emergence of such Lithuanian judicial practice therefore suggests the conclusion that, despite the CJEU practice mentioned above and the obligations of Lithuania as an EU member state to follow the region's Common Commercial Policy, the GATT and its annexes had started to be treated as self-executing international agreements.

Further development of this position took place in 2013. With respect to this, it is pertinent to mention case No. A-442-709/2013 of the SACL (the Supreme Administrative Court of Lithuania, 5 March 2013 ruling of the board of judges in administrative case No. A<sup>442</sup>-709/2013, 2012), in which the Court decided on a dispute on the customs value of imported goods, making a final decision based on CJEU case law used in case No. C-431/05, *Merck Genéricos - Produtos Farmacêuticos v. Merck & Co. Inc. and Merck Sharp & Dohme Ld<sup>a</sup>*, 2007. The SACL explained that under EU Council decision No. 94/800/EC, the EU itself adopted the WTO agreements (*inter alia*, the WTO Agreement on Customs Valuation, in other words the agreement on the application of Article VII of the GATT, 2001) as an integral part of the Union's legal system, compulsory for EU institutions and member states. It followed that the international treaties (the WTO agreements) approved by the decision cited above form an integral part of the Union's legal system and should thus be applied in this case.

Such a precedent adopted by the SACL raises the question of whether national case law had recognised the possibility of full direct applicability of the WTO agreements in the national legal system. In case No. A<sup>442</sup>-709/2013, the Court interpreted how the transaction value method, which is supposed to form a basis for customs valuation, should be applied. It noted that the WTO Agreement on Customs Valuation was adopted by recognising the importance of Article VII of the GATT and seeking to develop rules for its application. The Court interpreted that the main goal of this agreement was thus to ensure greater uniformity in implementing the provisions of GATT Article VII and to create a fair, uniform and neutral system to prevent the use of fictitious customs values for the taxation of imported goods. The WTO Agreement on Customs Valuation specifies that, as far as conditions permit, the value of goods should be established on the basis of their evaluated transaction value (based on the transaction price of purchased goods). The agreement also acknowledges that the customs value should be based on simple and objective criteria that comply with commercial practice, and that assessment procedures should be applied uniformly without variance for different sources of supply (see Article 1 and the Preamble (para. 1) of the agreement). The Court stated that such

a concept for customs valuation replaced the previously used “normal price” concept, and relied on these rules to review the legality of calculations relating to the customs value of imported goods conducted by national authorities.

In this case, the SACL again departed from its previous practice and directly applied the WTO Agreement on Customs Valuation, recognising that certain WTO agreements could be applied, for example, to resolve disputes on the customs valuation of imported goods. However, Decision 94/800/EC (1994), to which the SACL referred in case No. A<sup>442</sup>-709/2013, obliges EU institutions to take measures to bind the EU with regard to the portion of the WTO agreements that falls within its competence. It does not set the exact rules on their effect in EU law and the national law of member states (Article 1, para. 3; Article 2, para. 3). On the other hand, in the case *Merck Genéricos - Produtos Farmacêuticos v. Merck & Co. Inc. and Merck Sharp & Dohme Lda*, 2007 (para. 34), the CJEU acknowledged that WTO agreements (such as the TRIPS Agreement) might be directly applied in member states at the discretion of their national courts. Such a possibility exists in cases for which there are regulatory areas that the Community has not yet regulated using EU legislation. In addition, as interpreted by van Rossem, the legal doctrine that began to be formulated in the *Merck Genéricos* CJEU case is based on the principle that the CJEU itself (not the national courts of member states, as in administrative case No. A<sup>442</sup>-709/2013 of the SACL) has the exclusive right to determine which specific provisions of the WTO agreements are covered by EU law and which are not (van Rossem, 2012). Under this principle, member states are therefore free to grant direct effect to such provisions of WTO law only if the CJEU has ruled that they do not fall within the scope of EU law. However, it is clear that customs valuation is regulated in detail (incorporated literally or almost literally) by EU legislation (the Community Customs Code (1992) and, since 1 May 2016, by the Union Customs Code (2013)). In addition, as noted by individual authors such as Lux, the WTO Agreement on Customs Valuation belongs to the category of international agreements that need transposition into EU legislation to be implemented and applied. The possibility of it taking a direct effect is therefore usually not recognised. It should be noted that Mlsna (2010) also shares similar general views on the transposition of international treaties into the EU’s legal framework with the help of secondary sources of EU law (that is, EU regulations) and states that international agreements which were transposed into the EU legislation doesn’t possess the feature of direct effect. The same position is supported by M. Cremona, who contends that it is difficult to argue that an international agreement can be applied directly and should prevail over secondary EU legislation in cases when the agreement itself is incorporated into EU law by establishing the EU’s own rules (Cremona, 2012).

It therefore seems relevant to state that the new practice of the SACL is debatable. It is clearly based on the primacy of WTO law (instead of applying EU law as a primary source). In such a context, this may contradict the practice of the CJEU, which does not recognise that the WTO agreements may be applied to review the legality of decisions (acts) of EU institutions and member states. On the contrary, in the so-called *Bananas* case (*Germany v Council*, 1994; see para. 9 of the Summary of the Judgment of the Court), the European Court of Justice made it clear that it would review the legality of an EU act under the GATT “only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT”. Meanwhile, such national practice may also be interpreted as damaging the principle of legal autonomy of the EU, which requires that when an international agreement is considered as an integral part of EU law, its application and interpretation falls under the CJEU’s exclusive jurisdiction (van Rossem, 2012).

In addition, the practice of the CJEU, which allows the direct application of the GATT and its annexes in the EU as a whole, has almost exclusively been used in the field of anti-dumping (in the application of the WTO Anti-Dumping Agreement), but not in the application of the WTO Customs Valuation Agreement (Law of the Lithuanian Republic on the ratification of the General Agreement on Tariffs and Trade (GATT 1947) and the Final Act of the Uruguay Round of multilateral trade negotiations, 2001). The national interpretation of the direct effect of this agreement in Lithuania therefore differs from the understanding adopted by the CJEU. The existence of different interpretations can be explained by certain specific reasons of a practical or theoretical nature. Firstly, as described earlier, Lithuanian national law does not provide a clear definition of self-executing international agreements. The rules, which regulates collisions between national and international law, are set out in Article 5 of the Law on Tax Administration (2004) or, for example, Article 28, paragraph 3, of the Law on Customs of the Republic of Lithuania (2016) use a monistic approach with regard to the relationship between international and national law, thus giving priority to all ratified

international treaties and formally ensuring their equal and direct application. Secondly, one feature of Lithuanian national rules and practices on the determination of customs value relates to leaving disproportionately wide discretion to customs authorities on exemptions to using the transaction value method as the main method of customs valuation (comparing to the discretion which should be left according to the practice of the CJEU, see Medelienė, Paulauskas, 2008; Baronaitė, 2010). Accordingly, the direct application of the WTO Agreement on Customs Valuation may seem to be used as a tool to solve these problems of legal regulation in practice, and to ensure compliance with international standards, as emphasised in case No. A<sup>442</sup>-709/2013.

A detailed analysis of the Court's ruling in the case cited above, and the context in which the ruling was adopted, raises the question of the consistency of the Court's position on the unconditional direct effect of the GATT and its annexes in the national legal system. In general, the Court used the doctrine of monism to define the legal status of the GATT and its annexes. On the other hand, it has also reiterated the fundamental principle previously formulated and used by the CJEU that the WTO agreements can be relied upon in interpreting EU law, particularly in cases for which the scope of EU legislation is not clearly defined (see, for example, case *Germany v. Council*, 1994). Therefore, it can be said that in practice they are recognised merely as an additional source of law: although recognised as an integral part of the national legal system, they have only an explanatory nature. In the administrative case No. A<sup>442</sup>-709/2013, as the Court has noted, the legal dispute dealt with the situation, when the rules of the Community Customs Code (EU law) had to be applied that regulate the determination of the customs value of goods (Articles 28-36 of the Code (1992), which correspond to Articles 69-76 of the Union Customs Code (2013)). These rules essentially repeat the rules of the WTO Agreement on Customs Valuation. Moreover, as we can see in this case, the question about the application of the WTO law was raised precisely because the customs value of goods was determined using the "last chance" (*fallback*) method – that is, using other generally acceptable means to determine the customs value of goods. This aspect is important because, as it is also noted at a theoretical level by L. W. Gormley (2009), for a case in which EU law and the Community Customs Code do not regulate customs valuation in detail, use of the "last chance" (*fallback*) method (Article 31 of the Community Customs Code (1992), which corresponds to Article 74, paragraph 3 of the Union Customs Code (2013)) allows WTO law to be applied directly. In such a situation, determination of the customs value should be consistent with the aims and provisions of Article 7 of the Agreement on the Implementation of Article VII of the GATT (2001). After assessing these factors, it can thus be stated that in administrative case No. A<sup>442</sup>-709/2013, the SACL in principle did not provide a universal interpretation of the WTO agreements and the relationship between them and national law.

In recent cases, the SACL, following the practice of the CJEU in cases C-149/96 (*Portugal v. Council of the European Union*, 1999) and C-300/98 (*Parfums Christian Dior SA v. TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV.*, 2000), has taken some steps to soften its position on the direct application of WTO law. It has declared that in at least some circumstances, it may review the WTO agreements as not belonging to rules that give rights to individuals on which they can rely in court proceedings. For example, in administrative case No. A<sup>602</sup>-1447/2013, the SACL refused to rely on the provisions of the GATT Agreement to which the applicants had appealed in their complaints and procedural documents (the Supreme Administrative Court of Lithuania, 2 December 2013 ruling of the panel of judges in administrative case No. A<sup>602</sup>-1447/2013, 2013). However, the object of this case related to issues involving internal taxation (value added tax (VAT) refunds to foreign residents), but not on the primary subject matter of the GATT Agreement – international trade in goods. This application of the GATT Agreement cannot therefore be interpreted as altering the previous practices used in cases relating to the regulation of international trade and application of customs duties. The practice formulated by the SACL in administrative case No. A<sup>442</sup>-709/2013 is still binding to the courts and other state institutions. According to the Law on Administrative Proceedings of the Republic of Lithuania (1999; see Article 13, para. 2), the binding effect of this practice is evident in the fact that the case was decided by an extended panel of judges and published in the official bulletin "Administrative Jurisprudence". Furthermore, the same approach to WTO law (treating it as conferring rights and obligations on individual persons) was used again in other recent additional cases in 2016 (see the Supreme Administrative Court of Lithuania, 22 March 2016 ruling of the panel of judges in administrative case No. A<sup>214</sup>-261/2016, 2016).

We can conclude that the practice in the above-mentioned cases No. A<sup>442</sup>-709/2013 and No. A<sup>214</sup>-261/2016), as well as earlier above-mentioned cases (specifically the ones, which were examined in 2008–2011 and which dealt with the transfer of the burden of proof on the valuation of imported goods for customs purposes (justified by direct referral to WTO law)) was inconsistent. It does not formulate a clear doctrine on the status of the WTO agreements in the national legal system and their application in national courts. Nevertheless, it should be emphasised that the position taken by the Lithuanian Supreme Administrative Court in case No. A<sup>442</sup>-709/2013 and other cases since 2008 is more liberal than the jurisprudence of the CJEU on the direct effect of the WTO agreements. The practice of the Republic of Lithuania as an EU member state in this area seems more focused (than the practice of the CJEU) on the protection of individual rights (such as the rights of taxpayers) and is based on the direct application of WTO law (the concept of monism). The practice of the CJEU in the same area is, in contrast, not strictly based on the monistic approach because it first and foremost seeks to ensure the legal autonomy of the EU and the financial interests of the Union itself.

In general, we can note that national judicial practice in Lithuania does not consider the differences between self-executing or non-self-executing treaties, and follows a monistic model with regard to the application of WTO law. This type of monistic model is usually implemented by non-EU countries. This therefore signals the need for an urgent revision of existing practices and approaches in terms of the status of WTO law in the national Lithuanian legal system both at a theoretical and practical level, ensuring conformity with the judicial practice of the CJEU. For this reason, it seems necessary to reconsider the rules set by the Law on International Treaties of the Republic of Lithuania (Article 11, 1999) and clearly define the concepts of self-executing and non-self-executing international agreements. These rules should define the separate procedures for their application in the national legal system, given that current regulations formally presume the direct effect of all ratified international treaties.

## Conclusions

When implementing WTO law, a state can incorporate the WTO agreements into its system of national law as self-executing treaties, meaning they possess a direct effect (monistic model). Alternatively, it may hold the position that the WTO agreements should be considered non-self-executing treaties, in which case they are accommodated and applied by national courts only if there are multiple possible interpretations of national legislation (dualistic model). The monistic model, under which WTO law is directly applicable in the national courts, is not used commonly, especially in EU member states. Most of the countries in the world (the WTO member states) or their blocs (such as the EU) use the dualistic or mixed (coordinative) model for the application of the WTO agreements. The models are based on the general provision that these agreements are not directly applicable in national courts, except in certain exceptional cases (as confirmed by the consistent and long-standing practice of the CJEU).

An analysis of Lithuanian case law from the time when the Republic of Lithuania became a member of the WTO (2001) and the EU (2004) leads to the conclusion that for more than eight years (2001–2008), the Lithuanian courts did not recognise the possibility of a direct effect for the WTO agreements. The national courts maintained this position even though ratified international treaties have privileged status under the Constitution of Lithuania and in the case of conflict with the national law, priority should be given to them. Lithuania's courts had contended that the WTO agreements (the GATT and its components) could be applied only when national rules provided a direct reference to the application of these agreements in certain situations. But since 2008, the position that the Lithuanian Supreme Administrative Court took in case No. A<sup>442</sup>-709/2013 and other judicial cases has been more liberal than the doctrine of the CJEU on the direct effect of the WTO agreements. The practice and experience of the Republic of Lithuania in this area should be qualified as specific and unique, because at a practical level in general it does not recognise a difference between self-executing or non-self-executing treaties, and follows a monistic model like that implemented by some non-EU countries.

For this reason, the problem related to the different understanding of the direct effect of the WTO law and its consequences in the national legal system of the Republic of Lithuania should be resolved at the level of national case law by referring to the practice of the CJEU and forming a clear national case law that clarifies the areas in which the

direct application of the WTO agreements is allowed. This can alternatively be achieved at a regulatory level, by amending the rules set in the Law on International Treaties of the Republic of Lithuania (Article 11), and clearly defining the concepts of self-executing and non-self-executing international agreements and their differing status in the national legal system. Such changes in legal regulations seem necessary not only for the definition of a clear framework for applying WTO law in Lithuania (as already consistently discussed in CJEU case law), but also for the definition of rules applying to other international treaties. We should stress that although the Constitutional Court of the Republic of Lithuania recognises the possibility of applying specific international agreements of varying legal nature differently, more specific criteria for the practical separation of these agreements are currently not defined (contrary to the practice of some other countries). This leads to an uneven approach to the application of various international agreements in the national courts. For this reason, the inclusion of such concepts and their features in national law could contribute positively to the development of the national legal system, and better ensure implementation of the constitutional imperatives of legal certainty and clarity. This would also allow the creation of a clearer regulatory environment, in which the possibilities for legal entities to invoke the relevant provisions of international agreements for the defence of their rights during judicial proceedings could be more precisely defined.

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