Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 17 November 2022[1]

Case C-123/21 P

Changmao Biochemical Engineering Co. Ltd
v
European Commission

(Appeal – Dumping – Determination of the normal value – 'Analogue country' methodology – Article 2(7) of Regulation (EU) 2016/1036 – Section 15 of the Protocol of Accession of China to the WTO – Power of judicial review – *Nakajima* v *Council*)

I. Introduction

1. This case concerns an appeal brought by Changmao Biochemical Engineering Co. Ltd ('the appellant') in which the latter asks the Court of Justice to set aside the General Court's judgment of 16 December 2020, *Changmao Biochemical Engineering* v *Commission*[2] ('the judgment under appeal'). By that judgment, the General Court rejected the appellant's action for annulment of Implementing Regulation (EU) 2018/921 ('the contested regulation'),[3] which maintained anti-dumping duties on the appellant's exports of tartaric acid from China.

2. In the part of the appeal of interest to this Opinion,[4] the appellant in effect challenges the General Court's finding that it could not review the legality of Article 2(7) of Regulation (EU) 2016/1036 ('the Basic Regulation')[5] in the light of the World Trade Organization ('WTO') Agreements, and more specifically Section 15 of the Protocol of Accession of China to the WTO[6] ('Accession Protocol'). This appeal accordingly raises important questions regarding the limits of the Court's power of judicial review of acts of the EU institutions in the light of WTO law.

1 Original language: English.

2 T-541/18, not published, EU:T:2020:605.

3 Commission Implementing Regulation (of 28 June 2018 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ 2018 L 164, p. 14).

4 The Court has requested that my Opinion focus only on the first ground of appeal.

5 Regulation of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

6 World Trade Organization, Protocol on the Accession of the People's Republic of China (WT/L/432, 23 November 2001).

II. Background to the dispute

3. On 7 December 1995, the Government of China applied for accession to the Agreement establishing the WTO, pursuant to Article XII of that agreement. On the same day, a WTO Accession Working Party was established in order to reach agreement on terms of accession acceptable to China and all WTO Members. The European Commission, on behalf of the European Union and its Member States, took part in those negotiations.

4. On 1 December 2001, China acceded to the WTO. As part of its accession process, that country agreed to a series of commitments, which are enshrined in the Accession Protocol. Among other aspects, that protocol envisages a regime for the calculation of the normal value in anti-dumping investigations that differs from the rules contained in the WTO Anti-Dumping Agreement ('the ADA').

5. More specifically, Section 15(a) of the Accession Protocol contains rules regarding the determination of the normal value in anti-dumping proceedings that enable the investigating authority of a WTO member to make use of a methodology that is not based on a strict comparison with Chinese domestic prices and costs. Recourse to that methodology matters in practice, as it means that a Chinese producer's prices and costs can be disregarded by the investigating authority, thus not giving an accurate picture of the actual normal value of the product concerned.

6. However, by virtue of Section 15(d) of the Accession Protocol, part of that regime was to expire 15 years after the date of accession of China to the WTO. That day was 11 December 2016.

7. On 19 April 2017, and thus, as is common ground between the parties, after the expiry of the 15-year period contained in the Accession Protocol,[7] the Commission published a notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in China.[8]

8. In that notice, the Commission informed interested parties that, by application of Article 2(7)(a) of the Basic Regulation, normal value would be determined by using the so-called 'analogue country' methodology.[9] Recourse to that methodology was possible in that investigation given the statutory classification of China, in Article 2(7)(b) of the Basic Regulation, alongside 'any non-market-economy country which is a member of the WTO'.

9. In practice, the use of the 'analogue country' methodology allows the normal value of imports to be calculated on the basis of prices in an appropriate market-economy country and not on the basis of domestic prices and costs in the exporting country, the prices and costs in which are considered not to be established subject to market-economy conditions.[10] That methodology is required under Article 2(7)(b) of the Basic Regulation, unless the producers subject to the investigation are able to show that market-economy conditions prevail in respect of their manufacture and sale of the like product concerned. The 'analogue country' methodology

[7] It should be noted that while, at the hearing, all parties agreed that the investigation was initiated after the 15-year period contained in the Accession Protocol, there was no clear line of argument as to the effects of that expiry, not even among the EU institutions.

[8] Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China (OJ 2017 C 122, p. 8).

[9] Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China, point 5.2.2.

[10] On the practical problems of applying the 'analogue country' methodology, see Zang, M.Q., 'The WTO contingent trade instruments against China: what does accession bring?', *International and Comparative Law Quarterly*, Vol. 58, 2009, pp 321 to 351, at pp 326 to 330.

accordingly differs from the standard methodology, contained in Article 2(1) to (6) of the Basic Regulation, according to which the normal value is calculated on the basis of domestic prices and costs in the exporting country.

10. The Commission informed the appellant, other exporting producers in China, as well as the Chinese Government of the initiation of that expiry review and of its intention to resort to the methodology contained in Article 2(7)(a) of the Basic Regulation. None of those parties cooperated in that review.

11. On 28 June 2018, the Commission adopted the contested regulation, maintaining the anti-dumping duties.[11] With regard to the existence of dumping, the Commission calculated the normal value pursuant to Article 2(7)(a) of the Basic Regulation.[12]

III. Action before the General Court

12. By application of 12 September 2018, the appellant brought an action for annulment of the contested regulation before the General Court. Among other arguments, the appellant, in essence, asserted that the normal value for imports of its tartaric acid should have been calculated on the basis of Article 2(1) to (6) of the Basic Regulation, because Article 2(7)(b) thereof (and thereby the use of the 'analogue country' methodology contained in Article 2(7)(a)) ceased to be applicable to imports from China after the expiry of the 15-year period contained in Section 15(d) of the Accession Protocol.

13. The argument was thus that, being contrary to the Accession Protocol, Article 2(7)(b) of the Basic Regulation could not be applied to imports from China after 11 December 2016. Therefore, the appellant claims, the Commission could not have had recourse to the 'analogue country' methodology because it 'lack[ed] [the] legal basis for the application of Article 2(7)' in the underlying investigation.

14. On 16 December 2020, the General Court delivered the judgment under appeal. It recalled that 'given their nature and purpose, WTO agreements are not, in principle, among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed'.[13]

15. The appellant does not challenge that 'in principle' finding. Rather, it argues that its situation is covered by what it refers to as the 'first exception' to the aforementioned rule, as developed in the Court's judgment in *Nakajima*.[14]

16. In the judgment under appeal, the General Court acknowledged the existence in the case-law of two situations in which the review of the legality of an EU measure in the light of the WTO agreements was deemed possible. The first is where 'the European Union intended to implement a particular obligation assumed in the context of those agreements'[15] (as was recognised to have

[11] Contested regulation, recital 181.

[12] Ibid, recital 45.

[13] Judgment under appeal, paragraph 58.

[14] Judgment of 7 May 1991, *Nakajima* v *Council* (C-69/89, EU:C:1991:186, paragraphs 29 to 32; '*Nakajima*'), although, arguably, the current understanding of *Nakajima* is based on the restatement of that judgment in the judgment of 5 October 1994, *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 111).

[15] Judgment under appeal, paragraph 60.

been the case in the situation underlying the judgment in *Nakajima*) and the second is 'where the EU measure at issue refers explicitly to specific provisions of those agreements' [16] (as arises from the circumstances resulting in the judgment in *Fediol* [17]).

17. The inapplicability of the judgment in *Fediol* was not challenged by the appellant, given the fact that the EU acts at issue do not refer expressly to WTO law.

18. Relying on the judgment in *Rusal Armenal*, [18] the General Court found that *Nakajima* was not applicable since Article 2(7) of the Basic Regulation is the result of the legislature's intention to introduce 'a special regime laying down detailed rules for the calculation of normal value for imports from non-market-economy countries, including the People's Republic of China'. [19]

19. In the alternative, before the General Court, the appellant raised a second argument, according to which, in the event that *Nakajima* does not apply, the appellant should be able to benefit from a 'third exception'. [20] The appellant claimed that it should be able 'to rely directly on the provisions of an international agreement, … where the international agreement in question allows a derogation from the general rule and EU law makes use of that power, as in the present case'. [21] The General Court dismissed that line of argument; first, because it did not find that it differed from the situation present in *Nakajima*, and, second, because it did not consider it appropriate to recognise the existence of such a 'new' situation. [22]

20. Consequently, the General Court ruled that the appellant could not rely on the Accession Protocol to object to the application of Article 2(7) of the Basic Regulation. [23] On that basis, inter alia, the General Court dismissed the appellant's action.

IV. Procedure before the Court of Justice

21. In its appeal before the Court of Justice, lodged on 26 February 2021, the appellant asks the Court to set aside the judgment under appeal; grant the form of order sought before the General Court and annul the contested regulation in so far as it relates to the appellant; and order the Commission and Distillerie Bonollo SpA; Industria Chimica Valenzana (ICV) SpA; and Caviro Distillerie Srl ('the interveners') to pay the appellant's costs of this appeal and those in Case T-541/18.

22. The first ground of appeal is directed principally against three paragraphs of the judgment under appeal. Those are, respectively, paragraph 64 (denying the applicability of *Nakajima* to the present situation); paragraph 65 (applying *Rusal Armenal* to conclude that Article 2(7) of the Basic

16 Ibid.

17 Judgment of 22 June 1989, *Fediol* v *Commission* (70/87, EU:C:1989:254, paragraphs 19 to 23; '*Fediol*') (in that case an EU act referred explicitly to rules of international law based on the General Agreement on Tariffs and Trade ('the GATT') for which reason the Court considered that it may exercise its power to interpret relevant provisions of the GATT).

18 Judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494; '*Rusal Armenal*').

19 Judgment under appeal, paragraph 65.

20 The appellant referred to the situation as it existed in *Nakajima* as the first exception and to the situation as it existed in *Fediol* as the second exception. On the misplaced use of the word 'exception' in relation to *Nakajima* and *Fediol*, see point 46 et seq. of this Opinion.

21 Judgment under appeal, paragraph 74.

22 Ibid.

23 Judgment under appeal, paragraph 67.

Regulation constitutes an independent EU law approach for imports from non-market economy countries, including China); and paragraph 74 (dismissing the appellant's arguments relating to the presence of a 'third exception').

23. For its part, the Commission, supported by the interveners, contends that the Court should dismiss the appeal and order the appellant to pay the costs.

24. At the hearing of 8 September 2022, the appellant, the interveners, the European Parliament, the Council, as well as the Commission submitted observations.

V. The arguments of the parties

25. The appellant's main argument is that Article 2(7) of the Basic Regulation constitutes an intention to implement, in EU law, within the meaning of *Nakajima*, the consequences of the expiry of the period laid down in Section 15(d) of the Accession Protocol.

26. To substantiate that argument, the appellant relies principally on paragraphs 54 and 55 of the Explanatory Memorandum of the 2001 Commission proposal for a Council decision on the accession of China to the WTO ('the 2001 Proposal').[24] Those two paragraphs concern the methodology for the calculation of the normal value for imports from China, with the latter paragraph explaining that the 'specific procedures for dealing with cases of alleged dumping by Chinese producers, which may not yet be operating in normal market economy conditions, will remain available for up to 15 years after China enters the WTO'.

27. The appellant views that explanation as constituting an expression of the clear intention of the EU legislature, within the meaning of the judgment in *Nakajima*, to limit the use of the 'analogue country' methodology contained in Article 2(7) of the Basic Regulation as regards China to a period of 15 years only. For that reason, the appellant argues, the General Court erred in law by considering that it could not review the legality of Article 2(7) of the Basic Regulation in the light of Section 15 of the Accession Protocol for lack of an intention to implement.

28. The appellant also asserts that *Rusal Armenal* does not apply to its situation. According to it, that judgment concerned solely the application of Article 2(7) of the Basic Regulation to the specific situation of Armenia. Thus, the finding of the Court of Justice, in *Rusal Armenal*, that 'Article 2(7) of the basic regulation is the expression of the EU legislature's intention to adopt in that sphere an approach specific to the EU legal order',[25] concerns solely the situation of non-market-economy countries that are not members of the WTO. Therefore, in the appellant's view, the General Court erred in extending that judgment to the situation of imports from China after the expiry of the Chinese Accession Protocol.

29. By way of an alternative argument, the appellant claims that the General Court failed to recognise the presence of circumstances enabling the recognition of a 'third exception', distinct from those at issue in *Nakajima* and *Fediol*. At the hearing, it elaborated on that position. It

[24] Proposal for a Council Decision establishing the Community position within the Ministerial Conference set up by the Agreement establishing the World Trade Organization on the accession of the People's Republic of China to the World Trade Organization (COM(2001) 517 final). That proposal was adopted by Council decisions establishing the Community position, within the Ministerial Conference set up by the agreement establishing the World Trade Organization, on the accession of the People's Republic of China and of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) to the World Trade Organization (Bull. 10-2001, point 1.6.26).

[25] *Rusal Armenal*, paragraph 48.

explained that the circumstances of the present case differ from the situation in *Nakajima*, given that Article 2(7) of the Basic Regulation was introduced prior to the accession of China to the WTO. Therefore, the specific language in paragraphs 54 and 55 of the Explanatory Memorandum of the 2001 Proposal should be understood as meaning that recourse to the 'analogue country methodology' would no longer be possible 15 years after the date of China's accession to the WTO.

30. The Commission and the interveners, supported in the oral part of the procedure by the Parliament and the Council, contest that reasoning. In essence, they note that the present case does not fall within the circumstances evoked in *Nakajima*. They contend that the explanations in the 2001 Proposal are irrelevant for assessing the intention of the EU legislature to adopt, in Article 2(7) of the Basic Regulation, an approach specific to the EU legal order, as was recognised in *Rusal Armenal*. In their view, the only relevant sources for establishing the intention to implement, on the part of the EU legislature, a particular obligation falling under the WTO agreements, would be the recitals or other documents relating to the process of adoption or amendment of the Basic Regulation itself.

31. As explained by the Council at the hearing, that institution is essentially able to 'wear two different hats'; one, when it acts as part of the EU legislature, and another, when it participates in negotiations at international level. Thus, statements adopted during the course of international negotiations cannot be used to explain the legislative intent behind acts adopted on that basis, let alone those adopted or amended that do not relate to that international legal instrument.

32. On that basis, the Commission, backed by the Parliament and the Council at the hearing, took the position that the application of the judgment in *Nakajima* requires a clear and expressly stated intention of the EU legislature to implement a particular obligation assumed under the WTO agreements. It is only in such a situation that the EU legislature would be signalling its intention to submit itself to judicial review by the Court. Therefore, since no such intent is present for Article 2(7) of the Basic Regulation, that provision is not an expression of the will of the EU legislature to implement Section 15 of the Accession Protocol. The result is, they claim, that the Court lacks jurisdiction to review an act of the institutions in the light of that protocol.

VI. Assessment

A. Preliminary remarks

33. International agreements to which the Union is a party, such as the WTO agreements, form part of the EU legal order and bind its institutions. As part of that legal order, those international agreements have primacy over EU secondary law. This follows from Article 216(2) TFEU and the case-law of the Court. [26]

[26] As early as 1974, the Court ruled that international agreements adopted by the Union form part of its legal order; see judgment of 30 April 1974, *Haegeman* (181/73, EU:C:1974:41, paragraphs 4 and 5) (opining that an association agreement entered into by the (then) Community with Greece 'is therefore, in so far as concerns the Community, an act of one of the institutions … [and that] the provisions of the Agreement … form an integral part of Community law'). Later, the Court also confirmed their binding force on the institutions and primacy over secondary EU law. See, for instance, judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 42) (relating to the binding nature of the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978).

34. Therefore, international agreements to which the Union is a party are not only binding on its institutions as a matter of international law and its principle *pacta sunt servanda*, but also as a matter of EU constitutional law. Their binding force on the EU institutions is the constitutional choice of the Union. [27]

35. The second relevant constitutional choice concerns the power of judicial review granted to the Court. Within the EU legal order, it is the duty of the Court to 'say what the law is' [28] and to make sure that the institutions abide by the law. The Treaties bestowed on the Court the power of judicial review of acts of the institutions already in the first days of the European project. [29] Today, that power is exercised either directly, through actions for annulment (Article 263 TFEU) or indirectly, through the preliminary ruling procedure (Article 267 TFEU) and the plea of illegality (Article 277 TFEU). Importantly, ever since the judgment in *Foto-Frost*, [30] it is clear that the Court of Justice of the European Union (understood as both the General Court and the Court of Justice) has, within the EU legal order, the exclusive power to review the legality of acts of the EU institutions. [31]

36. If those two features of the EU constitutional order are brought together, they result in the Court's power to review whether the EU institutions, including in their legislative choices, respect the Union's obligations stemming from the WTO agreements, which form part of the EU legal order and thus bind them.

37. However, by reason of the political reality of the international trade system, the Court has, since early on, [32] hesitated to exercise its power of judicial review when it comes to reviewing the conformity of EU legislation with the GATT, [33] and, subsequently, the WTO agreements. [34]

38. The Court already explained the reasons for that judicial self-restraint in the judgment in *International Fruit Company*. [35] It first noted the specific nature and structure of the GATT, which is 'based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements"', and which is 'characterised by the great flexibility of its

[27] It is that constitutional choice which is at issue in the present case. For that reason, the arguments raised by some of the institutions at the hearing, such as that only the WTO Dispute Settlement Body has jurisdiction and can decide whether EU acts are or are not in conformity with WTO law, are irrelevant for the purposes of the present case. In this appeal, we are solely concerned with the question of the power of the Court, within the EU constitutional order, to establish such discrepancies.

[28] To borrow the language from the U.S. Supreme Court judgment in *Marbury v Madison* (5 U.S. (1 Cranch) 137) (1803), at 177.

[29] See Article 34 ECSC.

[30] See judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraph 17).

[31] I should recall here the Opinion of Advocate General Jacobs in *Netherlands* v *Parliament and Council* (C-377/98, EU:C:2001:329, point 147), where the Advocate General pointedly explained that 'more generally, it might be thought that it is in any event desirable as a matter of policy for the Court to be able to review the legality of Community legislation in the light of treaties binding the Community. There is no other court which is in a position to review Community legislation; thus if this Court is denied competence, Member States may be subject to conflicting obligations with no means of resolving them'.

[32] In its judgment of 12 December 1972, *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115), after confirming that the GATT is binding on the institutions (paragraph 18), the Court considered that that agreement's provisions are of such a nature that they are not capable of granting rights to individuals (paragraph 27). Due to the lack of direct effect of those provisions, individuals could therefore not rely on the GATT in a national court in order to question the validity of EU law.

[33] In its judgment of 5 October 1994, *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 109), the Court concluded not only that individuals cannot directly invoke the GATT (as that agreement, in principle, lacks direct effect), but also that the Member States cannot rely on that agreement in actions brought under Article 260 TFEU. Indeed, the Court considered itself precluded from taking the GATT into consideration when assessing the legality of an EU regulation.

[34] In its judgment of 23 November 1999, *Portugal* v *Council* (C-149/96, EU:C:1999:574, paragraph 47), the Court considered that the establishment of the WTO did not change anything in relation to its finding that, in principle, it cannot assess EU law in the light of the GATT, and, more generally, WTO law.

[35] Judgment of 12 December 1972, (21/72 to 24/72, EU:C:1972:115).

provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties'. [36]

39. The Court further elaborated on the flexible nature of the GATT in *Germany* v *Council*, [37] and later extended the same reasoning to the WTO agreements in *Portugal* v *Council*. [38] In the latter case, the Court explained that, notwithstanding the strengthening of the dispute resolution system under the WTO agreements as compared to that available under the GATT, its dispute settlement mechanism [39] nevertheless accorded considerable importance to negotiation between the parties. Thus, even though the DSU shows a 'preference' for the full implementation of a recommendation to bring a measure into conformity with WTO law, it nevertheless allows for different negotiated solutions based on mutually acceptable compensation. [40]

40. Given that structure of the WTO system, the Court considered that the EU legislative organs would be deprived of the possibility of entering into such negotiated arrangements, or of offering mutually acceptable compensation instead of bringing EU law in conformity with WTO law, if the courts could impose on them the obligation to refrain from applying EU rules which are inconsistent with the WTO agreements. [41]

41. It was therefore necessary that the Court abstain from exercising its power of judicial review in order not to prevent the EU legislature from making use of the discretion left to it by the WTO agreements. By this move, the Court respected the institutional balance as it results from the WTO system. In its view, the WTO agreements leave to the political institutions the decisions on how to implement a particular obligation assumed thereunder, or even not to implement some of the WTO obligations at all.

42. The need for judicial self-restraint was additionally supported by the fact that the European Union's most important trading partners did not submit their legislative and executive bodies to judicial scrutiny within the WTO. [42]

43. Those two reasons – the flexibility built into the WTO system itself and the political reality that the Union's trading partners do not judicially restrain their institutions from using that flexibility – then led to the conclusion that '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 [EU] institutions'. [43]

44. I should clarify the consequences that arise from that case-law. The resulting margin of discretion to the EU political institutions, which includes the possibility of choosing a certain interpretation of the provisions of the WTO agreements as well as, after assessing the relevant

[36] Ibid, paragraph 21.

[37] Judgment of 5 October 1994, *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraphs 106 to 109).

[38] Judgment of 23 November 1999, *Portugal* v *Council* (C-149/96, EU:C:1999:574).

[39] That mechanism is based on the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU').

[40] Ibid, paragraphs 36 to 39.

[41] See, that effect, ibid, paragraph 40.

[42] Ibid, paragraph 43.

[43] Ibid, paragraph 47. By reason of that same flexibility, the Court also found it inexpedient to permit a validity review of secondary acts of the institutions against recommendations or rulings of the WTO Dispute Settlement Body finding that WTO rules have been infringed. See judgments of 1 March 2005, *Van Parys* (C-377/02, EU:C:2005:121, paragraphs 41 to 48); of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 127 to 133); and of 18 October 2018, *Rotho Blaas* (C-207/17, EU:C:2018:840, paragraph 52).

consequences, of deciding, if necessary, to depart from the Union's obligations under the WTO agreements,[44] should not be misunderstood as a decision by the Court to withdraw completely from its prerogative of ensuring that the Union's international obligations are respected.

45. To do so is not constitutionally possible; it would upset the interinstitutional balance between the EU judiciary and its political institutions.[45]

46. That brings me to the apparent misunderstanding expressed by the Commission at the hearing, and in which it appeared to be supported by the Parliament and the Council. Contrary to the position of those institutions, the situations present in *Nakajima* and *Fediol*, in which the Court decided to carry out a validity review of EU acts in the light of WTO law, are not 'exceptions' to an apparent lack of the power of judicial review in that field.[46] The power of judicial review exercised in those cases by the Court does not derive from the benevolent legislative decision of the EU political institutions to return to the Court the authority to review their acts against WTO law. As I have explained, within the EU constitutional 'normal', that cannot be accepted, as the power of judicial review conferred on the Court derives directly from the Treaties. Rather, those two situations are instances where the Court decided that it would not undermine the political discretion necessary at WTO level if it were to conduct a validity review of acts of EU political institutions.

47. The Court's judgments create a body of case-law and the rules explained in the original judgment are then reapplied in subsequent judgments in similar but not identical situations. The unfortunate side effect of that process is that, in time, the case-law becomes detached from its original context and, more importantly, the underlying justification. That type of detachment, although uncommon, is a feature inherent in a legal system based on precedent.[47]

48. It is, therefore, sometimes necessary to revisit the cases on which we often rely. In that light, when re-reading the judgment in *Nakajima*, I have trouble discerning any reasoning that would indicate that the Court meant to introduce an 'exception' to an otherwise non-existent power of judicial review. At issue in that case were anti-dumping duties on certain printers from Japan, which the exporting producer at issue sought to challenge by relying directly on the GATT Anti-Dumping Code. The Council challenged the power of the Court to review the validity of the (then) basic regulation on the ground that it might be in breach of that code. It argued that this

[44] A situation, which, I observe, is not new to the European Union at GATT/WTO level. From 1997 to 2012, the Union found itself in open breach of its WTO obligations over its regime relating to the importation, sale and distribution of bananas. That is, in spite of multiple unsatisfactory implementations of Panel and compliance reports, as well as suspended concessions by multiple WTO Members. Only after a mutually agreed solution was found was that issue then (partially) settled. See WTO, Notification of a Mutually Agreed Solution (WT/DS27, WT/DS361, WT/DS364, WT/DS16, WT/DS105, WT/DS158, WT/L/616 and WT/L/625, 8 November 2012). Similarly, recall the long-standing and acrimonious trade dispute between the United States and the European Union over the latter's decision to ban hormone-treated meat, starting from 1981 (with Directive 81/602/EEC (OJ L 222, 7.8.1981, p. 32)). Only in 2019 did the European Union reach an agreement with the United States on hormone-treated beef, thereby (temporarily) settling the dispute. See Agreement between the United States of America and the European Union on the Allocation to the United States of a Share in the Tariff Rate Quota for High Quality Beef referred to in the Revised Memorandum of Understanding Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union (2014) (OJ 2019 L 316, p. 3).

[45] The requirement of that balance is reflected in Article 13(2) TEU.

[46] To be clear, not only the institutions, but also the appellant and the interveners referred to the situations evoked in *Nakajima* and *Fediol* as 'exceptions'.

[47] While there is no formal system of precedent in EU law, the Court will nonetheless substantiate its reasoning by reference to earlier judgments, and will only depart from previous judgments in exceptional circumstances. In that regard, see Arnull, A., 'Owning up to Fallibility: Precedent and the Court', *Common Market Law Review*, Vol. 30(2), 1993, pp. 247 to 266; Tridimas, T., 'Precedent and the Court of Justice, A Jurisprudence of Doubt?' in Dickinson, J., Eleftheriadis, P. (eds.), *Philosophical Foundations of EU Law*, OUP, Oxford, 2012, pp. 307-330.

followed from the Court's prior case-law denying the direct effect of the GATT.[48] The Court first dealt with the argument relating to direct effect. It explained that the applicant, Nakajima, was not relying on the direct effect of the provisions of the Anti-Dumping Code, but that that party was, in fact, questioning, in an incidental manner, by way of the plea of illegality, the applicability of the (then) new basic regulation.[49] Thus, the question of the direct effect of WTO provisions can and should be detached from the question of the exercise of the Court's power of judicial review of acts of the EU institutions.[50]

49. It is worth noting that the situation giving rise to the judgment in *Nakajima* is similar to that in the present case. On the basis of the fourth paragraph of Article 263 TFEU, the appellant directly challenges the contested regulation. At the same time, as an ancillary argument, it claims that Article 2(7) of the Basic Regulation is not applicable in relation to imports from China because it is not in conformity with the Accession Protocol.

50. To discard the Council's second argument as to the preclusion of judicial review, the Court in *Nakajima* relied on the parts of the judgment in *International Fruit Company* which stressed the binding effect of the GATT on the (then) Community.[51] It then looked for the possible reasons to refrain from review, but found, on the contrary, that the recitals of the (then) basic regulation explained that it 'was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code'.[52] On that basis, the Court concluded that the then 'new basic regulation, which the applicant called in question, was adopted in order to comply with the international obligations of the Community which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures'.[53]

51. 'In those circumstances',[54] there was nothing to prevent the Court from exercising its power of judicial review.

48 *Nakajima*, paragraph 27.

49 *Nakajima*, paragraph 28.

50 That is corroborated by the judgment of 5 October 1994, *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 109). After assessing the possible direct effect of the GATT, the Court concluded that 'those features of [the] GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, *also* preclude the Court from taking provisions of [the] GATT into consideration to assess the lawfulness of a regulation'. Emphasis added. See also Opinion of Advocate General Saggio in *Portugal* v *Council* (C-149/96, EU:C:1999:92, point 18) (distinguishing the denial of direct effect of the GATT from the right to review the legality of a (then) Community act).

51 *Nakajima*, paragraph 29, referring to paragraph 18 of the judgment in *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115).

52 *Nakajima*, paragraph 30.

53 Ibid, paragraph 31.

54 Ibid, paragraph 32.

52. In the case-law that followed which relied on the judgment in *Nakajima*, the wording 'in those circumstances' morphed into either 'in two situations' or 'in two exceptional situations'. [55]

53. To my mind, it would be unacceptable to treat the situation at issue in the judgment in *Nakajima* as an 'exception' to an alleged general rule that the Court lacks jurisdiction to review EU measures in the field of WTO law. [56]

54. The Court's jurisdiction to review EU acts is based on the Treaties, and the institutions cannot, by an act of secondary law, limit the Court's jurisdiction. [57] To make the power of judicial review of the Court dependent on the prior consent of those institutions, which that very Court is tasked to monitor, would render the power of judicial review meaningless.

55. Furthermore, to reason along those lines would be akin to presuming that the EU political institutions do not have the intention of fulfilling their international obligations unless they clearly state so, such as by adopting measures expressly declaring their willingness to give effect to the European Union's international obligations. That would be difficult to square with the constitutional framework created by Article 216(2) TFEU as well as with the declared policy aims of the Union's relations with the wider world, as they arise from Article 3(5) TEU.

56. On the contrary, the starting position must always be that the European Union, in principle, wanted to respect its international commitments, irrespective of the legal instrument enacted by its institutions. Starting from that assumption, the Court may then decide whether, by reason of the nature and structure of the international agreement in question as well as larger political concerns surrounding the Union's trade policy actions, the Court must exceptionally restrain its power of judicial review in a particular case.

[55] Although it appears unclear why the Court alternates between this language. In general, the changes in language appear traceable through a long line of case-law in which the circumstances of *Nakajima* (and *Fediol*) were jointly described in one sentence, and which was subsequently reproduced in other cases. Thus, in *Germany* v *Council* (C-280/93, EU:C:1994:367), the Court referred to *Nakajima* (and *Fediol*) in the following way: after stating that the direct applicability of the GATT cannot be derived from its spirit, general scheme or terms, the Court explained that 'in the absence of such an obligation following from [the] GATT itself, it is *only if* the Community intended to implement a particular obligation entered into within the framework of [the] GATT, or if the Community act expressly refers to specific provisions of [the] GATT, that the Court can review the lawfulness of the Community act in question from the point of view of [the] GATT rules [quoting *Fediol* and *Nakajima*]' (*Germany* v *Council*, paragraph 111; emphasis added). In *Portugal* v *Council* (C-149/96, EU:C:1999:92, paragraphs 47 and 49) the same quote followed the statement that 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 (then) Community institutions. In *Rusal Armenal*, the Court for the first time referred to the two cases as 'two *exceptional* situations' (*Rusal Armenal*, paragraph 40; emphasis added). It then added that 'for such an *exception* to be allowed in a specific case, it must also be established, to the requisite legal standard, that the legislature has shown the intention to implement in EU law a particular obligation assumed in the context of the WTO agreements' (*Rusal Armenal*, paragraph 45; emphasis added). Thereafter, however, the Court appeared to alternate between 'in two situations' (see, for instance, judgments of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 87) (which adds 'by way of exception' after the indirect reference to *Nakajima* and *Fediol*), and of 15 November 2018, *Baby Dan* (C-592/17, EU:C:2018:913, paragraph 67) (which adds 'exceptionally' later in the same paragraph) and 'in two exceptional situations' (judgments of 18 October 2018, *Rotho Blaas* (C-207/17, EU:C:2018:840, paragraph 47); of 9 July 2020, *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:539, paragraph 46); and of 5 May 2022, *Zhejiang Jiuli Hi-Tech Metals* v *Commission* (C-718/20 P, EU:C:2022:362, paragraph 85)). Finally, I should point out that the 'exception' rationale also entered the case-law on other international agreements, such as the Aarhus Convention. See, in that respect, judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 57).

[56] The wording used by the Court sometimes pulls in that direction. For instance, in *Rusal Armenal*, it was found that 'the Court has in certain cases acknowledged that the WTO's anti-dumping system could constitute *an exception to the general principle that the EU Courts cannot review* the legality of the acts of EU institutions in light of whether they are consistent with the rules of the WTO agreements' (*Rusal Armenal*, paragraph 44; emphasis added).

[57] In that regard, see Opinion of Advocate General Saggio in *Portugal* v *Council* (C-149/96, EU:C:1999:92, point 20) (referring to the last recital of Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) relating to the conclusion, by the Union, of the WTO agreements, which appears 'intended … to limit the effects of the agreement', before concluding that, by reason of the Court's Treaty obligation to ensure that agreements binding on the Union are respected, 'the Council may not, by an act of secondary legislation, limit the Court's jurisdiction, nor decide to rule out the jurisdiction of national courts to apply these agreements').

57. In view of the recognition of the realities of the system of international trade, it is, therefore, entirely legally possible – and indeed at times expedient – that the EU political institutions be left with the possibility of interpreting a WTO obligation entered into by the Union without review by the Court, and, where necessary, to make a conscious decision to depart from that obligation. However, that margin of discretion is exceptional and only possible because the particular international agreement at issue allows for it. The WTO agreements happen to be such international agreements.

58. Thus, when considering the WTO agreements and their flexible nature and structure, it was possible for the Court to create a rebuttable presumption [58] that it should restrain its power of judicial review. Hence, the use of the expression 'in principle' when the Court decides not to review an EU act in the light of WTO law. Only within that specific context can the judgment in *Nakajima* be read as creating an 'exception'.

59. Indeed, *Nakajima* can itself be given a broader or narrower reading. It can easily be confined, as claimed by the institutions at the hearing, to situations in which the EU legislature sent a clear message that it intended to apply WTO law. In those circumstances, there is no reason for the Court to limit its power of judicial review as there is no 'potentiality of embarrassment from multifarious pronouncements by various departments on one question'. [59] I would argue that there is, in fact, some evidence that the Court reads that judgment in such a narrow way. [60]

60. However, *Nakajima* could equally be read more broadly, so as to mean that the Court should entertain a review of secondary law in any situation in which it is in a position to conclude that the legislature did not intend to depart from its WTO obligations. There is also evidence in the case-law that suggests that this is the proper reading of *Nakajima*. [61]

61. If the applicability of *Nakajima* is narrowed down, there must, in my view, be room for additional situations in which the Court might decide to revert to reviewing acts of the institutions in the light of the EU's commitments under the WTO agreements. The judgments in *Nakajima* (and *Fediol*) could then be seen as not the 'only' situations in which the Court may decide to exercise its review powers in the light of WTO law.

62. One situation in which the Court considered that *Nakajima*, whether interpreted broadly or narrowly, did not apply was the situation at hand in *Rusal Armenal*. In that case, the Court concluded that Article 2(7) of the Basic Regulation represents an approach specific to the EU legal order (at least in relation to the question on how to treat non-market-economy countries in respect of, among other elements, the calculation of the normal value for the purposes of anti-dumping investigations). [62]

[58] See, in that respect, Ruiz Fabri, H., 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?', *European Journal of International Law*, Vol. 25(1), 2014, pp. 151 to 173, at p. 152.

[59] To borrow the language from the U.S. Supreme Court's judgment in *Baker v. Carr*, 369 U.S. 186 (1962), at p. 217.

[60] See, for example, *Rusal Armenal*, paragraphs 45 and 46 (finding the 'requisite legal standard' arising from *Nakajima* not to be satisfied where the preamble of an EU act contains 'only a general inference that the legal act in question was to be adopted with due regard for international obligations entered into by the European Union'). That conclusion also seems to follow from the failed attempt to apply *Nakajima* outside of the particular area of WTO law. See, for instance, judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 57 and 59) (denying the applicability of the *Nakajima* line of case-law to the particular obligations assumed by the European Union under the Aarhus Convention).

[61] See, for instance, judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube* (C-891/19 P, EU:C:2022:38, paragraphs 30 and 34). In that judgment, the Court concluded that because the provisions of Article 3 of the Basic Regulation can be considered to be substantially the same as those in Article 3 of the ADA, the Court may interpret the former by reference to interpretation given by the WTO Dispute Settlement Body to the latter.

[62] *Rusal Armenal*, paragraphs 47 and 48.

63. While *Nakajima* can be read as a situation in which it is safe to conclude that the Union intended to abide by the WTO rules, *Rusal Armenal* must accordingly be understood as a situation in which the Union might have wanted, but might also *not* have wanted, to abide by its WTO commitments. The latter situation justifies the Court's restraint in exercising its power of judicial review on the basis of the justification of the particular nature and structure of the WTO system.

64. Accordingly, where *Rusal Armenal* applies, *Nakajima* does not apply.

65. In the light of the foregoing, it is necessary to examine whether, in the present case, there exist reasons for the Court to refrain from judicially reviewing Article 2(7) of the Basic Regulation in the light of the Accession Protocol.

B. Assessment of the first ground of appeal

66. The appellant offers two lines of reasoning in support of its claim that the General Court erred in law by considering that it cannot rule on the alleged incompatibility of Article 2(7) of the Basic Regulation with Section 15 of the Accession Protocol. On the one hand, the appellant claims that *Nakajima* applies to the case at hand. On the other hand, it claims that *Rusal Armenal* does not apply.

67. It would be possible to reverse the analysis and first assess whether *Rusal Armenal* can be applied. A finding in the affirmative would then, as explained in point 64 of this Opinion, automatically mean that *Nakajima* does not apply. However, I will, for the sake of completeness, assess both lines of reasoning separately.

68. By way of its first line of reasoning, the appellant claims that its situation is comparable to the situation that existed in *Nakajima*. It asserts that the 2001 Proposal, and in particular paragraphs 54 and 55 of its Explanatory Memorandum, demonstrate a clear intention on the part of the EU legislature to implement Section 15(d) of the Accession Protocol in the Basic Regulation.

69. The relevance of the 2001 Proposal can be dismissed in short order. If *Nakajima* is construed narrowly, it is only where there is an express indication in a legislative act itself that the EU legislature intended to implement, into EU law, certain obligations assumed under the WTO agreements, that the Court will exercise its power of judicial review.[63]

70. No such intention to implement the Accession Protocol can be demonstrated with regard to the Basic Regulation. As the Commission, the interveners, the Parliament and the Council explained, both in writing and at the hearing, the 2001 Proposal bears no relation to the legislative process that led to the adoption of the Basic Regulation, or indeed Article 2(7) thereof in the form applicable during the underlying investigation. The appellant was unable to contest that explanation. At the same time, neither the text, nor the preparatory documents to that legislative act, mention any intention to implement Section 15 of the Accession Protocol.

[63] Recall that *Nakajima* concerned a situation whereby the legislative intention to implement an international law obligation binding on the Union was expressed in the very document which sought to implement that obligation.

71. However, if *Nakajima* is understood broadly, that is to say as requiring judicial review whenever the Court can conclude that the legislature did not want to depart from its WTO obligations, the appellant's argument relating to the intentions expressed at WTO level cannot be entirely neglected. At the same time, it must be recognised that a supposed intention expressed in only one preparatory document by the Commission, and not repeated in the Council's act by which the European Union entered into respective commitments under the Accession Protocol, or indeed by the Parliament as co-legislator, is hardly sufficient for a conclusive finding on that front. As the Council rightly explained at the hearing, statements adopted during the course of international negotiations cannot, at least not by themselves, be used to infer the legislative intention behind the internally adopted acts of the institutions.

72. The appellant was also unable to establish any other indication of the intention of the EU legislature not to depart from the Accession Protocol. Similarly, as the Parliament pointed out at the hearing, the Basic Regulation has been amended several times since 2001, that is to say after the Accession Protocol entered into force. On none of these occasions was its text changed to reflect the expiration of the 15-year period referred to in Section 15(d) of the Accession Protocol, nor can any indication of the intention to adjust the Basic Regulation accordingly be found in the relevant recitals or preparatory documents to the amending acts.[64]

73. The situation in the present case therefore differs from the situation that led to the judgment in *Nakajima*. It cannot be concluded that the EU legislature intended to implement the Accession Protocol in Article 2(7) of the Basic Regulation, nor can it be concluded that it did not intend to depart from it by means of that provision.

74. The General Court did not err, therefore, in its finding in paragraph 64 of the judgment under appeal.

75. That leads me the appellant's second line of reasoning, according to which the General Court was wrong to find that *Rusal Armenal* applies in the present case and leads to the conclusion that the specific nature of Article 2(7) of the Basic Regulation applies also to China after the expiry of the period contained in Section 15(d) of the Accession Protocol.

76. Indeed, if it can be concluded that Article 2(7) of the Basic Regulation constitutes a specific regime, which the EU legislature adopted for the calculation of the normal value in relation to imports from China, as was found in relation to the imports from Armenia in *Rusal Armenal*, then judicial review is not warranted.

[64] Article 2(7)(a) and (b) found its place in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as of the latter's amendment in 1998 by Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18). Article 2(7)(b) in that version already referred expressly to China, together with Russia. In 2000, by Council Regulation (EC) No 2238/2000 of 9 October 2000 (OJ 2000 L 257, p. 2), three other countries were added to Article 2(7)(b) – Ukraine, Vietnam and Kazakhstan. In 2002, by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, , p. 1), Russia was deleted from the text of Article 2(7)(b). Ukraine followed suit in 2005, by amendment through Council Regulation (EC) No 2117/2005 of 21 December 2005 (OJ 2005 L 340, p. 17). Later changes to the (then) Basic Regulation, including the codifications in 2009 (Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51)) and in 2016 (Regulation 2016/1036), did not bring about amendments to Article 2(7)(b), or China's inclusion therein, until the 'significant distortions' methodology was introduced by means of Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ 2017 L 338, p. 1).

77. In *Rusal Armenal*, the Court considered whether Article 2(7) of Regulation (EC) No 384/96 (in the version of the Basic Regulation applicable at the time), read against its recitals, must be understood as intending to implement certain obligations deriving from the ADA.

78. The reasoning in that judgment may be summarised in three stages. First, the Court considered whether recital 5 of Regulation No 384/96, which explains that the 'language' of the 'new' WTO ADA 'should be brought into Community legislation as far as possible', was sufficiently precise so as to present an expression of the EU legislature's intention to implement that agreement in EU law. It concluded against that contention.[65] Second, the Court turned to Article 2(7) of Regulation No 384/96 specifically. It observed that it follows from recital 7 of that regulation that the EU legislature had sought to introduce 'a special regime laying down detailed rules for the calculation of normal value for imports from non-market-economy countries', which deviates from the ordinary rules contained in Article 2(1) to (6) of Regulation No 384/96 for calculating the normal value.[66] Finally, the Court noted that the ADA contains no specific rules for non-market-economy countries. Thus, no correlation between Article 2(7) of Regulation No 384/96 and Article 2 of the ADA could be established.[67] Therefore, the Court concluded that the regime contained in Article 2(7) of Regulation No 384/96 constitutes 'the expression of the EU legislature's intention to adopt in that sphere an approach specific to the EU legal order'.[68]

79. Can this reasoning automatically be transposed to the situation in the present case?

80. First, Regulation No 384/96 (the version of the basic regulation applicable in *Rusal Armenal*) was replaced first by Regulation No 1225/2009 and then by Regulation 2016/1036 (which is applicable in the present case). Second, *Rusal Armenal* concerned imports from Armenia, and not from China. The Court thus assessed the reviewability of Regulation No 384/96 in the light of the ADA, but not in the light of the Accession Protocol.

81. I am of the opinion that *Rusal Armenal* cannot automatically be transposed to the present case. Nevertheless, in my view, the dumping regime for imports from China can be characterised as an EU-specific legislative choice by employing the same logic as that adopted by the Court in *Rusal Armenal*.

82. As to the first difference between those two situations, the relevant provisions of the basic regulation applicable in *Rusal Armenal* and that applicable in this case do not differ, except in a few respects that are irrelevant for the present discussion. Furthermore, recital 5 of Regulation No 384/96, which was reviewed in *Rusal Armenal*, states that it sought to introduce the ADA into EU secondary legislation 'as far as possible'. By contrast, recital 3 of Regulation 2016/1036 states that the language of the ADA should be reflected in EU legislation 'to the best extent possible'.[69] I do not see an important difference between these two expressions. Therefore, it is possible to conclude the same as in *Rusal Armenal*: that the European Union intended to apply the ADA, but not necessarily all of its provisions.

[65] *Rusal Armenal*, paragraph 52.

[66] Ibid, paragraph 47.

[67] Ibid, paragraph 50.

[68] Ibid, paragraphs 47 to 50 and 53.

[69] This linguistic divergence between the two regulations does not exist in all of the language versions. For instance, while that difference is present in the German, Dutch and Italian versions, it does not exist in the Spanish, French and Portuguese versions.

83. The second difference between the situation in *Rusal Armenal* and in the present case may lie in the fact that, this time, it is an accession protocol of a (major) WTO member, which is sought as the yardstick of review for the validity of the Basic Regulation, and not the ADA.

84. That difference might be relevant in several ways. On the one hand, the argument used in *Rusal Armenal* that the ADA contains no provisions relating to non-market-economy countries, meaning that Article 2(7) of the Basic Regulation cannot be regarded as its implementation, is not applicable if the Accession Protocol is indeed used as a yardstick for review. Specifically, Section 15(d) of the Accession Protocol uses the wording 'market economy', and provides, under Section 15(a) thereof, for the choice of differential treatment of imports from China under certain conditions.[70] That is an argument in favour of finding Article 2(7)(b) of the Basic Regulation, and the methodology applied under Article 2(7)(a) thereof, relating to the calculation of the normal value for non-market-economy countries, as an implementation of the Accession Protocol for the specific case of China.

85. On the other hand, whereas the recitals of the Basic Regulation (in its different versions) called for adjustments to the ADA 'as far as possible' or 'to the best extent possible', there is no recital that even mentions the Accession Protocol. That is an argument to conclude that the regime for the calculation of the normal value for imports from China is specific to the EU legal order and is not aimed at implementing that protocol.

86. If, additionally, the arguments of the institutions at the hearing, according to which the specific EU treatment of China predated the latter's membership of the WTO and did not change afterwards, are taken into consideration, I am inclined to interpret Article 2(7) of the Basic Regulation as a regime specific to the European Union in relation to China, despite the presence and binding nature of the Accession Protocol.

87. That conclusion justifies the General Court's decision not to exercise its power of judicial review.

88. Moreover, like the ADA, the Accession Protocol forms an integral part of the WTO agreements.[71] As such, it is to be treated just like any other part of those agreements. As confirmed both at General Court level[72] as well as at the hearing in the present case, the appellant does not challenge this. Therefore, the flexible nature of the WTO system used as the justification for judicial restraint is applicable also in relation to the Accession Protocol.

89. Finally, there is a clear and recent precedent on the applicability of the *Rusal Armenal* logic to imports from China. Without entering into possible differences between the positions of Armenia and China, in its judgment in *Zhejiang Jiuli Hi-Tech Metals* v *Commission*, the Court relied on

[70] As Zang observes, 'all the previous GATT 1947 accessions by non-market economies, namely, Poland, Romania and Hungary – have witnessed similar provisions to those under Section 15; yet, none of them made explicit reference to market or non-market-economy conditions. Thus … Section 15 is the first WTO provision that explicitly employs these concepts'. Zang, M.Q., 'The WTO contingent trade instruments against China: what does accession bring?', *International and Comparative Law Quarterly*, Vol. 58, April 2009, pp 321 to 351, at pp 324 to 325.

[71] See, for instance, paragraph 1.2 of Part I of China's Accession Protocol (stating that the protocol 'shall be an integral part of the WTO Agreement'. By analogy, see also judgments of 19 September 2019, *Zhejiang Jndia Pipeline Industry* v *Commission* (T-228/17, EU:T:2019:619, paragraph 97) (finding the Chinese Accession Protocol as constituting a 'part of a single package of agreements concluded with the WTO'), and of 5 May 2021, *Acron and Others* v *Commission* (T-45/19, not published, EU:T:2021:238, paragraph 105) (finding the Russian Accession Protocol as forming an integral part of the WTO Agreement). It should be highlighted that this treatment is not unique to accession protocols, as Article II(2) of the WTO Agreement specifies that the agreements and associated legal instruments included in Annexes 1, 2 and 3 to that agreement 'are integral parts' thereof.

[72] Judgment under appeal, paragraph 63 (explaining that 'the applicant confirmed at the hearing that it did not claim that the WTO agreements or the Accession Protocol had direct effect in general').

Rusal Armenal.[73] Faced with arguments virtually identical to those raised by the appellant in the present case, the Court concluded that Section 15 of the Accession Protocol could not be relied on to challenge the validity of the implementing regulation applying Article 2(7) of the Basic Regulation to imports from China, because that article constitutes the expression of a specific EU approach.[74]

90. Admittedly, *Zhejiang Jiuli Hi-Tech Metals* v *Commission* concerned factual circumstances which differed slightly from those at issue in the present case. Unlike in this case, the underlying investigation was initiated prior to the expiry of the 15-year period contained in Section 15(d) of the Accession Protocol.[75]

91. However, the conclusion reached by the Court in that judgment is more transversal than fact-specific: the logic of *Rusal Armenal* must be considered to apply to Article 2(7) of the Basic Regulation in general,[76] and not just in relation to the particular factual and legal framework within which that judgment was decided. There is no indication that the Court in *Zhejiang Jiuli Hi-Tech Metals* v *Commission* deemed the timing of the initiation of the investigation at issue of any relevance.

92. At the hearing, the appellant was not able to explain how that difference in timing would lead to a different conclusion, such that, in the present case, Article 2(7) of the Basic Regulation would no longer represent a regime specific to the EU legal order.

93. Thus, even after December 2016, Article 2(7) of the Basic Regulation must be considered as a regime specific to the EU legal order and which provides for differential treatment for the calculation of the normal value for imports to a certain number of countries, including China.

94. However, concluding that Article 2(7) of the Basic Regulation, as applied to imports from China, constitutes a regime specific to the EU legal order does not, in itself, imply that that regime contravenes Section 15 of the Accession Protocol. It only means that the Court may decide to refrain from exercising judicial review of the compatibility of the former with the latter.

95. Accordingly, it must be concluded that the specific EU law nature of Article 2(7) of the Basic Regulation is a reason for the Court to refrain from reviewing acts of the institutions in relation to the Accession Protocol, prior to or after the expiry of the period contained in Section 15(d) thereof. For that same reason, it is not for the Court to interpret the effects of Section 15(d) of the Accession Protocol in order to establish whether that provision remained, and if so which

[73] Judgment of 5 May 2022 (C-718/20 P, EU:C:2022:362).

[74] Ibid, paragraphs 88, 89 and 91.

[75] Ibid, paragraph 18 (explaining that the Commission initiated the expiry review at issue on 10 December 2016).

[76] That understanding of *Rusal Armenal* as a judgment characterising the entire system established under Article 2(7) of the Basic Regulation as a specific EU legislative choice in relation to countries referred to in that article helps in discarding other differences between that case and the present one. Namely, Armenia was listed in Article 2(7)(a) of the Basic Regulation among non-market-economy countries to which the 'analogue country' methodology was always applied. For its part, China is listed in subparagraph (b) of Article 2(7) of the Basic Regulation, which requires the use of the analogue country methodology whenever the cooperating exporting producer in question cannot show that the 'market-economy conditions [in subparagraph (c) of that provision] prevail for this producer … in respect of the manufacture and sale of the like product concerned'.

part(s), after 11 December 2016, and whether those parts, if any, that remained still enabled the Commission to employ the analogue country methodology for the calculation of the normal value for imports from Chinese producers like the appellant.[77]

96. It follows that there is no reason to consider that the General Court erred in its conclusion in paragraph 65 of the judgment under appeal.

97. Finally, I shall briefly turn to the alternative argument raised by the appellant, concerning the alleged presence of a 'third exception', distinct from those arising in *Nakajima* and *Fediol*. In relation to this argument, the appellant again relies on the 2001 Proposal, claiming that it is relevant to conclude that Article 2(7) of the Basic Regulation, predating that proposal, should be understood as no longer applying to imports from China from 11 December 2016.

98. As I have already explained, I do not, in principle, see any reason why the Court would not decide in other situations, different from those in *Nakajima* or *Fediol*, to exercise judicial review in the light of WTO law. Such a decision would need to be motivated by an assessment that it is clear that the EU legislature did not intend to depart from WTO law. However, I have to admit that, even with the best of intentions, I continue to struggle to understand how precisely the appellant's proposal of a 'third exception' would operate, or how it differs from that in *Nakajima*.

99. With some imagination, the only way I could understand the appellant's explanations, in writing and at the hearing, is that that exception relates not to the issue of the non-applicability of Article 2(7) of the Basic Regulation due to its non-conformity with the Accession Protocol, but relates instead to the obligation of conform interpretation. However, as the Commission rightly emphasised at the hearing, the latter issue, also raised (and rejected) at first instance, was not appealed.[78] The Court is accordingly precluded from considering that line of argument.[79]

100. Nevertheless, I wish to express my point of view according to which the same reasons which advocate in favour of the Court restraining its power of judicial review, must equally apply to the obligation of the Court to interpret EU law (here, the Basic Regulation) in conformity with WTO

[77] For the sake of completeness, I should add that, as yet, there is no decision from the WTO Dispute Settlement Body on the effect of the expiry of the time period contained in Section 15(d) of the Accession Protocol and the possibility, thereafter, of using a methodology that is not based on a strict comparison with domestic prices or costs in China, be that on the basis of the Accession Protocol or the ADA. Indeed, while China initiated a dispute against the European Union immediately after the expiration of the period contained in the protocol, in June 2019, it requested the suspension of that dispute. The authority of the Panel constituted for the dispute in *European Union – Measures related to price comparison methodologies* (WT/DS516), which concerned precisely that issue, lapsed on 15 June 2020 (see the Note by the WTO Secretariat of the same day, WT/DS516/14). For more detail, see Zhou, W., and Qu, X., 'Confronting the "Non-Market Economy" Treatment: The Evolving World Trade Organization Jurisprudence on Anti-Dumping and China's Recent Practices', *Journal of International Dispute Settlement*, Vol. 13(3), 2022, pp. 1 to 22, pp. 6 to 7. At the same time, academic views about the effects of the expiry differ. Some suggest that nothing has changed, given that only Section 15(a)(ii) thereof expired, leaving untouched Section 15(a) and (a)(i), but thereby reversing the burden of proof required to depart from the rules for the calculation of the normal value contained in Article 2 of the ADA. Others are of the opinion that the expiry of Section 15(a)(ii) affects the entire subparagraph (a). Yet others, like the appellant, consider that as of the expiry of that time period, China should unconditionally be considered a market economy country. See, inter alia, Graafsma, F., Kumashova, E., 'In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?', *Global Trade and Customs Journal*, Vol. 9(4), 2014, pp. 154 to 159; Lee, J., 'China's Nonmarket Economy Treatment and U.S. Trade Remedy Actions, *Journal of World Trade*, Vol. 51(3), 2017, pp. 495 to 516; Suse, A., 'Old Wine in a New Bottle: the EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession', *Journal of International Economic Law*, Vol. 20(4), 2017, pp. 951 to 977; and 'China: NME at the Gates? Article 15 of China's WTO Accession Protocol: A multi-perspective analysis', Research Paper, European Institute for Asian Studies, Brussels, 2016.

[78] Judgment under appeal, paragraph 68. That being said, I find it strange that the General Court would consider conform interpretation not to be possible before establishing the result that such an interpretation would lead to.

[79] As derives from Article 169(2) of the Court's Rules of Procedure (requiring that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal). See also, to that effect, judgment of 19 September 2013, *EFIM* v *Commission* (C-56/12 P, not published, EU:C:2013:575, paragraph 97) (dismissing as inadmissible on appeal an argument not challenging the conclusions reached by the General Court).

law (here, the Accession Protocol). As is understood in the internal EU legal order, the obligation of conform interpretation requires the interpreting court to do everything possible to find a solution which complies with the EU legal rule in relation to which it interprets a rule of national law. [80]

101. In a situation such as the one in the present case, the requirement to do everything possible to interpret EU law in the light of WTO law would be incumbent on the Court of Justice, with the only limit in that regard being not to interpret EU law '*contra legem*'. If the Court's understanding of WTO law would then differ from that of the EU legislature, or if the legislature actually wished to depart from WTO law, but did not express it clearly (which should not be a surprise), conform interpretation would close the door to the necessary discretion for the political branch to have available to it all those features of the DSU which allow for political manoeuvre. That would run counter to the logic of the justification for restraining the Court's power of judicial review.

102. Consequently, I also do not find fault with the General Court's finding in paragraph 74 of the judgment under appeal.

VII. Conclusion

103. On the basis of the foregoing, I propose that the Court of Justice reject the first ground of appeal.

[80] See, for instance, judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 119), and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 27). In the judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 73 and the case-law cited), the Court thus required a national court to disapply existing national case-law which would require that court to 'consider that it is impossible for it to interpret a provision of national law in conformity with EU law'.