A Truly "Common" Commercial Policy? – A Legal Assessment of the Ban on Ukrainian Grain in the Interplay of WTO and EU Law

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Abstract

On 18 September 2023, Ukraine initiated proceedings against Poland, Hungary and the Slovak Republic under the WTO Dispute Settlement Understanding. This came in response to bans on Ukrainian grain imports which the three EU Member States had previously introduced. This unilateral conduct puts the common nature of the EU's commercial policy, an exclusive Union competence, seriously into question. This article elaborates on that jeopardization of the common commercial policy by showing that the grain ban is violating WTO law and may result in retaliations affecting the EU at large. It then assesses whether nevertheless the commonality of the Union's policy can be maintained both externally and internally. To this end, it elaborates on the practice of the Union in WTO dispute settlement and argues that the conduct of Member State organs is attributable to the EU. Furthermore, it analyses whether and on what basis infringement proceedings against the Member States may be successful. In this, it takes account of norms regarding the common commercial policy, the duty of cooperation, and the WTO Agreements as integral parts of EU law. To this end, special attention is paid to the CJEU's jurisprudence on the legal value of WTO law and DSB Reports.

Keywords: European Union, Ukraine, Common Commercial Policy, GATT, Dispute Settlement, Attribution of Conduct, Dual Attribution, Infringement Proceedings, Court of Justice of the EU

A. Introduction

On 18 September 2023, Ukraine raised complaints against Poland, Hungary and the Slovak Republic under the World Trade Organisation's (WTO) Dispute Settlement Understanding[1] (DSU).[2] This was the reaction to unilateral import bans on Ukrainian grain,[3] introduced respectively by the three Eastern frontline Member States (MS) of the European Union (EU or the Union)[4]. This puts the EU in a somewhat awkward position: According to its treaties, the Common Commercial

1 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the WTO, Annex 2, Done at Marrakesh, 15/04/1994, 1869 UNTS 401.

2 DS619, Poland – Agricultural Products (Ukraine); DS620, Hungary – Agricultural Products (Ukraine); DS621, Slovak Republic – Agricultural Products (Ukraine).

3 Polish Ministry of Development and Technology, Journal of Laws 2023, item 1898, 15 September 2023, available at: https://dziennikustaw.gov.pl/DU/2023/1898; Hungarian Ministry of Justice, Government Decree 430/2023 (IX. 15.), Hungarian Gazette No. 131 of 2023, 15 September 2023, available at: https://magyarkozlony.hu/dokumentumok/ca491780f561537e3fe50d1c9af92eca77de7453/ megtekintes; Slovak Ministry of Agriculture and Rural Development, Resolution No 466/2023, 15 September 2023, available at: https://rokovania.gov.sk/RVL/Resolution/21091/1 (all last accessed 14/11/2023).

4 For the sake of simplicity, this article will only refer to the EU, even when dealing with issues before the Treaty of Lisbon, when trade issues were dealt with by the European Communities.

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Policy (CCP) is an exclusive Union competence.[5] Accordingly, only the EU may legislate and adopt legal acts in this field.[6] The unilateral action of the three MS puts this into question: Is the Union's commercial policy truly a "common" one?

There are two elements to this conundrum. Firstly, the CCP has an external element: Both the EU and its MS are WTO Members.[7] If the CCP is truly common, however, they must be perceived as one actor by other Members. The second element is an internal one: External unity in the CCP necessarily requires reliable internal mechanisms to ensure compliance with common Union positions and obligations.

This article assesses both the external (D.) and the internal element (E.) along the pertinent questions which arise with regard to the grain ban. In order for these analyses to be fruitful, the first two sections introduce the dispute in detail (B.) and elaborate on the profound problems it poses to the CCP by showing that the grain ban is inconsistent with WTO law (C.). To keep things concise, the assessment will focus on the measures imposed by Poland. This is possible because, although the three import bans differ slightly in their material scope, they are generally comparable.[8]

B. The Grain Ban: Background to the Dispute

The origins of the grain ban can be traced back to the implications of the Russian aggression against Ukraine in 2022. In order to alleviate the negative economic impact on Ukraine in light of the destruction of production capacity and the impediment of transportation due to the restriction of access to the Black Sea, the EU enacted Regulation (EU) 2022/870.[9] With this, it temporarily suspended all tariff-rate quotas as well as the application of an entry price system, and set to zero all preferential customs duties under the EU-Ukraine Association Agreement[10] (AA). The provisions of this regulation were prolonged by Regulation (EU) 2023/1077[11] and Regulation (EU) 2024/1392[12], the latter of which is in force until 5 June 2025.

5 Art. 3(1)(e) Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326/47 of 26/10/2012.
6 Art. 2(1) TFEU.
7 WTO, Members and Observers, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (14/11/2023).
8 See *Hanke Vela*, Ukraine Will Sue Poland, Hungary and Slovakia over Agricultural Bans, POLITICO, 18/9/2023.
9 Regulation (EU) No. 2022/870, OJ L 152/103 of 03/06/2022, also known as the "Autonomous Trade Measures Regulation". On the situation regarding the failed Black Sea Grain Deal and the futile attempts to reinstall it, see *Trevelyan/Russell*, Russia Sticks to Demands on Black Sea Grain Deal, Rejects UN Bank Proposal, Reuters, 9/9/2023; *Wintour*, What Was the Black Sea Grain Deal and Why Did It Collapse?, The Guardian, 20/7/2023.
10 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161 of 29/5/2014.
11 Regulation (EU) 2023/1077, OJ L 144/1 of 5/6/2023.
12 Regulation (EU) 2024/1392, OJ L of 29/5/2024.

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In consequence, the imports into eastern European frontline States increased enormously: In Poland alone, in 2022 imports reached 2.08 million tonnes of corn (6,269 in 2021), 579,315 tonnes of wheat (3,033) and 44,114 tonnes of barley (none).[13] Although such imports were largely destined to be exported outside of Europe, overloaded ports and increased profits by avoidance of shipping costs incentivised Ukrainian traders to sell their grain locally. This in turn led domestic prices to plummet and resulted in European farmers being unable to sell their crops.[14] In reaction to these market distortions, in April 2023 the eastern European frontline States introduced unilateral import bans on Ukrainian grain.[15] These were rapidly replaced by a common Union measure under Art. 4(9) of Regulation (EU) 2022/870.[16] This included market stimulations and a ban on Ukrainian grain imports into those countries, but allowed their transit.[17] This ban was prolonged until 15 September 2023.[18] On that date, the Commission announced that a market analysis had led to the conclusion that "the market distortions in the 5 Member States bordering Ukraine have disappeared."[19] Accordingly, it let the safeguard measures expire. Poland, Hungary and Slovakia responded immediately with their own, unilateral bans.[20] The Polish measure prohibits the importation of certain Ukrainian grain. It does, however, explicitly allow for transit and contains no further rules affecting the marketing or competition with other products. According to the then Polish Minister of Agriculture, they were "forced to introduce the decision unilater-

13 *Hunt/Clarke*, Explainer: Why the EU Is Restricting Grain Imports from Ukraine, Reuters, 9/5/2023. For a graphic processing of increased imports into all five frontline States, see *Directorate-General for Agriculture and Rural Development*, €100 Million to Support Farmers from Bulgaria, Hungary, Poland, Romania and Slovakia, 3/5/2023, available at: https://agriculture.ec.europa.eu/news/eu100-million-support-farmers-bulgaria-hungary-poland-romania-and-slovakia-2023-05-03_en (12/7/2024).

14 *Higgins*, Angry Farmers Pierce Europe's United Front on Ukraine, The New York Times, 25/4/2023.

15 *Brzeziński*, Ukraine Criticizes Poland's Move to Block Farm Products; Hungary Joins Ban, POLITICO, 15/4/2023.

16 *European Commission*, Commission Adopts Exceptional and Temporary Preventive Measures on Limited Imports from Ukraine, 2/3/2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2562 (12/7/2024).

17 *Kijewski/Brzeziński*, Eastern EU Countries Strike Deal with Commission to Clear Ukrainian Grain Glut, POLITICO, 28/4/2023.

18 *European Commission*, EU Extends Trade Benefits for Ukraine, 5/6/2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3059 (12/7/2024).

19 *European Commission*, Following the Expiry of the Restrictive Measures on Ukrainian Exports of Grain and Other Foodstuff to the EU, Ukraine Agrees to Introduce Measures to Avoid a Renewed Surge in EU Imports, 15/9/2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4497 (12/7/2024).

20 *Brzeziński*, EU Lifts Ukrainian Grain Import Ban; Poland Vows to Go It Alone, POLITICO, 15/9/2023. For the respective legal documents enacting the ban, see *supra* fn. 3.

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ally to protect [their] farmers".[21] In reaction, Ukraine initiated the proceedings before the WTO on 18 September and threatened to retaliate against Polish agricultural products.[22] Claims that the consultations have been set on hold on 5 October 2023 are not officially confirmed.[23] More so, notwithstanding all domestic political developments in the frontline States, the unilateral grain ban is maintained at the time of writing.[24]

C. The Grain Ban and WTO Law

This unilateral MS action is at odds with the common nature of the CCP. In order to grasp the full consequences of this, it is necessary to establish whether the grain ban is violating WTO law. This is because such a breach could lead to the authorisation of retaliations against the MS. Given the single European market, however, measures targeted against a particular economy are "likely to spill over to other Member States and may affect them and the [EU] at large".[25] This rationale reveals the need for a CCP. Accordingly, before turning to the external and internal elements of "true commonality", it must be assessed whether Ukraine's claims are valid and may lead to the authorisation of retaliations. This requires that the grain ban is violating WTO law (I.) and that the proceedings have been initiated correctly from a procedural point of view (II.).

I. The Norms Invoked by Ukraine

In its three requests for consultations, Ukraine is alleging violations of Arts. V:2, X:1, XI:1 of the General Agreement on Tariffs and Trade[26] (GATT) and of Arts. 4.2,

21 *Fortuna/Foote*, Polish Agri Minister Doesn't Fear EU, WTO Fallout over Ukraine Import Ban, Euractiv, 19/9/2023. Also the newly elected Minister quickly announced his intention to maintain the trade-restrictive measures after entering office. See *Brzeziński*, Poland's Next Government to Keep Ban on Ukrainian Grain Imports, POLITICO, 11/12/2023.

22 *Krzysztoszek*, Poland-Ukraine "Grain War" Escalates Dangerously, Euractiv, 21/9/2023. Notably, Ukraine is the fourth biggest importer of Polish apples.

23 For such claims, see *Ptak*, Ukraine Suspending WTO Grain Complaint Is "Good Step but Not Enough", Says Poland, Notes From Poland, 10/10/2023. See also a respective tweet by the then Polish Minister of Agriculture, Robert Telus, of 5 October 2023, available at: https://twitter.com/RobertTelus/status/1709953264937005178 (15/11/2023). The WTO did not confirm this upon a request by the author directed to them via e-mail. Rather, they reaffirmed that according to their information displayed on the WTO Website the disputes are still in the consultation phase.

24 See also *Dodd/Welsh*, Fracturing Solidarity: The Grain Trade Dispute between Ukraine and the European Union, Center for Strategic & International Studies (CSIS), 20/2/2024; *Hodunova*, Budapest not planning to lift ban on Ukrainian grain import, Hungarian FM says, The Kyiv Independent, 6/6/2024.

25 *Cottier*, CML Rev. 1998, p. 355.

26 General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, Done at Marrakesh, 15 April 1994, 1867 UNTS 187.

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5 of the Agreement on Agriculture[27] (AoA).[28] Since both Agreements are found in Annex 1A (Trade in Goods) to the Marrakesh Agreement[29], their material scope overlaps. This begs the question whether they are both applicable.[30] According to the general interpretative note to Annex 1A, in case of a conflict between a provision of the GATT and another Agreement in Annex 1A, the provision of the latter prevails. Moreover, Art. 21.1 AoA specifies that the GATT applies "subject to the provisions of" the AoA. This has been interpreted by the Appellate Body (AB) merely to mean that it prevails to the extent of conflicts.[31] The AB has explicitly confirmed, though, that Arts. XI:1 GATT, 4.2 AoA, which both outlaw non-fiscal restrictions to trade, are not in conflict, but apply cumulatively.[32] In effect, all invoked norms are applicable.[33]

Art. V:2 GATT demands freedom of transit, i.e. goods from any Member must be allowed entry whenever destined for the territory of a third country.[34] At least *de jure*, this is guaranteed by the Polish regulation.[35] Moreover, media coverage confirms that – apart from occasional protests by farmers and truckers[36] – also *de facto* transit is possible.[37] Accordingly, Art. V:2 GATT is not violated.

Art. X:1 GATT demands the prompt publishment, *inter alia*, of regulations of general application which impose a prohibition on imports. This is applicable to the grain ban, since the criterion of "general application" is satisfied by country-specific measures affecting an unidentified number of economic operators.[38] For the sake of judicial economy, however, an assessment of whether the publication was sufficient-

27 Agreement on Agriculture, Marrakesh Agreement Establishing the WTO, Annex 1A, Done at Marrakesh, 15 April 1994, 1867 UNTS 410.

28 WTO Docs WT/DS619/1, G/L/1487, G/AG/GEN/224, 21 September 2023; WT/620/1, G/L/1488, G/AG/GEN/225, 21 September 2023; WT/621/1, G/L/1489, G/AG/GEN/226, 21 September 2023.

29 Marrakesh Agreement Establishing the WTO, Done at Marrakesh, 15 April 1994, 1867 UNTS 154.

30 On the notion that one measure can, in principle, violate multiple Agreements, see *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), p. 247.

31 AB Report, *EC – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005, para. 221.

32 AB Report, *Indonesia – Import Licensing Regimes*, WT/DS477/AB/R, WT/DS478/AB/R, 9 November 2017, para. 5.18.

33 Remember that all parties involved are Members of the WTO (see *supra* fn. 7). See also Art. 2 AoA and the corresponding Annex 1 to the AoA.

34 Panel Report, *Colombia – Ports of Entry*, WT/DS366/R, 27 April 2009, para. 7.401.

35 Polish Journal of Laws 2023, item 1898, 15 September 2023, para. 1, nos. 1, 2.

36 See, e.g., *Stezycki*, Polish farmers anger Ukraine with border blockade, grain spillage, Reuters, 21/2/2024.

37 *Denisova*, Tusk meets Polish farmers, no agreement on ending border protests reached, The Kyiv Independent, 9/3/2024; *Gotev*, Warsaw, Kyiv Make Breakthrough on Ukrainian Grain Transit, Euractiv, 3/10/2023.

38 Panel Report, *US – Underwear*, WT/DS24/R, 8 November 1996, para. 7.65.

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ly prompt, does not seem opportune.[39] This is due to the fact that Arts. XI:1 GATT, 4.2 AoA on non-fiscal restrictions and Art. 5 AoA on Specific Safeguard Measures (SSGs) seem to be tailored for the grain ban situation.

1. The Prohibition of Non-Fiscal Restrictions

While there is no mandatory sequence of analysis between Arts. XI:1 GATT, 4.2 AoA,[40] it appears sensible to start with the more general norm. A violation of Art. XI:1 GATT requires two elements: a measure (1) falling within the phrase "quotas, import or export licences *or other measures*", which (2) constitutes a *prohibition* or restriction on the importation of a product.[41] The term "prohibition" has, furtherly, been defined as a "legal ban on the trade or importation of a specified commodity".[42] The grain ban must clearly be subsumed under this definition. Since import restrictions can also be subsumed under Art. III:4 GATT, the delimitation of both norms is a standard problem of non-fiscal restrictions.[43] However, this is not problematic in this case, because the grain ban affects the importation of Ukrainian grain itself, not the marketing or sale of already imported products. Hence, Art. XI:1 GATT is the pertinent norm. While there are specific exceptions for import restrictions on agricultural products under Art. XI:2(c) GATT, those exceptions have been rendered inoperative by Art. 4.2 AoA.[44] Thus, the grain ban is inconsistent with Art. XI:1 GATT.

Also Art. 4.2 AoA prohibits non-fiscal restrictions, but for trade in agricultural goods. This is an ascertainment of Art. XI:1 GATT, having a narrower product coverage, but applying to more types of measures.[45] Therefore, "a violation of Article XI of GATT […] would necessarily constitute a violation of Article 4.2 of the [AoA]".[46] Accordingly, the grain ban is also inconsistent with Art. 4.2 AoA.

39 On the admissibility of judicial economy in general, see AB Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, 25 April 1997, p. 18; AB Report, *Australia – Salmon*, WT/DS18/AB/R, 20 October 1998, para. 223. For an application on Art. X:1 GATT, see Panel Report, *Turkey – Pharmaceutical Products (EU)*, WT/DS583/12, 28 April 2022, para. 7.255.

40 AB Report, *Indonesia – Import Licensing Regimes*, WT/DS477/AB/R, WT/DS478/AB/R, 9 November 2017, para. 5.25.

41 Panel Report, *EU – Energy Package*, WT/DS476/R, 10 August 2018, para. 7.243.

42 AB Report, *China – Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, para. 319. See also Panel Report, *Brazil – Retreaded Tyres*, WT/DS332/R, 12 June 2007, para. 7.11.

43 See generally, *Vranes*, pp. 251 ff.

44 WTO Analytical Index, GATT 1994 – Article XI (DS reports), pp. 25f., referring to AB Report, *Indonesia – Import Licensing Regimes*, WT/DS477/AB/R, WT/DS478/AB/R, 9 November 2017, paras. 5.75 ff.

45 AB Report, *Indonesia – Import Licensing Regimes*, WT/DS477/AB/R, WT/DS478/AB/R, 9 November 2017, para. 5.24 at fn. 106.

46 Panel Report, *Korea – Various Measures on Beef*, WT/DS161/R, WT/DS169/R, 31 July 2000, para. 762.

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However, Art. 5 AoA allows the introduction of SSGs under certain conditions (increased imports[47] or decreased prices[48]), which may justify the inconsistencies.[49] A further look into Art. 5 AoA reveals, though, that these conditions merely entitle a WTO Member to apply an "additional duty".[50] This wording only entails *fiscal* SSGs. Thus, Art. 5 AoA cannot justify the grain ban.

2. Exceptions under GATT

There are, however, the exceptions enshrined in GATT, which might serve as justifications for an inconsistency with Art. XI:1 GATT.[51] More so, they have also been incorporated into the AoA by the second part of footnote one to Art. 4.2.[52] Accordingly, both the inconsistency with Art. XI:1 GATT and Art. 4.2 AoA may be justified by the exceptions under GATT, with the same burden of proof applying.[53]

An analysis of the general exceptions of Art. XX GATT requires a two-tiered test: the measure must (1) come under one of the particular exceptions (paras. (a)-(j)), and (2) satisfy the requirements of the *chapeau*.[54] This sequence of analysis must be maintained as enlisted.[55] It is, thus, firstly questionable whether the grain ban may come under one of the particular exceptions. As stated before, the Polish authorities claim to use the ban to protect their farmers from the increased imports and their repercussions.[56] A brief look into the particular exceptions reveals that none of them are applicable to this rationale. While this might seem peculiar at first, it makes sense considering the systemic position of Art. XX GATT right after Art. XIX on General Safeguard Measures (GSGs). This norm allows WTO Members to suspend their obligations under the Agreement, if an unforeseen increase in imports causes or threatens to cause serious injury to domestic producers.[57] This is

47 The yearly import volume of a product category exceeds the trigger level of 105-125 per cent of the import volumes of the preceding three-year period (Art. 5.1(a) AoA).
48 The product's import price falls below a trigger price equal to the average 1986 to 1988 reference price (Art. 5.1(b) AoA).
49 For a brief elaboration on the rationale behind this, especially in agricultural industries, see *Matsushita et al.*, p. 267.
50 Paras. 4, 5 of Art. 5 AoA. The French version reads "*droit additionnel*", the Spanish one "*adicionales impuestos*".
51 See, e.g., AB Report, *China – Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, para. 334.
52 AB Report, *Indonesia – Import Licensing Regimes*, WT/DS477/AB/R, WT/DS478/AB/R, 9 November 2017, para. 5.41.
53 Ibid., para. 5.17.
54 AB Report, *US – Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 22.
55 AB Report, *US – Shrimp*, WT/DS58/AB/R, 12 October 1998, paras. 119 f.
56 See *supra* fn. 21 and accompanying text.
57 For criticism of Art. XIX GATT, see *Bown*, World Trade Rev. 2002/1; *Sykes*, World Trade Rev. 2003/3.

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similar to, but not in conflict with Art. 5 AoA (allowing for SSGs).[58] Thus, Art. XIX GATT may justify inconsistencies with both Arts. XI:1 GATT[59] and 4.2 AoA.

It can easily be concluded, though, that the grain ban does not meet the requirements of GSGs: Any such measures must comply with Art. XIX GATT and the Agreement on Safeguards[60] (AoS).[61] This contains a non-discrimination clause.[62] The Polish grain ban, which prohibits agricultural products originating from the territory of Ukraine,[63] clearly falls foul of this. Therefore, also Art. XIX GATT cannot justify the inconsistencies.

Finally, the grain ban might be justified under Art. XXI(b)(iii) GATT, which concerns measures taken in time of war, which a Member considers necessary to protect its essential security interests. There can be no doubt that we are in time of war.[64] It is, however, questionable whether Poland is protecting an essential security interest. These are defined as "interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".[65] The objective to protect farmers cannot meet this threshold, especially since the norm must be applied in good faith.[66]

In conclusion, none of the exceptions under GATT justify the grain ban. Thus, Arts. XI:1 GATT, 4.2 AoA are violated.

II. Procedural Questions: The DSU and the Association Agreement

Consequently, in accordance with Arts. XXIII GATT, 19 AoA, 4 DSU, Ukraine was entitled to request consultations. It is, however, questionable whether the AA changes these circumstances since WTO law is not to be read in clinical isolation from public international law.[67] In other words, does the AA not operate as a form

58 *Yilmaz*, Glob. Trade Cust. J. 2009/3.
59 See AB Report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, 14 December 1999, para. 95.
60 Agreement on Safeguards, Marrakesh Agreement Establishing the WTO, Annex 1A, Done at Marrakesh, 15 April 1994, 1869 UNTS 154.
61 AB Report, *Korea – Dairy*, WT/DS98/AB/R, 14 December 1999, para. 77; AB Report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, 14 December 1999, para. 84.
62 Art. 2.2 AoS: "Safeguard measures shall be applied to a product being imported *irrespective of its source*" (emphasis added). For discussions see *Bown/McCulloch*, World Trade Rev. 2003/3; *Pauwelyn*, JIEL 2004/1.
63 Polish Journal of Laws 2023, item 1898, 15 September 2023, para. 1.
64 Consider *General Assembly*, Aggression against Ukraine, UN Doc. A/RES/ES-11/1, 2 March 2022. Note also, *a fortiori*, Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.123: "Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994."
65 Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.130.
66 Ibid., para. 7.132.
67 See AB Report, *US – Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17.

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of *lex specialis* regulating the economic relations between Ukraine and the EU?[68] To this end, it must be noted that also the AA contains a dispute settlement mechanism.[69] Furthermore, Arts. XI, XX, XXI GATT form an integral part of the AA[70] and the parties have retained their rights under Arts. XIX GATT, 5 AoA[71]. Since Art. 5 AoA has explicit reference to Art. 4.2 AoA, all involved norms could also be adjudicated under the AA.[72] On the other hand, Art. 23.1 DSU demands that WTO Members have recourse to the DSU when seeking redress for violations of WTO law. This can also be seen as a right to have recourse to the DSU's mechanism.

The AA's solution for this tension is the introduction of a "choice of forum" clause[73] in Art. 324. That is, both parties may freely choose whether to initiate proceedings under the DSU or the AA. When it had the opportunity, the AB did not criticise such a norm.[74] This has been interpreted to mean that in case of proceedings under the AA, the invoked norms would simply be viewed as AA-norms, while the question of a WTO violation remains unanswered, which is in conformity with Art. 23.1 DSU.[75]

In effect, the choice of forum for the grain ban in favour of the DSU, which was a deliberate decision by the Ukrainian authorities[76], is legal both from the WTO as well as the AA perspective.[77] Hence, the proceedings have been correctly initiated by Ukraine.

III. Interim Result: The Grain Ban is Jeopardising the CCP

In conclusion, this section has shown that the grain ban is violating WTO law and that the proceedings have been correctly initiated under the DSU. This can lead to an authorisation for Ukraine to retaliate against the MS.[78] As has been argued before, however, this is suitable to affect the EU at large. On the one hand, this shows why the Union needs a CCP. On the other hand, when unilateral MS

68 For such an interpretation of regional trade agreements see *Pauwelyn*, JIEL 2004/1, pp. 113 f.
69 Title IV, Chapter 14, Arts. 303ff. AA. According to Art. 477.1 sentence 2 AA, this mechanism exclusively governs disputes on trade and trade-related matters. For an analysis see *Van der Loo et al.*, pp. 19 f.
70 Arts. 35, 36 AA.
71 Art. 40 AA.
72 For a discussion of the resulting relationship between the WTO and bilateral dispute settlement procedures see *Garcia Bercero*, in: Bartels/Ortino (eds.), pp. 399 ff.
73 Wording according to *Garcia Bercero*, in: Bartels/Ortino (eds.), p. 403.
74 AB Report, *Peru – Agricultural Products*, WT/DS457/AB/R, 20 July 2015, para. 5.27.
75 *Pauwelyn*, Interplay, 19 at fn. 66.
76 *Hanke Vela*, Ukraine Will Sue Poland, Hungary and Slovakia over Agricultural Bans, POLITICO, 18/9/2023.
77 In fact, data shows that the decision in favour of the DSU is not peerless: 19% of all DSU disputes until 2010 have been raised between members of the same regional trade agreement. See *Chase et al.*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements, Innovative or Variations on a Theme?, 10/6/2013, available at: https://www.wto-ilibrary.org/content/papers/25189808/150 (12/7/2024), p. 47.
78 Arts. 224.4 AA, 22 DSU.

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conduct leads to this result, the CCP is seriously put into question. While also the former, common Union measure, which expired on 15 September 2023, could in effect have led to the same result, it is the unilateral nature of the MS acts that poses a severe problem to the EU: national conduct may result in adverse effects for other MS and the whole Union. In consequence, the subsequent sections need to analyse whether, from a legal perspective, the common nature of the CCP can be maintained both externally and internally in the current situation.

D. The External Element: Unity Towards Third Actors

The external element of "true commonality" of the CCP requires that the Union can act as one economic bloc towards third actors: If each MS were perceived to act in its own right, the resulting "cacophony" would seriously jeopardise the EU's economic weight and undermine its common policy.[79] In the present setting, as a bare minimum of commonality, this requires that it must be possible to hold the EU accountable for the violation of WTO law by its MS and to let the Commission defend the case. This necessitates an analysis of DSB practice concerning the EU and its MS (I.). In addition, a more nuanced conclusion regarding the external element of "true commonality" can be drawn by analysing the attribution of conduct concerning the grain ban (II.). If even such unilateral MS conduct is attributable to the Union, the CCP's common nature would be utterly reinforced.

I. DSB Practice: The Commission as the Union's *Porte-Parole*

The EU is an original Member of the WTO.[80] In accordance with the *pacta sunt servanda* principle, other Members may thus expect it to comply with its obligations, including Arts. XI:1 GATT, 4.2 AoA, just as they expect compliance from the Union's MS.[81] In the rich DSB practice, Panels thus needed to address the problem of whom (the Union or its MS) to hold accountable as a respondent in disputes. Generally speaking, here the EU is being held responsible for MS conduct,[82] which makes sense in the WTO regime: Firstly, the EU simply represents the bigger market with more options for retaliations.[83] Secondly, especially cross-retaliations expose any MS to such measures although another MS has breached its WTO

79 See *Larik*, in: Bungenberg et al. (eds.), pp. 84 ff.
80 Art. XI:1 Marrakesh Agreement.
81 Art. 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), Done at Vienna, 21 March 1986, UN Doc. A/CONF.129/15 (not yet in force). On the applicability of the VCLTIO and for a resulting discussion of the bindingness of the WTO Agreements on the EU, see *Steinberger*, EJIL 2006/4, pp. 842 ff.
82 *Eeckhout*, in: Bartels/Ortino (eds.), p. 463.
83 *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), p. 253.

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obligations.[84] Thirdly, in a system that aims at the return to legality after a breach, it will typically make sense to sue the EU, which has exclusive competences in the CCP.[85]

For instance, in the *Asbestos* and *Biotech* cases, the Union was the sole respondent for claims against MS measures.[86] In further cases, Panels were willing to view MS authorities as (*de facto*) organs of the Union.[87] When cases were brought against both the EU and its MS, though, Panels stressed that the role of the EU cannot diminish the rights and obligations of the MS.[88] This, however, did not hinder them from directing their recommendations only at the EU, when they considered that this sufficed to ensure future compliance.[89] Finally and most importantly with regard to the grain ban, even cases which were directed merely against MS have resulted in the EU intervening and negotiating a mutually agreed solution.[90]

From the EU perspective, it must be stressed that the Commission assumes the role of the Union's *porte-parole* (or spokesperson) in accordance with Art. 17(1) TEU.[91] In addition, especially the possibility of cross-retaliations reveals how intricate separate MS action before Panels would be.[92] Consequently, a *modus operandi* has been developed whereby the Commission represents the MS (even *contre coeur*[93]), while the latter exercise their influence via the Council and the Trade Committee.[94] In light of this, concerning the grain ban, it is not surprising that media coverage claims that the Commission has gathered information from the involved MS and would represent them in the trade dispute at the WTO.[95] More so, the Polish Press Agency has announced that the respective EU delegation would include

84 *Chatháin*, Eur. Law J. 1999/4, p. 475. For example, in the *Airbus* case, the USA have retaliated against Parmesan cheese from Italy, which was technically not involved in the dispute. See Opinion of AG *Kokott*, case C-66/18, *Commission v. Hungary (Higher Education)*, ECLI:EU:C:2020:172, para. 54.

85 *Kuijper*, Rev. BDI 2013/1, pp. 65f.; *Marín Durán*, EJIL 2017/3, p. 722.

86 Panel Report, *EC – Asbestos*, WT/DS135/R, 18 September 2000, para. 2.3; Panel Report, *EC – Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para. 7.101.

87 Panel Report, *EC – Trademarks and Geographical Indications*, WT/DS174/R, 15 March 2005, para. 7.98; Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, 16 June 2006, para. 7.556.

88 E.g., Panel Report, *EC and certain member States – Large Civil Aircraft*, WT/DS316/R, 30 June 2010, para. 7.175.

89 Panel Report, *EC – IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para. 8.2.

90 *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), pp. 239f.; *Eeckhout*, in: Bartels/Ortino (eds.), p. 453; *Marín Durán*, EJIL 2017/3, p. 713.

91 See also CJEU, case C-131/03 P, *Reynolds Tobacco and Others v. Commission*, ECLI:EU:C:2006:541, para. 94.

92 *Cottier*, CML Rev. 1998, p. 355; *Kuijper*, J. World Trade 1995/6, p.59.

93 *Cottier*, CML Rev. 1998, p. 356.

94 *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), p. 249.

95 *Fortuna*, Commission Stuck in between Going after, Defending Unilateral Ukraine Import Bans, Euractiv, 21/9/2023; *Gijs/Moens*, Commission Takes on Ukraine at WTO in Grain Fight It Didn't Want, POLITICO, 20/9/2023.

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experts from Poland, Slovakia and Hungary.[96] This information certainly fits the pattern of DSB practice outlined before.

II. Attribution of MS Conduct to the Union

In order to supplement these findings, it is useful to analyse whether unilateral MS conduct is attributable to the EU. This analysis can help to better grasp the DSB practice and to draw a more nuanced conclusion regarding the extent of commonality in the commercial policy. To assess attribution, one must have recourse to the International Law Commission's (ILC) Draft Articles on the Responsibility of IOs[97] (DARIO), which are applicable to the EU.[98] While the DARIO rather resemble progressive development of international law than a codification of international custom,[99] there is no equally authoritative document on the responsibility of IOs, including in relation to the EU.[100] In the following, the DARIO are applied to show that the grain ban is attributable to the Union (1.). Such attribution can, however, not exempt the MS from their own responsibilities (2.).

1. Art. 6 DARIO and *Dédoublement Fonctionnel*

According to the DARIO, the conduct of an IO's organs (Art. 6) and of State organs placed at its disposal (Art. 7) is attributable to the IO. The grain ban has been introduced by the Polish Minister of Development and Technology and is executed by other Polish authorities. These are organs of Poland, which have not been placed at the EU's disposal.[101] Accordingly, *prima facie* their conduct would be attributable to Poland, but not the EU.[102]

However, there is the legal phenomenon of *dédoublement fonctionnel*.[103] It has been described by Georges Scelle as encompassing the concept that an organ of one legal entity (e.g., a MS) may functionally act as the organ of another legal entity (e.g., the EU), which otherwise lacks the organisational structure to exercise its

96 *Osiński*, The Case of Ukrainian Grain. Important Talks in Brussels, Polish Press Agency, 27/9/2023.
97 ILC Report, Sixty-Third Session, UN Doc. A/66/10, 2011, pp. 40 ff.
98 Arts. 1(1), 2(a) DARIO and Art. 47 TEU.
99 ILC Report, Sixty-Third Session, UN Doc. A/66/10, 2011, pp. 46 f., para. 5.
100 *Nollkaemper*, in: Nollkaemper/Plakokefalos (eds.), p. 3; *Palchetti*, EJIL 2018/4, p. 1425.
101 See *Kuijper*, in: Hillion/Koutrakos (eds.), p. 216.
102 Consider Art. 4 of the ILC's Articles on the Responsibility of States for Internationally Wrongful acts, UN Doc. A/RES/56/83, 12 December 2001, Annex.
103 The compatibility of *dédoublement fonctionnel* (or in her words: *de facto* organs) with the DARIO has been assessed and confirmed by *Leinarte*, p. 82.

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functions.[104] In that case, the organ *de facto* becomes an organ in the other legal order and is competent in, but also bound by, both.[105] This construct has enormous potential to theoretically grasp the EU as an actor in international law.[106] This is because the EU largely relies on its MS to execute Union law – a concept usually described as "executive federalism".[107] Also the CCP rests on an exclusive legislative Union competence, flanked by a shared executive competence.[108] In effect, it must be established what function (national or Union) the Polish organs were carrying out when breaching the WTO Agreements.

According to Art. 6(2) DARIO, the functions of an organ shall be determined by the rules of the IO. Within executive federalism, the function of the MS is to adopt national measures to "implement" legally binding Union acts (Art. 291(1) TFEU). Thus, the precise question is whether Regulation (EU) 2023/1077 (now 2024/1392) is subject to Art. 291(1) and the Polish authorities are implementing it.[109] Having a closer look at the regulation, it becomes clear that, while it does not explicitly require the MS to take a certain action, its implementation does rely on MS authorities. This is because the regulation essentially suspends the enforcement of customs duties, which are levied by MS customs authorities as there is no Union customs service.[110] More so, the regulation explicitly confers implementing powers to the Commission regarding temporary suspensions and safeguard measures.[111] This option is based on Art. 291(2) TFEU. By way of an *argumentum e contrario*, this entails that the implementation of the rest of the regulation is subject to Art. 291(1).[112] Not only to ensure the *effet utile* of Union law, but also by the wording of Art. 291(1) ("Member States"), this should include all MS organs, which might be involved in the implementation. That is, e.g., not only the customs authorities but also the Minister of Development and Technology. A final argument to underline this is that the Union has extensive normative and judicial control over the MS organs in these matters, which makes it sensible to regard them as functionally being Union organs.[113]

104 For a definition in one his last works, see *Scelle*, in: Schätzel/Schlochauer, p. 331: "les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité « fonctionnelle » telle qu'elle est organisée dans l'ordre juridique qui les a institué, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisants" (emphasis omitted).
105 Ibid., p. 332.
106 See already *Cassese*, EJIL 1990/1, p. 231.
107 See *Schütze*, CML Rev. 2010.
108 Ibid., p. 1401 at fn. 70. See also *Marín Durán*, EJIL 2017/3, p. 705.
109 For elaborations on the CJEU's broad interpretation of the term 'implementing Union law' in the context of fundamental rights, see *Hancox*, CML Rev. 2013; *Sarmiento*, CML Rev. 2013, pp. 1274 ff.
110 See *Kuijper*, in: Hillion/Koutrakos, p. 214.
111 Para. 13 of the preamble and Arts. 3, 4 of Regulation (EU) 2024/1392. See also *infra* E.I.
112 See also *Schütze*, CML Rev. 2010, p. 1410: "Article 291(2) TFEU […] entitles the Union to *replace* the Member State's indirect execution of European law by means of its direct involvement" (emphasis as in original).
113 *Ahlborn*, Int'l Org. L. Rev. 2011/2, p. 452; *Delgado Casteleiro*, pp. 48 f.

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In effect, the Polish authorities are functionally acting as EU organs. Therefore, their conduct is attributable to the EU pursuant to Art. 6 DARIO. This includes conduct *ultra vires* (Art. 8 DARIO).[114]

2. Dual Attribution and "Joint and Several Responsibility"

This finding might suggest that the MS itself is exonerated from international responsibility when it implements Union law.[115] This can, however, not be the case as long as the MS are themselves WTO Members. This has been confirmed at various instances: At the MS level, the German Federal Constitutional Court (GFCC) held that the Lisbon Treaty may not force the MS to waive their WTO Member status.[116] In other words, the CCP cannot "serve to deny the international legal personality and international actorness" of the MS.[117] Also WTO Panels have repeatedly reiterated that the MS are WTO Members in their own right and bound by their WTO obligations.[118] Last but not least, the CJEU has stressed that the WTO Agreement was concluded without any allocation of obligations between the EU and its MS.[119] Accordingly, also from an EU law perspective, the EU *and* its MS are bound by the WTO Agreements in their entirety.[120]

To this end, the ILC explicitly considered the possibility of dual attribution and held that "attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State".[121] Accordingly, the conduct of the Polish authorities is attributable both to the EU and to Poland. The consequence of such dual attribution should be "joint and several responsibility".[122] That is, a complainant may choose to sue the EU or its MS or both jointly for full reparation.[123] This ensures the protection of the rights of the injured party.[124] It also provides a theoretical framework for the DSB practice outlined above.

114 On the incompatibility of the grain ban with EU law (i.e., conduct *ultra vires*), see *infra* E.
115 Consider, e.g., ICSID, *Electrabel S.A.* v. *Hungary*, Award, ICSID Case No. ARB/07/19, para. 6.76: "if and to the extent that the European Commission's Final Decision required Hungary, under EU law, prematurely to terminate Dunamenti's PPA, that act by the Commission cannot give rise to liability for Hungary".
116 BVerfG, Judgement of 30 June 2009, 2 BvE 2/08, para. 375.
117 *Larik*, in: Bungenberg et al. (eds.), p. 105.
118 Panel Report, *EC – Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, 5 February 1998, para. 8.16; Panel Report, *EC – IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para. 8.2; Panel Report, *EC and certain member States – Large Civil Aircraft*, WT/DS316/R, 30 June 2010, para. 7.174.
119 CJEU, case C-53/96, *Hermès v. FHT*, ECLI:EU:C:1998:292, para. 24.
120 *Chatháin*, Eur. Law J. 1999/4, p. 471; *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), pp. 237 f.
121 ILC Report, Sixty-Third Session, UN Doc. A/66/10, 2011, p. 54, para. 4.
122 *General Assembly*, Second report on responsibility of international organizations, UN Doc. A/CN.4/541, 2 April 2004, para. 8; *Steinberger*, EJIL 2006/4, p. 861.
123 *Steinberger*, EJIL 2006/4, p. 861.
124 *Nedeski*, Int'l Org. L. Rev. 2021, pp. 175 f.

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III. Interim Result: Not a Federal State, but Responsible for MS Conduct

This section has assessed the external element of "true commonality" of the CCP and concluded that unilateral MS conduct does indeed entail the Union's responsibility. The latter, however, is not a federal State and the MS remain WTO Members in their own right. Thus, this is a case of "joint and several responsibility": Ukraine may choose from whom (the EU or the MS or both) to claim restitution.[125] Nevertheless, an established practice in the WTO, which is rooted in the regime's exigencies, typically lets the Commission intervene and lead the consultations on behalf of the MS. This also appears to be the case with regard to the grain ban. The reliance on such a practice certainly is not ideal from a Union perspective. However, we deal with a *common*, not a *federal* commercial policy.[126] In light of this, situations such as the present one cannot be excluded. This is not *per se* contradicting the common nature of the CCP. Rather, it depends on the reaction to such situations. In the present case, eventually, unity towards third actors appears given.

E. The Internal Element: Ensuring MS Compliance

Any such external unity can, however, only be maintained if there are pertinent mechanisms to ensure also internal compliance with common Union positions and obligations.[127] The CJEU explicitly recognised the need for MS compliance with EU agreements already in *Kupferberg*.[128] In the WTO context, this notion is reflected in Art. XVI:4 of the Marrakesh Agreement and in the so-called "federal clause" of Art. XXIV:12 GATT[129]. Accordingly, WTO Members are under a positive obligation to take available, reasonable measures to ensure compliance by regional and local governments and authorities within their territories.[130]

125 It would be an intriguing political science research agenda to analyse the factors which lead to the invocation of EU or MS or joint responsibility. In the case of the grain ban, *prima facie*, it appears sensible for Ukraine, which seeks a timely EU membership, to raise claims only against the MS, rather than the EU or both.

126 On the EU's characteristics being somewhere between a confederation and a federal State, see *Leben*, in: Joerges et al. (eds.), pp. 99 ff.

127 In this sense, note *General Assembly*, Second report on responsibility of international organizations, UN Doc. A/CN.4/541, 2 April 2004, para. 11: "It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible."

128 CJEU, case 104/81, *Hauptzollamt Mainz v. Kupferberg*, ECLI:EU:C:1982:362, para. 13: "In ensuring respect for commitments arising from an agreement concluded by the [EU] institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and *above all in relation to the [EU] which has assumed responsibility for the due performance of the agreement*" (emphasis added).

129 See generally *Wolfrum et al.*, p. 253. Note also Art. 22.9 DSU.

130 Note that it has never been clarified whether this norm applies to the EU. In this sense, see Panel Report, *EC – Selected Customs Matters*, WT/DS315/R, 16 June 2006, para. 7.145 at fn. 288.

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Intuitively, the infringement proceedings of Art. 258 TFEU come to mind, which are a "powerful tool" to ensure compliance.[131] In fact, quickly after the end of the Uruguay round, legal scholars have pointed to this option for the Commission.[132] Notably, though, infringement proceedings can only be entertained *ex post*, making them unsuitable to prevent violations of WTO law.[133] More so, Panel proceedings under the DSB typically are considerably faster than such of the CJEU.[134] Accordingly, in the present situation an infringement proceeding itself could not prevent the DSB from authorising retaliations.[135] Nevertheless, it could identify a breach of Union law and thereby not only enforce the rule of law, but also serve as a precedent, based on which the common nature of the CCP would be strongly consolidated.[136]

Accordingly, this section will assess whether and on what basis infringement proceedings would be successful in the present case. According to Art. 258(1) TFEU, the Commission can initiate infringement proceedings when a MS has failed to fulfil an obligation under the Treaties. Three main types of obligations are involved regarding the grain ban: those establishing the CCP (I.), the duty of cooperation (II.), and the WTO Agreements themselves (III.).

I. Primary and Secondary CCP Legislation

The obvious starting point to look for infringed norms is the CCP itself. According to Art. 3(1)(e) TFEU, the CCP is an area of exclusive Union competence. That is, only the Union may legislate and adopt legally binding acts in accordance with Art. 207(2) TFEU. The adoption of the grain ban via a national regulation is clearly at odds with this. Such a breach of the Union's exclusive competence is justiciable.[137]

However, there may be a justification for unilateral MS action in secondary Union law.[138] In fact, Art. 24(2)(a) of Regulation (EU) 2015/478 on common rules for imports allows MS to introduce import prohibitions on grounds of certain justi-

131 See *Mendez*, CML Rev. 2010, p. 1741.
132 *Chatháin*, Eur. Law J. 1999/4, pp. 476f.; *Cottier*, CML Rev. 1998, p. 357; *Kuijper*, in: Bourgeois et al. (eds.), p. 111; *Sack*, EuZW 1997/22, p. 688.
133 *Steinberger*, EJIL 2006/4, p. 853.
134 *Kuijper*, J. World Trade 1995/6, p. 69.
135 Consider, though, *inter alia* the possibility to suspend the Panel's work (Art. 12.12 DSU).
136 Note also the CJEU's mandate in Art. 19(1) sentence 2 TEU: "It shall ensure that in the interpretation and application of the Treaties the law is observed."
137 See, *mutatis mutandis*, CJEU, case C-114/12, *Commission v. Council*, ECLI:EU:C:2014:2151, especially para. 103. In this sense, *Larik*, in: Bungenberg et al. (eds.), pp. 97 f.
138 Art. 2(1) TFEU: „only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves *only if so empowered by the Union or for the implementation of Union acts*" (emphasis added). On the at times ambiguous relationship between primary and secondary Union law in general, see *Syrpis*, CML Rev. 2015.

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fications such as public policy.[139] However, the application of this exception has been temporarily suspended with regard to imports originating in Ukraine.[140] Accordingly, the mentioned justifications are not applicable to the grain ban. Rather, only the Commission may impose safeguard measures, if exceptional circumstances so require.[141] Thus, secondary Union law provides no justification for unilateral MS action. The grain ban is an infringement of Arts. 3(1), 207(2) TFEU.

II. Duty of Cooperation & Art. 4(3) TEU

Secondly, there is the duty of cooperation, which obliges MS to closely cooperate with the Union in implementing international agreements.[142] This duty, which has been dubbed a "constitutional principle" of the EU,[143] was developed by the CJEU in a line of constant jurisprudence[144] and has been related to Art. 4(3) TEU[145]. More so, with a view to cross-retaliations, the Court has stressed that the duty of cooperation is especially important in the WTO.[146] As such, the duty is justiciable.[147]

However, an infringement of the Union's exclusive competence itself will suffice to establish a breach of a treaty obligation, rendering an assessment of the duty of cooperation superfluous.[148] Especially in the CCP, reference to it will typically not be necessary.[149] It should not be forgotten, though, that the duty of cooperation also entails a "duty to remain silent".[150] That is, MS must let the Commission represent them and actively cooperate in DSU proceedings.[151]

139 Regulation (EU) 2015/478, OJ L 83/16 of 27/05/2015. Said justifications are identical to those found in Art. 36 TFEU.
140 Art. 1(3) of Regulation (EU) 2023/1077, Art. 1(2) of Regulation (EU) 2024/1392.
141 Art. 4 of Regulation (EU) 2024/1392. According to para. 13 of the preamble and Art. 5 of the same regulation, the competence of the MS in this regard is reduced to the participation in a committee established in accordance with Regulation (EU) 182/2011, OJ L 55/13 of 28/02/2011.
142 *Hillion*, in: Hillion/Koutrakos (eds.), p. 89.
143 *Cremona*, in: Cremona/de Witte (eds.), p. 157. For a Court reference to such constitutional principles, see CJEU, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 285.
144 CJEU, Ruling 1/78, ECLI:EU:C:1978:202, para. 34; CJEU, Opinion 2/91, ECLI:EU:C:1993:106, para. 36; CJEU, Opinion 2/00, ECLI:EU:C:2001:664, para. 18; CJEU, Opinion 1/08, ECLI:EU:C:2009:739, para. 136.
145 CJEU, Case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 174; *Hillion*, in: Hillion/Koutrakos (eds.), pp. 91 f.
146 CJEU, Opinion 1/94, ECLI:EU:C:1994:384, para. 109.
147 *Hillion*, in: Hillion/Koutrakos (eds.), pp. 94 f.; *Larik*, in: Bungenberg et al. (eds.), pp. 88 f.
148 See, *mutatis mutandis*, CJEU, case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345, para. 171.
149 *Larik*, in: Bungenberg et al. (eds.), pp. 97 ff.
150 See *Delgado Casteleiro/Larik*, EUR. L. REV. 2011.
151 *Delgado Casteleiro/Larik*, in: Evans/Koutrakos (eds.), p. 242; *Hillion*, in: Hillion/Koutrakos (eds.), p. 111; *Marín Durán*, EJIL 2017/3, p. 698.

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III. WTO Law as an Integral Part of the *Acquis* (Art. 216(2) TFEU)

Thirdly, it may be possible for the Commission to directly invoke WTO law before the CJEU. According to Art. 216(2) TFEU, international agreements form an integral part of the EU's legal order, which resembles a monist approach to international law.[152] Thus, as is shown by various precedents, the obligations stemming from international agreements can be subject to infringement proceedings.[153] One must, however, also take note of the Court's jurisprudence on the legal value of the WTO Agreements, generally denying them direct effect and making it impossible to invoke WTO obligations in actions against EU institutions.[154] Thus, this section firstly focusses on CJEU jurisprudence to see whether WTO obligations may be subject to infringement proceedings (1.). In a similar vein, the Court has denied DSB Reports direct effect. As possible infringement proceedings concerning the grain ban might meet with a Panel Report on the same matter, secondly an analysis of the legal value of such reports before the Court is necessary (2.).

1. Can WTO Law be Invoked in Infringement Proceedings against MS?

In *Portugal v. Council*, in the context of actions against EU institutions the CJEU set out its view on the legal value of WTO Law. Here, the Court stressed that the WTO Agreements are based on the principle of negotiations.[155] More so, domestic courts of the "most important commercial partners" of the EU would not entertain legality reviews of national laws against WTO obligations.[156] Accordingly, the CJEU could not do so without depriving the Union's legislative and executive organs of the scope of manoeuvre enjoyed by their counterparts.[157] While these elaborations were not directly connected to infringement proceedings against MS, they made it questionable whether such proceedings would be compatible with the Court's general denial of invokability of WTO law.[158] However, the CJEU has recently confirmed the possibility of invoking WTO norms in proceedings against MS in the *Lex CEU* case.[159]

152 *Lenaerts et al.*, p. 695.
153 Concerning the Second Lomé Convention: CJEU, joined cases 194/85 and 241/85, *Commission v. Greece*, ECLI:EU:C:1988:95; concerning the International Dairy Arrangement: CJEU, case C-61/94, *Commission v. Germany*, ECLI:EU:C:1996:313; concerning the Berne Convention for the Protection of Literary and Artistic Works: CJEU, case C-13/00, *Commission v. Ireland*, ECLI:EU:C:2002:184; concerning the Convention for the Protection of the Mediterranean Sea Against Pollution: CJEU, case C-239/03, *Commission v. France*, ECLI:EU:C:2004:598; concerning the EEC-Algeria Cooperation Agreement: CJEU, case C-173/05, *Commission v. Italy*, ECLI:EU:C:2007:362.
154 See generally *Thies*, pp. 6 ff.
155 CJEU, case C-149/96, *Portugal v. Council*, ECLI:EU:C:1999:574, para. 42.
156 Ibid., para. 43. On the situation in the USA, see *Griller*, JIEL 2000/3, pp. 455 f.
157 CJEU, case C-149/96, *Portugal v. Council*, ECLI:EU:C:1999:574, para. 46.
158 See *Nagy*, AJIL 2021/4, p. 702.
159 CJEU, case C-66/18, *Commission v. Hungary (Higher Education)*, ECLI:EU:C:2020:792.

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The case concerned a 2017 Hungarian law, which was clearly aimed against the New York-based Central European University (CEU).[160] This law was in apparent conflict with the General Agreement on Trade in Services[161] (GATS), but the United States did not make use of their rights under the DSU.[162] Hence, the Commission initiated infringement proceedings against Hungary. In its defence, Hungary claimed that WTO disputes would need to be resolved under the DSU and that an affirmation of the Court's jurisdiction would undermine the uniform interpretation of GATS.[163] In its judgement, the Court reaffirmed that WTO law is part of EU law.[164] Furtherly, it considered that the EU may incur international liability due to MS incompliance with WTO law.[165] Thus, it confirmed its jurisdiction.[166] At the same time, however, it assured that its judgement in such proceedings would only be binding on the Union and its MS, but not affect their relation to other WTO Members.[167] Eventually, the Court found a violation of Art. XVII GATS.[168] It did not assess a possible violation of the duty of cooperation, which had been mentioned by Attorney General Juliane Kokott in her opinion.[169]

This judgement has been criticised for a variety of causes, such as its tardiness (3.5 years) or the *nonchalance* of the Court in interpreting WTO law.[170] All criticism aside, however, the *Lex CEU* judgement confirms that the grain ban can be subject to the Court's scrutiny under infringement proceedings regarding WTO norms.

160 *Bárd*, A Strong Judgment in a Moot Case: Lex CEU before the CJEU, Reconnect, 12/11/2020, available at: https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/ (12/7/2024). For further insights into the background of the dispute, see *Simon*, Lex CEU – Orbán hat der Wissenschaft den Krieg erklärt, 12/4/2017, available at: https://www.boell.de/de/2017/04/12/lex-ceu-orban-hat-der-wissenschaft-den-krieg-erklaert (12/7/2024).

161 General Agreement on Trade in Services, Marrakesh Agreement Establishing the WTO, Annex 1B, Done at Marrakesh, 15 April 1994, 1869 UNTS 183.

162 *Fontanelli*, ESIL Reflections, 2021/2, p. 3.

163 CJEU, case C-66/18, *Commission v. Hungary (Higher Education)*, ECLI:EU:C:2020:792, paras. 58 ff.

164 Ibid., para. 71.

165 Ibid., paras. 81, 84.

166 Ibid., paras. 92 f.

167 Ibid., paras. 89 ff.

168 Ibid., para. 156.

169 Opinion of AG *Kokott*, case C-66/18, *Commission v. Hungary (Higher Education)*, ECLI:EU:C:2020:172, paras. 54f. On this point see also *Stoppioni*, L'audience dans l'affaire Commission c. Hongrie (C-66/18) sur la « loi CEU » : le détour par le droit de l'OMC pour protéger la liberté académique, blogdroiteuropéen, 1/7/2019, available at: https://blogdroiteuropeen.com/2019/07/01/laudience-dans-laffaire-commission-c-hongrie-c-66-18-sur-la-loi-ceu-le-detour-par-le-droit-de-lomc-pour-proteger-la-liberte-academique-par-edoardo-stopp/ (12/7/2024).

170 *Bárd*, 12/11/2020; *Fontanelli*, ESIL Reflections, 2021/2, p. 9.

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2. Are Panel Reports Binding on the CJEU?

It must be duly noted, though, that proceedings in the same matter have already been initiated before the DSB. Given that Panel proceedings are considerably faster than those of the CJEU, the Court could end up in a situation in which it has not yet reached a judgement, but there is already a legally binding DSB Report. Thus, an important question is whether a Panel Report concerning the grain ban would be binding on the CJEU.

While the question of whether international judicial decisions are binding on domestic courts in general is rather complex,[171] the CJEU has acknowledged that decisions of international judicial bodies can be binding on all EU institutions, including itself.[172] In practice, however, it has had reference to such decisions at best in order to use them as guidance for its own interpretations.[173] In addition, in the Court's view, DSB reports cannot be fundamentally distinguished from the substantive WTO rule they review and, thus, be no more capable of having direct effect than WTO law in general.[174] More so, it considers that Art. 22(2) DSU provides the WTO Members with the opportunity to find a negotiated solution even after a Panel recommendation has been adopted. Accordingly, the Court could not enforce such reports without depriving the legislative and executive Union organs of such an opportunity, which is enjoyed by other WTO Members.[175] In effect, the CJEU does not consider itself bound by Panel Reports.[176]

In the *Lex CEU* judgement, however, with reference to the *pacta sunt servanda* principle in Art. 26 VCLT, it stated that "the Court *must*, for the purposes of interpreting and applying the GATS, *take account of* the DSB's interpretation of the various provisions of that agreement."[177] Here, the CJEU signalled a different approach to its standing jurisprudence by recognising a legal obligation ("must").[178] The subsequent wording ("take account of"), however, appears more ambiguous.[179] This phrase could imply a duty to follow the DSB's interpretations, but could also merely mean that the Court must consider them but is free to deviate.

171 See generally *Bedjaoui*, N.Y.U. J. Int'l L. & Pol. 1996/1&2; *Gattini*, in: Fastenrath et al. (eds.), pp. 1168 ff.
172 CJEU, Opinion 1/91, ECLI:EU:C:1991:490, paras. 39 f.
173 *Thies*, p. 95.
174 CJEU, joined cases C-120/06 P and C-121/06 P, *FIAMM and Others v. Council and Commission*, ECLI:EU:C:2008:476, paras. 128 f.
175 CJEU, case C-377/02, *Van Parys*, ECLI:EU:C:2005:121, paras. 42 ff. This has been described as a "*de facto* option to maintain the breach of international law", even if negotiations have failed. See *Thies*, CML Rev. 2004, p. 1674. For criticism see *Lock*, pp. 229 ff.
176 On the 'muted' judicial communication between the CJEU and WTO Panels in general, see *Bronckers*, JIEL 2008/4; *Zang*, EJIL 2017/1.
177 CJEU, case C-66/18, *Commission v. Hungary (Higher Education)*, ECLI:EU:C:2020:792, para. 92 (emphasis added).
178 *Hadjiyianni*, ICLQ 2021, p. 914.
179 This ambiguity is present in various language versions of the judgement, c.f. French ("tenir compte de"), German ("berücksichtigen"), or Spanish ("tener en cuenta").

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The reference to Art. 26 VCLT, which also entails a *bona fide* obligation, indicates that such deviations should only be possible given cogent reasons. In order to further define this obligation, one may analogously have reference to domestic jurisprudence, since the CJEU "is not an international court in the traditional sense, but rather resembles a constitutional court or a general national court of last instance."[180] For instance, the GFCC has interpreted the term "take into account", regarding decisions of the European Court of Human Rights (ECtHR), to mean that it must "at least duly consider" the ECtHR's interpretation, but may deviate from it, e.g., if "a changed fact situation does not permit it to be applied to the case."[181] As a restraint on such deviations, elsewhere, the GFCC has held that judgements of the ICJ have a "guidance effect" (*Orientierungswirkung*) for the interpretation of international law, such as to avoid that Germany incurs international responsibility.[182] This strongly resembles the CJEU's argument that the objective of infringement proceedings invoking WTO norms is to evade that the Union incurs international liability for acts of its MS.[183] The achievement of this objective would be seriously jeopardised if the Court were to deviate from standing DSB jurisprudence. This is especially true in proceedings which involve the EU or its MS as a party.

In conclusion, DSB Reports are not binding on the CJEU, but it can only deviate from them with a proper justification.[184] Thus, if the Commission initiates infringement proceedings concerning the grain ban, during the course of which a Panel Report on the matter is adopted, the Court should in principle follow its reasoning.

IV. Interim Result: The Commission Should Initiate Infringement Proceedings

This section has shown that infringement proceedings against the grain ban would indeed be successful. Hence, there is a pertinent mechanism to ensure MS compliance and, thus, to fulfil the internal element of "true commonality". However, this mechanism will only be useful, if it is actually used. Notably, already in September 2023 the Commission reserved its right to launch infringement proceedings concerning the grain ban as a "theoretical option" but claimed to try to "find a

180 *Bronckers*, CML Rev. 2007, p. 621.

181 BVerfG, Order of 14 October 2004, 2 BvR 1481/04, para. 62 (official translation). The German original reads: ""Berücksichtigen" bedeutet, die Konventionsbestimmung in der Auslegung des Gerichtshofs zur Kenntnis zu nehmen und auf den Fall anzuwenden, soweit die Anwendung nicht gegen höherrangiges Recht, insbesondere gegen Verfassungsrecht verstößt. Die Konventionsbestimmung muss in der Auslegung des Gerichtshofs jedenfalls in die Entscheidungsfindung einbezogen werden, das Gericht muss sich *zumindest gebührend mit ihr auseinander setzen*. Bei einem zwischenzeitlich veränderten oder bei einem anderen Sachverhalt werden die Gerichte ermitteln müssen, worin der spezifische Konventionsverstoß nach Auffassung des Gerichtshofs gelegen hat und *warum eine geänderte Tatsachenbasis eine Anwendung auf den Fall nicht erlaubt*" (emphasis added). For a commentary, see *Hartwig*, Ger. Law J. 2005/5.

182 BVerfG, Order of 19 September 2006, 2 BvR 2115/01, paras. 61 f.

183 See *supra* fn. 165 and accompanying text.

184 For a similar conclusion, see *Bronckers*, CML Rev. 2007, p. 627.

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constructive and equitable solution".[185] Back then, this has been described as a "lack of political leadership".[186] It is submitted that the Commission should assume such political leadership and enable the CJEU to corroborate its jurisprudence with a further precedent. This way the Court could consolidate the common nature of the CCP.

Strikingly, the recent prolongation of the suspension of tariffs through Regulation (EU) 2024/1392 contains a new automatic safeguard mechanism.[187] Accordingly, if import volumes of certain products exceed a reference level of an earlier period, the Commission shall reintroduce tariffs on that product. On 2 July 2024 this has been done with regard to eggs[188] and sugar[189] and, on 22 July 2024, with regard to groats[190]. While this development appears to be a laudable effort to reconcile the common Union position with the interests of certain MS, it does not change the conclusion of this section, but rather reinforces it. The MS may exercise their influence in the legislative process, but then they also have to abide by the result.

F. Conclusion

This article has sought to answer the question of whether the Union's commercial policy truly is "common" in light of the current ban on Ukrainian grain. To this end, it has shown that the ban is violating Arts. XI GATT, 4.2 AoA and argued that this is profoundly jeopardising the CCP's common nature. It has, further, elaborated that "commonality" in the CCP requires that the Union may externally take up the defence of the MS and that it must be able to go after them internally. Both these conditions are fulfilled. On the external side, a violation of WTO law by a MS entails the EU's responsibility as its conduct is attributable to the Union. This, however, does not exempt the MS from its own responsibility. Nevertheless, "joint and several responsibility" will typically result in an eventual invocation of the Union's responsibility, given the aims of the WTO regime. This appears to be the case in the grain ban situation. On the internal side, infringement proceedings would find that the MS are not only violating CCP norms, but also (technically) their duty of cooperation and the WTO Agreements as an integral part of the Union's *acquis*. This, however, is worth nothing as long as the Commission does not initiate such proceedings. Accordingly, it is submitted that, as guardian of the treaties, it should do so in order to reaffirm the common nature of the CCP and dispel any doubts to this end.

185 *Fortuna*, Commission Stuck in between Going after, Defending Unilateral Ukraine Import Bans, Euractiv, 21/9/2023.
186 *Moens/Brzeziński*, "Incomprehensible": How the EU Lost Control in Ukraine Grain Fight, POLITICO, 27/9/2023.
187 Para. 11 of the Preamble and Art. 4(VII) of Regulation (EU) 2024/1392.
188 Commission Regulation (EU) 2024/1827, OJ L of 2/7/2024.
189 Commission Regulation (EU) 2024/1825, OJ L of 2/7/2024.
190 Commission Regulation (EU) 2024/1999, OJ L of 22/7/2024.

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In effect, this article has shown that the Union's commercial policy truly is a "common" one, notwithstanding unilateral MS action. However, the Union institutions must insist on their rights and ensure that the MS honour their obligations or are duly punished for a breach of the latter. After all, the EU is a special IO, but not a federal State. This will naturally, from time to time, lead to disparities. In such situations, more than ever, it is important that the rule of law is properly enforced. No legal system can truly be functionable without such enforcement.

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