

Relationship of the EU legal order with WTO law: Studying Judicial Activism

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GARNET Working Paper No: 70/09

September 2009

ABSTRACT

As International Politics has become increasingly institutionalised since the end of the Cold War, a fragmented institutional architecture for global governance is being put in place, at differential degrees according to the issue area.

In this perspective, this paper aims at exploring the interaction between the EU and WTO, from the angle of their jurisdictional bodies involved in the common pursuit of managing economic globalization through law. The departing premise of this research project is the recognition that during the 1990s both the WTO and EU have refined their compulsory implementation mechanisms for their own rules through a judicialization of the compliance phase. This development tended to favour the emergence of a more coherent regulatory regime, allowing for the completion of negotiated agreements by jurisprudential ways.

In other words, the institutional design plays a role in favouring regulatory patterns, even if it creates potential problems of coordination and coherence between global and regional levels.

Accordingly, the aim of paper is twofold. Firstly, it seeks to demonstrate empirically to what extent judicial interaction has become an important parameter of trade governance at the global and European levels. Two results of the interaction between regional and multilateral level need to be analysed in depth. On the one hand, WTO standards have changed the direction of European integration as they have progressively been invoked against the EU and national rules of its State members. On the other hand, the creation of the WTO legal regime has helped to consolidate EU system of governance and opened an important avenue through which European norms can take root at the global level.

Secondly, this research project seeks to investigate the underlying social mechanisms of inter-jurisdictional interactions. The research will illustrate how judicial bodies have been trying to solve some of the systemic incongruities of their relationship by intruding into each other's legal orders. Due to their different jurisdictions, procedures and different rules of conflict resolution, national and international judges often interpret international trade law from different judicial viewpoints, in the framework of conflicting 'constitutional' perspectives.

The paper will show that, despite their rather turbulent relationship, the judicial bodies and their judges are in the process of setting up a common framework of coexistence, which, in turn, has allowed them to build a transnational and pluralistic space of normative dialogue. In fact, the fragmented nature of national and international legal and dispute settlement regimes, and the formalistic nature of the customary international law rules on treaty interpretation and conflicts of laws, offer little guidance on how national and international judges should respond to the proliferation of competing jurisdictions and the resultant incentives for forum shopping and rule shopping by governments and non-governmental actors in international economic law.

Keywords: WTO, Direct effect, Court of Justice, Judicial regulation of International Trade

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Introduction

The rule of law is one of the defining features of the European Union (EU)¹. No other International Organisation enjoys “such a reliably effective supremacy of its law over the laws of member governments, with a recognised Court to adjudicate disputes”². Once overlooked by scholars, European Court of Justice (ECJ) is recognised as an actor and factor in the process of European Integration³. The ECJ has been widely credited with a central role in the “constitutionalisation” of the EU legal order, deviating from its international law roots, under the banner of the rule of law. The jurisprudence of the European Court has resulted, on the hand, in transforming the original treaty-based relationship between national and European law and, on the other hand, in remodelling the vertical separation of powers between the Union and its Member States.

The manner in which the ECJ helped bring about this transformational process has routinely provoked irate reactions by some Member States, both at the national and supranational levels⁴. As a consequence, the European Court of Justice in Luxembourg is often accused of being excessively "activist" in its judgments. This charge, however, leaves unclear questions about what activism exactly denotes, at which point the European Court of Justice has transgressed the limits of its judicial function, and what the consequences should be. Intervening in this debate, the late Lord Mackenzie-Stuart remarked:

“Commentators, both kind and critical, have frequently referred to the approach of Court as ‘activist’ and ‘dynamic’, but with great respect I wonder whether these adjectives do not obscure the issues”⁵

In spite of the ambiguities of labelling of the Court of Justice as ‘activist’ the charge of ‘activism’ against the ECJ stuck⁶. Another judge rejected it altogether, however, as part of a ‘conspiracy theory’:

¹ Neil Walker, “The *Rule of Law* and the EU: Necessity's Mixed Virtue” in Neil Walker, Gianluigi Palombella (eds), *Relocating the Rule of Law* (London, Hart, 2009), pp. 119-138

² Robert Keohane, Stanley Hoffmann, “Institutional change in Europe in the 1980s” in Robert Keohane, Stanley Hoffmann (eds), *The new European Community: Decision-making and Institutional Change* (Boulder, Westview, 1991), pp. 10-11

³ Joseph Weiler, «The transformation of Europe», *Yale Law Journal* 100:8, 1991, pp. 2403-2483

⁴ Lately, following C-170/96 *Commission / Council* [1998] I-2763, the Danish Prime Minister Fogh Rasmussen raised the issue of a renegotiation of the mandate of the Court. The Austrian Chancellor Wolfgang Schüssel, at the beginning of his EU presidency, criticized the ECJ for its expansive jurisprudence, commenting on C-147/03 *Commission / Austria* [2005] I-5969

⁵ Lord Mackenzie-Stuart, *The European Communities and the Rule of Law*, London, Stevens, 1977, p. 77

⁶ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff, 1986)

“The Court cannot have an agenda unless all the judges, or at least a consistent majority of them, are part to it – presumably in violation of the judicial oath. At the very least, they are guilty of intellectual dishonesty. Even if their decisions are right, they commit the greatest treason... The test of a judicial decision is whether it is legally and intellectually credible as an answer to the problem the judge has been called upon to resolve.”⁷

In spite of the strong rebuttals by the judges, the ‘dynamic’ character of the jurisprudence of the ECJ is still a matter of debate among scholars. After a theoretical discussion of judicial activism, the paper will focus more specifically on the jurisprudential and doctrinal aspects of the ECJ relationship with WTO law, before assessing to what extent and how the ECJ has been activist in the realm of external trade relations of the EU. The conclusion is that the incoherencies of the Court’s jurisprudence in this domain have been exposed by the learned community of Community Lawyers but justified in terms of political necessities. This brings to the question of the persistent bias in favour of pro-integration positions among the Community lawyers as an epistemic community.

I) Defining Activism

According to Rasmussen, “In terms of methodology, the student of European judicial activism has, indeed, no choice but to monitor carefully the responses to activism offered by the Court's political as well as legal, social and economic environments”⁸. Accordingly, the jurisprudential trajectory of the Court remains within legitimate boundaries in absence of widespread negative reactions, notably from Member States.

On the other hand, Weiler objected that: “The Court as guardian of the Treaties...has, of course within proper limits, a huge responsibility in not allowing that vision and idea, as incorporated into the Treaties establishing the European Communities, to be destroyed by contingent political and social negative inputs”⁹. According to this author, demanding the adherence of the European Court of Justice to the desiderata of the Member States implies the risk of a political opportunism of the Court, which is endangering the proper functioning of an impartial jurisdiction, even if the question of “proper limits” to the jurisprudential

⁷ David Edward, “Judicial Activism – Myth or Reality?” in A.I.L. Campbell, M. Voyatzi, *Legal Reasoning and Judicial Interpretation*, London, Trenton, 1996, pp. 29-67

⁸ Hjalte Rasmussen, *op. cit.*, p. 7

⁹ Joseph Weiler, “The Court of Justice on Trial”, *Common Market Law Review* 24 (1987), p. 570

trajectory of the Court remains. At the contrary, “One may...argue with the rationale; but perceived non-arbitrariness and certainty usually remain hallmarks of proper judicial function.”¹⁰

Following this suggestion, to evaluate the label of ‘activist’ attached to the Court of Justice, this paper is taking seriously doctrinal assessment of the latter jurisprudence. The main function performed by a jurisdiction is essentially a creative one, updating and adapting the body of law at the lights of the facts of a controversy. For this reason, the judges are bound by a number of professional norms, substantive rules, procedures, and standards of interpretation and reasoning tests, which are normally used by commentators to evaluate its jurisprudence. One of the main test of the legitimacy of a court is «whether and by what consideration its decisions are justified on, or at the very least, rationally justifiable»¹¹. The doctrinal reactions are deemed to be a valuable indicator if the ECJ’s jurisprudence passes this test.

The paper maintains that the issue of legitimacy is of essential importance for the future of the European Union and, more specifically, of its constitutive entities. However, one has to distinguish the sources of legitimacy of judicial and legislative branch. While the latter is derived from the democratic process, the former is derived from procedural and substantive justice. The ECJ as a judicial institution is bound by legal rules, and comprised of individuals who interpret the law. It is both facilitated and constrained by its relationship with other EU actors. Judicial interpretation is an inherently tricky function. Judicial interpretation both empowers and constraints the ECJ.

Interpretation of the law inherently leaves room for creativity; yet judgments must also be credible answers to the problems the Court has been called upon to resolve. Consequently, judicial creativity in its interpretative function does not yield unlimited autonomy. The ECJ is bound by traditional rules of procedure and legal reasoning. Its room of manoeuvre is constrained by the nature of the actions and arguments brought before it. More structurally, the ECJ cannot initiate or decline cases. It must rule in all legitimate disputes. Ultimately, its legitimacy as a judiciary instance depends upon the extent to which its decisions reflect a

¹⁰ *Ibidem*, p. 573

¹¹ Joxerramon Bengoetxea, Neil MacCormick, Lenor Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in Grainne De Burca, Joseph Weiler (eds), *The European Court of Justice* (Oxford, Oxford University Press, 2001), p. 44

“reasonable” interpretation of EU law¹². Finally, the ECJ is bound by rules of procedure and constrained by precedent. Usually, the Court “launched its decisions on an unsuspecting world. [Each one] grew out of previously established case law in response to questions put to the Court which it was the Court’s function and duty to answer”¹³.

Using this interpretation of the legitimate bounds of a jurisdiction, the objective of this paper is to evaluate how and to what extent the ECJ actively pursue its own agenda according to its preferences, using its discretion. Judicial discretion is measured by the degree of creativity used in judicial interpretation. It is maintained that the degree of creativity employed by the Court in its decision-making is an important element of judicial legitimacy. Creativity is defined here as the extent to which jurisprudential interpretation departs from a generally accepted consensus, and typified by the reactions of the mainstream doctrine to the rulings of the ECJ, either in terms of internal inconsistency of the reasoning process or external assessment of unreasonable results. Operationally, judicial creativity can be defined as the extent to which the ECJ takes liberty from generally accepted reading of the text of Treaties or from its previous case law. In itself, however, it is not the amount of interpretative creativity enjoyed by a jurisdiction which is the measure of its legitimacy, but rather the degree of acceptance by its designate audience.

The hypothesis at work is that the fewer the legal and political factors which constrain the Court, the more likely it is to employ a creative interpretation. Conversely, the greater the constraints, the more conservative the interpretation. Whereas the ECJ interpretation in the internal context has often been labelled “reckless” because of its disregard of political constraints, the Court appears to have adopted a more nuanced interpretation in the external realm, which suggests a judicial pragmatic approach to the complex political and legal issues facing the EU in the world¹⁴. The interpretation of the ECJ on the effects of GATT/WTO law on the Community legal order is going to be analyzed thereafter at the light of this hypothesis.

II) Jurisprudence on International Law and its effects on Community Law

The Treaties are silent on the effects of an international agreement, concluded by the EC/EU, for the European legal order. Normally, this is the ideal situation for the Court to step in and

¹² Federico Mancini, “The Making of a Constitution for Europe”, *Common Market Law Review* 26 (1989), p. 606

¹³ David Edward, *op. cit.*, p. 35

¹⁴ Takis Tridimas, Piet Eeckhout, “The external competence of the Community and the case law of the European Court of Justice: principle versus pragmatism”, *Yearbook of European Law* 14 (1994), pp. 143-177

“to fill in the details of an incomplete contract and adjudicate future disputes»¹⁵. To fill this gap at the light of actual controversies, the ECJ was called to pronounce itself on the legal consequences of international agreements properly concluded and ratified. Earlier on, with the ruling in *Haegeman*, the Court stated that they were integral part of EC law¹⁶, but without explaining why. The doctrine generally approved of the approach taken by the Court, attributing it to a monist understanding of the relationship between Community and International law, which does not require the latter to be transformed in a regulation or a directive to have effect. Even those scholars who are most inclined to criticise the whole ECJ’s line of decisions concerning International law are of the view that the wrong principles have prevailed rather than contending that no principles at all have prevailed¹⁷.

However, the European Court of justice seemed to adopt such a monist understanding of the relationship between International and Community law, without explicitly stating so¹⁸. This implied an important part of judicial discretion, in determining under which criteria individuals could rely upon an international agreement in order to challenge the legality of a legal act of the EC/EU. This has the advantage of guaranteeing a comfortable room of maneuver for the judicial comproms to be struck.

Later on, in what is considered to be the classical locus of its jurisprudence on the matter, the Court of Justice held in *Kupferberger* that provisions of agreements concluded by the Community are part of Community law, binding upon the institutions and Member States. When a State implements domestically a provision of such an international agreement, it fulfils EU law obligations. The ECJ concluded that it alone has the authority to determine the nature of such an obligation and, in particular, whether individuals before national courts can enforce them¹⁹.

¹⁵ Mark Pollack, «Delegation, Agency and Agenda Setting in the EC», *International Organization* 51:1, 1997, p. 104

¹⁶ C-181/73 *Haegemann* [1974] 741

¹⁷ Robert Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO jurisprudence” in Joseph W. W. Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford: Hart, 2000), chapter 3.

¹⁸ C-104/81 *Hauptzollamt Mainz / Kupferberg* [1982] 3641. The ECJ concluded that the provision at issue in this case (the prohibition of discriminatory internal taxation in the Free Trade Agreement with Portugal) was ‘sufficiently precise’ and ‘unconditional’ to be “capable to conferring upon individual traders rights which the Court must protect”.

¹⁹ Marco Bronckers, “The Effect of the WTO in European Court Litigation”, *Texas International Law Journal* 40 (2005), pp. 443-448

Further developing this reasoning in respect of the decisions pertaining to bodies created as part of international agreements²⁰, the Court recognized in its opinion 1/91 the possibility to be bound by the decision of a jurisdictional body set up from an international agreement signed by the EU and Member States²¹, when called to interpret the international agreement in question²².

At the light of this ruling, whenever there is a conflict between an international agreement and the treaties, the former does not take precedence, whereas it is possible that in case of conflict between an international agreement and inconsistent secondary law, the latter gives way under article 300 EC, which states that international agreements are binding on the institutions and Member States. The implication is that the Treaties are the ‘constitutional’ backbone of the European legal order²³; a perspective enshrined in the amended article 300(6) EC.

Both principled stances of the ECJ on the relationship with International Law and its obligatory status in respect of Community law have been stretched by the encounter of the European Communities with the GATT multilateral system of trade regulation (A), which made way to a creative rearrangement of the jurisprudential case law using its discretionary leeway. In particular, the doctrinal view is that there is less willingness on the side of the ECJ to consider a direct effect of GATT/WTO provisions, in respect of agreements concluded by the EC with non-Member States²⁴. Moreover, the ECJ has avoided stating that WTO law forms an integral part of Community Law and avoided this qualification also in relation to the WTO Agreement. This is even more evident in the twin fields of applicability and invocability of WTO law and decisions of the WTO dispute settlement system (B).

²⁰ Takis Tridimas, Piet Eeckhout, “The external competence of the Community and the case law of the European Court of Justice: principle versus pragmatism”, *Yearbook of European Law* 14 (1994), pp. 149-151. *Opinion* 1/76 [1977] I-449

²¹ *Ibidem*, para. 39-40

²² Marco Bronckers, “The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?”, *Common Market Law Review* 44 (2007), pp. 601-627; Allan Rosas, “International Dispute Settlement: EU Practices and Procedures”, *German of Yearbook International Law* 46 (2003), pp. 284-322

²³ In *Opinion 1/91* [1991] I-6079, EEC Treaty was referred to as “the constitutional charter of a Community based on the rule of law” para. 21

²⁴ Steve Peers, “Constitutional Problems and International Trade”, *European Law Review* 24:2 (1998). This stands in contrast to the case law on preferential agreements concluded by the EU, which the ECJ has held capable of direct effect in the European legal order. Steve Peers, “Banana Split: WTO law and Preferential Agreements in the EC Legal Order”, *European Foreign Affairs Review* 4:2 (1999), pp. 195-214 discussing: C-181/73 *Haegemann* [1974] I-449; C-104/81 *Kupferberg* [1982] 3641; C-12/86 *Demirel* [1987] 3719; C-469/93 *Chiquita Italia* [1995] I-4533.

A) The exceptional status of GATT

In contrast to its expansive case law on the direct effect of EU law, the Court has adopted a narrow view concerning the direct effects of international law, and especially of GATT provisions, when used against Community law²⁵. Broadly speaking, the ECJ is protecting the integrity of the European legal order from the encroachment of International law. The criteria to define the direct effect of provisions of International treaties are formally similar to those applied for Community law: precision, unconditionality and applicability by a jurisdiction. Nonetheless, referring to the Convention of Vienna canon of interpretation of International law, the ECJ puts much emphasis on the context, objective and purpose of the International treaties to determine the direct applicability of those provisions. This allows the ECJ to avoid a simple parallelism between International treaties and European treaties, in favor of a graduated approach. In the case of the GATT/WTO treaties, however, the ECJ took the general view that their provisions are incapable of any direct effect, in any circumstance, having regard to the nature and objective of the treaties in question.

Ten years before *Kupferberger*, a plaintiff sought to rely on a GATT provision for the annulment of a Community measure. In *International Fruit*, the Court held that in order to do so, the provision in question must not only be binding upon the Community, but also “confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure”. Referring to the ‘flexibility’ enshrined in GATT provisions as well as the possibilities for derogation and unilateral withdrawal, the Court concluded that the functioning of GATT “is not capable of conferring on citizens of the Community rights which they can invoke before the Courts”²⁶. As a matter of fact, this first encounter tainted permanently the dealings of the ECJ with GATT/WTO in the light of the doctrine of direct effect. As an effect of the path dependency of jurisprudential precedent²⁷, relationship of EC law with GATT/WTO law remained subsequently framed in the jurisprudential denial of direct effect to the latter²⁸.

²⁵ Francis Snyder, “The Gatekeepers: The European Courts and WTO Law”, *Common Market Law Review* 40:2 (2003), pp. 313-367

²⁶ C-21&C-24/72 *International Fruit Company / Produktschap voor Groenten en Fruit* [1972] 1219

²⁷ Alec Stone Sweet, “Path Dependence, Precedent, and Judicial Power” in Martin Shapiro, Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002), pp. 112-135

²⁸ Jan Klabbbers, “International Law in Community Law: the Law and Politics of Direct Effect”, *Yearbook of European Law* 21 (2002), pp. 274-275 and Gerhard Pischel, “Trade, Treaties, and Treason”, *European Foreign Affairs Review* 6:1 (2001), p. 110

The Court confirmed this view in its ‘bananas’ judgment concerning the 1994 case of *Germany v. Council*²⁹, as it regards the legality of EU provision with the GATT, drawing a parallelism between the positions of Member States and private parties:

“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 GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty”³⁰

Adding hereafter the exception that:

“...only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provision of GATT”³¹

As a consequence, the European Court of Justice has consistently denied direct effect to GATT/WTO, with limited exceptions³². In the aforementioned case, therefore, Germany was unable to challenge the validity of the banana regulation in the light of obligations contracted by the Community in the GATT framework and provisions, which did not have direct effect in EU law. Legal scholars criticized the decision of the Court, arguing that it undermined the GATT system³³ and it betrayed the international rule of law³⁴.

In political terms, however, the ECJ’s approach was in line with the negotiating position of the Council in the WTO framework, which stated in the preamble to the decision of concluding the WTO agreement, modifying the GATT provisions at the light of the results of the Uruguay Round negotiations:

²⁹ Norio Komuro, “The EC Banana Regime and Judicial Control”, *Journal of World Trade* 34:5 (2000), pp. 1-88

³⁰ C-280/93 *Germany v. Council* [1994] I-4973, para 109

³¹ *Ibidem*, para 111

³² C-69/89 *Nakajima* [1991] I-2069. So far, the EC Courts have only recognised such exceptions in respect of the EC’s anti-dumping legislation. Marco Bronckers, “Private Appeals to WTO Law: An Update”, *Journal of World Trade* 42:2 (2008), pp. 245-260

³³ Joanne Scott, “GATT and Community Law” in Jo Shaw, Gillian More, *New Legal Dynamics of the European Union* (Oxford, Clarendon Press, 1995), p. 164

³⁴ Kees Jan Kuilwijk, *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights?* (Portland, International Specialized Book Service, 1996)

“By its nature, the Agreement establishing the World trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts”³⁵

In such a way, according to the ECJ, the only effect that GATT/WTO law can have on the European legal order is indirect, through the obligation of consistent interpretation of EC law in the light of WTO law³⁶. Nonetheless, the limitations of such a judicial technique are well known in the field of EC directives. Consistent interpretation requires relevant legislation to exist and to be sufficiently flexible to be interpreted, absence of a clear conflict between referred law and the legislation to be interpreted, and finally is less effective than direct effect in establishing legal certainty³⁷. On the other hand, consistent interpretation has the advantage of being sensitive to context and flexible as a filter concerning which EC legislation need to be interpreted according to WTO provisions, increasing the discretion of the judge called to act as a gatekeeper³⁸.

B) The continuation of the exception for WTO law

The Court confirmed in *Portugal v. Council*³⁹ that WTO law was to be treated as GATT law. Overall, the emphasis of the Court’s reasoning has changed slightly since *Germany v. Council*. Whereas its principal objection to direct effect for the GATT had been the flexibility of the legal provisions in question, in the case of the WTO the Court was concerned with the flexibility of the whole structure of the agreement⁴⁰ and the necessary freedom of negotiation in the context of WTO for EU legislative or executive bodies⁴¹.

If we look at the reception of this jurisprudential continuity of treatment, it is possible to document a serious discontinuity in the general doctrine⁴². There has been an incremental

³⁵ Council Decision 94/800, OJ 1994 L 336, p. 1

³⁶ C-35/96 *Hermès International v. FHT Marketing Choice* [1998] I-3603

³⁷ Francis Snyder, *op. cit.*, p. 363

³⁸ Joel Trachtman, Joel Trachtman, “Bananas, Direct Effect and Compliance”, *European Journal of International Law* 10:4 (1999), p. 677

³⁹ C-149/96 [1999] I-8935

⁴⁰ Paul Craig, Grainne de Burca, *EU Law: Text, Cases, Materials 3rd Ed.* (Oxford: Oxford University Press, 2002), pp. 193-201; Joseph W. W. Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford: Hart, 2000); Stephen Weatherill, «The Application of WTO Law in the EC legal order: Does the European Court of Justice have a Double Standard?», *Studi Senesi* 1 (2003), pp. 135-160

⁴¹ Mario Mendez, “The Impact of WTO rulings in the Community legal order”, *European Law Review* 29:4 (2004), p. 528

⁴² Francis Snyder, “The Gatekeepers: the European Courts and WTO law”, *Common Market Law Review* 40:3 (2003), pp. 313-367; Jan Klabbers, “International Law in Community Law: the Law and Politics of Direct Effect”, *Yearbook of European Law* 21 (2002), pp. 263-298; Stefan Griller, “Judicial Enforceability of WTO law in the European Law”, *Journal of International Economic Law* (2000), pp. 441-472; Piet Eeckhout, “Judicial Enforcement of WTO law in the European Union – Some further reflections”, *Journal of International*

transition from relative consensus on the views of the ECJ about the GATT to a growing minority dissenting on the treatment reserved to the WTO agreement, reflected in the arguments advanced by different Advocate Generals suggesting a re-adjustment of the established case law of the Court, at least in the field of damages⁴³.

With the entry into force of the WTO, legal scholars hoped that the more developed institutional features of the WTO would convince the Court to take a broader approach to the direct effect of WTO provisions⁴⁴. In the international trade regime at the global level, a dual process of legalization and judicialization was at work, concerning respectively the multiplication of legal norms and the strengthening of enforcement mechanisms of these rules⁴⁵. In respect of the previous GATT experience⁴⁶, trade rules developed both in terms of scope and depth, concerning the possibility of intervention of the new World Trade Organization. According to the doctrinal analysis, the evolution from GATT to WTO proved the triumph of jurists over diplomats⁴⁷, both in terms of procedures and logics⁴⁸. As Joseph Weiler has argued, the culture of law has a more pervasive impact on the politics of dispute resolution at the global level. Turning the process over to lawyers means that controversies are fought on the basis of their legal merits, and not their political merits. Once the WTO dispute settlement mechanism is used, as it is increasingly so, the parties' objective is to win the case, making diplomatic compromise almost impossible⁴⁹. The result is that law supplants diplomacy in resolving the dispute. As a result, commentators talked of two intertwined processes at work in the WTO framework⁵⁰. On the one hand, "legalization" designates in the context of the development of the world trading system the increasing trend of codifying rules and procedures to cover the deficits in practice and to create a more predictable dispute

Economic Law 4:1 (2002), pp. 91-110; Norio Komuro, "The EC Banana Regime and Judicial Control", *Journal of World Trade* 34:5 (2000), pp. 1-88

⁴³ Armin von Bogdandy, "Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC", *Journal of World Trade* 39:1 (2005), pp. 54-66; Alessandro Alemanno, "Judicial enforcement of the WTO 'hormones' ruling within the European Community: toward EC liability for the non-implementation of WTO dispute settlement decisions?", *Harvard International Law Journal* (2004), pp. 547-561

⁴⁴ Joel Trachtman, *op. cit.*, pp. 656-657

⁴⁵ Arie Reich, "From Diplomacy to Law: the Juridicization of International Trade Relations", *Northwestern Journal of International Law and Business* 17, 1997, pp. 776-777

⁴⁶ Robert Hudec, "The GATT Legal System: A Diplomat's Jurisprudence", *Journal of World Trade Law* 4, 1970 in Robert Hudec, *Essays on the Nature of International Trade Law* (London, Cameron May, 1999), pp. 17-76

⁴⁷ Michael Young, "Dispute resolution in the Uruguay Round: Lawyers triumph over Diplomats", *International Lawyer* 29:5 (1995), pp. 389-409

⁴⁸ Joseph H. H. Weiler, "The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO dispute settlement", *Journal of World Trade* 35:2 (2001), pp. 191-207

⁴⁹ Karen Alter, "Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System, *International Affairs* 79:4 (2003), pp. 783-800

⁵⁰ Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague, Kluwer, 1997) chapters 2, 5, and 6

settlement process. On the other hand, “judicialization” refers in the same context to the increasing trend of resorting to WTO dispute mechanisms to settle differences, in place of or in addition to relying on market power and diplomatic negotiations. Both trends can be summed up by the statement that:

“growing demand by States to regulate their trade relations by using norms and enforcement procedures that are legal in character, create significant limitations on the sovereignty of the States, and, in extreme cases, even exclude the State’s power to determine policy in certain socio-economic fields.”⁵¹

From a jurisprudential standpoint, however, the ECJ did not draw major consequences from the relevant changes experienced in the transition from GATT to WTO and contributed to the creation of a ‘sovereignty shield’⁵² for the EC/EU legal order in respect of GATT/WTO legalization and of the judicialization experienced by the WTO settlement dispute system. *Prima facie*, it seems to be a tension between the concept of sovereignty and the jurisprudential doctrines espoused by the ECJ. However, assimilating the ECJ to a protectionist court in respect of the influences of International Law on the Community legal order enlightens a few aspects of its jurisprudential relationship with GATT/WTO law. Generally speaking, domestic courts avoid implementing International Law when it contradicts important policies of the executive of the polity in which they are embedded. In order to do so, they adopt a series of techniques, centred around the incorporation of International Law in a domestic piece of legislation, largely adopted in the jurisprudential doctrine of the ECJ concerning WTO law.

III) Development of a Sovereignty Shield

The Court confirmed in *Portugal v. Council*⁵³ that WTO law may be invoked only in the exceptional circumstances already recognized in the case of GATT⁵⁴. According to the ECJ’s established practice, “the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community

⁵¹ Arie Reich, “From Diplomacy to Law: the Juridicization of International Trade Relations”, *Northwestern Journal of International Law and Business* 17 (1996-1997), pp. 776-77

⁵² Term used by the *European Parliament Report*, “Relationship between International Law, Community Law and Constitutional Law of the Member States”, PE 220.225

⁵³ C-149/96 [1999] I-8935

⁵⁴ In *International Fruit*, the ECJ required that a GATT provision to be not only binding on the EC but also “capable of conferring rights on citizens of the Community which they can invoke before the Courts. Schermers criticized the Court for introduction an additional condition for the application of international law. Henry Schermers, “Community Law and International Law”, *Common Market Law Review* 77:1 (1975), p. 80.

institutions”. Despite harsh criticism of such a general rule, the ECJ accepted exceptions only in those limited circumstances where the EU intended to implement a particular obligation assumed in the context of the WTO⁵⁵, or where the EU measure refers expressly to the precise provisions of the WTO agreements⁵⁶. These exceptions are not clearly defined⁵⁷ and seem very limited⁵⁸, fluctuating on a case-by-case approach.

The building of a “sovereignty shield” between WTO law and Community Law has progressed in two different directions⁵⁹. On the one hand, the unavailability of WTO law to challenge Community Law either by States or individuals (A). On the other hand, the impossibility to claim compensation under article 288(2) EC for damages provoked by the EU negotiating and settling commercial controversies in the WTO framework (B).

A) General Invocability of WTO law

According to established case law of the ECJ, Member States cannot normally invoke WTO law to invalidate Community Law. In cases brought by Member States to review the lawfulness of Community measures, however, the reasons given by the Court are the same for which it refuses direct effect⁶⁰, establishing a parallelism in the case law between Member States and private parties and maintaining it.

Somewhat confusingly, returning briefly to the logic of *Kupferberg* ruling in the realm of GATT/WTO law, the ECJ declared admissible an infringement procedure brought forward by the Commission against the German government⁶¹. In this case, the Commission brought proceedings against Germany for having breached obligations under the EC Treaty resulting from its failure to comply with the International Dairy Agreement, concluded in the framework of the GATT Tokyo Round. The action of the Commission was held by the ECJ on the basis of the “general rule of international law requiring the parties to any agreement to show the good

⁵⁵ C-69/89 *Nakajima All Precision v. Council* [1991] I-2069

⁵⁶ C-70/87 *Fediol v. Commission* [1989] 1781

⁵⁷ Both exceptions appear to be traditionally *à la carte*, in order to provide a convenient loophole at the European Court of Justice to escape unpleasant consequences of its general line of jurisprudence on WTO law. Steve Peers, “WTO dispute settlement and Community law”, *European Law Review* 25:5 (2001), pp. 605-615

⁵⁸ In particular, the Nakajima exception seems to be applying almost exclusively to the field of anti-dumping law, with limited possibilities of extension. Geert Zonnekeyn, “The latest on indirect effect of WTO law in the EC legal order: The Nakajima case law misjudged?”, *Journal of International Economic Law* 4:3 (2001), pp. 597-608; Geert Zonnekeyn, “The ECJ’S Petrotub Judgment: Towards a Revival of the ‘Nakajima Doctrine’?”, *Legal Issues of Economic Integration* 30:3, (2003), pp. 256-260

⁵⁹ Armin van Bogdandy, Tilman Makatsch “Collission, Co-existence or Co-operation”, in Grainne De Burca, Joanne Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (Oxford, Hart, 2001), pp. 131-150

⁶⁰ C-300/98&C-392/99, *Dior* [1998] I-11307, para. 44-45 which refer to paragraphs 42-46 of C-268/94, *Portugal v. Council* [1999] I-8395

⁶¹ *Commission v. Germany* 1994

faith in its performance”⁶². This has caused quite a stir amongst Member States and legal scholars. In fact, as the case law stands, neither private parties/undertakings, nor Member States can invoke WTO law against the Community and its institutions, while the European Commission can invoke WTO law against Member States. This problem is not only interesting from a theoretical angle, but also of practical significance. A good illustration is the situation of Germany during the so-called “Banana-war” between the US and the EC. According to the US, the EC regime on imports of Latin American bananas infringed WTO law because it was harmful to the US company ‘Chiquita’. Germany challenged the regime too because the interests of most German banana importers ran parallel to those of ‘Chiquita’. However, Germany was outvoted in the Council, which decided by qualified majority, and it therefore challenged the regime before the Court of Justice. The Court rejected the appeal and stated that Germany could not invoke GATT/WTO law. In the meantime, the US successfully brought a case in the WTO. Because the EC did not properly implement the WTO decision, the US received permission to take retaliatory economic measures against the EC. Some private undertakings, including German ones, were seriously affected by these US measures but they were prevented by the ECJ’s ‘sovereignty shield’ to obtain a satisfactory answer in a judicial forum. It is, to say the least, paradoxical to see that German undertakings were affected by sanctions imposed against the EC for its violation of international law, knowing that Germany had always made objections against the banana regime. It is also remarkable that the EC could in fact force Germany to infringe its international obligations and that the Court *de facto* refused to accept international economic law as a relevant reference in several cases arising from the ‘banana saga’⁶³.

This impossibility for private parties to invoke WTO law, even in presence of panel and Appellate Body reports finding against the EU, has recently been developed and confirmed in *Van Parijs*⁶⁴, where it was stated that an individual does not have the right to challenge, before a national court, Community measures at the light of WTO rules, even if the WTO dispute settlement Appellate Body had previously declared the Community legislation to be incompatible with those rules. In substance, this ruling reconfirmed and extended the cover provided by *Portugal v. Council* to the discretionary powers of negotiation and settlement of the European Union in the WTO context. Moreover, by the same token, the Court acknowledges that the implementation of WTO obligations, in practice, may have to be

⁶² *Ibidem*, para 30

⁶³ Davies, “Bananas, Private Challenges, the Courts and the Legislature”, *Yearbook of European Law* 21 (2002), pp. 299-326

⁶⁴ C-377/02 *Leon Van Parijs v. Belgisch Interventie-en-Restitutie Bureau* [2005] I-1465

reconciled with other international obligations⁶⁵ and with the requirements of Community policies⁶⁶, although the ECJ recognised the binding nature of WTO agreements for the Community as a whole with *Biret*⁶⁷.

B) Liability for damages

With the latter ruling, the ECJ seemed, for a brief moment, to entertain the possibility of granting direct effect to WTO rules on Community law, at least as action for damages under Article 288(2) EC is concerned⁶⁸. According to its ruling *Biret International SA*, the European Court of Justice appeared prepared to admit that decisions of the WTO Dispute Settlement Body (DSB) are capable of supporting a legal action invoking WTO law⁶⁹. With its finding of a potential liability of European institutions as a result of the WTO dispute settlement process, the ECJ opened a new round in the debate over the effect of WTO law within the European legal order. In accordance with the opinion of Advocate-General Alber in this case, the ECJ did not rule out the possibility that the WTO rules may have a direct effect, at least if the EU has indicated that it intended to comply with its WTO obligations as established by the WTO dispute settlement bodies⁷⁰.

Whereas the latter ruling opened a window of opportunity for a judicial dialogue between the Court of Luxembourg and the Appellate Body of Geneva, at least in the area of damages for “extra-contractual liability”⁷¹, the ruling *FIAMM and Fedon* slammed the door on it. To curtail even further the impact of the WTO system law on the internal inter-institutional equilibrium of the European political system, the ECJ has disregarded the arguments of its Advocate-General Maduro in *FIAMM and FEDON* concerning the possibility of awarding compensation for damages arising from “lawful conduct” of the Commission, exercising its discretion in the general interest⁷².

⁶⁵ *Ibidem*, para 49-51

⁶⁶ *Ibidem*, para 52

⁶⁷ C-93/02, *Biret International SA v. Council* [2003] I-10497

⁶⁸ Armin von Bogdandy, “Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC”, *Journal of World Trade* 39:1 (2005), pp. 54-66

⁶⁹ Delphine De Mey, Pablo Ibanez Colomo, “Recent Developments on the Invocability of Wto Law in the EC: A Wave of Mutilation”, *European Foreign Affairs Review* 11:1 (2006), pp. 63-86

⁷⁰ *Ibidem*, pp. 85-86

⁷¹ Mario Mendez, “The Impact of WTO rulings in the Community legal order”, *European Law Review* 29:4 (2004), pp. 517-529

⁷² Geert Zonnekeyn, “EC liability for non-implementation of WTO dispute settlement decisions: are the dice cast?”, *Journal of International Economic Law* 7 (2004), pp. 483-490

IV) Assessing Judicial Activism in the External Trade Realm

As argued before, the degree of creativity employed by the Court in its decision-making is an important element of its judicial activism, and is measured by negative reactions to it, in line with Rasmussen analysis of judicial activism⁷³ but only in respect of doctrine. Judicial creativity was defined as the extent to which the ECJ departs from a generally accepted reading of a text or previous case law as revealed by doctrinal reactions. Creativity in judicial interpretation is measured in terms of the extent to which judgments reflect a ‘reasonable’ interpretation of the legal text, and the extent to which the case law reflects a consistent reasoning on the basis of the original rationale. The more accepted and well received the type of argument used by a court, the more ‘reasonable’ its interpretation is likely to be⁷⁴.

On both accounts, the ECJ’s interpretation of the effects of GATT/WTO Treaties on the Community legal order has been one of the most contested aspects of its jurisprudence on International Law and Community Law⁷⁵. It has often employed a creative approach, in which it has looked not just to the words of GATT and WTO provisions but also to the ‘spirit’ of the treaties as the basis for its interpretation, to toe the line of Commission and Council standpoints. To do so, however, the Court has treated differently GATT/WTO treaties in respect of its more favourable interpretation of Free Trade Agreements established with third countries by the EC/EU, all other things being equal⁷⁶. Summarizing, the ECJ has adopted a purpose-oriented approach to judicial interpretation in order to orient the relationship of EU law with GATT/WTO law⁷⁷.

Because of this undue creativity and *ad-hoc* flexibility of the ECJ jurisprudence, lawyers and scholars have been more sceptical than politicians and technocrats in respect of the jurisprudential approach of the Court⁷⁸. Over the years, critics have charged that the Court’s

⁷³ J.W.R Reed, “Political Review of the European Court of Justice and its Jurisprudence”, *Journal of European Public Policy* 13:1 (1995), pp. 1-20

⁷⁴ Joxerramon Bengoetxea, Neil MacCormick, Lenor Soriano, “Integration and Integrity in the Legal Reasoning of the European Cour of Justice” in Grainne De Burca, Joseph Weiler (ed.), *The European Court of Justice* (Oxford, Oxford University Press, 2001), pp. 46-47

⁷⁵ Pieter Jan Kuijper, Marco Bronckers, “WTO law in the European Court of Justice”, *Common Market Law Review* 42:6 (2005), pp. 1313-1355; Francis Snyder, “The Gatekeepers: the European Courts and WTO law”, *Common Market Law Review* 40:3 (2003), pp. 313-367; Piet Eeckhout, “Judicial Enforcement of WTO law in the European Union – Some further reflections”, *Journal of International Economic Law* 4:1 (2002), pp. 91-110; Piet Eeckhout, “The domestic legal status of the WTO agreement: interconnecting legal system”, *Common Market Law Review* 34:1 (1997), pp. 11-58

⁷⁶ Gerhard Pischel, “Trade, Treaties, and Treason”, *European Foreign Affairs Review* 6:1 (2001), p. 111-115

⁷⁷ Iris Canor, “«Can Two Walk together Except Agreed» - The relationship between International Law and European Law”, *Common Market Law Review* 35:1 (1998), pp. 183-184

⁷⁸ Pieter Jan Kuijper, “The New Dispute Settlement System – The Impact on the European Community”, *Journal of World Trade* 6:1 (1995), p. 63

treatment of GATT/WTO law was based on an unorthodox reading of International Law, bordering on the treason of its mission of enforcing the rule of law⁷⁹, and that it was an expedient interpretation presented as principled exception⁸⁰. Although the doctrinal debate has been largely subdued by the fact that the Court's interpretation has been largely accepted and supported by the EU political instances, it has by no means been extinguished⁸¹. However 'reasonable' its original rationale may or may not have been on the effects of international agreements upon the European legal order, as exemplified by its ruling *Kupferberg*, the Court has opted out of this mode of reasoning in its case law concerning GATT/WTO law, without giving valid legal reasons⁸².

For such a treatment to be understood, underlying political reasons provide a more convincing explanation than legal ones. In the eyes of the doctrine, the ECJ's GATT/WTO jurisprudence was deemed politically 'reasonable', given the structural constraints, but legally flawed.

The granting of direct effect to GATT/WTO law leads to undesired effects, from the point of view of the EU, both internally and externally. Externally, the bargaining position of the EU is weakened as the room for negotiations is minimised by possibility of judicial enforcement of unconditional rules and directly enforceable judgments both at the European and national level, which amounts to conceding an asymmetrical advantages to commercial partners at the global level. Internally, it leads to a loss of autonomy of the ECJ, resulting in the EU judicial machinery becoming the implementing tool at the service of the WTO dispute settlement process and putting into peril the institutional equilibrium.

From an external standpoint, the attitude of the ECJ can be resumed by the traditional dilemma faced by domestic courts in face of International Law⁸³. Domestic courts find themselves in a conundrum when considering the possibility of implementing International Law at the expenses of their own executives. In order not to put the latter to a disadvantage vis-à-vis other partners, the courts must assume the same conditions for other executives. On

⁷⁹ Kees Jan Kuilwijk, *The European Court of Justice and the GATT dilemma* (Portland, International Specialized Book Service, 1996), p. 42

⁸⁰ *Ibidem*, p. 159

⁸¹ Nikolaos Lavranos, "The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law", *European Foreign Affairs Review* 3 (2006), pp. 313-338

⁸² Steve Peers, "Fundamental Rights or Political Whim? WTO law and the European Court of Justice" in Grainne De Burca, Joanne Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (Oxford, Hart, 2001), pp. 111-130

⁸³ Eyal Benvenisti, "Exit and Voice in the Age of Globalisation", *Michigan Law Review* 98:1 (1999), pp. 167-213

the one hand, since all major negotiating partners of the EU in the WTO framework do not recognise direct effect to it, except South Korea, the prospect of unilateral concessions without reciprocity will have bound the EU legislative and executive bodies by the Community's effective legal system. On the other hand, the Uruguay Agreement establishing the WTO neither provided for nor suggested direct effect of its provisions⁸⁴. WTO membership in itself does not imply to carry out any obligation in this respect⁸⁵.

As a consequence, the multilateral nature⁸⁶ of this institutional framework makes it more rational for the ECJ to develop its 'sovereignty shield' jurisprudence, in order for the EU to exercise its economic power in a more effective way. Furthermore, given the high complexity of issues dealt with in the WTO and its extensive membership, diplomatic freedom of manoeuvre is essential to exercise an effective influence in the matter submitted to litigation and settlement negotiations. Because of the sheer number of area covered and the vast number of disputes about obligations flowing from GATT/WTO law, only flexibility can provide for effective management of the complexities of the global trade regime. This amount to the traditional argument that foreign policy is best left at the discretion of the executive, without interferences due to judicial review.

From the internal viewpoint, the ECJ has also moved closer to a restrained position concerning the respect of EU institutional equilibrium, in respect of its historical position. In comparison with *Kupferberg*, where it posited itself as the ultimate arbiter of issues relative to the interpretation of international agreement, the ECJ has rediscovered the virtues of deferring to executive and legislative bodies, in order to maintain the institutional equilibrium⁸⁷. This move has meant a certain degree of confusion between monist and dualist, in order to avoid clashes with important policies of the executive bodies, which has brought some authors to question the heuristic recourse to monist or dualist theorist to frame the issue of the relationship between EU and International Law⁸⁸.

⁸⁴ Meinhard Hilf, "The Role of National Courts in International Trade Relations" in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (The Hague, Kluwer Law International, 1997), pp. 559-585

⁸⁵ Thomas Cottier, Krista Schefer, "The relationship between World Trade Organization, National and Regional law", *Journal of International Economic Law* 1:1 (1998), pp. 89-91

⁸⁶ John R. Ruggie, "Multilateralism: The anatomy of an institution" in John R. Ruggie (ed), *Multilateralism Matters* (New York, Columbia University Press, 1993), pp. 3-4

⁸⁷ Meinhard Hilf, "The ECJ's Opinion 1/94 on the WTO", *Journal of International Economic Law* (1995), pp. 245-247

⁸⁸ For an analysis of the oscillations between monist and dualist interpretations of the ECJ jurisprudence, see Jan Klabbers, "International Law in Community Law: the Law and Politics of Direct Effect", *Yearbook of European Law* 21 (2002), p. 263

Despite its promotion of judicial guarantees for individual rights at the European level, the ECJ identifies its institutional interest with the promotion of the EU executive autonomy on the global stage. This is even more evident as it regards the integrative or disintegrative added value of International law in respect of the effectiveness and scope of Community Law and, accessorially, of the independence of jurisdiction of the ECJ is crucial. Where the ECJ has been inclined to accept direct effect of international provisions, the EC had mostly negotiated the agreements alongside the lines of bilateralism. Whereas many of the cases involving international agreements, upheld by the ECJ, challenged national legislative acts and weakened the external competences of Member States in favour of the powers of European institutions⁸⁹.

The sum of these different strands of motives underlying the ECJ's jurisprudence is that the supporters of the application of International Economic law have not been able to rely on the European courts to enforce WTO law against the constituted interests at the basis of the trade policy of the European executive. The ECJ, in particular, has showed its utmost respect for the preferences of the executive (Commission) and legislative (Council) branches determining EU trade policy⁹⁰, which is arguably one of the most important tool in the supranational area of competences. Generally speaking, the Court tends to favour a broad reading of the International law and Treaties texts, in order to build a strong, integrated supranational legal order. It used, however, a much more pragmatic approach for trade relations, which exhibits marks of creativity in respect of its own case law, such as denying the direct effect of WTO law at the light of the 'spirit' of the WTO agreement, but also showed restraint in issues not expressly covered by the EC Treaties, as in the question of EU competence to enter in the WTO.

On the one hand, ECJ decision-making is not immune to broader institutional developments and/or political trends and pressures in the EU⁹¹. The ECJ has appeared less willing to take a broad interpretation of matters concerning the bounds of EU competences in the external realm. In its Opinion 1/94 concerning the division of powers between the EC and its Member States to conclude the WTO Agreements, the Court of Justice stated that "(w)here it is apparent that the subject-matter of an international agreement or convention falls in part within the

⁸⁹ Paul Craig, Grainne de Burca, *EU Law: Text, Cases, Materials 3rd Ed.* (Oxford, Oxford University Press, 2002), p. 182

⁹⁰ Sophie Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (Princeton, Princeton University Press, 2007), pp. 21-40

⁹¹ Meinhard Hilf, "ECJ's Opinion 1/94 on the WTO. No Surprise but Wise?", *European Journal of International Law* 6:1 (1995), pp. 245-259

competence of the Community and in part within that of the Member States, the requirement of unity in the international representation of the Community is such that it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into”⁹². The Court refused to construe the external competences of the EU in the direction indicated by the Commission. At the time of Opinion 1/94, just before the entry into force of the WTO Agreements, the Legal service of the Commission stated that if the Court came to the conclusion that the EC did not have exclusive competence for all WTO matters, this would result in chaos in the EC representation in the WTO. The Member States would “undoubtedly seek to express their views individually on matters falling within their competence whenever no consensus has been found”⁹³.

On the other hand, the study undertaken reveals the central importance of the ECJ’s relationship with the Commission. In its case law, neither private parties, nor Member States can invoke WTO law against the Community and its institutions, while the European Commission can invoke WTO law against Member States. This has caused quite a stir amongst Member States and legal scholars. This commotion is even intensified by the fact that the Member States are members of the WTO and therefore have obligations, while these States, in the context of the EC, do not enjoy more privileges than private parties. It remains to be seen to what extent the Court is going to enforce a more general tightening of judicial control over Commission negotiating powers in the context of the WTO. In fact, the practice followed by the EC in the WTO seems to be rather supranationalist: although every Member State has the right to attend WTO meetings, it is only the European Commission that represents the entire EC. This is not only the case for those aspects of external trade for which the EC enjoys exclusive competence, but also for those aspects for which the EC shares competence with the Member States (such as trade in services and international rules concerning the protection of intellectual property rights).

⁹² *Opinion* 1/94 [1994] I-5267

⁹³ *Ibidem*, para. 106. Takis Tridimas, Piet Eeckhout, “The external competence of the Community and the case law of the European Court of Justice: principle versus pragmatism”, *Yearbook of European Law* 14 (1994), p. 173

Conclusions

The central aim of this study was to determine to what extent and how the ECJ has been activist in the realm of external trade relations of the EU, promoting its own preferences against its political constituency. The answer is broadly negative.

In fact, the judicial appreciation of the effects of GATT/WTO law on the European legal order has shown that the ECJ has self-restrained strongly its interpretative role. Particularly obvious was the expedient avoidance of questions put to its jurisdiction, in order to protect the discretion enjoyed by the executive bodies in the framework of the WTO and to preserve the autonomy of the European legal order in respect of interferences coming from outside jurisdictions as the WTO dispute settlement system⁹⁴. The Court's controversial refusal of direct effect to WTO law, and its elaboration on the principles of indirect effect of WTO law and extra-contractual liability of European executive bodies, significantly strengthened the EU externally in the WTO context, but at the price of a prolonged debate about the political constraints behind its decisions.

In the long term, it can be argued that the line of interpretation taken by the ECJ in the cases of the GATT/WTO law weakened its legitimate standing as a judicial body in the eyes of lawyers. As an author as Cappelletti put it:

“What makes a judge a judge and a court a court is not non-creativity but rather (1) the connection of adjudication with cases and controversies, hence with ‘parties’, and (2) the impartial attitude of the adjudicator, who must not judge *in re sua*, who must assure a fair hearing with the parties...and who must be assured a degree of independence from outside pressures, especially those coming from the ‘political’ branches.”⁹⁵

At the light of those different aspects of judicial legitimacy, the ECJ has failed this test, by adopting a double standard concerning the respect of International law, according to its positive or negative impact on the integrity of Community law. In fact, its judicial decisions have been biased in order to achieve the most desirable effects for the Community legal order and its supranational developments, on which the ECJ has a vested interest, by deploying a number of techniques meant to build a ‘sovereignty shield’ around the EU operating in the

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⁹⁵ Mauro Cappelletti, “The ‘Mighty Problem’ of Judicial Review and the Contribution of Comparative Analysis”, *Legal Issues of European Integration* 2, 1979, p. 23

context of the WTO and to deflect legal challenges brought to the attention of the ECJ. One could summarize that the ECJ was not consistent with its case law on the effects of international agreements concluded by the European Communities⁹⁶ as it seemed to be devising *ad-hoc* arguments to deny direct effect to WTO rules to sidestep controversies coming in its judicial forum⁹⁷, changing parameters to refuse application of the same rules to the parties referring those controversies⁹⁸ and referring to the discretion of the political branches to protect its own jurisdiction and its own gatekeeper role⁹⁹. Even if the doctrine highlighted these contradictions in the reasoning of the Court, however, these failings were justified in the name of political circumstances and Community interest at the expenses of legal certainty and coherence. Such an outcome is reminiscent of the collusion between judges, lawyers and legal experts of the beginnings of the integration process to cover the creative interpretations which gave way to the ‘transformation of Europe’¹⁰⁰.

⁹⁶ Meinhard Hilf, “The Role of National Courts in International Trade Relations” in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (The Hague, Kluwer Law International, 1997), p. 574

⁹⁷ Piet Eeckhout, “WTO Dispute settlement and Community law”, *European Law Review* 26:3 (2001), pp. 605-615

⁹⁸ Lode van den Hende, “The EC as a Collective Member of the WTO: What role for the European Courts?” in Koen Byttebier, Kim Van den Borgh, *WTO Obligations and Opportunities: Challenges of Implementation* (London, Cameron May, 2008), pp. 261-274

⁹⁹ Francis Snyder, “The Gatekeepers: the European Courts and WTO law”, *Common Market Law Review* 40:3 (2003), pp. 313-367

¹⁰⁰ Harm Schepel, Richard Wesseling, “The Legal Community: Judges, Lawyers, Official and Clerks in the Writing of Europe”, *European Law Journal* 3:2 (1997), pp. 165-188; Antoine Vauchez, “Une élite d’intermédiaires: genèse d’un capital juridique européen (1950-1970)”, *Actes de la Recherche en Sciences Sociales* 1-2, 2007, pp. 54-65