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THE RELATIONSHIP OF THE EC COURTS WITH OTHER INTERNATIONAL TRIBUNALS: NON-COMMITTAL, RESPECTFUL OR SUBMISSIVE?

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1. Introduction

The extent to which courts from different jurisdictions engage in a judicial dialogue with each other has become a topic of growing interest. In this article, I plan to tackle the topic from the perspective of the courts of the European Communities and inquire how they deal with judgments of other international courts and tribunals. As will be seen, the EC courts refer with varying frequency to other tribunals. They usually do so to bolster the persuasive force of their own rulings. Particularly in respect of judgments of the European Court of Human Rights ("ECtHR"), the EC courts show a large measure of deference. Yet, although they have acknowledged the possibility that they might be bound by the rulings of another tribunal, the EC courts have never accepted this in an actual case.

This essay focuses on one question in particular: should the EC courts consider themselves bound by rulings of other international tribunals? Having reviewed the case law to date, I will assess what the relationship of the EC courts to other international tribunals could look like in view of the changing, globalizing landscape.

2. The practice to date

As a preliminary point, I note that I will most often refer to the highest court of the European Communities, i.e. the Court of Justice, and will also make

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reference to the Court of First Instance. I have not considered the emerging case law of the newly established Civil Service Tribunal.

Before analysing the effect of rulings of other international tribunals in the case law of the EC courts, it is useful first to recall briefly the position of international law within the legal order of the European Communities; in order to be legally precise and follow the EC courts' own terminology I will refrain from using the by now more broadly accepted term European Union.

2.1. *International law and EC law*

The EC courts have no trouble recognizing that the EC is bound by international law, notably by treaties to which the EC itself is a party,[1] but also several other treaties,[2] or customary international law.[3] The ECJ has consistently held, as a corollary, that it will interpret EC secondary legislation and national measures consistently with international law.[4] The CFI has posited that the UN Charter has primacy also over the EC Treaty.[5]

In respect of some treaties the ECJ is even prepared to accept that their provisions have direct effect, and may be invoked by private litigants to invalidate EC secondary legislation or Member State laws that conflict with

1. See Art. 300(7) EC.

2. For example, the Geneva Convention and the Protocol relating to the status of refugees and other relevant treaties, concluded by the Member States, by virtue of the reference in Art. 63(1) EC.

3. See Case C-162/96, *Racke*, [1998] ECR I-3655. The CFI has also given effect to customary international law after first transforming it into a general principle of Community law. See e.g. Case T-115/94, *Opel* v. *Austria*, [1997] ECR II-39. See Mengozzi, "The jurisprudence of the Court of Justice and the Court of First Instance of the European Communities", in Sacerdoti, Yanovich and Bohanes (Eds.), *The WTO at 10: The Contribution of the Dispute Settlement System* (Cambridge, 2006) p. 474; Wouters and Van Eeckhoutte, "Giving effect to customary international law through European Community law", at 26 et seq. (Institute for International Law Working paper No 25, June 2002), available at www.law.kuleuven.ac.be/iir/nl/wp/WP/WP25e.pdf (arguing in favour of the CFI's transformation approach).

4. E.g. Case C-286/90, *Poulsen*, [1992] ECR I-6019 (EC regulation on fisheries conservation interpreted consistently with, *inter alia*, the Convention on the Law of the Sea); Case C-377/98, *Netherlands* v. *European Parliament and Council*, [2001] ECR I-7079 (reviewing EC biotechnology directive against, *inter alia*, Convention on Biodiversity).

5. See Case T-306/01 and T-315/01, *Yusuf et al.* v. *Council*, [2005] ECR II-3533, para 231. This judgment, currently on appeal, has received mixed reactions. See the annotation of Tomuschat, 43 CML Rev. (2006), at 537; Garbagnati, "The Court of First Instance and the protection of human rights in the fight against terrorism: A case of bravery or recklessness?", 8 *Eur. Law Reporter* (2005), 402.

these international rules. Most often the EC courts have been able to avoid concluding that such a conflict exists, at least in respect of EC measures.[6]

This case law of the EC courts is a continuing source of debate and even controversy. A few points are worth mentioning. The ECJ has held that, although the Community is not a party to the European Convention on Human Rights, its provisions are part of the EC's general principles of law.[7] In this way, the EC courts have indirectly given effect to the Convention's provisions. The ECJ has also given direct effect to provisions in trade agreements which the EC has concluded bilaterally or with a group of trading partners.[8] In contrast, the EC courts have consistently denied giving direct effect to provisions in the WTO Agreements. They have, however, allowed WTO Agreements to be used as benchmarks in Treaty-consistent interpretation of EC secondary legislation and other measures, as well as EC Member State laws.[9]

2.2. *International rulings in EC case law*

The first initial impression is that there are relatively few international court rulings to which the EC courts have referred. One reason may be that the EC's jurisdiction is still limited. The EC courts do not generally deal with the issues that have come before the International Court of Justice.[10] It has further been noted that the EC long preferred diplomacy and appeared averse to the

6. E.g. Case C-344/04, *The Queen (IATA, ELFAA)* v. *Department of Transport*, [2006] ECR I-403 (provisions of the Montreal Convention on air passenger rights will prevail over inconsistent provisions of secondary EC legislation; no conflict found). For a rare example where the CFI found such a conflict and struck down EU secondary legislation, see *Opel* v. *Austria*, cited *supra* note 3 (declaring an EC safeguard measure incompatible with the EEA Agreement and the principle of legitimate expectations).

7. Case 36/75, *Rutili*, [1975] ECR 1219.

8. E.g. Case C-265/03, *Simutenkov*, [2005] ECR I-2579 (giving direct effect to the EC-Russia Partnership Agreement of 1997); Case C-469/93, *Chiquita Italia*, [1995] ECR I-4533 (giving direct effect to the Lomé Convention).

9. On the denial of direct effect to the WTO see e.g. Case C-149/96, *Portugal* v. *Council*, [1999] ECR I-8395. On Treaty-consistent interpretation in relation to WTO law see e.g. Case C-53/96, *Hermès*, [1998] ECR I-3603. This case law, of course, has been much debated in legal literature. For a recent sample, with references to other writings, see Kuijper and Bronckers, "WTO law in the European Court of Justice", 42 CML Rev. (2005), 1313–1355.

10. For relatively rare examples see Case T-231/04, *Greece* v. *Commission*, judgment of 17 Jan. 2007 (referring to the 1926 judgment of the Permanent International Court of Justice in the *German interests in Polish Upper Silesia* case, as well as the subsequent practice of the ICJ), nyr; *Racke*, cited *supra* note 3 (referring to the 1997 judgment of the ICJ in the *Gabcíkovo-Nagymaros Project* case); *Yusuf*, cited *supra* note 5 (referring to the 1984 judgment of the ICJ in the *Nicaragua* case). See Jacobs, "Judicial dialogue and the cross-fertilization of legal systems: The European Court of Justice", 38 *Texas Int'l Law Journal* (2003), 547, 553.

adjudication of disputes with countries with which it had concluded bilateral and regional free trade agreements, a significant group of treaties to which it is a party – to the point of also discouraging its trading partners from initiating disputes against the EC.[11] More recently the EC's attitude has changed. It now favours (quasi-) adjudicative methods of international dispute settlement, following the model of the WTO.[12] Yet the EC's past aversion does explain that the pool of international rulings from which the EC courts could draw directly has to date been relatively small.

The second impression is that, while the EC is also a party to several multilateral agreements which produce dispute settlement rulings (such as the WTO and the Law of the Sea Convention), the EC courts appear most comfortable in referring to other European courts, to begin with the ECtHR and, less frequently, the EFTA Court.

2.1.1. *The ECtHR and the EFTA Court*

The EC courts have referred most often to judgments of the ECtHR. They normally treat these judgments with deference, seeking to avoid conflicting views as much as possible. Yet in the final analysis, the ECJ does seem to reserve for itself the possibility to give its own, diverging interpretation of the Convention's fundamental rights as incorporated in general principles of EC law.[13] Accordingly, though deferential to the ECtHR, the ECJ does not feel itself bound by rulings of that Court. The formal reason is that the EC is not (yet) a party to the European Convention on Human Rights.[14]

11. Broude, "Between *pax mercatoria* and *pax europea*: How trade dispute procedures serve the EC's regional hegemony", papers.ssrn.com/sol3/papers.cfm?abstract_id=724641 (2005); a shorter version will be published in Stephan (Ed.), *The Law and Economics of the European Union* (2007). See also Ramírez Robles, "Political & quasi-adjudicative dispute settlement models in European Union Free Trade Agreements : Is the quasi-adjudicative model a trend or is it just another model ?", WTO Staff Working Paper ERSD-2006–09 (Nov. 2006), available at www.wto.org.

12. Garcia Bercero, "Dispute settlement in European Union Free Trade Agreements", in Bartels and Ortino (Eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford, 2006), pp. 383–405.

13. For a recent example where the ECJ draws its own conclusions see Case C-301/04 P, *Commission* v. *Tokai*, [2006] I-5915 (overruling earlier judgment of the CFI). See also the opinion of A.G. Geelhoed in this case, delivered on 19 Jan. 2006, who engages in some detail with the case law of the ECtHR. See generally Douglas-Scott, "A tale of two courts: Luxembourg, Strasbourg and the growing human rights acquis", 43 CML Rev. (2006), 29; Rosas, "Fundamental rights in the Luxembourg and Strasbourg courts" in Baudenbacher, Tresselt and Orlygsson (Eds.), *The EFTA Court: Ten Years on*, (Oxford and Portland, 2005) p. 163.

14. This would change, it has been argued, once the EC accedes to the European Convention on Human Rights. That step would subject the ECJ to the ultimate jurisdiction of the ECtHR. See Lenaerts, "The Court of Justice of the European Communities and the European

Less often, but on notable occasions, the ECJ has referred to judgments of the EFTA Court, the court established by the 1992 EEA Agreement. The EFTA Court is composed of members nominated by the non-EC signatories of the EEA (currently, Iceland, Liechtenstein, and Norway). The relationship between these two courts is an interesting one. In order to ensure homogeneity between the interpretation of EC and EEA principles, which are in many respects identical to EC law, the EFTA Court is obliged to follow ECJ precedents from before 1992, and to take later ECJ judgments duly into account.[15] On the other hand, the ECJ is not obliged to take account of judgments of the EFTA Court.[16] Yet, as the ECJ's President has stated, ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement, which is homogeneity.[17] In several landmark judgments the ECJ has acknowledged being strongly influenced by EFTA Court rulings.[18]

In respect of the ECtHR and the EFTA Court, the ECJ was confronted with a treaty to which the EC is not a party (ECtHR), or which makes it clear that the ECJ is not obliged to follow the rulings of the other tribunal (EFTA Court). Yet when the EC has acceded to treaties with adjudicatory dispute settlement mechanisms, which the EC courts might have to take into account, the ECJ has become more circumspect. This question did come up notably in connection with the still-born EEA Court, Joint Committees established under the EEA and ECAA Agreements, and WTO tribunals.

2.1.2. *The EEA Court and Joint Committees*

The ECJ showed itself rather concerned about the impact of another court's rulings on its own position when reviewing a first version of the EEA Agreement from 1991. This Agreement set up a European Economic Area between

Court of Human Rights – An old couple in a new setting" in *La Cour de Justice des Communautés Européennes 1952–2002: Bilan et Perspectives* (Bruylant, 2004), pp. 89, 103. In his view, when applying the EU's Charter of Fundamental Rights the ECJ is already bound by the interpretation given by the ECtHR to corresponding rights guaranteed by the European Convention on Human Rights: id., at pp. 101–102.

15. See Art. 6 EEA Agreement, and Art. 3 of the Surveillance and Court Agreement appended as Annex II to the EEA Agreement.

16. Ibid., read *a contrario*.

17. Skouris, "The ECJ and the EFTA Court under the EEA Agreement: A paradigm for international cooperation between judicial institutions", in Baudenbacher, Tresselt and Orlygsson, op. cit. *supra* note 13, pp. 123, 125.

18. E.g. Case C-192/01, *Commission* v. *Denmark*, [2003] ECR-I-9693, seemingly reversing its own case law and citing six times the EFTA Court's judgment in Case E-3/00, *EFTA Surveillance Authority* v. *Norway*, [2000–01] EFTA Ct Rep 73. See Skouris, ibid., at pp. 125–126; Bronckers, "Exceptions to liberal trade in foodstuffs: The precautionary approach and collective preferences", in Baudenbacher, Tresselt and Orlygsson, op. cit. *supra* note 13, pp. 105–106.

the European Community and the EFTA countries at that time (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland which ultimately opted out), with liberal trade and competition law principles closely tracking European Community law, but without a common customs tariff.

The initial draft of the Agreement envisaged the establishment of an EEA Court which, while independent from the ECJ, would be composed of five members of the ECJ and of three members nominated by the non-EC (i.e. EFTA) countries. The EEA Court was, amongst other things, competent to settle disputes between the EEA "Contracting Parties". The various courts, including the ECJ and the EEA Court, were instructed to pay due account to each other's rulings when interpreting principles from the EEA Agreement or EC Treaties or secondary legislation which were identical in substance, albeit that all courts had to follow the rulings of the ECJ rendered prior to the signature of the EEA Agreement. The EEA was to be concluded by the EC as a "mixed agreement", meaning that for some of the topics covered in the EEA Agreement both the EC and the Member States were still considered to share decision-making competence.[19] On the EC side both the Community and the individual EC Member States would therefore sign the EEA Agreement. Prior to initialling, the Commission asked the ECJ for an opinion as to whether the Agreement was compatible with the EC Treaty.[20]

The Court affirmed that, in principle, it is compatible with the EC Treaty for the EC to establish a system of adjudication in a treaty, pursuant to which another court would settle disputes between Contracting Parties. The decisions of that other court would be binding on the ECJ in case the ECJ would be called upon to rule on the interpretation of the treaty.[21] However, in this particular case the ECJ found that the dispute settlement machinery of the draft EEA Agreement was incompatible with Community law.

The ECJ argued that the EEA Court, in settling disputes between the "Contracting Parties" to the EEA Agreement, could end up ruling on the respective competences of the Community and the Member States. However, this was contrary to the EC Treaty, which assigned the allocation of such internal competences exclusively to the ECJ.[22] The ECJ also found that this draft

19. On the concept of "mixed agreements", see Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, 2004), pp. 190–199.

20. Under Art. 228 (now 300) EC. All the relevant provisions of the draft EEA Agreement are set forth in the ECJ's *Opinion 1/91*, [1991] ECR I-6079. The draft EEA Agreement also envisaged the establishment of an EEA Court of First Instance.

21. Ibid., para 39.

22. Ibid., paras. 33–36. The ECJ referred in this connection to Art. 164 (now 220) and 219 (now 292) EC. In commentaries at the time, it was argued that the problems of allocating internal competences between the EC and its Member States would arise in every mixed agreement

Agreement went very far in that it replicated an essential part of Community law governing economic and trading relations. Yet despite the objective of homogeneity expressed in the draft EEA Agreement, the ECJ saw a risk that the EEA Court might give diverging interpretations of identical rules, which the ECJ would then be obliged to take into account. According to the ECJ, this arrangement shook the very foundations of the Community and conflicted with the stipulation in the EC Treaty that entrusted the interpretation of Community law to the EC courts.[23] The fact that judges of the ECJ were to sit on the EEA Court did not alleviate, but rather accentuated the problems discerned by the ECJ.[24]

Following this critical opinion, the EEA Agreement was revised. The idea of an EEA Court was dropped, and in its place came an EFTA Court, with a smaller membership (ECJ judges were no longer included), and a more limited mandate (thus, the EFTA Court is not charged anymore with settling disputes between the Contracting Parties to the EEA Agreement, and will exercise its jurisdiction only within EFTA).[25] Disputes concerning the Agreement's application or interpretation can be brought before a Joint Committee by the European Community or an EFTA State. If the dispute concerns principles in the EEA Agreement that are substantially identical to EC law principles, the ECJ can also be asked to interpret the relevant rules. If no solution is found, a Contracting Party may take a safeguard measure. These safeguard measures can be challenged through arbitration.[26] This new arrangement found favour with the ECJ.[27]

In its new opinion, the Court did not indicate whether it would feel bound by decisions of the Joint Committee – following its general pronouncement on the possibility of being bound by other international courts in the previous opinion on the draft EEA Agreement. As the Joint Committee is specifically instructed not to "affect" the case law of the ECJ, the potential for conflicts would be extremely limited.[28] One could also say that the ECJ is not bound by the Joint Committee and that, if anything, it is the other way around. In

concluded by the EC. Accordingly, following the ECJ's logic in *Opinion 1/91*, no "mixed" agreement could therefore foresee an adjudicative mechanism to settle disputes between Contracting Parties. See Brandtner, "The 'drama' of the EEA: Comments on Opinions 1/91 and 1/92", 3 EJIL (1992), 300–328, text at note 85.

23. See *Opinion 1/91*, cited *supra* note 20, paras. 41–46. The ECJ referred again in this connection to Art. 164 (now 220) EC.

24. Ibid., paras. 47–52. The ECJ formulated other objections to the draft EEA Agreement as well, which need not be discussed here.

25. See *supra* text at notes 15–17.

26. This entire arrangement is set out in Art. 111 EEA Agreement.

27. See *Opinion 1/92*, [1992] ECR I-2821.

28. See Protocol 48 to the EEA Agreement.

any event, it is questionable whether Joint Committee decisions are subsumed under the ECJ's reference to court decisions to which it would feel bound. Recourse to the Committee is considered an attempt at dispute settlement through political means.[29] This mechanism has never been invoked to date.

A decade later, the ECJ had occasion to revisit its views on dispute settlement mechanisms contained in international agreements concluded by the EC. In 2002, the ECJ issued an opinion on the dispute resolution mechanism of the proposed ECAA Agreement, creating a European Common Aviation Area with liberal trade principles which, like the EEA Agreement, again replicated European Community law. As the ECJ stated, the ECAA was originally designed to cover the EC of 15, the ten countries in the process of acceding to the EC, as well as Norway and Iceland.[30] The dispute settlement mechanism created by the ECAA Agreement resembles the arrangement in the final EEA Agreement: disputes can be submitted by the EC or the non-EC States to a Joint Committee. In reaching decisions, the Committee must respect the case law of the ECJ. If the dispute concerns principles in the ECAA Agreement that are substantially identical to EC law principles, the ECJ can also be asked to interpret the relevant rules. If no solution is found, a Contracting Party may take a safeguard measure, or denounce the Agreement.[31]

This arrangement found favour with the ECJ. The Court took care to point out that this dispute settlement mechanism did not jeopardize the "autonomy" of the EC. First, the Agreement was to be concluded by the European Community and States not members of the Community. The Joint Committee would therefore not be asked to address the EC's internal division of competences between the Community and EC Member States which arises in the case of "mixed agreements", such as the EEA Agreement.[32] Second, the ECAA's mechanism does not have the effect of binding the Community and its institutions to a particular interpretation of the rules of Community law referred to in the ECAA Agreement.[33]

29. Norberg, Hökborg, Johansson, Eliasson and Dedichen, *EEA Law: A Commentary on the EEA Agreement* (Stockholm: Fritzes, 1993), pp. 278–279. I will not address here the possibility that decisions of a Joint Committee might be considered binding on the EC courts as emanating from a political body established by an international agreement to which the EC is a party, within the meaning of Case C-192/89, *Sevince*, [1990] ECR I-3461. See generally Martenczuk, "Decisions of bodies established by international agreements and the Community legal order", in Kronenberger (Ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, 2001), p. 141.

30. See *Opinion 1/00*, [2002] ECR I-3493.

31. This arrangement is set out in Art. 20 of the current ECAA Agreement (the ECJ referred to the corresponding Art. 27 in the draft Agreement).

32. See *Opinion 1/00*, cited *supra* note 30, paras. 1 and 16–17; see *supra* note 21.

33. See *Opinion 1/00*, paras. 27 et seq. National courts of ECAA Partners must observe

The ECJ did not repeat its finding that the EC might choose to submit itself to the jurisdiction of a court established by an international agreement, in which case the ECJ would be bound by the rulings of this court.[34] (The ECJ again remained silent on whether it would consider itself bound by decisions of the Joint Committee). Yet there is no reason to assume that the ECJ had abandoned this idea. Apart from the issues connected to mixed agreements, which were not raised by the draft ECAA agreement, its ECAA opinion suggests that the ECJ would only hold such a court system to be incompatible with the EC Treaty in the particular situation where the other court would be charged with interpreting treaty rules that replicate EC rules.[35]

Interestingly, the ECAA as submitted to the ECJ for review was never ratified. A substantially revised treaty, with additional parties, was signed in June 2006.[36] It is of note that the final Agreement is a mixed agreement, as it was signed by the Community together with its Member States. It is also of interest that the ECAA's new dispute settlement provision stipulates that "[t]he Community, together with the EC Member States, or an ECAA Partner" may bring a dispute before the Joint Committee.[37] Accordingly, the assumptions underlying the ECJ's earlier approval changed.[38] Yet the new Agreement was not resubmitted for review to the ECJ.

2.1.3. *WTO tribunals*

After the signature of the package of WTO Agreements by both the Community and the Member States, the European Commission asked the ECJ for an opinion as to whether this package was properly characterized as a "mixed agreement". According to the Commission, the entire package fell under the exclusive competence of the EC, something which was hotly contested by the Member States. In a renowned opinion, the ECJ confirmed the "mixed" character of the WTO, which was then concluded by both the Community and the

the case law of the ECJ issued prior to the signing of the ECAA when interpreting provisions of the ECAA that are identical in substance to Community law, and may refer questions to the ECJ. See Art. 16 current ECAA Agreement (Art. 23 in the draft Agreement to which the ECJ referred). Similarly, the Joint Committee shall observe the case law of the ECJ. See Art. 16(1) and 20 (2) current ECAA Agreement

34. See *supra* text at note 21.

35. This is also the view of Castillo de la Torre in his case note on *Opinion 1/00*, 39 CML Rev. (2002) 1373, 1387.

36. Ultimately the ECAA's coverage was expanded to include eight South-East European partners as well: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro and the U.N. Mission in Kosovo. At the time of writing (Jan. 2007), the ratification process is ongoing.

37. Art. 20 ECAA.

38. Cf. *supra* text at note 32.

Member States.[39] In view of the ECJ's concerns expressed in connection with the draft EEA Agreement only two years earlier, it is remarkable that in the entire debate about the WTO's proper conclusion before the ECJ, no attention was paid to the WTO's dispute settlement procedure.

Under the new WTO Dispute Settlement Understanding ("DSU") the Members accepted the compulsory jurisdiction of the WTO to decide on any dispute regarding their implementation of the WTO Agreements.[40] Disputes can be resolved in two instances, by *ad hoc* panels or a permanent Appellate Body. In their proceedings, these WTO tribunals must observe relatively short time limits, which result in a total duration from the establishment of a panel to an Appellate Body ruling of about a year and a half.[41] Dispute settlement rulings will become binding on the parties, unless there is consensus against their adoption in the WTO Dispute Settlement Body, which reunites the WTO membership.[42] Such a consensus is difficult to imagine, as the winning party would have to join it; so in fact, adoption is quasi-automatic. Should there be any doubt on whether the WTO ruling is correctly implemented, the complaining party can ask for a review during expeditious compliance proceedings, normally before the original panel with the possibility of an appeal to the Appellate Body.[43] When the losing party does not fully implement the WTO ruling within a reasonable period of time (which may be determined swiftly through arbitration),[44] the winning party can request trade compensation or take retaliatory measures to pressure the losing party into compliance.[45] Any dispute about the scope of such retaliation can be submitted to arbitration before a member of the original panel or Appellate Body, and these proceedings have to be completed within 60 days.[46]

As both the Community and the individual EC Member States were to become Members of the WTO it was entirely conceivable, following the Court's concerns about the EEA Court, that WTO tribunals would be asked to reflect on the EC's internal division of competences to implement WTO obligations. Yet at the time of *Opinion 1/94*, when the ECJ was asked to assess the EC's competence to conclude the WTO Agreements, no-one seems to have wanted

39. See *Opinion 1/94*, [1994] ECR 5267.
40. Art. 6 and Art. 16.4 DSU.
41. Compare Art. 20 DSU (more optimistically indicating a total duration of 12 months).
42. Art. 16.4 and 7.14 DSU.
43. Art. 21.5 DSU.
44. Art. 21.3(c) DSU.
45. Art. 22.2 and 3 DSU.
46. Art. 22.6 DSU. On the WTO's dispute settlement procedure see generally Wolfrum, Stoll and Kaiser (Eds.), *Max Planck Commentaries on World Trade Law: WTO - Institutions and Dispute Settlement* (Nijhoff: Leiden, 2006).

to consider the possibility that the Community might have been unable to accede to the WTO for internal, institutional reasons.

Following the EC's ratification of the WTO Agreements, the ECJ's denial of the direct effect of WTO rules came early.[47] In contrast, it has taken the EC courts longer to fix their position on the effect of WTO dispute settlement rulings. Intriguingly, when the CFI first denied direct effect to a WTO ruling, simply linking this to lack of direct effect of the underlying WTO rules[48], the ECJ reversed the CFI on this point. The ECJ did not find this a sufficient explanation.[49] The following year, the ECJ for the first time referred to a ruling of the WTO Appellate Body, in support of an interpretation it gave of the TRIPS Agreement.[50]

Any hopes, though, that the EC courts might easily consider themselves bound by WTO rulings were dashed in two judgments of early 2005, when both the CFI and the ECJ rejected private damage claims that had relied on a WTO ruling.[51] Both courts found that WTO dispute settlement was essentially diplomatic in nature, leaving considerable room for negotiation to the parties even after a WTO ruling. The ECJ also observed that giving direct effect would result in a lack of reciprocity in that some of the EC's most important trading partners precluded their courts from applying the WTO agreements in reviewing the legality of their rules of domestic law.

Since then, attention has shifted to the effect of a subset of WTO dispute settlement rulings: those condemning measures on the basis of WTO rules to which the ECJ has exceptionally allowed private challenges, i.e. antidumping and countervailing duty rules.[52] The CFI felt it could sidestep the issue in a recent case, distinguishing a WTO precedent (bed linen ruling) on the facts from the antidumping measure (on recordable compact discs) it had to adjudicate, while reserving its position as to whether such WTO rulings are binding on EC courts.[53]

47. See Case C-149/96, *Portugal* v. *Council*, cited *supra* note 9. The ECJ has maintained the narrow exceptions it developed in respect of the GATT, i.e. that whenever EC rules implement or refer to WTO rules they will be given effect. Case C-69/89, *Nakajima*, [1991] ECR I-2069. See Kuijper, in Kuijper and Bronckers, op. cit. *supra* note 9, at 1323–1328; Bronckers, "The effect of the WTO in European Court litigation", 40 *Texas Int'l Law Journal* (2005), 443, 445–447.

48. Case T-174/00, *Biret*, [2002] ECR II-17, paras. 61–69.

49. Case C-94/02P, *Biret*, [2003] ECR I-10565, paras. 56–59. The ECJ rejected the private damages claim in this case for other reasons.

50. Case C-245/02, *Anheuser-Busch* v. *Budvar*, [2004] ECR I-10989, para 49.

51. Case C-377/02, *Van Parys*, [2005] ECR I-1465, paras 42 et seq.; Case T-19/01, *Chiquita*, [2005] ECR II-315, paras. 156 et seq.

52. See Case C-69/89, *Nakajima*, cited *supra* note 47.

53. Case T-274/02, *Ritek*, judgment of 24 Oct. 2006, nyr, para 98.

However, Advocate General Léger, in a still pending case, firmly rejected that even this subset of WTO rulings would be binding on the ECJ. He argued that such an outcome would jeopardize the autonomy of the Community's legal order in pursuing its own objectives.[54] This case concerns a preliminary ruling on the validity of an EC antidumping measure regarding bed linen imports, which the WTO Appellate Body already ruled to be incompatible with the WTO's Antidumping Agreement. Although the Advocate General conceded that the WTO Agreement contains a set of rules which is binding on its Members, he felt that the WTO was first and foremost a negotiating forum, with far more modest objectives than the EC single market.[55] Furthermore, he drew attention to the ECJ's willingness to be bound by rulings of another international court created by a treaty to which the EC is a party.[56] Yet he opined that the WTO dispute settlement mechanism does not provide for the creation of a body in the nature of court. He considered rulings of WTO tribunals to be merely recommendations, which have to be confirmed by the WTO's Dispute Settlement Body, which is a political body. He also called attention to the importance of negotiations between the parties following a dispute settlement ruling, echoing the ECJ's reading on this point.[57] Having opined that WTO rulings were not binding on the ECJ, the Advocate General made no further mention of the WTO Appellate Body ruling in his assessment of the very same contested antidumping measure.

With this rehearsal of A.G. Léger's recent Opinion, we have come full circle. We are back again at the ECJ's starting point from 1991, that it is possible for the EC courts to be bound by another international tribunal, but must conclude that the search for such a tribunal has proven to be elusive. Before assessing this situation, it is useful to briefly mention one category of cases where the EC courts will not accept to be bound by the rulings of another international court: disputes between EC Member States on issues of Community law, as these fall within the exclusive jurisdiction of the EC courts.[58] In a recent case, the ECJ criticized Ireland's recourse to the Law of the Sea Tribunal against the UK, regarding the latter's authorization of a nuclear fa-

54. Case C-351/04, *IKEA*, opinion delivered on 6 April 2006, para 79. Here, A.G. Léger implicitly appealed to the ECJ's reasoning in Opinion 1/91; see *supra*, note 20.

55. Ibid., paras. 83–84.

56. Ibid., para 93, explicitly referring to the ECJ's Opinion 1/91; see *supra*, note 20.

57. Ibid., paras. 94–97.

58. See Art. 292 EC. See generally Lavranos, "Concurrence of jurisdiction between the ECJ and international courts and tribunals", 14 *Eur. Envirment'l Law Rev.* (2005), 213–225, 240–251; Cazala, "La contestation de la compétence exclusive de la Cour de justice des Communautés européennes", 40 RTDE (2004), 505.

cility (the *MOX plant*).[59] Similarly, it is not conceivable under EC law that EC Member States would sue each other before WTO tribunals, although being signatories of the WTO Agreements they would be entitled to do so as a matter of WTO law.[60]

3. Assessment

If one sums up the EC courts' case law so far, the following picture emerges. The ECJ has appeared reluctant to accept the jurisdiction of international courts that are established in "mixed agreements" to which both the EC and its Member States are parties. It will not accept such jurisdiction if the other courts are competent to interpret norms that "replicate" EC law. Moreover, the EC courts resist being bound to rulings produced by dispute settlement mechanisms that resemble the WTO system.

The implications of these criteria go far. The Community has embarked on an ambitious program to upgrade its relationships with a variety of trade and developmental partners. It is negotiating a multitude of new agreements within the framework of its European Neighbourhood Programme, as well as with a host of other countries, both near (e.g. Russia) and far (after Chile, Mexico, now China, India, Korea, Mercosur, Andean, ASEAN etc.). Many of these new agreements, going beyond traditional trade issues, have been or will be signed as mixed agreements, which is the EC's prevalent method of concluding international agreements.[61] In the agreements with those countries with which it wants to establish closer links, the EC attempts to export its *acquis communautaire*, and align treaty norms with EC law.[62] When conceiving of dispute settlement in these agreements, the EC has made a conscious shift in favour of (quasi-) adjudicative mechanisms following the model of the WTO.[63]

Accordingly, if it simply follows its case law to date, the ECJ may well distance itself from the international courts or tribunals established by these

59. See Case C-459/03, *Commission* v. *Ireland*, [2006] ECR I-4635.

60. Such a suit amongst EC Member States would also be considered to run afoul of the loyalty obligation contained in Art. 10 EC. Ibid., para 182.

61. See Paasivirta and Kuijper, "Does one size fit all? The European Community and the responsibility of international organizations", to be published in *Netherlands Yearbook of Int'l Law* (2005), text at note 23. The texts of these agreements are collected at www.consilium.europa.eu/cms3_applications-/Applications/accords/search.asp See generally Maresceau, "Bilateral Agreements Concluded by the European Community", 309 *Academie de la Haye*, *Receuil des cours*, (2006), 129–451.

62. See Garcia Bercero, op. cit. *supra* note 12, at 384.

63. Ibid., at 390–391.

agreements for some or all of the reasons it expressed previously. Not only would this render illusory the ECJ's original willingness to subject itself to the interpretation of international agreements by the very tribunals set up by these agreements. More importantly, this risks creating a situation where the EC courts will operate in clinical isolation from other international tribunals.[64] That is not a desirable outcome in a globalizing world, where countries are increasingly bound to cooperate with each other and where courts have a role to play in facilitating and reinforcing such cooperation. Can this outcome be forestalled by reconsidering the criteria which the ECJ formulated to identify the international courts by which it did not want to be bound?

3.1. *Rethinking the ECJ's criteria to distinguish binding rulings*

If international courts established by a "*mixed agreement*" were to entertain disputes between the "contracting parties", the ECJ was worried in Opinion 1/91 that they might be led to pronounce on the internal allocation of powers between the European Community and its Member States when interpreting who is the "contracting party" concerned by a particular obligation. The ECJ did not want to be bound by the decision of another court on this internal EC issue. Accordingly, some observers deduced early on that the EC courts would never accept adjudicative mechanisms in mixed agreements.[65] Subsequent practice suggests, however, that this concern should probably not be exaggerated.

To begin with, as we have seen, this issue did not come up in the ECJ's review of the WTO, a mixed agreement, in Opinion 1/94.[66] Nor did the Commission and the Member States deem it necessary to ask the ECJ to review this issue again when the ECAA was ultimately signed as a mixed agreement, contrary to the draft which had been assessed by the ECJ in Opinion 1/00.[67] The standard practice of the European Community also seems to be to

64. Consider e.g. AG Léger, who after having posited that the ECJ was not bound by a WTO ruling on the same EC measure being challenged before it, paid no further attention to this WTO ruling. See *supra*, notes 54–57.

65. Brandtner, cited *supra* note 22.

66. See *supra*, text at note 39. Interestingly, the division of competence between the Community and its Member States has been raised in WTO dispute settlement proceedings (notably, by the USA). Yet WTO tribunals have sought to avoid addressing this issue. See e.g. WTO Panel, *EC – Selected Customs Matters* (2006), paras. 6.72–6.74, 7.548–7.549 (distinguishing EC and EC Member States' responsibility for customs classification under international law and under EC domestic law); WTO Appellate Body, *EC Customs Classification of Computer Equipment* (1998), para 96 (focusing on the EC as the relevant export market).

67. See *supra* text at note 36.

conclude mixed agreements as bilateral rather than multilateral agreements, in the sense that the Community and its Member States together are signatories on the one side, and the other country is the signatory on the other side of the agreement. For dispute settlement, this means that the Community and the Member States act together as a complainant or defendant. This construct avoids the concern expressed by the ECJ about the international dispute settlement tribunal deciding on the EC's internal allocation of competences. Yet it can still create problems in the allocation of State responsibility between the Community and its Member States.[68]

Furthermore, the ECJ has shown concern that it does not want be bound by an international court's interpretation of norms that "*replicate*" EC law, as this would infringe on its exclusive competence to interpret EC law.[69] It seems that this concern can probably be limited to a fairly narrow set of circumstances, notably where the international agreement refers to EC legislation in so many words. In other words, if the international agreement contains norms that have merely been inspired by or are similar to EC legislation or principles, this should not be a bar to the EC courts' recognizing the interpretation of the agreement's norms by the international court or tribunal.[70] Nevertheless, there will be some agreements with the Community's closest partners which do incorporate EC law norms, and in those cases the ECJ's reluctance to be bound by the rulings of the other international court is likely to remain.[71]

Finally, there are the difficulties the EC courts have with the *WTO dispute settlement system.* The EC courts seem to be saying that this system is still a form of diplomacy and does not rise to the level of adjudication on which the EC courts are prepared to rely in interpreting international agreements.[72] This assessment of WTO dispute settlement is unlike the more deferential approach the EC courts have taken towards the European Court of Human Rights, as they do not question the nature of the proceedings before this

68. See Paasivirta and Kuijper, cited *supra* note 61.

69. See *supra* text at note 23.

70. For example, Castillo de la Torre observes that even if the Community were at some point to accede to the ECHR, the ECJ should have no problem subjecting itself to the interpretations of the ECtHR as the Convention does not replicate Community rules. See *supra* note 35, at 1387, n. 28.

71. Similar problems also arise, by the way, in other settings: for instance, if the international tribunal established by a bilateral free trade agreement between the EC and a third country is led to interpret WTO law. Such an interpretation could be seen to infringe on the WTO's exclusive jurisdiction to interpret conflicts between its Members. See Garcia Bercero, op. cit. *supra* note 12, 401–403.

72. See *supra* text at notes 51–57.

Court or the legal effect of its rulings.[73] In order to explain the ECJ's thinking some informed observers have even gone so far as to likening WTO law to soft law.[74] These are highly contestable findings. While this is not the place to dwell on the anomalies in the ECJ's reasoning,[75] a few observations will illustrate the problem. Essentially, the EC courts fail to appreciate that WTO rulings do produce legal effects. The normal situation is that WTO Members comply with the rulings and amend the offending measures.[76] Yet the WTO has also established remedies to deal with more recalcitrant Members. A losing and non-complying WTO Member will be exposed to trade compensation claims or retaliatory measures to induce it to comply.[77] In other words, non-compliance with WTO law creates international responsibility.

Similarly, if the ECJ condemns an EC Member State measure as violating EC law, in the majority of cases EC Members will comply and amend their measures. EC law also has devised measures to deal with non-complying Member States. These are not self-help remedies as envisaged in WTO law, in the sense that an EC Member State which does not bring itself into compliance with EC law will not be faced with retaliatory measures by other EC Member States. Instead, non-complying Member States can be fined by the ECJ on a proposal from the European Commission,[78] or they may face financial compensation claims from private parties that can show they are damaged by national measures found to be inconsistent with EC law.[79]

However, the fact that the remedies against non-complying Member States are different in WTO law as opposed to EC law does not means that WTO rulings lack legal force. Furthermore, as to the nature of WTO tribunals, according to most definitions WTO tribunals qualify as independent and competent adjudicatory bodies.[80] Their functioning and effectiveness compares

73. But see Editorial Comments, "Relations between international courts and Community courts: Mutual deference or subordination?", 42 CML Rev. (2005), 581, 584–585 (arguing that EC courts treat WTO rulings in many ways like ECtHR rulings when there is no question of execution or enforcement - which is non-committal; and referring to several opinions of advocates general who have cited WTO rulings to underline their own interpretation - which contrasts with their more recent dismissal by A.G. Léger, cited *supra* note 54).

74. See Lenaerts and Corthaut, "Of birds and hedges: The role of primacy in invoking norms of EU law", 31 EL Rev. (2006), 287, 299.

75. See Bronckers in Kuijper and Bronckers, op. cit. *supra* note 9, 1343 et seq.

76. According to a recent count, the WTO dispute settlement system has had a successful implementation rate of 83%. See Davey, "Dispute settlement in the WTO and RTAs: A comment", in Bartels and Ortino, op. cit. *supra* note 12, 347–348.

77. See *supra* text at note 45.

78. See Art. 228 EC.

79. See Case C-479/93, *Francovich*, [1995] ECR I-3843.

80. International adjudication is usually seen to involve (1) independent judges applying (2) relatively precise and pre-existing legal norms after (3) adversary proceedings, (4) respect-

favourably to the more diplomatic methods of dispute settlement included in other, often older international agreements; agreements, incidentally, to which the ECJ has granted direct effect.[81]

In addition, what does the ECJ's assessment of WTO dispute settlement say to the EC's treaty partners? If the Court's findings were to become common currency, would the Community still be able to request other WTO Members to comply with their WTO obligations in respect of the EC? And what are the countries with whom the Community is now creating a network of bilateral agreements so as to further strengthen relationships to think, if the EC courts were to treat these rules as soft law and trivialize the way disputes about their implementation are resolved. Again, when EC courts ignore rulings that are critical of the Community as mere products of diplomacy, this does not strengthen the EC's hand in requesting compliance of rulings in its favour. This also undermines the Community's credibility as a reliable negotiating partner, particularly in respect of smaller countries who must rely on rules rather than on power to preserve their interests.

Fundamentally, the findings of the EC courts on WTO dispute settlement run counter to the perception of the political arm of the EC (at least when not involved as a defendant in litigation before the ECJ) and of other countries who see the WTO system as an important step forward in international relations, and who have begun to model bilateral or regional dispute settlement systems after the WTO's example.[82] The WTO system stands for a rule-based system of adjudication, rather than a power-based approach to resolving disputes.[83] The advantages of a rule-based system are its predictability, effectiveness, and its guarantees of equality of arms for larger and smaller countries.

ing basic principles of procedural fairness, in order to achieve (5) reasoned decisions in which (6) one party wins. See Alvarez, "The new dispute settlers: (Half) truths and consequences", 38 *Texas Int'l Law Journal* (2003), 405, 407–408. WTO tribunals meet these criteria. Id. See also e.g. Dias Varella, "La complexité croissante du système juridique international: Certains problèmes de cohérence systémique", 2 Rev. belge dr. int. (2003), 331, 362 (highlighting the importance and increasing legitimacy of the WTO dispute settlement system amongst international tribunals); Helfert and Slaughter, "Why States create international tribunals: A response to Professors Posner and Yoo", 93 *California Law Rev.* (2005), 1, 5 and 22 (approving and reinforcing conclusion that WTO tribunals are highly effective and independent). See also Laget-Annameyer, "Le statut des accords OMC dans l'ordre juridique communautaire: En attendant la consécration de l'invocabilité", 42 RTDE (2006), 249, 276 et seq (arguing that the WTO dispute settlement system has a hybrid character, combining both legal and political elements, though submitting at the same time that the binding nature of WTO dispute settlement rulings is especially strong as a matter of public international law).

81. See *supra* note 8.

82. See text *supra* note 12. For a South-American perspective, see Francke, "Chile's participation in the Dispute Settlement System: Impact on capacity building" (ICTSD paper, 2006), at 3–4, available at www.ictsd.org/dlogue/2006–11–02/Mathias_Francke.pdf.

83. The importance of this distinction was originally developed by Jackson, "Governmen-

In sum, if one looks more closely at the reasons given by the ECJ in its case law to reject the binding nature of rulings issuing from international tribunals, there appears to be room for reconsideration. There are grounds for the EC courts to accept more easily that they are bound by international rulings, although not all problems that have been identified by the ECJ can be comfortably resolved. Yet before going down this path, one has to ask the basic question whether being bound is a desirable outcome.

3.2. *Rethinking the ECJ's original assumption*

The ECJ really went quite far in saying that it would accept to be "bound" by the decisions of an international court when called upon to interpret an international agreement, at least if this was meant to imply that the Court would feel bound to defer to the interpretations of another (domestic or international) court.[84] To say that rulings of an international tribunal are binding as a matter of international law appears relatively uncontroversial, though questions have arisen as to whom the resulting international obligation is addressed: to the State as a whole or specifically to the agency that committed the international legal violation (i.e. the executive, the legislature, or the judiciary).[85] Yet whether these international rulings have domestic law effect, and if so what this effect should be, is a different matter.

As a matter of principle, the effect of court rulings is limited: to the litigating parties, to the dispute being litigated, and to the facts as they were known before the ruling was issued. There is also not a generally accepted rule of *stare decisis* that is to be observed by one and the same international court, let alone between courts from different jurisdictions. Furthermore, when international agreements establish international dispute settlement tribunals, they generally do not determine the domestic law effect of the rulings issued by these tribunals. For example, the WTO Agreements leave WTO Members with discretion as to how they organize themselves in ensuring that they act in compliance with WTO obligations. Thus, the WTO does not prescribe that

tal disputes in international trade relations: A proposal in the context of GATT", 13 *Journal of World Trade Law* (1979), 1–21.

84. In *Opinion 1/91*, see *supra* note 20.

85. E.g., Nollkaemper, "Internationalisering van Nationale Rechtspraak", 131 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (Nov. 2005), 1, 27 et seq. (the State as a whole is deemed responsible for compliance with international law; and *mutatis mutandis* so is the EC). There are those, though, who plead for a "disaggregated State", and who would like separate governmental institutions, like courts, to have independent obligations to interpret and implement international law. See Slaughter, *A New World Order* (Princeton, 2004), pp. 268–269.

its rules or its dispute settlement rulings ought to have direct effect in the domestic legal order of its Members.[86]

The ECJ did not specify to what extent it would feel bound to follow the interpretations of another international tribunal. Perhaps the ECJ merely felt a diplomatic need at the time to say that, in principle, it accepted being bound by another international tribunal, before rather harshly declaring that the proposed arrangements for an EEA Court were incompatible with EC law. The ECJ may have wanted to offer an olive branch by showing some level of subservience to the political will of the EC legislature in its design of dispute settlement clauses in international agreements. Yet whatever its usefulness at the time, this judicial concession by now seems to be hindering the EC courts to pay due respect to the rulings of other international tribunals.

For the EC courts automatically to defer to the rulings of another court can have far-reaching consequences. Depending on the scope of the international agreement at issue, it could amount to the supremacy of another tribunal in assessing the validity of large swathes of EC legislation. But even in respect of an international tribunal with a more limited jurisdiction, if the EC courts accept that they are bound to follow its rulings this excludes their review of the functioning of the tribunal in an actual case. Essential procedural errors cannot be checked and corrected. Results may have to be accepted that are felt deeply to run counter to the public order of the Community and its Member States. Even the domestic reception of an international ruling that should be unproblematic can be hampered if it is perceived that it was automatically followed, rather than checked and endorsed, by the EC courts.

Faced with these far-reaching consequences of automatically deferring to the rulings of another tribunal, the EC courts are likely to have an overpowering instinct to reject being so bound, and focus on the reasons necessary to justify this. Yet set on this course it becomes more difficult for the EC courts to give some persuasive, let alone normative force to these very same rulings. In other words, the acceptance of being bound to other courts leads, paradoxically, to a weakening of judicial cooperation. This may have to be accepted if ever the EC legislature and its treaty partner were, in an international agree-

86. See Art. XV1(4) Marrakesh Agreement. See also WTO panel, *EC Bananas-régime (Art. 21.5 proceedings)* (1999), at 6.154: "Members remain free to choose how they implement DSB recommendations and rulings." See also WTO panel, *Section 301–310 of US Trade Act of 1974* (2000), para 7.72: "Whether there are circumstances where obligations in any of the WTO agreements addressed to members would create rights for individuals remains an open question." This is agreed by Rapp-Lücke, *Das Rechtliche Verhältnis zwischen dem Streitbeilegungsgremium der Welthandelsorganisation und dem Gerichtshof der Europäischen Gemeinschaften* (2004), pp. 217–221 (who otherwise favors the binding force of WTO rulings as a matter of EC law).

ment, to instruct their domestic courts (including the EC courts) to follow the rulings of a particular international tribunal. But in the absence of such an unusual treaty mandate, the considerations outlined above justify, in my view, the ECJ abandoning its assumption that it may be bound to follow the rulings of another tribunal – provided this step liberates the EC courts to properly consider the normative force of such rulings. Not having to worry any longer about being bound to give domestic law effect to rulings from other tribunals, the EC courts may also be more relaxed about such tribunals being established in "mixed" agreements or considering norms that closely track EC law.

3.3. *An alternative framework*

In order to stimulate thinking on another approach to treating international rulings by the EC courts, I offer the following alternative framework of analysis. I believe it is important to strike a balance between essentially two considerations: respect for the rulings of an international tribunal that was specifically set up to interpret an international agreement, and which is deemed to have the expertise and mandate to consider the legal claims and interests of all parties; and the limitations to be observed by the EC courts in maintaining the institutional balance with the other EC institutions who are charged not only with the negotiation but also with the implementation of international norms. In our era of globalization, with an ever denser network of international agreements, their implementation raises new issues for the traditional relations between the *trias politica.* [87]

The ECJ long ago established that the EC legal order is a separate legal order of international law.[88] The EC courts thus have to decide whether to assign effect to rulings emanating from another legal order into the EC legal order. Yet in these decisions the EC courts cannot ignore the political will regarding the EC's implementation when it is properly expressed by the other EC institutions. To this extent the classic case law of *Kupferberg* where the Court seemed to suggest that it had primary competence to decide on questions of interpretation of international agreements, to the exclusion of the other institutions, needs to be revisited.[89]

87. See generally Alkema, Over Implementatie van Internationaal Recht (inaugural address, University of Leiden, 18 Oct. 2005, available at hdl.handle.net/1887/3764 (arguing that even in a traditionally monist country like the Netherlands, the role of Dutch courts in assigning direct effect to international agreements has to be reconsidered in relation to the legislature and the executive).

88. Case 26/62, *Van Gend & Loos*, [1963] ECR 3, 10–15.

89. See Case 104/81, *Hauptzollamt Mainz*, [1982] ECR 3641. For a far-reaching plea to abandon *Kupferberg*, see my co-author Kuijper, op. cit. *supra* note 9, at 1317–1323 (note that

Constituting a separate legal order does not mean that the Community is autonomous or should strive to increase its autonomy. From this perspective, the ECJ's more recent emphasis on the "autonomy" of the EC's legal order is unfortunate.[90] Perhaps a wide notion of autonomy might have been understandable in the past, when the Community was still a fledgling and relatively unstable institution.[91] By now, though, the EC has grown sufficiently strong to play a play a key role in improving the governance of a globalizing world, without being overly concerned about its own survival.[92] The reinforcement of judicial cooperation between the EC courts and other international tribunals can make an important contribution towards this goal.

When articulating the proper weight which the EC courts are to give to rulings of international tribunals established by the Community and its treaty partners, it is also useful to draw inspiration from the experience of the highest national courts which face similar questions when faced with rulings from international tribunals. After all, the ECJ is not an international court in the traditional sense, but rather resembles a constitutional court or a general national court of last instance.[93]

Against the background of these more general considerations I would formulate the following preliminary guidelines. When called upon to interpret an international agreement which has established a (quasi-) adjudicative dispute settlement mechanism, the EC courts should actively inquire whether the competent international tribunal has pronounced itself on the treaty provisions and/or EC measures at issue. The EC courts should normally follow the interpretation of the international tribunal, especially when this tribunal has applied the international agreement to the same EC measure on which the EC courts are subsequently asked to pronounce. Yet the EC courts also ought to pay respect to relevant interpretations of the international tribunal given in respect of different measures, or (when the tribunal has been established by a multilateral agreement) different parties. This will help reduce the potential

Kuijper seeks reversal of *Kupferberg* for different reasons, notably as an acknowledgement of the increasing international stature of the Community, with attendant negotiating power).

90. This trend seems to have started with Opinion 1/91, cited *supra* note 20 (see paras. 30, 35, 47) and is amplified, for instance, in Opinion 1/00, cited *supra* note 30 (see paras. 5, 6, 11, 12, 21, 27, 37, 41, 46). See also A.G. Léger's recent Opinion, *supra*, text at note 54.

91. See Castillo de la Torre, op. cit. *supra* note 35, at 1389–1391, who also questions the ECJ's increasing insistence on "autonomy".

92. See generally on the contributions which the EC can make to global governance the pioneering studies of Lamy, *La Démocratie-Monde: Pour une autre Gouvernance Globale* (Seuil, 2004); Lamy and Laidi, "A European approach to global governance", 1 *Progressive Politics* (No. 1, 2002), 56–63.

93. See Rosas, "The European Court of Justice: Sources of law and methods of interpretation", in Sacerdoti, Yanovich and Bohanes (Eds.), op. cit. *supra* note 3, p. 482, 483.

for conflict between the EC measure and the Community's international obligations.[94]

The presumption in favour of following the international tribunal can be overturned in limited circumstances. Where the EC courts are faced with different facts, there may be reason to distinguish the international ruling. For instance, subsequent to the international ruling new and relevant facts may have arisen that require a fresh, and possibly different, assessment from the EC courts.[95] The EC courts might also decide that the international tribunal has not considered essential facts.[96] Yet even when considering different facts, the EC courts should still engage with the relevant ruling of the international tribunal so as to avoid conflicts and achieve a treaty-consistent interpretation.[97]

In a case concerning the same facts and involving the same EC measure, the EC courts normally ought to defer to the international tribunal and seek consistency.[98] One can conceive of exceptional situations, however, where the

94. This consideration was highlighted by the German Federal Constitutional Court when, in litigation between a Turkish national and the German authorities, it followed the interpretation given by the International Court of Justice of the Vienna Convention on Consular Relations in a dispute between Mexico and the United States. See BVerfG, *Mr F.*, 2 BvR 2115/01, para 62 (19 Sept. 2006) referring *inter alia* to the ICJ judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals* (nyr).

95. The German Federal Constitutional Court drew attention to this possibility, in the context of family law, when faced with the implementation of a judgment of the ECtHR. See BVerfG, *Görgülü*, 2 BvR 1481/04, para 62 (14 Oct. 2004), reviewing ECtHR, *Görgülü* v. *Germany*, [2004] Eur. Ct. H.R. 89. Again though, the starting position of the German Constitutional Court was that German courts ought to pay respect to and engage with such a ruling. See generally Hartwig, "Much ado about human rights: The Federal Constitutional Court confronts the European Court of Human Rights", 6 *German Law Journal* (2005), 870.

96. See the treatment by the Israeli High Court of the International Court of Justice's prior ruling on the barrier constructed by Israel and separating Palestinian territory. While paying respect to the authority of the International Court of Justice, the Israeli High Court of Justice came to different conclusions on the basis of additional factual elements. Compare ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, with Israeli High Court of Justice, *HCJ 7957/04*, *Zaharan Yunis Muhammad Mara'abe* v. *The Prime Minister of Israel*, judgment of 15 Sept. 2005, para. 60 et seq. But see Gross, "The construction of a wall between The Hague and Jerusalem: The enforcement and limits of humanitarian law and the structure of occupation", 19 LJIL (2006), 393, 426 (arguing that the factual elements in this case are not convincing to justify the different conclusions reached by the Israeli High Court).

97. See BVerfG, cited *supra* note 94, para 61 (aptly referring to the "*Orientierungswirkung*" of judgments of the ICJ).

98. See also the Court of Criminal Appeals of Oklahoma, which sought consistency with the ICJ's interpretation of the Vienna Convention on Consular Relations when subsequently reviewing the fate of a Mexican national whose appeal to this Convention had previously been recognized by the ICJ in *Avena*, cited *supra* note 94. See *Torres* v. *Oklahoma*, 120 P.3d 1184,

EC courts might not give domestic law effect to the international ruling and rather await action from the other branches of government in the Community.

To begin with, as this has played such an important role in the debate on WTO dispute settlement rulings, one should consider the possibility that the EC has lost its case before the international tribunal, but chooses not to comply immediately. What, if any, leeway should the EC courts afford the EC's political arm to manoeuvre within the relevant treaty's framework?

The initial question is whether the EC courts have assigned direct effect to the international obligation at issue. If the obligation is found to have direct effect, giving direct effect to the ruling of the international tribunal does not make matters worse for the EC's political arm. Faced with a condemnation by the EC courts, independently from the international tribunal, the EC's political arm would have had no choice but to comply in any event. On the other hand, if the international obligation is not deemed to have direct effect, the effect of the international ruling depends upon the context in which it is being invoked.

As to context, if the international ruling is being invoked in order to obtain some form of financial compensation from the EC, as opposed to obtaining the invalidity of the EC measure condemned by the international tribunal, the international ruling can be given more effect. In this connection one can notably think of an action for damages against the EC institutions.[99] It is one thing for the EC courts to grant the institutions some room to delay compliance with an international ruling because of overriding domestic policy considerations. Yet if, for example, such delay leads to countermeasures from the EC's treaty partner that injure particular EC citizens, there may be good reason for the EC courts to order the institutions to compensate these citizens on the grounds that few need not suffer on behalf of all where public policy is concerned *("égalité devant les charges publiques"*).[100]

However, if the object of the action before the EC courts is the invalidity of an EC measure, the effect of an international ruling on a treaty provision

1187 (2005). For an analysis of this litigation, see Koven Levit, "A tale of international law in the heartland: Torres and the role of State Courts in transnational legal conversation", 12 *Tulane Journal of Comp. & Int'l Law* (2004–2005), 163.

99. Art. 235 and 288 EC.

100. This issue has come up in connection with a claim filed by EC exporters against the EC institutions for the damages they suffered from US retaliatory trade restrictions in response to the EC's failure to bring its Bananas régime in compliance with a WTO Appellate Body ruling in time. The CFI rejected this claim in Case T-69/00 etc., *FIAMM*, [2005] ECR II-5393. The CFI's judgment, currently on appeal, has been criticized by Thies in her annotation in 43 CML Rev. (2006), 1145, 1158 (arguing that the payment of financial compensation does not restrict the EC institutions in pursuing their political goals, but will open a public discussion on the reasons for non-compliance, which is to be welcomed).

not having direct effect could depend on the position the EC's political arm has taken in the relevant international forum. If the Community has stated that it does not intend to implement the ruling by a particular date, the EC courts as a rule ought not invalidate the disputed measure, as this would compromise the EC's negotiating room. Yet the effect may be different if the EC has remained silent as to its intentions or has affirmed to its treaty partners that it intends to comply, especially if it has indicated a specific date and has allowed this deadline to slip for no identifiable reason of common policy.

Another consideration for the EC courts not to follow the international ruling, at least not without the explicit endorsement of the other EC institutions, could be if the other tribunal has given an interpretation of a norm which "replicates" secondary EC law, when this interpretation runs counter to the jurisprudence of the ECJ.[101] In their interpretations of EC law, the EC courts also need not feel bound by an international ruling which, for purposes of determining the Community's international responsibility, has assigned responsibility for a contested measure between the EC institutions and the EC Member States in a manner which is not consistent with the EC Treaty.[102]

Finally, the EC courts might decline to follow an international ruling if they believe that this would run counter to a fundamental public policy of the Community. Such cases are likely to be exceptional. Once the ECJ has decided not to follow an international ruling on this ground, it puts the other EC institutions in a delicate situation. Either they have to find a way to explain to the European public at large that the ECJ wrongly assessed public policy and seek to affirm a different policy choice that is consistent with the international ruling. Or the EC institutions have to seek a reversal of the international ruling through political means with their treaty partners. They may even have to accept that the Community will not be able to comply with the international ruling that has condemned an EC measure, creating legal and diplomatic repercussions on the international plane. As a result, the EC might have to withdraw from the treaty, or at least withdraw its submission to the jurisdiction of the international tribunal established by this treaty.[103]

101. Cf. *supra*, text at notes 69–71.

102. Cf. *supra*, text at notes 65–68.

103. By way of comparison, the US Supreme Court recently explained that it did not feel bound by the ICJ's interpretation of the Vienna Convention on Consular Relations given in *Avena*, cited *supra* note 94. See US, *Sanchez-Llamas* v. *Oregon* (28 June 2006), slip op., at 17–25. According to the US Supreme Court, the International Court of Justice in *Avena* had "overlooked" that a contested US rule of procedure was key to the US adversary system; id., at 21. The Supreme Court also noted that the United States shortly after the ICJ's ruling in *Avena* had withdrawn its consent to the ICJ's jurisdiction concerning Vienna Convention disputes, which it cited as another reason not to give decisive weight to the ICJ's interpretation of this Convention; id., at 20–21.

This set of guidelines is offered to stimulate discussion. It would be welcome if the EC's political arm were to indicate how it expects the EC courts to deal with interpretative questions arising from the EC's accession to international agreements, rather than this being exclusively a matter for judge-made law and academic commentary. For example, the European Parliament might organize hearings on this issue, and periodically review the EC courts' interpretation of international agreements.

4. Concluding remarks

In recent years the dialogue between courts of different jurisdictions, both domestic and international, has received considerable attention. Although in traditional comparative law courts have long been looking for solutions in other countries, the conversation amongst judges has taken on a new dimension in our times of globalization.[104] Some observers are even speaking of a "community of courts", which are guided by an affirmative principle of co-operation.[105] Others have noted an asymmetry, at least amongst international tribunals.[106] Apart from WTO tribunals, which regularly refer to rulings of other judicial bodies, other international tribunals seem to be rather more reluctant to acknowledge the case law of others. Thus, the International Court of Justice has been said to follow an inward-looking approach described as "jurisprudential narcissism",[107] whereas a tendency towards "jurisdictional egocentrism" has been ascribed to regional courts.[108]

To the extent a global conversation amongst judges does take place, one can distinguish various levels of intensity. One starts with loose, accidental

104. See Baudenbacher, "Judicial globalization: New developments or old wine in new bottles?," 38 *Tex. Int'l L. J.* (2003), 505, 525–526.

105. Slaughter, op. cit. *supra* note 85, pp. 68, 100; Allard and Garapon, *Les Juges dans la Mondialisation : La Nouvelle Révolution du Droit* (Seuil, 2005), pp. 25–26. Note that these authors draw very different conclusions from this burgeoning judicial dialogue. While Slaughter discerns the outlines of a new legal order, Allard and Garapon recognize no such general design. They posit that more frequent exchanges between judges from different jurisdictions create a new form of legal cosmopolitism, with its own problems and benefits; id., at pp. 91–94.

106. Ruiz-Fabri, contribution to the debate at the XXXVIe Colloque of the Société Française Pour le Droit International, *La Juridictionnalisation du Droit International* (Penone, 2003), at p. 462.

107. Kamto, "Les interactions des jurisprudences internationales et des jurisprudences nationales", in *La Juridictionnalisation du Droit International* (Penone, 2003), p. 393, at 415. See also Jouannet, "La notion de jurisprudence internationale en question", in *La Juridictionnalisation du Droit International*, id., p. 343, at 361.

108. Burgorgue-Larsen, "Le fait régional dans la juridictionnalisation du droit international", in *La Juridictionnalisation du Droit International*, id., p. 203, 258 et seq.

contact and ends up at a point where courts cannot avoid considering each other's rulings because an international agreement forces them to do so.[109] Within this broader discourse about judicial dialogue, I have discussed the most intense form of cooperation: whether EC courts are bound to follow a ruling of another international tribunal, which is established by the Community and its partners in a treaty. In this respect the position of the EC courts resembles that of a constitutional court or a general national court of last instance.

While the ECJ in the early 1990s suggested that it might be so bound, to date it has never accepted this in an actual case. In fact, the reasons it has given in various decisions to object to the jurisdiction of another tribunal, or to deny the binding force of WTO dispute settlement rulings, suggest that it will accept being bound in very few, if any cases (perhaps the ECtHR will be the exception if and when the Community accedes to the European Human Rights Convention).

Against the background of the broadly salutary trend towards more judicial dialogue this is a troublesome prospect, at least if the non-recognition of binding force means that the EC courts will ignore or trivialize the rulings of international tribunals set up by the international agreements to which the EC is a party. This would be a regrettable signal for the Community to give to its treaty partners, particularly the countries with which it desires to establish closer links through a network of bilateral and regional agreements. In recent agreements the EC has decided to shift to a (quasi-) adjudicative mode of settling disputes with these countries, following the model of the WTO dispute settlement mechanism. For the EC courts to discount the relevance of the rulings produced by these international tribunals on the grounds that they represent diplomacy rather than rule-based adjudication is ill-advised. The courts thereby weaken the Community's credibility as a reliable negotiating partner. Fundamentally, the EC courts thus fail to make a distinction between the rulings themselves, which deserve their respect, and the implementation of these rulings by the EC, where the EC courts may have to allow the other EC institutions some room to manoeuvre.

This essay has discussed two ways to redress this unattractive situation. To begin with, the EC courts could reconsider the reasons they have given in the past to reject the binding force of international jurisprudence. Such reconsideration might then lead them to accept more international rulings as being

109. See Bornkamm, "The German Supreme Court: An actor in the global conversation of High courts", 39 *Texas Int'l Law Journal* (2004), 415 (distinguishing five levels of cooperation, illustrated by examples drawn from intellectual property law).

binding compared to the *status quo* established by the ECJ's case law to date. But there is also another, preferable approach towards reconsideration.

In my view the ECJ's basic assumption, that it could be "bound" to give domestic law effect to the ruling of another international tribunal, ought to be modified. This assumption was really a judge-made invention of the ECJ's own design, which is not required by public international law. In the absence of a specific instruction in a particular international agreement, there are strong reasons for the EC courts not to bind themselves *a priori* to rulings of other international tribunals. The EC legal order is separate from the international legal order, and the EC courts have their own role to play in the implementation of these rulings by and within the Community. This does not mean that the EC courts can ignore these international rulings. On the contrary, in deference to its expertise and mandate to consider the claims of all parties to an international agreement, the EC courts should normally follow the rulings of the international tribunal that was specifically set up to interpret the international agreement to which the EC is a party. However, the EC courts should keep the power to recognize factual differences, and verify whether implementation of the international ruling does not upset fundamental public policies of the EC. There may also be instances where the EC courts will want to give more room to the other EC institutions, which share responsibility with the courts to implement international law, to comply with the international ruling.

These checks and balances should help the domestic reception of international law in the EC legal order. Ultimately, if the application of international law is more widely supported in the European Union, this can reduce anxieties about globalization and reinforce confidence in new structures of global governance.