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A Forbidden Fruit? The European Court of Justice's Case Law before the World Trade Organization

par

Clément Marquet*

Abstract

(French version below)

This paper sets out to evaluate the extent to which the WTO Dispute Settlement System takes the case law of the European Court of Justice into account. The ECJ is in a particular position from the WTO jurisdictions' point of view, because the EU is a fully-fledged member of the organization. This entails that referring to the ECJ as a regular international court would lead to an issue of impartiality. For this reason, we will first establish that the WTO Panels and the Appellate Body regularly look for guidance or confirmation in the case law of other international jurisdictions. We will then compare those elements to the way the ECJ is referred to, both by the parties to WTO disputes, and by the WTO "judges". The comparison will allow us to conclude that the ECJ is mainly seen as a domestic court, and not as a fellow international one, even when its case law is taken into account by the WTO's Panellists and AB Members. We will finally put this vision in the broader context of the interaction of law regimes.

Keywords: WTO, ECJ, ICJ, International courts and tribunals, Dialogue, References, Case law, Domestic court, ICSID, Guidance

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Résumé

Cet article a pour but d'évaluer à quel point le système de règlement des différends de l'OMC prend en compte la jurisprudence de la Cour de Justice de l'Union européenne. Celle-ci est dans une position particulière du point de vue des juridictions de l'OMC, car l'UE est un membre à part entière de l'organisation. Cela implique que se référer à la CJUE en tant que cour internationale normale amènerait à un problème d'impartialité. Pour cette raison, nous allons tout d'abord établir que les Groupes spéciaux et l'Organe d'appel de l'OMC cherchent régulièrement des conseils ou des confirmations dans la jurisprudence des autres juridictions internationales. Nous comparerons ensuite ces éléments à la manière dont il est fait référence à la CJUE, à la fois par les parties aux litiges et par les « juges » de l'OMC. Cette comparaison nous permettra de conclure que la CJUE est principalement vue comme une cour interne, et non comme une cour internationale de même niveau, même lorsque sa jurisprudence est prise en compte par les membres des Groupes spéciaux et de l'Organe d'appel. Enfin, nous replacerons cette vision dans le contexte plus large de l'interaction des régimes juridiques.

Mots-clés : OMC, CJUE, CIJ, Cours et tribunaux internationaux, Dialogue, Références, Jurisprudence, Cour interne, CIRDI, Conseils

A Forbidden Fruit? The European Court of Justice's Case Law before the World Trade Organization*

I. Introduction

*This is the reason why we have two ears and only one mouth,
that we may hear more and speak less¹*

When it rendered its award in the *Genocide* case², the International Court of Justice (ICJ) seemed to vividly criticize the International Criminal Tribunal for the former Yugoslavia (ICTY). Because of a disagreement on the legal test to be applied in the situation before them, the ICJ judges stated that the other tribunal was not, in general, competent on certain questions of general international law³. While sugar-coated in legal language politeness, the ICJ displayed its primacy in that field. Nevertheless, in an attempt of dialogue with the other jurisdiction, the International Court engaged in the ICTY's arguments, explaining why it disagreed.

This dialogue problematic shows itself even more complex in the context of the relation between the World Trade Organization (WTO) and the European Court of Justice. Indeed, upon the creation of the WTO on the 1st of January 1995, the European Communities became a fully-fledged member. By contrast to their previous status in the GATT⁴, the membership was not only through each of the EC's member states, but also through the Communities themselves.

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¹ Attributed to Zeno of Citium, in Diogenes L., *The Lives and Opinions of Eminent Philosophers*, literally translated by Yonge C. D., Bohn's classical Library, London, 1853, p. 268.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, par. 403.

⁴ The World Trade Organization (WTO) replaced the General Agreement on Tariffs and Trade (GATT) on the 1st of January 1995. The WTO Agreement now contains multiple other agreements, including the GATT. The EU itself was not a member of the GATT, only its member-states were. Van den Bossche P. & Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed., Cambridge University Press, Cambridge, 2013, p. 105.

The purpose of this paper is to assess, through an extensive analysis of the WTO Dispute Settlement System (DSS)'s⁵ case law, the impact of the European Court of Justice's jurisprudence⁶ on decisions taken by WTO Panels and the Appellate Body⁷.

To conduct this study, we will first look at how the case law of other international courts and tribunals (such as the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) or even arbitral tribunals) is used. In this context, we will examine the search for guidance, before addressing the search for confirmation in external case law.

We will then turn to the ECJ's case law and the different ways in which it is referred to in WTO rulings. In the first part, we will see how the parties themselves sometimes directly refer to ECJ awards. In the second part, we will examine how the judges themselves mention ECJ case law, while considering it as EU internal law. We will thus look at the few instances where WTO adjudicators seem to take some inspiration from the ECJ, and will finally assess the importance of those cases within the broader question of the judges' dialogue.

II. International jurisdictions in the WTO's case law

This first chapter examines the recourse to the case law of other international courts by the WTO. In general, WTO Panellists and AB Members do so mainly when faced with a lack of answer in their own legal system, and to some extent when they want to confirm their approach of a specific issue. The overall relevance of other international courts and tribunals' jurisprudence for the WTO DSS has been mentioned in two Panel Reports. In the first one, *US – 1916 Act (EC)*, the Panel found that:

While it is clear from the terms of Article 3.2 of the DSU that it falls within the competence of the Panel to "clarify the existing provisions of [the covered agreements] in accordance with customary rules of interpretation of public international law", the DSU does not expressly provide how panels should address domestic legislation. Article 11 of the DSU only specifies that panels "should make [...] an objective assessment of the facts of the case". However, both Article 3.2 of the DSU and the practice of the Appellate Body make it clear that we have, whenever appropriate, to develop our approach on the basis of that of international courts in similar circumstances. We will consequently take into consideration the practice of international tribunals in this respect⁸

This paragraph is comprised of two elements regarding the reference to other international jurisdictions. The first one, already mentioned above, is that external case law is mainly used when the WTO's own legal system either lacks an answer or when its jurisdictions wants to confirm an answer. The second aspect is that as long as it is deemed "appropriate", Panels

⁵ The WTO Dispute Settlement System is a two-instance jurisdiction. The first instance, called "Panel" is very similar to an arbitral tribunal, with three *ad hoc* adjudicators (called "Panellists") named for each dispute. Panel Reports can be appealed before the Appellate Body (AB). The AB is a permanent international tribunal composed of seven judges (called "Appellate Body Members"). See Van den Bossche P. & Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed., Cambridge University Press, Cambridge, 2013, p. 157ff.

⁶ For clarity purposes, the focus of this paper being the dialogue between the European judges and the WTO Dispute Settlement System, we will refer to the "Court of Justice of the European Coal and Steel Communities", the "Court of Justice of the European Communities" and the "Court of Justice of the European Communities" as the "European Court of Justice" (ECJ).

⁷ The case law has been thoroughly researched, however we will focus on the reports exhibiting a specific interest for our topic.

⁸ Panel Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/R, adopted 31 March 2000, par. 6.40.

and the AB are free to refer to other international courts and tribunals. This clearly leaves the question open to the appreciation of the Panel or the AB in each situation.

A. The search for guidance

The first element to be underlined in the WTO jurisdictions' recourse to external case law is that of a search for guidance. Here, the WTO's own legal system is itself unable to provide for a clear answer, leading Panels or the AB to look at how other courts or tribunals dealt with the issue at stake. This type of situation was expressly acknowledged by the Panel in *EC – Approval and Marketing of Biotech Products* in those words:

[I]t may be appropriate for panels to look to the practice of international tribunals for inspiration, particularly in situations where the WTO agreements, GATT/WTO jurisprudence or practice provide no useful guidance⁹

Not only does this Panel Report recognize that external case law is able and legitimate to fill gaps in WTO law, it went a step further by referring, later on, to individual ITLOS judges' opinions¹⁰.

Regarding substance, various aspects¹¹ of law have been looked at in other jurisdictions' case law. The support sought takes many forms, covering a wide spectrum from actual guidance to simple confirmation.

The first aspect that can be mentioned is that of a reference, without emphasis, that nevertheless impacts the outcome of a case. In the now famous *US – Shrimp* case, the Appellate Body was to interpret the meaning of the term “exhaustible natural resources”. Adopting an evolutionary approach, it referred to the case law of the International Court of Justice as follows:

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”¹²

See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are “by definition, evolutionary”, their “interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.” See also *Aegean Sea Continental Shelf Case*, (1978)¹³

The second quote being the footnote attached to “by definition, evolutionary”, the AB avoids stressing too much the reference to the ICJ in the main text of the report. It is also

⁹ Panel Report, *Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006, par. 7.1663.

¹⁰ The Panel seeks confirmation in Judges Treves and Laing' separate opinions in the *Southern Bluefin Tuna* case, with regards to the question of the precautionary principle, see Panel Report, *Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006, par. 7.88, footnote 262.

¹¹ Two broad categories can be identified: questions of general international law (treaty validity, interpretation, sovereignty) and questions of procedure (burden of proof, weight of proof, *stare decisis*, party representation, etc.).

¹² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, par. 130.

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, par. 130, footnote 109.

interesting to see that *US – Shrimp* is now often perceived as one of the main examples of evolutionary treaty interpretation¹⁴, while it was seemingly inspired by the ICJ's case law.

Another case, somewhat more explicit, of guidance by an external jurisdiction can be found in *Korea – Procurement*. Here, the jurisprudence of the PCIJ and the ICJ is used as a proxy to customary international law:

Error in respect of a treaty is a concept that has developed in customary international law through the case law of the Permanent International Court of Justice [sic] and of the International Court of Justice. [...] Since [Article 48 of the VCLT] has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law and we will apply it to the facts of this case¹⁵

One could argue that the rule being customary, it is first affirmed, before being only confirmed by the external case law. However, the Panel itself seems to consider that such customary nature stems from the International Court's practice, making it the root of the answer found. For that reason, we consider it can be categorized as a case of guidance.

Going further, another aspect of the guidance appears in *Korea – Dairy Products (Appellate Body)*. The Appellate Body, faced with a question of treaty interpretation, had recourse to the case law of the ICJ. Since the WTO relies on a "single undertaking"¹⁶, its Members are obliged by all the covered agreements¹⁷ as soon as they ratify the Marrakech Agreement. In this context, the holistic approach used by the ICJ was crucial to ensure a coherent system.

The duty to interpret a treaty as a whole has been clarified by the Permanent Court of International Justice in *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ, Series B, Nos. 2 and 3, p. 23. This approach has been followed by the International Court of Justice in *Ambatielos Case* (1953) ICJ Reports, p. 10; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) ICJ Reports, p. 15; and *Case Concerning Rights of United States Nationals in Morocco* (1952) ICJ Reports, pp. 196-199¹⁸

While the rule of holistic interpretation might stem from the general rules of treaty interpretation, it is the clarification of that principle that was sought in the case law of the ICJ. Thus, the rule might already be present beforehand, but its precise content is where guidance is found in external case law.

The Panel in *US – Zeroing (EC)* adopts a different and interesting approach. In discussing the question of municipal law before international courts and tribunals, it stated the following:

¹⁴ See for instance Torp Helmersen S., *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions* in *European Journal of Legal Studies*, Vol. 6, Issue 1, Spring/Summer 2013, p. 127-148.

¹⁵ Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000, par. 7.123.

¹⁶ Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 21 February 1997, p. 12.

¹⁷ Such as the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, the Agreement on Trade-related Aspects of Intellectual Property, the Agreement on Technical Barriers to Trade, etc. For a more exhaustive explanation of the agreements, see Van den Bossche P. & Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd ed., Cambridge University Press, Cambridge, 2013, p. 40ff.

¹⁸ Considering the importance of that aspect of the interpretation of the WTO Agreements, the AB went on quoting no less than six particularly respected authors, such as Brownlie, Fitzmaurice, McNair, etc. Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 14 December 1999, par. 81, footnote 44.

WTO panels and the Appellate Body have applied the principle, articulated by the Permanent Court of International Justice, that municipal laws are facts before international tribunals¹⁹

This quote could amount to *ex post* recognition of the guidance found in the case law of the PCIJ.

The term “articulate” used in the quote above underlines another way in which the WTO jurisdictions can seek guidance in external case law. The use of this word marks the end of the spectrum mentioned above, before entering the realm of “confirmation”. The Appellate Body itself also had recourse to it in *EC – Tariff Preferences*:

The principle of *jura novit curia* has been articulated by the International Court of Justice as follows: It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court. (International Court of Justice, Merits, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports, p. 14, para. 29 (quoting International Court of Justice, Merits, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, 1974 ICJ Reports, p. 9, para. 17))²⁰

In those two quotes, the use of “articulate” is a particularly weak recognition of guidance. It can refer either to a principle created by an external jurisdiction, or to a principle already existing beforehand only clarified by the International Court – for instance in customary international law or in the general principles of international law. In the quote provided here, it is difficult to conceive the rule *jura novit curia* as created by the ICJ²¹, thus rendering the second option more likely.

From those few examples, we can see that, when their own legal system is unable to provide an answer, the WTO jurisdictions directly apply the principles created or clarified by other courts or tribunals. It is important, however, to mention that this is not the most frequent referral to external case in the jurisprudence of the WTO. Only a few more cases could be seen as guidance²², while the remainder is rather a search for confirmation.

B. The search for confirmation

In this second approach, with a much softer type of inspiration found in external case law, WTO Panels and the AB only confirm an answer already reached by another mean.

¹⁹ Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R, adopted 31 October 2005, par. 7.53.

²⁰ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004, par. 105, footnote 220.

²¹ The principle *jura novit curia* seems to find its origins in the glossators' notes of the *Justinianus Corpus Juris Civilis*, in the 12th century. Geeroms Sophie, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis*, Oxford University Press, Oxford, 2004, p. 32.

²² The following cases could also be seen as involving a search for guidance, keeping in mind the disclaimer that this is a scale assessment from guidance to confirmation, rather than a binary one: Panel Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/R, adopted 31 March 2000, Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 31 May 1999.

The starting point is often found in the WTO's own case law, be it from a Panel or an AB Report. For instance, in order to answer the question of the probative value of official statements in *Argentina – Import Measures*, the Panel expressed the following:

In the Panel's view, caution is warranted when assessing the probative value of any statement, including those made by public officials. Having said that, previous panels have considered that public statements of government officials, even when reported in the press, may serve as evidence to assess the facts in dispute²³

See, for example, Panel Reports, *Australia – Automotive Leather II*, fn 210 to para. 9.65; *EC – Approval and Marketing of Biotech Products*, para. 7.532; *Mexico – Taxes on Soft Drinks*, paras. 8.76-8.77; *Turkey – Rice*, paras. 7.78-7.79 and fn 367. Other international courts, such as the ICJ, for example, also accord value to public statements by government officials²⁴

The main reasoning is thus rooted in the WTO's own case law, and the external case law is merely supplementary.

It is worth noting that the WTO jurisdictions also take ownership of other courts and tribunals' case law. The notion of evolutionary interpretation, mentioned above²⁵, was first championed by the ICJ. However, in the later report *China – Publications and Audiovisual Products*, the Appellate Body returned to this notion and found only confirmation in external case law, quoting a recent²⁶ award from the International Court:

We consider such reading of the terms in China's GATS Schedule to be consistent with the approach taken in *US – Shrimp*, where the Appellate Body interpreted the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. (Appellate Body Report, *US – Shrimp*, paras. 129 and 130) We observe that the International Court of Justice, in *Costa Rica v. Nicaragua*, found that the term "comercio" ("commerce"), contained in an 1858 "Treaty of Limits" between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and trade in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods. (International Court of Justice, Judgment, *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009)²⁷

The Appellate Body now sees evolutionary interpretation as an integral part of its own legal system, and only gives it a firmer ground by showing its current use in the ICJ's case law.

However, the element to be confirmed does not necessarily come from the WTO's own law. In *Canada – Aircraft*, the AB first simply relied on common sense, and further backed its view by referring to the ICJ:

There is no logical reason why the Members of the WTO would, in conceiving and concluding the SCM Agreement, have granted panels the authority to draw inferences in cases involving actionable subsidies that may be illegal if they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs a fortiori also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals²⁸

See, for example, *Case Concerning the Administration of the Prince von Pless* (Preliminary Objection) (1933) P.C.I.J. Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case* (Preliminary Objection) (1952) I.C.J. Rep., p. 116;

²³ Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R, adopted 22 August 2014, par. 6.78.

²⁴ Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R, adopted 22 August 2014, par. 6.78, footnote 183.

²⁵ See *supra* p. 7.

²⁶ Rendered six months before the AB Report.

²⁷ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 21 December 2009, par. 396 footnote 705.

²⁸ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 2 August 1999, par. 202.

Separate Opinion of Judge Sir H. Lauterpacht in *Case of Certain Norwegian Loans* (1957) I.C.J. Rep., p. 43; and Dissenting Opinion of Judge Sir H. Lauterpacht in the *Interhandel Case* (Preliminary Objections) (1959) I.C.J. Rep., p. 104. [...] See also the award of the Iran-United States Claims Tribunal in *Marks & Umman v. Iran*, 8 Iran-United States C.T.R., pp. 296-97 (1985) (Award No. 53-458-3)²⁹

Beyond the question of guidance or confirmation, it is here once again instructive to note that individual opinions – including a dissenting one – are quoted by the AB to support their approach.

The quote provided above is not the only time the Appellate Body had recourse to this “common sense” argument, before confirming it with case law from other jurisdictions³⁰. In *US – Wool Shirts and Blouses* the following was stated:

In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption³¹

In this report, the use of external case law is not limited to that of other international jurisdictions. In a both qualitative and quantitative approach, the AB firstly refers to other international tribunals in general – only naming the ICJ – before secondly examining the two main domestic law systems.

Finally, a last type of confirmation can be found in the 1997 Panel Report *EC – Bananas III*. When asked whether a legal interest from the complaining party was at stake, it concluded that the complaining parties had a right to pursue in this case, and further confirmed its assertion by quoting the PCIJ and the ICJ in those terms:

Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. Moreover, we note that this result is consistent with decisions of international tribunals³²

The International Court of Justice has not defined the concept of legal interest in specific terms. However, a number of its cases would support finding a legal interest in this case³³

The Panel seems to be cementing its argumentation, in that it first decided that it “fail[ed] to see that there is, or should be, a legal interest test under the DSU”³⁴, before arguing, as a subsidiary argument in the footnote, that in any case, a legal interest would be found. The

²⁹ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 2 August 1999, par. 202, footnote 128.

³⁰ Probably due to its authority as the highest court of the WTO and its permanent membership, the recourse to such argument is much more frequent in the case law of the AB than it that of the Panels.

³¹ Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997, p. 14.

³² Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 22 May 1997, par. 7.50.

³³ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 22 May 1997, par. 7.50, footnote 361.

³⁴ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 22 May 1997, par. 7.50.

external case law thus serves more as a subsidiary argument, confirming the main answer found – the right to pursue.

C. Conclusion

This chapter aimed at demonstrating that the World Trade Organization's Dispute Settlement System does not exist in a vacuum. Reference to external case, in particular that of other international courts and tribunals is no *rara avis*, and it takes place on a wide variety of legal questions.

As presented above, the jurisprudence from other international courts or tribunals is used in two different ways: as a source of guidance and as a source of inspiration. In the first situation, the answer sought is not present by itself in the WTO's own law, so the Panels and the AB are compelled to look for clues outside the system. In the second scenario, however, the WTO jurisdictions seem to reach an answer by themselves, but they nevertheless cement their approach by invoking the authority of other judges.

A clear trend also emerges from the cases mentioned here: the ICJ is the main source of external case law. This first shows through the sheer amount of cases where the World Court's case law is used, by comparison to other international jurisdiction³⁵. However, this prevalence is also slightly subtler, being only visible in the way those cases are mentioned by Panels or the AB. The ICJ is actually quoted most of the time, while the other courts and tribunals are often used without much distinction. The actual wording of their awards is rarely present, being summed up either by another case of the ICJ, or by a book exploring a wide array of tribunals. Even if no formal hierarchy exists between international tribunals, the ICJ holds a moral authority regarding general international law, being sometimes perceived as the guardian of international law³⁶. For that reason, it is logical that its case law is regarded highly by other international jurisdictions.

To conclude this chapter, one last aspect deserves to be underlined. The idea of a dialogue of the judges being the root of this research, it is particularly interesting to note that the WTO jurisdictions do not limit themselves to quotes from external awards. Indeed, on

³⁵ The ICJ or the PCIJ are mentioned in more than 60% of the cases where references to an external jurisdiction are present. By contrast, references to other international tribunals amount in total to less than 40%.

³⁶ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 114, Separate Opinion of Judge Lachs, p. 28; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, ICJ Reports 2002, p. 3, Separate Opinion of Judge *ad hoc* Bula-Bula, par. 20; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, par. 403.

multiple occasions, both Panels and the AB made explicit references to individual or separate opinions³⁷, going as far as quoting dissenting ones³⁸. The dialogue takes place not only in an institutionalized way, from jurisdiction to jurisdiction, but also between the WTO adjudicators and other judges expressing their personal vision of international law.

III. The European Court of Justice in the WTO's case law

After establishing that the WTO jurisdictions do refer to “classical” international courts and tribunals, we will now turn to the perception of the European Court of Justice's case law, which will allow us to compare the two situations.

In 2008, in *US – Continued Suspension*, the Panel made a revealing remark regarding this question. Called upon to decide on the meaning of the word “deliberation”, it justified its view by invoking the “statutes of other international judicial bodies”³⁹. While this is not an occurrence of “dialogue of the judges” *per se*, the Panel gave a list of examples in a footnote⁴⁰. The following jurisdictions were considered international judicial bodies: the International Court of Justice, the International Tribunals for the Law of the Sea and the International Criminal Tribunal for Former Yugoslavia⁴¹. While it is obviously not intended to be an exhaustive list, the absence of the ECJ can already be noted.

Two years later, a Panel clearly put the ECJ in a category of its own. In the context of treaty interpretation, it refused to take inspiration from it, arguing as follows:

The Panel notes that the European Communities has relied on the judgment of the European Court of Justice in *Kamino* to support its contention that its measures are WTO consistent. We recall that the facts of the case in *Kamino* are not the same as those before us and that while the case dealt with the same relevant HS Chapter Note it did not deal with the same HS subheading, the same measures, or the same products. We also note that the European Court of Justice is the domestic court of 27 out of 153 Members of the WTO and that in the *Kamino* decision the European Court of Justice was applying the rules of European Community law to gauge the consistency of the EC regulation at issue in that case with that legal regime rather than applying the general rules of interpretation of public international law to determine the consistency of a measure with WTO obligations⁴²

The vision seems to be that of a *sui generis* legal system, fairly remote from general international law.

An overall impression arises from those two elements: the WTO jurisdictions do not seem particularly willing to rely on the ECJ's case law as an inspiration. However, references to

³⁷ See for instance *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 31 May 1999, par. 9.9; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 2 August 1999, par. 202, footnote 128; Panel Report, *Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006, par. 7.88, footnote 262.

³⁸ See Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 28 August 2000, AB, par. 54, footnote 30; Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000, par. 7.123, footnote 764.

³⁹ Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, adopted 31 March 2008, par. 7.49.

⁴⁰ In spite of the ICTY being a particular kind of international tribunal, both in its inception and the fact it only has jurisdiction over individuals.

⁴¹ Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, adopted 31 March 2008, par. 7.49, footnote 350.

⁴² Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 16 August 2010, par. 7.735, footnote 974.

the highest court of the EU do exists and deserve attention. In this chapter, we will examine two aspects: first, the ECJ's case law in the parties' arguments and second, the ECJ's case in WTO Panel or AB Reports.

A. ECJ case law in the parties' pleadings before the WTO jurisdictions

The first occurrence of ECJ jurisprudence before Panels or the Appellate Body comes from the parties themselves. While this is not a question of dialogue of the judges *stricto sensu*, it still demonstrates how this type of case law is perceived by the parties to WTO disputes.

As a first situation worth mentioning, in 2008 the European Union filed a submission before a Panel in the case *US – Continued Zeroing*, where they relied on external case law to claim the absence of *stare decisis*⁴³ in the arbitrators' reports. To back up this argument, the EU gave a particularly comprehensive overview of other courts and tribunals' jurisprudence and, in doing that, incidentally revealed how it perceived its own jurisdiction:

The European Court of Justice (ECJ) which is a hybrid court – part constitutional court, part general national court of last instance⁴⁴

While the constitutional part could still be conceived as a supranational constitutional court, the EU seems to disqualify its own court from being seen as regular international jurisdiction in the WTO's eyes.

A couple of years earlier, in an argument closely resembling that of *US – Continued Zeroing*, the EU substantiated a claim by quoting other international courts and tribunals. However, the absence of the ECJ from the EU's own argument stands out, especially since the European Court of Human Rights (ECtHR) is on the list:

As far as the international tribunals are concerned, the European Communities notes that *stare decisis* in principle does not apply in such tribunals and there is no legal norm that requires them to follow previous decisions by higher courts. The European Communities points out, however, that in practice most international tribunals do give certain weight to precedents when dealing with similar legal issues. In this regard, the European Communities mentions the practice of the European Court of Human Rights, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the International Centre for Settlement of Investment Disputes⁴⁵

These two quotes show that while the EU does not necessarily rule out the status of “international jurisdiction” for its own supreme court, it does not consider it a fully-fledged one either⁴⁶.

Also in the context of parties' pleadings, the second situation is that of a reference to the ECJ by opposing parties, and not the EU itself. Those situations shed a light on the perception WTO members have from the highest court of the EU, and what they expect from

⁴³ Also known as the doctrine of precedent.

⁴⁴ Annex A-1, *First Written Submission of the European Communities*, in Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 1 October 2008, par. 72.

⁴⁵ Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 December 2007, par. 7.20.

⁴⁶ For a short attempt at an explanation of the Commission's position, see *infra* p. 30.

Panellists or AB Members in their reports. As a first example, we can look at *Korea – Dairy (Panel)*, where the European Communities complained about a safeguard measure. In its answer, South Korea pleaded that it had a wide discretionary power, using the ECJ's example.

It also claimed that most domestic jurisdictions “provide a significant degree of latitude to investigating authorities to make injury determinations after considering complicated facts” and even quoted a State aid case of the European Court of Justice in support⁴⁷

It is instructive to note that the ECJ is referred to as a “domestic jurisdiction”, not an international one. This view is coherent with the usual perception of the EU's opposing parties in various cases. They do not consider the ECJ's case law particularly highly in the hierarchy of the courts:

The ECJ is the highest court of EC law, and only its interpretation of the EC GI Regulation would be binding on the institutions and member States of the EC⁴⁸

Nothing in the ECJ decision in *Kip* changes this analysis. A decision under EC domestic law, *Kip* is of very limited relevance anyway. That limited relevance is to confirm that current EC practice is deeply flawed⁴⁹

[I]t is puzzling how the EC can base its entire defence on a ruling from its own highest court⁵⁰

The reason for those stances is that the other WTO members have no incentive to strengthen the moral authority of the ECJ, as it would undermine their own overall position.

In 1999, another Panel Report summed up Chile's arguments in *Chile – Alcoholic Beverages* in those terms:

Chile further notes that similar views have been expressed before the European Court of Justice (“ECJ”). The ECJ in Case 170/78, *Commission v United Kingdom*, 1983 ECR 2265 noted that:

“[T]he Commission has recommended that spirits should be charged at a higher rate of duty according to alcoholic strength than liqueur wines. It appears, therefore, to have accepted that there are social reasons for imposing a relatively higher rate of taxation on beverages with a higher alcoholic content.”⁵¹

This case alongside with *Korea – Dairy (Panel)* quoted above raises an interesting point regarding the European Court of Justice. The ECJ is sometimes used as a weak point in the EU's arguments, as it might disagree with the views the Union expresses before the WTO jurisdictions. The opposing party does not need to refer to it as an international court or tribunal, but rather points out the inconsistency in the EU's position.

⁴⁷ Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 21 June 1999, par. 4.78.

⁴⁸ Annex A-4, *Replies by the United States to Questions posed by the Panel and the European Communities to the Complaining Parties following the First Substantive Meeting (8 July 2004)*, in Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R/Add.1, adopted 15 March 2005, p. A-74, par. 8.

⁴⁹ Annex B-1, *Executive Summary of the second written submission by Japan*, in Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 16 August 2010, p. B-20, par. 29.

⁵⁰ Annex C-4, *Executive Summary of the second written submission by Chinese Taipei*, in Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 16 August 2010, p. C-28, par. 67.

⁵¹ Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 15 June 1999, par. 4.292.

From these various elements, a picture starts to take shape, in which the ECJ is, at the very least, not a fully-fledged international court in the EU's eyes, and but a domestic court for other WTO members.

B. ECJ case law in Panel and Appellate Body Reports

Coming back to the core of the dialogue of the judges, we now turn to the Panels' and the AB's views of the ECJ. The case law of the latter, mirroring the parties' views, is usually only seen as an expression of internal European law, rather than the award of an international court. This was clearly stated in *EC – Chicken Cuts (Brazil)*. In this Report, the Panel examined the relevance of a judgement from the ECJ in order to interpret the EU's obligations:

The first question for determination by the Panel is whether the ECJ judgements, *Dinter* and *Gausepohl*, qualify as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the Vienna Convention. The Panel considers that there are two elements associated with this question as it relates to the *Dinter* and *Gausepohl* judgements. The first is whether, as a theoretical matter, court judgements can be considered under Article 32. The second is whether the timing of issuance of the ECJ judgements at issue, and more particularly the *Dinter* judgement, necessarily disqualifies it from consideration under Article 32⁵²

In order to answer those questions, the Panel stated the following:

This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the Vienna Convention. Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32 of the Vienna Convention⁵³

The link is here clearly established; the case law from the ECJ is but another expression of the internal law of a member of the WTO.

Nevertheless, this conception of the ECJ's jurisprudence should not preclude us from looking at whether the European case law is actually taken into account, despite its non-international character.

In 1999, the Panel in *US – Section 301 Trade Act* was confronted with a question of direct effect. The United States argued that, since it was internationally obliged by the WTO Agreements, a violation of those could necessarily not be found in its national law. The Panel clearly refused this interpretation, using the ECJ's case law as a counter-argument:

We reject the notion that this danger is removed by virtue of the international obligation alone. Even in the EC where EC norms may produce direct effect and thus give far greater assurance, an EC Member State is not absolved by this fact from its duty to bring national legislation into compliance with its transnational obligations under, say, an EC directive (*Commission v. Belgium*, Case 102/79, [1980] European Court Reports 1473 at para. 12 of the judgment)⁵⁴

The Panel further referred to European case law, while trying at the same time to downplay its importance.

Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for

⁵² Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, adopted 30 May 2005, par. 7.390.

⁵³ Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, adopted 30 May 2005, par. 7.391.

⁵⁴ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 22 December 1999, par. 7.61, footnote 660.

individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect⁵⁵

We make this statement as a matter of fact, without implying any judgment on the issue. We note that whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute⁵⁶

The Panellists seem to strive to make use of the vast European case law regarding the direct effect, while still maintaining its status of domestic law. The fact that the European Union was the complaining party in this dispute makes it particularly crucial to avoid seeming biased in favour of the internal law of one party or the other. The above-mentioned footnote thus ends on this *caveat* from the Panel:

The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudice any decisions by national courts on this issue⁵⁷

With this last sentence, the Panel shows particular caution, explicitly stating that the ECJ's case law is simply an example, and nothing but that.

This extreme circumspection could already be seen in another Panel Report, one year earlier. In *Korea – Alcoholic Beverages*, the Panel had to determine whether the term “market” should be given the same definition under the National Treatment clause as under competition law. To help with that decision, the Panel looked at how the distinction had been made in the ECJ's case law. Here, the Panellists were even more explicit in their *caveat* towards using the European jurisprudence as such:

We are mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding, we observe that there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the analysis of non-discrimination provisions and competition law⁵⁸

In finding the relationship of the provisions to each other relevant, we do not intend to imply that we have adopted the market definitions defined in these or other ECJ cases for purposes of this decision⁵⁹

This case is probably the one where the Panel is in denial the most. After explicitly looking at how the ECJ deals with the issue at stake, based on the similarities between Article 95 of the EC Treaty (now Article 114 TFEU) and Article III of the GATT, the Panellists clearly take inspiration from it. Nevertheless, the footnote is carefully added, in an attempt to distinguish the ECJ's reasoning from their own.

A question of interpretation of the term “market” arose once again before the Appellate Body in a much more recent case. In 2011, in *EC and certain member States — Large Civil*

⁵⁵ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 22 December 1999, par. 7.72.

⁵⁶ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 22 December 1999, par. 7.72, footnote 661.

⁵⁷ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 22 December 1999, par. 7.72, footnote 661.

⁵⁸ Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 September 1998, par. 10.81.

⁵⁹ Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 September 1998, par. 10.81, footnote 398.

Aircraft, the highest judicial body of the WTO used the comparative approach to answer the question, quoting not only the ECJ but also the US Supreme Court⁶⁰:

Another definition of the term “market” is “{a} collection of homogenous transactions. A market is created whenever potential sellers of a product are brought into contact with potential buyers and a means of exchange.” (Dictionary of Economics, 2nd edn, G. Bannock, R.E. Baxter, E. Davis (eds) (The Economist Books, 1999), p. 262) See also **European Court of Justice, Judgment, Case 27/76, United Brands Company and United Brands Continental BV v. Commission** [1978] ECR 207; and **US Supreme Court, Brown Shoe Co., Inc. v. United States**, 370 US 294 (1962)⁶¹

This quote also further shows the status enjoyed by the ECJ's case law before the WTO jurisdictions. It is mainly perceived as domestic law, being compared to another member's highest national instance.

However, there is one case where no such disclaimer regarding the status of the ECJ's case law is present. In the last Panel Report we will examine, *US – Gambling*, the arbitrators had to decide whether the limitation of gambling activities could be seen as protecting public morality. In order to reach a decision, they extensively looked at the jurisprudence of the ECJ with this justification:

Other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations, in derogation of general treaty or legislative rules⁶²

The footnote⁶³ attached to this paragraph then proceeds to give a lengthy overview of how the ECJ viewed such limitations. The Panel demonstrates a clear understanding of the reasoning behind the European Court's decisions:

[T]he court considered that the particular features of lotteries justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of profits they yield and to decide whether to restrict or prohibit them⁶⁴

This case is a very particular one with regards to this paper's focus, in that the EU was neither respondent nor complainant, but only a third party. The reference to the ECJ is based on an analysis that does not compare the case law of the main parties of the dispute, thus giving a better anchoring to the reasoning. The legal argument is not only rooted in the strict relation between the US and Antigua and Barbuda, but also in the wider context of an international system involving a multiplicity of actors. In this report, the European jurisprudence seems to be looked at for its own worth, and the lack of any *caveat* such as those found in most other cases reinforces that impression. This may be the only case slightly blurring an otherwise clear picture of the ECJ as nothing but a domestic court.

⁶⁰ Considering the US was complainant and the EU along with some of its member States were respondent in this case, it makes sense the AB limited the comparison to those two courts.

⁶¹ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 18 May 2011, par. 1120, footnote 2467, emphasis ours.

⁶² Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 10 November 2004, par. 6.473.

⁶³ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 10 November 2004, par. 6.473, footnote 914.

⁶⁴ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 10 November 2004, par. 6.473, footnote 914.

C. The WTO's perception of the ECJ: a broader perspective

The question of the perception by the WTO jurisdictions of the European Court of Justice's case law deserves to be put in a broader context. It is representative of issues arising from the interplay of distinct supranational legal systems. While, in the context of WTO law, the issue might not be as problematic as in other fields, it is nevertheless symptomatic of a broader issue.

From the WTO's point of view, the question was raised in a recent AB Report, *Peru – Agricultural Products*⁶⁵. Here, Peru and Guatemala were involved in a free trade agreement which could violate provisions of the WTO covered agreements. While the case allowed the AB to avoid answering directly on the primacy (or lack thereof) of the WTO's legal system, it put the question in the spotlight.

The European Union, however, took a much more direct approach in its constitutive treaties. For the purpose of intra-European disputes, Article 344 of the TFEU⁶⁶ enacts the primacy of the ECJ over any other international dispute settlement system. This obviously did not go uncontested, and the field of investment arbitration reminded the Union that such primacy would be hard to enforce outside their own legal system.

The status of the ECJ as an international jurisdiction depends, to some extent, on the perception of EU law by external courts or tribunals. In the recent *Micula* case, the ICSID tribunal clearly decided that European law was not applicable as such in the context of a BIT arbitration:

The relevant question then becomes whether EU law plays a role in the interpretation of the BIT⁶⁷

The Tribunal notes in this regard that the Parties appear to agree that EU law forms part of the “factual matrix” of the case⁶⁸

The European Commission later forbade Romania to comply with the ruling, going as far as starting an infringement procedure, based on the primacy of EU law⁶⁹, making it an open – and currently unresolved – conflict.

In another award, rendered one year earlier, a decision similar to *Micula* was reached. After affirming the non-exclusiveness of the national application of EU law and its international character⁷⁰, the tribunal stated the following:

⁶⁵ Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 20 July 2015.

⁶⁶ Which reads as follows: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

⁶⁷ *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case N° ARB/05/20, Award, 11 December 2013, par. 320.

⁶⁸ *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case N° ARB/05/20, Award, 11 December 2013, par. 328.

⁶⁹ OJ C 393, 7.11.2014, p. 27-40.

⁷⁰ *Electrabel S.A v. The Republic of Hungary*, ICSID Case N° ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, par. 4.124.

In the Tribunal's view, when it is not applied as international rules under the [Energy Charter], EU law must in any event be considered as part of the Respondent's national legal order, i.e. to be treated as a "fact" before this international tribunal⁷¹

There seems to be a certain consistency between the WTO and the investment tribunals' approach. Indeed, as previously mentioned, the domestic law is mainly viewed as a fact to a case before the WTO jurisdictions⁷².

D. Conclusion

From the two aspects identified above, a clear picture appears. The parties themselves are open to using the ECJ's case law as a further justification of their claims. This happens mainly, when facing the EU in a dispute, be it as complainant or respondent, as a way to point out the inconsistencies between the opposing party's arguments and its legal system.

This perception reflects something that can also be found in the Panels' and the AB's use of the European jurisprudence. The case law is seen first and foremost as another expression of internal EU law, and not so much as the decisions of an international jurisdiction. The usual approach is thus to use the ECJ as an example of the action of a court. This allows the Panels or the AB to look for confirmation, without explicitly adopting the same reasoning. The fact remains that, except maybe in *US – Gambling*, the WTO DSS always explains that it is not adopting the ECJ's interpretation as such, but only using it as an example among many others. Clear guidance does not seem to exist in the use of the ECJ's case law by the WTO.

The approach underlined above closely resembles that adopted by international investment tribunals. The ECJ is seemingly not considered "international enough" for its case law to be taken into account as more than a mere fact. European jurisprudence informs the tribunal, but does not really guide its actions.

IV. Conclusion

The purpose of our study was to analyse how the WTO "judges" take the case law of the ECJ into account. In order to do that, we first looked at references to "classical" international tribunals, before turning to the various ways the ECJ was used in Panel of AB proceedings. In the first chapter, two aspects have been explored: the search for guidance and the search for confirmation.

⁷¹ *Electrabel SA v. The Republic of Hungary*, ICSID Case N° ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, par. 4.127.

⁷² Even though the interpretation of domestic law is sometimes seen as a question of law, so as to allow the Appellate Body to review it, under art 17.6 of the DSU (cf. Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 19 December 1997, par. 65-68).

From this comparison, it is clear that the EU's highest court is not seen in the same way as the ECtHR for instance⁷³. This means that the lack of authority of the ECJ's case law does not stem exclusively from its regional character, but rather comes from its role as the highest internal court of a WTO member. It is also particularly interesting to note that the ratio between references by the Appellate Body and those by Panels seems to shift from one chapter to another. While in the first one, the AB does not hesitate to look for answers or confirmation in external case law, Panels do it more often in the case of the ECJ. It could show that the highest instance of the WTO is not as comfortable with references to European case law as its lower counterpart.

This perception of the ECJ is, as seen above, not limited to external actors, but also extends to the Commission itself⁷⁴. This is a somewhat strange position, which could reflect the existing tension between the international foundations of the EU and its integrative objectives. Defending the *sui generis* character of the Union would reinforce its status as a “self-contained regime”⁷⁵. This seemingly inflexible stance from the Commission nevertheless weakens the ECJ's position, as well as its case law, on the international level, as seen in the context of investment arbitration.

Turning back to the core of the subject, the very idea of dialogue implies the notion of exchange. In the relation between the WTO jurisdictions and the European Court of Justice, such exchange does not really seem to be present. While the ECJ might make references to WTO Panel or AB Reports⁷⁶, the opposite does not happen, or rather not in the same way. Panellists or AB Members seem to only refer to the ECJ as an example of the action of a lower court, and not of a fellow international court. The dialogue between those jurisdictions is thus quasi non-existent.

As a final note, the relation between the ECJ and the WTO DSS underlines the hybrid situation of the European Union. The double membership of both the Union and its member-states to the trade organization exacerbates the question of federalism and sovereignty particularly strikingly. The ECJ remains, technically speaking, an international jurisdiction, but is at the same time the highest court of an entity whose boundary with a federal state might be blurry at times. In this context, the refusal of Panels and the AB to draw direct inspiration from ECJ's jurisprudence is justified by a need for visible impartiality, as “justice should not only be done, but should manifestly and undoubtedly be seen to be done”⁷⁷.

* * *

⁷³ Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R, adopted 26 March 2014, par. 7.61, footnote 127.

⁷⁴ See *supra* p.19.

⁷⁵ Phelan W., *What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime* in *International Studies Review*, Vol. 14 (2012), p. 371.

⁷⁶ Based on the fact that WTO law is an integral part of the EU's legal system, through art. 216 (2) of the TFEU.

⁷⁷ *R v Sussex Justices; Ex parte McCarthy*, KB 1 256 – 1924, 259.

List of abbreviations

AB	Appellate Body
BIT	Bilateral Investment Treaty
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EC	European Communities
ECtHR	European Court of Human Rights
EU	European Union
ECJ	European Court of Justice
FAO	Food and Agriculture Organization
GATT	General Agreement on tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ITLOS	International Tribunal for the Law of the Sea
OJ	Official Journal of the European Union
PCIJ	Permanent Court of International Justice
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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