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JUDICIAL ACTIVISM OF THE COURT OF JUSTICE OF THE EU IN THE PLURALIST ARCHITECTURE OF GLOBAL LAW

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Contents

| | |
|--|-----------|
| Acknowledgments | v |
| I. Introduction | 1 |
| 1. Research interest and project relevance | 3 |
| 2. Research questions | 8 |
| 3. Clarifications of key concepts and scope | 10 |
| 3.1. EU – European – International legal orders | 11 |
| 3.2. The particular status of the ECHR..... | 12 |
| 3.3. EU external relations – interactions between legal orders..... | 14 |
| 3.4. EU- European – national courts..... | 15 |
| 3.5. Global pluralism – global constitutionalism..... | 16 |
| 3.6. Pro-integrationist stance | 16 |
| 4. Methodological considerations: usefulness of the concept of judicial activism | 17 |
| 4.1. Relevance of the concept of judicial activism | 18 |
| 4.2. Response to the critique of indeterminacy..... | 21 |
| 5. Structure of the thesis | 24 |
| 5.1. Concept of judicial activism..... | 26 |
| 5.2. Institutional and normative framework of judicial activism of the CJEU..... | 27 |
| 5.3. Symptoms of judicial activism of the CJEU in the case-law concerning international law | 28 |
| II. Concept of judicial activism | 31 |
| 1. Historical roots of the concept | 32 |
| 1.1. In the context of ‘court-packing’ | 33 |
| 1.2. Legal Positivism | 35 |
| 1.3. Legal Realism..... | 40 |
| 1.3.1. Legal Reasoning as Magic and its societal functions | 42 |
| 1.3.2. Indeterminacy of law and unpredictability of judicial decision-making | 43 |
| 1.3.3. Conclusions on Legal Realism | 45 |
| 1.4. Critical Legal Studies | 46 |
| 1.4.1. Frankfurter School | 47 |
| 1.4.2. Critical Legal Studies in international law | 49 |
| 1.4.3. Conclusions on Critical Legal Studies | 53 |
| 2. Role of the judge | 54 |
| 2.1. Fitting the judicial role into the separation of powers doctrine | 54 |
| 2.2. Liberal understanding of the role of the judge as non-interventionist..... | 59 |
| 2.3. Adjudication in international law | 63 |
| 2.4. Theory of constitutional adjudication..... | 68 |
| 3. Definitions of judicial activism | 72 |
| 3.1. Defiance of the separation of powers doctrine | 73 |
| 3.2. Disregard of canons of judicial behavior..... | 79 |
| 3.3. Encroachment upon Member States’ powers | 84 |
| 3.4. Relative definitions of judicial activism..... | 86 |
| 4. Limited applicability of the definitions and necessity of an order-specific definition | 89 |
| 4.1. Difficulties of transposing the concept from different legal culture..... | 90 |
| 4.2. Need of contextualization..... | 93 |
| 4.3. Conclusions on the concept of judicial activism | 94 |
| III. Institutional and normative framework of judicial activism of the CJEU | 96 |

| | |
|---|------------|
| 1. The institutional set-up framing the judicial activism of the CJEU | 99 |
| 1.1. Object and Method of Interpretation by the CJEU..... | 101 |
| 1.1.1. Vagueness of the Treaties and the Gap-filling Function..... | 101 |
| 1.1.2. Usage of Teleological Interpretation and Judicial Activism..... | 105 |
| 1.1.3. Conclusions on Vagueness and Teleological Interpretation..... | 109 |
| 1.2. CJEU in the institutional landscape of the EU..... | 111 |
| 1.2.1. Commitment to the common project..... | 111 |
| 1.2.2. Little possibilities of legislative overruling..... | 117 |
| 1.2.3. Role of the European Commission before the Court..... | 120 |
| 1.2.4. Conclusions on the institutional set-up: systemic dimension of judicial activism..... | 124 |
| 1.3. Procedural arrangements and judicial activism..... | 125 |
| 1.3.1. Lack of dissenting opinions..... | 126 |
| 1.3.2. Appointment of the judges..... | 129 |
| 1.3.3. Composition of the Grand Chamber..... | 131 |
| 1.3.4. Linguistic aspects..... | 134 |
| 1.3.5. Advocate Generals..... | 136 |
| 1.3.6. Considerations of coherency in procedural reforms..... | 139 |
| 1.3.7. Conclusions: institutional dimension of judicial activism..... | 143 |
| 1.4. Judicial review in external relations..... | 145 |
| 2. Judicial activism of the CJEU and the relations among legal orders | 147 |
| 2.1. Relevance of the monism-dualism debate..... | 149 |
| 2.1.1. Monist and dualist claims..... | 150 |
| 2.1.2. The relevance of the monism-dualism debate in the current architecture of international legal order..... | 152 |
| 2.2. Pluralism in the European Context..... | 154 |
| 2.2.1. Appeals of constitutionalism in the European context..... | 157 |
| 2.2.1.1. Origins of European constitutionalism..... | 157 |
| 2.2.1.2. Multilevel constitutionalism..... | 160 |
| 2.2.1.3. Predominance of the limitational model..... | 162 |
| 2.2.1.4. Depolitization through constitutionalization..... | 162 |
| 2.2.1.5. Legitimacy of constitutional review..... | 164 |
| 2.2.2. Pluralist reality in the European context..... | 164 |
| 2.2.2.1. Main features of European pluralism..... | 166 |
| 2.2.2.2. Disputed ultimate authority in the domain of human rights..... | 172 |
| 2.2.2.3. National constitutional identity..... | 175 |
| 2.2.2.3.1. Jurisprudence of the CJEU concerning art.4 (2) TEU..... | 177 |
| 2.2.2.3.2. Perspective of national constitutional courts on art. 4 (2) TEU..... | 182 |
| 2.2.2.3.3. Trybunał Konstytucyjny reviewing an EU regulation..... | 184 |
| 2.2.2.3.4. Ústavní soud on the ultra vires jurisprudence of the ECJ..... | 188 |
| 2.2.2.3.5. Conclusions on national constitutional identity..... | 192 |
| 2.3. Relationship between legal orders in the international arena..... | 195 |
| 2.3.1. Postnational Global Law..... | 196 |
| 2.3.2. Global Constitutionalism..... | 199 |
| 2.3.3. Pluralism in the global context..... | 205 |
| 2.4. Conclusions on the pluralist architecture of relationships between legal orders..... | 207 |
| 3. Conclusions on the framework of judicial activism of the CJEU | 209 |
| IV. Symptoms of judicial activism of the CJEU in the case-law concerning international law | 214 |
| 1. Methodology of case analysis | 217 |
| 2. Activism for pluralism: adoption of an internal perspective of EU legal order | 222 |
| 2.1. Emphasis on the autonomy..... | 223 |

| | |
|--|--------------|
| 2.1.1. The <i>Kadi</i> saga..... | 226 |
| 2.1.2. The <i>Kadi II</i> (2013) judgment: full review and annulment of the Regulation | 230 |
| 2.1.2.1. Absence of immunity from jurisdiction of the contested regulation | 232 |
| 2.1.2.2. Question about the adequate standard of judicial review | 234 |
| 2.1.2.2.1. AG Bot in favour of limiting judicial review..... | 234 |
| 2.1.2.2.2. The Court upholds the full review | 239 |
| 2.1.3. Conclusions: pluralist symptoms in the <i>Kadi</i> judgments | 242 |
| 2.2. Exclusiveness of the jurisdiction | 247 |
| 2.2.1. The <i>MOX Plant</i> (2006) judgment: infringement by UNCLOS arbitration..... | 248 |
| 2.2.2. Opinion 1/09: incompatibility of a parallel patent regime | 252 |
| 2.3. Counter-examples: deference to international law | 259 |
| 2.3.1. Integrating customary international law into the EU legal order..... | 259 |
| 2.3.2. <i>Hungary v Slovakia</i> (2012): international diplomatic law as <i>lex specialis</i> | 262 |
| 2.4. Conclusions for “activism for pluralism” | 267 |
| 3. Not all values: tergiversation of general principles governing the relation with international law | 267 |
| 3.1. <i>BIT</i> (2008) judgments: Importance of autonomy and exclusiveness in other domains.. | 269 |
| 3.1.1. Tergiversation in application of art.351 TFEU | 270 |
| 3.1.2. <i>BIT</i> (2008) judgments introducing hypothetical incompatibility | 274 |
| 3.1.3. <i>BIT</i> (2008) judgments against the background of EU policy of foreign direct investment ... | 279 |
| 3.2. Instrumentalization of the doctrine of direct effect of GATT/WTO law | 285 |
| 3.3. Counter-example: Taking into account the values underlying EU external action | 289 |
| 3.3.1. <i>Brita</i> (2010) case: keeping the EU-PLO Agreement alive | 290 |
| 3.3.2. <i>Brita</i> (2010) in context of the EU agreements with Israel and Palestine..... | 294 |
| 4. Oversight or partisanship? Relationship with the legislators/policymakers..... | 297 |
| 4.1. Establishing new principles of EU external relations law | 299 |
| 4.1.1. External competences of the EU: Implied competences and the CCP | 300 |
| 4.1.2. Duty of loyal cooperation limiting MS actions | 305 |
| 4.1.3. Inter-institutional balance of powers in external relations | 310 |
| 4.2. The <i>ATAA</i> (2011) case: Integrating the EU foreign policy goals: | 313 |
| 4.2.1. Background of the ETS dispute..... | 315 |
| 4.2.2. <i>ATAA</i> (2011): Legalizing environmental leadership..... | 318 |
| 4.2.3. <i>ATAA</i> (2011) judgment as an episode in the ETS dispute: ‘Stopping the clock’ | 322 |
| 4.3. Counter-examples: <i>Kadi</i> and <i>Opinion 1/09</i> | 327 |
| 4.3.1. The <i>Kadi</i> judgments complicating the EU position in the UN..... | 327 |
| 4.3.2. <i>Opinion 1/09</i> undermining a long-term project of a UPC | 328 |
| 5. Conclusion on symptoms of judicial activism in the case-law concerning international law | 329 |
| V. Conclusions..... | 332 |
| 1. Recapitulation of the basic arguments | 334 |
| 2. Doctrinal contribution | 336 |
| 3. Avenues for future research..... | 338 |
| Bibliography..... | I |
| 1. Books | I |
| 2. Contributions in Edited Volumes | IV |
| 3. Articles | X |
| 4. Working Papers | XVI |
| 5. Conference Papers | XVIII |
| 6. Reports..... | XIX |
| 7. Press Articles | XX |

| | |
|--|--------------|
| 8. Podcasts..... | XXI |
| 9. Communications of European Institutions..... | XXII |
| 10. Encyclopedias..... | XXII |
| 11. Doctoral Theses..... | XXIII |
| 12. Websites and blogs..... | XXIII |
| 13. Judgments..... | XXIV |
| 13.1. United States Supreme Court | XXIV |
| 13.2. CJEU..... | XXV |
| 13.2.1. Judgments..... | XXV |
| 13.2.2. Opinions of AG | XXVIII |
| 13.3. ECtHR | XXIX |
| 13.4. ICJ | XXIX |
| 13.5. National courts of the EU member States..... | XXIX |
| 13.6. Other international adjudicative bodies..... | XXX |

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I. Introduction

- 1** Judicial activism is a contingent phenomenon. Its meaning often boils down to the judges stepping outside of the proper judicial function in a modern democratic society. However, the assessment of the “proper judicial role” lies in the eyes of the beholder. It can relate to the judge as the ultimate guardian of human rights against abuses of the executive power, as upholding constitutional rights of individuals against the rule of the majority expressed by the legislative branch or as a necessary guarantor of legal security in a liberal economy. In view of these various usages of the concept of judicial activism, we have to depart from its negative connotations.

- 2** Judicial activism implies a hidden politicization of the Court. The legal arguments and the methods used by the Court of Justice of the European Union (CJEU) might seem coherent. However, an inquiry into judicial activism means looking beyond the legal reasoning of the Court and trying to “connect the dots” of an alternative narrative that can explain the Court’s long-term approach to certain issues. In the case of judicial activism of the CJEU in the case-law concerning public international law, the veil for the politicization of the Court is provided by the pluralist architecture of global law. The heterarchical structure of relations among legal orders in the international arena activates the CJEU as an actor of global governance. Simultaneously, it results in the Court adopting a rather internal and defensive approach, undermining legal security.

- 3** Pluralism in relations among legal orders in the international arena provides a veil for the politicization of the CJEU. The Court’s approach in the case-law concerning international law can be explained in terms of pluralism. However, a thin overarching pluralist framework cannot explain the influence of other considerations on the Court’s jurisprudence, in particular considerations that traditionally would not be classified as legal. The inclusion of considerations going beyond the settlement of the particular dispute constitutes a natural part of modern judicial function in the highest courts.¹ In that sense, the CJEU is not more and not less activist than other international or national constitutional courts.

¹ VON BOGDANDY, Armin, VENZKE, Ingo, In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens, Suhrkamp 2014, pp.1-383, p.136

- 4** Judicial activism of the CJEU finds its particular expressions in the case-law concerning public international law. The pro-integrationist tendency of the CJEU often raised in the literature concerning the Court's role in the process of EU integration, translates into a substantial and an institutional dimension of judicial activism.² The substantial articulation of judicial activism in the case-law concerning international law is the Court's emphasis on the autonomy of the EU legal order. This internal perspective is adopted not only for virtuous reasons, but also in defense of definitely not universal European interests. The institutional dimension refers to the Court's position within the EU structure of governance. The case-law concerning international law is marked by a close alignment with the European Commission and the integration of the EU goals in external relations. Moreover, the pluralist veil can cover the extent to which the Court's decisions concerning international law are influenced by considerations completely internal to the EU.
- 5** Even though most of the symptoms considered traditionally as judicial activism are unavoidable part of judicial function of the CJEU, there is an added value to the debate about judicial activism as it provides for a critical evaluation of the role of the court in a particular legal community. Due to the institutional characteristics of the Court in Luxembourg, the analysis is not focus on individual judges or on the overstepping of some professional ethics. Instead, the underlying question concerns the boundaries of the Court's legitimacy.
- 6** In order to frame the following analysis of the functioning of judicial activism of the CJEU in a pluralist architecture of global law, I intend to sketch the research interest and the project's relevance (1), the underlying research questions (2), clarify certain concepts that will be used throughout the thesis (3), raise some

² See *i.a.* ALTER, Karen, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press 2014, pp.1-480, p.131; CHALMERS, Damian, CHAVES, Mariana, *The reference point of EU judicial politics*, pp.25-42, p.32 in SCHMIDT, Susanne K. And KELEMEN, Daniel (eds.), *The Power of the European Court of Justice*, Routledge 2013, pp.1-160; DE WAELE, Henri, *The Role of the ECJ in the Integration Process: A Contemporary and Normative Assessment*, *Hanse Law Review*, Vol.6 No.1, 2010, pp.1-24, pp.11-13; RASMUSSEN, Hjalte, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, BRILL 1986, pp. 1-555, p.291; TALLBERG, Jonas, *European Governance & Supranational Institutions: Making States Comply*, Routledge 2004, pp.1-192, p.28

general methodological considerations with regard to the concept of judicial activism (4) and present the outline of the thesis (5).

1. Research interest and project relevance

- 7 In public discussions on European integration that CJEU has often been accused of judicial activism. The fear of an expanding role of the CJEU has usually been a ricochet of the general fears of “an ever closer union”. Roman Herzog – former President of the Bundesverfassungsgericht, former German President and chair of the European Convention – published an article together with Lüder Gerken under a much-discussing title „Stop the ECJ”.³ Herzog’s criticism was triggered by the *Mangold* (2005) judgment of the CJEU.⁴ In *Mangold* (2005) the CJEU has leaned in quite far into national labor legislation on the basis of the general principle of EU law – non-discrimination.⁵ The principle of non-discrimination was a ground to challenge national legislation transposing an EU directive, even before the implementation deadline and in a horizontal situation, between private parties. In the same year, the Court decided that the limits imposed on the admission of foreign students to Austrian universities violated EU law.⁶ The Federal Chancellor of Austria at the time– Wolfgang Schüssel – commented that “all of a sudden, judgments about the role of women in the German army or about the admission of foreign students to Austrian universities are handed down – this is clearly national law”.⁷ Another former President of the Bundesverfassungsgericht – Hans-Jürgen Papier – pointed out in an interview that a not unproblematic tendency of the CJEU can be observed to control the validity of national law in view of the

³ HERZOG, Roman and GERKEN, Lüder, *Stoppt den Europäischen Gerichtshof*, published in Frankfurter Allgemeine Zeitung, 08.09.2008, available on http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf (12.05.2011)

⁴ CJEU, C-144/04, *Werner Mangold v Rüdiger Helm*, 22.10.2005, ECLI:EU:C:2005:709

⁵ See STONE SWEET, Alec and STRANZ, Kathleen, Rights adjudication and constitutional pluralism in Germany and Europe, pp.92-108, p.93 in SCHMIDT, Susanne K. And KELEMEN, Daniel (eds.), *The Power of the European Court of Justice*, Routledge 2013, pp.1-160

⁶ CJEU, C-147/03, *Commission of the European Communities v Republic of Austria*, 07.07.2005, ECLI:EU:C:2005:427

⁷ Interview with Wolfgang Schüssel by FRANK, Michael and KORNELIUS, Stefan, 300 Sprachen und 500 Dialekte – das ist mein Europa, Süddeutsche Zeitung, 31.12.2005, available on <http://www.sueddeutsche.de/politik/interview-mit-dem-kuenftigen-ratspraesidenten-der-eu-sprachen-und-dialekte--1.643574> (10.08.2012); translation in BASEDOW, Jürgen, *The Judge’s Role in European Integration. The Court of Justice and Its Critics*, pp.65-79, p.65 in MICKLITZ, Hans-W., DE WITTE, Bruno (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia 2012, pp.1-422

general principles of EU law (developed by the Court itself), even if they are not implementing mandatory EU law.⁸ This leads to the risk that through the jurisprudence of the CJEU the EU could encroach upon competences not entrusted to it by the Treaties.⁹

- 8 In line with the general tendency to open up the courts to the public eye, the academic inquiries into the role of the judge have also overcome the law-politics divide and extended its scope.¹⁰ The CJEU seems to be following in the footsteps of the US Supreme Court or the European Court of Human Rights (ECtHR) in becoming more aware of the outside critiques. This openness to external scrutiny was the apple of discord in the academic exchange between the Belgian judge – Koen LENAERTS (publishing as an academic) and the president of the European University Institute – Joseph WEILER.¹¹ Judicial activism has been one of the core instruments of public and academic scrutiny of the courts' legitimacy. As the law-making function becomes a natural part of judicial function within the EU, this scrutiny should not disappear.
- 9 Two main intentions of this thesis are worth highlighting at the beginning. First motive is to present an academic inquiry into judicial activism of the CJEU that can be more theory-rooted and analytical than the media comments. Secondly, the debate about judicial activism needs to be expanded to include the domains of the Court's activity that have developing with great dynamic in the past decade, such as the case-law concerning public international law. This domain could benefit from a critical inquiry into the leading role of the CJEU in shaping the relations between European and other legal orders.

⁸ Interview with Hans-Jürgen Papier by MÜLLER, Reinhard, *Die Union ist kein Staat und soll es auch nicht werden*, Frankfurter Allgemeine Zeitung, 24.07.2007, available on <http://www.faz.net/aktuell/politik/europaeische-union/interview-mit-verfassungsrichter-papier-die-union-ist-kein-staat-ist-und-soll-es-auch-nicht-werden-1463927.html> (10.08.2012)

⁹ *Ibid.*

¹⁰ See i.a. HERNANDEZ, Gleider I., *The International Court of Justice and the Judicial Function*, OUP 2014, pp.1-368; MICKLITZ, Hans-Wolfgang, DE WITTE, Bruno (eds.), *The European court of Justice and the autonomy of Member States*, Intersentia 2012, pp.1-416; MUIR, Elise, DAWSON, Mark, DE WITTE, Bruno (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar 2013, pp.1-304

¹¹ LENAERTS, Koen, *How the ECJ Thinks : A Study on Judicial Legitimacy*, Fordham International Law Journal, 2013, Vol.36 No.1, pp.1302-1371; WEILER, Joseph, *Epilogue: Judging the Judges – Apology and Critique*, pp.235-253 in ADAMS, Maurice, DE WAELE, Henri, MEEUSEN, Johan, STRAETMANS, Gert (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing 2013, pp.1-272

- 10** I have consciously chosen both of the crucial elements of this thesis - judicial activism and the case-law concerning public international law.
- 11** First, judicial activism allows me to focus this inquiry on law as experience and not on law as logic, following the words of Oliver Wendell HOLMES.¹² The aim is not to construct a mechanism that would be able to predict future jurisprudential outcomes nor to validate certain judgments as activist or not. I see the judicial activism of the CJEU in its jurisprudence concerning international law as constructed by experience. This experience is embedded in the political, legal and economic context of a particular community. The CJEU is socially and institutionally embedded in the process of European integration. The Court acknowledges the defense of the autonomy of the EU legal order as the *telos* of the Treaty norms that guides their interpretation. The importance that the CJEU attaches to teleological interpretation places it very close to the EU's executive, in particular the European Commission. It is questionable whether a process in itself, a process with a changing direction, can become a goal. This question clearly illustrates how the general challenges of European integration are being transposed to the judicial turf. Can we really blame the CJEU for using the process of EU integration as a *telos* if the EU Treaties differ in nature from the conventional structure of national constitutions? The Treaties include rather particular and specific goals in various domains of EU's competences than a general goal of a constructing a society, a nation state as the national constitutions traditionally do.¹³
- 12** The commitment of the judicial branch to a political project, such as the European integration under the EU's umbrella, might be problematized in light of the separation of power doctrine.¹⁴ Even though the EU institutions do not lend themselves to a conventional classification into three branches of government, because each of them is wearing several hats, still the constitutional design of the Treaties remains true to the idea of "checks and balances".

¹² "The life of the law has not been logic; it has been experience...", WENDELL HOLMES, Oliver Jr., The Common Law, Lecture I

¹³ BARTOLINI, Stefano, Taking "Constitutionalism" and "Legitimacy" Seriously, pp.11-34, pp.18-19 in GLENCROSS, Andrew, TRECHSEL, Alexander H., EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli, Lexington Books 2010, pp.1-172

¹⁴ LENAERTS, Koen, How the ECJ Thinks : A Study on Judicial Legitimacy, Fordham International Law Journal, 2013, Vol.36 No.1, pp.1302-1371, p.1310

- 13** Judicial activism understood as judicial law-making and participation of judges in the government processes constitutes an undeniable part of modern judicial function.¹⁵ The concept of judicial activism has often been co-opted by a liberal understanding of the judicial role - an understanding that denies the judicial branch the legitimacy to support state intervention, the construction of a welfare state or wealth redistribution. Nowadays, we should move beyond such a purely liberal understanding of judicial activism and beyond using it just as a stone to throw at judges constraining the market forces. Still, the concept remains relevant for a critical assessment of the role of the judges in a community. The privileges of judicial office might lead the judges to “wrap themselves in the mantle of infallibility”.¹⁶ Judicial activism is a concept that carries the potential of opening up a critical public and academic debate about the context of the judgments and the political role of the courts.
- 14** Judicial activism differs from judicial interpretation. Judicial interpretation is about tools used to construe the legislative provisions and apply them to a particular case, while judicial activism shifts the focus to the role of the judge in the community. Judicial interpretation might be one of the factors in the debate about judicial activism. However, judicial interpretation relates to legal reasoning of the Court and is usually evaluated in a legal context.¹⁷ Judicial activism, on the other hand, related to the CJEU as an institution, actor of governance and is more suited for an interdisciplinary analysis.
- 15** Judicial activism is a controversial concept, with no prevalent definition. My idea is not to develop an abstract and general definition of judicial activism that could be applied to future undefined constellations, but rather to try demonstrating the usefulness of the debate about judicial activism as a platform for including a broader spectrum of actors in the public sphere in shaping and updating the

¹⁵ VON BOGDANDY, Armin, VENZKE, Ingo, In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens, Suhrkamp 2014, p.137

¹⁶ TERRIS, Daniel, ROMANE, Cesare P.R., SWIGART, Leigh, The international judge: an introduction to the men and women who decide the world’s cases, BUP 2007, pp.1-315, p. 224

¹⁷ See i.a. BECK, Gunnar, The Legal Reasoning of the Court of justice of the EU, Hart Publishing 2012; 14. CONWAY, Gerard, The Limits of Legal Reasoning and the European Court of Justice, CUP 2012; BANGOETXEA, Joxerramón, The legal reasoning of the European Court of Justice: towards a European jurisprudence, Clarendon Press 1993, pp.1-294