The European Court of Justice and external relations

Internationalist objectives or integrationist priorities?

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Introduction

This essay will explore the relationship between Community law and international law by examining how key judgments of the Court of Justice of the European Union (hereafter referred to as the Court) have defined judicial attitudes to the implementation of international legal obligations within the Community legal order. Particular consideration will be given of how, and to what extent, the Court has complied with World Trade Organization (WTO) obligations and whether these obligations are fully implemented in Community law. The essay will also review the impact of the recent Kadi judgment (Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of the Court of Justice, 3 September 2008) concerning the status and application of United Nations (UN) Resolutions. How will this judgment shape future European Union (EU) external relations policy and does it promote the EU as a 'good international citizen' (Dunne 2008: 13)? The essay will conclude by examining whether, in the light of the Court’s judgments, a principle of loyal co-operation between the EU and international law exists.

Judicial policy and external relations

The case law of the Court, discussed in this essay, demonstrates what may be described as a hesitant attitude towards the application of international law within the Community legal order. In 2005 the Court of Justice and Court of First Instance (CFI) demonstrated a renewed reluctance to recognize that (WTO) law will produce legal effects within EC law, in particular in circumstances where the legality of European Community (EC) acts is challenged. This was so even in circumstances where EC acts have been upheld by the WTO Dispute Settlement Board to be in violation of WTO law.

By contrast, the Court has generally been more amenable to giving effect to and ensuring consistency with other international obligations such as UN Resolutions or the European
Convention on Human Rights (ECHR). In the recent Kadi judgment the Court of Justice confirmed that UN Security Council Resolutions can be implemented by the Council into EC law through a Regulation and that this will create binding legal effects upon an individual. However, in what would appear to be a departure from earlier judgments, the Court’s judgment seems to question the nature and extent of this loyal co-operation with the UN and the judgment portrays a degree of ambivalence to the status of international law within EC law. The Court held that in circumstances where the EC implements a UN Resolution through a Council Regulation, an individual does have the right to challenge the adoption of such a Regulation where it can be shown that the Regulation infringes the individual’s fundamental rights under Community law. This overturned an earlier judgment of the CFI which had held that permitting judicial review of the Council Regulation would amount to an indirect review of the UN Resolution, which was beyond the jurisdiction of the Court. De Búrca (2008: 2–4, 44–47) has criticized the Kadi judgment for offering a separatist view of EC law from international law by protecting and promoting EC constitutional norms for the protection of fundamental rights above hitherto accepted international obligations emanating from the UN. Consequently, while the Court was, prior to Kadi, inclined to unreservedly give effect to UN Resolutions (for example in the Bosphorus judgment discussed below) this would no longer appear to be the case.

The effect of WTO law in the Community legal order

One mechanism through which the Court has guaranteed the supremacy of EC law within the member states has been through the development of the principle of direct effect. Direct effect concerns the content of a legislative provision and refers to its capacity to give rise to rights for individuals which can be enforced before national courts. Direct effect is an important constitutional provision and the means through which individual Treaty rights are guaranteed in the domestic law. Legislation and the rights contained within it can be enforced by an individual before their national court. In Van Gend en Loos (Case 26/62 Van Gend en Loos v Nederlanse Administratie der Belastingen [1963] ECR 1) the Court stated that Treaty articles will have direct effect if they satisfy the following criteria:

- they must be clear and precise;
- unconditional; and
- not subject to further implementation.

An issue that has arisen concerns the question of what legal status is to be granted to international agreements such as the WTO within the Community’s legal order. In particular, do such agreements meet the criteria of direct effect? In the context of the application of the WTO rules this issue is important because it concerns the ability of individuals to enforce, within their domestic courts, the obligations that arise from the WTO. Furthermore, as a signatory to the WTO the European Community has committed itself and the member states to these international obligations which are intended to promote free trade. In particular, how has the Court viewed the EC’s obligations with regard to the WTO and has this created enforceable rights within the member states? According to the Court in Haegmann (Case C-239/03 Commission v France [2004] ECR I-9325) international agreements that are signed by the Community become ‘[a]n integral part of Community law and may, in certain circumstances, have direct effect within the legal systems of the Member States’.

The criteria laid down by the Court in Van Gend en Loos require a measure to be precise and unconditional. With regard to international agreements this can be problematic and the Court
has held that an agreement will have direct effect where the objectives of that agreement are the
same as those of the EC (McGoldrick 1997: 129). In International Fruit (Cases 21–24/72 Interna-
tional Fruit [1972] ECR 1219), the Court considered the status of the General Agreement on
TariFFs and Trade (GATT), which the founding six member states had signed individually prior
to the agreement of the Treaty of Rome in 1957. The Court was of the opinion that while
GATT was intended to bind the European Economic Community (EEC), the Agreement gave
some degree of flexibility to member states and contained a procedure that could allow them to
vary, or even withdraw, from the Agreement. The Court’s reasoning reflects a lack of reciprocity
and legal certainty, especially in the event of signatories being in dispute. The Court also argues
that agreements such as GATT, and even the WTO, are based upon diplomacy rather than
seeking to create binding legal rights that are judicially enforceable.

In Portugal v Council (Case C-149/96 Portugal v Council [1999] ECR I-8395) the Court stated
that subject to some very limited exceptions WTO law could not serve as a basis for the review
of the legality of Community measures. The Court came to this conclusion following a detailed
analysis of WTO law and specifically the dispute settlement procedures. The Court held that
the WTO Dispute Settlement Understanding does not oblige the EC to implement rulings by
making them directly enforceable. The Court further considered whether there was a basis
within Community law itself for recognizing the direct effect of the WTO, i.e. whether WTO
agreements could be applied in the Community legal order. The Court was of the opinion that
the WTO is founded upon the principle of negotiations with a view to ‘entering into reciproc-
al and mutually advantageous arrangements’ (Case C-149/96 Portugal v Council para. 42).

From a Community perspective this should be distinguished from agreements that have been
concluded between the Community and third countries which give rise to certain obligations
or create specific relations of integration with the Community and may have direct effect. In
the Kupferberg case (Case 104/81 Kupferberg [1982] ECR 3641), which concerned the pre-
accession Association Agreement with Portugal, the Court stated that such agreements must have
direct effect to ensure uniformity of application within the member states, thereby recognizing
the relevance of such Association Agreements to the operation of the Internal Market.

The absence of direct effect of WTO law within the Community legal order undoubtedly
undermines the application and effectiveness of WTO law. However, this can be defended on a
number of grounds, the most important of which is the absence of direct effect of WTO law in
the legal system of the EC’s trading partners. Eeckhout (2004: 309–11) argues that direct effect
of WTO law would also impact on the EC’s political institutions, which would lose the scope
to manoeuvre when seeking to resolve disputes with other WTO members. In Portugal v
Council the Court acknowledged that the binding nature of direct effect would restrict the
Commission, which would have to ensure that the rights contained within the WTO were
placed before EC obligations. On this analysis it is clear that the Court considers WTO law to
be different in both form and substance to other types of international agreement into which
the EC enters, for example the pre-accession Association Agreements or the EC-Turkey Association
Agreement, which create binding obligations on both sides and which are subject to judicial
review (Bogusz 2002: 477).

From this perspective the WTO line of case law could be differentiated from other case law
concerning the effects and application of international agreements and international law within
the EC legal order. However, from a political perspective the judgments of the Court do not sit
comfortably with the image that the EU is seeking to propel to the outside world that the EU
has become a major player in international affairs which is seeking to build strong economic and
human rights partnerships with other nations and organizations. In short, the WTO case law
creates an impression that in the context of international trade the EC is protectionist.

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In two judgments given in 2005 the Court was once again required to consider the status of WTO law. In both the Van Parys (Case C-377/02 Léon Van Parys NV v Belgisch Interventie-en Restitutiebureau [2005] ECR I-1465) and Chiquita (Case T-19/01 Chiquita Brands International and others v Commission [2005] ECR II-315) cases the issues concerned the effect of WTO dispute rulings and the general lack of direct effect of WTO law. In 1997 the WTO ruled that the EU’s rules for the importation of bananas breached WTO law by imposing tariffs and quotas on bananas from countries in Latin America while favouring the import of bananas from countries with which member states had historical or colonial ties. When such a ruling is passed down by the WTO the party at fault is given a ‘reasonable time’ to comply. In 1998 the EC amended its rules on the importation of bananas, but in 1999 the WTO established that the new regime continued to breach certain provisions of WTO law. Consequently, the issue arose in Van Parys and Chiquita of whether, in such circumstances, it is open to a private party to rely on that decision against the EC rules that are not fully compliant with the earlier WTO ruling? Furthermore, would a private party be entitled to damages for the period after the reasonable period of time had elapsed and could they request an annulment of the Community Regulation at issue?

In both cases the parties argued that the Community measure fell within the Nakajima principle. In short, the Nakajima principle means that when the legislation at issue expressly refers to WTO law or expressly refers to the prior ruling of the WTO, and that the Regulation was being implemented as a consequence of the WTO ruling, then judicial review can be possible on the basis of WTO law. For both Van Parys and Chiquita the argument was simple—the EC had intended to comply with the 1997 WTO ruling and there was a legitimate expectation that the requirements of this ruling would be complied with.

Though both applicants offer a correct interpretation of the dispute this understanding is an oversimplification of the substance of the dispute. Arguably of greater importance to the relationship between the Community and the WTO are two specific questions. First, are the Community Courts bound to accept that the EC must comply with a WTO ruling within a ‘reasonable time’ and, if so, what will constitute a reasonable time? Second, must the Community Courts accept that WTO Dispute Settlement Board decisions are binding and can they be enforced through judicial action?

The Court concluded categorically that an individual does not have the right to challenge, before a national court, the incompatibility of Community measures with WTO rules. This will be the case even if the WTO Dispute Settlement Board has previously declared that the Community legislation at issue is incompatible with those rules. In relation to the application of the Nakajima principle in such disputes, which the parties argued was applicable in the context of their disputes, the Court’s case law demonstrates that this principle has been confined to the context of reviewing the compatibility of EC Anti-Dumping Regulations with the provisions of the Anti-Dumping Codes, adopted as a part of GATT. This point was confirmed by the CFI in the Chiquita Brands International case at paragraph 118. In that judgment the CFI stressed the fact that in the anti-dumping area, the relevant GATT and WTO agreements impose a direct obligation on each of the contracting parties to adapt their national legislation so as to reflect the content of those agreements. Consequently this creates the necessary reciprocity which the Court considers as crucial to the application of such agreements. In Chiquita Brands International, the CFI did not exclude the applicability of the Nakajima exception to other areas, on the condition that the agreements and the Community provisions in question are comparable in nature and content to those of the Anti-Dumping Codes of GATT and the Anti-Dumping Regulations, which transpose them into Community law. However, in this case the nature and content of the applicable provisions of GATT, and the relevant Community law concerning the...
organization of the market in bananas differed significantly from the Anti-Dumping Codes and regulations. In short, the wording, nature and scope of the GATT provisions and the Community Banana Regulations were, by comparison, far more general in character.

In both the Van Parys and Chiquita judgments the Court is of the view that the ability of the Institutions to negotiate within the WTO cannot be fettered in any way, even after the conclusion of the reasonable period for compliance. In coming to this conclusion the Court had regard to the procedures of the WTO Dispute Settlement Undertaking. In both cases the Courts referred to Articles 21.6 and 22.8 of the Undertaking which state that in the absence of any agreement about compliance the matter remains on the agenda of the WTO. As there is no formal agreement of what constitutes a ‘reasonable time for compliance’, the Court chose not to impose a unilateral time limit that would ultimately bind the political institutions within any future negotiation process.

The Van Parys and Chiquita judgments are consistent with previous decisions in which the Court has been requested to give effect to WTO law within the Community legal order. The judicial policy behind these judgments is not to undermine the principles of Community law and in particular the integrity of the Internal Market. The Court’s case law recognizes the importance of the Community’s international trade obligations but the policy of the judgments is that direct effect will only be permitted when WTO decisions are themselves binding on all signatories.

International treaties and conventions in EC law

The case law demonstrates that the relationship between the Court and the WTO remains an uneasy one. This, however, does not mean that the Court has been unreceptive to all international obligations. By contrast, in areas such as environmental protection, social policy, employment protection and fundamental rights the Court has consistently examined international treaties and conventions to develop the protection available to individuals under Community law. EU law itself is acknowledged as being a source of international law and the key principles of EU law, such as respect for fundamental rights and non-discrimination, have contributed significantly to the development of the international legal order (Hoffmeister 2008: 54–57).

Though the EU is not a signatory to many of these international treaties or conventions, the member states are. Thus in the area of human rights protection the Court has consistently applied the standards of the ECHR as a benchmark for fundamental rights protection in the EU. The Court has acknowledged in the case of Internationale Handelsgesellschaft (Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125 and Case 92/78) that all member states have subscribed to the ECHR and that this provides a uniform minimum standard of fundamental rights protection across the Community. In the Internationale Handelsgesellschaft judgment the Court stressed that European integration has its roots in the constitutional traditions of the member states. This suggests that protection of fundamental rights in the domestic legal order constitutes not only a source of inspiration for the Court but also provides a binding standard (Lenaerts 2003: 877). Lenaerts argues that to form its judgments the Court has regularly adopted teleological techniques, arising from international law and comparative law, to draw upon the legal traditions of the member states for guidance in the absence of a distinct fundamental rights jurisprudence developed by the Court of Justice. The reference to legal traditions of the member states is a mechanism through which the Court seeks to reassure and secure acceptance of its judgments by the member states. The judgment of the Court in Internationale Handelsgesellschaft is an early example of this. For Lenaerts such comparative analyses and teleological reasoning in the application of Community law has been a key ingredient in the process of integration. Rather than being classified as judicial activism it is more appropriate to consider
this as effective enforcement of Community law rights (Lenaerts 2003: 879). Furthermore, according to Advocate-General Miguel Poiares Maduro in Kadi, reference to international law obligations has undoubtedly helped to define the rule of law in the EU.

Although the ECHR remains outside the EU legal order, it has been utilized as a point of reference for the Court. In the Nold judgment (Case 4/73, Nold v Commission [1974] ECR 491), the Court stated that additional sources of inspiration for fundamental rights protection in Community law are ‘international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories’.

The reference to external human rights documents and comparative law techniques in Internationale Handelsgesellschaft and Nold should not be dismissed as judicial activism and judges going beyond the scope of EC legal obligations. By contrast, the judgments can be considered as the development of a human rights jurisprudence in which an international court draws upon established international legal principles to ensure that fundamental rights are adequately protected.

The point illustrated by the judgments in Internationale Handelsgesellschaft and Nold is that the Court of Justice sitting in Luxembourg does not operate in a vacuum. On the contrary, despite its reluctance to give effect to WTO rulings, the Court has historically been prepared to accept the importance of a whole range of international agreements and conventions, in particular those where the protection of fundamental rights is at issue. Yet despite this apparent ‘internationalism’ and enthusiasm for conventions such as the ECHR, the Court does risk being increasingly considered as ‘isolationist’ in its positioning of EC law within the international legal order. In the following section this chapter will examine how the Court has interacted with arguably the most important source of international law, namely UN Resolutions, and whether, by being prepared to subject their application to the established principles and values of Community law, the Court is undermining its position as an international court.

**The application of United Nations Resolutions in EU law**

As with the ECHR, the EU is not an independent member of the UN but the member states are all signatories. Despite this, judgments of the Court of Justice in cases such as Bosphorus Airways (Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others [1996] ECR I-3953) have acknowledged the applicability of UN Resolutions in EC law. This case is interesting because in addition to the issue of the application of a UN Resolution within the EC legal order, the case also raises the question of the extent to which the Court should rely on external human rights documents such as the ECHR. Furthermore, the case is interesting as it involved separate proceedings before the Court of Justice and the European Court of Human Rights. These proceedings illustrate how the two Courts interact and whether and if so to what extent, Community law can, be reviewed by external judicial bodies. This latter point is interesting particularly in the light of the relationship between the Court of Justice and the WTO Dispute Settlement Board.

In Bosphorus Airways: Yugoslavian Airways leased two aeroplanes to Bosphorus, a Turkish airline, which sent one of the planes to Dublin for repairs. This occurred during the Balkan War and there were specific UN sanctions in place against the former Yugoslavia and, therefore, the plane was impounded in Dublin. The EU had implemented the sanctions through Regulation 990/93/EC. Bosphorus Airways sought a judicial review of the impoundment and the Irish Court made a preliminary reference under Article 234 EC to the Court of Justice to determine whether Regulation 990/93/EC was lawful. The Court held that while there was an interference with the right to the peaceful enjoyment of possessions this was justified by the general interest in bringing an end to the war in Bosnia. Following the Court of Justice decision to
uphold the Irish actions as compatible with the international obligations, Bosphorus Airways commenced an action before the European Court of Human Rights (Bosphorus Hava Yollari Turizm v Ireland, App. No. 45036/98 (Eur. Ct. H. R. 30 June 2005), in which it challenged the compatibility of the Court of Justice decision with Article 1 of Protocol 1 of the ECHR concerning reviewable acts. In practice, the substance of the dispute was a challenge to the compatibility of Regulation 990/93 with the ECHR, with the potential outcome that the European Court of Human Rights could be in conflict with the Court of Justice.

In respect of Article 1 of Protocol No. 1, the European Court of Human Rights stated that once adopted, Regulation 990/93 was ‘generally applicable’ and ‘binding in its entirety’ under Article 249 EC. The Court of Human Rights further explained that Regulation 990/93/EC applied to all member states, none of which could lawfully depart from any of its provisions. In addition, the direct applicability could not be disputed as Regulation 990/93 had become part of Irish domestic law. The Court considered it entirely foreseeable that the Irish Minister for Transport would implement the impoundment powers contained in Article 8 of Regulation 990/93/EC in such circumstances as arose in this case. The Court of Human Rights justified the decision on the basis that Ireland had no choice but to take the steps necessary to comply with EC law—the Regulation was directly applicable. Furthermore, because EC law has an ‘equivalent protection’ of human rights to that provided under the ECHR, the Court of Human Rights presumed that measures required by EC law comply with the ECHR. In coming to this decision the Court of Human Rights neatly side-stepped any conflict with the Court of Justice. In February 2009 in its judgment in Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands (App. No. 13645/05 judgment of 5 February 2009), the Court of Human Rights again confirmed that judicial procedures before the Court were compatible with the standards of the ECHR and that the Court provided equivalent protection of fundamental rights.

In the Kadi judgment the Court has again been faced with the issue of implementation of a UN Resolution through an EC Regulation which also raised human rights concerns. The Court, mindful of the need to give effect to international obligations, was nevertheless anxious not to do so at the expense of undermining the fundamental rights of individuals. That said, the Court’s judgment has raised questions of how far the Court should give effect to an international obligation, which in this case sought targeted action against terrorist suspects, even if to do so would leave the individual without an effective remedy. Ultimately the Court was being asked to prioritize fundamental obligations contained within the treaties, namely ensuring consistency with binding international obligations agreed through the UN, while simultaneously ensuring the adequate protection of individual rights.

The facts concerned Mr Kadi, a Saudi Arabian national and the Al Barakaat Foundation of Sweden, which were designated as being associated with Osama bin Laden, Al-Qa’ida or the Taliban. In accordance with a number of Resolutions of the UN Security Council, all states that are members of the UN must freeze the funds and other financial resources controlled directly or indirectly by such persons or entities. In order to give a coherent effect to those UN Resolutions within the European Community, the Council adopted Regulation 881/2002 ordering the freezing of the funds and other economic resources of the persons and entities whose names appear in a list annexed to that regulation. That list was regularly updated in order to take account of changes in the summary list drawn up by the Sanctions Committee, an organ of the UN Security Council. On 19 October 2001 the names of Mr Kadi and Al Barakaat were added to the summary list then placed in the list annexed to the Regulation 881/2002.

Mr Kadi and Al Barakaat brought actions under Article 230 EC before the CFI for annulment of the Regulation 881/2002. They claimed that the Council was not competent to adopt the
Regulation and that it infringed their fundamental rights, in particular the right to property and the right to conduct a defence. In its judgments of 21 September 2005 (Case T-315/01, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2005] ECR II-3649) the CFI rejected all the pleas in law raised by Mr Kadi and Al Barakaat and confirmed the validity of the Regulation. The CFI ruled, in particular, that the Community Courts had, in principle, no jurisdiction to review the validity of the regulation at issue, given that the member states are bound to comply with the resolutions of the UN Security Council according to the terms of the Charter of the UN, an international treaty that prevails over Community law. Through this approach the CFI sought to attain what Tridimas and Gutierrez-Fons have described as a ‘golden balance’ (Tridimas and Gutierrez-Fons 2008: 20), in which the primacy of the UN Charter over Community law was accepted but with the CFI evaluating whether the decision-making process in the UN Security Council complied with the fundamental principles of Community law. The CFI’s reasoning adopted an internationalist rather than a constitutionalist approach and Tridimas and Gutierrez-Fons (2008: 20–23) criticize this for being ‘neither logically inevitable nor constitutionally secure’. The issue of whether a constitutionalist or internationalist interpretation of international law is more appropriate arises within the subsequent appeal to the Court of Justice.

On appeal the Court confirmed that the Council was, because of the nature of UN Security Council Resolutions, competent to adopt the Regulation under the Treaty bases used, namely Articles 60 EC and 301 EC jointly with Article 308 EC. While this may be legally correct, commentators such as Garbagnati Ketvel (2006: 111) argue that, in particular, the use of Article 308 EC hands too much discretion to the Council to implement such an international obligation into Community law. Garbagnati Ketvel (2006: 112) argues that in Kadi the use of Article 308 EC provided a competence that did not necessarily exist. The Court sidestepped the question of competence and accepted that the Council was competent to implement the Regulation under these three Treaty bases.

The criticism of this reasoning is that both in substance and nature the EC Regulation bore the hallmarks of a Common Foreign and Security Policy (CFSP) measure arising under the EU Treaty. Tridimas (2009: 107), describing this reasoning as ‘problematic’, criticizes the Court for accepting Article 308 EC as a permitted Treaty base. By accepting Article 308 EC the Court has not only applied this Treaty provision as an inter-pillar legal base, but this also implies that imposing sanctions against individual terrorist subjects is a common market objective. Tridimas questions the nexus between the sanctions and the operation of the common market, which, according to the Court, exists because such sanctions may impede the freedom of establishment and free movement of capital between member states. For Tridimas the purpose of the sanctions is to combat terrorism and any impact on free movement is ‘incidental’ and there is ‘scant’ evidence in this case that distortions to competition have arisen (Tridimas 2009: 108). The Court further took the view that Article 301 EC was included in the EC Treaty to enable the Community to implement a coherent external relations policy and provides, in Tomuschat’s view, a ‘bridge’ between the two Treaty regimes (Tomuschat 2006: 540). The Court’s judgment recognized that Article 3 of the Treaty of European Union (TEU) requires that there is ‘consistency’ in the Union’s external activities which lends some additional support to the Court’s acceptance of the Treaty bases. Despite this justification, the Court’s reasoning on the choice of Treaty base remains questionable.

The Court’s judgment was primarily concerned with the substance and impact of the measure on the applicants and whether it had impacted upon their fundamental rights. The Court held that the CFI had erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested Regulation. The Court held, following the
reasoning of Advocate-General Maduro that judicial review by the Court of the validity of any Community measure in the light of fundamental rights is a constitutional guarantee based upon the principle of the rule of law. On that reasoning the Court concluded that as an autonomous legal system the EC Treaty may not be prejudiced by an international agreement confirming a constitutionalist solution to the dispute. The Court’s judgment emphasized that the review of lawfulness ensured by the Community Courts applies exclusively to the Community act intended to give effect to the international agreement, and not to the international agreement itself. A judgment given by the Community Courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

The Kadi judgment speaks volumes about how the Court considers the relationship between EC law and international law. The Court, following the reasoning of Advocate-General Maduro, opts for a constitutionalist rather than internationalist reasoning. The Court’s reasoning separates the question of the internal application and effect of the Regulation, which it concluded violated Mr Kadi’s fundamental rights, from the objective of the UN Resolution which, in principle, the Court has acknowledged is legitimate. The fine line that the Court walks is to preserve what it views are distinct Union values concerning the protection of fundamental rights while simultaneously trying to comply with the primacy of the UN Resolution in international law. Tridimas and Gutierrez-Fons (2008: 21) and Tridimas (2009: 114–15) view the Court’s constitutionalist interpretation as correct because the Court must determine the effect of international obligations within Community law by reference to the conditions set by Community law and in particular Community standards in the protection of fundamental rights.

De Búrca (2008: 35–44), by contrast, is critical of the Court’s judgment and suggests that the Court adopts a ‘sharply dualist tone’ to the relationship between international law and EC law, which marks a shift away from the monist interpretation that has hitherto guided the Court. According to de Búrca, the motivation of the Court was to pursue an agenda that maintains the autonomy of Community law, and when considered together with the WTO line of case law the conclusion is a European Court of Justice which is increasingly dualist in attitude towards international law and which regards internal constitutional governance as its priority. If that is the case it may be correct to conclude that Kadi confirms a new era of external relations policy is in development, and one that espouses a greater confidence and distinctiveness on behalf of the EU. If de Búrca’s analysis is correct then the Court’s judgment in Kadi has undoubtedly promoted this self-assurance. Whether Kadi and other judicial developments considered in this essay are consistent with that aim remains open to question. Both in the WTO line of cases and in the Kadi judgment the Court would appear to have set the parameters for the political institutions. In practice, this will mean that the EU will, as far as possible, comply with international law, but European integration, whether economic or constitutional will not be undermined by international obligations which conflict with stated European values.

Concluding remarks

This chapter portrays an uneasy relationship between the EU and the international legal order, and de Búrca questions whether after the Kadi judgment the EU can be considered as a ‘good international citizen’ (de Búrca 2008: 44–47). The uneasy relationship arises in part out of a self-belief by the Court, with the development of 50 years of case law, that its primary purpose is to protect and promote European integration whether economic or constitutional. This integration has been based upon principles of democracy, equality and the respect for fundamental rights,
which the Court believes should not be undermined by external obligations. The Court does not consider that this judicial self-confidence is at odds with international obligations; rather that integration has created a distinct international legal order that differs from other forms of international co-operation. By placing itself at the centre of the integration process the Court considers that it has a duty to protect the Treaty objectives.

The EU does not exist in isolation, despite the enlargement process creating a Union of nearly 500m. citizens. Yet the EU is in danger of being perceived as insular, isolationist and protectionist by the wider world. The future direction of external relations depends, in large part, upon whether the Treaty of Lisbon comes into force and how the Court considers EU relations with third countries and other international organizations. Protecting fundamental rights and values of integration will remain a priority for the Court, but in doing so the Court must take care that its judgments also promote participation in issues that have a global significance. The judgments considered in this essay point towards a ‘Bismarckian’ understanding of world affairs by the EU. Bismarck would look at the 19th-century map of Europe, which was divided into empires created by forced integration, and consider this to be the only relevant geopolitical area for Europeans. The EU must avoid such inward looking policies and the Court, while protecting integration, must simultaneously pursue the Treaty of Lisbon obligations. Article 3 of the revised TEU states in its relations with the wider world that the EU:

… shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

(Treaty of Lisbon, Article 3)

The Treaty of Lisbon views integration and loyal co-operation with international law as compatible and mutually dependent for an EU that wants to play an active part in international affairs. To achieve this aim the Court must also play its part. In the light of the EC’s relationship with the WTO and the Kadi decision, the critics of the Court would appear to be correct to question whether the Court will be willing to do this.

Notes

1 Article 308 EC states: ‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures’.