

Table of Contents

Table of Abbreviations	11
Chapter I: Introduction	13
I. Judicial Activism in International Law – The Current State of Play	15
II. The Aims and Plans of the Book	19
III. Scope and Limitations	21
IV. The Methodological Paradigms	22
V. Outline and Summary of the Book	27
Chapter II: The Definition and Assessment of Judicial Activism in International Law	29
I. Introduction	29
II. The differences in the understanding of judicial activism in the domestic and international context	30
1. Judicial activism in the domestic law context	30
2. The necessity to reconceptualize judicial activism in the international law context	35
III. The definition and precisions of judicial activism in international law	41
1. The relative nature of judicial activism	42
2. Judicial activism is a determinate concept	43
3. Judicial activism, applicable law and jurisdiction	47
IV. The assessment of judicial activism in international law	51
1. The means to exercise judicial activism	51
1.1. Judicial activism through the standard of review	52
1.2. Judicial activism through interpretation	57
2. The variables that affect judicial activism	64
2.1. The dispute settlement function	65
2.2. Constituencies contexts	68
2.3. Authority and legitimacy consideration	72
V. Conclusion	74

Chapter III: The Comparative Assessment of Judicial Activism in the WTO Appellate Body and the European Court of Justice	77
I. Introduction	77
II. The Basis and Rationale for comparing the Appellate Body and the ECJ	77
1. The Appellate Body and ECJ are international adjudicative bodies	78
2. The <i>ratione materiae</i> competence of the Appellate Body and the ECJ are similar	83
3. The Appellate Body and ECJ have compulsory and exclusive jurisdiction	85
4. The rationale to choose the ECJ as the comparative subject for the Appellate Body.	88
III. The means to exercise judicial activism	90
1. Judicial activism through applying an intrusive standard of review	90
1.1. General observations on the standard of review	91
1.2. The review of scientific facts, evidence and risk assessment	93
1.2.1. The Appellate Body	93
1.2.2. The ECJ	99
1.3. The review of public policies	102
1.3.1. The Appellate Body	102
1.3.2. The ECJ	108
1.4. The review of the autonomy of members	111
1.4.1. The Appellate Body	111
1.4.2. The ECJ	114
1.5. Summary of observation	116
2. Judicial activism through interpretation	120
2.1. The Appellate Body	120
2.2. The ECJ	125
2.3. Summary of observations	129
IV. The assessment of judicial activism at the Appellate Body and the ECJ	130
1. The perceived judicial function	130
1.1. The Appellate Body	130
1.2. The ECJ	135

1.3. Summary of observations	138
2. The authority and legitimacy considerations	139
2.1. The Appellate Body	140
2.2. The ECJ	144
2.3. Summary of observations	148
3. The constituencies context	149
3.1. The Appellate Body	149
3.1.1. National governments	149
3.1.2. National courts	154
3.1.3. The legal academics	156
3.2. The ECJ	160
3.2.1. National governments	160
3.2.2. National courts	162
3.2.3. Legal academics	164
3.3. Summary of observations	167
V. Conclusion	168
 Chapter IV: The Justifications for Judicial Activism in International Adjudication	 175
I. Introduction	175
II. Judicial activism as a fallback against a declaration of non liquet	175
1. Gaps in international law	177
2. The duty and methods of international courts and tribunals to fill in gaps in the written law and their shortcomings	180
3. Judicial activism as a fallback against the declaration of non liquet	186
III. Judicial activism to ensure the principle of effectiveness in treaty interpretation	190
1. The creation of an additional obligation to give meaning to all safeguard regulations	192
2. The incorporation of the legitimate regulatory distinctions test to persevere the objects and purposes of the TBT Agreement	195
3. Expanding jurisdiction to annulment against the acts of the European Parliament	199

4. Creating individual rights for compensation to ensure the effectiveness of EU law	201
IV. Judicial activism as a means to promote the authority and legitimacy of international courts and tribunals in hard cases	202
1. The conception of hard cases	203
2. Hard cases in the jurisprudence of the Appellate Body	204
2.1. The prohibition of the use of zeroing in anti-dumping investigations	204
2.2. Alleviating the confidentiality in dispute settlement	211
2.3. Establishing the hierarchical structure between the WTO panels and the Appellate Body	215
3. Hard cases in the jurisprudence of the ECJ	220
3.1. The primacy and direct effect of EU law	220
3.2. State liability for breach of Community law	224
3.3. The protection of fundamental rights	227
3.4. The guarantee of respect for the rule of law in Europe	230
V. Conclusion	237
Chapter V: Conclusion	241
Bibliography	245
I. Treaties and Legislations	245
II. Case Laws	246
A) International Court of Justice and Permanent Court of Justice	246
B) GATT Panel, WTO Panel and Appellate Body	248
C) European Court of Justice and European Court of Human Rights	255
D) Other International Courts and Tribunals	261
E) Domestic Courts	262
III. Books (Sections)	262
IV. Journals and Articles	286
V. Other Documents (Blog Posts, Newspaper, Encyclopaedia Entries and Reports)	310