

Regulating Competing Jurisdictions Among International Courts and Tribunals

Nikolaos Lavranos*

I. Introduction	576
II. Case-Studies on the Effects of the Multiplication of International Courts and Tribunals	576
A. The <i>MOX Plant</i> Dispute	578
The Facts	578
The OSPAR Arbitral Tribunal Award	579
The UNCLOS Arbitral Award	580
The MOX Plant Judgment of the ECJ	581
Analysis	583
B. The <i>IJzeren Rijn</i> Dispute	584
The Facts	584
The <i>IJzeren Rijn</i> Arbitral Decision	585
Analysis	586
C. The <i>Mexico Soft Drinks</i> Dispute	587
The Facts	587
The WTO Panel Ruling	588
The WTO Appellate Body Ruling	589
Analysis	591
D. The <i>Brazilian Tyres</i> Case	592
The Facts	592
The WTO Panel Ruling	593
The WTO Appellate Body Ruling	594
Analysis	596
E. The ICJ's Genocide Ruling	597
The Facts	597
The ICJ's <i>Genocide</i> Judgment	599
Analysis	601
F. The <i>Bosphorus</i> Case	603
The Facts	603
The ECtHR's <i>Bosphorus</i> Judgment	604
Analysis	605
III. The <i>Solange</i> Method as a Tool for Regulating Competing Jurisdictions	606
A. The Origins of the <i>Solange</i> Method and <i>Solange</i> Jurisprudence of the BVerfG	607
B. The Legal Basis of the <i>Solange</i> Method	612
C. The Application of the <i>Solange</i> Method at the International Law Level	616
IV. Conclusion	619

* Dr. jur., LL.M., Senior Researcher, Faculty of Law, ACIL, University of Amsterdam; Max Weber Fellow at the EUI, Florence, as of September 1, 2008. This article has been written as part of my NWO-sponsored research project "Competing Jurisdiction between the ECJ and Other International Courts and Tribunals" (2005-2009). I am indebted to Nicolas Viellard for his assistance. The author can be contacted at <nlavranos@yahoo.com>. The usual disclaimer applies.

I. Introduction

In the past decade the topic of proliferation or multiplication of international courts and tribunals, competing jurisdiction between these courts and possible fragmentation of international law has increasingly received the attention of a vast array of scholars and practitioners.¹

This article explores, first, the issue whether signs of fragmentation of international law as a result of the multiplication of international courts and tribunals could be detected, and second, whether there is a need for further general rules to regulate overlapping jurisdiction among those courts. More specifically, the question will be discussed whether in this context comity would be an appropriate general approach to handle competing jurisdiction.

The structure of the analysis below follows the order of these questions.

Accordingly, in the first part several case-studies will be presented that illustrate the various effects caused by overlapping jurisdictions.

The second part will discuss possible solutions to avoid the negative effects associated with divergent or conflicting rulings by the different courts and tribunals on the same legal issue. The focus will be on comity, but more specifically, on the more forceful variation of it, namely, the so-called *Solange* method (*Solange* means “as long as” in German) developed by the German Federal Constitutional Court.

The analysis will be wrapped up by some concluding remarks.

II. Case-Studies on the Effects of the Multiplication of International Courts and Tribunals

In this part several case-studies will be presented that illustrate what effects the multiplication of international courts and tribunals can have if those courts and tribunals come to divergent or conflicting rulings or simply negate the existing jurisdiction of another court or tribunal. To be sure, the multiplication of international courts and tribunals as such is not a problem. On the contrary, it should be considered as a sign that states are prepared to use courts and tribunals more often for settling their disputes rather than using armed forces. In other words, the multiplication of international courts and tribunals should be seen as a sign of a movement towards a rule of law based dispute settlement culture between states.² However, the multiplication of international courts and tribunals does raise problems if those courts arrive at divergent or even conflicting rulings – as has actually

¹ See i.e., Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, (2007); *idem*, *The Competing Jurisdiction of International Courts and Tribunals*, (2003); N. Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 *Leiden Journal of International Law* 223, 223-246 (2006).

² See i.e., E.-U. Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10(3) *Journal of International Economic Law* 529, 529-552 (2007).

been the case on several occasions. The main reason for these problems is the fact that there is no hierarchical legally binding relationship between all these courts and tribunals. In other words, there is no hierarchy between the various courts and tribunals, so they are not bound by each other's jurisprudence. Hence, they can act – formally and legally speaking – in “clinical isolation”.³

The case-studies discussed below cover a wide range of areas of international law, ranging from environmental law, trade law, and human rights law to general international law issues such as individual and state responsibility. Moreover, jurisdictional overlap also takes place between different legal orders, for instance EC law, MERCOSUR law, NAFTA law *vis-à-vis* international trade law as well as EC law *vis-à-vis* European Convention on Human Rights (“ECHR”) law.

This underlines the fact that the problem of competing jurisdictions is not confined to a certain area of international law but rather is of general importance which requires a generally applicable solution. The case-studies are each introduced by a short summary of the facts, followed by a synopsis of the relevant points of the decision of the court or tribunal as far as they concern the jurisdictional aspects and are concluded by a short analysis.

The first case concerns the *Mox Plant* dispute which entailed three separate dispute settlement proceedings: (i) the OSPAR arbitral tribunal's decision⁴, (ii) the UNCLOS arbitral tribunal's decision⁵ and (iii) the European Court of Justice's (“ECJ”) judgment.⁶ The relevant aspect of these proceedings for our purposes is the question whether or not the ECJ has exclusive jurisdiction instead of the arbitral tribunals.

That question was also the focus in the second case regarding the *IJzeren Rijn* (or *Iron Rhine*) dispute and the *IJzeren Rijn* arbitral tribunal's award.⁷

The third case deals with the *Mexico Soft Drinks*⁸ case brought before the WTO and its relationship with the NAFTA dispute settlement system.

The fourth case examines the *Brazilian Tyres*⁹ case brought before the WTO and its relationship with the dispute settlement system of the MERCOSUR.

³ The term “clinical isolation” is used in analogy and by reference to G. Marceau, A Call for Coherence in International Law – Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement, 33(5) *Journal of World Trade Law* 115, 87-153 (1999).

⁴ Available at <http://www.pca-cpa.org/showpage.asp?pag_id=1158>.

⁵ Available at <http://www.pca-cpa.org/showpage.asp?pag_id=1148>.

⁶ ECJ case C-459/03, *Commission v Ireland*, ECR I-4635 (2006).

⁷ See <http://www.pca-cpa.org/showpage.asp?pag_id=1056>.

⁸ WTO Mexico-Tax Measures on Soft Drinks and Other Beverages, Dispute DS308, Panel report circulated on 7 October 2005, Appellate Body report circulated on 6 March 2006. On 24 March 2006, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. Reports available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm>.

⁹ WTO Brazil-Measures Affecting Imports of Retreated Tyres, Dispute DS332, Panel Report circulated on 12 June 2007, Appellate Body Report circulated on 3 December 2007. On 17 December, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. Reports available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

The fifth case concerns the International Court of Justice's ("ICJ") recent *Genocide Convention*¹⁰ ruling in which the ICJ discussed the jurisdiction of the International Criminal Tribunal for the former Yugoslavia ("ICTY") regarding the application of a broader *Nicaragua* test by the ICTY.

Finally, the last case turns to the European Court of Human Rights' (ECtHR) *Bosphorus* judgment¹¹ in which the ECtHR clarified its jurisdiction *vis-à-vis* the ECJ concerning the level of fundamental rights protection in Europe.

A. The *MOX Plant* Dispute

The Facts

For many years Ireland has been concerned about the radioactive discharges of the Mox Plant situated in Sellafield, U.K., that are being released into the Irish Sea.¹² After having unsuccessfully tried to obtain information from the U.K. about the discharges of the Mox Plant, Ireland instituted proceedings against the U.K. by raising two different claims.¹³

First, Ireland wanted to obtain from the U.K. all available information regarding the radioactive discharges of the Mox Plant by relying on Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR"). Article 9(2) OSPAR requires the contracting parties to make available information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it".

Second, Ireland believed that the discharges of the Mox Plant contaminated its waters and therefore constituted a violation of the UN Law of the Sea Convention ("UNCLOS"). Accordingly, Ireland sought an award for the disclosure of information regarding the Mox Plant from the U.K. on the basis of the OSPAR convention as well as a declaration that the U.K. violated its obligations under UNCLOS. After lengthy negotiations, Ireland and the U.K. agreed to establish arbitral tribunals under both the OSPAR and UNCLOS conventions in order to resolve the dispute.

¹⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia Herzegovina v Serbia and Montenegro*) ICJ judgment of 26 February 2007. Available at <<http://www.icj-cij.org/docket/files/91/13685.pdf>>.

¹¹ ECtHR *Bosphorous Hava v Ireland*, App. No. 45036/98, judgment of 30 June 2005. Available at <<http://cmiskp.echr.coe.int//tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=10594&sessionId=5426811&skin=hudoc-en&attachment=true>>.

¹² See for an overview <http://www.ecolo.org/documents/documents_in_english/Ireland-PETER-BRAZEL.doc>.

¹³ See for the materials of the dispute Permanent Court of Arbitration, available at <www.pca-cpa.org>. See further: Y. Shany, The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures, 17 *Leiden Journal of International Law* 815, 815-828 (2004).

However, it should be noted that this dispute between two EC member states also touches on EC law (EC environmental law legislation and the EURATOM treaty). This in turn potentially triggers Article 292 EC Treaty (hereinafter “EC”), which prescribes that all disputes between EC member states involving EC law should be brought exclusively before the ECJ.¹⁴ In other words, this dispute raised the potential overlap of jurisdiction between the two arbitral tribunals and the ECJ.¹⁵ Eventually, as will be discussed below, the *Mox Plant* dispute came before the ECJ – at least as far as the UNCLOS dispute is concerned.

The OSPAR Arbitral Tribunal Award

In its decision of 2 July 2003 the OSPAR arbitral tribunal asserted its jurisdiction and rendered a final award.¹⁶ As regards the possible implications of EC law and in particular the possible jurisdiction of the ECJ, the OSPAR arbitral tribunal refused to take into account any other sources of international law or European law that might potentially be applicable in the dispute. Whereas Article 32(5)(a) of OSPAR states that the arbitral tribunal shall decide according to the “rules of international law, and, in particular those of the [OSPAR] Convention”, the OSPAR arbitral tribunal argued that the OSPAR Convention had to be considered to be a “self-contained” dispute settlement regime, such that the tribunal could base its decision only on the OSPAR Convention.¹⁷

Despite the fact that other relevant sources of international law or European law (in particular EC Directive 90/313¹⁸, now replaced by EC Directive 2003/4¹⁹, relevant ECJ jurisprudence²⁰ or the Convention on access to information, public participation in decision making, and access to justice regarding environmental matter (“the Aarhus Convention”) of 1998, which has been ratified by all EC member states and recently also by the EC itself²¹), were applicable in this case, the OSPAR arbitral tribunal did not consider itself competent to take these into account.

¹⁴ P. Craig/G. de Burca, *EU Law*, 4th ed., 203 (2008).

¹⁵ See for a detailed analysis Lavranos, *supra* note 1.

¹⁶ OSPAR arbitral tribunal, *Mox Plant*, final award, *supra* note 5, available at <<http://www.pca-cpa.org>>. See further: T. McDorman/D. Caron, *Access to Information under Article 9 OSPAR Convention*, 98 *Am. J. Int'l L.* 331, 331-341 (2004).

¹⁷ OSPAR arbitral tribunal, *supra* note 5, para. 143.

¹⁸ Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment, *O.J. L* 158/56 (1990).

¹⁹ Directive 2003/4 of the EP and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, *O.J. L* 41/26 (2003).

²⁰ See i.e., ECJ case C-186/04, *Housieaux*, *ECR I*-3299 (2005); ECJ case C-233/00, *Commission v France*, *ECR I*-6625 (2003); ECJ case C-316/01, *Glawischnig*, *ECR I*-5995 (2003); ECJ case C-217/97, *Commission v Germany*, *ECR I*-5087 (1999); ECJ case C-321/96, *Wilhelm Mecklenburg v Kreis Pinneberg – Der Landrat*, *ECR I*-3809 (1998).

²¹ Council Decision 2005/370/EC of 17 February 2005 on the Conclusion, on Behalf of the EC, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *O.J. L* 124/1 (2005).

In substance, the OSPAR arbitral tribunal ruled that the U.K. did not violate the OSPAR Convention by not disclosing the information sought by Ireland.

More specifically, the OSPAR arbitral tribunal chose to interpret the relevant provision of the OSPAR Convention much more restrictively compared to the ECJ's interpretation of the comparable Community law provisions. While the OSPAR arbitral tribunal was obviously legally not bound to follow the ECJ's jurisprudence, the fact that the dispute was between two EC member states and the similar context of the relevant OSPAR and EC law provisions, would have been sufficient reasons for the OSPAR arbitral tribunal to be more in line with the ECJ. Consequently, by failing to do so the OSPAR arbitral tribunal caused fragmentation regarding the standard of access to information on environmental issues provided for by EC law and by the OSPAR Convention.

The UNCLOS Arbitral Award

In contrast to the straight-forward OSPAR proceeding discussed above (first case), the UNCLOS proceeding appeared to be more complicated because of the various dispute settlement options offered by UNCLOS.

More specifically, Articles 287 and 288 UNCLOS provide that various forums can be selected by the contracting parties to settle their disputes. Parties can use the International Tribunal for the Law of the Sea (ITLOS), the ICJ or ad hoc arbitral tribunals. Moreover, Article 282 UNCLOS explicitly recognizes the possibility of bringing a dispute before dispute settlement bodies established by regional or bilateral agreements. As the parties had not commonly designated a certain dispute settlement forum, the dispute had to be submitted to an arbitration procedure in accordance with Annex VII Article 287(5) UNCLOS. However, pending the establishment of this ad hoc arbitral tribunal, Ireland requested from ITLOS interim measures under Article 290(5) UNCLOS. Ireland asked that the U.K. be ordered to suspend the authorisation of the Mox Plant or at least take all measures to stop the operation of the Mox Plant instantly.

Regarding the issue of jurisdiction, the ITLOS determined that *prima facie* the conditions of Article 290(5) UNCLOS were met so that under Annex VII the arbitral tribunal had jurisdiction to decide on the merits of the case.²² Concerning the substance, the ITLOS ordered both parties to co-operate and enter into consultations regarding the operation of the Mox Plant and its emissions into the Irish Sea, pending the decision on the merits of the arbitral award.²³

²² ITLOS, Mox Plant, Request for Provisional Measures, Order of 3.12.2001, available at <<http://www.itlos.org>>.

²³ Ibid.

After the matter had come before the UNCLOS arbitral tribunal, the arbitral tribunal confirmed the finding of ITLOS that it had *prima facie* jurisdiction.²⁴ However, in a second step, the arbitral tribunal considered it necessary to determine whether it indeed had definite jurisdiction to solve the dispute, in view of the U.K.'s objection that the ECJ had jurisdiction in this case on the basis of Article 292 EC because Community law was also at issue. The arbitral tribunal accepted the U.K.'s objection and consequently stayed the proceedings. Accordingly, the arbitral tribunal requested the parties of the dispute to first find out whether or not the ECJ had jurisdiction before it would proceed with rendering a decision on the merits.²⁵

But the parties did not have to take any action as – at about the same time – the European Commission (supported by the U.K.) started an Article 226 EC infringement procedure against Ireland for violating Article 292 EC and the identical provision in the Euratom Treaty. The Commission argued that Ireland had instituted the proceedings against the U.K. without taking due account of the fact that the EC was a party to UNCLOS. In particular, the Commission claimed that by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the ECJ as enshrined in Article 292 EC and the similarly worded Article 193 Euratom. Furthermore, according to the Commission, Ireland had also violated the duty of loyal co-operation incumbent on it under Article 10 EC and the similarly worded Article 192 Euratom.

So in this way the *Mox Plant* case, at least as far as it concerned the UNCLOS proceedings, ultimately came before the ECJ – against the initial intentions of the member states involved in the dispute.

The MOX Plant Judgment of the ECJ

The starting point of the Court's analysis was the question whether or not this dispute falls within the acting competence of the EC, because only if that were the case would the exclusive jurisdiction of the ECJ based on Article 292 EC be triggered.²⁶ The EC and its member states have concluded the Law of the Sea Convention as a mixed agreement.²⁷ In this context the ECJ reaffirmed that mixed agree-

²⁴ UNCLOS arbitral tribunal, *Mox Plant*, Suspension of Proceedings on Jurisdiction and Merits and Request for further Provisional Measures, Order No. 3 of 24.6.2003, available at <<http://www.pca-cpa.org>>.

²⁵ *Ibid.*

²⁶ ECJ case C-459/03, *Commission v Ireland*, ECR I-4635 (2006); see for a detailed analysis C. Romano, *Commission of the European Communities v. Ireland*, 101 *Am. J. Int'l L.* 171, 171-179 (2007); N. Lavranos, *The Scope of the Exclusive Jurisdiction of the Court of Justice*, 32 *European Law Review* 83, 83-94 (2007); S. Maljean-Dubois/J.-C. Martin, *L'affaire de l'Usine Mox devant les tribunaux internationaux*, 134 *Journal du Droit International* 437, 437-471 (2007).

²⁷ Council Decision 98/392/EEC of 23.3.1998 concerning the Conclusion by the EC of the UN Convention of 10.12.1982 on the Law of the Sea and the Agreement of 28.7.1994 Relating to the Implementation of Part XI Thereof O.J. L 179/1 (1998).

ments have the same status in the Community legal order as agreements concluded by the EC alone.²⁸ Consequently, when the EC ratified UNCLOS, it became an integral part of the Community legal order. Based on that, the ECJ examined whether the EC had exercised its competence in the policy area (maritime pollution) that is at the centre of the dispute between Ireland and U.K. The ECJ concluded that the matters covered by the provisions of UNCLOS relied upon by Ireland before the arbitral tribunal are “very largely” regulated by Community law.²⁹ Ireland therefore was relying before the UNCLOS arbitral tribunal on provisions that have become part of the Community legal order. This triggered the jurisdiction of the ECJ based on Article 292 EC. The next issue was to determine whether that jurisdiction is indeed exclusive in view of the fact that UNCLOS provides for its own sophisticated dispute settlement system. Referring to its position in Opinion 1/91,³⁰ the ECJ held that

“[...] an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive competence is confirmed by Article 292 EC [...]”³¹

As a consequence thereof, an international agreement such as UNCLOS cannot affect the exclusive jurisdiction of the ECJ regarding the resolution of disputes between the member states concerning the interpretation and application of Community law.³² Hence, Ireland was precluded on the basis of Articles 292 and 220 EC from bringing the dispute before the UNCLOS arbitral tribunal. Indeed, the Court of Justice went as far as stating that

“[...] the institution and pursuit of proceedings before the arbitral tribunal [...], *involve a manifest risk that the jurisdictional order laid down in the Treaties, consequently, the autonomy of the Community legal system may be adversely affected.*”³³

The ECJ did not leave it at claiming exclusive jurisdiction in this case, but found it necessary to make two important further remarks. First, that it is only for the ECJ itself to determine – should the need arise – whether, and if so to what extent, provisions of the international agreement in question fall outside its jurisdiction, and therefore may be adjudicated by another dispute settlement body.³⁴ Accordingly, if member states doubt whether a dispute involves Community law aspects, they are essentially obliged to obtain an answer from the ECJ before bringing the case to another dispute settlement body. Second, the ECJ found that Article 292 EC must be understood as a specific expression of the member states’ more general

²⁸ *Supra* note 26, para. 84.

²⁹ *Ibid.* at para. 110.

³⁰ ECJ Opinion 1/91 (EEA) ECR I-6079 (1991).

³¹ *Supra* note 26, para. 123.

³² *Ibid.* at para. 132.

³³ *Ibid.* at para. 154 [emphasis added].

³⁴ *Ibid.* at para. 135.

duty of loyalty as enshrined in Article 10 EC.³⁵ Thus, member states have a duty to inform and consult with the competent Community institutions (i.e. the Commission and/or the ECJ) prior of bringing a case before a dispute settlement body other than the ECJ.³⁶ In this way, the Commission and eventually the ECJ are informed in time of a dispute settlement procedure that might interfere with Article 292 EC. This in turn puts the Commission in a position to start an Article 226 EC infringement procedure against a member state if it considers that Article 292 EC has been violated. However, it should be emphasized that this is entirely in the discretion of the Commission. In contrast to the Commission, the ECJ has no possibility to seize *ex officio* by itself a case in order to protect its exclusive jurisdiction.

Analysis

The *Mox Plant* dispute was the first case that highlighted the potential problems associated with the exclusive ECJ jurisdiction and the multiplication of international courts and tribunals. The ECJ clearly decided to defend its exclusive jurisdiction to the maximum as far as it concerns disputes between EC member states that potentially may involve EC law. The ECJ did so by substantially limiting the freedom of EC member states to select a dispute settlement body of their choice. Only if it has been established by the ECJ that no EC law issues are involved, are EC member states in a position to bring their dispute before another dispute settlement body. In this way the ECJ hopes to protect the uniform application of EC law in all EC member states. However, the different approaches by the OSPAR and UNCLOS arbitral tribunals illustrate that the ECJ cannot force them to take EC law or for that matter the ECJ's jurisdiction into account. The UNCLOS arbitral tribunal showed comity by staying the proceedings and requesting the parties to check first whether the jurisdiction of the ECJ is triggered in this case. In contrast, the OSPAR arbitral tribunal did not show any comity towards the ECJ.

The *Mox Plant* dispute also revealed that the ECJ is quite helpless when it comes to defending its exclusive jurisdiction, in particular it cannot prevent member states from going to another court. Only the Commission can take action against such a move if it considers it necessary and appropriate.

In sum, the *Mox Plant* dispute exhibits fragmenting effects as far as the OSPAR Convention *vis-à-vis* EC access on information law is concerned, while at the same time showing unifying effects by preserving the uniform application of EC environmental law as far as UNCLOS law is concerned.

³⁵ Ibid. at para. 169 "The obligation devolving on Member States, set out in Article 292 EC, to have recourse to the Community judicial system and to respect the Court's exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 10 EC."

³⁶ Ibid. at para. 179.

B. The *IJzeren Rijn* Dispute

The Facts

The *IJzeren Rijn* (also known as *Iron Rhine*) case essentially concerned a dispute between the Netherlands and Belgium regarding the question as to which of the parties had to pay the costs for the revitalisation of an old railway line.³⁷ The *IJzeren Rijn* railway line was one of the first international railway lines in mainland Europe in the 19th century, running from Antwerp through the Netherlands to the Rhine basin-area in Germany. Belgium had obtained a right of transit through the Netherlands on the basis of two treaties dating back from 1839 (Treaty of Separation) and 1897 (Railway Convention). After 1991 the railway line was not used anymore. In the meantime, the Netherlands had assigned an area (the Meinweg, close to the city of Roermond) which the railway line crosses as a “special area of conservation” according to the EC Habitats Directive. Moreover, in 1994 the Netherlands had also identified the Meinweg as a special protection area in accordance with the EC Birds Directive. However, the Birds Directive was superseded by the Habitats Directive as far as it is relevant in the present dispute. In addition, the Meinweg area was identified as a national park and as a “silent area” under its domestic legislation.

It is at this point that the relevancy of EC law in this dispute comes into play, in particular, Article 6 of the “Habitats Directive” 92/43,³⁸ which imposes strict conditions for any activities in a “special area of conservation” such as in the Meinweg area.

Despite this designation of a protective status for the Meinweg area, Belgium expressed its intention to start using the railway line again. Accordingly, in the last decade discussions took place between Belgium and the Netherlands regarding the revitalisation of the railway line. The environmental impact studies that were conducted in order to assess the possibility of a revitalisation of this railway line determined that additional costs of about € 500 million would be involved in order to meet the applicable environmental standards. Since no agreement was reached on who should pay for the costs, both states agreed to solve the dispute by bringing it

³⁷ The details of the dispute can be found at the website of the Permanent Court of Arbitration, available at <<http://www.pca-cpa.org/ENGLISH/IPC/#Belgium/Netherlands>>; see further I. van Bladel, *The Iron Rhine Arbitration Case: On the Right Legal Track? An Analysis of the Award and of Its Relation to the Law of the European Community*, 18 *Hague Yearbook of International Law* 3, 3-22 (2005); C. Warbrick, *The “Iron Rhine” (“Ijzeren Rijn”) Arbitration: Its Contribution to International Law*, *The Iron Rhine Arbitration Award 2005*, 153-193 (2007).

³⁸ Council Directive 92/43/EEC of 21.5.1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, O.J. 1992 L 206, 7; see also the unofficial consolidated text of the Directive published in 2003, available at CELEX number: 392L0043. See for recent cases concerning Art. 6 Habitats Directive ECJ Case C-418/04 (*Commission v Ireland*), judgment of the ECJ of 13 December 2007; ECJ case C-388/05 (*Commission v Italy*), judgment of the ECJ of 20 September 2007, both judgments available at <<http://eur-lex.europa.eu>>.

before an arbitral tribunal established under the auspices of the Permanent Court of Arbitration (PCA). In the compromise between the Netherlands and Belgium, the arbitral tribunal was explicitly called upon to settle the dispute on the basis of international law, including if necessary European law, while at the same time respecting the obligations of the parties arising out of Article 292 EC. As mentioned before, Article 292 EC prescribes that all disputes between EC member states involving EC law should be brought exclusively before the ECJ.

Thus, whereas this dispute at first sight seemed to involve only international law aspects, the parties themselves recognized from the outset that European law, in particular Article 6 of the EC Habitats Directive, could potentially be relevant and thus expressly requested the arbitral tribunal to consider this issue as well.

The *IJzeren Rijn* Arbitral Decision

The arbitral tribunal started its analysis concerning Article 292 EC by stating “in regard to the limits drawn to its jurisdiction by Article 292 EC, it finds itself in a position analogous to that of a domestic court within the EC”.³⁹ The arbitral tribunal continued by stating that if the tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of EC law which constitutes neither *actes clairs* nor *actes éclairés* (i.e. the so-called CILFIT-conditions), Article 292 EC would be triggered and the dispute would have to be submitted to the ECJ.⁴⁰ Accordingly, the arbitral tribunal examined whether or not in the present case the CILFIT-conditions were met.

The ECJ developed the CILFIT-conditions in its jurisprudence concerning the obligation of national courts of the EC member states to refer preliminary questions to it.⁴¹ According to that jurisprudence the obligation of national courts to refer preliminary questions to the ECJ is only waved (i) if that question is not relevant, (ii) if it has been already answered by the ECJ or (iii) if the answer is entirely clear so that there is no need anymore for the ECJ to give an answer.⁴² It should be noted that the arbitral tribunal only examined the first possibility, i.e. whether the application of Community law is necessary for rendering its award in this dispute.

The arbitral tribunal set out the framework of its jurisdiction by stating that “from the viewpoint of Article 292 EC the question thus faced by the Tribunal is [...] does the Tribunal have to engage in the interpretation of the Habitats Direc-

³⁹ *IJzeren Rijn*, Arbitral Award, *supra* note 7, para. 103.

⁴⁰ *Ibid.*

⁴¹ ECJ case 283/81, *CILFIT*, ECR 3415 (1982); as clarified in ECJ case C-244/01, *Köbler*, ECR I-10239 (2003). But see the Opinion of AG Colomer in ECJ case C-461/03, *Gaston Schul*, ECR I-10513 (2005). However, in its judgment in ECJ case C-461/03, *Gaston Schul*, ECR I-10513 (2005) the ECJ flatly rejected any relaxation of the CILFIT-conditions as suggested by A.G. Colomer.

⁴² See further D. Chalmer et al., *European Union Law*, 299-302 (2006); J. Steiner et al., *EU Law*, 9th ed., 210-217 (2006); Craig/de Burca, *supra* note 14, at 460.

tive in order to enable it to decide the issue of the reactivation of the Iron Rhine railway and the costs involved?”⁴³ The arbitral tribunal concluded that:

“The Tribunal has examined whether it would arrive at different conclusions on the application of Art. XII to the Meinweg tunnel project and its costs if the Habitats Directive did not exist. The Tribunal answers this question in the negative, as its decision would be the same on the basis of Art. XII and of Netherlands environmental legislation alone. Hence the questions of EC law debated by the parties are not determinative, or conclusive for the Tribunal; it is not necessary for the Tribunal to interpret the Habitats Directive in order to render its award. Therefore, [...] the questions of EC law involved in the case do not trigger any obligations under Art. 292 EC.”⁴⁴

In substance, the *IJzeren Rijn* arbitral tribunal concluded that the Netherlands had to grant a right of transit to Belgium based on the Treaties of 1839 and 1897, but split the financial burden of the various parts of the reactivation project between both parties.

Analysis

It is remarkable that the *IJzeren Rijn* arbitral tribunal considered itself able to render its award despite the fact that Community law (Habitats Directive and Article 292 EC) was clearly applicable in this dispute and thus needed to be applied and interpreted. This in turn would have triggered the exclusive jurisdiction of the ECJ based on Article 292 EC.

As a consequence of the fact that the *IJzeren Rijn* arbitral tribunal exercised its jurisdiction, the Habitats Directive was not applied in this case, whereas clearly it was applicable. That in turn affects the uniform application of Community law in all EC member states. Moreover, due to the fact that the *IJzeren Rijn* arbitral tribunal was from the outset not in a position to request a preliminary ruling from the ECJ because it did not meet the conditions of a proper court within the meaning of Article 234 EC,⁴⁵ the arbitral tribunal was all the more obliged to refuse its

⁴³ *Supra* note 7, para. 121.

⁴⁴ *Ibid.* at para. 137.

⁴⁵ In ECJ case C-125/04, *Denuit and Cordenier v. Transorient*, ECR I-923 (2005), the ECJ formulated the conditions for a court or tribunal to be able to request a preliminary ruling from the ECJ as follows:

“12. In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96, *Dorsch Consult*, ECR I-4961 [1997], para. 23 [1997], and the case-law there cited, and Case C-516/99, *Schmid*, ECR I-4573, para. 34 [2002]).

13. Under the Court’s case-law, an arbitration tribunal is not a court or tribunal of a Member State within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81, *Nordsee Deutsche Hochseefischerei*, ECR 1095, para. 10 to 12 [1982], and Case C-126/97, *Eco Swiss*, ECR I-3055, para. 34 [1999]).”

jurisdiction in this case and refer the parties to the ECJ as the only proper forum. Accordingly, the *IJzeren Rijn* arbitral tribunal caused fragmentation – not so much within the international legal order – but rather within the European legal order by adjudicating a case that was clearly an EC law matter.

Finally and more generally, this case confirms again the observation made above regarding the *Mox Plant* dispute that arbitral tribunals are not particularly concerned with the possibility that the exclusive jurisdiction of the ECJ may be triggered in a certain case, but rather prefer to seize their jurisdiction and decide the case even if it requires presenting flawed legal argumentation.

C. The *Mexico Soft Drinks* Dispute

The Facts

In 2004 the U.S. complained about certain tax measures imposed by Mexico on soft drinks and other beverages that use any sweetener other than cane sugar. The tax measures concerned included: (i) a 20 % tax on soft drinks and other beverages that use any sweetener other than cane sugar (“beverage tax”), which is not applied to beverages that use cane sugar; and (ii) a 20 % tax on the commissioning, mediation, agency, representation, brokerage, consignment and distribution of soft drinks and other beverages that use any sweetener other than cane sugar (“distribution tax”).

The U.S. considered that these taxes were inconsistent with Article III of GATT 1994, in particular, Article III:2, first and second sentences, and Article III:4 thereof. Accordingly, the U.S. requested consultations with Mexico, which ended unsuccessfully. As a consequence thereof, the U.S. instituted dispute settlement proceedings before the WTO against Mexico.⁴⁶

As a preliminary point, Mexico raised the issue of jurisdictional competition. More specifically, Mexico requested the WTO panel to decide to decline to exercise its jurisdiction in favour of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (“NAFTA”).⁴⁷ In short, Mexico argued that this dispute involved two NAFTA states and touched on NAFTA provisions and therefore should be treated as a NAFTA dispute rather than a WTO dispute. Indeed, Mexico claimed that it had adopted the measure in order to force the US to cooperate in finding a resolution to the dispute within the framework of NAFTA. Accordingly, Mexico argued, a NAFTA panel would be in a better position to decide this dispute. In this context it should be noted that Mexico and the U.S. have

It is submitted that this also applies in analogy to international arbitral tribunals.

⁴⁶ *Supra* note 8.

⁴⁷ *Ibid.* at para. 7.1.

been having a broader dispute on sugar for quite some time that has been litigated in various proceedings before the WTO and NAFTA.⁴⁸

The WTO Panel Ruling

In a preliminary ruling, the WTO panel rejected Mexico's request and found instead that under the Dispute Settlement Understanding ("DSU"), it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it.⁴⁹ The WTO panel added that even if it had such discretion, it "did not consider that there were facts on record that would justify the panel declining to exercise its jurisdiction in the present case".⁵⁰

In its reasoning, the WTO panel opined that "discretion may be said to exist only if a legal body has the freedom to choose among several options, all of them equally permissible in law."⁵¹ According to the panel, "such freedom ... would exist within the framework of the DSU only if a complainant did not have a legal right to have a panel decide a case properly before it."⁵² Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia – Salmon*, the panel observed that the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes and that a panel is required to address the claims on which a finding is necessary to enable the Dispute Settlement Body ("DSB") to make sufficiently precise recommendations or rulings to the parties.⁵³ From this, the panel concluded that a WTO panel would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction.⁵⁴ Referring to Articles 3.2 and 19.2 of the DSU, the panel further stated that if a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements.⁵⁵ The WTO panel added that Article 23 of the DSU makes it clear that a WTO Member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by an

⁴⁸ See for a detailed discussion A. Vacek-Aranda, *Sugar Wars: Dispute Settlement Under NAFTA and the WTO as Seen Through the Lens of the HFCS Case and Its Effects on U.S.-Mexican Relations*, 12 *Texas Hispanic Journal of Law and Policy* 121, 121-160 (2006); P. Larios, *The Fight at the Soda Machine: Analysing the Sweetener Trade Dispute between the United States and Mexico before the World Trade Organization*, 20 *American University International Law Review* 649, 649-702 (2005).

⁴⁹ *Supra* note 8, Annex B, Fax of the Chairman of the Panel, dated 18 January 2005.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at para. 7.7.

⁵² *Ibid.*

⁵³ *Ibid.* at para. 7.8 (referring to Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, para. 223, 20 October 1998).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at para. 7.9.

other Member has the right to bring the case before the WTO dispute settlement system.⁵⁶

Finally, regarding the potential jurisdictional competition between the NAFTA and WTO dispute settlement system, it should be noted that the WTO panel did not make any findings on whether there may be other cases where a WTO panel's jurisdiction might be legally constrained, notwithstanding its approved terms of reference.⁵⁷ In any case, the WTO panel explicitly rejected Mexico's contention that this WTO proceeding is identical with the on-going negotiations to resolve the sugar dispute within the NAFTA context.⁵⁸ Consequently, the WTO panel concluded that "[...] even conceding that there seems to be an unresolved dispute between Mexico and the United States under the NAFTA, the resolution of the present WTO case cannot be linked to the NAFTA dispute. In turn, any findings made by this panel, as well as its conclusions and recommendations in the present case, only relate to Mexico's rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law."⁵⁹

The WTO Appellate Body Ruling

On appeal before the WTO Appellate Body, Mexico argued that the panel erred in rejecting its request that it declines to exercise jurisdiction in the circumstances of the present dispute.⁶⁰ Mexico submitted that WTO panels, like other international bodies and tribunals, have certain implied jurisdictional powers that derive from their nature as adjudicative bodies. Such powers include the power to refrain from exercising substantive jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the appropriate forum. Mexico argued, in this regard, that the U.S.' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute regarding access

⁵⁶ Ibid.

⁵⁷ Ibid. at para. 7.10.

⁵⁸ Ibid. at para. 7.14. The Panel noted, in this regard, that:

"In the present case, the complaining party is the United States and the measures in dispute are allegedly imposed by Mexico. In the NAFTA case, the situation appears to be the reverse: the complaining party is Mexico and the measures in dispute are allegedly imposed by the United States. As for the subject matter of the claims, in the present case the United States is alleging discriminatory treatment against its products resulting from internal taxes and other internal measures imposed by Mexico. In the NAFTA case, instead, Mexico is arguing that the United States is violating its market access commitments under the NAFTA."

⁵⁹ Ibid. at para. 7.15.

⁶⁰ *Supra* note 8. See generally: A.A. Jimenez, The WTO AB Report on Mexico-Soft Drinks, and the Limits of the WTO Dispute Settlement System, 33(3) Legal Issues of Economic Integration 319, 319-333 (2006).

of Mexican sugar to the U.S. market under the NAFTA. Mexico further emphasized that there is nothing in the DSU that explicitly rules out the existence of a WTO panel's power to decline to exercise validly established jurisdiction. Accordingly, Mexico argued that the WTO panel should have exercised this power in the circumstances of this dispute. In contrast, the U.S. argued that the WTO panel's own terms of reference in this dispute instructed the panel to examine the matter referred to the DSB by the U.S. and to make such findings as will assist the DSB in making the recommendations and rulings provided for under the DSU.

The WTO Appellate Body started its analysis by noting that Mexico did not question whether the WTO panel had jurisdiction to hear the U.S. claims. Moreover, Mexico did not claim that there were legal obligations under NAFTA or any other international agreement to which Mexico and the U.S. are both parties, which might raise legal impediments to the panel hearing this case. Instead, Mexico's position was that, although the WTO panel had the authority to rule on the merits of the U.S. claims, it also had the "implied power" to abstain from ruling on them, and should have exercised this power in the circumstances of this dispute. Hence, the issue before the Appellate Body was not whether the WTO panel was legally precluded from ruling on the U.S.' claims that were before it, but, rather, whether the WTO panel could decline, and should have declined, to exercise jurisdiction with respect to the U.S.' claims under Article III of the GATT 1994 that were before it.

The WTO Appellate Body continued by agreeing with Mexico's claim that WTO panels have certain powers that are inherent in their adjudicative function. Notably, WTO panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction.

In this regard, the WTO Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it".⁶¹ Furthermore, the WTO Appellate Body has also explained that WTO panels have a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.⁶² For example, WTO panels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings are

⁶¹ WTO Appellate Body Report, US – 1916 Act, footnote 30 to para. 54. See also Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 53. In that dispute, the Appellate Body also stated that:

"... panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. ... [P]anels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed". (Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 36)

⁶² WTO Appellate Body Report, EC – Hormones, footnote 138 to para. 152. See also Appellate Body Report, US – FSC (Article 21.5 – EC), paras. 247-248.

not necessary to resolve the matter in issue in the dispute.⁶³ But at the same time the WTO Appellate Body has cautioned that to provide only a partial resolution of the matter at issue would be false judicial economy.⁶⁴

In the WTO Appellate Body's view, it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute.⁶⁵ On the contrary, the WTO Appellate Body notes that, while recognizing WTO panels' inherent powers, it has previously emphasized that:

"Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. ... Nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU."⁶⁶(emphasis added)

Indeed, the fact that a WTO member may initiate a WTO dispute whenever it considers that any benefits accruing to that member are being impaired by measures taken by another member implies that that member is entitled to a ruling by a WTO panel. According to the WTO Appellate Body, a decision by a WTO panel to decline to exercise validly established jurisdiction would seem to diminish the right of a complaining member to seek the redress of a violation of obligations within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.⁶⁷

Finally, regarding the issue of jurisdictional competition the WTO Appellate Body, like the WTO panel, did not express a view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. Thus, the WTO Appellate Body saw no reason to disagree with the panel's decision.

Analysis

The *Mexico Soft Drinks* case appears to be the first case in which the issue of jurisdictional competition between dispute settlement systems established by regional trade agreements (RTAs) and the global WTO dispute settlement system was explicitly raised. The WTO panel and Appellate Body, however, were able to

⁶³ WTO Appellate Body Report, US – Wool Shirts and Blouses, 19, DSR 1997: I 323, para. 340.

⁶⁴ WTO Appellate Body Report, Australia – Measures Affecting Importation of Salmon, para. 223.

⁶⁵ Emphasis added by the author.

⁶⁶ WTO Appellate Body Report, India – Patents (U.S.), para. 92.

⁶⁷ Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

Article 19.2 of the DSU states that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

avoid dealing with this issue mainly on factual grounds arguing that this dispute is a different one than the one currently raised before NAFTA. Regardless of whether that is true or not, the general approach of the WTO panel and Appellate Body shows little consideration for comity. The WTO Appellate Body seems to argue that if a WTO panel has jurisdiction in a case, it must exercise it by rendering a ruling, regardless of whether or not other courts or tribunals might have jurisdiction or have been seized with the dispute. Of course, a different approach is clearly thinkable in which a WTO panel or Appellate Body relinquishes its jurisdiction and orders the parties to resolve their dispute before the other dispute settlement body or alternatively the WTO panel or Appellate Body could stay the proceedings until that other body rendered its decision. In this way, the WTO panel or Appellate Body could take that decision into account when adjudicating the dispute.

In sum, both the WTO panel as well as the WTO Appellate Body carefully circumvented the issue by not expressing any clear view on the topic of jurisdictional competition.

D. The *Brazilian Tyres Case*

The Facts

In 2000 Brazil adopted legislation in order to effectively reduce the waste of tyres because of the risk for the health and the environment associated with the exposure to toxic emissions caused by tyre fires and the transmission of the dengue disease to animals. This legislation (Portaria SECEX 8/2000) contained an import ban on retreaded and used tyres. Following the adoption of Portaria SECEX 8/2000, Uruguay requested in August 2001 the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR.

In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce.⁶⁸ Following the MERCOSUR arbitral tribunal award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. This exemption was incorporated into Article 40 of Portaria SECEX 14/2004, which contains three main elements: (i) an import ban on retreaded tyres (the "import ban"); (ii) an import ban on used tyres; and (iii) an exemption from the import ban of imports of

⁶⁸ See <<http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/arquivos/VI%20LAUDO.pdf>>.

certain retreaded tyres from other countries of the MERCOSUR, which is referred to as the “MERCOSUR exemption”.

In this context, it must be emphasized that the “MERCOSUR exemption” did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX 8/2000, but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.

The EC initiated proceedings against Brazil before the WTO dispute settlement body complaining about the import ban and the MERCOSUR exemption.⁶⁹ Essentially, the EC argued that the “MERCOSUR exemption” is discriminatory and that Brazil was not obliged to implement the MERCOSUR arbitral tribunal decision in the way it did, i.e. lifting the ban only for MERCOSUR member States. According to the EC, Brazil should instead have lifted the ban for all WTO Members. Besides, the EC claimed that Brazil was at least partially responsible for the MERCOSUR arbitral tribunal’s ruling that resulted in the adoption of the “MERCOSUR exemption” because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.

Brazil defended its measure by emphasizing that it introduced the exemption only after the MERCOSUR arbitral tribunal ruled that the import ban violated Brazil’s obligations under MERCOSUR. In addition, Brazil argued that the MERCOSUR arbitral tribunal ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994. Moreover, Brazil argued that it had an obligation under international law to implement the ruling of the MERCOSUR arbitral tribunal. Indeed, Brazil claimed that it applied the MERCOSUR ruling in the narrowest way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban.

The WTO Panel Ruling

The WTO panel accepted that it was only after the MERCOSUR arbitral tribunal found Brazil’s ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating from MERCOSUR countries from the application of the import ban. For the WTO panel, the MERCOSUR exemption “does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR”.⁷⁰ The WTO panel added that the discrimination arising from the MERCOSUR exemption was not “*a priori* unreasonable”, because this discrimination arose in the context of an agreement of a type expressly

⁶⁹ WTO Dispute DS332 Brazil – Measures Affecting Imports of Retreaded Tyres. Available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

⁷⁰ WTO Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, para. 7.272. Available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

recognized under Article XXIV of the GATT 1994 that “inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries”.⁷¹

According to the WTO panel, the MERCOSUR arbitral tribunal ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary.⁷² The WTO panel indicated, however, that it was not suggesting that “the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX”.⁷³ The WTO panel concluded that the “MERCOSUR exemption” had not resulted in the import ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.⁷⁴

Finally, the WTO panel explicitly stated that it was not in a position to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil’s litigation strategy in those proceedings.⁷⁵ Indeed, the WTO panel considered it inappropriate to engage in such an exercise.⁷⁶ Moreover, the WTO panel underlined that while the particular litigation strategy followed in that instance by Brazil turned out to be unsuccessful, it is not clear that a different strategy would necessarily have led to a different outcome.⁷⁷ Hence, the WTO panel sided on these points with the position of Brazil.

The WTO Appellate Body Ruling

The EC appealed the WTO panel’s ruling to the WTO Appellate Body.⁷⁸ The WTO Appellate Body’s starting point was that even though the discrimination between MERCOSUR countries and other WTO Members in the application of the import ban was introduced as a consequence of a ruling by a MERCOSUR arbitral tribunal, that ruling is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the import ban that falls within the purview of Article XX (b). Accordingly, the WTO Appellate Body

⁷¹ Ibid. at para. 7.273.

⁷² Ibid. at para. 7.281.

⁷³ Ibid. at para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV: 8(a) of the GATT 1994 – which specifically excludes measures taken under Article XX from the requirement to liberalize “substantially all the trade” within a customs union – to take into account, as it did, “the fact that the MERCOSUR exemption was adopted as a result of Brazil’s obligations under MERCOSUR”. (Ibid. at para. 7.284).

⁷⁴ Ibid. at para. 7.289.

⁷⁵ Ibid. at para. 7.276.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ WTO Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, 3.12.07, available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

concluded that the “MERCOSUR exemption” had resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.⁷⁹

The WTO Appellate Body continued by stating that, like the WTO panel, it considers that Brazil’s decision to act in order to comply with the MERCOSUR arbitral tribunal ruling cannot be viewed as “capricious” or “random”.⁸⁰ Indeed, according to the WTO Appellate Body, acts implementing a decision of a judicial or quasi-judicial body, such as the MERCOSUR arbitral tribunal, can hardly be characterized as a decision that is “capricious” or “random”.⁸¹ However, according to the WTO Appellate Body, discrimination can result from a rational decision or behavior and still be “arbitrary or unjustifiable”, because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX GATT, or goes against that objective.⁸² Thus, the WTO Appellate Body concluded that the “MERCOSUR exemption” had resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.⁸³

Then, the WTO Appellate Body turned to Brazil’s defence strategy before the MERCOSUR arbitral tribunal. It noted that Brazil could have sought to justify the challenged import ban on the grounds of human, animal, and plant health under Article 50 (d) of the Treaty of Montevideo.⁸⁴ Brazil, however, decided not to do so. The WTO Appellate Body explicitly stated, like the WTO panel, that it would not be appropriate for it to second-guess Brazil’s decision not to invoke Article 50 (d), which serves a function similar to that of Article XX (b) of the GATT 1994. However and at the same time, the WTO Appellate Body inferred from this that Article 50 (d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings,⁸⁵ that the discrimination associated with the “MERCOSUR exemption” does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.⁸⁶ In sum, the WTO Appellate Body reversed the findings of the WTO panel on this point.

⁷⁹ Ibid. at para. 228.

⁸⁰ Ibid. at para. 231.

⁸¹ Ibid. at para. 232.

⁸² Ibid. at para. 232.

⁸³ Ibid. at para. 233.

⁸⁴ Treaty of Montevideo, Instrument Establishing the Latin American Integration Association (ALADI), done at Montevideo, August 1980. Article 50(d) reads as follows:

“No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:

[...]

d. Protection of human, animal and plant life and health.”

⁸⁵ See WTO Panel Report, *supra* note 70, para. 7.275.

⁸⁶ See WTO Appellate Body Report, *supra* note 78, para. 234.

Analysis

The *Brazilian Tyres* case can be considered an evolution from the *Mexican Soft Drinks* case since the WTO panel and Appellate Body could not circumvent the fact that the basis of this dispute was the MERCOSUR arbitral tribunal's ruling. This dispute is in particular more interesting because it shows the opposite approach adopted by the WTO panel and the Appellate Body regarding the weight that should be accorded to the MERCOSUR arbitral tribunal's ruling.

The WTO panel accepted Brazil's defence that the measure was adopted in order to implement the MERCOSUR arbitral tribunal's ruling, i.e. to fulfil its international obligations. Since MERCOSUR is a Free Trade Area/Customs Union within the meaning of Article XXIV GATT, a measure that benefits MERCOSUR members naturally discriminates against non-members. That is the whole purpose of a Free Trade Area and Custom Union, which is accepted by Article XXIV GATT.⁸⁷ Consequently, the WTO panel did not review or criticize the ruling of the MERCOSUR arbitral tribunal but rather accepted it as a fact and starting point of the whole dispute. Besides, the WTO panel quite rightly refrained from assessing Brazil's defence strategy before the MERCOSUR arbitral tribunal. It is submitted that the defence strategy of a WTO member before another dispute settlement body, that is not bound by WTO law, is entirely its own business and that any assessment of it by a WTO panel would go far beyond its competence.

The WTO Appellate Body clearly did not feel any such constraints. While the WTO Appellate Body claimed to have stayed clear from reviewing the MERCOSUR arbitral tribunal's decision, it nevertheless rejected the logic of the WTO panel as argued by Brazil that the mere fact of being obliged to implement a ruling from a judicial or quasi-judicial body is an *a priori* presumption of WTO law compatibility. Accordingly, the Appellate Body seems to suggest that even though Brazil was clearly obliged by the MERCOSUR arbitral tribunal to bring its measure in line with MERCOSUR obligations, Brazil was at the same time required to do it in a way that is compatible with its WTO law obligations. Thus, one could detect here a sort of supremacy which the WTO Appellate Body is attaching to WTO law over other international (regional trade) agreements or indeed decisions rendered by dispute settlement bodies that have been established by such treaties. In other words, it seems that the WTO Appellate Body is suggesting that other dispute settlement bodies should issue their decisions in conformity with WTO law and Appellate Body jurisprudence or at least make sure that the implementation of their decisions does not cause WTO law violations.

However, even more interesting is the fact that the WTO Appellate Body discussed Brazil's defence strategy before the MERCOSUR arbitral tribunal. Although the WTO Appellate Body stressed that it is inappropriate to second-guess Brazil's decision not to invoke Article 50 of the Montevideo Treaty, the WTO

⁸⁷ See generally J. Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement*, (2002).

Appellate Body at the same time “punished” Brazil’s choice or failure not to invoke that provision by excluding without any further analysis the possibility that there might have been a conflict between MERCOSUR and GATT provisions or indeed between the MERCOSUR arbitral tribunal’s decision and the Appellate Body’s ruling concerning the same dispute.⁸⁸

As argued above, the assessment of Brazil’s defence strategy by the WTO Appellate Body is, in my view, an unprecedented interference in Brazil’s sovereignty in defending its interests before other dispute settlement bodies that are fully independent and free from any “supervision” by the WTO Appellate Body. In other words, the WTO Appellate Body has no competence to assess the defence strategy of a WTO member before another dispute settlement body and therefore is prevented from drawing conclusions from it to the detriment of that WTO member relating to the dispute before it.

In sum, the different approach between the WTO panel and the Appellate Body on this point unveils the underlying potential problems of competing jurisdiction between dispute settlement systems created by regional trade agreements (like NAFTA and MERCOSUR) and the global WTO dispute settlement system.⁸⁹ In view of the increasing number of dispute settlement systems being established and enhanced at the regional level,⁹⁰ it is doubtful whether a claim of WTO Appellate Body supremacy over other dispute settlement bodies is the most cooperative answer to this problem.

E. The ICJ’s Genocide Ruling

The Facts

The war and killings in the Balkans have been so widespread that a special court – the International Criminal Tribunal for the former Yugoslavia (ICTY) – was es-

⁸⁸ See *supra* note 78, para. 234.

⁸⁹ R. Leal-Arcas, Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?, 16 (1) *Minnesota Journal of International Law* 1, 1-59 (2007); L. Bartels, Regional Trade Agreements and the WTO Legal System, in: L. Bartels/F. Ortino (eds.), (2006).

⁹⁰ See the recent developments regarding the dispute settlement system of Mercosur: D. Pavon/J.P. Schmidt, In the Footsteps of the ECJ: First Decision of the Permanent Mercosur-Tribunal, 34 *Legal Issues of Economic Integration* 283, 283-293 (2007); A. Appleton/B. Graf, Freedom of Speech and Assembly versus Trade and Transit Rights: Roadblocks to EU and Mercosur Integration, 34 *Legal Issues of Economic Integration* 255, 255-281 (2007). See with regard to SADC J. Pauwelyn, Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions, 13 *Minnesota Journal of Global Trade* 231, 231-304 (2004). See with regard to SAFTA A. Nath, The Safta Dispute Settlement Mechanism: An Attempt to Resolve or Merely Perpetuate Conflict in the South Asian Region?, 22 *American University International Law Review* 333, 333-358 (2007). See i.e., D. A. Gantz, Settlement of Dispute under the Central America-Dominican Republic-United States Free Trade Agreement, 30 (2) *Boston College International and Comparative Law Review* 331, 331-410 (2007).

tablished by the UN so as to hold individuals responsible for those acts.⁹¹ Accordingly, the ICTY has rendered numerous judgments in which it has punished individuals responsible for the horrendous crimes such as ethnic cleansing and mass rapes that were committed in the 1990s.⁹²

In one of the most discussed cases, *Tadić*⁹³, for instance, the ICTY was not concerned with a question of state responsibility but with the nature of armed conflicts. However, in order to ascertain whether the conflict was international, the ICTY Chamber needed to look into the rules on state responsibility. The ICTY Chamber identified two degrees of control, the ICJ's *Nicaragua* "effective control" test and the previously established "overall control" test. The ICTY Chamber noted that the former is better applicable to private individuals engaged by a state to perform specific illegal acts in the territory of another state and the latter is better applicable to organized and hierarchically structured groups. The ICTY Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the Federal Republic of Yugoslavia (FRY – as it then was) on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS (army of the Republika Srpska) without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

Accordingly, in its *Tadić* judgment⁹⁴ the ICTY expressly adopted a conflicting view on the issue of use of force in customary international law.⁹⁵ The Appeals Chamber of the ICTY argued that the law as stated by the ICJ on the use of force was not "persuasive" and was "unconvincing" and went on to declare that the law was to the contrary of what the ICJ had said it was.⁹⁶ In a subsequent case, the ICTY Appeals Chamber further declared that this contrary statement of the law had to be followed notwithstanding the asserted differences with the point of view of the ICJ.⁹⁷

It could be argued that the test of control is variable, as in the *Celebici*⁹⁸ case, where the ICTY Appeals Chamber held that "the 'overall control' test could thus be fulfilled even if the armed forces acting on behalf of the 'controlling state' had

⁹¹ See instrument establishing the ICTY, UN Security Council Resolution 827 of May 2003.

⁹² See website of ICTY at <<http://www.un.org/icty>>.

⁹³ *Tadić*, IT-94-1-A, available at <<http://www.un.org/icty/cases-e/index-e.htm>>.

⁹⁴ ICTY Appeals Chamber, *Tadić* judgment, 15 July 1999, available at <<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>>.

⁹⁵ See for details M. Shahaabuddeen, Consistency in Holdings of International Tribunals, in: N. Ando/E. McWhinney/R. Wolfrum, Liber Amicorum Judge Shigeru Oda, 633-650 (2002).

⁹⁶ *Supra* note 93, paras. 115 and 116.

⁹⁷ ICTY Appeals Chamber, *Aleksovski*, IT-95-14/1-A of 24.3.2000, paras. 92 ff. Available at <<http://www.un.org/icty/cases-e/index-e.htm>>.

⁹⁸ ICTY Case No. IT-96-21-A, Appeals Chamber Judgment, *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka 'Pavo'), Hazim Delic and Esad Landzo (aka 'Zenga')* of 20 February 2001. Available at <<http://www.un.org/icty/cases-e/index-e.htm>>.

autonomous choices of means and tactics although participating in a common strategy along with the controlling State”.⁹⁹

In separate proceedings before the ICJ, Bosnia-Herzegovina, relying in particular on the Convention on the Prevention and Punishment of the Crime of Genocide 1948, argued that Serbia shared with the Republika Srpska the vision of a “Greater Serbia” and consequently gave its support to those persons and groups responsible for the crimes which allegedly constitute genocide. Bosnia-Herzegovina submitted that Serbia armed and equipped those persons and groups throughout the war and therefore should be held responsible.

The ICJ’s *Genocide* Judgment¹⁰⁰

The ICJ’s starting point was the question whether the massacre committed at Srebrenica in July 1995, which had been found to constitute the crime of genocide within the meaning of Articles II and III, paragraph (a) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948),¹⁰¹ were attributable in whole or in part to the Respondent, Serbia alone at the time of the judgement.

This question has actually two aspects which must be discussed separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of the Respondent.¹⁰²

The first question was answered in the negative by the Court on the basis that the persons (Scorpions, Mladic) or entities (Republika Srpska and VRS) that committed the acts of genocide at Srebrenica did not have such ties with the FRY that they deemed to have been “completely dependent”¹⁰³ on it. The Court also found that neither the Republika Srpska nor the VRS were *de jure* organs of the FRY since none of them had the status of organ of that state under its internal law.

⁹⁹ Ibid. at para. 47.

¹⁰⁰ *Supra* note 10. See generally V. Dimitrijevic/M. Milanovic, The Strange Story of the Bosnian Genocide Case, 21 *Leiden Journal of International Law* 65, 65-94 (2008).

¹⁰¹ Article II – “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group”. Article III – “The following acts shall be punishable: (a) genocide”.

¹⁰² *Supra* note 10, para. 384.

¹⁰³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment, I.C.J. Reports 1986, 62-63, para. 110). Available at <<http://www.icj-cij.org/docket/files/70/6503.pdf>>.

This conclusion was taken by looking into Article 4 of the ILC Articles on state responsibility.¹⁰⁴

Following the above conclusion the ICJ had to determine whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent nevertheless acted on its instructions or under its direction or control. In other words, the ICJ had to determine whether the authors of the Srebrenica genocide could nevertheless be considered as *de facto* organs of the FRY.

In order to do so the ICJ looked at Article 8 of the ILC Articles on state responsibility, which reads:

“The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of*, that state in carrying out the conduct.” (emphasis added by the author)

The ICJ then looked into its jurisprudence on the subject and in particular that of the *Nicaragua* case, where when it was confronted with the question of the responsibility of the US for actions by the Contras forces in Nicaragua, held that there would be no state responsibility in the absence of evidence of actual “effective control” of military operations, whereas manifestly the U.S. would be answerable for the actions of its own armed forces and covert operations.¹⁰⁵ The test here is to prove that the persons who perpetrated the acts alleged to have violated international law did so in accordance with that state’s instructions or under its “effective control”. It must be shown that “effective control” was used or that the state’s instructions were given in respect of each operation and not generally in respect of overall actions.

However, the Applicant objected to this test in the circumstances of its case by raising the test used by the ICTY Appeals Chamber in the *Tadić* case mentioned above. But the ICJ strongly rejected the ICTY Appeal Chamber’s “reasoning” on the basis that findings on question of state responsibility were outside the scope of its jurisdiction, its jurisdiction being criminal and applicable to persons only. To soften the blow on its confinement of the ICTY’s jurisdiction, the ICJ restated that it attaches the “utmost importance to the factual and legal findings made by the ICTY”.¹⁰⁶

Nonetheless, the ICJ reacted even more strongly on the issue of jurisdiction when further asserting that the ICTY’s finding on state responsibility was not indispensable for the “exercise of its jurisdiction”.¹⁰⁷ The ICJ went on to state that al-

¹⁰⁴ “Article 4 – Conduct of organs of a State – 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

¹⁰⁵ *Supra* note 103, 64-65, para. 115.

¹⁰⁶ *Supra* note 10, para. 403.

¹⁰⁷ *Ibid.*

though it will accept the factual and legal findings made by the ICTY on criminal liability of an accused, it will not accept its positions on issues of general international law, especially when this is outside its jurisdiction and unnecessary.

The ICJ further argued that the “overall control” test may be suitable to find whether or not an armed conflict is international but that issue was not applicable to the current case and was therefore not considered.¹⁰⁸ Indeed, with respect to whether the “overall control” test was applicable to find a state responsible for acts committed by armed forces which were not among its official organs, the ICJ emphasized that it found the argument “unpersuasive”.¹⁰⁹ The ICJ went on criticizing the ICTY by finding the overall control test “unsuitable” and by qualifying it as a “major drawback”.¹¹⁰ In fact, according to the ICJ, the ICTY stretches “too far, almost to breaking point, the connection which must exist between the conduct of a state’s organs and its international responsibility”.¹¹¹

By rejecting the ICTY’s unauthorized “overall control” test and applying the “effective control” test the ICJ was left with no option but to find that it had not been established that the massacres at Srebrenica were committed on the instructions, or under the direction of organs of the Respondent state, nor that the Respondent exercised effective control over the operations.

Analysis

The disagreement between the ICJ and ICTY on such a fundamental point of general international law, while operating under the same UN umbrella, must be qualified as seriously undermining the consistency and uniformity of international law. In other words, the ICJ’s *Genocide* judgment further fragments the already divergent jurisprudence on this point.

Having said that, it is highly questionable whether the ICJ is indeed competent to limit the jurisdiction of the ICTY, it being an independent tribunal, to factual and legal findings, thereby preventing the ICTY from expressing its own views on fundamental questions of general international law, which it considers necessary for rendering its judgments.

It is because of the lacking hierarchy between the ICJ and ICTY, as compared for instance to the hierarchy between the ECJ and national courts of the EC member states, that the ICJ is not in a position to establish such a hierarchy by imposing itself as the highest UN court regarding issues of general international law. Rather, any international court charged with applying a specific body of international law is authorised to apply rules belonging to other bodies of international law for the purpose of construing or applying a rule that is part of the corpus of legal rules on which it has primarily to decide upon. That authority is part and parcel of the in-

¹⁰⁸ Ibid. at para. 404.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. at para 406.

¹¹¹ Ibid.

herent jurisdiction of any international court or tribunal.¹¹² Accordingly, as Cassese recently rightly pointed out, the ICJ was wrong to argue that the ICTY Appeals Chamber was outside the confines of its jurisdiction by dealing with an issue of state responsibility.¹¹³

Obviously in order to preserve the unity and consistency of international law, it is preferable that these courts and tribunals issue their judgments in accordance with the jurisprudence of the ICJ. But there may be good reasons to develop and apply different interpretations of international law in specific cases or areas of law, which deviate from the ICJ's point of view. Indeed, it is submitted that the ICJ should respect the existing jurisdiction and expertise of specialised courts by showing more deference.

Cassese also states that the ICJ should not have confined its arguments that the *Tadić* case was about the nature of armed conflicts whereas the *Nicaragua* case revolved around state responsibility and therefore the two tests may coexist in that they relate to different subject matters.¹¹⁴

Finally, in this context one must refer to the dissenting opinion of ICJ judge and Vice-President Al-Khasawneh.¹¹⁵ He considered that the effective control test for attribution established in the *Nicaragua* case is not suitable to questions of state responsibility for international crimes committed with a common purpose.¹¹⁶ The overall control test for attribution established in the *Tadić* case by the ICTY is more appropriate when the commission of international crimes is the common objective of the controlling state and the non-state actors.¹¹⁷ The ICJ's refusal to infer genocidal intent from a consistent conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY.¹¹⁸

In his explanation he went on to say that the ICJ applied the "effective control" test to a situation different from that presented in the *Nicaragua* case. In the present case, there was a unity of goals, unity of ethnicity and a common ideology, such that "effective control" over non-state actors would not be necessary.¹¹⁹

The ICJ's rejection of the standard in the *Tadić* case fails to address the crucial issue raised therein, namely that different types of activities, particularly in the ever evolving nature of armed conflict, may call for subtle variations in the rules of attribution.¹²⁰

¹¹² A. Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 *The European Journal of International Law* 649, 649-668 (2007).

¹¹³ *Ibid.* at 662.

¹¹⁴ *Ibid.* at 663.

¹¹⁵ Available at <<http://www.icj-cij.org/docket/files/91/13689.pdf>>. See also Dissenting opinion of Judge Ad Hoc Mahiou.

¹¹⁶ Dissenting opinion of Vice-President *Al-Khasawneh*, page 1, preamble, second paragraph. Available at: see supra note 115.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 10, para. 36.

¹²⁰ *Ibid.* at 11, para. 39.

In his conclusion he stated that the ICJ required too high a threshold for control and one that did not accord with the facts of this case nor with the relevant jurisprudence of the ICTY.¹²¹

In sum, it is quite clear that with its “ICTY bashing”, the ICJ rather worsened than improved the already deeply divergent approach regarding the issue of responsibility. In fact, it would not be surprising if the ICTY or any other court (for instance the International Criminal Court [ICC]) that needs to deal with responsibility feels even less inclined to close this gap in future judgments when being criticized in this manner by the ICJ. Therefore, it can only be hoped, together with *Cassese*, that next time the ICJ will look into state practice and case law instead of simply reiterating its own previous decisions.¹²² Although that hope might be shattered if one agrees with Goldstone/Hamilton that “the ICJ was fairly measured in its response to the issue in Serbia-Bosnia”.¹²³

F. The *Bosphorus* Case

The Facts

The *Bosphorus* case concerned the implementation of UN sanctions against former Yugoslavia. Bosphorus was leasing an airplane from the state-owned Yugoslav airline JAT. Due to UN sanctions, which were implemented by an EC Regulation, the plane was impounded by Irish authorities. Bosphorus started proceedings against that measure which at the end reached the ECJ. The ECJ ruled that the measures were acceptable in order to attain the objectives of the UN sanctions.¹²⁴ Following that ruling, Bosphorus started proceedings against Ireland before the ECtHR, claiming that the measure violated its fundamental rights as protected by Article 1 of Protocol 1 to the ECHR, which protects the right to property. The ECtHR was thus called upon to review in effect the EC measure and the *Bosphorus* judgment of the ECJ.

¹²¹ *Ibid.* at 17, para. 62.

¹²² *Cassese*, *supra* note 112, 668.

¹²³ R.J. Goldstone/R.J. Hamilton, *Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, 21 *Leiden Journal of International Law* 95, 101 (2008).

¹²⁴ ECJ case C-84/95, *Bosphorus*, ECR I-3953 (1996).

The ECtHR's *Bosphorus* Judgment

The ECtHR started its analysis by repeating its position it had already adopted in *Matthews*¹²⁵ that EC law measures could be reviewed – indirectly – and that EC member states could not hide behind an international organization.

However, the ECtHR shied away from actually performing that review. Instead, the ECtHR explicitly applied the *Solange* method for the first time *vis-à-vis* the ECJ.¹²⁶

In a first step, the ECtHR held that the level of fundamental rights protection, including the available procedures for obtaining judicial review before the ECJ within the EC is equivalent though not identical with the ECtHR level.¹²⁷ Consequently, a presumption of sufficient fundamental rights protection within the EC exists.

In a second step, the ECtHR explicitly held that as long as that fundamental rights protection is “not manifestly deficient” in a specific case, the ECtHR would

¹²⁵ ECtHR, *Matthews v UK*, judgment of 18 February 1999, available at <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Matthews&sessionid=8523321&skin=hudoc-en>>.

¹²⁶ See regarding the *Solange* model N. Lavranos, *Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH*, 41 *Europarecht* 79, 79-92 (2006), J.-P. Jacqu e, *Droit Communautaire et Convention europ enne des droits de l’homme, L’arret Bosphorus, une jurisprudence “Solange II” de la Cour europ enne des droits de l’homme?*, 41 (3) *Revue Trimestrielle de Droit Europeen* 749, 749-768 (2005).

¹²⁷ ECtHR, *Bosphorus Hava Turizm v Ireland*, application 45036/98, 42 E.H.R.R.1, judgment of 30.06.05:

“155. In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited M. & Co. decision, at p. 145, an approach with which the parties and the European Commission agreed). By ‘equivalent’ the Court means ‘comparable’: any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights (*Loizidou v Turkey* [preliminary objections], judgment of 23 March 1995, Series A No. 310, § 75).

[...]

165. In such circumstances, the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, ‘equivalent’ (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see paragraph 156).”

not exercise its jurisdiction.¹²⁸ In other words, the ECtHR will, in principle, refrain from reviewing EC law measures including ECJ judgments unless a specific case reveals a “manifestly deficient” protection of fundamental rights within the EC.¹²⁹ Only in such a situation would the ECtHR review EC law measures. Unfortunately, the ECtHR did not define what “manifestly deficient” actually means or when that threshold could be reached.¹³⁰ In any case, the ECtHR concluded that in this case there was no “manifestly deficient” fundamental rights protection. Accordingly, the ECtHR in substance rejected Bosphorus’ claim.

Analysis

It appears to be the first time that the ECtHR applied the *Solange* method explicitly in order to delimit its jurisprudence *vis-à-vis* the ECJ’s jurisdiction. In this way the ECtHR was able to solve a very sensitive and delicate issue, at least for the time being, very elegantly.

The issue is nothing less than which court is the Supreme Court for reviewing human rights in Europe. Rather than answering that question the ECtHR displayed comity towards the ECJ by applying this “as long as” approach, but at the same time kept a reserve jurisdiction towards the ECJ by asserting that it will apply and enforce the ECHR *vis-à-vis* Community law if necessary.¹³¹

In return, the ECJ has given the ECHR a special place within the Community legal order and is even applying the ECHR directly in its jurisprudence.¹³² Indeed, in its *Schmidberger* judgment the ECJ accepted a restriction even of primary EC law (one of the four freedoms of the internal market were at issue) in order to give full effect to ECHR rights.¹³³ In other words, under certain circumstances the ECJ will give primacy to the ECHR above Community law. In this way, the ECJ

¹²⁸ Ibid.

¹²⁹ Thus, the ECtHR concluded that:

“166. The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court’s view, therefore, it cannot be said that the protection of the applicant’s Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.”

¹³⁰ See i.e., C. C o s t e l l o, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 *Human Rights Law Review* 87, 87-130 (2006).

¹³¹ *Supra* note 124. See generally I. C a n o r, *Primus inter pares. Who Is the Ultimate Guardian of Fundamental Rights in Europe?*, 25 *European Law Review* 3, 3-21 (2000); S. D o u g l a s - S c o t t, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 *Common Market Law Review* 629, 629-665 (2006).

¹³² See i.e., ECJ case C-413/99, *Baumbast*, ECR I-7091 (2002); ECJ case C-60/00, *Carpenter*, ECR I-6279 (2002).

¹³³ ECJ case C-112/00, *Schmidberger*, ECR I-5659 (2003).

showed comity by sending a clear message to the ECtHR that it takes the ECHR very seriously. Accordingly, both European courts displayed comity towards each other by allowing each court to “reign over their own kingdoms” without having to fear any interference from each other – except in exceptional cases. It will be interesting to see though whether this seemingly harmonious “living next to each other” can be sustained if once the EU accedes to the ECHR as is stipulated in the Lisbon Treaty, thereby submitting the ECJ to the final authority of the ECtHR.

III. The *Solange* Method as a Tool for Regulating Competing Jurisdictions

The case studies discussed above illustrate that the issue of competing jurisdictions is approached quite differently, resulting in either more fragmenting or more unifying effects.

At the one end of the spectrum, we find the OSPAR arbitral tribunal, the ECJ’s judgment in the *Mox Plant* dispute, the WTO panel and Appellate Body rulings in *Mexico Soft Drinks* and *Brazilian Tyres* and the ICJ’s *Genocide* judgment, which all show little comity towards the possible jurisdiction of the other courts or tribunals involved in the respective disputes.

At the other end of the spectrum, we find the UNCLOS arbitral tribunal and the WTO panel in *Brazilian Tyres*, which respected the jurisdiction of the other court/tribunal by either staying the proceedings and allowing the other court/tribunal to express its view regarding jurisdictional competition or accepting the decision rendered by the other court/tribunal as a fact of the case and taking it fully into account. The ECtHR’s *Bosphorus* judgment also belongs in this category, by showing comity towards the ECJ, while at the same time keeping a reserve jurisdiction in order to be able to interfere into the ECJ’s jurisdiction if necessary.

In the middle of that spectrum, we find the *IJzeren Rijn* arbitral tribunal that, while discussing the possibility that the ECJ might have jurisdiction in this dispute, eventually concluded on the basis of a flawed analysis that the ECJ has no jurisdiction and thus rendered its award. But the *IJzeren Rijn* arbitral tribunal at least paid lip service to comity.

The *Bosphorus* judgment brings us to the *Solange* method, which will be examined in more detail in the following sections.

In the first section, the origins of the *Solange* method will be shortly summarized.

The second section will identify the legal basis for the *Solange* method.

On that basis, the third section will illustrate how the application of the *Solange* method in the various cases would have resulted in a different result by regulating the jurisdictional competition more adequately.

A. The Origins of the *Solange* Method and *Solange* Jurisprudence of the BVerfG

The *Solange* method was invented by the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) in order to regulate its jurisdiction *vis-à-vis* the ECJ. For our purposes it suffices to focus on several key aspects of the BVerfG's *Solange* jurisprudence.¹³⁴

In the first place, it should be noted that the development of this jurisprudence, which dates back to its first *Solange* judgment in 1974,¹³⁵ has not been linear, but rather has taken the form of waves: it has had its high and low points. The high points signify times in which the BVerfG was prepared to give up more of its “reserve jurisdiction”, the low points indicate when the BVerfG assumed or re-assumed more jurisdictional powers.

In the second place, it should be remembered that the *Solange* method was introduced because the supremacy claim of the ECJ coupled with the expanding development of Community law collided with the protection of fundamental rights as guaranteed by the national constitutions of the member states. In particular, the BVerfG considered fundamental rights as a “no-go area” for the ECJ. In this area the BVerfG kept at all times a “reserve jurisdiction”, in the sense that it considered itself always competent to exert its jurisdiction, despite the existence and use of ECJ jurisdiction (which in the eyes of the ECJ is of an exclusive nature).

The *Solange I* case concerned the question as to what domestic courts should do in case of a conflict between a provision of an EC Regulation and fundamental rights as protected by the German Constitution. The BVerfG held that as long as (which means in German “*solange*”) the integration process of the EC does not contain a catalogue of fundamental rights, which is adequate to the German Constitution and has not been duly approved by the German Parliament, a German court may, after requesting a preliminary ruling from the ECJ, request a ruling from the BVerfG as to the compatibility of the EC measure with the German Constitution.¹³⁶ In substance, the BVerfG concluded that in this case there was no conflict between the EC measure and the German Constitution. Nonetheless, the BVerfG found it necessary to emphasize that it did not consider the level of fundamental rights protection at EC level to be adequate enough, in particular because no EC catalogue of fundamental rights, which could be compared to the one existing in the German Constitution, existed at EC level. Consequently, since at that time fundamental rights had not been explicitly recognized in the jurisprudence of

¹³⁴ See more extensively N. Lavranos, Towards a *Solange* Method between International Courts and Tribunals, in: Y. Shany/T. Broude, *The Allocation of Authority in International Law, Essays in Honour of Prof. R. Lapidot*, (2008), 217-235; *ibid.*, *Decisions of International Organisations in the European and Domestic Legal Orders of Selected EU Member States*, Europe Law Publishing 148-154 (2004).

¹³⁵ BVerfGE 37, 327 (*Solange I*), available at <http://www.servat.unibe.ch/dfr/dfr_bvbd100.html>.

¹³⁶ *Ibid.* at para. 56.

the ECJ, the BVerfG considered itself unable to give up its jurisdiction regarding fundamental rights protection in favour of an exclusive ECJ jurisdiction.

That signal of the BVerfG was subsequently picked up by the ECJ, which started to develop a jurisprudence on fundamental rights protection.¹³⁷ In recognition of that development, the BVerfG conceded parts of its jurisdiction under certain conditions when it issued its second *Solange* judgment in 1986.¹³⁸ In this case the main issue was whether a judgment of the ECJ on the interpretation and application of EC law must be considered to be final or whether it could still be reviewed by the BVerfG if a conflict with fundamental rights as protected by the German Constitution would be established. In its *Solange II* judgment, the BVerfG held that as long as the case-law of the ECJ offered effective protection of fundamental rights against acts of public organs (i.e. EC organs), which is comparable to the minimum level as guaranteed by the German Constitution, the BVerfG will not exercise its jurisdiction in reviewing EC law measures.¹³⁹ In other words, the BVerfG accepted that the interpretation of the ECJ regarding EC law is authoritative and final, thus also binding on all German courts – including the BVerfG itself.

So, after *Solange II*, the relationship between the ECJ and the BVerfG was back on track. Indeed, the ECJ continued its approach of explicitly integrating fundamental rights into the Community legal order by issuing some bold judgments on the subject¹⁴⁰ (despite or because of the lack of a written catalogue of EC fundamental rights). However, it must be highlighted at the same time that the ECJ did not go as far as submitting itself to the jurisdiction of the ECtHR when it rejected in its Opinion 2/94 the possibility of EC accession to the ECHR.¹⁴¹

But in 1992 the Maastricht Treaty came onto the European stage and introduced new tensions into the ECJ/BVerfG relationship. Although the Maastricht Treaty certified the ECJ jurisprudence on fundamental rights protection, by explicitly referring in the EU Treaty to the fundamental rights as protected by the common constitutional traditions of the member states and the ECHR,¹⁴² the other novel

¹³⁷ See i.e., ECJ case 4/73, *Nold*, ECR 449 (1974); ECJ case 44/79, *Hauer*, ECR 3727 (1979).

¹³⁸ BVerfGE 73, 339 (*Solange II*), available at <http://www.servat.unibe.ch/dfr/dfr_bvbd100.html>.

¹³⁹ *Ibid.* at para. 132.

¹⁴⁰ See i.e., ECJ Case C-260/89, *ERT*, ECR I-2925 (1991); ECJ Case 5/88, *Wachauf*, ECR 2609 (1989); see generally J.H.H. Weiler, *The Jurisprudence of Human Rights in The European Union, Integration and Disintegration, Values and Processes*, Jean Monnet Working Paper (1996), available at <<http://www.jeanmonnetprogram.org/papers/96/9602.html>>.

¹⁴¹ ECJ Opinion 2/94 (Accession to the ECHR) ECR I-1759 (1996).

¹⁴² See Treaty of the European Union (TEU adopted 7 February 1992, entered into force 1 November 1993), Articles 6 and 46.

Article 6 reads as follows:

“1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as

and far-reaching components of the Treaty – the EMU and the Euro, Common Foreign and Security Policy and Police and Justice Cooperation – were for the BVerfG too much to swallow. Hence, in its *Solange III* judgment the BVerfG *de facto* overturned its *Solange II* jurisprudence by allowing for the non-application of EC law in Germany under certain conditions (the so called *ausbrechender Gemeinschaftsakt*).¹⁴³

So in its third *Solange* judgment on the Maastricht Treaty, the BVerfG, while allowing the ratification of the Maastricht Treaty by Germany, made clear that the future development of the EU remains under conditional approval of the BVerfG. Thus, the BVerfG reasserted its “reserve jurisdiction” and signalled to the ECJ that it was prepared to question the doctrine of supremacy of EC law and consequently the authority of the ECJ. In other words, the BVerfG challenged the ECJ’s self-declared supremacy over national laws and institutions, whose impact largely depends on voluntary submission by national courts. At that time, the relationship between the BVerfG and the ECJ had become frosty – to say the least.

The vigilant attitude taken by the BVerfG towards the ECJ was justified, at least from the perspective of the BVerfG (as well as large parts of the German academia) by the position adopted by the ECJ and the Court of First Instance (CFI) towards the EC “banana regulation” and its WTO law inconsistency.¹⁴⁴ In short, German importers claimed that the EC banana regulation essentially disrupted all their import opportunities because the banana regulation made their imports from Central and South America much more expensive. This, the importers argued, constituted

they result from the constitutional traditions common to the Member States, as general principles of Community law.”

[...]

Article 46 reads as follows:

“The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

[...]

(d) Article 6(2) [TEU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities under this Treaty;

[...]”

¹⁴³ In its BVerfGE 89, 155 (*Maastricht Treaty, Solange III*) decision at <http://www.servat.unibe.ch/dfr/dfr_bvbd100.html>, the BVerfG defined the conditions of “*ausbrechender Gemeinschaftsakt*” as follows (at para. 106):

If European organs would apply and develop the EU Treaty in a way that is not covered anymore by the German Act ratifying the EU Treaty, then the measures resulting thereof would not be binding in Germany. The German organs would be prevented by reason of German Constitutional law to apply them. Accordingly, the BVerfG reviews whether the acts of European organs remain within the limits of the German ratification act or go beyond that. (translation by the author).

¹⁴⁴ For a detailed discussion, see U. Everling, Will Europe Slip On Bananas? The Bananas Judgment of the ECJ and National Courts, 33 *Common Market Law Review* 401, 401-437 (1996); N. Lavranos, Die Rechtswirkung von WTO Panel Reports im Europäischen Gemeinschaftsrecht sowie im deutschen Verfassungsrecht, 34 *Europarecht* 289, 289-308 (1999).

a violation of their fundamental rights over property. Moreover, they argued that the WTO law inconsistency of the banana regulation, which is an inconsistency of a lower norm (EC banana regulation) with a higher norm (EC Treaty, ECHR), could not be accepted on the basis of the rule of law and the ECHR. However, the ECJ and CFI were not prepared to review the compatibility of the EC banana regulation with WTO law or fundamental rights protected by the ECHR and/or national constitutions.¹⁴⁵ Thus, the ECJ/CFI left the EC banana regulation intact.

Moreover, in parallel proceedings before German courts, the importers claimed that this also constituted a violation of the German ratification act of the EC Treaty and therefore should be qualified as an “*ausbrechender Gemeinschaftsakt*” within the meaning of *Solange III*.

But by the time the BVerfG was finally called upon by the Frankfurt Administrative Court to disapply the banana regulation by qualifying it as “*ausbrechender Gemeinschaftsakt*”, the BVerfG was differently composed than it was back at the time of its *Solange III* ruling. Apparently, the BVerfG now found the time ripe for offering the ECJ a “peace treaty” by essentially giving up the concept of “*ausbrechender Gemeinschaftsakt*”.¹⁴⁶ As a result the BVerfG held in its *Solange IV* judgment that it would review EC law measures only in case the minimum level of fundamental rights protection would not be guaranteed anymore by the EC organs on a general level.¹⁴⁷ So, even though the possibility of declaring an EC law measure as an “*ausbrechender Gemeinschaftsakt*” still remains possible, the conditions placed for this are extremely difficult to meet. In effect, only an act of the EC that goes completely against basic fundamental rights on a general level – and not only in one or several specific cases – would meet those criteria.

Hence, the BVerfG moved back to its second *Solange* decision, thereby accepting the jurisdiction of the ECJ to a maximum extent, while at the same time limiting its own “reserve jurisdiction” to a minimum.

¹⁴⁵ See N. Lavranos, The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law, 10 European Foreign Affairs Review 313, 313-338 (2005).

¹⁴⁶ BVerfGE 102, 147 (*Bananas Solange IV*, available at <http://www.servat.unibe.ch/dfr/dfr_bvbd100.html>; see generally I. Pernice, Les bananes et les droits fondamentaux: La Cour Constitutionnelle Allemande fait le point, 3-4 Cahiers de Droit Européen 427, 427-440 (2001); C. Grewe, Le “traite de paix” avec la Cour de Luxembourg: L’arrêt de la Cour Constitutionnelle Allemande du 7.6.2000 Relatif au Règlement du Marche de la Banane, 37 Revue Trimestrielle de Droit Européen 1, 1-17 (2001).

¹⁴⁷ In its decision on the EC banana regulation BVerfGE 102, 147 (*Bananas Solange IV*, the BVerfG defined the conditions as follows:

Thus even after the decision in *Solange III*, requests by national courts before the BVerfG are inadmissible if they do not argue that the required level of fundamental rights protection within the EC, including ECJ case-law, has fallen below the standard as determined in *Solange II*. Accordingly, a request must prove in detail that a violation of fundamental rights by secondary EC law measures is general and that the level of protection has fallen below the minimum level as determined by the German Constitution. (translation by the author).

The crucial condition is that a violation of fundamental rights by secondary EC law (such as the EC bananas regulation) must be specifically proven by showing that the absolute minimum level of fundamental rights is generally not guaranteed anymore.

However, this honeymoon did not last very long. This is because the ECJ trespassed on another “holy ground” of member states law, namely, criminal law. While member states had accepted that criminal law is an important and necessary component of the EU, as illustrated by its third pillar (Justice and Home Affairs, renamed Police and Justice Cooperation), the member states clearly did not intend to bring criminal law into the first pillar (the Community) and delegate to the EC the competence to impose criminal law obligations with supranational force (that is, endowed with supremacy over the national laws of the member states). But the ECJ apparently thought otherwise and rendered groundbreaking judgments in *Pupino*¹⁴⁸ and *Commission v Council*¹⁴⁹.

In *Pupino* the ECJ for the first time stated that national courts must apply and interpret their national criminal procedural law as far as possible in accordance with the third pillar. In other words, a similar supremacy effect as the first pillar must be attached to the third pillar *vis-à-vis* national law.

In *Commission v Council* the ECJ for the first time explicitly held that criminal law measures can be prescribed by the Community legislature for the purpose of maximum enforcement of EC law (in this case EC environmental law measures). This means that criminal law measures such as minimum and maximum fines and prison terms can be prescribed by EC law measures, i.e. first pillar measures.

Accordingly, criminal law has entered the Community legal order and continues to expand.¹⁵⁰ When this development is combined with the continuous stream of far-reaching legislation in the third pillar, one may detect a forceful impact of EU law on national competencies in criminal law issues, which increasingly affects individuals directly.¹⁵¹

So, when the BVerfG got the opportunity to decide on the German law implementing the European Arrest Warrant (EAW),¹⁵² it is perhaps not surprising that it returned to its *Solange* formula as developed in its *Maastricht* judgment (*Solange III*). The *EAW* case concerned the issue of constitutionality of the German act implementing the European Arrest Warrant, which was adopted within the third pillar as an EU Framework Decision. The crucial novelty of the EAW is the auto-

¹⁴⁸ ECJ case C-105/03, *Pupino*, ECR I-5285 (2005). See E. Spaventa, Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*, 3 European Constitutional Law Review 5, 5-24 (2007).

¹⁴⁹ ECJ case C-176/03, *Commission v Council*, ECR I-7879 (2005); see also J. Prinszen, Doctrinal Legal Effects of EU Criminal Law: A Transfer of EC Law Doctrines?, in: N. Lavranos/D. Obradovic (eds.), Interface between EU Law and National Law, Europe Law Publishing 313-331 (2007).

¹⁵⁰ See also the recent ECJ judgment in ECJ case C-440/05, *Commission v Council*, judgment of 23 October 2007, available at <<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>>.

¹⁵¹ See generally A. Doves/O. Lynskey, The Ever-longer Arm of EC Law: The Extension of Community Competence Into the Field of Criminal Law, 45 Common Market Law Review 131, 131-158 (2008).

¹⁵² BVerfGE 113, 273 (*European Arrest Warrant*) available at <http://www.servat.unibe.ch/dfr/dfr_bvbd100.html>; see generally F. Schorkopf (ed.), Der Europäische Haftbefehl vor dem Bundesverfassungsgericht, (2006).

matic binding force that is given to arrest orders from any EU member state and their automatic mutual recognition. In other words, a member state that is requested to arrest and transfer a citizen (including own nationals) to another EU member state is not able anymore to review that decision. The BVerfG, however, held that despite the current level of fundamental rights protection guaranteed by the ECJ, the ECHR and in the other EU member states, this could not affect or exclude the possibility of judicial review by the BVerfG in individual cases as guaranteed by the German Constitution.¹⁵³ Accordingly, the “reserve jurisdiction” of German courts, and ultimately of the BVerfG, in this matter remains intact.

In other words, the BVerfG continues to exercise its jurisdiction regarding third pillar measures irrespective of the existence of any (limited) ECJ jurisdiction in this area. Hence, in policy areas that inevitably affect fundamental rights in a substantial way, such as in matters of police and judicial cooperation (third pillar), the BVerfG is not yet prepared to limit its jurisdiction in the same way as it did regarding first pillar cases. Accordingly, one can now distinguish between a rather limited BVerfG “reserve jurisdiction” in first pillar cases and a rather broad “reserve jurisdiction” in third pillar cases.

In sum, it can be concluded that the *Solange* method has been used by the BVerfG in a flexible way in order to allow it to accommodate its jurisdictional relationship with the ECJ according to developments in the ECJ case-law, as well as developments on the more general European political scene. Accordingly, the *Solange* method enables the BVerfG to limit its jurisdiction in favour of the jurisdiction of the ECJ depending on the existing level of fundamental rights protection at the European level. In short, a high level of fundamental rights protection means limited interference from the BVerfG, while a low level fundamental rights protection means more interference from the BVerfG. But this flexibility should not be misunderstood as implying at any time a complete renunciation of jurisdiction, since the BVerfG has always kept its “reserve jurisdiction”.

B. The Legal Basis of the *Solange* Method

The previous section illustrated that the roots of the *Solange* method are to be found in constitutional law. Indeed, the *Solange* method regulates the vertical jurisdictional relationship between two supreme courts belonging to two different legal orders, i.e. national and European legal order.

As discussed above, the ECtHR applied the *Solange* method in its *Bosphorus* judgment for regulating its horizontal jurisdictional relationship *vis-à-vis* the ECJ. Accordingly, by using the *Solange* method, the ECtHR expanded the scope of application of the *Solange* method towards the horizontal relationship between two international (regional) courts, i.e. the ECJ and ECtHR.

¹⁵³ Ibid. at para. 118.

This raises the following questions: what is the legal basis of the *Solange* method for its application at the international level? To what extent are international judges and arbitrators obliged to apply the *Solange* method when confronted with competing jurisdictions?

Before answering these questions, it should be noted that the *Solange* method is considered to be an example of judicial comity. Accordingly, it is necessary to get a clear understanding of judicial comity. For this we need to turn to Professor Yuval Shany who has extensively analyzed this term.¹⁵⁴ According to Shany comity can “create a framework for jurisdictional interaction that will enable courts and tribunals to apply rules originating in other judicial institutions. This, in turn, will encourage cross-fertilization and may result in increased legitimacy of international judgments (through utilizing the authority of other international courts and tribunals) and in the application of the ‘best available’ rule, reflecting not merely the narrow interests of the parties and the law-applying regime at hand but also those of the international community at large”.¹⁵⁵ Professor Shany defines comity as follows:

“According to this principle, which is found in many countries (mostly from common law systems) courts in one jurisdiction should respect and demonstrate a degree of deference to the law of other jurisdictions, including the decisions of judicial bodies operating in the jurisdictions.”¹⁵⁶

In this context, it should be noted that the term “comity”, “international comity” or “judicial comity” is often used interchangeably and is, moreover, amorphous and applied in very different contextual settings.¹⁵⁷

The type of comity we are looking at in this contribution can be traced back to the U.S. Supreme Court, which argued already in 1895 in *Hilton v Guyot* with respect to foreign acts that “comity”, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other hand. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.”¹⁵⁸ More recently, the U.S. Supreme Court emphasized the need to extend judicial cooperation to quasi-judicial international tribunals as well.¹⁵⁹

¹⁵⁴ Shany, *supra* note 1.

¹⁵⁵ *Ibid.* at 261.

¹⁵⁶ *Ibid.* at 260.

¹⁵⁷ See i.e. M. Ramsey, *Escaping International Comity*, 83 *Iowa Law Review* 893, 893-952 (1998); A. Perez, *WTO and UN Law: Institutional Comity in National Security*, 23 *Yale Journal of International Law* 301, 301-379 (1998); A. Ben-Ezer/A. Bender, *The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity*, 29 *North Carolina Journal of International Law and Commercial Regulation* 1, 1-34 (2003); S. Foster Halabi, *The Comity of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels*, 46 *Harvard International Law Journal* 279, 279-293 (2005); D. Tan, *Anti-suit Injunctions and the Vexing Problem of Comity*, 45 *Virginia Journal of International Law* 283, 283-356 (2005).

¹⁵⁸ US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

¹⁵⁹ US Supreme Court, *Intel Corp. v. Advanced Micro Devices*, 124 S. Ct. 2466 (2004).

Accordingly, viewed from this perspective comity is not considered as a legal principle *stricto sensu*, but rather a sort of “gentlemen’s agreement” between courts and tribunals. In other words, every court or tribunal is totally free to decide whether or not to apply comity in a certain case and what consequences it attaches to it.

However, if one looks further, in particular to basic international law instruments, which is appropriate since we deal here with comity between international courts and tribunals, we can find a legal basis for comity.

For example, Article 1 (1) of the UN Charter explicitly notes that

“The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by *peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes* or situations which might lead to a breach of the peace [...]” (emphasis added)

This directly applies to all courts and tribunals established by the UN (i.e. the ICJ, ICTY) but arguably also to all other international courts and tribunals that are called upon to apply the UN Charter.

Likewise the Preamble of the Vienna Convention on the Law of the Treaties (VCLT) 1980 explicitly states that:

“Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and *in conformity with the principles of justice and international law* [...]” (emphasis added)

Since the VCLT is generally considered to be an expression of customary international law,¹⁶⁰ the principles of justice and international law apply to all international disputes. Hence, when international courts/tribunals are called upon to resolve an international dispute, they must do so in conformity with the principles of justice and international law.

It is submitted that comity (including the *Solange* method) is part of the principles of justice. More specifically, it is argued that comity must be understood as being an inherent part of the tasks and functions of a judge/arbitrator to resolve disputes in conformity with the principles of justice and international law.¹⁶¹ Thus, comity can be qualified as being an integral part of the obligation of all international courts and tribunals to apply it when determining whether or not to exercise their jurisdiction in a specific case brought before them. In other words, as Professor Petersmann recently convincingly argued, judicial comity must be considered to be part of the rule of law and of delivering justice by judges and arbitrators when resolving a dispute.¹⁶² Besides, it is submitted that all international courts and

¹⁶⁰ M.N. Shaw, *International Law* 811, 5th ed., (2003).

¹⁶¹ See E.-U. Petersmann, *Do Judges Meet Their Constitutional Obligation to Settle Disputes In Conformity with Principles of Justice and International Law?*, 2 *European Journal of Legal Studies* (2007). Available at <<http://www.ejls.eu>>.

¹⁶² *Ibid.*

tribunals have an obligation to ensure the efficiency and coherence of the international legal order when executing their function.¹⁶³ In short, applying comity (i.e. the *Solange* method) must be considered to be an inherent fundamental legal duty of every judge or arbitrator.¹⁶⁴

If this point of view is accepted, the question arises as to what does this legal duty entail for judges/arbitrators? Essentially, it entails delivering justice at three levels: (i) justice to the parties, (ii) justice towards other international courts/tribunals as well as (iii) justice towards the rule of law.¹⁶⁵

Justice towards the parties means that every court/tribunal is obliged to resolve a dispute by rendering a decision that is efficient, fair and final. Thus, parties must be discouraged from endlessly re-litigating the same dispute (or parts of the same dispute), while at the same time be encouraged to end their disputes by accepting the outcome of the first proceeding. Since the court or tribunal first seized with a dispute can substantially determine the process, it bears particular responsibility when deciding whether or not to exercise its jurisdiction.

But at the same time, the courts and tribunals must do so in a way that does not undermine the authority of the other court/tribunal whose jurisdiction also is potentially triggered. So justice towards the other international courts/tribunals entails showing respect for the other court's jurisdiction by relinquishing its own jurisdiction, staying the proceeding or taking full account of the other court's decision.

This brings us to the third element of justice and that is to show justice towards international law, more specifically by preserving the uniform and effective application of international law. Indeed, in view of the recent multiplication of international courts and tribunals, it is increasingly becoming vital to prevent – in one way or another – a fragmentation of international law (including regional law like EC, NAFTA or MERCUSOR law).¹⁶⁶ In other words, courts/tribunals have an inherent obligation to contribute to the uniform interpretation and application of international law. The application of comity – for instance in the form of the *Solange* method – forms part of this obligation.

Accordingly, it is not difficult to find a legal basis for comity. In fact, comity has a dual legal basis – to be found in constitutional law as well as international law –

¹⁶³ Ch. Leathley, *An Institutional Hierarchy to Combat Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 *New York University Journal of International Law and Politics* 298, 259-306 (2007).

¹⁶⁴ *Ibid.* at 299.

¹⁶⁵ See generally E.-U. Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 *University of Pennsylvania Journal of International Economic Law* 273, 273-366 (2006).

¹⁶⁶ See generally N. Lavranos, *Jurisdictional Competition between the ECJ and Other International Courts and Tribunals*, 11 *European Law Reporter* 156, 156-171 (2007); *Ibid.*, *Das Rechtsprechungsmonopol des EuGH in Lichte der Proliferation internationaler Gerichte*, 42 *Europarecht* 440, 440-469 (2007).

which allows comity to be transposed from the national law level to the international law level.

This is also confirmed by the UN General Assembly that adopted at the 2005 World Summit an Outcome document, which explicitly states that:

“Pacific settlement of disputes

73. We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

[...]

Rule of law

134. *Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels* (emphasis added), we:

(a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an *international order based on the rule of law* and international law, which is essential for peaceful coexistence and cooperation among States; (emphasis added)

[...]

(f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court’s work, including by supporting the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.”¹⁶⁷

In sum, it is submitted that applying comity is part of the inherent power of the judiciary and more specifically inherent obligation of every judge or arbitrator. In other words, all international courts and tribunals are obliged to apply the *Solange* method when confronted with competing jurisdictions.

C. The Application of the *Solange* Method at the International Law Level

Accordingly, it seems an interesting exercise to apply the *Solange* method in those case-studies in which it was not applied and find out what the effects of its application would have been. Thus, in this section the *Solange* method is tested hypothetically in all the case-studies with the exception of the UNCLOS arbitral award in the *Mox Plant* dispute and the *Bosphorus* judgment of the ECtHR since in those cases the *Solange* method was applied.

¹⁶⁷ 2005 World Summit Outcome, Resolution adopted by the UN General Assembly (A/60/L.1) 25 October 2005, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>>.

In the *Mox Plant* dispute, instead of seizing its jurisdiction, the ECJ could have opted for declining its jurisdiction by applying the *Solange* method and referring the parties back to the UNCLOS arbitral tribunal for a final decision. In this way, the ECJ could have respected the existing jurisdiction of the UNCLOS arbitral tribunal and would have stopped the parties from re-litigating the dispute before the ECJ with the danger of potentially conflicting rulings. This would also have shortened the length of proceedings considerably.¹⁶⁸ Such a move by the ECJ would have been particularly risk free in this case, since the UNCLOS arbitral tribunal showed so much consideration for the ECJ jurisdiction that it can be assumed that it would have shown similar consideration to the relevant ECJ jurisprudence. Thus, the risk of a possible divergent or conflict ruling by the UNCLOS arbitral tribunal would have been very low indeed. There was therefore no reason for the ECJ to worry about the uniform application of EC law within the EC member states. However, as discussed above, the ECJ did not show any signs that it would apply the *Solange* method towards the UNCLOS arbitral tribunal or any other international court/tribunal in general. Instead, the ECJ opted for claiming maximum exclusive jurisdiction.

Similarly, also the OSPAR arbitral tribunal was not inclined to apply the *Solange* method. If it had applied the *Solange* method and consequently declined its jurisdiction, the parties would have had to go to the ECJ and relevant Community law would have been applied in the case. This in turn would have ensured the uniform application of EC law. At least, the OSPAR arbitral tribunal was obliged when exercising its jurisdiction in this case to take relevant EC law and ECJ jurisprudence fully into account rather than adopting a divergent approach.

The application of the *Solange* method in the *IJzeren Rijn* dispute would have clearly made a huge difference in the outcome of the case. By applying the *Solange* method, the *IJzeren Rijn* arbitral tribunal would have declined its jurisdiction in favor of the ECJ. Since EC law was so obviously applicable in this case, this would have been the only appropriate solution. As a result, the ECJ would have been placed in a position to adjudicate this dispute, thereby ensuring the proper and uniform application of EC law (especially the Habitats Directive) within the EC member states.¹⁶⁹ Moreover, this would have prevented the *IJzeren Rijn* arbitral tribunal from formulating its inventive but flawed line of argument justifying its jurisdiction.

Finally, it would have sent a strong message to EC member states that they should stop trying to circumvent the ECJ when they think it is in their interest to do so. In this way, also the authority of the ECJ would have been strengthened instead of weakened.

¹⁶⁸ It is noteworthy that even though the ECJ judgment in the *Mox Plant* dispute in which it seized jurisdiction regarding UNCLOS dates from 30 May 2006, the UNCLOS arbitral tribunal terminated the proceedings only on 6 June 2008 without discussing the merits of the case.

¹⁶⁹ Lavranos, *supra* note 1.

In the *Mexico Soft Drinks* case, the *Solange* method could have been applied by the WTO panel and Appellate Body in order to force the parties involved in the dispute to find a solution within the NAFTA dispute settlement body rather than litigate the same dispute again before another dispute settlement body.¹⁷⁰ As mentioned above, the *Mexico Soft Drinks* dispute is closely related to the much broader and long-standing *Sugar* dispute between the US and Mexico. The WTO panel and Appellate Body already found Mexico in breach of similar measures,¹⁷¹ so there was no need to re-litigate the dispute again before the WTO. In particular, since Mexico apparently has been trying to establish a NAFTA panel but which so far has been blocked by the U.S.¹⁷² If the establishment of a NAFTA panel could be induced by applying the *Solange* method, this would have also strengthened the authority of the NAFTA dispute settlement system.

The *Brazilian Tyres* case is particularly interesting because it illustrates within one and the same dispute the consequences of the (non-) application of the *Solange* method.

On the one hand, the WTO panel applied the *Solange* method to the extent that it accepted that Brazil had adopted the disputed measure in order to implement the MERCOSUR arbitral tribunal's ruling. What's more, the WTO panel accepted the findings of the MERCOSUR arbitral tribunal as a fact of the case and did not review Brazil's defence strategy before that tribunal. In other words, even though the WTO panel exercised its jurisdiction in this case, it respected the jurisdiction of the MERCOSUR arbitral tribunal and took its award adequately into account by concluding that Brazil did not violate its WTO obligations when implementing the MERCOSUR arbitral tribunal's decision. Thus, the WTO panel showed comity and delivered justice.

On the other hand, the WTO Appellate Body's approach towards the MERCOSUR arbitral tribunal's decision was quite the opposite. Although, the WTO Appellate Body avoided reviewing the award of the MERCOSUR arbitral tribunal, it discussed and rejected the way Brazil implemented that award. Indeed, the WTO Appellate Body went even further by criticizing Brazil's defence strategy and suggesting which provision Brazil ought to have relied upon before the MERCOSUR arbitral tribunal. In short, had the WTO Appellate Body applied the *Solange* method it could have ensured a more consistent resolution of the dispute and would have ensured that the MERCOSUR and WTO law obligations remained congruent.

¹⁷⁰ NAFTA Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, (MEX-USA-98-1904-01), available at <http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98011e.pdf>.

¹⁷¹ WTO Appellate Body Report, Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS), (Article 21.5-US), case WT/DS132/AB/RW, adopted by the DSB on 21 November 2001.

¹⁷² See generally J. Pauwelyn, Adding Sweeteners to Softwood Lumber: the WTO-NAFTA "Spaghetti Bowl" is Cooking, 9(1) *Journal of International Economic Law* 197, 197-206 (2006).

The ICJ's *Genocide Convention* judgment is another example which illustrates that the application of the *Solange* method would have resulted in a different – and from the point of view of uniformity of international law – preferable outcome.

Even though the ICTY never challenged the jurisdiction of the ICJ and its competence to state the law regarding general international law issues, the ICJ considered it necessary to criticize the ICTY quite strongly and limit the jurisdiction of the ICTY. As a consequence thereof, a divergent jurisprudence exists regarding the application of the proper test for determining whether or not the conditions for individual/state responsibility for international crimes are met. This creates an unnecessary fragmentation concerning a vital point of general international law.

The ICJ could have avoided this situation, if it had applied the *Solange* method. The ICJ could have easily adopted the approach of the ICTY, thereby ensuring the uniformity of international law and strengthening the authority of the ICTY and its own. Moreover, and maybe even more importantly, the ICJ could have ensured that the horrific events in the Balkans be treated equally, i.e. actually punished.

To sum up, from the hypothetical application of the *Solange* method in these cases one can draw the following conclusions:

First, had the *Solange* method been applied by all courts and tribunals, the length of the proceedings would have been shortened and it would have resulted in a more consistent and uniform application of law.¹⁷³

Second, the authority of the courts and tribunals would have been lifted if the courts and tribunals would have applied the *Solange* method, thereby acting in a coordinated and efficient manner, which in turn would strengthen the various dispute settlement systems involved. In other words, the consistent application of the *Solange* method would contribute towards a more rule-based dispute settlement culture between states.

Third, as a result of the previous points, true justice would have been delivered towards the parties, the courts and tribunals and the legal orders involved. In other words, the *Solange* method would have contributed to the rule of law.

In sum, it can be safely concluded that a systematic and consistent application of the *Solange* method by all courts and tribunals allows resolving issues of jurisdictional competition quite adequately.

IV. Conclusion

This contribution has shown that there is a need for regulating competing jurisdictions, in particular in view of the still on-going proliferation of international courts and tribunals and the lack of any formal legally binding institutional coor-

¹⁷³ See extensively C. Romano, From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent, New York University School of Law, Paper 20 (2006), available at <<http://Isr.nellco.org/cgi/viewcontent.cgi?article=1019&context=nyu/plltwp>>.

dination – either through hierarchy or any other means – between those courts and tribunals.¹⁷⁴

As mentioned at the outset, competing jurisdiction as such is not problematic, indeed one may even sympathize with the view recently posited by Professor Cogan who argued that even more jurisdictional competition is needed in order to constrain the expanding power of international courts and tribunals.¹⁷⁵

However, the case-studies discussed in this contribution quite clearly illustrated the fundamental problems that have arisen from jurisdictional competition so far.¹⁷⁶

In the first place, we noted the creation of inconsistencies in law by either conflicting interpretation of the law or failure to take full account of the law and jurisprudence of the other courts and tribunals (potentially) involved in a dispute. This in turn has had a fragmenting effect on the legal systems and/or subsystems involved.

In the second place, several cases were clearly examples of forum shopping, which resulted in endless re-litigation with protracted proceedings. Moreover, it not only contributes to huge and unnecessary investment in resources (money, manpower and time), but also damages the political and economic relationships between the parties involved. This is an important but often underestimated cause or root for even more disputes between parties that have been entangled in protracted proceedings.

In the third place, jurisdictional competition that has led to divergent or conflicting rulings or to open ignorance of existing jurisdiction of another court/tribunal undermines the authority of courts and tribunals, in particular if they themselves openly criticize each other as has been the case between the ICJ and ICTY. One should not underestimate the negative impression that is created by such behaviour not only upon government officials but also upon lawyers and academics and the public at large.

In the fourth place, it should also be remembered that divergent or conflicting rulings by different courts or tribunals create conflicting obligations for the parties involved, which inevitably forces states to breach one or the other law. This in turn undermines the respect and belief in justice, rule of law and peaceful dispute resolution.

In sum, it can be concluded from the analysis above that the application of the *Solange* method would have helped to reduce or even eliminate the problems associated with competing jurisdictions. Indeed, a consistent and uniform application of the *Solange* method by all international courts and tribunals would substantially

¹⁷⁴ See generally H. Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, (2008); Leahley, *supra* note 163.

¹⁷⁵ J. Cogan, Competition and Control in International Adjudication, 48 Virginia Journal of International Law 411, 411-449 (2008).

¹⁷⁶ See on the more general negative effects of fragmentation: E. Benvenisti/G. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law, 60 Stanford Law Review 595, 595-631 (2007).

reduce the risk of fragmentation of international legal order (including regional legal orders). It would also foster and improve the understanding and informal cooperation between international courts and judges.¹⁷⁷

Finally, the analysis has also shown that there is a firm legal basis to be found in basic international law instruments obliging all international courts and tribunals to apply the *Solange* method.

Moreover, comity of which the *Solange* method is one example is part of the legal duty of each and every court to deliver justice.¹⁷⁸ Indeed, justice is part of the rule of law, which is the most fundamental principle that underpins the belief in international cooperation and its advantages for the individuals.

But at the same time we should not forget that the application of the *Solange* method very much depends on the attitude of each and every judge.¹⁷⁹ Accordingly, only if all judges and arbitrators start recognizing the usefulness and effectiveness of the *Solange* method, it will be possible to reap the benefits from the multiplication of international courts and tribunals without at the same time jeopardizing justice and the rule of law.

¹⁷⁷ See generally on this aspect: A.-M. Slaughter, A Global Community of Courts, 44 *Harvard International Law Journal*, 191, 191-219 (2003).

¹⁷⁸ See generally on this point Petersmann, *supra* note 2, 529, 529-551. It is submitted that this is not confined to international trade but applies equally to all areas of international law.

¹⁷⁹ P.-M. Dupuy, The Unity of Application of International Law at the Global Level and the Responsibility of Judges, 2 *European Journal of Legal Studies* 1, 20-21 (2007).

ZaöRV 68 (2008)