Giorgio Bongiovanni
Giovanni Sartor
Chiara Valentini
Editors

Law and Philosophy Library 86

Reasonableness and Law

Springer

"judicial dialogues" among courts derives from their protection of constitutional citizen rights as a constitutional precondition for individual and democratic self-development in a constitutionally protected framework of "participatory," "deliberative" and "cosmopolitan democracy." Citizens and courts have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges (e.g., in worldwide and non-European institutions) if they perceive themselves as mere agents of governments and disregard the constitutional obligation of judges to settle disputes in conformity with human rights.

5.1 The "Solange-Method" of Judicial Cooperation Among the German Constitutional Court and the EC Court in the Protection of Fundamental Rights

The EC Court, the EFTA Court and the ECtHR have—albeit in different ways—interpreted the intergovernmental EC-, EEA- and ECHR treaties as objective legal orders protecting also *individual rights* of citizens. All three courts have acknowledged that the human rights goals to empower individuals and effectively protect human rights, like the objective of international trade agreements to enable citizens to engage in mutually beneficial trade transactions under non-discriminatory conditions of competition, call for "dynamic judicial interpretations" of treaty rules with due regard to the need for judicial protection of citizen interests in economic markets and constitutional democracies. These citizen-oriented interpretations of the EC- and EEA Agreements were influenced by the long-standing insistency by the German Constitutional Court on its constitutional mandate to protect fundamental rights and constitutional democracy also vis-à-vis abuses of EC powers affecting citizens in Germany. The "*Solange* jurisprudence" of the German Constitutional Court, like similar interactions between other national constitutional courts and the EC Court (see Mayer 2006), contributed to the progressive extension of judicial protection of human rights in Community law:

– In its *Solange I* judgment of 1974, the German Constitutional Court held that "as long as" the integration process of the EC does not include a catalogue of fundamental rights corresponding to that of the German Basic Law, German courts could, after having requested a preliminary ruling from the EC Court, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.[43] This judicial insistence on the then higher level of fundamental rights protection in German constitutional law was instrumental for the ECJ's judicial protection of human rights as common, yet unwritten constitutional guarantees of EC law.[44]

[43] BVerfGE 37, 327.

[44] The ECJ's judicial protection of human rights since 1969 (Case 29/69, *Stauder v. City of Ulm*, ECR 1969, 419; Case 11/70 *Internationale Handelsgesellschaft*, ECR 1970, 1125; Case 4/73, *Nold*, ECR 1974, 491) continues to evolve.

- In view of the emerging human rights protection in EC law, the German Constitutional Court held—in its *Solange II* judgment of 1986[45]—that it would no longer exercise its jurisdiction for reviewing EC legal acts "as long as" the EC Court continued to generally and effectively protect fundamental rights against EC measures in ways comparable to the essential safeguards of German constitutional law.
- In its *Maastricht* judgment (*Solange III*) of 1993, however, the German Constitutional Court reasserted its jurisdiction to defend the scope of German constitutional law: EC measures exceeding the limited EC competences covered by the German Act ratifying the EU Treaty ("*ausbrechende Gemeinschaftsakte*") could not be legally binding and applicable in Germany.[46]
- Following GATT and WTO dispute settlement rulings that the EC import restrictions of bananas violated WTO law, and in view of an ECJ judgment upholding these restrictions without reviewing their WTO inconsistencies, several German courts requested the Constitutional Court to declare these EC restrictions to be *ultra vires* (i.e., exceeding the EC's limited competences) and to illegally restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002[47] (*Solange IV*), declared the application inadmissible on the ground that it had not been argued that the required level of human rights protection in the EC had *generally* fallen below the minimum level required by the German Constitution.
- In its judgment of 2005 on the German act implementing the EU Framework Decision (adopted under the third EU pillar) on the European Arrest Warrant, the Constitutional Court held that the automatically binding force and mutual recognition in Germany of arrest orders from other EU member states were inconsistent with the fundamental rights guarantees of the German Basic Law.[48] The limited jurisdiction of the EC Court for third pillar decisions concerning police and judicial cooperation might have contributed to this assertion of national constitutional jurisdiction for safeguarding fundamental rights vis-à-vis EU decisions in the area of criminal law and their legislative implementation in Germany.

The progressively expanding legal protection of fundamental rights in EC law in response to their judicial protection by national and European courts illustrates how judicial cooperation has been successful in Europe far beyond economic law. Judge A. Rosas (2005, 163, 169) has distinguished the following five "stages" in the case-law of the EC Court on the protection of human rights:

- In the supra-national, but functionally limited European Coal and Steel Community, the Court held that it lacked competence to examine whether an ECSC

[45] BVerfGE 73, 339, at 375.
[46] BVerfGE 89, 115.
[47] BVerfGE 102, 147.
[48] BVerfGE 113, 273.

decision amounted to an infringement of fundamental rights as recognized in the constitution of a member state.[49]

- Since its *Stauder* judgment of 1969, the EC Court has declared in a series of judgments that fundamental rights form part of the general principles of Community law binding the member states and EC institutions, and that the EC Court ensures their observance.[50]
- Since 1975, the ever more extensive case-law of the EC courts explicitly refers to the ECHR and protects ever more human rights and fundamental freedoms in a wide array of Community law areas, including civil, political, economic, social and labour rights, drawing inspiration "from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."[51]
- Since 1989, the ECHR has been characterized by the EC Court as having "special significance" for the interpretation and development of EU law[52] in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.
- In the 1990s, the EC courts have begun to refer to individual judgments of the ECtHR[53] and have clarified that—in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions—all interests involved have to be weighed "having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests," without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.[54] The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,[55]

---

[49] Case 1/58, *Storck v. High Authority,* ECR 1959, 43.

[50] See the cases cited in note 44.

[51] See, e.g., Opinion 2/1994 on the ECHR, ECR 1996 I-1759, par. 33.

[52] Joined Cases 46/87 and 222/88, *Hoechst*, ECR 1989, 2859, par. 13.

[53] See Case 13/94, *P v. S*, ECR 1996 I-2143, par. 16.

[54] See Case C-112/00, *Schmidberger*, ECR 2003 I-5659. The Court began by examining the EC's economic freedom, as requested by the national court, and observed that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods"; "unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose" (par. 80). The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

[55] In Case C-94/00, *Roquette Frères,* ECR 2002 I-9011, par. 29, for example, the ECJ referred explicitly to new case-law of the ECtHR on the protection of the right to privacy of commercial enterprises in order to explain why—despite having suggested the opposite in the ECJ's earlier judgment in *Hoechst*—such enterprises may benefit from Article 8 ECHR: "For the purposes of determining the scope of that principle in relation to the protection of business premises, regard

and to differentiate—as in the case-law of the ECtHR—between judicial review of EC measures,[56] state measures[57] and private restrictions of economic freedoms in the light of fundamental rights.[58]

5.2 "Horizontal" Cooperation Among the EC Courts, the EFTA Court and the ECtHR in Protecting Individual Rights in the EEA

Judicial cooperation between the EC courts and the EFTA Court was legally mandated in the EEA Agreement (e.g., Article 6) and facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical with the EC's common market rules (notwithstanding the different context of the EC's common market and the EEA's free trade area). The EC Court of First Instance, in its *Opel Austria* judgment of 1997, held that Article 10 of the EEA Agreement (corresponding to the free trade rules in Articles 12, 13, 16 and 17 EC Treaty) had direct effect in EC law in view of the high degree of integration protected by the EEA Agreement, whose objectives exceeded those of a mere free trade agreement and required the contracting parties to establish a dynamic and homogenous EEA.[59] In numerous cases, EC court judgments referred to the case-law of the EFTA Court, for example by pointing out "that the principles governing the liability of an EFTA state for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdottir.*"[60] In its *Ospelt* judgment, the EC Court emphasized that "one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the four

must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. France, not yet published in the Reports of Judgments and Decisions)* and second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."

[56] See, e.g., the ECJ cases listed in note 44 above.

[57] See, e.g., the *Omega* Case C-36/02, ECR 2004 I-9609, in which the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states.

[58] See Emberland 2006 and Cases C-341/05, *Laval*, Judgment of 18 December 2007 (nyr), as well as Case C-438/05, *Viking Line*, Judgment of 11 December 2007 (nyr): the ECJ recognized that trade unions are legally bound by the EC's common market freedoms, and that the private plaintiffs in these cases could rely directly on the EC Treaty in their judicial challenge of restrictions imposed on market freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of *Viking Line* to another EC member state).

[59] Case T-115/94, ECR 1997 II-39.

[60] Case C-140/97, *Rechberger*, ECR 1999 I-3499, par. 39.

freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states."[61]

The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries and with due regard also to the case-law of the ECtHR. In view of the intergovernmental structures of the EEA Agreement, the legal homogeneity obligations in the EEA Agreement (e.g., Article 6) as well as in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (e.g., Article 3) were interpreted only as *obligations de résultat* with regard to the legal protection of market freedoms and individual rights in EFTA countries. Yet, the EFTA Court effectively promoted "*quasi*-direct effect" and "*quasi*-primacy" (C. Baudenbacher) as well as full state liability and protection of individual rights of market participants in national courts in all EEA countries.[62] In various judgments, the EFTA Court followed the ECJ case-law also by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR (e.g., concerning Article 6 ECHR on access to justice, Article 10 on freedom of expression). In its *Asgeirsson* judgment, the EFTA Court rejected the argument that the reference to the EFTA Court had unduly prolonged the national court proceeding in violation of the right to a fair and public hearing within a reasonable time (Article 6 ECHR); referring to a judgment by the ECtHR in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ (pursuant to Article 234 EC), the EFTA Court shared the reasoning of the ECtHR that adding the period of preliminary references (which was less than 6 months in the case before the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the ECJ. In *Goodwin*, for example, the ECtHR referred to Article 9 of the EU Charter of Fundamental Rights (right to marry) so as to back up its judgment that the refusal to recognize a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.[63] In *Dangeville*, the ECtHR's determination that an interference with the right to the peaceful enjoyment of possessions was not required in the general interest took into account the fact that the French measures were incompatible with EC law.[64] In cases *Waite and Kennedy v. Germany*, the ECtHR held that it would be incompatible with the purpose and object of the ECHR if an attribution of tasks to an international organization or in

---

[61] Case C-452/01, ECR 2003 I-9743, par. 29.

[62] See the EFTA Court President C. Baudenbacher (2005) and H.P. Graver: "Direct effect of primary law, state liability and the duty of the courts to interpret national law in the light of EEA obligations have been clearly and firmly accepted in national law by Norwegian courts" (Graver 2005, 97).

[63] *Goodwin v. United Kingdom*, judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, pars. 58, 100.

[64] *SA Dangeville v. France* judgment of 16 April 2002, Reports of Judgments and Decisions 2002-III, pars. 31ff.

the context of international agreements could absolve the contracting states of their obligations under the ECHR.[65] In the *Bosphorus* case, the ECtHR had to examine the consistency of the impounding by Ireland of a Yugoslavian aircraft on the legal basis of EC regulations imposing sanctions against the former Federal Republic of Yugoslavia; the ECtHR referred to the ECJ case-law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the ECJ preliminary ruling that "the impounding of the aircraft in question [. . .] cannot be regarded as inappropriate or disproportionate"; in its examination of whether compliance with EC obligations could justify the interference by Ireland with the applicant's property rights, the ECtHR proceeded on the basis of the following four principles[66]:

(a) "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations";
(b) "State action taken in compliance with such legal obligations is justified as long as the relevant organization 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";
(c) "If such equivalent protection is considered to be provided by the organization, 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 organization."
(d) "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 cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights."

After examining the comprehensive EC guarantees of fundamental rights and judicial remedies, the ECtHR found "that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, 'equivalent' [. . .] to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from requirements of the Convention when it implemented legal obligations flowing from its membership of the EC." As the Court did not find any "manifest deficiency" in the protection of the applicant's Convention rights, the relevant presumption of compliance with the ECHR had not been rebutted.[67]

---

[65] *Waite and Kennedy v. Germany*, judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, par. 67.
[66] *Case of Bosphorus Hava Yollari Turizm v. Ireland*, judgment of 30 June 2005, European Human Rights Reports 42 (2006) 1, pars. 153ff.
[67] *Case of Bosphorus Hava Yollari Turizm v. Ireland* (n. 66), pars. 165–66.

6 Conditional "*Solange*-Cooperation" Among International Trade and Environmental Courts Beyond Europe?

Competing multilateral treaty and dispute settlement systems with "forum selection clauses" enabling governments to submit disputes to competing jurisdictions (with the risk of conflicting judgments) continue to multiply also outside economic law and human rights law, for example in international environmental law, maritime law, criminal law and other areas of international law. Proposals to coordinate such overlapping jurisdictions through hierarchical procedures (e.g., preliminary rulings or advisory opinions by the ICJ) are opposed by most governments. Agreement on exclusive jurisdiction clauses (as in Article 292 EC Treaty, Article 23 DSU/WTO, Article 282 Law of the Sea Convention) may not prevent submission of disputes involving several treaty regimes to competing dispute settlement *fora*. For example, in the dispute between Ireland and the United Kingdom over radioactive pollution from the MOX plant in Sellafield (UK), four dispute settlement bodies were seized and used diverging methods for coordinating their respective jurisdictions:

6.1 The OSPAR Arbitral Award of 2003 on the MOX Plant Dispute

In order to clarify the obligations of the United Kingdom to make available all information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it" pursuant to Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic" (OSPAR), Ireland and the United Kingdom agreed to establish an arbitral tribunal under this OSPAR Convention. Even though Article 35, par.5,a of the Convention requires the tribunal to decide according to "the rules of international law, and in particular those of the Convention," the tribunal's award of July 2003 was based only on the OSPAR Convention, without taking into account relevant environmental regulations of the EC and of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ratified by all EC member states as well as by the EC). The OSPAR arbitral tribunal decided in favour of the United Kingdom that the latter had not violated its treaty obligations by not disclosing the information sought by Ireland (see McDorman 2004).

6.2 The UNCLOS 2001 Provisional Measures and 2003 Arbitral Decision in the MOX-Pant Dispute

The UN Convention on the Law of the Sea (UNCLOS) offers parties the choice (in Articles 281 ff) of submitting disputes to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitral tribunals or other dispute settlement *fora* established by regional or bilateral treaties. As Ireland claimed that the discharges released by the MOX Plant contaminated Irish waters in violation of UNCLOS, it requested establishment of an arbitral tribunal and—pending this procedure—

requested interim protection measures from the ITLOS pursuant to Article 290 UNCLOS. The ITLOS order of December 2001, after determining the *prima facie* jurisdiction of the Annex VII arbitral tribunal to decide the merits of the dispute, requested both parties to cooperate and consult regarding the emissions from the MOX plant into the Irish Sea, pending the decision on the merits by the arbitral tribunal. The arbitral tribunal suspended its proceedings in June 2003 and requested the parties to clarify whether, as claimed by the United Kingdom, the EC Court had jurisdiction to decide this dispute on the basis of the relevant EC and EURATOM rules, including UNCLOS as an integral part of the Community legal system (see Shany 2004).

6.3 The EC Court Judgement of May 2006 in the MOX Plant Dispute

In October 2003, the EU Commission started an infringement proceeding against Ireland on the ground that—as the EC had ratified and transformed UNCLOS into an integral part of the EC legal system—Ireland's submission of the dispute to tribunals outside the Community legal order had violated the exclusive jurisdiction of the EC Court under Article 292 EC and Article 193 of the EURATOM Treaty. In its judgment of May 2006, the Court confirmed its exclusive jurisdiction on the ground that the UNCLOS provisions on the prevention of marine pollution relied on by Ireland in its dispute relating to the MOX plant "are rules which form part of the Community legal order."[68] The Court followed from the autonomy of the Community legal system and from Article 282 UNCLOS that the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that provided for in Part XV of UNCLOS. As the dispute concerned the interpretation and application of EC law within the terms of Article 292 EC, "Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant."[69] By requesting the arbitral tribunal to decide disputes concerning the interpretation and application of Community law, Ireland had violated the exclusive jurisdiction of the Court under Article 292 EC as well as the EC member states' duties of close cooperation, prior information and loyal consultation of the competent Community institutions as prescribed in Article 10 EC.

6.4 The 2004 IJzeren Rijn Arbitration between the Netherlands and Belgium

The IJzeren Rijn arbitration under the auspices of the Permanent Court of Arbitration concerned a dispute between Belgium and the Netherlands over Belgium's right

---

[68] ECJ Case C-459/2003, *Commission v. Ireland* ECR (2006) I-4635, par. 121.
[69] ECR (2006) I-4635, par. 133.

to the use and reopening of an old railway line leading through a protected natural habitat and the payment of the costs involved (see Lavranos 2006). The arbitral tribunal was requested to settle the dispute on the basis of international law, including if necessary EC law, with due respect to the obligations of these EC member states under Article 292 EC. The Tribunal agreed with the view shared by both parties that there was no dispute within the meaning of Article 292 EC because its decision on the apportionment of costs did not require any interpretation of EC law (e.g., the Council Directive on the conservation of natural habitats).

6.5 The "Solange-Method" as Reciprocal Respect for Constitutional Justice

The above-mentioned examples for competing jurisdictions for the settlement of environmental disputes among European states raise questions similar to those regarding overlapping jurisdictions for the settlement of trade disputes, human rights disputes or criminal proceedings in national and international criminal courts. The UNCLOS provisions for dispute settlement on the basis of "this Convention and other rules of international law not incompatible with this Convention" (Article 288) prompted the ITLOS to affirm *prima facie* jurisdiction in the MOX plant dispute. The Annex VII Arbitral Tribunal argued convincingly, however, that the prospect of resolving this dispute in the EC Court on the basis of EC law risked leading to conflicting decisions which, bearing in mind considerations of mutual respect and comity between judicial institutions and the explicit recognition of mutually agreed regional jurisdictions in Article 282 UNCLOS, justified suspending the arbitral proceeding and enjoining the parties to resolve the Community law issues in the institutional framework of the EC.

WTO law recognizes similar rights of WTO Members to conclude regional trade agreements with autonomous dispute settlement procedures; yet, the lack of a WTO provision corresponding to Article 282 UNCLOS, and the WTO rights to the *quasi* automatic establishment of WTO dispute settlement panels entail that WTO dispute settlement bodies must respect the right of WTO Members to receive a WTO dispute settlement ruling on the WTO obligations of members of FTAs, even if the respondent WTO Member would prefer to settle the dispute in the framework of the FTA procedures. The EC Court's persistent refusal to decide disputes on the basis of the WTO obligations of the EC and its member states offers an additional argument for WTO dispute settlement bodies to respect the rights of WTO Members (including EC member states) to WTO dispute settlement rulings on alleged violations of WTO rights and obligations (e.g., by the EC Council's import restrictions on bananas), notwithstanding the exclusive ECJ jurisdiction for settling disputes inside the EC over WTO law as an integral part of the Community legal system: "As long as" the EC Court continues to ignore the WTO obligations of the EC in its dispute settlement practices and offers EC member states no judicial remedy against EC majority decisions violating WTO law, WTO dispute settlement bodies may see no reason to exercise judicial self-restraint in WTO disputes over violations by the EC

of its WTO obligations vis-à-vis EC member states.[70] The lack of a treaty provision similar to Article 282 UNCLOS might also have prompted the OSPAR arbitral tribunal to decide on the claim of an alleged violation of the OSPAR Convention, without any discussion of Article 292 EC and without prejudice to future dispute settlement proceedings in the EC Court based on EC law (which, arguably, includes more comprehensive information disclosure requirements). The Ijzeren Rijn arbitral tribunal examined, as requested by the parties, the legal relevance of Article 292 EC and decided the dispute without prejudice to EC law.

The "*Solange*-principle" conditions respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law. It has also been applied by the EC Court itself, for instance when—in its Opinion 1/91 on the inconsistency of the EEA Draft Agreement with EC law—the EC Court found the EEA provisions for the establishment of an EEA Court to be inconsistent with the "autonomy of the Community legal order" and the "exclusive jurisdiction of the Court of Justice" (e.g., in so far as the EEA provisions did not guarantee legally binding effects of "advisory opinions" by the EEA Court on national courts in EEA member states).[71] The "*Solange*-principle" can explain the jurisprudence of both the EC Court[72] as well as the EFTA Court[73] that voluntarily agreed, private arbitral tribunals are not recognized as courts or tribunals of member states (within the meaning of Article 234 EC and Article 33 SCA) entitled to request preliminary rulings by the European courts. The fact that international arbitral tribunals (like the OSPAR and IJzeren Rijn arbitral tribunals mentioned above) are likewise not entitled to request preliminary rulings from the European Courts, may justify judicial self-restraint and deference to the competing jurisdiction of European courts in disputes requiring interpretation and application of European law. To the extent conflicts of jurisdiction and conflicting judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules,[74] international courts should follow the example of national civil and commercial courts and European courts and resolve conflicts through judicial cooperation and "judicial dialogues" based on principles of judicial comity and judicial protection of constitutional principles (like due process of law, *res judicata*, human rights) underlying modern international law. The horizontal cooperation among national and international courts with overlapping jurisdictions

---

[70] Such challenges in the WTO by EC member states of EC acts violating WTO law have never occurred so far. Most Community lawyers argue that not only from the point of view of Community law, but also "from the point of view of international law, the supremacy of Community law within the EC and its member states must be accepted" (Lavranos 2006, 10–11). Yet, it is arguable even from the point of view of Community law that the duty of loyalty (Article 10 EC) applies "as long as" the ECJ offers effective judicial remedies against obvious violations by EC institutions of their obligations (e.g., under Articles 220, 300 EC) to respect the rule of law and protect EC member states from international legal responsibility for EC majority decisions violating mixed agreements.

[71] ECJ Opinion 1/91, *EEA Draft Agreement* ECR 1991 I-6079.

[72] Case C-125/2004, *Denuit/Cordenier v. Transorient*, ECJ judgment of 27 January 2005.

[73] See above note 25.

[74] Cf. Lavranos 2006, 20: "[T]he key to all solutions is hierarchy."

for the protection of constitutional rights in Europe reflects the constitutional duty of judges to protect "constitutional justice"; it should serve as a model for similar cooperation among national and international courts with overlapping jurisdictions in other field of international law,[75] notably if the intergovernmental rules protect cooperation among citizens across national frontiers, such as the settlement of transnational trade, investment and environmental disputes. Especially in those areas of intergovernmental regulation where states remain reluctant to submit to review by international courts (e.g., as in the second and third pillars of the EU Treaty), *national courts* must remain vigilant guardians so as to protect citizens and their constitutional rights from inadequate judicial remedies at the international level of multilevel governance for the collective supply of international public goods demanded by citizens.

7 Judicial Protection of "Principles of Justice" as Constitutional Limitation on Intergovernmental Power Politics

The prevailing perception of the "international law among states" as a foreign policy instrument for advancing *national* interests in an anarchic world prompts many international lawyers and diplomats to argue that effective international tribunals must remain "dependent" tribunals staffed by ad hoc judges closely controlled by governments, for example through their power of reappointment and threats of retaliation. Independent international courts are perceived with suspicion because independent judges risk allowing moral ideals and interests of third parties to influence their judgments; the domestic ideal of rule of law is seen as inappropriate for the reality of international power politics: "Dependent tribunals" are more likely to "render judgments that reflect the interests of the states at the time that they submit the dispute to the tribunal."[76] In support of such power-oriented conceptions of international judges as agents of the governments which appoint them, reference is also made to the empirical voting patterns of ad hoc judges (e.g., in the ICJ and arbitral tribunals) who side much more often with the legal claims of the government nominating the judge than with the legal claims of the other party to the dispute (see Posner and de Figueiredo 2005). From such state-centered rather than citizen-oriented perspectives, intergovernmental trade and economic rules should be interpreted and applied as intergovernmental commitments about reciprocal market access without private rights of action (see Sykes 2005).

---

[75] "[I]f the *Solange*-method would be applied by all international courts and tribunals in case of jurisdictional overlap, the risk of diverging or conflicting judgments could be effectively minimized, thus reducing the danger of a fragmentation of the international legal order [. . .]. One could argue that the *Solange*-method, and for that matter judicial comity in general, is part of the legal duty of each and every court to deliver justice" (Lavranos 2008, 235).

[76] See Posner and Yoo (2005, 6), who define the function of international tribunals as providing states with neutral information about the facts and the law in a particular dispute.