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The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals

Nikolaos Lavranos

I. INTRODUCTION

In the past decade, the proliferation or multiplication of international courts and tribunals, competition between these courts, and the possible fragmentation of international law as a result of the lack of a hierarchical structure, has received increasing attention from a vast array of scholars and practitioners. It was therefore, appropriate that a conference on this topic entitled, “International Courts and Tribunals in the 21st Century: The Future of International Justice” be organized to reflect on the current situation and how to move forward.

This article outlines two issues that were raised in the first panel of the conference for which this author was invited to

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comment upon. The first, more preliminary, question was whether signs of the fragmentation of international law could be detected as a result of the multiplication of international courts and tribunals. The second question was whether there is a need for further general or specific rules to regulate overlapping jurisdiction among those courts. More specifically, the question was put as to whether in this context, comity would be an appropriate general approach to handle competing jurisdiction.

The analysis below follows the order of these questions. Accordingly, Part II presents several case-studies which illustrate the various effects of overlapping jurisdictions. Part III discusses possible solutions to avoid the negative effects associated with divergent or conflicting rulings by different courts and tribunals on the same legal issue. The focus will be on comity, 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.

II. CASE-STUDIES ON THE EFFECTS OF THE MULTIPLICATION OF INTERNATIONAL COURTS AND TRIBUNALS

In this part, several case-studies will be presented to illustrate the effects that a multiplication of international courts and tribunals can have when they come to divergent or conflicting rulings or simply negate the existing jurisdiction of another court or tribunal. The multiplication of international courts and tribunals is not problematic on its own. On the contrary, it signals preparation on the part of states to use courts and tribunals for settling their disputes more often, rather than using armed forces. In other words, the multiplication of international courts and tribunals indicates a movement towards a rule of law based dispute settlement between states. Such multiplication, however, may raise problems when courts arrive at divergent or even conflicting rulings—as has been the case on several occasions. The primary sources of these problems stem from the lack of a hierarchical, legally binding relationship, between all the courts and tribunals.

The lack of a singular hierarchy means that the various courts and tribunals are not bound by each other's jurisprudence, permitting them to act, formally and legally speaking, in "clinical isolation."5

The case-studies below cover a wide range of international law, 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 example, the European Community (EC), the North America Free Trade Agreement (NAFTA), its South-American counterpart, Mercado Comun del Sur (MERCOSUR), 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 requiring a similarly general 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, as far as they concern jurisdictional aspects, and concluded with a short analysis.

The first case concerns the MOX Plant dispute which involved three separate dispute settlement proceedings: (i) the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) arbitral tribunal’s decision,6 (ii) the United Nations Convention on the Law of the Sea (UNCLOS) arbitral tribunal’s decision,7 and (iii) the European Court of Justice’s (ECJ) judgment.8 For the purposes of this article, the relevant question in these proceedings asks whether the ECJ has exclusive jurisdiction over the case, thereby precluding the involvement of the other 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.9

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5. The term "clinical isolation" is used by analogy in reference to Gabrielle Marceau, A Call for Coherence in International Law—Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33 J. WORLD TRADE L. 87, 115-52 (1999).
The third case deals with the *Mexico Soft Drinks*\(^{10}\) case brought before the World Trade Organization (WTO) and its relationship with the NAFTA dispute settlement system.

The fourth case examines the *Brazilian Tyres*\(^{11}\) case brought before the WTO and its relationship with the dispute settlement system of the MERCOSUR.

The fifth case concerns the International Court of Justice’s (ICJ) recent *Genocide Convention*\(^{12}\) 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* judgment\(^{13}\) 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**

1. The Facts

For many years, Ireland has been concerned with the radioactive discharges of the MOX plant situated in Sellafield, UK, that are being released into the Irish Sea.\(^{14}\) After having tried, unsuccessfully, to obtain information from the United Kingdom about the discharges of the MOX plant, Ireland instituted proceedings against the United Kingdom by raising two different claims.\(^{15}\)

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First, Ireland wanted to obtain from the United Kingdom all available information regarding the radioactive discharges of the MOX plant by relying on Article 9 of OSPAR. Article 9(2) 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 discharge of the MOX plant contaminated its waters and, therefore, constituted a violation of UNCLOS. Accordingly, Ireland sought an award for the disclosure of information regarding the MOX plant from the United Kingdom on the basis of the OSPAR convention as well as a declaration that the United Kingdom violated its obligations under UNCLOS. After lengthy negotiations, Ireland and the United Kingdom agreed to establish arbitral tribunals under both the OSPAR and UNCLOS conventions in order to resolve the dispute.

The dispute between the two EC member states also involved EC law, specifically EC legislation and the European Atomic Energy Community (EURATOM) treaty. Article 292 of the Treaty Establishing the European Community (EC Treaty), requires all disputes between EC member states involving EC law to be brought exclusively before the ECJ. Thus, this dispute raised the potential overlap of jurisdiction between the two arbitral tribunals and the ECJ. Eventually, as discussed below, the MOX Plant dispute came before the ECJ—at least with regard to the UNCLOS dispute.

2. The OSPAR Arbitral Tribunal Award

In its decision on July 2, 2003, the OSPAR arbitral tribunal asserted its jurisdiction over the case and rendered a final award. The tribunal held that the United Kingdom did not violate the OSPAR Convention by not disclosing the information sought by

19. Id. at 816.
21. For a detailed analysis see Lavranos, The MOX Plant, supra note 1, at 213-41.
Ireland. With respect to the possible implications of EC law to its
decision and in particular, the possible jurisdiction of the ECJ, the
tribunal refused to take into account any other sources of
international law or European law that might potentially be
applicable. 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 tribunal asserted that the OSPAR Convention
was to be considered a "self-contained" dispute settlement regime,
such that the tribunal could base its decision on the convention alone.

3. Analysis

Despite the fact that a multitude of other relevant sources of
international law or European law were applicable in this case,
such as EC Directive 90/313, replaced by EC Directive 2003/4;
ECJ jurisprudence; and the Convention on Access to
Information, Public Participation in Decision Making and Access
to Justice Regarding Environmental Matter (Aarhus Convention),
the OSPAR arbitral tribunal did not consider itself
competent to take these into account.

More specifically, the OSPAR arbitral tribunal chose to
interpret the relevant provision of the OSPAR Convention much
more restrictively than the ECJ's interpretation of comparable EC
law provisions. While the tribunal was not legally bound to follow
the ECJ's jurisprudence, the similar context of the relevant
OSPAR and EC law provisions, and the fact that the dispute was
between two EC member states would have been sufficient
reasons for the OSPAR arbitral tribunal to give judicial deference
to the ECJ. By failing to do so, the tribunal created a fragmenting
discrepancy between EC law and the OSPAR Convention as to the standard of access to information on environmental issues.

4. The UNCLOS Arbitral Award

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

Specifically, Articles 287 and 288 of UNCLOS provide that various forums can be selected by the contracting parties to settle their disputes; parties may use the International Tribunal for the Law of the Sea (ITLOS), the ICJ or ad hoc arbitral tribunals. Moreover, Article 282 explicitly recognizes the possibility of bringing a dispute before settlement bodies established by regional or bilateral agreements. Because the parties had not agreed to designate a particular dispute settlement forum, the dispute was submitted to arbitration in accordance with Annex VII Article 287(5) of UNCLOS. Pending the establishment of this ad hoc arbitral tribunal, however, Ireland requested from ITLOS interim measures under Article 290(5) of UNCLOS. Ireland asked that the United Kingdom be ordered to suspend the authorization of the MOX plant or at least take the measures necessary to halt the operation of the MOX plant instantly.

Regarding the issue of jurisdiction, the ITLOS determined that the conditions of Article 290(5) of UNCLOS were prima facie met so that under Annex VII the arbitral tribunal had jurisdiction to decide on the merits of the case. Furthermore, the ITLOS ordered both parties to cooperate 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.

32. Id. at art. 282.
33. MOX Plant (No. 10) (Ir. v. U.K.), supra note 7.
34. Id. ¶ 33.
35. Id. ¶ 27.
36. Id. ¶ 62. Note also, that even if the condition of Art. 290(5) were not prima facie found, the tribunal deemed that provisional measures may still be prescribed in emergency situations. Id. ¶ 64.
37. Id.
The UNCLOS arbitral tribunal subsequently confirmed the finding of ITLOS that it did in fact have *prima facie* jurisdiction. In a second step, however, the arbitral tribunal considered it necessary to determine whether it had *definite* jurisdiction to solve the dispute in view of the United Kingdom's objection that the ECJ had jurisdiction under Article 282 of the EC Treaty since EC law was also at issue. The arbitral tribunal accepted the United Kingdom's objection and consequently stayed proceedings. Accordingly, the arbitral tribunal urged the parties to first determine whether or not the ECJ had jurisdiction before it would proceed with rendering a decision on the merits.

The parties did not, however, have to take any action as the European Commission, supported by the United Kingdom, immediately began an Article 226 EC Treaty infringement procedure against Ireland for violating Article 292 of the EC Treaty and the identical provision in the EURATOM Treaty. The Commission argued that Ireland had instituted the proceedings against the United Kingdom without taking into account the fact that the European Community was a party to UNCLOS. In particular, the Commission claimed that by submitting the dispute to a tribunal outside the EC legal order, Ireland had violated the exclusive jurisdiction of the ECJ as enshrined in Article 292 of the EC Treaty and the similarly worded Article 193 of EURATOM. Furthermore, according to the Commission, Ireland had also violated the duty of loyal cooperation incumbent upon it under Article 10 of the EC Treaty and the similarly worded Article 192 of EURATOM.

Thus, the *MOX Plant* case ultimately came before the ECJ; at least in as far as it concerned the UNCLOS proceedings, against the initial intentions of the member states involved in the dispute.

5. Judgment of the ECJ

The Court first analyzed whether or not the dispute fell within the acting competence of the EC, because Article 292 EC would

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39. *Id.* ¶¶ 15-16.
40. *Id.* ¶ 29.
41. *Id.* ¶¶ 30, 69.
43. *Id.* ¶ 59.
44. *Id.*
be triggered only if the case fell within the exclusive jurisdiction of the ECJ. The EC and its member states have concluded the Law of the Sea Convention as a mixed agreement. In this context the ECJ reaffirmed that mixed agreements have the same status in the Community's legal order as agreements concluded by the EC alone. Consequently, when the EC ratified UNCLOS, the treaty became an integral part of the Community legal order. Based on UNCLOS the ECJ examined whether the EC had exercised its competence in the policy area (maritime pollution) that is at the center of the dispute between Ireland and the United Kingdom. The ECJ concluded that the matters covered by the provisions of UNCLOS relied upon by Ireland before the arbitral tribunal were "very largely" regulated by Community law. Ireland was thus relying on provisions that had become part of the Community legal order. This triggered the ECJ's jurisdiction under Article 292 EC.

The next issue was to determine whether that jurisdiction was 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, the ECJ held, 

\[\text{[A]n international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC. . . .} \]

An international agreement such as UNCLOS cannot affect the ECJ's exclusive jurisdiction regarding the resolution of disputes between member states concerning the interpretation and application of Community law. Hence, Ireland was precluded on the basis of Articles 292 and 220 EC from bringing the dispute.

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45. Id. ¶ 86.
48. Id. ¶ 96.
49. Id. ¶ 110.
50. Id. ¶ 126.
51. Id. ¶ 127.
54. Id. ¶ 132.
before the UNCLOS arbitral tribunal. The Court of Justice went as far as stating,

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

The ECJ did not simply claim exclusive jurisdiction in this case, but found it necessary to make further remarks. First, only the ECJ may determine whether, and to what extent, provisions of the international agreement in question fall outside its jurisdiction, and whether it may be adjudicated by another dispute settlement body. 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 duty of loyalty as enshrined in Article 10 EC. Thus, member states have a duty to inform and consult with the competent Community institutions (i.e., the Commission and/or the ECJ) prior to bringing a case before a dispute settlement body other than the ECJ. In this way, the Commission and the ECJ are eventually informed of a dispute settlement procedure that may 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 determines that Article 292 EC has been violated. This is, however, entirely in the discretion of the Commission. In contrast to the Commission, the ECJ has no authority to seize ex officio by itself a case in order to protect its exclusive jurisdiction.

55. Id. ¶ 133.
56. Id. ¶ 154 (emphasis added).
57. Id. ¶ 135.
58. Id. ¶ 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.”).
59. Id. ¶ 179.
6. Analysis

The *MOX Plant* dispute was the first case that highlighted the potential problems associated with exclusive ECJ jurisdiction and the multiplication of international courts and tribunals. The ECJ decided to defend its exclusive jurisdiction to the fullest as far as it concerned disputes between EC member states that potentially involved EC law. It did so by substantially limiting the freedom of EC member states to select a dispute settlement body of their choice. Only if the ECJ establishes that no EC law issues are involved, will EC member states be in a position to bring their dispute before another dispute settlement body. This way, the ECJ hopes to protect the uniform application of EC law in all EC member states. The different approaches by the OSPAR and UNCLOS arbitral tribunals, however, illustrate that the ECJ cannot force a party to take EC law or 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 was 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; 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, while at the same time showing unifying effects by preserving the uniform application of EC environmental law as far as UNCLOS law is concerned.

B. The Ijzeren Rijn Dispute

1. The Facts

The *Ijzeren Rijn* (also known as *Iron Rhine*) case concerned a dispute between the Netherlands and Belgium as to which of the parties had to pay the costs for the revitalization of an old railway
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 to 1839 (Treaty of Separation) and 1897 (Railway Convention). After 1991 the railway line was no longer used. In the meantime, the Netherlands 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. In 1994 the Netherlands also identified the Meinweg as a special protected area in accordance with the EC Birds Directive. The Birds Directive, however, was superseded by the Habitats Directive as far as what is relevant in the present dispute. In addition, the Meinweg area was identified as a national park and a “silent area” under domestic legislation.

It is at this point that the relevancy of EC law in this dispute became apparent. In particular, Article 6 of the Habitats Directive, imposed strict conditions for any activities in a “special area of conservation” such as the Meinweg area.

Despite this designation of protected status for the Meinweg area, Belgium expressed its intention to start using the railway line again. As a result, discussions took place between Belgium and the Netherlands regarding the revitalization of the railway line. The impact studies that were conducted in order to assess the possibility of a revitalization determined that additional costs of about five hundred million euros would be involved in order to

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61. PCA Awards Series, supra note 9, ¶ 16, 42.
62. Id. ¶¶ 31, 42.
63. Id. ¶ 19.
64. Id. ¶ 128. See also Council Directive 92/43 1992 O.J. (L 206) 7 (EC).
65. PCA Awards Series, supra note 9, ¶ 128.
66. Id.
67. Id.
69. PCA Awards Series, supra note 9, ¶¶ 21-23.
70. Id.
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 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 necessary European law, while respecting the obligations of the parties arising out of Article 292 EC. As previously mentioned, Article 292 EC prescribes that all disputes between EC member states involving EC law should be brought exclusively before the ECJ.

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

2. The Arbitral Decision

The arbitral tribunal explained that with regard to “the limits drawn to its jurisdiction by the reference to Article 292 of the EC Treaty . . . it finds itself in a position analogous to that of a domestic court within the EC.” The arbitral tribunal continued by saying 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 constitute 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. Thus, the arbitral tribunal examined whether or not the CILFIT-conditions were met.

The CILFIT conditions concern the obligation of national courts of the EC member states to refer preliminary questions to the ECJ. Under these conditions, the obligation of national courts

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71. Id. See also Counter-Memorial of the Kingdom of the Netherlands, Permanent Court of Arbitration, Iron Rhine Case (Belg. v. Neth.) ¶ 2.13.5.1 (Jan. 2004), http://www.pca-cpa.org/upload/files/NL%20Counter-Memorial.pdf.
72. PCA Awards Series, supra note 9, ¶ 28.
73. CRAIG & DE BURCA, supra note 20, at 203.
74. PCA Awards Series, supra note 9, ¶ 103.
75. Id.
to refer preliminary questions to the ECJ is only waived if: (i) the question is not relevant; (ii) it has already been answered by the ECJ; or (iii) the answer is entirely clear so that there is no need for the ECJ to give an answer.\(^\text{77}\) The arbitral tribunal only examined the first possibility, i.e., whether the application of Community law was necessary for rendering its award in this dispute.\(^\text{78}\)

The arbitral tribunal set out the framework of its jurisdiction by stating that "[f]rom the viewpoint of Article 292 of the EC Treaty the question thus faced by the Tribunal is... [D]oes the Tribunal have to engage in the interpretation of the Habitats Directive in order to enable it to decide the issue of the reactivation of the Iron Rhine railway and the costs involved?"\(^\text{79}\) The arbitral tribunal concluded:

[T]he Tribunal has examined whether it would arrive at different conclusions on the application of Article 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 Article 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 Article 292 of the EC Treaty.

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.

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Opinion of AG Colomer, Case C-461/03, Gaston Schul Douane-Expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit, 2005 E.C.R. I-10513 (the ECJ flatly rejecting any relaxation of the CILFIT-conditions as suggested by A.G. Colomer).
77. See Damian Chalmer et al., European Union Law 299-302 (2006); J. Steiner et al., EU Law 210-17 (9th ed. 2006); Craig & de Burca, supra note 20, at 467.
78. See PCA Awards Series, supra note 9, ¶ 104.
79. Id. ¶ 121.
80. Id. ¶ 137.
3. 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 interpreted and applied. This 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, however, it was clearly applicable. That, in turn, affected the uniform application of Community law in all EC member states. Due to the fact that the Ijzeren Rijn arbitral tribunal was 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,\(^1\) the arbitral tribunal was all the more obliged to refuse its jurisdiction in this case and refer the parties to the ECJ as the only proper forum. Consequently, 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, this case confirms the observation made above regarding the MOX Plant dispute that arbitral tribunals are not

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81. 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 [1997] ECR I-4961, paragraph 23, and the case-law there cited, and Case C-516/99 Schmid [2002] ECR I-4573, paragraph 34).

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 [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 34).

Case C-125/04, Denuit v. Transorient - Mosaique Voyages & Culture SA, 2005 E.C.R. I-923, ¶¶ 12-13. It is submitted that this also applies in analogy to international arbitral tribunals.
particularly concerned with the possibility that the exclusive jurisdiction of the ECJ may be triggered in a certain case. Instead, tribunals prefer to seize jurisdiction and decide the case even if it requires presenting flawed legal arguments.

C. The Mexico Soft Drinks Dispute

1. The Facts

In 2004 the United States 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 United States considered these taxes inconsistent with Article III of GATT 1994, in particular, Article III:2, first and second sentences, and Article III:4. Accordingly, the United States requested consultations with Mexico, which were unsuccessful. Consequently, the United States instituted dispute settlement proceedings against Mexico before the WTO.

As a preliminary point, Mexico raised the issue of jurisdictional competition. More specifically, Mexico requested the WTO panel to decline to exercise its jurisdiction in favor of an Arbitral Panel under Chapter Twenty of NAFTA. 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 United States to cooperate in finding a resolution to the dispute.

82. Tax Measures Panel Report, supra note 10, ¶ 1.1.
83. Id. ¶ 2.2.
84. Id. ¶ 1.2.
85. Id. ¶ 1.1.
86. Id. ¶ 1.4.
87. Id. ¶ 3.2.
88. Id. ¶ 7.11.
within the framework of NAFTA. Accordingly, Mexico argued that a NAFTA panel would be in a better position to decide this dispute. It should be noted that Mexico and the United States had been engaged in a broader dispute on sugar for quite some time that has been litigated in various proceedings before the WTO and NAFTA.

2. 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. 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.”

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.” 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.” 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] to make sufficiently precise recommendations or rulings to the parties.”

89. Id. ¶ 8.89.
90. Id. ¶ 7.11.
93. Id. ¶ 7.18.
94. Id. ¶ 7.7.
95. Id.
96. Id. ¶ 7.8 (referring to Appellate Body Report, Australia—Measures Affecting Importation of Salmon, ¶ 223, WT/DS18/AB/R (Oct. 20, 1998)).
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.” Referring to Articles 3.2 and 19.2 of the DSU, the panel further stated that “[i]f 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.” 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 another Member has the right to bring the case before the WTO dispute settlement system.”

Finally, 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.” In any case, the WTO panel explicitly rejected Mexico’s contention that the WTO proceeding was identical with the on-going negotiations to resolve the sugar dispute within the NAFTA context. Consequently, the WTO panel concluded,

[E]ven 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

97. Id.
98. Id. ¶ 7.9.
99. Id.
100. Id. ¶ 7.10.
101. Id. ¶ 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.

Id.
other international agreements, such as the NAFTA, or other rules of international law. 102

3. The WTO Appellate Body Ruling

On appeal before the WTO Appellate Body, Mexico argued that the panel erred in rejecting its request that it decline to exercise jurisdiction in the circumstances of the present dispute. 103 Mexico submitted that WTO panels, like other international bodies and tribunals, have certain implied jurisdictional powers that derive from their nature as adjudicative bodies. 104 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'. 105 Mexico argued, in this regard, that the United States' claims under Article III of the GATT 1994 are "inextricably linked to a broader dispute" regarding access of Mexican sugar to the U.S. market under NAFTA. 106 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. 107 Accordingly, Mexico argued that the WTO panel should have exercised this power in the circumstances of this dispute. 108 In contrast, the United States 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 United States and to make such findings as will assist the DSB in making the recommendations and rulings provided for under the DSU." 109

102. Id. ¶ 7.15.
105. Id. (citation omitted).
106. Id.
107. Id. ¶ 11.
108. Id.
109. Id. ¶ 22.
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 the NAFTA or any other international agreement to which Mexico and the United States 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 United States' 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 United States' claims that were before it, but, rather, whether the [WTO] Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' 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." According to the Appellate Body, "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. 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. For example, [WTO] panels may exercise judicial economy, that is, refrain

110. Id. ¶ 44.
111. Id. (citation omitted).
112. Id. (citations omitted).
113. Id.
114. Id. ¶ 45.
115. Id.
from ruling on certain claims, when such rulings are not necessary to resolve the matter in issue in the dispute.116 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."117

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.118 On the contrary, the WTO Appellate Body noted 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.119

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."120 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."121

116. Id. ¶ 45 (internal quotes and citations omitted).
117. Id. (internal quote and citation omitted).
118. Id. ¶ 46 (emphasis added).
120. Id. ¶ 52 (internal citations omitted).
Finally, with regard to 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.\(^{122}\) Thus, the WTO Appellate Body saw no reason to disagree with the Panel’s decision.\(^{123}\)

4. 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 avoid dealing with this issue mainly on factual grounds arguing that the dispute before the WTO was a different one than that raised before NAFTA. Regardless of whether that argument 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 by the dispute. Of course, a different approach is imaginable in which a WTO panel or Appellate Body relinquishes its jurisdiction and orders the parties to resolve their dispute before another dispute settlement body, or alternatively, the WTO panel or Appellate Body could stay the proceedings until that other body renders 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.

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123. *Id* ¶ 57.
D. The Brazilian Tyres Case

1. The Facts

In 2000, Brazil adopted legislation in order to effectively reduce the waste of tires because of the risk for the health and the environment associated with the exposure to toxic emissions caused by tire fires and the transmission of the dengue disease to animals. This legislation (Portaria SECEX 8/2000) contained an import ban on retreaded and used tires. 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 on January 9, 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of June 29, 2000, which oblige MERCOSUR countries not to introduce new intra-zone restrictions on commerce. Following the MERCOSUR arbitral tribunal award, Brazil enacted Portaria SECEX No. 2 of March 8, 2002, which eliminated the import ban for remolded tires 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 tires (the "import ban"); (ii) an import ban on used tires; and (iii) an exemption from the import ban of imports of certain retreaded...
tires from other countries of the MERCOSUR, which is referred to as the "MERCOSUR exemption."\textsuperscript{130}

The "MERCOSUR exemption" did not form part of previous regulations prohibiting the importation of retreaded tires, notably Portaria SECEX 8/2000, but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.\textsuperscript{131}

The EC initiated proceedings against Brazil before the WTO dispute settlement body complaining about the import ban and the MERCOSUR exemption.\textsuperscript{132} 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.\textsuperscript{133} According to the EC, Brazil should instead have lifted the ban for all WTO Members.\textsuperscript{134} 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.\textsuperscript{135}

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.\textsuperscript{136} 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.\textsuperscript{137} Moreover, Brazil argued that it had an obligation under international law to implement the ruling of the MERCOSUR arbitral tribunal.\textsuperscript{138} 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 tires (remolded) from the application of the ban.\textsuperscript{139}

\begin{itemize}
\item [130.] Brazil Panel Report, \textit{supra} note 124, \S \ 2.7.
\item [131.] First Written Submission, \textit{Retreaded Tyres}, \textit{supra} note 127, \S \ 137.
\item [132.] Request for Consultations by the European Communities, \textit{Brazil—Measures Affecting Imports of Retreaded Tyres}, WT/DS332/1 (June 20, 2005).
\item [133.] Brazil Panel Report, \textit{supra} note 124, \S \ 4.299.
\item [134.] \textit{Id.}
\item [135.] \textit{Id.} \S \ 7.268.
\item [136.] \textit{Id.} \S \ 4.302.
\item [137.] \textit{Id.} \S \ 3.3(c).
\item [138.] \textit{Id.} \S \ 4.302.
\item [139.] \textit{Id.} \S \ 7.279.
\end{itemize}
2. 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 remolded tires to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remolded tires 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.” 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 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.”

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. 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.” 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.

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

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140. Id. ¶ 7.272.
141. Id.
142. Id. ¶ 7.273.
143. Id.
144. Id. ¶ 7.281.
145. Id. ¶ 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.” Id. ¶ 7.284.
146. Id. ¶ 7.289.
MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil’s litigation strategy in those proceedings.\(^{147}\) Indeed, the WTO Panel considered it inappropriate to engage in such an exercise.\(^{148}\) Moreover, the 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.\(^{149}\) Hence, the WTO Panel sided on these points with the position of Brazil.

3. The WTO Appellate Body Ruling

The EC appealed the Panel’s ruling to the WTO Appellate Body.\(^{150}\) The WTO Appellate Body’s started by pointing out 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.\(^{151}\) That ruling is not an acceptable rationale because it bears no relationship to the legitimate objective pursued by the import ban that falls within the purview of Article XX(b).\(^{152}\) Accordingly, the WTO Appellate Body found that the “MERCOSUR exemption” had resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.\(^{153}\)

The WTO Appellate Body also stated that, like the WTO Panel, it does not consider Brazil’s decision to comply with the MERCOSUR arbitral tribunal ruling as “capricious” or “random.”\(^{154}\) Indeed, according to the WTO Appellate Body, “[a]cts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as an act that is ‘capricious’ or ‘random.’”\(^{155}\) According to the WTO Appellate Body, however, discrimination can result from a rational decision or behavior and still be

\(^{147}\) Id. ¶ 7.276.
\(^{148}\) Id.
\(^{149}\) Id.
\(^{150}\) Brazil Appellate Body Report, supra note 11.
\(^{151}\) Id. at 90, ¶ 228.
\(^{152}\) Id.
\(^{153}\) Id.
\(^{154}\) Id. at 91, ¶ 232.
\(^{155}\) Id.
"arbitrary or unjustifiable" if it is explained by a rationale that bears no relationship or opposes any objectives of Article XX of GATT.\textsuperscript{156} Thus, the Appellate Body concluded that the "MERCOSUR exemption" had resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.\textsuperscript{157}

The WTO Appellate Body then turned to Brazil's defense 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.\textsuperscript{158} Brazil, however, decided not to do so. The WTO Appellate Body again 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).\textsuperscript{159} At the same time, however, the WTO Appellate Body inferred from this that Article 50(d) of the Treaty of Montevideo, and the discrimination associated with the "MERCOSUR exemption" does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.\textsuperscript{160} In sum, the WTO Appellate Body reversed the findings of the WTO Panel on this point.

4. Analysis

The \textit{Brazilian Tyre} case can be considered an evolution from the \textit{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 particularly interesting because it shows the opposite approach adopted by the WTO Panel and the Appellate Body regarding the weight that should be given to the MERCOSUR arbitral tribunal's ruling.

The WTO Panel accepted Brazil's defense that the measure was adopted in order to implement the MERCOSUR arbitral tribunal's ruling (i.e., to fulfill its international obligations). Since

\textsuperscript{156} \textit{Id.} at 91-92, \textsection 232.

\textsuperscript{157} \textit{Id.} at 92, \textsection 233.

\textsuperscript{158} \textit{Id.} at 92, \textsection 234. \textit{See also} 1980 Montevideo Treaty Establishing the Latin American Integration Association (ALADI) art. 50(d), Aug. 12, 1980 [hereinafter 1980 Montevideo Treaty] ("No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding... [p]rotection of human, animal and plant life and health.").

\textsuperscript{159} Brazil Appellate Body Report, \textit{supra} note 11.

\textsuperscript{160} \textit{Id.} at 92, \textsection 234.
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. Not only is this the whole purpose of a Free Trade Area and Custom Union, it is also acceptable under Article XXIV GATT. Consequently, the WTO Panel did not review or criticize the ruling of the MERCOSUR arbitral tribunal, but rather accepted it as a fact and a starting point of the whole dispute. In addition, the WTO Panel quite rightly refrained from assessing Brazil’s defense strategy before the MERCOSUR arbitral tribunal. The defense strategy of a WTO member before another dispute settlement body that is not bound by WTO law is entirely its own business. Any assessment of it by a WTO Panel would go far beyond the Panel’s competence.

The WTO Appellate Body clearly did not feel any such constraints. While the WTO Appellate Body claimed to have steered clear from reviewing the MERCOSUR arbitral tribunal’s decision, it nevertheless rejected the logic of the WTO Panel as argued by Brazil. Thus, it rejected the argument that 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 so in a way that is compatible with its WTO obligations. Therefore, the WTO Appellate Body attached a sense of supremacy to WTO law over other international (regional trade) agreements and decisions rendered by dispute settlement bodies that have been established by such treaties. In other words, it seems that in this decision the WTO Appellate Body suggested 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 violate any WTO laws.

Even more interesting, however, is the fact that the WTO Appellate Body discussed Brazil’s defense 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 Appellate Body at the same time "punished" Brazil's choice by excluding the possibility that there might have been a conflict between MERCOSUR and GATT provisions or between the MERCOSUR arbitral tribunal's decision and the Appellate Body's ruling concerning the same dispute.\textsuperscript{162}

As argued above, the assessment of Brazil's defense strategy by the WTO Appellate Body is an unprecedented interference of 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 defense strategy used by a WTO member before other dispute settlement bodies and, therefore, is prevented from drawing conclusions from it to the detriment of that WTO member relating to the dispute at hand.

In sum, the different approaches between the WTO Panel and the Appellate Body on this point unveils the underlying potential problems of competing jurisdictions between dispute settlement systems created by regional trade agreements (like NAFTA and MERCOSUR) and the global WTO dispute settlement system.\textsuperscript{163}

In view of the increasing number of dispute settlement systems being established and enhanced at the regional level,\textsuperscript{164} it is doubtful whether a claim of WTO Appellate Body supremacy over

\textsuperscript{162} See Brazil Appellate Body Report, supra note 11, at 92, ¶ 234.

\textsuperscript{163} See Rafael Leal-Arcas, Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?, 16 MINN. J. INT'L L. 1, 1-59 (2007); L. BARTELS, REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 447-575 (Bartels & Ortino eds., 2006).

other dispute settlement bodies is the most cooperative answer to this problem.

E. The ICJ's Genocide Ruling

1. The Facts

The war and killings in the Balkans were so widespread that a special court, the International Criminal Tribunal for the former Yugoslavia (ICTY), was established by the United Nations to prosecute individuals responsible for those acts. Accordingly, the ICTY has rendered numerous judgments in which it has punished individuals responsible for the horrendous crimes that were committed during the 1990s, such as ethnic cleansing and mass rapes.

In one of the most discussed cases, Tadic, the ICTY was not concerned with a question of state responsibility, but with the nature of armed conflicts. In order to ascertain whether the conflict was international, however, 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 more applicable to private individuals engaged by a state to perform specific illegal acts in the territory of another state and the latter is more 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). Their view remained without there being any need to

168. See id. at 34, ¶¶ 84-85.
169. Id. at 42, ¶ 105.
170. Id. at 40, ¶¶ 99-100.
171. Id. at 56, ¶ 131.
172. Id. at 50, ¶¶ 124-25.
173. Id. at 69, ¶ 156.
prove that each operation was carried out on the FRY’s instructions, or under its effective control.

Accordingly, in its Tadic judgment, the ICTY expressly adopted a conflicting view on the issue of use of force in customary international law.\textsuperscript{174} 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.” From there, it went on to declare that the law was contrary to the ICJ’s ruling.\textsuperscript{175} In a subsequent case, the ICTY Appeals Chamber further declared that this contrary statement of the law had to be followed notwithstanding its asserted differences with the point of view of the ICJ.\textsuperscript{176}

It could be argued that the test of “overall control” is flexible, as in the Celebici\textsuperscript{177} case where the ICTY Appeals Chamber held that “[t]he ‘overall control’ test could thus be fulfilled even if the armed forces acting on behalf of the ‘controlling State’ had autonomous choices of means and tactics although participating in a common strategy along with the controlling State.”\textsuperscript{178}

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.”\textsuperscript{179} Consequently, they argued that Serbia gave its support to those persons and groups responsible for the crimes, which allegedly constitute genocide.\textsuperscript{180} Bosnia-Herzegovina submitted that Serbia armed and equipped those persons and groups throughout the war and, therefore, should be held responsible.\textsuperscript{181}

\begin{itemize}
\item[174.] See MOHAMED SHAHABUDDEEN, Consistency in Holdings of International Tribunals, in LIBER AMICORUM JUDGE SHIGERU ODC 633, 633-50 (Nisuke Ando et al. eds., 2002).
\item[175.] Tadic Appeals Judgment, supra note 167, at 47, ¶ 115.
\item[176.] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, 92 (Mar. 24, 2000) [hereinafter Aleksovski Appeals Judgment].
\item[177.] Prosecutor v. Delalic, Mucic, Delic, and Landzo, Case No. IT-96-21-A, Appeals Judgment (Feb. 20, 2001) [hereinafter Delalic Appeals Judgment].
\item[178.] Id. at 15, ¶ 47.
\item[180.] Id.
\item[181.] Id. ¶ 239.
\end{itemize}
2. The ICJ's Genocide Judgment

The massacre committed at Srebrenica in July 1995 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). The ICJ's starting point was the question of whether the massacre was attributable in whole or in part to the Respondent, Serbia, alone at the time of the judgment.

This question may be broken down into two parts. The first question is whether organs of the Respondent perpetrated the acts committed at Srebrenica, i.e., whether the acts were committed by persons or entities whose conduct is necessarily attributable to the Respondent because they are in fact the instruments of its action. If this question is answered in the negative, the next question is whether the acts in question were committed by persons who were not organs of the Respondent, but did, nevertheless, act on the instructions or under the control of the Respondent. The first question was answered in the negative by the Court on the basis that the persons (Scorpions, Mladic) and entities (Republika Srpska and VRS) that committed the acts of genocide at Srebrenica did not have such ties with the FRY that they could be deemed to have been "completely dependent" 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. This conclusion was reached by looking into Article 4 of the ILC Articles on state responsibility.

183. Article II states, "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 groups, as such: (a) Killing members of the group ...." Article III states, "The following acts shall be punishable: (a) Genocide ...."
185. Id.
186. Id.
187. Id. ¶¶ 386, 395.
188. Id. ¶ 388. Article 4 of the ILC states as follows:

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
Having concluded that the persons who committed the massacres were not organs of the Respondent, the ICJ next had to determine whether these persons nevertheless acted on the Respondent's instructions or under its direction or control.\textsuperscript{189} In other words, the ICJ had to determine whether the authors of the Srebrenica genocide could be considered \textit{de facto} organs of the FRY.\textsuperscript{190}

In order to resolve this question 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 \textit{in fact acting on the instructions of, or under the direction or control of}, that state in carrying out the conduct.\textsuperscript{191}

The ICJ then examined its jurisprudence on the subject, in particular the \textit{Nicaragua} case.\textsuperscript{192} There, the court was confronted with the question of the responsibility of the United States for actions by the Contras forces in Nicaragua.\textsuperscript{193} The court held that there would be no state responsibility in the absence of evidence of actual "effective control" of military operations, whereas manifestly the United States would be answerable for the actions of its own armed forces and covert operations.\textsuperscript{194} The test is whether the alleged acts were perpetrated in accordance with the state's instructions, or under the state's "effective control."\textsuperscript{195} The state's instructions must have been given with respect to each operation and not generally with respect to overall actions.\textsuperscript{196}

\textsuperscript{189} Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 12, ¶ 396.
\textsuperscript{190} Id. ¶ 397.
\textsuperscript{191} ILC State Responsibility, supra note 188, at art. 8 (emphasis added).
\textsuperscript{192} Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 12, ¶ 399.
\textsuperscript{194} Id. at 64.
\textsuperscript{195} Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 12, ¶ 400.
\textsuperscript{196} Id.
The Applicant objected to the use of the "effective control" test, arguing instead that the "overall control" test, used by the ICTY Appeals Chamber (ICTY) in the Tadic case, was more appropriate under the circumstances. The ICJ strongly rejected the reasoning of the ICTY. The Court explained that the ICTY's jurisdiction is criminal and applies only to persons. Accordingly, the Court believed the ICTY's findings on the question of state responsibility were outside the scope of its jurisdiction. 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." Nonetheless, the ICJ went on to state that although 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 held that although the "overall control" test may be suitable to determine whether an armed conflict is international, that issue was not applicable to the case at hand and was therefore, not considered. The Court was not persuaded by the argument that 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 continued to criticize the ICTY, finding the "overall control" test "unsuitable," and stating that the test "has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct . . . ." 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."

199. Id. ¶ 403.
200. Id.
201. Id.
202. Id.
203. Id. ¶ 404.
204. Id.
205. Id. ¶ 406.
206. Id.
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, or that the Respondent exercised effective control over the operations.\textsuperscript{207}

3. Analysis

The disagreement between the ICJ and ICTY on such a fundamental point of general international law, while operating under the same UN umbrella, seriously undermines the consistency and uniformity of international law. The ICJ’s \textit{Genocide} judgment further fragments the already divergent jurisprudence on this point.

It is highly questionable whether the ICJ is competent to limit the jurisdiction of the ICTY. In so doing, the ICJ is preventing an independent tribunal from expressing its own views on fundamental questions of general international law. The ICTY considers such expression of views a necessary part of rendering its judgments.

The ICJ is not in a position to establish a hierarchy by imposing itself as the highest UN court regarding issues of general international law. Unlike the hierarchy that exists between the ECJ and national courts of the EC member states, there is no hierarchy between the ICJ and ICTY. Rather, any international court charged with applying a specific body of international law is authorized to apply rules belonging to other bodies of international law. This authority is part and parcel of the inherent jurisdiction of any international court or tribunal.\textsuperscript{208} Accordingly, as Antonio Cassese, the first President of the ICTY, has 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.\textsuperscript{209}

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. Nevertheless, there may be good reasons to develop and apply

\textsuperscript{207} \textit{Id.} \textsuperscript{,} 413.
\textsuperscript{209} \textit{Id.}
different interpretations of international law in specific cases or areas of law which deviate from the ICJ’s point of view. The ICJ should respect the existing jurisdiction and expertise of specialized courts by showing more deference.

According to Cassese, international courts like the ICJ are entitled to challenge the validity of the ICTY’s tests. When they do, he suggests that they should “assail” judgments like Tadic on the merits. He writes that the ICJ “should not be confined to the flimsy argument that Tadic was about the nature of armed conflicts whereas Nicaragua revolved around state responsibility and therefore the two tests may coexist in that they relate to different subject-matters.”

Finally, ICJ judge and Vice-President Al-Khasawneh presented another view in his dissenting opinion. He did not consider the Nicaragua case’s “effective control” test suitable to questions of state responsibility for international crimes committed with a common purpose. According to him, the “overall control” test for attribution established in the Tadic 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. The ICJ’s refusal to infer genocidal intent from consistent conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY.

Al-Khasawneh 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.

The ICJ’s rejection of the standard in the Tadic case fails to address the crucial issue raised therein, namely, that different

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210. Id. at 663.
211. Id.
212. Id. (emphasis in original).
214. Dissenting Opinion of Vice-President Al-Khasawneh, supra note 213, pmbl.
215. Id.
216. Id.
217. Id. at 10, ¶ 36.
types of activities, particularly in the ever evolving nature of armed conflict, may call for subtle variations in the rules of attribution.\textsuperscript{218}

In his conclusion, Al-Khasawneh stated that the ICJ required too high a threshold for control—one that did not accord with the facts of this case nor with the relevant jurisprudence of the ICTY.\textsuperscript{219}

In sum, by bashing the ICTY, the ICJ increased the divide between the already deeply divergent approaches of international courts regarding the issue of responsibility. In fact, it would not be surprising if the ICTY or another court felt even less inclined to close this gap in future judgments. Therefore, it can only be hoped, together with Cassese, that in the future, the ICJ will look into state practice and case law instead of simply reiterating its own previous decisions.\textsuperscript{220} Nevertheless, such a hope may be shattered if one agrees with South African judge and international war crimes prosecutor, Richard J. Goldstone, and international law scholar, Rebecca J. Hamilton, that “the ICJ was fairly measured in its response to the issue in \textit{Serbia v. Bosnia}.”\textsuperscript{221}

\textit{F. The Bosphorus Case}\textsuperscript{222}

\textbf{1. The Facts}

The \textit{Bosphorus} case concerned the implementation of UN sanctions against former Yugoslavia. Bosphorus was leasing an airplane from the state-owned Yugoslav airline JAT.\textsuperscript{223} Due to UN sanctions, which were implemented by a European Community (EC) regulation, the plane was impounded by Irish authorities.\textsuperscript{224} Bosphorus started proceedings against that measure which eventually reached the ECJ. The ECJ ruled that the measures were acceptable in order to attain the objectives of the UN sanctions.\textsuperscript{225} Following that ruling, Bosphorus started proceedings

\textsuperscript{218} Id. at 11, ¶ 39.
\textsuperscript{219} Id. at 17, ¶ 62.
\textsuperscript{220} Cassesse, \textit{supra} note 208, at 668.
\textsuperscript{222} Case C-84/95, Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Commc'ns, 1996 E.C.R. I-3953.
\textsuperscript{223} Id. ¶ 2.
\textsuperscript{224} Id. ¶¶ 3-4.
\textsuperscript{225} Id. ¶¶ 23-27.
against Ireland before the European Court of Human Rights (ECtHR), claiming that the measure violated its fundamental rights as protected by Article 1 of Protocol 1 to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), 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.

2. The ECtHR's Bosphorus Judgment

The ECtHR started its analysis by repeating its position it had already adopted in Matthews: 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.

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

227. Id.
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.
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 not exercise its jurisdiction. 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. 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. Nonetheless, the ECtHR concluded that in this case there was no "manifestly deficient" fundamental rights protection. Accordingly, the ECtHR in substance rejected Bosphorus' claim.

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).

Id. (emphasis added).


233. Thus, the ECtHR concluded:

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.


3. Analysis

It appears to be the first time that the ECtHR explicitly applied the Solange-method 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 was to determine which court was the supreme court for reviewing human rights in Europe. Rather than answering that question the ECtHR displayed comity towards the ECJ by applying the “as long as” approach. At the same time, the ECtHR kept a reserve jurisdiction towards the ECJ by asserting that it will apply and enforce the CPHRFF vis-à-vis Community law if necessary.\[236\]

In return, the ECJ has given the CPHRFF a special place within the Community legal order and even applied the CPHRFF directly in its jurisprudence.\[237\] 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 CPHRFF rights.\[238\] In other words, under certain circumstances the ECJ will give primacy to the CPHRFF above Community law. In this way, the ECJ showed comity by sending a clear message to the ECtHR that it takes the CPHRFF 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, apart from exceptional cases. It will be interesting to see whether this seemingly harmonious coexistence can be sustained once the EU accedes to the CPHRFF, as stipulated in the new European Constitution, thereby submitting the ECJ to the final authority of the ECtHR.

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237. See, e.g., Case C-413/99, Baumbast v. Sec’y of State for the Home Dep’t., 2002 E.C.R. I-7091; Case C-60/00, Carpenter v. Sec’y of State for the Home Dep’t., 2002 E.C.R. I-6279.

III. THE SOLANGE-METHOD AS A TOOL FOR REGULATING COMPETING JURISDICTIONS

The case studies discussed above illustrate that among different judicial bodies, the issue of competing jurisdictions is approached quite differently, resulting in either more fragmenting or more unifying effects. At one end of the spectrum are cases such as the OSPAR arbitral tribunal award, the ECJ’s judgment in the MOX Plant dispute, the WTO Panel and Appellate Body rulings in Mexico Soft Drinks, the WTO Appellate Body ruling in Brazilian Tyres, and the ICJ’s Genocide judgment, each of which show little comity towards the possible jurisdiction of other courts or tribunals involved in the respective disputes.\(^239\) The other end of the spectrum is comprised of cases such as the UNCLOS arbitral tribunal award and the WTO panel ruling in Brazilian Tyres. The WTO panel ruling respected the jurisdiction of the other court or tribunal by either staying the proceedings to allow the other body to express its view regarding jurisdictional competition or accepting the decision rendered by the other court or tribunal as a fact of the case and taking the decision fully into account.\(^240\) The ECtHR’s Bosphorus judgment also falls within this second category by showing comity towards the ECJ, while at the same time reserving jurisdiction in order to intercede in ECJ matters if necessary.\(^241\)

The IJzerten Rijn arbitral tribunal falls in the middle of the spectrum. While discussing the possibility that the ECJ might have jurisdiction in the dispute, the tribunal eventually concluded, based on a flawed analysis, that the ECJ had no jurisdiction and thus, rendered its award.\(^242\) The IJzerten Rijn arbitral tribunal, however, did acknowledge the idea of comity.\(^243\)

The Solange-method, illustrated in the Bosphorus judgment will be examined in more detail in the following sections. The

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\(^{239}\) See OSPAR Final Award, supra note 6, ¶ 143; Comm’n v. Ireland, 2006 E.C.R. I-4635, ¶ 177; Tax Measures Panel Report, supra note 10, ¶ 7.1; Mexico Appellate Body Report, supra note 103, ¶ 57; Brazil Appellate Body Report, supra note 11, ¶ 228; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 12, ¶ 403.

\(^{240}\) See MOX Plant (No. 3) (Ir. v. U.K.), supra note 38, ¶¶ 28-30; Brazil Panel Report, supra note 124, ¶¶ 7.272-7.278.


\(^{243}\) See id. ¶ 102-103.
section will summarize the origins of the Solange-method, while 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 produced 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 developed by the German Federal Constitutional Court (Bundesverfassungsgericht) (hereinafter BVerfG) in order to regulate its jurisdiction vis-à-vis the ECJ. For the purposes of this article, several key aspects of the BVerfG's Solange-jurisprudence will be discussed.

It should be noted that the development of this jurisprudence, which originated in the first Solange judgment in 1974 (hereinafter Solange I), has not been linear, but rather, has taken the form of waves, with corresponding high and low points. The high points reflect times in which the BVerfG was prepared to relinquish more of its "reserve jurisdiction." The low points indicate when the BVerfG assumed or reassumed more jurisdictional powers.

It should also be noted 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

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considered fundamental rights as a "no-go area" for the ECJ. The BVerfG kept at all times a "reserve jurisdiction" in this area, considering itself always competent to exert its jurisdiction despite the ECJ's presence (which in the eyes of the ECJ is of an exclusive nature).

The Solange I case concerned the question of what domestic courts should do when there is a conflict between a provision of an EC Regulation and fundamental rights protected by the German Constitution. The BVerfG held that as long as the integration process of the EC does not contain a catalogue of fundamental rights that is adequate to the German Constitution and has not been duly approved by the German Parliament, a German court may request a ruling from the BVerfG as to the compatibility of the EC measure with the German Constitution. Yet, this may occur only after requesting a preliminary ruling from the ECJ. 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 the EC level to be sufficient, in particular, because no EC catalog of fundamental rights comparable to those in the German Constitution existed at the EC level. Consequently, since fundamental rights had not been explicitly recognized in the jurisprudence of the ECJ at that time, the BVerfG considered itself unable to relinquish its jurisdiction regarding fundamental rights protection in lieu of exclusive ECJ jurisdiction.

The ECJ subsequently picked up on the BVerfG's signal and began to develop jurisprudence on fundamental rights protection. In recognition of that development, the BVerfG conceded parts of its jurisdiction under certain conditions when it issued its second Solange-judgment in 1986 (hereinafter

250. Id. at 570.
251. Id. at 570, 580.
252. Solange I, supra note 246.
253. Id.
254. Id.
255. Id.
256. Id.
257. Brewer, supra note 249, at 570.
In that case, the main issue was whether an ECJ judgment on the interpretation and application of EC law must be considered final, or whether it was still reviewable by the BVerfG if conflict with fundamental rights protected by the German Constitution were 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 the acts of public organs (i.e., EC organs), which is comparable to the minimum level of guarantees by the German Constitution, the BVerfG will not exercise its jurisdiction in reviewing EC law measures. In other words, the BVerfG determined that the ECJ's interpretation of EC law was authoritative and final, thereby binding all German courts—including the BVerfG itself.

Thus, 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 several bold judgments on the subject (despite or because of the lack of a written catalogue of EC fundamental rights). It should be noted, however, that in its Opinion 2/94, the ECJ did not "submit" itself to the jurisdiction of the ECHR; the ECJ rejected the possibility of EC accession to the ECHR.

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

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259. Solange II, supra note 247.
260. Id.
261. Brewer, supra note 249, at 572.
264. See Treaty on European Union arts. 6, 46, July 29, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU]. 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.
components of the Treaty—the EMU and the Euro, Common Foreign and Security Policy and Police and Justice Cooperation—were too much for the BVerfG to accept. 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*).265

In its third *Solange* judgment on the Maastricht Treaty, the BVerfG made clear that the future development of the EU remains under conditional approval of the BVerfG while allowing the ratification of the Maastricht Treaty by Germany.266 Thus, the BVerfG reasserted its "reserve jurisdiction" and signaled 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.

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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 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;

[...]

265. See *Solange III*, supra note 248, § 106, where the BVerfG defined the conditions of "*ausbrechender Gemeinschaftsakt*" as follows:

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, than 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 author).

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 alleged conflict with WTO law. In short, German importers claimed that the EC banana regulation completely disrupted their import opportunities because the regulation made imports from Central and South America much more expensive. This, the importers argued, constituted a violation of their fundamental rights over property. Moreover, they argued that the inconsistency of the banana regulation, specifically the interaction 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. 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 have been qualified as an "ausbrechender Gemeinschaftsakt" within the meaning of Solange III.

Yet, by the time the BVerfG was finally called upon by the Frankfurt Administrative Court to remove the banana regulation (by qualifying it as "ausbrechender Gemeinschaftsakt"), the BVerfG’s composition, in the wake of the Solange III ruling, had changed. Apparently, the BVerfG now found that the time was right to offer the ECJ a "peace treaty" by essentially giving up the concept of "ausbrechender Gemeinschaftsakt." As a result, the

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BVerfG held in its Solange IV judgment that it would review EC law measures only if the minimum level of fundamental rights protection would no longer be guaranteed by the EC organs on a general level.270

So, even though the possibility of declaring an EC law measure as an "ausbrechender Gemeinschaftsakt" still remains possible, the necessary conditions 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 these criteria. Hence, the BVerfG reverted back to its second Solange decision, thereby fully accepting the jurisdiction of the ECJ while also limiting its own "reserve jurisdiction."

This honeymoon, however, did not last long because the ECJ trespassed on another "holy ground": member states' criminal law. While member states had accepted that criminal law was an important and necessary component of the EU, as illustrated by its third pillar (Justice and Home Affairs, renamed Police and Justice Cooperation), member states clearly did not intend to bring criminal law into the first pillar (the Community) and delegate to the EC the ability to impose criminal law obligations with supranational force (that is, endow it with supremacy over the national laws of the member states). Yet, the ECJ apparently thought otherwise, by rendering groundbreaking judgments in Pupino271 and Commission v. Council.272

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270. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 7, 2000, 102 147 (F.R.G.), where 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 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.

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.

Further, 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 meant that criminal law measures such as minimum and maximum fines and prison terms could be prescribed by EC law measures (i.e., first pillar measures).

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

Therefore, when the BVerfG had the opportunity to rule on the German law implementing the European Arrest Warrant (EAW), it is not surprising that it returned to its *Solange* formula as developed in its *Maastricht* judgment (*Solange III*). The EAW case concerned the issue of the constitutionality of the German act implementing the EAW, which was adopted within the third pillar as an EU Framework Decision. The crucial novelty of the EAW is the automatic 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 its own nationals) to another EU member state is no longer able to review such a decision.

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274. Id. at 326.


The BVerfG, however, held that despite the current level of fundamental rights protection guaranteed by the ECJ, the ECHR, and other EU member states, these protections could not affect or exclude the possibility of judicial review by the BVerfG in individual cases as guaranteed by the German Constitution. Accordingly, the “reserve jurisdiction” of German courts, and ultimately of the BVerfG, 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 consistent with 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 favor of the jurisdiction of the ECJ depending on the existing level of fundamental rights protection at the European level. In short, high-level fundamental rights protection means limited interference from the BVerfG, while low-level fundamental rights protection means more interference from the BVerfG. But this flexibility should not be misunderstood as implying 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).

279. Id. ¶ 118.
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).

This raises two questions: first, what is the legal basis of applying the Solange method at the international level and, second, 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 turn to Professor Yuval Shany, who has extensively analyzed this term. According to Professor 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 [by] utilizing the authority of other international courts and tribunals. . . . [I]n the application of the ‘best available’ rule, [this will reflect] not merely the narrow interests of the parties and the law-applying regime at hand but also those of the international community at large.”

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.

In this context, it should be noted that the terms “comity,” “international comity,” or “judicial comity” are often used interchangeably; they are amorphous and applied in varying contextual settings.

280. SHANY, COMPETING JURISDICTIONS, supra note 1.
281. Id. at 261.
282. Id. at 260.
The type of comity we are looking at in this contribution can be traced back to the U.S. Supreme Court, which, in \textit{Hilton v. Guyot} (1895), reasoned that "'[c]omity,' in the legal sense, is neither a matter of absolute obligation nor of mere courtesy and good will" with respect to foreign acts, but it is the recognition that "one nation allows within its territory the legislative, executive or judicial acts of another nation."\textsuperscript{284} More recently, the U.S. Supreme Court emphasized the need to extend judicial cooperation to quasi-judicial international tribunals as well.\textsuperscript{285}

Accordingly, comity is not considered as a legal principle \textit{stricto senso}, 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. If one, however, looks to basic international law instruments, which is appropriate since we deal here with comity between international courts and tribunals, one 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:

\begin{quote}
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 \textit{peaceful means}, and \textit{in conformity with the principles of justice and international law}, adjustment or settlement of \textit{international disputes} or situations which might lead to a breach of the peace. . . \textsuperscript{286}
\end{quote}

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

\textsuperscript{284} Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).
\textsuperscript{286} U.N. Charter art. 1, § 1 (emphasis added).
Similarly, the Preamble of the Vienna Convention on the Law of the Treaties (VCLT) 1980 explicitly states:

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.

Since the VCLT is generally considered to be an expression of customary international law, the principles of justice and international law applies to all international disputes. Hence, when international courts and 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 or arbitrator to resolve disputes in conformity with the principles of justice and international law.

Thus, comity can be qualified as being an integral part of the obligation of all international courts and tribunals and should be applied when such courts and tribunals are determining whether or not to exercise their jurisdiction in a specific case brought before them. In other words, as Professor Petersmann recently (and 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. Besides, it is submitted that all international courts and tribunals have an obligation to ensure the efficiency and coherence of the international legal order when executing their functions. In short, applying comity (i.e., the Solange method) must be considered an inherent and fundamental legal duty of every judge or arbitrator.

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290. Id.
292. Id. at 299.
If this point of view is accepted, the question arises as to what this legal duty entails for judges and arbitrators. Essentially, it entails delivering justice to: (i) parties, (ii) other international courts and tribunals, and (iii) the rule of law.\footnote{293. See generally Ernst-Ulrich Petersmann, \textit{Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade}, 27 U. PA. J. INT'L ECON. L. 273, 273-366 (2006) [hereinafter Petersmann, \textit{Justice as Conflict Resolution}].}

Justice towards the parties means that every court or 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 exercise its jurisdiction in a way that does not undermine the authority of the other courts and tribunals whose jurisdiction is also potentially triggered. So justice towards the other international courts or 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 has increasingly becoming vital to prevent—in one way or another—a fragmentation of international law (including regional law like EC, NAFTA, or MERCUSOR law).\footnote{294. See generally N. Lavranos, \textit{Jurisdictional Competition Between the ECJ and Other International Courts and Tribunals}, 11 EUR. L. REP. 156, 156-71 (2007) [hereinafter Lavranos, \textit{Jurisdictional Competition}].} In other words, courts and 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 \textit{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, both in constitutional law and
international law.\footnote{See SHANY, REGULATING JURISDICTIONAL RELATIONS, \textit{supra} note 1.} This allows comity to be transposed from the national law level to the international law level.

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

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 \textit{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.\footnote{2005 World Summit Outcome, G.A. Res. 60/1, \S\S 73, 134, U.N. Doc. A/RES/60/1 (Oct. 25, 2005).}

Applying comity is part of the inherent power of the judiciary, and more specifically an inherent obligation of the very judge or arbitrator. In other words, all international courts and tribunals are
The Solange-Method

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 to determine 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, where the Solange-method was already applied.

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 stopped the parties from re-litigating the dispute before the ECJ, where there would be a danger of potentially conflicting rulings. This would also have considerably shortened the length of proceedings. 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 conflicting ruling by the UNCLOS arbitral tribunal would have been very low. Similarly, there was no reason for the ECJ to worry about the uniform application of EC law within the EC member states. As discussed above, however, the ECJ did not show any signs of applying the Solange-method towards the UNCLOS arbitral tribunal or any other international court or tribunal. Instead, the ECJ opted for claiming maximum exclusive jurisdiction.

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297. It should be noted that even though the ECJ judgment in the MOX Plant dispute in which it seized jurisdiction regarding UNCLOS dates back to May 30, 2006, the UNCLOS arbitral tribunal terminated the proceeding only on June 6, 2008 without discussing the merits of the case. See Order No. 6, Termination of Proceedings, Permanent Court of Arbitration, The MOX Plant Case (Ir. v. U.K.) (June 6, 2008), http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf.

Similarly, 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’ next option would have been the ECJ. Relevant Community law would have been applied, which would have ensured the uniform application of EC law. At the least, the OSPAR arbitral tribunal was obliged 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 obviously applicable in this case, EC law would have been the only appropriate solution. As a result, the ECJ would have been called upon to adjudicate this dispute, thereby ensuring the proper and uniform application of EC law (especially the Habitats Directive) within the EC member states. This would have prevented the IJzeren Rijn arbitral tribunal from formulating its inventive, but flawed line of argument to justify its jurisdiction. It would have also 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, the authority of the ECJ would have been strengthened instead of weakened.

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 to find a solution within the NAFTA dispute settlement body rather than litigate the dispute again before yet another dispute settlement body. As mentioned above, the Mexico Soft Drinks dispute is closely related to the much broader and long-standing sugar dispute between the United States and Mexico. The WTO Panel and Appellate Body already found Mexico in breach of similar measures, so there was no need to re-litigate the dispute before the WTO. This is particularly relevant to

Mexico, which has been trying to establish a NAFTA panel (but has thus far been blocked by the U.S.). If the establishment of a NAFTA panel could be induced by applying the Solange-method, this would also strengthen the authority of the NAFTA dispute settlement system.

The Brazilian Tyre case is particularly interesting because it uses one dispute to illustrate the consequences of both the application and non-application of the Solange-method. On the one hand, the WTO panel applied the Solange-method by acknowledging that Brazil adopted the disputed measure in order to implement the MERCOSUR arbitral tribunal’s ruling. Moreover, the WTO Panel accepted the findings of the MERCOSUR arbitral tribunal as a fact of the case and did not review Brazil’s defense 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 did discuss and reject Brazil’s implementation of that award. The WTO Appellate Body further criticized Brazil’s defense strategy, suggesting which provision Brazil ought to have relied upon before the MERCOSUR arbitral tribunal. 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.

The ICJ’s Genocide Convention judgment also illustrates how the application of the Solange-method would have resulted in a different and preferable outcome. Even though the ICTY never challenged the ICJ’s jurisdiction and competence regarding general international law issues, the ICJ considered it necessary to

303. Lavranos, The MOX Plant, supra note 1, at 234.
304. Id.
criticize the ICTY and limit its jurisdiction. As a consequence, a divergent jurisprudence exists regarding which test should be used to determine 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 both its own authority and that of the ICTY. Even more importantly, the ICJ could have ensured that the horrific events in the Balkans would be treated (and punished) equally.

To sum up, one can draw a number of conclusions from the hypothetical application of the Solange-method in these cases. First, had the Solange-method been applied by all courts and tribunals, the length of the proceedings would have been shortened, and there would have been a more consistent and uniform application of law.

Second, the application of the Solange-method would have increased the authority of the courts and tribunals. By acting in a coordinated and efficient manner, the various dispute settlement systems involved could have been strengthened. In other words, the consistent application of the Solange-method would result in a more rule-based dispute settlement culture between states.

Third, as a result of the previous points, the Solange-method would have contributed to the rule of law. True justice would have been delivered for the parties, the courts and tribunals, and the legal orders involved. It can be safely concluded that a systematic and consistent application of the Solange-method would adequately allow courts and tribunals to resolve issues of jurisdictional competition.

IV. CONCLUSION

There is a need for regulating competing jurisdictions, especially with the recent proliferation of international courts and
tribunals and the lack of any formal legally binding institutional
coordination between those courts and tribunals.\textsuperscript{307}

As mentioned at the outset, competing jurisdictions are not
problematic. 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.\textsuperscript{308}

The case studies discussed, however, illustrate the
fundamental problems that have arisen from jurisdictional
competition.\textsuperscript{309} In the first place, inconsistencies in law create either
conflicting interpretations of the law or failures to take full
account of the law and jurisprudence of other courts and tribunals
that may be involved in a dispute. This results in a fragmenting
effect on the legal systems involved.

Second, several cases were clearly examples of forum
shopping, which resulted in endless re-litigation and protracted
proceedings. Such forum shopping contributes not only to huge
and unnecessary investments 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 for even more disputes between parties that
have been entangled in protracted proceedings.

Third, jurisdictional competition that leads to divergent
rulings or open ignorance of another court’s existing jurisdiction
undermines the authority of courts and tribunals. This is
particularly true if the courts and tribunals openly criticize each
other, as has been the case between the ICJ and ICTY. One
should not underestimate the negative impression that this
behavior creates, not only upon government officials, but also
upon lawyers, academics, and the public at large.

Fourth, it should also be remembered that rulings by different
courts and tribunals create conflicting obligations for the parties
involved. This inevitably forces states to breach one law or the

\textsuperscript{307} See HEIKO SAUER, JURISDIKTIONSKonFLIKTE IN MEHREBENENSYSTEMEN
(2008).

\textsuperscript{308} Jacob Katz Cogan, Competition and Control in International Adjudication, 48 VA.

\textsuperscript{309} See generally Eyal Benvenisti & George W. Downs, The Empire’s New Clothes:
Political Economy and the Fragmentation of International Law, 60 STAN. L. REV. 595, 595-
631 (2007).
other, which in turn undermines the respect and belief in justice, rule of law, and peaceful dispute resolution.

It can be concluded from the above analysis 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 reduce the risk of fragmentation of international legal orders (including regional legal orders). It would also foster and improve the understanding and informal cooperation between international courts and judges.\(^{310}\)

The analysis has also shown that there is a firm legal basis behind basic international law instruments that oblige 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.\(^{311}\) Justice is part of the rule of law, a rule that is the most fundamental principle underpinning the belief in international cooperation and its advantages for individual.

But at the same time we should not forget that the application of the Solange-method depends on the attitude of each judge.\(^{312}\) Accordingly, judges and arbitrators must begin recognizing both the usefulness and the effectiveness of the Solange-method in order to reap the benefits of international courts and tribunals without jeopardizing justice and the rule of law.


311. See Petersmann, Constitutional Obligation to Settle Disputes, supra note 289, at 34-35. It is submitted that this is not confined to international trade, but applies equally to all areas of international law.