Global Jurist

Advances

Volume 8, Issue 3

2008

Article 7

The Hidden Dialogue: When Judicial Competitors Collaborate

Giuseppe Martinico*

Filippo Fontanelli†

*Sant'Anna School of Advanced Studies, martinico@sssup.it

†Sant'Anna School of Advanced Studies, ffontanelli@cgsh.com

Recommended Citation

Giuseppe Martinico and Filippo Fontanelli (2008) "The Hidden Dialogue: When Judicial Competitors Collaborate," *Global Jurist*: Vol. 8: Iss. 3 (Advances), Article 7.

Available at: <http://www.bepress.com/gj/vol8/iss3/art7>

Copyright ©2008 The Berkeley Electronic Press. All rights reserved.

The Hidden Dialogue: When Judicial Competitors Collaborate*

Giuseppe Martinico and Filippo Fontanelli

Abstract

Legal scholars have regularly focused on the conflict episodes between the Court of Justice and national constitutional courts. We try instead to investigate the techniques that both the Court of Justice and its national counterparts use to develop a hidden judicial dialogue, through which a non-legally bound harmonization is pursued, and mostly achieved. Moreover, we understand these strategies in the light of the notion of comity, and we compare the opposite attitudes kept by the Court of Justice towards national courts and international tribunals to describe its shifting attitude, which is due to its interest in preserving a pre-eminent position in the interpretive competition over EC law.

KEYWORDS: judicial dialogue, comity, European Court of Justice, national constitutional courts, international tribunals

*This paper was presented to the 6th International Workshop for Young Scholars (WISH), Dublin 16-17 November 2007. G. Martinico wrote paragraphs I-IV; F. Fontanelli wrote paragraphs V-VIII. We would like to thank Sabino Cassese, Francis Snyder, Andrea Biondi, Oreste Pollicino, Suzanne Doshi and Helen Xanthaki for their help and comments. The usual disclaimers apply.

I Goals of the paper

The preliminary ruling as described in Art. 234 of the Treaty establishing the European Community (ECT) was intended to represent the main instrument by which national courts, that are the domestic guarantors of the application of EC law, ask the European Court of Justice about its correct interpretation, by lodging a preliminary referral. Therefore, traditionally the literature has widely focused on this instrument as a tool of judicial cooperation between ordinary judges and the Court of Justice, with this latter playing the role of the “consultant” *vis-à-vis* national colleagues.

Many authors have also stressed the communicational difficulty between the Court of Justice and the Constitutional Courts due to the fact that most Constitutional Courts have avoided the preliminary ruling (with the Belgian, Austrian, Lithuanian and - within the limit of the “*principaliter* proceeding”- Italian exceptions). Few analyses have been devoted, instead, to the techniques of “hidden” dialogue invented by the Constitutional Courts to assure the coherence of the multilevel legal order and the national constitutional autonomy. There is, in fact, a dark and unexplored side of the relationship between Constitutional Courts and Court of Justice which feeds itself with the some non- orthodox ways of judicial communication.

The Court of Justice has reacted to this approach by alternating soft (persuasion: see *Omega* case) and hard (supremacy without exceptions: see *Internationale Handelsgesellschaft*) instruments in order to assure the respect for constitutional diversity and the reasons of the supranational integration.

In our opinion, this mutual attitude can be interpreted as a matter of judicial comity¹: courts prefer to avoid wearying conflicts when their own existence is at stake. Thus they are ready to apply self-restraint and to conform their practices to a dialogic structure: regardless of where the final interpretive balance is put, the uniformity of the legal order is assured: national courts are reluctant to trigger a challenge to the Court of Justice and the Court of Justice is content with its (implicit) role of keeper of either the communitarian law, and of its coherent application.

When, on the contrary, an external subject (*rectius*: a judicial actor pertaining to another legal order) jeopardizes such virtual monopoly owned by the Court of Justice, then its reactions cease to show this cooperative feature, suffice it to recall the intransigent wording of Opinion 1/91, or the *Mox Plant* decision; in these cases comity was not the judicial policy to adopt, as the risk to avert was the fragmentation of the EC order.

¹ This concept will be explained in Section V of this article.

This paper is divided in two parts: in the first part we attempt to sum up the techniques of the “hidden” judicial dialogue invented by the Constitutional Courts and the ways of responding by the Court of Justice while in the second we will try to “adapt” the notion of comity to the European judicial context.

Our reasoning has two premises: the former is represented by the existence of a common axiological field shared by the Court of Justice and the national constitutional Courts thanks to the progressive communitarization of the “counter-limits”. The latter could be illustrated by the formula of the *limited flexibilization of supremacies* used by Ferreres Comella² with specific regard to the Spanish side of the dialogue.

As for the first point, by the formula “counter-limits” (‘controlimiti’³) we mean those national fundamental principles which have been raised - like impenetrable barriers - against the penetration of EU law by the national Constitutional Courts. The ‘counter-limits’ are conceived as a form of ‘*contrepoids au pouvoir communautaire*’,⁴ an ultimate wall to the full application of EC law, intangible nucleus of national constitutional sovereignty.⁵

The counter-limits doctrine (‘*dottrina dei controlimiti*’) was *de facto* conceived in *Solange I* by the German *Bundesverfassungsgericht*⁶ and in case 183/73 (but see also 170/84⁷) by the Italian Constitutional Court. However, many

² V. Ferreres Comella, ‘La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004’, in A. Lopez Castillo - A. Saiz Arnaiz - V. Ferreres Comella, *Constitución española y constitución europea* (Centro de estudios políticos y constitucionales, 2005) 77-100, 80-89.

³ This formula has been introduced in the Italian scholarly debate by Paolo Barile: P. Barile, ‘Ancora su diritto comunitario e diritto interno’ in *Studi per il XX anniversario dell’Assemblea costituente*, VI (Firenze, 1969) 49.

⁴ About the notion of *contrepoids au pouvoir* see: B. Manin, ‘Frontières, freins et contrepoids—La séparation des pouvoirs dans le débat constitutionnel américain de 1787’, (1994) *Revue française de sciences politiques*, 257-293; T. Georgopoulos ‘The checks and balances doctrine in member states as a rule of EC law: the cases of France and Germany’, (2003) 9 *European Law Journal*, 530–548.

⁵ It is very interesting to notice that the notion of the counter-limits implies a sort of constitutional and moral superiority of the national legal orders with regard to the supranational level. This form of constitutional superiority is usually justified by the existence of the democratic deficit which characterizes the EU. See, for example, *Solange I* (see note below): ‘*the Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level.*’

⁶ BVerfGE 37, 271 (1974), available at <http://www.bundesverfassungsgericht.de/>, English translation available in 2 CMLR 540 (1974), *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

⁷ Corte Costituzionale, sentenza No. 180/1974: ‘*Questo Collegio ha, nella sent. n. 183/73, già avvertito come la legge di esecuzione del Trattato possa andar soggetta al suo sindacato, in riferimento ai principi fondamentali del nostro ordinamento costituzionale e ai diritti inalienabili*

Constitutional Courts accepted it in the following years: recently the *Conseil Constitutionnel* in 2004⁸ and *Tribunal Constitucional* in Spain,⁹ but before them in Great Britain¹⁰ the Court of Appeal admitted the primacy of EC law by preserving a hard core of principles. One of the most interesting cases is the Danish one, *Carlsen*,¹¹ when the Supreme Court specified the possible dynamics of such a declaration.¹²

More recently the decisions of the Polish¹³ and German Constitutional Courts¹⁴ (but see also the decisions of the Cypriot¹⁵ and Czech¹⁶ judges) have reposed the issue of the ultimate barriers in the field of the European arrest warrant.¹⁷

Despite these decisions, in this article we will just focus on the first pillar's ambit, thus we will avoid extending our reasoning to the third pillar.¹⁸ This choice

della persona umana'. On this point see M. Cartabia, *Principi inviolabili e integrazione europea* (Giuffrè, 1995).

⁸But see also *Conseil d'Etat, dec. Sarran*, 30 October 1998; *Cour de Cassation, dec. Fraisse*, 2 June 2000; *Conseil d'Etat, dec. SNIP*, 3 December 2001. In addition see: *Conseil Constitutionnel* 2004-496-497-498-499 DC 2004-505 DC, available at <http://www.conseil-constitutionnel.fr/>

⁹*Tribunal Constitucional, declaración* 1/2004. About this point, see V. Ferreres Comella, *La Constitución española cit.*, 80-89, and A. Saiz Arnaiz, 'De primacia, supremazia y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 diciembre de 2004 y el Tratado por el que establece una Constitución para Europa', *ibidem*, 51-75.

¹⁰*McWhirter and Gouriet v Secretary of State for Foreign Affairs*, [2003], EWCA civ 384. On this point see A. Biondi, 'Principio di supremazia e "Costituzione" inglese. I due casi "Martiri del sistema metrico" e "Mc Whirter and Gouriet"', available at www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=101&Itemid=82

¹¹*Højesteret, Carlsen v Rasmussen*, [1999] 3 CMLR 854.

¹²According to the *Carlsen* doctrine if there is a doubt about the consistency of the EC act with the Constitution, the Constitutional Courts could raise the question by asking the Court of Justice to clarify the exact meaning of the norm. If the Court of Justice did not convince them of the compatibility, they could "apply" the counter-limits theory. Such a vision demonstrates that the Constitutional Courts have the last word even though they have accepted the preliminary ruling.

¹³*Trybunał konstytucyjny*, P 1/05, available at www.trybunal.gov.pl/eng/index.htm

¹⁴*BVerfG*, 2 BvR 2236/04 (EAW case), available at www.bundesverfassungsgericht.de/

¹⁵*Ανώτατο Δικαστήριο*, 294/2005, available at www.cylaw.org

¹⁶*Ústavní Soud*, Pl. ÚS 66/04, available at http://angl.concourt.cz/angl_verze/doc/pl-66-04.php

¹⁷In the paper we will focus on the first pillar because of the differences existing between Art. 234 ECT and 35 EUT. As for the role of the Court of Justice in this ambit see: J. Komarek, 'European Constitutionalism and the European Arrest Warrant: in search of the limits of contrapunctual principles', Jean Monnet Working paper, 10/05, available at www.jeanmonnetprogram.org/papers/05/051001.html.

¹⁸The pillar structure is a helpful image reflecting the distribution of competences within the European order. The first pillar covers Community's policies. The second pillar concerns common foreign and security policy, whilst the third pillar covers police and judicial cooperation in criminal matters.

reflects the unique interpretative power owned by the Court of Justice in the first pillar, a power provided for under Articles 220(1), 234 and 292 of ECT.¹⁹

In spite of the strictness shown in their decisions, the Constitutional Courts have never used this “weapon” in the field of EC Law and in the recent years the German *Bundesverfassungsgericht* changed its position by substituting the case by case control (hypothesized in *Solange I*) with an abstract control of the general compatibility of EC law with the demands of the protection of rights (*Solange II*,²⁰ *Maastricht*,²¹ *Banana*²²).

Something similar happened in Italy with judgment No. 232/1989²³: from that decision, in fact, the Italian Constitutional Court has implicitly admitted that the possible contrast with the Constitution would not cause the invalidity of the act of execution of the EC Treaty but only the non-applicability of EC rule.²⁴

The fact that the Constitutional Courts have not ever put such counter-limits theory into practice can be partially explained by the progressive constitutionalisation of the EC law. The result of this constitutionalisation process is the progressive rapprochement between the common constitutional traditions and the counter-limits, between the rationale of integration and that of diversification.

With respect to the second premise: as we know, at the beginning of the relationship the two Courts (national Constitutional Courts and the Court of Justice) started from opposing positions of pure monism (Court of Justice) and dualism (Constitutional Courts).

During the following years this “pureness” was overcome and Constitutional Courts began to talk about two “*autonomous and separated*,

¹⁹ Reading, respectively: ‘[220] The Court of Justice [...] shall ensure that in the interpretation and application of this Treaty the law is observed’; ‘[234] The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB [...]’; ‘[292] Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein [i.e., before the Court of Justice]’.

Despite the similarities existing between Art. 234 ECT and Art. 35 of EUT some differences, in fact, are evident: see for example the lack of distinction between supreme courts (*i.e.* ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’) and other courts in Art. 35 EUT as regards the duty (‘shall bring the matter before the Court of Justice’) or the faculty (‘may request the Court of Justice’) to raise the question to the Court of Justice.

²⁰ *BVerfGE* 73, 339 (1986), English translation available in 3 CMLR 225 (1987), re the application of *Wünsche Handelsgesellschaft*.

²¹ *BVerfGE* 89, 155 (1993), English translation available in 1 CMLR 57 (1994), Manfred Brunner et al v. The European Union Treaty.

²² *BVerfGE* 102, 147 (2000), available at <http://www.bundesverfassungsgericht.de>.

²³ *Corte Costituzionale*, sentenza No. 232/1989, available at www.cortecostituzionale.it.

²⁴ See M. Cartabia - J. Weiler, *L'Italia in Europa* (Mulino, 2000), 171-172.

although coordinated’ systems (Italian Constitutional Court for example in case No. 170/1984); at the same time the Court of Justice has demonstrated to appreciate the efforts of these national actors by assuming - sometimes - a benign and tolerant attitude.

The first characteristic of the jurisdictional dialogue described is therefore the “mutability”²⁵ of the starting position of the Constitutional justices and of the Court of Justice.

Such a premise is very important to understand the situation of instability that characterizes the relationship between Constitutional Courts and the Court of Justice. On the one hand, the Constitutional Courts have progressively accepted the EC law supremacy and have entrusted its protection to the ordinary judges, despite the lack of a national or supranational clause of *primauté*.

On the other hand, the Constitutional Courts have claimed to maintain their own role (the role of the guardians of the national constitutional identity) without exceptions. They refused the acceptance of dangerous monistic visions in order to preserve the constitutional identity of their legal orders.

Obviously, despite this progressive convergence, the tension between these two actors has not been missing because of the progressive expansion of the Court of Justice’s activity in national fields but in our opinion it is possible to draw a less pessimistic picture by considering some non-orthodox ways of judicial communication.

²⁵ It is possible, indeed, to notice a strong evolution in the Italian Constitutional Court case-law: compare, for example, case No. 14/1964- where the Italian Constitutional Court interpreted the relationship between national and EC acts in the light of chronological criterion (on the basis of the fact that the enabling act of ratification of the European Treaties was an ordinary legislative act)- with cases No. 183/1973 - where the Constitutional Court recognized the constitutional basis of EC law supremacy in Art. 11 of the Italian Constitution - and 170/1984 (where the Italian Court entrusted such a control to the national ordinary judges). In Spain, the *Tribunal Constitucional* used Art. 93 of the Spanish Constitution as a basis to found the EC law supremacy without giving the EC law a constitutional degree in the legal sources system. Nevertheless, it is possible to notice a strong evolution in *Tribunal Constitucional* case-law from the judgment No. 28/1991 and *Declaración* No. 1/1992 up to the very recent declaration 1/2004. In this case the Spanish justices adopted a more substantial reading of Art. 93 of the Constitution, no longer conceiving it as a merely procedural clause.

As we know, the German justices softened their argumentations after *Solange I* by conceiving a form of cooperation between courts for the protection of fundamental rights (“*Kooperationverhältnis*”) although they have never completely abandoned the dualistic vision. Before 1992, then, they employed Art. 24 of Basic Law (on the participation to international organizations) to explain the penetration of the EC law.

II The techniques of hidden dialogue

Once assumed the supremacy of EC law, the Constitutional Courts dealt with another enigma: how could they guarantee the equilibrium between the levels as well as the dialogue with the Court of Justice?

As we know the English High Court²⁶ and the Irish,²⁷ Greek,²⁸ Danish,²⁹ and Finnish³⁰ Supreme Courts have accepted the dialogue with the Court of Justice while the Constitutional Courts (except for the Belgian³¹, Austrian³² Lithuanian³³ and - recently - Italian³⁴ Constitutional Courts) in general have avoided it. They have always preferred to be excluded from the dynamics of the preliminary ruling by refusing to define themselves as “judges” according to EC law. On the contrary, they have raised some ultimate barriers against the penetration of EC law in order to define the fundamental principles of the legal orders of which they are the guardians.

Many Constitutional Courts, in fact, do not consider themselves judges under Art. 234 ECT, and have always refused to raise the question to the Court of Justice,³⁵ despite its opinion.³⁶

To resolve such a problem, national constitutional justices have invented some expedients that allow them not to interrupt the communication with the Court of Justice.

For example, many Courts have tried to explain the supremacy of EC law by placing the EC rules above the primary sources of law, but still below the Constitution, through the introduction of a new step in the legal sources

²⁶ 34/79 Henn and Derby [1979] ECR 3795.

²⁷ 182/83 Fearon c. Irish Land Commission [1984] ECR 3677.

²⁸ 348/96 Calfa [1999] ECR I- 11.

²⁹ 151/78 Sukkerfabriken Nykobing [1979] ECR, 1147.

³⁰ 172/99 Liikenne [2001] ECR 475.

³¹ *Cour d'Arbitrage*, 19 February 1997, No. 6/97, available at www.arbitrage.be/fr/common/home.html.

³² *VfGH*, 10 March 1999, B 2251/97, B 2594/97, available at www.vfgh.gv.at/cms/vfgh-site.

³³ *Lietuvos Respublikos Konstitucinis Teismas*, Decision of 8 May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm.

³⁴ *Corte Costituzionale*, sentenza No. 102/2008 and ordinanza No. 103/2008, both available at www.cortecostituzionale.it.

³⁵ See Italian cases *Corte Costituzionale*, ordinanza No. 206/1976; *Corte Costituzionale*, sentenza No. 168/1991 and *Corte Costituzionale*, ordinanza No. 536/1995, all available at www.cortecostituzionale.it; Spanish case *Tribunal Constitucional*, sentencia No. 372/1993, available at www.tribunalconstitucional.es; French case *Conseil Constitutionnel*, 2006-540 DC, available at www.conseil-constitutionnel.fr.

³⁶ 54/1996 Dorsch Consult Ingenieurgesellschaft / Bundesbaugesellschaft Berlin [1997] ECR I-4961.

hierarchy.³⁷ Such an attempt has created confusion in the Constitutional Courts case-law itself, as the contradictions of the *Tribunal Constitucional*'s findings demonstrate. In case no. 28/1991, in fact, the *Tribunal Constitucional* used two formulas to define the normative strength of the EC law – “*non constitutional law*” and “*infra-constitutional law*” - while in other cases it used the formula “*constitutionally relevant (law)*”.³⁸

Consequently, according to the *Tribunal Constitucional*, the contrast between the EC law and the national law cannot be seen as a figure of unconstitutionality of the national rule: it is a question of legality which has to be resolved by the ordinary judges.

Similarly, there is an evident manipulation of the constitutional text operated by the Belgian *Cour d'Arbitrage* with regard to art. 34 of the Constitution in order to give a partial super-constitutionality to the EC law, still without endorsing the competence of its guarantee.

Something similar happened in England in the *Thoburn*³⁹ case. In this case, the judge recognized the existence of a constitutional group of statutes and acts: this group of constitutional statutes and laws also included the 1972 E.C. Act. In this way, the English judges guaranteed the reasons of the integration and the EC law supremacy but, at the same time, recognized that the supremacy rests in the acceptance and in the self-limitation of the English Parliament (*i.e.* in an Act of the Parliament).

Another example of the creative constitutional case-law is the distinction between “*primacia y supremacia*” conceived by the *Tribunal Constitucional*.⁴⁰ This was done in order to explain the compatibility between the reasons of integration and the guarantee of the Constitution. A further proof of this trend is the very recent acknowledgement⁴¹ of the exhaustibility of *recurso de amparo* when the ordinary judge refuses to refer to the Court of Justice *ex Art. 234 ECT*. If this refusal implies the violation of a fundamental right guaranteed by *recurso de amparo*, it is possible to proceed before the *Tribunal Constitucional* for violation of Art. 24 of the Spanish Constitution. By this *revirement* the *Tribunal*

³⁷ A similar strategy was recently followed by the Italian Constitutional Court, that was called to rule on the status of treaty international law in the domestic hierarchy of sources of law. See *Corte Costituzionale*, sentenze No. 348 and 349 /2007. See also the comment by F. Biondi Dal Monte and F. Fontanelli, ‘The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System’, (2008) 9 *German Law Journal*, 889-932.

³⁸ See *Tribunal Constitucional*, sentencia No. 28/1991, available at www.tribunalconstitucional.es. Concerning the terminology used by the *Tribunal Constitucional* see: C. Vidal Prado, *El impacto del nuevo derecho europeo en los Tribunales Constitucionales* (Madrid, 2004) 156-159.

³⁹ High Court- Queen's Bench Division *Thoburn v. Sunderland City Council*, CMLR, 50.

⁴⁰ *Tribunal Constitucional*, declaración 1/2004, available at www.tribunalconstitucional.es.

⁴¹ *Tribunal Constitucional*, sentencia 58/2004, available at www.tribunalconstitucional.es.

Costituzionale has compensated the Court of Justice for the refusal to accept the mechanism of preliminary ruling.

The Italian Constitutional Court is particularly active in this field with expedients like the acknowledgement of *erga omnes* effects (*ie* the normal effects of the classical sources of law according to some scholars⁴²) to the interpretative rulings of the Court of Justice and the *dual preliminary* (“*doppia pregiudizialità*”).⁴³

The first technique consists of the acknowledgment of the peculiar interpretative function of the Court of Justice: the Italian Constitutional Court has recognised *erga omnes* effects to the Court of Justice’s rulings in its case-law (mainly in 113/1985⁴⁴ and 389/1989⁴⁵) because they share certain characteristics with the classic EC legal sources.

In the Italian Constitutional Court’s reasoning, these interpretative rulings present the normal effect of the classical EC legal sources when they contain the interpretation of EC legal provisions characterized by such effects: direct applicability and direct effect. In this way the Italian Court put the classic EC acts (regulations, directives) on an equal footing with the Court of Justice interpretative rulings. Following this reasoning, according to the Italian Constitutional Court, the ordinary judge’s duty to non-apply the internal law contrasting with the EC law has to be extended to the case of contrast between the national law and those interpretative rulings of the Court of Justice. The reasoning of the Italian Constitutional Court takes as its starting point the particular position covered by the Court of Justice in the EC legal system.

The interpretative rulings of the Court of Justice would be second grade sources because they infer their legal power from the interpreted provisions. In fact, the Italian Court recognised the content and the effects of the classic

⁴² A. Pizzorusso, ‘Le fonti del diritto’, in A. Scialoja - G. Branca (eds.), *Commentario del codice civile, Disposizioni sulla legge in generale* (Artt. 1-9) (Bologna-Roma) 1977, 15. Pizzorusso tried to look at the effects of a normative act or fact, finding in its *erga omnes* effects (conceived as the opposite of the *inter partes* effects which characterize, instead, a contract) the common feature of all the sources of law in order to overcome the critiques put forward towards the theory of the general and abstract act.

⁴³ M. Cartabia, ‘Il processo costituzionale: l’iniziativa. Considerazioni sulla posizione del giudice comune di fronte a casi di ‘doppia pregiudizialità’, comunitaria e costituzionale’, (1997) 5 *il Foro italiano*, 222–225. For a very similar point of view about the dual preliminary see in English M. Cartabia, ‘Taking Dialogue Seriously’ The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union’, Jean Monnet Working paper, 12/07, available at www.jeanmonnetprogram.org/papers/07/071201.html.

See *Corte Costituzionale*, ordinanza No.536/1995, and *Corte Costituzionale*, ordinanza No. 319/1996, both available at www.cortecostituzionale.it.

⁴⁴ *Corte Costituzionale*, sentenza No. 113/1985, available at www.cortecostituzionale.it.

⁴⁵ *Corte Costituzionale*, sentenza No. 389/1989, available at www.cortecostituzionale.it.

communitarian sources (direct effect and direct applicability) only if the interpreted provisions have such effects.

This is an indirect recognition of the strong role of the Court of Justice and implies (for the national judge) the extension of the obligation of non-application of national law contrasting with the interpretative rulings of the Court of Justice.

According to the second technique (dual preliminary), the Constitutional Court could be asked to solve a question of constitutionality regarding an Italian norm in cases where such a question is strongly related to another preliminary ruling question contemporarily raised before the Court of Justice (either by the same or by another ordinary judge) on the meaning/validity of an EC act.

If these two questions are strongly related, the Italian Constitutional Court can decide to return the question (declaring it “inadmissible”) to the ordinary judge (536/1995⁴⁶) or “wait for” the Court of Justice to pronounce before judging (165/2004⁴⁷).

As we can see, the *dual preliminary* is a technique by which the Italian Constitutional Court recognizes a “priority” to the Court of Justice and to Art. 234 ECT questions; at the same time, it can work as a “safety valve”, as it avoids a contrast with the Court of Justice with regard to the possible violation of the counter-limits. In *Berlusconi* case for example the Italian Constitutional Court (165/2004⁴⁸) waited for the Court of Justice’s answer, preparing itself for a decision that could possibly be incompatible with its fundamental principles. All this was also caused by the Court of Justice’s progressive orientation to accept questions concerning *de facto* the contrast between EC law and national legislative acts (although “dressed” as interpretative questions of EC law). Thanks to the *dual preliminary*, the Italian Court allows the Court of Justice to decide whether to challenge the risk of a jurisdictional “clash” or not. On the other hand it is perhaps possible to read the *Berlusconi* case as an attempt to avoid such a danger, and as a chance to show the EC system ripeness about fundamental rights.

The very recent *revirement*⁴⁹ of the Italian Constitutional Court does not constitute a material change, since the Court accepted to raise the preliminary question to the Court of Justice only within the *principaliter* proceeding, a judicial procedure that bears some peculiar features (*inter partes* nature, absence of *a quo* judge etc).

⁴⁶ *Corte Costituzionale*, ordinanza No. 536/1995, available at www.cortecostituzionale.it.

⁴⁷ *Corte Costituzionale*, ordinanza No. 165/2004, available at www.cortecostituzionale.it.

⁴⁸ *Corte Costituzionale*, ordinanza No. 165/2004, available at www.cortecostituzionale.it.

⁴⁹ *Corte Costituzionale*, sentenza No. 102/2008 and ordinanza No. 103/2008, www.cortecostituzionale.it. As we wrote in the *incidenter proceeding* the principle of “mutual impermeability” between EC and national law: was applied; according to the decisions No. 384/1994 and 94/1995 the Italian Constitutional Court decided to “centralise” the questions of consistency between national and EC law and to solve them within the framework of the *principaliter* proceeding.

The mechanism of the dual preliminary, in fact, implies the existence of a judicial triangle (national *a quo* judge; national Constitutional Court and Court of Justice) which does not exist in the *principaliter proceeding*.

Another technique consists of the distinction between disapplication and non-application. In the Italian context, the Constitutional Court started to accept that the guarantee of the EC law's supremacy was entrusted to national judges with an important specification: technically, the judge can not "disapply"⁵⁰ the national law contrasting with the EC act but he must "not apply" the national rule contrasting with directly applicable EC law (a regulation, in the earlier case-law,⁵¹ but then also self-executing directives⁵² and interpretative rulings concerning directly effective and directly applicable norms, see cases no. 113/1985⁵³ and 389/1989⁵⁴). Disapplication, in the Constitutional Court's reasoning, is a figure of invalidity⁵⁵ which would presume a hierarchical relationship between supranational and national legal orders. It would imply the subordination of the Constitutional Court to the Court of Justice (the hierarchy between orders which conduct to the hierarchy of Courts) while non-application is a figure of inefficacy, limited to the specific case before the national judge.⁵⁶ The Italian case - along with the German one - is very relevant for a complete understanding of reasons underlying the "resistance".

Having a look at these techniques it is possible to notice a progressive rapprochement between the Courts (national and supranational) through non-orthodox ways.

⁵⁰ 106/77 Amministrazione delle finanze dello Stato /Simmenthal, [1978] ECR 629.

⁵¹ Corte Costituzionale, sentenza No. 170/1984, available at www.cortecostituzionale.it.

⁵² Corte Costituzionale, sentenza No. 64/1990, available at www.cortecostituzionale.it.

⁵³ Corte Costituzionale, sentenza No. 113/1985, available at www.cortecostituzionale.it.

⁵⁴ Corte Costituzionale, sentenza No. 389/1989, available at www.cortecostituzionale.it.

⁵⁵ Corte Costituzionale, sentenza No. 168/91, available at www.cortecostituzionale.it. *Contra*, see 104/86 Commission / Italy, [1988] ECR 1799.

⁵⁶ The exceptions to this scheme are represented by the following: 1) the case of the "*principaliter proceeding*" (when the legislative act-which is supposed to be unconstitutional- is contested by a Region or the State on the basis of art. 127 of the Italian Constitution); 2) the case of contrast between national norms and non-directly effective or directly-applicable EC rules; 3) the case of violations of the national *counter-limits*; 4) within the control of admissibility of abrogative *referendum* (sentenze No.64/1990 and 41/2000); 5) the permanent contrast between internal norms and a fundamental principle of the European Community (sentenza No.286/1986). In these cases the Constitutional Court considered itself to be competent. See P. Costanzo - L. Mezzetti - A. Ruggeri, *Lineamenti di diritto costituzionale dell'Unione europea* (Torino, 2006) 284.

III The Court of Justice's point of view

The Court of Justice itself has changed its position over the years showing a behaviour oscillating between constitutional accelerations and self-restraint, always looking at the possible effects of its decisions on national legal orders.

By attempting to apply the idea of the techniques of hidden dialogue to the Court of Justice's side, it is possible to identify three strategies: a) the progressive "refinement" of the idea of primacy, due to the double process of constitutionalisation of the EU and communitarization of the counterlimits; b) the terminological attention; c) the preventive evaluation of the impact of its case-law on the national legislation. In this part of the paper we will focus on the first technique devoting few comments to the other two.

First of all, it is possible to notice a progressive mitigation of the idea of absolute primacy of the EU law.

This statement can be supported by a rapid comparison between the "blind" supremacy of the *Internationale Handelsgesellschaft*⁵⁷ (para. 3) with latest judgements:

Therefore the validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure.

We can notice that, according to the reasoning of the Court of Justice, the respect of fundamental rights is seen as an exception to the primacy of EC law.

This kind of argumentation was drawn on in a recent order of the European Court of First Instance (*Gonnelli e Aifo v. Commission*, para. 57)⁵⁸:

Furthermore, in their observations on the objection of inadmissibility, the applicants cannot maintain that, to remedy this alleged lack of judicial protection, the Italian Constitutional Court could refrain from applying Community measures contrary to the fundamental rights proclaimed in the national Constitution since, in accordance with settled case-law, Community law has primacy over national law.⁵⁹

Normally by the formula "constitutionalisation" of the EC legal order, the authors⁶⁰ mean the progressive shift of the EC law from the perspective of an

⁵⁷ 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵⁸ T-231/02 *Gonnelli e Aifo v. Commission* [2004] ECR II-1051.

⁵⁹ 6/64 *Costa* [1964] ECR 1141.

⁶⁰ For example M. Cartabia - J. H. H. Weiler, *L'Italia in Europa* (Mulino, 2000) 73. About the ambiguity of the notion of constitutionalisation in EC/EU Law see: F. Snyder, 'The unfinished constitution of the European Union', in J. H. H. Weiler - M. Wind (eds.), *European constitutionalism beyond the state* (Cambridge University Press, 2003); B. Rittberger - F.

international organization to a federal state perspective. We can stress another meaning of constitutionalisation of the EC legal order, with regard to the progressive “humanization” of the law of the common market. It is a very famous story which started with judgements like *Nold*,⁶¹ *Stauder*⁶² and was enriched, in the latest years, by judgements like *Omega* and *Berlusconi*.⁶³

The partial overcoming of the vision of *Internationale Handelsgesellschaft* was contained in the *Omega* case. In *Omega*,⁶⁴ the Court said that ‘Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.’ This statement should be read as the final line of a long run, which started after *Solange I*. This judgment intends to demonstrate (before a German judge: it is not a coincidence) the ripeness of the EU legal system and, in general, the outcome of the constitutional dialogue with the national interlocutors. Something similar happened in the *Berlusconi*⁶⁵ case (before an Italian reference).

These argumentations are probably supported by strategic (and persuasive) reasons, due also to the broad notion of human dignity and of retroactive application of lenient penalty assumed by the Court; anyway it is clear that such decisions are the result of a long conversation with the national courts.

By doing this, the Court assumes the respect of fundamental rights as a premise of its discourse, rather than as an exception to the primacy of EC law.

This process of convergence between the languages of the (national and supranational) courts has contributed to the creation of a common axiological field between the different (constitutional) legal orders. This common axiological field can be described as the heart of multilevel constitutionalism.

The rapprochement between legal orders is confirmed by the ‘structural continuity’ between common constitutional traditions and counter-limits. From a theoretical point of view, in fact, the counter-limits are related to the input of the communitarian legal materials in the inner order; the common constitutional traditions, instead, are related to the input of inner legal materials in the European legal order. Apparently they both follow opposite routes and are inspired by different rationales: the former by the rationale of integration while the latter by

Schimmelfennig, ‘The Constitutionalization of the European Union. Explaining the Parlamentarization and Institutionalization of Human Rights’, available at www.princeton.edu/~smeunier/Rittberger&Schimmelfennig%20Princeton%20memo.pdf.

⁶¹ 4/73 *Nold* [1974] ECR 491.

⁶² 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

⁶³ 387/02 *Berlusconi and others* [2005] ECR I-3565.

⁶⁴ 36/02 *Omega* [2004] ECR I-9609, par. 41.

⁶⁵ 387/02 *Berlusconi and others* [2005] ECR I-3565.

the rationale of constitutional diversification. As stressed, however, by Ruggeri⁶⁶ thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the inner legal orders arise from their origin (national level) and become common sources of EU Law; then these common constitutional traditions come back to the origin in a new form when they are applied by the Court of Justice.

This progressive communitarization of national fundamental principles can be seen as another limit for the EU law primacy, as the scholarship has stressed reading together Artt. I-5 (Art. 4 of EUT after the Reform Treaty of Lisbon) and I-6 of the Constitutional Treaty (disappeared in the Reform Treaty of Lisbon): in Art. I-5 of the Constitutional Treaty, in fact, we can find the proof of the communitarization of the counter-limits theory as a result of the judicial dialogue between Constitutional Courts and Court of Justice.

The model of Art. I-5 is undoubtedly represented by Art. 6 EUT ('current' version), which efficaciously described the closeness between common constitutional traditions and national fundamental principles: in this article, in fact, these two kinds of legal sources (common constitutional traditions⁶⁷ and national fundamental principles) are mentioned in two subsequent paragraphs.

It suffices to recall here the reference that the Art. 6 ('current' version), para. 2 makes to the common constitutional traditions, and the reference to the "national identities" of its Member States that is set in para. 3 of Art. 6. We argue that within a legal context, by the formula "national identities", the European legislator meant the constitutional identities of the Member States, that is the counter-limits, as defined by national constitutional courts. In this sense we can say that Art. I-5 of the Constitutional Treaty has only expressly codified such an interpretation by speaking about "constitutional structure" and in this way it delivered the interpretation of the counter-limits to the Court of Justice.

⁶⁶ A. Ruggeri, "Tradizioni costituzionali comuni" e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione', (2003) 1 *Diritto Pubblico Comparato e Europeo*, 102-120, the best example of such a dynamic is provided by the EC principle of proportionality. It was clearly "extracted" from the German legal tradition, although the classic three-step partition (*Geeignetheit, Erforderlichkeit, Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the Court of Justice. Moreover the translation of the German principle in the supranational context has been enriched by the French experience of the "*bilan avantages- coûts*" as elaborated in the *Conseil d'Etat* case-law. About this phenomenon see D. U. Galetta, 'Il principio di proporzionalità comunitario e il suo effetto di spill over? negli ordinamenti nazionali' (2005) *Nuove Autonomie*, 541-557.

⁶⁷ About the common constitutional traditions as sources of EC Law see: A. Pizzorusso, 'Common Constitutional Traditions in Europe as a Source of Community Law' in A. Auer - J. D. Delley - M. Hottelier - G. Malinverni (eds.), *Aux confins du droit – Essais en l'honneur du Professeur C.A. Morand* (Helbing & Lichtenhahn, 2001), 307-319.

Despite this structural continuity between common constitutional traditions and counter-limits, it is possible to find other recent cases⁶⁸ where the Court seems to accept a more “selective” vision of fundamental rights:

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.⁶⁹

In *Schmidberger* the Court of Justice distinguished between two groups of fundamental rights: the absolute rights (which admit of no restrictions) and other fundamental rights. Concerning the second category of rights, the Court of Justice admitted the necessity to evaluate through a case by case approach the proportionality of their possible restrictions. This selective and case by case approach seems to be in contrast with the very broad approach which the Court of Justice followed in *Omega*.⁷⁰

In conclusion, in *Schmidberger* this balance between fundamental and economic rights could be questionable and could appear incoherent with the Court of Justice case-law because it comes just before the *Omega* case. Recently the Court of Justice went back to the selective and case by case approach to the fundamental rights (conceived in *Schmidberger*) in *Laval*⁷¹ and *Viking*⁷² cases.

In these cases, the Court of Justice recognized the fundamental right to collective action as integral part of EU Community law. This right can justify restrictions on the fundamental freedom of establishment or on the freedom to provide services guaranteed under the EU Treaty, in order to protect workers and their conditions of employment. The Court of Justice added that this action is legal ‘only if it pursues a legitimate aim such as the protection of workers’ and it has left the decision of legitimacy in this case up to the national courts to decide, balancing the rationale of market integration with the rationale of social policies.

⁶⁸ 112/00 *Schmidberger* [2003] ECR I-5659, par. 80.

⁶⁹ See, to that effect, case 62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and case 404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18.

⁷⁰ About *Omega* and *Schmidberger* see the wonderful piece by Alberto Alemanno ‘À la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts *Schmidberger* et *Omega*’, (2004) 4 *Revue du droit de l'Union Européenne*, 709-751.

⁷¹ 341/05 *Laval un Partneri Ltd/Svenska Byggnadsarbetareförbundet et a.* [2007] ECR I-11767.

⁷² 438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

Concluding, the Court of Justice's activity could be read as swinging between the two poles identified above (high level of integration and preservation of differences): following this reconstruction this mixture of acceleration and deceleration is explicable, as Morbidelli⁷³ pointed out, by reading the different choices made by the Court in terms of proportionality, conceived as a *costs/benefits analysis*.

The progressive "softening" of the primacy is accompanied by the unclear result of the contrast between national and supranational laws. In *Simmenthal*⁷⁴ the Court specified that the contrast between EC law and national law implies the invalidity and the inefficacy of the latter.

As we have seen above, the Italian Constitutional Court contested the invalidity of the national law contrasting with EC law, by distinguishing between disapplication (figure of invalidity) and non-application (figure of inefficacy, which does not preclude the future application of the contested national act in other cases). As a form of partial concession, the Court of Justice stated in *Imperial Chemical Industries* (para. 34):

When deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation. Where a particular provision must be disappplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rule.⁷⁵

Another interesting profile is provided by the terminology of the Court of Justice: usually the Court of Justice does not use the term "supremacy" (in *Costa Enel*,⁷⁶ for example, the Court of Justice used the words "primacy" or "precedence"). The only exceptions in the Court of Justice's case-law are represented by cases like *Walt Wilhelm*⁷⁷ and *Leonesio*.⁷⁸ Despite this terminological absence in the text of the Court of Justice judgements and in the Treaties, the notion of supremacy has entered the common language of lawmakers

⁷³ G. Morbidelli, 'La tutela dei diritti tra la Corte del Lussemburgo e Corte Costituzionale', in G. Morbidelli - F. Donati (eds.), *Una costituzione per l'Unione europea* (Giappichelli, 2006), 9, 23-24.

⁷⁴ 106/77 *Simmenthal* [1978] ECR, 629.

⁷⁵ 264/96 *Imperial Chemical Industries* [1998] ECR I-4695.

⁷⁶ 6/64 *Costa Enel* [1964] ECR, 1141.

⁷⁷ 14/68 *Walt Wilhelm* [1969] ECR I.

⁷⁸ 93/71 *Leonesio* [1972] ECR 287. See D. Piquani, 'Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe', paper presented at the VII World Congress of the International Association of Constitutional law, Athens, 11-15 June 2007, available at www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf

and scholars: the best example of this trend is confirmed by the debate about Art. I-6 of the Constitutional Treaty (disappeared in the Reform Treaty of Lisbon), that would have crystallised the so-called “*supremacy clause*”. The word “supremacy”, in fact, is borrowed from the term used by the American Constitution and presumes the existence of a perfect federal model and of a normative “monism”. An evident exception to this ‘linguistic trend’ is provided by the French scholarship which has preferred to use the word ‘*primauté*’ instead of ‘*suprématie*’ in order to describe the priority given to the EC law.⁷⁹

Unlike classical federal experiences, the ‘secret’⁸⁰ of the European Communities lies in the ‘constitutional tolerance’⁸¹ and the consequence of such a peculiarity is the impossibility of resolving the antinomies in terms of invalidity, as the Constitutional courts have maintained for many years.

Constitutional tolerance, in fact, implies a form of voluntary obedience to the EC law, which cannot be inferred by the existence of a hierarchy between legal orders.

Being forced to deal with this constitutional diversity, the Court of Justice has adopted a strategy that reminds us of the attitude of other international Courts, using a sort of *margin of appreciation doctrine*. ‘The doctrine of the margin of appreciation, as developed by the European Court of Human Rights (ECtHR), is an interpretational tool by which the court can delineate between what is properly a matter for each community to decide at the local level and what is so fundamental that the same requirements are imposed on every State, regardless of variations in culture.’⁸² This doctrine requires a certain attention to the legislative and factual situation of the national order involved in the case, and implies the need - for the Court of Justice - to immerse itself in the constitutional structure of the national laws in order to do a preventive evaluation of its judgments.

This would require a case-by-case approach by the Court of Justice and a more frequent use of comparative law tools before the EC judge.

We can find a confirmation of such an approach in the latest judgements dealing with the issue of State liability caused by the breach of EC law. In *Konle* (para. 64)⁸³:

⁷⁹ But about this point see the language used by the French scholars with regard to the recent *Arcelor* judgment (*Conseil d’Etat, Assemblée Société Arcelor et autres*, 8 février 2007, available at www.conseil-etat.fr/ce/jurisprudence/index_ac_id0706.shtml).

⁸⁰ In Bagehot’s meaning: W. Bagehot, *The English Constitution* (Cambridge, 2001) 8.

⁸¹ J. H. H. Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’ (2000) Harvard Jean Monnet Paper available at www.jeanmonnetprogram.org/papers/00/001001.html

⁸² A. A. Ostrovsky, ‘What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals’, (2005) 1 *Hanse Law Review*, 47-64.

⁸³ 302/97 *Konle* [1999] ECR I-3099.

The answer to the fourth question must therefore be that, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

At the same time, it is possible to read *Grant*⁸⁴ and *P v S*⁸⁵ coherently by looking at the different impact of the Court of Justice's decisions on the factual background. In those cases it was self-evident that the acknowledgement of rights to homosexual couples would have had much worse financial repercussions on the Member States than those caused by the possible acknowledgement of transsexuals' rights. Consequently, such a decision would have been less understood by the States.

These are only two examples of the attention paid by the Court of Justice to the constitutional structures of the Member States and they can be seen as a strong hint of a judicial comity attitude by the Court.

IV Final remarks of the section - A glance at sentenza No. 102/2008

To conclude, we observe that the Court of Justice has sometimes reacted strongly to Constitutional Courts' strategy, by denying the possibility for the Constitutional Court to refuse the preliminary ruling; by denying the possibility that Italian acts contrasting with EC law could be valid; by denying the possibility to build some ultimate barriers (even though of constitutional degree) against the penetration of EC law.

In other cases the Court of Justice approached the Constitutional Courts showing the ripeness of its legal system (the recognition of the fundamental rights in *Nold*,⁸⁶ *Stauder*,⁸⁷ *Omega*⁸⁸) in order to gain the trust of the Constitutional Courts. Such an alternation of soft means (persuasion) and hard means (supremacy without exceptions) in the Court of Justice's activity is the result of two forces: constitutional tolerance and evolving dynamism.⁸⁹ In the Court of Justice's case-law it is not possible arrange this scheme on a chronological

⁸⁴ 249/96 *Grant c. South west trains Ltd* [1998] ECR I-621.

⁸⁵ 13/94 *P v S and Cornwall County Council* [1996] ECR I-2143. See O. Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', (2004) 5 *German Law Journal*, 283-317.

⁸⁶ 4/73 *Nold* 1973 [1975] ECR 491.

⁸⁷ 29/69 *Stauder v. City of Ulm*, [1969] ECR 419.

⁸⁸ 36/02 *Omega* [2004] ECR I-9609.

⁸⁹ O. Pollicino, 'Against the idea of "Americanization" of European judicature in the context of the new era of judicial globalization', (2007) 1 *Panóptica*, 407-440; G. Martinico - O. Pollicino, 'Between constitutional tolerance and judicial activism: the "specificity" of the European judicial law' (2008) 1 *European Journal of Law Reform*, 97-125.

distinction (as the closeness in time of decisions which are so different proves) that would imply an “activist” first stage and a “persuasive” second stage. From the national point of view, the Constitutional Courts try to defend their jurisdiction and prerogatives, by inventing complicated mechanisms (dual preliminary; *erga omnes* effects of the interpretative rulings; disapplication vs. non application; counter-limits) in order to balance the rationale of the jurisdictional dialogue and the rationale of the constitutional identity. The result of this interlacement is a situation of obliging instability characterized by a *de facto* synergy, despite formal and rhetorical calls for contrast.

Before turning to the next part of our essay, it is worth describing the recent behaviour of the Italian Constitutional Court. On April 15, 2008,⁹⁰ for the first time in its history, the Italian Constitutional Court agreed to raise a preliminary question to the Court of Justice, adopting a decision presenting at the same time features of continuity and rupture with regard to the previous case-law.

A continuity point is represented by the fact that the decisive criterion upon which the Constitutional Court decides to handle this EC procedure lies in the distinction between *principaliter* and *incidenter* proceedings.⁹¹ The 2008 decision was drawn in a *principaliter* proceedings, this meaning that the Italian Constitutional Court acted as the “true” judge of the (abstract) controversy, as opposed to the *incidenter* proceedings, where the “true” judge of the real dispute is the referring judge. Accordingly, the Constitutional Court was ready to acknowledge for the first time that it falls under the scope of the definition of “court or tribunal” of Art. 234 ECT (rupture), but only in the case of a *principaliter* proceedings (continuity); and this exception comes from the past.

It is usually a task of the ordinary judge to review the consistency between domestic law and EC law, rather than a Constitutional Court’s duty. However, in two old decisions (see *sentenze* No. 384/1994 and No. 94/1995), the Italian Constitutional Court already acknowledged that, since in the *principaliter* proceedings there is not an ordinary judge to carry out this task, the refusal by the Constitutional Court do so would have resulted in a dangerous gap in the protection of rights, and a breach of the principle of legal certainty.

⁹⁰ Corte Costituzionale, sentenza No. 102/2008, available at www.cortecostituzionale.it.

⁹¹ The *principaliter* proceedings are related to claims lodged directly by the Central Government or by the Regions before the Constitutional Court. The *incidenter* proceedings, on the contrary, consist of claims filed by an ordinary judge (known as judge *a quo*, a Latin expression meaning “from which”, referring to the fact that the question stems “from” the judge) who has a doubt on the constitutionality on a national provision he should apply. The former is a direct review of a piece of legislation which also entails an abstract nature, whereas the latter is a form of indirect review of the challenged provisions, that bears a concrete nature (i.e., the outcome of the constitutionality review is decisive for the settlement of the dispute pending before the referring judge).

Another consideration may be useful as regards the role of the ordinary judges: their contribution is important to the functioning of both the *incidenter* proceedings before the Italian Constitutional Court and the preliminary reference mechanism before the European Court of Justice: they are the doorkeepers entrusted with the initiation of both proceedings, and their cooperation is essential for the work of both the “higher” Courts.

We saw above that the technique of dual preliminary⁹² is based upon a judicial triangle: the national referring judge is due to raise two related questions to the European Court of Justice and to the Constitutional Court. As obvious, this can be true only in the framework of the *incidenter* proceedings; now that a formal channel of cooperation (the use of Art. 234 ECT) was opened in relation to the *principaliter* proceedings we can observe how the two instruments of dialogue coexist, at different levels: the institutional procedure and the hidden technique.⁹³

This double approach reflects the double temptation of the Constitutional Court: on one hand it still wants to avoid a direct clash with a powerful competitor, and keeps implementing the dialogue incognito; on the other hand it would like to enter the interpretive arena in order to influence the outcome of the ECJ’s construction of EC law, that more and more often affects the content and the interpretation of domestic EC-related law.

V An international law attempt to re-define and interpret these praxes

After giving this overview on the ever-evolving relationship between the Court of Justice and national constitutional courts, we will now try to form a possible interpretation of this set of facts using instruments drawn from traditional international law studies.

Moreover, we would like to fully merge the federal and the international law views on the European Union and Community: whereas hierarchical and/or constitutional reconstructions sometimes fall short of justifying the institutional competition between national courts and the Court of Justice,⁹⁴ the international law approach alone would erroneously ignore the supremacy discourse, that

⁹² See above in Section II.

⁹³ The decision is also relevant as regards two other hidden techniques: whilst it seems to overlook the distinction between non-application and disapplication (the “disapplying” action was mentioned), it agrees upon the theoretical grounds of the separation between primacy and supremacy, when it gives a description of the domestic and supranational legal orders as being two autonomous systems, although integrated and coordinated.

⁹⁴ On the concept of interpretive competition between judicial bodies, see K. Alter, ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’, in A. Slaughter - A. Stone Sweet - J. H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Oxford, 1997), 227-252

differentiates the EC legal order from the flattened international law system, in which actors are not supposed to depend on each other, but to bear equal powers.

Let us start by noting that many among the techniques we have described above can be easily traced back to some general principles of (international) procedural law.⁹⁵ We refer here to the principles of *lis alibi pendens*, of *ne bis in idem*, of *res judicata*, of *electā unā viā*, of estoppel. Whereas similar principles are easy to recognize and are commonly acknowledged within single legal orders, their force starts to fade when required to be effective across different systems.⁹⁶

In particular, whilst it can be questionable – at the state level – whether these principles of judicial coordination are binding, it is common to deem that they are not, when applied to a multilayered scenario. This preliminary consideration helps us to understand two things about this paper: first, all the dialogic techniques we have described so far are of a voluntary nature,⁹⁷ and therefore develop within a framework of spontaneous practices. Secondly, this cooperative attitude, being based more on a need for peaceful collaboration rather than on a formal obligation, closely resembles the definition of judicial comity,⁹⁸ as employed in international law theory.⁹⁹

⁹⁵ See extensively A. Gattini, 'Un regard procédural sur la fragmentation du droit international' (2006) 110 *RGDIP*, 303, and A. Reinisch, 'The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes', (2004) 3 *Journal of Law and Practice of International Courts and Tribunals*, 37. Regarding the applicability of procedural principles drawn from private international law studies, we share P. M. Dupuy remarks, see 'L'Unité d'Application du Droit International à l'Echelle Globale et Responsabilité des Juges', (2008) 1 *European Journal of Legal Studies*, 21.

⁹⁶ See on this point F. Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and EU Law', (1999) 5 *European Law Journal*, 334, 374, where the Author refers to what we roughly define here 'systems' by using the lightening concept of 'sites of governance'. After describing their features, their functions and their somehow shapeless nature, the Author concludes by confirming the insufficiency of conflict of norms rules to discipline their mutual relationships: 'the various sites [of governance] are not all necessarily hierarchically ordered in relation to each other. Instead, they demonstrate many other types of interrelationships, sometimes hierarchical, sometimes not, sometimes competing, sometimes collaborating. In other words, even when viewed very broadly, they do not make up a legal system.' In our paper we investigate those interrelationships that places themselves on the borderline between legally bound praxes and collaborating behaviours, still trying to figure out the actual (strategic) motivations that cause them.

⁹⁷ As P. M. Dupuy states (see *L'Unité cit.*, 1): 'L'examen de la structure actuelle des relations entre juridiction internes et internationales d'une part, internationales entre elles d'autre part, conduit en tout cas à la conclusion qu'au-delà de toutes les institutions juridiques, c'est d'abord dans la tête des juges eux-mêmes que se résout la question.' Given the lack of specific provisions, it rests with the judge to choose whether to take care of the unity of international law, and of the consistency of its application.

⁹⁸ As J. Allard and A. Garapon recalls, the word comity comes from the Latin "comitas gentium", an expression referring to the benevolence and generosity of the peoples, a sort of international courtesy, see *Les juges dans la mondialisation - la nouvelle révolution du droit*, (2005) Editions du

We prefer here to rely on the concept of comity in the rendition(s) given by international law scholars, in order to elude the labyrinth of all the possible meanings comity can take in its different national versions.¹⁰⁰ We will then try to study the relationship between the Court of Justice and national constitutional courts according to a new and intentionally dualistic model.

Finally, a comparison will be sketched between the behaviour carried out by the Court of Justice towards national courts and the behaviour showed to international courts or tribunals, when the interpretation of EC law has been at stake.¹⁰¹ The difference between these two situations depends (we will try to support this statement) less on the different connection that links the actors (parts of the same integrated order or belonging to different orders) than on the different strategy the Court of Justice wants to pursue (silent tolerance or hostile defence of its prerogatives).

VI The 'As Long As' mechanism as a comity device

Is there a possibility to extract an essential rationale from the *Solange* doctrine, and to use it as the foundation for an inter-level comity between judiciary bodies?¹⁰² There is no need here to rehearse the meaning underlying the very well known *as long as* adage. Let us just recall briefly how the German Constitutional Court conceded a general rebuttable presumption of constitutionality to the EC

Seuil. See also M. Delmas Marty, *Le relatif et l'universel. Les forces imaginantes du droit*, (2004) Editions du Seuil, and *Le pluralisme ordonné*, (2006) Editions du Seuil, Parigi, and A. M. Slaughter, 'A Global Community of Courts', (2003) 44 *Harvard International Law Journal*, 191.

⁹⁹ See Y. Shany, 'Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules Apply?', (2006) Hebrew University International Law Research Paper No. 02-06, 54: 'the comity framework of analysis seems to provide [...] a more adequate method of balancing between the competing interests of the national and international legal system than rigid pro-integration rules, such as *res judicata* or *lis alibi pendens*.'

¹⁰⁰ We will provide below narrower and more opportune definitions of comity, suffice it here to recall the first formulation Justice Gray gave in *Hilton v. Guyot*, 159 U.S. 113, 40 L. Ed. 95, 16 S. Ct. 139 (1895): 'Comity, in the legal sense, is neither a matter of absolute obligation [...] nor of mere courtesy and good will [...]. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.' For an overview of the concept, see J. Paul, 'Comity in International Law', (1991) 32 *Harvard International Law Journal*, 1.

¹⁰¹ On the point, see M. Bronckers, 'The Relationship of EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?', (2007) 44 *Common Market Law Review*, 601.

¹⁰² I owe many of the ideas developed in this paragraph to E. U. Petersmann's teaching, see e.g. the recent essay 'Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with 'Principles of Justice and International Law'?', (2007) 1 *European Journal of Legal Studies*.

legislation, giving up the possible intention to scrutinize every piece of EC legislation dealing with fundamental rights.¹⁰³

This technique has been recognized to be of a surprisingly deferential nature, despite its smart formulation. It can easily be read as an act of surrender signed by the national court in the moment it realizes that the interpretive competition with the Court of Justice is a non-convenient strategy. Moreover it is a smooth escape from the impasse resulting from the Constitutional Court's refusal to use Art. 234 EC.

Similarly, the European Court of Human Rights, in the *Bosphorous* case,¹⁰⁴ has recently refused to second-guess an EC regulation¹⁰⁵ which implemented a UN Security Council resolution,¹⁰⁶ although the content of the regulation was openly restrictive of a fundamental right, namely property right.

By doing this, the ECHR has recognized the limitative effect the EC act had on a basic right, but such a consideration was balanced by the importance of the purpose that determined this intentional restriction, and by the fact that the European Community system, overall, could guarantee a system of fundamental rights' safeguard which is comparable to that provided by the European Convention of Human Rights.¹⁰⁷ The same formula¹⁰⁸ (*as long as*) is used here to introduce a similar mechanism: there is a *prima facie* presumption that prevents a clash between jurisdictions and this presumption regards the protection of fundamental rights.¹⁰⁹ Para. 155 of the judgment reads, in fact:

¹⁰³ See *BverfGE* 73, 339, cit.

¹⁰⁴ See *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (30 June 2005).

¹⁰⁵ See Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ L 102, 28 April 1993, 14.

¹⁰⁶ See UN Security Council resolution No. 820 of 17 April 1993.

¹⁰⁷ The ECHR fails in addressing directly the imperative nature of the Security Council resolution to which the regulation conformed: the natural consequence of the reasoning held by the Strasbourg Court would have then been to verify whether the UN system itself could be deemed to offer an 'equivalent protection' of fundamental rights. See F. Hoffmeister, 'Comment to *Bosphorous Hava Turizm ve Ticaret Anonim Sirket v. Ireland*. App. 45036/98', (2006) 100 *American Journal of International Law*, 442, 448.

¹⁰⁸ This curiosity has also been noted by S. Douglas-Scott, in his comment on the decision '*Bosphorous Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*', (2006) 43 *Common Market Law Review*, 243, 246. It is not a case that the Author state, *ibid*, that the EctHR appears to desire a comity relationship between the courts, or at least a pattern of co-operation. See also N. Lavranos, 'Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH', (2006) 41 *European Review*, 79.

¹⁰⁹ In para. 156 this presumption is explained: by merely implementing obligations flowing from the organization it is part of, a State is presumed to be complying the Convention's requirements. Such a presumption can be rebutted if the protection provided by the organization, and carried out by the State, were to be manifestly deficient. 'In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of

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 (...). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (...). 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 (our italic).

Neither the European Court of Human Rights nor the German Constitutional Court felt that a diverging interpretation on the protection of fundamental rights, which is probably the most typical among their prerogative tasks, entitled them to intervene and reaffirm their primacy over the European Community order. Paradoxically, the safeguard of core rights, far from being the reason for the application of the counter-limit, was used as the harmonizing platform, and either tribunal sacrificed its own particular conception¹¹⁰ to pledge allegiance to the Court of Justice, or to give it support.¹¹¹

This is, in our opinion, a clear example of the 'legitimation through human rights' advocated by J. Habermas,¹¹² the kind of legitimation through which practices that 'deserve recognition' can be identified.¹¹³

Is this courteous practice something we can categorise, at least roughly? Here is where we must refer to international law concept of comity that we have mentioned above.

Before criticising its content, let us remind how comity is supposed to work in the harmonization of independent tribunals' action, by quoting a 1985

European public order" in the field of human rights (Loizidou v. Turkey (preliminary objections), judgment of 23 March 1995, Series A no. 310, § 75). This wording recalls the counter-limit rhetoric, in which reactions are foreseen just in case of patent infringement of fundamental values.

¹¹⁰ As S. Douglas-Scott sharply concludes, see *Bosphorous cit.*, 253.

¹¹¹ According to E. U. Petersmann (see *Do Judges cit.*, 21) the Solange mechanism that we have described 'should serve as a model for 'conditional cooperation' among international courts and national courts also in international economic law, environmental law and human rights law beyond Europe'. In addition, see the reasoning by N. Lavranos (quoted *ibidem*, 35 fn 99, from a forthcoming essay): the Author argues that the Solange method, and comity in general, could be conceived as the content of a peculiar obligation of the judge, that of settling a single dispute according to justice principles.

¹¹² See J. Habermas, 'Remarks on Legitimation through Human Rights' in *id.*, *The Postnational Constellation*, (Cambridge, 2001), 113.

¹¹³ See C. Joerges, 'Rethinking European Law's Supremacy' (2005) EUI Working Paper LAW No. 2005/12, available at www.iue.it, 21: 'Deliberative Supranationalism II [based on governance rather than normative mechanisms] has to respect and to organize diversity, just as European conflict of laws does. Only then can it ensure the development of law-mediated governance practices and conflict resolutions which 'deserve recognition.' [Habermas formula]'.

decision handed down by a tribunal applying ICSID (International Centre for Settlement of Investment Disputes) law:

When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.¹¹⁴

Comity, or judiciary courtesy, are nevertheless shifty concepts; as S. Maljean Dubois and J.C. Martine fairly state, '[I]a justification morale tirée du «mutual respect» et de la «comity» [...] est particulièrement incertaine et contingente; elle ne repose que sur l'appréciation discrétionnaire de considérations d'opportunité.'¹¹⁵ This clear-cut consideration, that blends opportunism and discretion as the basic ingredients of comity, serves us better than the politically incorrect 'best definition' given in 1915 by A.M. Brown, according to which comity is not but a form of '*caprice*.'¹¹⁶

Our analysis intends to take these criticisms into consideration, not to run the risk of blindly entrusting the comity device with our conclusive remarks. In fact, given that neither the constitutional integration (whose parameters are far from being univocally identifiable) nor the interjudicial comity are reliable parameters to solve jurisdictional conflicts according to a foreseeable legal rule (were it hierarchic or coordinative),¹¹⁷ we must then follow a different pattern. Such a pattern could be used to envisage interpretative monopoly and exclusive authority as the real interests at stake.¹¹⁸

¹¹⁴ See *SPP v Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 121, 129.

¹¹⁵ See S. Maljean Dubois and J.C. Martine, 'L'affaire de l'Usine Mox devant les tribunaux internationaux' (2007) 134, JDI, 438, 450.

¹¹⁶ See A.M. Brown, 'Comity in the Federal Courts', (1915) 28 *Harvard Law Review*, 589, 589: 'it is perhaps true that no more definite principle than caprice can be said, on the whole, to govern the attitude of the courts of one nation towards those of another.'

¹¹⁷ The abandonment of the hierarchical constitutional criterion to rule conflicts of laws and jurisdiction (in favour of proceduralisation and methodology) is sharply described in R. Nickel, 'The Riddle of Unitas in Diversitas: from Conflict of Laws to Administrative Constitutionalism?' (2005) EUI Working Paper cit., 45, 45.

¹¹⁸ Another model could be used, if we try to avoid the unreliability of comity as a prescriptive criterion, because of its discretionary and unforeseeable character. A. Rosas has built one in its article 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', (2007) 1 *European Journal of Legal Studies*. 15. The Author makes a distinction, among those non bound behaviours inspired by comity, based to their different degree of compulsoriness: 'Sometimes a 'must' or a 'shall' becomes a 'should'. An example of a 'should' relationship exists in my view between the Court of Justice and the European Court of Human Rights; especially in what I called horizontal judicial dialogue [...], it is at most a question of a 'may.' The mention to the 'horizontal dialogue' refers to one of the category Rosas describes in this differentiation, which

VII The struggle for survival and for interpretive monopoly

Let us now turn to analysing the Court of Justice's behaviour in what we shall call the interpretive competition among independent courts. Another attitude was shown by the Court of Justice towards international courts menacing its monopoly, something that does not match the relaxed and obliging dialogue we have described taking place between the European Court and national constitutional tribunals.

When the European Economic Area was founded,¹¹⁹ a tribunal was to be established for the settlement of disputes arising between Parties: this new EEA Court was supposed to have a mixed jurisdiction, encompassing conflicts founded on either EEA or relevant EC provisions.¹²⁰ Due to the uncertain consequences this mixed system could trigger, the Commission requested the Court's opinion on this new judicial body, under Article 228(6) EC.¹²¹

The Court of Justice issued the Opinion 1/91,¹²² whose core statement was set in para. 51: 'The system of judicial supervision which the [EEA] Agreement proposes to set up is incompatible with the EEC Treaty.'

The main argument supporting this clear rebuttal resides in the non-renounceable need for legal homogeneity: a duplication of the set of applicable norms and a duplication of the bodies charged with their adjudication could not lead to a consistent order;¹²³ but the real concern of the Court of Justice was clearly the risk of being bound by the decisions of a newcomer (the EEA

reflects the changeable obligatoriness of judges' action. J. Allard and A. Garapon, in their *Les juges dans la mondialisation* (Seuil, 2005), give an effective description of the comity concept, referring as well to its etymologic origin (the *comitas gentium* of Roman Law), and put it halfway between information and coactions. Furthermore, they contrast comity with competitiveness, in accordance with a model that we use in this article, and that has been vastly described by A. M. Slaughter, in her *A new world order* (Princeton University Press, 2004).

¹¹⁹ After the signature of the Agreement Creating a European Economic Area, 2 May 1992.

¹²⁰ For a detailed review of the facts we are describing, see extensively B. Brandtner, 'The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92', (1992) 3 *European Journal of International Law*, 300.

¹²¹ Art. 228(6) EC.

¹²² Opinion 1/91, 'Draft Treaty on a European Economic Area', O.J. (No. C110) 1.

¹²³ See the recital No. 35 of the 1/91 Opinion, which clearly states how the EEA Court competence would be 'likely [...] to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect of which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty [now art. 239]. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 [now art. 292] of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that Treaty to any method of settlement other than those provided for in the Treaty.'

Court).¹²⁴ in this case the macroeconomic simile is more than appropriate: the Court attained its *monopoly* position by obstructing the *competition*.

The consequence of the Court of Justice's Opinion was the re-negotiation of the EEA, and the inclusion in the new version of the Agreement of several clauses of coordination between the new EFTA Court and the Court of Justice, whose main effect is to tie to the Court of Justice's jurisprudence both this new tribunal and the EEA Joint Committee, a mixed 'forum in which views are exchanged and decisions are taken by consensus to incorporate Community legislation into the EEA Agreement.'¹²⁵ The Court of Justice gave its consent to the new system, by issuing its 1/92 Opinion.¹²⁶

The relationship between the WTO quasi-judicial dispute settlement mechanism and the Court of Justice presents similar features, even if this latter adopts a different legal reasoning in attempting to avoid DSB decision to be directly invoked before the Luxembourg Court. In particular, the Court of Justice has declared¹²⁷ that the direct effect of a decision issued by the Panel or the Appellate Body would undermine the margin of discretion that WTO Parties enjoy when they choose how to settle a dispute, because alternative ways of resolution would be ruled out if the EC act deemed illegal in the WTO framework were directly to be considered non-applicable in the EC framework.¹²⁸

It should nevertheless be maintained that, in case the EC were not to comply with a DSB decision by amending its legislation, the Court of Justice itself should conform to the DSB finding its decision on the validity of the opposed act.¹²⁹

¹²⁴ As B. Brandtner (The Drama cit., 309) notes. The decisions of the EEA Court would have had binding force on all EC institutions, including the Court of Justice, see recital 37 of the 1/91 Opinion. Moreover, the ECJ's opposition to the establishment of the EEA Court is less based on considerations of this latter's composition (as in Opinion 1/76, dealing on the establishment of a mixed Swiss – Court of Justice Tribunal) than on doubts about its very existence.

¹²⁵ See the related webpage, accessible through the EFTA website at: <http://secretariat.efta.int/Web/EuropeanEconomicArea/institutions/EEAJointCommittee>

¹²⁶ See Opinion 1/92 of 10 April 1992, 'Draft agreement relating to the creation of the European Economic Area', O.J. (No. C136) 1.

¹²⁷ 377/02 NV Firma Leon Van Parys v Belgisch Interventie - an Restitutiebureau [2005] ECR I-1465, para. 42; 149/96 Portugal v Council [1999] ECR I-8395, para. 36-40.

¹²⁸ See Art. 22 of DSU, in particular para. 2 and 8. Among the many contributions available on the WTO – EC issue, see M. Recanatì, 'Sugli effetti delle decisioni dell'organo di conciliazione dell'OMC nell'ordinamento comunitario', (2007) 12 *Diritto dell'Unione Europea*, 437.

¹²⁹ See the Opinion of Advocate General A. Tizzano, delivered on 18 November 2004 Case 377/02 cit., para. 106: 'since the DSB decision [...] found that the regime was not consistent with those [WTO] rules, it follows that the Court, which is required to determine the matter, has no alternative but to reach a negative conclusion, that is to say to declare that the acts on which the regime in question is based are invalid.'

It is in the WTO DSM – Court of Justice case that we will probably test in the near future the real character of the Court of Justice interpretive policy. Being that the WTO tribunals are ‘uninterested’ in such a need for monopoly felt by the Court of Justice,¹³⁰ let alone bound by any obligation to support it, the Court of Justice will have to find a balanced way to fully recognise the importance of the DSB case-law, without giving up too much of its power.¹³¹

We can see in the *Portugal – Van Parys* jurisprudence another clear example of a traditional Court of Justice’s strategy, *ie* the introduction of a controversial finding (in this case, the WTO decisions’ lack of direct effectiveness)¹³² coupled with some circumstantial qualifications (in this case, the safeguard of alternative techniques of dispute resolution) that should soften the impact of the new doctrine, by giving the impression that in different circumstances such a new trend will not apply.¹³³

It is possible that in the future the Court will discard these specifications to adopt a fully operative version of its view, but if that is the case it will have to dare the authority of the WTO dispute settlement system, which is far bigger than those of the EEA Court or the ITLOS Tribunal (see below).¹³⁴

¹³⁰ And stated in Artt. 220 and 234 of the EC Treaty.

¹³¹ It is worth here to remind that Art. 23 of the DSU of the WTO provides for ‘exclusive jurisdiction’ of the DSB on WTO law disputes, as art. 292 CE provides for Court of Justice’s ‘exclusive jurisdiction’ on EC law disputes. Although the Court has shown its tendency to misappropriate jurisdiction on mixed competences, we do not think that the DSB will easily back this trend, if asked to renounce its monopoly over WTO law. This scenario is similar to the German Constitutional Court – Court of Justice relationship, described by R. Stith, ‘Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law’ (2007) NYU Jean Monnet Working Paper 1/07, 38: as neither court is certain in advance of its own victory in case of clash, ‘no resistance has ever actually occurred, it has only been threatened.’

¹³² For a comprehensive analysis of the relationship between WTO law and the EC legal order, see F. Snyder, ‘The Gatekeepers: The European Courts and WTO Law’, (2003) 40 *Common Market Law Review*, 313-367.

¹³³ See how T.C. Hartley describes this process in *The foundations of European Community Law* (Oxford University Press, 2003), 81: ‘a common tactic by the Court is to introduce a new doctrine gradually: in the first case that comes before it, it will establish the doctrine as a general principle, and if there are not too many protests, it will be reaffirmed in later cases: the qualifications can then be whittled away and the whole of the doctrine revealed.’ See also O. Pollicino, Legal Reasoning cit., 311, and K. Alter, ‘Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice’, (1998) 52 *International Organizations*, 121, 133, for further comments on this passage. For a description of a similar but symmetric tactic (consisting of the avoidance of the direct effect problem, allegedly due to the presence of specific circumstances, which concealed instead the nascent intent not to concede WTO decisions a direct effect in the EC system) see F. Snyder, *The Gatekeepers* cit., 335-339.

¹³⁴ In P. Egli, ‘Leon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB). Case C-377/02’, (2006) 100 *American Journal of International Law*, 449, 454 the Author recalls how the Court of Justice did not allow the WTO to set of standards on which EC acts could be reviewed: EC legality could not be set by non-EC actors; see also A. Antoniadis, ‘The European Union and

More recently the Court of Justice harshly condemned Ireland¹³⁵ for having submitted a dispute with the United Kingdom to an international tribunal,¹³⁶ instead of referring to the European Court: that was perceived as an attempt to elude the exclusive monopoly that the Court of Justice has over the interpretation and application of EC law, even in cases where the facts at issue are only partially regulated by its norms (mixed agreements). As the Court itself distinctly states in the *Mox Plant* decision,

an international agreement [...] cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law.¹³⁷

In this case, again, the Court showed its willingness to reassess the absolute relevance of a principle (its exclusive jurisdiction) that has in fact a relative (internal) value: formally speaking, in fact, the prohibition referred to in Art. 292 is binding only within the EC system.¹³⁸

We can easily observe how the Court preferred to centralise the jurisdiction, rather than to pay attention to the specialisation of any other concurrent forum; by doing this the Court neglected construction of a possible ‘judiciary federalism’.¹³⁹ In fact, the Court sanctioned the reciprocal exclusion of

WTO law, a nexus of reactive, coercive, and proactive approaches’, (2007) 6 *World Trade Review*, 45, 82. The Author notes, recalling the Opinion 1/91 precedent, how the Court of Justice while treating the DSB issue has to ‘perform between two competing considerations: the supremacy of international law and the supremacy of Community law.’

¹³⁵ See N. Lavranos, ‘The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?’, (2006) 19 *Leiden Journal of International Law*, 223; P. J. Cardwell and D. French, ‘Who decides? The Court of Justice’s judgment on jurisdiction in the MOX Plant case’, (2007) 19 *Journal of Environmental Law*, 121, 123.

¹³⁶ Namely the International Tribunal for the Law of the Sea (ITLOS), not to be confused with the arbitral tribunal established under the OSPAR Convention, that issued a decision the same facts, or the arbitral tribunal established under Annex VII (Art. 287.5) of UNCLOS, that decided instead to apply comity, and restrain from deciding the case.

¹³⁷ 459/03 European Commission v Ireland [2006] ECR I-4635, para. 132.

¹³⁸ See F. Casolari, ‘La sentenza MOX: la Corte di giustizia delle Comunità europee torna ad occuparsi dei rapporti tra ordinamento comunitario ed ordinamento internazionale’, (2007) 12 *Diritto dell’Unione Europea*, 327, 355.

¹³⁹ In a ‘judiciary federalism’ structure the specialization and the ‘proximity’ of a tribunal to the matter at stake and to the parties of the dispute could serve as a criterion to assign the jurisdiction to a particular tribunal, see P. M. Dupuy, *L’Unité cit.*, 2. This simile with the federal system could lead to accept another image, that of judicial subsidiarity, a concept which is embodied, for instance, in the wording of Art. 1 of the Rome Statute of the International Criminal Court, according to which the Court ‘and shall be complementary to national criminal jurisdictions.’ The system of protection of fundamental rights set out by the ECvHR is inspired by the subsidiarity principle as well, see the remarks made by the former president of the ECtHR L. Wildhaber, in A

two overlapping jurisdictions, rather than recognizing the competence of both, and a criterion to follow in order to choose the more opportune between them.

VIII Possible perspectives: the Court of Justice role and its fading integrative mission

It is worth noting here how the recent enlargement of the EC membership has triggered significant changes in the Court of Justice's structures and functioning. New judges joined the Court of Justice line-up, judges either coming from new Member Countries or being appointed to replace an exiting judge. New Advocates General were appointed as well. The new set up of the Court could conceal a new direction of its action.

Judges from new Member States could have missed the integration training that took place in the last half century, and could ignore the integration mission that the Court of Justice had in the past.¹⁴⁰ New Courts (*rectius*, the Court in its future formations) will certainly avail itself of the past conquests, on whose principles their findings will be based, but their purpose will maybe be different, and their concerns about the role and the survival of the Court higher.¹⁴¹

It would be therefore a rash attempt to draw from our consideration some prescriptive instructions: the interpretive struggle we have described was deeply influenced by the times it was set into, and in the future different conditions will most probably lead to different behaviours. The instability we have recalled above (better: the shifting positioning adopted by the Court of Justice) might have more evident effects.

That does not mean that such different attitudes will not be suitable of being interpreted in a similar manner: the struggle for (interpretive) power is going to be the constant factor determining the behaviour of the Court of Justice, possibly more than the European integration process.¹⁴²

Constitutional Future for the European Court of Human Rights?', (2002) 23 *Human Rights Law Journal*, 30, quoted in E. U. Petersmann, *Do Judges* cit., 10.

¹⁴⁰ Court of Justice judges risk, before our eyes, to resemble those Legal Realism scholars described by R.M. Unger, that are 'like a priesthood that had lost their faith and kept their jobs. They [stay] in tedious embarrassment before cold altars', see 'The critical Legal Studies Movement', (1983) 96 *Harvard Law Review*, 561, 675. This quote is borrowed from R. Stith, cit., 15.

¹⁴¹ We can quote in this respect what R. Stith, cit., 17) says about interpretive monopolists, such as the Court of Justice: 'trust in a supreme or constitutional court to apply the law correctly is more and more misplaced. As belief in legal science fades, the only secular analogue to papal infallibility disappears. To grant any court binding power to interpret the law is thus to secure only order, not some preexisting law.'

¹⁴² Let us just note how the interpretive monopoly doctrine of the Court of Justice (*ie* the situation in which every EC actor is bound by the interpretation given by the Court of Justice, except for the

We will have the opportunity to verify the legitimacy of some neo-realistic worries, in other words we will check whether the independency of the Court before national governments is doomed to decrease, now that the integration momentum seems to be over.¹⁴³ We recall here for the sake of completeness how the Court of Justice and the Court of First Instance, far from playing the tyrant role has indeed shown some signs of deference, namely towards the European Convention of Human Rights and UN Security Council acts, respectively in the *Schmidberger* and in the *Yusuf and Kadi* cases.¹⁴⁴ In particular, it is interesting to see how our model (which compares the Court of Justice – national courts relationship with the international tribunals – Court of Justice one) is not something ignored by the EC institutions: in the *Kadi* decision¹⁴⁵ the parallel between the UN – EC and the EC – Member States systems is clearly drawn, by reference to the *Internationale Handelsgesellschaft* case law.

Now that we have become familiar with the concept of comity, and we have seen how its discretionary nature often hides self-interest considerations,¹⁴⁶ we can easily imagine a future scenario in which the Court of Justice itself will apply self-restraint (by means of comity, or deferential praxes) in order to better safeguard its existence and the persistence of its powers, *vis-à-vis* the rise of the WTO Dispute Settlement Bodies' authoritativeness, the universalising pretensions of the UN Security Council and of the ECtHR,¹⁴⁷ and the lobbying pressure by Member States' governments.¹⁴⁸

Court of Justice itself) is similar to the 'judicial supremacy doctrine' of the US Supreme Court, established since the 1958 *Cooper v Aaron* case, 358 U.S. 1, 78 S. Ct. 1401.

¹⁴³ See K. Alter, *Who are the Masters* cit., 121, and studies referred therein. See also O. Pollicino, *Legal Reasoning* cit., 284. Again, the similarity of the Court of Justice's attitude with the 'judicial supremacy' US Supreme Court doctrine could lead us to compare the current US situation (characterized by continuous attacks to the US SC independence and supremacy, see A.M. Martens, 'Reconsidering Judicial Supremacy: From the Counter-Majoritarian Difficulty to Constitutional Transformations', (2007) 5 *Perspectives on Politics*, 447) with the actual and future state of the EC system.

¹⁴⁴ See the decisions of the Court of First Instance *Yusuf Al Barakaat International Foundation and Yassin Abdullah Kadi v Council and Commission* (306 and 315/01), para. 156 and para. 240 (*Kadi*).

¹⁴⁵ See para. 224. For a comment, see C. Tomuschat, (2006) 43 *Common Market Law Review*, 537, 544. In particular, the Court of First Instance states that the possible infringement of a EC fundamental right can not affect the validity of a Security Council resolution, and suggests that an analogue relationship is to be found in EC law, where an EC act can not suffer from the possible violation of a nationally protected right.

¹⁴⁶ See J. Allard and A. Garapon, *La mondialisation* cit.: the Authors recognize that often judicial cooperation must be set into an egoistic framework, given that it could well be that the reasons triggering comity are the same that, in other occasions, determine the rise of competition between courts.

¹⁴⁷ See A. Rosas, *The European Court of Justice* cit., 10. The Author underlines how the consistent praxis followed by the ECJ is that of backing up the interpretation given by the Court of Human

Such a circumspect tactic will probably pay in terms of peacefulness, like the tactic adopted in the 70's by Constitutional Courts (see *supra*) but, likewise, it will probably mean the beginning of a new era, where the Court of Justice will enter a declining path, whose consequences could be delayed only having recourse to compromises, variably disguised as courteous and gracious concessions.¹⁴⁹

We end here by noting how the same decision we have mentioned to give an example of national courts' deference towards the Court of Justice (the Italian *Berlusconi* case) is taken by some Authors as an example that shows how 'the [European] Court seemed ready to limit the principle of primacy'¹⁵⁰: the two contemporaneous facets of the 'hidden dialogue' were employed on the same issue by the two judicial interlocutors, and a sense of comity pervaded their parallel action.

Rights, and supports this argument by referring to the case C-94/00 Roquette Frères [2002] ECR I-9011 (para. 29), where the Court disregarded a precedent of its own (see cases C-46 e 227/88 Hoechst [1989] ECR 2859), justifying its decision with the adoption of the interpretation given by the Court of Human Rights in the meanwhile.

¹⁴⁸ To a certain extent, the Court of Justice will probably have to gradually retire from fields where other international tribunals seem to offer a better 'service'. In other words, the monopoly on interpretive action can be kept by shrinking the range of issues tackled. See J. K. Cogan, 'Competition and Control in International Adjudication', (2008) 48 *Virginia Journal of International Law* (forthcoming). See draft available at www.law.uga.edu/intl/Cogan.pdf, 25. For a list of recent or pending cases, which shows the increase of the judicial competition, see A. Rosas, *The European Court of Justice* cit., 15.

¹⁴⁹ Similar borderline situations (hovering between spontaneous recognition of outer values and legal obligation flowing from superior legal order) occurred in the WTO framework as well. Suffice it here to recall the Kimberley Diamonds waiver, by which the WTO waived free trade obligations that could favour the trade of "war diamonds". The act adopted (implementing the content of a UN Security Council) could be interpreted either as a mere clarification of how *jus cogens* can operate within the WTO legal system or as a gracious opening of this latter to otherwise irrelevant issues. See J. Pauwelyn, 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"', (2003) 24 *Michigan Journal of International Law*, 1177.

¹⁵⁰ See A. Biondi and R. Mastroianni, 'Joined Cases C-387/02, C-391/02 and C-403/02, Berlusconi and others', (2006) 43 *Common Market Law Review*, 553, 569.