

The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue

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I. Introduction

While the feudal system was monist, the nation state system was dualist and characterised by the dichotomies of international law versus national law, public law versus private law, and law versus non-law. Post-industrialised or ‘post-modern’ society implies a more pluralist system, involving globalisation, regionalisation as well as localisation. We are facing a patchwork of authorities instead of just one national government and one legislature.¹ The international and the internal are increasingly intertwined. Especially in EU-law, the distinction between public and private law seems less relevant. The phenomenon of soft law dilutes the barrier between law and non-law.

This plurality of international, European, national and sub-national norms and norm-givers seems to be accompanied by an increased focus on universal and European *values* and *principles*. They tie together, as it were, the various bits and pieces and give some stability and predictability to an otherwise somewhat chaotic world constantly on the move. The values and principles are articulated and interpreted mainly by a sort of “aristocracy of wise men and women”.² It is, or at least should be, an open group, in fact more of a loose forum, consisting of political, administrative and economic elites, judges, ombudsmen and other monitoring bodies, academic circles and the vanguard of non-governmental and interest organisations.

Whether we like it or not, courts and judges play an important -and probably increasing- role in this process. At the international level, speaking of the ‘proliferation’ of

¹ A. ROSAS, “The Decline of Sovereignty: Legal Aspects”, in J. IIVONEN, *The Future of the Nation State in Europe*, Aldershot, Elgar, 1993, pp. 130-158, at pp. 152-153.

² Cf J.-J. ROUSSEAU, “Du contrat social; ou, Principes du droit politique”, Livre III, Ch. V, in J.-J. ROUSSEAU, *Œuvres complètes III*, Paris, Gallimard, 1964: “Il y a donc trois sortes d'Aristocratie; naturelle, élective, héréditaire. La première ne convient qu'à des peuples simples; la troisième est le pire de tous les Gouvernements. La deuxième est le meilleur: c'est l'Aristocratie proprement dite” [p. 406]; “En un mot, c'est l'ordre le meilleur et le plus naturel que les plus sages gouvernent la multitude, quand on est sûr qu'ils la gouverneront pour son profit et non pour le leur” [p. 407].

international courts and tribunals has already become trite.³ It is a jargon, but it also, to some extent at least, reflects reality. Not only has there been an increase in the number of such courts and tribunals but some of them such as the World Trade Organization (henceforth, “WTO”) panels and Appellate Body and the European Court of Human Rights (henceforth, “E.C.H.R.”) are far from complaining about a scarcity of cases on their dockets. As to national judicial systems, the role of an independent judiciary in ensuring the rule of law and protecting fundamental rights has been recognised to a greater extent even in countries such as the Nordic countries and France where the judge was traditionally seen more as a civil servant who should implement the will of the State. One facet of this development is an increased emphasis on the constitutional review of legislation exercised by a constitutional court or ordinary courts.⁴ The *Rechtsstaat* of today does contain elements of a *Richterstaat*.

The Court of Justice of the European Communities (henceforth, “E.C.J.”) and the other two EU courts in Luxembourg are sometimes mentioned as examples of a tendency towards a *Richterstaat*. We can argue about the precise role and importance of the E.C.J. and its influence on European integration, but it is difficult to deny that it has played a considerable, probably crucial, role in the ‘constitutionalisation’ of the EU legal order. As is well-known, the E.C.J. is sometimes criticised for its alleged ‘judicial activism’.⁵ Part of this criticism may be based on a narrow conception of the role of the judge as being someone whose task it is to apply rather than interpret and construe the law. Some people, in any case, may have expected the E.C.J. to be a technical, economic tribunal rather than a constitutional or quasi-constitutional court.

It is true that the case-law of the E.C.J. and the Court of First Instance (henceforth, “C.F.I.”) does not confine the Courts to the model of a technical, economic tribunal but suggests, at least for the E.C.J., a mixture of the roles of constitutional court, supreme court, administrative court and economic and commercial court. It is also true that such a broad function is entrenched in several modifications and additions to the basic Treaties, notably the

³ See, e.g., **Y. SHANY**, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, Oxford University Press, 2003, pp. 1-11; and other publications of the Project on International Courts and Tribunals (PICT), <http://www.pict-pecti.org>.

⁴ **M. CLAES**, *The National Courts’ Mandate in the European Constitution*, Oxford, Hart, 2006, pp. 253-255.

⁵ See, e.g., **A. ROSAS**, “The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?”, in **C. BAUDENBACHER and H. BULL**, *European Integration through Interaction of Legal Regimes*, Oslo, Universitetsforlaget, 2007, pp. 33-63.

Treaty on European Union (henceforth, “TEU”) and the Treaty establishing the European Community (henceforth, “ECT”).

By the Reform Treaty, the jurisdiction of the Court, according to the mandate for the work of the Intergovernmental Conference adopted by the European Council in Brussels on 21-22 June 2007,⁶ would be enlarged to cover fully, inter alia, police and judicial cooperation in criminal matters (the current Title VI TEU). And instead of defining, as the *pouvoir constitutif*, the principle of primacy of EU law in the TEU, the Member States, assembled in the European Council adopting the said mandate, have preferred to provide for a separate Declaration, which would recall that EU law has primacy over the law of the Member States, “under the conditions laid down” by the case-law of the E.C.J. The principles of direct effect and respect for fundamental rights, articulated by the E.C.J. in 1963 and 1969,⁷ respectively, have been endorsed already in earlier amendments of primary and secondary EU law.⁸

II. The E.C.J. in a broader context

In guarding the specific nature of the Community legal order, the E.C.J. has been prone to underlining its “autonomy” especially in relation to other international or European regimes.⁹ This has not prevented the Court from accepting the conclusion, by the Communities, of international agreements providing for courts or tribunals which have jurisdiction to settle disputes concerning the application and interpretation of these agreements.¹⁰ As to such international agreements concluded in actual practice, binding and obligatory dispute settlement mechanisms are contained notably in the agreement relating to the European Economic Area (henceforth, “EEA”), the WTO Agreements, the United Nations Convention on the Law of the Sea as well as some bilateral agreements concluded by the European Community with third countries.¹¹ Moreover, the commitments of the EU to respect

⁶ **EU Council**, *Brussels European Council 21-22 June 2007, Presidency Conclusions*, **doc. 11177/07**, Annex I.

⁷ **E.C.J.**, Case 26/62, *Van Gend en Loos*, 1963 ECR 1; Case 29/69, *Stauder*, 1969 ECR 419.

⁸ At the level of primary law, one can mention Article 6 § 2 TEU (fundamental rights) and Article 34 § 2 (b) TEU, which by providing that framework decisions adopted under Title VI TEU “shall not entail direct effect”, seems to recognise implicitly that Community law (‘First Pillar’) instruments may have such direct effect.

⁹ See, e.g., **E.C.J.**, *Opinion 1/91 on a draft agreement relating to the creation of the European Economic Area*, 1991 ECR I-6079.

¹⁰ *Ibid.*, §§ 40 and 70.

¹¹ **A. ROSAS**, “International Dispute Settlement: EU Practices and Procedures”, *German Yearbook of International Law*, 2003, pp. 284-322; **M. BRONCKERS**, “The Relationship of the EC Courts with Other

customary international law as well as fundamental rights, in other words commitments which have been first articulated by the E.C.J. itself, have induced the Court to take into account the case-law of the International Court of Justice (henceforth, “I.C.J.”) and the E.C.H.R., respectively.¹²

The existence of these external dispute settlement mechanisms underlines the fact that the EU legal order and its judicial system are functioning not in isolation but in a broader international and European context. There is another feature more inherent in the EU legal order itself which contradicts the idea of the EU courts as some kind of lonely riders in the storm. I am, of course, thinking of the close relationship which exists between the E.C.J. and the national courts of the 27 Member States. In the application of EU law, national courts, in fact, function as EU courts (in the large sense of the word). Community law is not an external regime for the Member States but part of their law of the land. In some special cases, EU legislation even assigns certain national courts to perform specific tasks as Community courts, just as national administrative authorities are sometimes assigned to perform the functions of national regulatory authorities (NRA).¹³ If there is a genuine problem of interpretation of a norm of EU law, or doubts about the validity of EU legislation, national courts and tribunals have the right, and in the case of courts of last instance, the obligation, to request the E.C.J. to give a preliminary ruling. This brings the E.C.J. into what is often called a constant ‘dialogue’ with the national courts.

It goes without saying that the E.C.J. is in close contact with the C.F.I. and the new EU Civil Service Tribunal,¹⁴ which are lower courts belonging to what is still the same judicial institution in the broad sense. Finally, the E.C.J. and the other EU courts may follow, be it at a certain distance, what courts in jurisdictions outside the EU come up with.

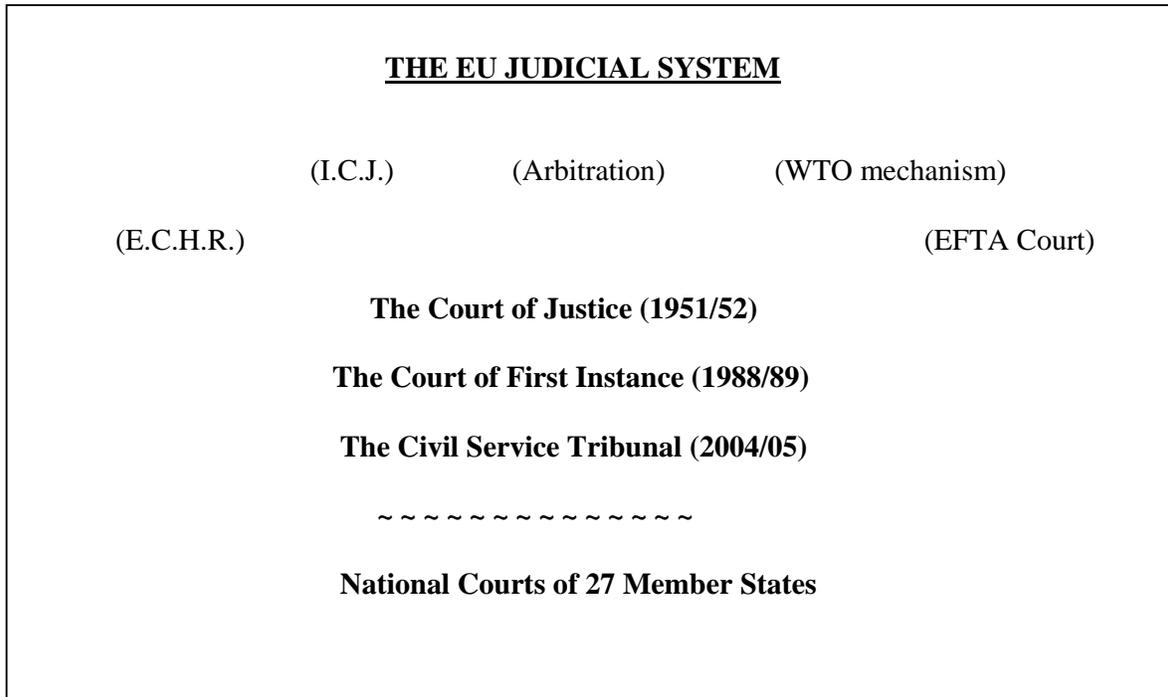
International Tribunals: Non-committal, Respectful or Submissive?”, *Common Market Law Review*, 2007, pp. 601-627, at p. 604.

¹² **A. ROSAS**, “With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts”, *The Global Community Yearbook of International Law and Jurisprudence*, 2005, pp. 203-230.

¹³ See, e.g., Articles 91-101 of **EU Council**, *Regulation (EC) on the Community trade mark*, No 40/94, 20 Dec. 1993, *Official Journal*, 14 Jan. 1994, L 11; and, more generally, **A. ROSAS**, “The European Union as a Federative Association”, in **Durham European Law Institute**, *European Law Lecture 2003*, Durham, University of Durham, 2004, pp. 8-11.

¹⁴ **EU Council**, *Decision establishing the European Union Civil Service Tribunal*, No 2004/752/EC, 2 Nov. 2004, *Official Journal*, 9 Nov. 2004, L 333.

The broader judicial context I have just outlined could be summarised and simplified as follows:¹⁵



This brings me to the question of the relations in law and in practice between the E.C.J. and the other courts and tribunals mentioned in the chart. One can also ask to what extent, if any, the E.C.J. takes into account the case-law of national courts of foreign countries such as the US Supreme Court. It has become commonplace to speak of not only the proliferation of courts but also ‘*judicial dialogue*’ between the various courts and their judges.¹⁶ It may be useful to distinguish between different situations, which are not all examples of judicial dialogue in the narrow sense but may denote a relationship which is closer to a hierarchy of higher and lower courts and thus goes beyond a willingness to be informed about and eventually be inspired by rulings of foreign courts. I shall now distinguish between five different types of relationships between courts, passing from a *vertical* hierarchy towards relations of a more *horizontal* nature, and try to situate the ECJ in this broader adjudicatory framework.¹⁷ It should be noted that I am not speaking of a vertical hierarchy in the administrative sense, given the principle of independence of courts and judges. It should

¹⁵ See also: **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, pp. 206-210.

¹⁶ See, e.g., “Symposium Issues on ‘Globalisation and the Judiciary’”, *Texas Journal of International Law*, 2003, pp. 397-ff; *Ibid.*, 2004, pp. 347-ff.

¹⁷ See also: **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, pp. 204-205.

also be emphasised that ‘judicial dialogue’ is a notion used for various purposes and with different connotations,¹⁸ and that all the categories I shall consider do not necessarily fit into the idea of a genuine dialogue between two equal partners.

III. Five categories of ‘judicial dialogue’

My *first* category refers to a vertical, hierarchical system in the broad sense of the term. Such a relationship exists between courts belonging to the same national system, where there may be a supreme court, courts of appeal, courts of first instance, and so on. In the EU system that would come close to the relation between the E.C.J., the C.F.I.¹⁹ and more recently also the EU Civil Service Tribunal. While one cannot exclude that the C.F.I. advances an interpretation which is not in conformity with the case-law of the E.C.J., it obviously then runs the risk that its judgment be annulled on appeal or dissected in another subsequent case decided by the E.C.J.²⁰ While an appeal against a judgment of the C.F.I. is not possible if the latter acts on appeal from the Civil Service Tribunal, the E.C.J., on the proposal of its First Advocate-General, may decide to “review” such a decision of the C.F.I. if there is “a serious risk of the unity or consistency of Community law being affected”.²¹

The C.F.I. for obvious reasons cites E.C.J. case-law on a daily basis (and the Civil Service Tribunal cites both higher courts) but it may also occasionally happen that the E.C.J., or its Advocates-General, cite a judgment of the C.F.I., not only in dealing with an appeal, but more as a source of inspiration especially in cases where there are scant or no rulings from the E.C.J. itself on a particular point of law.²²

The next or *second* category concerns the special relationship which exists between the E.C.J. and national courts of the EU Member States faced with problems of interpretation or validity of EU law, notably Community ‘First Pillar’ law. In this case there is not a relation

¹⁸ **M. BRONCKERS**, “The Relationship of the EC Court with Other International Tribunals”, *supra* note 11, pp. 625-626.

¹⁹ On the role of the C.F.I. and its relationship with the E.C.J., see, notably: **K. LENAERTS**, “Le Tribunal de première instance des Communautés européennes: Regard sur une décennie d'activités et sur l'apport du double degré d'instance au droit communautaire”, *Cahiers de droit européen*, 2000, pp. 323-411.

²⁰ See, e.g., **C.F.I.**, Case T-177/01, *Jégo-Quéré*, 2002 ECR II-2365, set aside by the **E.C.J.** in Case C-263/02 P, 2004 ECR I-3425; see also: **E.C.J.**, Case C-50/00 P, *Unión de Pequeños Agricultores*, 2002 ECR I-6677.

²¹ Articles 62-62(b) of the Statute of the Court of Justice [Protocol No 6 annexed to the TEU, the ECT and the Treaty establishing the European Atomic Energy Community].

²² **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, p. 207.

of vertical hierarchy in the sense that the E.C.J. does not function as a court of appeal being empowered to annul let alone modify judgments of national courts. On the other hand, the preliminary rulings that the national judge requests from the E.C.J. by virtue of Article 234 ECT are not only binding on the national judge making the request but they also function more generally as canons of interpretation for all courts and authorities of all the Member States, and this in the context of the principle of supremacy (primacy) of EU law.²³ The preliminary ruling given by the E.C.J. moreover applies in principle retroactively, going back to the entry into force of the norm that has been interpreted.²⁴

Failure to respect such an interpretation, or failure of a court of last instance to request a ruling even if there are doubts on the correct interpretation of EU law or the validity of a Community act, could lead to an infringement case started by the Commission, or a *Francovich*-type action for damages instigated by a private person, against the Member States concerned. In response to a reasoned opinion by the European Commission, Sweden has recently amended its legislation destined to remind its courts of last instance of their obligation to use, if need be, the Article 234 procedure.²⁵ In *Köbler* (2003), the ECJ held that liability of the Member State may in principle arise also in cases where the alleged infringement consists of the refusal of a national court of last instance (such as a Supreme Court) to request a preliminary ruling.²⁶ Failure of a court of last instance to request a preliminary ruling may also trigger an obligation, under certain conditions, to review a decision that has become final as a result of a judgment of that court which, in the light of a subsequent ruling of the E.C.J., turns out to constitute a misinterpretation of EU law.²⁷

²³ On the relationship between EU law and national law and EU courts and national courts in general see, e.g., **M. CLAES**, *The National Courts' Mandate in the European Constitution*, *supra* note 4, *passim*.

²⁴ The E.C.J. has held that “the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force”, see. e.g.: **E.C.J.**, Case C-292/04 *Meilicke*, judgment of 6 March 2007, n.y.r., § 34. In this judgment, the E.C.J. also confirmed that it cannot limit the application in time (*rationae temporis*) of its judgment in relation to one Member State only but that such temporal limitation must apply to all Member States under the principle of equal treatment [§§ 35-37].

²⁵ **M. SCHMAUCH**, “Sweden Introduces National Measures to Protect the Expectations of Individuals regarding the Application of Article 234 EC”, *European Law Reporter*, 2006, pp. 425-435; **Swedish Law relative to Preliminary Rulings from the EC Court [Lag med vissa bestämmelser om förhandsavgörande från EG-domstolen]**, 24 May 2006, *Svensk författningssamling*, 14 June 2006, SFS:502.

²⁶ **E.C.J.**, Case C-224/01, *Köbler*, 2003 ECR I-10239.

²⁷ **E.C.J.**, Case C-453/00, *Kühne & Heitz*, 2004 ECR I-837. The scope and meaning of this judgment may be elucidated by Case C-2/06 *Kempter* pending at the time of writing.

On the other hand, there *is* a dialogue between the E.C.J. and national courts in the sense that it is up to the latter to formulate the questions that they wish to have a preliminary ruling on. While the questions may sometimes be re-formulated by the E.C.J., this is done to increase the usefulness of the answer for the national court. The national court may also suggest an answer or outline optional answers in its order of reference,²⁸ in which case this may also be reflected in the E.C.J. judgment. On the other hand, the E.C.J. is not in the habit of citing other national courts than the referring court in its ruling, unless it is necessary for understanding national law on a certain point.²⁹ The E.C.J., of course, is not authorised to interpret purely national law. It should also be noted that in preliminary ruling cases, it is up to the national judge to decide definitively the entire case before him.

The *third* category of ‘judicial dialogue’ would be the ‘semi-vertical’ relation which exists, for instance, between the E.C.J. and the Strasbourg Court (the E.C.H.R.). Another example could be the relationship between the European Court and the WTO Appellate Body or on points of general customary international law, between it and the I.C.J. I am thus thinking about a situation where the EU has committed itself to a certain set of international norms and this international regime provides for a court or other dispute settlement mechanism. To what extent should the ECJ take into account especially binding decisions taken by such adjudicatory mechanisms?

In the case of the WTO the commitment of the EU is a formal and express one, as the EU (in the name of the EC) is a Contracting Party to the 1994 WTO Agreements. As is well known, the ECJ does not recognise the direct effect of these agreements in view of their special system of implementation, but that does not mean that the WTO Agreements are not part of the EU legal order and that they cannot be used as interpretative tools.³⁰ That is why

²⁸ See **E.C.J.**, *Information Note on References from National Courts for a Preliminary Ruling*, 2005, *Official Journal*, 11 June 2005, C 143, § 23: “Finally, the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling”, <http://curia.europa.eu/en/instit/txtdocfr/autrestxts/txt8.pdf>.

²⁹ **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, p. 207.

³⁰ **A. ROSAS**, “Case Annotation on Case C-149/96, *Portugal v Council*, judgment of the Full Court of 23 November 1999”, *Common Market Law Review*, 2000, pp. 797-816; **A. ROSAS**, “Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective”, *Journal of International Economic Law*, 2001, pp. 131-144, at pp. 138-139; **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, pp. 218 and 226-227. The lack of direct effect of WTO rules in the Community legal order has been reaffirmed, *e.g.*, in **E.C.J.**, Case C-377/02, *Van Parijs*, 2005 ECR I-1465.

the E.C.J., in the case of *Anheuser-Busch* (2004), cited two different decisions of the WTO Appellate Body as authoritative interpretations of the TRIPS Agreement.³¹

In the case of the Strasbourg Court and the European Convention on Human Rights, the commitment is less formal in the sense that the EU or the EC is not -at least not yet- a Contracting Party to the European Convention. But the EU has in the EU Treaty committed itself to respect fundamental rights, “as guaranteed” by that Convention.³² Since the 1980s, the E.C.J. has held that the European Convention has “special relevance” in determining what fundamental rights have become general principles of Community law.³³

In actual practice, the Luxembourg judges follow very closely the case-law of the Strasbourg Court. Since the mid-1990s, the E.C.J. and the C.F.I. cite the E.C.H.R. on a regular basis in their judgments. It should be added that the E.C.H.R., too, from time to time cites the case-law of the Luxembourg courts.³⁴ While the European Convention is not part of the Community legal order in the formal sense, the policy of the EU Courts seems to be based on an intention to avoid that European human rights and fundamental rights law takes on two different strides. That could create problems especially for the EU Member States, as in the application and implementation of EU law, they could be faced with conflicting interpretations, one from Luxembourg, the other from Strasbourg. While in the context of EU law, the Luxembourg interpretation would arguably prevail by virtue of the principle of primacy of EU law, the Member State complying with the EU interpretation could later find

³¹ **E.C.J.**, Case C-245/02, *Anheuser-Busch*, 2004 ECR I-10989, §§ 49 and 67; see also: **C.F.I.**, Case T-274/02, *Ritek Corp.*, 2002 ECR II-4305, §§ 89-108; compare: **M. BRONCKERS**, “The Relationship of the EC Courts with Other International Tribunals”, *supra* note 11, at p. 616, who claims that “essentially, the EC courts fail to appreciate that WTO rulings do produce legal effects”; it is submitted, however, that Bronckers here confuses the question of the legal nature of the WTO dispute settlement rulings with the questions of whether WTO norms have direct effect and whether individuals can claim damages if WTO norms have been violated [see *ibid.*, pp. 611-612 and 615-616]; the fact that (adopted) panel and Appellate Body rulings are binding does not necessarily mean that WTO norms have direct effect under Community law, nor does it settle the question of liability and compensation; to take another example, while the UN Law of the Sea Convention provides for binding dispute settlement mechanisms [*infra* at note 41], the direct effect in Community law of that Convention is another matter.

³² Article 6 § 2 TEU; see also: Article 46 (d) concerning the jurisdiction of the E.C.J.

³³ **A. ROSAS**, “Fundamental Rights in the Luxembourg and Strasbourg Courts”, in **C. BAUDENBACHER, PER TRESSELT and THORGEIR ÖRLYGSSON**, *The EFTA Court: Ten Years On*, Oxford, Hart, 2005, pp. 163-175, at 168-171; see also: **V. SKOURIS**, “The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions”, in *id.*, pp. 123-129, at p. 127.

³⁴ *Ibid.*, pp. 171-172.

itself in the uncomfortable situation of facing a finding in Strasbourg of a violation of the European Convention.³⁵

It should be added that contrary to what sometimes seems to be assumed in legal literature,³⁶ I am not aware of a single case where the E.C.J. has gone clearly against an interpretation advanced by the European Court of Human Rights.³⁷ Thus formal EU adherence to the European Convention, envisaged in the mandate for the Reform Treaty currently being negotiated,³⁸ would not in my view change things radically, although it is of course true that through this device the Convention would as such become an act of Community law rather than a particularly important guideline informing us of the content of the general principles of Community law.

As the E.C.J. has acknowledged that the EU is bound by general, customary international law, it is only natural that it also may cite what is perhaps the most authoritative interpreter of general international law, that is, the I.C.J. There are several cases where this has been done, with respect to substantive international law mainly relating to the law of the sea, and with respect to procedural law mainly the law of treaties.³⁹ The EU cannot be a party in a dispute before the I.C.J. but that has not prevented the ECJ to recognise the World Court as an important dispute settlement mechanism of global dimensions.

³⁵ In its judgment of 30 June 2006 in the Case of *Bosphorus v. Ireland*, the **E.C.H.R.** held that there is a “presumption” that a Member State implementing legal obligations flowing from its membership in the EU has not violated the European Convention (as the EU has developed a system of human rights protection “equivalent” to the Strasbourg system) but that that presumption can be rebutted “if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient” [§ 156]; see also: **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, pp. 216-217; and, more generally, **A. CLAPHAM**, “The European Union before the European Court of Human Rights”, in **L. BOISSON DE CHAZOURNES, C. ROMANO and R. MACKENZIE**, *International Organisations and International Dispute Settlement: Trends and Prospects*, New York, Transnational, 2002, pp. 73-88.

³⁶ See, e.g., **C. TURNER**, “Human Rights Protection in the European Community: Resolving Conflict and Overlap between the European Court of Justice and the European Court of Human Rights”, *European Public Law*, 1999, pp. 453-463, with references.

³⁷ And in Case C-94/00, *Roquette Frères*, 2002 ECR I-9011, § 29, the **E.C.J.** reversed its ruling in Joined Cases 46/87 and 227/88, *Hoechst*, 1989 ECR 2859, as “regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*”; see also: **J. MISCHO**, “*Hoechst, Colas, Roquette*: illustration d’une convergence”, in **N. COLNERIC et al.**, *Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias*, Berlin, Berliner, 2003, pp. 137-145.

³⁸ See *supra*, at note 6.

³⁹ **A. ROSAS**, “With a Little Help from My Friends”, *supra* note 12, pp. 222-226; for an example, see **E.C.J.**, Case C-286/90, *Poulsen*, 1992 ECR I-6019, § 10.

As to the UN Convention on the Law of the Sea, the EU is both a Contracting Party⁴⁰ and can be a party before two of its three main dispute settlement mechanisms, that is, arbitration and the Law of the Sea Tribunal in Hamburg. As the EU has not accepted generally the jurisdiction of the Tribunal, arbitration remains the only obligatory mechanism for the EU.⁴¹ But as the *Swordfish* Case between the EU and Chile demonstrates,⁴² the EU can always accept the jurisdiction of the Hamburg Tribunal *ad hoc*. I am not aware of any judgment from the ECJ citing the Hamburg Tribunal, but I suspect this is simply due to the fact that the case-law of this Tribunal cannot be described as extensive and that there has so far been no case before the E.C.J. raising questions already decided by the Hamburg Tribunal. One cannot perhaps exclude that the I.C.J. and the Hamburg Tribunal came up with differing interpretations. Such an effect of the proliferation of international courts could put the E.C.J. or other courts having to apply the Law of the Sea Convention before an interesting dilemma. To my knowledge, the E.C.J. has never been confronted by the existence of two conflicting judgments arising from a situation of overlapping jurisdictions of international courts.

It should be underlined that the use by the E.C.J. of the case-law of international tribunals such as the I.C.J., the WTO Appellate Body or the E.C.H.R. does not necessarily mean that the E.C.J. is legally ‘bound’ by their judgments, at least in the strict sense of the term. It is true that the E.C.J. has observed that it would be ‘bound’ by decisions of dispute settlement mechanisms contained in agreements binding the Community,⁴³ but one wonders whether this statement was meant to apply to all such mechanisms and/or whether the intention was really to rule out any margin of appreciation for the EU courts.⁴⁴

⁴⁰ **EU Council**, *Decision 98/392*, 23 March 1998, Official Journal, 23 June 1998, L 179.

⁴¹ **A. ROSAS**, “International Dispute Settlement”, *supra* note 11, pp. 301-302; **A. ROSAS**, “EU ja kansainvälinen merioikeus” [“EU and the International Law of the Sea”], in **K. KOIVUROVA**, *Kansainvälistyvä oikeus. Juhlakirja professori Kari Hakapää*, Rovaniemi, University of Lapland, 2005, pp. 419-440.

⁴² **International Tribunal for the Law of the Sea**, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community)*, Case No. 7. The proceedings have been suspended for a long time and are at the time of writing still suspended, as the two parties have tried to settle the dispute by negotiation; see, e.g., **A. ROSAS**, “International Dispute Settlement”, *supra* note 11, pp. 301-302; **M.O. ORELLANA**, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, *Nordic Journal of International Law*, 2002, pp. 55-81.

⁴³ **E.C.J.**, *Opinion 1/91*, *supra* note 9, § 39; **M. BRONCKERS**, “The Relationship of the EC Courts with Other International Tribunals”, *supra* note 11, pp. 606 and 618.

⁴⁴ See also: **M. BRONCKERS**, “The Relationship of the EC Courts with Other International Tribunals”, *supra* note 11, pp. 618-627, who advocates that the EU courts “should normally follow” the interpretation of an international agreement given by an international tribunal but that that “presumption” could be “overturned in limited circumstances” [pp. 621-622]. In the Case T-274/02 *Ritek Corp.*, *supra* note 31, the C.F.I. saw no need

In this context of “semi-vertical” judicial dialogue between the E.C.J. and some international courts, it may be appropriate to note that public international law and EU external relations issues, while not quantitatively very significant in the case-law of the E.C.J., are not on their way of diminishing in importance. On the contrary, some fairly high-profile cases have been recently decided or are actually pending before the Court. Among the former one can mention the *IATA Case* (2006) on the validity of Community legislation on air passengers rights in view of, inter alia, the Montreal Convention for the unification of rules for international carriage by air,⁴⁵ *Opinion 1/03* (2006) on the exclusive competence of the EU to conclude the Lugano Convention on jurisdiction of courts and enforcement of judgments,⁴⁶ the *Mox Plant Case* (2006) on disputes between EU Member States under the UN Law of the Sea Convention and the status of the Convention in the Community legal order⁴⁷ and the *Passenger Name Records Case* (2006) on the legality of agreements between the EU and the US on the transfer of passenger data from the former to the latter.⁴⁸ Among pending cases, it suffices to note that on 2 October 2007, the E.C.J. had an oral hearing in the well-known *Yusuf* and *Kadi* cases which are on appeal against the judgments of the C.F.I. and concern sanctions against terrorism and the relationship between EU law and international law, notably UN Charter law.⁴⁹

In the context of the UN Convention on the Law of the Sea, I mentioned the possibility of overlapping jurisdiction. My *fourth* category concerns, in fact, the existence of such overlapping or ‘competing’ jurisdiction,⁵⁰ in other words a situation where at least two international courts, less often national courts, have jurisdiction over the same issue. Such a situation would often give the parties a possibility of ‘forum shopping’. An obvious example which was already mentioned above concerns the overlapping jurisdiction of the I.C.J. and the Law of the Sea Tribunal in Hamburg. The same dispute could go to either of the two, if the parties have accepted their jurisdiction either generally or *ad hoc*. As already noted, it could

“to rule on whether the Community judicature is bound by the recommendations and decisions contained in the reports of the Dispute Settlement Body established within the WTO” [§ 98].

⁴⁵ E.C.J., Case C-344/04, *International Air Transport Association*, 2006 ECR I-403.

⁴⁶ E.C.J., *Opinion 1/03*, 2006 ECR I-1145.

⁴⁷ E.C.J., Case C-459/03, *Commission v Ireland*, 2006 ECR I-4635.

⁴⁸ E.C.J., Case C-317/04 and C-318/04, *Parliament v. Council and Commission*, 2006 ECR I-4721.

⁴⁹ E.C.J., Case C-402/05 P, *Kadi*, and Case C-415/05 P, *Yusuf*, pending on appeal from the C.F.I., Case T-315/01, *Kadi*, 2005 ECR II-3649; Case T-306/01 *Yusuf*, 2005 ECR II-3533.

⁵⁰ Y. SHANY, *Competing Jurisdictions*, *supra* note 3.

also go to arbitration which is a third possibility, depending on what the parties have agreed to.

Article 292 ECT confers exclusive jurisdiction on the European Court of Justice in matters of Community law so here the risk of overlapping jurisdictions is minimal to the extent that Article 292 is respected. A problem arose in the *Mox Plant* Case already mentioned above.⁵¹ In that case, the Commission successfully brought Ireland to court for having resorted to extra-EU dispute settlement procedures in its dispute with the UK, thus another EU Member State, in a case concerning the interpretation of the Law of the Sea Convention, which as was noted above has been concluded by the EC. The main legal problem in this case arose from the fact that the Law of the Sea Convention is a so-called mixed agreement, in other words has been concluded by both the EU and its Member States, and there was thus uncertainty as to what parts of the Convention have become Community law to such an extent and intensity that Article 292 ECT bars the jurisdiction of international dispute settlement mechanisms other than the E.C.J.⁵² As the E.C.J. concluded that Ireland could not resort to arbitration in its dispute with the United Kingdom, the outcome was the elimination of overlapping jurisdiction and the judicial dialogue which might accompany it.

My last and *fifth* category can be called *horizontal* judicial dialogue, by which I mean dialogue taking place between courts which are more or less at the same level. These courts may belong to the same judicial system (for instance, two national courts of appeal) but they may also belong to different regimes (for instance, national courts in different countries). In the latter respect, there seems to be a certain tendency in many countries of national judges looking at what their neighbours are doing. Sometimes they cite judgments from other jurisdictions. There are obvious differences between national systems in this regard.⁵³ It is sometimes a one-way street, devoid of reciprocal dialogue.

As to the EU system, the EFTA Court seems to offer the best example of a court with which the E.C.J. is engaged in a relationship of horizontal dialogue. But when the EFTA Court, as it routinely does, cites the EU courts it does so more in the context of 'vertical' or at

⁵¹ E.C.J., Case C-459/03, *Commission v Ireland*, *supra* note 47.

⁵² For a thorough discussion on the substantive and procedural issues involved see, e.g., R. CHURCHILL and J. SCOTT, "The Mox Plant Litigation: The First Half-Life", *International and Comparative Law Quarterly*, 2004, pp. 643-676.

⁵³ See the materials based on a symposium on globalisation and the judiciary mentioned *supra*, note 16.

least ‘semi-vertical’ dialogue (my three first categories above). This is not only because the legal material which is applied and interpreted, the Agreement on the European Economic Area (henceforth, “EEA”) and accompanying EEA law, is sometimes identical or at least similar, but because there is an obligation enshrined in the EEA Agreement that identical rules in the EEA Agreement “be interpreted in conformity with the relevant rulings of the [E.C.J.] given prior to the date of signature of this Agreement”.⁵⁴ As far as E.C.J. rulings which have been given *after* the EEA Agreement entered into force are concerned, the EFTA Court should “pay due account to the principles laid down by the relevant rulings” of the E.C.J.⁵⁵ In practice, the difference between the two obligations is minimal, to say the least.⁵⁶

As to the E.C.J., there is no obligation to interpret EU law in conformity with the decisions of the EFTA Court. But it does occur from time to time that the E.C.J. cites EFTA Court judgments. This may happen especially if the E.C.J. deals with a point of law which has not been settled by itself (or the C.F.I.) in a previous judgment. It may then cite an EFTA Court judgment, provided that it can agree with it. There are also examples where the EU approach would be somewhat different from that of the EFTA Court because of the differences in the two legal orders, the EU legal order implying a higher degree of integration.⁵⁷

The search light of the E.C.J. does not necessarily stop at the EFTA Court but the Court may occasionally take a look at what courts in third countries, such as the U.S. Supreme Court, are up to. While the E.C.J. is not in the habit of citing, for instance, US case-law, this has been done in the descriptive parts of a few judgments and more often by some of the Advocates-General.⁵⁸ In areas such as competition law and intellectual property law it may be useful to take into account developments outside the EU as well, without of course being in any way bound to follow.

⁵⁴ Article 6 of the EEA Agreement.

⁵⁵ Article 3 § 2 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [ESA/Court Agreement].

⁵⁶ C. BAUDENBACHER, “The EFTA Court Ten Years On”, *supra* note 33, pp. 13-51, at p. 20; V. SKOURIS, “The ECJ and the EFTA Court under the EEA Agreement”, *supra* note 33, p. 124.

⁵⁷ A thorough analysis is provided by C. BAUDENBACHER, “The EFTA Court Ten Years On”, *supra* note 33, at pp. 20-48.

⁵⁸ A. ROSAS, “With a Little Help from My Friends”, *supra* note 12, pp. 205-206.

IV. Concluding remarks

The five situations I have described bring out the fact that ‘judicial dialogue’ can cover many different things. There are many forms and patterns of judicial cooperation, judicial dialogue and judicial openness. Sometimes a judge is more or less bound to follow what another judge has ruled (for instance, the EFTA Court with respect to E.C.J. case-law preceding the entry into force of the EEA Agreement). Sometimes a ‘must’ or a ‘shall’ becomes a ‘should’. An example of a ‘should’ relationship exists in my view between the E.C.J. and the E.C.H.R.; especially in what I called horizontal judicial dialogue (category 5 above), it is at most a question of a ‘may’. But even in the last-mentioned case, judges should be aware of what their colleagues in other jurisdictions are doing, notably if there are similar problems to be solved and similarities in the norm systems applied.

As legal systems and subsystems are interacting in a pluralist world and a pluralist Europe, courts must interact too. This is particularly important in the articulation of *values* and *general principles* of law. As I noted at the outset, the patchwork of authorities we are facing calls for some stability, consistency and predictability and values and general principles play a role in this respect. They serve as road-signs and yardsticks for the legislator, the judge and other decision-makers. They may at best help to mitigate the hardships and anxieties felt by many in a sea of change. Values and general principles should emerge and evolve in a deliberative process, where judges and other decision-makers interact in a search for *general acceptability*. The distinction between applicable law and ‘foreign’ law becomes a matter of degree rather than an iron-clad curtain. Values and principles are not closed systems neither geographically nor temporally but draw upon national, regional and universal sources as well as past, present, and future exigencies. It goes without saying that not all values and principles are of universal scope but may reflect specificities of a certain region, sub-region, or country.⁵⁹

Judicial cooperation and judicial dialogue is not just a question of studying and citing judgments from other courts. A genuine dialogue requires some reciprocity and an exchange of views and experiences. The E.C.J., for its part, is actively engaged in an on-going series of

⁵⁹ For instance, in Case C-144/04, *Mangold*, 2005 ECR I-9981, the E.C.J., held that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. This does not necessarily mean that the prohibition of age discrimination has already become a universal principle.

contacts and discussions with other courts and their judges. The C.F.I. and the Civil Service Tribunal are a special case as they belong to the same institution in the broad sense. The EFTA Court is not far away, neither geographically nor intellectually. Judges from the national courts of the EU Member States visit the E.C.J. almost on a weekly basis and round table discussions and other joint events are frequent. From time to time, the E.C.J. also pays official visits to the Member States, including sometimes non-member countries,⁶⁰ normally at the invitation of their supreme and/or constitutional courts. With the E.C.H.R., there are meetings either in Strasbourg or Luxembourg on a regular basis.⁶¹ Judges from courts from outside the EU area, including African and Latin American regional courts, sometimes visit the E.C.J. With the US Supreme Court, there is a fairly regular exchange of views and organisation of joint seminars.⁶² At the time of writing (October 2007), upcoming events include a meeting of international courts and tribunals organised by the I.C.J. and a (first ever) visit to the E.C.J. by the WTO Appellate Body.⁶³

The need for such contact will not disappear. What goes on in the deliberation room of the E.C.J. remains a secret,⁶⁴ but that does not prevent the E.C.J. from participating in a broader space of judicial dialogue and cooperation. Such dialogue and cooperation has, in fact, become an important part of the judicial profession.

⁶⁰ During the last years, such visits have included Switzerland and the People's Republic of China.

⁶¹ The next meeting will take place in Strasbourg, in November 2007.

⁶² The most recent occasion was a seminar at the US Supreme Court in Washington D.C., in February 2007.

⁶³ Both events will take place in December 2007.

⁶⁴ See Articles 2 and 35 of the Statute of the Court of Justice.