than one judge at the same time, precisely because no single body had general competence of the sort that could guarantee the protection of all the interests involved.[76]

[76] It is in this sense that the claim by Tullio Treves in the context of the *Swordfish* controversy, that "...neither of the two available dispute settlement mechanisms could cover the whole of the 'real dispute'" can be interpreted. *See* Treves, *supra* note 55, at 862.

CHAPTER IV

THE JUDGE-MADE ORDER

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I. "JUDICIAL DIALOGUE"

NATIONAL and global legal orders, as illustrated above, sometimes converge; more often, however, they diverge – and turn, in cases of conflict, to bodies that are judicial in nature for their resolution. We must, then, at this point, inquire as to how these bodies decide conflicts. Are they concerned only with the specific case before them or do they, conscious of the absence of a "connective tissue" holding this atomized universe together, also seek to establish general rules for coexistence between legal orders?

The central focus of this inquiry is, as already noted, the different methods employed by judges for the regulation of the relations between legal orders. This issue does not concern the relations between national orders alone, which have already been the subject of numerous studies.[77] The problem that I will examine in what follows covers both the relations between national, supranational and global legal orders (a vertical dimension) and those between different global legal orders (a horizontal dimension). Examining these different types of relations side by side will enable us to draw more general – and more interesting – lessons for the future.

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[77] *See, e.g.*, the work of Anne-Marie Slaughter, who has analyzed regulation developed by national courts (Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L LJ. 191 (2003)); or that of Julie Allard and Antoine Garapon, who have highlighted the emergence of a "society of courts," and of judge-lieutenants and judge-ambassadors (JULIE ALLARD & ANTOINE GARAPON, LA MONDIALIZZAZIONE DEI GIUDICI. NUOVA RIVOLUZIONE DEL DIRITTO 5 (2006)).

An investigation of this sort can also enable us to ascertain the degree to which the process of "denationalization of law" (i.e., the "movement" of law beyond the frontiers of the State) has developed; to examine by which methods – and not with which results – judges operate as decision-makers of final instance on the different legal levels, building "bridges" between orders; to consider the interaction between the fragmentation of global regulatory regimes and the proliferation of courts; and to discern whether the conditions for the formation of a "general global law" are yet in existence.[78]

As noted at the outset, I am not concerned here with the definition of the principles of law affirmed by courts in the concrete cases before them, but rather with the modalities of elaboration and implementation of the different methods, capable of more general application, used in resolving conflicts between legal orders. That is to say, I am looking for rules of coexistence, "bridges" or linkages between such orders, created and implemented by judges. I am not interested in dialogue between courts in itself, but rather in the means by which judges establish connections between orders. In other words, the work of judges is analyzed here as a "link" between different legal regimes, in the absence of general norms that regulate these relations.[79] In this study, then, I focus on the norms regulating

[78] Not to mention allowing us to ascertain whether the theory of Santi Romano, set out in the second part of his *L'ordinamento giuridico*, has been realized in practice.

The major studies on the problem of the relations between legal orders and the role of courts in this are SANTI ROMANO, L'ORDINAMENTO GIURIDICO 85 ff. (2d ed. 1977), the two works mentioned above by YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 9, and REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS, *supra* note 9; Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Treves, *supra* note 55; Filippo Fontanelli & Giuseppe Martinico, *Alla ricerca della coerenza: Le tecniche del 'dialogo nascosto' fra i giudici nell'ordinamento costituzionale multi-livello*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 351 (2008).

[79] On this point, *see* Cassese,, *supra* note 2, at 609-626.

the interaction between many legal orders that have been identified by the courts of those orders themselves.

Before beginning, however, it may be useful to recall briefly the general context within which this study is situated. The problem stems from the absence of a general, pre-established hierarchy between legal orders; judges must, therefore, operate without general rules. It is connected, secondly, with the intrinsic weakness of the executive power of the State, which, as a rule, is charged with the management of foreign affairs. The foreign policy power of national executives is, for example, becoming less and less "exclusive" (think, for instance, of the recent creation of the European Arrest Warrant, in which a central role is given to judges and legislators, but not to governments); governments and parliaments are absent at the global level, whereas many extra-State quasi-judicial bodies already exist;[80] and national executives cannot intervene in the horizontal relations between global regimes.

Some have referred to the creation by judges of relations between legal orders as a "judicial dialogue" or "conversation." These terms can, however, create misunderstandings. Courts cannot, in fact, cooperate in resolving the cases brought before them. Informal contacts exist, but these do not fall within the normal conduct of judicial activity as courts cannot initiate processes *ex officio* (they have only a "passive role");[81] these processes are subject to procedural limitations and the decisions resulting from them cannot be of general applicability.

[80] It might be argued that the secretariats of international organizations represent forms of extra-state executive power. It should be noted, however, that these are, in reality, usually merely support organs; only in a very few cases do they constitute genuine executives or governments.

[81] Even if, through their decisions, they "govern" the demand for justice, accepting or rejecting requests for intervention.

For the purposes of this analysis, I have selected five different groups or types of cases. The first, which includes the *Simmenthal* case of the European Court of Justice,[82] Opinion No. 1/2004 of the Spanish *Tribunal Constitucional*,[83] and Judgment K 18/04 of the Polish Constitutional Tribunal,[84] concerns the relations between legal orders in the vertical dimension (between the Community legal order and those of its Member States in particular). The second, which includes the *Handyside* case of the European Court of Human Rights[85] and Judgments No. 348 and 349/2007 of the Italian Constitutional Court,[86] also concerns relations between orders in the vertical dimension, but this time between the Council of Europe and national legal orders. The third type of case is exemplified by the *Bosphorus* case of the European Court of Human Rights,[87] and concerns the interaction between two supranational legal orders: the European Community and the Council of Europe. The fourth group, consisting of the decision of the Arbitral Tribunal established under Article 287 of the UNCLOS in the *Mox Plant* case,[88] Decision C-495/03 of the European Court of Justice of the 30th of March 2006, and the *Kadi* judgment by the same court,[89] concerns the relation between global and supranational legal orders (the latter here represented by the EC). The fifth type, exemplified by the *Loewen* case before an ICSID Arbitral Tribunal,[90] concerns the relations between supranational (NAFTA) and national legal orders (those of the State of Mississippi and the United States).

[82] ECJ, *Simmenthal v. Italy*, case C-106/77 (28 June 1978).

[83] Judgment DTC 1/2004 (13 December 2004).

[84] Judgment K 18/04 (11 May 2004).

[85] ECtHR, *Case of Handyside v. The United Kingdom*, No. 5493/1972 (7 December 1976).

[86] Constitutional Court Judgments No. 348 and 349/2007 (24 October 2007).

[87] ECtHR, *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, No. 45036/98 (30 June 2005).

[88] Permanent Court of Arbitration (*ex* art. 287 UNCLOS), *The Mox Plant Case. Ireland v. United Kingdom* (24 June 2003).

[89] ECJ Grand Chamber, *Kadi* v *Council and Commission* and *Yusuf and Al Barakaat International Foundation* v *Council and Commission*, Cases C-402/05 P and C-415/05 P (3 September 2008).

[90] ICSID, *The Loewen Group et. al. v. United States of America*. Case No. ARB(AF)/98/3 (26 June 2003).

II. THE EUROPEAN COURT OF JUSTICE'S *SIMMENTHAL* JUDGMENT: THE PRIMACY OF EUROPEAN OVER NATIONAL LAW

The judgment of the ECJ in the *Simmenthal* case is well known.[91] It is here that the judges established the general principle of the primacy of Community law. This principle does not entail the invalidity of incompatible national laws, but simply treats such laws as non-applicable, even if they were enacted subsequent to the European norm in question.[92]

The most important passages of the judgment are those in which the Court formulated a number of rules on the relationship between Community law and the national laws of Member States (from ¶ 13 onwards). The Court reasoned in the following manner: first of all, the notion of direct applicability of Community norms within the national legal orders of Member States means that the former must be given "full effect." The Court made reference not to the validity of the norms, but rather to their "effectiveness," on the basis of a principle of "conformity" (¶ 14).

[91] There exists a vast literature on the *Simmenthal* case. See, in particular, Mario Berri, *Brevi riflessioni sulla "lezione" della Corte comunitaria*, I Giurisprudenza italiana 1153 (1978); Francesco D. Riccioli, *Preoccupanti contrasti tra Corte comunitaria e Corte Costituzionale*, IV Il Foro Italiano 204 (1978); Nicola Catalano, *I mezzi per assicurare la prevalenza dell'ordinamento comunitario sull'ordinamento interno*, I Giustizia civile 816 (1978); Paolo Barile, *Un impatto tra il diritto comunitario e la Costituzione italiana*, I Giurisprudenza costituzionale 641 (1978); Luigi Condorelli, *Il caso Simmenthal e il primato del diritto comunitario: due corti a confronto*, I Giurisprudenza costituzionale 669 (1978); Sergio M. Carbone & Federico Sorrentino, *Corte di giustizia o corte federale delle Comunità europee?*, I Giurisprudenza costituzionale 654 (1978); Giuseppe Sperduti, *La prevalenza, in caso di conflitto, della normativa comunitaria sulla legislazione nazionale*, Rivista trimestrale di diritto pubblico 3 (1979).

[92] It should be noted that this "non-applicability" is distinct from "disapplication," which concerns only administrative acts.

Secondly, the judges noted that the "full effect" of Community norms can only be achieved through their uniform application within Member States, from the date of their entry into force onwards (¶ 14).

Thirdly, Community norms are a direct source of rights and obligations for all those affected thereby (including Member States, individuals and judges) (¶ 15 and ¶16).

Fourthly, in virtue of the principle of the primacy of Community law, the relationship between provisions of the EC Treaty and directly applicable measures of the Community institutions on the one hand, and the national law of the Member States on the other, is such that those provisions and measures not only render inapplicable *ipso iure* any conflicting provision of current national law, but also preclude the adoption of new national legislative measures where these would be incompatible with Community provisions.

Fifthly, any recognition that national legislative measures that encroach upon the spheres within which the Community exercises legislative power had any legal effect would amount to a denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States, and would thus call into question the very foundations of the Community legal order. It is in this sense, for example, that Article 234 of the EC Treaty, which contains rules on references for preliminary rulings,[93] should be interpreted. Indeed,

[93] Article 234 of the EC Treaty provides as follows: "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; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under

the fact that provision has been made for references by national judges to an appropriate judicial body (the European Court of Justice) in cases of incompatibility between internal and Community rules, in order that the latter body verify the "conventionality"[94] of the contrasting national rule, itself implies recognition of the special nature and superiority of Community law.

It is worth noting that in this judgment (and, in particular, in ¶¶ 20-24), the Court clarifies the doctrine of direct effect and applicability of Community legislation without ever mentioning the validity of conflicting "inferior" rules.[95]

national law, that court or tribunal shall bring the matter before the Court of Justice."

[94] The "principle of conventionality" comes from French legal doctrine, referring to the constitutionality of domestic norms with respect to the European Treaties.

[95] These paragraphs of the judgment read as follows: "20. The effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court; 21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule; 22. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law; 23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary; 24. The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."

III. DECLARATION NO. 1/2004 OF THE SPANISH *TRIBUNAL CONSTITUCIONAL*: THE DIFFERENCE BETWEEN SUPREMACY AND PRIMACY

In 2004, the Spanish Constitutional Court[96] was called upon to rule on the ratification of the Treaty containing the text of the European Constitution.[97] Article 95(2) of the Spanish Constitution provides that either the Government or one of the two legislative chambers can request a declaration from the Tribunal as to whether there exists a contradiction between a given clause of an international treaty and the Constitution.[98] Article 93 provides that authorization may be granted, by means of an organic law, for the conclusion of treaties that attribute to an international organization or institution the exercise of competences derived from the Constitution. Moreover, the same provision establishes that it is the responsibility either of Parliament or of the Government, depending on the case in question, to guarantee compliance with these treaties and the resolutions emanating from the international or supranational organizations to which these competences have been devolved.[99]

[96] An analysis of this case is contained in Fontanelli & Martinico, *supra* note 78.

[97] The first project for a European Constitution was contained in a Treaty signed in Rome in 2004 (Treaty establishing a Constitution for Europe, Brussels, 13 October 2004). The more recent Treaty of Lisbon of 13 December 2007 modified the original text in a number of ways, among which was the elimination of any reference to the constitutional nature of the Treaty.

[98] Article 95 of the Spanish Constitution provides as follows: "*1. La celebración de un tratado internacional que contenga estipulaciones contrarias a la Constitución exigirá la previa revisión constitucional. 2. El Gobierno o cualquiera de las Cámaras puede requerir al Tribunal Constitucional para que declare si existe o no esa contradicción.*"

[99] The text of Article 93 is as follows: "*Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cesión.*"

On the basis, then, of Article 95(2) of the Spanish Constitution, and in order to fulfill its responsibilities under Article 93, the Spanish Government asked the *Tribunal Constitucional* to examine whether there was any contradiction between the provisions of the Constitution and those of the European Treaty (in particular Article I-6).[100]

The Declaration of the Constitutional Court was – as the Court itself noted – a decision of "anticipatory jurisdictional defense" or, in other words, a preliminary judgment of a "precautionary" – if both judicial and binding – nature.[101] It was, therefore, an "abstract" judgment in that it related to norms that were not yet in force.

The Court set out its reasoning in four points. Firstly, it observed that European law must assert its own primacy, and that the assertion of this superiority presents itself as an "existential requirement" [*exigencia existencial*]. In other words, the existence of European law depends upon the recognition of its primacy.

Secondly, the Court noted that European law contains the principle of respect for the identities and the laws of Member states, guaranteeing the existence of national legal orders, and respecting their values, principles and fundamental rights.[102]

Thirdly, the Court observed that European law was not general and all-inclusive in nature. It applies only in the spheres of compe-

[100] Article I-6 establishes that "the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." The other Articles of the Treaty indicated in the reference were II-111 and II-112, relating to fundamental rights.

[101] On this issue, *see* Paragraph 2, Point 1 of the Opinion: "*…Se si prefiere, al cometido jurisdiccional proprio de este Tribunal se le añade, en virtud de su ejercicio preventivo, una dimensión cautelar al servicio de la salvaguardia de la responsabilidad internacional del Estado…*"

[102] See Articles I-2 and I-5 of the Treaty establishing a Constitution for Europe.

tence of the Union, ceded by States in the exercise of their sovereignty, on the basis of the principle of "attributed competences."[103]

Lastly, the Court declared that no contradiction existed between the primacy of European law and the supremacy of constitutional law, both because the former does not apply in all matters, and because it applies without prejudice to constitutional principles, which thus prevail. The Spanish Constitutional Court thus placed the internal sources system, whose hierarchical structure dictates that constitutional law prevails in cases of conflict, side by side with the different, European normative system. The European system, in turn, prevails over national rules – without, however, supplanting the Constitution, the principles of which it must respect. This reasoning is based upon a distinction between supremacy, understood as a rule of the internal system, on one hand, and primacy, which applies to the European system, on the other.[104]

[103] This principle has its basis in the old German doctrine of the "self-limitation" of the State in matters relating to fundamental rights. According to that doctrine, fundamental rights guarantees derive from a self-limiting act of the State, and not from the direct recognition of those rights in citizens.

[104] Indeed, in Paragraph 4 of the declaration, the *Tribunal* established that "supremacy is manifested in the hierarchically superior nature of a given norm, which for that reason becomes the source of legitimacy of the subordinate norms, implying as a result the invalidity of the latter where these are in contravention of its binding provisions. Primacy, on the other hand, does not necessarily entail a hierarchical relationship, but rather a distinction between the sphere of application of different but valid norms, where one or more of these nevertheless has the capacity to displace the others in virtue of a doctrine of preferential application or of prevalence that can be based on a variety of different reasons. In principle, supremacy always implies primacy, excepting cases in which the superior norm has made provision for, in certain areas, its own displacement or inapplicability. The supremacy of the Constitution is, therefore, compatible with rules of application that recognize that preference should be given to norms of an order other than the national one on the condition that the Constitution itself has so provided – which is precisely what happens in Article 93." *See* Angelo Schillaci, *Il tribunale costituzionale spagnolo e la Costituzione europea*, available at www.associazionedeicostituzionalisti.it/cronache/estero/spagna_europa/; Francesco Duranti, *Il tribunal constitucional e la nuova Costituzione europea*, 2005, available at www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=134; Araceli

IV. JUDGMENT K 18/04 OF THE POLISH CONSTITUTIONAL TRIBUNAL AND ITALIAN CONSTITUTIONAL JURISPRUDENCE: THE DOCTRINE OF "COUNTER-LIMITS"

Judgment K 18/04 of the Polish Constitutional Tribunal concerned Poland's accession to the European Union.[105] Three parliamentary groups from the lower chamber of the Polish Parliament (the Sejm) requested that the Constitutional Tribunal ascertain the conformity of the Treaty concerning the accession of the Republic of Poland to the European Union, read in conjunction with certain provisions of the EC and EU Treaties, with the Polish Constitution. The Tribunal's competence to make this type of judgment is established in and regulated by Article 88 of the Constitution.

The issue confronting the Tribunal was that of the relationship between internal and Community law: if Community law is superior to its internal counterpart, internal rules must conform to those of the Community; how, then, can the problem that arises where Community law is incompatible with the Constitution be resolved? Does Community law or national constitutional law prevail?

Mangas Martín, *La Constitucion y la ley ante el derecho comunitario (Comentario a la sentencia del Tribunal constitucional espanol 28/1991 de 14 de febrero sobre la Ley Orgánica del Régimen Electoral General y el Acta relativa a las elecciones al Parlamento europeo)*, 18 REVISTA DE INSTITUCIONES EUROPEAS 587 (1991).

[105] On these cases and the doctrine of counter-limits more generally, *see* Alfonso Celotto & Tania Groppi, *Diritto UE e diritto nazionale: primauté vs controlimiti*, RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1309 (2004); Anneli Albi, *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of "Co-operative Constitutionalism"*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW 25 (2007); Giuseppe Martinico, *Il dialogo fra le corti nell'arena del Gattopardo: l'Europa fra novità costituzionale e nostalgie di comportamento*, *in* GIURISPRUDENZA COSTITUZIONALE E PRINCIPI FONDAMENTALI. ALLA RICERCA DEL NUCLEO DURO DELLE COSTITUZIONI 891 (Sandro Staiano ed., 2005); Giuseppe Martinico, *The Dark Side of the Constitutional Dialogue*, Jean Monnet Working Paper (19-20 May 2008).

The Tribunal set out its reasoning in five main steps. In the first, it affirmed that in cases of irreconcilable conflict between European law and national constitutional law, the latter prevails (¶ 1).

In the second, the Tribunal noted that the European Union only has attributed competences. In this regard, Article 90(1) of the Constitution establishes that Poland can, on the basis of international agreements, "delegate" the competences of the State to international institutions in relation to certain matters.[106]

In the third step, the Court held that the European Union could not take decisions contrary to the Polish Constitution, as Articles 8(1) and 91(3) of the Constitution implicitly establish (¶ 8). The first of these establishes that the Constitution is the supreme law of the country, and the second establishes that the laws created by international organizations have direct applicability and shall prevail over national laws if it is so provided in an international agreement that Poland has ratified.

In its fourth step, the Tribunal emphasized that the Polish Constitution acknowledges the need for cooperation with all Members of the EU (¶ 9), and that European law requires the coexistence between many legal orders; that, in other words, the superior legal order recognizes those inferior to it (¶ 12).

Lastly, the Tribunal concluded that in cases of conflict between a Community norm and the Constitution, the latter prevails, as it its provisions represent a minimum and unsurpassable threshold (¶ 14).

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[106] In both the provision of the Constitution and the Judgment, the use of the term "delegate" is inappropriate. It refers not to a delegation in the technical sense, which presupposes that the delegating party (in this case, the State) ultimately retains the power to direct the activity in question, but rather to an attribution of competences.

Turning now to Italy, the Italian Constitutional Court has, in a series of decisions in cases of incompatibility between Community norms and the national constitutions, relied upon the doctrine of "counter-limits" (in particular in its decisions No. 183/1973 and 232/1989, and Order No. 454/2006). In the first decision, the Court affirmed that "the idea that such limitations, concretely and precisely defined in the Treaty of Rome (and signed by countries whose legal systems are based upon the principles of the rule of law, and guarantee the essential freedoms of their citizens), could nevertheless grant to the institutions of the EEC an inadmissible power to violate the fundamental principles of our constitutional order or the inalienable rights of the human person, must be rejected."

In its 1989 decision, the Court, after recognizing that the protection of fundamental rights was an integral part of the Community legal order, added that "[t]his, however, does not mean that the competence of this Court to ascertain, by means of an evaluation of the constitutionality of the implementing legislation, whether any provision of the Treaty as interpreted and applied by the Community institutions and organs is in conflict with the fundamental principles of our constitutional order or fails to respect the inalienable rights of the human person can be diminished."

Lastly, in its most recent Order on these issues, the Court established that "national judges must implement fully and immediately those Community laws endowed with direct effect, and refuse to apply, in whole or in part, any internal rules held to be irreconcilable with them, and, where necessary, make a prior preliminary reference to the European Court of Justice under Art. 234 of the EC Treaty;" moreover, the national judge can either hold the incompatible internal rule to be non-applicable, or, if in doubt, "refer to this Court the question of compatibility with the Community legal order of legislation that may impede or prejudice the ongoing observance of the system or essential core principles established by the Treaty, in

cases in which it is not possible to arrive at a conforming interpretation and in which the non-application of the internal provision would lead to a clash – justiciable only by the Constitutional Court – with the fundamental principles of the constitutional order or with the inalienable rights of the person."

What emerges from this analysis of the judgment of the European Court of Justice, and those of the Spanish, Polish and Italian Constitutional Courts, is a "flexible" regulation of the boundaries between different legal orders. On the one hand, they affirm, on the basis of the doctrine of primacy, the direct effect of European law, which has an impact on the effects and not the validity of national legislative measures; while, on the other, they also assert the supremacy of the Constitution (not in its entirety, but rather the fundamental principles thereof). Both the doctrines of primacy and of "counter-limits" entail the recognition of a sphere of competence reserved to the State. The acknowledgement of the pre-eminence of European law is, in turn, limited, both by the fact that it is not general in nature, but rather restricted to those matters for which competence has been attributed to the superior level, and by the fact that it impacts upon the effectiveness, and not the validity, of conflicting internal rules.

Both the national and Community courts have arrived at this result, starting from opposite sides and meeting at a point somewhere in the middle. At this point, a boundary line has been drawn; yet it is not definitive, because it is dependent upon the State attribution of competences to the European legal order and on the constitutional principles of each national legal order. In other words, Community law prevails whenever fundamental principles have not been violated; on the contrary, constitutional law prevails whenever the "minimum threshold" has not been observed. The boundary line is not fixed, because it depends on the subject-matter upon which the incompatible internal rule impacts, and on the possible violation by the Community norm of fundamental national princi-

ples. The uniformity established by the primacy of European law goes hand in hand with the differentiation accepted by European law from the moment it recognizes the prevalence of constitutional principles that can differ from one Member to another.

In the space of a few decades, then, national and Community courts have succeeded in defining a method that, in the absence of general rules capable of disciplining relations between such orders, nonetheless renders cohabitation possible.[107]

V. THE *HANDYSIDE* CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THE MARGIN OF APPRECIATION DOCTRINE

In the *Handyside* judgment,[108] the European Court of Human Rights affirmed for the first time the principle of the "margin of appreciation," which underpins the relations between the legal order of the Council of Europe and those of States Parties to the Convention.

A Danish book, entitled *The Little Red Schoolbook*, was translated and published in the UK. The book dealt with certain delicate

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[107] I have not taken into consideration here the argument that the doctrine of counter-limits is a mere rhetorical device, deployed in order to hold the State's power to intervene in reserve (and to placate those concerned with the protection of State sovereignty). See generally DIRITTO COMUNITARIO E DIRITTO INTERNO, Proceedings of the Seminar held at the *Palazzo della Consulta*, Rome, 20 April 2007 (2008).

There exists a rich literature on the relations between national and community legal orders. Among recent contributions, see CESARE PAGOTTO, LA DISAPPLICAZIONE DELLA LEGGE (2008), and Oreste Pollicino, *EU Enlargement and European Constitutionalism through the looking glass of the interaction between national and supranational legal system* (unpublished manuscript, on file with the author).

[108] ECtHR, *Case of Handyside v. The United Kingdom*, No. 5493/1972 (7 December 1976).

questions, such as abortion, the use of contraceptives, homosexuality, pornography, pedophilia, etc., offering advice on these issues to youths between the ages of twelve and eighteen.

A number of parent groups demanded the seizure of the book. After an order for seizure had been made by the Director of Public Prosecutions, and an injunction handed down by a Magistrates' Court, Lambeth Magistrates' Court declared the applicant guilty of a violation of the *Obscene Publications Act* of 1959 (as amended in 1964), for having published, for gain, *The Little Red Schoolbook*. According to the English judges, the book had the potential to "deprave and corrupt" adolescents. The Court ordered that Handyside, the publisher, pay a fine and legal costs, and confirmed the seizure and destruction of all copies of the book. This decision was challenged before the Inner London Quarter Sessions, which rejected the appeal and upheld the original decision.

At this point, the English publisher decided to appeal to the European Court of Human Rights, alleging a violation by the English judicial authorities of a series of articles of the ECHR (and in particular Article 10), and seeking "just satisfaction" in accordance with Article 50.

Article 10 of the ECHR provides as follows: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure

of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The relevant part of this provision is that contained in subsection 2, which lists the conditions under which derogations from the freedom of expression are permitted. Any such derogations must be "prescribed by law," and "necessary" in relation to the other interests and fundamental rights explicitly listed. Freedom of expression can, therefore, be limited on the basis of two criteria: one formal (prescription by law) and the other substantive (necessity for the protection of further interests, exhaustively listed in Article 10).

The decision of the Strasbourg Court was set out on the following lines. First of all, the Court emphasized that Article 10 guarantees the right to freedom of expression within the limits established by law and necessary for the protection of morals (¶ 42).

Next, the Court noted that measures derogating from the freedom of expression must be prescribed by law and that, in the present case, the measures in question had been set out in the *Obscene Publications Act* (¶ 44).

Thirdly, the Court considered whether, in the case before it, the requirement of "necessity" established by the ECHR had been met. To this question, it gave a positive response, as the measures relating to the seizure and destruction of the book had been adopted in order to protect morals.

This section of the judgment contains the most interesting elements for our purposes here. The Court held that it could evaluate the appropriateness of the measure to the protection of morals, but intervened only in a subsidiary manner, noting that it was not possible to find in Contracting States a uniform conception of morals. National judges are in a better position to evaluate questions relat-

ing to the protection of morals than are their supranational counterparts; therefore, the ECHR leaves to national legislators, administrations and judges a "margin of appreciation" (¶ 48).[109]

The Court insisted, however, that this "margin of appreciation" is not unlimited, as it is subject to a "necessity test" – which consists, in effect, of an examination by the Strasbourg judges of the proportionality of the derogating measure to the ends pursued (¶ 49). The Court further held that it was not its task to take the place of national judges, but rather to evaluate the decisions delivered in the exercise of their "power of appreciation" in the light of the limits established by Article 10, examining also the arguments and evidence adduced at the national level (¶ 50).

At this point, the Court engaged in a long and complex evaluation of the "suitability" and "necessity" of the derogating measures adopted by the English judicial authorities, considering, in the following order: the age of the intended readership of the book; the possibility that the English judges were prejudiced; the appropriateness of the judicial measures to the goal of protecting morals; the temporary nature of the seizure; the characterization of the adoption of derogating measures intended to protect morals, as provided

[109] As already noted, this judgment provided the first formulation of the "margin of appreciation" doctrine, defined as the sphere of autonomy and discretion that ("inferior") national legal orders have in relation to the "superior" order of the ECHR, limited by a "necessity test" that translates in practice into the application of a principle of proportionality of means to ends. On the "margin of appreciation," *see* Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine*, 7 GERMAN LAW JOURNAL 611 (2006); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 907 (2005); Filippo Donati & Pietro Milazzo, *La dottrina del margine di apprezzamento nella giurisprudenza della Corte europea dei diritti dell'uomo*, proceedings of the conference on "*La Corte costituzionale e le corti d'Europa*", Catanzaro, 31 May- 1 June 2002, available at www.associazionedeicostituzionalisti.it/materiali/convegni/copanello020531/donatimilazzo.html; Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999).

for in Article 10, in terms of a power, and not a general obligation, to act; the absence of any measures taken against the revised edition of the book, which was considered compatible with the requirements of protecting morals, thus indicating the "necessity" of the conduct of the English authorities in relation to the first edition of the text;[110] the irrelevance of the fact that this book, and other publications considered "obscene," were freely circulating in other European States, in which the protection of morals could be based on different standards; and the fact that there was no need for the English authorities to request the modification of the incriminating sections of the text, as Article 10 does not oblige governments to engage in any form of "prior censorship."

At the end of this lengthy reasoning on the "necessity/proportionality" of the measures adopted against Handyside, the Court concluded that the English authorities had not violated Article 10 of the ECHR.

In this case, a relationship between national and supranational judges, and between a national and a supranational order, emerges. According to the Strasbourg Court, the authority that should intervene in questions relating to the protection of morals is the one that is "closest" to the interests involved. The right to freedom of expression is a uniform principle, valid for all of the national legal orders that are part of the Council of Europe, yet each national legislator, judge, and administration enjoys a certain degree of freedom (a "margin of appreciation") in evaluating the necessity of limitations on the freedom guaranteed to all. Such limitations, however, must be proportional and the Strasbourg Court is charged with the task of ensuring that they are so. The intervention of the Court is subsidiary, and consists in an examination of the manner in which national authorities

[110] The second edition of the text contained a number of modifications intended to bring it into compliance with the requirements of the protection of morals.

exercise their power to derogate, through the application of the principle of proportionality. The doctrine of "margin of appreciation" is, therefore, closely connected to the principle proportionality.

VI. JUDGMENTS NO. 348 AND 349/2007 OF THE ITALIAN CONSTITUTIONAL COURT: INTERPOSED RULES

In its Judgments 348 and 349 of 2007, the Italian Constitutional Court confronted the problem of the relations between the legal order of the ECHR and that of a State Party to the Convention (Italy), from the perspective of national judges.[111]

In Judgment No. 348, the Court examined the constitutionality of Article 5*bis* (1) and (2) of Decree Law No. 333/1992, converted into law, with adjustments, by Law No. 359/1992,[112] which established the criterion for calculating compensation for expropriation; in Judgment No. 349, the Court evaluated the constitutionality of subsection (7)*bis* of the same legislative instrument, which dealt with damages in cases of illegitimate occupation.[113] In both cases, the

[111] The Italian Constitutional Court had already ruled a number of times on the relation between the ECHR system and the national order. Particularly noteworthy in this regard is Judgment No. 10/1993, in which the Court defined the norms of the ECHR as "atypical sources."

[112] Decree Law No. 333 of 11 July 1992 (Emergency Measures for the Improvement of Public Finances), converted, with certain modifications, into Law No. 359 of 8 August 1992.

[113] Articles 5*bis* (1), (2) (7) and (7)*bis* provide as follows: "*1. Fino all'emanazione di un'organica disciplina per tutte le espropriazioni preordinate alla realizzazione di opere o interventi da parte o per conto dello Stato, delle regioni, delle province, dei comuni e degli altri enti pubblici o di diritto pubblico, anche non territoriali, o comunque preordinate alla realizzazione di opere o interventi dichiarati di pubblica utilità, l'indennità di espropriazione per le aree edificabili è determinata a norma dell'articolo 13, terzo comma, della legge 15 gennaio 1885, n. 2892, sostituendo in ogni caso ai fitti coacervati dell'ultimo decennio il reddito dominicale rivalutato di cui agli articoli 24 e seguenti del testo unico delle imposte sui redditi, approvato con d.P.R. 22 dicembre 1986, n. 917. L'importo così determinato è ridotto del 40 per cento; 2. In ogni fase del procedimento espropriativo il soggetto espropriato può convenire la cessione volontaria del bene. In tal caso non si applica la*

measures of constitutionality invoked were Article 111(1) and (2) of the Constitution,[114] in relation to Article 6 of the ECHR, and Article 117(1) of the Constitution,[115] in relation to both Article 6 of the ECHR[116] and Article 1 of Protocol No. 1 to the ECHR.[117]

riduzione di cui al comma 1..; 7. Nella determinazione dell'indennità di espropriazione per i procedimenti in corso si applicano le disposizioni di cui al presente articolo; 7-bis. In caso di occupazioni illegittime di suoli per causa di pubblica utilità, intervenute anteriormente al 30 settembre 1996, si applicano, per la liquidazione del danno, i criteri di determinazione dell'indennità di cui al comma 1, con esclusione della riduzione del 40 per cento. In tal caso l'importo del risarcimento è altresì aumentato del 10 per cento. Le disposizioni di cui al presente comma si applicano anche ai procedimenti in corso non definiti con sentenza passata in giudicato."

[114] Articles 111(1) and (2) of the Constitution establish that "*1. La giurisdizione si attua mediante il giusto processo regolato dalla legge. 2. Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata*" (*1. Jurisdiction is implemented through due process regulated by law. 2. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third position. The law provides for the reasonable duration of trials*).

[115] Article 117(1) of the Constitution provides: "L*a potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali*" (*1. Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations*).

[116] Article 6 of the ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have adequate time and facilities for the preparation of his defense; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[117] Article 1 of the Additional Protocol to the ECHR provides: "Every natural or legal

Both dealt with questions arising from cases brought by the owners of areas of building land that had been expropriated by the administration. They challenged the decision to apply the criterion for the calculation of compensation provided for by the above-mentioned Article 5*bis* instead of that laid down by the old rules governing the issue of expropriation, dating back to the Law of 1865. The new criterion, in contrast with the old one, did not entail the payment of a sum equal to the market value of the property expropriated, but rather of an amount equal to the average of the value of the property and the revalued cadastral income, reduced by 40% (this reduction does not apply in cases in which the property is voluntarily ceded to the Government – where, therefore, the "price" determined by the administration is accepted – or those involving damages paid for illegitimate occupation). The new criterion is much less advantageous to owners than was the older one.[118]

person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[118] These two judgments have been the subject of numerous studies. *See*, in particular, Oreste Pollicino, *Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007*, 4 European Constitutional Law Review 363 (2008); Francesca Biondi Dal Monte & Filippo Fontanelli, *The Decisions No.. 348 and 349/2007 of the Italian Constitutional Court: the Efficacy of the European Convention in the Italian Legal System*, 9 German Law Journal 889 (2008); Barbara Randazzo, *Costituzione e Cedu: il giudice delle leggi apre una «finestra» su Strasburgo*, Giornale di diritto amministrativo 25 (2008); Massimo Luciani, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti tra diritto italiano e diritto internazionale*, Corriere giuridico 201 (2008); Roberto Conti, *La Corte costituzionale viaggia verso i diritti CEDU: prima fermata verso Strasburgo*, Corriere giuridico 205 (2008); Antonio Ruggeri, *La Cedu alla ricerca di una nuova identità, tra prospettiva formale – astratta e prospettiva assiologico - sostanziale d'inquadramento sistematico* (2007), available at www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2007/0001_ruggeri_nota_348_349_2007.pdf.; Mario Savino, *Il cammino internazionale della Corte costituzionale dopo le sentenze n. 348 e 349 del 2007*, Rivista italiana di diritto pubblico comunitario 743 (2008); Claudio Panzera, *Il bello dell'essere diversi. Corte costituzionale e corti europee ad una svolta*, Forum di Quaderni costituzionali (2008); Cesare Pinelli, *Sul trattamento giurisdizionale della CEDU e delle leggi con essa confliggenti*, Giurisprudenza costituzionale 3518 (2007); Anna Moscarini, *Indennità di espropriazione e valore di mercato*

Prior to the reform of Article 117(1) of the Constitution in 2001, the Constitutional Court had pronounced many times on the legitimacy of Article 5*bis* of Law No. 359/1992, always rejecting the challenge. The provision referred to in these preceding decisions was principally Article 42 of the Constitution. The Strasbourg Court, in decisions handed down in 2004 and 2006, declared that the Italian rules were incompatible with the provisions of the ECHR, constituting a "structural and systematic" violation of the Convention.[119]

In its two 2007 Judgments, the Constitutional Court declared the unconstitutionality of Article 5*bis* (1), (2) and (7)*bis* of the 1992 rules, on the grounds of incompatibility with Article 117(1) of the Constitution.[120] This incompatibility stemmed from the violation by the rules in question of Article 6 of the ECHR and of Article 1 of

del bene: un passo avanti (ed uno indietro) della Consulta nella costruzione del patrimonio costituzionale europeo, Giurisprudenza Costituzionale 3525 (2007); Marta Cartabia, *Le sentenze "gemelle": diritti fondamentali, fonti, giudici*, Giurisprudenza Costituzionale 3564 (2007); Andrea Guazzarotti, *La Corte e la CEDU: il problematico confronto di standard di tutela alla luce dell'art. 117, comma 1, Cost.*, Giurisprudenza Costituzionale 3574 (2007); Vincenzo Sciarabba, *Nuovi punti fermi (e questioni aperte) nei rapporti tra fonti e corti nazionali ed internazionali*, Giurisprudenza Costituzionale 3579 (2007); Francesca Angelini, *L'incidenza della CEDU nell'ordinamento italiano alla luce di due recenti pronunce della Corte costituzionale*, Il diritto dell'Unione Europea 487 (2008); Maria Eugenia Bartoloni, *Un nuovo orientamento della Corte costituzionale sui rapporti fra ordinamento comunitario e ordinamento italiano?*, Il diritto dell'Unione Europea 511 (2008). On the relations between the Italian legal order and that of the ECHR more generally, see Ugo Villani, *Sul valore della Convenzione europea dei diritti dell'uomo nell'ordinamento italiano*, III Studi sull'integrazione europea 7 (2008). On the relations between European courts, see Vincenzo Sciarabba, Tra fonti e corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali (2008) and Justicia Constitucional y Unión Europea. Uno estudio comparado de las experiencias de Alemania, Austria, España, Francia, Italia y Portugal (Javier Tajadura & Josu de Miguel eds., 2008).

[119] *See*, in particular the case of *Scordino v. Italy*, Application No. 36813/97 (29 March 2006), cited by the Constitutional Court in this judgment.

[120] In its judgment 348/2007, the Court found unconstitutional Articles 37(1) and (2) of the Presidential Decree No. 327 of 8 June 2001 (Consolidated Text of the Laws and Regulations relating to Public Expropriation), which reproduced the provisions of Article 5*bis* of the 1992 law.

the first Additional Protocol to the Convention, which were held to be "interposed rules."[121] The Court held further that ECHR rules should be considered by national judges in the light of the way in which they had been interpreted by the Strasbourg Court (para. 4.6 of Judgment No. 348).

In cases of incompatibility between an internal norm and an ECHR norm, the judge – according to the Constitutional Court – should raise the question of constitutionality, performing a double check to "establish at the same time that both respect the Constitution, and more specifically that the interposed rule is compatible with the Constitution, as well as the constitutionality of the contested provision in the light of the interposed rules" (¶ 4.7 of Judgment No. 348). Thus, the idea that national judges can simply decide not to apply internal rules – which, of course, is the course of action envisaged in cases of conflict with Community rules – is rejected in cases of conflict with the ECHR (¶ 4.3 of Judgment No. 348).

The effect of this "interposition" of international treaty rules is that ordinary national legislation must respect them; but they, in turn, must also respect the Constitution.

[121] In particular, the Court held that "[t]he structure of the constitutional provision in relation to which the present question is raised is similar to that of other constitutional provisions, which become applicable *in concreto* when placed in a close relationship to other non-constitutional provisions necessary to give a substantive content to a principle which limits itself to setting out in general terms a quality which the laws referred to in it must possess. The necessary provisions in such cases have a lower status than the Constitution, but higher than ordinary legislation. Although its capacity to designate a unitary category is sometimes disputed, irrespective of the use of the expression "interposed sources," prevalent in academic literature and in a rich series of decisions of this court to indicate this type of provision..., it must be accepted that the principle contained in Article 117(1) of the Constitution becomes operative *in concreto* only if the "international law obligations" which restrict the legislative power of the state and the regions are specified. In the particular case before this court, the principle is supplemented and made operative by the provisions of the ECHR, the role of which in this case is therefore to give substance to the state's international law obligations."

It is interesting to inquire whether the mechanism of interposition, as affirmed by the Court in relation to ECHR norms, could also be applicable to other international treaty norms. There is nothing in the texts of the two Judgments that would exclude the application of the mechanism approved therein to all of the commitments under international treaties, but one difference should be borne in mind. A number of treaties make provision for an appropriate judicial body: the norms of such treaties will be assessed on the basis of the interpretation given to them by those bodies. Other treaties make no provision for a judicial body: the norms of those treaties can be interpreted freely by national judges (in this sense, the national judges in question become also judges of the international norms).

According the interpretation of the Constitutional Court, Article 117(1) of the Constitution thus allows judges to "bring home" the ECHR, and international treaty norms more generally.[122]

It may be useful, at this point, to consider the *Handyside* case and Judgments 348 and 349/2007 together. These come from judges at different levels, one in a "superior" and the other in an "inferior" position (or, perhaps better: one located in a more extensive legal order, the other operating in a legal order that constitutes only part of the first). Both sets of judges are engaged in a "dialogue," in the sense that they are seeking criteria for establishing connections between the legal orders in question.

The judge of the more extensive legal order, interested in ensuring that the principle of uniformity is respected, allows, nevertheless, a certain degree of divergence thanks to the "margin of appreciation" doctrine; however, he retains for himself the final say on the

[122] This expression is taken from Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998).

"necessity/proportionality" of the different national laws and their implementation. The judge of the less extensive order also has an interest in ensuring respect for the law common to the more extensive legal space, and to this end he inserts it into his own internal legal order, "nationalizing" it in the process, as the standard for the legitimacy of ordinary laws (in that the rule interposed between the Constitution and the ordinary law must be respected by the latter). This, however, also ensures a dose of divergence, if the Constitution so requires: the interposed rule, while superior to ordinary law, must itself respect the Constitution and constitutional laws, and is thus subordinate to them.

This "creative activity" of judges has therefore generated a set of reusable, indeed permanent, connecting principles between legal orders; this helps to attenuate the negative consequences of the absence of a superior order that encompasses all and establishes a hierarchy between norms.

Taking together the types of connection established by judges between the Community and national legal orders on the one hand, and between the ECHR and national orders on the other, we can identify both analogies and dissimilarities.

In both cases, the absence of a superior order encompassing those at the supranational and national levels creates a void of connecting norms, of rules of recognition, and of hierarchy. In both cases, judges compensate for this by establishing both the principle of respect for uniform, general rules (through the techniques of direct effect and interposition) and the principle of recognition of a sphere of self-determination of the "inferior" legal systems (through the doctrines of "counter-limits" and the margin of appreciation).

However, in the close-knit relations between the national legal orders and that of the Community, diversity is preserved in terms

of fundamental constitutional principles alone; by contrast, in the relations between the legal order of the ECHR and those of its State Parties (and between international treaty law and national legal orders more generally), which are less close, the national Constitution in its entirety can be a source of difference.

VII. THE *BOSPHORUS* CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS, AND THE "EQUIVALENT PROTECTION" OF HUMAN RIGHTS

In 1992, Bosphorus, an airline charter company incorporated in Turkey, leased two aircraft from Yugoslav airlines (JAT), the national airline of the former Yugoslavia. The aircraft were owned by JAT, but operated by the Turkish company.

From 1991 onwards, the United Nations (UN) adopted a series of sanctions against the Federal Republic of Yugoslavia, in an attempt to bring an end to the armed conflicts and grave violations of human rights then occurring in that country. One UN Security Council Resolution (No. 820 of 1993) provided that States should impound the aircraft belonging to companies in which a majority or controlling interest was held by Yugoslav natural or legal persons, or those operating in Yugoslavia. This Resolution was implemented in Europe by Regulation (EEC) 990/93, which entered into force on the 28th of April 1993.

In May 1993, one of the two aircraft arrived in Dublin, and was impounded by the Irish Department of Transport. There followed two judicial review proceedings before the Irish High Court, a preliminary reference to the ECJ, and a judgment of the Irish Supreme Court, until July 1997, by which time the lease had ended, an agreement had been reached between JAT and the Irish Department of Transport, and the aircraft was returned to the former.

In 1997, Bosphorus filed a complaint before the European Court of Human Rights, alleging that the impounding of the aircraft was

in violation of the right to property guaranteed by Article 1 of the First Protocol to the European Court of Human Rights.

> This provides, *inter alia*, that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest... ."

The Court concluded[123] that Ireland was not in violation of that provision (¶ 167), on the basis of a complex chain of reasoning that can be summarized as follows. States have a wide margin of appreciation in setting limits on the right to property (¶ 149). The actions of the Irish authorities had been taken in order to comply with the provisions of Article 8 of the Community Regulation, and not in the exercise of any discretionary power (¶ 148). Compliance with Community law can be viewed as a "general interest" for the purposes of Article 1 of the Protocol (¶ 150). It is not, however, sufficient that the action in question is taken in pursuance of the general interest; it is also necessary that the rights established in the European Convention on Human Rights, or "equivalent" (in the sense of "comparable") guarantees, are respected. If an equivalent level of protection is provided, then it can be presumed that the State has not departed from the requirements of the Convention (¶ 156). Community law in general ensures a level of protection of fundamental rights equivalent to that provided by the Convention, leading to a presumption that the latter has been respected (¶¶ 159-165).

In this case, the Strasbourg Court adopted an attitude of "deference" with respect to Community law, thus declining to apply Convention law. Of more interest to us here, however, is the principle of equivalence, which entails that, where one legal order provides for protection equivalent to that of another, the latter abstains from applying its own norms. This, however, implies that where the first legal order does not offer equivalent protection, the second will intervene in order to ensure respect for the rights that it guarantees. A further, and more important, implication is that, in this way, the two legal orders are construed together as a single, complete whole, in which the level of protection guaranteed cannot be diminished. If it is lowered in the first legal order, the second intervenes.[124]

[123] ECtHR, *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, No. 45036/98 (30 June 2005).

VIII. THE *MOX PLANT* ARBITRATION UNDER ARTICLE 287 UNITED NATIONS CONVENTION ON LAW OF THE SEA: THE DIVISION OF FUNCTIONS

The *Mox Plant* case concerned the disastrous environmental consequences resulting from the disposition and transportation of radioactive substances from certain British nuclear plants (British Nuclear Fuels, plc),[125] located in Sellafield, which were discharging some eight million liters of nuclear waste into the Irish Sea every day, contaminating the waters and marine fauna.[126] According to estimates by Greenpeace, this stretch of sea is among the most heavily polluted in the world. It is, moreover, a "semi-enclosed" sea in the sense of Article 122 of the UNCLOS.[127]

[124] On the *Bosphorus* case, *see* Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. CONST. L. 509 (2008). *See also* the case notes on the judgment by Frank Hoffmeister 100 AM. J. INT'L L. 442 (2006) and by Sionaidh Douglas-Scott, 43 COMMON MARKET LAW REVIEW 243 (2006); Fontanelli & Martinico, *supra* note 78, at 351-387.

[125] A company entirely owned by the UK Government.

[126] On the *Mox Plant* case, *see* in particular Nikolaos Lavranos, *The Mox Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 223 (2006).

[127] United Nations Convention on the Law of the Sea, Montego Bay, 10 December

In 2001, Ireland, no longer prepared to tolerate the consequences of the British pollution, requested the establishment of an Arbitral Tribunal under Article 287 of the UNCLOS, seeking a declaration that the UK had violated its obligations under the Convention and appropriate remedies. In particular, Ireland alleged a violation of Articles 123, 192, 193, 194, 197, 206, 207, 211, and 213 of the Convention. The most relevant of these for our purposes here is Article 123, which deals with relations of cooperation between States bordering enclosed or semi-enclosed seas.[128]

On the 24th of June 2003, the Arbitral Tribunal made an Order entitled "Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures," which referred to the objections raised by the United Kingdom, as respondent in the proceedings, relating to the jurisdiction of the Tribunal. In particular, the UK argued that the dispute may fall within the jurisdiction of the European Court of Justice, involving issues within the competence of the Community. The Tribunal was thus required to make a preliminary judgment as to the competent jurisdiction.

1982. This Convention was negotiated between 1973 and 1982, signed in 1982, and entered into force in 1994, with 159 States Parties. The text is composed of 320 Articles. The Convention substituted the traditional principle of the freedom of the seas with a number of others, relating, for example, to the common use of marine resources, and the management and development of oil-extraction and fishing activities. Article 122 of the UNCLOS, on "definitions," establishes that "[f]or the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

[128] Article 123 of the UNCLOS provides as follows: "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization: (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; (d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article."

In responding to this objection, the Tribunal noted that, in May 2003, the European Commission gave a Written Answer to the European Parliament,[129] in which it indicated that it was considering the possibility of initiating proceedings against Ireland under Article 226 of the EC Treaty, raising before the European Court of Justice the questions of Community competence in relation to the matters that formed the object of the dispute, and of the exclusive jurisdiction of the European Court (¶ 21).

Next, the Tribunal noted that, although neither party to the dispute had sought to sustain the view that the Court of Justice had exclusive jurisdiction over the issues in question, it could not be said with certainty that this possibility would be rejected by the European judges, thus precluding the jurisdiction of the tribunal under Article 292 of the UNCLOS (¶ 22). That provision, relating to "Obligations under general, regional or bilateral agreements," establishes that ""[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree." The UNCLOS system – as yet unperfected – thus envisages a sort of "flexible reference" to other legal orders where these are more developed.

Next, the Tribunal acknowledged that the problems raised in the case concerned the "international operation of a separate legal order" (¶ 24). For this reason, "it would still not be appropriate for the Tribunal to proceed with hearings on the merits in respect

[129] Plenary Session of the European Parliament, oral question by Proinsias De Rossa (H-0256/03), Thursday, 15 May 2003.

of any such provisions" (¶ 26), particularly given that there were substantial doubts as to whether the jurisdiction of the Tribunal could be established in respect of all or any of the claims before it. On the other hand, the Tribunal observed that the Community system is certainly a "legal order [that] may involve decisions that are final and binding" (¶ 27); therefore, the applicant would have had a greater chance of satisfaction had the complaint been brought before the European Court of Justice.

The Tribunal thus held that, given the conditions of "mutual respect and comity which should prevail between judicial institutions," it would be "inappropriate" for it to proceed further in the dispute before it, adding that, if it were to make a decision,[130] there was a risk that this could conflict with that reached by the Community judges.

In essence, over and above the preference for a fully judicial solution (a principle established, as noted above, by Art. 282 of the Convention), the Tribunal also affirmed a principle of respect for the separate legal order primarily concerned with the matters that form the object of the dispute. It therefore ordered the suspension of the arbitral proceedings until December 2003.[131]

[130] Paragraph 28 of the Order reads as follows: "in the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties."

[131] On the 6th of June 2008, the Tribunal adopted Order No. 6 on the definitive "Termination of Proceedings," following notification by Ireland of its withdrawal of its complaint against the UK dated the 15th of February 2007. See http://www.pca-cpa.org/upload/files/MOX%20Plant%20Press%20Release%20Order%20N.%206.pdf.

On the 30th of May 2006, in its judgment C-459/2003,[132] the European Court of Justice ruled on the claim brought by the Commission against Ireland on the basis of Articles 226 of the EC Treaty and 141 of the Euratom Treaty. The Commission had sought a declaration from the Court that Ireland, in initiating dispute resolution proceedings against the UK under the UNCLOS in relation to the Mox plant, had failed to respect it obligations under Articles 10 and 292 of the EC Treaty, and Articles 192-193 of the Euratom Treaty.[133] The Court accepted the arguments of the Commission, finding that Ireland had violated the norms in question.

This case also provides a useful illustration of the manner in which courts operate in defining the relations between different legal orders. Here, neither of the legal orders involved was "statal" in nature; rather, one was global (relating to the law of the sea) and the other supranational (the Community order). The global norm simply established a principle of preference for a fully judicial solution (i.e., a procedure that results in a binding decision) to the dis-

[132] ECJ case C-459/03 of 30 May 2006, *European Commission v. Ireland*.

[133] Article 10 of the EC Treaty establishes a principle of "loyal cooperation," providing that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. 2. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." Article 292 of the EC Treaty can be viewed as symmetrical to Article 282 of the UNCLOS; the former provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." Indeed, Article 192 and 193 of the Euratom treaty simply repeat the provisions of Articles 10 and 292 of the EC Treaty: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty" (192); and "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" (193).

pute. The judicial body here added a further principle, created by judges alone, of respect for the separate legal order primarily concerned with the subject-area of the dispute.

IX. THE *KADI CASE* BEFORE THE EUROPEAN COURT OF JUSTICE, AND THE PRIMACY OF GLOBAL OVER EUROPEAN LAW

Yassin Abdullah Kadi, an international businessman and Saudi Arabian citizen with important financial interests in the European Union, and the Al Barakaat International Foundation, established in Sweden, had all of their funds frozen in the UK and in Sweden respectively. Following unsuccessful attempts to have this reversed before national administrative and judicial bodies, they brought their case before the Court of First Instance of the European Communities, as the British and Swedish authorities had acted in order to give effect to a Community Regulation, itself adopted in implementation of a UN Security Council Resolution, intended to help combat international terrorism. The parties requested that the Court annul the contested Community rules. The Court, however, rejected this request, holding that the resolutions of the Security Council were binding on the Community, whose powers in the matter at issue were limited, having no autonomous discretion in the implementation of the Resolutions in question.

Both parties then appealed the decision of the Court of First Instance, seeking an order for annulment from the European Court of Justice. On the 3rd of September 2008, in its decision in the joined proceedings C-402/05 P and C-415/05 P, the ECJ reversed the judgment of the Court of First Instance and annulled Regulation EC 881/2002 (insofar as it applied to the two appellants), albeit ordering that the effects of the latter could be main-

tained for a period not exceeding three months from the date of the judgment.

The Court of First Instance had denied the existence of a number of legal principles (such as the right to participate in administrative proceedings, the right to a hearing, the right to property) on the basis of a centralized approach to the relations between the two legal orders, based on the French model:[134] the Community had acted in a purely executive fashion, having no autonomous discretion whatsoever, its powers being circumscribed. Its action, therefore, was immune from the jurisdiction of the Court, and could not be subjected to the requirements of the rule of law (see in particular ¶ 214 and ¶ 231 of the judgment of the Court of First Instance). The Court of Justice, on the other hand, reconfigured the relations between the UN and the European Union, affirming the primacy of the former over the latter in different terms.

The reasoning of the Court of Justice proceeded in five main logical steps. First: UN law has primacy (or prevalence) (¶ 288); thus, it must be respected by Community law (¶ 291 and ¶ 318). Second: global law establishes terms, objectives and obligations (¶¶ 296-297), but does not impose a particular or pre-established model for their implementation, thus leaving a free choice to States

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[134] Or perhaps an approach viewing them as a "legal pyramid." For a critique of this metaphor, *see* Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397 (2008). On the ECJ's *Kadi* judgment, *see* the comments published in 14 GIORNALE DI DIRITTO AMMINISTRATIVO (2008), in particular Aldo Sandulli, *Caso Kadi: tre percorsi a confronto* (1088-1090); Sabino Cassese, *Ordine comunitario e ordine globale* (1091-1092); Edoardo Chiti, *I diritti di difesa e di proprietà nell'ordinamento europeo* (1093-1095); Mario Savino, *Libertà e sicurezza nella lotta al terrorismo: quale bilanciamento?* (1096-1099); Giulio Vesperini, *Il principio del contraddittorio e le fasi comunitarie di procedimenti globali* (1100-1101); Giacinto della Cananea, *Un nuovo nomos per l'ordine globale* (1102-1104). *See also* Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09, NYU School of Law.

in that regard; the means of implementation are to be determined in accordance with the internal procedure applicable in each national or supranational legal order. Third: a Community regulation implementing global law is a Community act, not one of a subsidiary organ of the UN (¶ 326 and ¶ 314); it is not, therefore, directly attributable to the UN. Fourth: the Community is an autonomous legal order (¶¶ 316-317), constituting a community based on the rule of law (¶¶ 281 ff). Fifth: consequently, in implementing global law, Community law must respect fundamental principles of law.

The complex reasoning of the Court conceals a number of uncertainties, and has a number of hidden implications. Firstly, it is not clear whether the primacy of global law is structural or functional: the Court seems to affirm the latter in Paragraph 294 of its judgment, in which it emphasizes that the UN has the principal responsibility for combating terrorism; by contrast, in Paragraph 305, the relations between legal orders are presented – if only in a hypothetical instance – as a hierarchy of norms. Secondly, the references to global law oscillate: it is the UN Charter that does not impose any particular model for implementation, while it is the Resolutions of the Security Council that establish the obligations relating to the fight against international terrorism: therefore, reference is made both to global "constitutional" or primary law on the one hand, and secondary law on the other. Thirdly, from the Court's reconfiguration of relations between the two legal orders, there follow two limits on the global law in question: it only has primacy on the condition that it limits itself to setting the objectives of anti-terrorism policies (¶¶ 296-297) and that it conforms with the "constitutional" principles of the Community (contained above all in Art. 6(1) of the EU Treaty) – as, under Article 300(6) and (7) of the EC Treaty, international treaties ratified by the Community are binding only insofar as they are compatible with Community law (see, in particular, ¶ 308).

The Court's approach to the relations between the two legal orders recalls that of the Italian Constitutional Court in terms of the interaction between the internal legal orders of Member States and that established by the European Convention on Human Rights. The "superior" law imposes itself on the "inferior" primary law, but only within the limits set by the Constitution of the "inferior" legal order. This means that the "inferior" legal order retains the possibility to control the manner of its integration into the "superior" one, without unconditionally opening the door to the latter. In this sense, this approach can be distinguished from that adopted by many European constitutional courts to the issue of relations with the Community legal order, since the latter courts retain only fundamental principles as "counter-limits." This is confirmed by Paragraphs 282 and 285 of the *Kadi* judgment (and also by ¶¶ 301-304 if we consider the fact that the Community does not have its own Constitution and, instead, certain principles contained in the provisions of the different governing treaties perform a constitutional function).

X. THE *LOEWEN* CASE BEFORE AN INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ARBITRAL TRIBUNAL: THE PRINCIPLE OF SUBSIDIARITY

In the *Loewen* case, a dispute at the national level was brought first before a national judge, then before a global judge (an ICSID Arbitral Tribunal), on the basis of provisions of a supranational legal order (the NAFTA).[135] The provisions invoked in the proceeding before the ICSID Arbitral Tribunal were Articles 1102, 1105, and

[135] For an analysis of this case, *see* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

1110 of the NAFTA,[136] contained in Part V of the Agreement, concerning the regulation of investments. These articles establish in this field a most-favored nation principle, a principle of non-discrimination, and a principle of transparency.[137]

The *Loewen* decision involved a dispute that arose between a Canadian funeral home and funeral insurance business, part of a broader group of corporations which also included a US company (the "Loewen Group" and "Loewen Group International, Inc."), and a competitor company from Mississippi (O'Keefe), following the acquisition by the Loewen Group of a series of funeral businesses in the USA, amongst which was one owned by a Mr. Riemann in Mississippi. O'Keefe incurred losses as a result of the competition of the new industrial Group, and brought a claim for damages against Loewen before the Mississippi State Court. That

[136] The North American Free Trade Agreement is an agreement signed in 1992 between the United States, Canada and Mexico. It entered into force in 2004. It is a free trade treaty, modeled on the previous free trade agreement (FTA) between the US and Canada, which in turn was inspired by the European Community model. There are also two other agreements connected to NAFTA, relating to environmental cooperation (NAAEC) and labor cooperation (NAALC).

NAFTA has two principal organs: the Secretariat and the Commission. The Secretariat is divided into three sections, based in Ottowa, Mexico City and Washington DC, managed by a Secretary appointed by each Government. These organs provide administrative assistance to the Commission, which is the central, decision-making institution in NAFTA, and is composed of the Ministers responsible for international trade in each State.

[137] More precisely, Articles 1102(1) and (2) establish that "[e]ach Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Article 1105(1) provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Lastly, Article 1100 regulates expropriation and indemnity.

court, presided over by an African-American judge and consisting of a twelve-member jury, of whom eight were African-American, found for O'Keefe, awarding compensation for the losses, as well as punitive damages,[138] and providing explicitly discriminatory reasons for the decision.

Mississippi law allows for appeals only after an "appeal bond" has been paid, fixed by the Court in this instance at $625 million, to be posted within a week. Failure to do so would mean that the judgment would be executed immediately.

The extremely high level of the bond effectively precluded the Loewen Group from challenging the judgment; thus, considering themselves to have been discriminated against and treated in a manner less favorable than local businesses in the course of the Court proceedings, they brought a complaint before an Arbitral Tribunal under the relevant provisions of the NAFTA, constituted under the auspices of the ICSID.[139]

The Tribunal rejected the application in a decision of the 26th of June 2003. It recognized that the Mississippi State Court had conducted an unjust trial, in violation of NAFTA Article 1005. However, it also observed that, in order to benefit from the judicial protection afforded by NAFTA, the applicant must have exhausted local remedies (the "local remedies rule"), meaning that a State cannot be held responsible for errors made by its courts unless the matter has been ruled on by a court of final instance.[140]

[138] The total figure was around $500 million.

[139] The NAFTA provisions relating to the constitution of arbitral tribunals are contained in Articles 1116, 1117, 1121, and 1131 (the last of which concerns the law applicable by the tribunal).

[140] *See* Article 1101 of NAFTA, which establishes that "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect

The conduct of the national trial by the trial judge was – according to the Arbitral Tribunal – "a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law" (¶ 54). The Loewen Group had been subjected to unjust and discriminatory treatment (¶ 119).[141] The decision of the jury had been influenced by racial prejudice (and by "local favouritism") (¶ 136). The process and the final verdict were "improper and discreditable," failing to respect "minimum standards of international law and fair and equitable treatment" (¶ 137). The "international right to a fair hearing" had been violated by the Mississippi State Court (¶ 142).

The Tribunal recognized, however, that the decision of the Mississippi Court did not constitute a final judgment: "judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted" (¶ 143). And it observed that, were it to hand down a decision on issues on which internal remedies had not been exhausted, then this could lead to a conflict between the decisions of the global and national bodies. The Tribunal thus inquired whether the Loewen Group could have appealed to the Mississippi Supreme Court, in order to establish whether the verdict of the Mississippi State Court constituted "a

to Articles 1106 and 1114, all investments in the territory of the Party. 2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities. 3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services). 4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

[141] In paragraph 119, the Tribunal observed that "by any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."

measure 'adopted or maintained' by Respondent amounting to a violation of Art. 1105" (¶ 207). Ultimately, the Tribunal held in this regard that "Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible" (¶ 217), as the claimant had not demonstrated that it had no adequate remedy on the basis of internal law (¶ 2).[142] The global judges, therefore, were able to intervene only if all legal remedies had been exhausted at the national level.

In this decision, as in that in the *Mox Plant* case, reference was made to the notion of "comity" (¶ 230 and ¶ 233),[143] even if here only in respect of a marginal issue, namely the "requirement of continuous nationality."[144]

[142] Paragraph Two contains the finding of the Tribunal, and holds that "the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA."

[143] "Comity" is an international legal principle of uncertain definition. It has been variously described as the basis of international law; a rule of international law; a synonym for private international law; a choice-of-law rule; a principle of courtesy; a principle of good manners; a principle of convenience or of goodwill between sovereign governments; a moral necessity; a remedy or an expedient, etc. *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. Rev. 2029, 2050, n. 89 (2004). The entry for "comity" in the Encyclopedia of Public International Law, however, asserts that "in public international law the notion of comity (*comitas gentium*, *courtoisie internationale*, *Völkercourtoisie*) embraces those acts, practices and rules of goodwill, amity and courteous treatment habitually observed by States in their mutual intercourse without the conviction that any legal obligation is involved;" and adds that "since a rule of comity does not involve a legal obligation, its non-observance produces no legal consequences." Two points are clear: "comity" concerns the relations between courts, and not those between legal orders more generally; and it is an "umbrella term," in the sense that it has a plurality of meanings, drawn from rules relating to the precedence or respect afforded by one judge to another.

[144] During the process the Loewen Group was incorporated into the Loewen Group International inc., assuming US and losing Canadian nationality. This could have decreased

The *Loewen* decision concerned the relationship between a supranational and a national legal order. The former prohibits discrimination against foreign investors, which had been present in the case before the NAFTA judges, who were called upon to regulate the relations between the two orders (in the absence, however, of specific rules on how to do so). They were thus forced to identify a rule regulating the relationship between the legal orders, and they found it in the principle of subsidiarity: the global judge intervenes only when all legal remedies at the national level have been exhausted, meaning that he thus carries out a superior or appeal function. This principle can also be subsumed within that of "comity," on condition that the content of the latter is precisely defined. In other words, it is not in "comity" itself that I am interested here; rather, it is in certain content that might be given to that notion, and the manner in which it is applied.

the "coverage" of NAFTA, and the jurisdiction of the Arbitral Tribunal, on the grounds of a violation of the "continuous nationality" requirement, which itself is "grounded in comity" (¶ 230).

CHAPTER V

"THE LEAST DANGEROUS BRANCH"