Chapter 9
The Court of Justice of the European Union and Other Regional Courts

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9.1 Introduction

Interregional relations pertain to the realm of foreign policy. Courts do not determine or pursue foreign policy since this is the responsibility of the executive and to a lesser extent the legislative branches of government. State officials are therefore often reluctant to defer the mandate of defining and controlling foreign policy questions to the courts. The member states of the European Union (EU) and its officials are no exception in this regard (Bronckers 2007: 603). Eyal Benvenisti provides a good explanation for the moribund leverage that courts wield in matters of foreign affairs. He suggests that judicial independence and especially the force of judicial review are two components of a 'deal' struck between the courts and the other branches of government and this 'deal' does not appear to incorporate the granting of judicial discretion in the area of foreign affairs (Benvenisti 1994: 425). However, courts interpret laws that can have an impact on the manner in which foreign policy is conducted. Can the opinions of the Court of Justice (CJ) of the European Union affect the EU's international relations with other regional organisations? This is even more important bearing in mind that the EU's legal system does not function within the international legal order in the same ways as states do (Foriers 1965: 320–321).

International relations scholars, especially those of the realist hue, have seldom awarded any importance to the role of supranational institutions such as courts because they hold that states still have the monopoly on deciding whether to adhere

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to or dismiss judicial preferences (Mattli and Slaughter 1998: 179). In the case of the EU, neofunctionalists have argued that member states have to succumb to the power and influence of the Court. But neorealists argue that this is not the case and that the Court cannot bend the interests of big powers within the Union. Alter finds truth in all these explanations but claims that none adequately explains why or how the political influence of the Court has operated. She argues that the main reason member states created the CJ was to ensure that the Commission did not exceed its competences. The Court was created to fulfil three limited roles for the member states: to ensure that the Commission and the Council of the EU did not exceed their authority, to clarify aspects of European Community laws through dispute resolution and decide on charges of noncompliance raised by the Commission or by member states (Alter 1998: 121–124).

This chapter will consider the role that the CJ has played in EU interregional relations with other regions. Attention is focused on the modalities and fallouts of judicial cooperation. Judicial cooperation or adjudicative interregionalism does not exist in a vacuum. The proliferation and multiplicity of international and regional courts have been under discussion for some time and this reflects a deeper epistemological concern with the fragmentation of international law (Oellers-Frahm 2001; Buergenthal 2001; Pocar 2004). These issues will be presented in the next section of this chapter so as to situate the efforts made by judges to limit the problems that may result from proliferation. After briefly explaining the role and functions of the CJ in the third section, the subsequent three sections concentrate on ways by which jurisdictional or adjudicative interregionalism may be invoked. The first (Sect. 9.4) is the need for comity that is attested to by frequent judge-to-judge meetings. The second (Sect. 9.5) is cross-referencing by the CJ and Southern regional judges of the decisions of counterparts or colleagues in other regional courts. The third (Sect. 9.6) is the inclusion of dispute settlement clauses in interregional agreements that refer to the CJ. Some progress has been made with regard to the third dimension, and Sect. 9.7 includes a sample of regional courts in other regions. These regions are those that have well developed judicial third-party obligatory dispute settlement mechanisms modelled on the EU's. They include the East African Community's (EAC) Court of Justice, the Economic Community of West African States' (ECOWAS) Court of Justice, the Caribbean Community's (CARICOM) Court of Justice and the Court of Justice of the Andean Community (CAN). The concluding section discusses some of the prospective avenues for sub-regional courts.

9.2 Context: Proliferation of International Courts and Fragmentation of International Law

There has been a steady effort to create courts and tribunals at the international level. Such dispute settlement organs include the International Court of Justice (ICJ) (general jurisdiction), the International Tribunal for the Law of the Sea (general with respect to the law of the sea), various administrative tribunals

(administrative matters), the International Criminal Court (ICC) and various international criminal tribunals (grave crimes). Also at the lower level are the many (sub-)regional courts that have competence on various issues including human rights and trade. The vertical dimensions of proliferation of courts can be alluded to when matters of alignment of approaches arise, such as that between the international courts or tribunals and the regional ones.

The problems that have been associated with proliferation of courts have to do with the danger of incoherence for the international legal system (Spelliscy 2001: 152). The incoherence of the legal system has a negative impact on its legitimacy. Pauwelyn points out that the increasing number of international tribunals may mean that two tribunals make opposing decisions about the same issue. He adds that the increase in international tribunals and inconsistent findings may deprive international law of its predictability and hence its effectiveness (Pauwelyn 2003: 114–115; Kelsen 1992: 62). However, not all scholars regard the proliferation of courts as negative, particularly not when the courts are able to coordinate their work between themselves or with the ICJ (Abi-Saab 1999: 926–928). Dupuy suggests that the ICJ should play a stronger role in coordinating the operations of other courts (Dupuy 1999: 807). Others, such as Charney, see no threats in proliferation and regard it as a positive process (Charney 1998: 347).

Fragmentation of international law refers to the sundering of the law of nations as a result of the expanding of issue areas that require international normative responses, such as the environment, the seas and international trade. International law has burgeoned and it is no longer a subject that mainly addresses adjectival issues and questions of state responsibility or sovereignty but now embraces a wide spectrum of specialised areas and topics (Brownlie 1987). Alongside this sundering at the international level, which could be regarded as horizontal, is the vertical dimension of sundering, whereby regional entities are also adopting regional standards on various issues. This means there is potential for antinomy between the international level and internal level: be this municipal, domestic or regional (Salmon 1965: 285). Hafner argues that 'a major factor generating this fragmentation is the increase of international regulations' (Hafner 2002: 143). He claims that another element is the increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, environment, energy, resources, health and the proliferation of weapons of mass destruction (Hafner 2002). The issue here is that fragmentation may lead to conflicts about norms. The International Law Commission identifies some of the possible areas of conflicts over interpretation of general norms; conflict between a general law and a special one and conflicts between two specific norms in different fields (International Law Commission 2002; Koskenniemi 2003). It is now taken for granted by some that conflicts of norms within the international legal system are inevitable (Rousseau 1932: 191–192; Jenks 1953: 451; Fischer-Lescano and Teubner 2004: 1004). However, fragmentation of international law is not necessarily a problem (Pauwelyn 2004: 904). This is especially true if one looks at seemingly divergent fields such as trade and human rights as indivisible components, as Delmas-Marty does (Delmas-Marty 2003: 27). Actually a number of observers regard the sundering of law into

various fields as a good thing for international law. In any event within international law itself important rules and principles addressing possible conflicts have been developed over the years. They include the following: *lex specialis derogat lege generali, lex posterior derogat lege priori*, and *lex posterior generalis non derogat lege prior speciali*. However, a rule of *ius cogens* always takes precedence over a treaty even if the former is *generalis* or *prior* (Article 53 Vienna Convention on the Law of Treaties).

9.3 Functions of the Court of Justice of the European Union

This chapter looks at interregional relations from the point of view of the Court of Justice of the European Union. It is therefore relevant to briefly situate this European institution. The CJ was created in 1952, having been included in the Treaty of Paris that led to the creation of the European Coal and Steel Community (ECSC). It was established as the main organ for the ECSC to interpret the Treaty. In the Treaty of Rome, the founding fathers of the European Economic Community (EEC) decided that there will be one Court for the three communities (ECSC, EEC and EURATOM). Through its case law and particular method of interpretation, the Court has played a crucial role in framing the contours of European law. The increase in workload led the framers of the European integration project to provide for the creation of a Court of First Instance (CFI) attached to the Court of Justice and later on an EU Civil Service Tribunal.

As the judicial leg of the Union, the Court has a general function to ensure that Union law is observed. Its role is specific in the sense that

> the Court […] carries out tasks which, in the legal systems of the member states, are those of the constitutional courts, the courts of general jurisdiction or the administrative courts or tribunals, as the case may be.
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> In its constitutional role, the Court rules on the respective powers of the Communities and of the member states, and on those of the Communities in relation to other forms of cooperation within the framework of the Union and, generally, determines the scope of the provisions of the Treaties whose observance it is its duty to ensure. It ensures that the delimitation of powers between the institutions is safeguarded, thereby helping to maintain the institutional balance. It examines whether fundamental rights and general principles of law have been observed by the institutions and by the member states when their actions fall within the scope of Community law. It rules on the relationship between Community law and national law and on the reciprocal obligations between the member states and the Community institutions. Finally, it may be called upon to judge whether international commitments envisaged by the Communities are compatible with the Treaties.
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> (Court of Justice 1995: 2)

To this end, the Court establishes whether or not a member state has failed to fulfil an obligation under the Treaty (such actions can be brought by the Commission or a member state); exercises jurisdiction with regard to penalties in actions brought by the Commission; gives preliminary rulings at the request of national courts or tribunals; grants compensation for damages caused by the institutions in actions

brought by member states, natural and legal persons; acts as a court of appeal from the CFI; and reviews the legality of an act or of a failure to act of the Council, the Commission, or the Parliament, at the request of member states, the Council or the Commission. One of the strong and novel elements of the Court's jurisdiction is a compulsory and exclusive one: judgements not only apply *to* states but importantly also *in* member states (Mouton and Soulard 1998: 4–5; Arnull 2006).

Over the years, the CJ has used its leverage to expand the rendition of its mandate. It has been keen to ensure that the goal of the Communities, and later of the Union, of freer flow of production factors within the internal market is enhanced. It has developed technical doctrines through tests and landmark cases to chisel EU law into the fabric of municipal legal systems. This has been done through doctrines of direct effect and the supremacy of EU Law (Alter 2011: 4).[1] Through these principles, the Court has succeeded in commanding untrammelled legitimacy in what Weiler calls the 'silent revolution' (Weiler 1994: 517).

But why did the CJ succeed in embedding EU laws into the mould of domestic laws? The first reason is that the CJ relied graciously on the various national courts to apply EU law in the various states. National courts could use procedures, such as the preliminary reference, to secure a judicial conveyor belt to the CJ. The Court used test cases to seal important doctrines. For instance, in the *Van Gend & Loos* and *Costa/ENEL* cases, it developed the notions of direct effect and supremacy of Community law. Through these doctrines, national judges were simply converted into ordinary Community judges (Dehousse 1998: 33). In *Cassis De Dijon*, it further cemented the importance of harmonisation in forging the free flow of factors of production within the internal market (Alter and Meunier-Aitsahalia 1994: 537; De Waele 2010: 6). In the *ECOWAS* case it extended its remit into the realm of second pillar issues on Common Foreign and Security Policy (CFSP) allowing itself the discretion and competence of reviewing the legality of instruments adopted under the CFSP regardless of its formal exclusion from such acts under Article 46 of the EU Treaty (Case C-91/05, *Commission* v. *Council (ECOWAS)*; Eeckhout 2008). With this case, the Court slowly ventured into the domain of foreign policy, an area that (as noted above) was traditionally excluded from judicial review.

The second reason is that the CJ benefitted from the vital role played by Euro Law associations that mustered social and political capital together with legal arguments and premises to enhance the primacy of EU law at the national levels (Alter 2009a: 66–69). In the 1950s the Euro Law associations were formed in most EU member states but were not directly coordinated regionally. Workers of EU institutions like the Commission, the Court and Legal Services were often implicit and explicit members of the Euro Law associations. Associations helped in the training of lawyers on EU law matters and in creating a 'European' legal tradition. Financial support from the European Commission entailed that conferences could be

[1] During the early years of the Court and especially in the 1960s, Italian and French courts rejected the notion that international rules were superior to subsequent national ones. Initially, when the Court of Justice was created, it was more of a toothless bulldog since there appeared to be no strong sanctions when Community rules were violated.

organised and other activities carried out. Some of the associations included the *Wissentschaftliche Gesellschaft fûr Europarecht, Association belge pour le droit européen, Association française des juristes européens, Associazione Italiana dei Giuristi Europei, and the Nederlandse Vereniging voor Europees Recht.* The Commission also contributed to the creation of the *Fédération Internationale de Droit Européen* (FIDE) (Alter 2009a: 65).

The third main reason is that the CJ has been operating within a framework where the principles of rule of law and separation of powers are respected. So, unlike some of the regional courts of the South, there has been an accommodating environment for the growth of the Court with minimal political involvement.

Even if the CJ recorded favourable ratings when compared with other regional judicial organs, it also attracted criticisms, such as the workload and cumbersome nature of the tasks for the judges (Weiler 2001: 219). Other problems identified have related to the office of Advocates General and language and translation problems (Schiemann 2008: 5). In any event, the Treaty of Lisbon has provided initial solutions to the issue of workload and cumbersome nature of the CJ by re-assigning more tasks to the Court of First Instance (henceforth to be called the General Court) and reshaping the European Court of Justice (ECJ) into the Court of Justice of the European Union.

9.4 Judge-to-Judge Meetings

A first manifestation of judicial interregionalism refers to judge-to-judge contacts. Judges can relate to peers in other judicial systems in order to enrich their perspectives as to how similar challenges or issues are addressed in other *fora* and jurisdictions. Judge-to-judge cooperation is characteristic of what Slaughter describes as 'judicial globalisation' (Slaughter 2004: 66). She argues that judges are increasingly building a strong community amongst themselves and 'they see each other not only as servants and representatives of a particular government or polity, but also as fellow members of a profession that transcends national borders' (Slaughter 2004: 68).

CJ judges have in the past regularly engaged with their counterparts from other countries and regions. Examples of such interactions have been with the US, where exchange has been patent with CJ judges visiting the United States (US) Supreme Court and US Justices such as Retired Associate Justice Sandra Day O'Connor and Justice Stephen Breyer visiting the CJ (Slaughter 2000: 1119). Such meetings are vital for judicial comity that has been characterised as the lubricant of trans-judicial relations (Slaughter 1998: 708; 711).[2] Conversely, more conservative US Justices,

[2] US Supreme Court Associate Justices Antonin Scalia and Clarence Thomas have resisted the use of approaches or references to decisions of foreign courts in US courts. However, there is a US Committee on International Judicial Relations of the US Judicial Conference that has a mandate to coordinate the Federal judiciary's relationship with foreign judiciaries and with official and unofficial

including Scalia and Thomas, award minor importance to the degree to which judicial comity influences US legal and judicial processes. Friendly meetings have also been organised between CJ judges and judges from other regional courts, such as the ECOWAS Court, the Central American Court of Justice and the Andean Court of Justice. The European Commission has also been supporting the training of lawyers from other regions who visit the CJ to be schooled in the substantive and adjectival laws of the EU (Alter 2009b: 24). Even if some of these exchange programmes and judge-to-judge meetings are still weak (partly due to the youth of some of the courts), there is a visible trend.

Judge-to-judge visits that are not institutionalised in themselves cannot, however, fully account for the interactions that may exist between regional courts. As will be explained below, cross-referencing decisions of other regional courts is also important in determining how regional courts may impact on others.

9.5 Cross-Referencing Decisions

Through cross-referencing, judges use precedents from other courts to back up their decisions. This approach is highly regarded as it fortifies the broad appeal of the justifications and arguments marshalled by judges for specific positions adopted in their judgments. Helfer and Slaughter correctly submit that, 'invoking the reasoning of another tribunal that has no link to a particular case other than that its previous consideration and pronouncement on an analogous problem acknowledges the power of reason and the value of deliberation over time as well as across cultures' (Helfer and Slaughter 1997: 389).

Cross-referencing of decisions in other courts is regarded as a tool for enhancing judicial globalisation. It is an approach that has been common between the CJ and the European Court of Human Rights (Helfer and Slaughter 1997: 323–324). Within the human rights context, an interregional approach needed to be developed in the past because the Council of Europe and increasingly the European Communities were competent to adopt measures impacting on human rights. In the 1970s, responding to a challenge posed by the German Bundesverfassungsgericht in the *Solange I* case, the European Court of Justice developed a doctrine that human rights were part of the general principles of law binding that Court. To interpret these general principles, reference was made to the constitutional traditions common to the member states and the European Convention on Human Rights adopted within the framework of the Council of Europe.[3] In the words of the Court,

agencies and organisations interested in international judicial relations, and the establishment and expansion of the rule of law and the administration of justice, and to make recommendations as appropriate to the Chief Justice, Judicial Conference of the US and other judicial entities.

[3] ECJ, *Erich Stauder v. Stad Ulm* (12 November 1969); ECJ, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (17 December 1970); ECJ, J. *Nold, Kohlen- und Baustoffhandlung v. Commission of the European Communities* (14 May 1974); ECJ,

> fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those states are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception [...] refers on the one hand to the rights guaranteed by the constitutions of the member states and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.
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> (*Liselotte Hauer v. Land Rheinland-Pfalz:* paragraph 15).

This means that, when confronted with human rights issues, the ECJ/CJ will maintain that it is not bound by the European Convention on Human Rights but will nevertheless draw its inspiration from the way the European Court of Human Rights interpreted this human rights instrument. This doctrine developed by the ECJ was later taken over in the subsequent Treaty amendments to the original Treaty of Rome that established the European Community. To illustrate, one can refer to Article F.2 of the Maastricht Treaty where the member states agreed that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law'. As the CJ embraces greater competences in the human rights field within the context of the Lisbon Treaty and its interpretation of the EU Charter of Fundamental Rights, it will be significant to appraise how the two courts communicate with each other and how this cross-fertilisation may impact on the political processes of interregionalism.

As is the case with the European Court of Human Rights and the CJ, here is a trend of cross-referencing and citations between the various regional human rights control mechanisms such as the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the newly-established African Court on Human and Peoples' Rights. All these institutions are controlling the implementation of regional human rights instruments which are by their nature very similar and partly overlapping in terms of content. An interesting pointer is that the 1981 African Charter on Human and Peoples' Rights has even created *expresis verbis* the possibility, with its Articles 60–61, to draw inspiration from other human rights systems (Smis and Janssens 2008). Strictly speaking, these Articles allow the African Commission, when interpreting the African Charter on Human and Peoples' Rights, to draw inspiration from UN and other African human rights instruments. Indeed, the practice of the African Commission has developed since the turn of the century and the Commission is increasingly using these Articles as a means to look for inspiration

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Liselotte Hauer v. Land Rheinland-Pfalz (13 December 1974); ECJ, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* (15 May 1986); ECJ *Hubert Wachauf v. Federal Republic of Germany* (13 July 1989); ECJ, *Höchst AG v. Commission of the European Communities* (21 September 1989).

from other regional and particularly the European human rights system. For instance, in *Huri-Laws v. Nigeria*, the African Commission referred to the jurisprudence of the European Court of Human Rights (in particular *Ireland v. United Kingdom*) to question the absolute character of the prohibition of torture. Similarly, in *Curtis Francis Doebber v. Sudan*, it invoked the reasoning developed by the European Court of Human Rights in *Tyrer v. United Kingdom* to interpret the terms 'torture and degrading treatment' referred to in Article 5 of the African Charter of Human and Peoples' Rights.

Cross-referencing by CJ judges of their colleagues in sub-regional courts of the South is still to be chronicled. The approach to settling disputes by courts has a longer tradition in Europe than elsewhere and the European model has therefore become the model for other regional organisations. With the exception of the human rights domain, the European judge was often the first to be confronted with key issues of regional cooperation and integration and there has therefore been less interest in seeking inspiration elsewhere. Nevertheless, the converse has occurred as judges in the Andean Court of Justice as well as those in the EAC Court have made references in their decisions to the CJ-developed doctrines of direct effect and supremacy of Community rules over national ones. However, in both instances, the judges were unable to withstand the pressure from political figures who are often keen on dispensing with such ideals.

While this chapter considers the various ways in which the CJ has impacted on the decisions of other regional courts, the foregoing section has shown that the CJ's approaches on certain human rights questions have also been shaped by other regional bodies that sanction matters pertaining to human rights.

9.6 Interregional Dispute Settlement

There are few instances of interregional third party dispute settlement involving the CJ. There are many reasons for this. Firstly, the CJ has little leverage in this area because its mandate is to focus on the internal market in terms of promoting freer flow of factors of production within the Union.

Secondly, interregional issues are, as mentioned above, mainly a function of political decisions taken by state representatives rather than being decided by judges. On this point it is also important to distinguish between issue areas. Interregional cooperation that hinges on development cooperation will seldom elicit differences amenable to dispute settlement panels or adjudicative mechanisms. By the same token, differences arising from political dialogue, which now characterises the EU's ties with the Mediterranean countries, are not expected to be addressed in court because of the nature of the relations. They are inherently politically-driven rather than judicially accommodated.

Thirdly, although dispute settlement mechanisms are already included in some EU interregional arrangements, it is interesting to note that in most of these agreements the first method of dispute settlement (consultations) is political.

In the interim Economic Partnership Agreements (EPAs) for the East African Community (Council of the European Union 2008a), Cameroon (Council of the European Union 2009), the Southern African Development Community (SADC) Group (Council of the European Union 2008b) and the Pacific (Council of the European Union 2008c), standard clauses on consultation, mediation and arbitration are integrated in various ways. The trend of using arbitration gained steam when the EU signed Free Trade Agreements with Mexico (2000) and Chile (2001) (Bercero 2006: 383).

Fourthly, politicians often prefer mediated dispute settlement. In all the interim EPAs cited above, the main goal is that of dispute avoidance. Because of the time and costs that are associated with adjudication it is the least favoured option.

9.7 The Court of Justice of the EU as a Model

Even if the financial crisis that began in 2008 has exposed economic fault lines within the EU, Europe's model of integration is highly regarded and many developing countries seek to understand what has made the EU such a strong regional entity. One of the main factors for this has been the strong supranational institutions including the Council, the Commission and the Court. Many regional groups have sought to replicate the institutions of the EU in their own regions in the hope that they too can secure prosperity and peace. In the case of the judicial organ, Alter has estimated that there are now 11 operational copies of the CJ (Alter 2011: 2). But not all of the courts and tribunals are active. Some African, Caribbean and Latin American sub-regions have embraced the CJ styled regional courts. These are modelled on three main factors. First, the model is characterised by the existence of a commission that monitors compliance and brings cases to court. Second, the model is marked by the use of preliminary rulings that allow national courts to send references to the supranational court. Finally, the model accommodates the possibility of constitutional reviews where litigants can challenge Community acts before supranational courts (Alter 2011: 7). The influence of the CJ on some of the regional courts of the South reflects the broader trends of cross-fertilisation of institutions whereby most regions lean on European integration initiatives as models. At the sub-regional level, trade arrangements such as the EAC, the ECOWAS, the Andean Community and the CARICOM have all established functioning courts, the media coverage of which remains timid (Knott 2011: 2).

For courts like those of ECOWAS, policy makers copied the CJ model but adapted its lessons to suit the specific needs of the sub-regional actors. When the CJ was created, the objective was to check the actions of political masters (Alter 2011: 3). When it was formed, compliance levels to its rulings were very low. This experience is now being relived in some of the Southern sub-regional courts, like those of the SADC, where political actors have sought to trim, suspend or even abrogate the powers of the sub-regional tribunal as they feel more and more threatened by judicial rulings. Initially, when the CJ was created, there appeared to be no strong

sanctions regime when Community rules were violated. In the 1960s and 1970s, the Court was not held in high regard. CJ doctrines of direct effect and supremacy of Community law helped to build a constitutional order at a time when the political process of integration was largely paralysed in Europe (Alter 2011: 5–6). In the 1980s, governments changed attitudes as they realised the importance of the single market for global competitiveness. A more stringent application of European law was required. So, after this period, greater attention was placed on a stronger role for the common Court. In the 1980s and 1990s, there was the introduction of the former CFI (now General Court) alongside sanctions for non-compliance with European law.

In her recent study of regional courts, Alter finds no evidence that the EU has been using money to pressurise other sub-regions to use its model. Her explanation for judicial mimicry is that various regions desire to promote regional integration through law so they rely on the sub-regional courts that are similar to the CJ model. The paragraphs that follow present the manner in which the regional courts of the EAC, ECOWAS, CAN and CARICOM have made references to the decisions of the CJ in their own rulings or used some of the legal techniques of the CJ.

9.7.1 The East African Court of Justice

The EAC was initially created in 1967. Due to divergent economic and political interests of the members, it was dissolved in 1977 but revived in 2000, following the Treaty of the EAC being signed in 1999. The Community became a customs union in 2004, taking effect in 2005. The vision of the EAC is ‘to have a prosperous, competitive, secure and politically united East Africa’ (East African Community 2005: vi). The vision is geared at dealing with the main challenge for the organisation perceived as stimulating ‘investments beyond the natural resource sectors and guaranteeing a higher level of linkages in the economy’ (East African Community 2005: vi).

The EAC’s Court has alluded to ECJ decisions in some of its cases. In *Nyong’o v. Att. Gen. of Kenya*, the Court leaned on CJ decisions in *Van Gend & Loos, Costa/ENEL, Factortame and Simmental* to illustrate how vital it was to apply the doctrine of primacy of Community law in the municipal systems to ensure effective application of the Community rules (Van der Mei 2009: 14). It has been difficult for the EAC’s Court to apply notions of direct effect and supremacy. The EAC approaches regional integration from an intergovernmental perspective. It is not a supranational organisation like the EU and it was that specific characteristic of European economic integration that enabled the CJ to develop the doctrine of direct effect. In the much cited *Van Gend & Loos* case, the CJ stated it as follows:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Independently of the legislation of member states Community law therefore not only imposes obligations on

> individuals but is also intended to confer on them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon member states and upon institutions of the Community.

Moreover, member states such as Tanzania, Uganda and Kenya, have been dualists in terms of incorporating international law into their legal systems and this makes the issue of supremacy and direct effect even harder to apply in these countries. Considering the political atmosphere in which judges work in that part of the world, one cannot be optimistic about the future role of the Court to enhance harmonisation of Community rules (Van der Mei 2009: 30).

In *Calist Andrew Mwatela, Lydia Wanyoto Mutende and Isaac Abraham Sepetu v. East African Community* (which was a case brought to challenge the composition of the Judicial Sectoral Council of the EAC), applicants sought to annul the decisions adopted by the Council. In deciding the matter, the Court relied in part on the CJ's decision in *Defrenne v Sabena* to rule that since the Court was created in 2001 and the case was to be decided in 2006, it would not annul decisions of the Council between 2001 and 2006. Rather, it ruled that it would rely on the doctrine of prospective annulment that was used by the CJ in the *Defrenne case* to invalidate only those Council decisions adopted following the ruling. In other words, the Court upheld the principle of non-retrospective application of its decisions, meaning its judgments will not have retrospective effects.

9.7.2 ECOWAS' Community Court of Justice

The Treaty by which ECOWAS was created was signed on 28 May 1975. It was revised in July 1993 to provide new impetus to the regional process. The goals of ECOWAS as contained in the Treaty and its Vision 2020 include the eradication of poverty through the development of human capital. The ECOWAS Commission (formerly the Executive Secretariat) was inaugurated in January 2007, following a decision to implement a process of structural reforms taken at the January 2006 Summit of the Authority. The Revised Treaty of 1993 introduced a Community Parliament and a Community Court of Justice (CCoJ).

The CCoJ has heard important cases with ramifications for trade and especially for human rights (*Chief Ebrimah Manneh v The Republic of The Gambia; Hadijatou Mani Koraou v The Republic of Niger; Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*). It appears to be the most activist of all the sub-regional courts studied in its approach on defending the human rights of citizens of the region. In doing this, it has also relied on its own jurisprudence as well as on cases from the European Courts. Yet, in *Olajide Afolabi v Federal Republic of Nigeria,* the Court resisted calls made by the applicant to emulate the approach of the former ECJ by extending standing to individuals even if this was not expressly provided for in the Treaty of ECOWAS (Opong 2009: 141).

9.7.3 Andean Court of Justice

When the Andean Community was formed following the Cartagena Agreement of 1969, its member states were greatly influenced by the European model of integration. Conscious of reaching the goal of economic prosperity and human development, the designers of the Community were advised by EU officials to create strong institutions, especially a Court with robust powers akin to those wielded by the CJ (Saldias 2007: 3). The Tribunal was created in 1979 but commenced its operations in 1984 following requisite number of ratifications of the Tribunal's Treaty by member states. Over the years, the Court has indeed sought to reflect the approaches used by the ECJ or the EU's CJ by the embracing precepts developed by the CJ, such as supremacy of Community law and direct effect (Saldias 2007: 4). Adjectival mechanisms, such as preliminary rulings, that have been widely used and are still used by the CJ of the EU have also been imported for use in the Andean tribunal (Helfer and Alter 2009: 874).

9.7.4 Caribbean Court of Justice

CARICOM was created in 1973 following the endorsement of the Treaty of Chaguaramas. It is composed of 15 countries and dependencies. An important watershed in the region's history was the signing of the Revised Treaty of Chaguaramas in 2001. The Treaty ushered in the notion of a Caribbean Single Market Economy (CSME). The main goals behind the CSME are to move the common market blueprint to that of a single market economy and to fortify trading links between the region and non-traditional trading partners. The future of Caribbean integration now rests on implementation of the CSME that was formally created on 1 January 2006 and is expected to be fully operational by 2015.

The Caribbean Community is another sub-regional entity whose institutions are modelled on the EU's. One such institution is the Caribbean Court of Justice that has been hearing important cases. In some of the cases, the judges have made allusions to the EU's CJ. In *Trinidad Cement Limited (TCL) v The Caribbean Community*, TCL accused the Secretary General of CARICOM for lowering the tariffs for cement imported into the region without duly informing the company which had relied on higher tariffs as the basis upon which to make crucial investments to meet the regional needs for cement. This act, the company contended, compromised its chances to expand its cement business venture. Summoned to the Court, the Secretary General responded that he had acted according to the needs of the region and the fact that prior notice of the action served on the government of Trinidad and Tobago (where TCL is registered) had received no objections. Using a flexibility test in alluding to the EU Treaty and demarcating the role of the CJ under that Treaty, the Court quashed the claims of TCL, noting that the Secretary General had acted in good faith (*Trinidad Cement Ltd. v The Caribbean Community:* paragraph 34, footnote 2).

But the Court welcomed the fact that TCL had brought the claim, signalling that the private sector could actively bring cases before it (*Trinidad Cement Ltd. v The Caribbean Community*: paragraph 16).

9.7.5 Summary

The sample of cases from the Regional Trade Agreements indicates that sub-regional courts are starting to gain traction albeit in difficult and challenging political environments (Gathii 2010). The courts have borrowed from the CJ's design and approaches in certain instances and have also gone beyond the characteristic trade mandates bestowed on them to hear matters related to human rights (Alter 2011). Among the sub-regional courts considered here, only the EAC's Court has made important references to the CJ's rulings, especially to its doctrines of direct effect and supremacy of Community law. The real test for the sub-regional courts will be the degree to which they can act without interference from political masters. As Nyman-Metcalf and Papageorgiou argue, for a regional court to be successful, there must be a minimum level of integration; the need for the rule of law and culture of respect for rulings; the ability to sanction, and states in the grouping must be willing to relinquish some sovereignty and accept the supremacy of Community law. Above all, political masters must adhere to the *dicta* of the courts (Nyman-Metcalf and Papageorgiou 2005: 117–118).

9.8 Conclusion

Judicial cooperation in terms of dispute settlement and even cross-referencing that is meaningful at the interregional level is either still seminal or non-existent. Prospects for stronger interregional cooperation cannot be positive if interlocutors are either weak or bereft of enthusiasm to push for greater interregional court-to-court exchange. Yet, there are prospects for greater interregional court relations.

First, it is likely that court-to-court cooperation will continue and the first two dimensions of jurisdictional cooperation (judge-to-judge contacts and cross-referencing) will increase not so much on the region-to-region level during these initial stages but on a *court-to-court* basis, irrespective of the level (national or regional). In this regard, the work of the European Commission for Democracy through Law, also known as the Venice Commission, is worthwhile. The Commission was established in 1990 with the aim of strengthening constitutional practices in Europe. It is an advisory arm within the Council of Europe but its membership has been extended to 57 countries including Algeria, Israel, Morocco, Chile, South Korea. Canada, the US, Argentina and Mexico are all observers. South Africa and the Palestinian National Authority enjoy a special status akin to that of observers.

Second, prospects for a truly interregional dimension of judicial cooperation are particularly evident in the realm of human rights. Cross-referencing is strong between the CJ and the European Court of Human Rights but not very well developed between the CJ and sub-regional courts of the South that are modelled on the CJ. For instance, in *Fischer v Austria* as well as in *Konig v Federal Republic of Germany*, various judges of the European Court of Human Rights evoked the authority of the CJ. As the other regional courts gain traction in adjudication, it may be expected that cross-fertilisation will ensue. While there are prospects for court-to-court cooperation at the regional level, this is of course contingent on the regional courts being strong, respected and used. In a new context of grave economic crisis and the increased economic clout of emerging countries, there is little evidence that these new actors have a particular penchant for regional approaches to judicial governance. Rather, their approach has been to identify, in the case of China, how leverage can be exerted through the dispute settlement systems, especially that of the World Trade Organisation (WTO) (Hsieh 2010: 999). Unlike the WTO Dispute Settlement Body, the ICJ and the ICC as well as human rights bodies will not be well regarded by China (Posner and Yoo 2006: 11–13).

On the cross-citations, one is reminded by Voeten that transnational citations do not necessarily coincide with transnational influence (2009: 4). In other words, although instances have been identified in which Southern courts make references to CJ rulings, it cannot be concluded that this leads to substantive political leverage by the EU. Also in none of the cases cited was reliance on the CJ cases used to determine the merits of the issues litigated.

Courts have received relatively scant attention in new governance scholarship (Scott and Sturm 2007: 1) but the CJ of the EU continues to generate great interest. The extent to which the CJ can forge interregional cooperation between the EU and other regions depends on whether one is hoping for better judge-to-judge meetings, cross-referencing in decisions or active participation in interregional dispute settlement. As noted in this chapter, the last dimension presents specific challenges. However, the work of the Venice Commission and the accelerating jurisprudence in the regional protection of human rights suggests that judges of regional courts will converse more with their peers and that this will lead not only to better decisions but also to better interregional politics.

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