4 Legal Acts, 4.2 Solange I, BverfGE 37, 291, 29 May 1974; Solange II, BverfGE 73, 339, 22 October 1986; Solange III, BverfGE 89, 155 12 October 1993; and Solange IV, BverfGE 102, 147, 7 June 2000

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(p. 170) 4.2 *Solange I,* BverfGE 37, 291, 29 May 1974; *Solange II*, BverfGE 73, 339, 22 October 1986; *Solange III,* BverfGE 89, 155 12 October 1993; and *Solange IV,* BverfGE 102, 147, 7 June 2000

Relevance of the cases

The *Solange* case-law stands for a specific form of interaction between the legal order of the European Union (EU) and the legal orders of the member states or, respectively, between the European Court of Justice (ECJ) and the national Constitutional Courts of the member states. At the start of this line of cases the German Constitutional Court (Bundesverfassungsgericht—BverfG) first upheld its power to consider the compatibility of Community law rules with fundamental rights of the Basic Law (Grundgesetz) 'as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights' (*Solange I*). Afterwards, when fundamental rights protection had become sufficiently strong within the EC/EU the BVerfG declared to refrain from such a control activity 'as long as the European Communities ensure effective protection of fundamental rights' (*Solange II*). Subsequently, this case-law was further clarified and extended to the delimitation of the respective competences (*Solange III and IV*). More specifically, it dealt with the question whether the EU was acting *ultra vires*.

The attitude taken by the BVerfG was criticized for endangering the unity of EC/EU law and for being in contrast with the principle of supremacy and unity of EC/EU law but on the final count there was nonetheless virtue in this approach.

In fact, thereby, the BVerfG managed not only to defend the high standard of fundamental rights protection in Germany but also to give a decisive contribution to the integration of a highly evolved system of fundamental rights protection into EC/EU law. In many member states the *Solange* case-law influenced heavily the domestic approach taken in this regard. This form of interaction, of a 'dialogue' between institutions on questions of fundamental rights, became exemplary also beyond the EC/EU context.

Solange I, BverfGE 37, 291, 29 May 1974

I. The facts

A German import/export firm made an application to the Administrative Court (Verwaltungsgericht) of Frankfurt am Main for annulment of a decision of the Einfuhr- und Vorratsstelle für Getreide und Futtermittel in which an export deposit of DM 17,0026.47 was declared to be forfeited after the firm had only partially used an export licence granted to it for 20,000 tons of ground maize. This decision was based on Council regulations. In a preliminary ruling the ECJ confirmed the legality (p. 171) of the disputed regulations. The Administrative Court then stayed the proceedings and requested the BverfG to decide whether the rule that the deposit is to be released only in a case of force majeure (and otherwise is forfeited if an export licence is not or not fully used) is compatible with the Basic Law.

In the first years of the European integration process Germany had taken a decisively pro-European stance that also characterized the attitude of its courts and, in particular, of the BVerfG. This seemed to translate into an unconditional acceptance of EU law autonomy and supremacy.[1] This attitude began to change at the beginning of the 1970s due to a broader disillusionment with European integration and an exacerbated dispute between leading German public lawyers. Some of them warned of an endangerment of the high fundamental rights protection standard by the ever-increasing importance of EC law which seemed to be

widely unscathed by the fundamental rights debate.[2] Starting with Stauder in 1969[3] the ECJ recognized fundamental rights as general principles of law and therefore as part of EC law. In 1970, in Internationale Handelsgesellschaft,[4] the ECJ ruled that 'respect for fundamental rights forms an integral part of the general principles of Community law'. In the same case, however, the ECJ also proclaimed the principle of the supremacy of EC law over national constitutional law and therefore also over fundamental rights enshrined in national constitutions. After this preliminary ruling, that to many seemed too far-reaching, this question was referred to the BVerfG. In 1974 the latter issued a decision that widely diverged from that of the ECJ.

II. The legal question

The legal question referred to the BVerfG boils down to the following: did Germany have to accept EC law that stood in contrast to fundamental rights provisions of the German Constitution? The influential Mainz law Professor Hans Heinrich Rupp had asserted the existence of a far-reaching structural incongruence between EC law and national constitutional law that stood in the way of EC law supremacy.[5] The BVerfG seemed to accept at least some of his criticism.

III. Excerpts

> 4. The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. [6] Article 24 of the Basic Law does not without reservation allow it to be subjected to qualifications. (p. 172) In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights […]
>
> c) […]
>
> [. . .] as long as the integration process has not progressed so far that the Community also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.

Solange II, BverfGE 73, 339, 22 October 1986

I. The facts

The starting point of this case was a dispute between a German importer of preserved mushrooms from Taiwan and the German import authorities. In application of EEC Regulation 2107/74 laying down protective measures against the import of mushrooms from non EEC-countries the (German) Federal Office for Food and Licence refused to issue an import licence. After unsuccessfully contesting the lawfulness of Regulation 2107/74 before the Frankfurt Administrative Court with reference to art. 39 of the EEC Treaty the importer

appealed before the Federal Supreme Administrative Court (Bundesverwaltungsgericht). The proceedings were suspended and the Federal Supreme Administrative Court referred the question as to the lawfulness of the contested EEC import regime to the ECJ. For this Court, however, the Commission had correctly used its discretion in making its assessments when the disputed regulations were adopted.

In further proceedings before the Supreme Administrative Court the appellant objected that there had been a breach of various constitutional rules and requested either a referral of the question to the Federal Constitutional Court under art. 100(1) of the Basic Law or a fresh reference to the ECJ for further clarification in view of the specific content of the case. After both applications had been rejected the importer appealed on constitutional grounds against the judgment of the Federal Supreme Administrative Court before the Federal Constitutional Court, claiming *inter alia* that the Supreme Administrative Court should have referred the question of the alleged infringement of fundamental rights to the Constitutional Court. For the BVerfG, however, '[t]he appellant's complaints, that the European Court's ruling and Commission Regulations 1412/76 and 2284/76 as interpreted by that Court infringed the fundamental rights under the Basic Law and therefore ought not to have been (p. 173) applied by German authorities or courts during the period in question within the sphere to which the Basic Law applies, are inadmissible; a reference of the regulations to this Court by the Supreme Administrative Court under art. 100(1) of the Basic Law would have been inadmissible.'

The central question concerned the interpretation of the principles set out by the BVerfG in *Solange I*.

II. The legal question

The *Solange I* decision was cause for satisfaction for one group, for deep disappointment and even enragement for the other. As one commentator had it: 'In one short decision, the BVerfG had shifted dramatically to favour the side of the legal-academic spectrum which it had angered with its 1967 decision. As a result, it now faced the wrath of those scholars, with whom it had previously sided.'[7] Nonetheless, the decision was also a kind of wake-up call, in particular for the ECJ. In fact, the ECJ was well aware of the threat for the integration project originating in Karlsruhe. In extremis, Luxemburg tried to soothe Karlsruhe: two weeks before the *Solange I* decision was issued the ECJ delivered the judgment in the *Nold* case[8] where the Court stated the following:

> As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, *and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States*.[9]

As a consequence, member states should take confidence that the EC would not and could not infringe fundamental rights enshrined in their constitutions. However, this reassurance could not impress the BVerfG, at least not immediately.

III. Excerpts

> II, 1 f)[10]
>
> In view of those developments it must be held that, so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they

generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary (p. 174) Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) for that purpose are therefore inadmissible.

II, 1 g)

The question must, therefore, remain unanswered whether the appellant is correct in its accusation that the disputed Commission regulations in the interpretation given by the European Court infringe its fundamental rights as recognized in Article 12 (1) and 2 (1) in conjunction with Article 20 (3) of the Basic Law. It does not appear either from the appellant's submissions or from the preliminary ruling of the European Court that the Court under its interpretation of the law is in general simply not prepared or not in a position to recognize or protect the fundamental rights claimed by the appellant and that, therefore, the degree of protection of such rights required by the Basic Law has in general clearly not been reached at the level of Community law. For those reasons the present case does not give any occasion to consider a review of the disputed Commission regulations in respect of their compatibility with fundamental rights under the Basic Law. A reference of the Commission regulations under Article 100 (1) by the Federal Supreme Administrative Court in the main action would, therefore, have been inadmissible.

IV. Commentary

In the years following the *Solange I* decision the message by the BVerfG was heard and well-understood. The EC together with the member states and assisted by the ECJ tried hard to build up a sophisticated system of fundamental rights protection.

When the BVerfG was again seized with the question whether and to what extent this Court would exercise its jurisdiction to control the compatibility of EC law with fundamental rights provisions of the Basic Law it could therefore take this change of circumstances into account and withdraw, although under certain conditions, its announcement made in *Solange I*, to exercise such a control power. Therefore, in 1986, in *Solange II*, supremacy of EC law seemed to be fully restored. A reactivation of this control power was relegated to the absolutely hypothetical case that the fundamental rights standard achieved would again decline 'to an extent that makes it impossible on constitutional grounds to regard a reasonable protection of fundamental rights as being generally available'. With a control power whose exercise was made dependent on such a remote condition the EC could surely live.

Solange III, BverfGE 89, 155 12 October 1993

I. The facts and the legal question

The Treaty of Maastricht of 7 February 1992 brought about the most far-reaching reform of EC law since its inception by creating an EU with widely enlarged competences and strengthened supranational traits. This development did not meet with (p. 175) unconditional applause, as some feared an undue encroachment upon national sovereignty. Such fears materialized in particular in Germany, where the creation of a Monetary Union, for which the Treaty of Maastricht also laid the foundations, was seen by many as a step backwards in respect to the stable hard currency system painstakingly created with the D-Mark.[11] On the political level the Treaty of Maastricht was approved in Germany by a great majority: in the Bundestag it reached a majority of 526 out of 543 and the Bundesrat approved it unanimously.[12] In spite of this nearly plebiscitary voting Germany could not

ratify the Maastricht Treaty as several complaints were filed against the federal statute ratifying the Treaty. The complaints were lodged by four German members of the European Parliament of the Green Party and by Manfred Brunner. According to the complainants the amendments to the Basic Law resulting from the ratification of the Maastricht Treaty as well as the law transforming this treaty into national law violated a series of constitutional provisions. All but one of the complaints (presented by Manfred Brunner) were dismissed.[13] Only with regard to art. 38 of the Basic Law, guaranteeing the subjective right for every German voter to take part in the election of members of the German Bundestag, the Constitutional Court had some doubts. These doubts arose from a very broad interpretation of the right to vote and the principle of democracy: the BVerfG did not want to exclude that the right to vote could potentially be affected by an extensive transfer of competences by the German parliament to another institution: 'The complainant's right arising from Art. 38 of the GG can therefore be violated, if the exercise of the responsibilities of the German Federal Parliament is transferred so extensively to one of the governmental institutions of the European Union or the European Communities formed by the governments, that the minimum, inalienable requirements of democratic legitimation pursuant to Art. 20, paras 1 and 2 in conjunction with Art. 79, para. 3 of the GG relating to the sovereign power to which the citizen is subject can no longer be complied with.'[14]

At the end, this complaint was also dismissed as unfounded as the BVerfG found no infringement of the principle of democracy in the sense described. The BVerfG used, however, the opportunity to define the limits of European integration from the viewpoint of German constitutional law.

II. Excerpts

Headnote

1. Art. 38 GG [Grundgesetz] forbids the weakening, within the scope of Art. 23 of the GG, of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Art. 79, para. 3 in conjunction with Art. 20, paras. 1 and 2 of the GG, is violated.(p. 176)

2. The principle of democracy does not prevent the Federal Republic of Germany from becoming a member of a compound of States [Staatenverbund] which is organised on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States.

[…]

5. Art. 38 of the GG is violated if a law which subjects the German legal system to the direct validity and application of the law of the supranational European Communities does not give a sufficiently precise specification of the assigned rights to be exercised and of the proposed programme of integration (see BVerfGE 58, 1<37>). This also means that any subsequent substantial amendments to that programme of integration provided for by the Maastricht Treaty or to its authorisations to act are no longer covered by the Act of Consent to ratify this Treaty. The German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and Governmental entities may be considered to remain within the limits of the sovereign rights

accorded to them, or whether they may be considered to exceed those limits (see BVerfGE 75, 223).

[…]

9. c)

The Federal Republic of Germany is not, by ratifying the Maastricht Treaty, subjecting itself to an uncontrollable, unforeseeable process which will lead inexorably towards monetary union; the Maastricht Treaty simply paves the way for gradual further integration of the European Community as a community of laws. Every further step along this way is dependent either upon conditions being fulfilled by the parliament which can already be foreseen, or upon further consent from the Federal Government, which consent is subject to parliamentary influence.

III. Commentary

In the 'Maastricht' judgment the BVerfG reasserted its control power in the relationship with the ECJ and extended it in two directions. First of all, this power was no longer limited to fundamental rights in the traditional, stricter sense but it was extended more generally to the EC legislative power. Second, the control power should now also encompass Union acts.

As to the first aspect, the normative gateway to this new approach was found in the principle of democracy or, respectively, the right to vote. This right must not be voided by a transfer of legislative powers to a European Union not yet endowed with corresponding and sufficient democratic participatory rights of its citizens. According to the BVerfG the EU remains a 'compound of States' ('Staatenverbund'), a term introduced by the judge rapporteur Paul Kirchhof to convey the notion that the EU is neither a confederation, nor an international organization, nor a federal state but something in between. Democratic legitimation is conveyed via the national parliaments and therefore the extension of the functions and powers of the European Communities must not be limitless. The German Federal Parliament 'must retain functions and powers of substantial import'. The BVerfG takes note of the dynamic integration process but at the same time it admonishes that the national parliaments must remain in control of (p. 177) the 'integration programme' set by these democratically elected bodies. The implications of this statement are twofold:

— First of all, a law ratifying a treaty which transfers legislative powers to a supranational institution like the European Union has to 'give a sufficiently precise specification of the assigned right to be exercised by the European Communities and of the proposed programme of integration'. A ratification law without such a programme would be in violation of the Basic Law.

— Secondly, the BVerfG wants to preserve a control power also over the subsequent integration process:

> '[A]ny subsequent substantial amendments to that programme of integration provided for by the Maastricht Treaty or to its authorization to act are no longer covered by the Act of Consent to ratify this Treaty.'

'Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the

> sovereign rights accorded to them, or whether they may be considered to exceed those limits'.

This second assertion has met with strong criticism by legal doctrine as it implies nothing else than the control of EU law by a national constitutional court. Thereby the primacy of EU law, uncontested since Costa/ENEL,[15] and the proposition that this law has to find uniform application within all member states, has been jeopardized.

This attitude by the BVerfG was qualified as 'aggressive' and 'confrontational' and the statement by this Court that it would exercise its control power 'in cooperation' with the ECJ as deceiving and presumptuous.[16] As will be seen in the final evaluation this vision by the BVerfG was shaped to a large extent by personal approaches of individual judges to the relationship between national law and EC law. And foremost it was also a stratagem to further the acceptance of the Maastricht Treaty on the internal level.

Solange IV, BverfGE 102, 147, 7 June 2000

I. The facts and the legal question

The 'Banana judgment' of 2000 by the BVerfG represents the fourth main chapter of a long judicial controversy pitting Germany and its banana importers against the EU.[17] This controversy took place at the GATT/WTO level, at the level of the EU, and finally before the BVerfG.

Until mid-1993 each EC member state had its own banana import regime. Germany imported bananas mostly from the dollar area, while other member states, in particular France and Great Britain, preferred their former and actual colonies. This situation (p. 178) was terminated by Regulation No. 404/93, which established a common import regime for bananas, favouring trade from the EC area and from ACP countries, while import from the dollar areas was heavily restricted. German banana traders suffered extensive economic losses as they had to restructure their business relations. The ECJ dismissed complaints both by individuals and by Germany. Individual complaints by German banana traders before the ECJ were rejected as the complainants were not able to demonstrate that the Community had incurred non-contractual liability by manifestly and gravely disregarding the limits on the exercise of its powers.[18] Germany's complaint was rejected by the ECJ *inter alia* by stating that the right to property and the freedom to pursue a trade or business of the operators on the German market may be restricted. Furthermore, the Council had to reconcile conflicting interests by the different member states.[19] Subsequently, nineteen operators of the so-called Atlanta group brought a complaint before the BVerfG sustaining that the common market order for bananas conflicted with fundamental rights provisions of the German Constitution. Now, the BVerfG was called upon to further specify the Maastricht judgment. It took the BVerfG nearly four years to come to a decision. Some authors speculate that the Court waited for the retirement of the judge rapporteur in the Maastricht case, Paul Kirchhof.[20] The Court declared the submission inadmissible.

II. Commentary

The BVerfG considered that this submission was based on a misunderstanding of the Maastricht decision. This decision of 1993, according to the BVerfG, was not to be understood as an announcement that the BVerfG would, contrary to the *Solange II* decision, explicitly exercise its power of review again, albeit in co-operation with the ECJ. The applicants should rather have noted that in the Maastricht decision the BVerfG had quoted

the statements in the *Solange II* decision which show that it exercises its jurisdiction to a limited extent.

In the Banana decision of 2000 the BVerfG, now with a different composition and confronted with a widely changed national attitude towards the European integration process, re-read and re-interpreted its own decision of 1993 in a clearly more integration-friendly fashion.

In this decision, the BVerfG has not totally relinquished its pretension for a power of review of secondary EC (EC) law as to possible infringements of fundamental rights guaranteed by the Basic Law but it has made clear that it will be highly unlikely that it will exercise this power in the future. While in the 'Maastricht' decision it was associated with a warning towards the EU not to overstretch its powers, after Lisbon, this power of review is nothing else than a safeguard for an extrema ratio situation that is very unlikely to happen. No longer, the BVerfG speaks about a 'relationship of cooperation' with the ECJ in regard to the exercise of its power of review, giving thereby (p. 179) further proof of its acceptance of the ECJ's prerogative when EU law and its implementation come into play.

Conclusions

The *Solange* line of cases mirrors a series of different developments:

— First of all, it can be seen as reflecting the ups and downs of the integration process. Starting boldly in a period of strong EEC scepticism the BVerfG softened its approach when the integration climate improved—only to become sceptical again when the winds changed. It is remarkable, however, that the BVerfG never stated that a national measure to implement EU law (and even less so EU law itself) had violated the required standard of fundamental rights. [21] Thereby, European integration could proceed making it ever more unlikely that such a violation would be contested.

— This case-law is also an expression of the BVerfG's personal composition. In this context, judge Paul Kirchhof, judge rapporteur of the 'Maastricht' decision, has already been mentioned. Kirchhof has been notoriously critical towards a European integration process transforming the 'compound of states' ('Staatenverbund') into a European state. According to Kirchhof such a development would be against the European legal tradition; it would be something 'unnatural'. [22] The 'Banana' judgment was issued after Paul Kirchhof had left the BVerfG [23] and was proof of a new orientation within the Court.

— The *Solange* case-law reflects also the changing attitudes towards the relationship between national law, international law, and EC/EU law. Still in the 'Maastricht' decision the relationship between national constitutional law and EC/EU law was portrayed in a 'traditional' 'international law' perspective, a perspective that visibly clashed with that of the ECJ since *van Gend & Loos*. [24] The BVerfG ostensibly tried to retain control of the integration process. While in the relationship with international law this control power is fully in place, with regard to EC/EU law this battle has since long been lost.

— At the same time, the *Solange* case-law gives evidence of profound changes in German public law doctrine moving from a traditional 'dualist' perspective towards a 'communitarian' view with pronounced monist traits.

Now a presumption is in force that fundamental rights protection within the EU is equivalent with that of the Basic Law. This presumption operates also with regard to any further development of EU fundamental rights protection even though the (p. 180) presumption is rebuttable. The presumption has been confirmed by the BVerfG in the Lisbon judgment of 2009[25] in view of the eminent proclamation of the Charter of Fundamental Rights.

In the Honeywell decision of 2010[26] the BVerfG has declared that the BVerfG exercises an ultra vires review only if the breach of the competences by EU bodies is sufficiently qualified. This requires a manifest breach of competences and a structurally significant shift in the structure of competences to the detriment of member states.[27] It is not sufficient to demonstrate that fundamental rights protection is substantially deficient in one specific area in comparison to that guaranteed by the Basic Law; rather, these deficits have to be of a general nature.[28]

In any case, prior to any statement by the Court that an ultra vires act is at hand, the ECJ is to be afforded the opportunity to pronounce itself on the question.

Thereby the 'Banana' decision was confirmed and further specified. A conflict between EU law and national fundamental rights is still considered to be a possibility, though a very remote one.

With regard to the accusation that the BVerfG had taken, in particular in the 'Maastricht' decision, an 'aggressive' and 'confrontational' attitude, it should also be noted that an intense dialogue was going on between Karlsruhe, Luxemburg, and Brussels which was not only directed at the preservation of subjective positions but at the development of a sustainable relationship between states, courts, and supranational institutions that should contribute to the consensual construction of a highly evolved fundamental rights area. Without doubt, over the years this dialogue has brought about the desired result. It should not be forgotten that the conflict portrayed in *Solange I–IV* was real and not a merely hypothetical one. Had the BVerfG unconditionally accepted the precedence of EC/EU law from the very beginning, it is doubtful whether Brussels and Luxembourg would have shown so much dedication to the development of such a sophisticated EC/EU fundamental rights protection as is now in place. The concept of '*Solange*' has become emblematic for a difficult dialogue between legal areas with highly different standards of fundamental rights protection. These different legal areas are connected over communicating vessels and the *Solange* principle operates like a regulator impeding this connection to excessively watering down the fundamental rights protection within one sub-system. Lately, in the Lisbon decision (2009), the BVerfG extended its approach from the protection of core fundamental (p. 181) rights to the 'constitutional identity' according to which member states should have 'sufficient leeway to determine their own economic, cultural and social living conditions'. This concept remains, however, vague.[29]

It has to be remembered that an absolute and unconditional precedence of EU law has been recognized only by a small group of member states (in particular The Netherlands and Austria). Another group (France and Poland) have adopted a dualist approach. The large majority of Constitutional Courts seem to be influenced by the *Solange* line of cases even though no Court has so far developed case-law that has become so renowned on its own in dealing with this question (in this, only the Italian Corte Costituzionale[30] is coming near to the BVerfG). Sweden has developed a so-called sä länge case-law in direct correspondence to the *Solange* cases. An attitude similar to that of the BVerfG was taken by the Hungarian Constitutional Court.[31] All in all it can be said that the protection of core constitutional values (be it fundamental rights, or the rule of law as was the case in the Czech Republic) has been an important concern for nearly all member states. The *Solange* case-law has been extremely influential as to the way this challenge may be handled. It has shown its usefulness not only in the relationship between member states and the EU but also in that

between the EU and UN law, as is demonstrated by the *Kadi* case.[32] In the *Kadi* case the ECJ refused to relinquish its control power over acts transforming UN resolutions as long as the UN cannot assure comparable fundamental rights guarantees.[33] Again, this approach met on the one hand with criticism because it implied (at least indirectly) the challenge of UN law by the EU, but on the other hand it had as a consequence that the UN tried to upgrade fundamental rights protection when applying individual sanctions that stood at the centre of the *Kadi* case. In the *Bosphorus* case, to name a further example, the European Court of Human Rights (ECtHR), applying a test similar to that of the *Solange* case-law, came to the conclusion that fundamental rights protection by the EU was comparable to that of the ECHR.[34]

On the whole it can be said that the *Solange* case-law may raise a series of political and legal problems, in particular as far as it asserts a subsidiary competence by the BVerfG to identify 'outbreaking' or 'ultra vires' acts by the EU.[35] Also the 'reserve competence' (p. 182) to decide on the applicability of EU legislation cited as the legal basis for any acts of German courts or authorities in Germany by the standard of fundamental rights contained in the Basic Law has raised fears of a potential conflict between Germany's constitutional order and the EC/EU legal system. It seems, however, that the BVerfG has consequently shied away from a direct confrontation with the ECJ by considering such conflicts as merely hypothetical. In the years following the 'Maastricht' judgment the BVerfG made the probability of such a conflict even more remote. On this basis, the *Solange* case-law has become less a position expressing (potential) conflict and distrust and more a useful instrument of dialogue between different legal orders in need of co-operation with regard to core constitutional values. In this, *Solange* exerts an exemplary role in an international legal order characterized on the one hand by fragmentation and on the other by strong tendencies to improve and consolidate fundamental rights protection.

Footnotes:

1 See Decision of 18 October 1967, BVerfG 22, 293ss. (298).

2 See for further detail B. Davies, *Resisting the European Court of Justice* (Cambridge, Cambridge University Press 2012), pp. 180ss.

3 Case 29/69, *Stauder v Ulm* [1969] ECR 419.

4 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1161.

5 B. Davies (n. 2).

6 English translation at The University of Texas at Austin, School of Law, Institute for Transnational Law, Foreign Law Translation, http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588.

7 See B. Davis (n. 2) with reference to, *inter alia*, H.-P. Ipsen who in 'BVerfG versus EuGH re "Grundrechte"' (1979) 14 Europarecht 3, pp. 223–8) had qualified this decision as 'wrong … deceptive, superficial and legally erroneous' (transl. by Davis).

8 Case 4/73, *Nold v Commission* [1974] ECR 491.

9 Ibid., para. 13 (emphasis added).

10 See n. 6.

11 See extensively on this subject P. Hilpold, 'Eine neue europäische Finanzarchitektur' in P. Hilpold/W. Steinmair (eds), *Neue europäische Finanzarchitektur* (2013), pp. 3–82.

[12] See J. Wieland, ‘Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht’, (1994) 5 *European Journal of International Law* 259–66, 259.

[13] Ibid., p. 261.

[14] III, b).

[15] Case 6/64, *Costa v ENEL*, [1964] ECR 585.

[16] See for more details R. Ch. V. Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa* (2013), pp. 31ss.

[17] See P. Hilpold, *Die EU im GATT/WTO-System* (Innsbruck: Innsbruck University Press 2009), pp. 356ss.

[18] Case C-286/93, Judgment of 11 December 1996, para. 83.

[19] Case C-280/93, Judgment of 5 October 1994.

[20] See A. Peters, ‘The Bananas Decision (2000) of the German Federal Constitutional Court’ (2000) 43 *German Yearbook of International Law* 277–82, 277.

[21] In the *European Arrest Warrant* case (BVerfGE, 2 BvR 2236/04, judgment of 18 July 2005) the BVerfG found that the national provisions implementing the Framework Decision on the European arrest warrant were unconstitutional. This finding was, however, limited to the extent that Germany had exercised its discretion within the margins left by the EU. See J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, (2008) 14 *European Law Journal* 389–422, 396.

[22] See R. Ch. Von Ooyen (n. 16), pp. 71ss. (82).

[23] According to an article in the German journal ‘Focus’ (48/2000, p. 66) when Kirchhof left his office, an internal strategy paper was drafted within the BVerfG on the basis of which the question whether ultra vires acts of the EC/EU were at hand should be decided in future by the ECJ.

[24] Case 26/62, *van Gend & Loos* [1963] ECR 1.

[25] BVerfGE 30 June 2009–2 BvE 2/08 et al. In the Lisbon decision also terminological changes demonstrated a new attitude. The BVerfG no longer spoke of ‘outbreaking acts’ (‘ausbrechende Rechtsakte’) but used the more sober term of ‘ultra vires acts’. See F. Mayer/M. Wendel, ‘Die verfassungsrechtlichen Grundlagen des Europarechts’, in A. Hatje/P.-Ch. Müller-Graff, *Europäisches Organisations- und Verfassungsrecht* (2014), p. 234.

[26] BVerfGE 12b, 286.

[27] Mayer/Wendel (n. 25), p. 234, speak in this context of a new ‘double test’. For M. Bleckmann, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union* (2011), p. 158, the BVerfG judgment with regard to the Lisbon Treaty (BVerfGE 123, 267) represents again a retreat in respect to this requirement as now also the continuing, repeated, or substantial disregard of single fundamental rights may re-activate the BVerfG’s control power.

[28] ‘[Dass der] unabdingbar gebotene Grundrechtsschutz generell nicht gewährleistet ist’. See BVerfGE 102, 147 (164) and M. Bleckmann (n. 27), with further references.

[29] See M. Nettesheim, in: Europarecht, 2014, p. 152, para. 26.

[30] See the judgments in the cases *Frontini* (Cort. Cost. 183/1973), *Granital* (Cort. Cost. 170/1984), and *Fragd* (Cort. Cost 232/1989).

[31] For a comprehensive comparison of the respective national positions see F. Mayer/M. Wendel (n. 25), pp. 222ss.

32 See P. Hilpold, ‘EU Law and UN Law in Conflict: The Kadi Case’, (2009) 13 *Max Planck Yearbook of United Nations Law* 141–82 and idem, ‘UN Sanctions Before the ECJ: the Kadi Case’, in A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford, Oxford University Press 2010), pp. 18–53.

33 Ibid.

34 *Bosphorus v Ireland* (ECHR) Reports 2005-VI 107. Therefore, the ECtHR did not exercise its control power over the acts of the Irish government. The ECtHR also, however, made it clear that this case-law applies only where state action is completely predetermined by international obligations (as it was here the case for Ireland in respect to EU acts). The ECtHR would resume its control power also in such situations, if, ‘in the circumstances of a particular case, it is considered that the protection of convention rights was manifestly deficient’ (para. 156).

35 See F. Mayer, ‘Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung’, (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 685–89.