



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 30
Number 3 *Symposium—International Courts
and Tribunals in the 21st Century: The Future of
International Justice*

Article 6

6-1-2008

Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law

Ernst-Ulrich Petersmann

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Ernst-Ulrich Petersmann, *Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law*, 30 *Loy. L.A. Int'l & Comp. L. Rev.* 367 (2008).

Available at: <https://digitalcommons.lmu.edu/ilr/vol30/iss3/6>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law

PROF. DR. ERNST-ULRICH PETERSMANN*

In terms of rules, principles, state-centered treaty regimes, legislative authorities, executive and judicial institutions, and communities of citizens, the international legal system continues to be fragmented and anarchic. This is illustrated by the widespread national and international governance failures to more effectively protect human rights under the rule of international law and prevent the unnecessary poverty of more than one billion people living on less than one dollar per day.¹ From the normative point of view of the universal recognition of human rights by all 192 UN member states, however, modern international law has become, arguably, constitutionally founded on “inalienable” human rights deriving from respect for human dignity.² This includes *erga omnes* obligations binding all national and international governance institutions with a progressively expanding *jus cogens* core.³ In a globally interdependent world, these universal human rights obligations require judicial protection of the rule of law in human

* Petersmann is a Professor of International and European Law at the European University Institute (EUI) and Head of its Law Department, Florence, Italy. Former professor at the University of Geneva and its Graduate Institute of International Studies; former legal advisor in the German Ministry of Economic Affairs, GATT and the WTO, and member or chairman of several GATT and WTO dispute settlement panels.

1. United Nations Development Programme, *Human Development Report 2007/2008* 25 (2007), available at http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf.

2. Universal Declaration of Human Rights, G.A. Res. 217A (III), pmbl., U.N. Doc. A/810 (Dec. 10, 1948).

3. See generally Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS* 29, 29-67 (Frederick M. Abbott et al. eds., 2006) [hereinafter *Constitutional Functions*] (discussing human rights in modern international law).

interactions beyond states, for example, in the worldwide division of labor and the collective protection of security.⁴

International economic law promotes the emergence of regional communities. Notably, in Europe these regional communities insist on democratic re-interpretation of the "international law among states" as empowering and protecting citizens and their democratic self-governance.⁵ This "democratic paradigm" of a citizen-oriented international law system, as reflected already in the human rights commitments of the UN Charter,⁶ is promoted by the multilevel governance structures of more than two hundred and fifty regional trade agreements. This is especially true when such agreements combine guarantees of economic freedoms with human rights commitments and judicial remedies, empowering citizens vis-à-vis welfare-reducing government restrictions.⁷ Yet, "democratic constitutionalization" of economic integration law remains contested, as seen in the recent cases of judicial review by European courts of whether UN Security Council sanctions are consistent with human rights.⁸ International law, like municipal law, regulates human behavior in incomplete ways by using indeterminate legal terms, whose normative premises and precise meaning remain controversial

4. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford University Press 2005). The compatibility of constitutional democracy with rule of international law is contested not only by state-centered "realist approaches" criticizing the "democratic deficit" of international law, but also rights-based or communitarian "constitutional interpretations" of international law. These approaches may require cosmopolitan and democratic re-interpretations of intergovernmental rules that are bound to be contested by international lawyers focusing on power-oriented conceptions of international law among states. Constitutionalism offers the most coherent framework for rendering constitutional democracy compatible with rule of international law as an indispensable instrument for collective supply of international public goods which individual states cannot secure unilaterally.

5. *Constitutional Functions*, *supra* note 3, at 32.

6. *Id.* at 29.

7. STUDIES IN INTERNATIONAL TRADE LAW, CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION § I.1 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006) (discussing two competing visions regarding trade governance).

8. See, e.g., Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf v. Council & Comm'n*, 2005 E.C.R. II-3533; Case T-49/04, *Hassan v. Council & Comm'n*, 2006 E.C.R. II-52. The EC Court of First Instance considered aspects of the right to property. It determined the right to a fair hearing and the right to a judicial remedy were protected by *jus cogens* rules. The court also considered arbitrary interferences with rights to respect for private and family life and the right to a reputation as contrary to *jus cogens*. Governments often define *jus cogens* more narrowly in order to limit their legal accountability.

among governments as well as citizens.⁹ Courts mandated to settle disputes over the interpretation and application of such rules are inevitably confronted with interpretative choices that require judges to decide on conflicting claims in adversarial, fair procedures by means of judicial reasoning on the basis of legal principles, rules, judicial interpretation, “balancing,” and “optimization.”¹⁰ European treaties, on the other hand, are increasingly conceived by European courts as constituting communities of states as well as of citizens. UN treaties and UN bodies continue to focus on the “international community of states” and give only exceptional priority to citizen-oriented community conceptions over state-centered principles.¹¹

Part I of this article argues that, as the customary methods of international treaty interpretation—codified in the Vienna Convention on the Law of Treaties (VCLT)—prescribe “reasonable” interpretations of international treaties in conformity

9. See generally GOLDSMITH & POSNER, *supra* note 4.

10. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* xxviii (Oxford Univ. Press 2002) (discussing dual functions of human rights as empowering individuals and requiring governments to “balance” mutually conflicting human rights so as to “optimize” legislative and administrative protection of human rights).

11. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 21 U.S.T. 77, 1155 U.N.T.S. 331; G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (Endorsing the “Responsibility to Protect” civilians from crimes against humanity, the Resolution states: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”) Other exceptions include the increasing recognition of universal criminal jurisdiction and universal civil jurisdiction for individual responsibility for violations of fundamental human rights norms. Most international lawyers referring to an “international constitution” (including *jus cogens* norms superior to the UN Charter) emphasize its establishment by the international society of sovereign states. See THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); RONALD ST. J. MACDONALD & DOUGLAS M. JOHNSTON, TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Martinus Nijhoff Publishers 2005) In view of the undemocratic nature of most UN institutions, my own publications have focused on democratic bottom-up constitutionalism and citizen-oriented multilevel constitutionalism protecting individual freedom by limiting abuses of governance powers and enabling collective supply of international public goods (such as a mutually beneficial international trading system among citizens).

with “principles of justice,” “observance of human rights and fundamental freedoms for all,” as well as with other “relevant rules of international law,”¹² the independence and impartiality of international courts require judges to interpret citizen-oriented rules of international economic law with due regard to universal human rights obligations and other principles of “constitutional justice,” especially whenever legal formalism (e.g., based on *lex posterior*, *lex specialis*, *lex superior* principles) fails to settle disputes on just terms. Part II recalls how multilevel judicial cooperation in Europe—notably between the European Court of Justice (ECJ) and its Court of First Instance, the European Community (EC) courts and national courts, the European Free Trade Area (EFTA) Court and national courts, and the European Court of Human Rights (ECHR) and national courts—has successfully protected the rule of international law and has protected the constitutional rights of European citizens at multiple levels. Part III argues that the European “*solange*-method” of multilevel judicial cooperation should be supported by citizens, judges, civil society and their democratic representatives also in international economic law beyond Europe. Part IV concludes that as long as the international legal system continues to be dominated by power politics and by “constitutional pluralism” reflecting “reasonable disagreements” among states, the international cooperation necessary for the collective supply of international public goods—such as rule of law and an open, efficient world trading system—requires not only “global administrative law,” but also “multilevel constitutionalism” empowering and constraining citizens, governments, international organizations, and courts in their international cooperation for the collective protection of human rights, rule of law, and “constitutional justice.”

I. DE-FRAGMENTATION OF INTERNATIONAL LAW THROUGH “CONSTITUTIONAL JUSTICE”

The American legal philosopher Ronald Dworkin begins his recent book, *Justice in Robes*, with the story of U.S. Supreme Court Justice Oliver Wendell Holmes who, on his way to the court, was greeted by another lawyer: “Do justice, Justice!” Holmes replied: “I am not here to do justice, but to decide cases according

12. Vienna Convention on the Law of Treaties, *supra* note 11, at pmb1.

to the rules.”¹³ Should judges apply positive law and fragmented, intergovernmental treaty regimes without regard to general “principles of justice”? Does the separation of judicial power from legislative and executive powers require that, as postulated by Montesquieu, court decisions always conform to the exact letter of the law as understood by the legislator?¹⁴ Do the inter-state structures of international treaties and of “member-driven governance” (e.g., in the World Trade Organization (WTO)) require international courts to focus on state interests (as reflected in treaty texts and interpreted by governments) rather than on the interests of citizens (as protected by human rights and voiced by civil society and democratic institutions)?

The VCLT recalls the customary obligation of governments and courts stating, “disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,” including “respect for, and observance of, human rights and fundamental freedoms for all.”¹⁵ While the “general rule of interpretation” codified in Article 31(1) focuses on textual, contextual, and functional methods of treaty interpretation, Article 31 also requires taking into account “any relevant rules of international law applicable in the relations between the parties.”¹⁶ The 2006 WTO Panel Report on EC restrictions of genetically modified organisms argued to interpret Article 31(3)(c) narrowly as applying only to international law rules binding all parties of the treaty.¹⁷ But this narrow interpretation of Article 31(3)(c) continues to be challenged because, outside the WTO, hardly any international agreements have been accepted by all WTO Members, including non-state members like Hong Kong, Macau, Taiwan and the EC.¹⁸ The alternative interpretation of the text of Article 31(3)(c) could protect the disputing parties against

13. RONALD DWORKIN, *JUSTICE IN ROBES* ch. 1 (2006) (internal citations omitted).

14. See generally MONTESQUIEU, *DE L'ESPRIT DES LOIS* [THE SPIRIT OF THE LAWS] 305 (P. Pourrat Freres eds., 1831) (1748).

15. Vienna Convention on the Law of Treaties, *supra* note 11, at pmb1.

16. *Id.* ¶ 3(c).

17. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.65, WT/DS291/R (Sept. 29, 2006).

18. See Members and Observers, World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 21, 2008) (for information on the trade statistics, WTO commitments, disputes, trade policy reviews, and notifications of all WTO members).

conflicting legal obligations without prejudging the interpretation of the treaty obligations of contracting third parties.¹⁹

Customary international law prohibits treaty interpretations with “manifestly absurd or unreasonable” results.²⁰ The independence, impartiality and due process guarantees of courts distinguish the judicial task of dispute settlement on the basis of the rule of law from the different objectives and procedures of parliamentary majority politics and administrative decision-making. According to the legal philosopher John Rawls, “in a constitutional regime with judicial review, public reason is the reason of its supreme court.”²¹ It is of constitutional importance for the overlapping, constitutional consensus necessary for a stable and just society among free, equal, and rational citizens who tend to be deeply divided by conflicting moral, religious, and philosophical doctrines.²² Following the universal recognition of “inalienable” human rights and the adoption of national constitutions by virtually all 192 UN member states, I have long argued that the human rights obligations of all governance institutions, the customary law requirements of international treaty interpretation, and the independence and due process guarantees of international courts require *international judges* to engage in “public reasoning” clarifying the post-Westphalian “overlapping constitutional consensus” as a reasonable basis for settling international disputes in conformity with “principles of justice” and “relevant rules of international law.”²³ Like national judges offering complainants and defendants “their day in court,” international judges promote “free trade in ideas,”²⁴ “public reason,”²⁵ and “justice.”²⁶ This may also call for judicial correction

19. Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 314 (2005).

20. Vienna Convention on the Law of Treaties, *supra* note 11, at art. 32.

21. JOHN RAWLS, POLITICAL LIBERALISM 231 (1993).

22. *See id.* at Part II, Lecture IV.

23. Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication*, 31 N.Y.U.J. INT'L L. & POL. 753 (1999).

24. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 170 (2007) (1976).

25. *See* RAWLS, *supra* note 21 (discussing supreme courts as “the exemplar of public reason” which can reduce problems resulting from “the fact of reasonable pluralism” by promoting an “overlapping consensus” on basic political and legal principles among citizens, notwithstanding their often different and incompatible worldviews).

26. JOHN RAWLS, A THEORY OF JUSTICE 3 (1999) (discussing “justice as fairness” and “first virtue of social institutions”); RAINER FORST, DAS RECHT AUF RECHTFERTIGUNG: ELEMENTE EINER KONSTRUKTIVISTISCHEN THEORIE DER

of cases of injustice for the benefit of adversely affected citizens. For example, the U.S. Supreme Court has been described as “the voice of the national conscience”²⁷ and as the most independent and impartial guardian of the constitutional “checks and balances” protecting U.S. citizens and their constitutional rights against potential “tyranny of majorities” and governmental abuses of powers.²⁸

The legal institution of impartial judges has existed since the beginning of legal civilization. The functional interrelationships between the law, judges, and justice are reflected in legal language from antiquity (e.g., in the common core of the Latin terms *jus*, *judex*, *justitia*) to modern times (e.g., the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice).²⁹ Like the Roman god, *Janus*, justice and judges face two different perspectives. Their “conservative function” is to apply the existing law and protect the existing system of rights so as “to render to each person what is his [right].”³⁰ Yet, as laws tend to be incomplete and subject to change, impartial justice may require “reformatory interpretations” of legal rules in response to changing social conceptions of justice.³¹ This is particularly true following the universal recognition of inalienable human rights, which call for a “constitutional paradigm change” based on citizen-oriented interpretations of the power-oriented structures of international law.³² Former UN Secretary-General Kofi Annan, in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on September 19, 2006, criticized the UN system as “unjust, discriminatory and irresponsible” in view of its failures to effectively respond to the three global challenges to the United Nations: “to ensure that globalization would benefit the

GERECHTIGKEIT (Suhrkamp Verlag 2007) (2005) (inferring from the Kantian idea of reason based on universal principles that individuals can reasonably claim moral and legal rights to participation in decision-making that affects them, as well as receive a justification of restrictions of individual freedoms).

27. ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 27 (1968).

28. DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 149 (1994).

29. D.D. RAPHAEL, *CONCEPTS OF JUSTICE* 1 (2001).

30. *Id.* at 2.

31. *Id.*

32. ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* 135 (2000).

entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot.”³³ According to Kofi Annan, these three challenges—“an unjust world economy, world disorder and widespread contempt for human rights and the rule of law”—entail divisions that “threaten the very notion of an international community, upon which the UN stands.”³⁴ Especially in citizen-driven areas of international economic law, national and international judges are increasingly requested to interpret international guarantees of individual freedom from citizen-oriented, human rights perspectives.³⁵ In the past, judges focused primarily on the state-centered perspective of governments.³⁶ The government representatives all too often pursued protectionist self-interests in protecting rent-seeking interest groups.³⁷ They did so in exchange for political support and in limiting judicial accountability of the rulers for violations of international law by disempowering citizens and treating them as mere objects of international rights and obligations of states.³⁸

The legal instruments establishing the courts are not the only sources of definition for the functions of judges. Since legal antiquity, judges have also derived powers from the constitutional instruments of their respective legal systems,³⁹ often in response to claims for “justice.”⁴⁰ For example, Article III, section 2 of the U.S. Constitution provides that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.” Based on this Anglo-Saxon distinction between statutory law and equity, which limits the permissible content of

33. Kofi Annan, Secretary-General, U.N., Speech delivered to the United Nations General Assembly, U.N. Doc. GA/105000 (Sep. 19, 2006).

34. *Id.*

35. Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, LOY. U. CHI. INT'L L. REV. at 27 (Conference Feb. 15, 2008), available at http://www.luc.edu/law/activities/publications/ilrsymposium/2008sym/petersmann_defragmentation_paper.pdf (forthcoming 2009).

36. *See generally id.*

37. *See id.* at 18.

38. *See id.* at 27.

39. For example, constitutional safeguards of the independence of courts in the *Magna Carta* and in the U.S. Constitution. *See Magna Carta*.

40. *See id.*

governmental regulations, judicial decisions have often assumed a crucial role in the development of “constitutional justice.”⁴¹ Similarly, international courts invoke inherent powers to protect procedural fairness and principles of reciprocal, corrective, and distributive justice. For example, principles of equity continue to guide the delimitation of conflicting claims to maritime waters and to the underlying seabed.⁴² Since the advent of democratic constitutions in the eighteenth century, virtually all UN member states have adopted constitutions and international agreements that have progressively expanded the power of judges both domestically and in international relations.⁴³ Those constitutions that mandate a separation of powers provide for even more comprehensive legal protection of the impartiality, integrity, and institutional and personal autonomy of judges.⁴⁴ Regional and worldwide human rights conventions recognize a right of access “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” for the “determination of civil rights and obligations or of any criminal charge.”⁴⁵ Even beyond the realm of human rights agreements, other international treaties have extended individual rights pertaining to fair hearings, access to courts and effective legal

41. T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001).

42. See generally THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (Oxford University Press 1997) (1995) (discussing law of the sea and sharing sea resources in Chapters 12 and 13); CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (2007) (discussing generally the inherent powers of courts as a necessary feature of their judicial functions).

43. See generally CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (C. A. Thomas, ed., 2002) (discussing the roots of judicial power historically and its expansion in contemporary democracies).

44. See *JUDICIAL INTEGRITY* (Andras Sajó & Lorri Rutt Bentch eds., 2004) (discussing traditional separation of power theories and institutional integrity and independence).

45. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 14-15 (Oxford University Press 2005) (1999); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, Europ. T.S. No. 5; American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, *supra* note 2, at art. 10 (giving rise to comprehensive case-law clarifying the rights of access to courts and related guarantees of due process law, e.g., justice delayed may be justice denied).

remedies into other fields of law, such as international economic, labor, social, and environmental law.⁴⁶

In the "Federalist Papers," Alexander Hamilton described the judiciary as "the least dangerous" branch of government, in view of the fact that courts exercise "no influence over either the sword or the purse."⁴⁷ In modern, multilevel governance systems with both national and international "checks and balances," courts remain the most impartial and independent "forum of principle."⁴⁸ For example, fair and public judicial procedures entitle all parties involved to present and challenge all relevant arguments. In addition, judicial decisions often require more comprehensive and coherent justification than political and administrative decisions. As laws and international treaties tend to use vague terms and incomplete rules, the judicial function inevitably goes beyond being merely "*la bouche qui prononce les mots de la loi*."⁴⁹ By choosing among alternative interpretations of rules and "filling gaps" in the name of justice, judicial decisions interpret, progressively develop, and complement legislative rules and intergovernmental treaties. Empirical surveys of the global rise of judicial power and "judicial governance" confirm the profound impact of judicial interpretations on the development of national and international law and policy.⁵⁰ Both positivist-legal as well as moral-prescriptive theories of adjudication justify such judicial clarification and progressive development of indeterminate legal

46. See, e.g., International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

47. Alexander Hamilton, *The Federalist No. 78*, June 14, 1788.

48. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 32 (1985).

49. MONTESQUIEU, *supra* note 14.

50. ALEC STONE-SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) (describing how much third-party dispute resolution and judicial rule-making have become privileged mechanisms of adapting national and intergovernmental rule-systems to the needs of citizens and their constitutional rights); ALEC STONE-SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* ch. 2 (2004) (analyzing the judicial "constructing of a supra-national constitution" as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities); Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR L. REV. 155, 157 (1983) (confirming that, when deciding the case *Van Gend & Loos*, the judges had a certain idea of Europe, and that these judicial ideas, "and not arguments based on legal technicalities of the matter," had been decisive); TOBIAS MÄHNER, *DER EUROPÄISCHE GERICHTSHOF ALS GERICHT* (Duncker & Humblot 2005) (criticizing "judicial law-making" and the inadequate democratic legitimacy of the ECJ's expansive case-law limiting national sovereignty in unforeseen ways, e.g. by judicial recognition of fundamental rights as general principles of Community law).

rules (such as general human rights guarantees) on the ground that independent courts are the most principled guardians of constitutional rights and of “deliberative, constitutionally limited democracy,” of which the public reasoning of courts is an important part.⁵¹ For example, despite previous attempts by U.S. legislators and courts to narrowly define the phrase “equal protection of the laws,” the Supreme Court created a system to judicially enforce equal treatment of minority schoolchildren in the landmark case of *Brown v. Board of Education*, 348 U.S. 483, 495 (1954). Notwithstanding the progressive nature of *Brown*, it was supported by the other branches of government and is celebrated today as a crucial step in carrying out the stated goals of the U.S. Constitution⁵² and human rights.⁵³

In its Advisory Opinion on Namibia, the International Court of Justice (ICJ) emphasized that even international legal institutions ought not to be viewed statically and must be allowed to interpret international law in light of the legal principles prevailing at the moment issues arise which implicate them: “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”⁵⁴ International human rights courts (like the ECHR) and economic courts (like the ECJ) have often emphasized that effective protection of human rights and non-discriminatory competition may require “dynamic interpretations” of international rules with due regard to changing circumstances.⁵⁵ As in domestic legal systems, intergovernmental and judicial rule-making are intertwined in international relations as well. Because international treaties tend to be incomplete and are built on general principles of law,⁵⁶ the judicial interpretation, clarification

51. See CHRISTOPHER F. ZURN, *DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW* 68 (2007) (justifying judicial review as essential for protecting and promoting deliberative democracy).

52. For example, “to establish justice and secure the blessings of liberty.” U.S. CONST. pmb1.

53. *Id.* at amend. XIV pmb1.

54. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

55. Such circumstances may include new risks to human health, competition and the environment. See CHRISTIAN BONAT, *THE EUROPEAN COURT OF HUMAN RIGHTS* (The Federalist Society, 2003) (discussing the European Court of Human Right’s history of dynamic interpretation of the Convention).

56. *Id.*

and application of international legal rules may influence the dynamic evolution and definition of the *opinio juris* expressed by governments, judges, parliaments, citizens, and non-governmental organizations with regard to the progressive development of international rules. The universal recognition of certain “inalienable” human rights deriving from respect for human dignity, and the acceptance by all 192 UN member states of increasingly specific legal obligations to protect human rights, demonstrates that citizens⁵⁷ and judges⁵⁸ can today assert no less cosmopolitan, communitarian, and democratic legitimacy for defining and protecting human rights than governments that have, for centuries, disregarded struggles for human rights in international relations and continue to treat citizens as mere objects of international law in most UN institutions.⁵⁹ From the perspective of citizens and “deliberative democracies,” active judicial protection of constitutional individual rights (including human rights) is essential for “constitutionalising,” “democracising,” and transforming international law into a constitutional order. This is how it is emerging for the more than eight hundred million European citizens who are benefiting from the human rights and fundamental freedoms guaranteed by the ECHR. This is especially true for the four hundred and eighty million EC citizens who have been granted, by EC law and by European courts, constitutional freedoms and social rights that national governments never protected previously.⁶⁰ The inalienable “*jus cogens*” and “*erga omnes*” core of human rights, and the judicial obligation to settle disputes “in conformity with principles of justice and international law,” are the foundations of “constitutional justice” in constitutional democracies and international law in the twenty-first century.⁶¹

57. Citizens are the “democratic owners” of international law and institutions. Ernst-Ulrich Petersmann, *Judging Judges: Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?*, 1 EUR. U. INST. WORKING PAPERS L. 5 (2008), available at <http://cadmus.iue.it/dspace/bitstream/1814/7805/1/LAW-2008-01.pdf> [hereinafter Petersmann, *Judging Judges*].

58. Judges are the most independent and impartial guardians of the “principles of justice” underlying international law. *Id.*

59. *Id.*

60. See generally *Constitutional Functions*, *supra* note 3.

61. UN Charter art. 1.

II. MULTILEVEL JUDICIAL PROTECTION BY EUROPEAN COURTS OF RULE OF INTERNATIONAL LAW AND “CONSTITUTIONAL JUSTICE”

Europe has a long history of multilevel judicial governance in regional economic unions,⁶² functional organizations,⁶³ and in (con)federal associations of states.⁶⁴ European integration law also illustrates that the fragmentation of national and international rules and treaty regimes may be more easily reduced by multilevel judicial governance than by multilevel legislative and administrative cooperation. The conditional cooperation among European courts draws attention to potential advantages of legal fragmentation, by inducing European courts to protect citizens against abuses of foreign policy powers in conformity with constitutional principles of subsidiarity.⁶⁵ Since the VCLT does not always provide satisfactory responses to the power-oriented fragmentation and frequent abuses of international law, European experiences with “judicial integration” of fragmented treaty regimes on the basis of principles of “constitutional justice” may offer complementary, and more effective “constitutional safeguards.”⁶⁶ The transformation of the intergovernmental EC treaties and of the European Convention on Human Rights (ECHR) into objective constitutional orders protecting citizens’ rights across national frontiers was driven by diverse kinds of “multilevel judicial governance.”⁶⁷

- The multilevel judicial governance in the EC among national courts and European courts remains characterized by the supranational structures of EC law. This is demonstrated by the fact that the fundamental freedoms and related social guarantees provided by EC law generally go far beyond the national laws of EC member states.⁶⁸

62. See, e.g., The Benelux Court of Justice, http://www.benelux.be/en/bnl/bnl_inst_gerechtshof.asp (last visited Nov. 21, 2008).

63. See, e.g., the supranational Rhine River Court, based on the Rhine River Navigation Act of 1868.

64. See, e.g., the Reichskammergericht in the Holy Roman Empire of a German Nation.

65. E.g., consider human rights recognized in UN conventions protected by more comprehensive domestic constitutional safeguards of human rights, and by European courts even vis-à-vis UN Security Council sanctions.

66. Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 EUR. J. INT’L L. 769, 775 (2008) [hereinafter Petersmann, ‘Constitutional Justice’].

67. *Id.*

68. *Id.*

- The multilevel judicial governance of national courts and the European Court of Human Rights (ECtHR) in the field of human rights differs from that of European economic law in many ways. For example, both the ECtHR and the Convention assert only subsidiary constitutional functions vis-à-vis national human rights guarantees and respect the diverse democratic traditions of the forty-seven countries that have ratified the Convention.⁶⁹
- The multilevel judicial governance among national courts and the European Free Trade Association (EFTA) Court has extended the EC's common market law to the three EFTA members (Iceland, Liechtenstein, and Norway) of the European Economic Area (EEA) through intergovernmental modes of cooperation rather than by using the EC's constitutional principles of legal primacy, direct effect, and direct applicability of the EC's common market law. This alternative model of multilevel judicial cooperation (e.g., based on voluntary compliance with legally non-binding preliminary opinions by the EFTA Court) has demonstrated that citizens in third countries can effectively benefit from the EC's legal "market freedoms" and social benefits without the EC's supranational integration law.⁷⁰

Part II of this article provides an overview of the diverse forms of "judicial dialogues," "judicial cooperation," judicial resistance, and judicial self-restraint among national courts, the EC courts, the EFTA Court and the ECtHR. Part III uses these European experiences to illustrate that the "*solange*-method" used by courts in Europe for their conditional cooperation in their multilevel judicial protection of constitutional rights should also serve as a model for promoting judicial cooperation, comity (e.g., through foreign jurisdictions protecting constitutional rights), and judicial self-restraint (e.g., through domestic legislatures protecting constitutional rights) beyond Europe. The "*solange*-method" should serve as a model in the judicial interpretation and progressive development of international economic and environmental law, human rights law, and related constitutional rights of citizens.

69. *Id.*

70. *Id.*

A. Multilevel Judicial Protection of European Law Inside the EC

The EC's common market with free movement of goods, services, persons, capital, and payments can remain effective only to the extent that the EC's common market and competition rules are coherently applied and protected in the national courts of all twenty-seven EC member states. The declared objective of an "ever closer union among the peoples of Europe"⁷¹ was to be brought about by economic and legal integration requiring additional law-making and common policies by the European institutions. The EC Treaty differs from other international treaties in its innovative judicial safeguards for the protection of the rule of law. This is accomplished not only in intergovernmental relations among EC member states, but also in the citizen-driven common market and in the common policies of the European Communities.⁷² Whereas most international jurisdictions remain characterized by intergovernmental procedures,⁷³ the EC Treaty provides unique legal remedies not only for member states, but also for EC citizens and EC institutions as guardians of EC law and of its "constitutional functions" for correcting "governance failures" at national and European levels:⁷⁴

- The citizen-driven cooperation among national courts and the ECJ in the context of preliminary rulings procedures has uniquely empowered national and European judges to cooperate, at the request of EC citizens, in the multilevel judicial protection of citizen rights protected by EC law.⁷⁵
- The empowerment of the European Commission to initiate infringement proceedings⁷⁶ rendered the ECJ's function as an intergovernmental court more effective than it would have been under purely inter-state infringement proceedings.⁷⁷
- The Court's "constitutional functions" (e.g., in the case of actions by Member States or EC institutions for annulment

71. Consolidated Version of the Treaty on European Union, 2006 O.J. (C 321) 1, pmb. [hereinafter EC Treaty].

72. Petersmann, *Judging Judges*, *supra* note 57, at 6-7.

73. See, e.g., the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal and the WTO dispute settlement bodies.

74. Petersmann, *Judging Judges*, *supra* note 57, at 7.

75. EC Treaty, *supra* note 71, at art. 234.

76. *Id.* at art. 226.

77. *Id.* at art. 227.

of EC regulations), as well as its functions as an “administrative court” (e.g., protecting private rights and rule of law in response to direct actions by natural or legal persons for annulment of EC acts, failure to act, or actions for damages), offered unique legal remedies for maintaining and developing the constitutional coherence of EC law.⁷⁸

- The EC Court’s teleological reasoning based on communitarian needs (e.g., in terms of protection of EC citizen rights, consumer welfare, and of undistorted competition in the common market) justified judicial protection of unwritten “fundamental freedoms” of EC citizens that would not have been acceptable in purely intergovernmental treaty regimes.⁷⁹

The diverse forms of judicial dialogues (e.g., on the interpretation and protection of fundamental rights), judicial contestation (e.g., of the scope of EC competences), and judicial cooperation (e.g., in preliminary ruling procedures) were based on the multilevel, judicial protection of common constitutional principles. Those principles were derived from the EC Member States’ obligations under their national constitutions, the ECHR (as interpreted by the ECtHR), as well as under the EC’s constitutional law.⁸⁰ This judicial respect for “constitutional pluralism” promoted judicial comity among national courts, the ECJ, and the ECtHR in their complementary, multilevel protection of constitutional rights.⁸¹ This was with due respect for the diversity of national constitutional and judicial traditions.⁸² The progressively expanding legal protection of fundamental rights in EC law—in response to their judicial protection by national and European courts—illustrates how judicial cooperation in the field of economic law can promote judicial protection of constitutional

78. Petersmann, *Judging Judges*, *supra* note 57, at 7.

79. *Id.*

80. Franz C. Mayer, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 281 (Armin von Bogdandy & Jürgen Bast eds., 2006) (discussing the interpretation and protection of fundamental rights and the scope of EC competences in preliminary ruling procedures).

81. Petersmann, ‘*Constitutional Justice*’, *supra* note 66, at 777.

82. *Id.*

rights. Judge A. Rosas⁸³ has distinguished the following five “stages” in the case-law of the EC Court on the protection of human rights:⁸⁴

- In the supra-national, but functionally limited European Coal and Steel Community (ECSC), the Court held that it lacked competence to examine whether an ECSC decision amounted to an infringement of fundamental rights as recognized in the constitution of a member state.⁸⁵
- Since the *Stauder* judgment of 1969, the EC Court has clarified in numerous judgments that fundamental rights form part of the general principles of community law binding the member states and EC institutions, and that the EC Court ensures their observance.⁸⁶
- As of 1975, the ever more extensive case-law of the EC courts explicitly refers to the ECHR and protects ever more human rights and fundamental freedoms in a wide array of Community law areas, including civil, political, economic, social, and labor rights, drawing inspiration “from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”⁸⁷
- Since 1989, the ECHR has been characterized by the EC Court as having “particular significance” for the interpretation and development of EU law⁸⁸ in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.

83. Allan Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts, in THE EFTA COURT: TEN YEARS ON* 163, 169 (Carl Baudenbacher, Per Tresselt & Thorgeir Orlygsson eds., 2005).

84. Petersmann, *Judging Judges*, *supra* note 57, at 19.

85. Case 1/58, *Storck v. European Coal & Steel Cmty.* High Auth., 1959 E.C.R. 43.

86. The ECJ’s judicial protection of human rights since 1969 continues to evolve. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr*, 1970 E.C.R. 1125; Case 4-73, *Nold v. Comm’n*, 1974 E.C.R. 491.

87. *See, e.g.*, Case C-2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759.

88. *Joined Cases 46/87 and 227/88, Hoechst AG v. Comm’n of the European Communities*, 1989 E.C.R. 2859 ¶ 13.

- In the 1990s, the EC courts began to refer to individual judgments of the ECtHR⁸⁹ and clarified that—in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions—all interests involved have to be weighed “having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests,” without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.⁹⁰ The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,⁹¹ and to differentiate—as in the case-law of the ECtHR—between judicial review of EC measures,⁹² state measures,⁹³ and private restrictions of economic freedoms in the light of other fundamental rights.⁹⁴

89. Case C-13/94, *P v. S*, 1996 E.C.R. I-2143 ¶ 16.

90. Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659.

91. Case C-94/00, *Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes*, 2002 E.C.R. I-9011 ¶ 29. The ECJ referred explicitly to new case-law of the ECHR on the protection of the right to privacy of commercial enterprises in order to explain why—despite having suggested the opposite in the ECJ’s earlier judgment in *Hoechst*—such enterprises may benefit from Article 8 ECHR: “For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. Frances*, not yet published in the Reports of Judgments and Decision, § 41) and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case . . .” *Id.*

92. See *Stauder*, 1969 E.C.R. 419; *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125; *Nold*, 1974 E.C.R. 491.

93. See Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609 (in which the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states).

94. See MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (Oxford Univ. Press 2006). Also see the recent judgments by the ECJ, Case C-438/05, *Int’l Transp. Workers’ Fed’n v. Viking Line ABP*, 2007 ECJ EUR-Lex LEXIS 2396 (Dec. 11, 2007) as well as Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 ECJ EUR-Lex LEXIS 2399 (Dec. 18, 2007) (in which the EC Court recognized that trade unions are legally bound by the EC’s common market freedoms, and that the private plaintiffs in these cases can rely directly on the EC Treaty in their judicial challenge of restrictions imposed on market

*B. Multilevel Judicial Enforcement of the ECHR: Subsidiary
“Constitutional Functions” of the ECHR*

The ECHR, like most other international human rights conventions, sets out minimum standards for the treatment of individuals that respect the diversity of democratic constitutional traditions, which define individual rights in democratic communities. The fourteen protocols to the ECHR and the European Social Charter (as revised in 1998) also reflect the constitutional experiences in some European countries (like France and Germany) in protecting economic and social rights, as integral parts of their constitutional and economic laws. For example, in order to avoid a repetition of the systemic political abuses of economic regulation prior to 1945,⁹⁵ the ECHR also includes guarantees of property rights.⁹⁶ The jurisdiction of the ECtHR for the collective enforcement of the ECHR—based on complaints not only by member states but also by private persons—prompted the Court to interpret the ECHR as a constitutional charter of Europe,⁹⁷ protecting human rights across Europe as an objective “constitutional instrument of European public order.”⁹⁸ The multilevel judicial interpretation and protection of fundamental rights, as well as of their governmental restriction “in the interests of morals, public order or national security in a democratic society,”⁹⁹ are constitutional in nature. But ECtHR judges rightly emphasize the subsidiary functions of the ECHR and of its court:

freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of the companies *Viking Line* to other EC member states)).

95. For example, the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany’s 1919 Constitution for the “Weimar Republic” led to ever more restrictive government interventions into labor markets, capital markets, interest rates, as well as to expropriations “in the general interest” which—during the Nazi dictatorship from 1933 to 1945—led to systemic political abuses of these regulatory powers.

96. Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

97. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978).

98. See *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, ¶ 75 (1995) (Referring to the status of human rights in Europe; unlike the ECJ, the ECtHR has no jurisdiction for judicial review of acts of the international organization (the Council of Europe) of which the Court forms part of.).

99. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at art. 6.

These issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the breaches that escape the rigorous scrutiny of the national constitutional bodies.¹⁰⁰

The court aims to resist the “temptation of delving too deep into issues of fact and of law, of becoming the infamous “fourth instance” that it has always insisted it is not.”¹⁰¹ The court also exercises deference by recognizing that the democratically elected legislatures in the member states enjoy a “margin of appreciation” in the balancing of public and private interests. That is, provided that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest, it should be upheld.¹⁰² Rather than imposing uniform approaches to the diverse human rights problems in ECHR member states, the ECtHR often exercises judicial self-restraint, for example:

- by leaving the process of implementing its judgments to the member states, subject to the “peer review” by the Committee of Ministers of the Council of Europe, rather than asserting judicial powers to order consequential measures;¹⁰³
- by viewing the discretionary scheme of Article 41 ECHR for awarding just satisfaction as being secondary to the primary aim of the ECHR to protect minimum standards of human rights protection in all Convention states;¹⁰⁴
- by concentrating on “constitutional decisions of principle” and “pilot proceedings” that appear to be relevant for many individual complaints and for the judicial protection of a European public order based on human rights, democracy and the rule of law; and

100. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161 (2002).

101. *Id.*

102. See Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 HUM. RTS. L.J. 30, 31 (1998).

103. *Id.*

104. Wildhaber, *supra* note 100, at 164.

- by filtering out early, manifestly ill-founded complaints because the Court perceives its “individual relief function” as being subsidiary to its constitutional function.¹⁰⁵

Article 34 of the ECHR permits individual complaints not only “from any person,” but also from “non-governmental organizations or groups of individuals claiming to be the victim of a violation” of ECHR rights by one of the state parties.¹⁰⁶ The African, American, Arab, and UN human rights conventions protect human rights only of individuals and of people, whereas, the ECHR and the European Social Charter also protect human rights of non-governmental legal organizations (NGOs).¹⁰⁷ The protection of this *collective dimension* of human rights (e.g., of legal persons that are composed of natural persons) has prompted the ECtHR to protect procedural human rights (e.g., under Articles 6, 13, 34 ECHR) as well as substantive human rights of companies (e.g., under Articles 8, 10, 11 ECHR, Protocol 1)¹⁰⁸ in conformity with the national constitutional traditions in many European states as well as inside the EC (e.g., the EC guarantees of market freedoms and other economic and social rights of companies). The rights and freedoms of the ECHR can thus be divided into three groups:

- Some rights are inherently limited to natural persons (e.g., Article 2 ECHR, right to life) and focus on their legal protection (e.g., prohibition of torture in Article 3 ECHR; prohibition of arbitrary detention in Article 5 ECHR; freedom of conscience in Article 9 ECHR).¹⁰⁹
- But some provisions of the ECHR also explicitly protect rights of “legal persons.”¹¹⁰
- Rights of companies have become recognized by the ECtHR also with respect to other ECHR provisions that

105. *Id.*

106. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at art. 34.

107. *Id.* African Charter on Human and Peoples’ Rights Part I: Rights and Duties, Ch. I: Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217; Arab Charter on Human Rights Part II, Sept. 15, 1994, *reprinted in* 18 HUM. RTS. L.J. 151 (1997).

108. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at arts. 6, 8, 10, 11, 13, 34; Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96.

109. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at arts. 2, 3, 5, 9.

110. See, e.g., property rights protected in Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96, at art.1.

protect rights of “everybody” without mentioning the rights of NGOs; most notably rights of companies to invoke the right to a fair trial in the determination of civil rights,¹¹¹ the right to respect of one’s home,¹¹² freedom of expression,¹¹³ freedom of assembly,¹¹⁴ freedom of religion,¹¹⁵ the right to an effective remedy,¹¹⁶ and the right to request compensation for non-material damage.¹¹⁷ Freedom of contract and economic activity is not specifically protected in the ECHR, which focuses on civil and political rights, but the right to form companies in order to pursue private interests collectively is protected by the freedom of association,¹¹⁸ the right to property,¹¹⁹ and indirectly, by the protection of “civil rights” in Article 6 ECHR.¹²⁰

This broad scope of human rights protection is reflected in the requirement of Article 1 ECHR to secure the human rights “to everyone within their jurisdiction.”¹²¹ It also protects traders and companies from outside Europe and may cover even state acts implemented outside the national territory of ECHR member states or implementing obligations under EC law.¹²² Yet, compared to the large number of complaints by companies to the ECJ, less than four percent of judgments by the ECtHR relate to complaints made by companies.¹²³ So far, such complaints have mainly concerned Article 6(1) ECHR (right to a fair trial), Article 8 ECHR (right to respect of one’s home and correspondence), Article 10 ECHR (freedom of expression including commercial

111. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at art. 6.

112. *Id.* at art. 8.

113. *Id.* at art. 10.

114. *Id.* at art. 11.

115. *Id.* at art. 9.

116. *Id.* at art. 13.

117. *Id.* at art. 41.

118. *Id.* at art. 11.

119. Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96.

120. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at art. 6.

121. *Id.* at art. 1.

122. *Id.* at art. 1.

123. EMBERLAND, *supra* note 94, at 14.

free speech), and the guarantee of property rights in Protocol 1 to the ECHR.¹²⁴

Similar to the constitutional and teleological interpretation methods used by the ECJ, the ECtHR—in its judicial interpretation of the ECHR—applies principles of “effective interpretation” aimed at protecting human rights in a practical and effective manner. These principles of effective treaty interpretation include a principle of “dynamic interpretation” of the ECHR as a “constitutional instrument of European public order” that must be interpreted with due regard to contemporary realities so as to protect “an effective political democracy” (which is mentioned in the Preamble as an objective of the ECHR).¹²⁵ Limitations of fundamental rights of economic actors are reviewed by the ECtHR as to whether they are determined by law, in conformity with the ECHR, and whether they are “necessary to a democratic society.”¹²⁶ Governmental limitations of civil and political human rights tend to be reviewed by the ECtHR more strictly (e.g., as to whether they maintain an appropriate balance between the human right concerned and the need for “an effective political democracy”) than governmental restrictions of private economic activity. Governmental restrictions of private economic activity tend to be reviewed by the Court on the basis of a more lenient standard of judicial review respecting a “margin of appreciation” for governments.¹²⁷

Article 1 of Protocol 1 to the ECHR protects “peaceful enjoyment of possessions” (paragraph one).¹²⁸ The term “property” is used only in paragraph two.¹²⁹ The ECtHR has clarified that Article 1 guarantees rights of property not only in corporeal things (rights *in rem*), but also intellectual property rights and private law

124. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at arts. 6(1), 8, 10 (art. 8, right to respect for one’s home and correspondence; art. 10, freedom of expression including commercial free speech); Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96.

125. On the Court’s teleological interpretation of the ECHR in the light of its “object and purpose” see EMBERLAND, *supra* note 94, at 20.

126. THEMISTOKLIS K. GIANNAKOPOULOS, SAFEGUARDING COMPANIES’ RIGHTS IN COMPETITION AND ANTI-DUMPING/ANTI-SUBSIDIES PROCEEDINGS 95 (Kluwer Law Int’l 2004).

127. *Id.* at 96-97.

128. Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96, at art. 1

129. *Id.* at arts. 1-2.

or public law claims *in personam* (e.g., monetary claims based on private contracts, employment and business rights, pecuniary claims against public authorities).¹³⁰ In *Immobiliare Saffi v. Italy*, the Court also recognized positive state duties to protect private property.¹³¹ For example, the duties include providing police assistance in evacuating a tenant from the applicant's apartment. The lack of police assistance in executing a judicial order to evacuate a tenant was found to constitute a breach of the applicant's property right.¹³² The inclusion of the right to property into the ECHR confirms that property is perceived as a fundamental right that is indispensable for personal self-realization and dignity.¹³³ As the moral justifications of private property do not warrant absolute property rights, Article 1 of Protocol 1 to ECHR recognizes—in conformity with the constitutional traditions of many national European constitutions, which emphasize individual as well as social functions of property—that private property can be restricted for legitimate reasons.¹³⁴ The case-law of the ECtHR confirms that such restrictions may include, for example:¹³⁵

- taxation for the common financing of public goods (including redistributive taxation if it can be justified on grounds of reciprocal benefit, correction of past injustices or redistributive justice);

130. On private law and constitutional law meanings of property (as a relationship to objects of property and to other legal subjects that have to respect property rights), and on the different kinds of property protected in the case-law of the ECtHR, see ALI RIZA ÇOBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS chs. 2, 6 (2004).

131. *Immobiliare Saffi v. Italy*, App. No. 22774/93, 30 Eur. H.R. Rep. 756 (1999).

132. *Id.*

133. On the moral foundations of market freedoms see Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29, 36 (Thomas Cottier et al. eds., 2006); ÇOBAN, *supra* note 130, at ch. 3. (justifies property rights as *prima facie* human rights on the basis of four arguments: (1) both the use value and the exchange value of property are essential for private autonomy; (2) a system of private property is also essential for personal self-realization; (3) respect for individual autonomy requires respect for the entitlement of people to the fruits of their labor as well as respect for the outcome of peaceful, voluntary cooperation (e.g., in markets driven by consumer demand and competition); and (4) a system of private property further encourages fruitful initiative and an autonomy-enhancing society based on welfare-increasing competition, division of labour and satisfaction of consumer demand).

134. Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96, at art. 1.

135. Petersmann, *Judging Judges*, *supra* note 57, at 11.

- governmental control of harmful uses of property (e.g., by police power regulations designed to prevent harm to others); as well as
- government takings of property by power of eminent domain, whose lawful exercise depends on the necessity and proportionality of the taking for realizing a legitimate public interest and—if the taking imposes a discriminatory burden only on some individuals—may require payment of compensation for the property taken.

Even though the ECtHR respects a wide margin of appreciation, allowing states to limit and interfere with property rights (e.g., by means of taxation)¹³⁶ and to balance individual and public interests (e.g., in case of a taking of property without full compensation),¹³⁷ the Court's expansive protection—as property or “possessions”—of almost all pecuniary interests and legitimate expectations arising from private and public law relationships reveals a strong judicial awareness of the importance of private economic activities and economic law for personal self-realization, dignity and effective protection of human rights.¹³⁸ The court's review of governmental limitations of, and interferences with, property rights is based on “substantive due process” standards that go far beyond the “procedural due process” standards that have been applied by the U.S. Supreme Court since the 1930s.¹³⁹ In the unique European context of an ever broader “social market economy” across the forty-seven member states of the Council of Europe, the ECtHR's constitutional approach to the protection of broadly defined property rights and fundamental freedoms, including those of companies, appears appropriate.

136. *Id.*

137. *Id.*

138. *Id.*

139. The U.S. Constitution (Amendments V and XIV) includes strong guarantees of private liberty and property rights against takings without “due process of law” and “just compensation.” Up to the late 1930s, the U.S. Supreme Court frequently overturned legislation on the ground that it violated economic liberties. Yet, since the Democrats took over the U.S. Supreme Court in 1937, the Court has limited judicial protection of “substantive due process of law” essentially to civil and political rights. In the field of economics, the Court introduced a constitutional presumption which states that legislative restrictions of private property are lawful and no longer subject to judicial review of “economic due process of law.” See *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938). Moreover, the commerce clause in the U.S. Constitution does not guarantee individual economic liberties as in the EC Treaty, but merely gives regulatory authority to the U.S. Congress. Petersmann, *Judging Judges*, *supra* note 57, at 11 n.29.

C. *Diversity of Multilevel Judicial Governance in Free Trade Agreements (FTAs): The Example of the EFTA Court*

The 1992 Agreement between the EC and EFTA States (Iceland, Liechtenstein, and Norway) establishing the EEA¹⁴⁰ is—in terms of the General Agreement on Tariffs and Trade (GATT) Article XXIV—the most judicially-developed of greater than two hundred and fifty Free Trade Agreements (FTAs) concluded after World War II.¹⁴¹ The EFTA Court illustrates the diversity of judicial procedures and approaches to the interpretation of international trade law, and confirms the importance of “judicial dialogues” among international and domestic courts for the promotion of the rule of law in international trade.¹⁴² In order to ensure that the extension of the EC’s common market law to the EFTA countries functions in the same manner as in the EC’s internal market, the 1991 Draft Agreement for the EEA provided for the establishment of an EEA Court, composed of judges from the ECJ as well as from EFTA countries.¹⁴³ In *Opinion 1/91*, the ECJ objected to the structure and competence of such an EEA Court on the ground that its legally binding interpretations could adversely affect the autonomy and exclusive jurisdiction (Articles 220, 292 EC) of the ECJ (e.g., for interpreting the respective competences of the EC and EC Member States concerning matters governed by EEA provisions).¹⁴⁴ Following the Court’s negative Opinion, the EEA Agreement’s provisions on judicial supervision were re-negotiated and the EEA Court was replaced by an EFTA Court with more limited jurisdiction and composed only of judges from EFTA countries. In a second Opinion, the ECJ confirmed the consistency of the revised EEA Agreement¹⁴⁵ subject to certain legal interpretations of this agreement by the Court.¹⁴⁶ In order to promote legal homogeneity between EC and EEA market law,

140. Agreement on the European Economic Area, 1994 O.J. (L 1) 3 [hereinafter EEA Agreement].

141. *Id.* General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 55 U.N.T.S. 194.

142. Petersman, *Judging Judges*, *supra* note 57, at 12.

143. Opinion 1/91, On a Draft Agreement Relating to the Creation of the European Economic Area, 1991 E.C.R. I-6079 [hereinafter Opinion 1/91].

144. *Id.* ¶¶ 31-36.

145. EEA Agreement, *supra* note 140.

146. Opinion 1/92, Second Opinion on the European Economic Area, 1992 E.C.R. I-2821.

Article 6 of the revised EEA Agreement provides for the following principle of interpretation:

Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and the ECSC Treaty] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the [EC] given prior to the date of signature of the agreement.¹⁴⁷

The EFTA Court took up its functions in January 1994.¹⁴⁸ Following the accession of Austria, Finland, and Sweden to the EC in 1995, the Court moved its seat to Luxembourg and continues to be composed of three judges nominated by Iceland, Liechtenstein, and Norway.¹⁴⁹ According to the 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA),¹⁵⁰ the Court has jurisdiction for infringement proceedings by the EFTA Surveillance Authority against an EFTA state (Article 31 SCA), actions concerning the settlement of disputes between EFTA states (Article 32 SCA), advisory opinions on the interpretation of the EEA Agreement (Article 33 SCA), review of penalties imposed by the EFTA Surveillance Authority (Article 35 SCA), as well as jurisdiction in actions brought by an EFTA state or by natural or legal persons against decisions of the EFTA Surveillance Authority (Article 36 SCA) or alleging failure to act (Article 37 SCA). Out of the sixty-two cases lodged during the first ten years of the EFTA Court, eighteen related to direct actions, forty-two concerned requests by

147. The limitation to prior case-law was due to the refusal by EFTA countries to commit themselves to unforeseeable, future case-law of the EU courts on which they are not represented. Vassilios Skouris, *The ECJ and the EFTA Court Under the EEA Agreement: A Paradigm for International Cooperation Between Judicial Institutions*, in *THE EFTA COURT: TEN YEARS ON* 123, 124 (Baudenbacher et al. eds., 2005) (concludes, however, that “it does not seem that the EFTA Court has treated the ECJ case-law differently depending on when the pertinent judgments were rendered.”).

148. See EFTA, *EFTA History at a Glance*, <http://www.efta.int/content/about-efta/history>.

149. See EFTA Court, *Introduction to the EFTA Court*, <http://www.eftacourt.int/index.php/court/mission/introduction>.

150. Agreement on the Establishment of a Surveillance Authority and a Court of Justice, May 2, 1994, 1994 O.J. (L 344) 1, arts. 31-33, 35.

national courts for advisory opinions, and two related to requests for legal aid and suspension of a measure.¹⁵¹

In its interpretation of EC law provisions that are identical to EEA rules (e.g., concerning common market and competition rules), the EEA Court has regularly followed ECJ case-law and has realized the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning. In its very first case, *Restamark*,¹⁵² the EFTA Court interpreted the notion of court or tribunal (in the sense of Article 34 SCA regarding requests by national courts for preliminary opinions) by proceeding from the six-factor-test applied by the ECJ in its interpretation of the corresponding provision in Article 234 EC: the referring body must, in order to constitute a "court or tribunal," (1) be established by law (rather than by private agreement as in the case of commercial arbitration); (2) be permanent; (3) have compulsory jurisdiction for legally binding decisions on issues of a justiciable nature (*res judicata*); (4) conduct *inter-partes* procedures; (5) apply rules of law and evidence; and (6) be independent.¹⁵³ Yet, the EFTA Court considered the request admissible even if, as frequently found in administrative court proceedings in Finland and Sweden, only one party appeared in the proceedings. In the 1997 case of *Dorsch Consult*¹⁵⁴ and the 2000 case of *Gabalfrisa*,¹⁵⁵ the ECJ followed suit and acknowledged that the *inter-partes* requirement was not absolute.¹⁵⁶ The EFTA Court's case-law on questions of *locus standi* of private associations to bring an action for nullity of a decision of the EFTA Surveillance Authority offers another example of liberal interpretations by the EFTA Court of procedural requirements.¹⁵⁷

151. Hans Petter Graver, *The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States*, in THE EFTA COURT 79 n.27 (Carl Baudenbacher et al. eds., 2005).

152. Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 1994-95 Rep. EFTA Ct. 15, 16 [hereinafter Case E-1/94].

153. *Id.*

154. Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 1997 E.C.R. I-4961.

155. Joined Cases C-110-147/98, *Gabalfrisa SL and Others v. Agencia Estatal de Administracion Tributaria*, 2000 E.C.R. I-1577.

156. *Id.*

157. Carl Baudenbacher, *The EFTA Court Ten Years On*, in THE EFTA COURT TEN YEARS ON 24 n.27 (Carl Baudenbacher, Per Tresselt & Thorgeir Orlygsson eds., 2005) (suggesting this liberal tendency might be influenced by the fact that the EFTA Court, unlike the ECJ, is not overburdened).

In *Opinion 1/91*, the EC Court held that the Community law principles of legal primacy and direct effect were not applicable to the EEA Agreement and were “irreconcilable” with its characteristics as an international agreement conferring rights only on the participating states and the EC.¹⁵⁸ The EFTA Court, in its *Restamark* judgment of December 1994, followed Protocol 35 (on achieving a homogenous EEA based on common rules) and found that individuals and economic operators must be entitled to invoke and to claim at the national level any rights that could be derived from precise and unconditional EEA provisions if they had been made part of the national legal orders.¹⁵⁹ In its 2002 *Einarsson* judgment, the EFTA Court, again following Protocol 35, stated that such provisions with quasi-direct effect must take legal precedence over conflicting provisions of national law.¹⁶⁰ Already in 1998, in its *Sveinbjörnsdottir* judgment, the EFTA Court characterized the legal nature of the EEA Agreement as an international treaty *sui generis* that had created a distinct legal order of its own;¹⁶¹ the court therefore found that the principle of state liability for breaches of EEA law must be presumed to be part of EEA law.¹⁶² This judicial recognition of the corresponding EC law principles was confirmed in the 2002 *Karlsson* judgment, where the EFTA Court further held that EEA law—while not prescribing that individuals and economic operators be able to directly rely on non-implemented EEA rules before national courts—required national courts to consider relevant EEA rules, whether implemented or not, when interpreting international and domestic law.¹⁶³

III. LESSONS FROM THE EUROPEAN “*SOLANGE-METHOD*” OF JUDICIAL COOPERATION FOR WORLDWIDE ECONOMIC AND HUMAN RIGHTS

From the perspectives of economics and international law, Free Trade Agreements are sometimes viewed as sub-optimal compared to the rules of the WTO for trade liberalization, rule-

158. *Opinion 1/91, supra*, note 143, ¶ 28.

159. *Case E-1/94, supra*, note 152, at 16.

160. *Case E-1/01, Einarsson v. Icelandic State*, 2002 Rep. EFTA Ct. 1.

161. *Case E-7/97, EFTA Surveillance Authority v. Kingdom of Norway*, 1998 Rep. EFTA Ct. 62, 95.

162. *Id.*

163. *Case E-4/01, Karl K. Karlsson hf. v. Icelandic State*, 2002 Rep. EFTA Ct. 240, 248.

making and compulsory dispute settlement at worldwide levels. For example:

- While most FTAs only provide for *diplomatic* dispute settlement procedures (e.g., consultations, mediation, conciliation, panel procedures subject to political approval by member states) without preventing their member countries from submitting trade disputes through the *quasi* judicial WTO dispute settlement procedure, the compulsory WTO dispute settlement system may offer comparatively more effective legal remedies. This is illustrated by the fact that most of the intergovernmental trade disputes among the three member countries of the North American Free Trade Agreement (NAFTA) have been submitted to the WTO dispute settlement system rather than through the legally weaker dispute settlement procedures of Chapter 20 of the NAFTA Agreement.¹⁶⁴
- Submission of trade disputes among FTA member countries to the WTO has only rarely given rise to legal problems.¹⁶⁵ The rare instances in which successive invocations of FTA and WTO dispute settlement procedures challenged the same trade measure¹⁶⁶ did not

164. See generally W.J. Davey, Dispute Settlement in the WTO and RTAs: A Comment, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343-57 (Lorand Bartels & Federico Ortino eds., 2007). There have been only three intergovernmental disputes under Chapter 20 since NAFTA entered into force in 1994. On the other six NAFTA dispute settlement procedures and their very diverse records see generally A.L.C. de Mestral, *NAFTA Dispute Settlement: Creative Experiment or Confusion?*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 359-81 (Lorand Bartels & Federico Ortino eds., 2007).

165. For example, in the WTO dispute between the United States and Canada over Canadian restrictions on "split-run periodicals." Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997) (adopted July 30, 1997). Canada did not consider itself entitled to justification under the WTO in its violation of GATT Article III by invoking Article 2106 NAFTA permitting preferential measures in favor of cultural industries. A.L.C. de Mestral, *supra* note 164, at 364-65 n.61. Also, the Appellate Body upheld a WTO Panel's conclusion that the Panel had no discretion "to decline to exercise its jurisdiction" based on the existence of a NAFTA dispute on an allegedly related matter. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 44-53, WT/DS308/AB/R, AB-2005-10 (Mar. 6, 2006) (adopted May 9, 2006).

166. Examples would include challenges of U.S. import restrictions on Canadian lumber in both NAFTA and WTO panels, challenges of EC import restrictions on bananas and genetically modified organisms in the ECJ and in the WTO, challenges of Argentine import restrictions on cotton and of Brazilian import restrictions of retreaded tires in both Mercosur and WTO dispute settlement proceedings. K. Kwak & G. Mareceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and Regional Trade*

amount to “abuses of rights,” because WTO Members have rights to conclude regional trade agreements with separate dispute settlement procedures as well as rights to the *quasi* automatic establishment of WTO dispute settlement bodies that examine complaints in the WTO on the different legal basis of WTO law.¹⁶⁷

Yet, from the perspective of citizens and their economic rights as protected by courts in Europe, the EC and EFTA courts offer citizens direct access and judicial remedies that appear economically more efficient, legally more effective, and democratically more legitimate than politicized, intergovernmental procedures among states for the settlement of disputes involving private economic actors. The fact that the ECJ has rendered only three judgments in international disputes among EC member states since the establishment of the ECJ in 1952, illustrates that many intergovernmental disputes (e.g., over private rights) could be prevented or settled by alternative dispute settlement procedures if governments would grant private economic actors more effective legal and judicial remedies in national and regional courts against governmental restrictions.¹⁶⁸ Unfortunately, some national and international judges fail to cooperate in their judicial protection of the rule of law in international relations beyond the EC and ECHR. For instance, U.S. courts claim that WTO dispute settlement rulings “are not binding on the United States, much less this court;”¹⁶⁹ similarly, the EC Court has refrained—at the request of the political EC institutions who have repeatedly misled the ECJ about the interpretation of WTO obligations so as to limit their own judicial accountability¹⁷⁰—from reviewing the legality of

Agreements, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 465-85 (L. Bartels & F. Ortino eds., Oxford Univ. Press 2006).

167. Petersmann, *Judging Judges*, *supra* note 57, at 15.

168. *Id.*

169. *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (2005). In the *Corus Staal* dispute, the U.S. Supreme Court denied petition for certiorari on January 9, 2006, despite an amicus curiae brief filed by the EC Commission supporting this petition (“We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department’s “zeroing” methodology—held invalid by both a WTO Appellate Body and a NAFTA Binational Panel—is not entitled to Chevron deference because it would bring the United States into noncompliance with treaty obligations.”).

170. See Marco Bronckers & Pieter Jan Kuijper, *WTO Law in the European Court of Justice*, 42 COMMON MKT. L. REV. 1313 (2005) (claiming “it is difficult to point out one

EC measures in the light of the EC's GATT and WTO obligations. WTO law tends to be perceived as intergovernmental rules, which governments and domestic courts may ignore without legal recourse for their citizens adversely affected by the welfare-reducing violations of WTO guarantees of market access and rule of law.¹⁷¹ Both the EC and U.S. governments have requested their respective domestic courts to refrain from applying WTO rules at the request of citizens or of NGOs.¹⁷² In order to limit their own judicial accountability, they have repeatedly encouraged their respective courts to apply domestic trade regulations without regard to WTO dispute settlement findings on their illegality.¹⁷³ The simultaneous insistence by these same trade politicians that WTO rules are enforceable at their own request in *domestic courts* vis-à-vis violations of WTO law by states inside the EC or inside the United States,¹⁷⁴ illustrates the political, rather than legal nature of such Machiavellian objections against judicial

specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body," and "that it is rarely or never possible to speak of a sufficiently serious breach of WTO law" by the political EC institutions justifying the EC's non-contractual liability for damages pursuant to Article 288 EC Treaty).

171. See, e.g., the criticism by the EC's legal advisor, P.J. Kuiper of the ECJ's "Kupferberg jurisprudence," on the judicial applicability of the EC's free trade area agreements at the request of citizens as politically "naive." *Id.*

172. On the exclusion of "direct applicability" of WTO rules in the EC and U.S. laws on the implementation of the WTO agreements see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 19 (Kluwer Law International 1997) (At the request of the political EC institutions, the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC's GATT and WTO obligations; the Court refers only very rarely to WTO rules and WTO dispute settlement rulings in support of the ECJ's interpretations of EC law. In the United States, courts are barred by legislation from challenging the WTO-consistency of U.S. federal measures.).

173. Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is The Charming Betsy Sinking?*, 24 *FORDHAM INT'L L.J.* 1533-47 (2001). On the controversial relationship between the "Charming Betsy doctrine" of consistent interpretation and the "Chevron doctrine" of judicial deference see Arwel Davies, *Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon*, 10 *J. INT'L ECON. L.* 117 (2007). The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g., in Case C-112/80, *Dürbeck*, ECR [1981] 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information submitted to the Court).

174. Davies, *supra* note 173.

accountability for violations by trade bureaucracies of the international rule of law.

Part I argued that the universal recognition of inalienable human rights requires national and international courts to review whether—in their judicial settlement of “disputes concerning treaties, like other international disputes . . . in conformity with the principles of justice and international law”¹⁷⁵—human rights and other principles of justice (like due process of law) justify judicial application of international guarantees of freedom, non-discrimination, rule of law and social safeguard measures for the benefit of citizens.¹⁷⁶ Part II described the citizen-driven, multilevel judicial protection of the EC, EEA, and ECHR guarantees of freedoms, fundamental rights and rule of law as models for decentralizing and transforming intergovernmental rules and dispute settlement procedures for the benefit of citizens. Part III suggests that the “*Solange*-method” of conditional cooperation by national courts with the ECJ should serve as a model for “conditional cooperation” among international and national courts (Part III C) “as long as” it protects the constitutional rights of citizens (Part III A). The method should also serve as a model for judicial self-restraint of the ECtHR vis-à-vis alleged violations of human rights by EC institutions as long as the EC Court protects the human rights guarantees of the ECHR (Part III B). Part IV asks whether the judicial function to settle disputes in conformity with the principles of procedural and substantive justice can assert democratic legitimacy in international relations, which—beyond rights-based European integration law—continues to be dominated by power politics. It is argued that the legitimacy of judicial cooperation, self-restraint, “judicial competition,” and “judicial dialogue” among courts derive from their protection of constitutional citizen-based rights as a constitutional precondition for individual and democratic self-development in a protected framework of “participatory,” “deliberative,” and “cosmopolitan democracy.”¹⁷⁷ Citizens have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges if they perceive themselves as mere

175. Vienna Convention on the Law of Treaties, *supra* note 11, at pmb1.

176. *Id.*

177. Petersmann, *Judging Judges*, *supra* note 57, at 17.

agents of governments and disregard their constitutional obligations to settle disputes in conformity with human rights.¹⁷⁸

A. *The German Constitutional Court's "Solange-Protection" of Fundamental Rights in the EC's Legal System*

Part II recalled how the ECJ, the EFTA Court, and the ECtHR have—albeit in different ways—interpreted the intergovernmental EC, EEA, and ECHR Treaties as objective legal orders also protecting *individual rights* of citizens. All three courts have acknowledged that the human rights goals of empowering individuals and effectively protecting human rights, like the objective of international trade agreements to enable citizens to engage in mutually beneficial trade transactions under non-discriminatory conditions of competition, call for “dynamic judicial interpretations” of treaty rules with due regard to the need for judicial protection of citizen interests in economic markets and constitutional democracies.¹⁷⁹ These citizen-oriented interpretations of the EC and EEA Agreements were influenced by the long-standing insistence of the German Constitutional Court on its constitutional mandate to protect fundamental rights and constitutional democracy vis-à-vis abuses of EC powers affecting citizens in Germany.¹⁸⁰ The “*Solange* jurisprudence” of the German Constitutional Court, like similar interactions between other national constitutional courts and the EC Court,¹⁸¹ contributed to more effective judicial protection of human rights in Community law:

- In its *Solange I* judgment of 1974, the German Constitutional Court held that “as long as” the integration process of the EC does not include a catalogue of fundamental rights corresponding to that of the German Basic Law, German courts could, after having requested a preliminary ruling from the ECJ, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.¹⁸² This judicial insistence on the

178. *Id.*

179. Mayer, *supra* note 80, at 296.

180. *Id.*

181. *Id.* at 295.

182. Entscheidungen des Bundesverfassungsgericht [BVerfGE] May 29, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271 (F.R.G.).

- higher level of fundamental rights protection in German constitutional law was instrumental for the ECJ's judicial protection of human rights as common, yet unwritten, constitutional guarantees of EC law.¹⁸³
- In view of the emerging human rights protection in EC law, the German Constitutional Court held in its *Solange II* judgment of 1986 that it would no longer exercise its jurisdiction for reviewing EC legal acts "as long as" the ECJ continued to generally and effectively protect fundamental rights against EC measures in ways comparable to the essential safeguards of German constitutional law.¹⁸⁴
 - In its *Maastricht* judgment (*Solange III*) of 1993, however, the German Constitutional Court reasserted its jurisdiction to defend the scope of German constitutional law: EC measures exceeding the limited EC competences covered by the German Act ratifying the EU Treaty ("ausbrechende Gemeinschaftsakte") could not be legally binding and applicable in Germany.¹⁸⁵
 - Following GATT and WTO dispute settlement rulings concerning EC import restrictions of bananas violating WTO law, and in view of an ECJ judgment upholding these restrictions without reviewing their WTO inconsistencies, several German courts requested the Constitutional Court to declare these EC restrictions as *ultra vires* (i.e., exceeding the EC's limited competences) and as an illegal restriction on the constitutional freedoms of German importers.¹⁸⁶ The German Constitutional Court, in its judgment of 2002¹⁸⁷ (*Solange IV*), declared the application inadmissible on the ground that it had not been argued that the required level of human rights protection in the EC had

183. On the ECJ's judicial protection of human rights since 1969, see SHELTON, *supra* note 45.

184. Entscheidungen des Bundesverfassungsgericht [BVerfGE] Oct. 22, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 339 (375) (F.R.G.).

185. Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.).

186. Petersmann, *Judging Judges*, *supra* note 57, at 18.

187. Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 7, 2000, 102 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 147 (F.R.G.).

generally fallen below the minimum level required by the German Constitution.¹⁸⁸

- In its judgment of 2005 on the German act implementing the EU Framework Decision (adopted under the third EU pillar) on the European Arrest Warrant, the Constitutional Court held that the automatically binding force and mutual recognition in Germany of arrest orders from other EU member states were inconsistent with the fundamental rights guarantees of the German Basic Law.¹⁸⁹ The limited jurisdiction of the ECJ for third pillar decisions concerning police and judicial cooperation might have contributed to this assertion of national constitutional jurisdiction for safeguarding fundamental rights vis-à-vis EU decisions in the area of criminal law and their legislative implementation in Germany.

B. "Horizontal" Cooperation among the EC Courts, the EFTA Court, and the ECtHR in Protecting Individual Rights in the EEA

Judicial cooperation between the EC courts and the EFTA Court was legally mandated in the EEA Agreement¹⁹⁰ and facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical with the EC's common market rules (notwithstanding the different context of the EC's common market and the EEA's free trade area).¹⁹¹ The Court of First Instance (CFI), in its *Opel Austria* judgment of 1997, held that Article 10 of the EEA Agreement (corresponding to the free trade rules in Articles 12, 13, 16 and 17 EC Treaty) had direct effect in EC law in view of the high degree of integration protected by the EEA Agreement, whose objectives exceeded those of a mere free trade agreement and required the contracting parties to establish a dynamic and homogenous EEA.¹⁹² In numerous cases, EC court judgments referred to the case-law of the EFTA Court, for example by pointing out "that the principles governing the liability of an EFTA state for infringement of a directive referred

188. Petersmann, *Judging Judges*, *supra* note 57, at 18.

189. Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] July 18, 2005, 113 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 273 (F.R.G.).

190. *Id.* at art. 6.

191. *Id.*

192. Case T-115/94, *Opel Austria GmbH v. Council*, 1997 E.C.R. II-39.

to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdóttir*.¹⁹³ In its *Ospelt* judgment, the ECJ emphasized that "one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the four freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states."¹⁹⁴

The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries, and with due regard to the case-law of the ECtHR. In view of the intergovernmental structures of the EEA Agreement, the legal homogeneity obligations in the EEA Agreement (e.g., Article 6 EEA) as well as in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (e.g., Article 3 SCA) were interpreted only as *obligations de résultat* with regard to the legal protection of market freedoms and individual rights in EFTA countries.¹⁹⁵ Yet, the EFTA Court effectively promoted "*quasi-direct effect*" and "*quasi-primacy*" as well as full state liability and protection of individual rights of market participants in national courts in all EEA countries.¹⁹⁶ In various judgments, the EFTA Court followed the ECJ case-law by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR.¹⁹⁷ In its *Asgeirsson* judgment,¹⁹⁸ the EFTA Court rejected the argument that the reference to the EFTA Court had unduly prolonged the national court proceeding in violation of the right to a fair and public hearing within a reasonable time (Article 6 ECHR).¹⁹⁹ Referring to a judgment by the ECtHR in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ (pursuant to Article 234 EC), the EFTA Court shared the reasoning of the ECtHR that adding the period

193. Case C-140/97, *Rechberger v. Republik Österreich*, 1999 E.C.R. I-3499 ¶ 39.

194. Case C-452/01, *Ospelt*, 2003 E.C.R. I-9743 ¶ 29.

195. Baudenbacher, *supra* note 157.

196. *Id.* ("Direct effect of primary law, state liability and the duty of the courts to interpret national law in the light of EEA obligations have been clearly and firmly accepted in national law by Norwegian courts.")

197. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, at arts. 6, 10.

198. Case E-2/03, *Ákaeruvaldio v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, 2003 Rep. EFTA Ct. 185.

199. *Id.*

of preliminary references (which was less than six months in the case before the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.²⁰⁰

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the ECJ. In *Goodwin*, for example, the ECtHR referred to Article 9 of the EU Charter of Fundamental Rights (right to marry) to back up its judgment that the refusal to recognize a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.²⁰¹ In *Dangeville*, the ECtHR considered the fact that French measures were incompatible with EC law when it determined that an interference with the right to the peaceful enjoyment of possessions was not required.²⁰² In the series of cases, *Waite and Kennedy v. Germany*, the ECtHR held that it would be incompatible with the purpose and objective of the ECHR if an attribution of tasks to an international organization or in the context of international agreements could absolve the contracting states of their obligations under the ECHR.²⁰³ In the *Bosphorus* case, the ECtHR had to examine the consistency of Ireland's impounding of a Yugoslavian aircraft on the legal basis of EC regulations imposing sanctions against the former Federal Republic of Yugoslavia;²⁰⁴ the ECtHR referred to the ECJ case-law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the ECJ preliminary ruling that "the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1."²⁰⁵ In its examination of whether compliance with EC obligations could justify the impugned interference by Ireland with the applicant's property rights, the ECtHR proceeded on the basis of the following four principles:

- (a) A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was

200. *Id.*

201. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, ¶¶ 58, 100.

202. *SA Dangeville v. France*, App. No. 36677/97, 2002-III Eur. Ct. H.R.

203. *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Comm'n H.R. ¶ 67 (Feb. 18, 1999).

204. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Eur. Ct. H.R. 2005-VI Eur.Ct. H.R. 109.

205. *Id.* ¶ 167.

a consequence of domestic law or of the necessity to comply with international legal obligations.²⁰⁶

(b) State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.²⁰⁷

(c) If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.²⁰⁸

(d) However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.²⁰⁹

After examining the comprehensive EC guarantees of fundamental rights and judicial remedies, the ECtHR found "that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, 'equivalent' . . . to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from requirements of the Convention when it implemented legal obligations flowing from its membership of the EC."²¹⁰ As the Court did not find any "manifest deficiency" in the protection of the applicant's Convention rights, the relevant presumption of compliance with the ECHR had not been rebutted.²¹¹

206. *Id.* ¶ 153.

207. *Id.* ¶ 155.

208. *Id.* ¶ 156.

209. *Id.*

210. *Id.* ¶¶ 165, 166.

211. *Id.*

C. Towards a "Solange-Method" of Cooperation among International Trade and Environmental Courts Beyond Europe

Competing multilateral treaty and dispute settlement systems with "forum selection clauses" enabling governments to submit disputes to competing jurisdictions (with the risk of conflicting judgments) continue to multiply outside of economic law and human rights law. For example, multiplication has been seen in international environmental law, maritime law, criminal law, and other areas of international law.²¹² Proposals to coordinate such overlapping jurisdictions through hierarchical procedures (e.g., preliminary rulings or advisory opinions by the ICJ) are opposed by most governments.²¹³ Agreement on exclusive jurisdiction clauses (as in Article 292 EC Treaty, Article 23 Dispute Settlement Understanding (DSU)/WTO, Article 282 Law of the Sea Convention) may not prevent submission of disputes involving several treaty regimes to competing dispute settlement *fora*.²¹⁴ For example, in the dispute between Ireland and the United Kingdom over radioactive pollution from the MOX plant in Sellafield (UK), four dispute settlement bodies were seized and all of them used diverging methods for coordinating their respective jurisdictions.²¹⁵

1. The OSPAR Arbitral Award of 2003 on the *MOX Plant* Dispute

In order to clarify the obligations of the United Kingdom to make available all information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it"²¹⁶ pursuant to Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), Ireland and the United Kingdom agreed to establish an arbitral tribunal under the OSPAR Convention.²¹⁷ Even though Article 32(5)(a) of the OSPAR Convention requires the tribunal to decide according to "the rules of international law, and in particular those

212. Petersmann, 'Constitutional Justice', *supra* note 66, at 787.

213. *Id.*

214. *Id.*

215. Yuval Shany, *The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures*, 17 LEIDEN J. INT'L L. 816 (2004).

216. *Id.* at 819.

217. *Id.*

of the Convention,²¹⁸ the tribunal's award of July 2003 was based only on the OSPAR Convention, without taking into account relevant environmental regulations of the EC and of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (ratified by all EC member states as well as by the EC).²¹⁹ The OSPAR arbitral tribunal decided in favor of the United Kingdom that the latter had not violated its treaty obligations by not disclosing the information sought by Ireland.²²⁰

2. The UNCLOS 2001 Provisional Measures and 2003 Arbitral Decision in the *MOX Plant* Dispute

The UN Convention on the Law of the Sea (UNCLOS) offers parties the choice (in Articles 281) of submitting disputes to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitral tribunals, or other dispute settlement *fora* established by regional or bilateral treaties.²²¹ As Ireland claimed that the discharges released by the MOX Plant contaminated Irish waters in violation of UNCLOS, it requested establishment of an arbitral tribunal and—pending this procedure—requested interim protection measures from the ITLOS pursuant to Article 290 UNCLOS.²²² The ITLOS order of December 2001, after determining the *prima facie* jurisdiction of the Annex VII arbitral tribunal to decide the merits of the dispute, requested both parties to cooperate and consult regarding the emissions from the MOX Plant into the Irish Sea, pending the decision on the merits by the arbitral tribunal.²²³ The arbitral tribunal suspended its proceedings in June 2003 and requested the parties to clarify whether, as claimed by the United Kingdom, the EC Court had jurisdiction to decide this dispute on the basis of the relevant EC and EURATOM rules, including UNCLOS as an integral part of the Community legal system.²²⁴

218. Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 Y.B. INT'L ENVTL. L. 703, 31 ILM 1312 (1993) art. 32(5)(a).

219. Shany, *supra* note 215 at 820.

220. T. McDorman, *Access to Information under Article 9 OSPAR Convention (Ireland v. UK)*, *Final Award*, 98 AM. J. INT'L L. 330 (2004).

221. Petersmann, 'Constitutional Justice', *supra* note 66, at 788.

222. Shany, *supra* note 215, at 818.

223. *Id.*

224. *Id.*

3. The EC Court Judgment of May 2006 in the *MOX Plant* Dispute

In October 2003, the EU Commission started an infringement proceeding against Ireland on the ground that—as the EC had ratified and transformed UNCLOS into an integral part of the EC legal system—Ireland's submission of the dispute to tribunals outside the Community legal order had violated the exclusive jurisdiction of the EC Court under Article 292 EC and Article 193 of the EURATOM Treaty.²²⁵ In its judgment of May 2006, the Court confirmed its exclusive jurisdiction on the ground that the UNCLOS provisions on the prevention of marine pollution relied on by Ireland in its dispute relating to the MOX Plant “are rules which form part of the Community legal order.”²²⁶ The Court followed from the autonomy of the Community legal system and Article 282 UNCLOS that the system for the resolution of disputes set out in the EC Treaty must, in principle, take precedence over that provided for in Part XV of UNCLOS.²²⁷ As the dispute concerned the interpretation and application of EC law within the terms of Article 292 EC, “Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant.”²²⁸ By requesting the arbitral tribunal to decide disputes concerning the interpretation and application of Community law, Ireland had violated the exclusive jurisdiction of the Court under Article 292 EC as well as the EC member states' duties of close cooperation, prior information, and loyal consultation of the competent Community institutions as prescribed in Article 10 EC.²²⁹

4. The 2004 *IJzeren Rijn* Arbitration between the Netherlands and Belgium

The *IJzeren Rijn* arbitration under the auspices of the Permanent Court of Arbitration concerned a dispute between Belgium and the Netherlands over Belgium's right to the use and reopening of an old railway line leading through a protected

225. *Id.*

226. Case C-459/03, European Commission v. Ireland, 2006 E.C.R. I-04635, ¶ 121.

227. *Id.*

228. *Id.* ¶ 133.

229. *Id.*

natural habitat and payment of the costs involved.²³⁰ The arbitral tribunal was requested to settle the dispute on the basis of international law, including, if necessary, EC law, with due respect to the obligations of the EC member states under Article 292 EC.²³¹ The Tribunal agreed with the view shared by both parties that there was no dispute within the meaning of Article 292 EC because its decision on the apportionment of costs did not require any interpretation of EC law (e.g., the Council Directive on the conservation of natural habitats).²³²

5. The “Solange-Method” as Reciprocal Respect for Constitutional Justice

The above-mentioned examples for competing jurisdictions on the settlement of environmental disputes among European states raise questions similar to those regarding overlapping jurisdictions for the settlement of trade disputes, human rights disputes, or criminal proceedings in national and international criminal courts. The UNCLOS provisions for dispute settlement on the basis of “this Convention and other rules of international law not incompatible with this Convention” (Article 288) prompted the ITLOS to affirm *prima facie* jurisdiction in the MOX Plant dispute.²³³ The Annex VII Arbitral Tribunal argued convincingly, however, that the prospect of resolving this dispute in the EC Court on the basis of EC law risked leading to conflicting decisions which, bearing in mind considerations of mutual respect and comity between judicial institutions and the explicit recognition of mutually agreed regional jurisdictions in Article 282 UNCLOS, justified suspending the arbitral proceeding and enjoining the parties to resolve the Community law issues in the institutional framework of the EC.²³⁴ WTO law recognizes similar rights of WTO members to conclude regional trade agreements with autonomous dispute settlement procedures; yet the lack of a WTO provision corresponding to Article 282 UNCLOS, and the WTO rights to the *quasi* automatic

230. Nikolaos Lavranos, *The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN J. OF INT'L L. 223 (2006) [hereinafter Lavranos, *The MOX Plant*].

231. *Id.*

232. *Id.*

233. *Id.*

234. Shany, *supra* note 215, at 826.

establishment of WTO dispute settlement panels require that WTO dispute settlement bodies respect the right of WTO members to receive a WTO dispute settlement ruling on the WTO obligations of members of FTAs, even if the respondent WTO member would prefer to settle the dispute in the framework of FTA procedures.²³⁵ The EC Court's persistent refusal to decide disputes on the basis of the WTO obligations of the EC and its member states, offers an additional argument for WTO dispute settlement bodies to respect the rights of WTO members (including EC member states) to WTO dispute settlement rulings on alleged violations of WTO rights and obligations (e.g., by the EC Council's import restrictions on bananas), notwithstanding the exclusive (but ineffective) ECJ jurisdiction for settling disputes inside the EC over WTO law: "As long as" the EC Court continues to ignore the WTO obligations of the EC in its dispute settlement practices and offers EC member states no judicial remedy against EC majority decisions violating WTO law, WTO dispute settlement bodies may see no reason to exercise judicial self-restraint in WTO disputes over alleged violations by the EC of its WTO obligations vis-à-vis EC member states.²³⁶ This lack of a treaty provision similar to Article 282 UNCLOS might also have prompted the OSPAR arbitral tribunal to decide on the claim of an alleged violation of the OSPAR Convention, without any discussion of Article 292 EC and without prejudice to future dispute settlement proceedings in the EC Court based on EC law (which, arguably, includes more comprehensive information disclosure requirements).²³⁷ The Ijzeren Rijn arbitral tribunal

235. Nikolaos Lavranos, *Towards a Solange-Method between International Courts and Tribunals?*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 217 (Tomer Broude & Yuval Shany eds., 2008) [hereinafter Lavranos, *Solange-Method*].

236. Such challenges in the WTO by EC member states of EC acts violating WTO law have never occurred so far. Most Community lawyers argue that not only from the point of view of Community law, but also "from the point of view of international law, the supremacy of Community law within the EC and its member states must be accepted." Lavranos, *The MOX Plant*, *supra* note 230, at 233. Yet, it is arguable even from the point of view of Community law that the duty of loyalty (Article 10 EC) applies "as long as" the ECJ offers effective judicial remedies against obvious violations by EC institutions of their obligations (e.g., under Articles 220, 300 EC) to respect the rule of law and protect EC member states from international legal responsibility for EC majority decisions violating mixed agreements.

237. Lavranos, *The MOX Plant*, *supra* note 230, at 238.

examined the legal relevance of Article 292 EC and decided the dispute without prejudice to EC law.²³⁸

This “*Solange*-principle,” that is, conditioning respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law, has also been applied by the EC Court itself. For instance, in its Opinion 1/91 on the inconsistency of the EEA Draft Agreement with EC law, the EC Court found that the EEA provisions for the establishment of an EEA Court were inconsistent with the “autonomy of the Community legal order” and the “exclusive jurisdiction of the Court of Justice” (e.g., in so far as the EEA provisions did not guarantee legally binding effects of “advisory opinions” by the EEA Court on national courts in EEA member states).²³⁹ The “*Solange*-principle” also explains the jurisprudence of both the EC Court²⁴⁰ as well as the EFTA Court that private arbitral tribunals are not recognized as courts or tribunals of member states (within the meaning of Article 234 EC and Article 33 SCA) entitled to request preliminary rulings by the European courts.²⁴¹ As international arbitral tribunals (like the OSPAR and IJzeren Rijn arbitral tribunals mentioned above) are likewise not entitled to request preliminary rulings from the European courts, they might exercise judicial self-restraint and defer to the competing jurisdiction of European courts in disputes requiring interpretation and application of European law. To the extent conflicts of jurisdiction and conflicting judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules,²⁴² international courts should follow the example of national civil and commercial courts and European courts by resolving conflicts through judicial cooperation and “judicial dialogues” based on principles of judicial comity and judicial protection of constitutional principles (like due process of law, *res judicata*, and human rights) underlying modern international law. The horizontal cooperation among national and international courts with overlapping jurisdictions for the protection of constitutional rights in Europe reflects the

238. *Id.*

239. Opinion 1/91, *supra* note 143.

240. Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient-Mosaïque Voyages et Culture SA*, 2005 E.C.R. I-923.

241. *Id.*

242. Lavranos, *The MOX Plant*, *supra* note 230, at 242 (the key to all solutions is hierarchy).

constitutional duty of judges to protect “constitutional justice” and should serve as a model for similar cooperation among national and international courts with overlapping jurisdictions in other fields of international law,²⁴³ such as the settlement of trade and environmental disputes among the 153 WTO members. Especially in the areas of intergovernmental regulation where states remain reluctant to submit to review by international courts (e.g., as in the second and third pillars of the EU Treaty), *national courts* must remain vigilant guardians so as to protect citizens and their constitutional rights from inadequate judicial remedies at the international level of multilevel governance.

6. Judicial Self-Restraint in WTO Dispute Settlement Practices

The WTO dispute settlement system differs from all other international dispute settlement systems by its uniquely institutionalized review and adoption of all WTO panel, appellate, and arbitral reports by WTO members in the Dispute Settlement Body (DSB). Notably, in the field of trade-related environmental measures, WTO dispute settlement reports and the DSB have referred to the WTO objectives of “sustainable development” (WTO Preamble) and to multilateral environmental agreements for justifying differential treatment (e.g., imports of shrimps dependent upon whether their harvesting methods protected sea turtles) on grounds of environmental protection.²⁴⁴ Yet, the WTO Panel Report on the EC’s restrictions on genetically modified organisms interpreted Article 31(3)(c) VCLT narrowly, as applying only to international law rules binding all parties of the treaty concerned.²⁴⁵ This narrow interpretation of the customary rules of treaty interpretation was supported by WTO Members as protecting state sovereignty and limiting the relevant context of WTO rules (there are hardly any other multilateral treaties ratified by all 153 WTO members, including customs territories like Hong

243. Lavranos, *Solange-Method*, *supra* note 235, at 235 (“[I]f the *Solange*-method would be applied by all international courts and tribunals in case of jurisdictional overlap, the risk of diverging or conflicting judgments could be effectively minimized thus reducing the danger of a fragmentation of the international (including European) legal order. . . . [O]ne could argue that the *Solange*-method and for that matter judicial comity in general is part of the legal duty of each and every court to deliver justice.”).

244. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (adopted Nov. 6, 1998).

245. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 17, ¶ 7.65.

Kong, Macau, Taiwan, and the EC). In the *Mexico-Soft Drinks* dispute, the WTO Panel and Appellate Body declined jurisdiction for claims based on NAFTA and interpreted the general exception in Article XX(d) GATT narrowly, as not covering “laws and regulations” which Mexico had adopted as countermeasures in order to respond to alleged violations of NAFTA obligations by the United States.²⁴⁶ According to the Appellate Body, NAFTA obligations are not “laws and regulations” within the meaning of Article XX(d) GATT because they are not part of the domestic legal order.²⁴⁷ The reasoning by the Appellate Body—that “it would have to assess whether the relevant international agreement had been violated” in order to examine the applicability of Article XX(d), and that “this is not the function of panels and the Appellate Body as intended by the DSU”²⁴⁸—would presumably lead to similar judicial self-restraint in the *Swordfish* dispute between the EC and Chile in the WTO:²⁴⁹ WTO dispute settlement bodies would refrain from examining the Chilean claim that Chile’s violations of GATT obligations were justified countermeasures in response to preceding violations by the EC of environmental obligations under the Law of the Sea Convention.²⁵⁰ Even if—as permitted by the Law of the Sea Convention (Article 280) as well as by the DSU (e.g., Articles 7, 26)—Chile, the EC, and the DSB would request a WTO panel to examine the dispute in the light of both WTO law and the Law of the Sea Convention, the narrow interpretation of GATT Article XX is likely to prevail (i.e., that GATT Article XX does not justify unilateral departures from GATT obligations in response to violations of non-WTO agreements).²⁵¹

246. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, *supra* note 165. The Appellate Body upheld the Panel finding that Mexico’s measures, which sought to secure compliance by the United States with its obligations under the NAFTA, did not constitute measures “to secure compliance with laws or regulations” within the meaning of Article XX(d) GATT.

247. *Id.* ¶ 56.

248. *Id.* ¶ 69.

249. *Chile—Measures Affecting the Transit and Importation of Swordfish, Request for Consultations by the European Communities* WT/DS193/1 (Apr. 26, 2000) (the WTO complaint by the EC and the related Chilean complaint against the EC in the International Tribunal for the Law of the Sea, were suspended).

250. *Id.*

251. *Id.*

IV. IS JUDICIAL PROTECTION OF "CONSTITUTIONAL JUSTICE" LEGITIMATE IN INTERNATIONAL ECONOMIC LAW?

The universal recognition of *jus cogens* and of inalienable human rights; the "treaty constitutions" of international organizations with rule-making, executive, and judicial powers; the proliferation of international courts; their judicial protection of rule of law; and the judicial clarification of "constitutional principles" limiting abuses of public and private power, transform some of the intergovernmental structures of international law (notably in Europe) by constitutional "checks and balances" as well as through procedural and substantive "constitutional restraints."²⁵² In most of the forty-seven European states cooperating in the Council of Europe, human rights, fundamental freedoms, and mutually beneficial cooperation of citizens across national frontiers are now legally and judicially protected by national and European constitutional law.²⁵³ As explained in Parts I and II, the constitutional obligation of independent and impartial judges to protect constitutional rights, and the multilevel cooperation of judges in protecting "constitutional justice" and mutually beneficial cooperation among citizens across national frontiers in Europe, were major driving forces behind this "constitutionalization" of transnational economic and civil society relations in Europe. Disputes among European states have become rare not only in the EC Court, the EFTA Court, and in the ECtHR; they are also decreasing in worldwide courts (e.g., the ICJ) and in other dispute settlement bodies (e.g., the WTO).

A. *How to Correct "Discourse Failures" in Intergovernmental Politics?*

Realists and public choice analyses emphasize that the "rational ignorance" of most voters vis-à-vis global public goods, "interest group capture" of foreign policies, and the introverted "pathologies" of democratic processes, make it difficult for periodically elected, national politicians to engage in cosmopolitan action unsupported by the people: "Information and power asymmetries, as well as the absence of a centralized enforcement mechanism, make international collective action problems difficult to overcome even when there is a plausible argument that the

252. Petersmann, *Judging Judges*, *supra* note 57, at 26.

253. *Id.*

international regime, if successful, would enhance the welfare of every participating state.”²⁵⁴ The “protection biases” of national foreign policies in favor of protecting powerful local constituents (e.g., import-competing industries financing election campaigns) and the public’s ignorance are rational (e.g., in view of the high information costs) and reveal structural “discourse failures.”²⁵⁵ Hence, it is no coincidence that the power-oriented, intergovernmental reasoning among European states was progressively “constitutionalized” by multilevel judicial reasoning of independent national and European courts, usually at the request of independent European community institutions (like the EC Commission and the European Commission for Human Rights) and private and public litigants. Support by civil society (e.g., the EC’s “market citizens”) and by multilevel parliamentary cooperation (e.g., in the EC and Council of Europe) also helped to clarify the self-interests of states in European integration.²⁵⁶

Many other examples—like European citizenship, the legal autonomy of EC institutions and European courts, the ever closer networks of independent regulatory agencies and other multilevel governance institutions in Europe, and the rare recourse to the “horizontal” enforcement mechanisms of international law (such as inter-state sanctions) in relations among European democracies—confirm that “state sovereignty” is “disaggregating” in Europe.²⁵⁷ In contrast to North American proponents of “global administrative law” who accept intergovernmental structures as given, Europeans have learned to support the need for a transnational “empowering constitution” protecting citizen rights across frontiers (e.g., the EC’s “market freedoms”), as well as a “limiting constitution” constraining protectionist abuses of legislative powers in transnational relations.

B. Multilevel Governance for the Collective Supply of International Public Goods Requires Multilevel Judicial Protection of Rule of Law

All states have experienced and learned that effective protection of human rights, constitutional democracy, and an

254. GOLDSMITH & POSNER, *supra* note 4, at 219.

255. GUIDO PINCIONE & FERNANDO TESON, *RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCOURSE FAILURE* (2006).

256. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

257. More generally on “disaggregated sovereignty” see *id.* at 266.

efficient division of labor, are not possible without rule of law. This is true also for the ever expanding multilevel governance for the collective supply of international public goods. The success of the “*solange*-method” of judicial cooperation and contestation among European courts based on respect for “constitutional pluralism,” has led to judicial clarification and legal protection of an ever growing number of common constitutional principles limiting abuses in European economic, environmental, and human rights law for the benefit of citizens.²⁵⁸ The limited role of European courts in the second and third “pillars” of the European Union, and the limited cooperation among European and worldwide courts (e.g., the ICJ and the WTO’s Appellate Body), illustrate the political limits of international courts in Europe and more notably in areas of national security and foreign policy disputes over the distribution of power or the legitimacy of international law rules.²⁵⁹ Beyond Europe, international relations remain dominated by power politics; refusal by most UN member states to submit to the compulsory jurisdiction of the ICJ, insistence on state sovereignty, and introverted “constitutional nationalism” impeding collective supply of global public goods.²⁶⁰ Proposals for extending European “multilevel constitutionalism” to worldwide organizations (such as the UN and the WTO) are opposed by most states outside Europe (including the United States) in view of their focus on constitutional and democratic nationalism and power-oriented foreign policies.²⁶¹ The more intergovernmental networks and worldwide organizations evade parliamentary and democratic control, and the more legislators fail to correct the ubiquitous “market failures” and “governance failures” in international relations, the more citizens have reason to appeal to the “public reasoning” of independent and impartial courts mandated to

258. See Petersmann, *Judging Judges*, *supra* note 57, at 26.

259. *Id.*

260. On this “globalization paradox” (i.e., needing multilevel governance for the collective supply of international public goods, but fearing and opposing such governance) see *id.* at 8. On the need for “multilevel constitutionalism” as a necessary legal framework for the collective, democratic supply of international public goods see *STUDIES IN INTERNATIONAL TRADE LAW, CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5-57* (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

261. *Id.*

protect constitutional rights and rule of law “in conformity with principles of justice.”²⁶²

Even though the reality of international politics continues to evade effective worldwide constitutional constraints, the multilevel democratic governance needed for international protection of human rights and of other international public goods requires multilevel constitutionalism. If democratic and judicial institutions are perceived as instruments for protecting the constitutional rights of citizens without which individual and democratic self-development in dignity are not sustainable (e.g., due to public and private abuses of power, including majoritarian abuses of parliamentary powers), then multilevel judicial protection of fundamental freedoms of citizens can be justified as a necessary precondition for constitutional democracy in a globally integrated world. The risk of paternalist abuses of judicial powers must be countered by “deliberative democracy” and “public reasoning.” Rights-based “judicial discourses” focusing on “principles of justice” tend to be more precise and more rational than political promises to protect vaguely defined “public interests.” Similar to European courts, national constitutional judges and economic courts outside Europe increasingly argue that constitutional democracies are premised on “active liberty”; hence, the exercise of rights to individual and democratic self-government (in citizen-driven “political markets” no less than in consumer-driven economic markets) may serve as a “source of judicial authority and an interpretative aid to more effective protection of ancient and modern liberty alike.”²⁶³ Legitimacy no longer derives from (inter)governmental *fiat*, but from democratic and judicial justification of relevant rules as “*just*.”²⁶⁴ The independence, impartiality, and constitutional function of judges to protect constitutional rights against abuses of power legitimize adjudication as a necessary component of constitutional democracy.²⁶⁵ Citizens must hold governments and courts more accountable for meeting their constitutional obligation to protect

262. *Id.*

263. S.G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (Knopf, 2005).

264. On the diverse (e.g., rational Kantian, contractarian Rawlsian and discursive Habermasian) methodological approaches to identifying just rules see C.S. Nino, *Can There Be Law-abiding Judges?*, in 1789 ET L'INVENTION DE LA CONSTITUTION 275, 286 (Michel Troper & Lucien Jaume eds., 1994).

265. *Id.* at 293.

“constitutional justice” in governmental and judicial interpretations of international law rules in conformity with the human rights and constitutional rights of citizens. The increasing cross-references in ECJ and EFTA judgments to their respective case-law, as well as to other European and international courts (e.g., the ECtHR, WTO dispute settlement rulings, and the ICJ), may also serve as models for cooperation among other international courts in order to better coordinate their respective jurisprudence on the basis of common legal principles.²⁶⁶

Civil society and its democratic representatives rightly challenge traditional conceptions of international justice shielding an authoritarian “international law among states” as being inconsistent with the universal recognition of inalienable human rights, which call for constitutional conceptions of justice as a shield of the individual and of human rights against abuses of power. As long as citizen-oriented “world constitutionalism” for the collective supply of “global public goods” remains a utopia, legal and judicial protection of constitutional rights in transnational relations in conformity with principles of justice and international law remain essential for “bottom-up constitutionalization” of international legal practices through pragmatic piecemeal reforms. Just as multilevel constitutionalism in Europe was rendered possible by the intergovernmental creation and judicial protection of common markets and of rights-based, transnational communities (rather than by “Wilsonian liberalism” projecting national, democratic institutions to the worldwide level), so will the needed “constitutionalization” of intergovernmental power politics and “cosmopolitan peace” crucially depend on the wisdom and courage of judges supporting citizen-oriented reforms of international economic law and judicial protection of constitutional rights in the peaceful cooperation among citizens across national frontiers.

266. Allan Rosas, *With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts*, in 1 THE GLOBAL COMMUNITY Y.B. INT'L. L. & JURISPRUDENCE 201 (2006).