

Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?

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The American legal philosopher Ronald Dworkin begins his recent book on *Justice in Robes* with the story of US 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 to the rules”.¹ Should lawyers and judges apply positive law without regard to justice, like a watchmaker may have no interest in the notion of time as such? Does the separation of judicial power from legislative and executive powers require that, as postulated by Montesquieu, decisions of courts must always conform to the exact letter of the law, as understood by the legislator? Is judicial protection of ‘constitutional justice’ democratically legitimate in international relations governed by power politics? Why do international courts so rarely refer to their legal obligation (as codified in the VCLT) to settle disputes “in conformity with the principles of justice”?

I. Law, judges and ‘constitutional justice’: The judicial function to settle disputes through just procedures

In a world of scarce resources and imperfect knowledge, conflicts of interests among self-interested individuals, as well as among states pursuing rational self-interests, are inevitable. Such conflicts, and their peaceful settlement on the basis of law and judicial procedures, also entail *positive* incentives for competition enhancing productive uses of resources, new discoveries, social learning processes and mutually beneficial cooperation.² The task of judges consists primarily in the independent and impartial interpretation, clarification and protection of the rule of law. By offering complainants and defendants ‘their

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¹ R.M. DWORKIN, *Justice in Robes*, Cambridge (Mass.), Harvard University Press, 2006, Chapter 1.

² On the productive value of competition, conflicts and peaceful conflict resolution, see E.U. PETERSMANN, “Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralisation of Dispute Settlement in International Trade”, *University of Pennsylvania Journal of International Economic Law*, 2006, pp. 273-366.

day in court', judges promote "free trade in ideas" (Oliver Wendell Holmes),³ "public reason"⁴ and "justice"⁵ that may also justify judicial correction of cases of injustice for the benefit of adversely affected citizens. The US Supreme Court, for example, has been described as "the voice of the national conscience"⁶ and as the most independent and impartial guardian of the constitutional 'checks and balances' protecting US citizens and their constitutional rights against potential "tyranny of majorities" [T. Jefferson] and governmental abuses of powers.

The legal institution of impartial judges has existed since the beginnings of legal civilisation. The functional interrelationships between law, judges and justice are reflected in legal language from antiquity (*e.g.*, in the common core of the Latin terms *jus*, *judex*, *justitia*) up to modern times (*cf* the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). 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]"; yet, laws tend to be incomplete and subject to change. Impartial justice may require 'reformative interpretations' of legal rules in response to changing social conceptions of justice. This is particularly true following the universal recognition -by all 192 UN member states- of inalienable human rights, which call for a 'constitutional paradigm change' and for citizen-oriented interpretations of the power-oriented structures of international law. Former UN Secretary-General Kofi Annan, in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, criticised the power-oriented 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 globalisation would benefit the entire human race; to heal the disorder of the

³ See **G.E. WHITE**, *The American Judicial Tradition: Profiles of Leading American Judges*, Oxford, Oxford University Press, 1988, p. 170.

⁴ On Rawls' conception of 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, see **J. RAWLS**, *Political Liberalism*, New York, Columbia University Press, 1993, pp. 231-ff.

⁵ On "justice as fairness" and "first virtue of social institutions", see **J. RAWLS**, *A Theory of Justice*, Cambridge (Mass.), Harvard University Press, 1999, p. 3; see also **R. FORST**, *Das Recht auf Rechtfertigung*, Frankfurt am Main, Suhrkamp, 2007; who infers from the Kantian idea of reason based on universalisable principles that individuals can reasonably claim moral and legal rights to participation in decision-making affecting them, as well as to receive a justification of restrictions of individual freedoms.

⁶ **A. COX**, *The Warren Court*, Cambridge (Mass.), Harvard University Press, 1968, p. 27.

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”. 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”.⁷ Under which conditions may national and international judges interpret ‘principles of justice and international law’ from citizen-oriented, human rights perspectives rather than from the state-centred perspectives of governments, whose representatives all too often pursue self-interests in limiting their personal accountability by treating citizens as mere objects of international law and of discretionary foreign policies?

The functions of judges are defined not only in the legal instruments establishing courts. Since legal antiquity, judges also invoke inherent powers deriving from the constitutional context of the respective legal systems (such as constitutional safeguards of the independence of courts in the *Magna Charta* and in the US Constitution), often in response to claims for independent ‘justice’. Article III Section 2 of the US Constitution provides, for example, 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 statute law and equity limiting the permissible content of governmental regulations, courts and judge-made law have often assumed a crucial role in the development of ‘constitutional justice’.⁸ Also in international law, international courts invoke inherent powers to protect procedural fairness and principles of reciprocal, corrective and distributive justice, for example by using principles of equity for the delimitation of conflicting claims to maritime waters and to the underlying seabed.⁹ Since the democratic constitutions of the 18th century, almost all UN member states have adopted national constitutions and international agreements that have progressively expanded the power of judges in most states as well as in international relations.¹⁰ The constitutional separation of powers provides for ever more comprehensive legal safeguards of the

⁷ The speech of Kofi Annan is reproduced in **UN Doc., GA/105000**, 19 Sept. 2006.

⁸ See **T.R.S. ALLAN**, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2001.

⁹ See the examples given by **T.M. FRANCK**, *Fairness in International Law and Institutions*, Oxford, Clarendon, 1997, Chapters 3 and 10.

¹⁰ See **C. GUARNIERI and P. PEDERZOLI**, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2002.

impartiality, integrity, institutional and personal independence of judges.¹¹ Regional and worldwide human rights conventions recognise human rights 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”.¹² An ever larger number of other international treaties continue to extend such individual rights of access to courts and to effective legal remedies to other fields of law, notably in the field of international economic and environmental law.

Alexander Hamilton, in the *Federalist Papers*, described the judiciary as “the least dangerous branch of government” in view of the fact that courts dispose neither of “the power of the sword” nor of “the power of the purse”.¹³ In modern, multilevel governance systems with their ever more national and international “checks and balances”, courts remain the most impartial and independent ‘forum of principle’; for example, fair and public judicial procedures entitle all parties involved to present and challenge all relevant arguments, and judicial decisions require more comprehensive and more coherent justification than in the case of political and administrative decisions. As all laws and all international treaties use vague terms and incomplete rules, the judicial function goes inevitably beyond being merely “*la bouche qui prononce les mots de la loi*” [Montesquieu]. 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. An ever larger number of empirical political science analyses of the global rise of judicial power, and of ‘judicial activism’ of national supreme courts and some international courts (notably in Europe), confirm the political impact of judicial interpretations on the development of national and international law and policies.¹⁴ Both positivist-legal theories as well as moral-

¹¹ See **A. SAJÓ and L.R. BENTCH**, *Judicial Integrity*, Leiden, Nijhoff, 2004.

¹² See Article 6 of the European Convention on Human Rights and similar guarantees in other regional human rights conventions (e.g., Article 8 of the Inter-American Convention on Human Rights), UN human rights conventions (e.g., Article 14 of the International Covenant on Civil and Political Rights) and other UN human rights instruments (e.g., Article 10 of the Universal Declaration of Human Rights), which have given rise to a comprehensive case law clarifying the rights of access to courts and related guarantees of due process of law (e.g., justice delayed may be justice denied); see **D. SHELTON**, *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 2005, pp. 113-ff.

¹³ **A. HAMILTON**, *The Judiciary Department*, **A. HAMILTON, J. MADISON and J. JAY**, *The Federalist Papers*, No 78, New York, Bantam.

¹⁴ See **A. STONE SWEET**, *Governing with Judges: Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000; who describes 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. In his book *The Judicial Construction of Europe* [**A. STONE SWEET**, *Judicial*

prescriptive theories of adjudication justify such judicial clarification and progressive development of indeterminate legal rules (e.g., 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.¹⁵ For example, the judicial protection of equal treatment for children of different colour by the US Supreme Court in the celebrated case of *Brown v. Board of Education* in 1954 -notwithstanding earlier denials by the law-maker and by other courts of such a judicial reading of the US Constitution’s safeguards of “equal protection of the laws” (Fourteenth Amendment)- was democratically supported by the other branches of government and is today celebrated by civil society as a crucial contribution to protecting more effectively the goals of the US Constitutions (including its Preamble objective “to establish justice and secure the blessings of liberty”) and human rights.

In its Advisory Opinion on Namibia, the International Court of Justice [ICJ] emphasised that -also in international law- legal institutions ought not to be viewed statically and must interpret international law in the light of the legal principles prevailing at the moment legal issues arise concerning 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”.¹⁶ International human rights courts (like the ECtHR) and economic courts (like the ECJ) have often emphasised that effective protection of human rights and of non-discriminatory conditions of competition may require ‘dynamic interpretations’ of international rules with due regard to changed circumstances (such as new risks to human health, competition and the environment). As in domestic legal systems, intergovernmental

Construction of Europe, Oxford, Oxford University Press, 2004], Stone Sweet analyses the judicial “constructing of a supra-national constitution” [Chapter II] as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities. The former EC Court judge P. Pescatore confirmed 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; P. PESCATORE, “The Doctrine of Direct Effect”, *European Law Review*, 1983, pp. 155-177, at p. 157. On the criticism of such ‘judicial law-making’, see T. MÄHNER, *Der Europäische Gerichtshof als Gericht*, Berlin, Duncker & Humblot, 2005; who criticises 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). From the point of view of ‘deliberative democracy’, however, the ECJ’s case-law has been approved by EC member states, parliaments and citizens.

¹⁵ For a justification of judicial review as being essential for protecting and promoting deliberative democracy, see C.F. ZURN, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge, Cambridge University Press, 2007.

¹⁶ I.C.J., *Namibia Case*, Adv. Op., 21 June 1971, § 53.

and judicial rule-making are interrelated also in international relations. As all international treaties remain incomplete and build on general principles of law, the judicial interpretation, clarification and application of international law rules, like judicial decisions on particular disputes, inevitably influence the dynamic evolution and clarification of the *opinio juris* voiced by governments, judges, parliaments, citizens and non-governmental organisations with regard to the progressive development of international rules. The universal recognition, by all 192 UN member states, of “inalienable” human rights deriving from respect for human dignity, and the ever more specific legal obligations accepted by all states to protect human rights, entail that citizens (as the ‘democratic owners’ of international law and institutions) and judges (as the most independent and impartial guardians of ‘principles of justice’ underlying international law) can assert no less democratic legitimacy for defining and protecting human rights than governments that have, for centuries, disregarded rights-based struggles for human rights in international relations and continue to prefer treating citizens as mere objects of international law in most UN institutions. From the perspective of citizens and ‘deliberative democracies’, active judicial protection of constitutional citizen rights (including human rights) is essential for ‘constitutionalising’, ‘democracising’ and transforming international law into a constitutional order, as it is emerging for the more than 800 million European citizens benefiting from human rights and fundamental freedoms protected by the ECtHR, and especially for the 480 million EC [European Community] citizens who have been granted by EC law and by European courts constitutional freedoms and social rights across the EC that national governments had never protected before. The inalienable *ius 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 constitutional foundations of ‘constitutional justice’ in constitutional democracies and international law in the 21st century.

II. Multilevel judicial protection by European courts of constitutional rights and economic rights of citizens

Europe has a long history of multilevel judicial governance in regional economic unions (*e.g.*, the BENELUX Court), functional organisations (*e.g.*, the supranational Rhine River Court based on the Rhine River Navigation Act of 1868) and in (con-)federal associations of states (*e.g.*, the Reichskammergericht in the Holy Roman Empire of a German Nation). The transformation of the intergovernmental EC treaties and of the European

Convention on Human Rights [ECHR] into objective constitutional orders protecting constitutional citizen rights across national frontiers was driven by different kinds of ‘multilevel judicial governance’:

- The multilevel judicial governance in the EC among national courts and European courts remains characterised by the supranational structures of EC law and the fact that the fundamental freedoms of EC law and related social guarantees go far beyond the national laws of EC member states [below A].

- The multilevel judicial governance of national courts and the ECtHR in the field of human rights differs from the multilevel judicial governance in European economic law in many ways. For example, both the ECtHR and the ECHR assert only subsidiary constitutional functions vis-à-vis national human rights guarantees and the diverse democratic traditions in the 47 countries that have ratified the ECHR [below B].

- 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 different kind 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 legal ‘market freedoms’ and social benefits of European integration law without full membership in the EC [below C].

This *Section II* emphasises the diverse forms of ‘judicial dialogues’, ‘judicial cooperation’, judicial resistance or judicial self-restraint among national courts, the EC courts, the EFTA Court and the ECtHR. The following *Section III* argues that the ‘*Solange*-method’ used by these courts as the basis for their conditional respect (‘as long as’) of the diverse legal and judicial methods of protecting constitutional rights should serve as model for promoting judicial cooperation, comity and judicial self-restraint also beyond Europe in the judicial

interpretation and progressive development of international economic, environmental, criminal law, human rights and related constitutional rights of citizens.

A. Multilevel judicial protection of European economic law inside the EC

A citizen-driven common market with free movement of goods, services, persons, capital and payments inside the EC can work effectively only to the extent that the common European market and competition rules are applied and protected in coherent ways in national courts in all 27 EC member states. As the declared objective of an “ever-closer union between the peoples of Europe” (Preamble to the EC Treaty) was to be brought about by economic and legal integration requiring additional law-making, administrative decisions and common policies by the European institutions, the EC Treaty differs from other international treaties by its innovative judicial safeguards for the protection of rule of law – not only in intergovernmental relations among EC member states, but also in the citizen-driven common market as well as in the common policies of the European Communities. Whereas most international jurisdictions (like the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal, the World Trade Organisation (WTO) dispute settlement bodies) remain characterised by intergovernmental procedures, 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:

- The citizen-driven cooperation among national courts and the ECJ in the context of preliminary rulings procedures (Article 234 EC) 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.

- The empowerment of the European Commission to initiate infringement proceedings (Article 226 EC) rendered the ECJ’s function as an intergovernmental court much more effective than it would have been possible under purely inter-state infringement proceedings (Article 227 EC).

- The Court’s ‘constitutional functions’ (*e.g.*, in case of actions by Member States or EC institutions for annulment 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.

- 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 constitutional interpretations of 'fundamental freedoms' of EC citizens that would hardly have been acceptable in purely intergovernmental treaty regimes.

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) emphasised the need for respecting common constitutional principles deriving from the EC Member States' obligations under their national constitutions, under the ECHR (as interpreted by the ECtHR) as well as under the EC's constitutional law. 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, with due respect for the diversity of national constitutional and judicial traditions. *Section III* [below] concludes that it was this multilevel judicial protection of common constitutional principles underlying European law and national constitutions which enabled the ECJ, and also the ECtHR, to progressively transcend the intergovernmental structures of European law by focusing on the judicial protection of individual rights in constitutional democracies and in common markets rather than on state interests in intergovernmental relations.

B. Multilevel judicial enforcement of the ECHR: Subsidiary 'constitutional functions' of the ECtHR

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 of defining individual rights in democratic communities. The 14 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) with 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 1945,¹⁷ the ECHR also includes guarantees of property rights and rights of companies. 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 Europe¹⁸ protecting human rights across Europe as an objective ‘constitutional order’.¹⁹ 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” (Article 6 ECHR), are of a constitutional nature. But ECtHR judges rightly emphasise the subsidiary functions of the ECHR and of its Court:

“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”.²⁰

The Court aims at resisting the “temptation of delving too deep into issues of fact and of law, of becoming the famous ‘fourth instance’ that it has always insisted it is not”.²¹ The Court also exercises deference by recognising that the democratically elected legislatures in the member states enjoy a ‘margin of appreciation’ in the balancing of public and private interests, provided 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 affected.²² Rather than imposing uniform approaches to the diverse human rights problems in ECHR member states, the ECtHR often exercises judicial self-restraint, for example:

¹⁷ For example, the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany’s 1919 Constitution for the ‘Weimar Republic’ had led to ever more restrictive government interventions into labour 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.

¹⁸ See *Ireland v. United Kingdom*, 18 Jan. 1978.

¹⁹ See *Loizidou v. Turkey* [preliminary objections], 23 Mar. 1995, § 75; 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 organisation (the Council of Europe) of which the Court forms part of.

²⁰ **L. WILDHABER**, “A Constitutional Future for the European Court of Human Rights?”, *Human Rights Law Journal*, 2002, pp. 161-165.

²¹ *Ibid.*, p. 161.

²² See **J. SCHOKKENBROCK**, “The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights”, *Human Rights Law Journal*, 1998, pp. 30-36.

- 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;

- by viewing the discretionary scheme of Article 41 ECHR for awarding just satisfaction "if necessary" as being secondary to the primary aim of the ECtHR to protect minimum standards of human rights protection in all Convention states;²³

- 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 rule of law; and

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

Article 34 of the ECHR permits individual complaints not only "from any person", but also from "non-governmental organisations or groups of individuals claiming to be the victim of a violation" of ECHR rights by one of the State parties. Whereas the African, American, Arab and UN human rights conventions protect human rights only of individuals and of people, the ECHR and the European Social Charter protect also human rights of non-governmental legal organisations (NGOs). 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 No 1)²⁴ 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 3 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.*, Article 3 ECHR: prohibition of

²³ L. WILDHABER, "A Constitutional Future for the European Court of Human Rights?", *o.c.*, pp. 164-165.

²⁴ See M. EMBERLAND, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2006.

torture; prohibition of arbitrary detention in Article 5 ECHR; Article 9 ECHR: freedom of conscience).

- But some provision of the ECHR explicitly protect also rights of ‘legal persons’ (e.g., property rights protected in Article 1 of Protocol No 1 ECHR).

- Rights of companies have become recognised by the ECtHR also in respect of other ECHR provisions that protect rights of “everybody” without mentioning rights of NGOs, notably rights of companies to invoke the right to a fair trial in the determination of civil rights (protected under Article 6 ECHR), the right to respect one’s home (protected under Article 8 ECHR), freedom of expression (Article 10 ECHR), freedom of assembly (Article 11 ECHR), freedom of religion (Article 9 ECHR), the right to an effective remedy (Article 13 ECHR), and the right to request compensation for non-material damage (Article 41 ECHR). Freedom of contract and of 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 freedom of association (Article 11 ECHR), by the right to property (Protocol No 1 ECHR) and, indirectly, also by the protection of “civil rights” in Article 6 ECHR.

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”, which protects also 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. Yet, compared with the large number of complaints by companies to the ECJ, less than 3% of judgments by the ECtHR relate to complaints by companies. So far, such complaints concerned mainly Article 6 § 1 ECHR (right to a fair trial), Article 8 ECHR (right to respect for one's home and correspondence), Article 10 ECHR (freedom of expression including commercial free speech), and the guarantee of property rights in Protocol No 1 to the ECHR.

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).²⁵ Limitations of fundamental rights of economic actors are being reviewed by the ECtHR as to whether they are determined by law, in conformity with the ECHR, and whether they are “necessary in a democratic society”. 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 that tend to be reviewed by the Court on the basis of a more lenient standard of judicial review respecting a ‘margin of appreciation’ of governments.

Article 1 of Protocol No 1 to the ECHR protects “peaceful enjoyment of possessions” (§ 1); the term “property” is used only in paragraph 2. 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 or public law claims *in personam* (*e.g.*, monetary claims based on private contracts, employment and business rights, pecuniary claims against public authorities).²⁶ In *Immobiliare Saffi v. Italy*, the Court also recognised positive state duties to protect private property, for example to provide police assistance in evacuating a tenant from the applicant’s apartment; the lack of such police assistance for executing a judicial order to evacuate a tenant was found to constitute a breach of the applicant’s property right.²⁷ 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-realisation in dignity.²⁸ As the moral

²⁵ On the Court’s teleological interpretation of the ECHR in the light of its “object and purpose”, see **M. EMBERLAND**, *The Human Rights of Companies, o.c.*, pp. 20-ff.

²⁶ 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 **A.R. ÇOBAN**, *Protection of Property Rights within the European Convention on Human Rights*, Aldershot, Ashgate, 2004, Chapters 2 and 6.

²⁷ *Immobiliare Saffi v Italy*, 28 July 1999.

²⁸ On the moral foundations of market freedoms, see **E.U. PETERSMANN**, “Human Rights and International Trade Law: Defining and Connecting the Two Fields”, in **T. COTTIER, J. PAUWELYN and E. BÜRGI BONANOMI**, *Human Rights and International Trade*, Oxford, Oxford University Press, 2006, pp. 29 and 48-ff; **A.R. ÇOBAN**, *Protection of Property Rights within the European Convention on Human Rights, o.c.*, Chapter 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-realisation; (3) respect for individual autonomy requires respect for the entitlement of people to the fruits of their labour as well as respect for the outcome of peaceful, voluntary cooperation (*e.g.*, in

justifications of private property do not warrant absolute property rights, Article 1 ECHR recognises -in conformity with the constitutional traditions of many national European constitutions which emphasise individual as well as social functions of property (*e.g.*, in Article 14 of the German Basic Law)- that private property can be restricted for legitimate reasons. The case-law of the ECtHR confirms that such restrictions may include, for example:

- 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);
- governmental control of harmful uses of property (*e.g.*, by police power regulations designed at preventing harm to others); as well as
- governmental takings of property by power of eminent domain, whose lawful exercise depends on the necessity and proportionality of the taking for realising 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 of states to limit and interfere with property rights (*e.g.*, by means of taxation) and to balance individual and public interests (*e.g.*, in case of a taking of property without full compensation), 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-realisation in dignity and effective protection of human rights. 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 applied by the US Supreme Court since the 1930s.²⁹ In the different European context of

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.

²⁹ The US 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 US Supreme Court frequently overturned legislation on the ground that it violated economic liberties. Yet, since the Democrats took over the US Supreme Court in 1937, the Court has limited judicial protection of "substantive due process of law" essentially to civil and political rights; in the economic field, the Court introduced a constitutional presumption (in the famous *Carolene Products* case of 1938 [304 U.S. 144]) that legislative restrictions of private property are presumed to be lawful and no longer subject to judicial review of "economic

creating an ever broader ‘social market economy’ across the 47 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.

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 European Economic Area (EEA)³⁰ is the legally most developed of the more than, in terms of the General Agreement on Tariffs and Trade (GATT) Article XXIV, 250 Free Trade Agreements (FTAs) concluded after World War II. 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 rule of law in international trade. In order to ensure that the extension of the EC’s common market law to the EFTA countries would function in the same manner as in the EC’s internal market, the 1991 Draft Agreement for the EEA had provided for the establishment of an EEA Court, composed of judges from the ECJ as well as from EFTA countries, and for the application by the EEA Court of the case-law of the EC Court. In *Opinion 1/91*, the ECJ objected to the structure and competences 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).³¹ 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 Agreement³² subject to certain legal interpretations of this agreement by the Court.³³ In order to promote legal homogeneity between EC and EEA market law, Article 6 of the revised EEA Agreement provides for the following principle of interpretation:

due process of law”. Also the commerce clause in the US Constitution does not guarantee individual economic liberties as in the EC Treaty, but merely gives regulatory authority to the US Congress.

³⁰ Signed on 2 May 1992 and in force as of 1 January 1994 [*O.J.*, 1994, L 1/3].

³¹ *Opinion 1/91, Agreement on the EEA*, ECR [1991] I-6079, §§ 31-ff.

³² *O.J.*, 1994, L 1/3.

³³ *Opinion 1/92, Agreement on the EEA*, ECR [1992] I-2821.

“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”.³⁴

The EFTA Court took up its functions in January 1994. 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. According to the 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA)³⁵, 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 against failure to act (Article 37 SCA). Out of the 62 cases lodged during the first ten years of the EFTA Court, 18 related to direct actions, 42 concerned requests by national courts for advisory opinions, and 2 related to requests for legal aid and suspension of a measure.³⁶

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 realised the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning. In its very first case, *Restamark*,³⁷ the EFTA Court interpreted the notion of court or tribunal (in the sense of Article 34 SCA regarding

³⁴ 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. **V. SKOURIS**, “The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions”, in **C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON**, *The EFTA Court: Ten Years On*, Oxford, Hart, 2005, p. 124; 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”.

³⁵ *O.J.*, 1994, L 344/1.

³⁶ See **H.P. GRAVER**, “The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States”, in **C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON**, *o.c.*, pp. 79-ff.

³⁷ **EFTA Court**, *Case E-1/94*, 16 Dec. 1994.

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. Yet, the EFTA Court considered the request admissible even if, as frequently in administrative court proceedings in Finland and Sweden, only one party appeared in the proceedings. In the ECJ judgments in cases *Dorsch Consult* of 1997³⁸ and *Gabalfrija* of 2000,³⁹ the ECJ followed suit and acknowledged that the *inter-partes* requirement was not absolute. 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 for liberal interpretations by the EFTA Court of procedural requirements.⁴⁰

The EC Court, in its Opinion 1/91, held that the Community law principles of legal primacy and direct effect were not applicable to the EEA Agreement and “irreconcilable” with its characteristics as an international agreement conferring rights only on the participating states and the EC.⁴¹ The EFTA Court, in its *Restamark* judgment of December 1994, followed from Protocol 35 (on achieving a homogenous EEA based on common rules) 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.⁴² In its 2002 *Einarsson* judgment, the EFTA Court further followed from Protocol 35 that such provisions with quasi-direct effect must take legal precedence over conflicting provisions of national law.⁴³ Already in 1998, in its *Sveinbjörnsdottir* judgment, the EFTA Court had characterised the legal nature of the EEA Agreement as an international treaty *sui generis* that had created a distinct legal order of its

³⁸ Case C-54/96, ECR [1997] I-4961

³⁹ Cases C-110/98 to C-147/98, ECR [2000] I-1577

⁴⁰ See C. BAUDENBACHER, “The EFTA Court Ten Years On”, in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, *o.c.*, p. 24; who mentions that this liberal tendency might be influenced by the fact that the EFTA Court, unlike the ECJ, is not overburdened.

⁴¹ *Opinion 1/91*, § 28.

⁴² *Case E-1/94*, 16 Dec. 1994.

⁴³ *Case E 1/01*, 22 Feb. 2002.

own; the Court therefore found that the principle of state liability for breaches of EEA law must be presumed to be part of EEA law.⁴⁴ This judicial recognition of the corresponding EC law principles was confirmed in the 2002 *Karlssoon* 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.⁴⁵

III. Lessons from the European ‘Solange-method’ of judicial cooperation for worldwide economic and human rights law?

From the perspectives of economics and international law, FTAs are sometimes viewed as sub-optimal compared with the rules of the WTO for trade liberalisation, rule-making and compulsory dispute settlement at worldwide levels. For example:

- As 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 to the *quasi* judicial WTO dispute settlement procedures, the compulsory WTO dispute settlement system may offer comparatively more effective legal remedies. This is illustrated by the fact that most intergovernmental trade disputes among the 3 member countries of the North American Free Trade Agreement (NAFTA) have been submitted to the WTO dispute settlement system rather than to the legally weaker dispute settlement procedures of Chapter 20 of the NAFTA Agreement).⁴⁶

- Submission of trade disputes among FTA member countries to the WTO has only rarely given rise to legal problems, for example if the respondent country

⁴⁴ *Case E 7/97*, 30 Apr. 1998.

⁴⁵ **EFTA Court**, *Case E 4/01*, 30 May 2002, § 28.

⁴⁶ See **W.J. DAVEY**, “Dispute Settlement in the WTO and RTAs: A Comment”, in **L. BARTELS and F. ORTINO**, *Regional Trade Agreements and the WTO Legal System*, Oxford, Oxford University Press, 2006, pp. 343-357. There have been only 3 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 **A. DE MESTRAL**, “NAFTA Dispute Settlement: Creative Experiment or Confusion?”, in **L. BARTELS and F. ORTINO**, *o.c.*, pp. 359-381.

could not invoke in WTO dispute settlement procedures legal justifications based on FTA rules⁴⁷ or on FTA dispute settlement procedures.⁴⁸ The rare instances of successive invocations of FTA and WTO dispute settlement procedures challenging the same trade measure⁴⁹ did not amount to “abuses of rights”, for instance 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 examining complaints in the WTO on the different legal basis of WTO law.

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 politicised, 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. Unfortunately, national and international judges often fail to cooperate in their judicial protection of the rule of law in international relations beyond the EC and ECHR, for example because they perceive international and domestic law as being based on mutually conflicting conceptions of justice. For instance, US courts claim that WTO dispute settlement rulings “are not binding on the US, much less this

⁴⁷ For example, in the WTO dispute between the USA and Canada over Canadian restrictions on “split-run periodicals” (WTO Panel Report, *Canada-Periodicals*, WT/DS31/R, 30 July 1997), Canada did not consider it was entitled to justify in the WTO its violation of GATT Article III by invoking Article 2106 NAFTA permitting preferential measures in favour of cultural industries, see **A. DE MESTRAL**, “NAFTA Dispute Settlement: Creative Experiment or Confusion?”, *o.c.*, pp. 364-365.

⁴⁸ For instance, the WTO Appellate Body Report on *Mexico-Tax Measures on Soft Drinks (WT/DS308/AB/R)*, adopted in May 2006) upheld the 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 (§§ 44-53).

⁴⁹ Examples would include challenges of US 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 tyres in both Mercosur and WTO dispute settlement proceedings; see **K. KWAK and G. MARCEAU**, “Overlaps and Conflicts of Jurisdiction between the WTO and Regional Trade Agreements”, in **L. BARTELS and F. ORTINO**, *o.c.*, pp. 465-485.

court”;⁵⁰ similarly, the EC Court has refrained long since -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 accountability-⁵¹ from reviewing the legality of 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 and judicial remedies by their citizens adversely affected by welfare-reducing violations of WTO guarantees of market access and rule of law.⁵² Both the EC and US governments have requested their respective domestic courts to refrain from applying WTO rules at the request of citizens or of NGOs;⁵³ 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.⁵⁴ The simultaneous insistence

⁵⁰ US Court of Appeals for the Federal Circuit, judgment of 21 January 2005, *Corus Staal BV v Department of Commerce*, 395 F.3d 1343 C.A. Fed., 2005, available at <http://www.fedcir.gov/opinions/04-1107.pdf>. In the *Corus Staal* dispute, the US Supreme Court denied petition for certiorari on 9 January 2006, *Corus Staal BV v Department of Commerce*, 546 U.S. 1089, 126 S. Ct. 1023 (Mem) U.S., 2006 (<http://www.supremecourtus.gov/docket/05-364.htm>), notwithstanding 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”; available at <http://www.robbinssullivan.com/pdf/265.pdf>).

⁵¹ See **P.J. KUIJPER and M. BRONCKERS**, “WTO Law in the European Court of Justice”, *Common Market Law Review*, 2005, pp. 1313-1355; who claims [p. 1334] that “it is difficult to point out one 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.

⁵² See, e.g., the criticism by the EC’s legal advisor 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 ‘naïve’ in **P.J. KUIJPER and M. BRONCKERS**, “WTO Law in the European Court of Justice”, *o.c.*, p. 1320.

⁵³ On the exclusion of “direct applicability” of WTO rules in the EC and US laws on the implementation of the WTO agreements see **E.U. PETERSMANN**, *The GATT/WTO Dispute Settlement System: International Law, International Organisations, and Dispute Settlement*, London, Kluwer, 1997, pp. 19-ff; 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 US, courts are barred by legislation from challenging the WTO-consistency of US federal measures.

⁵⁴ See **J.A. RESTANI and I. BLOOM**, “Interpreting International Trade Statutes: Is The Charming Betsy Sinking?”, *Fordham International Law Journal*, 2001, pp. 1533-1547. On the controversial relationship between the ‘Charming Betsy doctrine’ of consistent interpretation and the ‘Chevron doctrine’ of judicial deference see **A. DAVIES**, “Connecting or Compartmentalising the WTO and United States Legal Systems? The Role of the Charming Betsy Canon”, *Journal of International Economic Law*, 2007, pp. 117-149. 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).

by the 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 US, illustrates the political rather than legal nature of such Machiavellian objections against judicial accountability for violations by trade bureaucracies of the international rule of law.

Section I had 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”; Preamble Vienna Convention on the Law of Treaties [VCLT]-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. *Section 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 decentralising and transforming intergovernmental rules and dispute settlement procedures for the benefit of citizens. This *Section III* suggests that the ‘*Solange*-method’ of conditional cooperation by national courts with the ECJ ‘as long as’ (which is ‘*solange*’ in German) it protects the constitutional rights of citizens [below 1], as well as the judicial self-restraint by 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 [below 2], should serve as a model for ‘conditional cooperation’ among international courts and national courts also in international economic law, environmental law and human rights law beyond Europe [below 3]. *Section IV* asks whether the judicial function to settle disputes in conformity with principles of procedural and substantive justice can assert democratic legitimacy in international relations which -beyond rights-based European integration law-continue to be dominated by power politics. It is argued that the legitimacy of judicial cooperation, self-restraint, ‘judicial competition’ and ‘judicial dialogues’ among courts derives from their protection of constitutional citizen rights as a constitutional precondition for individual and democratic self-development in a constitutionally protected framework of ‘participatory’, ‘deliberative’ and ‘cosmopolitan democracy’. Citizens have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges (*e.g.*, in worldwide and non-European institutions) if they perceive

themselves as mere agents of governments and disregard the constitutional obligation of judges to settle disputes in conformity with human rights.

A. The German constitutional court's 'Solange-method' of protection of fundamental rights in the EC's legal system

Section 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 protecting also *individual rights* of citizens. All three courts have acknowledged that the human rights goals to empower individuals and effectively protect 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. These citizen-oriented interpretations of the EC and EEA Agreements were influenced by the long standing insistence by the German Constitutional Court on its constitutional mandate to protect fundamental rights and constitutional democracy also vis-à-vis abuses of EC powers affecting citizens in Germany. The '*Solange* jurisprudence' of the German Constitutional Court, like similar interactions between other national constitutional courts and the EC Court,⁵⁵ contributed to a 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.⁵⁶ This judicial insistence on the then higher level of fundamental rights protection in German constitutional law was

⁵⁵ F.C. MAYER, "The European Constitution and the Courts", in A. VON BOGDANDY and J.BAST, *Principles of European Constitutional Law*, Oxford, Hart, 2006.

⁵⁶ BVerfGE 37, 327.

instrumental for the ECJ's judicial protection of human rights as common, yet unwritten, constitutional guarantees of EC law.⁵⁷

- In view of the emerging human rights protection in EC law, the German Constitutional Court held -in its *Solange II* judgment of 1986-⁵⁸ 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.

- 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.⁵⁹

- 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 to be *ultra vires* (i.e., exceeding the EC's limited competences) and to illegally restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002⁶⁰ (*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 *generally* fallen below the minimum level required by the German Constitution.

- 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.⁶¹ 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

⁵⁷ The ECJ's judicial protection of human rights has continued to evolve since 1969; see **ECJ**, Case C-29/69, *Stauder*, ECR [1969], 419; **ECJ**, Case C-11/70, *Internationale Handelsgesellschaft*, ECR [1970], 1125; **ECJ**, Case C-4/73, *Nold*, ECR [1974], 491.

⁵⁸ **BVerfGE** 73, 339, at 375.

⁵⁹ **BVerfGE** 89, 115.

⁶⁰ **BVerfGE** 102, 147.

⁶¹ **BVerfGE** 113, 273.

safeguarding fundamental rights vis-à-vis EU decisions in the area of criminal law and their legislative implementation in Germany.

- Since the 1990s, the EC Courts have begun to refer to individual judgments of the ECtHR⁶² and have 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.⁶³ The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,⁶⁴ and to differentiate -as in the case-law of the ECtHR- between judicial review of EC measures,⁶⁵ state measures⁶⁶ and private restrictions of economic freedoms in the light of fundamental rights.⁶⁷

⁶² See Case C-13/94, *P v. S*, ECR [1996] I-2143, § 16.

⁶³ See Case C-112/00, *Schmidberger*, ECR [2003] I-5659. The Court began by examining the EC’s economic freedom, as requested by the national court, and observed that “since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods; unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose” [§ 80]. The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

⁶⁴ In Case C-94/00, *Roquette Frères*, ECR [2002] I-9011, § 29, for example, the ECJ referred explicitly to new case-law of the ECtHR 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* (Joined cases C-46/87 and C-227/88, *Hoechst*, ECR [1989] 2859)– 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, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment *Société Colas Est v. France*, 16 Apr. 2002, 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.)

⁶⁵ See, e.g., the ECJ cases listed in footnote 57.

⁶⁶ See, e.g., ECJ, Case C-36/02, *Omega* ECR [2004] 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.

⁶⁷ See **M. EMBERLAND**, “The Human Rights of Companies: Exploring the Structure of ECHR Protection”, *o.c.*; and the Opinion of Advocate-General Mengozzi in Case C-341/05, *Laval* (still pending before the ECJ), as well as of Advocate-General Poiares Maduro in Case C-438/05, *Viking Line* (still pending before the ECJ); both Advocates-General recommend that the ECJ should recognise 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 freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of *Viking Line* to another EC member state.

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 has been successful in Europe far beyond economic law. Judge A. Rosas⁶⁸ has distinguished the following five “stages” in the case-law of the EC Court on the protection of human rights:

- In the supra-national, but functionally limited European Coal and Steel Community, the Court held that it lacked competence to examine whether an ECSC decision amounted to an infringement of fundamental rights as recognised in the constitution of a member state.⁶⁹

- Since its *Stauder* judgment of 1969, the EC Court has declared in a series of 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.⁷⁰

- Since 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 labour 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”.⁷¹

- Since 1989, the ECHR has been characterised by the ECJ as having “special significance” for the interpretation and development of EU law⁷² in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.

- Since the 1990s, the EC courts have begun to refer to individual judgments of the ECtHR⁷³ and have clarified that -in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions- all interests

⁶⁸ A. ROSAS, “Fundamental Rights in the Luxembourg and Strasbourg Courts”, in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, *o.c.*, p. 169.

⁶⁹ Case C-1/58, *Storck*, ECR [1959], 43.

⁷⁰ See the cases cited in footnote 57.

⁷¹ See, *e.g.*, Opinion 2/94, *ECHR*, ECR [1996] I-1759, § 33.

⁷² Joined Cases 46/87 and 222/88, *Hoechst*, ECR [1989], 2859, § 13.

⁷³ See Case 13/94, *P v. S*, ECR 1996 I-2143, § 16.

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.⁷⁴ The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,⁷⁵ and to differentiate -as in the case-law of the ECtHR- between judicial review of EC measures,⁷⁶ state measures⁷⁷ and private restrictions of economic freedoms in the light of fundamental rights.⁷⁸

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 Agreement (*e.g.*, Article 6 EEA) 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

⁷⁴ See Case C-112/00, *Schmidberger*, ECR 2003 I-5659. The Court began by examining the EC’s economic freedom, as requested by the national court, and observed that “since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods”; “unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose” [§ 80]. The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

⁷⁵ In Case C-94/00, *Roquette Frères*, ECR 2002 I-9011, § 29, for example, the ECJ referred explicitly to new case-law of the ECtHR 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, the protection of the home provided 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 France*, not yet published in the Reports of Judgments and Decisions) 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”.

⁷⁶ See, *e.g.*, the ECJ cases listed in footnote 57 above.

⁷⁷ See, *e.g.*, the *Omega* Case C-36/02, ECR 2004 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.

⁷⁸ See *Emberland* (footnote 24) and the Opinion of Advocate-General Mengozzi in Case C-341/05, *Laval* (still pending before the ECJ), as well as of Advocate-General Poiares Maduro in Case C-438/05, *Viking Line* (still pending before the ECJ); both Advocates-General recommend that the ECJ should recognise 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 freedoms by trade unions invoking their social rights to strike (*e.g.*, in order to prevent relocation of *Viking Line* to another EC member state).

rules (notwithstanding the different context of the EC's common market and the EEA's free trade area). 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.⁷⁹ 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 to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdottir*".⁸⁰ In its *Ospelt* judgment, the ECJ emphasised that "one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the four freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states".⁸¹

The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries and with due regard also 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. Yet, the EFTA Court effectively promoted "*quasi-direct effect*" and "*quasi-primacy*" [C. Baudenbacher] as well as full state liability and protection of individual rights of market participants in national courts in all EEA countries.⁸² In various judgments, the EFTA Court followed the ECJ case-law also by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR (*e.g.*, concerning Article 6 ECHR on access to justice, Article 10 ECHR on freedom of expression). In its *Asgeirsson* judgment,⁸³ the EFTA Court rejected the

⁷⁹ Case T-115/94, ECR [1997] II-39.

⁸⁰ Case C-140/97, *Rechberger*, ECR [1999] I-3499, § 39.

⁸¹ Case C-452/01, ECR [2003] I-9743, § 29.

⁸² See the EFTA Court President C. BAUDENBACHER, "The EFTA Court Ten Years On", *o.c.*; H.P. GRAVER, "The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States", *o.c.*, at p. 97: "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".

⁸³ Case E-2/03, 12 Dec. 2003.

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); 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 of preliminary references (which was less than 6 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.

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) so as to back up its judgment that the refusal to recognise a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.⁸⁴ In *Dangeville*, the ECtHR's determination that an interference with the right to the peaceful enjoyment of possessions was not required in the general interest took into account the fact that the French measures were incompatible with EC law.⁸⁵ In cases *Waite and Kennedy v Germany*, the ECtHR held that it would be incompatible with the purpose and object of the ECHR if an attribution of tasks to an international organisation or in the context of international agreements could absolve the contracting states of their obligations under the ECHR.⁸⁶ In the *Bosphorus* case, the ECtHR had to examine the consistency of the impounding by Ireland of a Yugoslavian aircraft on the legal basis of EC regulations imposing sanctions against the former Federal Republic of Yugoslavia; 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 impounding of the aircraft in question [...] cannot be regarded as inappropriate or disproportionate"; 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:

⁸⁴ *Goodwin v United Kingdom*, 11 July 2002, §§ 58 and 100.

⁸⁵ *SA Dangeville v France*, 16 Apr. 2002, §§ 31-ff.

⁸⁶ *Waite and Kennedy v Germany*, 18 Feb. 1999, § 67.

(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 a consequence of domestic law or of the necessity to comply with international legal obligations”;

(b) “state action taken in compliance with such legal obligations is justified as long as the relevant organisation 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”;

(c) “if such equivalent protection is considered to be provided by the organisation, 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 organisation”;

(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”.⁸⁷

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”. 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.⁸⁸

C. Towards a ‘Solange-method’ of cooperation among international trade and environmental courts beyond Europe?

⁸⁷ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, §§ 153-ff.

⁸⁸ *Ibid.*, §§ 165-166.

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 also outside economic law and human rights law, for example in international environmental law, maritime law, criminal law and other areas of international law. Proposals to coordinate such overlapping jurisdictions through hierarchical procedures (*e.g.*, preliminary rulings or advisory opinions by the ICJ) are opposed by most governments. 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*. 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 used diverging methods for coordinating their respective jurisdictions.

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” 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 this OSPAR Convention. Even though Article 32 § 5 (a) of the Convention requires the tribunal to decide according to “the rules of international law, and in particular those of the Convention”, 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). The OSPAR arbitral tribunal decided in favour of the United Kingdom that the latter had not violated its treaty obligations by not disclosing the information sought by Ireland.⁸⁹

⁸⁹ See **T. MCDORMAN**, “Access to Information under Article 9 OSPAR Convention (Ireland v UK), Final Award”, *American Journal of International Law*, 2004, pp. 330-339.

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-ff) 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. 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. 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. 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.⁹⁰

3. The EC Court judgement 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. 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".⁹¹ The Court followed from the autonomy of the Community legal system and from Article 282 UNCLOS that the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that

⁹⁰ See Y. SHANY, "The First MOX Plant Award: The Need to Harmonise Competing Environmental Regimes and Dispute Settlement Procedures", *Leiden Journal of International Law*, 2004, pp. 815-827.

⁹¹ Case C-459/2003, *Commission v. Ireland*, ECR [2006] I-4635, § 121.

provided for in Part XV of UNCLOS. 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”.⁹² 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.

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 natural habitat and the payment of the costs involved.⁹³ 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 these EC member states under Article 292 EC. 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).

5. The ‘Solange-method’ as reciprocal respect for constitutional justice

The above-mentioned examples for competing jurisdictions for 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. The Annex VII Arbitral Tribunal argued convincingly,

⁹² *Ibid.*, § 133.

⁹³ See N. LAVRANOS, “The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbitrator?”, *Leiden Journal of International Law*, 2006, pp. 1-24.

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. WTO law recognises 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 establishment of WTO dispute settlement panels entail that WTO dispute settlement bodies must 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 the FTA procedures. 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 an integral part of the Community legal system: '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.⁹⁴ 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). The Ijzeren Rijn arbitral

⁹⁴ 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"; see, for example, N. LAVRANOS, *o.c.*, pp. 10-11. 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 and 300 EC) to respect the rule of law and protect EC member states from international legal responsibility for EC majority decisions violating mixed agreements.

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

This ‘*Solange*-principle’, 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 when -in its Opinion 1/91 on the inconsistency of the EEA Draft Agreement with EC law- the EC Court found the EEA provisions for the establishment of an EEA Court to be 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).⁹⁵ The “*Solange*-principle” also explains the jurisprudence of both the EC Court⁹⁶ as well as the EFTA Court⁹⁷ that voluntarily agreed, private arbitral tribunals are not recognised 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. 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,⁹⁸ 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 constitutional duty of judges to protect ‘constitutional justice’ and should serve as a model for similar cooperation among national

⁹⁵ Opinion 1/91, *Agreement on the EEA*, ECR [1991] I-6079.

⁹⁶ Case C-125/04, *Denuit/Cordenier v Transorient*, ECR [2005] I-923.

⁹⁷ See footnote 37.

⁹⁸ N. LAVRANOS, “The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter”, *o.c.*, p. 20; “the key to all solutions is hierarchy”.

and international courts with overlapping jurisdictions in other field of international law,⁹⁹ such as the settlement of trade and environmental disputes among the 151 WTO Members. Especially in those 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.

IV. Is judicial protection of “constitutional justice” legitimate in international relations governed by power politics?

The universal recognition of *ius cogens* and of inalienable human rights, the ‘treaty constitutions’ of international organisations with rule-making, executive and judicial powers, the proliferation of international courts, their judicial protection of rule of law and 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’ and procedural as well as substantive ‘constitutional restraints’. In most of the 47 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. As explained in *Sections 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 ‘constitutionalisation’ 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 (such as the WTO). Many other examples -like European citizenship, the legal autonomy of EC

⁹⁹ See N. LAVRANOS, “Towards a Solange-Method between International Courts and Tribunals?”, in T. BROUDE and Y. SHANY, *The Allocation of Authority in International Law. Essays in Honour of Prof. R. Lapidot*, 2008; “if 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 minimised, thus reducing the danger of a fragmentation of the international legal order; [...] one 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”.

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.¹⁰⁰ The success of the ‘*Solange*-method’ of judicial cooperation and contestation among European courts, based on respect for ‘constitutional pluralism’, leads to judicial clarification and ‘judicial defence’ of an ever larger number of common constitutional principles limiting abuses in European economic, environmental and human rights law for the benefit of citizens.

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 (like the ICJ and the WTO’s Appellate Body), illustrate the political limits of international courts also in Europe, notably in areas of national security and foreign policy disputes over the distribution of power or the legitimacy of international law rules. 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.¹⁰¹ Proposals for extending European ‘multilevel constitutionalism’ to worldwide organisations (such as the UN and the WTO) are opposed by most states outside Europe (including the United States) in view of their different constitutional and democratic traditions and power-oriented foreign policies. The more intergovernmental networks and worldwide organisations 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 protect constitutional rights and rule of law ‘in conformity with principles of justice’.

¹⁰⁰ More generally, on ‘disaggregated sovereignty’, see **A.M. SLAUGHTER**, *A New World Order*, Oxford, Princeton University Press, 2004, pp. 266-ff.

¹⁰¹ On this ‘globalisation paradox’ (*i.e.*, needing multilevel governance for the collective supply of international public goods, but fearing and opposing such governance), see **A.M. SLAUGHTER**, *A New World Order, o.c.*, pp. 8-ff. On the need for ‘multilevel constitutionalism’ as a necessary legal framework for collective, democratic supply of international public goods, see **E.U. PETERSMANN**, “Multilevel Trade Governance Requires Multilevel Constitutionalism”, in **C. JOERGES and E.U. PETERSMANN**, *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford, Hart, 2006, pp. 5-57.

If democratic 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, also 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”.¹⁰² Legitimacy no longer derives from (inter)governmental *fiat*, but from democratic and judicial justification of the relevant rules as being *just*.¹⁰³ The independence, impartiality and constitutional function of judges to protect constitutional rights against abuses of power legitimise adjudication as a necessary component of constitutional democracy. Citizens must hold judges more accountable for meeting their constitutional obligation to protect ‘constitutional justice’ in terms of justifying legal interpretations and judicial decisions independently and impartially, in conformity with the human rights obligations of government institutions and the 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 (such as the ECtHR, WTO dispute settlement rulings, the ICJ), may serve models for cooperation also among other international courts in order to better coordinate their respective jurisprudence on the basis of common legal principles.¹⁰⁴

¹⁰² See US Supreme Court justice **S.G. BREYER**, *Active Liberty: Interpreting Our Democratic Constitution*, New York, Kopf, 2005.

¹⁰³ On the diverse (*e.g.*, rational Kantian, contractarian Rawlsian and discursive Habermasian) methodological approaches to identifying just rules, see *e.g.* **C.S. NINO**, “Can there be Law-abiding Judges?”, in **M. TROPER and L. JAUME**, *1789 et l’invention de la constitution*, Brussels, Bruylant, 1994, pp. 286-ff.

¹⁰⁴ **A. ROSAS**, “With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts”, in *The Global Community Yearbook of International Law and Jurisprudence 2005, 2006*, Vol. I, pp. 201-230.

Civil society and their 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 her human rights against abuses of power. As long as world governance for the collective supply of the ever more needed ‘global public goods’ (such as international ‘democratic peace’, respect for universal human rights, poverty reduction, protection of the global environment) remains so deficient as it is, legal and judicial protection of constitutional rights in transnational relations ‘in conformity with principles of justice and international law’ remain essential for protecting human rights through pragmatic piecemeal reforms of international legal practices. 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 ‘constitutionalisation’ of intergovernmental power politics and ‘cosmopolitan peace’ depend crucially 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.