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# Human Rights, International Economic Law and 'Constitutional Justice'

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## Abstract

According to J. Rawls, 'in a constitutional regime with judicial review, public reason is the reason of its supreme court'; it is of constitutional importance for the 'overlapping, constitutional consensus' necessary for a stable and just society among free, equal, and rational citizens who tend to be deeply divided by conflicting moral, religious, and philosophical doctrines.<sup>1</sup> The European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and the European Free Trade Area (EFTA) Court successfully transformed the intergovernmental European Community (EC) treaties and the European Convention on Human Rights (ECHR) into constitutional orders founded on respect for human rights. Their 'judicial constitutionalization' of intergovernmental treaty regimes was accepted by citizens, national courts, parliaments, and governments because the judicial 'European public reason' protected more effectively individual rights and European 'public goods' (like the EC's common market). The 'Solange method' of cooperation among European courts 'as long as' constitutional rights are adequately protected reflects an 'overlapping constitutional consensus' on the need for 'constitutional justice' in European law. The power-oriented rationality of governments interested in limiting their judicial accountability is increasingly challenged also in worldwide dispute settlement practices. Judicial interpretation of intergovernmental rules as protecting also individual rights may be justifiable notably in citizen-driven areas of international economic law protecting mutually beneficial cooperation among citizens and individual rights (e.g. of access to courts). Multi-level economic, environmental, and human rights governance can become more reasonable and more effective if national and international courts cooperate in protecting the rule of international law for the benefit of citizens (as 'democratic principals' of governments) with due regard for human rights and their constitutional concretization in national and international legal systems.

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<sup>1</sup> J. Rawls, *Political Liberalism* (1993), at 231 ff.

In his *Theory of Justice*,<sup>2</sup> Rawls used the idea of reasonableness for designing fair procedures that prompt reasonable citizens (as autonomous moral agents) to agree on basic equal freedoms and other principles of justice. In his later book on *Political Liberalism*, Rawls reframed his theory of justice as fairness by emphasizing the importance of the public use of reason for maintaining a stable, liberal society confronted with the problem of reasonable disagreement about individual conceptions for a good life and a just society. Public reason and ‘deliberative democracy’ require constitutional guarantees of basic equal rights (e.g. freedoms to participate as equals in public discourse, independent judicial protection of basic rights) as legal preconditions for public debate defining the conditions for a stable consensus on the principles of justice.<sup>3</sup> This article argues that the universal recognition of human rights and the task of international courts, as codified in the Vienna Convention on the Law of Treaties, to settle disputes ‘in conformity with principles of justice’ and human rights (Preamble VCLT) entail that democratic and judicial reasoning increasingly challenges power-oriented ‘inter-governmental reasoning’ and the state-centred ‘rules of recognition’ of the Westphalian system of ‘international law among states’ (Sections 1 and 2). In Europe, three different ways of judicial transformation of intergovernmental treaties into objective constitutional orders – i.e., the judicial ‘constitutionalization’ of the intergovernmental EC Treaty and of the ECHR, and to a lesser extent also of the European Economic Area (EEA) Agreement – succeeded because multilevel judicial protection of constitutional citizen rights *vis-à-vis* transnational abuses of governance powers was accepted by citizens, national courts, and parliaments as legitimate (Section 3). Sections 4 and 5 argue that the European ‘*Solange* method’ of judicial cooperation ‘as long as’ other courts respect constitutional principles of justice should be supported by citizens, judges, civil society, and their democratic representatives also in judicial cooperation with worldwide courts and dispute settlement bodies. Section 6 concludes that citizen-oriented conceptions of international economic law (IEL) are a precondition for maintaining an ‘overlapping consensus’ on rule of law not only inside constitutional democracies but also in mutually beneficial, international economic cooperation among citizens. Hence, there is a need for a constitutional theory of adjudication in IEL protecting individual rights and mutually beneficial cooperation among citizens across national frontiers. Just as ‘public reason’ among the 480 million EC citizens is no longer dominated alone by the reasoning of their 27 national governments, so do human rights require national and international courts to interpret the state-centred

<sup>2</sup> J. Rawls, *A Theory of Justice* (1973).

<sup>3</sup> Whereas for Rawls, public reason is based on substantive principles which tend to be applied most consistently by supreme courts, Habermas’ theory of ‘deliberative democracy’ focuses on the role of courts as guardians of the constitutional conditions of procedural legitimacy: ‘if one understands the constitution as an interpretation and elaboration of a system of rights in which private and public autonomy are internally related (and must be simultaneously enhanced), then a rather bold constitutional adjudication is even required in cases that concern the implementation of democratic procedure and the deliberative form of political opinion- and will-formation’, J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), at 279.

structures of international economic law in conformity with universal human rights and their underlying 'cosmopolitan public reasons' requiring legal and judicial protection of individual rights, rule of law, and of general consumer welfare in international civil society cooperation among citizens.

## 1 Human Rights Require Citizen-oriented Conceptions of International Law

UN human rights law proceeds from the Kantian premise that – as emphasized in the Preambles to the 1966 UN Covenants on civil, political, economic, social, and cultural rights – human rights 'derive from the inherent dignity of the human person' and are based on 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world'. The Preambles make clear that human rights precede 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'. Today universal recognition by all states – in hundreds of UN, regional, and national human rights instruments and national constitutions – of inalienable human rights has objectively changed the legal status of individuals as legal subjects and bearers of human rights under international law: Inalienable human rights now exist *erga omnes* and require respect, legal protection, and fulfilment of inalienable human rights by all governments. Due to their progressive transformation into international *ius cogens*, the fragmented, treaty-based UN human rights guarantees gradually evolve into constitutional restraints limiting the powers also of international organizations.<sup>4</sup> Yet, most UN human rights guarantees prescribe only minimum standards without hindering states and regional organizations in providing for higher standards of constitutional protection. For example, human dignity and human rights are also recognized as constitutional foundations of European law (e.g., in Article 6 EU), which tends to provide for more comprehensive guarantees of human rights (e.g., in the EU Charter of Fundamental Rights) and fundamental freedoms (including common market freedoms) than UN human rights law. Hence, judicial protection by European courts of human rights *vis-à-vis* UN Security Council Resolutions requiring the seizure, without due process of law, of private property of alleged terrorists may be in conformity with UN human rights law.<sup>5</sup>

Human rights require all governments and intergovernmental organizations to review how the power-oriented structures of the Westphalian 'international law

<sup>4</sup> Cf. Petersmann, 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution', in F.M. Abbott, C. Breining-Kaufmann, and T. Cottier (eds), *International Trade and Human Rights* (2006), at 29–67.

<sup>5</sup> Cf. Petersmann, 'Multilevel Constitutionalism and Judicial Protection of Freedom and Justice in the International Economic Law of the EC', in A. Arnulf, P. Eeckhout, and T. Tridimas (eds), *Continuity and Change in EU Law. Liber amicorum Francis Jacobs* (2008), at 338, 343.

among states' must be restructured so as to respect citizens as legal subjects and protect and promote human rights more effectively. The development of the customary international law rules for the protection of aliens, which require states to provide decent justice to foreigners and 'to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected',<sup>6</sup> into human rights of access to justice<sup>7</sup> illustrates this progressive transformation of state-centred into citizen-oriented rules of international law. The ever larger number of international treaties, notably in the field of international economic and environmental law, providing for individual rights of access to courts confronts judges with a 'constitutional dilemma':

- On the one side, citizens increasingly invoke specific treaty rules (e.g., relating to human rights, labour rights, intellectual property rights, investor rights, trading rights, fishing rights, protection of the environment) in national and international courts.
- On the other side, most intergovernmental treaties do not offer effective individual legal and judicial remedies;<sup>8</sup> hence, national and international judges are increasingly confronted with legal claims that intergovernmental treaty rules on the protection of individual rights (e.g., in UN human rights conventions, WIPO conventions on intellectual property rights, ILO conventions on labour and social rights, WTO rules and regional trade agreements on individual freedoms of trade, investment treaties protecting investor rights) should be legally protected by judges as justifying *individual rights* and legal remedies.

The UN Charter (Article 1) and the VCLT recall the general obligation under international law 'that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law', including 'universal respect for, and observance of, human rights and fundamental freedoms for all' (VCLT, Preamble). 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

<sup>6</sup> J. Paulsson, *Denial of Justice in International Law* (2006), at 7, 36.

<sup>7</sup> Cf. F. Francioni (ed.), *Access to Justice as a Human Right* (2007).

<sup>8</sup> Cf. J. Dugard, *First Report on Diplomatic Protection* (International Law Commission UN Doc. A/CN.4/506, 2000), at para. 25: '[t]o suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right to individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.'

require 'reformative interpretations' of legal rules in response to changing social conceptions of justice. As explained by R. Dworkin, judges should interpret law in conformity with its rule-of-law objectives and its underlying constitutional principles.<sup>9</sup> As, from a human rights perspective, IEL is an instrument for empowering and protecting mutually beneficial cooperation among citizens across frontiers, judges should protect these 'civil society functions' of IEL by recognizing citizens as legal subjects and protecting rule of law not only at intergovernmental levels, but also for the benefit of citizens engaged in, benefiting from, or affected by international economic transactions.

## 2 International Courts as 'Exemplars of Public Reason' (Rawls)

The functions of judges are defined not only in the legal instruments establishing courts. Since legal antiquity, judges also have invoked inherent powers deriving from the constitutional context of the respective legal systems (such as constitutional safeguards of the independence of courts in the Magna Carta and in the US Constitution), often in response to claims to impartial, judicial protection of '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' (etc.). Based on this Anglo-Saxon distinction between statute law and equity limiting the permissible content of governmental regulations, courts and judge-made law have assumed a crucial role in the development of 'equity law' and 'constitutional justice' in many countries.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The constitutional separation of powers provides for ever more comprehensive legal safeguards of the impartiality, integrity, institutional and personal independence of judges.<sup>13</sup>

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'.<sup>14</sup> Also in modern, multilevel

<sup>9</sup> R. Dworkin, *Justice in Robes* (2006), at 9–21.

<sup>10</sup> Cf. T.R.S. Allan, *Constitutional Justice. A Liberal Theory of the Rule of Law* (2001).

<sup>11</sup> Cf. the examples given by T. Franck, *Fairness in International Law and Institutions* (1997), at chaps 3 and 10.

<sup>12</sup> Cf. C. Guarnieri and P. Pederzoli, *The Power of Judges* (2002).

<sup>13</sup> Cf. A. Sajo (ed.), *Judicial Integrity* (2004).

<sup>14</sup> Hamilton, 'The Judiciary Department, The Federalist Papers No. 78', in: A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* (1789/1989).

governance systems based on hundreds of functionally limited, intergovernmental treaty regimes, courts offer the most impartial and independent ‘forum of principle’ and ‘exemplar of public reason’.<sup>15</sup> For example, fair and public judicial procedures and ‘*amicus curiae*’ briefs may not only enable all parties involved to present and challenge all relevant arguments; they may also require more comprehensive, principled justification of judicial decisions compared with political decisions focusing on national or particular interests. 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, ‘filling gaps’ in the name of justice, and by justifying judicial reasoning on the basis of general principles underlying the hundreds of specialized treaty regimes, judicial decisions inevitably develop and complement legislative rules and intergovernmental treaties in order to settle disputes ‘in conformity with principles of justice’. The multilevel judicial protection of constitutional citizen rights across Europe (see section 3 below) illustrates that national and international judges, due to their independence and impartiality, can act as the most effective guardians of the ‘constitutional principles’ and ‘overlapping consensus’ (J. Rawls) underlying human rights, democratic self-government, and IEL. Judicial clarification of the ‘public reason’ of indeterminate legal rules also contributes to ‘deliberative constitutional democracy’, of which the public reasoning of courts is an important part.<sup>16</sup> 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 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 as a crucial contribution to protecting more effectively the goals of the US Constitution (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) emphasized 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: ‘[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.<sup>17</sup> International human rights courts like the ECtHR, just as economic courts like the EC Court, have often emphasized 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). Arguably, the universal recognition of human rights also requires interpreting the ‘rules of recognition’ of the ‘international law among states’ no longer only in the

<sup>15</sup> On supreme courts as ‘exemplar of public reason’ see Rawls, *supra* note 1.

<sup>16</sup> 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* (2007).

<sup>17</sup> [1971] ICJ Rep 16, at 31, para. 53.

light of the '*opinio juris*' voiced by diplomats (who often prefer treating citizens as mere objects of international law in order to avoid judicial accountability for their diplomatic decisions), but also with due regard to the recognition of rules by judges, parliaments, and civil society.

### 3 Constitutional Pluralism: Three Different Kinds of Multilevel Judicial Protection of Fundamental Rights in Europe

An ever larger number of empirical political science analyses of the global rise of judicial power, and of 'judicial activism' by supreme courts and international courts in Europe, confirm the political impact of judicial interpretations on the development of national and European law and policies.<sup>18</sup> The 'multilevel judicial governance' in Europe – notably by the EC Court, its Court of First Instance, the EFTA Court, the ECtHR, and national courts – succeeded because their judicial cooperation was justified as multilevel protection of constitutional citizen rights and, mainly for this reason, was supported as reasonable and 'just' by judges, citizens, and parliaments. The multilevel, judicial protection of fundamental freedoms was the driving force in the progressive transformation of the intergovernmental EC and EEA treaties, and of the ECHR, into constitutional instruments protecting citizen rights and community interests across national frontiers by three different kinds of 'multilevel constitutionalism':

- The multilevel judicial governance in the EC among national courts and European courts remains characterized 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, sub-section A).
- The multilevel judicial governance of national courts and the ECtHR in the field of human rights differs fundamentally: The ECtHR asserts only subsidiary constitutional functions *vis-à-vis* national human rights guarantees, with due respect for the diverse democratic traditions in the 47 ECHR member countries in the economy (below, sub-section B).
- The multilevel judicial governance among national courts and the EFTA Court has extended the EC's common market law to the three EEA members (Iceland, Liechtenstein, and Norway) through intergovernmental modes of cooperation without using the EC's constitutional principles of legal primacy, direct effect, and direct applicability of the EC's common market law. Yet, this different kind of multilevel judicial cooperation (e.g., based on voluntary compliance with legally non-binding preliminary opinions by the EFTA Court) effectively protects the EC's market freedoms and fundamental rights in all EEA member countries (below, sub-section C).

<sup>18</sup> See, e.g., A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (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.

### ***A Multilevel Judicial Protection of EC Law has Extended the Constitutional Rights of EC Citizens***

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 the 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 (including the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal, WTO dispute settlement bodies) remain characterized by intergovernmental procedures, the EC Treaty provides unique legal remedies not only for Member States, but also for EU citizens and EU 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 EC Court 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 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 EU citizens which governments had never accepted before in 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) emphasized 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. 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. Arguably, it was this multilevel judicial protection of common constitutional principles underlying European law and national constitutions which enabled the EC Court, and also the ECtHR, progressively to 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,<sup>19</sup> 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 Europe<sup>20</sup> protecting human rights across Europe as an objective 'constitutional order'.<sup>21</sup> 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), are of a constitutional nature. But ECtHR judges rightly emphasize 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.<sup>22</sup>

<sup>19</sup> E.g., 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.

<sup>20</sup> See *Ireland v. United Kingdom* (1979), 2 *European Human Rights Reports* (EHRR) 25.

<sup>21</sup> See the judgment of the ECtHR in *Loizidou v. Turkey* (preliminary objections) of 23 Mar. 1995, at para. 75, referring to the status of human rights in Europe.

<sup>22</sup> Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights L Rev* (2002) 161.

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’.<sup>23</sup> The Court also exercises deference by recognizing that the democratically elected legislatures in the member states enjoy a ‘margin of appreciation’ in the balancing of public and private interests, 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. Rather than imposing uniform approaches to the diverse human rights problems in ECHR member states, the ECtHR often exercises judicial self-restraint, for example:

- by leaving the process of implementing its judgments to the member states, subject to the ‘peer review’ by the Committee of Ministers of the Council of Europe, rather than asserting judicial powers to order consequential measures;
- 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;<sup>24</sup>
- 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 organizations or groups of individuals claiming to be the victim of a violation’ of ECHR rights by one of the states parties. The protection of this *collective dimension* of human rights (e.g., of legal persons that are composed of natural persons) has prompted the ECtHR to protect procedural human rights (e.g., under Articles 6, 13, 34 ECHR) as well as substantive human rights of companies (e.g., under Articles 8, 10, 11 ECHR, Protocol 1)<sup>25</sup> in conformity with the national constitutional traditions in many European states as well as inside the EC (e.g., the EC guarantees of market freedoms and other economic and social rights of companies). The rights and freedoms of the ECHR can thus be divided into three groups:

- Some rights are inherently limited to natural persons (e.g., Article 2: right to life) and focus on their legal protection (e.g., Article 3: prohibition of torture; prohibition of arbitrary detention in Article 5; Article 9: freedom of conscience).
- Some provisions of the ECHR explicitly protect also rights of ‘legal persons’ (e.g., property rights protected in Article 1 of Protocol 1).
- Rights of companies have become recognized by the ECtHR also in respect of other ECHR provisions which protect rights of ‘everybody’ without mentioning rights of NGOs, notably rights of companies to invoke the right to a fair trial in the

<sup>23</sup> *Ibid.*, at 161.

<sup>24</sup> *Ibid.*, at 164–165.

<sup>25</sup> Cf. M. Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection* (2006).

determination of civil rights (protected under Article 6), the right to respect for one's home (protected under Article 8), freedom of expression (Article 10), freedom of assembly (Article 11), freedom of religion (Article 9), the right to an effective remedy (Article 13), and the right to request compensation for non-material damage (Article 41). 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), by the right to property (Protocol 1), and, indirectly, also by the protection of 'civil rights' in Article 6 ECHR.

Similarly to the constitutional and teleological interpretation methods used by the EC Court, 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' which 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).<sup>26</sup> 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 which 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 1 to the ECHR protects 'peaceful enjoyment of possessions' (paragraph 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).<sup>27</sup> 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 effective protection of human rights and personal self-realization in the economy and civil society. 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.

<sup>26</sup> On the Court's teleological interpretation of the ECHR in the light of its 'object and purpose' see *ibid.*, at 20 ff.

<sup>27</sup> Cf. A. Riza Coban, *Protection of Property Rights within the European Convention on Human Rights* (2004).

### *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 EEA<sup>28</sup> is the legally most developed of the more than 250 FTAs (in terms of GATT Article XXIV) concluded after World War II. The EFTA Court illustrates the reasonable 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 promote legal homogeneity between EC and EEA market law, Article 6 of the revised EEA Agreement provides that ‘[w]ithout 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’. The EFTA Court’s jurisprudence suggests, 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’.<sup>29</sup> Out of the 62 cases lodged during the first 10 years of the EFTA Court, 18 related to direct actions against decisions of the EFTA Surveillance Authority, 42 concerned requests by national courts for advisory opinions, and two related to requests for legal aid and suspension of a measure. In its interpretation of EC law provisions that are identical to EEA rules (e.g., concerning common market and competition rules), the EEA Court has regularly followed ECJ case law and has realized the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning.

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.<sup>30</sup> In spite of this restrictive interpretation, 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 had to 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.<sup>31</sup> In its 2002 *Einarsson* judgment, the EFTA Court further followed from Protocol 35 that such provisions with quasi-direct effect had to take legal precedence over conflicting provisions of national law.<sup>32</sup> Already in 1998, in its *Sveinbjörnsdóttir* judgment, the EFTA Court had characterized the legal nature of

<sup>28</sup> OJ (1994) L 1/3.

<sup>29</sup> 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 (eds), *The EFTA Court Ten Years On* (2005), at 123, 124.

<sup>30</sup> *Opinion 1/91*, EEA Agreement [1991] ECR I-6079, at para. 28.

<sup>31</sup> Case E-1/94 [1994–1995] EFTA CR 15.

<sup>32</sup> Case E-1/01 [2002] EFTA CR 1.

the EEA Agreement as an international treaty *sui generis* which had created a distinct legal order of its own; the Court therefore found that the principle of state liability for breaches of EEA law had to be presumed to be part of EEA law.<sup>33</sup> This judicial recognition of the corresponding EC law principles was confirmed in the 2002 *Karlsson* judgment, where the EFTA Court further held that EEA law – while not prescribing that individuals and economic operators be able directly to rely on unimplemented EEA rules before national courts – required national courts to consider relevant EEA rules, whether implemented or not, when interpreting international and domestic law.<sup>34</sup>

#### 4 Lessons from the European 'Solange Method' of Judicial Cooperation Beyond Europe?

The judicial protection of fundamental freedoms and economic rights of citizens by national and international courts throughout Europe offers citizens direct judicial remedies which appear economically more efficient, legally more effective, and democratically more legitimate than the politicization of similar disputes through intergovernmental dispute settlement procedures among states at worldwide levels (e.g., in the ICJ and the WTO). The fact that the EC Court has delivered 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 in domestic courts if governments did not prevent their domestic courts from applying relevant IEL rules. In order to limit their own judicial accountability for non-compliance with their WTO obligations, both the EC and US governments requested their respective domestic courts to refrain from applying WTO rules at the request of citizens or of NGOs.<sup>35</sup> US courts even claim that WTO dispute settlement rulings 'are not binding on the US, much less this court',<sup>36</sup> also the EC Court has refrained long since – at the request of the political EC institutions which have repeatedly misled the ECJ about the interpretation of WTO obligations – from reviewing the legality of EC measures in the light of the EC's GATT and WTO obligations.<sup>37</sup> The simultaneous insistence 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 and the US, and the effective cooperation among national courts and investor-state arbitral tribunals in the field of international investment law,<sup>38</sup> illustrate the political rather than legal nature of Machiavellian objections against judicial accountability of governments for their own violations of IEL.

<sup>33</sup> Case E-7/97 [1998] EFTA CR 95.

<sup>34</sup> Case E-4/01 [2002] EFTA CR 240, at para. 28.

<sup>35</sup> Cf. E.U. Petersmann, *The GATT/WTO Dispute Settlement System* (1997), at 19 ff.

<sup>36</sup> *Corus Steel* (US CA Fed. Cir.), judgment of 21 Jan., available at: [www.fedcir.gov/opinions/04-1107.pdf](http://www.fedcir.gov/opinions/04-1107.pdf).

<sup>37</sup> Cf. Petersmann, *supra* note 5, at 350 ff.

<sup>38</sup> On the recognition and enforcement of investor-state arbitration awards in domestic courts see R.D. Bishop, J. Crawford, and M. Reisman, *Foreign Investment Disputes* (2005), at 1515 ff.

This section suggests that the ‘*solange* method’ of conditional cooperation by national courts with European courts ‘as long as’ (which is what *solange* means in German) European courts protect common constitutional principles (below, sub-section A), 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, sub-section B), should serve as a model for ‘conditional cooperation’ among international courts and national courts also in international economic, environment, and human rights law beyond Europe. Such multilevel judicial cooperation and ‘judicial dialogues’ among courts for the protection of individual rights could contribute not only to citizen-oriented conceptions of rule of law in international civil society cooperation, but also to constitutional protection of ‘participatory’, ‘deliberative’, and ‘cosmopolitan democracy’ in the worldwide division of labour.

### ***A The ‘Solange Method’ of Judicial Cooperation among the German Constitutional Court and the EC Court in the Protection of Fundamental Rights***

The EC Court, 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 of empowering individuals and effectively protecting human rights, like the objective of international trade agreements of enabling 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,<sup>39</sup> contributed to the progressive extension of 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 did 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 EC Court, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.<sup>40</sup> This judicial insistence on the more comprehensive scope of fundamental rights protection in

<sup>39</sup> Cf. Mayer, ‘The European Constitution and the Courts’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2006), at 281–334.

<sup>40</sup> BVerfGE 37, 327.

- German constitutional law was instrumental for the ECJ's judicial protection of human rights as common, yet unwritten constitutional guarantees of EC law.<sup>41</sup>
- In view of the emerging human rights protection in EC law, the German Constitutional Court held – in its *Solange II* judgment of 1986<sup>42</sup> – that it would no longer exercise its jurisdiction for reviewing EC legal acts 'as long as' the EC Court continued generally and effectively to 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.<sup>43</sup>
  - Following GATT and WTO dispute settlement rulings that the EC import restrictions of bananas violated 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 illegally to restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002<sup>44</sup> (*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.<sup>45</sup> The limited jurisdiction of the EC Court for third pillar decisions concerning police and judicial cooperation might have contributed to this assertion of national constitutional jurisdiction for safeguarding fundamental rights *vis-à-vis* EU decisions in the area of criminal law and their legislative implementation in Germany.

The progressively expanding legal protection of fundamental rights in EC law in response to their judicial protection by national and European courts – *vis-à-vis* restrictions by EC institutions, EC Member States, intergovernmental organizations (including UN Security Council decisions), non-governmental organizations (e.g., trade unions exercising their right to strike in order to prevent companies from

<sup>41</sup> The ECJ's judicial protection of human rights has continued to evolve dynamically since 1969 (Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide* [1970] ECR 1125).

<sup>42</sup> BVerfGE 73, 339, at 375.

<sup>43</sup> BVerfGE 89, 115.

<sup>44</sup> BVerfGE 102, 147.

<sup>45</sup> BVerfGE 113, 273.

exercising their ‘market freedoms’ under EC law), and individuals (e.g., demonstrators blocking imports or transit of goods inside the EC) – illustrates how judicial cooperation has been successful in Europe far beyond economic law. Judge A. Rosas<sup>46</sup> has distinguished the following five ‘stages’ in the case law of the EC Court on 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 recognized in the constitution of a Member State.<sup>47</sup>
- 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.<sup>48</sup>
- 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’.<sup>49</sup>
- Since 1989, the ECHR has been characterized by the EC Court as having ‘special significance’ for the interpretation and development of EU law<sup>50</sup> in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.
- In the 1990s, the EC courts began to refer to individual judgments of the ECtHR<sup>51</sup> and clarified that – in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions – all interests involved have to be weighed ‘having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests’, without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.<sup>52</sup> The EC courts have also been willing to adjust their case law to new developments in the case law of the ECtHR<sup>53</sup>, and to differentiate – as in the

<sup>46</sup> Rosas, ‘Fundamental Rights in the Luxembourg and Strasbourg Courts’, in Baudenbacher, Tresselt, and Orlygsson, *supra* note 29, at 163, 169.

<sup>47</sup> Case 1/58, *Storck v High Authority* [1959] ECR 43.

<sup>48</sup> Cf. *supra* note 41.

<sup>49</sup> See, e.g., *Opinion 2/1994 on the ECHR* [1996] ECR I–1759, at para. 33.

<sup>50</sup> Joined Cases 46/87 and 222/88, *Hoechst v. Commission* [1989] ECR 2859, at para. 13.

<sup>51</sup> Cf. Case 13/94, *P v. S* [1996] ECR I–2143, at para. 16.

<sup>52</sup> Cf. Case C–112/00, *Schmidberger* [2003] ECR I–5659. The judicial balancing by the EC Court refutes the claim that the EC Court gives priority to economic freedoms at the expense of other human rights.

<sup>53</sup> In Case C-94/00, *Roquette Frères* [2002] ECR I–9011, at para. 29, e.g., the EC Court 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 its earlier judgment in *Hoechst* – such enterprises may benefit from Art. 8 ECHR.

case law of the ECtHR – between judicial review of EC measures,<sup>54</sup> state measures,<sup>55</sup> and private restrictions of economic freedoms in the light of fundamental rights.<sup>56</sup>

### 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) and facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical to the EC's common market rules (notwithstanding the different context of the EC's common market and the EEA's free trade area). 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 *Sveinbjörnsdóttir*'.<sup>57</sup> In its *Ospelt* judgment, the EC Court emphasized that 'one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the four freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states'.<sup>58</sup>

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) 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.<sup>59</sup> In various judgments, the EFTA Court followed the EC Court's 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 on freedom of expression). In its *Asgeirsson* judgment, the EFTA Court rejected the argument that the

<sup>54</sup> Cf., e.g., the ECJ cases listed *supra* in note 41.

<sup>55</sup> Cf., e.g., Case C-36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, in which the EC Court 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.

<sup>56</sup> In Case C-438/05, *Viking Line*, judgment of 11 Dec. 2007, not yet reported, the EC Court confirmed that trade unions – in exercising their social rights to strike (e.g., in order to prevent relocation of the *Viking* shipping line to another EC Member State) – are legally bound by the EC's common market freedoms which have to be reconciled and 'balanced' with social and labour rights.

<sup>57</sup> Case C-140/97, *Rechberger v. Austria* [1999] ECR I-3499, at para. 39.

<sup>58</sup> Case C-452/01 [2003] ECR I-9743, at para. 29.

<sup>59</sup> Cf. the EFTA Court President Baudenbacher, 'The EFTA Court Ten Years On', in Baudenbacher, Tresselt, and Orlygsson, *supra* note 29, at 13 and Graver, in *ibid.*, at 79: '[d]irect 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'.

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 six months in the case before the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the EC Court. 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 recognize a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.<sup>60</sup> 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.<sup>61</sup> In the *Waite and Kennedy v. Germany* cases, the ECtHR held that it would be incompatible with the purpose and object of the ECHR if an attribution of tasks to an international organization or in the context of international agreements could absolve the contracting states of their obligations under the ECHR.<sup>62</sup> 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 EC Court case law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the EC Court's 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 interference by Ireland with the applicant's property rights, the ECtHR proceeded on the basis of the following four principles:<sup>63</sup>

- (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 organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides';

<sup>60</sup> *Goodwin v. United Kingdom*, judgment of 11 July 2002, Reports of Judgments and Decisions 2002–VI, at paras 58 and 100.

<sup>61</sup> *SA Dangeville v. France*, judgment of 16 Apr. 2002, Reports of Judgments and Decisions 2002–III, paras 31 ff.

<sup>62</sup> *Waite and Kennedy v. Germany*, judgment of 18 Feb. 1999, Reports of Judgments and Decisions 1999–I, at para. 67.

<sup>63</sup> *Case of Bosphorus Hava Yollari Turizm v. Ireland* 42 EHRR (2006) 1, at paras 153 ff.

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

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.<sup>64</sup>

## 5 Conditional 'Solange Cooperation' for Coordinating Competing Jurisdictions in International Trade and Environmental Law beyond Europe?

Competing multilateral treaty and dispute settlement systems with 'forum selection clauses' enabling governments to submit disputes to competing jurisdictions (with the risk of conflicting judgments) continue to multiply 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 DSU/WTO) 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 seised and used diverging methods for coordinating their respective jurisdictions.

### A *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

<sup>64</sup> *Ibid.*, at paras 165, 166.

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 35(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.<sup>65</sup>

### **B *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 the 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.<sup>66</sup>

### **C *The EC Court Judgment of May 2006 in the MOX Plant Dispute***

In October 2003, the EU Commission started an infringement proceeding against Ireland on the ground that – as the EC had ratified and transformed UNCLOS into an integral part of the EC legal system – Ireland’s submission of the dispute to tribunals outside the Community legal order had violated the exclusive jurisdiction of the EC Court under Article 292 EC and Article 193 of the EURATOM Treaty. 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

<sup>65</sup> Cf. McDorman, ‘Access to Information under Article 9 OSPAR Convention (Ireland v. UK), Final Award’, 98 *AJIL* (2004) 330.

<sup>66</sup> Cf. Shany, ‘The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures’, 17 *Leiden J Int’l L* (2004) 815.

dispute relating to the MOX plant 'are rules which form part of the Community legal order' which also offered (e.g., in Article 227 EC) effective judicial remedies for Ireland's complaint.<sup>67</sup> 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 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'.<sup>68</sup> 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.

#### **D 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.<sup>69</sup> 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).

#### **E The 'Solange Method' as Reciprocal Respect for Constitutional Justice**

The above-mentioned examples of competing jurisdictions for the settlement of environmental disputes among European states raise questions similar to those regarding overlapping jurisdictions for the settlement of human rights disputes,<sup>70</sup> criminal proceedings in national and international criminal courts, or trade disputes over related claims in the WTO, NAFTA, and MERCOSUR.<sup>71</sup> 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

<sup>67</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, at paras 84, 121, and 128.

<sup>68</sup> *Ibid.*, at para. 133.

<sup>69</sup> Cf. Lavranos, 'The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?', 19 *Leiden J Int'l L* (2006) 223.

<sup>70</sup> Cf. Helfer, 'Forum Shopping for Human Rights', 148: *U Penn L Rev* (1995) 285.

<sup>71</sup> Cf. Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals', 30 *Loyola Int'l & Comp L Rev* 2008 (forthcoming).

convincingly, however, that the prospect of resolving this dispute in the EC Court on the basis of EC law risked leading to conflicting decisions which, bearing in mind considerations of mutual respect and comity between judicial institutions and the explicit recognition of mutually agreed regional jurisdictions in Article 282 UNCLOS, justified the suspension of the arbitral proceeding and the enjoining of the parties to resolve the Community law issues in the institutional framework of the EC.

WTO law recognizes similar rights of WTO Members to conclude regional trade agreements with autonomous dispute settlement procedures. Yet, WTO law lacks a provision corresponding to Article 282 UNCLOS enabling WTO dispute settlement bodies to decline jurisdiction on WTO disputes in favour of regionally agreed jurisdictions; nor does WTO law include an explicit authorization (similar to Article 288 UNCLOS) to decide disputes not only on the basis of WTO law (e.g., GATT Article XXIV) but also with due regard to other relevant rules of international law. The *quasi*-automatic establishment of WTO dispute settlement panels at the request of any WTO member entails that WTO dispute settlement bodies must respect the ‘right to a panel’ of WTO Members even if the respondent WTO Member would prefer to settle the dispute in the framework of an FTA. Hence, WTO panels have accepted jurisdiction also for complaints by NAFTA and MERCOSUR member states notwithstanding arguments by the defending country that essentially the same legal complaint (e.g. challenging the legality of import restrictions on poultry imposed by Argentina, or duties imposed by the US on lumber imports from Canada) had already previously been rejected in MERCOSUR or NAFTA dispute settlement proceedings. Under which conditions could WTO dispute settlement bodies exercise ‘judicial comity’ in favour of regional jurisdictions similar to the judicial comity exercised by the arbitral tribunal under the Law of the Sea Convention in favour of the EC Court in the *MOX plant case*? How should the WTO Dispute Settlement Body decide whether an EC Member State (e.g., Germany) could request a WTO dispute settlement ruling on the EC’s WTO-inconsistent banana restrictions in view of the EC Court’s persistent refusal to ensure compliance by EC institutions with their WTO obligations? Should it refuse WTO jurisdiction in view of Article 292 EC even if the EC/WTO member concerned would have no alternative judicial remedy against EC majority decisions violating the WTO obligations of the EC and of EC Member States? Or should the WTO respect the ‘right to a panel’ of every WTO member ‘as long as’ the EC and the EC Court continue to ignore WTO obligations of the EC country concerned?<sup>72</sup> The 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

<sup>72</sup> Such challenges in the WTO by EC Member States of EC acts violating WTO law have never occurred so far and would violate the EC duty to cooperate pursuant to Art. 10 EC. Community lawyers (like Lavranos, *supra* note 69, at 10–11) 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’. Yet, it is arguable even from the point of view of Community law that the duty of loyalty (Art. 10 EC) applies ‘as long as’ the EC Court offers effective judicial remedies against obvious violations by EC institutions of their obligations (e.g., under Arts 220, 300 EC) to respect the rule of law and protect EC Member States from international legal responsibility for EC majority decisions violating mixed agreements.

without any discussion of Article 292 EC and without prejudice to future dispute settlement proceedings in the EC Court based on EC law. The IJzeren Rijn arbitral tribunal examined, as requested by the parties, the legal relevance of Article 292 EC and decided the dispute without prejudice to EC law.

The '*solange* principle' makes respect for competing jurisdictions conditional on regard for constitutional principles of human rights and rule of law. It has also been applied by the EC Court itself; for instance, when – in its *Opinion 1/91* – 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).<sup>73</sup> The '*solange* principle' can explain the jurisprudence of both the EC Court<sup>74</sup> and the EFTA Court<sup>75</sup> which voluntarily agreed that private arbitral tribunals are not recognized as courts or tribunals of member states (within the meaning of Article 234 EC and the corresponding EEA provision) entitled to request preliminary rulings by the European courts. The fact that 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 may justify judicial self-restraint and deference to the competing jurisdiction of European courts in disputes requiring interpretation and application of European law. To the extent that conflicts of jurisdiction and conflicting judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules, international courts should follow the example of national civil and commercial courts and European courts and resolve 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*, human rights) underlying modern international law.<sup>76</sup> The 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'; it should serve as a model for similar cooperation among national and international courts with overlapping jurisdictions in other fields of international law,<sup>77</sup> notably if the intergovernmental rules protect cooperation among citizens across national frontiers, such as the settlement of transnational trade, investment, and environmental disputes. Especially in those areas of intergovernmental regulation where states

<sup>73</sup> *Opinion 1/91, EEA Draft Agreement* [1991] ECR I–6079.

<sup>74</sup> Case C–125/04, *Denuit/Cordenier v. Transorient* [2005] ECR I–923.

<sup>75</sup> Case E-1/94, [1994–1995] EFTA CR 15.

<sup>76</sup> Cf. Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts* (2007), at 166 ff.

<sup>77</sup> Cf. Lavranos, 'Towards a *Solange*-Method between International Courts and Tribunals?', in T. Broude and Y. Shany (eds), *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 minimized, 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.'

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 of the rule of law so as to protect citizens and their constitutional rights from inadequate judicial remedies at the international level of multilevel governance.

## 6 Need for a Constitutional Theory of Judicial Review of IEL: The Example of Investor-State Arbitration

Politicians and diplomats like to defend their discretionary policy powers by claiming that the task of courts is ‘to apply the law, not to make it’. Yet, there is broad agreement among lawyers today that judicial rulings can rarely be justified on purely syllogistic reasoning (rules + facts = judgment). Legal-positivist theories of adjudication (like that of H.L.A. Hart) expose judges as law-makers by arguing that, whenever legal rules are indeterminate, judges do not apply positive rules of law but exercise judicial discretion in deciding disputes.<sup>78</sup> Legal-constructivist theories of adjudication (like that of R. Dworkin) reject this link between indeterminacy of rules and judicial discretion by arguing that judicial reasoning on the basis of fundamental rights, general principles of law, and ‘due process of law’ tends to lead judges to one single right answer.<sup>79</sup> According to Dworkin’s ‘adjudicative principle of integrity’, judges should interpret law in conformity with its objectives of legality and the rule of law as expressing ‘a coherent conception of justice and fairness’:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.<sup>80</sup>

Political scientists often reject such legal models of judicial decision-making as being outside politics as ideology. The increasing political science literature on the expansion of judicial power and on ‘judicial governance’ refers, for example, to the political selection of Supreme Court judges as confirming the widespread belief that the judges’ political preferences influence the decisions of Supreme Courts.<sup>81</sup> Proponents of ‘institutional theories’ analyse judicial decision-making as ‘collegial games’ or as a function of the interaction of courts with other institutions (e.g., the legislature, the executive, or other courts).<sup>82</sup> A few political philosophers (like J. Waldron) even argue against judicial review on the ground that constitutional language is often indeterminate and leaves judges too much political discretion (as reflected by the frequent disagreements among judges).<sup>83</sup>

<sup>78</sup> H.L.A. Hart, *The Concept of Law* (1961), at chap. 7.

<sup>79</sup> R. Dworkin, *Taking Rights Seriously* (1977), at 31–39, 68–71.

<sup>80</sup> R. Dworkin, *Law’s Empire* (1986), at 225, 243.

<sup>81</sup> L. Epstein and J. Knight, *The Choices Justices Make* (1998).

<sup>82</sup> Cf. A. Stone Sweet, *The Judicial Construction of Europe* (2004).

<sup>83</sup> J. Waldron, *Law and Disagreement* (1999).

## A Diversity of Constitutional Conceptions of Judicial Review

The controversies over whether constitutional review is best performed as part of the normal court system (as in the USA), or by independent constitutional courts (as in many European states), or by politically more accountable parliamentary bodies (as in England and some British Commonwealth countries) illustrate that the functional interrelationships between human rights, democratic procedures, and the design of judicial review may be interpreted in diverse ways. Hence, theories about the legitimate functions of courts differ among jurisdictions depending on their respective conceptions of democracy and constitutionalism. For example:

- conceptions of democracy as rule by present majorities have criticized judicial review as a 'deviant institution in the American democracy', the 'countermajoritarian difficulty' of which requires constitutional justification, for example by the legitimacy of judicial protection of constitutional minority rights;<sup>84</sup>
- proponents of democratic self-governance by collective decisions of citizens have warned that judicial review risks entailing paternalistic rule by 'a bevy of Platonic Guardians';<sup>85</sup>
- defenders of human rights counter that judicial discourse is better capable than political discourse among periodically elected politicians to find the right answers for the interpretation of fundamental human rights;<sup>86</sup>
- supporters of rights-based constitutional democracy justify the judicial function by the judicial protection of the constitutional rights of 'the governed' and of other constitutional principles *vis-à-vis* their encroachment by governments;<sup>87</sup>
- if democracy is defined by the aim 'that collective decisions be made by political institutions whose structure, composition and practices treat all members of the community, as individuals, with equal concern and respect', then judicial review can be viewed as a necessary 'forum of principle' enhancing constitutionally limited democracy and protecting equal citizen rights;<sup>88</sup>
- proponents of deliberative constitutional democracy argue that, 'in a constitutional regime with judicial review, public reason is the reason of its supreme court';<sup>89</sup>

<sup>84</sup> Cf. A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Barr of Politics* (2nd edn, 1986), at 16ff, 23.

<sup>85</sup> L. Hand, *The Bill of Rights* (1958), at 73.

<sup>86</sup> Cf. M.J. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

<sup>87</sup> Cf. A.S. Rosenbaum (ed.), *Constitutionalism: The Philosophical Dimension* (1988), at 4: '[a] "democratic" constitution embodies a conception of the fundamental rights and obligations of citizens and establishes a judicial process by which rights claims may be litigated'; B. Ackerman, *We the People: Foundations* (1991), at 262: '[i]f the Court is right in finding that these politicians/statesmen have moved beyond their mandate, it is furthering Democracy, not frustrating it, in revealing our representatives as mere "stand-ins" for the People, whose word is not to be confused with the collective judgment of the People themselves'.

<sup>88</sup> Cf. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996), at 21 ff, 344: '[i]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence'.

<sup>89</sup> Rawls, *supra* note 1, at 231 ff.

constitutional review can ensure that the procedural conditions of democratic legitimacy – basic rights to private and public autonomy – have been fulfilled.<sup>90</sup>

The design of international courts should not depend on contested conceptions of constitutional review inside democracies. Yet, as international court decisions are legally binding and assert legal precedence over domestic law, their constitutional legitimacy is important. Governments and international courts can enhance the legitimacy of judicial review not only by promoting due process of law, transparent and inclusive judicial procedures (e.g., admitting *amicus curiae* briefs by adversely affected third parties), and by institutionalizing dialogue between legislative and judicial branches (as in the WTO Dispute Settlement Body's review and approval of all WTO dispute settlement reports) as well as with civil society (as in the WTO's annual public *fora* with civil society representatives); they should also promote citizen-oriented interpretations of intergovernmental guarantees of human rights, economic freedom, non-discrimination, and the rule of law in international cooperation among citizens. Even if judges may lack competence to declare intergovernmental guarantees (e.g., of human rights, private 'trading rights' and intellectual property rights protected in WTO law, investor rights protected in bilateral investment treaties) to have 'direct effect' for the benefit of individual economic actors and for the interpretation of their corresponding domestic rights inside domestic legal systems, judges can prevent and settle international economic disputes by interpreting domestic laws in conformity with international legal obligations of the country concerned. From a human rights perspective, both national and international judges should – as prescribed in the VCLT – interpret IEL 'in conformity with principles of justice' and human rights, with due respect for the legitimate diversity of domestic legal systems.<sup>91</sup>

### **B Dispute Avoidance through Constitutional Approaches: Failures of Investor-State Arbitration**

International investment law, like international trade law, is no longer defined only by governments, but increasingly also by judgments of national and international courts at the request of citizens and non-governmental organizations. By the end of 2007, about 120 investor-state arbitration proceedings were pending under the jurisdiction of the

<sup>90</sup> Cf. Habermas, *supra* note 3.

<sup>91</sup> Due to the diversity of national constitutional traditions, domestic implementation of international rules is likely always to remain diverse. For example, should fundamental rights be interpreted and applied by way of balancing (as 'optimization precepts' as proposed by R. Alexy) or should they be considered as 'trumps' (R. Dworkin) and definitive rules which cannot be overruled in certain situations by public policies and public goods? Are individual 'market freedoms' and other fundamental freedoms necessary consequences of respect for human liberty (as recognized in EU law), or are they 'Kitsch' (M. Koskeniemi) and should be replaced by more flexible utilitarianism? On the diversity of domestic legislation and adjudication implementing international economic rules see M. Hilf and E.U. Petersmann (eds), *National Constitutions and International Economic Law* (1993). On the diverse conceptions of constitutional rights see Kumm, 'Political Liberalism and the Structures of Rights', in G. Pavlakos (ed.), *Law, Rights and Discourse* (2007), at 131–165.

International Centre for the Settlement of Investment Disputes (ICSID). The more than 40 ICSID cases initiated against Argentina for its 'emergency measures' taken in response to the 2001/2002 financial crises have led to arbitration awards which have been widely criticized for their lack of coherent reasoning, contradictory legal findings, and disregard for human rights, for example in case of privatizations of essential water services. In three recent ICSID arbitration procedures about failed water privatizations in Argentina and Bolivia, none of the parties submitted human rights arguments, none of the arbitral decisions referred to human rights or other legal citizens' rights of access to water, and adversely affected third parties were not allowed to intervene or submit *amicus curiae* submissions.<sup>92</sup> True, prior to the – legally not binding – General Comment No. 15 on *The Right to Water* adopted by the UN Committee for Economic, Social and Cultural Rights in November 2002,<sup>93</sup> the legal status of rights of access to water at affordable prices (e.g., as constitutional, legislative, or human right) was contested.<sup>94</sup> If Argentina and Bolivia – in their concession contracts with private water companies – had acknowledged their human rights obligations to protect access to water by including such obligations in the concession contracts, the subsequent investment disputes over price increases, insufficient investments, and inadequate water quality controls might have been avoided. It was only in the more recent ICSID complaint by *Aguas Argentinas SA* requesting compensation for the alleged damage caused by Argentina's economic emergency measures adopted in 2002 that an ICSID tribunal granted the request by civil society organizations to apply for leave to make *amicus curiae* submissions on the public health and human rights dimensions of the dispute.<sup>95</sup> The *Tecmed case* seems to have been the first ICSID award in which the tribunal included human rights considerations in its proportionality analysis (which it had explicitly borrowed from an ECtHR judgment that pollution caused by a private waste treatment plant had violated the human rights to respect for one's home and private family life); the ICSID tribunal found that the refusal to renew an operating permit for a landfill was disproportionate to its stated aim (i.e., protection of public health and the environment) and constituted an expropriation in violation of Mexico's BIT obligations.<sup>96</sup>

## Conclusion: Human Rights and 'Constitutional Justice' Require Constitutional Approaches to Dispute Settlement in IEL

As explained by John Rawls, it is unreasonable for democratic constitutions and international law regulating cooperation among people and free citizens with diverse

<sup>92</sup> *AdA v. Argentine Republic*, ICSID Case No. ARB/97/3; *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12; *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3.

<sup>93</sup> UN doc E/C.12/2002/11.

<sup>94</sup> Cf. R. Eibe and P. Rothen (eds), *The Right to Water* (2006).

<sup>95</sup> *Aguas Argentinas SA v. Argentina*, ICSID Case No. ARB/03/19.

<sup>96</sup> *Tecmed SA v. United Mexican States*, ICSID Case No. ARB/00/2, 43 ILM (2004) 133.

moral, religious, and political conceptions of justice to prescribe comprehensive political doctrines of justice. Just as human rights tend to prescribe only minimum standards which may be implemented in diverse ways in national and international legal systems, so must democratic constitutionalism and international law limit themselves to protecting an ‘overlapping consensus’ of reasonably diverse moral, religious, and political conceptions that are likely to endure over time in democratic societies.<sup>97</sup> Yet, the increasing ‘legalization’ and ‘judicialization’ of IEL demonstrate that it is no longer reasonable for national laws to ignore the general consensus among economists that liberalizing trade and investments is more important for alleviating unnecessary poverty than reliance on redistributive foreign aid. Even though trade liberalization will produce winners and losers, it tends to increase national wealth inside each of the trading partners in ways also benefiting the poor (e.g., by increasing their real income and choice through more, better, and lower-priced goods and services, enhancing competition and productivity, enabling governments to use the ‘gains from trade’ for helping import-competing producers to adjust to import competition). This mutually beneficial character of trade liberalization in terms of global and national welfare and poverty reduction (e.g., as a result of trade liberalization in India and China since the 1990s) offers important utilitarian justifications of IEL and of its potential, ‘constitutional functions’ for limiting protectionist ‘governance failures’ and ‘constitutional failures’ inside states.<sup>98</sup> Yet, the legal legitimacy of IEL depends on respect for human rights and their constitutional protection rather than on utilitarian welfare arguments. The disregard, for instance by WTO dispute settlement bodies, investor-state arbitral tribunals, and most regional economic dispute settlement systems outside Europe, for human rights runs counter to the explicit requirement of the customary methods of international treaty interpretation that ‘disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble VCLT).

The Westphalian conception of ‘international law among states’ as an instrument for advancing *national* interests in an anarchic world continues to prompt many international diplomats and state-centred lawyers to argue that effective international tribunals must remain ‘dependent’ tribunals staffed by *ad hoc* judges closely controlled by governments; for example, through their power of reappointment and threats of retaliation. Independent international courts are perceived with suspicion because independent judges risk allowing moral ideals and interests of third parties to influence their judgments; the domestic ideal of rule of law is seen as inappropriate for the

<sup>97</sup> Rawls, *supra* note 1, at 154 ff. Even inside the USA, there is – as explained by R. Dworkin, *Is Democracy Possible Here?* (2006) – pervasive disagreement among conservatives and democrats on human rights and democracy. Dworkin argues for basing constitutionalism on two basic principles of human dignity, i.e., first, that each human life is intrinsically and equally valuable and, secondly, that each person has an inalienable personal responsibility for realizing her unique potential and human values in her own life.

<sup>98</sup> Cf. C. Joerges and E.U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006).

reality of international power politics: 'dependent tribunals' are more likely to 'render judgments that reflect the interests of the states at the time that they submit the dispute to the tribunal'.<sup>99</sup> Similar power-oriented conceptions of international adjudication are also advanced for the WTO dispute settlement system by legal advocates of the major trading powers; for instance, if they suggest that EU judges should focus on the intergovernmental 'WTO law in action' rather than on the 'WTO law in the books' as ratified by domestic parliaments.<sup>100</sup> The often one-sided focus of WTO and investor-state arbitrators on governmental and producer interests is not only reflected by the fact that human rights arguments have never been made in WTO dispute settlement proceedings and, only very recently, in investor-state arbitration proceedings and arbitration awards. There is also an increasing number of requests for disqualification of individuals who serve as arbitrator in one case and as counsel in another investment dispute; hence, the model of private *ad hoc* commercial arbitration is increasingly criticized for its lack of adequate judicial accountability, independence, openness, legal coherence, and public law constraints for final judicial decisions on how legislatures, governments, and courts may lawfully regulate foreign investments: 'as merchants of adjudicative services, arbitrators have a financial stake in furthering the system's appeal to claimants and, as a result, the system is tainted by an apprehension of bias in favour of allowing claims and awarding damages against governments'.<sup>101</sup>

As supervision of arbitral awards by ICSID annulment committees, or by domestic courts in the seat of arbitration or enforcement, is essentially limited to jurisdictional errors, procedural improprieties, or serious violation of public policies, the absence of an appeals process to resolve the frequent contradictions in the legal reasoning of arbitral awards hinders the development of an international 'common law' on investment protection.<sup>102</sup> Yet, it is to be welcomed that both WTO dispute settlement panels, the WTO Appellate Body, and increasingly also arbitral tribunals established under ICSID procedures,<sup>103</sup> admit *amicus curiae* briefs by non-governmental organizations that may assist in a more inclusive balancing of all interests affected by trade or investment disputes; for example, if foreign investors and the host government were complicit in human rights violations and the tribunal considers rejecting legal claims which are inconsistent with international

<sup>99</sup> See Posner and Yoo, 'Judicial Independence in International Tribunals', 93 *Calif L Rev* (2005) 1, at 6, who define the function of international tribunals as providing states with neutral information about the facts and the law in a particular dispute.

<sup>100</sup> See the legal advice by the EC's legal advocate, Kuijper, 'WTO Law in the European Court of Justice', 42 *CMLRev* (2005) 1313, at 1332–1334.

<sup>101</sup> G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 152–153.

<sup>102</sup> The proposals for establishing international appeals mechanisms for international investment disputes seem to have led, so far, only to changes in the recent practice of BITs concluded by the US: cf. K.P. Sauvant (ed.), *Appeals Mechanisms in International Investment Disputes* (2008).

<sup>103</sup> The revised ICSID arbitration which came into effect on 1 Apr. 2006, and the new model BITs by Canada and the USA, in principle allow written submissions by a person who is not a party to the dispute, yet subject to various conditions. Rule 37 of the revised ICSID arbitration rules seems to recognize only a right to file a petition requesting that a brief may be submitted, without any broader right to disclosure of documents and information.

public policy (*ordre public*). For, in contrast to commercial arbitration which remains organized and controlled by party autonomy, WTO and investor-state arbitration often involves important public interests and broader constitutional issues that may justify *amicus curiae* briefs affording the tribunal additional arguments from adversely affected third parties.

The widespread perception of lack of legitimacy and bias – for example, ‘that many awards narrow the object and purpose of investment treaty arbitration to that of investor protection’<sup>104</sup> – could be overcome best by judicial review of investor rights and of regulatory powers of host states with due regard to the constitutional principles underlying human rights and IEL. Just as European economic and human rights courts derive their legitimacy from promoting ‘constitutional justice’ (e.g., in the sense of justifying the legal precedence of their judgments *vis-à-vis* domestic laws in terms of respect for human rights and common constitutional principles of European states), international trade and investment judges should also act as ‘exemplar[s] of public reason’ (J. Rawls) and independent guardians of respect for equal citizen rights by settling IEL disputes in conformity with the human rights obligations of governments and the constitutional principles of citizen-driven self-governance. As in Chief Justice John Marshall’s justification – in *Marbury v. Madison* – of the US Supreme Court as the most legitimate interpreter of US constitutional law and independent guardian of constitutional rights in disputes over constitutional interpretations, international courts may also be the most independent and impartial guardians of ‘constitutional justice’ and of equal citizen rights in IEL, provided they protect individual rights and settle investor-state disputes – as required by the customary methods of international treaty interpretation – with due respect for procedural and substantive principles of justice and the human rights obligations of the states involved.<sup>105</sup> The ultimate value of governments, courts, and law, including IEL, derives from respect for human rights and for the equal status of citizens in their individual and democratic self-development. Hence, if international tribunals protect equal rights of citizens and explain to the people the ‘principles of justice’ underlying their judgments, they can also assert democratic legitimacy and may enhance participatory and deliberative democracy in the international economy as in the polity.

<sup>104</sup> Van Harten, *supra* note 101, at 174.

<sup>105</sup> The VCLT’s explicit requirements of treaty interpretation ‘in conformity with principles of justice’ and human rights may be construed in the sense of Dworkin’s theory that judicial decisions must not only ‘fit’ the ongoing practice of the law (e.g., by taking into account precedents and consistency); they must also justify that practice as the best interpretation of the principles of justice underlying the judicial practice (cf. Dworkin, *supra* note 80, at chap. 7).