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Law and Philosophy Library 86

Reasonableness and Law

Springer

judicial protection of common constitutional principles underlying European law and national constitutions which enabled the EC Court, and also the ECtHR, to progressively transcend the intergovernmental structures of European law by focusing on the judicial protection of individual rights in constitutional democracies and in common markets rather than on state interests in intergovernmental relations.

4.2 Multilevel Judicial Enforcement of the ECHR: Subsidiary "Constitutional Functions" of the ECtHR

The European Convention on Human Rights (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,[11] 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[12] protecting human rights across Europe as an objective "constitutional order."[13] 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. (Wildhaber 2002, 161)

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

[12] See Ireland v. United Kingdom (1979), 2 *European Human Rights Reports* 25.

[13] See the judgment of the ECtHR in *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, par. 75, referring to the status of human rights in Europe. Unlike the ECJ, the ECtHR has no jurisdiction for judicial review of acts of the international organization (the Council of Europe) of which the Court forms part.

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" (ibid., n. 24). 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 (see Schokkenbrock 1998). 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 (Wildhaber 2002, 164–65, n. 24);
- 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 State parties. Whereas the African, American, Arab and UN human rights conventions protect human rights only of individuals and of people, the ECHR and the European Social Charter protect also human rights of non-governmental legal organizations (NGOs). The protection of this *collective dimension* of human rights (e.g., of legal persons that are composed of natural persons) has prompted the ECtHR to protect procedural human rights (e.g., under Articles 6, 13, 34 ECHR) as well as substantive human rights of companies (e.g., under Articles 8, 10, 11 ECHR, Protocol 1; see Emberland 2006) in conformity with the national constitutional traditions in many European states as well as inside the EC (e.g., the EC guarantees of market freedoms and other economic and social rights of companies). The rights and freedoms of the ECHR can thus be divided into 3 groups:

- Some rights are inherently limited to natural persons (e.g., Article 2: 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 provision 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 that protect rights of "everybody" without mentioning rights of NGOs, notably rights of companies to invoke the right to a fair trial in the determination of civil rights (protected under Article 6), the right to respect 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.

This broad scope of human rights protection is reflected in the requirement of Article 1 to secure the human rights "to everyone within their jurisdiction," which protects also traders and companies from outside Europe and may cover even state acts implemented outside the national territory of ECHR member states or implementing obligations under EC law. Yet, compared with the large number of complaints by companies to the EC Court of Justice, less than 3% of judgments by the ECtHR relate to complaints by companies. So far, such complaints concerned mainly Article 6:1 (right to a fair trial), Article 8 (right to respect for one's home and correspondence), Article 10 (freedom of expression including commercial free speech), and the guarantee of property rights in Protocol 1 to the ECHR.

Similar 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" that must be interpreted with due regard to contemporary realities so as to protect "an effective political democracy" (which is mentioned in the Preamble as an objective of the ECHR).[14] Limitations of fundamental rights of economic actors are being reviewed by the ECtHR as to whether they are determined by law, in conformity with the ECHR, and whether they are "necessary in a democratic society." Governmental limitations of civil and political human rights tend to be reviewed by the ECtHR more strictly (e.g., as to whether they maintain an appropriate balance between the human right concerned and the need for "an effective political democracy") than governmental restrictions of private economic activity that tend to be reviewed by the Court on the basis of a more lenient standard of judicial review respecting a "margin of appreciation" of governments.

Article 1 of Protocol 1 to the ECHR protects "peaceful enjoyment of possessions" (par. 1); the term "property" is used only in par. 2. The ECtHR has clarified

[14] On the Court's teleological interpretation of the ECHR in the light of its "object and purpose" see Emberland 2006, 20ff.

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).[15] In *Immobiliare Saffi v. Italy*, the Court also recognized positive state duties to protect private property, for example to provide police assistance in evacuating a tenant from the applicant's apartment; the lack of such police assistance for executing a judicial order to evacuate a tenant was found to constitute a breach of the applicant's property right.[16] The inclusion of the right to property into the ECHR confirms that property is perceived as a fundamental right that is indispensable for personal self-realization in dignity.[17] As the moral justifications of private property do not warrant absolute property rights, Article 1 recognizes—in conformity with the constitutional traditions of many national European constitutions which emphasize individual as well as social functions of property (e.g., in Article 14 of the German Basic Law)—that private property can be restricted for legitimate reasons. The case-law of the ECtHR confirms that such restrictions may include, for example:

- taxation for the common financing of public goods (including redistributive taxation if it can be justified on grounds of reciprocal benefit, correction of past injustices or redistributive justice);
- governmental control of harmful uses of property (e.g., by police power regulations designed at preventing harm to others); as well as
- governmental takings of property by power of eminent domain, whose lawful exercise depends on the necessity and proportionality of the taking for realizing a legitimate public interest and—especially if the taking imposes a discriminatory burden only on some individuals—may require payment of compensation for the property taken.

Even though the ECtHR respects a wide margin of appreciation of states to limit and interfere with property rights (e.g., by means of taxation) and to balance individual and public interests (e.g., in case of a taking of property without full compensation), the Court's expansive protection—as property or "possessions"—of almost

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[15] On private law and constitutional law meanings of property (as a relationship to objects of property and to other legal subjects that have to respect property rights), and on the different kinds of property protected in the case-law of the ECtHR, see Coban 2004, Chapters 2, 6.

[16] *Immobiliare Saffi v. Italy*, Reports 1999-V (2000), 30 EHRR 756.

[17] On the moral foundations of market freedoms see Petersmann 2006a, 29, 48ff. Coban justifies property rights as *prima facie* human rights on the basis of four arguments: (1) both the use value and the exchange value of property are essential for private autonomy; (2) a system of private property is also essential for personal self-realization; (3) respect for individual autonomy requires respect for the entitlement of people to the fruits of their labor as well as respect for the outcome of peaceful, voluntary cooperation (e.g., in markets driven by consumer demand and competition); and (4) a system of private property further encourages fruitful initiative and an autonomy-enhancing society based on welfare-increasing competition, division of labor and satisfaction of consumer demand. See Coban 2004, Chapter 3.

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.[18] In the different European context of creating an ever broader "social market economy" across the 47 member states of the Council of Europe, the ECtHR's constitutional approach to the protection of broadly defined property rights and fundamental freedoms, including those of companies, appears reasonable.

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

The 1992 Agreement between the EC and EFTA states (Iceland, Liechtenstein and Norway) establishing the European Economic Area (EEA)[19] 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 ensure that the extension of the EC's common market law to the EFTA countries would function in the same manner as in the EC's internal market, the 1991 Draft Agreement for the EEA had provided for the establishment of an EEA Court, composed of judges from the ECJ as well as from EFTA countries, and for the application by the EEA Court of the case-law of the EC Court. In *Opinion 1/1991*, the EC Court objected to the structure and competences of such an EEA Court on the ground that its legally binding interpretations could adversely affect the autonomy and exclusive jurisdiction (Articles 220, 292 EC) of the EC Court (e.g., for interpreting the respective competences of the EC and EC member states concerning matters governed by

[18] The US Constitution (Amendments V and XIV) includes strong guarantees of private liberty and property rights against takings without "due process of law" and "just compensation." Up to the late 1930s, the US Supreme Court frequently overturned legislation on the ground that it violated economic liberties. Yet, since the Democrats "packed" the US Supreme Court in 1937, the Court has limited judicial protection of "substantive due process of law" essentially to civil and political rights; in the economic field, the Court introduced a constitutional presumption (in the famous *Carolene Products* case of 1938, 304 U.S. 144) that legislative restrictions of private property are presumed to be lawful and no longer subject to judicial review of "economic due process of law." Also the commerce clause in the US Constitution does not guarantee individual economic liberties as in the EC Treaty, but merely gives regulatory authority to the US Congress.

[19] Signed on 2 May 1992 and in force as of 1 January 1994, OJ EC 1994, L 1/3.

EEA provisions).[20] Following the Court's negative Opinion, the EEA Agreement's provisions on judicial supervision were re-negotiated and the EEA Court was replaced by an EFTA Court with more limited jurisdiction and composed only of judges from EFTA countries. In a second Opinion, the EC Court confirmed the consistency of the revised EEA Agreement[21] subject to certain legal interpretations of this agreement by the EC Court.[22] In order to promote legal homogeneity between EC and EEA market law, Article 6 of the revised EEA Agreement provides for the following principle of interpretation and judicial cooperation:

> "Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and the ECSC Treaty] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the (EC) given prior to the date of signature of the agreement."[23]

According to the 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA),[24] the Court has jurisdiction for infringement proceedings by the EFTA Surveillance Authority against an EFTA state (Article 31), actions concerning the settlement of disputes between EFTA states (Article 32), advisory opinions on the interpretation of the EEA Agreement (Article 33), review of penalties imposed by the EFTA Surveillance Authority (Article 35), as well as jurisdiction in actions brought by an EFTA state or by natural or legal persons against decisions of the EFTA Surveillance Authority (Article 36) or against failure to act (Article 37). Out of the 62 cases lodged during the first ten years of the EFTA Court, 18 related to direct actions, 42 concerned requests by national courts for advisory opinions, and 2 related to requests for legal aid and suspension of a measure (see Graver 2005, 79ff.).

In its interpretation of EC law provisions that are identical to EEA rules (e.g., concerning common market and competition rules), the EEA Court has regularly followed ECJ case-law and has realized the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning. In its very first case, *Restamark*,[25] the EFTA Court interpreted the notion of court or tribunal (in the sense of Article 34 SCA regarding requests by national courts for preliminary opinions) by proceeding from the six-factor-test applied by the ECJ in its interpretation of the corresponding provision in Article 234 EC: the referring body must, in order

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

[21] See Official Journal EC 1994, L 1/3.

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

[23] The limitation to prior case-law was due to the refusal by EFTA countries to commit themselves to unforeseeable, future case-law of the EU courts on which they are not represented (Skouris 2005, 123ff.). Skouris concludes, however, that "it does not seem that the EFTA Court has treated the ECJ case-law differently depending on when the pertinent judgments were rendered" (ibid., 124).

[24] Official Journal EC 1994, L 344/1.

[25] Case E-1/94, EFTA Court Reports 1994–1995, 15.

to constitute a "court or tribunal," (1) be established by law (rather than by private agreement as in the case of commercial arbitration); (2) be permanent; (3) have compulsory jurisdiction for legally binding decisions on issues of a justiciable nature (*res judicata*); (4) conduct *inter-partes* procedures; (5) apply rules of law and evidence; and (6) be independent. Yet, the EFTA Court considered the request admissible even if, as frequently in administrative court proceedings in Finland and Sweden, only one party appeared in the proceedings. In the EC Court judgments in cases *Dorsch Consult* of 1997[26] and *Gabalfrisa* of 2000,[27] the ECJ followed suit and acknowledged that the *inter-partes* requirement was not absolute. The EFTA Court's case-law on questions of *locus standi* of private associations to bring an action for nullity of a decision of the EFTA Surveillance Authority offers another example for liberal interpretations by the EFTA Court of procedural requirements.[28]

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.[29] The EFTA Court, in its *Restamark* judgment of December 1994, followed from Protocol 35 (on achieving a homogenous EEA based on common rules) that individuals and economic operators must be entitled to invoke and to claim at the national level any rights that could be derived from precise and unconditional EEA provisions if they had been made part of the national legal orders.[30] In its 2002 *Einarsson* judgment, the EFTA Court further followed from Protocol 35 that such provisions with quasi-direct effect must take legal precedence over conflicting provisions of national law.[31] Already in 1998, in its *Sveinbjörnsdottir* judgment, the EFTA Court had characterized the legal nature of the EEA Agreement as an international treaty *sui generis* that had created a distinct legal order of its own; the Court therefore found that the principle of state liability for breaches of EEA law must be presumed to be part of EEA law.[32] This judicial recognition of the corresponding EC law principles was confirmed in the 2002 *Karlsson* judgment, where the EFTA Court further held that EEA law—while not prescribing that individuals and economic operators be able to directly rely on non-implemented EEA rules before national courts—required national courts to consider relevant EEA rules, whether implemented or not, when interpreting international and domestic law.[33]

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[26] Case C-54/96, ECR 1997 I-4961.

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

[28] See Baudenbacher 2005, 24 (who mentions that this liberal tendency might be influenced by the fact that the EFTA Court, unlike the ECJ, is not overburdened).

[29] Opinion 1/91, *EEA Agreement*, ECR 1991 I-6079, par. 28.

[30] Case E-1/94, EFTA Court Reports 1994-95, 15.

[31] Case E 1/01 EFTA Court Reports 2002, 1.

[32] Case E 7/97 EFTA Courts Reports 1998, 95.

[33] Case E 4/01 EFTA Court Reports 2002, 240 (par. 28).

5 Lessons from the European "*Solange*-Method" of Judicial Cooperation for Worldwide Economic and Human Rights Law?

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

- As most FTAs only provide for *diplomatic* dispute settlement procedures (e.g., consultations, mediation, conciliation, panel procedures subject to political approval by member states) without preventing their member countries from submitting trade disputes to the *quasi* judicial WTO dispute settlement procedures, the compulsory WTO dispute settlement system may offer comparatively more effective legal remedies. This is illustrated by the fact that most intergovernmental trade disputes among the 3 member countries of the North American Free Trade Agreement (NAFTA) have been submitted to the WTO dispute settlement system rather than to the legally weaker dispute settlement procedures of Chapter 20 of the NAFTA Agreement.[34]
- Submission of trade disputes among FTA member countries to the WTO has only rarely given rise to legal problems, for example if the respondent country could not invoke in WTO dispute settlement procedures legal justifications based on FTA rules[35] or on FTA dispute settlement procedures.[36] The rare instances of successive invocations of FTA and WTO dispute settlement procedures challenging the same trade measure[37] did not amount to "abuses of rights," for WTO Members have rights to conclude regional trade agreements with separate dispute settlement procedures as well as rights to the *quasi* automatic establishment of

[34] See Davey 2006. There have been only 3 intergovernmental disputes under Chapter 20 since NAFTA entered into force in 1994. On the other six NAFTA dispute settlement procedures and their very diverse records see de Mestral 2006.

[35] For example, in the WTO dispute between the USA and Canada over Canadian restrictions on "split-run periodicals" (WTO Panel Report, *Canada-Periodicals*, WT/DS31/R, adopted 30 July 1997), Canada did not consider it was entitled to justify in the WTO its violation of GATT Article III by invoking Article 2106 NAFTA permitting preferential measures in favour of cultural industries, see ibid., 364–65.

[36] For instance, the WTO Appellate Body report on *Mexico-Tax Measures on Soft Drinks* (WT/DS308/AB/R, adopted in May 2006) upheld the WTO Panel's conclusion that the Panel had no discretion "to decline to exercise its jurisdiction" based on the existence of a NAFTA dispute on an allegedly related matter (see pars. 44–53).

[37] Examples would include challenges of US import restrictions on Canadian lumber in both NAFTA and WTO panels, challenges of EC import restrictions on bananas and genetically modified organisms in the ECJ and in the WTO, challenges of Argentine import restrictions on cotton and of Brazilian import restrictions of retreaded tyres in both Mercosur and WTO dispute settlement proceedings; see Kwak and Marceau 2006.

WTO dispute settlement bodies examining complaints in the WTO on the different legal basis of WTO law.

Yet, from the perspective of citizens and their economic rights as protected by courts in Europe, the EC and EFTA courts offer citizens direct access and judicial remedies that appear economically more efficient, legally more effective and democratically more legitimate than politicized, intergovernmental procedures among states for the settlement of disputes involving private economic actors. The fact that the EC Court has rendered only three judgments in international disputes among EC member states since the establishment of the ECJ in 1952 illustrates that many intergovernmental disputes (e.g., over private rights) could be prevented or settled by alternative dispute settlement procedures if governments would grant private economic actors more effective legal and judicial remedies in national and regional courts against governmental restrictions. Unfortunately, national and international judges often fail to cooperate in their judicial protection of the rule of law in international relations beyond the EC and ECHR, for example because they perceive international and domestic law as being based on mutually conflicting conceptions of justice. For instance, US courts claim that WTO dispute settlement rulings "are not binding on the US, much less this court"[38]; similarly, the EC Court has refrained long since—at the request of the political EC institutions who have repeatedly misled the ECJ about the interpretation of WTO obligations so as to limit their own judicial accountability[39]—from reviewing the legality of EC measures in the light of the EC's GATT and WTO obligations. WTO law tends to be perceived as intergovernmental rules, which governments and domestic courts may ignore without legal and judicial remedies by their citizens adversely affected by welfare-reducing violations of WTO guarantees of market access and rule of law.[40] Both the EC and US governments have requested their respective domestic courts to refrain from applying WTO rules at the request of

[38] US Court of Appeals for the Federal Circuit, judgment of 21 January 2005 (Corus Staal), available at http://www.fedcir.gov/opinions/04-1107.pdf. In the Corus Staal dispute, the US Supreme Court denied petition for certiorari on 9 January 2006 (http://www.supremecourtus.gov/docket/05-364.htm), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition ("We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department's "zeroing" methodology—held invalid by both a WTO Appellate Body and a NAFTA Binational Panel—is not entitled to Chevron deference because it would bring the United States into noncompliance with treaty obligations" (available at http://www.robbinsrussell.com/pdf/265.pdf).

[39] See Kuijper (2005, 1334) who claims that "it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body," and "that it is rarely or never possible to speak of a sufficiently serious breach of WTO law" by the political EC institutions justifying the EC's non-contractual liability for damages pursuant to Article 288 EC Treaty.

[40] See, e.g., the criticism by the EC's legal advisor Kuijper of the ECJ's "Kupferberg jurisprudence" on the judicial applicability of the EC's free trade area agreements at the request of citizens as politically "naïve" (ibid., 1320).

citizens or of NGOs[41]; in order to limit their own judicial accountability, they have repeatedly encouraged their respective courts to apply domestic trade regulations without regard to WTO dispute settlement findings on their illegality.[42] 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 or inside the US, illustrates the political rather than legal nature of such Machiavellian objections against judicial accountability for violations by trade bureaucracies of the international rule of law.

This contribution began by arguing that the universal recognition of inalienable human rights requires national and international courts to review whether—in their judicial settlement of "disputes concerning treaties, like other international disputes [. . .], in conformity with the principles of justice and international law" (Preamble VCLT)—human rights and other principles of justice (like due process of law) justify judicial application of international guarantees of freedom, non-discrimination, rule of law and social safeguard measures for the benefit of citizens. Section 4 described the citizen-driven, multilevel judicial protection of the EC, EEA and ECHR guarantees of freedoms, fundamental rights and rule of law as models for decentralizing and transforming intergovernmental rules and dispute settlement procedures for the benefit of citizens. Sections 5 and 6 suggest that the "*Solange*-Method" of conditional cooperation by national courts with the EC Court "as long as" (which means "solange" in German) the ECJ protects the constitutional rights of citizens (below 1), as well as the judicial self-restraint by the ECtHR vis-à-vis alleged violations of human rights by EC institutions "as long as" the EC Court protects the human rights guarantees of the ECHR (below 2), should serve as a model for "conditional cooperation" among international courts and national courts also in international economic law, environmental law and human rights law beyond Europe. Section 7 concludes by asking whether the judicial function to settle disputes in conformity with principles of procedural and substantive justice can assert democratic legitimacy in international relations which—beyond rights-based European integration law—continue to be dominated by power politics. It is argued that the legitimacy of judicial cooperation, self-restraint, "judicial competition" and

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[41] On the exclusion of "direct applicability" of WTO rules in the EC and US laws on the implementation of the WTO agreements see Petersmann 1997, 19ff. At the request of the political EC institutions, the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC's GATT and WTO obligations; the Court refers only very rarely to WTO rules and WTO dispute settlement rulings in support of the ECJ's interpretations of EC law. In the US, courts are barred by legislation from challenging the WTO-consistency of US federal measures.

[42] See Restani and Bloom 2001. On the controversial relationship between the "Charming Betsy doctrine" of consistent interpretation and the "Chevron doctrine" of judicial deference see Davies 2007. The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g., in Case 112/80, Dürbeck, ECR 1981, 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information submitted to the Court).

"judicial dialogues" among courts derives from their protection of constitutional citizen rights as a constitutional precondition for individual and democratic self-development in a constitutionally protected framework of "participatory," "deliberative" and "cosmopolitan democracy." Citizens and courts have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges (e.g., in worldwide and non-European institutions) if they perceive themselves as mere agents of governments and disregard the constitutional obligation of judges to settle disputes in conformity with human rights.

5.1 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 to empower individuals and effectively protect human rights, like the objective of international trade agreements to enable citizens to engage in mutually beneficial trade transactions under non-discriminatory conditions of competition, call for "dynamic judicial interpretations" of treaty rules with due regard to the need for judicial protection of citizen interests in economic markets and constitutional democracies. These citizen-oriented interpretations of the EC- and EEA Agreements were influenced by the long-standing insistency 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 (see Mayer 2006), 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 does not include a catalogue of fundamental rights corresponding to that of the German Basic Law, German courts could, after having requested a preliminary ruling from the EC Court, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.[43] This judicial insistence on the then higher level of fundamental rights protection in German constitutional law was instrumental for the ECJ's judicial protection of human rights as common, yet unwritten constitutional guarantees of EC law.[44]

[43] BVerfGE 37, 327.

[44] The ECJ's judicial protection of human rights since 1969 (Case 29/69, *Stauder v. City of Ulm*, ECR 1969, 419; Case 11/70 *Internationale Handelsgesellschaft*, ECR 1970, 1125; Case 4/73, *Nold*, ECR 1974, 491) continues to evolve.