

DE-FRAGMENTATION OF INTERNATIONAL ECONOMIC LAW
THROUGH CONSTITUTIONAL INTERPRETATION AND
ADJUDICATION WITH DUE RESPECT FOR
REASONABLE DISAGREEMENT

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ABSTRACT: *In his Theory of Justice,¹ Rawls used the idea of reasonableness to design fair procedures that prompt reasonable citizens as autonomous moral agents to agree on basic equal freedoms and other principles of constitutional justice and distributive justice, which citizens would subsequently use for framing a just constitution, for legislation by representatives of the people, and for administrative and judicial application of rules to particular cases. In his later book, Political Liberalism, Rawls reframed his theory of justice as fairness by emphasizing the importance of the public use of reason to maintain a stable, liberal society confronted with the problem of reasonable disagreement about individual conceptions of a good life and a just society. According to Rawls, “in a constitutional regime with judicial review, public reason is the reason of its supreme court.”² 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.³ Since the universal recognition of human rights and the adoption of national constitutions by almost all 192 United Nations (“UN”) member states, the power-oriented “Westphalian reasoning” of governments and their “realistic” conceptions of “international law among states” are increasingly challenged by citizens, parliaments and courts, notably in citizen-driven areas of mutually beneficial economic cooperation among individuals across frontiers. This contribution argues for “constitutional interpretations” of international law in conformity with the universal recognition in UN human rights instruments that domestic laws may provide for higher standards of constitutional and judicial protection of human rights beyond the minimum standards prescribed in UN law. The Vienna Convention on the Law of Treaties (“VCLT”) calls for “reasonable” interpretations of international treaties in conformity with “principles of justice,” “observance of human rights and fundamental freedoms for all,” as well as in conformity with other “relevant rules of international*

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¹ See JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press 2005) (1971).

² See JOHN RAWLS, POLITICAL LIBERALISM 231 (Columbia University Press 1993).

³ *Id.*

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law.”⁴ *The independence and impartiality of courts require judges to interpret international economic law and to “balance” conflicting legal claims (e.g. concerning the “necessity” and “proportionality” of governmental restrictions of economic freedoms and property rights), with due regard to universal human rights and other principles of “constitutional justice,” including legal and judicial respect for reasonable disagreement over the interpretation of human rights and principles of justice. The fragmentation and distributive injustice of power-oriented, intergovernmental treaty rules may be reduced best by constitutional interpretations and judicial “balancing” of competing rules, principles and jurisdictions, subject to “deliberative democracy” holding governments and courts accountable for their frequent failures to protect rule of law in the international cooperation among citizens.*

Introduction: Lessons from Europe for “judicial integration” on the basis of common constitutional principles?

International law evolved as an authoritarian system of rules among states based on effective control by governments over people and territories. The sovereign equality of all 192 UN member states contributed to fragmentation of international law into increasingly specialized treaty regimes and international organizations with overlapping memberships and jurisdictions. Furthermore, the universal recognition of human rights and the independence of courts promoted citizen-oriented and democratic conceptions of international law, challenging power-oriented and state-centered interpretations of international law rules. The European Court of Justice (“ECJ”), the European Court of Human Rights (“ECtHR”) and the European Free Trade Area (“EFTA”) Court used citizen-oriented “constitutional interpretations” to transform the intergovernmental European Community (“EC”) treaties and the European Convention on Human Rights (“ECHR”) into “constitutional instruments” protecting rule of law and fundamental rights of citizens on the basis of constitutional principles common to the member states of the EC and the ECHR.⁵ This “judicial constitutionalization” of intergovernmental treaty regimes on the basis of procedural and substantive “constitutional principles” was accepted by citizens, national courts, parliaments, and governments because the judicial “European public reasoning” protected individual rights and European “public goods” (such as the EC’s common market, rule of law, and democratic peace) more effectively than the state-centered power politics and periodic European wars up to 1945. The “solange method” of cooperation among national and European courts “as long as” constitutional rights are adequately protected, reflects an “overlapping constitutional consensus” on the

⁴ Vienna Convention on the Law of Treaties pmb1, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁵ See Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262 (2005) (discussing judicial review by national and European courts of EC rules in the light of common constitutional principles such as legality, fundamental rights, limited competences, subsidiarity, democratic legitimacy, and their judicial clarification and legal codification (e.g. Article 6 of the Treaty of the European Union) with due respect for constitutional diversity).

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need for “constitutional justice” and judicial protection of European Union (“EU”) citizen rights, with due regard for the diverse forms of democratic governance at national and European levels.⁶ Judicial respect for the legitimate diversity of national human rights and democratic traditions was a precondition for the judicial re-interpretation of treaties among states as instruments of constitutional order protecting European citizens against abuses of powers by their own governments.⁷

The power-oriented rationality of governments interested in limiting their judicial accountability towards citizens is increasingly challenged in international dispute settlement practices beyond Europe.⁸ The universal recognition of human rights implies recognizing citizens as democratic principals of government agents. Judicial interpretation of intergovernmental rules as protecting individual rights may be notably justified in international economic law protecting mutually beneficial economic cooperation among citizens and individual rights, including citizen-oriented rules of the World Trade Organization (“WTO”), such as the trading rights, intellectual property rights, and rights of access to courts protected by the WTO Protocols on the Accession of China, Vietnam, and Ukraine. This contribution argues that the multilevel governance necessary for the collective supply of international public goods can reduce collective action problems more effectively if national and international courts cooperate in protecting the rule of law for the benefit of citizens adversely affected by governmental power politics and violations of international law. Just as European constitutional law can be interpreted as “authorizing Member States as a matter of EU law to set aside EU law on constitutional grounds under certain circumstances,”⁹ this contribution interprets UN human rights law as authorizing UN member states to construe, under certain circumstances, intergovernmental treaties in conformity with domestic human rights even if such domestic constitutional protection goes beyond the minimum standards of UN law.

Overview and summary of main arguments

Section I recalls the political and legal limits of “member-driven governance” for the collective supply of international public goods (such as international rule of law, a consumer-driven open world trading system) and criticizes state-centered “realism” for disregarding the empirical evidence that “institutionalized

⁶ Cf. Ernst-Ulrich Petersmann, Do Judges Meet Their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?, 1 EUR. J. LEGAL STUD. (2007) (arguing that the universal recognition of human rights requires judges to take human rights more seriously in their judicial settlement of disputes to conform to the principles of justice and international law that are prescribed in the Vienna Convention on the Law of Treaties and in the United Nations Charter).

⁷ See SAMANTHA BESSON, THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW (Hart Publishing 2005) (discussing the “paradox of reasonable disagreement,” when rule of law is a necessary response to disagreement and conflicts of interests depend on legal respect for reasonable disagreement and on dialogue and cooperation among legal institutions).

⁸ For example, challenges occur in transnational investor-state arbitration, the Inter-American Court of Human Rights, and the Andean Common Market Court.

⁹ Kumm, *supra* note 5, at 262.

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multilateralism” and citizen-oriented “constitutional approaches” can reduce international collective action problems. *Section II* uses recent examples from the jurisprudence of the ECJ, the ECtHR, and the EFTA Court for illustrating how international courts have successfully used constitutional approaches to review whether economic regulations, including sanctions imposed by the UN Security Council, are consistent with constitutional safeguards such as due process of law, access to justice, and fundamental freedoms. *Section III* provides examples from European and WTO dispute settlement practices to demonstrate why national and international courts should protect the rule of law in international trade in conformity with constitutional rights of citizens, with due respect for reasonable disagreement among constitutional democracies. Without such citizen-oriented “constitutional approaches,” the lack of judicial accountability of governments vis-à-vis their citizens for governmental violations of intergovernmental trade agreements will continue to undermine the rule of law and general citizen interests in international trade. *Section IV* concludes that the European “solange method” of judicial cooperation should be supported by citizens, national judges, civil society, and their democratic representatives also with regard to judicial cooperation of domestic courts with worldwide courts and dispute settlement bodies “as long as” other courts respect constitutional principles of justice. “Public reasonableness” is a precondition for maintaining an “overlapping consensus” on rule of law not only inside constitutional democracies, but also in the international division of labor and mutually beneficial cooperation among citizens across national frontiers. Just as “public reason” among the 480 million EC citizens is no longer dominated by state-centered reasoning of their twenty-seven national governments, so can rules-based economic integration beyond Europe be promoted by “constitutional reasoning” complementing the inter-state structures of international law. In a world dominated by power politics and by reasonable “constitutional pluralism,” it is easier for international judges to meet their legal obligation to settle disputes “in conformity with principles of justice” if courts cooperate and base their “judicial discourses” on “constitutional justice,” such as judicial protection of due process of law and of universal human rights. Just as international treaty regimes need “constitutional interpretations” and clarification of the “principles of justice,” traditional private law, administrative law, and public international law approaches to international economic law need to be supplemented by “constitutional approaches” to clarify the common constitutional foundations of modern international economic law. Transatlantic leadership for a rules-based “social market economy” offers welfare gains far beyond economics, including extending democratic self-government and legal security to international relations.

I. From Power Politics to Comparative Institutionalism and Multilevel Constitutionalism in International Economic Law

In terms of rules, principles, state-centered treaty regimes, legislative authorities, executive and judicial institutions, and communities of citizens, the reality of international law remains fragmented and anarchic. For example, such fragmentation and anarchy exists due to institutional incapacity to limit the widespread

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governance failures at national and international levels to protect human rights and rule of international law more effectively and prevent the unnecessary poverty of more than one billion people living on less than one dollar per day. From the normative point of view of the universal recognition of human rights by all 192 UN member states, however, modern international law has become, arguably, constitutionally founded on “inalienable” human rights based on respect for human dignity, including *erga omnes* obligations binding all national and international governance institutions with a progressively expanding *jus cogens* core.¹⁰ The more citizens live and cooperate, not only in national communities, but also in functionally limited international communities¹¹ for the collective supply of international public goods, the more it is necessary to “constitutionalize international anarchy” so as to reduce the collective action problems of protecting international rule of law and other international public goods. Without rule of law in the international cooperation among citizens, rule of law and democratic self-governance risks being undermined inside states. The national commitments of governments to protection of consumer welfare, non-discriminatory conditions of competition, human rights, and poverty reduction must be extended to the ever more important *transnational* division of labor among citizens.

A. Lack of realist theories for the collective supply of international public goods

State-centered “realist approaches” to international relations emphasize that the reality of international relations continues to be dominated by power politics aimed at promoting state interests. Yet, this “realist” focus on state interests (such as national security, power, and welfare) neither correctly describes nor explains the reality of international integration agreements such as those in Europe, where twenty-seven EC member states and forty-seven member states of the ECHR have transferred governance powers to international institutions that can and do decide against national governments. The “realist” identification of “state interests” with “the preferences of the state’s political leadership”¹²—rather than with general citizen interests in reducing abuses of intergovernmental power politics and nationalist “discourse failures”¹³—reveal authoritarian neglect

¹⁰ See Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 29-67 (Frederick M. Abbot, Christine Kaufmann & Thomas Cottier eds., University of Michigan Press 2006).

¹¹ For example, the 800 million European citizens governed by the ECHR.

¹² Cf. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 6 (Oxford University Press 2005) (asserting that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power).

¹³ Cf. *id.* at 17 (“[W]e are more sceptical about the role of international law in advancing international cooperation than most (but not all) international relations institutionalists and most rational choice-minded lawyers.”). This realist scepticism is based on the authoritarian assumption that individual preferences and state interests cannot be significantly changed by international law and institutions and, hence, national foreign policies are bound to “reflect the usually self-regarding interest of voters,” *id.* at 166, and the “realistic limits on what liberal democracies can do,” *id.* at 205, in an anarchic world of power politics. See GUIDO PINCIONE & FERNANDO R. TESÓN, *RATIONAL CHOICE AND DEMOCRATIC DELIBERA-*

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for constitutionalism as a method of protecting general citizen interests at national and international levels. The empirical evidence of European integration law demonstrates that international institutions and multilevel constitutional restraints can, indeed, reduce collective action problems among states (such as information and power asymmetries) as well as inside national democracies (such as nationalist “protection biases” and other “discourse failures”).

The WTO’s consensus-based Doha Round negotiations since 2001 reflect the lack of political and conceptual agreement on how to reduce the “jurisdictional gap,” the “participation gap,” and the “incentive gap”¹⁴ impeding more effective supply of global public goods. This contribution argues that international coordination and collective action problems cannot be effectively reduced without a more citizen-oriented “public reasoning” aimed at reducing the obvious disagreements among governments and citizens on the constitutional foundations of collective supply of international public goods. European integration law suggests that procedural legitimacy (e.g. inclusive decision-making based on democratic participation) and democratic and judicial re-interpretations of intergovernmental economic law, with due respect for regulatory subsidiary and democratic disagreement, are preconditions for citizen-oriented economic law and consumer-driven markets aimed at promoting consumer welfare and respect for human rights. Rather than “compromising justice internally,”¹⁵ courts and democratic governments should protect citizen-oriented conceptions of rule of law in international trade for the benefit of their own citizens on the basis of common “constitutional principles” as “legislative pre-commitments.”¹⁶ Democratic self-governance and mutually beneficial cooperation among citizens are seriously undermined without judicial protection of international legal guarantees of freedoms and non-discriminatory conditions of competition, such as those in EC and WTO law. As long as governments prevent effective participation by citizens and parliaments in intergovernmental economic organizations like the WTO, they undermine democratic support and citizen-driven self-government in economic integration law. The independence and integrity of courts make it easier for judges to challenge state-centered interpretations of international economic law from the point of view of human rights, democratic participation, and constitutional justice. The historical lesson from European economic law is that multilevel judicial protection of citizen-oriented rule of law in international trade is the most reasonable response to reduce reasonable disagreements among states and citizens over the interpretation of inter-state rules on the basis of constitutional pluralism.

TION: A THEORY OF DISCOURSE FAILURE (Cambridge University Press 2006) (discussing the public’s “rational ignorance” and structural “discourse failures” in nation states vis-à-vis global public goods).

¹⁴ See GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., Oxford University Press 1999) (discussing various collective action problems).

¹⁵ For example, by judicial disregard in domestic courts for WTO obligations of governments and international rule of law.

¹⁶ Cf. BESSON, *supra* note 7, at 282.

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B. Need for citizen-oriented “constitutional realism” in international law

State-centered realists assume that “states enter into international institutions because they gain more than they lose from doing so.”¹⁷ The “two distinguishing factors in the domestic realm: genuine communal sacrifices (whereby some members sacrifice interests for others) and centralized coercion” are unlikely to work on a global scale.¹⁸ Yet, such claims—that most international law rules reflect coincidence and coordination of state interests—do not exclude self-interested cooperation among states and individuals in the collective supply of international public goods if the “prisoner dilemmas” in intergovernmental bargaining can be constitutionally limited. It is true that cooperation and politics in the WTO continue to be dominated by state interests and bilateral negotiations (e.g. on reciprocal trade commitments and the settlement of WTO disputes). Yet, the acceptance of WTO law by 153 WTO members illustrates that institutional strategies and constitutional guarantees can prompt rational governments to cooperate in the collective supply of *international* public goods.¹⁹ State-centered “realism” protects the self-interests of the rulers (e.g. trade politicians redistributing income among domestic constituencies by means of illegal import restrictions) rather than general citizen interests (e.g. promoting consumer welfare and democratic governance also in the WTO). Constitutional democracy and the universal recognition of human rights require focusing on the reasonable interests of citizens (e.g. in rule of law in international trade) as relevant context for re-interpreting intergovernmental trade rules for the collective supply of international public goods.

The universal recognition of “inalienable” human rights and the adoption of national constitutions by virtually all 192 UN member states reflect the constitutional insight that peaceful resolution of the inevitable conflicts between social reasonableness and rational egoism of individuals requires constitutional restraints on abuses of power, such as the human right to access justice administered by independent courts in transparent procedures protecting due process of law.²⁰ If the universal human rights obligations of all UN member states are

¹⁷ Cf. GOLDSMITH & POSNER, *supra* note 12, at 223-24.

¹⁸ *Id.*; Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1692 (“Successful governance in the domestic realm works differently than this purely instrumental conception of international governance.”).

¹⁹ For example, institutional strategies include termination of the 1947 General Agreement on Tariffs and Trade as an incentive for joining the WTO. Constitutional guarantees include independent WTO dispute settlement rulings that are binding on states. An example of an international public good includes the compulsory WTO dispute settlement system promoting international rule of WTO law.

²⁰ The UN Charter and UN human rights conventions explicitly recognize human rights and “principles of justice” as necessary foundations of international peace. See, e.g., Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., Oxford University Press 2007) (discussing the recognition of individual rights of access to justice in national and international law); see RAWLS, *supra* note 3, at 48 (discussing the Kantian distinction between human rationality, when one pursues individual ends often without moral sensibility for the consequences of individual actions on other’s well-being, and human reasonableness, which aims at just terms of social cooperation by constitutionally restraining individual actions on the basis of equal freedoms and universalizable principles); see Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International*

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taken into account as relevant context for interpreting intergovernmental agreements and redesigning international institutions, the conceptual and normative disagreements on state-centered or citizen-centered interpretations of indeterminate legal concepts (e.g. in WTO law) increase enormously.²¹ As explained by Immanuel Kant, the antagonistic nature of human interactions and the needed respect for human dignity and reasonable disagreement require multilevel constitutional safeguards of equal liberties, due process of law, and corresponding constitutional restraints of abuses of public and private power in all human interactions at the national, international, and transnational levels based on “public reason.”²² As individuals and governments are unlikely to voluntarily comply with legal rules unless they reflect their reasonable long-term interests, the Kantian “constitutional imperative” is both a *normative* requirement of “public reason” and a rational explanation of why so many power-oriented rules of international law (including WTO law) continue to be disregarded by rational citizens, domestic courts, and democratic legislatures skeptical of the power politics underlying international trade bargaining. John Rawls explained that political and legal morality at the international level must be separated from comprehensive moral doctrines by focusing on minimal agreement, public reasoning on the needed “overlapping consensus,” and respect for reasonable disagreement.²³

The acceptance by most UN member states of international treaty *constitutions* (*sic*) establishing the International Labor Organization (“ILO”), the World Health Organization (“WHO”), the Food and Agricultural Organization (“FAO”), and the UN Educational and Scientific Cooperation Organization (“UNESCO”) entailed ever more legal research on using “constitutional methods”²⁴ and “constitutional reasoning”²⁵ for reducing collective action problems also in transnational relations.²⁶ Such constitutional discourses tend to be closely related to legal protection of human rights, including labor rights promoted by the ILO, the human right to health protected by the WHO, the human right to food promoted by the

Trade, 27 U. PA. J. INT’L ECON. L. 273 (2006) (discussing the productive value of competition, conflicts and peaceful conflict resolution).

²¹ See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU], for the dispute settlement system of the WTO.

²² The antagonistic nature of all human interactions is reinforced by the scarcity and arbitrary distribution of natural resources among individuals and states, the resulting asymmetries in power, national biases in state-centred politics, and social inequalities, etc.; see Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT’L L. 1 (1998) (discussing the Kantian explanation of the need for multilevel constitutionalism).

²³ RAWLS, *supra* note 3, *passim*.

²⁴ Such as pre-commitments to constitutional principles of a higher legal rank.

²⁵ Such as judicial “balancing” among competing constitutional rights on the basis of non-discrimination, necessity, and proportionality principles.

²⁶ MASSIMO LA TORRE, *CONSTITUTIONALISM AND LEGAL REASONING: A NEW PARADIGM FOR THE CONCEPT OF LAW* (Springer 2007). Cf. *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* (Ronald St. John Macdonald & Douglas M. Johnston eds., Martinus Nijhoff Publishers 2005).

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FAO, and the human right to education promoted by UNESCO. Constitutional discourses are also closely aligned with the legal protection of “community interests”(including *jus cogens* and *erga omnes* obligations). Yet, outside Europe, such functionally limited “treaty constitutions” for the collective supply of international public goods have failed to effectively constrain intergovernmental power politics. Citizen-oriented “constitutional reforms” in worldwide organizations (such as the tripartite structures in the ILO, and recognition of duties to protect human rights by humanitarian intervention authorized by the UN Security Council) remain rare. Constitutional constructivism has, however, succeeded in “constitutionalizing” foreign policy powers and intergovernmental treaties in Europe, such as the EC and EU Treaties, the European Economic Area [EEA] Agreement, and the ECHR. This constitutional re-construction of multilevel governance in favor of 480 million EC citizens and almost 800 million citizens protected by the ECHR refutes nationalist claims that “liberal democracies are unlikely to support a cosmopolitan foreign policy.”²⁷

C. Need for a new legal realism vis-à-vis multilevel trade governance

Legal realism requires considering that transformation of self-interested national policy processes through “multilevel democratic constitutionalism” (e.g. in the EU), multilevel administrative governance (e.g. in EFTA and NAFTA), and “multilevel judicial governance” (e.g. in the EC as well as in the WTO) can induce governments to comply with cosmopolitan international rules, which protect their rational self-interests in global public goods. Even if rational governments give priority to their moral and legal duties to promote the *national* welfare of their citizens rather than comply with power-oriented rules of international law, their moral and legal obligations towards their own citizens require exploring more realistically how the self-interests of their citizens in the collective supply of international public goods can be promoted more effectively by using constitutional approaches that enable citizens and governments to collectively supply public goods at national and regional levels.²⁸ Comparative institutional analysis can help identify why different international institutions have succeeded in reforming national and international political processes. For example, the international arbitration and other dispute settlement proceedings provided for in the North American Free Trade Agreement (“NAFTA”) limit the risk of discrimination of foreigners in national judicial proceedings less effectively compared to the judicial remedies in European integration law.²⁹ The numerous failures of “member-driven governance” (e.g. to realize an open and efficient

²⁷ Cf. GOLDSMITH & POSNER, *supra* note 12, at 226.

²⁸ See Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law*, 2008 U. ILL. L. REV. 359 (2008), for a more detailed explanation why realist, liberal, institutional and constructivist approaches to international law should be used as complementary strategies for inducing governments to collectively supply international public goods.

²⁹ North American Free Trade Agreement [NAFTA], U.S.-Can.-Mex., chs. 11, 19, Dec. 17, 1992, 32 I.L.M. 289 (1993).

world trading system in the legal framework of GATT and WTO law)³⁰ are no proof for parochial claims that “global problems may simply be unsolvable.”³¹ Rather, they show the need for further “constitutionalizing” national biases and governance failures in state-centered policies (e.g. producer-driven trade policies), to protect general consumer welfare and general citizen interests more effectively by limiting protectionist abuses of public and private power.

II. Multilevel Judicial Protection of Individual Rights in European Economic Law: Judicial Review of Economic Sanctions Imposed by the UN Security Council

The VCLT recalls the customary obligation of governments and courts “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 “respect for, and observance of, human rights and fundamental freedoms for all.”³² While the “general rule of interpretation” codified in Article 31(1) focuses on textual, contextual, and functional methods of treaty interpretation, Article 31 also requires taking into account “any relevant rules of international law applicable in the relations between the parties.”³³ The WTO Panel Report on the EC’s restrictions on genetically modified organisms argued for interpreting Article 31(3)(c) narrowly and applying only to international law rules binding all parties of the treaty concerned.³⁴ However, this narrow interpretation of Article 31(3)(c) continues to be challenged. Interpreting the text of Article 31(3)(c) as referring only to the parties of the dispute concerned could avoid that the large number and often unique composition of multilateral treaties (e.g. among the 153 WTO Members, including customs territories like Hong Kong, Macau, Taiwan and the EC) prevent dispute settlements in conformity with other international legal obligations that have been accepted by the parties to the dispute, but not by all other contracting parties.³⁵

The recent case-law by the EC Courts and the ECtHR on their judicial review of economic sanctions imposed by the UN Security Council illustrates the practical relevance of “constitutional interpretations” of international economic law and the role of independent courts as guardians of the constitutional unity of international law. As WTO law explicitly recognizes the right of every WTO

³⁰ Cf. Ernst-Ulrich Petersmann, *From ‘Member-Driven Governance’ to Constitutionally Limited ‘Multi-Level Trade Governance in the WTO*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 86-110 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., Cambridge University Press 2006).

³¹ Cf. GOLDSMITH & POSNER, *supra* note 12, at 226.

³² Vienna Convention, *supra* note 4.

³³ *Id.* art. 31, ¶ 3(c).

³⁴ Cf. Panel Report, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, ¶7.65, WT/DS291-3 (Sept. 29, 2006) (adopted Nov. 2006).

³⁵ Cf. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *INT’L & COMP. L.Q.* 279, 314 (2005) (asserting every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way).

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Member to take “any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security,”³⁶ the “constitutional approaches” by European courts may also influence the legal reasoning of WTO dispute settlement bodies in case of future WTO disputes over the consistency of economic sanctions requested by the UN Security Council with the WTO obligations of WTO Members.

A. The Example of Judicial Review of UN Economic Sanctions by the EC Courts

All UN member states have legal obligations under the UN Charter (e.g. Arts. 1, 55, 56), human rights conventions, and general international law to respect, protect, and promote human rights. Yet, it remains controversial to what extent human rights have evolved into *erga omnes* obligations and jus cogens, to what extent they are legally binding not only on UN member states but also on UN bodies and other international organizations, and to what extent they may be relevant “context” for interpreting international treaties in the light of relevant “rules of international law applicable in the relations among the parties” (Article 31(3)c VCLT). In 2001, Saudi Arabian resident Mr. Kadi brought an action before the EC Court of First Instance against the EC Council and Commission claiming that the Court should annul EC Regulations Nos 2062/2001 and 467/2001 insofar as they listed Mr. Kadi as a person suspected of supporting terrorism, whose financial resources are to be frozen. Mr. Kadi argued, *inter alia*, that the EC regulations breached a number of his fundamental rights. The EC Council and Commission contended, *inter alia*, that the regulations were necessary for implementing binding Security Council resolutions, that Mr. Kadi had been listed by the Sanctions Committee of the Security Council, and that EC courts should not assess the conformity of the EC’s implementing regulations with fundamental rights.

In its judgment of 21 September, 2005, the Court of First Instance acknowledged that UN Charter obligations are legally binding also on the EC, upheld the contested regulations, and rejected all of Mr. Kadi’s pleas.³⁷ It concluded that Articles 60, 301, and 308 EC gave the Community power to adopt the contested regulations. As Security Council resolutions, in keeping with Article 103 UN Charter, take precedence over the EC Treaty, the Court found it could assess the conformity of the Security Council resolution and of the EC implementing regulations with fundamental rights only to the extent that those rights formed part of jus cogens.³⁸ On appeal, Advocate-General Poiares Maduro convincingly argued

³⁶ See General Agreement on Tariffs and Trade art. 21, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services art. XIV bis, April 15, 1994, WTO Agreement, Annex 1B, 33 I.L.M. 1167, 1178 (1994) [hereinafter GATS].

³⁷ Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3649.

³⁸ See Case T-49/04, *Hassan v. Comm’n*, 2006 E.C.R. II-52, where the Court considered arbitrary interferences with rights to respect for private and family life and the right to a reputation as contrary to jus cogens. Compare *Id.* at II-3649 and Case T-306/01, *Yusuf v. Comm’n*, 2005 E.C.R. II-3533, where the Court of First Instance considered aspects of the right to property, the right to a fair hearing and the right to a judicial remedy as being protected by jus cogens rules.

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for the jurisdiction of Community courts to review – so long as the United Nations do not provide for a mechanism of independent judicial review that guarantees compliance with fundamental rights of decisions taken by the Security Council and its Sanctions Committee – whether EC regulations implementing those UN decisions are in conformity with fundamental rights as recognized in the EC legal order.³⁹ The EC Court - in line with its established case-law that “measures which are incompatible with the observance of human rights . . . are not acceptable in the Community” - emphasized the constitutional duty of EC courts to protect European fundamental rights (such as Mr. Kadi’s rights of defense and of effective judicial protection as enshrined in Articles 6 and 13 ECHR and reaffirmed in Article 47 of the EU Charter of Fundamental Rights), and uphold the rule of law, also if the blacklisting of individuals in the EC Council Regulation was based on a UN Security Council Resolution.⁴⁰ The Court largely concurred with the Opinion by Advocate-General Maduro that the extraordinary circumstances of antiterrorist measures could justify exceptional restrictions on individual freedom; however, the authorities could not be relieved of their requirement to demonstrate that such restrictions are justified in respect of the person concerned. In the absence of such procedural safeguards, the freezing of someone’s assets for an indefinite period of time infringed the right to property, the right to be heard by the administrative authorities, as well as the right to effective judicial review by an independent tribunal. The Court refrained from commenting on the *obiter dictum* of the Advocate-General that “Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order.”⁴¹ Nor did the ECJ point out that – as UN law does not prejudice the right of UN member states to protect higher guarantees of human rights – judicial protection of human rights by the ECJ can hardly amount to a violation of UN obligations as long as UN measures do not ensure themselves adequate standards of human rights protection.

B. Judicial Review of UN Economic Sanctions by the ECtHR

The right to effective judicial protection is also emphasized by the ECtHR which held, for example, in *Klass and Others*:

[T]he rule of law implies, *inter alia*, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the

³⁹ Opinion of Advocate Gen. Poirares Maduro, Case C402/05 P, Yassin Abdullah Kadi v. Council and Comm’n (Jan. 16, 2008), available at <http://curia.europa.eu/> (select “Case Law,” then select “Search form,” then enter “C402/05 P”).

⁴⁰ Case C-402/05 P, Kadi v. Council and Comm’n (Sept. 3, 2008), available at http://curia.europa.eu/jcms/jcms/j_6/ [search for “Case C-402/05”].

⁴¹ Yassin Abdullah Kadi v. Council and Comm’n, ¶ 54.

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last resort, judicial control offering the best guarantees of independence, impartiality, and a proper procedure.⁴²

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the ECJ. In the *Bosphorus* case, the ECtHR had to examine the consistency of Ireland's impounding of a Yugoslavian aircraft on the legal basis of EC regulations implementing UN Security Council sanctions against the former Federal Republic of Yugoslavia. The ECtHR referred to the ECJ case-law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the ECJ preliminary ruling that "the impounding of the aircraft in question . . . cannot be regarded as inappropriate or disproportionate"⁴³ 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:⁴⁴

(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;"⁴⁵

(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;"⁴⁶

(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."⁴⁷

(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."⁴⁸

After examining the comprehensive EC guarantees of fundamental rights and judicial remedies, the ECtHR found:

⁴² *Klass v. Federal Republic of Germany*, App. No. 5029/71, 2 Eur. Ct. H.R. (ser. A) at 214, 217 (1978).

⁴³ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland (Bosphorus)*, App. No. 45036/98, 42 Eur. H.R. Rep. 1, 15 (2006).

⁴⁴ *Id.* at 42.

⁴⁵ *Id.* at 44.

⁴⁶ *Id.* at 45.

⁴⁷ *Id.*

⁴⁸ *Id.*

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[T]hat 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.⁴⁹

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.⁵⁰

C. The “*Solange* Jurisprudence” of the German Constitutional Court and its Contribution to “Constitutional Justice” in the EC

These examples for conditional cooperation among international courts, which are subject to respect for the basic constitutional guarantees of their respective jurisdiction, were inspired by the “*solange* jurisprudence” of the German Constitutional Court and similar interactions between other national constitutional courts and the EC Court,⁵¹ which contributed to the progressive extension of judicial protection of human rights in European economic 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.⁵² 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.⁵³
- In view of the emerging human rights protection in EC law, the German Constitutional Court held, in its *Solange II* judgment of 1986, that it would no longer exercise its jurisdiction to review EC legal acts “as long as” the EC Court continued to generally and effectively protect fundamental rights against EC measures in ways comparable to the essential safeguards of German constitutional law.⁵⁴

⁴⁹ *Id.* at 47

⁵⁰ *Bosphorus*, 42 Eur. H.R. Rep. at 47.

⁵¹ *Cf.* Franz C. Mayer, *The European Constitution and the Courts*, in *Principles of European Constitutional Law* 281-334 (Armin von Bodandy & Jürgen Bast eds., Hart Publishing, 2006).

⁵² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 271 (F.R.G.), translated in [1974] 2 C.M.L.R. 540.

⁵³ The ECJ’s judicial protection of human rights since 1969 continues to evolve. See, e.g., *Case 4/73, Nold v. Comm’n*, 1974 E.C.R. 491; *Case 11/70, Internationale Handelsgesellschaft v. Einfuhr*, 1970 E.C.R. 1125; *Case 29/69, Stauder v. City of Ulm*, 1969 E.C.R. 419.

⁵⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 339, 375 (F.R.G.), translated in [1987] 3 C.M.L.R. 225, 258.

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- 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.⁵⁵
- 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 to illegally restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002 (*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.⁵⁶
- 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.⁵⁷ 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 legal protection of fundamental rights in EC law is progressively expanding due to judicial protection by national and European courts, which illustrates how judicial cooperation can successfully transform intergovernmental economic agreements into “constitutional instruments” (ECJ) protecting international guarantees of freedom as fundamental freedoms of individual citizens. Judge A. Rosas⁵⁸ has distinguished the following five “stages” in the case-law of the EC Court on the protection of human rights:

- In the functionally limited European Coal and Steel Community (“ECSC”), the Court held that it lacked competence to examine whether an ECSC deci-

⁵⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 115 (F.R.G.), translated in [1994] 1 C.M.L.R. 57.

⁵⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 7, 2000, 102 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 147 (F.R.G.).

⁵⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2005, 2 BVR 2236/04, translated in [2006] 1 C.M.L.R. 16.

⁵⁸ Allan Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, in *The EFTA Court: Ten Years On* 163, 169 (Carl Baudenbacher, Per Tresselt & Thorgeir Orlygsson eds., Hart Publishing, 2005).

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sion amounted to an infringement of fundamental rights as recognized in the constitution of a member state.⁵⁹

- 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.⁶⁰
- 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.”⁶¹
- Since 1989, the EC Court characterized the ECHR as having “special significance” for the interpretation and development of EU law⁶² 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 referring to individual judgments of the ECtHR⁶³ 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.⁶⁴ The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,⁶⁵ and to differentiate – as in the case-law of the ECtHR –

⁵⁹ Case 1/58, *Storck v. High Authority*, 1959 E.C.R. 17, 43.

⁶⁰ See *Nold*, 1974 E.C.R. 491; see also *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125; *Stauder*, 1969 E.C.R. 419.

⁶¹ See, e.g., Case 2/94, *Opinion 2/94 on the European Convention for the Prot. of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759, ¶ 33.

⁶² Cases 46/87 & 227/88, *Hoechst v. Comm’n*, 1989 E.C.R. 2859, ¶ 13.

⁶³ Cf. Case C-13/94, *P v. S*, 1996 E.C.R. I-2143, ¶ 16.

⁶⁴ The Court began by examining the EC’s economic freedom, as requested by the national court, and observed that “since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.” Case C-112/00, *Schmidberger v. Republik Österreich*, 2003 E.C.R. I-5659, ¶ 74. “[U]nlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.” *Id.* ¶ 80. The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights. *Id.*

⁶⁵ The ECJ referred explicitly to new case-law of the ECtHR on the protection of the right to privacy of commercial enterprises in order to explain why—despite having suggested the opposite in the ECJ’s earlier judgment in *Hoechst*—such enterprises may benefit from Article 8 ECHR:

For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights

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between judicial review of EC measures,⁶⁶ state measures,⁶⁷ and private restrictions of economic freedoms in the light of fundamental rights.⁶⁸

The multilevel legal and judicial protection of human rights and democratic governance in the EC as well as in the Council of Europe have led to legal recognition of individuals as legal subjects of European integration law and to the transformation of the intergovernmental EC Treaty and of the ECHR into “constitutional instruments of European public order.”⁶⁹

III. Multilevel Judicial Protection of Rule of Law in International Trade

The precedential value of “constitutional interpretations” of the intergovernmental EC treaties by the EC Courts is often discarded by “realist” defenders of the inter-state paradigm of international law on the ground that European integration is “more usefully viewed as an example of multi-state unification akin to pre-twentieth-century unification efforts in the United States, Germany, and Italy.”⁷⁰ However, all European states abandoned the idea of a utopian European federal state long ago. Article (1)(a) of the Lisbon Treaty on European Union, signed on 13 December, 2007 by all twenty seven EC member states, bases the EU explicitly on “constitutional pluralism among states:”

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-dis-

subsequent to the judgment in *Hochst*. According to that case-law, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises and second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.

C-94/00, *Roquette Frères v. Comm'n*, 2002 E.C.R. I-9011, ¶ 29; *see also* *Société Colas Est v. France*, App. No. 37971/97 (2002), <http://cmiskp.echr.coe.int/tkp197/search.asp>.

⁶⁶ *See, e.g.*, *Nold*, 1974 E.C.R. 491; *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125; *Stauder*, 1969 E.C.R. 419.

⁶⁷ *See* Case C-36/02, *Omega Spielhallen v. Bonn*, 2004 E.C.R. I-9609, where the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states.

⁶⁸ *See* Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP* (2007), <http://curia.europa.eu/judgment>, where the ECJ confirmed that trade unions—in exercising their social rights to strike (e.g. in order to prevent relocation of the shipping line *Viking* to another EC member state)—are legally bound by the EC's common market freedoms that have to be reconciled and “balanced” with social and labour rights. *Cf.* MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES. EXPLORING THE STRUCTURE OF ECHR PROTECTION* (Oxford University Press, 2006) (studying the response of the European Court of Human Rights to complaints submitted to it by companies and their shareholders).

⁶⁹ *See* *Loizidou v. Turkey*, App. No. 15318/89 (1996), <http://cmiskp.echr.coe.int/tkp197/search.asp>, where this concept was first used by the ECtHR, which continues to be used not only by the EC Court, but also in many judgments of the ECtHR. *See also* GIULIANO AMATO & JACQUES ZILLER, *THE EUROPEAN CONSTITUTION: CASES AND MATERIALS IN EU AND MEMBER STATES' LAW* (Edward Elgar Publishing 2007) (discussing the progressive “constitutionalization” of the EC treaties up to the 2007 Lisbon Treaty).

⁷⁰ GOLDSMITH & POSNER, *supra* note 12, at 5, 224.

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crimination, tolerance, justice, solidarity, and equality between women and men prevail.⁷¹

As more citizens cooperate in functionally limited transnational communities, such as the European Economic Area (EEA) and other regional common markets (such as the Andean Common Market), it becomes more likely that citizens and courts will ask national governments to accept judicial accountability for rule of law based on communitarian guarantees of freedom, non-discrimination and judicial protection of individual rights beyond state borders. In addition, free trade areas dominated by hegemonic states, such as NAFTA and Mercusor, recognize that there is a need to limit protection biases and national discrimination against foreigners, which is illustrated through their transnational dispute settlement procedures (e.g. Chapters 11 and 19 of NAFTA).

A. Multilevel Judicial Protection of Fundamental Freedoms in the EEA

The EEA Agreement⁷² illustrates that transformation of intergovernmental economic agreements into international guarantees of human rights and constitutional freedoms can also be achieved through intergovernmental cooperation. Judicial cooperation between the EC courts and the EFTA Court was legally mandated in the EEA Agreement⁷³ and facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical with the EC's common market rules (notwithstanding the different context of the EC's common market and the EEA's free trade area). The EC Court of First Instance, in its *Opel Austria* judgment of 1997, held that Article 10 of the EEA Agreement (corresponding to the free trade rules in Articles 12, 13, 16 and 17 EC Treaty) had direct effect in EC law in view of the high degree of integration protected by the EEA Agreement, whose objectives exceeded those of a mere free trade agreement and required the contracting parties to establish a dynamic and homogenous EEA.⁷⁴ In numerous cases, EC court judgments referred to the case-law of the EFTA Court, for example, by pointing out "that the principles governing the liability of an EFTA state for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in *Sveinbjörnsdottir*."⁷⁵ In its *Ospelt* judgment, the EC Court emphasized, "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."⁷⁶

⁷¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 1a, Dec. 14, 2007, 50 O.J. (C 306) 1, available at http://bookshop.europa.eu/eu-bookshop/download.action?fileName=FXAC07306ENC_002.pdf&eubphfUId=534817&catalogNbr=FX-AC-07-306-EN-C.

⁷² European Economic Area Agreement [EEA Agreement], Jan. 1, 1994, 1994 O.J. (L 1) 3.

⁷³ See, e.g., *id.* art. 6.

⁷⁴ Case T-115/94, *Opel Austria GmbH v. Council*, 1997 E.C.R. II-39.

⁷⁵ Case C-140/97, *Rechberger v. Republik Osterreich*, 1999 E.C.R. I-3499, ¶ 39.

⁷⁶ Case C-452/01, *Ospelt v. Schlossle Weissenberg*, 2003 E.C.R. I-9743, ¶ 29.

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The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries and ECtHR case law. In view of the intergovernmental structures of the EEA Agreement, the legal homogeneity obligations in the EEA Agreement—for example, Article 6—as well as in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice⁷⁷—for example, Article 3—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.⁷⁸ In various judgments, the EFTA Court further followed the ECJ case-law by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR (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 reference to the EFTA Court had unduly prolonged the national court proceeding in violation of the right to a fair and public hearing within a reasonable time (Article 6 ECHR); referring to a judgment by the ECtHR in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ (pursuant to Article 234 EC), the EFTA Court shared the reasoning of the ECtHR that adding the period of preliminary references (which was less than 6 months in the case before the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.

B. Multilevel Judicial Clarification and Protection of WTO Law?

The Agreement establishing the WTO, its compulsory dispute settlement system, and the progressive development of WTO law by the already more than 240 panel, Appellate Body and arbitration reports adopted by the WTO Dispute Settlement Body (DSB) have legally and institutionally limited the “member-driven governance” that was so characteristic for producer-driven power politics under GATT 1947. Whereas many GATT 1947 panel reports were rightly criticized or opposed by GATT contracting parties and were neglected by public opinion, the uniquely institutionalized dialogues between WTO dispute settlement bodies (e.g. panels, Appellate Body, DSB), and their ever closer evaluation by governments and civil society (e.g. in the annual WTO Public Forum, ever more law journals and academic conferences), are giving rise to a more cosmopolitan “public reasoning” in world trade law.

⁷⁷ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice art. 3, 1994 O.J. (L 344) 3.

⁷⁸ Cf. Hans Peter Graver, *The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States*, in *THE EFTA COURT TEN YEARS ON* 79, 97 (Hart Publishing 2005) (“Direct effect of primary law, state liability and the duty of the courts to interpret national law in the light of EEA obligations have been clearly and firmly accepted in national law by Norwegian courts.”).

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1. *Judicial Balancing and Clarification of Rules and Principles in WTO Law*

The recognition in the Preamble of the WTO Agreement of “basic principles and objectives . . . underlying this multilateral trading system”⁷⁹ reflects the constitutional insight that legislation and international agreements tend to be incomplete: Their coherent interpretation and legal application often depend on general principles and judicial procedures for reasonable resolution of conflicts over disputed claims and divergent legal interpretations of imprecise rules. For example, the two principles set out in the Preamble to the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) – respect for the right of Members to take necessary measures to protect the life and health of humans, animals, and plants within their domestic jurisdiction, and harmonization of national SPS standards with international standards⁸⁰—may lead to conflicting legal interpretations of WTO rules and claims that need to be “balanced” out through “public reasoning” among WTO dispute settlement bodies, WTO Members, and civil society. By delegating the clarification of deliberately vague WTO provisions (e.g. on “the objective of sustainable development” in the WTO Preamble) to WTO dispute settlement bodies, WTO Members acknowledged that judicial clarification and settlement of disputes over the legal interpretation of vague principles and rules inevitably entail progressive development of rules.⁸¹ Past WTO dispute settlement practice was criticized for lacking a coherent framework for clarifying principles of WTO law, principles of customary international law, and general principles of law in the already more than 400 GATT and WTO dispute settlement rulings.⁸² Even though the various UN reports on the human rights dimensions of WTO agreements have identified potential conflicts between GATT/WTO rules and the human rights obligations of all WTO Members, GATT and WTO dispute settlement reports almost never refer to human rights principles in their interpretation of the “public interest clauses” of WTO law (e.g. the right under GATT Article XX to protect human health).⁸³ The generalized systems of tariff preferences granted by developed WTO Members on the basis of the WTO principles for non-reciprocal, preferential, and differential treatment of less-developed countries have likewise been criticized for being potentially inconsistent with principles of distributive justice.⁸⁴ In the WTO dispute over *EC-Tariff Preferences*, the Panel’s interpretation of the term “non-discriminatory” in the Ena-

⁷⁹ Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

⁸⁰ Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1154 (1994) [hereinafter SPS Agreement].

⁸¹ Cf. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT’L L. 247 (2004) (discussing judicial lawmaking at the WTO, which continues to face hard political constraint).

⁸² Andrew D. Mitchell, *The Legal Basis for Using Principles in WTO Disputes*, 10 J. INT’L ECON. L. 795, 795 (2007).

⁸³ Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the WTO: Challenges for WTO Jurisprudence and Civil Society*, 19 LEIDEN J. INT’L L., 633, 638 (2006).

⁸⁴ Frank J. Garcia, *Global Justice and the Bretton Woods Institutions*, 10 J. INT’L ECON. L. 461, 466 (2007).

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bling Clause as requiring identical treatment for all developing-country Members was reversed by the Appellate Body on the basis of contextual and functional arguments; the interests of less-developed WTO members could be promoted more effectively by allowing for different treatment among some less-developed countries if such differential tariff preferences were justified by special development needs and other less-developed WTO Members with the same needs were treated alike.⁸⁵

2. Principles of Justice in WTO Law?

Much like Article 1 of the UN Charter, the Preamble to the VCLT requires 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.”⁸⁶ Some of the WTO principles are explicitly specified in WTO provisions, for instance in the GATT⁸⁷ and other WTO agreements on trade in goods,⁸⁸ services,⁸⁹ and trade-related intellectual property rights.⁹⁰ The WTO requirement of interpreting WTO law “in accordance with customary rules of interpretation of public international law”⁹¹ refers not only to *formal* interpretative principles (such as *lex specialis*, *lex posterior*, *lex superior*) aimed at mutually coherent interpretations on the basis of legal presumptions of lawful conduct of states, the systemic character of international law, and the mutual coherence of international rules and principles. The customary law requirement of interpreting treaties “in conformity with principles of justice,” and the related reference of the VCLT to “universal respect for, and observance of, human rights and fundamental freedoms for all” (Preamble VCLT), also call for clarifying the *substantive principles of justice* underlying WTO law, like freedom, non-discrimination, rule of law, independent third-party adjudication, and preferential treatment of least developed countries (LDCs). Disregard for “principles of justice” common to national and international law may undermine the legitimacy of, and compliance with, WTO rules. The basic WTO principle of progressive liberalization and legal protection of liberal trade can be justified by all liberal theories of justice, such as

⁸⁵ Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 58, WT/DS246/10 (Apr. 7, 2004).

⁸⁶ Vienna Convention, *supra* note 4, pmb1.

⁸⁷ See, e.g., GATT, *supra* note 36, arts. III ¶2, VII¶1, X ¶3, XIII ¶5, XX §j, art. XXIX ¶6, XXXVI ¶9.

⁸⁸ See, e.g., Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade art. 7.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 279 (1994) [hereinafter Customs Valuation]; Agreement on Rules of Origin art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397 (1994).

⁸⁹ GATS, *supra* note 36, art. X.

⁹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights pmb1., arts. 8, 62.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

⁹¹ DSU, *supra* note 21, art. 3.2.

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- utilitarian theories defining justice in terms of maximum satisfaction of individual preferences and consumer welfare;
- libertarian theories focusing on protection of individual liberty and property rights;
- egalitarian concepts defining justice more broadly in terms of equal human rights and democratic consent; and
- international theories of justice based on sovereign equality and effective empowerment of states to increase their national welfare through liberal trade.⁹²

Hence, the diversity of libertarian, egalitarian, or utilitarian value preferences should not affect recognition that the WTO guarantees of freedom, non-discrimination, rule of law, non-reciprocal and preferential treatment of LDCs - by enhancing individual liberty, non-discriminatory treatment, economic welfare, and poverty reduction across frontiers - reflect, albeit imperfectly, constitutional principles of justice. In terms of the Aristotelian distinction between ‘general principles of justice’ (like liberty, equality, fair procedures, and promotion of general consumer welfare) and particular principles of justice requiring adjustments depending on particular circumstances, WTO rule-making and WTO dispute settlement procedures can also contribute to “corrective justice” and “reciprocal justice,” just as the special, differential and non-reciprocal treatment of less-developed WTO Members in numerous WTO provisions may contribute to “distributive justice.” Legal and judicial clarification of the “principles of justice” underlying WTO law is important not only for the interpretation and judicial clarification of existing WTO rules, but also for WTO negotiations on additional WTO rules. For example, less-developed WTO members rightly complain that delays in concluding the “Doha Development Round” are also due to the inconsistency of developed country proposals (e.g. in the field of cotton and agricultural subsidies) with the development objectives of WTO law.

3. Principles as “Optimization Requirements”?

The increasing judicial recourse—in the case-law not only of WTO dispute settlement bodies but also of domestic trade courts—to “principles” and “balancing” for justifying interpretive choices is in line with modern constitutional theories of adjudication, such as Dworkin’s “adjudicative principle of integrity” which requires judges to regard law as expressing “a coherent conception of justice and fairness,”⁹³ or Alexy’s conceptualization of “principles” as “optimization requirements” aimed at balancing and realizing conflicting principles to the

⁹² See FRANK J. GARCIA, *TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (Transnational Publishers 2003) and A. BEVIGLIA ZAMPETTI, *FAIRNESS IN THE WORLD ECONOMY: US PERSPECTIVES ON INTERNATIONAL TRADE RELATIONS* (Edward Elgar Publishing 2006) for overviews of these theories.

⁹³ Cf. RONALD DWORKIN, *LAW’S EMPIRE* 225, 243 (Belknap Press of Harvard University Press 1986) (“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.”).

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greatest extent possible given the legal and factual constraints.⁹⁴ Alexy rightly emphasizes that constitutional rights (including universal human rights as relevant context for interpreting WTO law) also include principles that have to be taken into account and “optimized” in the interpretation and application of rules as far as factually and legally possible. Whereas rules are definitive norms (based on “if-then” structures) that are either adhered to or not, principles compete with one another and “require that something be realized to the greatest extent possible given the legal and factual possibilities.”⁹⁵ The judicial function is to reduce conflicts among principles and rights through examining, “balancing,” “optimizing,” and clarifying competing principles. Consider, for example, the independent and impartial review of the “suitability,” necessity, and proportionality of governmental restrictions of freedom for realizing competing principles. A significant achievement of the WTO Appellate Body jurisprudence is the ever more sophisticated “weighing” and “balancing” of trading rights and non-economic public interests in the judicial clarification of WTO rules (such as GATT Article XX and GATS Article XIV). For example, the Appellate Body in the *Korea-beef* clarified that:

Determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁹⁶

Similarly, in the *Brazil-tyres* case, the Appellate Body argued that the “necessity” and “material contribution” of a measure to the achievement of the objective can be assessed both qualitatively as well as quantitatively, and may need to be evaluated over the long term, and alternative measures must not impose “an undue burden,” such as “prohibitive costs or substantial technical difficulties.”⁹⁷

Governmental, judicial, and intergovernmental reasoning in the WTO remains inadequate in many ways, for example, vis-à-vis preferential treatment of LDCs and the authoritarian focus on rights and duties of governments rather than of their citizens engaged in international trade. Even though citizens and non-governmental organizations are the main producers, investors, traders, and consumers in the economy and the “democratic principals” in most polities, the number of WTO rules protecting individual rights (such as individual legal and judicial

⁹⁴ Cf. ROBERT ALEXY, A Theory of Constitutional Rights 44-61 (Julian Rivers trans., Oxford University Press 2002). Alexy’s theory of “optimizing” competing principles rejects the Dworkian notion of rights as anti-utilitarian “trumps.” *Id.*

⁹⁵ *Id.* at 47.

⁹⁶ Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 162, 164, WT/DS161, 169/AB/R (Dec. 11, 2000).

⁹⁷ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 150, WT/DS332/AB/R (Dec. 3, 2007).

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remedies, intellectual property rights, and “trading rights” protected by the WTO Protocol for the Accession of China) remain very limited due to the prevailing “Westphalian paradigm” of “member-driven WTO governance” by the rulers, rather than constitutional paradigms of citizen-driven self-governance and consumer-driven competition in international trade relations. Without effective individual freedoms and judicial remedies in international trade, citizens continue to depend on the benevolence of their governments, who all too often cling to discretionary trade policy powers and welfare-reducing trade restrictions like the monarchical rulers during the Westphalian system of international law. Preferential treatment of, and assistance for less-developed WTO Members may also require additional obligations (e.g. to use scarce resources offered by developed countries for the benefit of the least advantaged inside LDCs).

4. *Judicial Deference towards National and International Jurisdictions*

WTO dispute settlement bodies have emphasized long since the right of every WTO Member to determine its desired level of protection with respect to environmental and other objectives covered under the general exception clauses (such as GATT Article XX).⁹⁸ In the *US-gambling* case, both the Panel and the Appellate Body readily accepted that the GATS exception for “measures necessary to protect public morals or to maintain public order” (Article XIV GATS(a)) could cover restrictions for preventing money laundering, organized crime, fraud, and pathological or underage gambling.⁹⁹ Following its reasoning in *Korea-beef*, the Appellate Body clarified that even though “the responding party must show that its measure is “necessary” to achieve objectives relating to public morals or public order” it is:

Not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden. . . . If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not , in fact, ‘reasonably available.’¹⁰⁰

⁹⁸ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 168, WT/DS135/AB/R (Mar. 12, 2001).

⁹⁹ Appellate Body Report, *United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 296, WT/DS285/AB/R (Apr. 7, 2005).

¹⁰⁰ *Id.* at ¶¶ 296, 310, 311. See Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 70, WT/DS285/AB/R (Apr. 25, 2005) (discussing the flexible “necessity standard”).

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This distribution of the burden of proof reflects deference towards domestic regulators in the application of the WTO exception clauses and related processes of “weighing and balancing” factors relevant for the determination of the “necessity” of restrictive measures. WTO dispute settlement bodies, unlike previous GATT dispute settlement panels, have become reluctant to second-guess domestic regulators unless complainants have argued and submitted evidence that a WTO-consistent (or less WTO-inconsistent) alternative to the challenged measure is reasonably available to the defendant.

The WTO dispute settlement system differs from all other international dispute settlement systems by its uniquely institutionalized review and adoption of all WTO panel, appellate and arbitral reports by WTO Members in the DSB. Notably in the field of trade-related environmental measures, WTO dispute settlement reports and the DSB have referred to the WTO objectives of “sustainable development” (WTO Preamble) and to multilateral environmental agreements for justifying differential treatment (e.g. of imports of shrimps depending upon whether their harvesting methods protected sea turtles) on grounds of environmental protection.¹⁰¹ Yet, the WTO Panel Report on the EC’s restrictions on genetically modified organisms interpreted Article 31(3)(c) VCLT narrowly as applying only to international law rules binding all parties of the treaty concerned.¹⁰² This narrow interpretation of the customary rules of treaty interpretation was supported by WTO Members as protecting state sovereignty and limiting the relevant context of WTO rules.¹⁰³ In the *Mexico-Soft Drinks* dispute, the WTO Panel and Appellate Body declined jurisdiction for claims based on NAFTA and interpreted the general exception in Article XX(d) GATT narrowly as not covering “laws and regulations” which Mexico had adopted as counter-measures in order to respond to alleged violations of NAFTA obligations by the United States.¹⁰⁴ According to the Appellate Body, NAFTA obligations are not “laws and regulations” within the meaning of Article XX(d) GATT because they are not part of the domestic legal order.¹⁰⁵ The reasoning by the Appellate Body that, “it would have to assess whether the relevant international agreement had been violated” in order to examine the applicability of Article XX(d), and “this is not the function of panels and the Appellate Body as intended by the DSU”¹⁰⁶ would presumably lead to similar judicial self-restraint in the *Swordfish dispute*

¹⁰¹ Cf. Appellate Body Report, United States—Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998).

¹⁰² Panel Report, *European Commission—Measures affecting the Approval and Marketing of Biotech Products*, ¶ 7.65, WT/DS/291-293/R (Sept. 29, 2006).

¹⁰³ There are hardly any other multilateral treaties ratified by all 153 WTO Members, including customs territories like Hong Kong, Macau, Taiwan, and the EC.

¹⁰⁴ Cf. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks*, ¶ 69, WT/DS308/AB/R (Mar. 24, 2006). (upholding the Panel finding that Mexico’s measures, which sought to secure compliance by the United States with its obligations under the NAFTA, did not constitute measures “to secure compliance with laws or regulations” within the meaning of Article XX(d) GATT).

¹⁰⁵ Cf. WT/DS308/AB/R, *supra* note 104, ¶ 56.

¹⁰⁶ *Id.* ¶ 69 *et seq.*

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between the EC and Chile in the WTO.¹⁰⁷ WTO dispute settlement bodies would refrain from examining the Chilean claim that Chile's violations of GATT obligations were justified countermeasures in response to preceding violations by the EC of environmental obligations under the Law of the Sea Convention.¹⁰⁸ Even if—as permitted by the Law of the Sea Convention¹⁰⁹ as well as by the DSU¹¹⁰—Chile, the EC, and the DSB would request a WTO panel to examine the dispute in the light of both WTO law and the Law of the Sea Convention, the narrow interpretation of GATT Article XX is likely to prevail, i.e. that GATT Article XX does not justify unilateral departures from GATT obligations in response to violations of non-WTO agreements.

5. *Lack of Common Conceptions of Rule of Law and Justice in Multilevel Judicial Governance of World Trade*

Rule of law is a precondition for democratic self-government and for protection of general citizen interests. The lack of effective constitutional restraints on violations of WTO guarantees of non-discriminatory conditions of international trade entails that trade policy powers are frequently abused by trade politicians in order to redistribute domestic income for the benefit of rent-seeking interest groups. WTO law regulates “the dispute settlement system of the WTO” (Article 3 DSU) as a multilevel system with compulsory jurisdiction for the settlement of international as well as domestic trade disputes by independent international and domestic dispute settlement bodies. Yet trade politicians benefit from discretionary trade policy powers and deny, in order to avoid being held accountable by their own citizens in domestic courts for violating WTO obligations, that the WTO dispute settlement “system” should offer citizens judicial remedies also against their own rulers. Hence, the numerous WTO provisions protecting individual access to domestic courts¹¹¹ only exceptionally require domestic courts to apply relevant WTO rules.¹¹² At the request of trade bureaucracies, domestic judges all too often fail to interpret domestic trade law in conformity with WTO obligations and refrain from reviewing domestic trade measures on the basis of WTO law. Due to the protectionist biases of most national legal systems, domestic judges continue to perceive *domestic* trade law as being based on constitutional conceptions of *national* justice different from *international law*.¹¹³ This lack of cooperation among national and international judges in their judicial pro-

¹⁰⁷ *Chile—Measures Affecting the Transit and Importation of Swordfish, Request for Consultations by the EC*, WT/DS193/1 (Apr. 26, 2000) (the WTO complaint by the EC, and the related Chilean complaint against the EC in the International Tribunal for the Law of the Sea, were subsequently suspended).

¹⁰⁸ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; 21 I.L.M. 1261.

¹⁰⁹ *Id.* art. 280.

¹¹⁰ DSU, *supra* note 21, arts. 7, 26.

¹¹¹ See GATT, *supra* note 36, art. X; GATS, *supra* note 36, art. VI; TRIPS Agreement, arts. 41-50.

¹¹² Application of WTO Rules as prescribed in Article XX of the WTO Agreement on Government Procurement, *supra* note 79.

¹¹³ Cf. Ernst-Ulrich Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 J. INT'L ECON. L. 529, 551 (2007).

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tection of the rule of law in international trade undermines the rules-based world trading system and its effective promotion of consumer welfare and general citizen interests.

Just as U.S. courts claim that WTO dispute settlement rulings “are not binding on the U.S., much less this court,”¹¹⁴ so has the EC Court refrained—at the request of the political EC institutions who have repeatedly misled the ECJ about the interpretation of WTO obligations so as to limit their own judicial accountability¹¹⁵—from reviewing the legality of EC measures in the light of the EC’s GATT and WTO obligations. Even though the mandate of national and international judges to protect the rule of law includes a mandate to promote coherent interpretations of international and national law for the benefit of citizens, domestic judges, like international judges, often refrain from applying international rules unless they are explicitly required to do so. This is similar to the *dictum* by U.S. Supreme Court justice Oliver Wendell Holmes that his judicial task was not to administer justice, but to apply the positive rules of law.¹¹⁶ Similarly, multilevel judicial governance in international trade tends to neglect the legal requirement and judicial task of interpreting international treaties “in conformity with principles of justice,” including “universal respect for, and observance of, human rights and fundamental freedoms for all,”¹¹⁷ as required by the universal human rights obligations of all WTO Members under international treaty law (e.g., the UN Charter), customary law, and “general principles of law recognized by civilized nations” (Article 38 ICJ Statute). Like the frequent incoherencies between international and domestic *trade laws* and related dispute settlement proceedings, international and domestic judicial proceedings over foreign *investment disputes* often lack mutual coordination and coherence.

6. Need for Multilevel “Constitutional Justice”

Regional economic integration law and the conditional cooperation among national and international courts “as long as” they respect common constitutional

¹¹⁴ *Corus Staal BV v. Dep’t of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006). In the *Corus Staal* dispute, the United States Supreme Court denied petition for certiorari on January 9, 2006, notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition. Brief for European Commission as Amici Curiae Supporting Petitioner, *Corus Staal BV v. Dep’t of Commerce*, 546 U.S. 1089 (2006) (No. 05-364). “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.”

¹¹⁵ Cf. Peter J. Kuijper, *WTO Law in the European Court of Justice*, 42 COMMON MKT. L. REV. 1313, 1334 (2005). Kuijper argues 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.

¹¹⁶ See RONALD DWORIN, *JUSTICE IN ROBES* (Belknap Press 2006) (discussing this dictum by Justice Holmes).

¹¹⁷ Vienna Convention, *supra* note 4, pmb1.

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principles demonstrate that “constitutional interpretations” can promote rule of international law and voluntary rule-compliance. Multilevel cooperation among independent and impartial courts for the benefit of citizens can promote cosmopolitan “public reason” protecting rule of law in the international division of labor among citizens against the “protection biases” in state-centered policies. Just as economists emphasize that the economic gains from trade depend on consumer-driven competition, constitutional theory explains why democratic self-government and rule of law depend on empowering citizens by constitutional rights and effective judicial remedies against harmful majority politics and abuse of executive powers. The fact that almost all states protect their national markets through constitutional safeguards (such as the ‘commerce clause’ and guarantees of freedoms, property rights and due process of law in the U.S. Constitution)¹¹⁸ also suggests that *international* market competition depends on an “empowering constitution” (e.g. protecting citizens rights and regulatory agencies for the correction of market failures) as well as a “limiting constitution” (e.g. limiting abuses of private market power as well as public powers) so as to protect rights and obligations not only of governments, but also of citizens engaged in, and benefiting from, international economic cooperation. The multilevel legal and judicial protection of individual market freedoms, of fundamental rights, and of non-discriminatory conditions of competition in the EEA illustrates that multilevel trade governance can effectively protect liberal trade and citizen rights without supranational institutions such as those of the EC.

National and international theories of justice rightly emphasize the need for supplementing principles of “constitutional justice” (like basic equal freedoms) with principles of distributive justice (like the Rawlsian “difference principle”) at national and international levels.¹¹⁹ Yet, as confirmed by the WTO dispute settlement procedures challenging tariff discrimination among less-developed WTO Members, it remains deeply contested whether WTO rules and practices vis-à-vis LDCs – or the controversial treatment of LDCs in the law and administrative practices of the International Monetary Fund, the World Bank Group, and the EC’s development policies – are consistent with principles of distributive justice (e.g. as regards conditionality of preferential treatment). The frequent arguments by human rights defenders, import-competing industries and governments in LDCs in favor of trade protection as a means of promoting “global justice” illustrate the widespread “discourse failures”¹²⁰ that continue to impede putting into practice the economic consensus on freedom and non-discriminatory market regulations as the most important means for promoting individual and economic welfare.

¹¹⁸ MEINHARD HILF & ERNST-ULRICH PETERSMANN (eds.), *National Constitutions and International Economic Law*, in V.8 STUDIES IN TRANSNATIONAL ECONOMIC LAW (Kluwer Publishers 1993).

¹¹⁹ Cf. GARCIA, *supra* note 92; Garcia, *supra* note 84; and Ernst-Ulrich Petersmann, *Symposium on the Emerging Transnational Constitution: Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 460 (2004).

¹²⁰ FERNANDO R. TESÓN ET AL., *GLOBAL JUSTICE AND TRADE: A PUZZLING OMISSION* (Cambridge University Press 2007).

IV. Multilevel Constitutional Pluralism: De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication

International law progressively evolves through unilateral, bilateral, and multi-lateral practices of some two hundred states without a single coordinating legislative will. Most international agreements are “incomplete” in that they build on and complement other rules of international law and use indeterminate legal concepts whose normative interpretation is not universally shared (such as the WTO objective of “sustainable development”). International agreement among governments from diverse legal and political systems is all too often possible only by recourse to “constructive ambiguity” of international rules. International tribunals give effect to a legal presumption that the parties to an international treaty “intend something not inconsistent with generally recognised principles of international law, or with previous treaty obligations towards third States.”¹²¹ They also assume that, as international tribunals, they must apply general international law unless and to the extent that the parties to a treaty have created a *lex specialis*.¹²² The less democratic accountability mechanisms ensure legitimacy of intergovernmental rules, the more courts are requested to review the legality and procedural, jurisdictional and substantive legitimacy of intergovernmental rules.¹²³

Many WTO rules on trade in goods, services, and intellectual property rights explicitly require respect for multilateral international agreements concluded outside the WTO, and for the parties “to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.”¹²⁴ WTO members did not intend WTO rules to be a ‘self-contained regime’ without regard to their other obligations under international law. Every WTO member state has ratified the UN Charter, UN human rights conventions, and other worldwide agreements. Consequently, interpretation and application of WTO rules is increasingly influenced by non-WTO rules and legal obligations under general international law. The report of the Study Group of the

¹²¹ OPPENHEIM’S INTERNATIONAL LAW 1275 (Robert Jennings & Arthur Watts eds., Oxford University Press 9th ed. 1992) (1905). See also *Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)*, 1957 I.C.J. 142 (Nov. 26) (“[I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.”).

¹²² Cf. *Georges Pinson (France) v. United Mexican States*, 5 R. Int’l Arb. Awards 422 (“Every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way”) and *Saudi Arabia v. ARAMCO*, 27 INT’L L. REV. 165 (1963) (expressing that the same principle has also been applied in many arbitral awards to transnational investor-state contracts: “It is obvious that no contract can exist *in vacuo*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties”).

¹²³ See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 931 (2004) (regarding such constitutional approaches and the transformation of alleged constitutional conflicts into judicial balancing of constitutional principles common to national and international law).

¹²⁴ SPS Agreement, *supra* note 80, art. 3.5.

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International Law Commission on ‘Fragmentation of International Law’ emphasized that no special international law regime is self-contained:

Even in the case of well-developed regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfill aspects of its operation not specifically provided by it Second, the rules of general law also come to operate if the special regime fails to function properly¹²⁵

The same report noted that “conflict resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with *prima facie* conflicts depends on the way the relevant rules are interpreted. . . . Rules appear to be compatible or in conflict as a result of *interpretation*.”¹²⁶ Whether special and general rules, prior and subsequent norms, rules and principles of different scope (e.g. *erga omnes* obligations) at different levels of law or with different normative power (e.g. *jus cogens*) conflict, or can be interpreted in mutually coherent ways, depends on such aspects as the text, context, object, and purpose of the rules concerned, the will of the parties and the nature of the legal instruments and systems involved. International law includes numerous general and specific “conflict of law” rules; for example, on successive treaties relating to the same subject-matter,¹²⁷ and agreements modifying multi-lateral agreements between certain of the parties only.¹²⁸ These aim to prevent conflicts between treaties, such as those between bilateral practices (e.g. on “voluntary export restraints”), regional practices, (e.g. by customs unions like the EC) and worldwide agreements. Treaties presumably enjoy priority over customary rules unless the latter have the status of *jus cogens*. Treaty conflicts may be prevented *ex ante* by “integration rules” aimed at reconciling, for instance, free trade agreements and customs unions with the WTO trading and legal system.¹²⁹ Alternatively, they may be settled *ex post* by procedural and substantive rules promoting clarification and harmonization of treaty provisions and conflict resolution. Such legal harmonization may be rendered more difficult if the limited jurisdiction or mutually conflicting conceptions of dispute settlement bodies under specialized treaties lead to conflicting judgments, as was the case with respect to the EC Court judgments, GATT and WTO dispute settlement rulings on the EC import restrictions on bananas: in spite of numerous GATT and WTO

¹²⁵ See Martti Koskenniemi, Report of Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 193, U.N. Doc. A/CN.4/L.682 (Apr. 4, 2006). The Report concludes that “the term ‘self-contained regime’ is a misnomer. No legal regime is isolated from general international law.” See also Brunno Simma & Dirk Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 EUR. J. INT’L L. 483, 529 (2006) (discussing the contested relationships between treaty rules and general international law rules).

¹²⁶ Koskenniemi, *supra* note 125, at 412.

¹²⁷ Cf. Vienna Convention, *supra* note 4, art. 30.

¹²⁸ Cf. *id.* art. 41.

¹²⁹ See, e.g., GATT, *supra* note 36, art. XXIV; WTO Agreement, *supra* note 79, art. XIV (on membership to the WTO).

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dispute settlement findings on the inconsistency of these EC regulations with GATT and WTO law, the EC restrictions were found lawful by the ECJ.¹³⁰

A. Citizen-oriented “Constitutional Interpretations” of WTO Rules?

Since the democratic revolutions of the eighteenth century, citizens in national and regional legal systems have made the universal experience that effective legal and judicial protection of human rights, constitutional rights, and welfare of citizens depends on limitation and separation of government powers by constitutional rules of a higher legal rank, empowering citizens and their democratically elected representatives, and limiting abuses of public and private power. Peoples and countries have adopted diverse constitutional and democratic systems depending on their respective historical experiences, such as process-based democracies in common law countries with longstanding, successful constitutional safeguards (e.g. in North America) or rights-based democracies in response to experiences of dictatorship and genocide (e.g. in European countries like Germany). With the recognition of UN human rights obligations and the adoption of domestic constitutions by all 153 WTO Members, “constitutional pluralism” and the legitimate diversity of national human rights regulations have become part of the legal and political foundations of the world trading system. The traditional inter-state structures of the Westphalian system of “international law among states” are slowly transformed by human rights and other *erga omnes* obligations, regional integration law, community obligations, (e.g. to protect human rights in failed states) and vertical legal restraints (e.g. based on Article 103 UN Charter and the law of other international organizations).

In response to these “constitutional changes,” citizens, courts, parliaments, human rights bodies, and democratic governments argue ever more for “constitutionalizing” international economic law by enlarging the “intergovernmental reasoning” in the WTO through “human rights approaches,” stronger parliamentary oversight, an advisory inter-parliamentary WTO body, and citizen-oriented “cosmopolitics” (P.Lamy) based on “cosmopolitan constituencies” supporting open markets and consumer-driven competition.¹³¹ Such arguments for constitutionalizing intergovernmental power politics have *descriptive* as well as *normative dimensions*:

- The “humanization of international law” since World War II,¹³² notably by the universal recognition and judicial protection of “inalienable” and “indi-

¹³⁰ See F. Weiss, Manifestly Illegal Import Restrictions and Non-Compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute, in *TRANSATLANTIC ECONOMIC DISPUTES. THE EU, THE UNITED STATES AND THE WTO* 121 (Ernst-Ulrich Petersmann & Mark Pollack eds., 2003).

¹³¹ See *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE* (Ernst-Ulrich Petersmann ed., Oxford University Press 2005) (discussing the “human rights approach” to international economic relations advocated by the UN High Commissioner for Human Rights, the EC proposals for an advisory inter-parliamentary WTO assembly, Pascal Lamy’s proposals for “cosmopolitics”, the admission of *amicus curiae* briefs in WTO dispute settlement proceedings, and other initiatives for improving the democratic legitimacy of the WTO system).

¹³² Cf. Theodore Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006).

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visible” human rights in national and international law¹³³ and the recognition of “community interests” in ever more international legal instruments, may justify contextual, *positive legal arguments* for citizen-oriented “constitutional interpretations” of international rules for the benefit of citizens, as illustrated by the jurisprudence of regional economic and human rights courts, investor-state tribunals, UN human rights bodies and citizen-oriented guarantees in the law of worldwide organizations (protection of core labor rights by the ILO, humanitarian interventions protected by the UN Security Council, etc).

- Yet, as constitutional protection of individual rights usually results from struggles of citizens rather than from initiatives by the rulers, calls for “multilevel constitutional restraints” on multilevel trade governance¹³⁴ involve also *normative arguments* for constitutional re-interpretations of international law (e.g. of intergovernmental EC rules) and for a constitutional reconstruction of intergovernmental organizations as a “realistic utopia.” Unless citizens challenge intergovernmental power politics and insist on constitutional safeguards of the international division of labor among citizens, governments prefer avoiding judicial accountability by treating citizens as mere objects of discretionary trade policies.

B. “Constitutional Justice” in International Economic Law Depends on the Self-Perception of National and International Courts

My publications on “constitutional functions” of intergovernmental guarantees of individual freedom, non-discrimination and rule of law as a potential “second line of constitutional entrenchment” for extending *domestic* constitutional guarantees of freedom, non-discrimination, and rule of law for the benefit of citizens across frontiers have focused on the mutually complementary functions of national and international guarantees of individual freedom and their common basis of legitimacy deriving from respect for human dignity and normative individualism.¹³⁵ Similar “correspondence arguments” justify also the increasing “unbundling” of state functions to protect “constitutional justice” at national and

¹³³ See SHIV R. S. BEDI, *THE DEVELOPMENT OF HUMAN RIGHTS LAW BY THE JUDGES OF THE INTERNATIONAL COURT OF JUSTICE* (Hart Publishing 2007) (discussing the protection and progressive development of human rights by the International Court of Justice).

¹³⁴ Cf. Ernst-Ulrich Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* 5, 57 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

¹³⁵ ERNST-ULRICH PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* (Westview Press 1991). From the premise of normative individualism, I have criticized communitarian justifications, see Bruno, *Simma, From Bilateralism to Community Interests in International Law*, *Receuil des Cours* 250 (1994-VI), 225 ff, of the notion of a “UN Constitution” if they were based on vertical hierarchy of norms, cf. U.N. Charter art. 103, and the “basic principles of a community among states,” as defined in U.N. Charter art. 2, as neither normatively justified nor descriptively desirable (e.g. in view of the state-centered, authoritarian value premises of UN law). The WTO rules for non-discriminatory conditions of competition among individuals in global markets justify constitutional approaches, provided the reality of “constitutional pluralism” (e.g. in the sense of co-existence of national and transnational constitutional systems without legal hierarchy) is respected.

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international levels.¹³⁶ By challenging governmental treaty interpretations from the point of view of constitutional citizen rights, regional economic and human rights courts and investor-state arbitral tribunals are increasingly defending citizen-oriented conceptions of “constitutional justice” in international law.¹³⁷ WTO dispute settlement panels, by contrast, have a long tradition of state-centered reasoning accommodating the “member-driven governance” in GATT and the WTO. The narrow interpretation of Article 31(3)(c) VCLT by the *EC-Biotech Panel*,¹³⁸ for example, accommodated the political insistence by powerful WTO Members (such as the United States) that multilateral treaties cannot serve as “relevant context” for interpreting WTO rules unless the treaties have been ratified by all 153 WTO Members. Yet, promoting the legal coherence of WTO rules by such legal formalism risks to entail unnecessary inconsistencies with the international legal system, even if the Panel mitigated its rigid interpretation by noting that “other treaties” could always be taken into account as factual evidence for the “ordinary meaning” of the terms used in WTO provisions.¹³⁹

The independence, impartiality, and due process guarantees of courts distinguish the judicial task of dispute settlement on the basis of the rule of law from the different objectives and procedures of majority politics and intergovernmental power politics (including producer-driven bargaining in GATT and the WTO). Like national judges, by offering complainants and defendants ‘their day in court’ and transparent procedures for adversarial arguments, international judges promote “public reason.”¹⁴⁰ “Justice”¹⁴¹ may also justify judicial correction of cases of injustice. The U.S. Supreme Court, for example, has been described as “the voice of the national conscience”¹⁴² and as the most independent and impartial guardian of the constitutional ‘checks and balances’ protecting U.S.

¹³⁶ See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton University Press 2004) (discussing the “disaggregated state,” and its functional “unbundling” of traditional state functions in a globally integrating world).

¹³⁷ Petersmann, *supra* note 6.

¹³⁸ Cf. Petersmann, *supra* note 30.

¹³⁹ Cf. also Koskeniemi, *supra* note 125, at 471-72 (arguing against the narrow interpretation of Article 31(3)(c) because it would “have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law. In practice, the result would be the isolation of multilateral agreements as ‘islands’ permitting no reference *inter se* in their application . . . This would seem contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers . . . A better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty.”

¹⁴⁰ RAWLS, *supra* note 3, at 231 (discussing the conception of supreme courts as “the exemplar of public reason” which can reduce problems resulting from “the fact of reasonable pluralism” by promoting an “overlapping consensus” on basic political and legal principles among citizens, notwithstanding their often different and incompatible worldviews).

¹⁴¹ RAWLS, *supra* note 1, at 3 (discussing “justice as fairness” and “first virtue of social institutions” See also RAINER FORST, *DAS RECHT AUF RECHTFERTIGUNG* (Suhrkamp Verlag KG 2007) (inferring from the Kantian idea of reason based on universal principles that individuals can reasonably claim moral and legal rights to participation in decision-making affecting them, as well as to receive a justification of restrictions of individual freedoms).

¹⁴² ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 27* (Harvard University Press 1968).

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citizens and their constitutional rights against potential “tyranny of majorities”¹⁴³ and governmental abuses of powers. The self-perception of international courts depends on their constitutive agreements, procedures and the substantive law to be applied by the judges concerned. In the economic area of mutually beneficial cooperation among citizens across national frontiers, there are strong arguments for interpreting international trade agreements no longer only from the Westphalian perspective as “international law among states,” but also as legal frameworks protecting producers, investors, traders, and consumers not only against abuses of *foreign governments*, but also of their own government. Independent judges are often better placed to endorse “constitutional interpretations” of citizen-oriented international economic law than governments intent on defending their own trade policy powers. The currently pending WTO disputes over U.S. complaints against Chinese restrictions of intellectual property rights,¹⁴⁴ private trading rights, distribution services, and individual access to independent courts¹⁴⁵ illustrate that WTO rules are often designed to protect, directly or indirectly, individual rights of private economic actors (such as the trading rights, property rights, and individual judicial remedies protected by the WTO Protocol of the Accession of China).

C. Constitutional Obligations of Courts to Protect Constitutional Justice

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” (*suum cuique tribuere*). Yet, as laws tend to be incomplete and subject to change, impartial justice may justify also ‘reformative interpretations’ of legal rules in response to changing social conceptions of justice. This is particularly true following the universal recognition of inalienable human rights, which call for a ‘constitutional paradigm change’ in favor of citizen-oriented interpretations of power-oriented international law rules. Since legal antiquity, judges invoke also 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 U.S. Constitution), often in response to claims for ‘justice.’¹⁴⁶

¹⁴³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Bantam Books, 2004) (1835).

¹⁴⁴ *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362 (Apr. 16, 2007).

¹⁴⁵ *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363 (Apr. 16, 2007).

¹⁴⁶ See CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (Oxford University Press 2007) (discussing inherent powers of courts).

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Article III, sect. 2 of the U.S. 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.”¹⁴⁷ Based on this Anglo-Saxon distinction between statute law and equity limiting the permissible content of governmental regulations, courts and judge-made law have often assumed a crucial role in the development of ‘constitutional justice’.¹⁴⁸ 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.¹⁴⁹ The constitutional guarantees of courts and of separation of powers in ever more countries¹⁵⁰ provide for comprehensive legal safeguards of impartiality, integrity, institutional, and personal independence of judges.¹⁵¹ Regional and worldwide human rights conventions recognize human rights of access “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” for the “determination of civil rights and obligations or of any criminal charge.”¹⁵² An ever larger number of other international treaties continue to extend such individual rights to fair hearings, access to courts, and effective legal remedies to other fields of law, such as international economic, social, and environmental law. What does the customary law obligation of courts—“that disputes concerning treaties, like other international disputes, should be settled . . . in conformity with principles of justice and international law”¹⁵³—entail for the settlement of international WTO disputes over the rights and interests of private economic actors? Does the “dispute settlement system of the WTO”¹⁵⁴ protect only the rights and obligations of the rulers or also those of their citizens relying on rule of law in international trade?

¹⁴⁷ U.S. CONST. art. III, § 2.

¹⁴⁸ Cf. T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (Oxford University Press 2001).

¹⁴⁹ Cf. T.M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (Oxford University Press 1995) (referring to the examples provided).

¹⁵⁰ Cf. CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (Oxford University Press 2002).

¹⁵¹ Cf. *JUDICIAL INTEGRITY* (Andreas Sajó, ed., Brill Academic Publishers 2004).

¹⁵² Cf. Article 6 ECHR and similar guarantees in other regional human rights conventions (e.g., American Convention on Human Rights Art. 8); UN human rights conventions (e.g., International Covenant on Civil and Political Rights Art. 14); and other UN human rights instruments (e.g., Universal Declaration of Human Rights Art.10), which have given rise to a comprehensive case-law clarifying the rights of access to courts and related guarantees of due process of law (e.g., justice delayed may be justice denied); cf. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 113 (Oxford University Press 1999).

¹⁵³ Vienna Convention, *supra* note 4, pmb1.

¹⁵⁴ DSU, *supra* note 21, art. 3.

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D. Constitutional Legitimacy of Multilevel Judicial Protection of Constitutional Rights and of “Constitutional Justice”

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.”¹⁵⁵ In modern, multilevel governance systems with their ever more national and international “checks and balances,” courts remain the most impartial and independent ‘forum of principle.’ For example, fair and public judicial procedures entitle all parties involved to present and challenge all relevant arguments; judicial decisions are often justified more comprehensively and more coherently than political and administrative decisions. As all laws and international treaties use vague terms and incomplete rules, the judicial function goes inevitably beyond being merely “*la bouche qui prononce les mots de la loi*” (Montesquieu). By choosing among alternative interpretations of rules and ‘filling gaps’ in the name of justice, judicial decisions interpret, progressively develop, and complement legislative rules and intergovernmental treaties. Empirical political science analyses of the global rise of judicial power and of “judicial governance” confirm the political impact of judicial interpretations on the development of national and international law and policies.¹⁵⁶ Both positivist-legal theories as well as moral-prescriptive theories of adjudication justify judicial clarification and progressive development of indeterminate legal rules on the ground that independent courts are the most principled guardians of constitutional rights and of “deliberative, constitutionally limited democracy,” of which the public reasoning of courts is an important part.¹⁵⁷ For example, the judicial protection of equal treatment for children of different color by the U.S. Supreme Court in the celebrated case of *Brown v. Board of Education* in 1954—notwithstanding earlier denials by the law-maker and by other courts of such a judicial reading of the U.S. Constitution’s safeguards of “equal protection of the laws”¹⁵⁸—was democratically supported by the other branches of government and is today celebrated as a crucial

¹⁵⁵ THE FEDERALIST No. 78 (Alexander Hamilton) (concerning the Judiciary).

¹⁵⁶ Cf. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (Oxford University Press 2000) (discussing 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), with ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (Oxford University Press 2004) (analyzing the judicial “constructing of a supra-national constitution” as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities). The former EC Court Judge, P. Pescatore, confirmed that, when deciding the case *van Gend & Loos*, the judges had a certain idea of Europe, and that these judicial ideas—“and not arguments based on legal technicalities of the matter”—had been decisive. P. Pescatore, *The Doctrine of Direct Effect*, 8 Eur. L. Rev. 155, 157 (1983). See TOBIAS MÄHNER, DER EUROPÄISCHE GERICHTSHOF ALS GERICHT (Duncker & Humblot 2005), for a discussion of the frequent criticism of such ‘judicial law-making’. From the point of view of ‘deliberative democracy’, however, the ECJ’s case law has been approved by EC member states, parliaments and citizens.

¹⁵⁷ See CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW (Cambridge University Press 2007) (justifying judicial review as being essential for protecting and promoting deliberative democracy).

¹⁵⁸ U.S. CONST. ammend. XIV.

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contribution to protecting more effectively the goals of the U.S. Constitution and human rights.

In its Advisory Opinion on Namibia, the International Court of Justice 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: “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹⁵⁹ International human rights courts (such as the ECtHR) and economic courts (such as the ECJ) have 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). As in domestic legal systems, inter-governmental and judicial rule-making are interrelated also in international relations. Judicial interpretation, clarification, and application of international law rules, like judicial decisions on particular disputes, inevitably influence the dynamic evolution and clarification of the *opinio juris* voiced by governments, judges, parliaments, citizens, and non-governmental organizations with regard to the progressive development of international rules. The ever more specific legal obligations accepted by all states to protect human rights entail that citizens (as the ‘democratic owners’ of international law and institutions) and judges (as the most independent and impartial guardians of ‘principles of justice’ underlying international law) can assert no less democratic legitimacy for defining and protecting human rights than governments that have, for centuries, disregarded rights-based struggles for human rights in international relations and continue to prefer treating citizens as mere objects of international law in most UN institutions. From the perspective of citizens and ‘deliberative democracies’, active judicial protection of constitutional citizen rights is essential for ‘constitutionalizing,’ ‘democratizing,’ and transforming international law into a constitutional order that protects general citizen interests and human rights more effectively.

E. Multilevel Constitutionalism as a Necessary Framework for “Global Administrative Law”

This contribution has argued that constitutional discourse may not only legitimize citizen-oriented interpretations of state-centered international law rules, the delegated powers of international judges, and judicial interpretations protecting and “balancing” constitutional rights; it can also strengthen “public reason” in international law and help clarifying the constitutional foundations of fragmented, state-centered international treaty regimes (such as popular sovereignty and human rights no less than “state sovereignty”). Constitutional discourse also reminds us that justifying, limiting, separating, and constitutionalizing power through horizontal and vertical “checks and balances” and “mixed constitutions”

¹⁵⁹ Advisory Opinion on Namibia, 1971 I.C.J. at 53 (June 21).

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(combining monarchical, oligarchic and democratic elements) continues to be a perennial challenge since the ancient Greek and Italian city republics.

The *genius loci* of the European University Institute at Florence is a reminder of the longstanding concerns about inadequate constitutional constraints on abuses of foreign policy powers. Following the overthrow of the third and last republic of Florence in 1530 by the Medici, Donato Gianotti (who had served as legal advisor in the third republic in the same position which Niccolò Machiavelli had occupied in the second republic of Florence from 1494-1512) elaborated an ideal constitution for a future Florentine republic in his exile at Rome.¹⁶⁰ Compared to Montesquieu's much later distinction (in his *De l'esprit des lois*, 1748) between legislative, executive, and judicial powers and Montesquieu's misleading definition of foreign policy as an integral part of the executive power limited to the implementation of international law, Gianotti's *Repubblica Fiorentina* (1534) emphasized the need for subjecting foreign policy powers to specific constitutional restraints in order to avoid a repetition of Florence's historical experience that the survival of the republic was put at risk by abuses of foreign policy powers (like the Medici's alliance with the Spanish emperor of the Holy Roman Empire which sealed defeat of the Florentine republic).¹⁶¹ Regional integration law confirms that multilevel governance for the collective supply of international public goods (such as the common market and monetary union in Europe, NAFTA, the Andean common market) requires multilevel constitutional and judicial safeguards, with due respect for the reality of "constitutional pluralism" and reasonable disagreement (e.g. on different kinds of multilevel constitutionalism in the EC, EEA, and ECHR, the North-American preference for constitutional nationalism, and the much more limited regional agreements outside Europe). The more state constitutions for the collective supply of national public goods turn out to be "partial constitutions" that cannot unilaterally protect international public goods demanded by ever more citizens, the more international lawyers must become open for multilevel constitutionalism in their analyses of how citizens and their constitutional rights can be protected more effectively in a global community of states and citizens.

The "constitutional approach" advocated in this contribution illustrates that many controversies over private and administrative law dimensions of international economic rules, and over modern conceptions of public international law rules (e.g. state responsibility for protection of human rights, inherent powers of international courts, and applicable law in investor-state arbitration), derive from disagreement over the constitutional foundations of international law (e.g. as inter-state rules or rights-based self-government of citizens). For instance, legal determinations of rights and obligations of private foreign investors, corporate accountability, *forum non conveniens* under the U.S. Alien Tort Claims Act, ad-

¹⁶⁰ See DONATO GIANNOTTI, *REPUBBLICA FIORENTINA* (G.Silvano ed., Droz 1990) (1534). Afraid of being poisoned by the Medici, Gianotti did not dare publishing the few handwritten copies of this *Repubblica Fiorentina* during his lifetime; see G. Silvano, Introduction.

¹⁶¹ See A. RIKLIN, *MACHTTEILUNG, GESCHICHTE DER MISCHVERFASSUNG* 416 (*Schweizerischen Akademie der Geistes* 2006) (discussing these and other deficits of modern theories of separation of powers).

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ministrative antidumping or government procurement decisions may be influenced by the constitutional law governing the respective jurisdiction. Whereas “global administrative law” approaches remain state-centered, constitutional approaches distinguish state and citizen-oriented rules of international law. The human rights obligations of governments call for interpreting national and international law with due regard to their common “constitutional principles” and justify “constitutional reasoning” and “constitutional justice” administered by independent courts in transparent procedures protecting the interests of all adversely affected citizens.

The power-oriented “basic structures” of the world economy will continue to shape many areas of international economic law (e.g. the market access commitments under WTO law, the voting rules and assistance of the IMF and the World Bank). As the international allocation and distribution of scarce resources is morally arbitrary, questions of constitutional and distributive justice will remain contested in international relations. Judicial clarification of international economic rules must respect the legitimate diversity of human rights and democratic conceptions. As the most independent and impartial institutions in international law, judges must promote public reason in the clarification of incomplete international agreements.¹⁶² Taking reasonable disagreements and inevitable conflicts seriously requires a stronger commitment by national and international courts to “constitutional justice” as a precondition for rules-based settlement of legal conflicts. Just as founding European economic law “on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”¹⁶³ has contributed to sixty years of democratic self-government and peace in Europe, constitutional interpretations of WTO rules in conformity with the universal human rights obligations of WTO Members can strengthen rule of law not only among governments, but also for the benefit of the individual rights and consumer welfare of their citizens.

¹⁶² For example, on a “fair comparison between the export price and the normal value” in antidumping calculations pursuant to Article 2 of the WTO Antidumping Agreement, “fair and equitable treatment” of foreign investors under Bilateral Investment Treaties. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

¹⁶³ Charter of Fundamental Rights, 2000 O.J. (L 364) 6.