

Proposals for Strengthening the UN Dispute Settlement System

Lessons from International Economic Law

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Introduction: Constitutional Democracy, the Right to Effective Judicial Remedies and the Need for “Constitutionalizing” UN Law

In his “philosophical sketch” on “Perpetual Peace” (1795), *Immanuel Kant* explained why classical international law, based on state sovereignty and self-help, cannot secure freedom and equal rights of citizens as well as of states. In order to limit abuses of government powers and protect “democratic peace” at home and abroad, national constitutional guarantees of individual rights and of representative governments must be supplemented by international constitutional rules based on a “federation of free states” and on “cosmopolitan” integration law for peaceful cooperation among citizens across frontiers. *Kant* criticized classical

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international law doctrine ("Grotius, Pufendorf, Vattel and the rest — sorry comforters as they are") for justifying military aggression and not effectively protecting human rights. According to *Kant*, a law-governed civil society and "perpetual peace" depend on the progressive extension of national and international constitutional guarantees of equal freedoms of citizens as well as of states; *Kant* recognized international economic cooperation as being of crucial importance for the necessary constitutionalization of international law and cosmopolitan self-emancipation, "for the spirit of commerce sooner or later takes hold of every people, and it cannot exist side by side with war."²

As predicted by *Kant*, individual freedom and rule-of-law are today more effectively protected in international economic law and in regional integration law among constitutional democracies than in most other areas of international law. The right to effective judicial protection has become a general principle of law not only within constitutional democracies but also in the regional integration law of the European Community (EC) and the European Convention on Human Rights (e.g. article 6 ECHR).³ Since legal security and judicial protection are of fundamental importance for economic transactions and investments, worldwide international economic law likewise provides for comprehensive guarantees of judicial review at the national and international level. The UN-Charter and many areas of UN law (including the 1966 UN human rights covenants), by contrast, do not provide for compulsory adjudication of international disputes.

The UN legal and dispute settlement system continues to be based on state sovereignty as traditionally understood in the Westphalian system of classical international law, *i.e.* based on effective government control over a specific territory and population rather than on human rights and democratic government. The power-oriented structure of UN law is reflected in the limitation of UN membership to states, regardless of their respect for human rights; in the dispute settlement by "peaceful means of their own choice" (Article 33 UN-Charter), including the right to unilateral reprisals; in the admission only of states to the contentious jurisdiction of the ICJ (cf. Article 34 ICJ Statute); in the dependence of the ICJ's jurisdiction on mutual agreement by the parties; or in the acceptance of the ICJ's compulsory jurisdiction (cf. Article 36 para. 2 ICJ Statute) by 62 states only (including only one

² H. Reiss (ed.), *Kant, Political Writings*, 1991, 103, 114.

³ Cf. the references to the case-law in: H.G. Schermers, D. Waelbroeck, *Judicial Protection in the European Communities*, 5th edition, 1992, 42.

permanent member of the Security Council), and this subject to a multitude of often far-reaching reservations. The mere 60 judgments (often only on procedural issues such as jurisdiction and admissibility) and 21 advisory opinions delivered by the ICJ during its first 50 years (1946–1996), and the defiant reactions to some of these judgments (such as the unilateral withdrawal of the ICJ's compulsory jurisdiction e.g. in 1974 by France in response to the *Nuclear Tests Case*, and in 1984 by the United States in response to the *Nicaragua Case*), are widely seen as evidence that the ICJ “remains a minor actor in international relations” dealing mainly with “rather technical disputes concerning boundaries” and treaty interpretations, yet “marginal to most of the structural issues of international relations” (such as human rights, “democratic peace”, international organizations, the global economy, protection of the environment).⁴

How can the UN legal and dispute settlement system be made more effective for the protection of human rights, democratic peace and sustainable development? Does the worldwide recognition of human rights (e.g. in the 1993 UN World Conference on Human Rights) require a “democratic re-interpretation” of UN law in favour of human rights as constitutive elements of popular sovereignty and democratic peace? If, as claimed by the “democratic peace literature”,⁵ democracies do not fight each other and “democratic peace” depends on the spread of democracy and judicial dispute settlement mechanisms, how can compulsory jurisdiction and international adjudication be extended beyond the areas of international economic law and regional integration law? Why have UN member states and the UN Security Council not complied with the requirement of the UN-Charter “that legal disputes should as a general rule be referred by the parties to the International Court of Justice” (Article 36 para. 3 UN-Charter)? Can the UN protect the rule of law without limiting the “free choice of dispute settlement means” by rights to compulsory international adjudication? What reforms are needed so as to enable the ICJ to decide more than 2–3 cases per year and exercise more effectively its statutory task as the “principal judicial

⁴ The quotations are from: D.P. Forsythe, “The International Court of Justice at Fifty”, in: A.S. Muller, D. Raic, J.M. Thuranszky (eds), *The International Court of Justice — Its Future Role after Fifty Years*, 1997, 385, 386, 402.

⁵ Cf. e.g. B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, 1993; D.S. Sullivan, “Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy”, *Geo.L.J.* 81 (1993), 2369 et seq.

organ of the United Nations" (Article 92 UN-Charter)? How can the statutory limitations that "only states may be parties in cases before the Court" be overcome (Article 34 para. 1 ICJ Statute)? Can the right of UN specialized agencies to request Advisory Opinions from the ICJ serve as a substitute for the lack of access by international organizations to contentious proceedings before the ICJ?

Discussions among international lawyers on the UN dispute settlement system and the ICJ⁶ often ignore the lessons to be learnt from worldwide compulsory adjudication in international economic law. They also recommend amendments of the UN-Charter and the ICJ Statute (e.g. in favour of admitting direct access of individuals and international organizations to the ICJ) without regard to the problem that the large number of non-democratic UN Member States make such amendments pursuant to Arts. 108 or 109 of the UN-Charter politically unlikely. Can the political obstacles for formal amendments of the UN-Charter and the ICJ Statute be circumvented by optional protocols providing for access of individuals and international organizations to the ICJ? What lessons can be learnt in this respect from the acceptance of compulsory adjudication in worldwide and regional economic law? Can the judicial interpretations, by the European Court of Justice (ECJ) and the European Court of Human Rights, of the EC Treaty and the ECHR as "constitutional charters" with constitutional guarantees of fundamental rights and rule-of-law serve as models for "constitutional interpretations" of the UN-Charter, e.g. by the ICJ?⁷ Or does the lack of ECJ jurisdiction for the "common foreign and security policy" of the European Union (EU) show that the interstate "Westphalian system" of international law cannot be "constitutionalized" by means of judicial interpretations?

⁶ Cf. e.g. C. Peck, R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice*, 1997; V. Lowe, M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, 1996.

⁷ Cf. T.M. Franck, "The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?", *AJIL* 86 (1992), 519 et seq., who compares the ICJ's *Lockerbie* Case with the United States Supreme Court's *Marbury v. Madison* (1803): in both cases, the courts told powerful actors what they wanted to hear about a current dispute, but asserted the prerogative of the courts to review the legality of the actions by the government actors.

I. Need for a Theory of Effective International Adjudication

The numerous international dispute settlement treaties concluded since the 1899 Peace Conference at The Hague tend to distinguish ten different international dispute settlement methods: (1) negotiations; (2) good offices; (3) mediation; (4) international commissions of inquiry; (5) conciliation; (6) arbitration; (7) judicial settlement by permanent courts; (8) “resort to regional agencies or arrangements”, or (9) “other peaceful means of their own choice” (Article 33 UN-Charter); and (10) dispute settlement by the UN Security Council (e.g. pursuant to Arts 34–38 UN-Charter) or by other UN organs or other international organizations. Many international treaties, including the UN-Charter, view these political and legal procedures as complementary options and define the conditions for their use. But there exists no comprehensive theory so far on how recourse to the legal methods of international dispute settlement, especially compulsory arbitration and court proceedings, can be strengthened in international relations so as to reduce recourse to alternative power-oriented dispute settlement methods. Such a theory would have to answer, *inter alia*, the following legal and political questions:

1. Does the principle, in Article 33 of the UN-Charter, of free choice among political and legal methods of dispute settlement operate as an incentive for power-oriented dispute settlement methods, and for non-recognition of compulsory jurisdiction by the ICJ, because the more powerful country may be less interested in settling a dispute than in having its view prevail and, hence, may find power politics more advantageous for itself than third-party adjudication?

2. Why has it been possible — for instance in WTO law, in the 1982 Law of the Sea Convention, as well as in a number of regional integration agreements (including the EC Treaty, the ECHR and the NAFTA Treaty) — to prompt all contracting parties to accept compulsory jurisdiction for judicial dispute settlement procedures? Under what conditions do states accept compulsory jurisdiction and adjudication in non-economic areas of international cooperation? Why has it so far not been possible to extend the jurisdiction of the ECJ to the second pillar of the European Union concerning the common foreign and security policy of the European Union? Why have European Union member states accepted, in the 1997 Amsterdam Treaty (e.g. article K.7), to extend the ECJ jurisdiction to certain fields of police and judicial cooperation? Why have fewer than half of the member states of the Organization for

Security and Cooperation in Europe (OSCE) accepted the jurisdiction of the OSCE arbitral tribunal?

3. Why has it been possible in some international agreements — like the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, which created the International Centre for the Settlement of Investment Disputes (ICSID), the Law of the Sea Convention, the WTO Agreement on Preshipment Inspection, the EC Treaty, the ECHR and NAFTA — to grant private citizens direct access to international arbitration or court procedures? Why do modern Bilateral Investment Treaties (e.g. of the United States) provide for the submission of disputes to ICSID investor-state arbitration, or to inter-state arbitration, rather than to the ICJ (as it was provided for under the old Friendship, Commerce and Navigation Treaties of the United States)? Is private access to non-judicial international complaints procedures — for instance in the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, or the UN Committee against Torture — an effective substitute for private access to international adjudication? Do “mixed” dispute settlement mechanisms between private persons and foreign states contribute to avoiding intergovernmental disputes among states? Under what conditions can such a “privatization” of international disputes be extended to other fields of international law?

4. How can effective supranational adjudication be promoted? How could the ECJ and the European Court of Human Rights, even though both tribunals were created through classical international treaties among states, evolve into supranational courts for both governmental and private litigants, whose judgments are almost as effective as national court rulings?⁸ Can the contribution of these courts to the emergence of a European “community law” serve as a model for the transformation of the power-oriented, state-centered Westphalian system of international law into worldwide “community law”? What strategies are available for “constitutionalizing international law and foreign policy”?⁹

5. What lessons are to be drawn from the fact that national courts, international institutions and private citizens have played such an important role in the European integration process? How can stronger co-

⁸ Cf. L.R. Helfer, A.M. Slaughter, “Toward a Theory of Effective Supranational Adjudication”, *Yale L.J.* 107 (1997), 273.

⁹ Cf. E.U. Petersmann, “How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?”, *Mich.J.Int'l L.* 1999 forthcoming.

operation among national and international courts in the judicial enforcement of international law be promoted? How can national courts and the ECJ be induced to protect the rule of international law more effectively, rather than exercise judicial self-restraint *vis-à-vis* foreign policy measures and violations of international law? How can the "conceptual chaos that surrounds judicial treatment of cases with foreign affairs implications",¹⁰ such as judicial "political question doctrines", "act-of-state doctrines", "non-self-executing treaty doctrines", or judicial deference to "later in time legislation" inconsistent with international law be overcome? Why are these doctrines so often invoked by domestic courts as a justification for the non-application of international rules that were ratified by national parliaments so as to protect individual freedom and non-discrimination in transnational relations?

The following contribution proceeds from the *working hypothesis* that the success of rule-oriented dispute settlement procedures depends essentially on three factors:

First, on the *applicable substantive rules*: For instance, private access to international courts has been accepted in areas such as transaction law and international guarantees of freedom and non-discrimination (e.g. in human rights law, international economic law, regional integration law among constitutional democracies). By contrast, international disputes e.g. on territorial and maritime boundaries have remained the dominant kind of inter-state disputes in the ICJ. "Result-oriented rules" (e.g. on redistributive "social rights"), and provisions authorizing discretionary governmental "safeguard measures", tend to be less precise and less "justiciable" than conduct-oriented "prohibitive rules" (e.g. on freedom and non-discrimination).

Second, on the availability of *legal dispute settlement procedures* which induce the parties to the dispute to appear before a tribunal and to comply with the tribunal's procedures and decisions: Rule-oriented procedures and third-party adjudication tend to maximize the effectiveness and social benefits of agreed rules, without precluding recourse to political dispute settlement methods and compromise solutions agreed among the parties concerned. The worldwide *access to justice* movement is a necessary consequence of the spread of the "rule of law state" aimed at protecting individual freedom and equal citizen rights under the rule of law at home and abroad. Yet, as emphasized by the German Constitutional Court, "in Europe the judge was never merely *'la bouche qui*

¹⁰ Cf. T.M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, 1992, 5.

prononce les paroles de la loi’.¹¹ Contrary to the Montesquieuan myth of value-free judges operating as the “mouth of the law”, the judicial process involves choices among alternative interpretations of general rules so as to decide disputes and enhance legal security; the inevitably law-creating elements of the judicial process require constitutional legitimation and guarantees of due process in order to be acceptable.

Third, on the *legal limitation of recourse to alternative power-oriented dispute settlement methods*: As predicted in Kant’s philosophical sketch on “Perpetual Peace” (1795) more than 200 years ago, the international law of “federations of free states” (e.g. EC law), and the “cosmopolitan” transnational integration law for non-discriminatory cooperation among citizens across frontiers (e.g. WTO law), have progressively limited the power-oriented dispute settlement methods of the classical *international law of coexistence* (e.g. self-help and unilateral reprisals) by guaranteeing individual access to courts and compulsory international adjudication. While political dispute settlement methods offer important preliminary means for negotiating agreed settlements of international disputes, the option of unilateral recourse to mandatory adjudication is a precondition for the “rule of law” in national as well as in international law.

The remainder of this article analyzes these three conditions of the effectiveness of international adjudication, with particular focus on the pertinent experience in international economic law. Part 2 examines why compulsory international adjudication is more widely accepted in international economic law than in UN law and in other non-economic areas of international law. Part 3 draws lessons from international economic law for strengthening international dispute settlement procedures in non-economic areas. Part 4 discusses political strategies for “constitutionalizing” UN law and the ICJ. For, the needed strengthening of the UN dispute settlement system is not only a question of improving dispute settlement *procedures*; rule of law and international third-party adjudication also depend on *substantive* constitutional reforms and can prevail only if freedom and non-discrimination are constitutionally protected not only among states but also among their citizens.

¹¹ *Kloppenborg Case, Common Market Law Reports* 53 (1988) 1 et seq., (19).

II. Why Is International Adjudication more Widely Accepted in International Economic Law than in Other Areas of International Law?

1. Decreasing Role of the ICJ for the Settlement of International Economic Disputes

International economic law is essentially based on treaties on the reciprocal liberalization of market access barriers. Most international economic treaties include precise and detailed rules so as to maximize legal security for private investors, producers and traders; they usually also provide for their own specific dispute settlement mechanisms so as to ensure that the specific treaty rules are interpreted and applied by experts in economic law and policy.¹² Even though the ICJ, and to a lesser degree also its predecessor: the PCIJ, were expected to become the "principal judicial organ" (Article 92 UN-Charter) for the settlement of disputes among states, these hopes, unfortunately, never materialized. Fewer than a third of the 185 UN Member States have accepted the compulsory jurisdiction of the ICJ under Article 36 of the ICJ Statute, often only subject to far-reaching reservations. The number of compromissory clauses in international treaties providing for the submission of disputes to the ICJ remains likewise comparatively small. And the existing clauses have been used only rarely for the settlement of international economic disputes.

The 1992 analysis by Professor Jaenicke of international trade conflicts before the PCIJ and the ICJ noted:

"the remarkable fact that no such conflict has ever been submitted to the Permanent Court of International Justice or the International Court of Justice. Both Courts have never had the opportunity to pronounce themselves on such important legal principles as most-favoured-nation treatment and non-discrimination. The reluctance of States to submit a conflict of this kind to the Court is also apparent from the limited number of commercial treaties which contain a

¹² For a comparative survey see e.g.: E.U. Petersmann, G. Jaenicke (eds), *Adjudication of International Trade Dispute in International and National Economic Law*, 1992.

compromissory clause providing for the jurisdiction of the Court in respect to trade conflicts proper.”¹³

Among the motives behind this reluctance of states to submit trade disputes to the ICJ, Jaenicke identified the unwillingness of states to submit their economic policy decisions to third-party judgments. Yet, this interpretation does not explain why, in numerous postwar international economic treaties, governments have accepted to limit their economic policy discretion; and why they accepted international judicial review of compliance with such treaty commitments by specialized dispute settlement bodies, such as GATT and WTO panels, the WTO Appellate Body, arbitration procedures in the WTO, the ECJ and EC Court of First Instance, the EFTA Court of Justice, the NAFTA panels, arbitration under the rules of the World Bank's ICSID, or the International Law of the Sea Tribunal and arbitration mechanisms provided for in the Law of the Sea Convention. Most of these specialized dispute settlement mechanisms are being used with increasing frequency. As some of these treaties (e.g. article 219 EC Treaty; article 23 WTO Dispute Settlement Understanding) prescribe exclusive recourse to these specific procedures for the settlement of disputes over the interpretation and application of the respective treaties, it seems unlikely that disputes over these international treaties will be brought to the ICJ.

As regards foreign investment disputes relating to the treatment of foreigners and corporations doing business in other states, Jaenicke noted a greater preparedness of states to accept international adjudication by the ICJ, possibly because an unfavourable judgment was likely to have less far-reaching policy implications and to be limited to the specific case. The 1926 and 1928 judgments of the PCIJ in the *Chorzow Factory Case*, the 1925 and 1927 judgments in the *Mavrommatis Concession Cases*, the 1934 judgment in the *Oscar Chinn Case*, the 1970 judgment by the ICJ in the *Barcelona Traction Case*, and the 1989 judgment in the *ELSI Case* are examples where the PCIJ and the ICJ decided on claims of alleged violations of international law rules on the treatment of aliens and the protection of foreign-owned property. A more recent analysis by Professor Wellens concludes that the ICJ has not hesitated in past cases to take into account economic dimensions of its judicial reasoning (e.g. fisheries, mineral resources and navigation as criteria for maritime delimitation agreements); withholding interna-

¹³ G. Jaenicke, “International Trade Conflicts before the Permanent Court of International Justice and the International Court of Justice”, in: Petersmann, Jaenicke, see note 12, 43 et seq., (44).

tional economic disputes from the ICJ would therefore be “totally unjustified”.¹⁴ Yet, even though many states have included disputes of an economic nature in their acceptance of the ICJ’s jurisdiction, it seems doubtful whether the ICJ can assume a more active role in the continuing trend towards judicialization of dispute settlement methods in international economic law. For instance:

- Countries continue to show a clear preference for submitting disputes over the interpretation and application of multilateral economic treaties to specialized international tribunals (e.g. the Law of the Sea Tribunal, the WTO Appellate Body) and other dispute settlement mechanisms (e.g. GATT panels, the WTO Dispute Settlement Body, the Executive Directors or Board of Governors of the World Bank, the IMF’s “Committee of Interpretation”) of the contracting parties concerned rather than to the ICJ. The possibility, provided for in the statutes of many UN Specialized Agencies (such as the ILO and WIPO), of submitting disputes to the ICJ has hardly ever been used in the field of economic law.
- Whereas bilateral Friendship, Commerce and Navigation treaties (e.g. of the United States) used to include compromissory clauses providing for the settlement of disputes by the ICJ, the modern Bilateral Investment Treaties tend to provide for investor-state arbitration and inter-state arbitration rather than for ICJ jurisdiction.
- The state-centred and far too lengthy procedures of the ICJ, its universal composition (including judges from non-democracies), the ICJ’s too limited jurisdiction *ratione personae*, and the so far limited attention paid to human rights in past jurisprudence of the ICJ (e.g. the *Nicaragua Case*),¹⁵ are perceived as disincentives by industries

¹⁴ K. Wellens, *Economic Conflicts and Disputes Before the World Court (1922–1995)*, 1996, 5.

¹⁵ In the *Nicaragua Case*, the Court rejected the US claim “that Nicaragua actually undertook a commitment to organize free elections”, notwithstanding Nicaragua’s membership in the UN Covenant on Civil and Political Rights and in the American Convention on Human Rights, and noted in respect of the US argument that Nicaragua had failed to observe its treaty commitments to respect human rights: “where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves” (ICJ Reports 1986, 131–134). These findings are difficult to reconcile with the recognition by the ICJ (e.g. in the *South West Africa Cases*) that human rights give rise to international obligations *erga omnes*, cf. S.M. Schwebel, “The treatment of human rights and of aliens in the International Court of Justice”, in: V.

interested in speedy judicial protection of private rights and non-discriminatory market access.

2. Enforcing WTO Guarantees of Freedom, Non-Discrimination and Rule of Law: Compulsory Jurisdiction and Appellate Review at the International and National Level

The dispute settlement system of the WTO is unique in respect of its worldwide compulsory jurisdiction with appellate review for disputes over international trade in goods, services, trade-related investments and intellectual property rights. Like the preceding dispute settlement system under GATT 1947, the WTO dispute settlement system is more frequently used for the settlement of disputes among states than any other multilateral system. Notwithstanding certain transitional WTO provisions which limit the right to submit certain disputes (e.g. over anti-dumping measures and intellectual property rights) during the initial years after the entry into force of the WTO Agreement on 1 January 1995, there were already more than 150 invocations of the WTO Dispute Settlement Understanding (DSU) up to the end of 1998 — i.e. more contentious proceedings than were submitted to the PCIJ and the ICJ since 1922 altogether. What are the reasons for this frequent recourse to the WTO dispute settlement system?¹⁶ Should WTO law follow the example of European integration law and progressively extend its judicial remedies to the protection of individual rights (as it has already been done with respect to protection of intellectual property rights and investment rights in WTO law)?

rights and of aliens in the International Court of Justice”, in: V. Lowe, M. Fitzmaurice, see note 6, 327 et seq., who rightly asks: “if fundamental rights do complement obligations that exist *erga omnes*, and if those rights indeed are of fundamental importance, should their pursuance on the international plane be so limited by the traditional rules of diplomatic protection?”, at 338.

¹⁶ For a detailed analysis of the WTO dispute settlement system see: E.U. Petersmann, *The GATT/WTO Dispute Settlement System*, 1997; E.U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997.

a) Compulsory WTO Jurisdiction for Judicial and Appellate Review of WTO Law

The DSU is an integral part of WTO law binding on all members. It provides for compulsory and exclusive jurisdiction of the Dispute Settlement Body (DSB) “to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements” (article 2 para. 1). When WTO members seek redress of a violation of WTO law, “they shall have recourse to, and abide by, the rules and procedures of this Understanding” without recourse to unilateral determinations of violations or unilateral reprisals (article 23). Article 3 para. 2 emphasizes the rule-oriented function of the DSU “to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”. Dispute settlement panels are established automatically at the request of the complaining member (article 6). The risk of unconvincing panel reports is limited by the right to appellate review within very short time limits. Panel and Appellate Body reports are adopted automatically (cf. article 20-rejection is possible only by “negative consensus”). Article 21 on multilateral surveillance and implementation of dispute settlement rulings also provides for the increasingly used possibility of arbitration awards within 90 days on the “reasonable period of time” for implementation of dispute settlement rulings. Similarly, and again at the unilateral request of the complaining country, the WTO consistency of implementing measures can be reviewed by the original panel within 90 days.

b) Primacy of WTO Law vis-à-vis Alternative Dispute Settlement Methods

Apart from the arbitration-like panel procedures and the court-like appellate review by the standing Appellate Body, the DSU offers all the other political and legal methods for the peaceful settlement of disputes set out in Article 33 of the UN-Charter, such as bilateral and multilateral consultations (article 4), good offices (arts 5, 24), conciliation (arts 5, 24), mediation (arts 5, 24), enquiries (e.g. by “expert review groups” pursuant to Annex 4 of the DSU) and international arbitration (article 25). But the DSU gives clear priority to the primacy of the rule of law by requiring that “(A)all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agree-

ments, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements” (article 3 para. 5). This legal primacy of WTO law greatly enhances legal security and predictability. It seems largely due to the “dispute prevention function” of such requirements of rule of law and of compulsory jurisdiction for judicial review, that more than 20 % of WTO dispute settlement proceedings are settled “out of court” without a DSB ruling. While the UN Security Council has rarely complied with its obligation to “take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice” (Article 36 para. 3 UN-Charter), the WTO Appellate Body has effectively become the “principal judicial organ” of the WTO. Appellate Body reports refer regularly to general international law principles as applied in the case law of the ICJ; such “cooperation among international courts” and “cross-fertilization” of legal systems enhance the legitimacy, consistency and political acceptability of WTO dispute settlement rulings.

c) Integration of International and Domestic Dispute Settlement Mechanisms

Article XVI para. 4 of the WTO Agreement, and numerous specific WTO rules, require each member to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” Periodic multilateral surveillance and detailed review of the domestic implementing legislation of each WTO member are major activities of the various WTO Councils and Committees and serve important “conflict prevention” functions. Nonetheless, many GATT and WTO dispute settlement proceedings were directed against domestic laws, and not only against individual administrative acts or court decisions.

GATT and WTO disputes are often initiated by private traders and investors which, under their respective domestic laws — such as the 1994 Trade Barriers Regulation of the EC and Section 301 of the US Trade Act — are entitled to request their government to challenge illegal or “unreasonable” foreign trade measures of other WTO member countries. Even though direct access of citizens to international arbitration in the WTO still remains an exception (see the private international arbitration in the WTO pursuant to article 4 of the WTO Agreement on Preshipment Inspection), domestic industries have “indirect access” to

WTO dispute settlement mechanisms under the domestic laws of many WTO countries and use these legal remedies very actively. The industries involved sometimes also pay the costs for private legal counsel in WTO dispute settlement proceedings. Just as the successful conclusion of the "Uruguay Round" and preceding "GATT Rounds" was facilitated by political support from industries and consumer interests in liberal trade, private stakeholders are a major political driving force behind initiation and implementation of GATT and WTO dispute settlement proceedings.

WTO law includes numerous requirements of granting citizens access to domestic courts and individual remedies against restrictions or distortions of trade or individual rights. WTO law increasingly protects substantive private rights, such as intellectual property rights. The availability of such individual rights and of decentralized dispute settlement and enforcement mechanisms contributes to the fact that most governments seem to observe most of their GATT and WTO obligations most of the time. Unlike the customary international law requirement of prior exhaustion of local remedies, GATT and WTO law — similar to European Community law — enables access to GATT and WTO dispute settlement mechanisms even prior to the exhaustion of local remedies.¹⁷ Since GATT and WTO dispute settlement proceedings tend to be much quicker, and to apply stricter legal standards of judicial review, than domestic court proceedings which often ignore international law, parallel recourse to national and international dispute settlement mechanisms has become a frequent feature of GATT and WTO practice. In some disputes, GATT and WTO dispute settlement rulings were explicitly taken into account by domestic courts dealing with similar legal complaints. Unfortunately, there remain many examples of domestic courts disregarding their obligation to construe domestic law in conformity with international law; even the ECJ has frequently ignored GATT and WTO dispute settlement case-law notwithstanding about 25 GATT and WTO dispute settlement findings of inconsistencies between EC law and GATT or WTO obligations of the EC.

d) Constitutional Functions and Legitimacy of WTO Rules

GATT and WTO law, notwithstanding the length and complexity of their 30.000 or so pages of treaty texts, serve essentially to protect free-

¹⁷ See Petersmann, *The GATT/WTO Dispute Settlement System*, see note 16, 240–244.

dom, non-discrimination, property rights and rule of law in transnational economic relations. Most WTO rules are formulated in terms of rights and obligations of governments, rather than in terms of "private rights" (as many provisions in the WTO Agreement on Trade-Related Intellectual Property Rights which explicitly recognizes that "intellectual property rights are private rights") or as rules for enterprises (as GATT Article XVII and some provisions in the WTO Agreement on Preshipment Inspection). Furthermore the WTO rules addressed to states are designed to promote private market access and non-discriminatory conditions of competition for private producers, traders, investors and consumers so that "merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions" (Article VII GATT), or "to facilitate investments across frontiers so as to increase the economic growth of all trading partners" (Preamble to the WTO Agreement on Trade-Related Investment Measures). The strong self-interests of private stakeholders in promoting legal security of their trade transactions and investments are among the reasons why dispute settlement procedures and legal remedies in international economic law are more developed than in many non-economic areas of international relations.

WTO rules derive their legitimacy not only from their legal function to promote individual freedom, market access, non-discriminatory conditions of competition, rule of law and the use of transparent, non-discriminatory and welfare-increasing policy instruments.¹⁸ They also derive political legitimacy from today's universally recognized insight that liberal trade and non-discriminatory competition tend to maximize consumer welfare, competition and individual responsibility (e.g. to adjust to competition and change). The "ethics of undistorted markets" (e.g. as democratic "dialogue about values" and consumer-oriented information, allocation and coordination mechanism), and rules on non-discriminatory market access and competition, are also consistent with *Kant's* moral imperative that law and governments must be legitimated by "universalizable" rules that maximize individual freedom (including economic freedoms e.g. to buy, sell, export or import) and legal equality of citizens. WTO member governments know very well that compliance with GATT and other WTO rules, and also with WTO dispute settlement rulings, hardly ever imposes "economic sacrifices" on the country concerned. WTO rules and dispute settlement mechanisms

¹⁸ Cf. E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, 1991, Chapter VII.

rather help governments to protect freedom and equal treatment of their citizens, to implement welfare-increasing policies, and to resist protectionist political interest group pressures and power politics at home and abroad.

e) Due Process of Law and “Evolutionary” Judicial Interpretations

Justice delayed may amount to justice denied. The ICJ, for instance, has come under increasing criticism for the slowness of the Court in disposing of only two, or at most three, cases each year. In contentious ICJ proceedings, the usually two or three rounds of written pleadings and subsequent oral arguments tend to last several years. The time-lapse of one to two years between the close of written proceedings and the opening of oral hearings, the relatively few days used each year for formal sittings of the ICJ (e.g. five public and 26 private sittings in 1992), the short duration of a “day in Court” (from 10 a.m. to 1 p.m. with a 20-minute break for coffee), or the lengthy internal procedures for elaborating a judgment (e.g. with written notes of 40–100 pages prepared by each of the 15–17 judges and translated into the other working language), have been criticized as additional causes for the delay of usually several years between the filing of an application and the final ICJ judgment on the merits.

Most WTO panel and appellate review proceedings have thus far respected the statutory requirement that “the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed” (article 20). The Working Procedures for panels (Appendix 3 of the DSU) allow two to six weeks for written submissions, two to three weeks for receipt of written rebuttals, and one to two weeks for the first and second substantive meeting with the parties as well as with intervening third parties. In Appellate Body proceedings, the appellant has up to 10 days for the filing of the written submission; the appellee’s submission must be received within 25 days after the date of the filing of the notice of appeal. While the ICJ has only very rarely admitted third countries to intervene, intervention by third WTO Members and “multiple complaints” are regular features of WTO dispute settlement proceedings. Panel and Appellate Body meetings with or without the parties usually last the whole day. Even though all WTO documents (including panel and appellate reports) have to be translated into three working languages, many oral hearings and all internal panel and Appellate Body meetings are conducted without trans-

lation. While separate or dissenting opinions of ICJ judges are frequent and usually much longer than the majority judgment itself, they continue to be extremely rare, short and anonymous in GATT and WTO dispute settlement practice.

One characteristic feature of the jurisprudence of the Appellate Body has been the progressive clarification and development, in almost every appellate report so far, of panel and appellate review procedures and matters of treaty interpretation, often with explicit references to the relevant practice in the ICJ. This jurisprudence illustrates the "evolutionary approach to interpretation" in WTO legal practice,¹⁹ as well as the growing influence of general international law principles and dispute settlement practices of other international courts on WTO legal practice.

3. Enforcing EC Guarantees of Freedom, Non-Discrimination, Rule of Law and Access to Courts: Compulsory Jurisdiction and Appellate Review at the International and National Level

Dispute settlement and judicial protection in the EC differ from the law of all other international organizations by the comprehensive jurisdiction and functions of the ECJ; the comprehensive scope and comparatively greater democratic legitimacy of EC law; the close cooperation between national courts and the ECJ in the interpretation and enforcement of Community law; and the active role of EC citizens and other individual litigants in the judicial development of EC law.

a) Compulsory Jurisdiction of the ECJ as International Court, Constitutional Court, Administrative Court and Court of Appeals

The Statute of the ECJ was in several regards (e.g. as to delivery, publication, rectification and revision of judgments) influenced by the Statute

¹⁹ In the 1998 *Shrimp/Turtle Case* (Doc.WT/DS58/AB/R), the Appellate Body stated, with references to the ICJ's 1971 *Namibia* advisory opinion, that "where concepts embodied in a treaty are 'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law.... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (para. 130, footnote 109).

of the ICJ. Just as the ICJ Statute is an integral part of the UN-Charter, the ECJ Statute forms part of the EC Treaty. The ECJ has, however, acted only rarely as international court for the settlement of disputes among states over alleged violations of their treaty obligations: While direct enforcement actions by the EC Commission against EC member states under arts 169, 93 and 100a para. 4 of the EC Treaty (ECT) have become increasingly frequent, direct actions among EC member states pursuant to article 170 remain very rare and led to an ECJ judgment in only one case to date.²⁰ The ECJ's jurisdiction goes, nonetheless, far beyond that of the ICJ and of the WTO's Dispute Settlement Body, especially as regards:

- the constitutional court jurisdiction of the ECJ to exercise, for instance, powers of judicial review over EC regulations and EC directives in actions to annul (article 173), actions for inactivity (article 175) or pleas of illegality (article 184), and to give opinions on whether the envisaged conclusion of international agreements is compatible with the EC Treaty (article 228 para. 6);
- the administrative court jurisdiction of the ECJ to review the legality of administrative acts of EC institutions, for example in annulment actions (article 173), staff cases (article 179) and suits for damages (arts 178, 215);
- the ECJ's jurisdiction to give preliminary rulings (article 177) at the request of national courts concerning the interpretation of EC law and the validity of EC Acts, which may imply the judicial review of the compatibility of EC Acts with the EC Treaty in the same way as a constitutional court is required to consider the constitutionality of national legislation;
- the appellate jurisdiction of the ECJ for the review, “on points of law” only (cf. article 168a), of final decisions or interlocutory decisions of the EC Court of First Instance (CFI), in respect of which the ECJ may act either as a Court of revision (by quashing the CFI judgment and substituting its own judgment as the final one in the matter) or as a Court of cassation (by referring the case back to the CFI for rehearing and judgment in the light of the ECJ findings on the points of law on appeal).²¹

²⁰ See: L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, 4th edition, 1994, 105 et seq.

²¹ In contrast to the WTO dispute settlement system where, during the first years, most panel reports were appealed and in part reversed by the Ap-

In contrast to the relative freedom of litigant states as regards recourse to the ICJ and the conduct of procedures before the ICJ, the jurisdiction of the ECJ is compulsory and exclusive: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein" (article 219). In line with the much broader functions of the ECJ compared with the ICJ, the ECJ's procedures vary according to the different kinds of legal actions; they differ in many respects from dispute settlement proceedings in the World Court and the WTO, for instance regarding the adversarial written and comparatively short oral procedures before the ECJ (the oral hearing may even be dispensed with unless one of the parties objects); the preliminary report of the judge-rapporteur; the subsequent decision on an inquisitorial "preparatory inquiry"; the comparatively brief ECJ judgments (which e.g. do not include Dissenting Opinions as in ICJ judgments and occasionally also in WTO panel reports); and the enforcement mechanisms for ECJ decisions (such as the possibility, provided for in article 171, to impose a financial penalty on a recalcitrant state refusing to comply with a judgment, and the financial liability of both EC institutions and national governments *vis-à-vis* adversely affected private citizens for damages caused by violations of EC law).²² The establishment of the CFI has enabled a more comprehensive specialization of this court in the judicial protection of the interests of private parties against acts of EC institutions, notably in disputes involving complex questions of fact. The establishment of a *Common Patent Appeal Court* under the 1989 Community Patents Agreement, and of a *Board of Appeal* under the 1993 EC regulation on the Community trade mark, are further precedents for the setting-up of specialized international courts with direct access of private citizens.

b) Interpretation and Legitimization of the EC Treaty as a "Constitutional Charter" Conferring Rights on EC Citizens

Unlike the limited jurisdiction of the ICJ for the judicial review of acts of UN bodies and UN member states, the ECJ has exclusive and com-

pellate Body, only about 10% of the CFI's decisions were appealed during the first years, and most appeal cases were rejected by the ECJ, cf.: *The Role and Future of the European Court of Justice*, British Institute of International and Comparative Law (ed.), 1996, 35.

²² For comparative analyses see: R. Plender, "Procedures in the European Courts: Comparisons and Proposals", *RdC* 267 (1997), 9 et seq.

pulsory jurisdiction for the final interpretation of EC law *vis-à-vis* EC institutions and all EC member states so as to “ensure that in the interpretation and application of this Treaty the law is observed” (article 164). The law administered by the ECJ is fundamentally different from the law applied by the ICJ insofar as it binds all EC institutions, member states and their citizens and derives democratic legitimacy

- not only from the parliamentary ratification of the EC Treaty in all EC member states, but also
- from the explicit protection of individual and democratic citizen rights in EC law,
- as well as from the recognition of the common constitutional traditions of fundamental rights, democracy and rule of law in all EC member states as sources of EC constitutional law.

According to the Court, “the European Economic Community is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”; “the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions”.²³

Most of the constitutional characteristics of the EC Treaty — such as direct effect and supremacy of EC law in the national legal systems, direct applicability of precise and unconditional EC rules by EC citizens and national courts, unwritten guarantees of fundamental rights and constitutional principles of democracy and rule of law, the Community law principles of pre-emption, implied Community powers, state responsibility for non-compliance with EC law — were developed through judicial interpretations based on functional and systemic treaty interpretations, including the “general principles common to the laws of the Member States” (article 215) and the “constitutional traditions common to the Member States as general principles of Community law” (article F Treaty of the European Union). The national courts and national governments recognized this judicial “constitutionalization” of the EC Treaty, and its progressive transformation from an international treaty among states into a vertically integrated legal system conferring judicially enforceable rights to the “citizens of the Union” (article 8) as well as to foreigners. The German Constitutional Court, for instance, justified the judicial activism by referring to:

²³ Case 294/83, *Les Verts*, ECR 1986, 1339, consideration 23.

“the intention of the Member States to provide the Community with a Court which would ascertain and apply the law by methods developed over centuries of common European legal tradition and refinement of law. In Europe the judge was never merely ‘la bouche qui prononce les paroles de la loi’. Roman law, the English common law and the German *Gemeines Recht* were to a large extent the creation of the judges in the same way as in more recent times in France, for instance, the development of general legal principles of administrative law by the *Conseil d’Etat* or, in Germany, general administrative law, a large part of the law of employment or security rights in private-law business transaction.”²⁴

In contrast to the state-oriented jurisprudence of the ICJ (e.g. as regards the “general principles of international law”), the ECJ construed the EC Treaty provisions — even if they were formally addressed to member states — often in a citizen-oriented manner as conferring direct individual rights. Thus, the ECJ inferred from the general principles of Community law, and from the common constitutional traditions of the member states, the obligation of all EC institutions to respect human rights and constitutional principles of democracy and rule of law. The ICJ, by contrast, appears to have rarely construed “the general principles of law recognized by civilized nations” (Article 38 ICJ Statute) in a similar constitutional perspective focusing on UN human rights law. The close interaction between national and European constitutional law, especially the strong influence of the European Convention on Human Rights on the interpretation of EC law and the “direct applicability” of EC guarantees of freedom and non-discrimination by private litigants and national courts, has provided EC law with a legal dynamic and democratic legitimacy which UN law has never achieved.

c) Cooperation between European and National Courts for the Benefit of EC Citizens and Individual Litigants

Many of the leading cases of the ECJ, such as *Van Gend en Loos* in 1963 and *Costa v. ENEL* in 1964, were referred to the Court in the context of its jurisdiction to give “preliminary rulings” under article 177 EC Treaty at the request of national courts. The ECJ’s policy of welcoming such references empowered individual litigants and national judges to act as

²⁴ *Kloppenburg Case*, Decision of 8 April 1987 by the German Bundesverfassungsgericht BVerfGE 75, 223 (engl. translation in: *Common Market Law Reports* 53 (1988), 19).

guardians of EC law and to enforce the EC guarantees of freedom and non-discrimination, construed by the ECJ as "market freedoms" and constitutional rights of EC citizens, against national legislative and administrative restrictions. Political science analyses of the cooperation between the ECJ and national courts in the "constitutionalization" of the Community legal order have emphasized that national courts have played as important a role as the ECJ itself. The cooperation between the ECJ, national courts and individual litigants served not only the self-interests of the judges and citizens involved; it also entailed a shift of political power: national judges could act as common judges of Community law and control even acts of national parliaments; and individual litigants — like the Dutch transporter *Van Gend en Loos*, the Italian advocate *Costa*, or the Belgian air-hostess *Defrenne* — pursued not only their self-interests (which sometimes involved trivial amounts of money, as in the case of Mr. *Costa's* electricity bill) but defended rights-based interpretations of EC law for the benefit of EC citizens against discriminatory government restrictions supported by "rent-seeking" interest groups.

The constitutional interpretations of EC law were often linked to the human rights jurisprudence of the ECJ, as illustrated by the judicial recognition that "the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance".²⁵ The ECJ's case-law on the individual right to effective judicial protection, or on the "principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law",²⁶ reinforced this "empowering function" of EC guarantees of freedom and non-discrimination, and the effectiveness of the rule of law, for the benefit of EC citizens and individual litigants. Judicial interpretations of the EC Treaty prohibitions of e.g. non-tariff trade barriers (article 30) were politically easier to accept by national governments when the interpretation was founded on the protection of individual rights and supported by the national courts. This democratic legitimacy of judicial interpretations of international treaty rules in a manner maximizing human rights and constitutional law principles should serve as a model also for the interpretation of the UN-Charter and UN law by the ICJ and other courts.

²⁵ Case 240/83, *ADBHU*, ECR 1985, 531, 548.

²⁶ Joined Cases 46 & 48/93, *Brasserie du Pêcheur, Common Market Law Reports* 75 (1996), 889.

4. Enforcing Free Trade Area Rules in Europe and North America: Access to Courts at the International and National Level

a) The EFTA Court in the European Economic Area (EEA)

Article 108 of the 1992 Agreement on the EEA among the EC and EFTA states (Iceland, Liechtenstein, Norway) provides for an EFTA Court, whose rules and procedures are modeled on those of the ECJ. As the objectives of the EEA parallel those of the EC Treaty with regard to the free movement of goods, services, persons and capital, article 6 of the EEA Agreement, and article 3 of the 1993 "Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice", require to interpret EEA rules in conformity with corresponding EC rules and the "relevant rulings" of the ECJ. Given the more limited objectives of the EEA as a free trade area, the EFTA countries did, however, not grant the EFTA Court jurisdiction to deliver legally binding preliminary rulings; the EFTA Court may only give advisory opinions on request by national courts in EFTA countries.

The jurisprudence of the EFTA Court since 1994 is strongly influenced by the relevant case-law of the ECJ, albeit with due account (e.g. in the 1997 *Maglite* Case concerning the "exhaustion" of the right to restrict "parallel imports" of trade-marked goods) of the different context of a free trade area compared with the EC's economic and monetary union. As in the EC, the objectively formulated EEA prohibitions of tariffs, non-tariff-barriers, trade discrimination and restraints of competition are construed and protected by the courts as direct rights of EEA citizens. As a consequence, national courts are frequently called upon to apply and enforce EEA rules in EC and EFTA states.

b) Dispute Settlement in the North American Free Trade Area (NAFTA)

As of 1 January 1994, the Canada-United States FTA was superseded by the NAFTA Agreement between Canada, Mexico and the United States. No significant changes were made to the intergovernmental dispute settlement mechanisms in Chapter 18 of the FTA Agreement, which were carried over into Chapter 20 of the NAFTA Agreement.

Chapter 19 of NAFTA maintains the previous requirement that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review" (arti-

cle 1904.1). Even though the panel review procedure is formally initiated by the importing or exporting countries, their governments are required to do so at the "request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination" (article 1904.5). "Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had the right to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel" (article 1904.7). Individual plaintiffs are thus given the right to appear before international NAFTA panels as an alternative to national remedies which were considered to be too time-consuming and "protection-biased". In spite of this "internationalization" of the dispute settlement procedure, the private party remains dependent on cooperation by its government (e.g. as regards submission of the request for establishment of the panel and appointment of panelists); and the substantive law to be applied by the binational panels is not the NAFTA Agreement but "the antidumping or countervailing duty law of the importing Party" (article 1904.2).

NAFTA also provides for various sector-specific arbitration and other dispute resolution procedures (e.g. for environmental, labour and investment disputes) and for recourse to national judicial review (e.g. for intellectual property and government procurement disputes). The "internationalization" of dispute settlement procedures for investment disputes between a NAFTA country and private investors from another NAFTA country goes beyond the "Chapter 19 dispute settlement procedures": the private "NAFTA investor" can freely choose between recourse to local remedies or direct recourse to international investor-state arbitration, which can be initiated by the investor himself according to the ICSID or UNCITRAL arbitration rules (cf. article 1120) without diplomatic protection by his home state. NAFTA's Environmental and Labour Agreements, by contrast, grant private persons no direct access to international dispute settlement procedures; the latter take place at the intergovernmental level; private persons may, however, submit complaints to the NAFTA Secretariat which may indirectly trigger the dispute settlement mechanisms.

The NAFTA Agreement includes numerous references to GATT/WTO law. As NAFTA does not dispose of an integrated dispute settlement system with appellate review and multilateral surveillance and enforcement mechanisms as in the WTO, NAFTA member states continue to avail themselves of the possibility of submitting trade dis-

putes among NAFTA countries to the WTO rather than to the special, yet not exclusive NAFTA dispute settlement mechanisms.²⁷

5. International Judicial Protection of Private Investor Rights: The Examples of ICSID and the Law of the Sea Treaty

The need for supplementing substantive rights of individuals in international law by complementary procedural rights and individual remedies, and the inadequacies of the traditional international law remedies of discretionary diplomatic protection of foreigners by their home state following the prior exhaustion of local remedies in the host state, have become increasingly recognized in international economic law during the 20th century. The globalization of production, investments, trade and division of labour has thus led to a corresponding "internationalization" of commercial and investment law that increasingly overcomes the inadequate distinction between classical *public international law governing relations among states*, and *private international law for international relations among citizens*. This internationalization of the substantive law and procedures for the settlement of foreign investment disputes is promoted by the increasing number of model international arbitration procedures (as elaborated e.g. by the International Chamber of Commerce and the UN Conference on International Trade Law) as well as by more than 1.200 bilateral and multilateral international investment treaties.

a) Multilateral Investor-State Arbitration: The International Center for the Settlement of Investment Disputes (ICSID)

In order to avoid certain shortcomings of *ad hoc* arbitration between host countries and foreign companies, arbitration is increasingly institutionalized so as to better ensure the expeditious functioning of the arbitration procedure, the availability of expertise and assistance by the organs of the institution, and recognition and enforcement of arbitra-

²⁷ On this choice of dispute forum, and the occasional "two-forum disputes" in both GATT and the FTA, cf. G. Marceau, "The Dispute Settlement Rules of the NAFTA: A Thematic Comparison with the Dispute Settlement Rules of the WTO", in: Petersmann, *International Trade Law and the GATT/WTO*, see note 16, 487, 534 et seq.

tion awards by municipal courts.²⁸ The conclusion of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States was promoted by the World Bank so as to enhance and protect the flow of foreign investment into developing countries; this Convention set up the ICSID and, by 1997, was signed by 143 states.

The 1965 Convention on the Settlement of Investment Disputes, and the 1978 Additional Facility Rules for disputes involving parties which are not a member country or a national of such a member country, give private investors direct access to international arbitration proceedings under the supervision of ICSID if the host state has consented (e.g. in its national foreign investment law or in an "ICSID clause" contained in an international investment treaty with the foreign investor or with its home state) to submit the specific "legal dispute arising directly out of an investment" (article 25 para. 1) to arbitration under ICSID or its Additional Facility. Article 42 of the 1965 Convention provides for the "internationalization" of the substantive law applicable to ICSID arbitration:

"(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

Even if the parties have chosen the national law of the host state as applicable law, ICSID tribunals have still subjected the national law to control by international law which will prevail in case of conflict. This primacy of international law enhances the recognition and enforcement of ICSID awards in all ICSID member states (cf. article 54).

In practice, about some 20 ICSID member countries have consented to ICSID arbitration in their national investment legislation; in addition, there are about 900 bilateral investment treaties and also multilateral treaties (such as NAFTA, Mercosur and the 1994 Energy Charter Treaty) containing provisions on ICSID arbitration. The number of recourses to ICSID arbitration (48 by the end of 1997) and ICSID conciliation procedures (3 by 1997) remains, nonetheless, limited. One of

²⁸ Cf. R. Bruno, *Access of Private Parties to International Dispute Settlement: A Comparative Analysis*, Harvard Jean Monnet Working Paper 13/97, 73 et seq.

the reasons for this seems to have been the controversial use of the “annulment procedures” provided for in article 52.²⁹

ICSID’s recognition and effective protection of substantive and procedural individual rights of investors offers a unique model for strengthening international law and dispute settlement procedures for the benefit of individuals, without the many disadvantages of the classical international law rules on diplomatic protection. Empowering private investors to defend and protect their property rights through international arbitration, rather than merely through national and diplomatic remedies, reflects the constitutional insight that the effectiveness of substantive individual rights depends on complementary procedural rights and on individual access to national and international dispute settlement mechanisms. Investor-state ICSID arbitration could also serve a useful role in WTO Agreements on the protection of private rights, such as the WTO Agreements on Trade-Related Investment Measures (TRIMS) and Trade-Related Intellectual Property Rights (TRIPS); it is only in the WTO Agreement on Preshipment Inspection that WTO law has so far enabled direct private access to international private arbitration in the WTO. The WTO dispute settlement system has overcome certain disadvantages of traditional inter-state dispute settlement procedures, such as the customary law requirement of prior exhaustion of local remedies in case of diplomatic protection; granting holders of property rights direct access to WTO-or ICSID-arbitration procedures could further strengthen individual rights and depoliticize WTO dispute settlement mechanisms.

b) Private Remedies Under the Dispute Settlement Mechanisms of the Law of the Sea Convention

Article 279 of the 1982 UN Convention on the Law of the Sea requires States Parties to “settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, ... seek a solution by the means indicated in Article 33, paragraph 1 of the Charter.” States Parties thus remain free “to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own

²⁹ Cf. D. Caron, “Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal”, *ICSID Review* 7 (1992), 21.

choice" (article 280). The Law of the Sea Convention goes, however, far beyond the dispute settlement methods of the UN-Charter by prescribing compulsory dispute settlement procedures entailing binding decisions (cf. article 286 et seq.). One characteristic feature of these compulsory dispute settlement procedures is the freedom of states to choose between the jurisdiction of the International Tribunal for the Law of the Sea, the ICJ, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII of the Law of the Sea Convention (cf. article 287). These dispute settlement procedures are limited to States Parties and international organizations (cf. Annex IX), and are admissible "only after local remedies have been exhausted where this is required by international law" (article 295). Another innovative feature of the dispute settlement provisions of the Law of the Sea Convention is to open the access to the Tribunal for the Law of the Sea to non-state entities, like international organizations and natural or juridical persons which enjoy rights concerning maritime activities that are protected by the Convention.³⁰ The special provisions for the settlement of disputes relating to "the area" provide for compulsory jurisdiction by the Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea, or by binding commercial arbitration, for disputes involving non-state parties, such as "the enterprise, state enterprises and natural or juridical persons" (article 187). Article 190 para. 2 prescribes that, "(i)f an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute referred to in article 187, subparagraph (c), the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person."

6. Why Are International Economic Law Remedies Comparatively Effective? Economic, Political and Legal Reasons

Why is it that compulsory jurisdiction, appellate review procedures and private access to international arbitration have been accepted in worldwide and regional economic law but continue to be resisted by governments in most other areas of international law? What lessons are to be

³⁰ Cf. R. Wolfrum, "The Legislative History of Article 20 and 21 of the Statute of the International Tribunal for the Law of the Sea", *Rebels Zeitschrift* 63 (1999), 342 et seq.

drawn from the fact that, at least at the regional level, economic integration law has facilitated a progressive extension of international compulsory jurisdiction and judicial control to non-economic subject matters, such as human rights, "visas, asylum, immigration and other policies related to the free movement of persons" (cf. the new article 68 of the ECT as revised by the 1997 Amsterdam Treaty), and "police and judicial cooperation in criminal matters" (cf. the new arts 35 and 40 of the ECT, as well as the new article 11 of the ECT, as revised by the Amsterdam Treaty)? Why has it so far not been possible, even within European integration law, to provide for compulsory judicial review of the EU's "common foreign and security policy" (cf. the new article 46 of the ECT) and to go beyond the conciliation and only optional and subsidiary arbitration procedures in the OSCE (cf. article 19 of the 1992 OSCE Convention)?

a) Economic and Political Reasons for the Increasing Role of Judicial Review in International Economic Law

Economic and political theory offer a number of reasons why governments often find it politically easier to accept compulsory adjudication and judicial protection of individual rights in international economic relations than in other fields of international law (such as border disputes and UN human rights law).³¹ For instance:

aa) There is worldwide agreement among governments that reciprocal trade liberalization is a mutually beneficial, welfare-increasing "positive sum game". Also export industries and domestic consumers strongly support liberal trade agreements and judicial dispute settlement. Border disputes, by contrast, risk to be perceived as "zero-sum games" in which the more powerful country should use its relative power so as to impose its territorial claims on the weaker country.

bb) International economic transactions involve the exercise of individual rights (e.g. freedom of contract) and the transfer of such rights (e.g. property rights in the sold goods). Legal security and adjudication are obviously beneficial in this area because e.g. they reduce transaction costs. Hence, both the European Union and the United States have introduced domestic procedures under which export industries can petition the government to challenge the market access restrictions of *for-*

³¹ Cf. E.U. Petersmann, "National Constitutions and International Economic Law", in: M. Hilf, E.U. Petersmann (eds), *National Constitutions and International Economic Law*, 1993, 3 et seq., (46).

eign governments through international adjudication (e.g. in the WTO). In the field of political human rights, by contrast, governments tend to view human rights disputes as a matter of primarily domestic jurisdiction; even in the ECHR, governments have challenged the human rights practices of other governments through inter-state adjudication only very rarely.

cc) Just as no country is rich enough to forego the welfare gains from participation in the world trading system based on WTO law, almost all governments in Europe consider membership in the European Union as essential for maximizing their national welfare. Both the WTO and European integration are based on "package deal negotiations" which have induced governments to accept international guarantees of compulsory adjudication and judicial protection of individual rights (e.g. intellectual property rights protected by the WTO's Agreement on TRIPS) which many governments had rejected in preceding "single subject negotiations" (e.g. on protection of intellectual property rights in WIPO).

dd) Within national democracies, the separation of powers between parliaments and courts often induces the latter to exercise judicial self-restraint in the judicial interpretation and application of parliamentary laws. In international organizations, however, the absence of international parliaments offers an additional justification for "judicial activism" of e.g. the ECJ and the WTO Appellate Body in defending international guarantees of freedom, non-discrimination and rule-of-law against governmental protectionism. Most national parliaments have ratified the European Community and WTO Agreements without granting powers to the executive to violate these international treaty guarantees of transnational freedom and non-discrimination. Judicial activism in defending these agreed guarantees of freedom and non-discrimination can therefore claim not only legal but also democratic legitimacy for the benefit of domestic citizens.

ee) Liberal trade and market integration, like democracy, focus on maximizing individual consumer welfare through legal guarantees of freedom, non-discrimination and rule of law. It is increasingly obvious for citizens and governments that the advantages of liberal international economic agreements, such as rule of law and "democratic peace" (e.g. in Europe and NAFTA), go far beyond the economic area. While the strengthening of human rights law is often opposed by non-democratic governments at the UN level, American and European regional integration law have succeeded in prompting almost all American and European states to accept the American and European human rights conven-

tions as a necessary condition for the benefits of other areas of regional cooperation. As predicted in *Kantian* legal theory more than 200 years ago, international agreements among constitutional democracies and cosmopolitan transnational integration law have proven to be the most effective tools for the progressive constitutionalization of the authoritarian classical international law and its Westphalian system of power politics.

b) Progressive “Constitutionalization” of European Integration Law: Constitutional Functions of Judicial Review

In most states, human rights and access to justice (*habeas corpus*) were secured only after “glorious revolutions”, civil wars and other struggles by citizens in defence of their rights against abuses of power (“Kampf ums Recht” as described by *Savigny*). At the national level, the progressive limitation of abuses of executive and legislative government powers led to the constitutional insight that human rights, in order to be effective, need to be supplemented by complementary constitutional guarantees for a “government of laws, not of men” (as stated in the 1780 Constitution of Massachusetts), such as separation and only limited delegation of powers, access to courts and judicial protection of fundamental rights. Constitutionalism has proven to be the most successful strategy for achieving rule of law, democratic peace and judicial protection of fundamental rights. Independent courts have proven to be the “least dangerous” branch of government, a necessary “check and balance” for containing political power and for protecting the citizens against their rulers. Judicial protection of fundamental rights and of other constitutionally agreed limitations on government serves also important democratic functions.

At the European level, both the Statute of the Council of Europe (e.g. article 3) and the 1992 Maastricht Treaty (e.g. article F) commit member countries to rule of law and protection of human rights. In both the Council of Europe and the European Union, these requirements are construed to imply that only countries with a democratic constitution and with parliamentary legislation may join the Council of Europe or the European Union, and only if they accept the compulsory jurisdiction of the European Court of Human Rights and of the ECJ, respectively. As predicted by *Kantian* legal theory, the constitutional commitments to rule of law and protection of human rights at home and abroad enabled “democratic peace” over a longer period than ever before in Europe. Both the ECHR (e.g. arts 6, 13; Protocol 11) as well

as European Community law (e.g. arts 173, 177 ECT) guarantee individual access to national and international judicial remedies for the protection of individual rights; this enabled the European courts to construe the ECHR as well as the EC Treaty as “constitutional charters” based on rule of law, democratic peace, fundamental rights and their judicial protection.

In the case-law of the ECJ, the interrelationships between human rights guarantees (e.g. for fair and public judicial proceedings within reasonable time limits, procedural and substantive rights of defence) and judicial protection of economic freedoms were duly taken into account. Many other areas of ECJ jurisprudence, for instance on state responsibility and responsibility of the European Community for reparation of injuries, were likewise influenced by human rights guarantees for effective remedies and “equitable satisfaction” (cf. article 50 ECHR). Both the ECJ and the European Court of Human Rights have given the principle of rule of law, as well as other “general principles of law” (such as legal security, proportionality, protection against arbitrary abuses of public power, the “right to a judge”, the prohibition of a “denial of justice”), much more precise legal meaning, also in relations *vis-à-vis* individual citizens, than seems to have been done so far in the inter-state jurisprudence of the ICJ. Since the member states of the European Union, EFTA, EEA and the OSCE have accepted the European Convention on Human Rights and other agreements of the Council of Europe, the national and international courts and jurisprudence in the European Community, EFTA and Council of Europe are promoting a progressive “cross-fertilization” and integration of human rights law, constitutional law and European economic law. This “constitutional jurisprudence” derives democratic legitimacy from the fact that it reinforces the protection of human rights and rule of law across frontiers for the benefit of the citizens.

c) Constitutional Problems of Judicial Review: Can the “International Economic Law Revolution” Serve as a Model for the Necessary Constitutionalization of International Law?

The 1948 Universal Declaration of Human Rights explicitly recognizes that human rights must be protected by “the rule of law” and must include individual rights to effective judicial remedies (article 8). Yet, neither general international law nor the UN-Charter and 1966 UN human rights covenants provide for compulsory adjudication of international disputes and do not offer effective safeguards against violations of hu-

man rights. UN law thus lacks the means of securing the rule of international law. The lack of effective protection of human rights also entails a “democracy deficit” of UN law which risks to undermining the UN-Charter’s claim to legal priority over other international agreements (cf. Article 103 of the UN-Charter), including the legitimacy of the ICJ (e.g. in view of its tendency to apply UN resolutions as indications of international law). In contrast to the frequent references to rule of law and other constitutional principles in the jurisprudence of the EC, EFTA and ECHR Courts, the jurisprudence of the PCIJ and ICJ has only rarely referred to human rights and constitutional principles of rule of law and democracy;³² the “general principles” of international law (such as state sovereignty) are too often construed in a power-oriented manner (e.g. focusing on the effectiveness of governments rather than on their democratic legitimacy) rather than as human rights standards.

Notwithstanding the claim of international law that a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (cf. article 27 of the Vienna Convention on the Law of Treaties), national parliaments and courts often refuse to recognize the primacy of international law rules over domestic legislation and prefer to apply the “later in time rule” in favour of legal primacy of later domestic legislation, even if it is inconsistent with prior international obligations.³³ In national constitutional systems where “treaties ... shall be the supreme law of the land” (article VI cl.2 US Constitution), the logic of Chief Justice Marshall’s reasoning in *Marbury v. Madison* (1803) — that if the Constitution is to be higher law, judges must be bound to apply it over conflicting ordinary legislation — could have been applied also to international law.³⁴ Yet, as illustrated by European integration law, distrust by national parliaments and courts *vis-à-vis* international

³² Cf. Schwebel, see note 15; J.Y. Morin, “L’Etat de droit: l’émergence d’un principe du droit international”, *RdC* 254 (1994), 9 et seq., (28).

³³ See e.g. T. Franck, G.H. Fox (eds), *International Law Decisions in National Courts*, 1996. There is a long tradition of US cases in which US courts ignored international law or even interim orders of the ICJ (as in the 1998 “Paraguay Case”).

³⁴ Cf. e.g. L. Henkin, *Constitutionalism, Democracy and Foreign Affairs*, 1990, 64: “The equality of statutes and treaties ... is not ... what the framers intended and seems not to satisfy either democratic principle or international need. Democracy does not require the supremacy of laws over treaties, or even their equality, if the treaty power is itself democratic.”

law is likely to continue as long as international law does not more effectively protect human rights, democracy and rule of law.

The modern "international economic revolution" offers, nonetheless, important lessons for the necessary "constitutionalization" and strengthening of UN law.³⁵ The more than 30,000 pages of frequently precise and unconditional international guarantees of freedom, non-discrimination and rule of law in WTO law, and the even more comprehensive guarantees of market freedoms and rule of law in European and North American integration law, go far beyond the protection of citizen rights in domestic laws. There are many other reasons why governments were willing to render these international guarantees of freedom, non-discrimination and rule of law effective through national and international compulsory adjudication:

aa) Liberal international economic rules serve "democratic functions" by protecting individual freedom (e.g. of consumers, traders and producers), non-discrimination and transparent discussion (e.g. insofar as markets operate as spontaneous information mechanisms and "democratic dialogues" about the valuation of scarce goods, services, investments and labour); they are thus politically more legitimate than many power-oriented rules of international law.

bb) The "due process guarantees", for instance in WTO law, European Community law, EEA law and NAFTA law, for national and international judicial review by independent courts confer additional legal legitimacy on this integration law. The availability of appellate review, notably in the WTO and EC legal systems, reduces the risks of "wrong" judgments.

cc) Since the WTO, EC, EEA and NAFTA agreements were all negotiated and concluded as "package deals", countries had no choice of "opting out" of the compulsory dispute settlement systems, as they have frequently done *vis-à-vis* the ICJ and the optional protocols to UN human rights instruments.

dd) The worldwide and regional international economic law guarantees of non-discriminatory market access and judicial protection of individual rights (such as the intellectual property rights protected by the TRIPS Agreement) are obviously beneficial for traders, investors and consumers; they tend to enjoy strong political support from export industries and other powerful institutions (such as national and interna-

³⁵ Cf. E.U. Petersmann, "How to Reform the United Nations: Lessons from the International Economic Law Revolution", *UCLA J.Int'l.L. & Foreign Aff.* 2 (1997-98), 183 et seq.

tional banks, including the World Bank Group and the IMF). UN human rights instruments, by contrast, are often resisted not only by non-democratic governments but also within democracies if the *national* human rights standards and domestic laws are considered to be more precise and better justiciable.

ee) Free trade and common market rules tend to be formulated as justiciable “obligations of conduct” that have been progressively clarified through national and international jurisprudence. The UN rhetoric on the interdependence and indivisibility of economic and other human rights, by contrast, has not become a legal reality in most UN member states where the “programmatic” nature of certain economic and social rights in the ICESCR is sometimes invoked so as to refuse judicial protection of so-called “obligations of result”.

III. Ten Lessons for Strengthening International Dispute Settlement in UN Law and Regional International Law

Part II. of this article has shown that worldwide liberal economic agreements (like the WTO Agreement) and regional integration agreements among democracies (e.g. in the European Community, EEA and NAFTA) have protected economic freedom and property rights more effectively — notably by means of international guarantees of freedom, non-discriminatory market access, rule-of-law and compulsory adjudication at the national and international level — than the UN-Charter and the 1966 UN human rights covenants. International economic law and European integration law offer important lessons for the necessary reforms of the legal and dispute settlement system of the UN and other regional organizations:

1. Need for Democratic Legitimacy and Justiciability of International Rules

Perhaps the most important lesson from the WTO, European Community, EEA and NAFTA dispute settlement systems is the *need for democratic legitimacy* and political support of the applicable rules. Worldwide compulsory adjudication appears politically acceptable only in respect of precise and unconditional rules with a high degree of democratic legitimacy and clear advantages for governments and their

citizens. Worldwide and regional liberal trade rules, such as those in WTO law and regional free trade areas and customs unions pursuant to GATT Article XXIV, are based on precise and unconditional guarantees of freedom, non-discrimination and rule-of-law which are a precondition for a mutually beneficial division of labour across frontiers; they offer obvious advantages for the freedom, non-discrimination, legal security, peaceful cooperation and individual welfare of traders, producers, investors and consumers all over the world. European integration law confirms that political support for compulsory international adjudication is easier to achieve in the area of economic transaction law (e.g. in view of its obvious advantages for traders and investors) and in human rights law (e.g. in view of the limited nature of most private complaints and the rareness of inter-state complaints) than in more politicized areas of “international status law” (e.g. border disputes) and of discretionary foreign policy. The legal and dispute settlement systems of UN law and of other areas of international law should therefore — as in WTO law, the European Union and in the Council of Europe — be more clearly based on guarantees of individual freedom, non-discrimination and rule of law in order to be democratically legitimate. Since “democracies don’t fight each other”, and many international conflicts are triggered by non-respect for human rights, strengthening international human rights and access to courts remains the most important conflict-avoidance strategy.

2. Need for Compulsory International Adjudication

WTO law and European integration law are based on the constitutional insight that protection of individual rights and rule-of-law require *compulsory judicial protection at the national and international level*. Without access to impartial courts, human rights and rule-of-law cannot prevail. Without compulsory jurisdiction for third-party adjudication of international disputes, also the UN and the ICJ cannot ensure the rule of law. Since the UN-Charter provides neither for parliamentary rule-making nor for democratic control of the executive powers of e.g. the UN Security Council and the UN General Assembly, judicial protection of human rights can contribute — as in the European Community and in the European Convention on Human Rights — to the necessary “democratization” and constitutionalization of the law of international organizations. The “democracy deficit”, and the absence of effective separation of powers in the UN’s institutional framework, make judicial control of the constitutionality of “secondary UN law” even more nec-

essary. WTO law and EC law indicate that the risks of compulsory international adjudication can be limited by international appellate review. WTO law, European Community law and the law of the Council of Europe (where Protocol No.11 to the ECHR has made the right of individual petition mandatory only after more than 45 years since the entry into force of the ECHR) further indicate that compulsory international adjudication can only progressively be extended beyond the areas of human rights law and international economic law.

3. Need for a "Constitutional Strategy"

The experience of WTO law clearly shows the *political possibility of introducing compulsory adjudication and appellate review on a worldwide level through "constitutional reforms"*. Yet, the necessary "constitutionalization" and "democratization" of the UN-Charter, such as the introduction of worldwide compulsory jurisdiction of the ICJ, cannot be achieved through the amendment procedures pursuant to Arts 108 and 109 UN-Charter. Following the model of the replacement of "GATT 1947" by the WTO Agreement with compulsory jurisdiction and appellate review, the 1945 UN-Charter may need to be supplemented among constitutional democracies by a new UN Constitution based on UN human rights covenants, "democratic peace" and compulsory adjudication by the ICJ. As in the case of the WTO Agreement and "GATT 1947", such a new UN Constitution could temporarily coexist with the "UN 1945"; it must offer such economic and other advantages, especially to less-developed countries, that states find it more beneficial to commit themselves to the necessary democratic and legal reforms than to face the risk of being excluded from the new UN.

4. European Integration Law as a Model for Regional Constitutional Reforms

The progressive "constitutionalization" of, and compulsory adjudication in *European integration law should serve as a model for regional integration law*, for instance in North and Latin America. Just as the ECHR and the common constitutional traditions of EC member states served as standards for the judicial recognition of constitutional guarantees of rule of law and effective judicial remedies in European integration law, the American Convention on Human Rights and the com-

mon constitutional traditions (e.g. of NAFTA countries) could assist in "constitutionalizing" the NAFTA Agreement and in extending its compulsory dispute settlement mechanisms to additional fields of cooperation and additional constitutional standards of judicial review.

5. Need for Integrating Political and Legal Dispute Settlement Mechanisms

Political and legal dispute settlement mechanisms must be integrated, as e.g. in WTO law and EC law. Compulsory international adjudication has important conflict-preventing functions by inducing governments to accept, prior to or during recourse to adjudication, rules-based dispute settlements. The UN Security Council should more actively use its power to refer international disputes to the ICJ and to other international courts (such as the new International Criminal Court).³⁶ And the UN Specialized Agencies (notably the World Bank Group) should use their development and technical resources for assisting developing countries in the international mediation of disputes involving developing countries (e.g. IBRD financial and technical assistance for mutually beneficial dispute settlement projects and democratic and legal reforms). There is also clear evidence that the enforcement of international judgments can be made more effective through systematic supervision by political bodies (such as the WTO Dispute Settlement Body, the EC Commission, the ECHR Committee of Ministers, the UN Security Council).

6. Need for Creating a Transnational Legal Community with Rights of Action and Access to Courts by Non-State Actors

Outside international transaction law (e.g. concerning foreign investments), states remain reluctant to initiate court proceedings against other states for fear of jeopardizing bilateral relationships or being exposed to reciprocal complaints. The assumption underlying the limitation of the ICJ's jurisdiction *ratione personae* to interstate disputes — that human rights will be defended by governments and do not warrant direct citizen access to the ICJ — is clearly inconsistent with practical

³⁶ Cf. in this respect, A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq.

experience (e.g. that governments have only very rarely invoked human rights in ICJ proceedings or initiated interstate complaints under human rights treaties that permit such complaints). WTO law and regional economic law suggest that *creating a transnational legal community, with rights of action and access to courts by non-state actors*, offers the most effective strategy for increasing the effectiveness of international rules and for “depoliticizing” international adjudication. For instance, the EC Commission’s right of access to the ECJ, the EC citizens’ direct access to national and international courts, or the right of national judges to request preliminary rulings by the ECJ on the interpretation of EC law and the validity of EC secondary law, have set incentives for independent institutions, judges and citizens to act as guardians of the rule-of-law in European integration. Also in GATT and the WTO, most disputes are initiated at the request of private industries which invoke, directly or indirectly, the international GATT/WTO guarantees of freedom, non-discrimination and rule of law in their favour and request governments to comply with and enforce the international rules.

By protecting the substantive and procedural rights not only of states but also of non-state actors, and by promoting cooperation among national and international institutions and courts, “functional integration” based on “constitutional guarantees” of freedom, non-discrimination and judicial protection of rule-of-law can set strong incentives for a transnational community of law also outside the economic area (notably in human rights law), thereby inducing private citizens, lawyers, judges and government officials to cooperate in the enforcement of liberal international rules. In both American and European human rights law and economic integration law, for instance, private access to international courts (such as the American and European Courts of human rights, the ECJ, EEA Court and NAFTA panels) has been much more actively used than traditional inter-state complaints. It was mainly through *private* complaints to the ECJ and to the ECHR Commission, and through preliminary rulings by the ECJ in cooperation with national courts, that international law has become successfully constitutionalized and democratized in European integration — enabling a unique period of more than half a century of “democratic peace” with more individual freedom than ever before among European states.

Similarly, UN law and regional integration law (e.g. in North America) should promote access to courts by non-state actors so as to increase the incentives for rule-compliance (e.g. a right of the UN Secretary-General to request Advisory Opinions by the ICJ, citizen rights to invoke the UN human rights covenants before national and interna-

tional courts and UN bodies). Participation of non-state actors is a precondition for building a "community of law" among private citizens, lawyers, judges and other sub- and supra-national legal actors which interact and cooperate in treating international disputes as legal rather than political problems.³⁷

7. Need for Cooperation Among International and National Courts

In international economic law, "cooperation among international courts" has been recognized as an important tool for promoting an international "community of law" (see e.g. the frequent references to ICJ judgments in the case-law of the WTO Appellate Body, the references to GATT jurisprudence in the dispute settlement reports of the Canada-United States FTA Panels, or the references by the ECJ to decisions of the European Court of Human Rights and of the ICJ). The ICJ should follow this example, for instance by interpreting the general principles of international law in the light of the human rights jurisprudence of international human rights courts and of UN human rights bodies (e.g. the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, or the Committee against Torture which are authorized to hear claims by governments or private parties against other governments).³⁸

International "rule-of-law" and effective international adjudication also require better cooperation between international and *national* courts, for example so as to limit judicial self-restraint based on "political-question doctrines", "act-of-state doctrines", "non-self-executing-treaty doctrines" or "later-in-time legislation" inconsistent with international law. Both "horizontal" and "vertical" cooperation among courts can "reinforce each other's legitimacy and independence from

³⁷ Cf. Helfer, Slaughter, see note 8, 368–369.

³⁸ It is important to clarify, for instance, that the classical international law presumption that limitations on government powers are not readily to be presumed, does not apply *vis-à-vis* citizen rights: human rights treaties and European integration law rightly proceed from the opposite principle that limitations of individual freedom and human rights require legal justification and may not go beyond what is "necessary in a democratic society" (cf. arts 12, 18, 19, 21, 22 ICCPR) and "proportionate" for achieving a public interest.

political interference” and promote the needed “global conception of the rule of law”.³⁹ The close cooperation between the ECJ and national courts has been systematically promoted in many ways, for instance by regular contacts between EC judges and national judges and training programs for national judges on European Community law. Similar contacts and programs need to be developed for familiarizing national judges with the ICJ and human rights courts, even in the absence of direct citizen access to international courts and without a provision similar to article 177 ECT on international preliminary rulings at the request of national courts.

8. Need for Legal and Judicial Limitations on the Right to Unilateral Reprisals

The legal limitations in WTO law and EC law of the right to unilateral counter-measures go far beyond general international law and UN law. Just as the implementation of WTO dispute settlement rulings is under systematic “surveillance” by the WTO Dispute Settlement Body, and the EC Commission watches over the implementation of ECJ rulings on infringements of EC obligations by member states, the UN Security Council should keep under systematic multilateral surveillance the domestic implementation of ICJ judgments. As suggested by the ILC in its draft articles on state responsibility,⁴⁰ the right to unilateral counter-measures must be limited — as in WTO law and European Community law — by substantive legal disciplines and third-party adjudication.

9. Need for Comparative Analyses of the Different Procedures Practised by International Courts

Notwithstanding the many differences between the legal status, substantive law and procedures to be applied by the ICJ, on the one side, and e.g. the WTO Appellate Body and the ECJ, on the other side, comparative analyses of the procedures and dispute settlement practices of these international bodies are needed in order to examine, for instance, why the written and oral dispute settlement proceedings before the ICJ

³⁹ Cf. Helfer, Slaughter, see note 8, 282.

⁴⁰ *ILM* 37 (1998), 440.

last so much longer than panel and appellate review proceedings in the WTO (e.g. the time-lapse between the close of the written proceedings and the opening of oral hearings; the two rounds of oral proceedings which are limited in WTO practice to 1–2 days each, but tend to last many weeks in the ICJ); why intervention by third states is a regular feature in WTO and EC dispute settlement proceedings, but plays hardly any role in the ICJ; why WTO dispute settlement procedures are more open for *amicus curiae* submissions by non-governmental organizations than the very restrictive ICJ practice in this respect; whether and how international courts should encourage a negotiated dispute settlement in the course of the court proceeding; why *ad hoc* chambers (“divisions”) are regularly used in the WTO Appellate Body and enable its seven part-time judges to decide more disputes per year than the ICJ; or whether the reluctance on the part of the ICJ to exercise appellate review over arbitral awards needs to be reconsidered.⁴¹

Such comparative analyses could suggest reforms of the ICJ’s procedures and working methods (e.g. the limitation of a “day in court” to 3 hours per day, minus a coffee break; the lengthy and costly elaboration of “notes” of up to 100 pages by each of the 15 ICJ judges) and could help to improve the functional capacity of the ICJ. For instance, even though neither the WTO dispute settlement procedures nor the ECJ procedures prohibit individual opinions, the WTO Appellate Body and the ECJ have so far disallowed individual separate or dissenting opinions so as to strengthen the authority of their decisions, insulate individual judges from political pressures, and avoid delays resulting from individual opinions. The proliferation of separate and dissenting opinions in the practice of the ICJ, by contrast, seems to delay the ICJ’s procedures and sometimes to weaken the authority of ICJ decisions. Comparative analyses of international court procedures (e.g. for preliminary objections, requests for preliminary measures, default of appearance by one of the parties) could no doubt also help the periodic reviews of the still very imperfect WTO dispute settlement system to prepare additional reforms.

⁴¹ Apart from the very special ICJ advisory opinions on appeals from the UN and ILO administrative tribunals, there have been so far two requests, in the *King of Spain Case* (ICJ Reports 1960, 192) and in the *Guinea-Bissau v. Senegal Case* (ICJ Reports 1991, 53), in which a state asked the ICJ to overturn a previous arbitral award. In both cases, the ICJ confirmed the validity of the arbitral award and manifested great reluctance to set them aside on grounds of excess of powers or insufficiency of reasoning.

10. Need for American and European Leadership for “Constitutionalizing” UN Law

Compulsory judicial protection of freedom, non-discrimination and rule of law would have never been achieved in WTO law and European integration law without strong leadership from constitutional democracies. After having “exported” the authoritarian model of the “sovereign state” and “European public law” to all continents without much respect for human rights, and after having succeeded in constitutionalizing modern European integration law, the EU should “lead by example” initiatives for the overdue “democratization” of UN law. The 1997 Amsterdam Treaty defines the objectives of the EU’s “common foreign and security policy” in terms of “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”... “in accordance with the principles of the United Nations Charter” (article J.1). Parallel to the increasing number of guarantees of human rights and democracy in the internal law of the European Union,⁴² “human rights clauses” and “democracy clauses” have also been included into more than 50 international trade, association and development agreements concluded by the European Community with third states.⁴³ European history has made abundantly clear that the EU’s objective of a “common foreign and security policy covering all areas of foreign and security policy” cannot be achieved unless the foreign policies of the EU and its member states are based on respect for human rights and international law, on active participation of the EU in international organizations, and on judicial protection of the rule of law not only within the European Union but also in its international relations with third states.

IV. Need for a Constitutional Theory and Strategy for Strengthening the UN Legal and Dispute Settlement System

Can the UN be reformed? Tommy Koh, Singapore’s ambassador to the UN for more than three decades and chairman of numerous UN con-

⁴² L. Betten, N. Grief, *EU Law and Human Rights*, 1998.

⁴³ B. Brandtner, A. Rosas, “Human Rights and the External Relations of the EC: An Analysis of Doctrine and Practice”, *EJIL* 9 (1998), 468 et seq.

ferences, has qualified his positive answer to this question by two major caveats: "My first caveat is that no amount of reforming can realize the two central goals of 1945 which are enshrined in the UN-Charter, i.e. that disputes between states would be settled by peaceful means and that international peace and security would be maintained by the Security Council The reality of international politics leads me to the conclusion that those goals cannot be realistically achieved in the future. My second caveat is that we should have no illusions about the formidable vested interests, both in the Secretariat and in the delegations of member states, which will oppose any reform which impinges on their interests. This unholy alliance has succeeded in defeating all previous attempts at reforming the United Nations."⁴⁴

One hundred years after the 1899 Hague Peace Conference and the Hague Convention on the Peaceful Settlement of International Disputes, access to courts and third-party adjudication of international disputes are more widely guaranteed, and much more frequently used, in worldwide economic law and European integration law than in UN law and other areas of international law. The WTO and European Community legal and dispute settlement systems are also open for non-state actors and for the protection of individual rights (such as the intellectual property rights protected by the WTO Agreement on TRIPS). The 1999 centennial of the Hague Peace Conference and the closing of the UN Decade of International Law offer appropriate occasions for identifying areas where the UN legal and dispute settlement system needs to be strengthened. No less important is the need to recognize that proposals e.g. to permit private citizens direct access to the ICJ, or to provide for preliminary rulings by the ICJ at the request of national courts, are at risk of being opposed by the very same governments which currently oppose the strengthening of human rights in UN law and compulsory jurisdiction of the ICJ. Hence the need for a more comprehensive constitutional theory and strategy for strengthening the UN legal and dispute settlement system not only *vis-à-vis* states but also for the benefit of individual citizens and other non-state actors (like the people of Namibia and of East Timor who, in the 1971 *Namibia Case* and 1995 *East Timor Case* in the ICJ, had neither standing to intervene nor a right to present *amicus curiae* briefs). Failure to take into account the interests of individuals and other non-state subjects of international law (like the European Community) risks rendering the UN legal and dispute set-

⁴⁴ T. Koh, *The Quest for World Order. Perspectives of a Pragmatic Idealist*, 1998, 27.

tlement system even less relevant for many actors in international relations.

As indicated above, effective protection of human rights, and the declared UN objective of “the rule of law among nations”,⁴⁵ cannot be achieved without access to courts and compulsory third-party adjudication at the national and international levels. “Realists” perceive the absence of “rule of law” and of compulsory judicial protection in the UN legal and dispute settlement system as normal in view of the power-oriented nature of many areas of UN law. “Idealists”, however, rightly emphasize the need for actively promoting “democratic peace”, as well as the historical possibility, proven by European integration law and WTO law, to design “constitutional strategies” for replacing power-oriented dispute settlement systems by judicial protection of the international rule of law. The acceptance of compulsory international adjudication in the worldwide WTO legal and dispute settlement system, as well as in regional European integration law and the Council of Europe, was made politically possible through the following three insights of constitutional theory:

1. Taking Human Rights and Rule of Law more Seriously: Need for “Democratization” of UN Law

The WTO Agreement has brought citizens all over the world more freedom, non-discrimination and economic welfare gains (e.g. in terms of tax savings and increased real income) than probably any other international treaty. Also EC law and the ECHR were legitimized not only by their ratification by national parliaments but also by their “democratic functions” to protect and extend individual freedom, non-discrimination and judicial review for the benefit of European citizens across national frontiers.⁴⁶ The UN-Charter’s claim to legal primacy (cf. Article 103) over all other international and national law will remain contested as long as UN law does not protect human rights, democratic peace and third-party adjudication of international disputes more effec-

⁴⁵ Quoted from the preamble to the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 October 1970, reproduced e.g. in: I. Brownlie, *Basic Documents in International Law*, 4th edition, 1995, 36.

⁴⁶ Cf. Petersmann, see note 18, Chapter VII.

tively. As within constitutional democracies, the worldwide recognition of human rights entails that the classical international law principle of *pacta sunt servanda* may no longer be a sufficient basis for the “rule of international law” if the international rules do not protect human rights and democratic peace. As explained in *Kantian* legal theory more than 200 years ago, the authoritarian “international law of coexistence” and “international law of cooperation”⁴⁷ need to be supplemented by “international constitutional law” and “cosmopolitan integration law” designed to protect human rights, rule of law and democratic peace more effectively.

Just as the constitutional theories (e.g. on parliamentary democracy) for nation states could not be transplanted to the level of EC law without far-reaching adjustments,⁴⁸ the necessary elaboration of a “UN constitutional law” requires taking into account the structural differences between constitutional democracies and international organizations with necessarily limited powers and with different institutional systems for democratic participation and constitutional “checks and balances”.⁴⁹ Depicting the UN as an emerging constitutional system with legislative, executive and judicial powers similar to constitutional democracies is misleading and illustrates the “constitutional deficit” of traditional international law doctrines.

2. Need for “Constitutional Package-deals” behind a “Veil of Uncertainty”

Constitutional theory emphasizes that agreement on long-term rules on equal freedoms and rule-of-law is easier to achieve behind a “veil of ignorance” (*J.Rawls*) which, by making it difficult to identify the redistributive effects of alternative rules, reduces the incentive for egoistic “strategic choices” among rules for one’s own advantage and enhances

⁴⁷ On this distinction see: W. Friedmann, *The Changing Structure of International Law*, 1964.

⁴⁸ E.U. Petersmann, “Proposals for a New Constitution for the European Union: Building-blocks for a constitutional theory and constitutional law of the EU”, *Common Market Law Review* 32 (1995), 1123 et seq.

⁴⁹ Id., “How to Constitutionalize the United Nations? Lessons from the “International Economic Law Revolution”, in: V.Götz, P.Selmer, R.Wolfrum (eds), *Liber amicorum Günther Jaenicke-Zum 85. Geburtstag*, 1998, 313 et seq.

the willingness to accept long-term constitutional guarantees of freedom, non-discrimination, fair procedures and rule-of-law.⁵⁰ In the Uruguay Round of multilateral trade negotiations in GATT, for instance, it was recognized that compulsory international adjudication could not be introduced by means of "amendments" of GATT 1947 pursuant to GATT Article XXX, but only by replacing the GATT 1947 by a new "WTO Constitution" and by excluding countries from the WTO world trade and legal system unless they accept the whole "Uruguay Round package deal", including the WTO's dispute settlement system based on compulsory jurisdiction and quasi-judicial panel and appellate review.

UN lawyers do not render the UN legal system a service by ignoring that the necessary "democratization" and "constitutionalization" of the UN-Charter cannot be brought about through amendments pursuant to Arts 108 or 109 UN-Charter. The UN-Charter's failure of inducing all UN member states to voluntarily accept the compulsory jurisdiction of the ICJ, like other "constitutional failures" of UN law, can be overcome only through a "new UN Constitution" that offers a mutually beneficial package deal with such advantages to UN member states (e.g. in terms of economic assistance from the IMF and World Bank Group for democratic reforms) that governments find it more advantageous to commit themselves to democratic reforms and compulsory ICJ adjudication of international disputes than face the alternative of being excluded from a "new UN".⁵¹ Just as the old GATT 1947 coexisted during a transitional period with the new WTO, the "UN 1945" and a democratic new UN Constitution could coexist and complement each other until the guarantees of a new UN constitution for human rights, democratic peace and compulsory jurisdiction of the ICJ would be recognized by all UN member states.

⁵⁰ Cf. J. Rawls, *A Theory of Justice*, 1973, Chapter III.24. On the important distinction between "constitutional choices" among rules and "post-constitutional choices" within rules see: Petersmann, see note 18, 212 et seq.

⁵¹ This "Uruguay Round strategy" for "constitutionalizing" the UN is explained in detail in: E.U. Petersmann, "How to Reform the UN System? Constitutionalism, International Law and International Organizations", *LJIL* 10 (1997), 421 et seq.

3. Need for "Constitutionalizing" International Adjudication

Compared with the domestic law of constitutional democracies, the interpretation and application of international law by international courts is fraught with many uncertainties, for instance if judges from non-democratic countries construe the authoritarian concepts of classical international law without regard to human rights. One way of reducing such risks is the provision of appellate review, as in the WTO dispute settlement system, the ECJ and the European Court of Human Rights (as revised by the 11th Protocol). Another possibility is to grant the parties greater influence on the choice of the judges (e.g. in international arbitration, the GATT and WTO panel procedures, and in the use of chambers in the ICJ). GATT/WTO law — by prescribing justiciable minimum standards for "free trade areas", "customs unions" and "integration agreements" and providing for political and judicial review of the WTO-consistency of such regional law (including e.g. European Community, EFTA and NAFTA court decisions) — applies still another unique method for promoting the mutual consistency of worldwide and regional agreements and dispute settlement procedures.

The necessary "democraticization" of UN law requires allowing both individuals and supranational organizations (like the European Community) direct access to the ICJ as well as to specialized UN courts. As long as the necessary consensus for such reforms of the UN dispute settlement system does not exist, the continuing proliferation of regional and worldwide courts, arbitral tribunals and other dispute settlement mechanisms offer an alternative way of progressive reforms of the international dispute settlement system in response to the needs of the modern "human rights revolution" and "international economic law revolution". Even though this proliferation of international dispute settlement bodies has emerged without a coherent system (e.g. as regards access to justice and overlapping jurisdiction), and without hierarchical authority (e.g. by the ICJ) to ensure overall legal consistency, "conflicting judicial interpretations" have remained rare so far and harmless (since judicial interpretations may benefit from additional review).⁵²

⁵² See R.Y. Jennings, "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers", in: *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, ASIL Bulletin 9 (1995), 5–6, who refers to conflicting interpretations in the 1995 judgment of the European Court of Human Rights in the case *Loizidou v. Turkey* and in the 1956 *Norwegian Loans Case* of the ICJ.

Apart from the ECJ's jurisprudence on the "autonomy" of European Community law as a "new legal order of international law" based on human rights and rule of law (rather than on the classical international law principles of state sovereignty, reciprocity and self-help),⁵³ international courts — notwithstanding the variety of their procedures and specialized jurisdiction — tend to accept the unity of international law and the need for legal coherence. The frequent references to ICJ judgments, e.g. in WTO Appellate Body reports, illustrate that the ICJ — in spite of the much smaller number of ICJ judgments compared with judgments e.g. in WTO and European Community adjudication — continues to be recognized as "the principal judicial organ of the United Nations" and only international court with general international law jurisdiction to decide on "any question of international law" (Article 36 para. 2 lit.b ICJ Statute). The mere fact that the ICJ's docket remains full and the ICJ continues to decide two to three cases per year, is, however, no reason for ICJ judges and UN lawyers to ignore international economic law and the jurisprudence e.g. of the WTO Appellate Body, the ECJ or the European Court of Human Rights.

The ICJ — as the "principal judicial organ of the United Nations" (Article 92 UN-Charter) — should actively contribute to the necessary cross-fertilization and "cooperation among international courts" (e.g. in the international human rights jurisprudence). State-centered interpretations of international law by the ICJ risk coming into conflict with interpretations (e.g. by the ECJ and the European Court of Human Rights) focusing on human rights and on non-discriminatory competition among citizens across frontiers. The limitation of the ICJ's contentious jurisdiction to disputes among states will hamper the evolution of the ICJ into a "supreme court" for the interpretation of international law, especially if the ICJ neglects (e.g. in its interpretation of the general principles of international law) the need for adjusting the "international law of coexistence" to the modern "human rights revolution" and "international economic law revolution". The establishment of the international criminal tribunals for Rwanda and Yugoslavia, and the 1998 Rome Statute of the International Criminal Court, were necessary because the ICJ could not have assumed such a role in view of its limited contentious jurisdiction for inter-state disputes. The Law of the Sea Tribunal reflects dissatisfaction with the ICJ. Creation of new international courts may, however, facilitate the necessary reforms of the UN dispute settlement system.

⁵³ *Van Gend en Loos*, Case 26/62, ECR 1963, 1.

In European integration law, the ECJ and national courts, usually at the request of the independent EC Commission or of self-interested citizens, have become the most potent enforcers of international guarantees of freedom, non-discrimination and rule-of-law. The procedure for preliminary rulings (article 177 ECT) has enabled a powerful cooperation between national and international judges and courts: the ECJ has final jurisdiction for interpreting European Community law and for deciding on the validity of European Community secondary law; but the European Community rules are applied to the particular facts by the national courts which decide the dispute at issue. Governments have occasionally not implemented ECJ rulings; but they have not dared to ignore the judgments and enforcement of European Community law by their own national courts.

The ECJ and the European Court of Human Rights, even though established by international treaties among states, construed their constituent treaties as "constitutional charters" with implied guarantees of human rights, rule of law, democracy and other constitutional principles conferring direct citizen rights. By enabling self-interested citizens to enforce the international rules through national courts, the European legal and dispute settlement system uniquely enhanced the effectiveness of the rule of law and of constitutional restraints on abuses of government powers. European integration law, by enlarging the individual rights of the "citizens of the Union" (article 8 ECT), responded in an innovative manner to the need for democratic legitimacy of European Community rule-making, notwithstanding the absence of a single European "demos" and the still limited powers of the European Parliament. The progressive constitutionalization of European integration law offers important lessons for the necessary "democratization" of the state-centered UN law which, in many areas, still treats citizens as mere objects of government without effective guarantees of human rights, democracy, separation of powers and judicial control.

The European court system rests in part on procedures (such as requests by national courts for "preliminary rulings", direct citizen access to the ECJ and the European Court of Human Rights) that have so far no parallel in the inter-state dispute settlement system of the ICJ and in UN human rights covenants. Nonetheless, the "constitutional jurisprudence" of both the ECJ and the European Court of Human Rights can in many ways serve as a model for how the ICJ and other international courts should interpret international law for the benefit of "We the

Peoples of the United Nations”⁵⁴ and strengthen cooperation among international and domestic courts. The increasing influence of non-governmental organizations and other private interests on the progressive development of international human rights law, humanitarian law, economic law and regional integration law — for example on the 1998 Rome Statute of the International Criminal Court and the settlement of international environmental disputes (such as the 1998 WTO Appellate Body report on the “shrimp/turtle dispute” which explicitly admitted “*amicus curiae*” briefs” from non-governmental organizations⁵⁵) — also illustrates that international economic law and regional integration law offer important lessons for the necessary “democratization” of world-wide international law and dispute settlement procedures.

⁵⁴ H.G. Schermers, “We the Peoples of the United Nations”, *Max Planck UNYB* 1 (1997), 111 et seq.

⁵⁵ Doc. WT/DS58/AB/R of 12 October 1998.