

Tel Aviv University Law School

Tel Aviv University Law Faculty Papers

Year 2011

Paper 125

National Courts Review of Transnational Private Regulation

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I. Introduction

In recent years, the growing reliance on private actors in the domestic sphere¹ to perform functions and deliver services traditionally provided by governmental actors has migrated to the international sphere. Transnational private regulation (TPR) bodies composed of either private actors or a hybrid of public and private actors have increasingly either replaced direct governmental regulation or have begun regulating

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¹ On the privatization in the domestic sphere and its public law implications see *e.g.* Gillian E. Metzger (2003) Privatization as Delegation 103 Colum. L. Rev. 1367; Jody Freeman (2000), *The Private Role in Public Governance* 75 NYU L. Rev. 543; Harm Schepel (2005), *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*; Martha Minow (2002), *Partners, Not Rivals: Privatization and the Public Good*.

areas that have never been subject to governmental oversight. Such private initiatives result from full or partial delegation of authority by governments to private actors, or from new private initiatives that are approved, tolerated, or left unnoticed by overburdened governments. These TPR bodies either regulate their own behavior by deciding, for example, which food safety measures they will adopt for their own purchases of agricultural products,² or regulate others' activities, by accumulating, processing or disseminating information for the consumption of third parties.³

The sources of power and authority of private actors vary. At times, the large market share that these private regulators possess is itself sufficient to generate the compliance of those who transact with them. At other times, as in the case of professional associations, they are backed by statutory delegation of authority from the state to control entry to the profession, and regulate the conduct of the professionals. With or without delegation of public authority from the state, such privately set policies often shape the choices of third parties as much or sometimes even more, than official state functionaries. As in the case of the domestic sphere, opinion remains divided about the potential consequences of TPR. While some extol the virtues of what they view as impartial, expertise-driven standard-setting,⁴ others express concerns about the efficacy and legitimacy of governance by bodies that are subject to little oversight and

² Jan Wouters, Axel Marx, Nicolas Hachez (2008), 'Private Standards, Global Governance and Transatlantic Cooperation- The Case of Food Safety Governance', 3, Leuven Centre for Global Governance Studies
 Fabrizio Cafaggi (2010), 'Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety', 1 European University Institute, EUI Working paper RSCAS 2010/10; Fabrizio Cafaggi, 'Product Safety, Private Standard-Setting and Information Network', in F. Cafaggi and H. Muir Watt (2009), *The regulatory function of European private law*, EE, pp. 215

³ For a comprehensive overview of the phenomenon of TPR and its implications see Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, European university institute, EUI Working paper RSCAS 2010/53 (2010) (hereinafter: *New Foundations*); *id.*, *Private regulation*, *supra* note 2.

⁴ See Freeman, *supra* note 1, at 666 ("Public/private arrangements can be more accountable because of the presence of powerful independent professionals within private organizations. The background threat of regulation by an agency can provide the necessary motivation for effective and credible self-regulation. The two principal partners in a regulatory enterprise (the agency and the regulated firm, or the agency and the private contractor) might rely on independent third parties to set standards, monitor compliance, and supplement enforcement.").

can potentially advance narrow private interests through the creation of standards tailored to their own needs rather than those of the effected publics.

Not surprisingly *transnational* private regulation poses even more dramatic challenges than *domestic* private regulation.⁵ Globalization and the increased international regulatory coordination that it has fostered accelerated the long standing shift in the political balance of power in most democratic states from the legislative to the executive branch and, in addition, have advantaged those private actors with mobile economic resources.⁶ As a consequence, key venues of regulatory policy making have tended to migrate – with governmental approval or by default – from the national to the global arena and from the public to the private sphere. Such privately-ordered, informal arrangements facilitated coordination without entailing long-term commitments, rigid rules that might constrain state executives, and avoidance of public scrutiny.⁷ In this sense, TPR which is emblematic of both trends is doubly removed from the public sphere and from the ideal of deliberative democracy. More disturbingly, by increasing the information asymmetries among the various (domestic and global) stakeholders, and by evading or rendering obsolete traditional constitutional checks and balances and other oversight mechanisms, TPR threatens to exacerbate the already existing regulatory oversight deficit that globalization is widely believed to have created in many democratic states.

TPR has potential geopolitical implications as well with respect to further diminishing the bargaining power of developing countries. For example, TPR in the food

⁵ Benedict Kingsbury (2009), 'Weighing Global Regulatory Rules and Decisions in National Courts' *Acta Juridica* 90; David Kennedy (2005), 'Challenging Expert Rule: The Politics of Global Governance' 27 *Sydney L. Rev.* 5.

⁶ On the impact of globalization on national executives, especially of powerful states see Eyal Benvenisti & George W. Downs (2007), 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stan. L. Rev.* 595; on the benefits for small interest groups from globalization see Eyal Benvenisti (1999), 'Exit and Voice in the Age of Globalization', 98 *Mich. L. Rev.* 167.

⁷ Benvenisti & Downs, *supra* note 6, at 617-618; Eyal Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law, in *Coalitions of the Willing*—Avantgarde or Threat? (C. Callies et al. eds., 2007), available at <http://ssrn.com/abstract=875590>.

safety context concentrates power in the hands of Northern large retailers⁸ and creates an imbalance between them and producers who are mainly in the South.⁹ Developed countries refuse to regard these TPRs as barriers to trade while southern countries express concerns about what appears to them as the north's disingenuous way to overcome WTO obligations.¹⁰ Such suspicions are not allayed by the fact that the modest amount of positive evidence that the developed state defenders of TRPs have marshaled in defense of their democratizing effects often collapses under close scrutiny. For example, as Vogel has observed "[a]dvocates of civil regulations claim that, by providing nonbusiness constituencies with new political and market mechanisms to affect business decisions, these regulations can help address the democratic deficit in global governance. But virtually all these nonbusiness constituencies are located in developed countries."¹¹

While the move to TPRs characteristically improves the leverage of northern capital owners over more diffuse (northern and especially southern) constituencies, a few affected stakeholders have found ways to push back and revise the consequences of the delocalization of markets. Perhaps the most effective example of such resistance involves a global union association, the International Transport Workers' Federation (ITF) whose most successful campaign to date has focused on eliminating the adverse consequences for seafarers from the reflagging of ships under flags of convenience.¹² The ITF, based in London, draws its strength from the solidarity that exists between

⁸ Fabrizio Cafaggi (2010), *Supra note 2*, at 3; Wouters *et al.*, *Supra note 2*, at 12

⁹ Cafaggi, *id.* Also G. Chia-Hui Lee (2006), 'Private Food Standards and their Impacts on Developing Countries', European Commission – DG Trade Unit G2 Paper, available at http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf

¹⁰ On this debate Wouters *et al.*, *supra note 2* at 18-22

¹¹ David Vogel (2008), 'Private Global Business Regulation', 11 *Annu. Rev. Polit. Sci.* 261, 276. available at <http://polisci.annualreviews.org>.

¹² International Transport Workers' Federation, <http://www.itfglobal.org/about-us/moreabout.cfm>: "The ITF defines a ship that flies a Flag of Convenience, or FOC as one that has no "genuine link" between the real shipowner and the flag the vessel flies. An FOC ship is one that flies the flag of a country other than the country of ownership. The beneficial ownership and control of the vessel belong to a different country than that of the flag of the vessel" On this campaign see Nathan LILLIE, (2004) "Global Collective Bargaining on Flag of Convenience Shipping." *British Journal of Industrial Relations*, 42 (1), 47–67

dock workers and seafarers. While ship owners can hire and fire seafarers at will, doing so exposes them to retaliatory boycott threats by dockworker unions. The ITF has managed to successfully leverage this threat to create improved employment conditions and wages in the shipping industry. It has set up a Fair Practices Committee (FPC) to reduce “flags of convenience” abuses and to oversee ITF minimum collective agreements for seafarers designed to “ensure decent salaries and conditions for FOC seafarers, thus helping to prevent unfair wage-based competition.”¹³ While the IFC protected the interests of unions from both developed and established, labor-supplying developing countries, it effectively cut out new competitors to this market such as seafarers from China and Indonesia.¹⁴ Vogel's warning is applicable also for transnational labor unionism which manages to exclude important voices, such as the Chinese and Indonesian seafarers.

In what follows we discuss the prospect that national courts (NCs) will take it upon themselves to directly or indirectly review such TPRs and thereby address some of the challenges that the TPRs potentially raise with respect to economic efficiency, democracy, and equality. Below we briefly flesh out some of the concerns that TPRs raise as a prelude to assessing the prospects for effective NC oversight. Similarly to inter-governmental standard setting exercises through inter-governmental institutions or informally, NCs involvement can be at least partially instrumental in promoting accountability and representativeness of TPR processes. In order to accomplish this, NCs can resort to tools that they have developed over the years in response to privatized regulation in the domestic level. These are doctrines that seek to provide either direct or indirect judicial review of the policies adopted by private regulators or review of the act of delegating governmental authority to private actors. Part II surveys the available doctrines that NCs could use and the procedural norms that shape private law litigation

¹³ <http://www.itfglobal.org/itf-americas/fpc.cfm>

¹⁴ The ITF's so called "Athens Policy" requires that vessels engaged in international ferry service provide employment standards equivalent to one or the other of the countries they service. This policy was invoked when the Finnish ferry Viking Line wished to reflag under Estonian flag in order more effectively compete with Estonian-based ferries in the Baltic ferry trade, an incident that will be discussed further below. Lillie, *supra* note 12 at 58.

as opposed to public law litigation. Part III assesses the constraints that NCs face when confronted with such tasks. Part IV concludes with an assessment of the potential and limits of NC regulation of TPRs.

II. NC Tools for Regulating TPRs

Despite the fact that private regulation takes part below the radar screen of public law and does not necessarily depend on prior authorization or subsequent approval by public authorities, national courts have developed legal doctrines that successfully identify and alleviate at least some of the adverse effects of domestic private regulation. These doctrines can often be used to regulate TPRs. This Part examines the tools that NCs have used in this context. Section (a) will focus on doctrines of substantive law. Section (b) will examine procedural norms and examine their impact on NC review of private regulation. The aim in this Part is not to discuss these doctrines exhaustively, but to outline their potential effect on containing the discretion of TPRs.

(a) Substantive Law

(i) Public Law Doctrines

Formally or informally, many TPRs exercise public authority, either because they act under explicit or implicit state authorization or because their exercise of "public functions," however vaguely defined, impacts individual rights and interests that are protected by domestic constitutions, domestic administrative law norms, or by supranational bills of rights. As we have already noted, NCs in several countries have developed a number of doctrines in the domestic context that subject such domestic actors to public law obligations, including administrative law requirements (as if they were administrative agencies) or constitutional law obligations. These doctrines typically

have different titles and different scopes of application (e.g. the US “State Action” doctrine),¹⁵ but they all share the effort to treat private bodies that exercise public functions as if they were administrative agencies subject to at least some public law constraints and hence to judicial review.

Such review may or may not involve the private actor directly. The executive and even legislator might be subjected to judicial review by virtue of their decision either to delegate authority to the private body, or by virtue of their failure to effectively oversee its activities. The Supreme Court of Canada, for example, reasoned that “[j]ust as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”¹⁶ Courts in several other countries have applied similar principles of administrative law to private entities that perform public functions.¹⁷ These are tools developed in the domestic context by many NCs in response to executive branch attempts to pass, disguised as private actors, below the muster of administrative or constitutional courts. There is no doctrinal reason that would prevent NCs from responding in a similar fashion to the use of TPRs for similar objectives, and, for example, subject the TPR body responsible for organizing the Olympic Games to the obligation to maintain gender equality in the games. The failure of the Canadian and the

¹⁵ Stephen Gardbaum (2006), 'Where the (state) action is' *International Journal of Constitutional Law*, 4 (4), 2. Andras Sajó & Renata Uitz (eds) (2005) *The Constitution in Private Relations: Expanding Constitutionalism*, Eleven International Publishing; Freeman, *supra* note 1; Harold J. Krent (1990) Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, *NW. U. L. Rev* 85 (1). 62 pp 65-66 (noting that Congress has delegated administrative authority also to private individuals and private groups to implement and execute legislative plans.); F. Cafaggi (2006), 'Rethinking Private Regulation in the European Regulatory Space', *European University Institute, EUI Working Paper*, 13, 1 pp 7,16.

¹⁶ *Eldridge v. British Columbia (Attorney General)* [1997] 2 S.C.R. 624, para. 42

¹⁷ In the UK the leading judgment is *R v Panel for Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815 (decisions of a private body -- the City's self-regulating mechanism for dealing with mergers and acquisitions -- exercising public functions may be amenable to judicial review). See also *YL v Birmingham City Council and others* (2007), para.20, 30 [a majority of 3 to 2 held that a private care home providing care and accommodation for elderly people under contract with a local authority was not exercising “functions of a public nature” within s 6(3)(b) of the Human Rights Act 1998]; Colin D. Campbell (2009), 'The Nature of Power as Public in English Judicial Review', *Cambridge Law Journal* 68 (01) 90, p-11.

US courts to decide against the organizers of these Games¹⁸ should be attributed not to the lack of legal tools but to the collective action problem that NCs face, a problem to be dealt with below.

(ii) Private Law Doctrines

TPRs may be bound by statutes that regulate market activities, most prominently competition law, corporate law and the law of associations that offer different rationales and opportunities for NC review of TPR activities that affect third parties.¹⁹ Beyond such specific statutory obligations, TPR bodies could be subjected to the general obligations imposed on private actors. In both contract law and tort law there are open-ended standards such as good faith (in contract) or reasonableness (in tort) that can be employed by NCs to review private regulations. In both areas of law, the reliance of one party to a contract or the defendant in torts on a relevant PR standard could be regarded as complying (or not) with their contractual or tort law obligations.²⁰ This provides courts with an opportunity to address the relevant PR and assess its proper impact on the parties' obligations.

In many legal systems, courts interpret private law obligations on the basis of underlying public law principles. In some jurisdictions, Germany for example, courts

¹⁸ *Sagen v. Vancouver Organizing Committee for the 2010 Olympics and Paralympic Winter Games 2010* (Supreme Court of British Columbia, 2009) (rejecting a suit alleging gender discrimination). In *Martin v. International Olympic Committee* 740 F.2d 670 (1984) the Ninth Cir. rejected the suit on procedural grounds but added: "we find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement--the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement." The dissenting judge lamented the missed opportunity to use "America's commitment to human rights... to tip the scales of justice in favor of equality."

¹⁹ See e.g. *Broadcom Corp v Qualcomm Inc*, 501 F.3d 297 (3rd Cir. 2007) (private standard setting regime must be compatible with US competition law); *Coalition for ICANN Transparency, INC. v. VeriSign* (9th Cir., 2009) (accepting the framing of standards set by ICANN as potentially infringing anti-competition law). See in general Freeman, *supra* note 1, Cafaggi, *supra* note 15 at, pp 31-33

²⁰ See Kingsbury *supra* note 5 at 97-98; Cafaggi, *New Foundations*, *supra* note 3 at 336; Cafaggi (2006) *supra* note 15 at 25-26.

readily acknowledge the indirect effect of constitutional rights on private law. The German doctrine of “Drittwirkung” is based on the judicially-supported understanding that in a coherent legal system, the constitution must be regarded as having not only vertical effects on the relations between government and governed but also horizontal effects among the governed. As a consequence, the constitution sets forth not only “subjective” rights against the state but it also creates an objective order of values that permeates the whole legal system.²¹ Such a doctrine is not explicitly recognized in the U.S.. However as the case of *New York Times v. Sullivan*²² demonstrates, civil rights inform the interpretation of the responsibilities of individuals inter se, due to the immediate effect that imposing civil liability has on the exercise of civil rights like free speech.²³ The ECJ explained the indirect applicability of Community law obligations not on the basis of a certain theory but on the functional need to ensure the effectiveness of community law: “the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.”²⁴

The 2007 case of *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line*²⁵ offers an example of indirect judicial review of a TPR. The ECJ invoked the principle of indirect effect of community law as the basis for examining and potentially superseding the policy of the ITF which is a TPR that sought to

²¹ See e.g. Andrew Clapham (2006), *Human Rights Obligations of Non-State Actors*, Oxford University Press 521.

²² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),

²³ Gardbaum, *supra* note 15, at 6; Cafaggi, *supra* note 15, at 43.

²⁴ Case C–36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405, para 18. For the EU see Joanna Krzeminska-Vamvaka *Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU theories compared after Viking Line* Jean Monnet Working Paper 11/09 <http://centers.law.nyu.edu/jeanmonnet/papers/09/091101.pdf>;

²⁵ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union V Viking Line ABP and OU Viking Line Esti* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML>

set standards for reflagging of ships under flags of convenience,²⁶ and subjected the TPR to a proportionality analysis that includes examination whether they are aimed at ensuring legitimate interests, are "suitable for ensuring the achievement of the objective pursued and do[] not go beyond what is necessary to attain that objective."²⁷

(b) Procedural Norms

Historically, NC review of private regulations has usually taken place in private law litigation. As we saw above courts possess several legal doctrines that enable them to import public law principles to private law disputes and thereby bridge the normative gap between public and private law litigation. However, the procedural dimension of the litigation adds complexity: while private litigation offers some benefits to potential claimants, it also imposes some restrictions on them.²⁸

Private law litigation is relatively less open to public participation than public law litigation which frequently offers more possibilities for members of the general public, either to initiate litigation or to take part in it. The requirements of standing for initiating public law adjudication are also lower than in private action: in common law systems one has to demonstrate a personal stake (not necessarily unique) in the outcome of the litigation rather than that a right had been infringed by the defendant. Some jurisdictions are ready to open their doors to *actio popularis* petitions that raise public concerns. Those systems that require a showing of a right that was infringed as the basis for public law litigation are ready to interpret that right widely and read into it the reciprocal state obligation to protect that right against encroachment by private parties. Public law litigation is also relatively more open for input from members of the

²⁶ *Id* at para 73.

²⁷ *Id.*, at para 84.

²⁸ On the of private ex-post enforcement see Samuel Issacharoff and Ian J. Samuel (2009), 'The Institutional Dimension of Consumer Protection,' Public Law & Legal Theory Research Paper Series Working Paper No.09-18, 5. Electronic copy available at: <http://ssrn.com/abstract=1369744>

public as respondents or amici.²⁹ As a result, public law litigation is likely to generate better information for the judges to process and decide upon. Courts that do not satisfy themselves that the information they have is comprehensive and full tend to intervene less in regulatory decisions.³⁰

An additional burden of private law litigation is the relatively high litigation costs when seeking to challenge the private regulators. The costs of private litigation are often significantly higher than public petitions, and private defendants may react to suits by bringing counterclaims for lost revenues as a result of the litigation or injunctions that were issued by the court. Attorney fees often constitute a significant obstacle for individuals who consider challenging a TPR in court. Attention in this context should be given to the growing availability of class action suits.³¹

At the same time, however, private law litigation can overcome barriers that exist in public law. First, private litigation that involves a foreign private regulator does not raise concerns about foreign sovereign Immunity, foreign act of state or other doctrines designed to prevent domestic courts from encroaching on foreign sovereigns. The “effects doctrine” has been recognized by NCs to empower them to adjudicate foreign private activity that produced adverse economic consequences within their jurisdiction and to impose on that foreign practice domestic antitrust or other regulatory norms.³² Also, sophisticated discovery tools developed in private law

²⁹ Hannah L. Buxbaum (2010), ‘National Jurisdiction and Global Business Networks’, *Indiana Journal of Global Legal Studies*, 17 (1) 165, pp 173-174.

³⁰ *Id.*, at 178; Robert Wai (2005), ‘Transnational Private Law and Private Ordering in a Contested Global Society’, *Harvard International Law Journal* 46 (2), 475-476, 482.

³¹ Samuel Issacharoff & Geoffrey P. Miller (2009) ‘Will Aggregate Litigation Come to Europe?’ 62 *Vanderbilt L. Rev.* 179.

³² See e.g., the decision to assert jurisdiction over KPMG, a UK-based accounting group: *Rocker Management, L.L.C. v. Lernout & Hauspie Speech Products N.V.*, 2005 WL 3658006, *7 (D.N.J. 2005). The court concluded that general jurisdiction could be sustained over KPMG UK: “There can be no doubt that KPMG offices are integral parts of a single global enterprise that conducts business in the United States. That KPMG UK deliberately markets and promotes itself as part of an integrated global network severely undercuts its present attempt to divest itself of a relationship with that network in order to defeat the exercise of personal jurisdiction.” See Buxbaum, *supra* note 29 at 181-182. Similarly *Ernst & Young Bermuda: Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 462 (S.D.N.Y. 2001).

litigation more than in public law could be used to obtain crucial information that could assist in reviewing TPR.

Just like in the case of the evolution of public law doctrines, it is safe to assume that courts will react to the need to restrain executive branch attempts to evade the review of administrative or constitutional courts. The private identity of the reviewed bodies could even enable courts to overcome barriers that exist in public law litigation.

III. Transnational Regulation Meets Transnational NC Cooperation

The question remains as to just how useful the tools developed by NCs to review private regulation will be for regulating transnational regulation. The fact that private regulation is now set by foreign private actors poses a challenge to many NCs. If one NC would refuse to give effect to a certain TPR, the TPR could then ignore the judgment (for example, because of the insignificant market share of the forum state) and even punish domestic actors for their court's activism. To the extent that TPRs reflect the private interests of major commercial actors, NCs may be deterred from exercising review over the TPRs out of the concern that such actors will retaliate by moving their business elsewhere. For example, if credit rating agencies would be penalized by one court for negligent rating³³ they might simply choose to stop rating local issuers or even relocate to a more amenable jurisdiction or; facing a demand to respect athletes' rights³⁴ could prompt the Olympic Games committee to choose another country as the venue of the Olympic Games. Past judicial practice indicates that NCs are quite sensitive to such adverse economic pressures.³⁵ NCs will tend not to volunteer their services simply to

³³ See e.g. *Abu Dhabi Commercial Bank v. Morgan Stanley and Co. et al* (08 Civ. 7508 (SAS)), one of the class action suits filed by investors against credit rating agencies in the Southern District of New York.

³⁴ See supra note 18.

³⁵ See the refusal of the US courts to litigate the consequence of the Bhopal disaster *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987) (on this case see *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Upendra Baxi ed., 1986); Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (1993)).

promote global economic interests or the global rule of law: they are national courts and they perceive themselves as the guardians of their respective domestic legal systems. NCs are unlikely to intervene in TPR review if there are no adverse domestic consequences that call for remedial action by the courts.³⁶ In other words, NCs must cope with the fact that regulating TPRs is a collective action problem.

But this collective action problem need not necessarily lead to failure to react to TPRs. Because we can expect that TPRs could cause adverse economic effects in several jurisdictions rather than in few, and thus pose a challenge to several courts simultaneously, we can anticipate that NCs will respond by exploring ways to collectively review those TPRs. National courts have since the end of the Cold War developed practices of coordination and cooperation to collectively confront global challenges to their authority. Especially since 2000 we are witnessing an increasing willingness by NCs to cooperate across political borders. NCs have probably realized that globalization made judicial cooperation both necessary and possible. It was necessary to seek a common judicial front that would limit the possibilities of foreign actors to shop for lower standards of environmental protection or labor rights, or of migrant workers to benefit from a particularly lenient application of the refugee convention. It was perhaps even more necessary to counter the growing practice of executives to set up global policies without regard to domestic constitutional guarantees. It was also necessary to resist lawmaking by the newly established or recently invigorated international tribunals. Fortunately, the technological innovations in the area of communications that sustained globalization also facilitated the evolution of cooperation among NCs. As a

Similar was the unwillingness of U.S. courts to adjudicate class action suits by Ecuadorian and Peruvian citizens against Texaco alleging that Texaco had severely polluted rainforests and rivers in Ecuador and Peru as a result of its oil exploitation activities in Ecuador (*Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated*, 157 F.3d 152 (2d Cir. 1998); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994)). In the same vein is the refusal to litigate the consequences of the bankruptcy of the International Tin Council in UK courts (*J.H. Rayner Ltd. v. Dep't of Trade & Indus.*, [1989] 3 W.L.R. 969, 81 I.L.R. 670 (H.L.)). For more examples see Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 *Eur. J. Int'l L.* 159 (1993).

³⁶ See *Morrison v. National Australia Bank* 130 S.Ct. 2869 (2010); *F. Hoffmann-La Roche Ltd., v. Empagran S.A.* 542 155 (2004); Buxbaum *supra* note 29 at 173.

result, in recent years NCs have evidenced an increased willingness to venture into the international arena, to take issue with the positions of their governments regarding the interpretation of treaties, and to otherwise constrain what had previously been governments' free hand in international bargaining.

This emerging practice of NC cooperation should eventually become self-enforcing as TPRs continue to develop. As it becomes routine NC cooperation can be expanded to other transnational phenomena which are believed to generate serious negative externalities that affect a significant proportion of states. While regulating TPRs poses a host of challenges, it does not raise special political or economic concerns that are beyond the courts' reach. After all, if NCs have managed to make the UN Security Council modify its procedures for delisting suspected supporters of terrorism there is no reason that they would not be able to insist that private athletic associations improve the due process rights of athletes accused of using illegal drugs.

IV. The Promise and Limits of NC Review of TPRs

In recent years a growing number of NCs have signaled a willingness to cooperate with their peers. They conveyed information about their commitment to cooperate by their reasoning and decisions and the tendency to rely on the same or similar legal sources. Using web-based forums,³⁷ e-mail lists, conferences and informal interaction they have set collective policies and informally monitored each other's compliance. The same practice can be repeated in the TPR context where NCs are in a position to serve as their nations' last national line of defense against skewed or unfair TPRs in circumstances where the political branches are captured by powerful lobbies.

³⁷ See for example the website of the IARLJ – International Association of Refugee Law Judges. Available at: <http://www.iarlj.org/general/index.php>

There are several opportunities for direct or indirect judicial review of TPR standards or practices.³⁸ Judicial endorsement of TPRs will be required, for example, for accepting a certain TPR standard as the “state of the art” practice in tort litigation, for endorsing a certain decision-making procedure as compatible with due process requirements, for supporting an administrative agency’s decision to comply with a TPR-based standard, or for recognizing private arbitration or alternative dispute resolution mechanisms that justify judicial deference to them under the doctrine of *forum non conveniens* as bar to litigation³⁹ or for recognizing its award as enforceable.⁴⁰

An important factor that has facilitated NCs cooperation across jurisdictions is their ability to resort to similar norms (based on similarly-worded bills of rights) or on the very same norm (in the case of multilateral treaties) to communicate with each other and signal their commitment to coordinated outcomes. Thus, for example, NC cooperation in reviewing executive policies has been facilitated by the use of comparative constitutional law and international law.⁴¹ Unfortunately in the context of TPR review there is more diversity in the legal doctrines available in the different jurisdictions, and reliance on general concepts such as human rights and due process may be too open-ended to serve as a focal point. In the future, NCs will therefore have to streamline their respective private and public law doctrines if they are to succeed in promoting coordination.

To the extent that NCs flex their muscles and exercise effective review, TPRs will need to take into account the potential NC reactions to their policies rather than simply rely on the acquiescence (or collaboration) of national regulators. Over time, this should prompt TPRs to peremptorily adopt reforms in response to anticipated criticism by courts and to shield themselves from future judicial intervention with their policies.

³⁸ For examples see Kingsbury (2009) *supra* note 5 at pp. 97-99

³⁹ *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp. 2d 348 (S.D.N.Y. 2002).

⁴⁰ *Barcelona.com v Excelentísimo Ayuntamiento*, 330 F.3d 617 (4th Cir. 2003)

⁴¹ Eyal Benvenisti (2008), 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', *American Journal of International Law*, 102, 241, at p. 243.

Some evidence of such preemptive initiatives can be found in global sport regulation. Intervention of some courts that expressed interest in protecting the due process rights of athletes has led a number of global sport TPRs to adopt standards that protect athletes' due process rights.⁴² The threat of NC intervention was probably also instrumental in motivating these TPRs to accept an expansive role for the Court of Arbitration for Sport which ensures that decisions affecting athletes comply with international principle of human rights.

We are, of course, still in the early stages of NC intervention in this area and it is not clear what the future will bring. However, it can be expected that increasing reliance on TPRs will be countered by growing NC willingness to review the standards for compatibility with their domestic laws and concerns. To the extent that NCs have reason to believe that TPRs are effectively acting as proxies for national executives we can expect a similar dynamic to take place. For example, if national political branches delegate authority to special TPRs to regulate environmental standards, there is no reason for NCs to treat the standards developed by the TPRs differently than those issued by the political branches themselves.

The promise of NC review of TPRs and its resulting impact also depends on the distribution of factors that shape the inclination of NCs to review TPRs. These factors will include the types of regulatory activities to be addressed and their impact on the economic, social, political and cultural condition of the forum state. There is some evidence that suggests that courts in India, for example, protect upper middle class interests such as clean environment but pay less attention to the interests of the poor farmers in the countryside or of dwellers of informal settlements.⁴³ Where judicial

⁴² Alec Van Vaerenbergh (2005), 'Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime,' IILJ Working Paper 2005/11, at pp 17-19.

⁴³ Upendra Baxi, "A Known but an Indifferent Judge": *Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 4 Int'l J. Cons. L. 557, 568 (2003)); Usha Ramanathan, 'Illegality and the Urban Poor' 41 *Economic and Political Weekly* 3193 (2006), available at <http://www.epw.org.in/epw/user/viewAbstract.jsp>, (suggesting that Indian courts give precedence to

scrutiny of TPRs will burden certain economic actors to the extent that they might boycott the forum state, we can expect significant internal pressure on the NC to avoid such review. TPRs that address the social and environmental impact of commercial activities in ways that benefit northern interests over southern ones will probably be treated differently in northern courts than in southern ones (if the latter ever get to adjudicate them). The more judicial intervention is likely to create adverse economic, social or environmental ramifications in the forum, the more NC intervention would require coordination with similarly situated NCs so that NCs make sure their forum does not suffer the adverse consequences of their activist court.

The parochial biases of NCs and their lack of experience in engaging in coordination with each other could also be mitigated by the assistance of regional and international tribunals when the latter have opportunities to respond to NC judgments. For example, the ECJ has an important role in imposing community obligations on private parties across the EU.⁴⁴ In theory, international tribunals could also step in to ameliorate north/south imbalances and thereby limit NC discretion. The WTO Appellate Body, for example, can be in a position to review the legality of national implementation of TPRs that effectively create barrier to trade.⁴⁵

V. Conclusion

In contrast to NC intervention in standard setting by intergovernmental organizations, indirect NC regulation of TPRs seems less likely to offer systematic responses to the challenges that they pose, at least in the short run. Private law doctrines vary among national legal systems to a greater degree than public law doctrines, and there is paucity of relevant international treaties that NCs could use if and when they seek to coordinate their policies with other NCs. Overtime, however, this

urban developers over slum dwellers and interpret narrowly laws that protect the poor).

⁴⁴ Cafaggi *Supra* note 15 at 21-22.

⁴⁵ *Id.*, at p. 22-23.

situation is likely to change as NC experience accumulates with NC cooperation in general and with addressing TPR-related cases in particular and there is broader public awareness of the challenges that they pose. An increase in the number of TPR cases is likely to lead NCs to begin citing each other and eventually to reducing the barriers to inter-court coordination by streamlining their respective doctrines on the direct or indirect applicability of public law obligations in private law.

Two other important distinctions between public and private litigation lay in the fact that the latter is less open to public participation and far more costly. NCs are likely to be or feel less informed and therefore unable to intervene. Here too we may anticipate changes introduced through developing similar class action requirements that would encourage private initiatives to sue on TPR issues. Even more than streamlining the doctrines on substantive legal obligations of TPRs, it will be important to consider reforms to comparative civil procedure law, especially the possibility of lowering the threshold of bringing class action suits.

At least initially, the more active NCs are likely to be those of northern countries and to be informed by predominantly northern stakeholders. This means that they are unlikely to receive complete information about the distributional stakes involved in connection with TPRs that have differential North/South effects and those that regulate the social and environmental impacts of commercial activities. As a result, the review processes driven by these NCs is likely to lead TPRs to become more egalitarian and democratic from the perspective of previously disregarded northern constituencies, but only rarely from those in the south. It is also not clear whether Southern NCs, if they ever choose to review TPRs, will protect the interests of average citizens or elites.