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## The Democratizing Effects of Transjudicial Coordination

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# The Democratizing Effects of Transjudicial Coordination

Eyal Benvenisti

## Abstract

There are growing indications that transjudicial dialogue among national courts has increased in recent years and that it has become more routinized. We argue below that this trend is at least partially motivated by the efforts of these courts to: address a 'judicial deficit' that has resulted from the broad transfer of regulatory policy-making authority from the domestic to the international sphere; and curb pro-executive interpretations of regulatory rules on the part of less politically insulated international tribunals. While recognizing the dangers of 'le gouvernement des juges', we suggest that, at least in the short term, the expanded role of national courts can operate to enhance rather than pre-empt domestic political processes and promote accountability to diverse democratic concerns by providing opportunities for national legislatures and civil society to weigh in on matters subject to executive discretion or international regulation.

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## The Democratizing Effects of Transjudicial Coordination

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### 1. Introduction

In addition to leading to a broad transfer of regulatory policy-making authority from the domestic to the international sphere, globalization has further enhanced the already dominant role of the national executive branches which are its chief architects. As a consequence, details of the regulatory policy design process and many aspects of the system's operation are effectively shielded from the domestic checks, balances and monitoring mechanisms that have been painstakingly constructed to insure adequate democratic oversight and deliberation. Should this trend continue, it is likely to result in a disproportionate increase in the power of the executive branch relative to other branches of government and a marked decrease in transparency.

The role of the judiciary at the international level has been particularly diminished relative to the traditional regulatory role played by the domestic judiciary in democratic states. Many international tribunals display relatively little independence from the executive branches of the dominant states,<sup>1</sup> and they have been particularly slow to embrace judicial review functions comparable to those traditionally provided by national courts. While these tribunals can be quite effective in criticizing a specific State Party for non-compliance with its international obligations – in fact this is the *raison d'être* of many of these tribunals – they shy away from supporting State Parties or individual third parties in questioning the legality of the measures and policies adopted by international organizations. At the same time, national courts, until relatively recently, have tended to defer to their executive branches and treat international regulatory policies as an aspect of foreign affairs.

The resulting lack of assertiveness on the part of international tribunals in adopting review functions combined with diminishing opportunities for national courts to effectively monitor and if necessary curb their respective executive branches in the area of foreign affairs, threatens to create a 'judicial deficit' that is particularly ominous for democracy and the rule of law at both the national and the international level.

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1 On the factors influencing the relative independence of international tribunals of the State Parties see E. Benvenisti & G. Downs, 'Prospects for the Increased Independence of International Tribunals', 2002 *German Law Journal* 12, pp. 1057-1081, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1353> (last visited 10 February 2012).

As Montesquieu despaired, in such an unbalanced system there is likely to be ‘no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.’<sup>2</sup>

In this article we argue that the intensification and routinization of the transjudicial dialogue among national courts is at least partially motivated by the effort of national courts to react to this ‘judicial deficit’ and its potentially negative consequences for their respective jurisdictions. This dialogue enables national courts to coordinate the interpretation of shared or similar texts – either domestic law or international law – and thereby to resist attempts of their respective executives to evade responsibility. Such coordination also helps national courts to curb pro-executive interpretations of the same texts by the less politically insulated international tribunals.

Of course, the success of such a strategy depends critically on its ability to address the judicial deficit without inadvertently promoting a democratically corrosive ‘*gouvernement des juges*’. Despite this danger, we suggest that, at least in the short term, the expanded role of national courts can enhance rather than pre-empt domestic political processes and can promote accountability to diverse democratic concerns by international organizations and transnational regulatory bodies (hereinafter referred to as international organizations). At this juncture, given the opaqueness of international organizations and the relative lack of will by international tribunals to review their principles, national court activism can provide a greater number of opportunities for domestic deliberation by national legislatures on matters subject to executive discretion or international regulation and national court review can provide much needed information for civic society and lawmakers engaged in forming their views and policies. Resistance by national courts to the regulatory measures of international organizations is likely to prompt the latter to take national courts’ concerns into account and address them. A beneficial (if unintended) consequence of national courts’ coordination may also be to strengthen the independence of international tribunals, thus allowing them to act more assertively vis-à-vis international organizations.<sup>3</sup>

## 2. The case for an expanded global role for national courts

### 2.1. Opportunities for national courts to control executives acting globally

Recently, national courts in several democratic countries have departed from their historical tendency to refrain from reviewing their own governments’ dealings with foreign governments and have exhibited a willingness to adopt a more assertive position vis-à-vis their governments. While their rationale for this new tendency towards assertiveness doubtless varies, it seems likely that, as acute political actors, these courts have come to realize that continuing to allow the executive branch unconstrained authority in international affairs in an era where an ever-increasing proportion of regulatory policy is made by international organizations risks impoverishing the domestic democratic and judicial processes. National courts also recognize that their respective legislatures often possess institutional limitations that leave them poorly equipped to cope with this trend<sup>4</sup> and they seek to strengthen the legislatures’ ability to react to executive-driven global regulation in the future.<sup>5</sup> Acting in consort with other domestic actors,<sup>6</sup> national courts can potentially reduce the degrees of freedom that executive branches enjoy in regulatory policymaking at the international level and start to rebalance their political systems, thereby recapturing the accountability that domestic constituencies have lost as well as preserving the expansion of judicial authority that many courts have managed to achieve in the last two decades.<sup>7</sup>

2 See C. Montesquieu, *The Spirit of the Law*, Vol. 11, 2008.

3 E. Benvenisti & G. Downs, ‘Court Cooperation, Executive Accountability and Global Governance’, 2009 *NYU Journal of International Law & Policy* 41, pp. 931-958.

4 See the analysis of the limited role of national legislatures in the EU legislative process: P. Norton, ‘National Parliaments and the European Union: where to from here’, in P. Craig & C. Harlow (eds.), *Lawmaking in the European Union*, 1998, p. 209; D. Judge, ‘The Failure of National Parliaments?’, 1995 *West European Politics* 18, pp. 79-100.

5 See, e.g., German Constitutional Court on Lisbon Treaty: *Bundesverfassungsgericht* (BVerfG) (Federal Constitutional Court), 30 June 2009, 2 BvE 2/08, available at <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)> (last visited 10 February 2012).

6 On the role of NGOs as transnational advocacy networks that assist domestic actors to change policies at the domestic and the international levels, see M. Keck & K. Sikkink, *Activists Beyond Borders*, 1998.

7 On the expansion of judicial power (and judicial autonomy) in recent years, see R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 2004 (explaining this phenomenon as resulting from attempts by elites to secure their dominant positions against challenges by the majority through the political process); A. Stone-Sweet, ‘The Politics of Constitutional

To succeed in this endeavour, national courts face two related challenges that threaten to limit or curtail their review authority. The first stems from the coordinated actions of the executive branches of mainly powerful states that are increasingly employing international organizations (like the UN Sanctions Committee) to regulate both the international and the domestic spheres. The second results from the impact of the decisions of various judicial bodies of international organizations such as the International Court of Justice (ICJ), the World Trade Organization (WTO) Appellate Body, or regional courts like the European Court of Justice (ECJ), on national court autonomy.

Perhaps as a consequence of these challenges, several national courts have become increasingly aggressive since 2000 in countering intergovernmental actions that threaten to limit their judicial review powers. Within developed states most of this activity has occurred in two areas: the judicial review of global counterterrorism measures and the determination of status and rights of asylum seekers in destination countries. However, in addition, national courts in developing countries have also presented judicial resistance to conflicting international organization-based standards in the areas of socio-economic rights and environmental standards.<sup>8</sup>

The grounds that national courts cite in defence of this expanded assertiveness in connection with these international bodies are similar to those that they have historically employed in the domestic context; namely, their own role as guardians of the domestic legal system and keepers of the integrity of the domestic rule of law and the constitution.<sup>9</sup> These traditional roles are flexible enough to provide national courts with a theoretical legal basis for expanding their authority in the spheres of foreign affairs and national security while demonstrating continuity with the past.

Direct opportunities for national courts to reassert domestic authority over executive discretion at the international organization level and thereby review international organization policies are rarely available since formal international organizations, like foreign sovereigns, have an independent legal personality under international law, and are therefore in principle immune from domestic adjudication.<sup>10</sup> However, national courts have developed a variety of indirect review options and related tactics that they can employ to express their disagreement with international organization/tribunal policies and even to delay and sometimes prevent their implementation. The national courts' main asset in this regard is their ability to influence the character of the domestic political and institutional response to the actions of the executive. Their intervention generates information that alerts additional domestic actors such as the domestic legislature, opposition parties and voters that a potential problem exists and enables these

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Review in France and Europe', 2007 *International Journal of Constitutional Law* 5, pp. 80-81.

8 In 2007 the High Court in Madras rejected Novartis's claim that Indian patent law violated India's TRIPS obligations (*Novartis AG v. Union of India* (2007) 4 *Madras Law Journal* 1153, available at <[http://judis.nic.in/judis\\_chennai/qrydisp.aspx?filename=11121](http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=11121)> (last visited 10 February 2012)). In 2001 several international pharmaceutical corporations dropped their suit which made a similar claim against a South African act after the South African court allowed NGOs to present affidavits (*Pharm. Mfr. Ass'n of S. Afr. v. S. Afr.*, Case No. 4138/98 (High Ct., withdrawn 17 April 2001) (South Africa)). On this litigation see D. Barnard, 'In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries', 2002 *Kennedy Institute of Ethics Journal* 12, pp. 159-174. Courts in Bangladesh, India and Pakistan prevented the importation of contaminated food and blocked advertisement campaigns by foreign tobacco companies. See *Farooque v. Bangladesh*, 48 DLR 438 (Bangladesh SC), *Vincent v. Union of India*, AIR 1987 SC 990 (India), *Islam v. Bangladesh*, 52 DLR 413 (2000) (Bangladesh SC) (referring to the similar decisions of the Indian court in *Bamakrishna v. State of Kerala and Others*, 1992 (2) *Kerala Law Times* 725 (Kerala HC)).

9 *A (FC) & Others (FC) v. Sec'y of State*, 2004 UKHL 56 (2004) (the so-called Belmarsh detainees case) (Lord Bingham, Para. 42). In April 2008, the Nagoya High Court in Japan declared that the Japanese operations in Iraq were unconstitutional: C. Martin, 'Rule of law comes under fire', *The Japan Times*, 3 May 2008, available at <<http://search.japantimes.co.jp/cgi-bin/ea20080503a1.html>> (last visited 10 February 2012). In May 2008 the German Federal Constitutional Court found the participation of German air force personnel in NATO-led activities to have violated the domestic obligation to seek parliamentary approval (BVerfG, 2 BvE 1/03 of 7 May 2008, Absatz-Nr. (1-92), available at <[http://www.bverfg.de/entscheidungen/es20080507\\_2bve000103.html](http://www.bverfg.de/entscheidungen/es20080507_2bve000103.html)> (last visited 10 February 2012)). In the Queen's Bench decision that forced the continued criminal investigation of possible bribes given to Saudi officials by a British company, although continuing with the investigation was deemed to seriously harm national security interests, Moses LJ invoked 'the need for the courts to safeguard the integrity of the judicial process' and the 'responsibility to secure the rule of law'. (*R (On the Application of Corner House Research and Campaign Against Arms Trade) v. The Director of the Serious Fraud Office and BAE Systems plc* [2008] EWHC 246 (Admin), Paras. 91 and 171 respectively). The appeal, which overturned the decision (*R (On the Application of Corner House Research and Others) v. Director of the Serious Fraud Office* [2008] UKHL 60) indicates that national courts would opt for saving their domestic interests even at the cost of undermining collective efforts: the House of Lords refused to enforce the OECD anti-bribery treaty when facing threats from Saudi Arabia to end its cooperation in counter-terrorism efforts.

10 A. Reinisch, 'The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity', in A. Reinisch & U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, 2007, p. 289 (discussing interjudicial dialogue in the areas of state immunity and the immunities of international organizations).

actors to weigh in on the matters under review that they otherwise might have ignored. By so doing, the courts' intervention activates and empowers domestic actors that executives have often sought to bypass, and establishes the basis of coalition that can potentially succeed in limiting executive discretion.

Interestingly, national courts can impose constraints on the executive both before and after it commits the country to the international organization. Ex ante constraints can be imposed in the bargaining stage, by demanding accountability of the executive to domestic constituencies before committing the country to a globally binding policy. The German Constitutional Court has twice reviewed the compatibility of the Acts of Accession to new EU treaties (Maastricht and Lisbon) with the principle of democracy enshrined in the German Basic Law. In its Lisbon judgment the German Constitutional Court demanded that German representatives to the EU bodies inform the German legislature and seek its ratification whenever they contemplate the further delegation of authority to EU institutions.<sup>11</sup> The French Constitutional Council routinely scrutinises treaties for their compliance with the French Constitution and instructs the political branches whenever the proposed treaty requires constitutional amendments before it can be ratified by France.

Ex post constraints can be imposed at the stage of the implementation in the domestic legal system of the act of the international organization/tribunal. National courts have several opportunities to resist the implementation of global acts ex post. National courts can, for example, react by refusing to give effect to an act of the international organization, following their finding that the act was outside the scope of authority of the international organization,<sup>12</sup> or incompatible with another set of norms, be it international norms (such as a *jus cogens* norm or an internationally recognized human rights norm<sup>13</sup>) or a norm of the domestic legal order (based on either constitutional or administrative law doctrines) that has precedence over the act of the international organization. Such refusals can be by means of the 'solange-type' judgments adopted by several European national courts influenced by the German Constitutional Court with respect to judgments of the ECJ,<sup>14</sup> or by the less-than-automatic endorsement of judgments of the European Court of Human Rights.<sup>15</sup> A national court can also indirectly review an international organization's acts without affecting them, such as in the case of a soldier refusing to participate in an 'act of aggression' perpetrated by a Security Council Resolution.<sup>16</sup> While initially the use of this type of review was 'episodic and fragmented',<sup>17</sup> it is now increasingly being used in a more systematic and effective way. This can be witnessed in the ongoing exchange between European national courts and the UN Security Council in relation to the 'listing' and 'de-listing' procedures under the UN 'Targeted Sanctions' regime.<sup>18</sup> Several national courts – the US Supreme Court being a notable exception<sup>19</sup> – have adopted an approach of 'international law friendliness' that both suggests that they will give due respect to the interpretation

11 See German Constitutional Court on Lisbon Treaty, *supra* note 5.

12 Such as the Danish court's assertion in 1998 of its power to question the legality of an EC act: *Carlsen v. Rasmussen* (judgment 6 April 1998) [1999] 3 CMLR 854 (the Danish Supreme Court found that Danish courts can declare such acts inapplicable in Denmark).

13 See the judgment of the Court of First Instance of the EU in the *Kadi* case, Case T-315/01, *Kadi v. Council & Commission* [2005] ECR II-3649, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTML>> (last visited 10 February 2012).

14 Known as the 'solange' ('as long as') line of cases: in a series of judgments, the German Federal Constitutional Court said that it would comply with decisions and judgments of European institutions 'as long as' these decisions are compatible with the values of the German Basic Law. See J. Kokkot, 'Report on Germany', in A. Slaughter et al. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence*, 1998, p. 77. This act was followed by several other courts in the EU. See W. Sadurski, "'Solange, chapter 3': Constitutional Courts in Central Europe—Democracy—European Union', 2008 *European Law Journal* 14, pp. 1-35; B. de Witte, 'Direct Effect, Supremacy, and the Nature of Legal Order', in P. Craig & G. de Burca (eds.), *The Evolution of EU Law*, 1999, pp. 177-213.

15 In 2005 the German Federal Constitutional Court asserted that national courts do not have to enforce European Court of Human Rights decisions without reflection, since they have to implement international law with care. See D. Richter, 'Does International Jurisprudence Matter in Germany? The Federal Constitutional Court's New Doctrine of "Factual Precedent"', 2006 *German Yearbook of International Law* 49, pp. 51-76.

16 See N. Schultz, 'Was the War on Iraq Illegal? The German Federal Administrative Court's Judgement of 21st June 2005', 2006 *German Law Journal* 7, pp. 25-44. Available at <[http://www.germanlawjournal.com/pdf/Vol07No01/PDF\\_Vol\\_07\\_No\\_1\\_25-44\\_Developments\\_Schultz.pdf](http://www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_25-44_Developments_Schultz.pdf)> (last visited 10 February 2012).

17 B. Kingsbury et al., 'The Emergence of Global Administrative Law', 2005 *Law & Contemporary Problems* 68, p. 33.

18 On the evolution of the listing and de-listing procedures, see K. Huber & A. Rodiles, 'An Ombudsman in the United Nations Security Council: a Paradigm Shift?', 2012 *Anuario Mexicano de Derecho Internacional, Décimo Aniversario*, p. 107.

19 See E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 2008 *American Journal of International Law* 102, p. 241. There is reason to believe that the US court does not share the same worries as other national courts and hence does not have the same motivation to strengthen its domestic deliberative processes against external influences; the US executive is probably sufficiently independent externally and controlled internally by Congress.

of international obligations by international organizations or international tribunals but also signals their ultimate autonomy.<sup>20</sup>

In most cases, the *ex ante* review will tend to be based on the domestic constitutional order: the incompatibility of the international organization's policy with domestic law. Their domestic constitutions provide national courts with an independent source of authority which they regard as the basis of an autonomous legal system which they believe they have the responsibility and sole authority to protect. Relying on domestic law does not hinder coordination among national courts because while constitutions vary, the similar set of norms they provide for the protection of civil rights and the primacy they grant to the legislative branch enable national courts to rely on similar concepts. In their *ex post* review the national courts might invoke either domestic or international law (namely that the reviewed act is incompatible with general international law or with the founding treaty of the international organization). International law poses more challenges for national courts because while they have the final say in interpreting domestic norms, and the ability of the executive to overcome this is limited, this is not necessarily the case with the interpretation of international norms, for example when only one national court criticizes the legality of a UN Security Council resolution while all the others accept the resolution as valid and binding. In order to carry any significant weight and reduce the pressure on the national court to conform, the interpretation of any given national court will have to be endorsed by other courts.

Nevertheless, now that they have embarked on the path of constraining the conduct of public affairs by their executives at the global level, the possibility emerges that national courts which are seeking to protect the integrity of their domestic legal system and their own autonomy will increasingly have to engage in reviewing the actions of international organizations and the decisions of international tribunals. Unlike international organizations that possess limited incentives to review each other, national courts have a clear interest in reviewing both international organization and international tribunal decisions that directly or indirectly affect the domestic legal system. As their traditional deference continues to erode, we expect national courts to have little interest in maintaining the authority of international organizations or of international law in general and to display little hesitation in reviewing international organizations' decisions that seem likely to affect their domestic legal system or limit their own authority as its guardians. The possible result is that, at least in the short term and when they can be confident that they have the support of their peers, national courts could be scrutinizing international organizations and international tribunals far more closely than their peer institutions at the international level.

Such assertiveness, which potentially enables national courts simultaneously to increase the accountability of their executives while enhancing their own authority to interpret and apply both national law and the laws of international organizations to which their states are parties, is paradoxically facilitated by the so-called 'fragmentation' of international law into a multitude of discrete treaties and regulatory bodies.<sup>21</sup> In contrast to their legislative branches and international organizations themselves, national courts are almost as well positioned as the executive branch to exploit the large number of international organizations and their often conflicting standards. Fragmentation provides national

20 See in Germany the principle of the international law friendliness of the Basic Law, expounded but also delimited by the Constitutional Court, in particular in the *Görgülü* Case 2 BvR 1481/04 (14 October 2004) BVerfGE 111, 307 (English translation available at <[http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html)> (last visited 18 March 2012)). And see C. Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court', 2010 *German Law Journal* 11, pp. 513-526, available at <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1253>> (last visited 18 March 2012). See also the *Mangold* case, where the same court recognizes but, at the same time, outlines the limits of the law-making functions of the European Court of Justice that would be tolerated by the German court (Judgment 2 BvR 2661/06 of 6 July 2010, English translation available at <[http://www.bundesverfassungsgericht.de/entscheidungen/rs20100706\\_2bvr266106en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html)> (last visited 18 March 2012)). The President of the UK Supreme Court asserted in a 2009 judgment that 'The requirement [under section 2(1) of the Human Rights Act 1998] to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.' (*R v. Horncastle and Others* [2009] UKSC 14, Para. 11). The Israeli Supreme Court asserted that it 'shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ' *HCJ 7957/04 Mar'abe v. Prime Minister of Israel*, Judgment of 15 September 2005, at Para. 74 (English translation available at <[http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm)> (last visited 18 March 2012)) and see also ILDC 157 (IL 2005). The judgment of the US Supreme Court is obviously the most blunt: *Medellin v. Texas*, 552 US 491 (2008).

21 On the political and legal consequences of the fragmentation of international law see E. Benvenisti & G. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 2007 *Stanford Law Review* 60, pp. 595-631.

courts with a varied menu of policy choices which they can either cite as precedents or strike down as they deem appropriate. This enables them to engage in what effectively amounts to the 'defragmentation' of conflicting international legal standards as they apply within their domestic jurisdictions. For example, a national court might choose to link human rights obligations to the legal regime of refugees or suspected terrorists, thus managing to add layers of protection not provided by the immediately relevant treaty regime.

## 2.2. *The benefits of national court coordination*

In the international system the amount of coordination required to institutionalize a given norm or regulatory function is inversely related to the size and prestige of the actors involved. A coalition composed of the national courts of the major democratic powers is far likelier to succeed in institutionalizing national court review of international organization policy than one composed of a much larger but diffuse coalition of developing states or of autocratic states. A single national court that embarks on challenging the policies of a major international organization or an international tribunal decision would run the risk of being marginalized as a troublemaker and outlier, whose jurisprudence does not reflect general state practice. Should it persist it could jeopardize a state's reputation as a reliable partner in the globalization process. In the extreme, foreign decision-makers, including powerful foreign governments, international institutions and even private companies, would become more reluctant to deal with that state in the future, and it could suffer a divestment of foreign capital as well as a loss of prestige.

If, however, a significant number of national courts anchored by a coalition of those from powerful states were to act collectively – for example, to review domestic acts that seek to implement Security Council resolutions on violations of the human rights of individuals – the costs to other states of imposing collective punishment on all of them would probably be too high to be practical. As in the case of meaningfully shaping the evolution of customary law, while a national court acting alone can accomplish relatively little, the judgments of several national courts will be difficult for international tribunals to ignore, especially since the tribunals are well aware that these same courts will often play a central role in implementing the tribunals' judgments.<sup>22</sup>

Coordination among national courts also helps to insulate them from the negative domestic political and social consequences that are often associated with unilateral action. A national court may be reluctant to unilaterally rule that a given agreement requires the state to adopt a more expansive policy with respect to providing sanctuary for refugees not because it fears that its government would be punished by other governments or by international organizations, but because it is worried that such a ruling would lead to an influx of greater numbers of refugees than the state can politically and economically accommodate. If a substantial number of countries were to make a similar ruling simultaneously so that the refugee burden was shared among them, this problem would be reduced and potentially avoided.<sup>23</sup>

Such collective action on the part of prominent national courts holds out the promise of creating, under certain political and social conditions, more coherent webs of linked obligations than those that currently exist. Such conditions will usually include public support for judicial independence vis-à-vis the executive, a promise of a constant flow of cases and the willingness of other key national courts to reciprocate in norm creation. If national courts choose to undertake such a project, it is likely that they will increasingly pre-empt international tribunals and international organizations by aggressively participating in the process of international lawmaking themselves. As a purely doctrinal matter, national courts are directly and indirectly engaged in the evolution of customary international law: their decisions

22 On the interplay between a supreme court (as the principal) and lower courts (as its agents), see McNollgast, 'Conditions for Judicial Independence' (Research Paper No. 07-43, Apr. 2006), available at <<http://ssrn.com/abstract=895723>> (last visited 10 February 2012); McNollgast, 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', 1995 *Southern California Law Review* 68, pp. 1631-1684. The dependence of an international tribunal on national courts that are not formally bound by its decisions is even greater. The tense relations that developed between the European Court of Justice and some of the national courts, in particular the German and the Italian courts, confirm this theoretical observation. See Kokkot, *supra* note 14; De Witte, *supra* note 14.

23 See Benvenisti, *supra* note 19 (analysing interjudicial coordination in the areas of counterterrorism measures, refugee status and environmental protection); E. Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures', in A. Bianchi & A. Keller (eds.), *Counterterrorism: Democracy's Challenge*, 2008 (discussing interjudicial coordination in the area of counterterrorism).



that are based on international law are viewed as reflecting customary international law,<sup>24</sup> and their governments' acts in compliance with their decisions will constitute state practice coupled with *opinio juris*. As such, international tribunals will have to pay heed to national courts' jurisprudence. It follows that the more the national courts engage in applying international law and the more united they are with respect to the arguments they employ, the more their jurisprudence will constrain the choices available to the international tribunals when those tribunals deal with similar issues.

National courts that engage in the serious rather than superficial application of international law – something that they must do if they want other courts to follow suit – send a strong signal to international tribunals that they regard themselves as equal participants in the transnational law-making process and will no longer passively accept the tribunals' decisions. Since the effectiveness of international tribunals ultimately depends on national courts' compliance with their decisions, they have good reason to anticipate the likely reactions of prominent national courts to their rulings and come to terms with their jurisprudence. The more frequently national courts invoke international law the more effectively they can limit the autonomy of international tribunals, or at least initiate an informal bargaining process in which they are relatively equal partners in an ongoing process.

For all these reasons, interjudicial coordination provides national courts with an increasingly attractive strategy for protecting and even potentially expanding their own authority and sustaining their traditional role in domestic democratic processes. The many procedural, institutional and normative similarities that characterize their judicial practice and the increasing number of opportunities for national court judges to exchange information via social networks is likely to facilitate such coordination, as will their reliance on the same or similar legal sources – similar provisions in domestic constitutions or in international treaties such as the Convention against Torture or the 1951 Geneva Convention on the Status of Refugees – which provide them with a common conceptual vocabulary.<sup>25</sup>

The realization of this potential to create a common interjudicial stance among national courts will not be easy of course. There are often marked differences in the positions of the national courts of the largest and most economically developed democracies, and the still greater differences between these courts and those in marginally democratic states or non-democracies may be unbridgeable.<sup>26</sup> National courts are also likely to vary considerably in the extent to which they regard the integrity of their domestic political process to be jeopardized by a given international organization or international tribunal policy and in their ability to resist its implementation.

Yet as we have already noted, although wide participation of national courts is desirable because it will strengthen their ability to withstand political and particularly executive-driven backlash, effective review by domestic courts of international organization policy does not require the active support of all or even most courts; a relatively small subset of those of powerful actors will generally be enough. The national courts of the US and EU enjoy an unusual degree of prestige and political independence from their respective executive branches compared with those in many developing states and this gives them a considerable degree of freedom in this regard. As Mancur Olson has famously showed,<sup>27</sup> there are times when power discrepancies among actors promote rather than pre-empt provision of the public good. The experience with previous national court activism supports this expectation. In the EU context, for example, it was the German Constitutional Court's '*solange*' signal that it might examine the compatibility of European Community legislation for compliance with fundamental principles of

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24 See, for example, the International Court of Justice in *Immunities of The State (Germany v. Italy: Greece Intervening)*, (ICJ, 3 February 2012), available at <<http://www.icj-cij.org/docket/files/143/16883.pdf>> (last visited 10 February 2012); and in *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 ICJ 3 (Feb. 14), available at <<http://www.icj-cij.org/icjwww/idocket/ICOB/E/ICOBframe.htm>> (last visited 10 February 2012) (examining national courts' jurisprudence to assess the extent to which states or heads of state enjoy immunity in foreign courts).

25 See Benvenisti, *supra* note 19, pp. 264-268.

26 It also may turn out that because the courts in non-democratic states are not independent of their respective governments, they will have relatively little influence in any collective consultation process and may even be less likely to participate. If that were the case, the common interjudicial stance emerging from the participating national courts might reflect a stronger emphasis on democratic values than the law produced by governments.

27 M. Olson, *The Logic of Collective Action*, 1965.

German constitutional law, which was quickly noticed by EC institutions and led to the ECJ's development of fundamental EU-wide human rights jurisprudence.<sup>28</sup>

### 3. Will national court coordination contribute to democracy?

In this section we assess the character of the political externalities that are likely to arise as a result of the increased national court coordination with similarly situated national courts across political boundaries. Specifically, we examine the possibility that the expansion and routinization of national court review might improve global accountability problems.

We argue the basic constitutional point that independent judicial review is necessary in order to keep political actors accountable and to compensate for the fact that citizens are not reliably informed about policies by the executive branches nor are their interests being reliably represented. Greater transparency and deliberation are attributes that are rarely oversupplied.

We emphasize that the desirability of national court activism, like that of domestic review of administrative action, is situational rather than fundamental.<sup>29</sup> It too must be evaluated in the relatively harsh light of contemporary conditions that include: the uncertain and sometimes negative consequences of rapid globalization on people's lives and opportunities; the highly skewed distribution of geopolitical power among states; the current fragmented character of the international legal system; and the scarcity of review of international organizations at the international level. All of these tend to lead to the increase in executive power and special interests' influence.

In such an environment an expanded and coordinated national court review of international organization policies is likely to produce positive externalities in terms of increasing transparency and deliberation that will increase the quality of both domestic and global public decision making and provide a much needed check on the growth of executive power. While national court review cannot and should not play the same central role in global government that it does domestically, it has an important role to play particularly under current conditions.

#### 3.1. National court coordination and the facilitation of democratic deliberation

Indirect judicial review of international organizations by national courts is no simple panacea for the accountability problem that the international organizations present. The general debate concerning the legitimacy of judicial review of political decision making and the justification of judicial pre-emption of politics is relevant to this case. The fundamental difficulty with the growing prowess of national courts from the perspective of democracy is obviously the traditional concern with the proper balance between the court and the elected branches, between law and politics. Many defenders of the democratic process have pointed out the concern that judicial review tends to pre-empt politics. Against such a backdrop, our advocacy of national court coordination may sound even more alarming, especially since it entails both the occasional judicial pre-emption of elected officials and the collusion of judges in different countries. Many have used Bickel's term 'the countermajoritarian difficulty'<sup>30</sup> to characterize this tension between the courts and the political branches. The 'countermajoritarian difficulty' assumes that there is a zero-sum game between the court and the political branches and that, without the court's interference, the popular vote will have its way. We do not wish to engage in the debate that starts off from these premises, because we believe that in the current international context international organization-driven policies pose more severe countermajoritarian concerns than judicial review by national courts. It is this assumption that drives our conclusion that at this juncture judicial review by national courts is more likely to enhance domestic democracy than to curtail it.

In this section we extend our discussion of the global countermajoritarian difficulty and argue that the presumption that the elected branches reliably represent majority wishes is heavily dependent on a host of assumptions about institutional structure, the nature of voter preferences, voting rules, and so

28 On the 'solange' cases, see supra note 14 and accompanying text.

29 J. Mashaw, 'Public Law and Public Choice: Critique and Rapprochement', in D. Farber & A. O'Connell (eds.), *Research Handbook On Public Choice And Public Law*, 2010.

30 A. Bickel, *The Last Dangerous Branch*, 1962.

forth. Some of the most critical of these have to do with the availability of information about such things as the nature of the choice set and the distributional implications (in the broadest sense of that term) associated with each alternative. When such information is lacking and particularly when it is possessed by some actors but not others – a situation that is more often the rule than the exception in connection with international regulatory rule making – the reliability of representation is thrown into doubt. By producing information in the course of their proceedings that is widely available to both a wide range of political actors as well as the public, courts reduce these information problems and promote better accountability and deliberation. We say this because we believe that, in the global arena, the greatest counter-majoritarian challenge continues to lie with the domination of most international organizations and international tribunals by a handful of powerful state executives. In such an environment, national court intervention is more the cure than the disease even if its input is less than perfect: the very dissension that national courts can create with the executive branches and the public contestation that ensues promotes rather than pre-empts accountable and informed policies.

In most discussions of the counter-majoritarian difficulty in the domestic sphere, both opponents and proponents of judicial review tend to focus on the most salient part of the judicial action, namely the ultimate approval or disapproval of the policy in question, especially on matters like the legality of abortion or same-sex marriage where the judges cannot claim to have a monopoly over the appropriateness of their decision. As a consequence of the saliency of the ‘yes or no’ moment, observers and analysts often ignore the many subtle, indirect and yet significant contributions that courts make to the political system and to public deliberation.

A major part of the court’s contributions to public information consists of its monitoring the state’s system of checks and balances in order to prevent any given branch from overstepping its limits and disturbing the system’s equilibrium. In parliamentary systems courts provide structural rather than substantive support to the opposition vis-à-vis the party or parties in power by requiring that the executive obtain the prior approval of Parliament for its plans: the debate that ensues in Parliament provides information to the public concerning government policies. The political contestation that ensues between the different political factions generates information that civil society can process. In principle, the more independent the actors involved in policy making are and the greater the level of contestation among them, the greater the amount and quality of information that the political process will generate for the public to assess. By bolstering the independence and stature of opposition parties, experts within the bureaucracy, and local governments (and state authorities in federal systems) vis-à-vis the national executive, courts help to ensure that public debate about policies will be adequately informed.

Beyond maintaining checks and balances between and within the political branches, courts have developed principles of administrative law that require officials to ensure the transparency of and public participation in executive decision-making processes. In addition, judicially protected constitutional guarantees for political rights, in particular the freedoms of speech, association and information, and the privileged status of journalists and the media, contribute to the generation of publicly available information.

The litigation process itself as well as the eventual outcome is information-generating. The courts become venues for public deliberation where conflicting claims are examined in structured proceedings. In reviewing administrative and legislative acts for compatibility with the constitution (or, where relevant, for compatibility with international law) courts require that the relevant decision makers provide public reasons for their acts and afford litigants and amici opportunities to contest those reasons. Moreover, the costs of initiating review of public policies are relatively low: a single individual can take the executive or the legislature to task if he or she has standing to seek judicial review. Briefs by amici, in jurisdictions where they are accepted, shed light on various considerations that are pertinent to the questions at hand. The structured and transparent deliberations in court are closely watched by the public and the press, and the court’s reasoned decisions are carefully scrutinized by legal experts who publicly report on the judgments.

While judges are not trained to be expert policy makers, they are trained to be expert fact finders. They are masters in employing fact-finding procedures and this expertise also enables them to credibly monitor the decision-making procedures of administrative agencies. Their relative insulation from

executive domination and special interests' influence lends credibility to the information they generate directly.

That judicial generation of information is important, sometimes crucial, is clear from the various occasions when information is all that the court provides. For example, the House of Lords can declare an Act of Parliament's incompatibility with the UK Human Rights Act but not invalidate it. Besides compensation (that for most governments is in most cases negligible) the main remedy that the European Court on Human Rights offers is a declaration of incompatibility with the European Convention of Human Rights. The only remedy provided by many of the rather effective international tribunals, like the Human Rights Committee, the World Bank Inspection Panel, the Aarhus Compliance Commission, or the UNESCO World Heritage Committee, involves the consequences of the compliance information that they provide. Such information is effective when a good reputation for compliance is believed to be important by executive branches because of the internal or external political pressures that it provokes.

When courts declare a certain policy to be incompatible with a certain norm, they always invite deliberation. Even strong courts choose their battles and often they prefer to engage in 'weak'<sup>31</sup> or 'soft' forms of judicial review because they prefer to encourage the public deliberation which will ensue when the political branches insist on sticking to the criticized decision but will then need to explain it to an informed public. National courts indirectly reviewing international organizations can cite as the basis for their intervention either the international organization's executive's lack of authority under the treaty which the international organization invokes,<sup>32</sup> or incompatibility with *jus cogens* norms,<sup>33</sup> and the national courts can rely on domestic law to rule that the international organization's policy is incompatible with a domestic norm which must be respected by the court and indeed by the state's executives.<sup>34</sup> In most cases the intervening national court would not pre-empt domestic deliberation but in fact encourage it. For example, a national court that requires specific statutory authorization for the freezing of assets of suspected terrorists, as demanded by the UN Security Council,<sup>35</sup> invites the legislature to weigh in on the matter, while at the same time it prompts the international organization to improve its procedures.

When national courts interpret a treaty in a way that is incompatible with the reading of the executive branch, or when they resort to the ultimate weapon of constitutional interpretation and find a treaty text to be incompatible with the constitution (rather than, for example, interpreting the statute strictly to render it in compliance with constitutional text), they raise the stakes for the political branches, but in most instances even their doing so does not pre-empt public deliberation. Unlike in the US where constitutional interpretation is frequently equated with usurpation of the political process (because overcoming the court's interpretation by constitutional amendments is extremely difficult), in other democracies, such as France, there are procedures such as referenda or constitutional amendments which are available for those wishing to modify the domestic legal system to align it with the foreign treaty regime after the court has determined that the two regimes are incompatible with each other.<sup>36</sup>

National courts that coordinate their judgments do not as such abandon their role as the guardians of their respective domestic legal systems or their commitment to the national interest. We suspect that the chance of national courts collectively acting to pre-empt or otherwise impoverish the domestic

31 On 'weak' versus 'strong' forms of judicial review see M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, 2009.

32 Such as, for example, the challenge by Milosevic against the jurisdiction of the ICTY lodged at a Dutch court in The Hague. On this and other cases see J. d'Aspermont & C. Brölmann, 'Challenging International Criminal Tribunals Before Domestic Courts', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts*, 2011, pp. 111-136.

33 See the *Kadi* judgment of the CFI, supra note 13.

34 On this practice see A. Nollkaemper, 'Rethinking the Supremacy of International Law', 2010 *Zeitschrift für öffentliches Recht* (Journal of Public Law) 65, pp. 65-85.

35 See, e.g., *Ahmed and Others v. HM Treasury*, [2010] UKSC 2 (UK Supreme Court).

36 Article 54 of the French Constitution provides that 'If the Constitutional Council (...) has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.' See, e.g., the *Conseil Constitutionnel's* approval of compatibility of the Maastricht Treaty with the French Constitution: Conseil Constitutionnel (CC) (Constitutional Court) decision No. 92-312DC, 2 September 1992, Rec. 72 (France), English translation available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/92-312DC-a92312dc.pdf>> (last visited 10 February 2012). See also the judgment of the Czech Republic Constitutional Court on the Lisbon Treaty: *Ústavní soud České republiky (ÚS)* (Decision of the Constitutional Court of 3 November 2009) *ÚS 29/09* (Czech), available at <<http://www.usoud.cz/view/pi-29-09>> (last visited 10 February 2010).

political process in their states is very remote. While they have increasingly turned their attention to how other courts are dealing with global problems that their states also face, their interest in each other is more tactical than strategic and more short-term than long-term. Their self-defined mission as guardians of the domestic legal order has remained largely intact. They continue to regard themselves first and foremost as national agents and their chief motivation remains that of protecting the domestic rule of law rather than overseeing the global governance regime or promoting global justice. Moreover, their sensitivity to the national interest continues to reflect itself in any number of traditional and predictable ways such as their continuing refusal to constrain their executives when such constraints might harm their economies, for example by imposing international trade law obligations on their executives,<sup>37</sup> by implementing anti-bribery provisions that might cause reactions by foreign governments that would harm their economy,<sup>38</sup> or by piercing the immunity granted by international law to acting officials of foreign states.<sup>39</sup> In the face of constitutional amendments and public pressure, as in the case of immigration laws that ran counter to the Refugee Convention, national courts have found ways to wriggle out of their shared understanding with other national courts of a given treaty when it becomes domestically controversial.<sup>40</sup>

Experience also suggests that the associated concerns connected with the consensus requirement for overcoming the courts are also exaggerated. Like-minded executives have been able to overcome their national courts' resistance by adopting treaty amendments.<sup>41</sup> International organizations like the UN Security Council or the EU do not require unanimity to counter national court judgments that they do not like. Finally and most importantly, in an overwhelming majority of jurisdictions national courts are required to comply with their constitutions at the expense of international texts or any shared national courts' position. The status of international law in most states as secondary to the constitution (and even secondary to statutes in some countries) is a major factor in ensuring the viability of domestic politics.

### **3.2. National court coordination, global deliberation and equality**

A second source of concern associated with national court coordination is that the courts of powerful states will dominate any national court coordination process just as their executives do within international organizations. The national courts of powerful democratic states tend to enjoy a first-mover advantage over other national courts both because the scale of their economies ensures them a steady stream of cases and because they characteristically enjoy more independence than do the courts of many weaker states. Given the fact that the judges care first and foremost for their own domestic constituency, their tendency is to generate information that is relevant to their particular states and to remain relatively oblivious to the perspectives and considerations of other states.

As in the case of the 'domestic' countermajoritarian difficulty discussed above, our point of departure in evaluating the merits of this concern is to question the implicit assumption that the executive-driven treaty has historically been adequately reflective of diverse national constituencies. Certainly the assumption seems implausible in the contemporary global context. The less democratic the country is, the less likely it is that its executive will internalize its citizens' interests when it negotiates treaties. The weaker the country is, the less likely it is that its executive will be able to promote its citizens' interests in global negotiations. While such states do not characteristically develop strong and independent national courts either, we suggest that the courts in such states often promote the interests of the weaker

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37 Cases C-120/06 P and C-121/06 P, *FIAMM v. Council of the EU*, 9 September 2008, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0120:EN:HTML>> (last visited 10 February 2012).

38 See [2008] UKHL 60, *supra* note 9.

39 *Jones v. Ministry of Interior (Kingdom of Saudi Arabia)* [2006] UKHL 26, [2007] 1 All ER 113 (HL).

40 The French and German courts in the context of the meaning of 'refugee' under the 1951 Refugee Convention. See Benvenisti, *supra* note 19, p. 267.

41 See, e.g., Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 OJ L 304, 12; Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 OJ L 212, 12, both available at <<http://eur-lex.europa.eu>> (last visited 10 February 2012).

constituencies more consistently and effectively than do their executives.<sup>42</sup> National courts will be more weak-friendly than executives because they have a different mode of operation. While executives resort to fragmentation that enables them both to ensure and conceal their domination, courts operate via a technology that involves weaving webs of coherent obligations of all the executive-made fragments that are exposed, well-defined, reasoned and tend to provoke rather than dampen collective deliberation. The information that national court coordination generates also has political implications in this context. NGOs committed to promoting the interests of constituencies in weaker states can employ such information to raise broader global consciousness about the effects of international organization policies in developing countries and among the less-well represented within developed economies. Such public awareness can prove politically significant not only in weak autocracies but also in strong democracies whose civil societies have grown increasingly sensitive to the executive control of information and to regulatory failure. Moreover, as we mentioned above, the intervention of a handful of national courts of powerful states can potentially have positive externalities on other constituencies, even those that do not have independent courts. The judicial lawmaking and review in the global sphere, due to the judicial effort to generalize and rationalize the international legal landscape, 'provides weaker states with a stable hierarchy of claims that they can then employ in a variety of venues, and it increases the likelihood that a victory in a particular venue will have wide-ranging limitations.'<sup>43</sup>

The involvement of national courts also limits the threat of exit from international organizations by states – a threat that would weaken international organizations and international tribunals – because such exit in and of itself will not affect the national courts' interpretation of either the domestic constitutional obligations or international law. Finally, national courts provide a measure of cover for international tribunals and increase the chances that international tribunals will escape retribution if they deviate from the outcome preferred by executives of the powerful states. If national courts are expected to rule against them eventually, executives may be more inclined to tolerate the international tribunals' ruling.

### *3.3. National court review: an obstacle to the functionality of global governance structures?*

Two other potential problems remain. The first relates to the functionality of international organizations. Unless employed with discretion and balance, national court review could easily undermine the effectiveness of these international organizations by creating gridlock that would make reform and adaptation to new circumstances more difficult. The second problem concerns the possible reactions of the executives of powerful states to national court coordination. History suggests that they will almost certainly initiate a search for ways to neutralize and limit their courts' jurisdiction just as they adjusted to the increased scrutiny of international organizations by creating a variety of informal and privatized decision-making venues. This could potentially lead to the further fragmentation of international law and undermine the efforts of generations of internationally-oriented lawyers and judges to create a coherent international legal system.

#### *3.3.1. Accountability and improved functionality*

As with the rise of judicial review of domestic administrative agencies and administrative tribunals, the national courts' coordinated review of international organizations is likely to yield mixed results. Coordinated judicial review is likely to slow down the administrative process and encumber it with procedural and substantive requirements whilst at the same time promoting better informed and more equitable policies. The interplay between efficiency on the one hand and deliberative transparency on the other is constantly shifting and the process must be carefully managed dynamically to maintain a satisfactory balance between them.<sup>44</sup> Review by internal bodies within international organizations and peer review may be helpful but, as we have noted elsewhere,<sup>45</sup> they are generally no substitute for

42 See supra note 8 (national courts promoting access to generic drugs); Benvenisti, supra note 19, pp. 258-262 (examples of national courts in developing countries that promote environmental standards).

43 Benvenisti & Downs, supra note 21, p. 624.

44 Mashaw, supra note 29.

45 E. Benvenisti & G. Downs, 'Toward Global Checks and Balances', 2009 *Constitutional Political Economy* 20, pp. 366-387.

a rigorous scrutiny of international organizations by national courts. At this point in their evolution rulings by international tribunals, like those of domestic administrative tribunals that are relatively less independent than national courts, need to be reviewed by regular national courts.

The intervention of national courts in the jurisprudence of international tribunals potentially provides informational benefits that are similar to those provided by national courts that intervene in domestic administrative review. International organizations are no less (and maybe even more) prone to special interest capture than are national executives, and to the extent that international tribunals are unwilling or unable to restrain the special interests, national courts could prove effective. National court review functions can be effective in developing norms concerning the decision-making processes within international organizations – global administrative law norms<sup>46</sup> – to ensure accountability and attention to all affected stakeholders. This is also why we think that national court activism is more likely to enhance, rather than undermine, the evolution of an egalitarian and coherent international legal system. Indirectly, by collectively exercising their review authority, even a relatively small group of national courts whose members are motivated by a common desire to safeguard their domestic democratic processes, can promote what is effectively a global public good; namely the increased accountability of international decision makers to more diverse groups of stakeholders around the globe.<sup>47</sup>

### *3.3.2. Anticipating executive reaction: the move from international organizations to informal and privatized decision-making venues*

It is, of course, possible and perhaps even probable that growing national court coordination, and in particular national court/international tribunal coordination, will lead the executives of major states to pursue informal and privatized ways to coordinate ‘below the radar’ of public law that is subject to judicial monitoring, just as they have periodically resorted to serial bilateralism to avoid the political transaction costs associated with multilateral agreements. Whatever the motivation for such informality in any particular case – effectiveness, flexibility of response, non-political expertise – it is difficult to escape the fact that it has generally operated to expand the de facto authority of the executive branch further in comparison with other branches of government and reduced the opportunities for accountability and deliberation generally.<sup>48</sup> In addition, state executives increasingly enjoy that additional option of being able to delegate regulatory functions to transnational private entities which do not usually depend on implementation by a public act but rather influence directly the relevant markets that they regulate by setting standards for private actors to follow or by monitoring private activity. This phenomenon has already been observed and analysed to some extent, and it is only expected to proliferate.<sup>49</sup> This possibility raises the prospect that the international regulatory system could become even more fragmented and subject to executive discretion than is currently the case.

Although the greater fragmentation and informality and the reduced transparency that might accompany greater scrutiny of international organizations by national courts are obviously not desirable, experience at the domestic level suggests that they are still a price well worth paying in the pursuit of curbing executive excesses. Moreover, courts have increasingly developed techniques to minimize the costs of executive reactions. For example, they have restricted the delegation of public authority to private actors or by imposing public legal obligations on private actors that exercise public functions.

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46 Kingsbury et al., *supra* note 17, pp. 37-41.

47 Niels Petersen offers a constructivist explanation for the attitude of national courts to judgments of international tribunals. In his view, ‘The more the international decision-making procedures embrace the rule of law, the more the trust [of national courts] in these procedures will be enhanced.’ See N. Petersen, ‘The Reception of International Law by Constitutional Courts through the Prism of Legitimacy’, 2009 *Preprints of the Max Planck Institute for Research on Collective Goods*, p. 26, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1532110](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532110)> (last visited 18 March, 2012).

48 See J. Freeman, ‘The Private Role in Public Governance’, 2000 *NYU Law Review* 75, p. 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.’).

49 F. Cafaggi, ‘Rethinking Private Regulation in the European Regulatory Space’, 2006 *European University Institute, EUI Working Paper*; D. Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’, 2005 *Sydney Law Review* 25, pp. 5-28.

There is every reason to expect that national courts will be able to develop similar tactics to apply at the global level.<sup>50</sup>

It is also important not to exaggerate the risks associated with more stringent review. While informal and privatized venues have a number of virtues such as flexibility and low transaction costs that appeal to state executives, they also possess certain disadvantages with respect to representativeness, enforceability and stability that make them second-best substitutes for international organizations in many situations. This is likely to be especially true from the perspective of powerful states whose dominance of the treaty-making system provides them with the ability to lock other states into a regime that benefits them. Just as one is likely to prefer a formal constitution to an unwritten informal constitution if one is fortunate enough to be one of its designers, so it is with treaties. Had this not been the case, it is unlikely that powerful states would have taken the time and effort to negotiate elaborate formal agreements in the first place.

#### 4. Conclusions

Historically, national courts have been instrumental in building up domestic democratic mechanisms and legal tools that address the ongoing challenge posed by asymmetric information in democracies. Because the policy-making process within international organizations is considerably more opaque than that at the domestic level in most democratic societies, globalization threatens the viability and relevance of those mechanisms. For most states the new modalities of international or inter-governmental policy making mean greater dependence on external events and actors, and less opportunity for meaningful domestic democratic deliberations. For national courts to continue to allow the government *carte blanche* to act freely in world politics potentially impoverishes the domestic democratic and judicial processes and reduces the opportunity of most citizens to use these processes to thwart outcomes that are detrimental to many if not most of them. Fortunately, the recent interventionism of some major national courts has managed, at least to some extent, to impede the dilution of the democratic controls of government to which judicial deference to the government's dominance of the international policy sphere can easily lead.

To accomplish this task in an era of global interdependency, rapid growth and increased intergovernmental coordination, the judicial branches of governments have begun to forge temporary coalitions across national boundaries in order to remain effective domestically. In seeking to coordinate their stances, the courts are not motivated by utopian globalism or the desire to create a united judicial front but, like their executive branch counterparts, they are acting in pursuit of their domestic interests and concerns. Such coordinated reviews on the part of national courts are potentially one of the most effective avenues for promoting democratic accountability within intergovernmental institutions and should be welcomed by those interested in improving the legitimacy of intergovernmental institutions.

Whether these goals are ultimately achieved has yet to be determined and depends on a number of factors, especially the future trajectory of the relationship between national courts and international organizations. This relationship, like the broader ongoing struggle to both govern and to contain government, is a dynamic one. It can be expected that international organizations will react to the prospect of review by national courts by acting to pre-empt or otherwise limit it. This resulting give-and-take between these actors will shape both their futures as well as the evolution of accountability in global governance.

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50 On this see E. Benvenisti & G. Downs, 'The Role of National Courts in Reviewing Transnational Private Regulation', in F. Cafaggi (ed.), *Transnational Private Regulation* (forthcoming 2012); B. Kingsbury, 'Weighing Global Regulatory Rules and Decisions in National Courts', 2009 *Acta Juridica*, pp. 90-119.