

**DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW BEYOND THE STATE:  
THE NEED FOR AN APPROPRIATE STANDARD OF REVIEW**

Andreas von Staden  
Assistant Professor of International Organization  
University of St. Gallen  
andreas.vonstaden@unisg.ch

===== ROUGH FIRST DRAFT =====  
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**1. Introduction**

The increasingly prominent visibility and activity of international courts and tribunals<sup>1</sup> in international affairs over the last half century, both in their role as dispute settlers narrowly understood and as policy- and law-makers in their own right, inevitably raises the question of their democratic legitimacy. Within contemporary political theory, whenever people are affected by the exercise of public authority – be it legislative, executive, or judicial in character – such exercise requires legitimation, with the strongest and currently most widely recognized form of legitimation being that of specifically *democratic* legitimacy. Whatever else “democracy” may mean and require in terms of the design of specific institutional arrangements, or with respect to the protection of particular substantive values, at its core it refers to a particular procedural mode of self-government that aims at generating collectively binding decisions. Neither thin nor thick definitions of democracy can do without this procedural element. Such self-government may involve decision-making at different levels of organization: locally, communally, at the state or federal level, or trans- and internationally. Whatever the specific configuration of institutions and procedures, however, from the vantage point of democratic theory the key criterion in its normative evaluation is the extent to which such an arrangement furthers the objective of self-government, and this criterion applies to courts the same way as it does to any other governance institution.

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<sup>1</sup> For reasons of linguistic economy, I will in the following refer only to “international courts” rather than “international courts and tribunals,” it being understood that the argument in principle applies to both principal types of international adjudicative institutions. Traditionally, the term “court” has been reserved for permanent adjudicative bodies that apply a body of law specified beforehand and whose judges are elected for specified terms, irrespective of concrete disputes. The term “tribunal,” on the other hand, has come to be generally used for adjudicative institutions that are not permanent, are often established *ad hoc only* for a given dispute, and where the disputing parties have some choice with respect to the applicable law as well as to the composition of the institution’s bench. Similarly, the term “international court” is understood to encompass judicial bodies that elsewhere are classified as trans- or supranational in character.

The question of the democratic legitimacy of courts of course originated with respect to the normatively appropriate allocation of authority within domestic governance<sup>2</sup> arrangements. Because judges are generally not popularly elected, and because the politico-legal consequences triggered especially by decisions of high courts can in many jurisdictions not easily be changed and overruled by the elected branches of government, the democratic credentials of judicial review and the role of courts within democratic self-government more broadly have long been contentious. The observable “global expansion of judicial power,”<sup>3</sup> not only internationally, but also at the domestic level,<sup>4</sup> has assured the continuing relevance of a debate whose origins are commonly traced back to the U.S. Supreme Court’s landmark decision of *Marbury v. Madison* (1803)<sup>5</sup> in which Chief Justice John Marshall famously claimed the Court’s right to invalidate legislation that, in the justices’ considered opinion, violated the higher law of the constitution.

This debate has in the meantime been expanded to courts beyond the state. As Armin von Bogdandy and Ingo Venzke have recently pointed out, “as autonomous actors wielding public authority [international courts’] actions require a genuine mode of justification that lives up to basic tenets of democratic theory” (von Bogdandy & Venzke 2010: 3). Whereas the legitimacy of international law and of international institutions more broadly has for some time now been subject to scrutiny and debate,<sup>6</sup> a number of authors have focused specifically on the legitimacy of courts and tribunals beyond the state, either generally<sup>7</sup> or with respect to particular adjudicative institutions.<sup>8</sup> These analyses have highlighted a number of institutional features of international courts that do or may affect their legitimacy, both from the perspective of normative theory as well as subjective perception, including, for example, the manner of a court’s constitution and the appointment of its judges, certain procedural features, such as access rights and transparency, and certain characteristics that are partly procedural, partly substantive in character, such as absence of bias and general fairness.

In this paper, I argue that although the institutional and procedural aspects identified in the recent literature as affecting the legitimacy of courts beyond the state are generally relevant and important, they still remain insufficient to establish a specifically *democratic* legitimacy of international courts. For international courts to be qualified as *democratically* legitimate, it is not

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<sup>2</sup> In most contemporary IR literature, the term “governance” has assumed a distinct meaning as setting it apart from state-centric forms of “government.” In this specific usage, governance refers to arrangements that include one or more non-state actor(s). I adopt a more basic definition in which governance captures all arrangements that seek to govern a specified geographic space or issue area. “Government,” in this understanding, is a specific sub-type of possible governance arrangements in which authority is state-centric and hierarchical, but it is not the only one.

<sup>3</sup> Tate & Vallinder (1995).

<sup>4</sup> Hirschl (2004); Ginsburg (2003).

<sup>5</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), available at <http://supreme.justia.com/us/5/137/case.html>. Although traditionally taken to be the starting point for the emergence of judicial review, *Marbury v. Madison* had historical precursors upon which it built; see generally Kramer (2004).

<sup>6</sup> See, e.g., Franck (1988a, 1988b, 1990 & 1998); Wolfrum & Röben (2008); Buchanan (2007); Buchanan & Keohane (2006); Ribeiro Hoffmann & Van Der Vleuten (2007); Kumm (2004; 2006); Meyer (2009); Wheatley (2010).

<sup>7</sup> See, e.g., von Bogdandy & Venzke (2010); Grossman (2009); Treves (2008).

<sup>8</sup> See, e.g., Rijpkema (2006) [ECJ]; Hamamoto (2007) [human rights complaints procedures]; Føllesdal (2009) [ECtHR]; Barkhuysen & van Emmerik (2009) [ECtHR]; Fukunaga (2008) [WTO Dispute Settlement System].

enough that the manner of their establishment and the modalities of their procedures conform to what have become recognized values in democratic theory applicable to judicial institutions. Rather, what is required in addition to these institutional-procedural elements are *democratically informed standards of review* that respect democratic decision-making at the domestic level whenever possible and appropriate. In other words, the substantive outcomes of judicial proceedings beyond the state must also be democratically legitimate and to democratically legitimate, such outcomes must respect decision-making at the national level to the extent that the legal instruments at issue permit or indeed require it.

This paper proceeds as follows. The next section will briefly recap the arguments for and against the democratic legitimacy of judicial review at the domestic level to provide a point of comparison and then summarize the institutional-procedural elements that existing scholarship has highlighted as affecting the legitimacy of judicial institutions beyond the state. In section 3, I elaborate why the democratic legitimacy of international courts specifically requires a judicial standard of review that pays appropriate deference to decisions taken by democratic governments at the domestic level – based on the central concepts of self-governance and autonomy within democratic theory – and identify the circumstances and concrete textual hooks in international legal instruments that should trigger it. Section 4 investigates the extent to which the standards of review currently employed by some of the most prominent international courts [in this draft version: the European Court of Human Rights and the WTO Dispute Settlement Body] correspond to the desideratum of a democratically informed deferential standard of review. The conclusion summarizes the main theoretical argument and the empirical findings, and provides an outlook on further research in this area.

## 2. Democratic Legitimacy of Judicial Review

Before turning to the democratic credentials (or absence thereof) of international judicial review, I will briefly recap the arguments for and against judicial review in the domestic context. Although international courts, with the exception of the European Court of Justice, generally exercise a form of weak judicial review in that their decisions do not automatically result in the invalidity or inapplicability of the domestic act or norm in question,<sup>9</sup> the normative concerns as to the effects on the quality of democratic governance are nonetheless relevant. This is so because even though weak judicial review does not directly trigger inapplicability or nullity, respondent states subject to a binding decision by an international court are nonetheless under a legal obligation to give effect to that decision, unless they want to violate their obligation to comply with such decisions.

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<sup>9</sup> The opposite would be strong judicial review where an adverse decision by a competent court results in the non-applicability or even nullity of the act norm in question. The German *Bundesverfassungsgericht*, for example, exercises a strong version of judicial review; see BVerfGG §31 (binding force of BVerfG decisions) and §78 (nullity, *inter alia*, of federal law that violates the Constitution).

## 2.1. Democratic Legitimacy of Domestic Judicial Review

Critics' rejection of judicial review as undemocratic is first and foremost based on what since Alexander Bickel's foundational work in the early 1960s has been generally been discussed under the label of the courts' "counter-majoritarian" character.<sup>10</sup> As put by Jeremy Waldron, "[b]y privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."<sup>11</sup> In reasonably well organized and functioning democracies that are characterized both by a general commitment to rights as well as by reasonable disagreement regarding their specific instantiations,<sup>12</sup> such resolution is instead said to be more appropriately entrusted to representative and electorally accountable legislatures. Even if working less than perfectly in practice, legislative institutions are said to realize much better the goal of political equality of all members within an a given polity and of republican non-domination than do courts.<sup>13</sup> In addition, the fairness and equality attributes of majority voting are said to apply only to "persons who have a moral claim to insist on being regarded as equals in some decision-process" – a claim not applicable to judges because "[t]hey do not represent anybody. Their claim to participate is functional, not a matter of entitlement."<sup>14</sup>

Moreover, courts are said to be institutionally inferior to representative political institutions in reaching broadly acceptable and representative policy solutions. Richard Bellamy criticizes that "constitutional courts have a disturbing tendency to have many of the vices attributed to democracy without any of the virtues of those processes"<sup>15</sup> and are in any event unable to remedy the real or alleged deficits of the latter. In particular, the argument that judicial institutions might be better than "majoritarian democracy" at getting the moral questions underlying constitutional disputes right cannot by itself satisfy "if what counts as a right or wrong answer is precisely the issue in question."<sup>16</sup> While process-related arguments, from the vantage point of democratic legitimacy, are said to weigh strongly and almost exclusively in favor of electoral and representative institutions, outcome-related reasons are by contrast viewed at best as inconclusive as there is no independent criterion by which to decide whether judicial review is indeed superior to democratic and representative parliaments when it comes to the protection of rights.<sup>17</sup> Without such a criterion, forms of judicial review that apply substantive conceptions of constitutional rights eventually turn into nothing other than judicial "censorship" of democratic processes of law-making and political will formation.<sup>18</sup>

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<sup>10</sup> See Bickel (1986), 16. For an extensive overview of the history of the debates about the "countermajoritarian difficulty" and its recurrent salience in U.S. legal scholarship, see Barry Friedman's magisterial five-part history: Friedman (1998; 2000; 2001a, 2002a; 2002b).

<sup>11</sup> Waldron (2006), 1353.

<sup>12</sup> See Waldron's four assumptions that define his core case, *ibid.*, 1359-1369.

<sup>13</sup> *Ibid.*, 1389, 1391; Bellamy (2007), 260.

<sup>14</sup> Waldron (2006), 1392.

<sup>15</sup> Bellamy (2007), 29.

<sup>16</sup> *Ibid.*, 93.

<sup>17</sup> Waldron (2006), \_\_\_.

<sup>18</sup> Maus (1994), 304.

An intermediate position has advanced the view that while substantive judicial review of value-based issues should indeed be rejected as being in conflict with democratic decision-making, there is a useful and legitimate role for the courts in assuring that the processes aimed at assuring such democratic decision-making are work properly and fairly. In John Hart Ely's words, the proper purpose of judicial review is to "polic[e] the process of representation."<sup>19</sup> Commenting positively on the U.S. Supreme Court's jurisprudence under Chief Justice Earl Warren which is generally qualified as having been quite activist, Ely notes that

while certainly interventionist decisions, ... the interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process - which is where such values *are* properly identified, weighed, and accommodated - was open to those of all viewpoints on something approaching an equal basis.<sup>20</sup>

This stripped-down procedural, representation-enhancing version of judicial review has been criticized in turn by both defenders<sup>21</sup> and opponents<sup>22</sup> of judicial review as ultimately unsustainable because the assessment of what "truly" democratic processes are and what counts as procedural fairness and equity always already requires a substantive view as to the content of these standards, standards which are often as contentious as those relating to the substance of concrete policy choices.

Finally, defenders of substantive judicial review as part of democratic governance base their position on "thick" definitions of democracy that include in addition to procedural aspects relating to (generally majoritarian) preference aggregation outcome-based elements that foreground the centrality of the protection and realization of fundamental civil and political rights. From this vantage point, "there will be a loss for democracy whenever democratic procedures produce nondemocratic outcomes," with judicial review being seen "as a democratic response to procedural failures to protect certain democratic rights."<sup>23</sup> Because of their institutional features that insulate them from direct political competition, courts are said to provide a beneficial "forum of principle" where, in contrast to legislatures, "the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power."<sup>24</sup> At the same time, the manner in which judges are generally selected and appointed is said to assure that they are not out of tune with respect to the moral and political issues faced by a given community. While disagreements among the members of the bench retain their political character, such disagreements "usually reflect real differences of political principle, rather than an effort to pander to voters, campaign for higher office,

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<sup>19</sup> The title of chapter 4 of Ely (1980), 73-104.

<sup>20</sup> Ely (1980), 74 (emphasis in the original).

<sup>21</sup> Dworkin (1981), 500-516.

<sup>22</sup> Bellamy (2007), 110-111.

<sup>23</sup> Brettschneider (2007), 138.

<sup>24</sup> Dworkin (1981), 517. It should be noted that Dworkin does not argue that judicial review is indispensable to constitutional democracy, but that it is not precluded either: "Democracy does not insist on judges having the last word, but it does not insist that they must not have it." Dworkin (1996), 7.

engineer an interest group deal, or honor a party platform."<sup>25</sup> As a result, by foregrounding questions of enduring values rather than more transitory interests, judicial review can be viewed as "a sensible way to promote *non-majoritarian representative* democracy."<sup>26</sup> The democratic deficits that judicial review may be said to have, Richard Fallon has concluded, can eventually be compensated for by its overall legitimacy which is rooted in its contribution to the protection of individual rights: both legislatures and courts "should be enlisted in the case of rights protection because it is morally more troublesome for fundamental rights to be underenforced than overenforced."<sup>27</sup>

A number of recent contributions to the debate have taken more measured approaches to the democratic legitimacy of domestic judicial review. Scott Lemieux and David Watkins, for example, have convincingly argued that judicial review is not the countermajoritarian force it is made out to be by its critics, both because the political institutions championed instead of the courts are not always as majoritarian and representative as claimed,<sup>28</sup> and because courts frequently enough *do* align themselves with reigning public opinion.<sup>29</sup> Instead, from a perspective that views as one of democracy's principal purposes the minimization of domination, Lemieux and Watkins find that "judicial review might make a modest contribution to democracy" as "one potential tool among many for reducing domination [...]."<sup>30</sup> In a similar vein, Annabel Lever has argued that while judicial review is not mandatory to protect rights effectively, as some defenders claim, it is nonetheless "normatively attractive on democratic grounds" as a "supplement to otherwise democratic institutions because it enables individuals to vindicate their rights against government in ways that parallel those they commonly use to vindicate their rights against each other, and against non-governmental organizations."<sup>31</sup> Finally, Corey Brettschneider has argued that both majoritarianism and substantive rights approaches to democracy have intrinsic value as expressions of the idea of democratic self-government and that it is one of judicial review's principal tasks to balance the two.<sup>32</sup>

Ultimately, the arguments regarding the democratically appropriate role of judicial review within democratic systems of government are merely a reflection of underlying disagreements about the definition of democracy as such,<sup>33</sup> of the proper balance of its procedural and substantive characteristics, and of the separation of powers between institutions in pursuit of that balance. As a consequence, there is no clear right or wrong with respect to the appropriateness of judicial review, only a "more" or "less" in light of a given democratic theory.

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<sup>25</sup> Eisgruber (2001), 4.

<sup>26</sup> Eisgruber (2001), 210 (emphasis added).

<sup>27</sup> Fallon (2008), 1735.

<sup>28</sup> Lemieux & Watkins (2009), 32 & 36-37; on the US context, see also generally Levinson (2006).

<sup>29</sup> Lemieux & Watkins (2009), 34-36; on the U.S. Supreme Court, see most recently Friedman (2009).

<sup>30</sup> Lemieux & Watkins (2009), 61.

<sup>31</sup> Lever (2009), 815.

<sup>32</sup> Brettschneider (2007), chap. 7.

<sup>33</sup> Lemieux & Watkins (2009), 33 ("Ultimately, then, the democratic legitimacy of courts depends entirely on the democratic theory being advocated").

## 2.2. (Democratic) Legitimacy of International Judicial Review

Taking a generic view of courts, the positions for and against judicial review developed in the context of the domestic judiciary also apply to its counterpart beyond the state: By declaring a domestic measure based on national law to be incompatible with a state's international obligation, an international court overrides the presumptive preferences of the majority within that state. Although most courts beyond the state - with the exception of the European Court of Justice - exercise a weak form of judicial review in that their judgments do not normally result in the automatic invalidation or displacement of the national norms at stake, as a matter of international law, respondent states are still under the obligation to remove the violation, provide for restitution, and to prevent the violation's recurrence. Unless a state's government is willing to bear the political costs for remaining non-compliant - which may or may not be significant - compliance with that obligation will often necessitate changes to existing legislation, be it by way of interpretation or through formal amendments, to administrative practices, or to judicial jurisprudence. To this extent, then, normative reservations or support as to the appropriateness of law- and policy-making by way of judicial review can be applied to courts beyond the state as well.

It is crucially important, however, to recognize that adjudication, due to the imprecision of legal language - its "indeterminacy" - *always* requires interpretive activity<sup>34</sup> and that the choice between two in principle plausible interpretations is *always* also a law-making act.<sup>35</sup> On the basis of this basic insight, it is easy to see that the debate about the democratic legitimacy of judicial review is really a debate about the *appropriate* separation of powers between legislative and judicial law-making.<sup>36</sup> The definition of what is considered an appropriate separation of powers can be brought about in two principal ways: First, by way of the explicit constitutional and/or legislative allocation of powers to the respective branches of government, and second, by way of institutional self-restraint in favor of another institution or set of institutions on the basis of principled considerations relating to institutional expertise normative appropriateness in light of contemporary understandings of democratic governance. Both occur with respect to the allocation of powers between courts and other government institutions domestically and both, I argue, are relevant to defining a normatively appropriate and democratically attractive separation of powers in multi-level governance systems including international courts, on the one hand, and national decision-makers, on the other.

Somewhat surprisingly, the majority of the recent discussions of the legitimacy of the international judiciary has largely ignored this particular dimension of the relational democratic legitimacy of courts. Instead the prevailing focus has been on questions of the design of international courts' institutional set-up, of their procedures, and on select formal aspects of their output. While the analyses of these elements are without question meritorious and the suggestions that flow from them deserve attention, they do not as such sufficiently exhaust the issue of the democratic credentials of

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<sup>34</sup> Add cite to Barak.

<sup>35</sup> Kelsen (1950), xv.

<sup>36</sup> After all, even opponents of judicial review do not generally expect courts to refrain from law-making through interpretation altogether, but only to leave the resolution of the big questions of contemporary politics and morality to the elected branches of government. Add cite.

international courts. To the contrary, I argue that a theory of *genuinely democratic* judicial decision-making beyond the state *must* include a theory as to the appropriate distribution of final politico-legal decision-making authority between the judicial institution under consideration, on the one hand, and the states subject to its jurisdiction, on the other. Without this element, any theory of the democratic legitimacy of international adjudication is necessarily insufficient because it disregards the central role of the key democratic values of autonomy and self-governance.

To be fair, many treatments of the question of the legitimacy of international adjudication are not clothed in terms specifically of *democratic* legitimacy, but address the issue without that qualifier, while at the same time some of institutional characteristics affecting legitimacy are subsequently linked back to values that are considered part of the "democratic" canon. In a forthcoming article, Nienke Grossman, for example, argues that international adjudicative bodies' legitimacy - that is, the "perception of justified authority" - is a function of three principal factors: "the fair and unbiased nature of the adjudicative body, commitment to the underlying normative regime that the body is interpreting and applying, and the body's transparency and relationship with other democratic values."<sup>37</sup> While the "infuse[ion] with democratic norms" is repeatedly invoked as enhancing judicial legitimacy,<sup>38</sup> what these norms are is not further specified, except that transparency may be counted among them.<sup>39</sup>

In Tullio Treves' treatment of the legitimacy of the decisions of international courts, democracy and democratic norms do not figure at all, neither in his list of analytic questions,<sup>40</sup> nor in his application of the legitimacy indicators developed by Thomas Franck,<sup>41</sup> nor when he considers the potential illegitimacy of a judicial decision "because it collides with values of a moral nature."<sup>42</sup> While Treves finds, in applying Franck's indicators, that the determinacy of decisions, their coherence with prior precedent(s), and adherence to existing institutional and procedural frameworks in the creation of a court and the exercise of its jurisdiction all benefit judicial legitimacy,<sup>43</sup> his analysis of the perceived illegitimacy of judgments due to conflicts with "values of a moral nature" only deals with the effects of jurisdictional constraints which may force a court to issue a judgment that only addresses select parts of a complex problem and which "some may see as illegitimate because it fails to address aspects of the conflict they consider essential in light of moral or political values. [...] In these cases the concern for 'legitimacy' as conformity with moral and political values collides with what we can call the 'legitimacy of legality'."<sup>44</sup> Nowhere is the question of the legitimacy of judicial

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<sup>37</sup> Grossman (2009), 104.

<sup>38</sup> Ibid., 109, 115, 147 & 154.

<sup>39</sup> Ibid., 150 & 153.

<sup>40</sup> Treves (2008), 171-173.

<sup>41</sup> See Franck (1990) 'While Franck had considered the principal applicability of these indicators to judicial decisions' not only treaty law - Franck (1995), 26 - he had not undertaken such an application himself.

<sup>42</sup> Treves (2008), 177.

<sup>43</sup> Treves (2008), 173-177. As to Franck's fourth legitimacy indicator, symbolic validation, Treves finds that because symbolic validation "seems an inherent characteristic of international judicial decisions," it will be unlikely to give rise to questions of legitimacy. Ibid., 175.

<sup>44</sup> Treves (2008), 178.

decisions linked to the appropriate separation of powers between an international court and national decision-makers, or between such a court and other international institutions.

The most explicit general treatment of the specifically democratic legitimacy of international courts to date has recently been provided by Armin von Bogdandy and Ingo Venzke. Noting that "as autonomous actors wielding public authority [international courts'] actions require a genuine mode of justification that lives up to basic tenets of democratic theory,"<sup>45</sup> von Bogdandy and Venzke address a number of elements in the institutional design and operation of international courts that can be characterized as affecting their democratic credentials. One of their arguments locates part of the democratic legitimacy of international courts and tribunals in the manner and modalities of selecting the members of the bench. Currently, judges may either be selected by way of (intergovernmental) appointment, as is the case with the European Court of Justice<sup>46</sup> and most arbitral tribunals,<sup>47</sup> or they may be elected by the consultative and/or executive bodies of an international institution, as is the case with the International Court of Justice, the European Court of Human Rights, and the International Criminal Court.<sup>48</sup> Domestically, parliaments may be involved to a greater or lesser degree in the selection of appropriate candidates.<sup>49</sup> The argument here is that greater involvement of an organization's plenary body and especially of national parliaments increases the democratic legitimacy of high courts beyond the state because it generates publicity and allows for involvement of otherwise excluded publics.<sup>50</sup>

A second set of arguments links the democratic legitimacy of international courts to formal procedural aspects of judicial decision-making, highlighting the legitimacy-enhancing function of greater publicity and transparency of international judicial proceedings, of a broadening of the right of third parties to intervene in them, and of greater participation of actors not directly involved in the case at bar – such as NGOs – by way of *amicus curiae* briefs. That decision-making processes aimed at collectively binding decisions need to be public and accessible to those whose affairs are affected by them in order to enable them to enter into a shared discourse on their merits, and to articulate political support or opposition, is a key element in most contemporary understandings of democracy.<sup>51</sup> While judicial deliberations as such are generally confidential as a matter of principle,

<sup>45</sup> von Bogdandy & Venzke (2010), 3.

<sup>46</sup> See Treaty on European Union (TEU), Art. 19 (2), and Treaty on the Functioning of the European Union (TFEU), Art. 253 ("appointed by common accord of the governments of the Member States ...").

<sup>47</sup> See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf), Art. 37 (2); UNCITRAL Arbitration Rules (as revised in 2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf>, Arts. 8-10.

<sup>48</sup> Elected by the General Assembly and the Security Council, the Council of Europe's Parliamentary Assembly, and the Assembly of States Parties, respectively.

<sup>49</sup> §1 (3) RichterWahlG: "Die von der Bundesregierung nach Artikel 253 des Vertrags über die Arbeitsweise der Europäischen Union [...] zur Ernennung zu Richtern und Generalanwälten des Gerichtshofs vorzuschlagenden Persönlichkeiten und die von der Bundesregierung nach Artikel 254 des Vertrags über die Arbeitsweise der Europäischen Union zur Ernennung zu Mitgliedern des Gerichts vorzuschlagenden Persönlichkeiten werden von der Bundesregierung im Einvernehmen mit dem Richterwahlausschuss benannt."

<sup>50</sup> von Bogdandy & Venzke (2010): 36-40.

<sup>51</sup> See only Kant (1983), 135-139; Habermas (1992), 435-467; Peters (2001).

both nationally or internationally, and while the statutes of a number of international courts and tribunals explicitly provide for public hearings,<sup>52</sup> some other high-profile international dispute settlement mechanisms do not, and have hence scored lower in terms of publicity and transparency.<sup>53</sup> Making judicial decisions, hearings and the parties' pleadings available or open to the public can feed into a broader public discourse on the justifications behind such decisions and other, similarly situated ones, a potentially legitimizing factor that is all the more important the more international courts and tribunals contribute to general developments in international law in their role as judicial law-makers.<sup>54</sup>

Similarly, granting expanded participation rights to third parties and civil society actors is seen as a way to connect judicial decision-making to a wider array of opinions and viewpoints held by potentially affected actors. As Dan Bodansky has noted, "[p]articipation can contribute to popular legitimacy by giving stakeholders a sense of ownership in the process."<sup>55</sup> Noting approvingly the ICJ's practice of allowing interventions of third states under Art. 62 of its Statute in the absence of a jurisdictional link with the disputants and even if the latter object to such intervention,<sup>56</sup> von

<sup>52</sup> ICJ Statute, Art. 46; ICJ Rules of Court, Art. 59; International Tribunal for the Law of the Sea (ITLOS) Statute, Art. 26 (2); ITLOS Rules of Court, Art. 74; ECHR, Art. 40; ECtHR Rules of Court, Art. 63(2); ICC Statute Arts. 67 & 68(2).

<sup>53</sup> Under the WTO Dispute Settlement Agreement, for example, written submissions are to be treated confidentially as are the proceedings – not only the deliberations – of the Appellate Body. See Art. 17 (10) and Art. 18 (1) DSU. If so inclined, parties to a dispute are free to disclose "statements of its own position" to the public, but must keep information submitted by other parties confidential, if so designated; see Art. 18 (2) DSU. Similar rules apply to investor-state arbitrations conducted under UNCITRAL rules, including the publication of the awards which is only permissible with the consent of the parties. See, e.g., UNCITRAL Arbitration Rules, *supra* note 47, Art. 28 (3) [hearings] and Art. 34 (5) [awards]; see also ICSID-Convention, *supra* note 47, Art. 48 (5) [awards]. Both the trade and investment dispute resolution systems have been subject to calls for greater access by the public to awards and proceedings in an effort to enhance their perceived legitimacy. See OECD (2005); Fukunaga (2008), 100-101. At the WTO, there has already been a trend toward greater openness and transparency in its dispute settlement proceedings by way of allowing public observation of panel and Appellate Body hearings with the mutual consent of the parties; see, e.g., Public Observation of the Arbitration on the Level of Sanctions Against the US in WTO Dispute Between the EU and the US on Zeroing, [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146032.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146032.pdf). The first time hearings were opened to the public occurred in 2005; see *US and Canada—Continued Suspension of Obligations*, Communication from the Chairman of the Panels of August 1, 2005, WT/DS321/8 (Aug. 2, 2005). See generally Center for International Environmental Law (2009); Ehring (2008). See also The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf), paras. 261-263 (making the case for opening up the dispute settlement proceedings to public observers to increase its legitimacy). In investor-state arbitrations under the ICSID Convention, which does not feature comprehensive regulations as to confidentiality, arbitral tribunals have decided that any issues not addressed in the Convention will have to be decided on a case-by-case basis by the tribunals themselves; see *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (Sept. 29, 2006), para. 121; *Giovanna a Beccara & Others v. The Argentine Republic*, ICSID Case No. ARB/07/05, Procedural Order No. 3 (Jan. 27, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1390\\_En&caseId=C95](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1390_En&caseId=C95), para. 73.

<sup>54</sup> von Bogdandy & Venzke (2010), 26.

<sup>55</sup> Bodansky (1999), 617.

<sup>56</sup> von Bogdandy & Venzke (2010-E), at 29, cite to the ICJ's decision in *Sovereignty over Pulau Ligitan und Pulau Sipadan (Indonesien v. Malaysia)*, Application by the Philippines for Permission to Intervene, 2001 I.C.J. 575 at para. 31-36 (Judgment of Oct. 23, 2001), available at <http://www.icj-cij.org/docket/files/102/7698.pdf>, but the Court's permissive position on third party interventions had several earlier precedents; see *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Application by Nicaragua for Permission to Intervene, 1990 I.C.J. 130 at para. 100 (Judgment of Sept. 13, 1990), available at <http://www.icj-cij.org/docket/files/75/6657.pdf>; cited affirmatively in *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Application by Equatorial Guinea for Permission to

Bogdandy and Venzke also point out that “[t]he trend towards wider participation in judicial proceedings testifies to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute.”<sup>57</sup> Participation of civil society actors by way of *amicus curiae* briefs might similarly contribute to the greater involvement in judicial proceedings of non-state stakeholders and thus give such proceedings greater democratic semblance; the admissibility of such briefs appears to be increasing among international courts.<sup>58</sup>

A final argument considers the issue of democratic legitimacy of international courts in light of the unity and fragmentation of international law. Based on a view that locates the legitimacy of domestic legislation in part in the openness of democratic deliberation in which arguments cannot be excluded *a priori* just because they involve other issue areas or types of argument,<sup>59</sup> the point here is that a form of judicial decision-making that seeks to make good use of the rule of systemic treaty interpretation laid down in Art. 31 (3) lit. c VCLT might remedy the effects of functional segmentation in contemporary international law. This rule asks interpreters to take into consideration, together with a norm’s text and context, “any relevant rules of international law applicable in the relations between the parties.” Embedding judicial decisions within the broader international legal discourse and engaging in trans-judicial dialogue might result in more holistic and thus more democratically legitimate judicial decision-making.<sup>60</sup>

As important as these aspects of the international judiciary may be in terms of their degree of conformity with what are widely perceived to be democratic values, I argue that although they may be necessary to establish and enhance international court’s democratic legitimacy, they are not sufficient: A theory of the democratic legitimacy of international courts must necessarily include as one its elements a sub-theory as to the appropriate allocation of decision-making authority between international courts, on the one hand, and national decision-making, on the other. The reason for this is rooted in the centrality within any conception of democracy of the concept of self-governance, an aspect to which I now turn.

### 3. Democratic Legitimacy of International Judicial Review and Judicial Deference

[This section, central to the argument, but as of yet a mere sketch, will be further expanded].

#### 3.1. Democracy, Self-Government, and Subsidiarity

"Self-government of the people," Adam Przeworski notes, is the principal "ideal that shaped the establishment of representative institutions *and* guided its evolution into democracy as we see it

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*Intervene*, 1999 I.C.J. 1029 at para. 15 (Order of Oct. 21, 1999), available at <http://www.icj-cij.org/docket/files/94/7449.pdf>.

<sup>57</sup> von Bogdandy & Venzke (2010-E), 29.

<sup>58</sup> von Bogdandy & Venzke (2010-E), 31-32.

<sup>59</sup> See Bast (2009).

<sup>60</sup> von Bogdandy & Venzke (2010-E), 40-43.

today."<sup>61</sup> In one largely uncontroversial definition, a people may be said to govern itself "when decisions implemented on its behalf reflect the preferences of its members."<sup>62</sup> Such collective self-government is itself the expression of another value at the heart of "the power and appeal of democracy,"<sup>63</sup> personal autonomy.<sup>64</sup> For Kant, "[a]utonomy of the will is that property of it by which it is a law to itself independently of any property of objects of volition"<sup>65</sup> and underpins an actor's status as a rational agent, where that status is seen as "the capacity to be normatively self-legislating, the capacity for participation in moral life."<sup>66</sup> A contemporary definition views "personal autonomy as the condition of being self-directed, of having authority over one's choices and actions whenever these are significant to the direction of one's life."<sup>67</sup> In the political context of interest here, one might thus say that autonomy is to the individual what self-government is to the collectivity, and that the autonomy of individuals finds expression at the collective level through political self-government.

Of course, there is nothing in the concept of self-government that limits its applicability to the historically accidental form of the nation-state and would thus prevent it from being realized across and beyond state boundaries. To the contrary, the ability and freedom to enter multilateral arrangements beyond the boundaries of one's own polity is a direct consequence of a polity's self-governing character. The critical issue is not whether political communities organized as states can or should engage in multilateralism, but rather whether the arrangements so made unduly detract from the power of self-government beyond what was envisaged as part of the delegation of authority. In David Held's words, the concern is with the "danger ... that political authority and decision-making capacity will be 'sucked' upwards in any new cross-border democratic settlement [...]."<sup>68</sup> To prevent the loss of legitimacy due to an improper arrogation of political authority beyond what has been delegated, "the principles governing appropriate levels of decision-making need to be clarified and kept firmly in view."<sup>69</sup>

Identifying such principles in light of the explosive increase of the number of international governance institutions over the last half century, on the one hand, and of contemporary democratic theory on the other, has been a core concern of much normatively inclined literature in law<sup>70</sup> and political science. In the context of the European Union in particular, it has for some time now been captured by the debates about the proper application of the principle of subsidiarity. The principle of subsidiarity, formally introduced into EU law at Maastricht in 1992 and now enshrined in Art. 5 (3)

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<sup>61</sup> Przeworski (2010), 8 (emphasis in the original).

<sup>62</sup> Przeworski (2010), 18.

<sup>63</sup> Dunn (1993), vi [check].

<sup>64</sup> Lakoff (1996), 155 [check].

<sup>65</sup> Kant (1959), 59 [check].

<sup>66</sup> Jacobs (2003), 222.

<sup>67</sup> Oshana (2003), 100.

<sup>68</sup> Held (1995), 235.

<sup>69</sup> Ibid.

<sup>70</sup> See only Bogdandy et al. (2010); Broude & Shany (2008).

TEU,<sup>71</sup> provides that in areas in which the Union does not possess exclusive competence it shall act only when a given policy objective cannot adequately be achieved solely at the national level and where Union action promises greater success.<sup>72</sup> More generally, subsidiarity has been defined as “a conceptual and rhetorical mediator between supranational harmonization and unity, on the one hand, and local pluralism and difference, on the other.”<sup>73</sup>

Although frequently expressed in terms of functionalism and efficiency, subsidiarity also has a strong normative component: Policy decisions should be made by those directly affected and closest to the problem to be solved; in other words, self-government should be realized at the lowest organizational level at which this is possible, not least because this also bestows the greatest democratic legitimacy on the decisions being made. The principle of subsidiarity can thus itself be understood to be an integral part of democratic government, both within states and across borders.

[...]

### 3.2. Subsidiarity and Standards of Review

In the context of international courts, there are two principal ways in which subsidiarity can be institutionalized. First, elements of subsidiarity can be written explicitly into a court’s constitutional treaty instrument. For example, a number of human rights instruments require that before the commissions and courts that they create can become engaged, applicants first have to exhaust all available and effective domestic remedies. This requirement gives expression not only to the duty of domestic institutions to seek to remedy claimed human rights violations, but also their *right* to do so in line with their domestic arrangements for resolving such disputes.

The second pathway through which subsidiarity can become institutionalized in international adjudication is by way of appropriately designed judicial standards of review, usually developed and adopted by courts themselves as an exercise of their inherent function as judicial policy-makers. The term “standard of review” refers in this context to “the nature of review by a court or tribunal of decisions taken by another governmental authority or, sometimes, by a lower court or tribunal.”<sup>74</sup> The range of possible standards of review comprises highly deferential judicial postures at one end of the scale--e.g., under a simple “good faith” standard<sup>75</sup>--and much more demanding and intrusive review of the merits of a decision under a strict scrutiny standard.

[...]

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<sup>71</sup> Art. 5 (3) TEU provides that “[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” The principle of subsidiarity has been further fleshed out by Protocol No. 2 to the TEU on the Application of the Principles of Subsidiarity and Proportionality, OJ 2008/C 115/206-209.

<sup>72</sup> See, e.g., Chalmers et al. (2006), 219-230.

<sup>73</sup> Carozza (2003), 39-40.

<sup>74</sup> Bohanes & Lockhart (2009), 379.

<sup>75</sup> See Burke-White & von Staden (2007), \_\_\_.

### 3.3. Circumstances where Deference is Indicated and Appropriate

Having proposed that a democratically attractive judicial standard of review should be sufficiently deferential to national decision-making, it is important to add that judicial deference is of course not appropriate in each and every legal context. Yuval Shany has pointed out, for example, that a standard of review such as the margin as an instrument of deference to democratic decisions taken at the national or sub-state level has its strongest justification in the context of “inward-looking norms that regulate domestic conditions,”<sup>76</sup> such as human rights regimes, that is, under circumstances that do not generally generate any meaningful negative material or political externalities. By contrast, outward-looking norms that primarily seek to regulate relations between states – that is, between political communities – are much less amenable to democratic deference if only because the applicable norms precisely seek to protect other communities from preferences that have, or may have, an adverse effect on them.

At the same time, even within legal regimes that seek to regulate behavior between states, there may be lexical “windows” that foreground domestic political preferences and may stake a claim to due deference on grounds of greater democratic legitimacy. Think, for example, of the general exceptions provisions that can be found in the WTO trade regime in GATT Art. XX, GATS Art. XIV and here specifically of their public morals and public order clauses. Elsewhere, Bill Burke-White and I have argued that arbitral tribunals constituted under the ICSID Convention should exercise some restraint in the review of national measures adopted under appropriate non-precluded measure provisions included in a number of bilateral investment treaties.<sup>77</sup> While our argument foregrounds considerations of institutional expertise and capacity,<sup>78</sup> it also has a democratic undercurrent in that we emphasize a state’s obligation *and right* to engage in determinations of what are to be considered threats to public order within the specific community it is charged to govern.

Note, further, that the deferential standard of review I am proposing does not as such undermine the long-established principle of international law – included in both the Vienna Convention on the Law of Treaties (Art. 27) and the ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Art. 32) – that a state’s internal law cannot justify the non-observance of its international obligations, irrespective of whether the domestic legislative process has been democratic or not. Deference to decisions by democratically legitimated national decision-makers has no place where an international norm is reasonably clear and specific: what governments agree to on the international plane should, for various normative reasons, generally bind their state until they have derogated again from any such obligations. The defense of a democracy-regarding standard of review as here understood is limited to those instances in which the text of a legal instrument itself suggests some interpretive or decision-making freedom for the states party to it.

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<sup>76</sup> Shany (2005), 920.

<sup>77</sup> Burke-White & von Staden (2010); see also Burke-White & von Staden (2007), 368-386.

<sup>78</sup> Burke-White & von Staden (2010), 329-333.

#### 4. Existing Standards of Review in International Judicial Practice

[This section examines existing standards of review employed by several of the most prominent international courts across different issue areas in order to show that the need to address and delineate a normatively appropriate standard of review has been recognized by some, though not by all international courts. At this stage, only the sub-sections on the ECtHR and the WTO DSB are available].

##### 4.1. European Court of Human Rights

The court that has developed the most elaborate, although by no means uncontroversial, standard of review reflecting a normatively sensitive separation of powers between judicial review by an international court, on the one hand, and democratic decision-making at the national level, on the other, is the European Court of Human Rights (ECtHR). Through its “margin of appreciation” doctrine, it employs a standard of review that grants national decision-makers “a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right.”<sup>79</sup> The operation of the margin of appreciation doctrine in the Court’s jurisprudence and the “breadth of deference”<sup>80</sup> it entails have given rise to a sizable literature of its own which cannot be covered here in any detail.<sup>81</sup> In this paper, I will focus only on the justifications for the doctrine’s existence and here in particular on its link to democratic decision-making at the national level.

First introduced by the now-defunct European Commission on Human Rights as part of its jurisprudence on the Convention’s derogation clause,<sup>82</sup> the Court adopted and developed the margin of appreciation doctrine primarily in the context of the limitation clauses of Articles 8-11 ECHR and of Article 1 of Protocol 1,<sup>83</sup> but it has also found application in the context of other Convention provisions without such clauses.<sup>84</sup> The limitation clauses are similarly worded and permit, for example, in the case of the freedom of expression protected under Article 10 (1) ECHR,

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

<sup>79</sup> Harris, O’Boyle, Bates & Buckley (2009), 11.

<sup>80</sup> Yourow (1987), 118.

<sup>81</sup> For further reference, see, e.g., Christoffersen (2009), chap. 3; Greer (2000); Arai-Takahashi (2002); Yourow (1996).

<sup>82</sup> See *Lawless v. Ireland*, App. No. 332/57, Eur. H.R. Rep., paras. 90, 93, 106 & 107 (1959); *Greece v. United Kingdom*, App. No. 176/56, I Eur. Comm’n H.R. Dec. & Rep., paras. 132 & 143 (1958); *Greece v. United Kingdom*, App. No. 176/56, II Eur. Comm’n H.R. Dec. & Rep., para. 318 (1958).

<sup>83</sup> These articles relate to the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of association (Article 11), and the protection of property (Article 1 of Protocol 1). Further limitation clauses also appear in Article 2 of Protocol 4 (freedom of movement) and Article 1 of Protocol 7 (procedural safeguards relating to the expulsion of aliens).

<sup>84</sup> See Arai-Takahashi (2002), chaps. 2 (Art. 5), 3 (Art. 6) & 9 (Art. 14); *Ždanoka v. Latvia*, ECtHR Reports of Judgments and Decisions 2006-IV para. 103 (Grand Chamber Judgment of March 16, 2003) (right to free elections under Art. 3 of Protocol No. 1).

information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>85</sup>

Restrictions on the exercise of the freedom of expression and the other Convention rights subject to limitation clauses thus have to meet a three-pronged test: they need to (a) be “prescribed by law;” (b) pursue one of the stated permissible objectives; and (c) be “necessary in a democratic society.”

It is this last requirement which has become the textual hook on which the margin doctrine has been built. Its key elements have been enunciated in its first doctrinal articulation by the Court in the 1976 *Handyside* judgment,<sup>86</sup> where the ECtHR had to determine whether the prohibition of a book aimed at school children of twelve years and upward due to the allegedly obscene and pornographic character of its sections on sex education was “necessary in a democratic society” for the “protection of morals.” In determining the scope of its review, the Court first noted the essentially subsidiary nature of the supervisory mechanism established by the Convention which “leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines”<sup>87</sup> as well as to identify and implement any restrictions considered necessary for the protection of the permissible objectives included in Art. 10 (2) ECHR. The Court further added that “by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”<sup>88</sup>

As a consequence, the provision in question left “to the Contracting States a margin of appreciation,” a margin that was “given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”<sup>89</sup> That margin, however, was not “unlimited” and went “hand in hand with European supervision.”<sup>90</sup> While it was “in no way the Court’s task to take the place of the competent national courts” as part of that supervision, it still had “to review under Article 10 ... the decisions they delivered in the exercise of their power of appreciation.”<sup>91</sup> In exercising such review, the Court had to “decide ... whether the reasons given by the national authorities to justify the actual measures of ‘interference’ they take are relevant and sufficient”<sup>92</sup> and whether such measures were “proportionate to the legitimate aim pursued.”<sup>93</sup>

The principal elements of the margin have been restated in countless judgments since the foundational *Handyside* case, albeit often in a formulaic, boiler-plate manner. In the context of interferences with the protection of private property, for example, which under Art. 1 of Protocol 1 is permissible only in the public interest, the Court has reiterated that “national authorities are in

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<sup>85</sup> Art. 10 (2) ECHR.

<sup>86</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A) (Judgment of Dec. 12, 1976).

<sup>87</sup> *Ibid.*, para 48.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, para 49.

<sup>91</sup> *Ibid.*, para 50.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, para 49.

principle better placed than the international judge to appreciate what is 'in the public interest'.<sup>94</sup> Elaborating on this issue in the context of a more recent expropriations case, the Court noted that

the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation ...<sup>95</sup>

Elsewhere, the Court has recognized margins of appreciation with respect to the design of domestic electoral systems under Art. 3 of Protocol 1;<sup>96</sup> the extent to which "differences in otherwise similar situations justify a different treatment in law"<sup>97</sup> under the non-discrimination provision of Art. 14 ECHR; the regulation of political associations under Art. 11 (albeit a limited one);<sup>98</sup> ...; and ... .

While the relationship between judicial deference in favor of democratic decision-making at the national level based on the margin of appreciation doctrine as an expression of the principle of subsidiarity is implicit throughout the Court's case-law, some of the frankest comments highlighting this connection have been made by ECtHR judges outside of the courtroom. Past ECtHR President Luzius Wildhaber, for example, has stated in defense of the democratic deference inherent in the margin that "national authorities enjoy an area of discretion which derives from their role in the expression of the democratic will of their people."<sup>99</sup> Similarly, Ronald St. John Macdonald, a former Canadian sitting on the ECtHR's bench for Liechtenstein, remarked that "[t]he margin of appreciation ... permits the Court to show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it wants to make ... while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide."<sup>100</sup>

The degree of deference that the Court is prepared to show respondent governments is not fixed or uniform, but varies both across Convention rights as well as across different permissible objectives within the same limitation clause. Although the imprecision of the determinants that will result in a broad or a narrow margin have been subject to criticism,<sup>101</sup> its width has been read by some as "a function of the level of respect due to the 'democratic process' within the respondent State" and "the extent to which the respondent government ought to be master of its own 'proportions'--the

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<sup>94</sup> James & Others v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), para. 46 (Judgment of Feb. 21, 1986).

<sup>95</sup> Broniowski v. Poland (Merits), 2004-V R.J.D., para. 149 (Judgment of June 22, 2004).

<sup>96</sup> Mathieu-Mohin and Clerfayt v. Belgium, 113 Eur. Ct. H. R. (ser. A) para. 52 (Judgment of March 2, 1987)

<sup>97</sup> Rasmussen v. Denmark, 87 Eur. Ct. H. R. (ser. A) para. 40 (Judgment of Nov. 28, 1984).

<sup>98</sup> United Communist Party of Turkey and Others v. Turkey, 1998-I Reports para. 46 (Judgment of Jan. 30, 1998).

<sup>99</sup> Wildhaber (2006), 95.

<sup>100</sup> Macdonald (1992), 160.

<sup>101</sup> Add cites.

extent, in other words, to which the national polity should be left to manage the various relationships ... [between individual rights and collective interests] in its own way."<sup>102</sup>

[...]

#### 4.2. WTO Dispute Settlement Body (DSB)

One of the notable achievements of the Uruguay Round of trade negotiations leading up to the creation of the World Trade Organization (WTO) was the replacement of the rudimentary dispute settlement scheme provided for in Arts. XXII and XXIII of the 1947 General Agreement on Tariffs and Trade (GATT)<sup>103</sup> with the much more detailed and formalized procedures specified in the Dispute Settlement Understanding (DSU), administered by the newly created Dispute Settlement Body (DSB). The DSU identifies the WTO dispute settlement system as “a central element in providing security and predictability to the multilateral trading system” by “clarify[ing] the existing provisions of [the] agreements” covered by the DSU (Art. 3.2 DSU). The adjudicative function under the DSU is exercised by panels established specifically for a given dispute (Art. 6 DSU) and the standing Appellate Body (AB) which hears appeals from panel reports (Art. 17 DSU).

The original GATT did not specify any specific standard of review to be applied by panels. Except for the odd case, neither did the panels address the issue in any detail.<sup>104</sup> This lacuna was largely non-consequential anyway, however, as the threat of override of national policies and preferences from adverse panel decisions was minimal as a result of the prevailing decision-making procedures: Panel reports, after all, needed to be adopted by consensus by all GATT parties before they became binding, giving every party to a dispute a veto with respect to the panel’s findings and recommendations.<sup>105</sup>

In the Uruguay Round negotiations, by contrast, the issue of the standard of review to be applied by panels and the Appellate Body in their examination of national determinations and decisions did become a major issue, reportedly with deal-breaking potential.<sup>106</sup> Responding to domestic interest groups, the U.S. had pushed for the specification of a deferential standard of review, especially in the area of anti-dumping,<sup>107</sup> and was ultimately successful with respect to the latter. Agreement on the specification of a general standard of review to be applied across all other covered agreements, however, remained elusive. As a result, the Anti-Dumping Agreement (ADA) remains the only WTO agreement that provides for an explicit and specifically deferential standard of review.<sup>108</sup> For all other cases, the generally phrased provision of Art. 11 DSU remained the only fallback option.

<sup>102</sup> Marks (1995), 219.

<sup>103</sup> See, e.g., Jackson (1997), 112-120; Jackson, Davey & Sykes, Jr. (2003), 256-257.

<sup>104</sup> General Agreement on Tariffs and Trade, [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf), Arts. XXII and XXIII.

<sup>105</sup> ...

<sup>106</sup> See Jackson (1994): 139 (noting that the “standard-of-review question was one of three or four issues that could have broken apart the WTO negotiations”).

<sup>107</sup> Ibid.

<sup>108</sup> For background on the negotiations with respect to the standard of review issue, see Oesch (2003), 72-78.

### Article 11 DSU as a General Standard of Review

Article 11 DSU stipulates that dispute settlement panels, in assisting the DSB in the discharge of its responsibilities, “should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements [...]”<sup>109</sup> In its first decision addressing the issue of standard of review under the DSU, the Appellate Body read Art. 11 DSU as articulating “with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.”<sup>110</sup> With regard to fact-finding, this “objective assessment” standard was said to be located somewhere between *de novo* review and total deference with respect to prior determinations by national authorities.<sup>111</sup> Regarding questions of compliance with WTO law, the Appellate Body suggested that an objective assessment required the application of the international customary law rules of treaty interpretation, in line with Art. 3.2 DSU.<sup>112</sup>

The Appellate Body’s pronouncement notwithstanding, the “objective assessment” standard by itself, “couched in rather broad terms,” does “very little to provide substantial guidance on the nature and intensity of the scrutiny that panels should apply in reviewing national measures”<sup>113</sup> and could conceivably go hand in hand with a range of deferential postures towards national decision-making as well as with the absence of any deference whatsoever.<sup>114</sup> In other words, to turn the “objective assessment” requirement into a workable standard of review, it needs to be made more specific. In practice, the Appellate Body has done so by elaborating different standards of review for legal as opposed to factual determinations, for different issue areas addressed in separate covered agreements, and for the results of treaty-mandated national procedures as opposed to those not required by the covered agreement at issue.<sup>115</sup>

As regards issues of law, the former are consistently subjected to *de novo* review, that is, panels and the Appellate Body interpret WTO law without deference to any relevant and prior national interpretations.<sup>116</sup> There are at least here justifications for this approach: First, the simple fact that the WTO dispute settlement bodies are generally the first to actually interpret WTO law as opposed to the national implementing legislation usually applied by national courts and decision-makers (even if such legislation may copy the WTO’s provisions verbatim), means that there often is no prior interpretation of WTO law that could simply be adopted. Second, the customary law rules of

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<sup>109</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf), Art. 11.

<sup>110</sup> Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (EC—Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998), para. 116.

<sup>111</sup> *Ibid.*, para. 117. For an earlier exposition of the same logic, see Panel Report, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear (US—Underwear)*, WT/DS24/R (Feb. 25, 1997), paras. 7.7 - 7.13.

<sup>112</sup> *EC—Hormones*, para. 118.

<sup>113</sup> Bohanes & Lockhart (2009), 383.

<sup>114</sup> *Ibid.*, 383; Ehlermann & Lockhart (2004), 271-272.

<sup>115</sup> Bohanes & Lockhart (2009), 384; Ehlermann & Lockhart (2004), 272.

<sup>116</sup> Bohanes & Lockhart (2009), 386.

treaty interpretation which the DSB is required by Art. 3.2 DSU to apply do not provide for any deference to the interpretations advanced by any single state, regardless of how reasonable these may be. Third, uniform interpretation achieved by *de novo* review at the international level best serves the objective of contributing to “security and predictability” (Art. 3.2 DSU) within the trading system as a whole.<sup>117</sup>

Concerning factual issues, and the substantive determinations based upon them, the applicable standards of review is generally more deferential. First of all, however, before a standard of review can become meaningful in the first place, it presupposes that there has in fact been “some kind of national process in which a first decision-maker has examined, and reached conclusions, on the facts”<sup>118</sup> which the WTO panels or the Appellate Body are then reviewing. Where no such process is foreseen,<sup>119</sup> then the DSB organs by necessity become the triers of first impression and have to conduct a *de novo* examination.<sup>120</sup> By contrast, where national authorities are required by the agreement in question to undertake detailed domestic investigations, as in several of the trade remedy agreements,<sup>121</sup> the standard of review that has emerged in judicial practice “afford[s] a considerable measure of discretion to national authorities for fact-finding.”<sup>122</sup>

At the same time, panels are not required to accept just any national determinations at face value. For example, to determine whether national findings are “reasoned and adequate” under Art. 4.2 of the Safeguards Agreement, panels “must ... review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data.”<sup>123</sup> In doing so, panels have to limit their review to the data available at the time of the national investigations at issue.<sup>124</sup> In short, the standard of review applied to national authorities' determination and evaluation of the facts becomes in essence a review

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<sup>117</sup> Ibid., 385-386.

<sup>118</sup> Ibid., 389.

<sup>119</sup> Examples are the Agreement on Technical Barriers to Trade (“TBT Agreement”), [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf), and the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”), [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf).

<sup>120</sup> See Bohanes & Lockhart (2009), 409-411 (TBT Agreement) and 411-414 (SPS Agreement).

<sup>121</sup> See, e.g., See Agreement on Safeguards, [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf), Art. 3 (providing, *inter alia*, that “[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994”); Agreement on Subsidies and Countervailing Measures, [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf), Art. 11 (providing for a national investigation “to determine the existence, degree and effect of any alleged subsidy” (para. 1) to be undertaken before any countervailing duties may be imposed).

<sup>122</sup> Bohanes & Lockhart (2009), 396.

<sup>123</sup> Appellate Body Report, United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US—Lamb), WT/DS177/AB/R, WT/DS178/AB/R (May 16, 2001), para. 106; see also Appellate Body Report, Argentina—Safeguard Measures on Imports of Footwear (Argentina—Footwear), WT/DS121/AB/R (Jan. 12, 2000), para. 121.

<sup>124</sup> Appellate Body Report, United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US—Cotton Yarn), WT/DS192/AB/R (Nov. 5, 2001), para. 78.

of the justifiability and reasonableness of the explanations advanced in support of such determinations:<sup>125</sup>

The Appellate Body has ... placed the quality and content of an investigating authority's explanation at the very heart of a panel's review of whether the authority has complied with the substantive conditions governing the imposition of trade remedy measures. By scrutinizing the explanation, a panel can review whether the national authority's determination complies with the substantive obligations of an agreement, without making its own decision on the substance.<sup>126</sup>

This approach thus preserves discretionary decision-making on the part of the national authorities which will be upheld by WTO panels *as long as* it can be supported by a "reasoned and adequate" explanation.

### The Standard of Review in Anti-Dumping Cases

As noted above, the Anti-Dumping Agreement (ADA) is the only WTO agreement that explicitly provides for a meaningful standard of review. More precisely, Article 17.6 ADA stipulates two such standards, one with respect to findings of facts, one with respect to legal determinations. As to the former, Article 17.6 i) ADA specifies that

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]<sup>127</sup>

In fact, the provision contains two separate sub-standards:<sup>128</sup> The first relates to national authorities' "establishment" of the facts which needs to meet the standard of having been "proper." Although still open to interpretation, it is clear that this standard rules out *de novo* review by a panel and permits overrule only where there has been "manifest or egregious impropriety" on the part of national authorities.<sup>129</sup> The second standard applies to the "evaluation" of the facts thus established. Here, a panel has merely to assess whether that evaluation has been "unbiased and objective." If a case can be made that it has, the panel has to accept the facts and their evaluation and cannot replace them with its own assessments. Both of these standards thus leave a "considerable margin of discretion"<sup>130</sup> to national a authority which is shielded against in-depth review by panels.

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<sup>125</sup> For an extended discussion of the criteria applicable to a panel's review of whether an explanation by domestic authorities has been "reasoned and adequate," see Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada (US—Softwood Lumber VI [Article 21.5 – Canada])*, WT/DS277/AB/RW (May 9, 2006), paras. 93-99.

<sup>126</sup> Bohanes & Lockhart (2009), 407.

<sup>127</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), [http://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](http://www.wto.org/english/docs_e/legal_e/19-adp.pdf), Art. 17.6 i).

<sup>128</sup> Bohanes & Lockhart (2009), 390.

<sup>129</sup> *Ibid.*, 391.

<sup>130</sup> *Ibid.*

Article 17.6 ii) ADA specifies the standard of review for legal interpretations undertaken by domestic authorities, stipulating that

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>131</sup>

The provision thus foregrounds situations of reasonable disagreement as to the meaning of a given WTO norm in the context of anti-dumping measures taken by a domestic authority: Where two interpretations are permissible, the national authority's interpretation would be allowed to prevail for purposes of dispute settlement. However, as has been pointed out,<sup>132</sup> the question is how likely such a situation is ever to arise, given that the two permissible interpretations are required to exist *after* the application of the customary rules of treaty interpretation as codified in Arts. 31-33 VCLT. These rules of treaty interpretation, however, precisely aim to eliminate any ambiguity with respect to a given norm and speak of the identification of a norm's meaning in the singular as the objective of treaty interpretation. In other words, for Article 17.6 ii) ADA to become relevant at all, the interpretive process would have to be incapable of reducing an existing set of diverging meanings to a single one.

It is easy to see that the specification of an explicit standard of review in the AD Agreement has been of little consequence in terms of creating two distinct approaches to the review of national decisions and measures:<sup>133</sup> The standard of review with respect to facts and their evaluation counsels deference to national determinations to the extent that they are "proper," "unbiased" and "objective" under the ADA and "reasoned and adequate" under all others. It will be only on very rare occasions that these two yardsticks would produce different outcomes. As concerns the standard of review vis-à-vis national interpretations of legal provisions, the ADA promises greater deference on its face, but because the application of the rules of treaty interpretation will rarely result in the foreseen situation of two permissible, post-interpretation options, that deference will almost never become relevant in practice.

### Deference to Policy Choices

An area where panels and the Appellate Body show deference to national decision-making, even if both fact-finding and legal interpretation are subject to *de novo* review, is with respect to the initial policy choice as such. Neither the SPS Agreement nor the general exceptions provision of Art. XX GATT, for example, define the level of protection that member states have to pursue with respect to the permissible objectives for which trade-restrictive measures may be adopted; they only require that if a member states decides to pursue a certain policy, the measures adopted as part of its implementation must not "arbitrarily or unjustifiably discriminate between Members where identical

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<sup>131</sup> ADA Agreement, Art. 17.6 ii.

<sup>132</sup> Bohanes & Lockhart (2009), 386; Croley & Jackson (1994), 200.

<sup>133</sup> See Palmetter (2006), 226.

or similar conditions prevail” and must not “constitute a disguised restriction on international trade.”<sup>134</sup> The Appellate Body has made clear, for example, that “WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation”<sup>135</sup> and that “[a] Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.”<sup>136</sup> As a result, “panels leave Members considerable margin for making policy choices in pursuing the interests covered by Article XX”<sup>137</sup> and elsewhere.

### Justifications

Part of the justification of deference to national decision-makers in the context of WTO dispute settlement proceedings is functional in character: For both lack of resources and expertise, WTO panels are often not suitably positioned to conduct factual investigations.<sup>138</sup> At the same time, there is a recognition that the standard of review to be applied must recognize the allocation of authority between WTO bodies and the members states. In *EC—Hormones*, the Appellate Body thus noted that an appropriate standard of review, in that case under the SPS Agreement, “must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”<sup>139</sup> In circumstances where the text indicated that the member states intended to retain such jurisdictional competence, the DSB bodies had to respect those and decide accordingly. Such respect for, e.g., the initial decisions of investigating authorities which are provided for in a number of covered agreements as the basis of subsequent actions, can also be linked directly to the issue of legitimacy. As Bohanes and Lockhart note, “[t]he decisions made by investigating authorities are usually politically sensitive for domestic constituencies in both the exporting and the importing country. Asking panels to make factual findings of first impression in such disputes is unlikely to enhance the perceived legitimacy of the WTO.”<sup>140</sup> [...]

#### 4.3. International Court of Justice (ICJ)

[TO BE ADDED]

#### 4.4. European Court of Justice (ECJ)

[TO BE ADDED]

#### 4.5. Inter-American Court of Human Rights (IACtHR)

[TO BE ADDED]

#### 4.6. ICSID Arbitral Tribunals

[TO BE ADDED]

<sup>134</sup> SPS Agreement, *supra* note 119, Art. 2.3. See, similarly, GATT 1947, *supra* note 104, Art. XX.

<sup>135</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC—Asbestos)*, WT/DS135/AB/R (April 5, 2001), para. 168.

<sup>136</sup> *EC—Asbestos*, para. 178; see also *EC—Hormones*, *supra* note 110, para. 194.

<sup>137</sup> Ehlermann & Lockhart (2004), 294.

<sup>138</sup> Bohanes & Lockhart (2009), 397.

<sup>139</sup> *EC—Hormones*, *supra* note 110, para. 115.

<sup>140</sup> Bohanes & Lockhart (2009), 402.

## 5. Conclusion

In this paper I have outlined the argument that the democratic credentials of international courts rise and fall to the extent that the exercise of their judicial activities is based on a defensible theory of the allocation of decision-making authority between an international court, on the one hand, and national decision-makers, on the other. While other aspects of the international judiciary, such as the manner of its establishment and the modalities of the procedures before it, are undoubtedly important and useful to enhance its democratic credentials, any theory of the democratic legitimacy of international courts and adjudication must necessarily address the appropriate separation of powers between courts and respondent states. The necessity of such a theory follows directly from the centrality of the notion of self-government to any contemporary conception of democracy. For the notion of self-government to be meaningful, there have to be appropriate criteria in place for when decisions arrived at within one institutional arrangement may be overridden by other institutions, and when they may not.

As institutions exercising public authority and reviewing the acts of other public actors, courts are not exempt from this requirement. As in the domestic realm where standards of review that counsel deference to other government actors under specified conditions are well known,<sup>141</sup> international courts need to address the always implicitly present question as to the appropriate boundaries of judicial law- and policy-making. It might well be the case that an international court, after careful consideration of the institutional setting within which it operates and of the law which it is charged to interpret and apply, comes to the conclusion that no deference to national decision-makers is warranted, but it still needs to address the issue; whether such a decision will stand, or will be modified in later cases, may then in part depend on the subsequent interactions between the court, the respondent states, and the non-state users of its jurisdiction.

Note in closing that a court need not define its standard of review explicitly in terms of deference to national *democracy* for such a standard to have positive implications for democratic decision-making at the national level. At the WTO, for example, the issue of appropriate standards of review are discussed in terms of deference to sovereign, not democratic decision-making; the reason for this is clear: not all WTO members can successfully claim to be functioning democracies. Still, any such deference will necessarily also benefit democratic decision-making (as well as non-democratic

Writing about the origins and ideology of international adjudication, Martti Koskenniemi has remarked that despite the enormous increase in the number of judicial institutions beyond the state, “no new theory accompanies them. We continue to think about international adjudication in view of ideas and proposals dating back to around the turn of the twentieth century... ”<sup>142</sup> Addressing the central issue of the relationship between the increasing ambit of international courts’ powers and activities and domestic democratic government might just provide an important building block for such a new theory.

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<sup>141</sup> See *ibid.*, 314-322; Koopmans (2003).

<sup>142</sup> Koskenniemi (2008), 127.

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