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THE JEAN MONNET PROGRAM

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REVISITING *VAN GEND EN LOOS*

Jean Monnet Working Paper 01/14

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The Premises, Assumptions, and Implications of *Van Gend en Loos*: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions

NYU School of Law • New York, NY 10011

The Jean Monnet Working Paper Series can be found at

www.JeanMonnetProgram.org

ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to 'celebrate' *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor Hélène Ruiz Fabri, Director of the UMR de droit comparé de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

THE PREMISES, ASSUMPTIONS, AND IMPLICATIONS OF *VAN GEND EN LOOS*: VIEWED FROM THE PERSPECTIVES OF DEMOCRACY AND LEGITIMACY OF INTERNATIONAL INSTITUTIONS

By Eyal Benvenisti[*] and George W. Downs[+]

I. The Premises of the Judgment

In its *Van Gend en Loos* judgment,[1] the ECJ gave a teleological justification for its view that Community law not only 'imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'[2] and can be invoked before national and Community courts. The court was concerned that a different outcome 'would remove all direct legal protection' of the individual rights of the Community's nationals: 'There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.'[3]

Since 'this Treaty is more than an agreement which merely creates mutual obligations between the contracting states,' and in light of the need to protect the rights of individuals and ensure the effective implementation of the treaty, it makes little sense to rely solely on the states, or more accurately on state executives that represent their respective states in the international arena. Instead, the ECJ looks through the veil of sovereignty and observes two important actors: the individual citizen, and the national court. The judgment assigns to citizens directly enforceable rights vis-à-vis their respective state executives, and it assigns the national courts the obligation to protect those rights: 'according to the spirit, the general scheme and the wording of the Treaty,

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[1] Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen [1963] ECR 1.
[2] *Id.*, at p. 12
[3] *Id.*, at p. 13.

Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.'[4]

What explains the court's suspicion of state executives as the sole actors to implement Community law (acting directly or through the Commission)[5], and its confidence in the central role of national courts prompted into action by the complaints of individuals?

The very same case provides an initial answer: the three states that appeared before the ECJ –Netherlands, Belgium and Germany – tried to convince the court to defer to their discretion. They did not want to be legally accountable to their citizens or to share responsibility for the implementation of the treaty with their own courts. They made this argument despite the fact that two of them (Belgium and Netherlands) had been responsible for the infringement that Van Gend en Loos was complaining about by their signing of a Protocol that was incompatible with the EC Treaty. The Commission did not react to this breach – most likely because it was not aware of a relative minor infringement, the imposition of a higher import duty by a local customs agency.

This, then, is one premise that informs the court: to ensure that an international organization (IO) is effective and accountable to the citizens, it is not enough to leave matters in the hand of state executives and the bureaucracy of the organization.

A second premise is implied: National courts (NCs) can effectively function as reviewing bodies of the policies of state executives and thereby take part in protecting individuals and implementing the treaty. The courts are independent both from state executives and from the interest groups that support them. Their independence is guaranteed by the EC

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[4] *Id., id*.

[5] Articles 169 and 170 (respectively) of the Treaty of Rome (Treat Establishing the European Economic Community, 1957) allowed the Commission or a member state to refer to the ECJ complaints against member states for non-compliance. In the early decades of the EEC, the Commission's use of its power of reference to the court was limited, and the court actually 'reprimanded the Commission for having been inactive although [the Commission] knew that several of the Member States were deliberately sidestepping the fulfillment of their obligations.' (Hjalt Rasmussen, On Law and Policy in the European Court of Justice 238 (1986). On the dependence of the Commission on Member States see Stefanie Bailer, *The European Commission and Its Legislative Activity – Not as Integrationist and Autonomous as Believed*, Center for Cooperative and International Studies Working Paper No. 24, at p. 15 (2006), available at http://www.cis.ethz.ch/publications/publications/2006_WP24_Bailer.pdf ('the success of the Commission hinges on the willingness of the member states and the ability of the Commission to predict the member states' preferences'). Bailer discusses the internal power structure in the commission and the influence exerted by the member states through 'their' commissioners, noting that 'In several instances, it has been known that EU member states have tried to influence EU policies via their Commissioners or that Commissioners have been defending national interests.'

treaty itself that resolves various collective action problems that the courts would otherwise face.[6] As a result, such a law-based order is generally less susceptible to power and manipulation. Yet while this premise may have informed the court, we believe that it is not crucial to explaining the court's reliance on national courts as a check on state executives.

We suspect that there is a third premise operating in the background of the judgment that is never fully articulated but ultimately more influential: that the cooperation of national courts among themselves and with the guidance and backing of the ECJ will help protect citizens of the relatively weaker countries in the organization – the Benelux countries in this case, developing countries in the global context – from predatory policies by the more powerful states. While smaller member states stood to benefit relatively more than the larger members from the opening of the markets in the EC, their executives could have remained subjected to pressures by the stronger ones. Indeed, given the interest of the smaller Common Market countries in openness, it was surprising to see the Belgian and Dutch governments joining Germany in objecting to the direct effect rule of the court. The court may well have taken notice of this same inconsistency and inferred that smaller governments were under external pressure to argue against their interests and would continue to be so in the future unless protected.

That the three smaller members of the EEC were keen to embrace the EC Treaty and give it legal effect was already reflected in their national law. The Dutch Constitution of 1953 provided for the supremacy of international treaties over domestic statutes.[7] The Luxemburg Court of Cassation (in 1950) and its Conseil d'État (in 1951) acknowledged the supremacy of treaty obligations over local laws.[8] In Belgium 'the van Gend en Loos decision, though revolutionary, created hardly a ripple at the time'[9] given

[6] On these challenges see Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 EJIL (1993) 159.

[7] The Dutch constitution of 1953 was designed to provide supremacy to EC law (including ECJ decisions). As Daniel Halberstam observed, the reference in the Van Gend case came from the Netherlands, which already had adopted monism: Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in The Past and the Future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty, (M.P. Maduro, L. Azoulai, eds., 2008).

[8] As the Luxemburg Court of Cassation later explained in its Pagani judgment of July 14, 1954, 'a treaty is a law of a superior nature [essence] having a superior origin than the will of an internal [national] organ.' (quoted, together with the other cases, in J. Polakiewicz & V. Jacob-Foltzer, *The European Human Rights Convention in Domestic Law*, 12 Human Rights Law Journal 65 (Part I), 125 (Part II), (1991), at 126.

[9] Rasmussen, *supra* note 5 at 334 (citing Ivan Verougstraate's unpublished paper from 1981).

the pro-integration attitude of the 'most outstanding' members of the Belgian judiciary.[10] The Belgian Procureur General Ganshof van der Meersch stated that the Rome Treaty created a common legal order whose subjects are not only states but also their citizens.[11] The celebrated judgment of the Belgian Court of Cassation in its 1971 *Le Ski* decision[12] which endorsed monism and accepted the primacy of EEC law was considered a 'logical and easy'[13] application of the principle of direct effect. These three small states fully grasped the benefits of international cooperation and that arguing in favor of the EC Treaty was clearly within their self-interest. They, and the Netherlands in particular, signaled to the ECJ that they would accept and follow its judgments whatever they might be. In the event, that France or Germany did not accept its rulings,[14] they would be the ones to be regarded as the violators of the treaty, whereas the ECJ would be deemed its guardian.[15]

Finally, there was a fourth premise: that the ECJ, with the cooperation of the NCs – at least the NCs of the three smaller members – was sufficiently independent of the state executives and the EC institutions to protect the rights of the citizens. The court's interpretation was protected from subsequent modifications of the treaty, given the likely opposition from at least one of the three smaller Member States.[16] Moreover, as Joseph Weiler argued, at least some of the member states had an interest in a strong court that was able to 'making bargains stick.'[17] In addition, the judgment was likely to be implemented by the Dutch court.[18] The judges therefore knew that the Dutch court

[10] *Id.*, at 333 and note 105 at p. 370.
[11] *Id.*, at 333.
[12] Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski' [1972] C.M.L.R. 330.
[13] Cited in Rasmussen, *supra* note 5 at 334.
[14] On the resistance of the French, German and Italian courts to the reference to the ECJ see Karen J. Alter, Establishing the Supremacy of European Law (2001) Chapters 3 and 4; Rasmussen, *supra* note 5 at 307-325.
[15] As Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, noted, 'the Court cannot afford to make decisions that litigant governments refuse to comply with or, worse, that provoke collective responses from the EU governments to circumscribe the Court's authority' (Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union* 52 International Organization 149, 174 (1998).
[16] George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 International Organization 357, 359 (2001); Karen J. Alter, Establishig the Supremacy of European Law 195 (2001)
[17] Joseph HH Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors* 26 Comparative Political Studies, 510, 527 (1994).
[18] *See supra* note 7.

would carry out their judgment regardless of the position of the Dutch government. This is a key consideration for a court concerned about compliance with its judgments.[19]

Also personally the judges felt safe. At the time, the 'longstanding tradition' promised the ECJ judges reappointment to another six-years term if they so wished.[20] Furthermore, the appointment process involves 'complicated political negotiations at the national level'[21] and the anonymous decisions made it 'hard to pin activism on any particular national appointee.'[22]

In this essay we would like to explore these four premises and examine their justification from the perspective of protecting individual rights and ensuring the effectiveness of the international organization, as well as from the perspective of strengthening democracy – judged by the effective and informed voter participation in public decision-making – within the EU and within its member states. Although judicial intervention often preempts public deliberation, it can also encourage it; although it may preempt the vote, it can also ensure it. This was particularly true in Europe. As Weiler has argued in his seminal piece on the transformation of Europe,[23] the van Gend 'revolution' which closed the exit option for member states increased their effort to voice their preferences at the Community decision-making bodies. In addition to taking decision-making at the IO level more seriously, the costs that judicial intervention imposed were far outweighed by their benefits when compared to the counterfactual of domination by the executives of the most powerful state parties. Below we argue that democratic failures at both the national and international levels can be best addressed through greater interaction and coordination between national and international tribunals. Such coordination has proven itself capable of promoting democracy at both the domestic and the international levels by helping to ensure that the interests of a greater proportion of relevant stakeholders are taken into account by decision-makers and that the resulting outcomes are more appropriately informed and balanced. We

[19] See Clifford James Carrubba and Matthew Joseph Gabel, *Courts, Compliance, and the Quest for Legitimacy in International Law* 14 Theoretical Inquiries In Law 505, 526 (2013) ('The court [...] rules against the government only if the likelihood of being obeyed is high enough.')
[20] Rasmussen, *supra* note 5 at 357. This changed in 1980 after France urged the other members of the European Council to 'do something about the European Court and its illegal decisions.' (id., at 354).
[21] Alter, *supra* note 14 at 200.
[22] *Id.*, *id*.
[23] Joseph HH Weiler, The Transformation of Europe, 100 Yale L. J. 2403, 2427 (1991).

further argue that 'democracy' in this context must be understood to provide a voice to foreigners who are often excluded from domestic and global decision-making processes.

II. The Democratic Failures Associated with State Executives Acting on the Supranational Level

Traditionally, democratic failures are analyzed from an internal perspective, namely discrimination against discrete and insular minorities or capture by indigenous interest groups. But with the move to supra-national policy making and enforcement, and the increased dependency of states' on foreign actors three additional reasons have emerged for worrying about the deterioration of the individuals' capacity for agency. First, the continuous lowering of the technical and legal barriers to the free movement of people, goods, services, and capital across territorial boundaries has both further marginalized the voices of 'discrete and insular minorities'[24] and strengthened the hand of those domestic actors who stand to benefit from the increased availability of 'exit' options from the state, for example, by relocation or reinvestment, that globalization offers.[25] Moreover, the newly established global venues for regulation, which remain inaccessible and quite opaque for most voters, have enabled better organized and better funded groups to exploit asymmetric information about the goals and consequence of regulation.

A second, more fundamental type of challenge to domestic democratic processes stems from the lack of congruence between the population of enfranchised voters and the population of parties affected by the voters' decisions. The basic assumption of state democracy—that there is a strong overlap between these two populations—might have been correct in a world of 'separate mansions,' when territorial boundaries defined not only the persons entitled to vote but also the community that was primarily affected by the choices made. Today, however, this condition is rarely met, and the consequences manifest themselves in two ways. First, voters in one country affect stakeholders in foreign countries, without the latter having the right to participate in the vote or

[24] *United States v. Carolene Products Co.* 304 U.S. 144, 152-153 n.4 (1938); John Hart Ely, Democracy and Mistrust: A Theory of Judicial Review (1980).

[25] Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 Mich. L. Rev. 167 (1999) (discussing how globalization increases the political leverage of more mobile voters in society). On the interplay between voice, exit, and loyalty, see Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

otherwise to influence the decisions that are made. This has led to the growing acknowledgment that the 'geography-based constituency definition introduces an arbitrary criterion of inclusion/exclusion right at the start.'[26] Second, foreign actors increasingly employ economic leverage to influence both local candidates and domestic public opinion in other states. While this phenomenon may temporarily compensate for their lack of voting power, it operates to distort the domestic democratic process and to disenfranchise their citizens.[27]

A third challenge that globalization poses for democracy springs from the proliferation of small and medium-size states that face increasing competition for access to foreign investment and foreign markets. Weaker states that find it difficult to bundle up their disparate preferences often discover that they have to submit to the dictates of a few powerful actors and the global institutions they have created.[28] Separated by political boundaries and often divided by high levels of political, social, and economic heterogeneity, they generally find it difficult to act collectively. This often makes it relatively easy for a strong economic or political actor—be it a powerful state or a wealthy investor—to practice 'divide and rule' strategies against them. These strategies further erode the capacity of weak sovereigns for collective action and effectively confine them to different 'cells' in what amounts to a maze of prisoners' dilemmas.

As a result of these failures, the prevailing assumption that state executives are willing and able to adequately represent the interests of their respective constituencies in international bargaining or by bureaucracies of IOs that are controlled by state executives is largely unrealistic. The move to policy-making at the supra-national level increases the space for special interests' control of the outcomes. This phenomenon has been observed in the EU: The powerful members of the EU not only were able to exert

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[26] Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANNU. REV. POLIT. SCI. 387, 397 (2008). *See also* Jean L. Cohen, *Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach),* 2 Humanity, 127 (2011); Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 New Left Rev. 1 (2005).

[27] On the influences of foreign lobbies, see David Schneiderman, *Investing in Democracy? Political Process and International Investment Law,* 60 U. Toronto L. J. 909, 931-940 (2010) (presenting and assessing evidence that foreign corporate actors are as effective as nationally based corporate actors and hence do not need special judicial protection).

[28] In general, developed economies have similar preferences, whereas developing countries are more diverse and hence more vulnerable to divide-and-rule strategies. See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

more influence on the policies adopted by the EU institutions,[29] they were also less likely to comply with them. A study of compliance with Eu policies between 1972-1993 found that cases of non-compliance in the EU rise with bargaining power in the Council. [30] This has led to the observation that powerful states implement IO policies less frequently simply because these 'strategic actors can safely choose not to implement.'[31]

III. The Countervailing Role of Courts

Historically, NCs have been instrumental in strengthening domestic democratic mechanisms and developing legal tools that address the ongoing challenges posed by asymmetric information in democracies. Since, as suggested above, the policy-making processes at the global level are considerably more opaque than those at the domestic level in most democratic societies, the move to supranational decision-making has increased the need for courts to embrace an additional remedial balancing role. Yet to date, NCs have generally hesitated to challenge their respective executives because they feared that acting alone against the government, or against the IO in which their state is party, might harm their economy or their state's foreign relations. Most likely, they have also feared potential government noncompliance with the judgment.

Fortunately, the Rome Treaty[32] provided the NCs with an invaluable tool to overcome this collective action problem: the recourse to the ECJ to interpret the Treaty. Such interpretation would bind all actors and require other NCs to follow suit. The Benelux NCs had another guarantee for ensuring at least partial adherence to the outcome: the domestic law in these jurisdiction ensured that the ECJ's interpretation will trump domestic law, and therefore all Benelux NCs will conform to the ECJ ruling.[33]

For the Benelux countries, a strong European court and strict adherence to the EC treaty not only promised to open the much larger markets of the big three, but also

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[29] Although 'a Commissioner's nationality does not automatically determine the degree of influence in the college. Coming from a big country provides a set of latent resources. However, in order to activate them, a commissioner and his or her staff must develop effective networks within and outside the Commission' (Andy Smith, *Why European Commissioners Matter* 41 J Common Market Studies 137, 153 (2003)).

[30] Heather A. D. Mbaye, *Why National States Comply with Supranational Law: Explaining Implementation Infringements in the European Union*, 1972–1993, 2 European Union Politics 259, 277 (2001). Other factors cited for non-compliance were length of membership, and regional autonomy (id.)

[31] *Id*.

[32] *Supra* note 5.

[33] *See supra* notes 8-15 and accompanying text.

offered protection against potentially predatory policies adopted by a qualified majority. The ECJ had the largest proportional representation of the small countries of all major EEC institutions and thus was relatively the most favorable European institution for them.[34] In anticipation for the introduction of the qualified majority vote, a strong ECJ gave them an assurance that a strong constitutional court grants minorities. Thus, even if the referred cases were not directly related to economic or regulatory disparities between different member states, the basic policy of supporting an evolving constitutional order through a strong court was the smaller states' underlying long-term preference. And indeed, the Benelux NCs referred questions to the ECJ significantly more (relatively to the size of their population) than those of the courts of the bigger states.[35] While the courts of the big three – France, Germany and Italy – regarded the ECJ with suspicion.[36] The latter – the French courts in particular – were significantly less enthusiastic about making references to the ECJ, and made clear that they would not automatically embrace the ECJ rulings. The German and the Italian courts declared their competence to review the ECJ jurisprudence against their national constitutions.

In fact, the successful counter-executive cooperation between the ECJ and the Benelux courts is a case study of the larger phenomenon of cooperation between NCs and international tribunals (ITs) that can at least partially remedy the democratic failures inherent in global governance. NCs realized that this new environment was not one in which NCs could continue to give their states' executives free hand to fashion global regulatory policies as they see fit. Such unchecked power could impoverish the domestic democratic and judicial processes and dramatically reduce the opportunity of citizens to promote their preferences. ITs that share this concern can rely on NCs to

[34] The ECJ comprised of 7 members, of which 3 were from the small states (the Commission was composed of 9 members, not more than 2 from any one state).

[35] Karen Alter, *supra* note 14, at 34-35, provides the data: Belgian and Dutch courts brought much more references per-person than the rest of the European states. Between 1970 and 1979, Belgian and Dutch courts referred 4 cases per 500,000 persons per year (CPPY), while German courts brought 2.2 CPPY and France, Italy, UK and Denmark less than 1; Between 1980-89, Belgian and Dutch courts brought 7.1 CPPY each, while Germany 2.8, France 2.6, Italy 1 and UK less than 1. Between 1990-98 Belgian and Dutch courts referred around 6 CPPY each, Germany 3, France 2, Italy 3, and UK 1. Of course in the total account of the number of references, the bigger member states brought a higher number of references, with Germany having the highest number. But still, it is significant that during 1980-89 Germany, with 82 million people, sent 246 references to the ECJ, and the Netherlands, with a population of 16 million, brought 224 references.

[36] *See supra* note 14.

form together a pro-democracy coalition vis-à-vis state executives and the IO bureaucracies.[37]

The improved cooperation between international and national courts can potentially help both types of institutions in their relations with their domestic and international executives. Their symbiotic relationship is based on the relatively greater independence of NCs as opposed to ITs from the pressures generated by coalitions of powerful states and the stronger domestic public support for NCs, on the one hand, and on the greater capacity of ITs to effectively monitor the policy compliance of any particular state, on the other hand. The relative greater independence and domestic legitimacy of NCs can indirectly and inadvertently contribute to the strengthening of IT review capacity in the international sphere because ITs can find support in NC activism.

NCs, in turn, also benefit from stronger ITs. This is particularly true when the two share an interest in curbing the growth of executive power. ITs also bring resources to the table that in certain situations can prove to be invaluable to NCs. ITs can facilitate coordination between NCs by endorsing, or at least by not opposing, their shared interpretation of the law. In addition, their endorsement of NC jurisprudence by, for example, regarding it as reflecting customary law can lend added legitimacy to its decision and help pressure recalcitrant courts in other states to comply with a given NC ruling. Such endorsement can also operate to preempt the possibility of a government threatening to 'appeal' a national court decision before an IT. While a measure of mutual dependence and vulnerability between NCs and ITs can occasionally cause friction, they can also serve as the basis for productive dialogue and cooperation. Defragmentation—if carefully coordinated between NCs and ITs—potentially benefits both in this regard.[38] NCs are likely to welcome the efforts of ITs to defragment the international legal system and to broaden their authority when these actions reduce the extent to which executive branches can employ IOs to escape domestic accountability and traditional constitutional constraints.

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[37] On this prospect see Eyal Benvenisti and George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law* 20 EJIL 59 (2009) (noting the promise of NC-IT cooperation in enhancing domestic democracy and creating a more coherent international regulatory apparatus).

[38] In saying this we do not mean to suggest that the judges share similar motivations, only that the expansion of the role of judiciary and judicial discretion are phenomena that benefit judges irrespective of the microfoundations of their individual decision making.

Similarly, ITs are likely to tolerate increased NC review if it also provides them with increased legitimacy and increases the likelihood that they will escape retribution if they deviate from the outcome preferred by executives of the powerful states. If NCs are expected to rule against them, executives may also be more inclined to tolerate the ruling of ITs. As we will see below, there is reason to believe that the effects of regulatory fragmentation on ITs and NCs are quite different but they can often be strategically complementary.

In sum, while serious areas of potential disagreement exist between NCs and ITs and are likely to continue to occur intermittently, both will generally be better off if they coordinate their actions. Acting independently in a globalizing environment will only perpetuate judicial marginalization and facilitate the further expansion of executive discretion.

IV. How Cooperation between National and International Courts Enhances Democracy

In this section we argue that judicial activism in the face of collective action on the part of state executives potentially advances democratic goals in three ways: (a) it enhances the domestic democratic processes threatened by state executives' collusion by providing necessary information from which individual voters may benefit; (b) it reduces the leverage of powerful foreign actors that thrive on the divisions among weaker countries; and (c) it provides at least some voice to those formally excluded from decision-making, including those of foreign status.

(a) Inter-Court Coordination and the Facilitation of Democratic Deliberation at the Domestic Level

The democratic process is based on votes, but not only on votes. Voting is a precondition for a functioning democracy, but for democracy to function, voting must be complemented with other safeguards that can supply information to voters about their choices and ensure the accountability of elected representatives in following them.[39] We do know that, voting itself is a poor way of shaping political outcomes even in the

[39] Anthony Downs, An Economic Theory of Democracy (1957).

national context. As suggested by Rokkan, 'votes count in the choice of governing personnel, but other resources decide the actual policies pursued by authorities.'[40] Public choice scholarship supports this observation, emphasizing the role of small interest groups in shaping national policies, based on the anti-intuitive observation that smaller groups obtain more political power than larger groups.[41] We can therefore, following Anthony Down's observations,[42] view the challenge of democracy as the challenge of reducing information asymmetries: accurate and sufficient information enables voters to hold their representative accountable and provide voters with an effective opportunity to shape policies.

In general, NCs, in the course of their proceedings, generate information and make it widely available to a broad range of political actors, as well as to the public. By doing so they can be instrumental in reacting to the inherent deficiency of democracy. Yet in most discussions concerning the democratic legitimacy of judicial review, this contribution to democratic deliberation is overshadowed by the so-called countermajoritarian difficulty.[43] This may be unavoidable in connection with the ultimate approval or disapproval of controversial issues such as the legality of abortion or same-sex marriage. However, the saliency associated with these 'yes or no' moments, can often lead observers and analysts to ignore the many subtle, indirect and yet significant contributions that NCs make to the vibrancy of the political system and to public deliberation. Even more importantly, such isolated instances of politically salient judge made law deflects public attention from the most persistent countermajoritarian difficulty that lies in the impoverished character of domestic democratic deliberations that are captured by interests groups. This is doubly true in the current global arena, where the countermajoritarian difficulty that inheres in insufficiently transparent domestic deliberations is exacerbated by the domination of most IOs and ITs by a

[40] Stein Rokkan, *Norway, Numerical Democracy and Corporate Pluralism*, in Political Opposition in Western Democracies, 70, 106 (Robert Dahl ed., 1966).
[41] Mancur Olson, The Logic of Collective Action (1965).
[42] Supra note 39.
[43] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). On this framing of the debate in US constitutional scholarship see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153 (2002).

handful of powerful state executives.[44] In such circumstances, judicial intervention—particularly in its collective or coordinated form—has a critical role to play. While judges are not trained to be expert policymakers, they are trained to be expert fact finders. This expertise in employing fact-finding procedures also enables them to credibly monitor the decision-making procedures of administrative agencies. The relative insulation of judges from executive domination and from the influence of special interests lends credibility to the information they generate.[45]

As we shift our gaze to inter-court coordination and examine the effects of courts' review of an IO on domestic democratic processes, we observe similar outcomes.[46] When NCs directly or indirectly decline to implement an IO demand, they increase public awareness about the demand and raise the stakes for the IO or the national executive branch. But in most instances they do not preempt public deliberation. For example, an NC that requires specific statutory authorization for freezing the assets of suspected terrorists, notwithstanding the demands of the UN Security Council,[47] invites the legislature to weigh in on the matter while at the same time publicly prompting the Security Council to improve its procedures.

Another structural failure in democracies relates to 'discrete and insular minorities' whose interests are inadequately protected by the domestic democratic process.[48] When this is the case, ITs can often step in and operate as the external protector of internal minorities. Such external protection can than provide grounds for NCs to offset pressure from domestic public opinion. It is in just such contexts that

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[44] Abigail C. Deshman, *Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture*, 22 EJIL 1089 (2011); Benvenisti & Downs, Empire, *supra* note 28.

[45] See Patrick A. Luff, *Captured Legislatures and Public-Interested Courts* (December 31, 2012). Available at http://dx.doi.org/10.2139/ssrn.2195169; Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation*, 86 Colum. L. Rev. 223, 225 (1986) (judicial review and activist interpretation is justified by the need to mitigate the harmful effects of interest group domination of the political process).

[46] On the conditions for judicial independence of international tribunals see Eyal Benvenisti and George Downs *Prospects for the Increased Independence of International Tribunals* in 12 German L.J. 1057 (2011) (rep. in Lawmaking by International Tribunals (Armin von Bogdandy and Ingo Venzke eds., 2012).

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

[48] This is the logic of the *Carolene Products* footnote and Ely's Democracy and Distrust, *supra* note 23, and also R. Keohane, S. Macedo, and A. Moravcsik, *Democracy-Enhancing Multilateralism*, 63 International
Organization, 1 (2009).

inter-court coordination is increasingly promoting democracy by ensuring voice to certain minorities.

(b) Inter-Court Coordination Offsets 'Divide and Rule' Strategies

An additional benefit of inter-court coordination is the strategic gain that it provides to subsets of relatively weak countries that are imprisoned in their respective sovereignty cells and are subjected to the predatory policies of powerful states or economic actors who exploit divisions among them in order to extort concessions, much to the discontent of their domestic constituencies. Given their shared legal vocabulary, their commitment to following their own precedents, their relative immunity to special interests pressure, and their mutual knowledge of each other's preferences as revealed by their prior opinions, developing state NCs often have a refined knowledge about which of their peers are likely to support a given policy position and what position is likely to garner the greatest degree of support.

This information can then serve as a focal point for NCs in the developing world. In turn, these NCs can help overcome the uncertainty and distrust that typically characterize the relations among their political branches and lead to better choices. For example, developing countries would have served as the dumping ground for hazardous wastes produced in the rich North if not for the successful common resistance of Southern NCs led by the Indian court.[49] NCs in Europe took an active part in demanding that IOs improve their internal labor standards and joined forces to reduce the IOs' immunity from their jurisdiction.[50]

ITs can resolve the collective action problems of states that are unable to overcome the 'sovereignty trap,' and rebuff the demand of a powerful state or a multinational company that weaker states comply with their demands. The European

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[49] Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241, 251, 258-60 (2008).

[50] Waite & Kennedy v. Germany App. No. 26083/94, Beer & Regan v. Germany, App. No. 28934/95, Eur. Ct. H.R. (1999) (at para. 67, the court asserts that it would be incompatible with the purpose and object of the European Convention on Human Rights if the State parties were absolved from their responsibility under the Convention by delegating competences to international organizations, hinting that the states are expected to make sure that the organizations provide comparable protection of the human rights of their employees); *See also* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals* 7 Chinese J. Int'l L. 285 (2008) (on the role of the European courts in imposing labor standards in international organizations).

courts in particular have been quite successful in this context, offering resistance to IOs that sought immunity from national labor laws,[51] or in imposing European legal standards on sporting associations that sought insulation from public law obligations.[52]

(c) Judicial Review and the Global Dimension of the Democratic Deficit

Of course, courts do more than provide information by their decisions and the doctrines they promote. At times they also render judgments that preempt political challenges: NCs may determine that certain policies are precluded by the national constitution or ITs may find a national law incompatible with a treaty obligation. Can these actions also be justified as democracy promoting? This question requires us to revisit the countermajoritarian difficulty from a global perspective that takes into account the unique failures of the domestic democratic processes that result from globalization.

We offer two answers to this question. The first answer minimizes the potentially negative effects of judicial intervention relative to the mostly unchecked power of the executive branches of powerful states, because the intervention of courts holds out potentially greater benefits for disenfranchised stakeholders. The second answer emphasizes the normative obligations that democracies have toward each other. These obligations legitimate the attention of both NCs and ITs to the interests of those affected stakeholders who are foreigners and have no voice in the domestic democratic process.

(i) *Courts in powerful states are generally more 'friendly' toward diffuse majorities and the interests of weaker states than are their executive branches.*

We believe that in general strong courts are more likely than strong executive branches to promote the interests of diffused majorities and of weak states.[53] The reason for this lies in their very different modes of operation. Executives tend to employ complicated

[51] See *supra* note 50 and accompanying text.

[52] David Meca-Medina and Igor Majcen v. Commission of the European Communities, ECJ, (2006), Case C-519/04; *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93.

[53] For a similar observation with respect to courts in the U.S. see Patrick Luff, Captured Legislatures and Public-Interested Courts, *supra* note 45 (courts generally act in the public interest because they receive different information than the legislature and they process the information they receive differently than legislators or administrative agents, and because they are not captured by interest-groups as legislators); Reginald S. Sheehan, William Mishler & Donald R. Songer, *Ideology, Status, and the Differential Success of Parties Before the Supreme Court*, 86 Am. Pol. Sci. Rev. 464, 469 (1992) (finding that wealth does not translate to judicial outcomes at the U.S. Supreme Court).

fragmentation strategies that operate to isolate and obscure their actions. This is typically done to increase the oversight costs that rival branches of government and weaker states must pay to question their actions. Courts, by contrast, generally employ what are essentially 'defragmentation strategies,'[54] in the sense that they attempt to weave disparate executive-created policy fragments into webs of coherent legal obligations that are transparent, well-reasoned, and accessible to all actors. These judicial efforts to generalize and rationalize the international legal landscape provide opposition parties and weaker states with a stable and interconnected hierarchy of claims—for example, linking trade obligations with human rights concerns—that they can then employ in a variety of venues to increase the likelihood that a victory in a particular venue will have wide-ranging implications. Increased collective action on the part of prominent NCs and cooperation with ITs holds out the promise of their creating, under the right political and social conditions, constellations of linked obligations that are more dense, more coherent, and more equitable than those that currently exist.[55]

Besides defragmenting the legal space, judicial coordination also generates information that has practical political benefits for diffuse constituencies. The litigation in the South African court concerning access to life-saving drugs, for example, helped reframe the public discourse about the costs of compliance with the TRIPs agreement to the populations in developing host countries.[56] A judgment in the Supreme Court of India endorsed an interpretation of India's IP law that restricted the 'evergreening' of drugs and thereby resisted the northern pharma's interpretation of the TRIPs agreement in the name of promoting the right to life.[57] NGOs committed to promoting

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[54] Supra text to note 38.

[55] Benvenisti and Downs EJIL *supra* note 37.

[56] 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 (Case No. 4138/98, High Court of South Africa). On this litigation see David 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*, 12 J. Kennedy Inst. Ethics, 159 (2002).

[57] Judgment of 1 April 2013 (http://supremecourtofindia.nic.in/outtoday/patent.pdf). *See also Novartis AG v. Union of India (2007) 4 M.L.J. 1153 available at http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=11121* (rejecting a constitutional challenge to the law). Courts in Bangladesh, India, and Pakistan prevented the importation of contaminated food and blocked advertisement campaigns of foreign tobacco companies (see *Farooque v. Bangladesh*, 48 DLR 438 (Bangladesh Supreme Court), *Vincent v. Union of India*, AIR 1987 (India Supreme Court) 990, *Islam v. Bangladesh*, 52 DLR (2000) 413; ILDC 477 (BD 2000) (Bangladesh Supreme Court) (referring to the similar decisions of the Indian court in *Bamakrishna v. State of Kerala*, 1992 (2) KLT 725 (Kerala High Court), and Pakistan (*Pakistan Chest Foundation v. Pakistan*, 1997 CLC 1379)).

the interests of constituencies in weaker states then use such information to raise global consciousness about the effects of IO policies in developing countries and among the less well represented within developed economies.[58] The resulting public awareness can prove politically significant not only in weak autocracies but also in strong democracies whose civil societies are sensitive to such concerns. As mentioned above,[59] the intervention of a handful of NCs of powerful states can generate a process of information dissemination that yields positive externalities for constituencies that do not even have independent courts.

As the story of the Van Gend judgment suggests,[60] NCs also provide a measure of cover for ITs and increase the likelihood that ITs will escape retribution if they deviate from the preferences of executives of powerful states. If NCs are expected to rule against them eventually in any event, executives may be more inclined to tolerate an IT's ruling. Finally and most importantly, as mentioned above,[61] judicial cooperation holds the promise of overcoming the predatory policies of powerful states and economic actors who exploit divisions among relatively weak states in order to extort concessions. Unable to overcome their political barriers, wary of being exploited, unsure whether they are involved in a repeated game, weak states find themselves competing against their peers to satisfy the demands of the powerful external actor, to the discontent of many of their domestic constituencies.

To conclude, at least at this juncture in the evolution of the global regulatory regime, IO-driven policies pose more severe countermajoritarian concerns than does judicial review by NCs. On the whole, judicial review by NCs is more likely to enhance domestic democracy than to curtail it.

(*ii) Democracy (and hence courts) must take outsiders' interests into account.*

The countermajoritarian debate at the national level is based on the premise that the deliberative process should be open to all relevant stakeholders. The same premise lies at the heart of some philosophers' skepticism regarding the authority of international

[58] Keck and Sikkinik emphasize the role of 'framing' in mobilizing global public opinion. *See* Margaret E Keck & Kathryn Sikkinik, Activists Beyond Borders, 16-18 (1998).
[59] See *supra* notes 43-47 and accompanying text.
[60] Supra notes 8-15 and accompanying text.
[61] *See supra* notes 49-52 and accompanying text.

institutions and courts. The worry is that such international bodies fail to represent those stakeholders that domestic deliberative processes protect, since they do not act 'in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally.'[62] Yet our observations about the democratic deficits that globalization often fosters suggest that this premise is outdated and no longer reflects current conditions of global interdependence. If one takes seriously the democratic impulse and adapts it to contemporary conditions, it is difficult to escape the conclusion that 'democracy' cannot be confined to the sovereign state as an insulated entity. Instead, every democracy must take others' interest into account even though the latter have no right to take part in the decision-making process. This can be explained on utilitarian-reciprocal grounds or on moral grounds. In either case, what is required is the understanding that judicial interference in decision making for the purpose of including the voice of the globally-disregarded may well be compatible with and often mandated by democratic and egalitarian concerns, not a violation of them.[63]

This is clearly the case for the EU, where, as the court announced, the principle of 'solidarity ... is the basis . . . of the whole of the Community system.'[64] This principle implies that '[s]ince the prosperity of all member states is an aim of the treaty, one state may not harm another without reason or justification. Member states may also be obliged to take positive action to harmonize their legislation and policies to conform with those of other member states.' If this is the obligation incumbent on domestic democratic processes then the courts need to ensure that such processes did, in fact, take the interests of other Community members into account, and give them due respect.

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[62] See Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 138 (2005). Although Nagel clearly assumes that such conditions obtain within states and only within states, it is difficult to see how any democracy today fulfills these conditions without ensuring voice to affected foreigners.

[63] The literature on global justice is vast. Some of the leading books include Charles Beitz, The Idea of Human Rights (2009); David Miller, National Responsibility and Global Justice (2008); Thomas Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms (2nd ed., 2008); James Bohman, Democracy Across Borders: From Dêmos to Dêmoi (2007); Sheila Benhabib, The Rights of Others: Aliens, Residents and Citizens (2004); Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral foundation for international law (2004).

[64] Joined Cases 6 & 11/69, Comm'n v. Fr., 1969 ECR 523, para. 16, *discussed in* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 Va. L. Rev. 731 (2004), at 764. *See also* the recent Lisbon Treaty is replete with references to such principles as 'sincere cooperation,' 'loyalty' and 'solidarity.'

V. The Elephant in the Room: Who Guards the Community Bodies?

Celebrating Van Gend may tend to obscure the fact that the direct outcome of the judgment meant more effective review of member state compliance with Community law, but had no effect on the adherence of the Community bodies with their legal constraints under the European treaties. One could say that Van Gend was not about the compliance of the European bodies with their treaty obligations, but if Van Gend tightens the grip of these regional bodies on the member states, it nonetheless augments the democratic deficit within the members.

It is a general observation that ITs, like the ECJ, are generally more aggressive when reviewing member state policies than when they engage in reviewing the policies adopted and pursued by the IO decision-making bodies. ITs are acutely aware of the fundamental distinction between their reviewing a member state for noncompliance with an IO policy or an internal review of low level bureaucrats of the IO (a function that they tend to perform) and their reviewing of an IO's policy or its policy-making process (which they prefer to avoid). One example is the UN. The International Court of Justice (ICJ) has found implicit authority based on a short reference in the UN Charter to set up an internal administrative tribunal for UN employees.[65] In addition, the ICJ has tended to look favorably on UN bodies' accretion of powers[66] and has also provided strong support for applicability of the doctrine of 'implied powers' to IOs (i.e., IOs have powers beyond those enumerated in the foundational treaty).[67] Yet it has conspicuously refused to appeal to the implied powers doctrine to assert its own authority to review the Security Council's resolutions.[68] The WTO Appellate Body has behaved similarly,[69] as

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[65] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954), Advisory Opinion, 1954 I.C.J. Rep. 47 (July 13).

[66] Jan Klabbers, An Introduction to International Institutional Law 237 (2002) ('As long as an act of an organization can somehow be fitted into the scheme of that organization's purposes, there is at least a presumption that the organization was entitled to undertake that activity').

[67] *See, e.g.*, Reparations for Injuries Suffered in the service of the United nations, 1949 I.C.J. Rep. 178, at 182 (April 11); Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, at 172 (July 20). Such powers must be linked to the purposes of the IO. *See* José E. Alvarez, International Organizations as Law-Makers 92-95 (2005).

[68] ICJ, Certain expenses Nations advisory opinion, *supra* note 30, at 168 ('Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.'); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, at para. 89 (June 21) ('Undoubtedly...the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned.' The ICJ did not accept the invitation to review the legality of the Security Council's Resolution to impose sanctions

compared with its rather timid treatment of the decision-making processes within the WTO Ministerial Conferences and the administrative bodies that remain opaque to civil society.[70]

The relief comes from the NCs: When the IT is timid in reviewing the IO, NCs can step in and provide the missing layer of protection against abuse of authority. The *Solange* challenge to EU institutions raised by European NCs has had a significant effect in imposing obligations on EU institutions. This additional layer of protection bolsters, in turn, the IT. There is reason to believe, for example, that the pivotal Kadi judgment in 2008[71] was prompted by the concern that if the Grand Chamber didn't review the EU policy, several NCs would step in and do this. In fact, the court's Advocate General Miguel Maduro hinted in his opinion that NCs had both the authority and the willingness to step in if the ECJ would not and that it was 'very unlikely that national measures for the implementation of [SCR] would enjoy immunity from [national] judicial review.'[72]

It thus becomes apparent that the Van Gend judgment, while it has empowered lower courts in Europe by turning them into mini constitutional courts,[73] has also drawn support from them due to their implicit threat of intervention and that this has provided backing for the more intrusive review of EU bodies.

It is obviously only speculative whether the ECJ envisioned this eventuality when rendering the Van Gend judgment. But this question is less important. What is

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on Libya: Case Concerning Questions of Interpretation And Application of The 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya V. United States of America), Provisional Measure, Order of 14 April 1992, 1992 I.C.J. Rep. 114.

[69] For an assessment of the legal and political scope for lawmaking by the WTO Appellate Body see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints* 98 AJIL 247 (2004) (arguing that such lawmaking will not fundamentally and adversely shift the balance of WTO rights and responsibilities against the interests of powerful states).

[70] Richard B. Stewart & Michelle Ratton-Sanchez, *The World Trade Organization: Multiple dimensions of Global Administrative Law* 9 Int'l J Constitutional Law 556, 567 (2011) ('The more significant administrative norm-making functions carried out by these WTO bodies are eminently suitable and ripe for application of GAL procedures for transparency, participation, reason giving, and review, yet, in practice, such procedures are almost wholly absent.').

[71] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union, 2008 E.C.R.I-6351.

[72] Opinion of Advocate General Poiares Maduro, Case C-402/05 P, delivered on 16 January 2008, *available at* http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf, at 12, footnote 34.

[73] Weiler, *the Quiet Revolution*, supra note 17.

important is to note that the symbiosis between ITs and NCs, as exemplified in the EU context, provides the most effective judicial mechanism to check IO decision-making.

VI. Conclusion

We claim no special expertise in the jurisprudence of the ECJ and the way in which it implemented its philosophy as articulated in Van Gend judgment. Rather, in this essay we have responded to the invitation to explore the premises, assumptions, and implications of the judgment, and have chosen to address them from the perspectives of democracy and legitimacy of international institutions. It may be the case that in retrospect it would be possible to demonstrate that the ECJ has failed to live up to its promise by deferring more than it should have to state executives instead of upholding the interests of diffuse stakeholders. But this is not the correct question. The appropriate question is whether a Community governed by a sub set of powerful state executive would have fared better (in terms of democracy and welfare) than the existing one in terms of the promotion of democracy and welfare within the European system.

We have argued that while judicial intervention often preempts public deliberation, the costs that this imposes are often far outweighed by their benefits when compared to the counterfactual of domination by the executives of the most powerful state parties and the IOs subjected to their control.

Whether courts will be able to continue to achieve the goals of promoting deliberation and increasing accountability depends on a number of factors, especially the future trajectory of the relationship between courts and international organizations. This relationship, like the broader struggle to both govern as well as to contain government, is a dynamic one. Initially, it can be expected that international organizations will react to the prospect of judicial review by trying to preempt and otherwise limit it. The resulting give-and-take between these actors will shape their futures, as well as the evolution of accountability at both the domestic and the global levels.