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GLOBAL GOVERNANCE AS PUBLIC AUTHORITY:
STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE

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The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review

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This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with ‘traditional rule’. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional

responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW BEYOND THE STATE: NORMATIVE SUBSIDIARITY AND JUDICIAL STANDARDS OF REVIEW

By Andreas von Staden*

Abstract

Judicial review of the acts of national governments by courts beyond the state raises the question of the democratic legitimacy of such review. In this paper, I outline a position that identifies the ideal of self-government as the core of democracy and argue that in order to be democratically legitimate, judicial review by international courts must be guided by the principle of "normative subsidiarity." Normative subsidiarity recognizes the legitimate exercise of decision-making authority by national governments in specific contexts as an appropriate instantiation of self-government at that level and, as a result, requires international courts to exercise some deference through appropriately defined judicial standards of review. While a number of international courts have already adopted appropriately deferential standards, I argue that all courts and tribunals engaged in judicial review beyond the state need to address the demands of normative subsidiarity if they want to enhance their specifically democratic legitimacy.

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1. Introduction

Over the last few decades, international courts and tribunals[1] have become increasingly visible actors in international affairs, both in their role as dispute settlers narrowly understood and as policy- and law-makers in their own right. In fulfilling their judicial function, these courts necessarily exercise a form of judicial review by assessing the conformity of national laws and policies with standards emanating from applicable international treaty or customary law. That such international judicial review is in most cases a weak version of the domestic counterpart practiced by many national supreme and constitutional courts in that judgments of courts beyond the state do not normally result in the non-applicability or even nullity of conflicting national legislative, executive or judicial acts (those of the Court of Justice of the European Union being a notable exception), is formally correct, but by itself not necessarily consequential: States that loose a case still remain under the legal obligation to comply with the judgment in question, following both from the binding nature of international judgments as laid down in most courts' statutes as well as from the generally applicable rules of state responsibility. Unless a respondent state willingly prefers to disregard an adverse judgment and to bear the potential political and/or material costs of such non-compliance, it will have to provide reparation and make amendments to bring its conduct or legal situation in line with the requirements of the international legal norm which it has been found to have violated.[2]

To the extent, then, that international courts exercise consequential public authority as part of their adjudicatory practices—and at a minimum they exercise interpretive authority with respect to the agreements they apply, even in non-binding advisory opinions[3]—their review practices inevitably raise 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

[1] For reasons of linguistic economy, I will for the most part refer only to "international courts," it being understood that the argument also applies to courts that for other purposes may be classified as trans- or supranational in character as well as, *mutatis mutandis*, to arbitral tribunals and quasi-judicial dispute settlement bodies.

[2] See generally International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10 (2001), Articles 28-39.

[3] W. Michael Reisman, The Constitutional Crisis in the United Nations, 87 Am. J. Int'l L. 87, 92 (1993).

exercise requires legitimation, with the strongest and currently most widely recognized form of legitimation being that of *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. No definition of democracy, whether thick or thin, can do without this core element. Such self-government may involve decision-making at different levels of political organization: locally, communally, at the state or federal level, or trans-, inter- and supranationally. Whatever the specific configuration of institutions and procedures, however, from the vantage point of this core understanding of democracy, the key criterion in its normative evaluation is the extent to which any given arrangement furthers the objective of self-government, and this criterion applies to courts the same way as it does to any other governance institution.

The question of the democratic legitimacy of courts first emerged with respect to the normatively appropriate allocation of authority between the traditional branches of national governments. Because judges are usually 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,"[4] internationally as well as domestically,[5] has assured the continuing relevance of a debate whose origins are commonly traced back to the U.S. Supreme Court's landmark decision *Marbury v. Madison* (1803)[6] in which Chief Justice John Marshall had famously claimed the court's right to invalidate legislation that, in the justices' considered opinion, violated the higher law of the U.S. Constitution.

[4] See The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds., NYU Press 1995).
[5] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard University Press 2004); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (Cambridge University Press 2003).
[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Although traditionally taken as judicial review's starting point, the decision had historical precursors upon which it built; see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (Oxford University Press 2004).

This debate has in the meantime been extended to courts beyond the state. As Armin von Bogdandy and Ingo Venzke have rightly 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."[7] While the legitimacy of international law and of international institutions generally has for some time now been subject to academic scrutiny and debate,[8] several authors have focused specifically on the legitimacy of courts and tribunals beyond the state, either generally[9] or with respect to particular adjudicative institutions.[10] These analyses have highlighted a number of institutional features of international courts that are hypothesized to affect their legitimacy, both from the perspective of normative theory as well as subjective perception. The features identified include, *inter alia*, the manner of a court's

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[7] Armin von Bogdandy & Ingo Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification. 3, *available at* http://ssrn.com/abstract=1593543, previously published in German as *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*. 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT & VÖLKERRECHT [HEIDELBERG J. INT'L L.] 1-49 (2010).

[8] See, e.g., Thomas L. Franck, *Why a Quest for Legitimacy?*, 21 U. CAL. DAVIS L. REV. 535-547 (1988); Thomas L. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705-759 (1988); THOMAS L. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (Oxford University Press 1990); RÜDIGER WOLFRUM & VOLKER RÖBEN, EDS., LEGITIMACY IN INTERNATIONAL LAW (SPRINGER 2008); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS OF INTERNATIONAL LAW (Oxford University Press 2007); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405-437 (2006); ANDREA RIBEIRO HOFFMANN & ANNA VAN DER VLEUTEN, EDS., CLOSING OR WIDENING THE GAP?: LEGITIMACY AND DEMOCRACY IN REGIONAL INTERNATIONAL ORGANIZATIONS (ASHGATE 2007); Matthias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in SUJIT CHOUDHRY, ED., THE MIGRATION OF CONSTITUTIONAL IDEAS, 256-293 (Cambridge University Press 2006); Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907-931 (2004); LUKAS H. MEYER, ED., LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW (Cambridge University Press 2009); STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW (Hart 2010).

[9] See, e.g., von Bogdandy & Venzke, *supra* note 7; Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107-180 (2009); Tullio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals*, *in* LEGITIMACY IN INTERNATIONAL LAW 169 (Rüdiger Wolfrum & Volker Röben eds., Springer 2008).

[10] See, e.g., Jean-Paul Costa, *On the Legitimacy of the European Court of Human Rights' Judgments*, 7 EUR. CONST. L. REV. 173 (2011); Andreas Føllesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595-607 (2009); Tom Barkhuysen & Michiel van Emmerik, *Legitimacy of European Court of Human Rights Judgments: Procedural Aspects*, in NICK HULS, MAURICE ADAMS & JACCO BOMHOFF, EDS., THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND 437-449 (T.M.C. Asser Press 2009); Peter Rijpkema, *On the Democratic Legitimacy of the European Court of Justice*, in AUKJE VAN HOEK ET AL., EDS., MULTILEVEL GOVERNANCE IN ENFORCEMENT AND ADJUDICATION 179-201 (Intersentia 2006); Shotaro Hamamoto, *An Undemocratic Guardian of Democracy—International Human Rights Complaint Procedures*, 38 VICTORIA U. WELLINGTON L. REV. 199-216 (2007); Yuka Fukunaga, *Civil Society and the Legitimacy of the WTO Dispute Settlement System*, 34 BROOKLYN J. INT'L L. 85-117 (2008).

constitution and the appointment of its judges; access rights and transparency; and the absence of bias.[11]

Although the institutional and procedural features identified in the recent literature as affecting the legitimacy of courts beyond the state are relevant and important, I argue that they remain insufficient to establish a specifically *democratic* legitimacy of international courts. For international courts to be qualified as democratically legitimate, it is not 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 is a *democratically informed standard of review* that guides courts in the exercise of their review and dispute settlement functions. Such a standard of review would need to be sensitive to questions concerning the democratically appropriate level of decision-making with respect to the specific issues governed by the agreement/norm in question and would counsel at least some deference where another level of decision-making appears democratically more appropriate. In other words, such a standard needs to operationalize what can be thought of as "normative subsidiarity."

It should be noted at the outset that I am neither advocating a one-for-all deferential standard across the board for all courts and cases, nor that in light of the absence of the traditional institutions of democratic governance at the international level the national level is *ipso facto* the democratically more appropriate one. To the contrary: In many cases of the interpretation and application of international legal norms by international courts, there are compelling arguments for the *denial* of deference on democratic grounds, either because national democratic decision-making is not a relevant factor or because the international level may actually be the democratically more appropriate level for reaching a decision. Nor should a deferential standard of review be understood to unhinge the long-established principle of international law—included in both the Vienna Convention on the Law of Treaties (Article 27) and the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Article 32)—that a state's internal law cannot justify the non-observance of its international obligations,

[11] See discussion *infra*, at section 2.2.

irrespective of whether the domestic legislative process has been democratic or not. Deference to decisions by democratically legitimated national decision-makers thus has no place where an international norm is reasonably clear and specific: What governments agree to on the international plane should, for equally strong normative reasons, bind their state until they have derogated again from any such obligations.

That said, there are a number of contexts in which the norms in question either allow or actually mandate some degree of deference. This is especially the case where the norms at issue refer to national value and belief systems, the meaning of which cannot be appropriately and exhaustively defined by an external actor, such as an international court. This justification is thus strongest where, as Yuval Shany has noted, "inward-looking norms that regulate domestic conditions"[12] such as human rights regimes, are concerned that is, under circumstances that do not generally generate any meaningful negative material or political externalities. There need to be, in any event, concrete textual hooks: 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.

Let me anticipate two comments. First, there already is such a democracy-regarding standard of review in international adjudication: the margin of appreciation as applied principally by the European Court of Human Rights (ECtHR). The margin of appreciation indeed is a main example of what I perceive as a democratically informed standard of review and will be discussed below. The thrust of my argument seeks to generalize the logic underpinning the margin as one that all courts beyond the state should consider and, where appropriate, adopt in order to increase the democratic legitimacy of their decision-making. Abstracting from concrete examples, my main point is that recent treatments of the legitimacy of international courts have failed to duly recognize that a standard of review similar (but not necessarily identical) to the margin is a *necessary component of the democratic legitimacy* of international courts.

Second, where deferential standards of review already exist, they are better understood as deference to sovereignty, rather than as deference to democracy. This is a

[12] Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 920 (2005).

point well taken, not least because many parties to international agreements are not democracies. But a democracy-protecting standard of review need not necessarily be phrased in those terms. What it needs to do, however, is to identify those circumstances in which decisions, from a normative point of view, are better taken at the national or sub-national, rather than the international level. Such a deferential standard of review, even if phrased not in terms of democracy but of sovereignty, would still be democratically legitimate because it protects democratic decision-making where it already exists, even if it may also benefit non-democratic decision-making elsewhere. To that extent, then, I perceive the criterion of the democratic legitimacy of judicial decision-making beyond the state from the vantage point of existing democracies and do not as such advocate differential treatment of democracies and non-democracies by international courts. Standards of review are a suitable instrument to protect, but not to spread democracy.

The next section briefly recaps first the arguments in the literature on democratic legitimacy of judicial review at the domestic level to provide a point of comparison and then summarizes the institutional-procedural elements that existing scholarship has highlighted as affecting the legitimacy of judicial institutions beyond the state. In section 3, I outline why the democratic legitimacy of international courts requires a judicial standard of review that pays deference to decisions taken by democratic governments at the domestic level in appropriate circumstances – based on the central concepts of self-governance and autonomy within democratic theory – and identify some of the circumstances and textual hooks in international legal instruments that should trigger it. I also explain how deference can be understood as an instantiation of "normative subsidiarity" in the context of international adjudication. Section 4 then examines the extent to which the standards of review currently employed in three specific institutional contexts—the European Court of Human Rights, the WTO Dispute Settlement Body, and investment arbitration under the ICSID regime—correspond to the desideratum of a democratically informed deferential standard of review. The conclusion summarizes the arguments and identifies open issues to be addressed in future research.

2. Democracy & Judicial Review: A Brief Review

Because the debates about the democratic credentials of judicial review have originated domestically, it is worthwhile to summarize briefly the main arguments pro and contra judicial review and to thus provide a backdrop for the subsequent argument concerning judicial review at the international level.

2.1. Democratic Legitimacy of Domestic Judicial Review

Critics' rejection of judicial review as undemocratic is first and foremost based on what Alexander Bickel had labeled the "counter-majoritarian difficulty."[13] As summarized 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."[14] 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,[15] such resolution should instead be entrusted to representative and electorally accountable legislatures. Even if working less than perfectly in practice, legislative institutions are said to be much better at realizing the goal of political equality of all members within an a given polity and of republican non-domination than do courts.[16] Courts, by contrast, are said to "have many of the vices attributed to democracy without any of the virtues of those processes."[17]

In particular, the argument that judicial institutions might be better than "majoritarian democracy" at getting the moral questions underlying constitutional disputes right is seen as dubious "if what counts as a right or wrong answer is precisely the issue in question."[18] 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 justifications are by contrast

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[13] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale University Press 2nd ed. 1986 [first published 1962]).
[14] Jeremy Waldron, *The Core of the Case against Judicial Review*." 115 YALE L. J. 1346, 1353 (2006).
[15] *Id*., at 1359-1369.
[16] *Id*., at 1389 & 1391; RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 260 (Cambridge University Press 2007).
[17] BELLAMY, *supra* note 16, at 29.
[18] *Id*., at 93.

viewed at best as inconclusive as there is no independent criterion by which to decide whether judicial review is superior to democratic and representative parliaments when it comes to the protection of rights.[19] Without such a criterion, forms of judicial review that apply substantive conceptions of constitutional rights eventually turn into judicial "censorship" of democratic processes of law-making and political will formation.[20] But even stripped-down, process-focused versions of judicial review that foreground its role in "policing the process of representation"[21] have been rejected as unsustainable because assessments of what "truly" democratic processes are and what counts as procedural fairness and equity always already require substantive views as to the content of these standards, standards which may be as contentious as those relating to substantive policy choices.[22]

By contrast, the defenders of judicial review as democratic 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."[23] 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."[24] At

[19] Waldron, *supra* note 14, at 1375 *et seq*.
[20] Ingeborg Maus, *Die demokratische Theorie der Freiheitsrechte und ihre Konsequenzen für gerichtliche Kontrollen politischer Entscheidungen*, in INGEBORG MAUS, ZUR AUFKLÄRUNG DER DEMOKRATIETHEORIE: RECHTS- UND DEMOKRATIETHEORETISCHE ÜBERLEGUNGEN IM ANSCHLUSS AN KANT 298, 304 (Suhrkamp 1994).
[21] JOHN HART ELY, DISTRUST AND DEMOCRACY: A THEORY OF JUDICIAL REVIEW 73 (Harvard University Press 1980).
[22] BELLAMY *supra* note 16, at 110-111.
[23] COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 138 (Princeton University Press 2007).
[24] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517 (1981). Dworkin's view is not 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." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (Harvard University Press 1996).

the same time, the manner in which judges (generally) are selected and appointed is said to assure that they will not be 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, engineer an interest group deal, or honor a party platform."[25] As a result, by foregrounding questions of enduring values rather than more transitory interests, judicial review could be viewed as "a sensible way to promote *non-majoritarian representative* democracy."[26] The democratic deficits that judicial review may have, Richard Fallon has concluded, can be compensated for by its overall legitimacy, 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."[27]

In any event, as Scott Lemieux and David Watkins have argued, judicial review is ultimately 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,[28] and because courts frequently enough *do* align themselves with reigning public opinion.[29] Instead, from a perspective that views as one of democracy's principal purposes the minimization of domination, Lemieux and Watkins argue that "judicial review might make a modest contribution to democracy" as "one potential tool among many for reducing domination [...]."[30] In a similar vein, Annabel Lever has noted 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

[25] CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 4 (Harvard University Press 2001).
[26] *Id*., at 210 (emphasis added).
[27] Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).
[28] Scott E. Lemieux & David J. Watkins, *Beyond the 'Countermajoritarian Difficulty': Lessons from Contemporary Democratic Theory*, 41 POLITY 30, 32 & 36-37 (2009); on the U.S., see also SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT) (Oxford University Press 2006).
[29] Lemieux & Watkins, *supra* note 28, at 34-36; on the U.S. Supreme Court, see most recently BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (Farrar Straus & Giroux 2009)
[30] Lemieux & Watkins, *supra* note 28, at 61.

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."[31]

In the last instance, the debates about the democratically appropriate role of judicial review within democratic systems of government reflect more basic disagreements about the definition of democracy as such,[32] of the proper balance of its procedural and substantive characteristics, and of the separation of powers between institutions in pursuit of that balance. In principle, the arguments developed in the national context both for and against judicial review – especially of the acts of the legislature, but also of the popularly elected executive – can also be extended to courts beyond the state. After all, the national acts that international courts assess against applicable international law standards also emanate from laws adopted by national parliaments or are the result of policies pursued by a given administration. At the same time, it must be kept in mind that courts beyond the state – just like national supreme and constitutional courts – are explicitly charged by their statutes or underlying legal instruments with the interpretation and application of legal norms in order to settle the disputes brought before them. And because interpretation always and necessarily involves value choices, the real question is not whether courts should engage in judicial review and make such choices as a general matter, but rather whether they were supposed to have such decision-making power in the concrete circumstances of the norm at issue and the delegation of decision-making authority which such norm reflects.

2.2. (Democratic) Legitimacy of International Judicial Review

In the normative assessments of judicial review beyond the state, democratic theory has so far played a much lesser role,[33] and where it has been addressed, this has been done either cursorily and selectively, or without reference to the relationship between international courts and democratic government at the national level. Nienke

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[31] Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 74 PERSPECTIVES ON POLITICS 805, 815 (2009).

[32] Lemieux & Watkins, *supra* note 28, at 33 ("Ultimately, then, the democratic legitimacy of courts depends entirely on the democratic theory being advocated").

[33] See Geir Ulfstein, *The International Judiciary*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 147 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., Oxford University Press 2009) (noting that "[t]he democratic legitimacy of international tribunals has … only been the subject of scant consideration").

Grossman, for example, has argued that the legitimacy of international adjudicative bodies – that is, the perception of their "justified authority"[34] – 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."[35] While the "infus[ion] with democratic norms" is repeatedly invoked as enhancing judicial legitimacy,[36] she does not further elaborate what these norms are, except that transparency may be counted among them.[37]

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,[38] nor in his application of the legitimacy indicators developed by Thomas Franck,[39] nor when he considers the potential illegitimacy of a judicial decision "because it collides with values of a moral nature."[40] 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,[41] 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. Such constraints 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

[34] Grossman, *supra* note 9, at 121.
[35] *Id.*, at 110.
[36] *Id.*, at 115, 153 & 160.
[37] *Id.*, at 153 & 156.
[38] Treves, *supra* note 9, at 171-173.
[39] See FRANCK, *supra* note 8. While Franck appears to have contemplated the applicability of these indicators to judicial decision-making, he had not undertaken such an application himself and discussed the international judiciary only under the rubrics of impartiality and procedural fairness; see THOMAS L. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 & 316-347 (Oxford University Press 1995).
[40] Treves, *supra* note 9, at 177.
[41] *Id.*, at 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. *Id.*, at 175.

we can call the 'legitimacy of legality'."[42] Nowhere is the question of the legitimacy of judicial decisions linked to questions of 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 analysis of the specifically democratic legitimacy of international courts to date has been provided by Armin von Bogdandy and Ingo Venzke who address a number of elements in the institutional design and operation of international courts that can be characterized as affecting their democratic credentials. These can be grouped into three sets of factors that are relevant for an international court's democratic legitimacy. First, such legitimacy is seen as being affected by the manner and modalities of selecting the members of the bench. Currently, this takes place either by way of intergovernmental appointment (e.g. in the case of the ECJ and most arbitral tribunals), or through elections by the consultative and/or executive bodies of an international institution (as is the case with the ICJ, the ECtHR, and the ICC). 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.[43]

Second, the democratic legitimacy of international courts is linked 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. Making judicial decisions, hearings and the parties' pleadings available or open to the public, the argument goes, 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

[42] *Id.*, at 178.
[43] von Bogdandy & Venzke, *supra* note 7, at 36-40.

law-makers.[44] 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 in this regard, "[p]articipation can contribute to popular legitimacy by giving stakeholders a sense of ownership in the process."[45] Noting with approval the ICJ's practice of allowing interventions of third states under Article 62 of its Statute in the absence of a jurisdictional link with the disputants and even if the latter object to such intervention,[46] von 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."[47] 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.[48]

Third, the democratic legitimacy of international courts is conceptualized as being affected by 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,[49] 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 Article 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

[44] *Id.*, at 26.
[45] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 617 (1999).
[46] von Bogdandy & Venzke, *supra* note 7, at 29.
[47] *Id.*, at 29.
[48] *Id.*, at 31-32.
[49] See Jürgen Bast, *Das Demokratiedefizit fragmentierter Internationalisierung [The Democracy Deficit of Fragmented Internationalization]*, in DEMOKRATIE IN DER WELTGESELLSCHAFT [DEMOCRACY IN WORLD SOCIETY] 185 (Hauke Brunkhorst ed., Nomos 2009).

international legal discourse and engaging in trans-judicial dialogue might thus result in more holistic and thus more democratically legitimate judicial decision-making.[50]

That transparency, openness, and broad participation rights have a positive impact on the legitimacy of judicial decisions is hardly controversial; neither is the presumption that the avoidance of inconsistencies through reliance on the systemic rule of treaty interpretation may have a similar effect. All of the general treatments of the legitimacy of international courts discussed here, however, ignore the extent to which the allocation of decision-making authority between international courts, on the one hand, and national governments, on the other, may also affect a court's legitimacy, not least because it has direct implications for the substance of a court's output (i.e., its judgments). What seems reasonably clear is that the democratic legitimacy of the allocation of competences is not exhausted by the initial act of ratification of the underlying agreement,[51] if only because the formal allocation of (sometimes broadly defined) competences and their exercise in practice are two different things. The allocation of such competences by way of treaty ratification therefore needs to be complemented with democratically informed standards as to their exercise in practice.[52]

3. Democratic Self-Government, Subsidiarity & Judical Review

In the following I sketch the argument that the democratic legitimacy of judicial review beyond the state necessarily requires some consideration of what may be called "normative subsidiarity," that is, sensitivity to the question of what level within multi-level governance systems is the most appropriate for a particular decision is to be made. The argument entails three steps: First, I define the core of democracy as self-government and elucidate what this entails. Second, I place democracy as self-government within the context of multi-level governance systems and discuss in this context the subsidiarity principle which has become a prominent guiding principle on allocating decision-making authority within such systems, especially in the European Union, but also elsewhere. Here I point out that subsidiarity properly understood does

[50] von Bogdandy & Venzke, *supra* note 7, at 40-42.
[51] Cp. Geir Ulfstein, *Institutions and Competences*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 75 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., Oxford University Press 2009) ("The democratic legitimacy of the activities of international organizations lies primarily in the consent of states when ratifying their founding treaties").
[52] See similarly Ulfstein, *supra* note 33, at 148.

not only give expression to efficiency concerns, but also has a strong normative component. Third, I indicate some of the contexts in which such normative subsidiarity is indicated in international adjudication and suggest how it can be operationalized through appropriately defined judicial standards of review.

3.1. Democracy as Self-Government

"Self-government of the people," Adam Przeworski writes, is the principal "ideal that shaped the establishment of representative institutions *and* guided its evolution into democracy as we see it today."[53] In one largely mainstream definition, for a people to be said to be self-governing, "public decisions must be plausibly understood by members of the collectivity as reflecting, expressing, or revealing a will that is authentically their own, and there must at least be social consensus on procedures for determining or verifying the content of this will, such that one can in principle assess the extent to which public action fulfills or deviated from it."[54] Such collective self-government is itself the expression of another value at the heart of "the power and appeal of democracy," autonomy, understood as the ability "of choosing freely for oneself,"[55] or 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."[56] As Sanford Lakoff has added, "[i]n sharp contrast to the autocratic alternatives, democracy aims to empower all citizens in equal measure. However short of this aim actual democracies may fall, it is this goal—the goal of autonomy—that characterizes them most centrally in both normative and empirical terms."[57]

Understood this way, democracy as a system of governing seeks to implement the self-governing aspirations of a collectivity which through such self-government in turn instantiates its autonomy. The democratic legitimacy of any concrete governance arrangement thus rises and falls to the extent to which it meets these aspirations for self-government. Because a given collectivity must in principle be free to decide on the concrete overall (or "constitutional") design by which such self-government is to be

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[53] ADAM PRZEWORSKI, DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT 8 (Cambridge University Press 2010).
[54] Colin Bird, *The Possibility of Self-Government*, 94 AM. POL. SCI. REV. 563, 564 (2000).
[55] John Dunn, *Preface,* in DEMOCRACY: THE UNFINISHED JOURNEY, 508 BC TO AD 1993 v, vi (John Dunn ed., Oxford University Press 1993).
[56] Marina Oshana, *How Much Should We Value Autonomy?,* 20 SOC. PHIL. & POL'Y 99, 100 (2003).
[57] SANFORD LAKOFF, DEMOCRACY: THEORY, HISTORY, PRACTICE 155 (Westview Press 1996).

institutionally and procedurally effected, there is obviously no singular blueprint for a "correct" design, as evidenced by the diversity of democratic systems of government at the national level. Specifically, in pursuing their own vision of self-government collectivities may also decide to tie their hands with regard to certain issues or to delegate decision-making to non-electoral institutions, including courts. Where the exercise of judicial review, then, is based on such explicit delegation, it is not as such democratically deviant, as long as the terms of delegation are being observed.

3.2. Self-Government, Multilevel Governance & Subsidiarity

By the same token, there is nothing in the concept of self-government that limits its applicability to the historically accidental form of the nation-state and that would prevent it from being realized across and beyond state boundaries through multilevel governance systems. 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 […]."[58] 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 clarified and kept firmly in view."[59]

A prominent and widely discussed principle for the allocation of authority between different levels of decision-making is that of "subsidiarity." One mainstream understanding of subsidiarity mandates that "powers or tasks should rest with the lower-level units of [a political] order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them."[60] In the context of the European Union, since the 1992 Maastricht Treaty, subsidiarity has

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[58] DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE 235 (Stanford University Press 1995).
[59] *Id.*
[60] Andreas Føllesdal, *Survey Article: Subsidiarity*, 6 J. POL. PHIL. 190, 190 (1998).

achieved the rank of a quasi-constitutional principle and is presently enshrined in Article 5 (3) of the Treaty on the European Union (TEU), which 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.[61]

Note that the principle in this context applies *only* when member states and the European Union have *concurrent* jurisdiction and that its applicability is excluded from those areas in which the EU alone has been made competent to act. Considerations of subsidiarity can guide both the allocation of competences as well as their exercise,[62] with the former usually being dominant during the institutional design phase and the latter becoming relevant once concrete design choices have been made and a specific institutional architecture has been put into place.

Although most often expressed in terms of functionalism and efficiency, subsidiarity can, however, also be interpreted as a normative principle. In this reading, subsidiarity "expresses a preference for the lower level in order to protect *values* associated with governance at the lower level"[63] and functions as "a conceptual and rhetorical mediator between supranational harmonization and unity, on the one hand, and local pluralism and difference, on the other."[64] This version of the subsidiarity principle is no longer operationalized in accordance with criteria of relative efficiency and effectiveness, but instead requires an assessment of the *relative normative appropriateness* of taking decisions at the lower or the higher level of political organization. In the context of such *normative subsidiarity,* efficiency as a criterion has little purchase because the question is no longer which level can better maximize results while minimizing costs in the

[61] Consolidated Version of the Treaty on European Union, Article 5 (3), C-115 O.J. 13, 18 (2008). 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, C-115 O.J. 206-9 (2008). See generally DAMIAN CHALMERS, CHRISTOS HADJIEMANUIL, GIORGIO MONTI & ADAM TOMKINS, EUROPEAN UNION LAW 216-230 (Cambridge University Press 2006).
[62] Føllesdal, *supra* note 60, at 195-196.
[63] Isabel Feichtner, *Subsidiarity*, in MAX PLANCK ENCYCL. PUBL. INT'L L. at para. 3 (Rüdiger Wolfrum ed., Oxford University Press, online edition, www.mpepil.com) (emphasis added).
[64] Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 39-40 (2003).

pursuit of a given shared objective, but rather which level should decide what objective is to be pursued in the first place. Again, the constitutive treaty of an international institution may already include the decision to pursue certain values and objectives exclusively at the international level, leaving little to no room for the application of the subsidiarity principle. Barring such exclusivity, however, questions of normative subsidiarity can come into play in all contexts in which both member states and an international institution exercise non-exclusive jurisdiction.

There is no reason why the subsidiarity principle should not also apply to courts beyond the state. If courts "merely" applied the law to a set of facts, there might be no room for subsidiarity – after all, the legal norms to be applied were approved and ratified by the respondent state(s). But of course there is little that is inevitable in the interpretation and application of the law; otherwise it should be possible to automate judicial decision-making. Instead, the application of law to the evidence usually first requires a series of value judgments as to the interpretation and thus specific meaning of the applicable legal norms. Faced with alternative interpretations, courts have, *inter alia*, to decide whether to accept the position advanced by the respondent state, and this decision-making situation very much allows for the operation of the principle of normative subsidiarity: Under what circumstances should respondent states be given an area of discretionary political authority in which their decisions as to the interpretation and concretization of international legal obligations should be accepted as an appropriate outcome of decision-making at the national level? On the basis of what normatively persuasive justifications may, or should, courts override national decisions that are the outcome of constitutionally anchored democratic processes? It is international courts' exercise of decision-making authority in their own right in the interpretation of indeterminate norms that triggers the applicability of normative subsidiarity as a guiding principle.

An element of subsidiarity can already be reflected in a court's institutional design. This is, for example, the case with the regional European, Inter-American and African as well as some global human rights supervisory bodies, all of which require applicants first to have exhausted all available and reasonably effective remedies at the domestic

level, before they can exercise their jurisdiction.[65] 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 operating in their local context. Many other courts' statutes, by contrast, do not make such provision, either because they only deal with interstate disputes (e.g., the ICJ or the WTO DSB Appellate Body), where the exhaustion of domestic remedies often makes little sense conceptually, or because they have been created as an alternative to domestic dispute settlement, as in the field of investor-state arbitration.[66]

More importantly, considerations of subsidiarity remain relevant even when a court's jurisdiction has been formally triggered and a case meets the applicable admissibility criteria (irrespective of whether the exhaustion of domestic remedies is among them): The element that may trigger normative subsidiarity in the course of interpreting and applying an international agreement as part of settling the dispute before the court is given by the very substance of its regulations, as expressed in the relevant norms' specific terms. When a legal norm foregrounds domestic values or processes of preference formation and aggregation, and unless an international court is explicitly granted exclusive jurisdiction to determine its specific meaning, a *prima facie* case of concurrent jurisdiction exists that necessitates at least the consideration of the operation of normative subsidiarity. It is a case of concurrent jurisdiction because domestic authorities cannot be considered to have fully ceded authoritative decision-making in this area to an international court. And it is a case for the consideration of normative subsidiarity because given non-exclusive jurisdiction, the question necessarily arises as to the level at which a decision should most appropriately be made.

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[65] See Convention for the Protection of Human Rights and Fundamental Freedoms, Article 35 (1); American Convention on Human Rights, Article 46 (1) lit. a; African Charter on Human and Peoples' Rights, Article 56 (5); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Article 4 (1); Optional Protocol to the International Covenant on Civil and Political rights, Article 5 (2) lit. b.

[66] While Article 26 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States—a.k.a. the ICSID Convention—permits contracting states to "require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention," this is very rarely done in either BITs or investment contracts, although some less restrictive forms of having to involve domestic courts exist. See generally Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 LAW & PRACTICE OF INT'L COURTS & TRIBUNALS 1, 2 & *passim* (2005).

In the context of the margin of appreciation, one instrument through which normative subsidiarity can be operationalized (see below), Yuval Shany has noted—correctly, from the point of view here defended—that the justification for deference that the margin exemplifies is strongest "with regard to 'inward-looking' international norms that regulate domestic conditions (for instance, human rights norms)."[67] By contrast, outward-looking norms that primarily seek to regulate relations 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, adverse external effects on them. At the same time, even within legal regimes that primarily regulate behavior between states, there may be lexical "windows" that foreground domestic preferences and decisions, and stake a claim to due deference on grounds of normative subsidiarity. At times, this is made textually explicit, as in the security exceptions provided for in GATT Article XXI, which stipulates that "nothing in this agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which *it considers* contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which *it considers* necessary for the protection of its essential security interests […]"[68] (emphasis added). The primary decision-making authority regarding these two exceptions is here expressly allocated to the GATT contracting parties and thus to the national level within the multilevel WTO system.

Even without the critical "it considers" language,[69] certain treaty terms highlight essentially domestic values that *necessarily* allocate some review-proof authority to national decision-makers to give meaning to them. To remain within the trade context, Article XX of the GATT exceptionally permits certain trade-restricting measures, *inter alia*, if "necessary to protect public morals" or when "imposed for the protection of national treasures of artistic, historic or archaeological value."[70] The definition of what are to count as "public morals" and as "national treasures" must necessarily first and foremost rest with the political community concerned and a wholesale delegation of

[67] Shany, *supra* note 12, at 920.
[68] General Agreement on Tariffs and Trade 1947 ("GATT 1947"), Article XXI lits. a & b.
[69] Cp. Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.), Merits, [1984] I.C.J. REP. 14, 116 (Nov. 26, 1986).
[70] GATT 1947, *supra* note 68, Article XX lits. a & f.

such determinations to an international court cannot be presumed in the absence of incontrovertible language to the contrary. Elsewhere, Bill Burke-White and I have argued that these and some other permissible objectives stipulated in non-precluded measure provisions of certain bilateral investment treaties should trigger some deference to national choices on the part of *ad hoc* arbitral tribunals.[71] While our argument there emphasizes considerations of institutional expertise and capacity,[72] 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.

3.3. Operationalizing Normative Subsidiarity: Standards of Review

Technically, the way normative subsidiarity can be operationalized in international adjudication is through appropriately defined standards of review, with the term "standard of review" understood as referring 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"[73] and usually developed by courts themselves as an exercise of their function as judicial policy-makers. The articulation of such standards of review is well known domestically[74] and can range from highly deferential judicial review at one end of the scale under a residual "good faith" standard to much more demanding and intrusive review of the merits of a decision under a strict scrutiny standard. Good faith review, for example, merely inquires whether there was honest and fair dealing on the part of the respondent party and whether there had been an at least *prima facie* rational basis for its action.[75] By contrast, under a strict scrutiny standard of review, the court's inquiry is much more detailed and seeks to determine whether the governmental measure at issue

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[71] See William W. Burke-White & Andreas von Staden, *Private Law Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); see also William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 368-386 (2007).

[72] Burke-White & von Staden, *Private Law Litigation*, *supra* note 71, at 329-333.

[73] Jan Bohanes & Nicolas Lockhart, *Standard of Review in WTO Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 378, 379 (Daniel Bethlehem et al. eds., Oxford University Press 2009).

[74] See Burke-White & von Staden, *Private Law Litigation*, *supra* note 71, at 314-322; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW (Cambridge University Press 2003).

[75] Burke-White & von Staden, *Private Law Litigation*, *supra* note 71, at 312.

"is narrowly tailored to achieve a compelling governmental purpose" and is the "least restrictive or least discriminatory alternative" to that end.[76]

It is not my purpose here to define in the abstract standards of review appropriate for specific contexts in which the democratic legitimacy of judicial review beyond the state is at issue, but to point out that international courts need to grapple with the question of what constitutes an appropriate standard in their issue area and in light of the specific legal norms they are charged with interpreting and applying if they want to enhance their democratic legitimacy, understood as the protection of self-government in light of normative subsidiarity. All that can be said generically about any such standard in the context of legal norms that foreground a legitimate interest on the part of national communities to have their democratic decision-making respected is that it cannot underpin strict scrutiny review and that it has, as a corollary, to circumscribe some area of discretionary decision-making that the court will not review.

4. Standards of Review in International Judicial Practice

Many international courts and tribunals already employ standards of review that recognize the legitimate authority on the part of national decision-makers to make interpretations and decisions within the context of international legal agreements, while some others do not. In the following I will briefly discuss three illustrative examples: the European Court of Human Rights and its margin of appreciation doctrine; standards of review applied by the Dispute Settlement Body of the World Trade Organization; and the mixed approach of some ICSID arbitral tribunals.

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

[76] *Id.*, at 316.

judicial action in the area of a Convention right."[77] The operation of the margin of appreciation doctrine in the Court's jurisprudence and the "breadth of deference"[78] it entails have given rise to a sizable literature of its own which cannot be covered here in any detail.[79] Instead, 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.

The Court has 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,[80] but it has also found application in the context of other Convention provisions without such clauses.[81] 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 information received in confidence, or for maintaining the authority and impartiality of the judiciary.[82]

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."

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[77] DAVID HARRIS, MICHAEL O'BOYLE, ED BATES & CARLA BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (Oxford University Press 2nd ed. 2009).

[78] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111, 118 (1987).

[79] For overviews, see e.g. JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS chap. 3 (Martinus Nijhoff 2009); YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (Intersentia 2002); STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Council of Europe Publishing 2000); HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (Kluwer 1996).

[80] 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 No. 1). Further limitation clauses appear in Article 2 of Protocol No. 4 (freedom of movement) and Article 1 of Protocol No. 7 (procedural safeguards relating to the expulsion of aliens).

[81] See ARAI-TAKAHASHI, *supra* note 79, chaps. 2 (Article 5), 3 (Article 6) & 9 (Article 14); Ždanoka v. Latvia, 2006-IV Eur. Ct. H. R. para. 103 (March 16, 2003) (Article 3 of Protocol No. 1).

[82] Article 10 (2) ECHR.

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,[83] 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"[84] as well as to identify and implement any restrictions considered necessary for the protection of the permissible objectives included in Article 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."[85]

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."[86] That margin, however, was not "unlimited" and went "hand in hand with European supervision."[87] 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."[88] 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"[89] and whether such measures were "proportionate to the legitimate aim pursued."[90]

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[83] Handyside v. United Kingdom, 24 Eur. Ct. H. R. (ser. A) (Dec. 12, 1976).
[84] *Id.*, para 48.
[85] *Id.*
[86] *Id.*
[87] *Id.*, para 49.
[88] *Id.*, para 50.
[89] *Id.*
[90] *Id.*, para 49.

The principal elements of the margin have been restated in countless judgments since the *Handyside* case, albeit often in boiler-plate manner. In the context of interferences with the protection of private property, for example, which under Article 1 of Protocol 1 is permissible only in the public interest, the Court has reiterated that "national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'."[91] 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 [...].[92]

Elsewhere, the Court has recognized margins of appreciation with respect to the design of domestic electoral systems under Article 3 of Protocol 1;[93] the extent to which "differences in otherwise similar situations justify a different treatment in law"[94] under the non-discrimination provision of Article 14 ECHR; the regulation of political associations under Article 11 (albeit a limited one);[95] and the regulation of access to the courts under the Article 6.[96]

While the relationship between judicial deference in favor of democratic decision-making at the national level 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

[91] James & Others v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) para. 46 (Feb. 21, 1986).
[92] Broniowski v. Poland (Merits), 2004-V Eur. Ct. H. R. para. 149 (June 22, 2004).
[93] Mathieu-Mohin & Clerfayt v. Belgium, 113 Eur. Ct. H. R. (ser. A) para. 52 (March 2, 1987).
[94] Rasmussen v. Denmark, 87 Eur. Ct. H. R. (ser. A) para. 40 (Nov. 28, 1984).
[95] United Communist Party of Turkey and Others v. Turkey, 1998-I Eur. Ct. H. R. para. 46 (Jan. 30, 1998).
[96] Wersel v. Poland, para. 41 (Sept. 13, 2011)

which derives from their role in the expression of the democratic will of their people."[97] Similarly, Ronald St. John Macdonald, a former Canadian judge 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.[98]

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 as well as the margin as such are not without criticism,[99] 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 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."[100]

The ECtHR has repeatedly affirmed the role of the Convention as "an instrument designed to maintain and promote the ideals and values of a democratic society,"[101] and part of that promotion occurs by way of deference to national decision-making, including that of domestic courts.[102] The greater relative proximity between the governors and the governed at the domestic level and hence the closer link to the "vital

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[97] LUZIUS WILDHABER, THE EUROPEAN COURT OF HUMAN RIGHTS: 1998-2006: HISTORY, ACHIEVEMENTS, REFORM 95 (N.P. Engel 2006).

[98] Ronald St. John Macdonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, *in* [1990] I:2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW: THE PROTECTION OF HUMAN RIGHTS IN EUROPE 95, 160 (Andrew Clapham & Frank Emmert eds., Martinus Nijhoff 1992).

[99] See, e.g., Timothy H. Jones, *The Devaluation of Human Rights Under the European Convention*, [1995] PUBLIC L. 430 (1995); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2005).

[100] Susan Marks, *The European Convention on Human Rights and Its 'Democratic Society'*, 66 BRIT. Y.B. INT'L L. 209, 219 (1995).

[101] Kjeldsen, Busk Madsen & Pedersen v. Denmark, 23 Eur. Ct. H. R. (ser. A) para. 53 (Dec. 12, 1976); Hasan & Eylem Zengin v. Turkey, para. 55 (Oct. 9, 2007)

[102] Palomo Sanchez & Others v. Spain, para. 54 (Sept. 12, 2011); see also Al-Skeini & Others v. United Kingdom, para. 99 (July 7, 2011).

forces" of their countries thus importantly underpins the subsidiary nature of the Convention control system, and the deference it spawns in the form of the margin of appreciation doctrine in turn protects democratic self-government at the domestic level.

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 Articles XXII and XXIII of the 1947 GATT[103] with the creation of the Dispute Settlement Body (DSB) and the much more detailed procedures of the WTO Dispute Settlement Understanding (DSU). The adjudicative function under the DSU is exercised by panels established specifically for a given dispute (Article 6 DSU) and the standing Appellate Body (AB) which hears appeals from panel reports (Article 17 DSU). Whereas the original GATT did not specify any specific standard of review to be applied by panels, during the Uruguay Round negotiations the issue of the standard of review to be applied in the judicial examination of national decisions did become a major issue, reportedly with deal-breaking potential.[104] 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,[105] 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 explicitly for a deferential standard of review.[106] For all other cases, the applicable standard of review has to be derived from Article 11 DSU, the provision specifying the general functions of panels.

The relevant provision in the ADA, Article 17.6, actually stipulates two separate standards of review, one concerning findings of facts (sub-para. i), the other legal

[103] See, e.g., JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 112-120 (MIT Press 2nd ed. 1997); JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 256-257 (West 4th ed. 2002).
[104] See John H. Jackson, *Remarks,* Panel on Trading in a Post-Uruguay World: The New Law of the GATT/World Trade Organization, 88 AM. SOC'Y INT'L L. PROC. 136, 139 (1994) (noting that the "standard-of-review question was one of three or four issues that could have broken apart the WTO negotiations").
[105] *Id.*
[106] For background on the negotiations with respect to the standard of review issue, see MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 72-78 (Oxford University Press 2003).

determinations (sub-para. ii).[107] The standard of review with regard to the facts is composed of two further sub-standards.[108] 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.[109] The second standard applies to the "evaluation" of the facts thus established. Here, a panel has merely to assess whether such 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"[110] to national authorities.

The standard of review with regard to legal determinations foresees 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 in principle feasible, the national authority's interpretation would be allowed to prevail for purposes of dispute settlement. However, as has been pointed out,[111] 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 Articles 31-33 VCLT. The 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, a highly unlikely outcome.

In all other cases, Article 11 DSU stipulates that dispute settlement panels, in assisting the DSB in the discharge of its responsibilities, "should make an objective

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[107] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), Article 17.6.
[108] Bohanes & Lockhart, *supra* note 73, at 390.
[109] *Id.*, at 391.
[110] *Id.*
[111] Bohanes & Lockhart, *supra* note 73, at 386; Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 200-201 (1996).

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 […].”In its first decision addressing the issue of standard of review under the DSU, the Appellate Body read Article 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.”[112] 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.[113] Regarding questions of compliance with WTO law, the Appellate Body suggested that an objective assessment requires the application of the customary law rules of treaty interpretation, in line with Article 3.2 DSU.[114]

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”[115] 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.[116] 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.[117]

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[112] Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products (EC—Hormones), WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998), para. 116.
[113] *Id.*, at 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 (Nov. 8, 1996), at paras. 7.7-7.13.
[114] EC—Hormones, *supra* note 112, at para. 118.
[115] Bohanes & Lockhart, *supra* note 73, at 383.
[116] *Id.*; Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, *in* A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD 267, 271-272 (Mark Hoskins & William Robinson eds., Hart 2004).
[117] Bohanes & Lockhart, *supra* note 73, at 384; Ehlermann & Lockhart, *supra* note 116, at 272.

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.[118] 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"[119] which the WTO panels or the Appellate Body are then reviewing. Where no such process is foreseen,[120] then the DSB organs by necessity become the triers of first impression and have to conduct a *de novo* examination.[121] By contrast, where national authorities are required by the agreement in question to undertake detailed investigations, as in several of the trade remedy agreements,[122] the standard of review that has emerged in judicial practice "afford[s] a considerable measure of discretion to national authorities for fact-finding,"[123] subject to criteria of reasonableness and justifiability,[124] and any decisions made on the basis of such facts can still be reviewed by panels as to whether they are "objective and coherent."[125]

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 Article 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

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[118] Bohanes & Lockhart, *supra* note 73, at 386.
[119] *Id.*, at 389.
[120] See, e.g., the Agreement on Technical Barriers to Trade ("TBT Agreement").
[121] See Bohanes & Lockhart, *supra* note 73, at 409-411 (TBT Agreement) and at 411-414 (SPS Agreement).
[122] See, e.g., Agreement on Safeguards, Article 3; Agreement on Subsidies and Countervailing Measures, Article 11.
[123] Bohanes & Lockhart, *supra* note 73, at 396.
[124] For discussion of the relevant criteria, see, e.g., 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 (April 13, 2006), paras. 93-99.
[125] Australia—Measures Affecting the Importation of Apples from New Zealand (Australia—Apples), WT/DS367/AB/R (Nov. 29, 2010), para. 225.

implementation must not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail" and must not "constitute a disguised restriction on international trade."[126] 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"[127] 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."[128] As a result, "panels leave Members considerable margin for making policy choices in pursuing the interests covered by Article XX."[129]

The main justification for deference to national fact-finding in the context of WTO dispute settlement proceedings is functional in character: For both lack of resources and expertise, WTO panels are not well positioned to conduct factual investigations.[130] Still, despite concerning ostensibly a-political processes, fact-finding is not without normative implications of its own. 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."[131]

Furthermore, there is recognition that the standard of review to be applied must recognize the allocation of authority between WTO bodies and the member states.[132] In the EC—Hormones case, 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."[133] In circumstances where the text of the applicable agreement indicates that the member states intended to retain such jurisdictional competence, the DSB

[126] Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"), Article 2.3; see, similarly, GATT 1947, Article XX (chapeau).
[127] Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC—Asbestos), WT/DS135/AB/R (March 12, 2001), para. 168.
[128] *Id*., at 178; see also EC—Hormones, *supra* note 112, at para. 194.
[129] Ehlermann & Lockhart, *supra* note 116, at 294.
[130] Bohanes & Lockhart, *supra* note 73, at 397.
[131] *Id*., at 402.
[132] Muhammed Korotana, *The Standard of Review in WTO Law*, 15 INT'L TRADE L. & REG. 72, 72 (2009).
[133] *EC—Hormones*, *supra* note 112, at para. 115.

bodies have to respect that bargain, and this includes not only fact-finding provisions, but also the definition of public policy as such, especially in the context of the general exceptions clause of Article XX GATT and the SPS Agreement.

Neither the DSB bodies, nor Article 17.6 ADA speak of deference to national decision-making on account of its greater claim to democratic legitimacy. Indeed, some have maintained that such an "argument from democracy" would, while appropriate in the domestic context of judicial oversight of administrative agencies, be misplaced in the WTO context: Whereas domestic agencies might be able to claim greater democratic legitimacy because they are accountable to the executive and legislative branches of government and through them to the polity as a whole, the parties in a WTO case cannot stake such claim because they neither represent nor are accountable to the membership at large.[134] This is certainly correct and militates against a *general* deferential standard of review. Moreover, the absence of any reference to the democratic quality of national decision-making in the WTO agreements is quite understandable, given that national democracy is not a prerequisite for joining the WTO and that many members may at best be democracies in name. Still, from the vantage point of those members that *are* democratic, the deference that does exist—in the context of Article 17.6 ADA, Article 11 DSU, the general exception clause of Article XX GATT and the largely self-judging security exception clause of Article XXI GATT—enhances the democratic legitimacy of judicial review as exercised by the DSB panels and Appellate Body and does so even if conceptualized not as deference to democracy, but protection of national sovereignty. The fact that such deference also benefits non-democracies is true, but irrelevant, if the perspective taken is that of those members that have chosen to be governed democratically and want their democratic decision-making honored as part of delegating certain governance functions to the World Trade Organization and its Dispute Settlement Body. The precise contours of the standard of review to be applied may remain an issue in concrete cases, but the fact that at least some deference is recognized as explicitly or implicitly indicated by key trade norms make WTO judicial review more democratically legitimate than would be the case in the absence of such deference.

[134] Croley & Jackson, *supra* note 111, at 207 & 209.

4.3. ICSID Investor-State Arbitration

The previous sub-sections examined two dispute settlement systems beyond the state that employ deferential standards of review in certain contexts and thereby protect existing democratic decision-making at the national level within these boundaries. Not all international courts and tribunals do so, however, or do not do so consistently. A case in point is investor-state arbitration under the ICSID Convention, as illustrated by a several arbitral awards rendered against Argentina concerning its package of rescue measures adopted during the country's devastating economic crisis in 2001-2002 which adversely affected many foreign investors.[135] A key issue in the subsequent arbitral proceedings concerned the question whether Argentina deserved any deference as to the evaluation of the necessity of these measures. Legally, the question arose specifically in the context of Article XI of the U.S.-Argentina bilateral investment treaty which provides as follows:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[136]

On its surface, the plain text is silent on the applicable standard of review that tribunals should employ in determining whether the requirements of the exceptions clause have been met. But on the theory defended here, the specific terms employed certainly *imply* some deference to national determinations: It is difficult to conceive that a treaty party would delegate the determination of what measures are necessary to protect its domestic public order or its "*own* essential security interests"—even less the precise content of these two permissible objectives—entirely to an international tribunal. To do so would cede authority over an integral part of any community's self-government which

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[135] As of 2010, a total of 51 known investment treaty claims had been filed against Argentina, most of which were initiated after and in relation to the 2001-2002 economic crisis; see UNCTAD, Latest Developments in Investor–State Dispute Settlement, [2011:1] IIA ISSUES NOTE 2 (2011), *available at* http://www.unctad.org/en/docs/webdiaeia20113_en.pdf. For overviews of the crisis and Argentina's responses, see, e.g., R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims: First Lessons from Argentina*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 425, 425-446 (Todd Weiler ed., Cameron May 2005); PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA (Public Affairs 2005).

[136] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103–2 (1993), Article XI.

cannot simply be presumed and would require a more explicit delegation of decision-making authority. It is much more plausible as well as normatively attractive from the vantage point of democratic theory to interpret Article XI as indicating some deferential standard of review to national determinations and decisions taken under it, as long as these remain within reasonable bounds and are not arbitrary or abusive.

The actual approaches of the tribunals charged with arbitrating the cases in which awards have been rendered so far have, however, been varied on this point.[137] Three tribunals in particular—in the *CMS*, *Enron* and *Sempra* cases—effectively denied Argentina any deference on the basis of the (erroneous) interpretation that Article XI mirrored the requirements of the necessity defense under customary international law. The CMS tribunal accordingly concluded that "if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness."[138] Such determination required not just an examination of whether measures had been taken in "good faith," but a "substantive review"[139] which eventually resulted in a finding against Argentina. Two other tribunals—in the *LG&E* and *Continental Casualty* cases—by contrast, interpreted Article XI on its own terms and granted Argentina some discretionary decision-making space. Any Assessment under Article XI "must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage [sic!] of hindsight."[140]

I submit that the second position is not only legally correct, but also enhances the democratic legitimacy of the arbitral tribunals' judicial review: Democratically constituted government plays an important role especially in times of national crises, when democratic accountability is important to enable meaningful self-government through political feedback mechanisms. It is not least for this reason that international

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[137] See only Andreas von Staden, *Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron, and Sempra Annulment Decisions*, 2 CZECH Y.B. INT'L L. 207, 212-215 (2011).
[138] CMS Gas Transmission Co. v. The Argentine Republic, Award, May 12, 2005, ICSID Case No. ARB/01/8, at 108 (para. 373).
[139] *Id*. (para. 374).
[140] Continental Casualty Co. v. The Argentine Republic, Award, Sept. 5, 2008, ICSID Case No. ARB/03/9, at 80 (para. 181).

tribunals should defer, within reasonable bounds, to democratic decision-making at the national level in circumstances as those foreseen in Article XI.

5. Conclusion

I have argued that the democratic credentials of international courts rise and fall with the extent to which the exercise of their review activities is based on a defensible theory of the allocation of decision-making authority between the international judiciary, 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 also address the normatively appropriate allocation of authority 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 definition of democracy. For the notion of self-government to be meaningful, there have to be criteria in place for when decisions arrived at within one institutional arrangement may be overridden by another, 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, international courts need to address the always implicitly present question as to the appropriate boundaries of their judicial law- and policy-making vis-à-vis respondent states. 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 needs to address the issue.

The argument as presented here remains in many ways a sketch in need of further elaboration. In addition to expanding on the textual hooks that should trigger judicial deference, two sets of issues in particular require further attention in future research: First, in what contexts and under what conditions would the principle of normative subsidiarity actually suggest the international (regional or global) level as the democratically more appropriate one for decision-making? In other words, when may

the relevant polity whose self-government aspirations are to be protected be found at the aggregate regional or global level, rather than at the national level, with an international court – in the absence of suitable and functioning elected institutions – acting as a "non-majoritarian representative"[141] institution and taking decisions as part of its judicial review powers on its behalf? Second, if the key factor that underpins the deference to be exercised by international courts as a result of normative subsidiarity lies in the greater democratic legitimacy of national decision-making in certain well-specified contexts, would a court then not after all first have to inquire into the actual democratic quality of domestic decision-making processes, and grant different degrees of deference depending on whether minimum criteria have been met or not? What should those minimum criteria be from a normative perspective, which ones would be feasible in practice?

Writing a few years ago about the origins and ideology of international adjudication, Martti Koskenniemi 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 [...]."[142] Addressing the central issue of the relationship between the increasing ambit of international courts' review activities and democratic government at the national level (and beyond) would be an important step toward such a theory.

[141] Eisgruber, *supra* note 25, at 4.
[142] Martti Koskenniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, in TOPICALITY OF THE 1907 HAGUE CONFERENCE, THE SECOND PEACE CONFERENCE 127, 127 (Yves Daudet ed., Martinus Nijhoff 2008).