The Future of Sovereignty: The Nation State in the Global Governance Space

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Abstract

Since its modern genesis, the claim to sovereignty has been inherently tied to the notion of freedom: from the Church, from empires, from colonial powers. More specifically, the freedom that sovereignty promised was the freedom “to be left alone,” given the premise that unfettered sovereignty was a necessary and sufficient condition for the people and its members to enjoy the freedom "to do, or be, this rather than that." But in our era of global governance the freedom to be left alone no longer holds the promise of providing citizens with control over their lives because no Chinese walls will be capable of insulating communities from the outside. States that seek to ensure freedom to their citizens must act proactively by engaging foreign and international governance bodies, and by ensuring opportunities for their citizens to do the same. And in fact, states that participate in the robust exchange between global, regional and local policy makers retain their promise of ensuring to their citizens the opportunity to “freely determine their political status and freely pursue their economic, social and cultural development” in an interdependent world. This contribution analyzes the costs and benefits that accrue to states from the emerging system of global governance and assesses the potential contributions of state organs to the effectiveness and democratization of the global processes of decision-making and review. It ends by outlining some normative implications of this type of “engaged sovereignty” which recognizes its embeddedness in a global order to which it is accountable.
The Future of Sovereignty: The Nation State in the Global Governance Space

Eyal Benvenisti*

I. Introduction: Can Sovereignty Ensure Freedom in an Interconnected Global Space?

Since its modern genesis, the claim to sovereignty has been inherently tied to the notion of freedom: from the Church, from empires, from colonial powers.¹ Sovereignty epitomized the freedom of each people “freely determine [its] political status … freely pursue [its] economic, social and cultural development … [and] freely dispose of [its] natural wealth and resources.”² More specifically, the freedom that sovereignty promised was, following Isaiah Berlin’s important distinction,³ the "freedom from," namely, the freedom “to be left to do or be what he is able to do or be, without interference by other persons.”⁴ The underlying premise of this ideal was that unfettered sovereignty, the freedom from external intervention, was a necessary and sufficient condition for the collective and for the individuals within it to enjoy the really important freedom, which is, again using Berlin's terms, the "freedom to," namely the freedom "to do, or be, this rather than that."⁵ Democracy will be possible only within independent states. And with democracy, as John Stewart Mill stated, justice will prevail, because citizens would have “a voice in the exercise of that ultimate sovereignty [and] an actual part in the government.”⁶ Democracy will not only provide guarantees for collective freedom but also for individual freedom, where the personal right to autonomy and “self-authorship”⁷ is ensured. As Martti Koskenniemi put it

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¹ However, as new states quickly realized already in the 19th century, sovereignty conferred much less autonomy and equality than they had anticipated: Arnulf Becker Lorca, ‘Sovereignty beyond the West: The End of Classical International Law’ (2011) 13 J Hist Int'l L 7.
² International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 UNTS 171, Article 1. See also ibid., Article 47: ‘Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.’ See also Nico Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge University Press, 1997).
⁴ Id. at 121.
⁵ Id. at 122.
⁶ John Stewart Mill, Considerations on Representative Government (Barker, Son, and Bourn 1861) 57.
⁷ Joseph Raz, The Morality of Freedom (Clarendon 1986) 204 (“[e]veryone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny.”). See also John Stuart Mill, ‘On Liberty’, in J. S. Mill, On Liberty
succinctly, “[s]overeignty articulates the hope of experiencing the thrill of having one’s life in one’s own hands.”

This emphasis on external freedom gained prominence in the early nineteenth century, and was reflected in domestic constitutional law that assumed that the state had the unlimited freedom to “make or unmake any law whatever,” and in international law that was based solely on state consent, and which stopped at the states’ borders, incapable of intervening in states’ internal affairs.

But to the extent that this premise was valid, it no longer holds even for relatively affluent collectives. As the various contributions to this book have demonstrated, global governance bodies – public, private and mixed – continue to shrink the regulatory space of national governments, and to limit the traditional powers of the state to adjudicate and enforce. Today’s economic and social realities leave us little choice. But at the same time, at least some key state actors refuse to give up power and therefore devise various means to retain their authority and protect the interests of at least some of their constituencies. The outcome is a restless, complex web of regulatory bodies that must negotiate and accommodate each other’s interests in order to remain effective.

Only a few states that can afford (or at least claim to be able to afford) to cling to the traditional freedom from claim of “sovereignty as independence.” China, most notably, still hail the so called “Five Principles of Peaceful Co-Existence” which reflect the classic nineteenth century vision of sovereignty. For most peoples and individuals, however, the perception of sovereignty as defined by consent and

*and Other Writings 59* (Stefan Collini ed., Cambridge University Press, 1989 [1859]) at 59 (“He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.”).


9 A.V. Dicey, Introduction to the Study of the Law of the Constitution (1885)

10 Case of the S.S. "Wimbledon" PCIJ 1923 (“The Court declines to see in the conclusion of any Treaty by which a state undertakes to perform or to refrain from performing a particular act an abandonment of its sovereignty ... [T]he right of entering into international engagements is an attribute of state sovereignty”); The Lotus Case PCIJ 1927 (International law “emanate[s] from the [states’] own free will”). See Steven Neff, Justice Among Nations, (2014); David Armitage, Foundations of Modern International Thought (2013), A. Truyol y Serra and R. Kolb, Doctrines sur le fondement du droit des gens 59 (2007).

11 As the German Federal Minister of Finance, Wolfgang Schäuble, stated “Nationalstaatliche Regelungsmonopole und das Interventionsverbot reichen nicht mehr aus in den globalen Interdependenzen. Der Nationalstaat kann die großen Probleme und Herausforderungen unserer Zeit nicht mehr allein lösen. Dazu bedarf es neuer Formen des Regierens.” (Frankfurter Allgemeine Zeitung, 21 May 2014).

non-interference no longer promises full freedom and hence no longer reflects the expectations and actions of many state and non-state actors. Interdependency prevents us from imagining ourselves ensconced in isolated mansions-states. We increasingly realize that states are no more – and, indeed, no less – than owners of small apartments in one densely packed high-rise in which about two hundred families live. In this global condominium, the “technology” of global governance that operates through discrete sovereign entities to ensure the freedom from no longer fits, if it ever worked. The freedom from does no longer hold the promise of providing citizens with control over their lives and the environment surrounding them because communities cannot insulate themselves from the world surrounding them. No Chinese walls will be capable of fending off the consequences of climate change. Even more importantly, permeable borders have become the signifiers of freedom: the free movement of goods, people, etc. People have realized that “the right to exit” – the ability of certain voters to influence collective choices by threatening with moving to other jurisdictions (e.g. high income tax for the super-rich) – can be as effective as – in some instances even more effective than – ”the right to voice.” Facing external threats as well as attractions, states must act proactively, exercising their and their citizens’ freedom to, in order to secure for themselves an autonomous space, free from external imposition. Hence the justification for state authority, its promise to ensure the positive freedom to for the respective citizens, requires state organs to actively engage with the emerging global actors and provide opportunities for their citizens to do the same.

Part II of this chapter outlines the limitations on states’ discretion that complicates stats’ ability to ensure democratic freedom in the traditional, nineteenth century sense. Part III describes responses of state organs to this challenge. Part IV draws the contours of the normative implications of sovereignty which is embedded in a global order that must ensure freedom to all, and suggests that such implications could soon be reflected in positive law. Part V concludes.

II. Assessing the impact of the Global Regulatory Space on Sovereign Discretion

(a) Costs: The Substantive and Institutional Constraints on State Discretion

In this age of global governance, external constraints on states have become ubiquitous as they have become strict (even while being formally “soft” norms). State authorities have in recent years willfully, unwillingly or even unwittingly surrendered regulatory discretion to various forms of public and private, formal and informal, international and a-national institutions. They yielded their monopoly on regulatory power – what traditionally defined sovereignty – to actors whose reach defies political boundaries. These global governance bodies (GGBs) now set policies in almost all aspects of life, including in the areas of financial stability, financial markets regulation, development, environment, transportation, intellectual property, labor standards, public health, food safety, communications and so on. These GGBs shape the rights, interests, expectations and life opportunities of diverse stakeholders across political boundaries through formal norms (international institutions set up by treaties), informal coordination among state executives, partnerships between public and private bodies, and purely private standard-setting bodies.\(^\text{15}\) Even their right to “freely dispose of their natural wealth and resources” is subject to external scrutiny for compliance with WTO law.\(^\text{16}\)

The freedom of states has been significantly delimited both substantively and institutionally. States’ “domestic” sphere has shrunk most conspicuously in the context of what traditionally was their central claim to monopoly of power: their internal monopoly on the exercise of violence. The human rights revolution has redefined sovereignty not only in relation to peacetime exercise of public authority but also transformed the law applicable to internal armed conflicts that challenge governmental authority. This is witnessed by the dramatic rise of international criminal adjudication since the mid-1990s that contributed to the impressive evolution of the law on non-international armed conflicts.\(^\text{17}\) The concept of *Jus Cogens* stipulates that state’s unfettered discretion is no longer the premise, and the Responsibility to Protect principle indicates that sovereignty entails significant substantive obligations toward their own citizens and also globally. Sovereigns are no longer defined by their authority to decide freely on the exception, but more and more by their responsibility towards their citizens and toward others that are affected by the sovereigns’ acts or omissions.

\(^{15}\) Eyal Benvenisti, The Law of Global Governance, Hague Academy of International Law (2014), Chapter II.


Even more profoundly, states’ discretion has become subjected to meaningful institutional constraints. The need to resolve regional and global coordination and cooperation problems intensified the intrusion of global regulation on states' freedom. The rise of global commons problems (global terrorism, human trafficking, climate change, etc.) requires further collective responses and indicates that the demand for global governance is only in its inception. This puts much pressure on the state’s ability to adopt policies, thereby reflecting the preferences of its citizens. The proliferation of global venues for regulation, many of which are dominated by the executive branches of a handful of powerful states, remain largely inaccessible and quite opaque to most voters, while enabling better organized and better funded groups to exploit asymmetric information about the goals and consequence of regulation. The diffuse and fragmented scene of global governance, characterized by multiple bodies each with a narrow scope of authority, has further disempowered diffuse domestic electorates and expanded the executive power of key powerful states.18

This global drive to regulate state behavior both substantively and institutionally meets states that have come to be heavily dependent on the market forces of globalization which has increases the dependency of most states on non-state and foreign actors. This is mainly due to two reasons. First, the continuous lowering of the technical and legal barriers to the free movement of people, goods, services, and capital across territorial boundaries has exacerbated the well-known failures inherent in domestic democratic processes. This process has operated to further marginalize the voices of "discrete and insular minorities" due to increased demand on their traditional resources (e.g., the “land grabbing” phenomenon since 2008). At the same time, the lowering of barriers on movement strengthened the hand of those domestic actors who could benefit from the increased availability of “exit” options from the state; for example, by relocating themselves or their investments, which are options that globalization offered. The threatened “exit” by these actors has increased their “voice” at the expense of the diffuse majority.19

A second factor that operated to increase state dependency on foreign actors springs from the fact that most small and medium-size states compete for foreign investment and access to foreign markets. Divided by political boundaries and high levels of political, social, and economic heterogeneity, most states find it difficult to act collectively. This often makes it relatively easy for a strong economic or political actor—be it a powerful state or a wealthy investor—to practice “divide and rule” strategies against the states. These strategies further erode the capacity of weak sovereigns for collective action and effectively confine

19 Benvenisti, ‘Exit and Voice’ (supra note 14).
them to different “‘cells” in a maze of prisoners’ dilemmas.20 The proliferation of informal and privatized standard-setting bodies further increased the leverage of multinational corporations and disadvantaged diffuse domestic electorates. 21

All these factors suggest that the promise of sovereign independence as the freedom from, as a necessary and sufficient condition for exercising the freedom to, has become in our times a false promise. To this one should add the fact that in many cases there is a lack of congruence between the group of enfranchised voters and the group of those affected by the voters’ decisions. The basic assumption of state democracy—that there is a strong overlap between these two populations—might have been correct in a world of “separate mansions,” when territorial boundaries defined not only the persons entitled to vote but also the community that was primarily affected by the choices made. Today, however, this condition is rarely met, and the consequences manifest themselves in two negative ways. First, voters in one country adopt policies that spill over beyond their states without the affected stakeholders having the opportunity to participate in the vote or to otherwise influence the decisions that are taken. 22 Second, foreign actors increasingly employ economic leverage to influence both candidates and domestic public opinion in other states. While this phenomenon may temporarily compensate for the foreigners’ lack of voting rights, it operates to distort the domestic democratic process in the target states and to disenfranchise their citizens.23

Due to all these factors, the age of global governance poses a severe challenge to domestic democratic processes. It shatters the traditional premise that sovereignty as freedom from can ensure its citizens the freedom to. In general, the transfer of authority to global bodies has eroded the traditional constitutional checks and balances found in many democracies, as well as other domestic oversight and

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20 Benvenisti and Downs (supra note 18).
22 Nadia Urbinati and Mark E. Warren, ‘The Concept of Representation in Contemporary Democratic Theory” (2008) 11 ANN. REV. POL. SCI. 387, 397; see also Jean L. Cohen, Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach) 2 Humanity 127 (2011) (discussing the need to reconsider state boundaries when considering sovereignty); Nancy Fraser, ‘Reframing Justice in a Globalizing World’ (2005) 36 NEW LEFT REV. 69, 71 (arguing that prior conceptions of the nation state are insufficient to address modern problems that spill over national borders).
monitoring mechanisms of executive discretion, and thereby reduced voters’ ability to promote their preferences through the political system.²⁴

(b) Benefits: The Democratic Gains Accrued by the Global Regulatory Space

The picture painted so far is only partial. The ramifications of global constraints on sovereign discretion are not necessarily negative. For the era of global governance offers at the same time an opportunity to reshape the traditional checks and balances and adapt them to the changing conditions. If the primary goal is to promote the freedom to, then globalization opens up new possibilities for securing it. I will not dwell here on the opportunities individuals and communities have to voice their concerns and monitor GGBs.²⁵ In this context I will draw attention to two mechanisms through which GGBs help secure domestic democratic processes. There are mainly two ways by which GGBs can secure the wishes of domestic voters that would otherwise be threatened by the forces of globalization. First, there are GGBs that enforce domestic commitments against their detractors; Second, there are GGBs that are sufficiently robust to engage with other global actors, thereby remedying states' powerlessness.

The first type of GGBs explicitly seek to enhance domestic democratic processes, as in the case of the Aarhus Convention on access to domestic environmental decision-making,²⁶ and to give voice to stakeholders that are sometimes ignored by state organs in the domestic level (e.g., tribunals in the areas of human rights, trade, or investment, or the World Bank Inspection Panel). The UNESCO World Heritage Committee examined critically a mining permit given to a private company operating near the Yellowstone Park, a matter that was beyond the US

²⁴ Richard B. Stewart, Remediimg Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness, 108 AM. J. INT’L L. 211 (2014) (discussing strategies to address the evolving gaps in the efficacy of domestic political and legal mechanisms of participation and accountability resulting from shifts of regulatory authority from domestic to global regulatory bodies); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (discussing what he sees are the (domestic) factors that lead to the rise of an unchecked U.S. presidency). See also Eyal Benvenisti, ‘Exit and Voice’ (supra note 14) (arguing that by employing international organizations as venues for policymaking, state executives and interest groups manage to reduce the impact of domestic checks and balances). There may be additional reasons for the concentration of power in the executive and the decline of domestic checks.

²⁵ For this see the burgeoning literature on Global Administrative Law.

President's constitutional authority.\textsuperscript{27} The same Committee recently managed to convince the Tel Aviv municipality to withstand the pressure of land developers whose initiatives threatened the architectural landscape of the “White City,” a recognized world heritage site by the UNESCO Convention.\textsuperscript{28} States opt for effective global mechanisms of review for the same reasons that they agree on domestic constraints on politics: to tie their own hands (e.g., the efforts of the Labor in Britain to establish the European Court of Human Rights and later on accepting its jurisdiction, all designed to constrain their domestic political rival),\textsuperscript{29} to enhance domestic fiscal discipline (e.g., by joining the OECD, by adopting FATF Recommendations), or to ensure their competitors are equally committed to pursue collective efforts (e.g., trade liberalization and intellectual property protection under the WTO).\textsuperscript{30}

The second institutional benefit states derive from GGBs is the GGBs’ ability to overcome the prisoner’s dilemma situation that competing national regulators face. As mentioned above, states often cave in to demands of a powerful state or a multinational company. For example, the global sports industry obtains immunity from domestic control by insisting on the private character of sporting events but mainly by threatening to boycott athletes from countries that insist on regulating sport activities. A similar problem is created by international organizations when they seek to establish headquarters in a certain jurisdiction but demand that the host state recognize their total immunity from domestic law and courts. In both cases, the European courts – rather than national regulators or national courts – have proven quite successful in offering resistance and indirectly imposing regulation on those global actors. The ECtHR has demanded that IOs respect the basic employment conditions for their employees,\textsuperscript{31} and the ECJ has imposed European legal standards on sporting associations that sought insulation from

\textsuperscript{28} “The Battle of Tel Aviv: The White City against the crumbling city” (Calcalist [Israeli newspaper], 7 March, 2013) (in Hebrew).
\textsuperscript{30} Kal Raustiala, ‘Rethinking the Sovereignty Debate in International Economic Law, 6 J. Int. Econ. L. 841 (2003); Abram Chayes and Antonia Handler Chayes, The New Sovereignty (Cambridge, MA, 1995).
\textsuperscript{31} Waite and Kennedy, Application No. 26083/94, European Court of Human Rights, 18 February 1999, (1999), ECHR 13; 116 ILR 121, paras. 11-19, 47, 67-69 (ECtHR indirectly reviews the treatment of employees of an international Organization).
public law obligations.\textsuperscript{32} Another example is the successful initiative to combat bribery of foreign officials under the auspices of the OECD, which responded to a collective action problem that plagued exporting states and importing communities.\textsuperscript{33}

Counterintuitively perhaps, global bodies assist domestic communities to enhance their ability to retain their collective and individual \textit{freedom to} against pressures emanating from internal or external actors. The next Part outlines opportunities for domestic actors to exercise their \textit{freedom to} also beyond the jurisdiction of their state, and thereby shape the global regulatory sphere.

III. The Vital Role of State Institutions within the Global Regulatory Framework

State organs do not simply passively surrender their regulatory functions to the rising global bodies. They have come to realize that in this age of global governance, external constraints on states have become ubiquitous as they have become strict, and as such they can no longer be ignored. Rather than reflecting the demise of the state,\textsuperscript{34} key national institutions, particularly courts, have proven their willingness and resourcefulness in finding novel and nuanced ways to react to the emerging forms of global governance that allow them to participate in shaping the emerging global governance scene and thereby to ensure significant degrees of \textit{freedom to} to their respective domestic constituencies as well as to others. Several state organs have become important global actors that shape global policies. National courts, once adverse to international law, embrace it as a tool to enhance inter-judicial cooperation and thereby to indirectly strengthen domestic democratic processes.\textsuperscript{35} A new version of sovereignty emerges, one that is based not on incorporation or assimilation into the global sphere that leads to the “relativization of the state” as Kelsen has envisioned and propagated,\textsuperscript{36} but one that identifies state organs as effective participants in an evolving system of global

\textsuperscript{32} Case C-519/04 P, David Meca-Medina & Igor Majcen v. Comm'n of the Eur. Communities, 2006 E.C.R I-06991; Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R I-04921 (in these cases, the ECJ was able to resolve the collective action problem created when private sports associations imposed their standards on individual states).

\textsuperscript{33} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

\textsuperscript{34} Cf. Susan Strange, The Retreat of the State (1996).


\textsuperscript{36} “the possibility of an international legal order constituting an international community of which the state is a member, just as corporations are members of the state.” Hans Kelsen, Foundations of Democracy, 66 ETHICS 1, 33 (1955).
checks and balances. Characteristically is the position of the German Constitutional Court which has on the one hand recognized that sovereignty is “freedom that is organised by international law and committed to it,” yet at the same time moved to ensure democratic controls over global bodies as well as their compliance with human rights obligations.

This system, which, like the domestic constitutional systems, benefits from constant competition between institutions, promises stability through friction. While relatively weaker states are less likely to have significant influence on these emerging checks on decision-making, those checks offer their best available protection, compared to a lawless environment that is exploited by powerful external actors who play one weak state against another.

This evolving global system may perhaps reflect Kant's vision of an international society forced to move slowly and in a non-linear fashion “from the lawless condition of savages into a league of nations.” Counter-intuitively, it is people's natural antagonism that yields cooperation, first at the national level and later on at the global level:

“[t]he same unsociability which drives man to [the creation of a commonwealth] causes any single commonwealth to stand in unrestricted freedom in relation to others; consequently, each of them must expect from another precisely the evil which oppressed the individuals and forced them to enter into a lawful civic state. The friction among men, the inevitable antagonism, which is a mark of even the largest societies and political bodies, is used by Nature as a means to establish a condition of quiet and security.”

In an interdependent world, states can act proactively in response to global regulation or the lack of it. By acting unilaterally states often seek to influence outcomes and thereby promote their voters’ preferences. They do so first by prescribing norms designed to modify the behavior of outsiders, and second by reviewing the acts or omissions of GGBs. In these two ways, states – mostly, powerful states – take an active role in global regulation.

40 Id.
The first type of proactive role is the unilateral setting of standards applicable to domestic and foreign actors alike, what I called "legislating for humanity." This is not a novel phenomenon. Already in the early nineteenth century, Great Britain resorted unilaterally to ban the slave trade. In recent years, this type of norm-making has spread. The United States imposes sanctions on all actors, public and private, including foreign ones, who do not comply with the US’s rules on illegal trafficking in humans. The US also imposed trade restrictions on all those engaged in the harvest of shrimp or the catch of tuna to protect endangered species around the world. Its Food and Drug Administration (FDA) demands that all non-U.S. clinical drug trials comply with FDA regulations. The EU, in turn, required any oil tanker visiting a port with the EU area, irrespective of their flag, to have a double-hull design, or, most recently, demands that non-EU air carriers landing in EU territory take part in the EU carbon emissions scheme which would apply also to those segments flown outside the EU area. One could add to this list also the rendering of global law enforcement services like the extension anti-bribery legislation to the global arena, or the extension of the courts’ jurisdiction to foreign events, as in the case of the Alien Torts Statute (ATS). While most of

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these acts were prescribed by developed countries, there are also similar acts by the developing South.\(^{50}\)

What is common to these and other unilateral regulatory efforts of this type is their aim: the unilateral attempt to prevent or remedy collective action failures that produce global public “bads.”\(^{51}\) A key characteristic of this type of “legislation for humanity” is the net burdens that it imposes on domestic producers and consumers in addition to the equivalent burdens it imposes on foreigners.\(^{52}\) Unlike the unilateral extension of the continental shelf or exclusive economic zone that may also be motivated by global welfare concerns but also carry benefits to the regulating state, the above examples do not offer exclusive benefits for the regulating state. Instead, they level the playing field by demanding competitors to abide by the same or equivalent constraints.\(^{53}\)

The second proactive role of state organs is characterized by their review of GGB decisions and policies. One challenge of global governance is the availability of the review function that keeps decisionmakers from deviating from the goals they are expected to pursue. Theoretically, the rise of global governance opens up numerous opportunities for review: the plurality of GGBs engaging in robust “peer review” of each other. But this is just (bad) theory. As we know from domestic experiences, the review function depends on a strong incentive of the reviewed to accept it.\(^{54}\) Because many if not most of contemporary GGBs are set up and dominated by the same small group of powerful states or economic

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50 Chile issued conservation measures for the swordfish migratory stocks in the South Pacific, see Marcos Orellana, ‘The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO’ (2002) 71 Nordic J. Int’l L. 55.

51 This last emphasis on global public bads excludes legislation that extends extraterritorially but is designed to prevent adverse effects on the domestic jurisdiction rather than respond to global collective action failures. For example, anti-trust laws (F. Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004) and security exchange regulations (Morrison v. National Australia Bank 130 S.Ct. 2869 (2010)) are not “legislation for humanity.” Therefore U.S. courts rightly refused to apply them to events not related to the U.S..

52 There is also the rarer possibility that the unilateral measure burdens only one’s own nationals and state agencies. See, for example, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir., 1993) (environmental impact assessment required under U.S. Law applied to a scientific station of a U.S. Federal Agency in Antarctica, which the court regards as a “global common”), but this type of legislation does not raise the problems discussed here. Compare Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (the Defenders of Wildlife had no standing to sue the U.S. Secretary of the Interior for not complying with procedural obligations under the Endangered Species Act of 1973 when aiding the constructions of dams in Egypt and Sri Lanka).


interests, those key actors would have little interest in being subjected to effective external review. They will not voluntarily provide it, and if they do, they will ensure that they control the identity and tenure of the reviewers (judges, ombudspersons, comptrollers). As a result, the great potential for GGB peer review is yet to materialize. But this void is being filled, at least partly, by the review functions of state organs: legislatures, administrative agencies, and courts.

While legislatures rarely take an active part in global policymaking and have limited opportunities to review the policies of global bodies, there are already a few exceptions. One notable exception is the U.S. Congress, whose influence in this context has been noted and analyzed. As Kristina Daugirdas suggests, Congress’s ability to influence global bodies is a function of the dependency of those bodies on U.S. funding. In fact, the U.S. Congress has used this leverage by withholding U.S. funding from IGOs like the UN Human Rights Council and UNESCO. Most recently the Swiss Parliament has passed a law that strengthened the oversight of more than 60 global sports associations based there, including the Fédération Internationale de Football Association (FIFA) and the International Olympic Committee (IOC). The so-called “Lex FIFA” designates the top officials of the sports associations residing in Switzerland as “Politically Exposed Persons” who, according to the Financial Action Task Force (FATF) rules could be subjected to corruption investigations. Thus far sports bodies based in Switzerland were not obliged to register with the state or to publish their accounts. They benefitted from tax breaks, autonomy to govern their own affairs, and exemption from Swiss anti-corruption laws, and effectively enjoyed immunity that led to impunity.

Domestic administrative agencies that implement global standards have opportunities under domestic law to filter out standards that they deem incompatible with domestic law or in conflict with local interests. The question is whether national agencies will use their internal procedures not to avoid compliance, but rather to press the global actor to become more accountable and

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56 For a rare example see Abigail C. Deshman, ‘Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture’ (2011) 22 Eur. J. Int'l L. 1089 (the Council of Europe…)


58 Daugirdas, at 555-556.

59 “New Swiss law allows more scrutiny of Fifa and IOC finances” (Guardian, 12 Dec. 2014).

promote global interests and concerns. The limited experience accumulated thus far suggests an interesting dichotomy. While several agencies do open their internal policy-making procedures to private stakeholders (including foreign ones) in their preparations for the meetings of the global body, thereby enabling domestic actors to shape the agency's position at the global level, they would be less open to including civil society and other actors in the ex-post implementation stage. Thus, while the U.S. Environmental Protection Agency was eager to involve private stakeholders and took measures to increase public participation and transparency during their preparations for the Montreal Protocol, it showed less interest to do so when it came to implementing the Protocol in domestic law.62

The most effective state organ that has offered "global review services" have been the national courts which have emerged in recent years as key actors in indirectly reviewing decision-making at the global level, using their “gatekeeping” opportunity to reject global policies that they regard as incompatible with domestic law.63 Reversing a long-held aversion to reviewing global standards and a strong deference towards their executive branches,64 national courts have in recent years changed course. Probably due to having become more aware of the challenges that the global regulatory structure poses for their domestic democratic processes, and of their ability to act together with their peers in other countries, they have begun to develop tools to respond to foreign and global actors.65 National courts can invoke several legal sources and doctrines. The ubiquitous response is to rely on the domestic constitution or on a statutory text, but courts have also used international law principles to narrowly interpret the immunities of IGOs66 or the text of the international standard.67 In one case a U.S. court found


62 Hans, at 844.


67 T-727-08, Abdelrazik v. Minister of Foreign Affairs & Attorney General of Canada, 2009 FC 580 (Can.).
that an international claims commission did not offer adequate protection for a claimant and therefore refused to block her suit based on the private law procedural doctrine of *forum non conveniens.*

The assertiveness of the national courts offers “cover” for international tribunals who worry about compliance with their judgments and about retaliation from key member states. If national courts are expected to rule against the IGOs, state executives may be more inclined to tolerate a ruling by the international tribunal to the same effect.

The willingness of state organs to intervene in policymaking at the global level holds out the promise of reducing excessive executive discretion at the global level and of improving domestic accountability. These emerging global checks and balances promise to enhance democracy at both levels by helping to ensure that decisionmakers take account of the interests of a greater proportion of the relevant stakeholders and that the outcomes are therefore better informed, including by the voices of foreigners, who are often excluded from domestic and global decision-making processes.

The integration of states into the global regulatory space seems less advantageous for poor countries than strong ones. Obviously, powerful states have greater possibilities to shape policies of global actors by controlling those actors or by acting unilaterally. But there are grounds to believe that coalitions of like-minded states would be able to take an active part in global affairs. The emerging checks offer their best available protection compared to a predatory environment in which weak states often find themselves competing against their peers to satisfy the demands of a powerful external actor who exploits their divisions to pursue predatory policies. Relatively independent judicial bodies, will have opportunities to heed the preferences of voters in those countries by generalizing and rationalizing the international legal landscape and thereby provide weaker states with a stable and interconnected hierarchy of claims—for example, linking trade obligations with human rights concerns—that they can then employ in a variety of venues. The fact that courts are more resilient to economic and political pressures than executives promises that judicial intervention in policy making might be able to improve the protection of the interests of the weak states or their citizens.

In addition, powerful states have come to realize that they have stakes in ensuring stability and welfare in weaker states, to avert migration flows, to reduce military threats, and to ensure markets for their products.

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69 See Eyal Benvenisti & George W. Downs, National Courts (supra).
70 Id.
IV. The Normative Implications of “Interdependent Sovereignty:” An Outline of Possible Future Development

The sense of interdependency is common to many states, strong and weak. Likewise is the understanding that unilateral state action has an effect across political boundaries and hence must not be taken lightly by domestic decisionmakers. Obviously developing countries have a strong sense of dependency on other actors’ policies, and they occasionally demand accountability. For example, in 2011 a Chinese analyst urged Washington to resolve the internal dispute over U.S.’s borrowing limit, reminding the political factions them that “with leadership comes responsibility” and that “the well-being of many other countries is also in the impact zone when the donkey and the elephant fight.”

But the conviction that interdependency must be taken into account is also shared by the United States that sees global stability as crucial for its own economic success. For example, in a 2014 lecture, the U.S. Fed Vice Chairman Stanley Fischer pointed out that in “a progressively integrating world economy and financial system, a central bank cannot ignore developments beyond its country’s borders.” Fischer emphasized that the U.S. has an interest in improving global financial conditions because of their positive effects on the U.S. economy. Therefore, he argued, the U.S. monetary policies “were not beggar thy neighbor policies.” For the same reason, “in the normalizing of its policy, just as when loosening policy, the Federal Reserve will take account of how its actions affect the global economy.” And if foreign growth is weaker than anticipated, the consequences for the U.S. economy could lead the Fed to remove [monetary] accommodation more slowly than otherwise.” The U.S. Special Envoy for Climate Change, Todd D. Stern, described the U.S. approach in the negotiations on the United Nations Framework Convention on Climate Change in the same terms: it was in the U.S.’s best economic interest to press for a global reduction of greenhouse gas emissions.

But perhaps interdependency obliges states to take others’ interests seriously into account not only out of sheer self-interest, but ultimately also as matter of justice. When Kant spoke of “[t]he friction among men, the inevitable antagonism, which is a mark of even the largest societies and political bodies,” he regarded it

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72 http://www.federalreserve.gov/newsevents/speech/fischer20141011a.htm
73 http://www.state.gov/s/climate/releases/2014/232962.htm
as "Nature['s] means to establish a condition of quiet and security."74 For Kant, perpetual peace is to be "produced and maintained by the[ ] equilibrium [of "all powers"] in liveliest competition."75 The metaphor of lively (or not so lively) competition was also used by James Madison to describe the beneficial friction between competing entities, secured by constitutional law to prevent the occurrence of "an unjust combination of a majority of the whole," by "comprehending in the society so many separate descriptions of citizens [to] render [such an unjust majority] very improbable, if not impracticable."76 Under this theory, friction between decision-makers generates respect for each other out of self-interest. There is no need to impose on states a duty to consider the global costs of their actions because states will voluntarily internalize those costs given the liveliest global competition.

However, while the growing inter-state friction operates like a global system of competing bodies that can often diffuse power, it is yet to provide a fully effective and equal protection to all. Powerful actors, both public and private, continue to enjoy opportunities to impose negative externalities on others with impunity. Debates about policy making still require mediation and also finalization though courts. It is therefore important to insist that taking others’ interests into consideration is not only a matter of self-interest but also a moral, if not a legal, obligation.77

We are just beginning to realize what taking foreigners’ interests into account could mean for states. When states “legislate for humanity” or otherwise form policies that seek to set global standards, it is quite obvious that they should keep in mind the impact of their policies on others, and that they should balance the others’ interests against their own. The same rationale should equally apply to situations where state organs regulate domestic activities that potentially have external ramifications. The need to balance their citizens’ rights and interests against those of potentially affected foreigners raises novel questions. Take for example the matter of speech that offends religious sentiments of foreigners. Should the foreigners’ sensitivities be taken into account? When national laws regulating speech, or treaties like the European Convention on Human Rights require states to subject the freedom of expression to “conditions, restrictions … for the protection of the reputation or rights of others,”78 do they include foreigners in faraway lands who are exposed to the speech by social media? And if so, who defines their “rights”?

74 Supra note 39.
75 Id.
76 Federalist No. 51
77 Benvenisti, Trustees of Humanity (supra).
78 Article 10 ECHR.
The jurisprudence of the ECtHR offers inconsistent responses. The court did include foreigners – both foreigners who resided in other European countries or even those who lived outside Europe – among those affected by domestic speech. It determined that the German press had violated the privacy of Princess von Hannover from Monaco by publishing paparazzi photos,\(^79\) and on the other hand found that the content of a publication by a Swedish journal had not violated the right of a person residing in Mozambique to respect for his private and family life under Article 8 of the Convention.\(^80\) The principle that when “the acts of [a member state] continue to produce effects, albeit outside [that state’s] … such that [that state’s] responsibility under the Convention could be engaged” has been recognized by the ECtHR on one occasion.\(^81\) On the other hand, when Moroccan citizens and NGOs petitioned to the court against Denmark’s lack of repression of what they considered to be offensive caricatures of the Prophet Muhammad, the Court found the petition inadmissible because according to the jurisdictional clause, the contracting states “must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their ‘jurisdiction’ [and] persons affected when situated outside the jurisdiction cannot be regarded as ‘within the jurisdiction’ of that state.”\(^82\)

Beyond textual interpretations, the question remains whether the Trail Smelter principle\(^83\) that stipulates that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another” should be extended to cover regulatory decisions that affect also physical and even non-physical harms where the “harm” is a matter for normative assessment.\(^84\) At the very least one could expect regulators to take into account (also) the impact of the regulations on “others” however defined.

V. Conclusion


\(^82\) Ben El Mahi v. Denmark (App. No. 5853/06, 2006) (available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78692) (“The Court considers that there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extraterritorial act.”).

\(^83\) Trail Smelter (US/Canada) (1941) 3 RIAA 1905.

In our global condominium, for most states, the continued insistence on freedom from external influence imposes isolation on their citizens and prevents them from enjoying a meaningful “freedom to.” This "ability to be or to do" is more and more secured by states’ and individuals’ access to both domestic and global arenas of policy making and review and on the complex interaction among them. Sovereigns that seek to ensure the freedom to to their citizens need to engage proactively with foreign actors, public and private.

The evolution of global governance bodies creates pressures on states for convergence and increase the effectiveness of global and foreign review of national executive action. But sovereign states continue to act as key participants in the robust exchange between global, regional and local policy makers. Thereby they retain their promise of ensuring to their citizens the opportunity to “freely determine their political status and freely pursue their economic, social and cultural development” in an interdependent world.

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