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**Democracy Captured: The Mega-Regional Agreements and  
the Future of Global Public Law**

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DEMOCRACY CAPTURED: THE MEGA-REGIONAL AGREEMENTS AND THE  
FUTURE OF GLOBAL PUBLIC LAW

Eyal Benvenisti\*

*“...strong, high-standards trade agreements...  
are vital to ... establishing rules for the global  
economy that help our businesses grow and hire.”*

President Obama, Statement on Senate  
passage of Trade Promotion Authority and  
Trade Adjustment Assistance, May 22, 2015<sup>1</sup>

**Abstract**

The negotiations over the Transatlantic Trade and Investment Partnership (TTIP) and the Trans Pacific Partnership (TPP) exemplify the efficacy and the consequences of fragmentation as a “divide and conquer” strategy. By choosing this negotiating strategy and by maintaining secrecy over the contents of the envisioned rules, the negotiators exclude diverse stakeholders in developed and developing countries who will be affected by agreements that are set to establish rules for the global economy. This Essay outlines the challenges to democracy – both at the domestic level and at the global level – posed by these negotiation processes and by their envisioned outcomes. It then moves on to assess the potential institutional responses that might eventually arise and replicate, at the global level, checks and balances among stakeholders that have traditionally been secured domestically by national constitutions and enforced by national courts and legislatures.

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<sup>1</sup> *Statement by the President on Senate Passage of Trade Promotion Authority and Trade Adjustment Assistance*, THE WHITE HOUSE (May 22, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/05/22/statement-president-senate-passage-trade-promotion-authority-and-trade-a> [hereinafter *Statement by the President*].

## I. Introduction

The on-going negotiations over the Transatlantic Trade and Investment Partnership (TTIP) and the Trans Pacific Partnership (TPP) are yet another significant link in the chain of international agreements that closes around key aspects of the domestic policy space of many if not most countries and threatens to render parts of it ineffectual. By choosing a negotiating strategy of fragmentation – a “divide and conquer” strategy that separates between competing groups of state parties – and by maintaining secrecy over the contents of the negotiations, the negotiators are hoping to impose top-down significant new rules for the global economy – far beyond trade and investment – that will affect most voters in developed and developing countries without their knowledge or consent. This Essay begins by explaining the logic of fragmentation as a negotiation strategy and as a structure of governance, and then explores the potential ramifications of the mega-regionals by outlining the challenges to democracy – both at the domestic level and at the global level – posed by these negotiation processes and by their envisioned outcomes. But these agreements are likely to face challenges from several national legislatures and courts that need to approve their compatibility with their respective legal orders. The Essay therefore moves on to assess the potential institutional responses that might eventually arise to these agreements or to their operation, attempting to contain them and limit their impact. To the extent that these national actors can cooperate with each other and form a united “front,” they could replicate, at the global level, checks and balances among stakeholders that have traditionally been secured domestically by national constitutions and enforced by national courts and legislatures.

## II. The Silencing Effects of Fragmentation

It was already in 2006 that the then U.S. President, George W. Bush, set forth a new agenda for American foreign policy. The U.S. National Security Strategy of 2006 declared its preference for “results-oriented partnerships” that “emphasize international cooperation, not international bureaucracy” and are “oriented towards action and results rather than legislation or rule-making.”<sup>2</sup> In this spirit of functionalism, in 2007 the U.S. and the EU created the Transatlantic Economic Council to explore ways to strengthen their economic partnership, leading to the formal launching of TTIP negotiations in 2013. In 2008 the U.S. began talks over the TPP with eleven other trading partners.<sup>3</sup> With these two parallel initiatives, the U.S. has since been trying to forge what U.S. Secretary of State Hillary Clinton labeled an

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<sup>2</sup> THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 46 (2006), *available at* <http://www.comw.org/qdr/fulltext/nss2006.pdf>.

<sup>3</sup> The states of the Trans-Pacific region include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

“economic NATO”<sup>4</sup> and what others have referred to as the “shap[ing of] the global rules of trade.”<sup>5</sup> But while the TTIP and the TPP are conveniently presented as addressing the rise of China and focusing on trade, they have other, far-reaching goals. In addition to reduction of various barriers to trade beyond the current framework of the World Trade Organization (WTO), the mega-regional agreements aim at harmonizing regulation, customs and e-commerce, at setting standards for labor and environmental protection, for the protection of foreign investments, government procurement, medical devices, professional services, pesticides, information and communication technology, pharmaceuticals, textiles, and vehicles, providing enhanced protection of intellectual property, and setting limits to state-owned enterprises.<sup>6</sup> As U.S. Vice President Joseph Biden candidly said, the general aim is “to help shape the character of the global economy.”<sup>7</sup> The U.S. President put it even more starkly when he stated that these “strong, high-standards trade agreements... are vital to ... establishing rules for the global economy that help our businesses grow and hire.”<sup>8</sup>

The choice to pursue the regional track rather than the multilateral one has been attributed to the failure of the Doha Round. But why these two parallel – and essentially similar – tracks rather than an inclusive one? And why do the negotiators seek to keep the content of the negotiations secret? Is it because the pivotal actor, the U.S., is playing a Machiavellian game that prevents its negotiating partners from uniting against it, while at the same time blocking input from the rest of the world? Intentionally or not, the simultaneous negotiations reduce the bargaining power of America’s partners. The EU, otherwise almost an equal power to the U.S. in bilateral negotiations, is undercut by the parallel TPP track, where the

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<sup>4</sup> David Ignatius, *A free-trade agreement with Europe?*, THE WASHINGTON POST, Dec. 5, 2012, available at [https://www.washingtonpost.com/opinions/david-ignatius-a-free-trade-agreement-with-europe/2012/12/05/7880b6b2-3f02-11e2-bca3-aadc9b7e29c5\\_story.html](https://www.washingtonpost.com/opinions/david-ignatius-a-free-trade-agreement-with-europe/2012/12/05/7880b6b2-3f02-11e2-bca3-aadc9b7e29c5_story.html); Jeffrey J. Schott and Cathleen Cimino, *Asia’s Rise and the Transatlantic Economic Response*, in A TRANSATLANTIC PIVOT TO ASIA: TOWARDS NEW TRILATERAL PARTNERSHIP 269, 273 (Hans Binnendijk ed., 2014) (“TTIP has the potential to improve U.S. and European competitiveness in the global economy, and thus is an integral component of the transatlantic strategy to address the new commercial challenge from emerging Asian countries.”)

<sup>5</sup> EU Trade Commissioner Karel de Gucht, Statement by EU Trade Commissioner Karel De Gucht on the Transatlantic Trade and Investment Partnership (TTIP) ahead of the second round of negotiations, Sept. 30, 2013, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=969>.

<sup>6</sup> European Commission, EU TEXTUAL PROPOSAL – POSSIBLE PROVISIONS ON STATE ENTERPRISES AND ENTERPRISES GRANTED SPECIAL OR EXCLUSIVE RIGHTS OR PRIVILEGES, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153030.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf) (last visited July 26, 2015) (tabled during the TTIP negotiations) (“There is a clear need to understand the behaviour and practices of [state-owned enterprises] in the international trading system, to identify the key concerns and to develop ambitious common rules to discipline the harmful effects of SOEs stemming from undue advantages which would contribute to creating and maintaining a level playing field between public and private market participants.”)

<sup>7</sup> Dan Mullaney, *Opening Remarks by U.S. and EU Chief Negotiators for the Transatlantic Trade and Investment Partnership (TTIP) Round Nine Press Conference* New York, NY (April 24, 2015), <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/april/opening-remarks-us-and-eu-chief#>. See also Brett Bickel, *Harmonizing Regulations in the Financial Services Industry through the Transatlantic Trade and Investment Partnership*, 29 EMORY INT’L L. REV. 557 (2014-2015).

<sup>8</sup> *Statement by the President*, *supra* note 1.

non-American partners are more divided and hence cannot present a united front vis-à-vis the U.S.<sup>9</sup> European economists have noted that the very existence of the TPP talks has put considerable pressure on the EU to negotiate the TTIP. They have expressed the immediate worry that the TPP might discriminate against European firms,<sup>10</sup> and also the more long-term concern that “the rules enshrined in the TPP could possibly be held as a model to be emulated” in future agreements.<sup>11</sup>

The strategy of “divide and rule” is one of the key strategies of “fragmentation” that powerful states often resort to in their international relations.<sup>12</sup> By avoiding (or by exiting from) broad, integrative agreements in favor of a large number of exclusive agreements that are functionally defined, the powerful actors can limit the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase the weak parties’ bargaining power and influence and thereby create a more democratized and egalitarian regulatory system. The powerful actors manage thereby to secure the outcomes they prefer without assuming accountability for the shortcomings of a global legal system.

The strategy of fragmentation poses two challenges to democratic decision-making:

- (1) The “horizontal” challenge – the loss of voice and influence in collective decision-making of less powerful states. These include the weaker states that are squeezed by the fragmentation strategies of their negotiating partners as well as those countries who are not invited to the bargaining table;
- (2) The “vertical” challenge – the loss of voice in collective decision-making of diffuse constituencies within the states. This loss of voice is the result of the increased opportunities of capture by special interests such as pharmaceutical companies and foreign investors of states whose negotiators are engaged in fragmented, secretive negotiations.<sup>13</sup>

A case in point that substantiates both concerns – the horizontal and vertical effects of fragmentation driven by special interests – is the current U.S. effort to enhance global standards for protecting intellectual property rights. Margot Kaminski is among the scholars who have been monitoring

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<sup>9</sup> Xinyuan Dai, *Who defines the rules of the game in East Asia? The Trans-Pacific Partnership and the strategic use of international institutions*, 15 INT’L RELATIONS OF THE ASIA-PACIFIC 1, 8 (2014) (arguing that “in a region where no intraregional institution binds all regional powers, it is easier to imagine new institutions [like the TPP] that attempt to reshape political and economic geography and rewrite regional governance structure.”)

<sup>10</sup> Patrick Messerlin, *The Much Needed EU Pivoting to East Asia*, 10 ASIA PACIFIC J. EU STUD. 9 (2012), available at [http://gem.sciences-po.fr/content/publications/pdf/Messerlin\\_EU-Pivot112012.pdf](http://gem.sciences-po.fr/content/publications/pdf/Messerlin_EU-Pivot112012.pdf) (“[t]he main risk of discrimination against EU firms comes, in the short and medium term, from the Transpacific Partnership.”)

<sup>11</sup> Billy A. Melo Araujo, *Regulating Services Through Trade Agreements – A Comparative Analysis of Regulatory Disciplines Included in EU and US Free Trade Agreements*, TRADE L. & DEVELOPMENT (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605776](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605776).

<sup>12</sup> Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) [hereinafter: *Benvenisti & Downs, The Empire's New Clothes*].

<sup>13</sup> Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999). See, generally, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), and the vast scholarship on “Public Choice” that has emerged since.

the ways in which the U.S. has “aggressively shifted among various international law and policy-making forums to promote a goal of harmonizing the world’s intellectual property laws in its image.”<sup>14</sup> What initially began with the WTO agreements (and TRIPS at its center) has proven insufficient, as legislatures and courts in the developing world have interpreted their obligations narrowly.<sup>15</sup> As multilateral negotiations over updating the WTO accords failed, the U.S. moved to bilateral free trade area (FTA) agreements, and later to secretive negotiations over an Anti-Counterfeiting Trade Agreement which was defeated by the EU Parliament that refused to ratify it.<sup>16</sup> Now the same effort is playing out in the TPP negotiations, with the same secrecy and capture.<sup>17</sup> If the TPP negotiations succeed they will set new standards for IP protection, and there would be much pressure on the EU to accede, and on the EU Parliament to ratify similar standards.

Kaminski and her colleagues have found that the process is captured by U.S. special interests that influence the U.S. Trade Representative (USTR). These small groups exploit the fact that the USTR is exempted from the accountability requirements of the U.S. Administrative Procedure Act and other federal accountability obligations.<sup>18</sup> As a result, the international IP law that is developed reflects their interests<sup>19</sup> and harms users and consumers, especially those in the developing world.<sup>20</sup> It seeks to preempt legislation in several developing countries that in recent years has sought to ensure access to life saving drugs.<sup>21</sup>

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<sup>14</sup> Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT’L L. REV. 105 (2013).

<sup>15</sup> See the Indian Supreme Court judgment in *Novartis AG v. Union of India*, (2013) 13(1) SCR 148 (India), available at <http://supremecourtindia.nic.in/outtoday/patent.pdf>.

<sup>16</sup> Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement*, 2011 PIJIP RESEARCH PAPER SERIES, paper no. 17.

<sup>17</sup> Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, The Washington Post (Feb. 27, 2014) <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>.

<sup>18</sup> Complaint of injustice and declaratory relief, *Intellectual Property Watch v. United States Trade Representative* (S.D.N.Y. filed Dec. 18, 2013) (No. 13 CV 8955), available at [http://www.law.yale.edu/documents/pdf/Clinics/IP\\_Watch\\_v.\\_USTR\\_-\\_13-cv-8955\\_-\\_complaint\\_\(00685445\).pdf](http://www.law.yale.edu/documents/pdf/Clinics/IP_Watch_v._USTR_-_13-cv-8955_-_complaint_(00685445).pdf)

<sup>19</sup> Margot E. Kaminski, *The Capture of International Intellectual Property Law through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014) [hereinafter: Kaminski, *The Capture of International IP Law*].

<sup>20</sup> Burcu Kilic, Hannah Brennan & Peter Maybarduk, *What is Patentable Under the Transpacific Partnership? An Analysis of the Free Trade Agreement’s Patentability Provisions from a Public Health Perspective*, 40 YALE J. INT’L L. ONLINE (2015), at 119-120, available at <http://www.yjil.org/docs/pub/o-40-kilic.pdf> (the “standards of the TPP would impede access to affordable medications and potentially threaten the livelihood of communities that rely on traditional farming practices”). The leaked TPP provisions suggest that the future regime “contains insufficient balancing provisions for users, consumers, and the public interest [and] would be particularly harmful for developing countries, where the risks and effects of exclusionary pricing by intellectual property monopolists are often most acute.” See also, Amy Kapczynski, *The Trans-Pacific Partnership — Is It Bad for Your Health?*, N. ENGL. J. MED 201 (2015), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1506158?query=TOC>.

<sup>21</sup> UNITAID, *The Trans-Pacific Partnership Agreement: Implications for Access to Medicines and Public Health*, 26-27 (March 2014), available at [http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report\\_Final.pdf](http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf)

The *Washington Post* has offered an illuminating analysis of “How Industry Voices Dominate the Trade Advisory System.”<sup>22</sup> This study demonstrates how special interests dominate the U.S. administration’s negotiations of both the TPP and the TTIP. It reveals that representatives of private industry and trade groups constituted at a relevant point in time the lion's share of committee members – 85% of the total – of the Industry-Trade Advisory Committees established by the USTR to assist it in forming its policies and negotiating with its partners. Crucially, in 15 out of a total of 28 committees, key committees that addressed the most sensitive issues for the trade and industry groups, the latter accounted for 100% of the membership.

This Essay seeks to highlight the two systemic challenges that are posed by the simultaneous mega-regional negotiations: Part II discusses the vertical challenge to our traditional domestic institutions that check executive power, namely the legislatures and the courts; and Part III outlines a horizontal challenge to the ideal of “sovereign equality” and the principle of equal entitlement of human beings, as the negotiators seek to unilaterally shape the global rules on trade. My aim in this Essay is not to add my voice to those against these trade talks, but to analyze their consequences and reflect on the possible legal and institutional responses that would mitigate the costs of this new and perhaps inevitable partisan way of “establishing rules for the global economy.” Therefore, the challenges having been outlined, Part IV suggests potential responses and asks whether “global checks and balances” could evolve to prove effective in this context.

### **III. TPP, TTIP and the Vertical Challenge to Domestic Constitutional Safeguards**

The TPP and TTIP talks and the emerging regimes they seek to create could potentially undercut the institutions that in democracies check the otherwise unbridled power of the executive: the legislature – the venue for deliberating and negotiating the preferences of the voters – and the judiciary – the institution that protects individual rights against governmental abuse of authority. Thus far most of the public attention in this context has focused on the latter challenge, although the former is arguably as problematic, if not more so. For the sake of clarity, I will first (in Section (a)) deal with the challenge to the courts by the proposed resort to arbitration. Section (b) will address the adverse effects of the proposed agreements on the opportunities for legislatures to shape policies in those areas covered by the agreements.

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<sup>22</sup> Ingraham & Schneider, *supra* note 17.



*a. The Challenge to the National Judiciaries: Investor-State Dispute Settlement (ISDS) vs. Judicial Review by Administrative and Constitutional Courts*

According to the text released on November 5, 2015, exactly a month after its conclusion,<sup>23</sup> the TPP seeks to set up Investor-to-State Dispute Settlement (ISDS) mechanisms, by means of which foreign investors could circumvent domestic regulatory bodies and administrative court review by instituting arbitration proceedings before ad hoc arbitral tribunals when they seek to challenge national regulations they deem incompatible with the international agreement. As EU negotiators have acknowledged, the TTIP envisions a similar mechanism.<sup>24</sup> This turn to privatized dispute settlement mechanisms has generated worries, recently expressed by several legal scholars.<sup>25</sup> Their chief concerns focus on the unfair advantage they see in allowing foreign parties to challenge regulations enacted by democratically-elected officials before private arbitrators in a process that is insulated from democratic input and is not subject to review, and in proceedings that only the foreign investor can initiate. These scholars express concern with an ensuing “regulatory chill” that would limit the space for policymaking by those fearing costly and unequal dispute resolution proceedings.

The rebuttal of these concerns came from an august group of international lawyers.<sup>26</sup> They defended ISDS, *inter alia*, by noting that arbitrators have only limited authority to review state action (they would intervene only in cases of “arbitrariness,” discrimination against the foreign actor, or other violations of the agreement), while bona fide government policies can be expected to pass muster with them. Moreover, the arbitrators are authorized “only” to impose damages and therefore are incapable of requiring states to rescind policies found faulty by the arbitrators. Finally, the ISDS supporters mentioned that ISDS mechanisms do typically include review procedures that resemble the protections often found in national court systems.<sup>27</sup>

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<sup>23</sup> Text of the Trans-Pacific Partnership, available at <https://www.tpp.mfat.govt.nz/text>.

<sup>24</sup> Cecilia Malmström], *Investment in TTIP and beyond – the path for reform (2015)*, [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (Malmström is the EU Commissioner for Trade).

<sup>25</sup> Letters of 11 March, 2015 (<http://www.citizen.org/documents/lawyers-isds-letter-march-2015.pdf>), and 30 April, 2015, <http://readersupportednews.org/opinion2/277-75/30076-focus-5-leading-legal-scholars-on-tpp-we-write-out-of-grave-concern>. See also memo on the potentially skewed allocation of costs (state parties incur costs, private actors the benefits), Lauge N. Skovgaard Poulsen, Jonathan Bonnitcha & Jason W. Yackee, *Costs and Benefits of an EU-USA Investment Protection Treaty*, (2013), LSE PAPER, available at [http://www.eu.dk/samling/20131/kommissionsforslag/KOM\(2013\)0136/bilag/8/1368047.pdf](http://www.eu.dk/samling/20131/kommissionsforslag/KOM(2013)0136/bilag/8/1368047.pdf) (“we assume that, all else equal, it would be significantly more costly for the UK to defend itself against an ISDS claim than an equivalent domestic court/domestic law claim.”). Entrance barrier: the average costs of litigation come to slightly over USD 4 million per party, *id.*

<sup>26</sup> International Law Experts Respond to Alliance for Justice ISDS Letter (April 8, 2015) [https://www.mcgill.ca/fortier-chair/files/fortier-chair/isds\\_press\\_release\\_april\\_2015.pdf](https://www.mcgill.ca/fortier-chair/files/fortier-chair/isds_press_release_april_2015.pdf)

<sup>27</sup> The scholars did mention that in *BG Group v. Argentina*, 134 S.Ct. 1198 (2014), the U.S. Supreme Court chose to defer to the interpretation of international arbitrators. They did so apparently to signal the court’s trust in the specific ISDS mechanism. However, the court’s rationale emphasized the autonomy of the parties to the agreement, not the reliability of the arbitrators. They treat the treaty as a contract, and assign the negotiating parties full authority as if

Without replicating this debate, I wish to highlight one fundamental difficulty that seems to have escaped attention: the main constitutional concern that the replacement of regular courts with private arbitrators raises. The concern is not with the scope of discretion that the arbitrators will or will not have in interpreting or adjudicating the disputes. It is equally not about the limited range of remedies that they can render. The worry is not one that a permanent review board can correct. It is about the level of independence that arbitrators will enjoy from the parties to the disputes. The key concern with any alternative to regularly constituted national courts is the relative dependence of adjudicators on the state executives who promote and elect them. In the space between judicial dependence and independence lies not only the individual's right to effective judicial remedy,<sup>28</sup> but also the possibility of a meaningful democracy.

What characterizes domestic judging in developed democracies is the relative insulation of courts from the pressures of the executive branches. Such insulation could be a function of vibrant competition among political parties or between the legislature and the executive, competition that increases the demand for a reliable umpire.<sup>29</sup> Judicial independence may also be the result of the general public's demand for reliable information that comes from nongovernmental sources, information that litigation generates directly or indirectly.<sup>30</sup> Obviously, everything is relative, and no court is completely independent of the other branches of government or of public opinion. But – again, relatively speaking – national courts in most democracies have come to enjoy significantly more independence from state executives than judges or arbitrators of international tribunals.<sup>31</sup>

As theory suggests, the domination of powerful actors at the global level, as well as the lack of public demand for the information that international courts generate, almost guarantees that international

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they were individuals representing only their own interests: “As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent”. *Ibid.*, at 10.

<sup>28</sup> This right is grounded in the constitutional law of several countries as well as in regional or international law. As the Kadi judgment recognized, individuals under EU law and European human rights law are entitled to “effective judicial protection [which] is a general principle of Community law stemming from the constitutional traditions common to the Member States.” Cases C-402/05 P & C-415/05 P *Kadi v. Council of the European Union* 2008 ECR I-6351; Stefan Trechsel, *The Right to an Independent and Impartial Tribunal*, in HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (Collected Courses of the Academy of European Law, 2006).

<sup>29</sup> McNollgast, *Conditions for Judicial Independence*, SAN DIEGO LEGAL STUDIES, Paper No. 07-43 (2006), available at: <http://ssrn.com/abstract=895723>; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

<sup>30</sup> Matthew C. Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003). On the link between political competition and independent courts, see also TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21–33 (2003).

<sup>31</sup> Erik Voeten, *International Judicial Independence*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART, (Jeffrey L. Dunoff and Mark A. Pollack, eds., 2013); Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, in INTERNATIONAL AND JUDICIAL LAW MAKING 99 (Armin von Bogdandy & Ingo Venke, eds., 2012).

judiciaries will remain dependent on powerful states. This dependency is secured through executive control of the appointment and reappointment of judges or through various retaliatory measures that losing states tend to resort to if they can afford them.<sup>32</sup> Of course, not all international courts are equally dependent on powerful state parties, and some courts have found remarkable ways to evade this design flaw,<sup>33</sup> but most find it difficult to overcome the factors that thwart their independence.<sup>34</sup>

This theory is supported by empirical findings. In the case of the most relevant international adjudication, in trade and investment disputes, the reticence of international judges and arbitrators to decide against influential state parties is clearly evident. In general, both the WTO dispute settlement tribunals and the various investment panels have promoted the interest of powerful state parties in trade liberalization<sup>35</sup> and in enforcing agreements to prefer investor-state arbitration rather than suing in the courts of the host states,<sup>36</sup> and at the same time have been keen to respect the discretionary space of the powerful states<sup>37</sup> and reduce the cost of their compliance with adverse rulings.<sup>38</sup> There is also evidence to suggest that the experience with the WTO dispute resolution led the key actors to be more careful in their

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<sup>32</sup> RUTH MACKENZIE, et al., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (2010).

<sup>33</sup> For an analysis of the success of the European Court of Justice, see Eyal Benvenisti and George Downs, The premises, assumptions, and implications of *Van Gend en Loos*: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions, 25 *European J Int'l L.* 85 (2014).

<sup>34</sup> SHAI DOTAN, *REPUTATION AND JUDICIAL TACTICS* (2014). See also Geert De Baere, et al. *The contribution of international and supranational courts to the rule of law*, in *THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW* (Jan Wouters & Geert De Baere, eds., 2015) ("international courts are generally not backed by a reliable enforcement procedure carried out by independent authorities, do not enjoy financial autonomy – on the contrary, they are largely dependent on the financing through the Member States, the Member States formally retain the power to withdraw from an international court or tribunal, to dissolve it or to change its mandate.").

<sup>35</sup> See, Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?* 14 *J. INT'L ECON. L.* 403 (2011) (showing that complainants' systematic high rates of success in substantive adjudication – about 80% – can be attributed to the pro-trade liberalization preference of the WTO adjudicators); see also John Maton & Carolyn Maton, *Independence under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 *J. INT'L ECON. L.* 317 (2007).

<sup>36</sup> Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 *NORTH CAROLINA LAW REVIEW* 1, 50 (2007). See also, David Schneidermann, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 *NORTHWESTERN J. OF INT'L L & BUS.* 383, 404-407 (2010) (on strategic factors shaping arbitral awards in investment disputes).

<sup>37</sup> Jeffrey L. Dunoff, *Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 322 (Cesare Romano ed., 2009) (arguing that, as a complainant, the U.S. "has been successful in virtually all of the cases it has pursued seriously," and explaining that the U.S. generally complies when it loses because the WTO maximizes its economic interests). With respect to the U.S. success in NAFTA arbitration, see the analysis of the strategic factors shaping arbitrators' positions in Schneiderman, *supra* note 36 at 404-406.

<sup>38</sup> Ryan Brutger & Julia Morse, *Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement*, 10 *REV. INT'L ORG.* 179 (2015) (noting that WTO panelists invoke "judicial economy" as reason to refrain from deciding more often when the U.S. or the EU are the losing parties, arguably to reduce the compliance burden for these two key actors).

nomination of candidates to be adjudicators and to punish those adjudicators found to be too independent by not extending their appointments.<sup>39</sup>

In contrast, recent years have seen a growing effort by national courts to rein in their executive branches.<sup>40</sup> In years past, in matters related to international affairs, national courts have tended to support their executive branches by giving them a free hand to do as they deemed fit. There was little domestic appetite for courts to “chain” their executives to the law and thereby limit their discretion to act freely in the international arena. But several courts have come to realize that the freedom they granted to the executive has – counterintuitively – operated against the best interest of their country. This executive freedom, essentially creating a regulatory void, weakened the executive, because it invited foreign actors to increase their pressure on the executive to accept concessions. In other words, the courts have realized that judicial stubbornness might actually strengthen the bargaining position of their executive in the international sphere.

Moreover, domestic public opinion and legislators have become aware of the growing importance of global decision-making venues and the attendant growing pressures on domestic political space. The new judicial assertiveness has provided legislators more opportunities to weigh in on global issues and thereby respond to the grassroots demand for voice.

Hence both domestic political institutions and the diffuse public in several countries have provided much needed support for increasingly independent domestic courts. This was the case not only in developed democracies in Europe but also in several developing countries. The famous judgment of the Indian Supreme Court in *Novartis v. The State of India* (2013),<sup>41</sup> which interpreted India’s trade-related

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<sup>39</sup> See Manfred Elsig & Mark A. Pollack, *Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization*, 20 EUR. J. INT’L RELATIONS 391 (2014) (arguing that the AB nomination process has become progressively more politicized as member states became far more concerned about judicial activism, systematically championing candidates whose views on key issues most closely approached their own, and opposing candidates perceived to be activist or biased against their substantive preferences); Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in THE POLITICAL AND GLOBAL REGULATION 211, 237 (Walter Mattli & Ngaire Woods eds., 2009) (“powerful members particularly the EC and the United States, have had a de facto veto over the appointment of Appellate Body members: in the WTO’s early years, these powerful members engage in a comparatively cursory review of Appellate Body nominees; in more recent years, as the Appellate Body’s capacity to make law became apparent, the United States began engaging in a thorough review and interview of Appellate Body nominees, blocking the appointment of some nominees who were seen as too activist. Similarly, members have not been shy about complaining when the Appellate Body engages in lawmaking they dislike, and proposals by powerful members to rewrite parts of the DSU in the Doha Round may have had a sobering effect on the Appellate Body.”). See also Dunoff, *supra* note 37, at 353 (discussing US proposals to increase party control over the dispute settlement process and for providing “additional guidance to WTO adjudicative bodies”).

<sup>40</sup> Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008); Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993).

<sup>41</sup> Civil Appeal No. 2728 of 2013, *Novartis AG v. Union of India & Others* (2013), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40212>; See also the earlier judgment of the Madras court in *Novartis AG v. Union of India*, 4 MADRAS L.J. 1153 (2007). See also LPA 443/2009, *Bayer Corporation & Anr vs*

obligations narrowly, was both a culmination of case-law that ventured to intervene in matters affecting the state's international commitments,<sup>42</sup> as well as a model for other national courts to emulate.

It may well be that this recent assertiveness of national courts is the “problem” that the ISDS hopes to resolve. What seems to policymakers and their constituencies to be assertiveness that promotes democratic deliberations is viewed by foreign stakeholders as barriers to trade. No doubt, the *Novartis v. India* judgment must have added to the determination of northern pharmaceutical companies to offer the ISDS as a system that would nullify the *Novartis* precedent and curb its potential ramifications around the developing world.<sup>43</sup>

The worry that parochialism will defeat the legitimate interests of foreign investors should not be underestimated. At the same time, however, the concern that the ISDS will give free reign to the demands of often captured executives – especially those of a handful of powerful states – in disregard of the rights of other, more diffuse, stakeholders must be recognized. True checks on executive rule are a necessity for democracy to flourish.

*b. The Muted Voice of Voters and their Representatives in National Parliaments*

The other major design flaw of the two negotiated regimes concerns the exclusive authority of the state parties – through an envisioned TPP/TTIP Commission – to issue binding interpretations of the agreement. They can issue such interpretations also in response to an interpretation by the ISDS tribunal with which the parties disagree. Thus, for example, the leaked text of the proposed TPP text reads:

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Union of India & Ors (2009), available at <https://www.escripnet.org/sites/default/files/Bayer%20Corporation%20and%20Anr%20v.%20Union%20of%20India%20%26%20Ors.pdf>.

<sup>42</sup> In 2003 the Supreme Court of Sri Lanka found that a bill that would have precluded compulsory licensing and parallel importing (regarded as important tools to ensure affordable access to pharmaceutical drugs) required a special majority in parliament because it infringed the principle of equality enshrined in the constitution: *Case of S.C. Special Determination No.14/2003* available at <http://www.elaw.org/system/files/Sri+Lanka+SC+Determination+on+Intellectual+Property+Bill.doc>. Courts in Bangladesh, India, and Pakistan prevented the importation of contaminated food and blocked advertisement campaigns of foreign tobacco companies: *M. Farooque v. Bangladesh*, 48 DLR 438 (1996) (Ban.); *Vincent v. Union of India*, 1987 AIR 990 (India), *Islam v. Bangladesh*, 52 DLR 413 (2000) (Ban.) (referring to the similar decisions of the Indian court in *Ramakrishna v. State of Kerala*, 1968 AIR 1367 (Ker.), and *Chest Foundation v. Pakistan*, 1997 CLC 1379 (Pak.)).

<sup>43</sup> Amy Kapczynski, *Engineered in India — Patent Law 2.0*, N. ENGL. J. MED (2013).

A decision of the Trans-Pacific Partnership Commission on the interpretation of a provision of this Agreement ... shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.<sup>44</sup>

Such an interpretation entitles state executives to modify the treaties following their ratification by way of interpretation that becomes authoritative if endorsed by the Commission that they control. As is well known, the act of interpretation is an opportunity to exercise discretion and essentially even deviate from the original meaning of the texts as understood by the legislatures involved in ratifying the treaties. The lengthy and complex text of these treaties, which address highly intricate topics and provide elaborate responses, will most certainly require clarifications and adaptations to unanticipated or novel issues. The latent legislative authority that such an executive-driven “interpretative” commission would have is vast and hence undemocratic.

Admittedly, the WTO Agreement has a similar provision. Article IX:2 of the GATT agreement reserves to the WTO Ministerial Conference and the General Council "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."<sup>45</sup> However, the wide and diverse membership in the WTO body has precluded the successful use of this procedure.<sup>46</sup> In contrast, the homogeneity between the two parties to the TTIP and also between the key parties to the TPP promises that recourse to the interpretative services of the Partnership Commissions could become a regular occurrence whereby state executives readjust the rules of the global economy without checks and without balances.

The interpretative Commission is not the only tool for the executive branches to continue shaping global rules. Another vehicle to obtain similar outcomes is the effort, to be entrenched in both agreements, to ensure “regulatory convergence” (or similar concepts like “regulatory harmonization,” “mutual recognition,” “mutual equivalence,” “regulatory cooperation” and “regulatory coherence”).<sup>47</sup> The

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<sup>44</sup> Trans-Pacific Partnership treaty, *supra* note 23, Article 9.24(3); See *also* the text of the Comprehensive Economic and Trade Agreement (CETA), Canada-EU, Art. X.27: Applicable Law and Interpretation, Sep. 26, 2014, *available at* [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) ("A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.")

<sup>45</sup> The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>46</sup> ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY, 26 (2010).

<sup>47</sup> Richard B. Stewart, *State Regulatory Capacity and Administrative Law and Governance Under Globalization*, IILJ Working Paper 2016/1 (MegaReg Series); Patrick Messerlin, *The Transatlantic Trade and Investment Partnership: The Services*

expectation is that this emphasis on convergence will generate a process of emulation among the regulatory bodies in the member states, and hence pressure to conform to a standard set by the more sophisticated or the first mover, who is likely to be of the more powerful state party. This ensures more influence for standards adopted by administrative agencies without much space for public deliberation, especially not within the less dominant partners.

To the extent that such subsequent, routine, “interpretations” and “regulatory harmonization” could potentially modify the original agreement, the absence of scrutiny by domestic institutions – both legislatures and courts – is deeply worrisome. Following the logic of the Lisbon judgment of the German Constitutional Court,<sup>48</sup> one could argue that the delegation of the exclusive right to interpret the agreements to the executive not only undermines the traditional checks and balances characteristic of vibrant democracies, but also undermines the individual’s right to democracy.

#### IV. TPP, TTIP and the Horizontal Challenge to the Voice of the “Global Others”

The two regional efforts to establish global standards have a significant indirect impact on all those countries who do not take part in them.<sup>49</sup> We are witnessing a repeat of the maneuver that led to the creation of the WTO by the U.S. and Europe. At the time, the two moved to set up the WTO as a way to overcome the deadlock of the GATT’s Uruguay Round negotiations. By exiting the old system of GATT and establishing the new regime, the U.S. and the EU “presented the developing countries with a fait accompli: either sign onto the entire WTO package or lose the legal basis for continued access to the enormous European and U.S. markets.”<sup>50</sup> Now a similar effort is underway.

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*Dimension*, in CEPS-CTR project “TTIP in the Balance”, Paper No. 6, at 13-15 (2015) available at <http://www.ceps.eu/system/files/SR106%20TTIP%20Services%20Messerlin%20.pdf>.

<sup>48</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court of Germany] June 30, 2009, 2 BvE 2/08 vom, Absatz-Nr. (1 - 421) (2009), available at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html) at para. 210 (upholding “the right to equal participation in democratic self-determination (democratic right of participation)” against possible violation “if in the structure of bodies established by the Basic Law, the rights of the Bundestag are essentially curtailed and thus a loss of substance of the democratic freedom of action of the constitutional body occurs ...”) [hereinafter Lisbon Judgment].

<sup>49</sup> For overviews of these effects see Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J INT’L L 2 (2014); Miguel Rodriguez Mendoza, *Mega-regionals and the Doha Negotiations: Implications for Developing Countries*, 3 BRIDGES AFRICA (Dec. 1, 2014) available at <http://www.ictsd.org/bridges-news/bridges-africa/news/mega-regionals-and-the-doha-negotiations-implications-for>. Interest groups such as Médecins sans Frontières and Oxfam warn that the agreements could impede the access to lifesaving drugs for millions of people in developing countries: see Kapczynski, *The Trans-Pacific Partnership — Is It Bad for Your Health?*, *supra* note 20; UNITAID report, *supra* note 21.

<sup>50</sup> Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 265 (2004). See also Benvenisti & Downs, *The Empire’s New Clothes*, *supra* note 13.

This fragmentation strategy raises questions with respect to two phases. First is the negotiation phase: Will the TPP/TTIP negotiators involve the representatives of third countries in their negotiations over the text of the agreements, or otherwise take the latter's interests into account?

Second is the phase of the agreements themselves: Will they allow third parties to be represented in the implementation phase, including in the ISDS and the interpreting committee?

The answer to both questions is, thus far at least, resoundingly negative. Until recent WikiLeaks revelations,<sup>51</sup> the negotiations took place behind hermetically closed doors. Draft texts were to remain confidential for years after the agreements would be signed. And one text that the EU Commission already gave its consent to, the CETA,<sup>52</sup> also indicates that the answer to the second question will be negative: the ISDS under CETA would allow for amicus briefs, but only from “Non-governmental persons *established in a Party*,”<sup>53</sup> namely, in the case of CETA, only in Canada or in the EU.

There are solid arguments supporting this attitude. No doubt, it is generally easier to reach a compromise with only a handful of like-minded participants, all eager to join an exclusive club. But if this was the only concern, democracies should have delegated their lawmaking function to a small set of actors. When global rules are drafted, this Part argues, more than a handful of state executives should be consulted.

*a. The Grounds for Accountability Obligations towards “the Global Others”*

Why is there a “horizontal challenge”? What is wrong with the U.S. President’s attempt to “establish[] rules for the global economy that help *our* businesses grow and hire”? Should the U.S. and other negotiators seek ways to forge global rules that are “development friendly”?<sup>54</sup> My work on the “Sovereigns as Trustees of Humanity” thesis starts out from the observation that we live in a shrinking world where interdependence between countries and communities is increasing.<sup>55</sup> I argue that these changes also affect – as they should – the concept of sovereignty. Unlike the conception of sovereignty that predominated in past decades as akin to the ownership of a large estate separated from other properties by rivers or deserts, today’s reality is more analogous to the ownership of a small apartment in one densely packed high-rise in which about two hundred families live.

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<sup>51</sup> Trans-Pacific Partnership treaty, *supra* note 23.

<sup>52</sup> CETA, *supra* note 44.

<sup>53</sup> *Ibid.*, on amicus curiae submissions: “44. Non-governmental persons established in a Party may submit amicus curiae briefs to the arbitration panel in accordance with the following paragraphs.”

<sup>54</sup> Raj Bhala, *supra* note 49, at 48, asks rhetorically “[m]ust a TPP foist every American regulatory preference on other countries? Is there no way to forge a TPP that is development friendly?”

<sup>55</sup> Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM.J.INT’L L. 295 (2013).



In our global apartment building it is necessary to revisit the prevailing solipsistic vision of sovereignty. An earlier understanding of sovereignty, one that views it as embedded in a global order that assigns competences and resources among humankind, might be more appropriate as a guiding principle in this day and age. This earlier vision can be found already in Greek thinking, and later, with the rise of sovereignty in the sixteenth century, in the writings of Grotius, Wolff and Vattel who regarded the earth as “belong[ing] to mankind in general” and who thought that common ownership generated certain duties toward others.<sup>56</sup> The age of human rights has added another ground to the view of states as instruments of humanity. Hersch Lauterpacht aptly suggested that since the “individual human being, as the ultimate unit of all law, rises sovereign over the limited province of the State,”<sup>57</sup> it is necessary to justify sovereignty as a means to this collective end. Or in the words of the Ebola Interim Assessment Panel recently appointed by the World Health Organization, “states have a responsibility to act as global citizens.”<sup>58</sup>

To the extent that the negotiations over TPP/TIP could affect the global allocation of resources or the human rights of “the global others” (e.g., access to lifesaving drugs, as mentioned above), the above grounds for global responsibility seem pertinent. But these agreements, and the secretive negotiations behind them, highlight yet a third ground for assigning duties on states toward strangers – the right to personal and collective self-determination. In modern times, state sovereignty has been justified, indeed extolled, as epitomizing the promise of self-determination. While this may have been a false promise from the start,<sup>59</sup> contemporary circumstances of interdependency accentuate the claim that sovereignty is a hindrance to rather than a guarantee of democratic self-government at both the collective and the individual levels. The sovereignty-based global system undermines too many stakeholders' possibility of exercising these rights and shaping their life opportunities. The boundaries between states become walls that create a collective prisoner's dilemma that private actors are able to exploit. To justify its continued persistence and legitimacy, this system must remedy these democracy losses at least somewhat. It can do so by opening its decision-making venues and processes that affect others – and obviously those like TIP/TTP, that *purposefully* affect others – to those others, and by taking their interests and rights into account and giving them due consideration, and by being accountable also to them. Such obligations necessitate significant adjustments to the process of negotiating the new agreements and to the decision-making processes that the agreements envision.

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<sup>56</sup> For a discussion of their work, see *id.*, pp. 307-310.

<sup>57</sup> HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS*, 47 (1950).

<sup>58</sup> World Health Organization, *Report of the Ebola Interim Assessment Panel*, at 12, (July 7, 2015) available at <http://www.who.int/csr/resources/publications/ebola/report-by-panel.pdf?ua=1>

<sup>59</sup> As Martti Koskenniemi pointed out, “formal sovereignty can undoubtedly also be imperialist – this is the lesson of the colonial era from 1870 to 1960 which in retrospect seems merely a short interval between structures of informal domination by the West of everyone else.” MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 177 (2001).

But beyond moral duties, in an interdependent global space, the taking into account of the interests of the global others is also a matter of self-interest. This is actually the position of the U.S. Federal Reserve that has taken seriously the question of its responsibility to the global economy. As the Vice Chairman of the Fed recently explained, 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.”<sup>60</sup> What the Fed’s logic seems to suggest is that the exclusivity of the TPP/TTIP negotiations may be not only harmful to the global others, but also undermine American interests.

*b. Accountability toward Others and Contemporary WTO Law*

Whether or not one endorses the general obligation to take into account and be accountable to distant strangers, this obligation is actually ingrained in WTO law, as elaborated on by the Appellate Body (AB) of the WTO. The general rule that prohibits state parties from discriminating against foreign economic interests has been interpreted to include a prohibition on the “imposition of a disproportionate burden on foreign economic interests for the achievement of albeit legitimate regulatory goals.”<sup>61</sup> This prohibition is bolstered by procedural obligations to take into account others’ interests when setting national standards that can affect international trade. In the famous U.S. Shrimp decision, the AB stated that standards set by importing states must be sensitive to the conditions prevailing in other countries:

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.<sup>62</sup>

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<sup>60</sup> Stanley Fischer, *The Federal Reserve and the Global Economy*, the Per Jacobsson Foundation Lecture, 2014, available at <http://www.federalreserve.gov/newsevents/speech/fischer20141011a.htm>.

<sup>61</sup> Robert Howse & Philip I. Levy, *The TBT Panels: US–Cloves, US–Tuna, US–COOL*, 12 WORLD TRADE REVIEW 327, at 344 (2013); Appellant Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R Para. 182 (Apr. 4, 2012); Appellant Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 225 (May 16, 2012).

<sup>62</sup> Appellant Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R at para. 165 (Oct. 12 1998).

Moreover, in the same decision, the AB criticized the U.S. for not opting for "multilateral procedures [that] are available and feasible,"<sup>63</sup> and for the lack of transparent decision-making procedures that allow for the participation of foreign stakeholders.<sup>64</sup> Arguably, the same logic should apply to standard-setting by international agreements that intentionally exclude third parties who are indirectly affected.

Recently the AB referred to the obligation of WTO members to others in an even more demanding way. In the Seals Product dispute<sup>65</sup> it found that the EU had to "mak[e] "comparable efforts" to facilitate the access of the Canadian Inuit to the [exception it provided to] the Greenlandic Inuit."<sup>66</sup> In other words, the Canadian Inuit had the same cultural rights as the Greenlandic, and the EU was required to respect their rights as well. Also here the AB emphasizes its preference for states to "pursue[] cooperative arrangements to facilitate the access of Canadian Inuit to the [same] exception."<sup>67</sup>

The obligation to take others' interests into account as part of WTO law is further enhanced by the decisions criticizing China for imposing export restrictions on certain raw materials<sup>68</sup> and rare earths.<sup>69</sup> Significantly, in the rare earths decision, although the AB rejected the claim that states must make sure that the burden of conservation of exhaustible natural resources "be evenly distributed, ... between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand," it went on to state that "it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g)."<sup>70</sup> This goes well beyond the procedural obligation of states and requires some burden-sharing, while taking into account the interests of others.<sup>71</sup>

As Sivan Shlomo-Agon shows,<sup>72</sup> the WTO dispute settlement system provides opportunities for the parties to renegotiate their WTO obligations with a view also to promoting community interests. At least one panel has stated that "the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. [...] [T]he WTO system is flexible enough to allow, through WTO-

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<sup>63</sup> *Ibid*, para. 166

<sup>64</sup> *Ibid*, para. 180.

<sup>65</sup> Appellant Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R & WT/DS401/AB/R (May 22, 2014).

<sup>66</sup> *Ibid*, para. 5.337.

<sup>67</sup> *Ibid*. See also Robert L. Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, New York University Public Law and Legal Theory, Working Paper No. 506 (2015).

<sup>68</sup> Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS4395/AB/R, & WT/DS398/AB/R, para. 307 (Jan. 30, 2012).

<sup>69</sup> Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R & WT/DS433/AB/R, paras. 5.119-5.141 (Aug. 7, 2014).

<sup>70</sup> *Ibid*, para. 5.134. Article XX(g) of the GATT: "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

<sup>71</sup> See also Robert Howse & Tim Josling, *Agricultural Export Restrictions and International Trade Law: A Way Forward*, International Food & Agricultural Trade Policy Council (2012).

<sup>72</sup> Sivan Shlomo Agon, *Noncompliance, Renegotiation, and Justice in International Adjudication: A WTO Perspective* (on file).

consistent trade and non-trade measures, appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.<sup>73</sup> The outcome (still not fully WTO-consistent) reflects the EU concern about keeping alive the economies of certain former British and French colonies through preferential trade arrangements.

Finally, as Robert Howse writes,<sup>74</sup> while Article XXIV GATT allows preferential treatment of members in a free-trade area or customs union in deviation from the Most Favored Nation obligation under the GATT, it requires that such treatment be subject to strict limitations. In theory at least, the AB might regard provisions of the TPP and TTIP as constituting arbitrary discrimination.

This brief discussion suggests that the horizontal challenge is not only a matter of moral responsibility toward individuals and communities outside the spatial scope of the mega regionals. The challenge can also be translated into a significant legal challenge under WTO law. It is a different question, however, whether the WTO dispute resolution bodies would be bold enough to rule against these agreements and thereby push the U.S. and its partners to disregard and eventually shun them.<sup>75</sup>

## V. Political and Institutional Responses: The Rise of Global Checks and Balances?

The discussion thus far has highlighted the main challenges that the TPP and the TTIP pose to the democratic structures that check executive discretion and enhance the voice of diffuse stakeholders. There are two possible institutional and legal responses to these challenges: responses that relate to the negotiation phase and those that address the implementation phase. This Section outlines these two aspects and thereafter inquires whether it is possible to envision the evolution of such responses.

### *a. Transparency and Participation during the Negotiation Process*

While thus far global administrative law scholarship has devoted less attention to the process of negotiating treaties,<sup>76</sup> the negotiations over TTIP and TPP should serve as a wake-up call for scholars to address this question as well. The most general comment one could make in this regard is that the

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<sup>73</sup> Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 by Ecuador, WT/DS27/RW/ECU, para. 6.164, (Apr. 12, 1999).

<sup>74</sup> Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity*, 78 LAW & CONTEMP. PROBS. 137 (2015). See also Joel P. Trachtman, *Development Aspects of a Trans-Pacific Partnership Partnership*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1953943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953943).

<sup>75</sup> Compare Dunoff, *supra* note 37, at 355 (discussing the “ebbs and flows in U.S. enthusiasm” for dispute resolution systems and suggesting that future interest depends on economic interests).

<sup>76</sup> Michal Saliternik, *Reducing the Price of Peace: The Human Rights Responsibilities of Third-Party Facilitators*, 48 VANDERBILT J. TRANSNAT'L L. 179 (GlobalTrust, Working Paper No. 2/2014) (2015), available at <http://globaltrust.tau.ac.il/wp-content/uploads/2014/11/Michal-Saliternik-WPS-new-version.pdf>.

negotiation phase should be conducted in a transparent and inclusive manner, to reflect the significance and potential impact of the agreements on almost everyone. Transparency and participation might cause some delay in the maturation of an agreement, and may make it more costly to achieve, but it will reflect a more informed and sensitive balancing of the interests and rights of all affected stakeholders, and the likelihood that it will offer more enduring and sustainable policies is greater.<sup>77</sup>

The failure of the Anti-Counterfeiting Trade Agreement demonstrates the crucial role of inclusive participation. As Kaminski observed in her analysis of the impact of special interests in writing the global IP law,<sup>78</sup> public pressure proved effective in convincing the USTR to disclose the draft text of the Anti-Counterfeiting Trade Agreement to several public interest groups. Armed with this information, the groups could request specific modifications that benefited wider constituencies and which the USTR was willing to accommodate. This experience led her to conclude: “A balanced membership requirement coupled with the latent threat of public digital protests may be uniquely powerful in the case of IP and trade policymaking.”<sup>79</sup> The European Parliament has played a major role in rejecting the Anti-Counterfeiting Trade Agreement.<sup>80</sup> Its vote against ratification was preceded by what was officially described as “unprecedented direct lobbying by thousands of EU citizens who called on it to reject ACTA, in street demonstrations, e-mails to MEPs and calls to their offices. Parliament also received a petition, signed by 2.8 million citizens worldwide, urging it to reject the agreement.”<sup>81</sup> The history of the evolution of domestic administrative law and, more recently, increasing recourse to administrative law in global governance regimes<sup>82</sup> is replete with similar stories that suggest that accountability and representation can be effective tools to respond to interest-group capture at the negotiation stage.

The European Parliament has emphasized the importance of such tools in its recommendations on the TTIP negotiations that it offered to the European Commission.<sup>83</sup> These recommendations go beyond the specific goals of the agreement and elaborate on the proper process of the negotiations, emphasizing the intimate connection between process and outcomes. Its recommendations “regarding transparency, civil society involvement, public and political outreach” include:

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<sup>77</sup> *Ibid.*, at 187.

<sup>78</sup> *Supra* notes 14-16 and accompanying text.

<sup>79</sup> Kaminski, *The Capture of International IP Law*, *supra* note 16, at 1051.

<sup>80</sup> *European Parliament rejects ACTA*, EUROPEAN PARLIAMENT NEWS (July 4, 2012) <http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>; Kaminski, *The Capture of International IP Law*, *supra* note 16.

<sup>81</sup> *European Parliament rejects ACTA*, *supra* note 79.

<sup>82</sup> For the rise of Global Administrative Law scholarship, see Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); SABINO CASSESE, WHEN LEGAL ORDERS COLLIDE (2010); EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014).

<sup>83</sup> See European Parliament, *Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 2014/2228(INI) (June 1, 2015) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BREPORT%2BA8-2015-0175%2B0%2BDOC%2BPDF%2BV0%2F%2FEN>).

- (i) to continue ongoing efforts to increase transparency in the negotiations by making more negotiation proposals available to the general public, to implement the recommendations of the European Ombudsman, in particular relating to the rules on public access to documents;
- (ii) to translate these transparency efforts into meaningful practical results, inter alia by reaching arrangements with the US side to improve transparency, including access to all negotiating documents for the Members of the European Parliament, including consolidated texts, while at the same time maintaining due confidentiality, in order to allow Members of Parliament and the Member States to develop constructive discussions with stakeholders and the public; to ensure that both negotiating parties should justify any refusal to disclose a negotiating proposal;
- (iii) to promote an even closer engagement with the Member States ... in order to ensure a broad, fact-based public debate on TTIP in Europe with the aim of exploring the genuine concerns surrounding the agreement;
- (iv) to reinforce its continuous and transparent engagement with a wide range of stakeholders, throughout the negotiation process; encourage all stakeholders to participate actively and to put forward initiatives and information relevant to the negotiations;
- (v) to encourage Member States to involve national parliaments in line with their respective constitutional obligations, to provide all the necessary support for Member States to fulfil this task and to strengthen outreach to national parliaments, in order to keep national parliaments adequately informed on the ongoing negotiations;
- (vi) to build on the close engagement with Parliament and to seek an even closer, structured dialogue, which will continue to closely monitor the negotiating process and to engage on its part with the Commission, the Member States, and the US Congress and Administration, as well as with stakeholders on both sides of the Atlantic, in order to ensure an outcome which will benefit citizens in the EU, the US and beyond;

While these thoughtful and important suggestions are presented as “recommendations,” there is little doubt that they derive from the same normative sources that informed the evolution of participatory rights within the democratic state, as well as the evolution of global administrative law in global settings.<sup>84</sup> In other words, in a process that is designed “to shape and regulate the international trade order,”<sup>85</sup> it should be regarded as a matter of *duty* for the negotiating parties to ensure effective participation of the affected stakeholders in the process, not a matter of mere discretion.

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<sup>84</sup> On this, see *supra* note 81.

<sup>85</sup> *Supra* note 82, at 8.

Moreover, and more importantly, the recommendations assume, perhaps naively, that engaging “stakeholders on both sides of the Atlantic” will “ensure an outcome which will benefit citizens in the EU, the US *and beyond*” (my emphasis). Obviously, involving stakeholders on both sides of the Atlantic can increase the likelihood that the outcome will benefit them. It is less convincing that their inclusion will benefit stakeholders beyond the EU and the U.S. The same rationales that call for the inclusion of EU and U.S. citizens support the inclusion of the other affected individuals and communities.

*b. Transparency and Participation at the Implementation Phase*

The implementation phase must ensure robust checks and balances that reduce partiality at key junctures in the life of the agreement, such as during the settlement of disputes and the interpretation of the agreement. The effort should focus on how to ensure voice to actors that do not depend on state executives or commercial interests. Several options could be offered. For example, the ISDS mechanism could be based on input from the national judiciaries who could be assigned the role of appointing judges to ISDS proceedings. Ensuring the right of public interest groups and third countries to submit amicus briefs to the tribunal and requiring it to conduct hearings in public and give reasons for its decisions, could help level the global playing field.

Similarly, the procedure for issuing an authoritative interpretation of the agreement should be more inclusive and involve, as Ingolf Pernice has suggested,<sup>86</sup> representatives of the contracting parties as well as of the president of the arbitration tribunal that issued the original interpretation. Further suggestions could entail the involvement of a committee composed of representatives of national legislatures, amicus briefs submitted also by third parties, and open deliberations.

The recommendations that the European Parliament presented to the European Commission related to the need to ensure effective parliamentary checks on state executives also during the life of the agreement. The European Parliament calls for a “deepening of transatlantic parliamentary cooperation, on the basis and using the experience of the Transatlantic Legislators Dialogue, leading in future to a broader and enhanced political framework to develop common approaches, reinforce the strategic partnership and to improve global cooperation between the EU and US.”<sup>87</sup>

This recommendation and others related to the need to ensure effective checks on executive discretion are arguably beyond a mere recommendation. As mentioned above,<sup>88</sup> the rights to effective

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<sup>86</sup> Ingolf Pernice, *Study on International Investment Protection Agreements and EU Law, in* INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) PROVISIONS IN THE EU’S INTERNATIONAL INVESTMENT AGREEMENTS 132, at 165-166 (Pieter Jan Kuijper et al. eds, 2014).

<sup>87</sup> *Ibid*, at 19-20.

<sup>88</sup> *Supra* note 28.

judicial protection by an independent and impartial tribunal established by law and the right to democracy have been recognized in constitutions and conventions, and courts have insisted on ensuring them. It should come as no surprise if courts demonstrate yet again their resolve to protect those rights (and thereby also to protect their respective turfs).

What remains to be seen is whether these courts will be ready to take into account also the rights and interests of “the global others” by granting them standing to initiate judicial review of regulations, or by recognizing their interests as relevant for the regulators to take into account. The *Novartis v. India* case offers a good example also in this context: one of the reasons for narrowing the rights of foreign pharmaceutical companies was the wish to secure access to lifesaving drugs not only in India but also throughout the developing world, access provided by Indian generic drug producers.<sup>89</sup>

c. *How Do We Get There? The Prospects for the Emergence of Global Checks*

My last reference to the possible reactions of courts alludes to the question of the possible routes for reasserting judicial and parliamentary controls over the mega-regionals. It is not impossible to envision the emergence of transjudicial cooperation, for example by courts in TPP and TTIP countries that insist on maintaining or recreating democratic safeguards. The recent history of judicial resistance to UN Security Council-led measures against terrorism,<sup>90</sup> or the reactions in courts of developing countries to economic pressures of foreign actors – dramatically illustrated in the *Novartis v. India* case<sup>91</sup> – demonstrate the surprising resilience and ingenuity of national bodies.

But even before these agreements take hold, it is not unthinkable to anticipate that some parliaments will refuse to ratify the agreement or incorporate its provisions into national law. The example shown by the European Parliament in its refusal to ratify the Anti-Counterfeiting Trade Agreement as well as other agreements<sup>92</sup> may lead the way for other legislatures to insist on the retention of domestic checks on executive discretion. It may also be the case that national courts will follow the lead of some of their peers (the German Constitutional Court; the Sri Lankan Supreme Court)<sup>93</sup> and make similar demands when asked to examine whether ratification is in line with the national constitution.

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<sup>89</sup> *Novartis*, *supra* note 41, at para. 66 (referring to the TRIPS Agreement as “being the cause of a good deal of concern not only in this country but also ... in other parts of the world; the concern being that patent protection to pharmaceutical and agricultural chemical products might have the effect of putting life-saving medicines beyond the reach of a very large section of people.”)

<sup>90</sup> Described in Benvenisti, *Reclaiming Democracy*, *supra* note 40.

<sup>91</sup> *Novartis*, *supra* note 41,

<sup>92</sup> *Supra* note 79; on the implications of this new role of the European Parliament see Christina Eckes, *How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures*, 12 I-CON 904 (2014).

<sup>93</sup> Respectively: The Lisbon Judgment, *supra* note 48, Sri Lanka Special Determination judgment, *supra* note 42.



## **VI. Conclusion**

It is widely acknowledged that under contemporary conditions of global interdependence, domestic democratic institutions have grown increasingly unresponsive to the preferences of many of their traditional domestic stakeholders, while international organizations, that tend to be dominated by the internal politics of a handful of powerful states, cannot ameliorate the resulting democratic deficits. This Essay sought to draw attention to mega-regionals as another stage in the trajectory of challenges to the traditional venues for democratic decision-making. The Essay set out to explain the logic of the parallel tracks of the TTIP/TPP negotiations, expose the vertical and horizontal democracy deficits associated with this strategy, and outline the possible legal and institutional remedies that may develop as a reaction.

The main thrust of the Essay is that negotiators involved in establishing rules for the global economy that impose common regulatory standards with global effect should do so in the open and be more inclusive, thereby involving – as a matter of right – not only a handful of powerful governments but also the representatives of diffuse stakeholders, including the global others. The hope is that a more transparent process will ensure that the institutions set up by these agreements are sufficiently sensitive and accountable to all relevant stakeholders. As state executives and special interests design the future rules for the global economy, public lawyers and political scientists should contemplate new designs for effective new venues for democratic deliberation.