

# NATIONAL COURTS AS “TRUSTEES OF HUMANITY”?

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*The concept of state sovereignty is under pressure and scholars criticize the traditional self-determination and noninterference understanding as inadequate. Professor Eyal Benvenisti has suggested a reconception of sovereigns as “trustees of humanity.” This Note looks at national courts and their possible role in realizing Benvenisti’s trusteeship conception. Drawing on examples from United States and German case law in the fields of standing, forum non conveniens, subject matter jurisdiction, and third party participation, it discusses possible ways for courts to give effect to the procedural obligations flowing from the trusteeship conception. In a last step, this Note identifies five factors that might make national courts more likely to conceptualize sovereigns as trustees of humanity and give effect to the sovereigns’ new obligations.*

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## I. INTRODUCTION

This Note asks to what extent national courts can contribute to states acting as trustees of humanity.<sup>1</sup> Around the world, national courts protect state sovereignty. They do so by making use of an extensive toolbox of avoidance doctrines like rejecting general jurisdiction, *forum non conveniens*, state immunity, political question, and lack of standing. The contents of the toolbox may vary between national court systems, but most courts, most of the time, adhere to the principle of state sovereignty and the restrictions it entails for courts.

The principle of state sovereignty and the Westphalian world it creates have long been challenged.<sup>2</sup> This challenge comes from two sides, the first being that of basic empiricists who contend that the principle of state sovereignty is a fiction blurring the view into the modern world as it really operates. In today's world, so the argument goes, states are not sovereign equals and the principle's non-interference doctrine is not a practical reality of an interdependent world.<sup>3</sup> The second challenge is normative and argues that no good justification for state sovereignty in its strict form exists; both a utilitarian argument for efficient administration of the world and its resources as well as a deontological argument for the respect

1. See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013) (arguing that states have an obligation to consider the interests not only of their own citizens but also of those beyond their borders).

2. For a historical discussion, see W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

3. For a general discussion about this issue, see HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 21–23 (1996).

of human rights require a reconceptualization of state sovereignty.<sup>4</sup>

One idea about the role of states in the modern world comes from Professor Benvenisti who argues for a conception of states as "trustees of humanity."<sup>5</sup> Under this theory, states are ultimately legitimate because they serve not only their citizens but contribute to a world in which the conditions for peace, security, respect of individual rights, and every person's pursuit of her conception of the good is possible. Under the trustees of humanity theory, states have certain positive obligations toward noncitizens. These include minimal procedural obligations like the right to participate in decision-making processes that specially affect them, and a right to be given reasons for a state's decisions to take or not take the interests of noncitizens into account. Additionally, states are under an obligation to act in the interest of noncitizens as long as they would not be worse off by doing so.<sup>6</sup>

This Note asks to what extent national courts can contribute to a world in which states are conceived of and conceive of themselves as trustees of humanity. More specifically, it focuses on the procedural obligations that the trusteeship conception entails and inquires how national courts could be able to fulfill such procedural obligations by allowing noncitizens a right to bring suit and, in some instances, a right to challenge state action. This focus on procedure is warranted because judicial procedures often exclude noncitizen interests from consideration in national courts. Liberalizing procedures is then a necessary, even though not a sufficient, step for national courts to be able to act as trustees of humanity.

The inquiry is organized around the procedural practice of courts in the United States and Germany and their general toolbox of avoidance doctrines. It discusses decisions by United States and German courts and shows the extent to which courts are able to use their discretion in promoting the trusteeship conception over the traditional sovereignty principle. The Note argues that the structural position of the judi-

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4. Anne Peters, *Humanity as the A and  $\Omega$  of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (arguing that state sovereignty can only be justified to the extent that it protects and fulfills human rights and human needs).

5. Benvenisti, *supra* note 1.

6. *Id.* at 320.

ary within states is generally suitable for national courts to conceive of states as trustees of humanity and act as if they were. It concludes by suggesting five factors that might make courts more likely to accept the trusteeship conception of sovereignty.

The five factors are as follows: First are the national courts' disposition toward the concept of state sovereignty, and their inclination toward either the traditional conception, with its primacy of national interest, or reconceptualizations of state sovereignty that take modern global interdependence into account. If courts perceive the traditional conception to be at odds with other general and often used constitutional principles, human equality for example, they may be more likely to adopt the trusteeship conception. Second and third are the courts' interaction with the executive and the legislature. The general dispositions of the other branches of government toward the trusteeship conception are important influences on the courts' behavior. Public opinion and its influence on courts through pressure, and as indicators of social and ideological change more generally, is the fourth factor likely to influence courts' sympathy for the trusteeship conception. Last, but not least, is interjudicial dialogue among national courts and exchange of information and doctrines as a factor influencing the likelihood that courts will act in accordance with the trusteeship conception.

The Note proceeds in four parts. Part II outlines the status of the principle of state sovereignty today and the challenges that it faces. It introduces Benvenisti's idea of states as trustees of humanity as a modern theory that is able to respond to the challenges of global governance. In Part III, evidence from United States and German courts is presented that suggests ways in which courts could, and in some cases do, take other-regarding considerations into account. Part IV uses the evidence of Part III to analyze the role of courts in guarding and evolving the concept of state sovereignty and describes the inherent qualities of courts' self-conception that push toward a trusteeship conception. It also discusses the courts' relationship to the other branches of government and how it is relevant to the courts' role in protecting and evolving the concept of state sovereignty. As a result, the Note presents the five factors influencing other-regardingness.

Methodologically, this Note starts with the premise that the general theory of states as trustees of humanity is sound. The Note does not engage the multitude of theoretical and normative questions that Professor Benvenisti's view raises. Given the theory, this Note studies national courts' approach to the concept of state sovereignty and inquires whether instances of judicial reasoning can be found that reflect basic tenants of the trusteeship conception. I focus on U.S. and German court decisions in cases that could give rise to claims that implicate the interests of noncitizens. A list of factors is ultimately drawn from the analysis of the court decisions that contribute to explain what influences national courts in being more likely to adopt tenants of the trusteeship conception.

This Note contributes to the literature on evolving conceptions of state sovereignty, especially the idea of states as trustees of humanity. It also attempts to synthesize the literature on the role of national courts more generally as it relates to national courts as actors in global governance. Lastly, the Note attempts to contribute to the study of global administrative law by inquiring into the effect of principles like participation and reason-giving.<sup>7</sup>

## II. FROM SELF-INTERESTED SOVEREIGN TO TRUSTEE

It is important to note at the outset that this Note is not an attempt to provide a normative argument in support of the conception of states as trustees of humanity. As will become obvious, I am sympathetic to the idea and am interested in thinking through the theory's ramifications of state action becoming other-regarding. Its theoretical justification is left to others more experienced. Nevertheless, it is necessary for the purposes of this Note to briefly survey the principle of state sovereignty as it relates to problems of global governance today and to outline the basic tenants of the theory of states as trustees of humanity.

The world has seen an increase in population, mobility, communication, and economic integration. As a consequence, the human condition, at least in its social aspects, has changed. Past are the days of "opting out, of retreating into

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7. See generally Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279–1284 (2009) (discussing the logic behind reason-giving).

splendid isolation . . .”<sup>8</sup> Benvenisti describes the modern world as a “densely packed high-rise,” in which state sovereignty as it has been understood in the past is neither efficient nor morally justifiable.<sup>9</sup>

The traditional concept of state sovereignty is based in national noninterference and, more recently, in collective and individual self-determination. In the Westphalian world, state sovereignty was motivated by the desire to find a principle of international law guarding against interference and aggression from outsiders. It was a way for rulers to protect their rule.<sup>10</sup> In the wake of a new philosophical and sociological individualism, international law has also come to reconsider its allegiances and has increasingly tried to find a basis for its rules in a theory that credits the person as the unit of normative significance.<sup>11</sup> This trend has also changed the concept of state sovereignty. Today, it is the right to self-determination of peoples that builds the modern justification for state sovereignty.<sup>12</sup>

It is important to note that the principle of self-determination is fundamentally one of non-interference or negative freedom.<sup>13</sup> It does not, however, stand for the proposition that a state does not have a positive obligation to take the interest of others into account. To be clear, it does not impose such an obligation either, but for the discussion of a reconceptualization of sovereignty as entailing positive obligations it is important to note that the underlying justifications for state sover-

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8. Benvenisti, *supra* note 1, at 295.

9. *Id.*

10. *See, e.g.*, Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 606 (1889) (stating that the “highest duty” of every government is to ensure its own protection and security). *See generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855–56, 859–60 (1987) (showing 19th century U.S. attitudes toward foreigners).

11. *See, e.g.*, Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992) (discussing the Kantian theory of international law predicated upon the normative status of the individual).

12. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 48 (1982) (introducing the right of self-determination as part of the “third generation” of human rights, what he calls the “collective rights”).

13. Even in 1970, the year when the Friendly Relations Declaration was adopted, it was not clear that state action would have effects outside of borders and that one could have international effect without actively trying.

eignty—noninterference and self-determination—do not themselves create a hurdle for conceiving of sovereignty as entailing other-regarding positive obligations. To the contrary, as Professor Sohn points out, “[e]very state has a concomitant obligation to respect every other state’s right of self-determination and to refrain from interference in the internal affairs of a state in any way that might impede the right of a people to control its own destiny.”<sup>14</sup> This positive aspect is increasingly important in the global high rise.<sup>15</sup> One state’s actions have more and more impact on citizens in other states. The integration of markets and production creates areas of internal state action with extensive external ripples. Also, the demands of self-determination are not overly strict. As the Canadian Supreme court prominently held in *Reference re Secession of Quebec*, the ability to meaningfully determine one’s own path and hold on to cultural traditions satisfies the demands of self-determination.<sup>16</sup> The requirements of the right to self-determination, therefore, can be met while also holding that state sovereignty entails obligations to others.

It might be time to reconceptualize state sovereignty yet again. The modern world with its “permeability of borders” and the “fluidity of community affiliations” challenges the “ideas of inviolate nation-state sovereignty.”<sup>17</sup> New legal norms are increasingly international, transnational, or global and modern courts are struggling to find new jurisdictional rules to “account for the fact that people enter relationships and cause harms without regard to the territorial boundaries of the

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14. Sohn, *supra* note 12, at 50.

15. Arguably, this positive aspect is apparent in the African Charter on Human and Peoples’ Rights which includes the “equal enjoyment of the common heritage of mankind” in its self-determination principle. Organization of African Unity, Banjul Charter on Human and Peoples’ Rights art. 22, para. 1, O.A.U. Doc. CAB/LEG./67/3/Rev.5., 21 I.L.M. 59.

16. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 222 (Can.) (“A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.”).

17. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 524 (2005). For a general discussion of the evolving conceptions of state sovereignty and plentiful references to the literature, see *id.* at 523–30.

Westphalian nation-state system.”<sup>18</sup> It is at this point that Benvenisti’s theory of sovereigns as trustees of humanity can provide solid theoretical grounding for the reality of the modern world.

Benvenisti’s argument has two main strands: one is utilitarian, the other Kantian. The first addresses the ideas developed in global administrative law that public participation, accountability, and contestation can contribute to “better informed, more efficient, and egalitarian outcomes.”<sup>19</sup> It is, at its core, a utilitarian argument. The utilitarian is interested in administration that is maximally efficient, and the state is to some extent an official or an agency for the administration of law. As the world’s administrative problems become increasingly global, the utilitarian rationale suggests that the state as administrator should become increasingly other-regarding. “Other-regarding” means the consideration, and sometimes the internalization, of the rights, interests, and well-being of individuals that are not citizens and live outside the state’s territory. It is a regard for humanity. The interest in efficiency and maximization does not stop at the border; as Benvenisti paraphrases Madison, “state governments are in fact but different agents and trustees of all human beings because the ultimate, residual, authority resides in humanity.”<sup>20</sup>

The second argument derives from the individualism already mentioned above. The principle of self-determination is not for the benefit of the state as a structure, but for its inhabitants. It means first and foremost the right to *individual* self-determination<sup>21</sup> and “self-authorship.”<sup>22</sup> State sovereigns are to be of service to individuals generally, and consequently have responsibilities that they are “inherently bound by—regardless of their consent, and from which they cannot contract out.”<sup>23</sup>

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18. *Id.* at 527, 530.

19. Benvenisti, *supra* note 1, at 300.

20. *Id.* at 307.

21. *Id.* at 302.

22. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 204 (1986) (“An autonomous person is part author of his own life. . . . A person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options.”).

23. Benvenisti, *supra* note 1, at 300.

Sovereignty is a means to an end—an “artificial construct”<sup>24</sup>—and states bear no ultimate value.<sup>25</sup> This is true both from the perspective of citizens, who endorse state sovereignty as a means to freedom and self-determination, and from the perspective of humanity as a whole, which endorses states as an effective way to reach the interests of individuals by means of a form of subsidiarity.<sup>26</sup> This theory finds a natural counterpart in liberalism and cosmopolitanism, most famously expressed by Kant in his political writings.<sup>27</sup> In legal theory, the push towards a global constitutionalism has also stressed the importance of other-regarding considerations. As Mattias Kumm writes, “The cosmopolitan paradigm [ ] requires that the national constitution be justified to those it seeks to govern. . . . [T]hat justification has to meet a complex standard of public reason, established by the principles of cosmopolitan constitutionalism, not by the will of the demos. Second, this complex standard of public reason *requires taking into account legitimate concerns of outsiders.*”<sup>28</sup>

In conclusion, Benvenisti’s argument stresses utilitarian efficiency and a regard for the individual as the normative basis for states. For states to be in accordance with that basis, today’s global interdependence requires states to take the interests of noncitizens into account. It follows, that the definition of states’ obligations as directed only against persons that have a connection to its territory is incomplete. This definition

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24. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 328 (2011).

25. *Id.* at 325.

26. *Id.* at 324. This latter part of sovereignty was emphasized by the German Constitutional Court when it stated that “sovereignty [is] ‘freedom that is organised by international law and committed to it’” (citing von Martitz, 1 *Internationale Rechtshilfe in Strafsachen* 416 (Leipzig, H. Haessel, 1888)) and held that “[t]he Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood. . . .” Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 30, 2009, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BvE] 2/08 (¶ 223).

27. See IMMANUEL KANT, *Toward Perpetual Peace: A Philosophical Sketch*, in PRACTICAL PHILOSOPHY 317, 322–25, 328–31 (Mary J. Gregor ed. & trans., 1996).

28. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258, 268 (Joel P. Trachtman & Jeffrey L. Dunoff eds., 2009) (emphasis added).

runs against basic tenants of liberalism and individualism because one's place of birth is not a personal choice, and it is to freedom of choice that liberalism and individualism are normatively committed.<sup>29</sup> For many people today, sovereignty is a hindrance that excludes them from opportunity, and subjects them to a system in which they are far removed from participation and influence.<sup>30</sup> Modern challenges of environmental degradation, migration, organized crime, terrorism, and welfare generally have proven difficult to address in a system that makes cross-border policy making difficult to achieve.

The conception of sovereignty thus needs to evolve to serve the people on this earth.<sup>31</sup> Benvenisti suggests conceiving of sovereigns as trustees of humanity that have three distinct, but related, obligations toward mankind as a whole. First are minimal procedural obligations, such as conferring a right to a hearing to affected states and noncitizens, and decision-making that at least considers the effects beyond the state's borders.<sup>32</sup> States acting in this manner would take the individual rights of noncitizens seriously and signal that they are not indifferent to the well-being of humanity as a whole. Courts are in a position to give meaning and effect to these procedural principles.

Second, states must have a commitment to reciprocity and burden sharing, which requires states to share in their other-

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29. For different interpretations of liberalism, see Gerald Gaus & Shane D. Courtland, *Liberalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis/>. One famous statement of this view of liberalism comes from John Rawls in his argument for "fair equality of opportunity." JOHN RAWLS, A THEORY OF JUSTICE 301 (1971).

30. See Benvenisti, *supra* note 1, at 305 ("The promise of 'sovereignty as freedom' has not materialized for many countries, which experience their tradition or hard-won formal freedom as having erected new types of walls that separate them from each other and from the actual public or private venue of deliberation and decision making."). See generally B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

31. A corollary to this re-conception of sovereignty is the *right to development* and the *right to a healthy environment* that are finding traction in scholarly debate. As early as 1982, Sohn argued that the right to development entails that "[e]ach group of states, especially the developed states, should act to make possible the enjoyment of the right by all states." Sohn, *supra* note 12, at 54.

32. Benvenisti, *supra* note 1, at 318.

regarding actions and for states to extend other-regardingness to states that have done the same for them.<sup>33</sup> An example of these considerations could be international agreements on riparian rights and resources where up-stream states share their other-regarding obligations toward down-stream states.

Third, Benvenisti introduces a weak Pareto principle that would require states to act in the best interest of noncitizens if the state is no worse off by doing so.<sup>34</sup> It is weak because it does not require states to sustain losses of welfare (i.e. well-being of citizens) to increase the welfare of other states.

States adhering to the last two obligations would revise policy to advance the utility and rights of humanity. Such considerations would influence legislation, executive action, and judicial decisions in all areas of policy with global effects. It would challenge the insular role of foreign aid as the place for other-regardingness and signal a multi-faceted, full government response (including all branches and different ministries) to benefit a globally integrated people, its well-being and rights.

In short, Benvenisti's theory requires states to start thinking of themselves as neighbors deeply interdependent. In the global high-rise, fences are not manageable and the effects of state action are felt throughout the building. States must live up to the obligations that their actions entail. However, Benvenisti's theory of sovereigns as trustees of humanity does not, as the title already indicates, destroy sovereignty. It modifies it, so that states and their citizens can coexist in an efficient and coherent manner. It is not a project of global justice comparable to those in modern political philosophy.<sup>35</sup>

### III. EVIDENCE FROM COURTS

This Note focuses on the minimal procedural obligations proposed by Benvenisti's theory and analyses of German and U.S. national court decisions that could lend themselves to other-regarding court action. National courts have tradition-

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33. *Id.* at 313–14.

34. *Id.* at 320. See generally Lewis Kornhauser, *The Economic Analysis of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 29 (defining and explaining the Pareto criterion).

35. See, e.g., GLOBAL JUSTICE (Thomas W. Pogge ed., 2001); JOHN RAWLS, THE LAW OF PEOPLES (2001) (examples of global justice programs).

ally been an important component in the protection of sovereignty. They were the place where foreigners would try to challenge actions of the state.<sup>36</sup> They were also the place where citizens, concerned with the effects that their government's actions had on those beyond its borders, would try to compel the government to "do something."<sup>37</sup> Courts can use principles of judicial decision making to have the interests of noncitizens considered and potentially empowered. The cases discussed in this Note are illustrations of such other-regarding possibilities.

On the other hand, courts also have a large toolbox to give effect to the traditional sovereignty conception. Doctrines like political question, sovereign immunity, and *forum non conveniens* have been used by national courts to give effect to state sovereignty.<sup>38</sup> They are used to protect the legislature and executive from undesirable challenges to their actions and allow the judiciary discretion in balancing its relationship with the other two branches. In this way, rules of procedure have often been an important mechanism for excluding unwanted interests and litigants. But, these doctrines are doctrines of restraint. They are self-imposed limitations that keep courts from taking cases that naturally come before them.

The issue then is the current role of national courts with respect to a changing conception of sovereignty, and what the role can be in the future. Could courts think of sovereigns as trustees of humanity? Are courts in some instances already doing so? And, more specifically, how could courts follow the three principles Benvenisti suggests for actualizing the new conception of sovereignty: (1) right to hearing and consideration of interest, (2) reciprocity and burden sharing, and (3) the weak Pareto principle.<sup>39</sup>

Courts can be other-regarding. They often consider interests beyond the lawsuit, often subsumed into the concept of *policy*. One dimension of national courts' other-regardingness

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36. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491 (2008) (case brought against the United States by a Mexican national).

37. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (case brought by environmental groups to challenge a regulation of the Secretary of the Interior).

38. *See generally* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 176–83 (1993).

39. Benvenisti, *supra* note 1, at 313–14, 318–20.

becomes visible by investigating procedural rules and the extent to which they allow noncitizen interests to bring a suit in court or be otherwise represented. Having your interest heard, as well as having the court give reasons about how and with what limitations the interests are taken into account, are the procedural requirements of Benvenisti's sovereignty conception.<sup>40</sup>

In this part, three kinds of avoidance doctrines are examined in light of the trusteeship conception: First, standing rules, that is, the rules which determine who can access the court as plaintiff. Second, the doctrine of *forum non conveniens*, which covers the standards allowing courts to dismiss cases because a better place to litigate exists. Finally, representation of third party interests, *amicus* briefs being the most prominent example.

Cases that raise questions of other-regardingness arise both in the realm of public and private law. State action, the realm of public law, may have ramifications across borders and affect noncitizen interests, for example in the areas of environmental protection and weapon exports. Transnational corporations and global production often give rise to private law disputes in which the ruling has effects beyond the state where the lawsuit is filed. In this Part, cases from the United States and Germany relating to standing, *forum non conveniens*, subject matter jurisdiction, and third party interest representation are analyzed to see how courts treat noncitizens procedurally, whether they shows signs of conceptualizing sovereigns as trustees of humanity, what influences them in their conception, and how it might affect their rulings.

#### A. *United States of America*

U.S. judges have a number of tools and techniques available to them "to increase the breadth of interests represented in a suit," the Federal Rules of Civil Procedure's liberal joinder rules being one example.<sup>41</sup> However, they also have many procedural tools to limit their international view and reject their

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40. *Id.* at 318.

41. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976) (recognizing different roles of trial and appellate judges in public law litigation); *see also* FED. R. CIV. P. 19, 20 (laying out the liberal joinder rules regime).

role as actors of global governance, such as finding lack of standing, *forum non conveniens*, and disregard of *amici curiae*.

To discuss the role of standing in the United States, this Note will first analyze the U.S. Supreme Court's decisions in *Lujan v. Defenders of Wildlife*<sup>42</sup> and *Massachusetts v. Environmental Protection Agency*<sup>43</sup> as standing cases of the public realm that entail considerations related to the trusteeship conception. In a second step, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,<sup>44</sup> a global anti-trust case in which the United States had to decide the fate of noncitizen litigants, is examined as an example of a broad jurisdictional question. Third, the use of *forum non conveniens* is examined by way of *Abdullahi v. Pfizer*.<sup>45</sup> Last, the modern use of the *amicus curiae* briefs in U.S. Supreme Court litigation is investigated using *Kiobel v. Royal Dutch Petroleum*.<sup>46</sup>

### 1. *Standing*

Justice Blackmun, concerned about standing to sue, once asked: “[m]ust our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?”<sup>47</sup> Standing rules might currently be “so inflexible” that they fail to respect a state’s affirmative obligations under the trusteeship conception.<sup>48</sup>

For a plaintiff to assume standing in front of a U.S. court, she must fulfill the constitutional case-and-controversy requirement.<sup>49</sup> The requirement is generally interpreted as a three-factor test. The plaintiff has to show (1) an injury in fact, (2) plausibility that the defendant caused the plaintiff’s alleged harm, and (3) that the court finding in favor of the plaintiff would redress that harm.<sup>50</sup> In addition to the constitutional requirement, U.S. courts have developed a doctrine of pru-

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42. *Lujan*, 504 U.S. 555.

43. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

44. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

45. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

46. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

47. *Sierra Club v. Morton*, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting).

48. *Id.*

49. U.S. CONST. art. 3, § 2.

50. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

dential standing that allows cases to be dismissed for policy reasons. The U.S. Supreme Court has called these “judicially self-imposed limits”<sup>51</sup> a part of “judicial self-government.”<sup>52</sup>

One difference between the constitutional and the prudential standing doctrine is that the legislature cannot create standing for plaintiffs that do not meet the constitutional requirements, but can, in modifying the prudential standing doctrine, tell courts to find standing where they would otherwise not.<sup>53</sup> However, even if statutes prescribe restrictive standing, and courts’ discretion is purposefully limited by the legislature, the law’s open texture often leaves ample room for courts to exercise discretion. It is therefore important for this Note’s argument to study the behavior and reasoning of courts in deciding issues of standing because courts could potentially give effect to procedural requirements deriving from the trusteeship conception by liberally granting standing to hear and consider the interests of noncitizens.

The U.S. Supreme Court showed flexibility in its standing doctrine when it concluded in *Massachusetts v. EPA* that private law notions unduly restrict the “quasi-sovereign” of Massachusetts in asserting its rights.<sup>54</sup> In effect the Court concluded that private law notions are “fundamentally incompatible with Congress’s approach to environmental regulation.”<sup>55</sup> By holding that the state of Massachusetts had standing to petition for review, the court relaxed standing to deal with the problem of diffuse interests that need redress but do not fit traditional standing jurisprudence. The question at issue in *Massachusetts v. EPA* was whether the state of Massachusetts, among others, had standing to sue the Environmental Protection Agency for

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51. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

52. *Lujan*, 504 U.S. at 560.

53. Examples might be *qui tam* suits allowing private persons to sue on behalf of the defrauded government or citizen-suits under the False Claims Act or the Endangered Species Act. False Claims Act, 31 U.S.C. §§ 3729–3733 (2011); Endangered Species Act of 1973, 16 U.S.C. §§ 1536(a)(2), 1540(g) (2011).

54. *Massachusetts v. EPA*, 549 U.S. 497 (2007) (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

55. Neil Gormley, *Standing in the Way of Cooperation: Citizen Standing and Compliance with Environmental Agreements*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 397, 401 (2010).

failing to set vehicle emission standards under the Clean Air Act.

For purposes of the trusteeship conception, the important issue coming from *Massachusetts v. EPA* is “whether the *Massachusetts* approach to standing extends to private plaintiffs, like environmental groups”<sup>56</sup> and ultimately to interested parties beyond the state’s borders like foreign governments and international environmental advocates. Commentators are skeptical that this development will take place because the reasoning in *Massachusetts v. EPA* relies on federalism and the absence of other remedies, which arguably are available on the international plane.<sup>57</sup> The reasoning of this decision therefore loses its force for cases where the interests of noncitizens should be represented in front of national courts. These cases are, however, the most interesting for purposes of the trusteeship conception of sovereignty.

Nevertheless, some argue that “[i]t makes more sense to allow nations to influence the climate change regulation process under U.S. law than to force them to rely either on diplomatic protests (which may be too weak) or trade sanctions (which may be too strong).”<sup>58</sup> This would represent a “moderate and restrained” approach to having the “opinions of mankind” heard in U.S. courts.<sup>59</sup> It would, in terms of Benvenisti’s conception, represent an adoption by the court of a minimal procedural obligation in line with the trustees of humanity conception of sovereignty. To use *Massachusetts v. EPA* as an illustration, the plaintiff with standing could represent the interests of groups around the world directly and indirectly affected by anthropogenic climate change.

With the issue of *Massachusetts v. EPA*’s reach in mind, it is useful to look at an earlier Supreme Court standing decision that was clearly global in reach. In *Lujan v. Defenders of Wildlife*,<sup>60</sup> the plaintiff, an environmental organization, “challeng[ed] a rule promulgated by the Secretary of the Interior

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56. *Id.* at 404.

57. Jonathan Zasloff, *Massachusetts v. Environmental Protection Agency*, 127 *S.Ct.* 1438, *United States Supreme Court*, April 2, 2007, 102 *AM. J. INT’L L.* 134, 138 (2008).

58. *Id.* at 139.

59. *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

60. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

interpreting § 7 of the Endangered Species Act of 1973 . . . in such fashion as to render it applicable only to actions within the United States or on the high seas.”<sup>61</sup> The interpretation mattered because the United States was involved in the construction of the Aswan dam in Egypt and a dam project in Sri Lanka partially funded by USAID.<sup>62</sup> The plaintiff’s claim was that the two projects were adversely affecting endangered crocodiles and elephants.<sup>63</sup> *Lujan* presented the Court with the question of whether the plaintiff had standing to sue the Secretary of the Interior.

The Court held no standing because the plaintiff could not show injury in fact and redressability.<sup>64</sup> The affidavits of environmentalists claiming interest in the endangered species and future plans to visit said wildlife were held to be insufficient to meet the burden of injury in fact.<sup>65</sup> To reject redressability, the Court relied on, among other reasons, a limited impact rationale, arguing that any cut in U.S. funding of the infrastructure projects in question would be compensated by other donors, thereby making species survival in case of U.S. policy change less likely.<sup>66</sup>

Guidance for a national court’s approach in line with the trustee conception can be found in Justice Blackmun’s dissent. First, he endorsed a view that only a “genuine issue” for which “the evidence is such that a reasonable jury could return a verdict for the non-moving party” was necessary to survive a motion for summary judgment on standing grounds.<sup>67</sup> Second, Justice Blackmun cited to internal documents from the Interior Department and USAID to support his claim that the U.S. agencies were in a position to at least “mitigate th[e] harm.”<sup>68</sup> Such evidence, in Blackmun’s eyes, is to carry weight and would reflect the procedural obligation of the United States in

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61. *Id.* at 557.

62. *Id.* at 563.

63. *Id.*

64. *Id.* at 568.

65. *Id.* at 563.

66. *Id.* at 571 (“[I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.”).

67. *Id.* at 590 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

68. *Id.* at 600.

the standing context.<sup>69</sup> Granting standing would provide some representation to global interests.

Blackmun's approach in *Lujan* shows how courts are generally able to acknowledge the significant global impact of national regulatory decisions. In cases where their verdict will affect the interests of noncitizens beyond their state's borders, standing requirements could be relaxed. *Massachusetts v. EPA* shows that this relaxation is, at least within limits, not beyond the Court's powers. Analogous to *Massachusetts v. EPA*, the Supreme Court of the United States could conclude that the injury in fact and redressability requirements of standing are fundamentally incompatible with the modern conception of sovereignty, which entails positive procedural obligations toward noncitizens.

The Court could also consider (1) the diffuseness of the plaintiff's interest and (2) the presumed difficulty for the affected noncitizens to sue in U.S. court, in relaxing the standing requirement. For example, global warming suits would be subject to lax standing requirements in order to allow suits at all, or Bangladeshi garment workers trying to sue U.S. companies for their procurement practices could be represented by a U.S. public interest law firm because the garment workers presumably have difficulty reaching the court. This balancing is not trivial and concerns of paternalism and judicial economy point the other way, but if national courts want to understand themselves as trustees of humanity, difficult innovations are unavoidable.

## 2. *Subject Matter Jurisdiction and Deference*

Another useful case to study is *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* in which the Supreme Court limited U.S. courts' jurisdiction over foreign anti-trust claims.<sup>70</sup> The issue before the Court was whether the Foreign Trade Antitrust Im-

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69. The Pareto principle's logic can be seen in the aid context as well, where the donor state is not worse off by stopping the aid. However, this example also shows that deciding what constitutes a Pareto improvement in a given situation is practically difficult. Some would be worse off if the aid was stopped. Does the trusteeship conception ask to maximize overall utility of the foreign interests taken into consideration or does it respect the Pareto principle's limits on redistribution in the foreign sub-group as well?

70. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); see also *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

provements Act of 1982 barred an anti-trust claim that produces negative effects for the U.S. market, and at the same time causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim.<sup>71</sup> In this case the plaintiffs, vitamin retailers from Ukraine, Panama, Australia, and Ecuador, had been damaged by price-fixing of vitamin sales in their respective countries.<sup>72</sup>

The Court held that U.S. courts did not have subject matter jurisdiction because statutes are to be read narrowly to “avoid unreasonable interference with the sovereign authority of other nations.”<sup>73</sup> Put simply, the court used an old principle of statutory interpretation to settle a difficult case that had given rise to lengthy and contentious opinions in the courts below. While the role of international third parties at the Supreme Court level will be studied below, this subsection focuses on what the courts could have done to take more seriously their affirmative procedural obligations toward noncitizens as derived from the trusteeship conception.

In the proceeding below, the Court of Appeals for the District of Columbia stated that “[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.”<sup>74</sup> The court relied on reasoning by Judge Higginbotham in a similar case deducing that “unless persons injured by the conspiracy’s effects on foreign commerce could also bring antitrust suits” a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from

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71. *Empagran*, 542 U.S. at 164.

72. *Id.* at 159–60.

73. *Id.* at 164; *see, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (finding that the exercise of sovereignty in the international sphere requires an affirmative intention of Congress); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382–83 (1959) (“[I]n the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.”).

74. *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 355 (D.C. Cir. 2003), *vacated sub nom.* *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

abroad would subsidize the U.S. operations.<sup>75</sup> Implicit in this reasoning is a view of the global market as interdependent to the extent that negative behavior abroad will ultimately have negative effects at home. It sits well with Benvenisti's idea of the global high-rise.

In global markets cases like *Empagran*, courts could give effect to the trusteeship conception by relaxing procedural barriers for foreign plaintiffs in order to integrate the law in an area where the flow of money has long been integrated. Giving a right to sue, and to find for plaintiffs in cases where the state is not worse off—the strict Pareto principle's rule—would allow an efficient method for plaintiffs to enforce a market based on egalitarian principles. This view is also risky, as the discussion of the *amicus* briefs below shows, since courts endorsing a broad view of their own regulatory power run the risk of duplicating regulatory power already created in a state elsewhere.

The public opinion and willingness of the other branches necessary for such broad reach in global markets cases was possibly visible in the class action litigation in the United States against German corporations that used slave labor during World War II.<sup>76</sup> This case is not only exemplary for its willingness to afford relief to many noncitizens around the world that suffered under Nazi forced labor, but it also shows the necessary political climate and public opinion for such other-regardingness to arise and prevail against state sovereignty concerns. In *Empagran*, by way of contrast, these conditions were not sufficiently present.

### 3. *Forum Non Conveniens*

*Forum non conveniens* doctrine is a further procedural tool for national courts to dismiss cases with international reach. Importantly for our purposes, it does not apply if the “remedy provided by the alternative forum is so clearly inadequate or

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75. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 435 (5th Cir. 2001).

76. Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 132 (2000); Michael J. Bazzyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 37 (2002); Michael J. Bazzyler, *www.swissbankclaims.com: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. S-64, S-87 (2001).

unsatisfactory that it is no remedy at all."<sup>77</sup> It is therefore a doctrine that can be sensitive to the need to replace malfunctioning foreign courts. It can be conscious of the other-regarding demands of the trusteeship conception.

An interesting case on *forum non conveniens* is *Abdullahi v. Pfizer* in which the multi-national life-sciences company Pfizer was sued under the Alien Tort Statute (ATS).<sup>78</sup> The plaintiffs alleged that Pfizer was responsible for the death of eleven children in Nigeria as a result of a non-consensual trial of their antibiotic Trovan.<sup>79</sup> Pfizer moved to dismiss the case on *forum non conveniens* grounds.

In an opinion that is rare for its consideration of the situation abroad and the interests of the foreign plaintiffs, the U.S. Court of Appeals for the Second Circuit acknowledged that "rampant corruption" in Nigerian courts made them an undesirable forum for plaintiffs.<sup>80</sup> The court also considered the political situation in Nigeria and used sources from international organizations as evidence for the detrimental effects of medical testing.<sup>81</sup> The court engaged in a very favorable read-

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77. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

78. This case contrasts with other cases in which the situation abroad was analyzed but the concern for the plaintiffs seemed much more limited. *See* *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477, 479 (2d Cir. 2002) (affirming dismissal on *forum non conveniens* grounds); *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 199 (2d Cir. 1987) (making a serious inquiry into the effectiveness of the Indian court system but demonstrating an unwillingness to consider a supervisory role for U.S. courts after dismissal on *forum non conveniens* grounds).

79. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168–72 (2d Cir. 2009).

80. *Id.* at 171.

81. *Id.* at 172, 175. For example, in the court's characterization of the Pfizer's changed litigation strategy, it states, "The *Abdullahi* and *Adamu* plaintiffs appealed. Since then, a tectonic change has altered the relevant political landscape. In May 2007, the state of Kano brought criminal charges and civil claims against Pfizer, seeking over \$2 billion in damages and restitution. Around the same time, the federal government of Nigeria sued Pfizer and several of its employees, seeking \$7 billion in damages. None of these cases seeks compensation for the subjects of the tests, who are the appellants before this Court. Pfizer then notified this Court that in light of these recent developments, which it believed required further consideration by the district court, it would not seek affirmance on the basis of *forum non conveniens*." *Id.* at 172 (internal citations omitted). The opinion also mentions the Nuremberg Code, the World Medical Association's Declaration of Helsinki, and the guidelines authored by the Council for International Organizations of Medical Services (CIOMS) as references of global practice. *Id.* at 175.

ing of international covenants as being evidence of the “international community’s recognition in the ICCPR of its obligation to protect humans against nonconsensual medical experimentation. . . .”<sup>82</sup>

Furthermore, the Second Circuit considered international legal developments around the world, in Australia, Belgium, Brazil, China, Israel, Japan, New Zealand, Norway, and Switzerland,<sup>83</sup> to conclude that it is a “powerful indication” of customary international law.<sup>84</sup> The majority criticized Judge Wesley’s dissent as “unselfconsciously reactionary and static.”<sup>85</sup> The decision is an example of international judicial dialogue as discussed below.

It is also notable that the court interpreted the Food and Drug Administration’s (FDA) informed consent requirement as other-regarding<sup>86</sup> and considered the “possibility of enormous health benefits” of drug inventions for the “world community.”<sup>87</sup> This is a case that, arguably, shows a court taking a view of its role as a trustee of humanity and reading legislative and executive action, in the form of the ATS and federal regulations, as supporting its other-regardingness. Why was the court willing to adopt this reasoning? The gravity of the allegations allowed the court the safe assumption that public opinion was on their side. On a more drastic reading, Judge Parker’s decision in this case represents law-making by subterfuge.

As Judge Wesley put it in his dissenting opinion:

“[A] smaller, more interdependent world community has not been employed by the Supreme Court (or any other court to my knowledge) to convert claims such as those presented here into violations of the

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82. *Id.* at 180.

83. *Id.* at 181.

84. *Id.*

85. *Id.* at 188.

86. *Id.* at 182. (“The importance that the United States government attributes to this norm is demonstrated by its willingness to *use domestic law to coerce compliance with the norm throughout the world.*” (emphasis added)). For this proposition, the court cites, *inter alia*, 21 C.F.R. §§ 312.20, 312.120 (2008) and DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., THE GLOBALIZATION OF CLINICAL TRIALS 5 (2001), available at <http://www.oig.hhs.gov/oei/reports/oei-01-00-00190.pdf>.

87. *Id.* at 186.

law of nations. . . . It is not enough that a wrong could create international ramifications; in order for it to be a matter of mutual concern, it must ‘threaten[ ] serious consequences in international affairs. . . . Demonstrating that a wrong is a matter of mutual concern must necessarily be difficult.’<sup>88</sup>

Judge Wesley rejected the course chosen by the court’s majority and argued from precedent, while the other judges were willing to move the law. Courts pursuing the trusteeship conception could adopt reasoning parallel to the court in *Abdullahi*—acknowledging difficult international conditions, paying attention to international legal decisions, and opening national courts for proceedings on the merits.<sup>89</sup>

#### 4. Amici

The U.S. court system allows third parties to submit their views. Today, the *amicus curiae*, as “an impartial assistant to the judiciary, providing advice and information to a mistaken or doubtful court,”<sup>90</sup> is an integral part of Supreme Court litigation. In a secondary function, it has evolved into a means of representing third-party interests affected by ongoing litigation<sup>91</sup> and “the politically powerless,” for whom the adversarial system has failed.<sup>92</sup> It is this second function that is of importance for a discussion of courts working towards a conception of national courts as trustees of humanity. In political transformation, *amici* have been important, for example in *Brown v. Board of Education* and *Roe v. Wade*.<sup>93</sup>

In cases in which the affected noncitizen interests are barred from being directly present in court due to overly stringent procedural rules such as those of standing discussed

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88. *Id.* at 208–09.

89. The step of the *Abdullahi* court is arguably less drastic because the ATS’s customary law inquiry justifies other-regardingness as a methodological necessity.

90. Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244 (1992).

91. *Id.*

92. *Id.* at 1245.

93. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 671 (2008).

above, *amicus* briefs provide a procedural tool to bring the full scope of foreign affected interests into the court's view. The *amicus* is, however, structurally inferior to standing because it needs to piggy-back on an existing case. If the case cannot be brought because of standing, no *amici* can take the stage. Moreover, the *amici* will also be an indicator of (financially able) public sentiment and in some cases allow the court to discern the views of the other two branches of government.<sup>94</sup> In cases of global reach, U.S. courts are exposed to views from foreign governments and interest groups.<sup>95</sup> This international *amicus* allows courts to approximate international sentiment and to localize those decisions in which their potential other-regardingness might be interpreted as meddling in state affairs.

Professor Simard provides two justifications for the *amicus*: affected groups theory and information theory.<sup>96</sup> Affected groups theory suggests that courts use *amici* to gauge public opinion. The mere fact that organizations went through the effort to submit an *amicus* is a significant statement of their involvement.<sup>97</sup> Information theory proposes that the main function of the *amicus* brief is to provide information to the court. Simard's empirical study suggests that courts take interest in the *amici* to learn about "matters that extend beyond the parties' dispute but impact a direct interest held by the *amicus* which may be materially impacted by the outcome of the case in which the *amicus* seeks to participate."<sup>98</sup>

Next, I will examine *amicus* briefs submitted in two U.S. Supreme Court decisions: *Kiobel v. Royal Dutch Petroleum Co.*<sup>99</sup>

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94. This view sits well with Abram Chayes' view of public law litigation. See Chayes, *supra* note 41 (arguing that public law litigation has consequences within the broader arena of public regulation and has consequences for many parties).

95. Lowman, *supra* note 90, at 1261.

96. Simard, *supra* note 93, at 681.

97. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 785–86 (2000).

98. Simard, *supra* note 93, at 692.

99. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, 642 F.3d 268 (2d Cir. 2011), 642 F.3d 379 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011), *aff'd*, 133 S. Ct. 1659 (2013); see also Brief for Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 WL 6396550.

and *F. Hoffman-La Roche Ltd. v. Empagran S.A.*<sup>100</sup> In *Kiobel*, Nigerian plaintiffs, representing a putative class, sued Royal Dutch Petroleum and its Nigerian subsidiaries under the ATS. The plaintiffs alleged the defendants violated the law of nations by aiding and abetting the Nigerian government in committing human rights abuses, such as torture and extrajudicial killings.<sup>101</sup> The case raised questions of the international civil liability of corporations, the extraterritorial application of the ATS, and the role of U.S. courts in providing a remedy to noncitizens more generally. It was in many ways a case about the other-regardingness of U.S. courts.

The case also triggered the submission of numerous *amicus curiae* briefs from around the world. In favor of the plaintiffs came submissions, among others, from international comparative law scholars and French judges,<sup>102</sup> a network of international human rights organizations,<sup>103</sup> U.S. universities,<sup>104</sup> the U.N. Special Rapporteur on Torture,<sup>105</sup> the U.N. High Commissioner for Human Rights,<sup>106</sup> the government of Argentina,<sup>107</sup> international law professors from the United States, Germany, Britain, Australia, and South Africa,<sup>108</sup> Ger-

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100. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

101. Brief for Petitioners, *supra* note 99, at 2–3.

102. Brief of *Amici Curiae* Comparative Law Scholars & French Supreme Court Justice in Support of Petitioners on the Issue of Extraterritorial Jurisdiction, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165341.

103. Brief on Reargument of *Amici Curiae* Int'l Human Rights Orgs. in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165336.

104. Supplemental Brief of Yale Law School Ctr. for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165340.

105. Brief of Professor Juan E. Méndez U.N. Special Rapporteur on Torture as *Amicus Curiae* on Reargument in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165335.

106. Supplemental Brief of *Amicus Curiae* Navi Pillay, the United Nations High Comm'r for Human Rights in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165332.

107. Brief for the Gov't of the Argentine Republic as *Amicus Curiae* in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165334.

108. Supplemental Brief of *Amici Curiae* German Inst. for Human Rights and Int'l Law Experts in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165344; Supplemental Brief of *Amici Curiae* Int'l Law Scholars in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165333.

man opposition Parliamentarians,<sup>109</sup> and the American Civil Liberties Union.<sup>110</sup> The list shows a diverse group of global actors. The ATS, as a significant exercise of global regulatory action, triggered a response from global regulatory interests affected by it. This confirms Simard's affected groups theory. But, no African organization or Nigerian NGOs submitted an *amicus* brief.

It is important to continue to be conscious of the bias created through liberal procedural participation mechanisms. It is often only the financially able and well-informed elites that are able to participate, and procedural mechanisms have the potential to exacerbate inequalities. Procedural mechanisms should have low entry thresholds and the mechanisms' operators should adopt it as their own obligation to include a diverse set of interests. To make the obligations of Benvenisti's sovereignty conception count, the mechanisms created to fulfill the obligations must themselves strive toward the fulfillment of the obligation. They must understand not only the letter, but the spirit of their function.

On the opposing side, in favor of Royal Dutch Petroleum Co., there was also a diverse set of interests that submitted their opinions to the Court. Oil companies such as British Petroleum and international corporations such as General Electric,<sup>111</sup> Chinese and European business interests,<sup>112</sup> the Ger-

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109. Supplemental Brief of Volker Beck and Christoph Strässer, Members of Parliament of the Fed. Republic of Ger., *Amici Curiae* in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165326 (objecting to the view of their government). The brief noted that German business groups had lobbied the German government to submit an *amicus* brief in favor of respondents. *Id.* at 12 n.3.

110. *Amicus* Brief of the American Civil Liberties Union on Reargument in Support of Petitioners, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2363407.

111. Supplemental Brief of *Amici Curiae* BP America, Caterpillar, Conoco Phillips, Gen. Electric, Honeywell, Int'l Bus. Machs, and Monsanto in Support of Respondents, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 3276506.

112. Supplemental Brief for *Amici Curiae* the Nat'l Foreign Trade Council, USA\*Engage, the U.S. Council for Int'l Bus., the Am. Petroleum Inst., the Nat'l Ass'n of Mfrs., the Org. for Int'l Inv., the Am. Ins. Ass'n, the Nat'l Mining Ass'n, the Int'l Chamber of Commerce UK, the Ass'n of German Chambers of Indus. & Commerce, the Fed'n of German Indus., the Confederation of British Indus., the Confederation of Netherlands' Indus. & Emp'rs, and *BusinessEurope* in Support of Respondents, 133 S. Ct. 1659

man and Dutch government, and different international law professors from around the world all submitted *amicus* briefs.<sup>113</sup> This atmosphere of real global contestation and a conflict between different strands of interest is a result of liberal procedural mechanisms such as the *amicus* brief. It also confirms Simard's information theory, as many views on the historical aspects of the ATS were submitted to the Court because of the *amici*. For the trusteeship conception, this procedure enabling contestation is important as it signals to courts the underlying substantive issue. The procedural obligation to have the views of noncitizens heard helps crystallize the fundamental question.

*Kiobel* shows how *amicus* briefs can be an effective tool to fulfill a state's procedural obligation under the trusteeship conception; they provide noncitizens with a mechanism to make their views heard. The recent judgment, however, is also a reminder about the remaining domestic focus of national courts. Chief Justice Roberts' decision focused on the presumption against extraterritorial application, a clear tool of judicial avoidance.<sup>114</sup> The only mention of *amicus* briefs in the majority's opinion came in a cite to a dissent in a related case that made much of the fact that Canada, Germany, Indonesia, and other states had objected to the extraterritorial application of the ATS.<sup>115</sup>

In *Empagran*, foreign states urged the Supreme Court to dismiss the claims of plaintiffs that had no connection to the United States. The *amicus* brief on behalf of Germany and Belgium contended that the state has "significant economic and political interests . . . in protecting against the encroachment of other countries' laws on [German and EU competition laws] enforcement efforts."<sup>116</sup> This position by the Ger-

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(2013) (No. 10-1491), 2012 WL 3276503; Supplemental Brief for US-China Law Soc'y as *Amicus Curiae* in Support of Respondents, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 3245483.

113. Brief of Int'l Law Professors as *Amici Curiae* Supporting Respondents, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 392539.

114. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

115. *Id.* at 1669 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part)).

116. Brief of the Gov'ts of the Fed. Republic of Ger. & Belg. as *Amici Curiae* in Support of Petitioners at 2, 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 226388, at \*6 [hereinafter Brief for Germany and Belgium].

man and Belgian governments raise a fundamental problem of other-regardingness. To the extent that taking somebody else's interest into account necessarily entails a judgment about what that interest is, other-regardingness is potentially paternalistic. In opening the Court's doors to foreign litigants in the *Empagran* case, the Supreme Court could be seen to pass judgment on what is in the foreign litigants' interest, and in the global interest more generally. To a state that does not think of other-regardingness as a legitimate exercise of state power, Germany in this case, it could look like interference with its own sovereignty.

This example shows that other-regardingness rarely implicates only one noncitizen's interest. To this extent, what might be in the interest of one group, say the international plaintiffs in *Empagran*, is set to run against another group's interest, say the German government. The latter part of this argument is showcased in the German government's proposition that "United States and international law require that nations consider the sovereign interest of other countries before exercising their jurisdiction extraterritorially,"<sup>117</sup> and the claim that the lower court finding in favor of plaintiffs "failed to give proper consideration to the legitimate choices those nations have made concerning the regulation of their own commerce and competition in their own markets."<sup>118</sup> In resolving this conflict, a court acting as a trustee of humanity has to be conscious of the normative concepts motivating the trusteeship conception in the first place. A trusteeship court must provide an equal playing field to different global interests and prevent interests from hiding behind their institutionalized privilege.

*Amicus* briefs represent an opportunity for courts to consider the views of diffuse and global interests. In line with a conception of sovereigns as trustees of humanity, courts could make it their obligation to consider the views of *amici* representing foreign interests, and possibly even addressing them explicitly in their opinions. It is unclear how to weigh the interests of foreign governments interested in their own sovereignty and individual interest groups advocating for the United States to accept a regulatory function otherwise

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117. *Id.* at 6 (drawing upon RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporter's note at 250 (1987)).

118. *Id.* at 10.

shirked by a national government. It is a general problem for global governance to strike this balance.

### B. *Germany*

I will now turn to German courts and their procedural practice and potential for realizing the procedural obligations entailed by the trusteeship conception. The German judiciary is divided into constitutional courts, ordinary courts, and specialized courts. The ordinary courts comprise both the civil courts and the criminal courts. The first part of this subsection deals with specialized procedures of the civil courts and how they relate to the procedural obligations of the trusteeship conception. The specialized courts encompass labor courts, financial courts, social courts, and administrative courts. The second part of this subsection considers administrative courts' standing in relation to the trusteeship conception.

To some extent the European Union has a built-in other-regardingness, for example the Aarhus Convention. The Convention obligates state parties to create public access to environmental information, allow for public participation in environmental decision-making, and provide access to justice.<sup>119</sup> The parties to the Convention owe these obligations to "the public concerned," which is not confined to only their own citizens.<sup>120</sup> This built-in other-regardingness must be kept in mind in order to not overstate the other-regardingness and progressive jurisprudence of German national courts. Another aspect to consider is the possibility that the need for courts' other-regardingness is diminished in Germany because the strong EU framework provides a forum that is sympathetic to international litigants and already allows for relatively easy access.

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119. *The Aarhus Convention: What is the Aarhus Convention?*, EUR. COMMISSION, <http://ec.europa.eu/environment/aarhus/> (last updated July 18, 2013).

120. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 2, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]; Treaty Establishing the European Economic Community art. 5, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome] (establishing the principle of loyal cooperation.); Case C-2/88, *Zwartveld et al.*, 1990 E.C.R. I-3365, I-3372 (The ECJ held that EU administrative bodies have to assist other EU states.).

### 1. *Standing in Civil Cases - Unterlassungsklage*

To have standing in German civil court, the plaintiff generally has to claim that she has been injured in her substantive rights.<sup>121</sup> This requirement parallels the injury in fact requirement of U.S. law. In contrast to the United States, German law protects the community interest by allowing civil society organizations that qualify and are registered with the Federal Office of Justice to sue on behalf of the public interest.<sup>122</sup> This middle ground in form of the so-called “Verbandsklage” avoids “popular suits” while maintaining a mechanism allowing diffuse interests to organize and seek legal relief. It is superior to afford actual standing, rather than allowing *amicus* rights, because it allows noncitizens to *initiate* the suit.

The lists of civil society organizations entitled to standing in each EU member state are now, pursuant to EC directive 98/27/EC, mutually recognized in other member states as equally entitled to standing.<sup>123</sup> Courts trying to pursue a trusteeship conception could try to analogize to the existing EU lists and try to admit non-EU member interest groups into court if they are so authorized in their home state.

### 2. *Administrative Courts and Cross-Border Infrastructure Projects*

The right of noncitizens living abroad to participate in German administrative proceedings, and their ability to sue if their rights are violated, is prominent in the field of environmental protection. Three cases about infrastructure projects close to the Dutch border—the licensing of a nuclear energy plant in 1987, an airport in 2008, and a wind energy park in 2011— illustrate the extent to which courts are willing to be

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121. Bacher, *Rechtsschutzbeduerfnis*, BECK'SCHER ONLINE-KOMMENTAR ZPO [BECKOKZPO] § 253, Rn 28 – 31 (Vorwerk/Wolf ed., 2012).

122. The Federal Justice Office is the central servicing agency for the judiciary and the general point of contact for international legal relations. For the homepage of the Federal Office of Justice, see *Welcome to the Federal Office of Justice*, BUNDESJUSTIZAMT, [https://www.bundesjustizamt.de/EN/Home/homepage\\_node.html](https://www.bundesjustizamt.de/EN/Home/homepage_node.html) (last visited Oct. 31, 2013).

123. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51. For commentary, see UKlaG § 3 Anspruchsberechtigte Stellen Micklitz/Münchener Kommentar zur Zivilprozessordnung 3. Auflage 2008 Rn 40–41.

other-regarding. This line of cases also shows the limits of other-regardingness.

The first case, *Standing of an Alien Against Nuclear-law Licensing*,<sup>124</sup> was about a Dutch national whose application to participate in the official licensing proceeding for a nuclear power plant close to the Dutch border had been rejected by the German executive organs. The Dutch national sued in front of an administrative court arguing that the executive organs had violated his right under Article 7 of the German nuclear law, which mandated that the rights of third parties be considered in the licensing.<sup>125</sup>

The lower administrative court held that the Dutch national lacked standing because Article 42 of the Administrative Court Procedure Act required plaintiffs to show a violation of their rights, and this violation was nonexistent.<sup>126</sup> To find otherwise, the court argued, would necessitate an interpretation of Article 7 of the nuclear law as having extraterritorial reach—creating rights in the Netherlands—and would therefore contradict the principle of territoriality.

On appeal, the Federal Administrative Court reversed the decision, holding that Article 1 of the nuclear law asks for an interpretation sympathetic with international law and international law requires states to control and avoid environmental degradation beyond its borders.<sup>127</sup> This international obligation demands an interpretation of Article 7 of the nuclear law in such manner that it confers rights on foreign noncitizens. As a result, the Dutch plaintiff could show a violation of his rights and hence fulfilled the standing requirement of Article 42 § 2 of the Administrative Court Procedure Act.<sup>128</sup>

In discussing the lower court’s territoriality argument, and its allegation that allowing the Dutch national to sue would undermine the principle of reciprocity in international

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124. Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Dec. 17, 1986, 75 ENTSCHIEDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 285, NEUE JURISTISCHE WOCHENSCHRIFT 1154, 1987 (“Klagebefugnis eines Ausländers gegen atomrechtliche Genehmigung”).

125. Atomgesetz [AtG] [Nuclear Law], Oct. 31, 1976, BGBl. I at 3053.

126. Verwaltungsgerichtsordnung [VwGO] [Administrative Court Procedure Act], Mar. 19, 1991, BGBl. I S. at 686 (art. 42).

127. 75 BVERWGE 285, NJW 1154 (1155).

128. Verwaltungsgerichtsordnung [VwGO] [Administrative Court Procedure Act], Mar. 19, 1991, BGBl. I S. at 686 (art. 42).

relations, the German court mentioned the fact that the Netherlands, just as France and Switzerland, had conferred similar participation rights to German citizens in opposing nuclear facility construction.<sup>129</sup> Moreover, the court pointed out that Germany had cooperated via the regional Euratom organization with its neighbors in developing nuclear energy for civil use.<sup>130</sup>

The reasoning is important for our discussion of other-regardingness. It shows that even procedural obligations toward other countries' citizens will often be justified on the basis of reciprocity and solidarity. Courts trying to be the first to be other-regarding will have a harder time justifying their move than those that already encounter such cooperation. There is a first-mover disadvantage.

The second case, *Suit of a Foreign County Against a Airtravel-law Based Conversion-license*, concerns a conversion of a military airport on German territory close to the Dutch border into a civilian airport.<sup>131</sup> A Dutch community tried to petition the German airport licensing authority to conduct an environmental impact assessment and to evaluate the appropriateness of night flights at times that had previously been agreed on in a treaty between the Netherlands and Germany.<sup>132</sup>

The German administrative court agreed with the lower court that the Dutch plaintiff had standing. The court acknowledged that neither the Aircraft-travel Law<sup>133</sup> nor the Ad-

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129. 75 BVERWGE 285, NJW 1154 (1155).

130. *Id.*

131. Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Oct. 16, 2008, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 452, 2009 (Pflicht zur Umweltverträglichkeitsprüfung bei luftverkehrsrechtlichem Konversionsvorhaben).

132. Gesetz zu dem Vertrag vom 29. April 2003 zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande über die Durchführung der Flugverkehrskontrolle durch die Bundesrepublik Deutschland über niederländischem Hoheitsgebiet und die Auswirkungen des zivilen Betriebes des Flughafens Niederrhein auf das Hoheitsgebiet des Königreichs der Niederlande (Gesetz zu dem deutsch-niederländischen Vertrag vom 29. April 2003 über den Flughafen Niederrhein) [Treaty of 29 April 2003 Between the Federal Republic of Germany and the Kingdom of the Netherlands on the Provision of Air Traffic Control by the Federal Republic of Germany on Dutch Territory and the Impact of Civil Operation of the Niederrhein Airport on the Territory of the Kingdom of the Netherlands], Apr. 29, 2003, BGBl II, at 1763.

133. NVwZ 452 ("Luftverkehrsgesetz") (translation by author).

ministrative Court Procedure Act clearly regulates the standing of foreign plaintiffs. The court, therefore, had some discretion in deciding the standing issue. The court held that the central question was whether the regulatory laws in question created "subjective-public rights"<sup>134</sup> for the noncitizens. Because airport noise "does not stop at German borders,"<sup>135</sup> the court held that the balancing required for the airport's planning decision must include the interests of neighbors. The German court, again, considered it important to mention that allowing the standing of the Dutch community did not constitute an exercise of German state power on Dutch soil and would therefore not interfere with Dutch sovereignty.<sup>136</sup>

For our discussion of the conception of sovereigns as trustees of humanity, the most interesting aspect of the decision is the court's use of the prior agreement between the Netherlands and Germany concerning the airport. The court deferred to the regulation procedure agreed upon by the executives and rejected the Dutch plaintiff's argument that the lower administrative court erred in rejecting the plaintiff's petition for a novel inquiry into the adequacy of noise protection.<sup>137</sup> This illustrates the point that courts, in their attempts to be other-regarding, will find it hard to be more active than the executive.<sup>138</sup> A case in which an executive agreement clearly excludes other-regardingness would be an interesting test case for this hypothesis.

The third case, *Suit of a Foreign Neighbor against the Approval of Windmill-powered Plants*, involved a suit in response to a German administrative proceeding granting a license to construct a wind energy park close to the Dutch border.<sup>139</sup> The Dutch national petitioned the court to apply the Dutch standard of hearing. The German court disagreed. According to the court,

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134. *Id.* at 454 ("[S]ubjektiv-öffentliche Rechte") (translation by author). This is a technical term needed for standing before an administrative court.

135. *Id.* ("M]acht vor den Staatsgrenzen Deutschlands nicht halt") (translation by author).

136. *Id.* ¶ 21.

137. *Id.* ¶ 29.

138. *See infra* Part IV.B.

139. Oberverwaltungsgericht Lüneburg [OVG Lüneburg] [Lüneburg Higher Administrative Court], Aug. 1, 2011, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1073, 2011 ("Klage eines ausländischen Nachbarn gegen die Genehmigung von Windenergieanlagen").

the standard to be applied was the German standard, and the Dutch national did not have the right to be treated by the German court to the satisfaction of Dutch laws. The court noted that the plaintiff submits to the law of the court and not the court to the laws of the plaintiff. It is not part of the licensing proceeding to inquire whether the laws of the neighboring country are being abided by.

This case is interesting as it illustrates the limits of other-regardingness. Part II mentioned that the justification for the trusteeship conception is not only one derived from a Kantian liberalism committed to self-determination and free choice, but similarly from utilitarian arguments committed to efficiency. Other-regarding obligations are not to be prohibitively costly. I take it to be an important aspect of Benvenisti's sovereignty conception that it aspires to be workable and plausible to many different philosophical positions about the normatively good function of the states and the law more generally. This means that national courts should not be required to consider complicated questions of foreign law that could lead to a less efficient judicial process. If courts and administrative agencies had to consider foreign law to vindicate the positive obligations entailed by the trusteeship conception, the efficiency rationale would suffer. In the *Windmill* decision, this efficiency rationale was at least implied when the court introduced the principle of territoriality as the basis for the choice of law and rejected application of Dutch law to the actions of a German administrative agency.<sup>140</sup>

The three decisions analyzed above draft a picture of an open German court system. The Dutch plaintiffs in all three cases were able to make their standpoint heard, and when rejecting their claims, the German courts gave reasons. This reasonably conforms with Benvenisti's procedural obligations, but the language in the decisions matters. The courts speak of "neighbors" not "foreigners" and acknowledge the reciprocity of other-regardingness between Germany and the Netherlands. To give effect to the trusteeship conception not only in effect, but also in spirit, courts could phrase their opinions in terms of noncitizens more generally and phrase their decisions in terms of an obligation, not comity.

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140. *Id.*

### 3. *Amici at the German Constitutional Court*

German courts do not have an equivalent to the *amicus curiae* brief.<sup>141</sup> Article 27 of the Constitutional Court Law states that the Constitutional Court may allow knowledgeable third-parties to make a statement.<sup>142</sup> An example of the Court admitting third-party experts comes from a suit involving the rights of refugees in which the court asked for a written statement from the U.N. High Commissioner for Refugees (UNHCR).<sup>143</sup> Commentators point out that the experts are usually “relevant groups from civil society.”<sup>144</sup>

The Constitutional Court could make more liberal use of its privilege to invite third party experts. In the recent *European Stability Mechanism* (ESM) decision, for example, the Court could have invited the Greek government and Greek civil society organizations to comment on the decision. The obvious risk with such a route is that Constitutional Court opinions would seem more like policy judgments and less like decisions of law. In some ways, this would not give away too much because the German government, in defense of the ESM, itself alluded to the “massive consequences for member states” if the stability mechanisms were invalidated by the German Constitutional Court.<sup>145</sup>

Having analyzed U.S. and German court decisions in light of the trusteeship conception’s procedural obligations, the Note now turns to its theoretical argument.

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141. HANS LECHNER & RÜDIGER ZUCK, BUNDESVERFASSUNGSGERICHTSGESETZ [BVERFGG] KOMMENTAR 224–25 (6th ed. 2011) (commentary to the law of the German Constitutional Court).

142. Bundesverfassungsgericht [BverfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBl I at 243 (§ 27(a)) (“Das Bundesverfassungsgericht kann sachkundigen Dritten Gelegenheit zur Stellungnahme geben” (“The Constitutional Court can give knowledgeable third parties an opportunity to state their point of view.”) (translation by author)).

143. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 2012, 1 BvL 2/10 (¶ 33), *available at* [http://www.bundesverfassungsgericht.de/entscheidungen/l20120710\\_1bvl000210.html](http://www.bundesverfassungsgericht.de/entscheidungen/l20120710_1bvl000210.html).

144. LECHNER & ZUCK, *supra* note 141, at 224 (translation by author).

145. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Sept. 12, 2012, 2 BvR 1390/12 (¶ 176), *available at* [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html) (“Eine deutlich verzögerte Ratifizierung der beiden Verträge sie in der derzeit fragilen Situation mit *massiven Folgen für einige Mitgliedsstaaten verbunden*” (emphasis added)).

#### IV. FACTORS INDUCING NATIONAL COURTS TO ACT AS TRUSTEES OF HUMANITY

This Part develops a list of factors that might influence national courts' behavior in cases involving state sovereignty. The list is derived from observations about the kinds of cases in which national courts were and were not inclined to adopt a progressive conception of state sovereignty that shows signs of the trusteeship conception. These observations are anecdotal and not based on serious empirical study.<sup>146</sup> They are also not derived from a general theory about the role of courts and their interaction with other institutions in the legal system. However, the basic disaggregationalist insight of viewing government as a complex structure, in which different institutions have different goals and constraints, lends a theoretical underpinning to looking at the executive, legislature, and judiciary separately.<sup>147</sup> The constructivists' emphasis on epistemic communities gives theoretical basis to the factors focusing on national courts' own disposition and their dialogue with courts around the world.

As the examples from the United States and Germany show, courts' inclination to think of states as trustees of humanity and endorse the minimal procedural obligations Benvenisti demands varies. To explain this variation, it is necessary to consider five factors. First is an analysis of national courts' disposition toward the concept of state sovereignty, and their inclination toward either the traditional conception, with its primacy of national interest, or reconceptualizations of state sovereignty, which take modern global interdependence into account. The question is whether the courts perceive the traditional conception to be at odds with other general constitutional principles, like human equality, that they rely on for decision-making in the national context.

Second and third are the courts' interactions with the executive and the legislature. The general dispositions of the other branches of government toward the trusteeship conception are important influences on the courts' behavior. Public opinion and its influence on courts through pressure and as

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146. Rigorous empirical analysis of reasoning in court decisions would make for an extremely difficult, but interesting, further study.

147. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 288-89 (1997).

an indicator of social and ideological change is the fourth factor to consider when analyzing courts.

The last factor is interjudicial dialogue among national courts, and exchange of information and doctrines as a factor influencing the likelihood of courts acting in accordance with the trusteeship conception.

A. *National Courts’ Interaction with State Sovereignty as a Legal Concept*

Justitia, the goddess of justice, the symbol for the court’s task and for the rule of law more generally, is “aloof and stoic” and “represents the physical and psychological distance between the judge and the litigants.”<sup>148</sup> A court’s distance to the litigants ideally facilitates impartiality. Additionally, the blindfold “protects Justice from distractions and from information that could bias or corrupt her.”<sup>149</sup> Impartiality, then, is an inherent quality of courts. This impartiality arguably makes it easier for courts to conceptualize sovereignty as a trusteeship for humanity because it is in the nature of their institution to disregard irrelevant factors and considerations like borders, language, and culture, as long as the law does not explicitly require them to do so. The courts’ presumption is in favor of abstraction and consequently a tendency to equalize the interested parties before the court.

Many modern societies are committed to human equality. For normative purposes, what matters to many today is the “equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice.”<sup>150</sup> National origin is a protected class in United States and German anti-discrimination law, just as race, color, and religion are.<sup>151</sup> Courts, guarding their societies’ constitutions and laws, are also required to uphold human equality. In this way it is not only their institutional ideal that promotes impar-

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148. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 383 (1982).

149. *Id.*

150. JOHN RAWLS, *A THEORY OF JUSTICE* 17 (rev. ed. 1999).

151. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2011); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 3(3) (Ger.) (“Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner *Heimat und Herkunft*, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden.” (emphasis added)).

tiality as discussed above, but the court's function in society that promotes equality.

As a consequence, national origin should not, in and of itself, be a category on which judges base their decisions. State sovereignty and the citizenship of parties are not a natural aspect of ideal justice based on human equality. The traditional conception of sovereignty, with its division into "here and there" and "them and us," is therefore somewhat unnatural for courts. The trusteeship conception, with its view across borders and its commitment to participation and impartiality independent of nationality, fits well with courts' ideal function and commitment to human equality and the rule of law. The point here is simply that courts, by their nature, might be inclined to adopt the trusteeship conception. This is important because structure and normative commitments influence institutions' interactions with legal concepts.

To be fair, the law has developed doctrines, already mentioned above, that pay tribute to citizenship, and in which a lawsuit's result will depend on a person's citizenship. On one interpretation, these legal constraints exist because it is the natural tendency of a court adhering to the principles of justice not to yield to specific idiosyncrasies of the litigants, such as citizenship, that would introduce a notion of inequality among the parties. As a result, doctrines in which citizenship of the parties can determine the legal outcome might be somewhat at tension with the self-conception of judges, and therefore might be more easily relaxed. Moreover, numerous doctrines exist that explicitly limit the jurisdiction of national courts in international affairs and international law.

The conception of sovereigns as trustees of humanity and the principles of consideration, deliberation, reciprocity, and the Pareto principle are conceivable as a natural evolution of judicial activity. Balancing interests is a natural activity of courts. In many parts of the law, the balance to be struck has a cross-border element.<sup>152</sup> The procedural principles of offering noncitizens a right to a hearing, justifying decisions to human-

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152. One example is in family law, where the Hague Convention against Child Abduction demands the return of the child to the parent, but the parent's place of residence might subject the child to a considerably dangerous environment. The Hague Convention on the Civil Aspects of International Child Abduction arts. 1, 7, Oct. 25, 1980, T.I.A.S. No. 11670.

ity, and demanding state action in favor of noncitizens in case of Pareto efficiency are activities relatively natural to court action. In sum, it will be courts with a strong commitment to the rule of law and human equality that are more likely to be other-regarding.

However, this argument fails to explain the many court-made and thereby self-imposed avoidance doctrines that courts can use to bypass other-regardingness. As the next two subsections argue, national courts are sensitive to their power relationship with the other branches of government, and it is often their deference to them, rather than a commitment to a traditional conception of sovereignty, that explains the avoidance doctrines.

#### B. *National Courts' Interaction with the Executive*

The executive influences the courts in two ways relevant for this Note's argument. First, in situations of power struggle between the executive and the national courts, national courts have two options. They can defer to the executive and not take the development of international law in their own hands. This approach is arguably visible in the United States where the Supreme Court takes the executive's stance seriously and is often unwilling to be confrontational.<sup>153</sup> Or, the courts try to use international and domestic law to bolster their position.<sup>154</sup> It is in systems where courts take the latter option, as well as in systems where the courts traditionally have a powerful position and must be less concerned about power struggle altogether, that progressive international legal doctrine, such as the trusteeship conception, could be endorsed.

Second, modern executives influence courts by forcing them to be more global in their mindset. In light of increasingly global executive action through treaties, international organizations, and global conferences, courts trying to fulfill

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153. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (Breyer, J., concurring) ("We noted 'a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.'") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004)); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–69 (2004).

154. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign And International Law by National Courts*, 102 AM. J. INT'L L. 241, 244 (2008).

their role as a check on the executive's power also have to increasingly engage with global problems. High activity of the executive in international politics will therefore make national courts more likely to engage with issues of state sovereignty, and thereby creates the prerequisite engagement necessary for a reconceptualization of state sovereignty.

The executive is both a progressive force that pushes international interaction and a conservative protector of sovereignty. It is progressive, as it is the branch of government that has, through foreign policy and negotiations, the most interaction with other states, and therefore is probably most aware and exposed to questions of global governance.<sup>155</sup> It is protective of sovereignty because it has the most to lose from a weakening of state sovereignty and the obligations entailed by sovereignty as a trusteeship of humanity. In foreign relations, executives are given wide discretion by the other branches of government. Germany is a good example, where the executive's empowerment "to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity."<sup>156</sup> The deference to the executive branch is also noted in U.S. jurisprudence.<sup>157</sup> As a result of this deference, national courts will be more likely to develop progressive legal concepts, such as the trusteeship conception of state sovereignty, in instances where the executive is itself positively inclined toward the trusteeship conception. Courts are, again, reacting to the executive's moves.<sup>158</sup>

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155. An example of the executive's progressive force comes from Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146. For a short discussion, see JEFFREY DAVIS, *JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS* 118–20 (2008).

156. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], June 30, 2009, 2 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BvE]* 2/08 (¶ 219).

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112 (1987) ("The degree of respect or deference to Executive Branch views is described variously—'particular weight,' 'substantial respect,' 'great weight'—but these various expressions are not used with precision and do not necessarily imply different degrees of deference.").

158. The German case involving the executive's agreement on airport development is an example of this relationship.

### C. *National Courts' Interaction with the Legislature*

The legislature has often constituted the organ for courts to defer to when they feel that an issue of international reach is too difficult for them to decide or required democratic legitimization.<sup>159</sup> In truly global problems affecting people in many different states, however, the fall back on the legislature is imperfect. To heed the national legislature, if it is not itself other-regarding in its decision making, is to effectively exclude noncitizens' interests from consideration. The extent to which courts are willing to acknowledge the limits of legislative legitimization and question legislative authority can increase a court's other-regardingness.

The sentiment in the legislature about state sovereignty is most likely to correspond to the political sentiment of the population in democratic societies. Legislatures have passed laws that are other-regarding and give the courts substantive or procedural rules to reach a conception of sovereignty as trustees of humanity. On one reading, the United States' adoption of the ATS and Foreign Corrupt Practices Act (FCPA) are such legislative acts.<sup>160</sup> Cases like *Abdullahi* would not be in front of U.S. courts without the ATS, regardless of the nationality of plaintiffs and defendants and territorial nexus of the breach of the duty. In Germany, the Aarhus Convention enabling statute is another example of the legislature's influence. These cases show how national courts' other-regardingness can be supported by the other-regardingness of the legislature.

A final example for the interaction and positive amplification of courts' ability to decide cases giving weight to the trusteeship conception of sovereignty does not come from the United States or Germany, but from India. In *Novartis v. Union of India*, the dispute was over the recognition of Novartis' patent for Gleevec, a cancer drug, based on a new form of the

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159. This sentiment is nicely expressed in *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U.S. 138, 147 (1957) ("For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision. . ."). That this thinking is very much alive can be seen by the fact that this passage was quoted at length in the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664 (2013).

160. 15 U.S.C. § 78dd-1 (2011); 28 U.S.C. § 1350 (2011).

molecule.<sup>161</sup> In rejecting Novartis' claim, the Supreme Court of India pointed to the debate in the Indian legislature that "strove to balance its obligations under the international [TRIPS Agreement] and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries)."<sup>162</sup> The Court concluded that "[t]o anyone going through the debate on the Bill, Parliament would appear keenly alive to national interests, human-rights considerations and the role of India as the producer and supplier of drugs to different parts of the world where impoverished humanity is critically in need of those drugs at cheap and affordable prices."<sup>163</sup> The Court also cited at length the letters to the government of India from the World Health Organization (WHO) and UNAIDS pointing to the importance of India for the provision of medication around the world.<sup>164</sup> This context of the Court's decision made it easier for the judges to side against Novartis than it would have been if the legislature in its debates had favored a stringent interpretation of TRIPS and encouragement of research into new drug development. With the legislature's other-regardingness, the Court's other-regardingness was naturally part of the discussion.

#### D. *Interjudicial Dialogue on Sovereignty and Judicial Reciprocity*

The new international caseload brings a new international awareness to courts. Justice O'Connor of the U.S. Supreme Court said in 1997 that "we live in a world that is constantly shrinking."<sup>165</sup> Justice Claire L'Heureux-Dube of the Ca-

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161. Supreme Court of India, *Novartis AG v. Union of India*, Civil Appeal Nos. 2706–16 of 2013, with 2728 of 2013 and 2717–2727 of 2013 (Apr. 1, 2013).

162. *Id.* ¶ 66; *see also id.* ¶ 4 ("The Court was reminded of its duty to uphold the rights granted by the statute, and the Court was also reminded that an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries, dependent on generic drugs from India.").

163. *Id.* ¶ 79.

164. *Id.* ¶¶ 76, 77.

165. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2, 2. A good example from the United States is *Lawrence v. Texas*, 539 U.S.

nadian Supreme Court argued that international awareness is not merely unilateral anymore, but that a meaningful and substantial dialogue with "cross-pollination" and judges being "givers" as well as "receivers" of "persuasive authority" has emerged.<sup>166</sup> Today, as Benvenisti argues, "even the courts of the most powerful nations are concerned that 'unilateral action by the courts of one nation' would not produce the desired outcomes."<sup>167</sup> Easy communication, international education, and travel contribute to an emerging solidarity among global national courts acting against the executive. As Professors Helfer and Slaughter argue, these factors might contribute to building a "global community of law."<sup>168</sup>

National courts' turn to judicial multilateralism was illustrated, albeit with a disappointing result to some, when the House of Lords argued that "[i]t is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."<sup>169</sup> Paradoxically, this line of reasoning might reinforce the legitimacy and persuasive significance of other-regarding considerations because no court will consider them and then openly question their significance. They are only raised when they swing the court's decision. This perspective also comports with a reading of the U.S. cases discussed above, in which other-regarding considerations were not mentioned just in order to then be dismissed. In the case where other-regardingness is apparent, *Abdullahi*, it carried the court to dismiss the *forum non conveniens* argument.<sup>170</sup>

International judicial dialogue might be particularly important for other-regardingness because it educates judges

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558, 576 (2003), in which the court referenced the European Court of Human Rights as authority on "values [the United States] share[s] with a wider civilization."

166. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

167. Benvenisti, *supra* note 154, at 250 (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992)).

168. Laurence R. Helfer & Anne-Marie Slaughter, *supra* note 147, at 370-76.

169. *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [63] (appeal taken from Eng.).

170. See *supra* Part III.A.3.

about foreign views and sentiments, thereby disarming concerns that other-regarding decisions might amount to judicial paternalism. This sentiment can be seen in the U.S. Supreme Court's decision in *Empagran*, in which Justice Breyer emphasized the fact that states did not agree about anti-trust rules and appropriate remedies, and therefore the Court's ruling in favor of allowing noncitizen plaintiffs into court would interfere with other states' antitrust regulation.<sup>171</sup> The sentiment was again present in Justice Breyer's concurrence in *Kiobel*, in which he argued for an "American interests" test to minimize "international friction."<sup>172</sup> Breyer went on to review the law of other states with the help of foreign court decisions to arrive at the proposition that "many countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad."<sup>173</sup>

Some dialogue might be hidden from view because it would be ill-received in the domestic jurisdiction. While the highest Dutch courts are willing to consider foreign judgments, they rarely reference them in their opinions, and many judges fear that "[r]eferences to foreign judgments would . . . risk weakening the authority of the judgments of the [Netherlands Supreme Court]."<sup>174</sup> The extent to which other-regard-

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171. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004) ("These [amicus] briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." (referencing amicus briefs submitted *inter alia* by the governments of Germany and Canada)). It is also interesting to note Germany's argument that it is a "well-settled principle[ ] of law" that requires the United States to consider the interest of foreign nations in the regulation of their own industries and commerce. Brief for Germany and Belgium, *supra* note 116, at 6.

172. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673–74 (2013) (Breyer, J., concurring).

173. *Id.* at 1675 (Breyer, J., concurring) (citing Brief of the Gov'ts of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 19–23, 133 S. Ct. 1659 (2013) (No. 10-1491), 2013 WL 2312825). The Brief in turn cites *Guerrero v. Monterrico Metals PLC*, [2009] EWHC (QB) 2475, (appeal taken from Eng.) and Rb. Gravenhage Dec. 30, 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.).

174. Elaine Mak, *Globalisation of the National Judiciary and the Dutch Constitution*, *UTRECHT L. REV.*, Mar. 2013, at 36, 42.

ingness must be hidden in cases is an interesting inquiry that is inherently difficult to study. It should just be kept in mind that the trusteeship conception of sovereignty might sometimes be more prevalent than meets the eye. In sum, it is plausible to assume that increasing interjudicial dialogue will contribute to national courts being other-regarding.

Judicial reciprocity may also influence courts in their willingness to adopt other-regarding reasoning. Courts, in cases involving noncitizens whose own national courts have in the past been open to other-regarding considerations, might themselves be more likely to handle cases in an other-regarding manner.<sup>175</sup> One interpretation of Justice Breyer's discussion in *Kiobel* and his mention of other courts' decisions about foreign plaintiffs suggests that, at least as a background principle, judicial reciprocity carries interpretive weight. As a result, an English or Dutch defendant might be more likely to be held responsible in U.S. courts for her allegedly wrongful conduct abroad than a citizen of a state whose courts are opposed to jurisdiction in such cases.

#### E. *Public Opinion and Other-Regardingness*

Professor Shapiro argues that courts are first and foremost part of a triad: They are the third element in a dispute between two parties and the element which consequently tips the balance toward one of the parties and decides the dispute in that party's favor.<sup>176</sup> As a result of this triad, courts are foremost concerned about their legitimacy with respect to the parties. If this is true, then public opinion matters because it is decisions of the courts that are generally reconcilable with a view of justice that will be accepted by the parties and the public. The view courts take with respect to sovereignty should correspond to the views of the parties and the wider public.

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175. The importance of judicial reciprocity can be seen in the international legal regime concerning the enforcement of foreign judgments. *See, e.g.*, Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 122 (2002) (discussing historical trends and development of judicial doctrines surrounding the enforcement of foreign judgments).

176. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1–2 (1981).

As recent empirical research highlights, the relevant publics are generally national publics.<sup>177</sup> This possibly limits the innovative potential of courts with respect to the sovereignty conception, as they need to accord with national sentiment. The consequent limited other-regardingness in turn makes these national courts unattractive forums for non-national litigants who would be aided by other-regardingness. However, an increasing globalization of legal elites paired with social psychology's proposition that judges are more concerned about what their peers think makes it at least conceivable that international opinion will play an increasing role.<sup>178</sup>

In consequence, the relevant public of the courts is not further internationalized and the capacity and need to reconceptualize sovereignty continues to be stifled. An interesting issue for further inquiry would be whether national courts with large international case loads, for example those in London and New York, show signs of viewing humanity, or at least the world's business community, as their relevant public. If this were the case, Shapiro's triad conception would suggest an opening of these courts to other-regardingness.

Professor Chayes points out that the public opinion relevant to courts is different from simple votes or opinion polls. National courts take a long-term view, and their "touchstone of legitimacy" is "the ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul."<sup>179</sup> Courts do not have to persuade the public with all their judgments and it is often more relevant that important changes in doctrine will be viewed favorably in the future. This view suggests that the general direction or trend of public sentiment is more important

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177. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010) (finding some empirical support for Friedman's conclusion). *But see* Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 968–69 (2011) (questioning Friedman's conclusion based on the Supreme Court's decisions since 2009).

178. For a study of the Supreme Court's bias toward elites, *see* Lawrence Baum & Neal Devins, *Why The Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (arguing that "Supreme Court Justices care more about the views of academics, journalists and other elites than they do about public opinion").

179. Chayes, *supra* note 41, at 1316.

than a present opinion poll for influencing courts' willingness to endorse the trusteeship conception. What matters is not what public opinion is today but what it will be in the future. This regard for the general trend could arguably underlie the U.S. Court of Appeals' relatively progressive *Abdullahi* ruling.

F. *Which Courts Are More Likely to be Other-Regarding?*

Synthesizing the discussion from the previous subsections, five factors emerge that make courts more likely to be other-regarding. Courts with (1) a strong commitment to the rule of law, (2) a strong relationship in relation to the legislature and executive, (3) other-regarding legislatures or executives, (4) domestic public opinion being friendly toward other-regardingness, and (5) productive integration into international judicial dialogue, face structurally positive conditions to realize a conception of sovereignty as a trusteeship for humanity.

It should also be noted which factors are absent from the list. It is, for example, not immediately apparent whether judiciaries of internationally powerful states would be more or less likely to act as trustees of humanity. On the one hand, their wealth and relatively strong position give them wider discretion to take the interests of noncitizens into account. Their actions are also often the ones with the farthest international reach, so, for example, garment manufacturing standards demanded by a U.S. regulatory body as a condition for import would reach a substantial part of the world's garment manufacturers. On the other hand, their experience might be most shielded from the negative externalities of foreign states' actions.

With the five factors at hand, how to balance them is the next question. Throughout this Note, no attempt has been made to test the explanatory value of these factors analytically, only anecdotally and qualitatively. To develop a methodology for testing the respective influence of the different factors requires further research. In addition, the balancing of the factors will depend on the structural positions of courts in any given domestic system. The balance will differ from state to state. At first sight, the likely codependence between the executive's, legislature's, and the public's opinions about the appropriateness of other-regardingness defies simple balancing.

Another question for further research is whether there are areas of substantive law in which national courts are more likely to be other-regarding. Will national courts grant noncitizens the procedural rights required under the trusteeship conception in human rights cases before they do so in global markets cases? Is the violation of civil and political rights more likely to make courts other-regarding than violations of economic and social rights? Pursuing these research agendas will reveal valuable insights into the ramifications of Benvenisti's theory.

#### G. *How Can Courts be Other-Regarding?*

In the following, this Note explores judicial decision-making that allows for progressive reconceptualization of state sovereignty. The five factors listed in the previous subsection are still relevant to the relative ease with which national courts *could* be other-regarding. A normative evaluation of such a strategy is not within the realm of this Note.

To the extent that judges think it apt to be other-regarding in their adjudication, but the law limits them, methods such as law making by subterfuge might be necessary.<sup>180</sup> As Duncan Kennedy points out, however, such judgments will often require a lot of "work" from judges who are dedicated to the project of other-regardingness.<sup>181</sup> Judges might be hesitant to do so if they have other issues on their agenda or they believe their judgments would decrease their legitimacy to a degree that inhibits them from being progressive in the future. States in which judges take comfort with the domestic state of justice might therefore be more likely to turn to the global sphere and pursue a reformation of the conception of sovereignty. Where facts make other-regardingness appropriate as a matter of policy, the closer the case to the core of the policy consideration, the likelier the policy is to control the adjudication.<sup>182</sup>

An illustration of the court's real discretion in actualizing the trusteeship conception is the class action litigation and ul-

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180. Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1792 (2007).

181. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 530 (1986).

182. *Id.* at 535.

timately the establishment of the \$8 billion compensation fund for Holocaust victims. As Professor Neuborne points out, the legal side was supported first by diplomacy from both the United States and Germany and, second by "community insistence on dealing with long-delayed issues arising from the Holocaust."<sup>183</sup> This established a public climate in which resolution in favor of the plaintiffs became politically salient. In short, the executive, foreign executives, and public opinion were on the court's side. This is an example of the factors discussed in this subsection making a court more likely to be other-regarding.

Neuborne suggests that in relation to the restrictive avoidance doctrines that could have been used by the court, "the technical answers" for them not having been used

are driven by something deeper—a sense of the moral obligation of foreign defendants to live by American rules of fundamental fairness, both substantive and procedural, if they wish to participate in the remarkable success of this economic, social, and political culture. The fact is that alternative forums are simply inadequate to give the victims a fighting chance at justice.<sup>184</sup>

This analysis suggests that if courts are committed to a conception of sovereigns as trustees of humanity, current doctrine does not pose an insurmountable obstacle.

For courts to be other-regarding and act in the spirit of Benvenisti's theory is no easy task. The application of the trusteeship conception will raise a host of difficult questions about the factual determinations relevant for the case, the proper theoretical basis and the proper balancing of competing interests. One example is the Pareto principle. The situation of *amicus* briefs on both sides of the dispute in *Kiobel* also flags a potential weakness of the Pareto principle. The principle has difficulties in addressing distributive questions as it only works in cases where no side stands to lose. It is unlikely that many clear Pareto principle cases arise in a world with high levels of interdependence. One possible solution could be to define only the U.S. citizens as tax payers as the relevant class to lose, U.S.

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183. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 797 (2002).

184. *Id.* at 830–31.

parties as such could then be dealt a loss by a U.S. court without violating the Pareto principle demand of Benvenisti's trusteeship conception.

Another example is the link between the trusteeship conception and solidarity. Solidarity, as this Note understands it, is not the right basis for Benvenisti's theory of sovereigns as trustees. Solidarity arises through shared histories, beliefs, and conditions.<sup>185</sup> In a world with as different histories, beliefs, and conditions as that of today, such solidarity seems out of reach.

## V. CONCLUSION

Before concluding, a general methodological and a theoretical criticism needs to be addressed. A possible challenge to the argument of this Note stems from the case selection underlying Part III on the evidence from courts. For many conclusions drawn from the cases, a different case might plausibly be presented concluding differently. In defense, it can only be noted that selecting cases that demonstrate the point set out to prove is no fatal flaw to the argument, as long as no claim to representativeness is made. This Note makes no such claim. The case studies are of extreme, influential, or deviant cases that illustrate different aspects of courts' approach to state sovereignty.<sup>186</sup>

A second possible criticism is that studying the procedural obligations of the trusteeship conception misses too much. The possible argument runs: Procedures like the right to standing and being heard, without the substantive principles like the weak Pareto principle and reason-giving, are essen-

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185. The concept of solidarity is generally contested. For the purposes of this Note, it suffices to note that in contrast to cosmopolitan ideals in ethical theory, the concept of solidarity often includes ideas about sharing something with a certain group that allows an identity to be defined by being different from others. Solidarity might need "the other" for purposes of negative definition. See generally Juliane Ottman, *The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model*, 2 VIENNA ONLINE J. ON INT'L CONST. L. 36 (2008) (discussing different philosophical and sociological foundations of the concept of solidarity); STEINAR STJERNØ, *SOLIDARITY IN EUROPE: THE HISTORY OF AN IDEA* (2005) (examining the concept of solidarity in its theoretical and political manifestations).

186. For an explanation of these terms, see Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RES. Q. 294, 301-04 (2008).

tially worthless. Participation without influence is not much gained. Therefore, this Note's studies of the procedural doctrines of national courts miss the critical engagement with the trusteeship conception in full force. In response, this Note points out that procedures often operate as instruments of exclusion. Liberalizing the procedures is therefore a necessary first step, albeit not a sufficient one. Liberal procedural rules and the consequent need of national courts to entertain issues that are essentially other-regarding are an important component of changing the perception of the global high-rise by national courts. This change in perception might be the first step in the direction of substantive changes like the Pareto principle.

This Note studies the potential of national courts to conceptualize sovereigns as trustees of humanity and to give effect to the procedural obligations flowing from it such as a right to hearing, and a right to have one's views responded to. In studying cases from the United States and Germany, five factors emerge that would make courts more likely to be other-regarding and to consequently give effect to the procedural obligations. First are the national courts' disposition toward the concept of state sovereignty, and their inclination toward either the traditional conception with its primacy of national interest or reconceptualizations of state sovereignty that take modern global interdependence into account. If courts perceive the traditional conception to be at odds with other general and often used constitutional principles, human equality for example, they may be more likely to adopt the trusteeship conception.

Second and third are the courts' interactions with the executive and the legislature. The general dispositions of the other branches of government toward the trusteeship conception are important influences on the courts' behavior. Courts are more likely to be other-regarding if they have an influential and independent position with respect to the other branches of government, or if the other branches of government are themselves inclined to be other-regarding.

Public opinion, and its influence on courts through pressure and as indicators of social and ideological change more generally, is the fourth factor likely to influence courts' sympathy for the trusteeship conception. If public opinion considers

other-regardingness a legitimate principle of state action, courts may be more likely to be other-regarding.

Last, but not least, is interjudicial dialogue among national courts and exchange of information and doctrines as a factor influencing the likelihood of courts acting in accordance with the trusteeship conception. National courts in active dialogue with other courts around the world will be more aware of ways to shape other-regarding outcomes and be conscious of judicial methods to appease foreign courts when ruling contrary to the traditional sovereignty conception.

National courts are ultimately reactive institutions. Their structural position of reviewing executive and private action against the backdrop of the constitution and legislature's enactments makes them an unlikely progressive force. If courts in states with a relatively strong rule of law, like the United States and Germany, are already reluctant and face serious constraints to give effect to the sovereignty as trusteeship conception, the conditions in many other parts of the world are even less promising.

Legal doctrine reflects the reality of social relations.<sup>187</sup> The reality of the global high-rise—with its global regulatory power distributed among the rich and powerful—finds no symmetry in contact and conflict. The world is interdependent, but far apart. As neighboring states move closer together and global elites share a common social reality, sovereigns might start to think of themselves as trustees for their neighbors, and elites might feel solidarity toward each other, but humanity remains disintegrated. National courts and especially their procedures show how controversies and legal concepts are the product of the kinds of interests represented and theories presented. It is a long way until national courts will give effect to a conception of sovereignty that makes them trustees of humanity.

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187. Often with a time lag.