A common theme throughout BIIJ 2012 was the manner in which international courts and tribunals (including those that operate at the regional level) interact with their domestic counterparts. The global legal system is undoubtedly interconnected, with judgments rendered by international courts directly affecting the states that are party to their respective governing agreements, and sometimes even states with which courts have no direct relationship. Toward the end of the institute, participants turned their attention to another channel of interaction among judicial spheres: the various ways in which international courts and their judges can and should build the overall capacity of national justice systems, as well as how they might assist developing countries to participate in international justice procedures.

As already discussed, globalization has led to a situation of overlapping and concurrent jurisdictions over many legal matters. Paradoxically, even when domestic jurisdictions have theoretical primacy over international ones – as reflected in the ECHR’s principle of subsidiarity or the ICC’s principle of complementarity – international courts often take the leading role in developing and promoting the global rule of law. This is because both their geographical jurisdictions and symbolic spheres of influence are wider than that of their domestic counterparts. The first question on the table during this session was whether and to what extent international courts should take concrete practical steps to share the knowledge and best practices developed in their own institutions in order to develop the capacity of national judicial systems.

To begin the debate, one participant asked an important question about such activities: is it a question of responsibility, or rather one of desirability? International courts are generally not under an obligation to enhance national justice systems. However, participants agreed that it is at least desirable for them to bring their rulings to the attention of national courts and help them to see why they matter. The ICTY has voluntarily gone further and formed a partnership with domestic courts in the Balkan region by aiding them to take up complex cases involving war crimes and crimes against humanity. Judges from the ICTY have held numerous meetings with judges from relevant domestic courts and distributed a manual on ICTY practices to this end.

For some courts, however, such activities are not merely desirable but instead part of their mandate. The regional human rights courts of the Americas, Africa, and Europe, for example, regularly issue advisory opinions to countries that have agreed to their jurisdiction or are members of their governing conventions. One judge described the process at her court: “The countries can pose a question related to national law or human rights, and ask for the court’s advisory opinion about whether their constitution or any piece of legislation is contrary to the Convention or international law.” Such advisory opinions ideally help states to avoid coming before the regional courts at a later date, explained another judge. “The ultimate aim is that respective states will end up in a position where there is no need to come to the court because the nation’s own courts and agencies pursue principles consistent with the overriding Convention.”
The ECJ is perhaps unique in the nature of its contact with the domestic courts of its jurisdictional area. A participant reported that fully half of that court’s work consists of answering questions about European law – treaties, secondary legislation established by treaties, and so on – posed by the 27 national jurisdictions in the European Union.

“We were anxious from the very beginning to set ourselves up as partners with national judges rather than act as a supreme appellate court. We have always played that role down. We are here instead to help interpret European law.” Assistance to national courts of a more informal nature may also take place. Occasionally national judges may contact the ECJ judge who sits in respect of their country or a judge advocate to request guidance on a particular legal matter. The regional judge can then direct the national judges to look at certain cases, suggest they wait for a pending ECJ case to be decided before acting on the home front, or otherwise guide the national court’s resolution of the matter. Such a personal approach may not be possible, it was pointed out, for regional or international courts with a larger group of states under their jurisdiction.

Participants also noted that advice on legal issues may be communicated through conferences or face-to-face meetings between senior judges from domestic judicial systems and judges from regional and international courts. But while such informal advising is often helpful and desired, it may raise confidentiality concerns, such as when a case on the issue at hand is pending. Some BIIJ participants expressed concern about other potential ethical concerns. “It is hard,” said one judge, “when a communication is from an international judge to a national judge, to decide whether that communication should be considered ex parte. Such informal conversation sounds very desirable in terms of building relationships, etc. But from an ethics standpoint, it strikes me as inappropriate and unacceptable in other contexts.”

Despite such concerns about direct personal contact, participants generally agreed that it is important for international and regional judges – and their institutions – to help their domestic counterparts understand governing charters and principles of the law in some manner or other. There are a number of strategies that can be used: invoking the aid of academics and non-governmental organizations when necessary and appropriate; writing clear and concise judgments that can be easily understood; and broadcasting courtroom proceedings live on the internet. One judge stressed the critical importance of good judgments in particular: “The more that judgments are clear and present the issues in a way that is accessible, the more they will be accessed by other courts. This is fundamental to establishing the rule of law – reducing the distance between international and domestic adjudication.” A human rights judge noted that all of these strategies will “promote the work of international courts and develop adherence to human rights.”

The question of how judicial decisions should best be disseminated was then addressed. Media outlets can register with most international courts and tribunals to receive both press releases and full decisions in a timely manner. International judgments, and increasingly broadcasts of proceedings, are available in databases as well and can be consulted by not only domestic judges but also the media and legal experts. Some participants expressed reservations about such databases, however. Although they are rich in content, there is the logistical problem of knowing where and how to look for particular decisions or broadcasts. Additionally, the websites of international courts and tribunals are often difficult to navigate, and each institution has its own format for accessing resources.

Participants recognized that facilitating access to the decisions of international courts and tribunals could directly benefit domestic jurisdictions. It was pointed out, however, that domestic courts do not have to be passive recipients of jurisprudence from the international domain, particularly on issues of human rights. A judge explained, “States shouldn’t wait for a violation to be found against them. When they see that a practice or law of their own country has been condemned by the court in relation to another
country, they should be incited to change things at home and not wait for a similar charge against them.” She added that the decision against the UK concerning the voting rights of prisoners led some European countries to immediately change their own laws on this matter. This kind of proactive behavior on the part of states can have the additional benefit of lessening the caseload of human rights courts. Furthermore, added a participant with both national and international experience, it is best for domestic courts to use their own legal traditions when incorporating human rights law. Otherwise, these issues will be decided by international judges from other countries. “It’s in the interest of countries to engage in these processes; the more they incorporate, the less power Strasbourg has.”

BIIJ participants agreed that disseminating information about the jurisprudence of international courts and tribunals must be approached with an eye to the future as well as the present. In addition to holding conferences with senior judges of domestic tribunals to aid their understanding of fundamental principles of international law, seminars with law students should be organized. The individuals just entering the practice of law increasingly need a solid understanding of international jurisprudence. Internship programs that both import and export skills, knowledge, and expertise can be tremendously helpful in training the next generation of lawyers and judges. Students could work and learn in regional and international tribunals, then bring those skills back to domestic courts and implement them there, which would benefit less developed jurisdictions in particular. Sponsored lectures should also be delivered by visiting international judges; such events are inspirational and expose national jurisdictions to developing international jurisprudence. On a larger scale, international courts and other entities could organize colloquia to engender cooperation, coordination, and exchange of ideas between domestic, regional, and international tribunals.

Whether BIIJ participants felt that it was a responsibility of international courts to build capacity, or merely desirable for them to do so, they agreed that there are certain concerns with the appearance of impropriety that courts must be aware of conveying. Judges must preserve their impartiality even while advising national judges and jurisdictions on legal questions, and avoid the appearance of fostering the interests of one party over those of another. International courts must also take steps to avoid accusations of self-aggrandizement, or trying to build their own capacity rather than that of domestic courts. “The job of capacity building must be approached as thoughtfully and respectfully as judges approach adjudication,” declared a participant. “There will inevitably be not only judicial but also economic, social, and cultural sensitivities when other institutions step in.” Furthermore, the successful outcome of such efforts is not a given. Several participants noted that it would be wise for other institutions—such as NGOs and academic organizations—to help domestic courts build capacity so that it is not left to international courts alone.

When it comes to building the capacity of domestic courts, participants noted that some situations are more critical than others. This is the case for the jurisdictions in the Balkan states and Rwanda that are taking over cases from the ICTY and ICTR, as the two ad-hoc tribunals reach the end of their mandates. BIIJ participants discussed briefly the term “completion strategy,” usually used to refer to this winding-down period. Should it more appropriately be called an “exit” or “continuation” strategy? For while it is true that the ad hoc tribunals need to complete their work and exit the scene, domestic tribunals will be continuing their legacy. After all, as noted in reference to the ICTY, “the Tribunal was never intended to act indefinitely as a substitute for national courts, particularly those in the region, which have an essential role to play in ensuring that justice is served, reconciliation is promoted, and closure is brought to the families and victims of the war.” Thus, a “completion strategy” does not so much complete the work of a special tribunal “as it is a strategy designed to allow continuation by local actors of those activities that were initially ‘kicked off’ by the [special tribunal]
Participants then turned their attention to a very different question for international courts, particularly those that adjudicate inter-state disputes: should they be involved in assisting states to access their institutions by helping them understand the process? Also, should they strive to “level the playing field” when one party is a developed nation and the other a developing nation? Specifically, participants examined whether there is perhaps a greater duty to do so in institutions like the WTO, where claims cannot be brought before national systems, leaving the international tribunal as the only option.

According to author Gregory Shaffer, there are three principle stages of dispute resolution that must be considered if a WTO member is to use that system successfully.7 Each of these may present difficulty for developing countries. The first stage is “naming,” identifying how imports or exports are being impeded. Developing countries often lack legal experience in WTO law as well as the “capacity to organize information concerning trade barriers and opportunities to challenge them.”8 The second stage is “blaming,” identifying the country or countries causing the trade issues, as well as the measures of the identified government(s) – law, regulation, or practice – that are causing the problem. Developing countries may fear political and economic pressure from WTO members with dominant market power at this stage.9 The last stage is “claiming,” where the affected country brings a claim before the WTO. Developing countries may have difficulty if they do not have a well-functioning government that is willing to prosecute the claim. The government may also lack expertise in bringing claims before the WTO, as well as the required resources to hire outside legal counsel versed in the WTO system.10 Given the difficulties that may arise at each phase of the dispute resolution procedure, the question is the following: is it the responsibility of the WTO and other international entities to help disadvantaged countries access WTO procedures?

BIIJ participants discussed three possible ways in which international courts could assist developing and least developed countries. One way would be to push for the creation of a special prosecutor or advocate who could do the blaming and claiming for these countries. Some judges were skeptical of this approach. Trade issues, one participant noted, are not like criminal violations that must necessarily be prosecuted. It is up to the WTO party to decide whether or not it is in its interest to pursue a claim.

Another possible form of support could come through legal assistance from a third party. An example is the Advisory Centre on WTO Law, a subsidized legal services organization established at a WTO Ministerial Meeting through an international agreement. The Centre aids developing countries in writing briefs and developing legal arguments, and advises those that wish to join cases as parties or third parties.11 Additionally, the Centre advises countries on the consistency of their proposed laws or another country’s laws with the WTO agreement. The Advisory Centre on WTO Law has been regarded as successful; it is well respected, and its assistance has helped to make developing country clients into a significant group of claimants in the WTO system. Further, the Centre has enhanced the fairness and legitimacy of the WTO system by not serving only dominant trading partners.

Despite these successes, however, some BIIJ participants expressed misgivings about such assistance. Are the Centre’s services adequate for developing countries, they wondered? After all, the Centre cannot help with naming – its assistance comes into play only after a country has recognized that its rights are being violated. Similarly, the Centre cannot help if a country is unwilling to bring a claim. Other participants raised the concern that the Centre
does not correct the power imbalances that create the heart of the problem – it cannot prevent dominant states from skewing the system in a way that cannot be corrected. A participant from another inter-state dispute resolution court mentioned a similar difficulty: while his institution takes care to treat all countries on an equal footing in the formal sense, there still remain issues of substantive inequality when dealing with dissimilar nations, such as differences in the quality of counsel at their disposal.

One participant objected to painting all developing countries with the same brush. Larger developing countries like China and Brazil, he noted, play an increasingly important and sophisticated role in dispute settlement with clearly articulated strategies; they therefore do not require special help. Developing countries may also not require the same kind of assistance if they are acting as respondents instead of claimants in a trade dispute.

Furthermore, an entity like the Advisory Centre on WTO Law must be aware of perception problems, just as international courts must be when building capacity in national judicial systems. Some observers believe that the WTO is using the Centre to bring itself more cases, thereby creating the impression of more robust participation in the WTO system. The Centre is also funded largely by developed countries, whose citizens may feel it is unjust that their tax money is used to underwrite the ability of poorer states to bring trade claims against donor governments, including their own.

Lastly, participants touched on the issue of fairness: a court or other dispute settlement body should not make the arguments for a particular party just because it is a developing country. The court’s responsibility is to provide access, not to defend the party itself, which is what some participants felt is the real role of the Advisory Centre.

After an extensive discussion on the need for assistance, and the benefits and disadvantages of providing it, one judge mentioned the possibility that the whole topic is a non-issue. “It doesn’t mean poorer countries shouldn’t have access to the system, but when assessing the extent of the problem, one must ask how much of a difference such access would make when regrettably these countries engage in very little foreign trade, and when they do, the extent of trade is modest – often only one commodity. I am not sure it is a huge problem.” Another participant immediately responded with the opposite view: “But for any one of those countries, it seems to me the case involved might be very large and important. So their perceived need for adequate assistance in appearing before the WTO might be larger to them than it seems in the global picture.”

Despite some differences in opinion, the majority of the BIIJ participants seemed to agree in the end with Shaffer’s statement: “[i]f developing countries are to participate meaningfully in the WTO dispute settlement system, they will need to continue to increase institutional capacity and coordination of trade policy at multiple levels, from the national to the regional to the global.” It is thus reasonable that some sort of assistance be provided to disadvantaged parties before an inter-state dispute settlement body, just as defense counsel is offered to accused parties before international criminal tribunals when they do not have the resources to pay for representation.

This session’s discussion highlighted that the simple existence of international courts and tribunals is not enough to ensure the establishment of global justice. Rather, these institutions have a role to play in ensuring that the law and procedures they have created are accessible, both to their counterparts in the domestic sphere and the parties that come before them. The question remains as to how the sharing of international law and procedures can be done most effectively and with the least risk of impropriety or conflicts of interest. BIIJ participants had the opportunity to at least begin the discussion of what will certainly become an increasingly important topic as legal globalization continues at a rapid pace.
Notes


3. In addition to the BIIJ, Brandeis University organizes such meetings among judges serving in international, regional, and domestic jurisdictions. See *Judicial Colloquia*, Brandeis U., http://www.brandeis.edu/ethics/internationaljustice/judicialcolloquia/index.html.


5. *Id.* at 658.

6. *Id.*


8. *Id.* at 177.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 197.