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# A Theory of International Adjudication

Eric A. Posner<sup>1</sup> and John C. Yoo<sup>2</sup>

*Abstract.* Some international tribunals, such as the Iran-U.S. claims tribunal and the trade dispute panels set up under GATT, are “dependent” in the sense that the judges are appointed by the state parties for the purpose of resolving a particular dispute. If the judges do not please the state parties, they will not be used again. Other international tribunals, such as the International Court of Justice, the Inter-American Court of Human Rights, and the new International Criminal Court, are “independent” in the sense that the judges are appointed in advance of any particular dispute and serve fixed terms. The conventional wisdom, which is based mainly on the European experience, is that independent tribunals are more effective at resolving disputes than dependent tribunals are. We argue that the evidence does not support this view. We also argue that the evidence is more consistent with the contrary thesis: the most successful tribunals are dependent. However, selection effects and other methodological problems render a firm conclusion impossible. We support our argument through an examination of qualitative and quantitative evidence, and we argue that the European Court of Justice is not a good model for international tribunals because it owes its success to the high level of political and economic unification among European states. We conclude with pessimistic predictions about the International Criminal Court, the International Tribunal for the Law of the Sea, and the WTO dispute resolution mechanism, the newest international tribunals.

In the last few years, international dispute resolution has assumed an unprecedented prominence in international politics. International courts once were linked to the quixotic and ignored interwar efforts to bring about world peace through the nonviolent settlement of disputes. Since World War II, however, international tribunals have proliferated, with a noticeable acceleration since the end of the Cold War. Now, international courts issue binding decisions that solve multibillion dollar trade disputes between the world’s major trading powers. They enforce the laws of the sea involving matters ranging from seizure of ships to law enforcement searches to the use of seabed resources. They may have been a crucial force behind the integration of Europe into a single economic and political unit. International courts even seek to protect the basic human rights of citizens against their own governments, and to punish war criminals throughout the world.<sup>3</sup>

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<sup>3</sup> See Cesare Romano, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle*, 31 *NYU J. Int’l L. & Pol.* 709 (2000).

International courts have also had a growing effect on American foreign and domestic policy. Appellate panels of the World Trade Organization (WTO) have declared illegal favorable tax treatment for American exporters and American tariffs on steel imports.<sup>4</sup> At the end of last year, President Bush ordered the termination of the tariffs, and Congress was considering new legislation to bring the tax code into harmony with WTO requirements.<sup>5</sup> The International Court of Justice (ICJ) has issued multiple judgments finding that American execution of foreign nationals has violated international law.<sup>6</sup> Although the United States Supreme Court and the involved states have for many years refused to delay executions to allow claims based on international law to be heard, this may be changing.<sup>7</sup> More than 100 nations throughout the world have joined the International Criminal Court (ICC), pledging themselves to bring war criminals to justice wherever they are found. Although the United States has rejected the court as a violation of American due process standards and separation of powers, it has been forced to wage a vigorous diplomatic campaign to immunize its citizens from the court's reach.

Prominent American officials and thinkers have criticized the move toward formal international adjudication as a threat to American values and U.S. foreign policy. Undersecretary of State John Bolton last year criticized the ICC as “an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.”<sup>8</sup> Judge Robert Bork sees international courts as institutions that inexorably expand liberal ideologies. “As the culture war has become global, so has judicial activism. Judges of international courts—the [ICJ], the European Court of Human Rights, and, predictably, the new [ICC], among other forums—are continuing to undermine democratic institutions and to enact the agenda of the Liberal Left or New Class. Internationally, that agenda contains a toxic measure of anti-Americanism.”<sup>9</sup> In a recent book, Henry Kissinger reflected with dismay that “in less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures,” one that “has spread with extraordinary speed and has not been subject to systematic debate.”<sup>10</sup> He warns that international adjudication “is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically the dictatorship of the virtuous has often led to inquisitions and even witch

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<sup>4</sup> United States – Definitive Safeguard Measures on Imports of Certain Steel Products, AB-2003-3 (Nov. 10, 2003), available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/248\\_259\\_abr\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.doc)> (steel tariffs); United States – Tax Treatment for Foreign Sales Corporations, WT/DS108/AB/R (Feb. 24, 2000), available at <<http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABR.doc>> (tax treatment).

<sup>5</sup> See President's Statement on Steel, Dec. 4, 2003, available at <http://www.whitehouse.gov/news/releases/2003/12/20031204-5.html>.

<sup>6</sup> See, e.g., Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 ICJ 248; LaGrand Case (Germany v. United States), 40 ILM 1069, 1100 (2001).

<sup>7</sup> See *Breard v. Greene*, 523 U.S. 371 (1998); Adam Liptak, Mexico Awaits Hague Ruling on Citizens on Death Row, *The New York Times*, Jan. 16, 2004, p. A1 (“Oklahoma attorney general asked appeals court to stay execution ‘out of courtesy’ to international court”).

<sup>8</sup> John R. Bolton, Undersecretary of State for Arms Control and International Security, American Justice and the International Criminal Court, remarks at the American Enterprise Institute (Nov. 3, 2003), <<http://www.state.gov/t/us/rm/25818.htm>>.

<sup>9</sup> Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* 10 (2003).

<sup>10</sup> Henry Kissinger, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* 273 (2001).

hunts.”<sup>11</sup> These views parallel those of international relations scholars of the realist school, who regard international adjudication as either irrelevant or dangerously quixotic in an anarchic world.<sup>12</sup>

In contrast, international legal academics have welcomed the turn to international dispute resolution.<sup>13</sup> Taking note of the success of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) in achieving compliance with their decisions, Laurence Helfer and Anne-Marie Slaughter created a “checklist” of the attributes of these courts, and argue that other international courts should have these attributes as well.<sup>14</sup> International courts modeled on the ECJ and ECHR would be able to create “global communities of law,” just as the ECJ and the ECHR have contributed to the establishment of a European community of law, the European Union.<sup>15</sup>

What are the attributes of a successful international court? Effective international tribunals, in Helfer and Slaughter’s view, are *independent*: they are composed of senior, respected jurists with substantial terms; they have an independent fact-finding capacity; their decisions are binding as international law; they make decisions on the basis of “principle rather than power;” and they engage in high quality legal reasoning.<sup>16</sup>

Success of an international tribunal, they concede, at times depends on factors outside of a court’s control, including the relationship of the state parties and their domestic political institutions.<sup>17</sup> But advocates of formal international dispute resolution believe that international adjudication can serve a causal role: it not only reflects existing international relationships; it also can bind states more closely together. To make this point, Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter distinguish *interstate dispute resolution* where the adjudicators, their agenda, and enforcement of decisions are all subject to veto by the individual national governments,<sup>18</sup> and *transnational dispute resolution*, where tribunals are more independent, private parties have access, and domestic legal systems enforce the tribunals’ judgments.<sup>19</sup> Keohane and

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<sup>11</sup> Id.

<sup>12</sup> See, e.g., John Mearsheimer, The False Promise of International Institutions, 19 Int’l Security 5 (1995). The older tradition begins with Carr and Morgenthau’s critique of interwar international legalism; see Edward H. Carr, The Twenty Years’ Crisis, 1919-1939 (1962); Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1948).

<sup>13</sup> The conventional wisdom is described in Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 202-07 (1995), though these authors register skepticism.

<sup>14</sup> Laurence Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 387 (1997).

<sup>15</sup> Id. at 391. Their view is qualified; they do not believe that effective supranational adjudication is possible when certain domestic conditions are not met.

<sup>16</sup> Helfer & Slaughter, 107 Yale L.J., supra note \_\_, at 300-14; see also J.H.H. Weiler, A Quiet Revolution: The European Court of Justice and Its Interlocutors, 26 Comp Pol Stud 510, 520-21 (1994); Franck, Power of Legitimacy, supra note \_\_, at 152; J.G. Merrills, The Development of International Law by the European Court of Human Rights 12 (2d ed. 1993).

<sup>17</sup> Helfer & Slaughter, supra note \_\_, at 328-36.

<sup>18</sup> Robert Keohane, et al., Legalized Dispute Resolution: Interstate and Transnational, in Legalization and World Politics 73, 84-85 (Judith L. Goldstein, et al., eds. 2001).

<sup>19</sup> Id.

his coauthors argue that “[l]egalization imposes real constraints on state behavior; the closer we are to transnational third-party dispute resolution, the greater those constraints are likely to be.”<sup>20</sup> When states move from interstate dispute resolution to transnational dispute resolution, the increasing court-like nature of the tribunal leads to stronger ties between the states.

We argue that the story is more complicated than these observers have recognized. Contrary to the arguments of some American officials and observers, we argue that there is a useful role for international adjudication. International courts allow states to overcome a limited set of cooperative problems in international affairs. We argue that states engaged in bilateral cooperative relationships can obtain a number of benefits from international tribunals as long as the tribunals are neutral as between the states having a dispute, and render judgments that reflect the interests of the states at the time that they agree to submit the dispute to the tribunal. States, for example, may wish to settle a boundary dispute and are willing to accept an outcome within a certain range, rather than go to war or engage in other costly coercive measures. International tribunals bring to bear expertise in determining the boundary, can produce more information about the facts of the dispute and the preferences of states, and provide (in the ideal case) a neutral arbiter that can help states overcome prisoners’ dilemma problems. An indictment of international courts that rejects all forms of international dispute settlement overlooks the helpful function that international courts can provide in limited circumstances.

However, we are skeptical of the views of the international legal academics. On our view, tribunals are simple problem-solving devices. They do not transform the interests of states; nor do they cause states to ignore their own interest for the sake of a transnational ideal. Tribunals are likely to be ineffective when they neglect the interests of state parties and instead make decisions based on moral ideals, or on the interests of groups or individuals within a state, or on the interest of states that are not parties to the dispute.<sup>21</sup> Finally, the difference between interstate adjudication and transnational adjudication is overdrawn: both involve states using a dispute resolution mechanism in order to promote their joint interests.

The difference between our view and the conventional wisdom is centered on the role of tribunal independence. A tribunal is independent when its members are institutionally separated from the state parties. Tribunal members are independent, for example, when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction. The conventional wisdom holds that independence at the international level is, like independence at the domestic level, the key to the international rule of law and the future success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because independent tribunals can render decisions

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<sup>20</sup> *Id.* at 104. This results because more court-like transnational adjudication provides benefits to groups within states subject to a tribunal, which increases the costs of non-compliance to governments.

<sup>21</sup> For this reason, tribunals should not allow themselves to be influenced by different tribunals that are set up for different purposes (as advocated in, for example, Jenny S. Martinez, *Towards an International Judicial System*, 56 *Stan. L. Rev.* 429 (2003)).

that violate the interests of state parties. On our view, independence *prevents* international tribunals from being effective.

Our view is influenced by the large political science and legal literature on the politics of domestic judicial decisionmaking. It is now conventional wisdom that the political views of judges influence their decisions (even if they do not necessarily fully determine their decisions).<sup>22</sup> A judge appointed by a Republican president is more likely to rule in favor of industry in an environmental dispute than a judge appointed by a Democratic president, for example. The possibility that international judges might similarly be influenced by their ideological views or their political or national allegiances is rarely discussed in the literature on international adjudication. If they are, states will be reluctant to use international tribunals unless they have control over the judges. Independence creates risks and costs that have not been adequately addressed in the literature, which has focused on its benefits. We redress this imbalance.

Part I of this paper describes the history of international dispute resolution, beginning with international arbitration and then moving forward to efforts after World Wars I and II to create permanent international tribunals and to today's attempts to increase the number and authority of international courts. Part II discusses why states resort to formalized adjudication to resolve disputes, and then examines what design features of international tribunals make most sense in light of the reasons that states use such courts. Part III analyzes data on the performance of international tribunals and relates it to their design characteristics. Part IV addresses the counterexamples to our thesis provided by the European experience. Part V concludes with some tentative predictions about the future of international adjudication

Before we start, we should clarify our use of terms. By “tribunal,” we mean any panel of individuals who are given the task of resolving a dispute between states on the basis of international law. The tribunal’s job is that of “international adjudication” or “third party dispute resolution.” A tribunal can be more or less dependent. A more dependent tribunal is an “arbitrator”; a less dependent tribunal is a “court.” Dependency is a continuous variable, and states set up tribunals in many places across the spectrum, so we can speak of a tribunal with quasi-arbitrator or quasi-court characteristics. Our usage does not line up perfectly with international usage,<sup>23</sup> but we rely on it because international usage is not internally consistent.

## I. BACKGROUND

States in conflict can choose from a range of methods to resolve disputes short of the use of force or coercive sanctions, including diplomacy, mediation or conciliation,

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<sup>22</sup> See, e.g., Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Amer. Pol. Sci. Rev. 557 (1989) (finding correlation between ideology of justices and their votes); Jeffrey A. Segal, et al., Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. Pol. 812 (1995) (same).

<sup>23</sup> See Romano, *supra* note \_\_.

arbitration, and adjudication.<sup>24</sup> While the distinctions between these categories are not sharp, international legal scholars traditionally distinguish arbitration and adjudication from negotiation or mediation because in the former a formally binding decision is reached according to a legal rule.<sup>25</sup> Before any permanent courts were established, states often relied on ad hoc arbitration. In the typical arbitration case, two states involved in a dispute would each appoint a single arbitrator; the two arbitrators would then jointly appoint a third; and the three arbitrators would together hear arguments and deliver a judgment. International lawyers date the modern era of arbitration to the Jay Treaty of 1795.<sup>26</sup> Since then, hundreds of arbitrations have occurred, and they continue to the present day. For example, the currently operating Iran-U.S. claims tribunal, which was created to hear and adjust claims for damages arising from the Iranian Revolution in 1979, falls within this tradition.<sup>27</sup> Interstate arbitrations have concerned a wide range of disputes, including controversies over borders, damage to property during wars and civil disturbances, and collisions between ships at sea.

While different in many respects, international arbitration shares a key characteristic with international judicial processes: reliance on third parties to resolve a dispute between two states. Third party dispute resolution has many attractions: it introduces (in theory) a neutral body to a dispute, one whose views are not colored by interest or passion.<sup>28</sup> Arbitration involves the third party in the most limited way possible: an arbitral panel is set up to resolve only one dispute or class of disputes, and it follows an ad hoc set of procedural and substantive laws that remain within the control of the parties. Arbitration's main weakness is that the disputing states, whose interests and passions *are* engaged, need not consent to a panel's jurisdiction; nor need they comply with its judgment, though they frequently do. A fully fledged international court has different features, including: (1) compulsory jurisdiction—the court would have automatic jurisdiction over certain classes of disputes; (2) a permanent judiciary whose members do not depend on the disputing states for their appointment or salary; and (3) regular procedures and substantive legal rules that would not be renegotiated from dispute to dispute.<sup>29</sup>

The first tentative steps toward this ideal were taken at the turn of the nineteenth century. The delegates to the Hague Conferences of 1899 and 1907 agreed to establish a permanent arbitral body, the Permanent Court of Arbitration (“PCA”).<sup>30</sup> The PCA had the modest goal of encouraging states to use arbitration; it did this by providing a set of

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<sup>24</sup> See generally, J. G. Merrills, *International Dispute Settlement* (3d ed. 1998).

<sup>25</sup> See *id.* at 88; see also Christine Gray & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, in *International Courts for the Twenty-First Century* 55, 63-68 (Mark W. Janis ed. 1992).

<sup>26</sup> See *Treaty of Amity, Commerce, and Navigation*, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116, T.S. No. 105 (signed at London, approved by Senate June 24, 1795, ratified by United States, Aug. 14, 1795). For a discussion of the Jay Treaty, see John Yoo, *Globalism and the Constitution*, 99 *Colum. L. Rev.* 1955, 2071-82 (1999).

<sup>27</sup> See, e.g., David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 *Amer. J. Int'l L.* 104 (1990).

<sup>28</sup> See generally Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago 1986).

<sup>29</sup> Cf. Merrills, *supra* note \_\_, at 168-69

<sup>30</sup> See generally Project on International Courts and Tribunals, available at <<<http://www.pca-cpa.org/>>>.



procedures for choosing arbitrators from a group of people identified in advance as potential candidates. However, parties did not use the PCA as much as its advocates hoped, and it went into desuetude.<sup>31</sup>

The next step was the establishment of the Permanent Court of International Justice (PCIJ), which, along with the League of Nations, was supposed to maintain international order after World War I.<sup>32</sup> The PCIJ's innovation was an authentic panel of judges, who served for fixed terms, and so in theory would be at least partly independent of the influence of states. In addition, states could submit to compulsory jurisdiction by making unilateral declarations, and many did. In other ways, however, the PCIJ lacked independence, and could be and was ignored. Its failure set the stage for the International Court of Justice, the judicial organ of the United Nations, which continued in 1946 from where the PCIJ left off.<sup>33</sup> The compulsory jurisdiction of the ICJ has been more significant than the compulsory jurisdiction of the PICJ. As we will discuss, compliance with ICJ judgments has been more than occasional, although not routine.

At roughly the same time that the ICJ began its operations, drafters were putting the finishing touches on GATT, a legal framework for international trade that eventually resulted in a relatively systematic form of arbitration. After several decades of operation, during which 298 cases were decided, the GATT arbitration system gave way to the more court-like dispute settlement mechanism (DSM) of the WTO in 1995. Unlike standard arbitration systems like GATT's, the DSM had compulsory jurisdiction, and states would (as a practical matter) be unable to refuse consent to the creation of tribunals and their adjudication of a dispute. As of 2000, 213 WTO cases had been initiated.

Starting in the 1950s, several regional courts were created. The European Court of Justice (1952) adjudicates disputes arising under European law.<sup>34</sup> The European Court of Human Rights (1959) adjudicates disputes involving the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>35</sup> The Inter-American Court of Human Rights (1979) hears cases involving the 1969 American Convention on Human Rights.<sup>36</sup> There are only the best known regional courts; others deal with human rights and commercial relationships in other parts of the world.

Another important development was the creation of the International Tribunal for the Law of the Sea (ITLOS) in 1996, which has jurisdiction over a range of maritime disputes governed by the United Nations Convention on the Law of the Sea

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<sup>31</sup> Ian Brownlie, *Principles of Public International Law* 710 (4th ed. 1990). Of the 25 cases considered by the Court, 21 were disposed of within its first 30 years, and then only four cases were brought to the PCA thereafter, with the last one in 1970. William E. Butler, *The Hague Permanent Court of Arbitration, in International Courts for the Twenty-First Century*, supra note \_\_, at 43, 44.

<sup>32</sup> See Statute of the Permanent Court of International Justice, available at <http://www.mfa.gov.tr/grupe/ed/eda/eda15e.htm>.

<sup>33</sup> See International Court of Justice, available at <<<http://www.icj-cij.org>>>.

<sup>34</sup> See European Court of Justice, available at <<<http://www.curia.eu.int>>>.

<sup>35</sup> See European Court of Human Rights, available at <<<http://www.echr.coe.int>>>.

<sup>36</sup> See, Inter-American Court of Human Rights, available at <<<http://www.corteidh.or.cr>>>.

(UNCLOS).<sup>37</sup> It has compulsory jurisdiction and an independent, permanent group of judges. Another area of growth in international adjudication has been in the area of war crimes. The Nuremberg tribunal after World War II was followed, after a long hiatus, by the International Criminal Tribunal for Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).<sup>38</sup> All three of these tribunals were established by the parties after the disputed behavior occurred. The drafters of the Rome Statute of 1998 aspired to turn these episodic judicial interventions into a permanent court, the International Criminal Court (ICC), which would be open to proceedings brought by a regular prosecutor.<sup>39</sup> This system would be the most independent to date; it would have compulsory jurisdiction, independent judges, and a prosecutor with the authority (with certain exceptions) to bring cases against defendants. It has not yet begun to hear cases.

In this mass of detail we can identify two trends. First, international tribunals have become more formally powerful over time. Compulsory jurisdiction has become more common, and the judiciaries have become more independent of the states that establish them. Second, international tribunals have become more diverse and specialized. Contrary to some expectations, the world has not moved toward a single judicial system comparable to a domestic hierarchical judiciary; instead, jurisdiction is parceled out to coequal institutions, with no higher appellate authority to resolve jurisdictional conflicts.<sup>40</sup>

These developments raise important questions. How do international courts work? Why do states create them and yield jurisdiction to them? Why do states obey them, if they do? How can international courts be improved? What explains their popularity and their fragmentation? As we noted in the introduction, the conventional wisdom is that the effectiveness of an international court or tribunal is correlated with its independence and, in general, with the degree to which it has the attributes of a domestic court.

It is understandable that recent scholarship has made the connection between the effectiveness of a tribunal and the independence of its members. A distinctive feature of domestic courts in advanced countries is their separation from politics. Even if they are not completely immune to political influence, they are less prone to manipulation by elected officials than ordinary political institutions are. Domestic courts are, in a word,

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<sup>37</sup> U.N. Convention on the Law of the Sea, concluded on December 10, 1982, entered into force November 16, 1994, 21 I.L.M. 1261 (1982).

<sup>38</sup> See, e.g., Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 ILM 1203 (1993); U.N. Sec. Res. 955, Establishing the International Tribunal for Rwanda, 33 ILM 1598 (1994).

<sup>39</sup> Rome Statute of the International Criminal Court, available at <http://www.un.org/law/icc/statute/romefra.htm>.

<sup>40</sup> The fragmented development of international courts worries some international legal scholars, who favor a unitary international legal system, but not others. See, e.g., Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 *Recueil Des Cours* 101 (1998); Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 *Recueil Des Cours* 9 (1996); Robert Jennings, *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 *Recueil* 240 (1992); Philip Jessup, *Do New Problems Need New Courts?* 65 *Proc. Amer. Soc. Int'l Law* 261 (1971).

independent; and conventional wisdom holds that the independence of courts is an important factor that distinguishes successful market-based liberal democracies from authoritarian countries and failed democracies in which corruption is the norm and markets are weak.<sup>41</sup> International legal scholars have transferred this logic from the domestic arena to the international arena. They argue that when international tribunals are dependent on the good will of particular states, their judges will be regarded as “political,” as tools of the various parties, and not as “legitimate.”<sup>42</sup> Legitimacy is greatest when international judges have independence comparable to that of domestic judges. Independence exists when judges have fixed terms and are not appointed by the parties of a dispute; when the judges are not, or not necessarily, the nationals of a state party to the dispute; when the judges observe regular, predetermined rules of procedure; and when precedent and other legal conventions are observed. In addition, it is necessary that jurisdiction be compulsory; otherwise, states will deny jurisdiction of a court when they believe that they are likely to lose. This conventional wisdom has much intuitive appeal, and some empirical support. Intuitively, we think that domestic courts are more successful when judges are independent; that, anyway, is the American experience.<sup>43</sup> In addition, the most successful supranational court is the ECJ, and that court is relatively independent. And states, apparently acknowledging the force of these observations, have invented new tribunals, such as the WTO and ICC, which are more independent than older tribunals.

However, the conventional wisdom overlooks the profound differences between the settings in which domestic and international courts operate. Domestic courts play their role within a political system thick with institutions, including a powerful executive that has a monopoly of force and a legislature that enacts rules binding on all citizens. Domestic courts are usually unified, with a powerful supreme court at the apex of the hierarchy, within a legal system that has universal scope within a nation-state’s territorial boundaries. In addition, the political system in any functioning state reflects a settlement between competing groups, and has their loyalty. By contrast, international tribunals do not operate as a part of a coherent and unified world government. They exist in an interstitial legal system that lacks a hierarchy, a routine legislative mechanism that would allow for centralized change, and an enforcement mechanism. International tribunals are more like domestic arbitrators than domestic courts because nothing prevents disputants from ignoring them if they do not believe that submitting to tribunals serves their interest.

To understand the significance of these differences, imagine that any country—say, the United States—had a court system but lacked an executive and a legislature. People bring their disputes to the courts, but there is no executive to enforce a judgment,

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<sup>41</sup> See, e.g., Rafael La Porta et al., *Judicial Checks and Balances*, *J. Pol. Econ.* (forthcoming 2004).

<sup>42</sup> See Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism*, 35 *N.Y.U. J. Int’l L. & Pol.* 291, 296 (2004).

<sup>43</sup> See, e.g., John Yoo, *In Defense of the Court’s Legitimacy*, 68 *U. Chi. L. Rev.* 775 (2001). More recent scholarship, however, argues that the Supreme Court has been successful because it has mirrored the prevailing norms in society. See, e.g., Lucas A. Powe, *The Warren Court and American Politics* 160-78 (2000); Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 *Va. L. Rev.* 7 (1994).

nor do the courts have their own enforcement personnel.<sup>44</sup> The courts enforce only agreements between people, and customs or conventions. The customs or conventions are determined by the courts, and if people disagree, they cannot appeal to a legislature to change the law because no legislature exists. Although we might imagine that some citizens would occasionally use courts to resolve private disputes, it is hard to believe that courts would have much power and legitimacy; and, historically, the judicial function of kings and rulers rarely emerged prior to the other powers of government; it arose simultaneously or (as an independent institution) afterwards.

The international setting is different, to be sure. There are fewer states in the world than people in any country; and it is possible that reputation can provide a means for enforcement, as we discuss below. Still, we think that until the evidence shows to the contrary, one should interpret the activities of international adjudicators with caution, and should be skeptical of the claim that states would submit disputes to judges over whom they have no influence. Independent judges are tolerated in domestic settings because citizens who become judges share most of the values and expectations of the political community, and when they do not, there is enough of a political consensus that they can be removed, deprived of funds, or regulated (through changes in jurisdiction, the modification of the laws that they enforce, and appointment of new judges). Trial judges are controlled by appellate and supreme court justices, who are usually integrated into the political community. However, there is no such political community at the international level.

## II. THE ROLE OF INTERNATIONAL TRIBUNALS

### *A. Why States Use International Tribunals*

International tribunals are modeled on domestic courts, and therefore resemble them in many ways. But they exist in an entirely different institutional setting. Domestic courts apply laws that have been created by legislatures; international tribunals do not. International tribunals enforce treaties that in most cases were ratified by governments that no longer exist, and customary international law that is frequently held to constrain states that played no role in its creation. Although domestic courts also enforce laws that a current government does not approve, and ancient constitutional provisions that no one likes anymore, they face significant constraints. Governments can change laws that no longer enjoy widespread support. By contrast, international law is quite difficult to change. As there is no legislative body operating by majority rule, something like a consensus is necessary for international law to change. In addition, international law has no democratic pedigree: its validity does not turn on whether the states that create them are democracies or autocracies. Finally, there is no enforcement mechanism: states that fail to comply with a judgment, or to show up in court, do not have to worry about being thrown in jail.

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<sup>44</sup> There was once danger that the U.S. Supreme Court might find itself powerless to enforce its decisions. See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832); we face no such danger today.

These characteristics of international tribunals raise several questions. If defendants do not have to comply with a judgment, why would they? If they do not, why would other states ever resort to an international tribunal to resolve an international dispute? And if a state that refuses to comply with a judgment incurs some cost like an injury to its reputation, why would it ever consent to appear before the court in the first place? Any theory of international adjudication must answer these questions.

We argue that tribunals can benefit states that seek to cooperate with each other by providing relatively neutral information about the facts and law when disputes arise. This occurs in two settings. First, tribunals may play a role in producing information of value to states that have treaty disputes. States come into conflict when they take actions that violate, or appear to violate, prior treaties. Tribunals can help resolve the conflict by discovering and revealing information about the meaning of the agreement and the nature of the allegedly infringing action. Second, when states come into conflict over conventions or customs governing the division of global resources, tribunals can discover facts, and help develop new rules or apply existing rules to new or unanticipated circumstances.<sup>45</sup>

### 1. Information Disclosure in Treaty Disputes

States frequently enter treaties. Many treaties create obligations with which states comply despite the absence of a centralized enforcement mechanism in the international legal system. States, however, cannot prepare for all future contingencies or anticipate all changed circumstances, nor will they always have access to expert information needed to resolve disputes about the meaning of the treaty or its application. In such situations, third parties can contribute to the resolution of treaty disputes by providing information about the facts or the meaning of ambiguous treaty terms.

Consider a treaty that clarifies a border between state A and state B. Prior to ratification of the treaty, the two states advanced conflicting claims over the same territory. The treaty resolves these claims by, say, stating that henceforth the border follows a river. Each state *might* obey the treaty—although it will not *necessarily* obey the treaty. Suppose that each state covets territory on the other side of the river as well as wanting to hold onto the territory on its own side of the river. Although state A would be better off if it had some of B's territory, it also knows that if it tries to grab that territory,

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<sup>45</sup> These arguments are related to two theories in the literature. Guzman argues that states resist international dispute resolution mechanisms because the reputational cost from losing can be a deadweight cost. He assumes that when a state loses a case, its reputation is hurt. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 *J. Legal Stud.* 303 (2002). Ginsburg and McAdams argue that the ICJ solves coordination games between states by serving as a focal point. Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, *William & Mary L. Rev.* (forthcoming 2004). Our focus is different from, but consistent with, that of these scholars: we are concerned with the question whether tribunals can be sufficiently neutral to serve these and similar functions. Both of the other papers assume that neutral tribunals will function more successfully than biased tribunals. For an argument that international adjudication (though the focus is on domestic adjudication) may decrease international cooperation, see Robert E. Scott and Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, unpub. m.s., 2004.

B will defend it with military force and perhaps retaliate as well by attacking the territory on A's side of the river. Similarly, B knows that if it tries to grab some of A's territory, A will retaliate.

The strategic problem has the structure of the familiar prisoner's dilemma; and the solution is the mutual threat to retaliate against the state that violates the border. Each state "cooperates" by keeping to its own side of the border; each state "cheats" by sending forces across the border. Although a state does best by cheating while the other state cooperates, it anticipates that this would never happen: if it cheats, the other state will respond in kind. Thus, the fear of retaliation keeps both states on their own side of the border, so long as the original balance of power that produced the treaty remains roughly intact.<sup>46</sup> The international agreement formalizes cooperation between states A and B that allows them to escape the prisoner's dilemma.<sup>47</sup>

So far we have explained how a treaty can be self-enforcing without relying on an international tribunal. To understand the role of a tribunal, one must complicate the story. It may be the case that the application of a treaty to the facts will be ambiguous, either because the treaty is ambiguous or the facts are unclear. If each state has different beliefs about the meaning of the treaty or about the facts, then they will have different interpretations of their obligations under the treaty. In such a case, an impasse can occur. Tribunals can serve as a device to resolve the impasse by providing a neutral judgment about the law and the facts.

To make the discussion more concrete, consider the Chamizal Tract case, an arbitration that was established to resolve a border dispute between the United States and Mexico.<sup>48</sup> After the Mexican-American War of 1848, the United States and Mexico agreed that the border between them would follow the Colorado and Rio Grande rivers.<sup>49</sup> Rivers make good borders because they are easy to observe, so it is clear when a border incursion occurs. The problem is that the course of a river can move. The course can shift slowly, as the current erodes one bank and deposits alluvium on the other bank. And the course of a river can move quickly: after a flood the channel may be miles away from its old location. This is called avulsion.<sup>50</sup> Treaties between the United States and Mexico stated that the border would shift with the river as long as the shift was due to erosion, but that the border would remain in place when the course of the river shifted as a result of avulsion.<sup>51</sup>

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<sup>46</sup> Retaliation need not take the form of symmetrical action – i.e., an identical incursion across the border. The victim of a border incursion can retaliate in many ways: seizing foreign assets located within its territory, cutting off diplomatic communications, suspending trade agreements, and so forth.

<sup>47</sup> For a discussion, see Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 *Va. J. Int'l L.* 113 (2003).

<sup>48</sup> *In the Matter of the International Title to the Chamizal Tract*, International Boundary Commission, *For. Rel. U.S.* 573 (1911).

<sup>49</sup> Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922; Gadsden Treaty, Dec. 30, 1853, U.S.-Mexico, 10 Stat. 1031.

<sup>50</sup> Chamizal Tract, *supra* note \_\_\_, at 573.

<sup>51</sup> Treaty of 1884, U.S.-Mex., 24 Stat. 1011.

In 1864, the Rio Grande flooded; when the floodwaters receded, the course of the Rio Grande was farther south than it had been at the end of the Mexican-American War. Because of a lack of records, it was not clear where the Rio Grande had been before the flood. One possibility was that it was at or near its original location at the time of the treaty. Another possibility was that the river had shifted gradually through erosion to its location after the flood, or nearby. The Chamizal tract lay between these two positions. Both the United States and Mexico claimed title to the whole tract.

Mexico and the U.S. had a disagreement about the application of the treaty. The original location of the Rio Grande was unknown, and so the amount of movement that resulted from erosion versus avulsion was unclear, and the treaty was silent about how to handle such a contingency. Suppose that each state had its own scientific experts, and these experts provided judgments about the pre-flood location of the river that favored their own governments. Then there is no clear “cooperative” move without the participation of a neutral third-party. A neutral tribunal could listen to the scientific and legal experts on both sides, and then provide its own judgment about the meaning of the treaty and the facts since its ratification. If the tribunal acts neutrally, then the information it produces will be better than either side’s independent information—the tribunal benefits from hearing from the experts on both sides—and the increased information then makes clear what costs or benefits would result from taking certain actions. In this case, the loser’s cooperative move is to comply with the judgment. If the tribunal, for example, concludes that the present course of the river resulted from avulsion, then the cooperative move is to treat the old location as the border; otherwise, the cooperative move is to treat the new location as the border.

One might ask why the states could not resolve the dispute without the tribunal. Each state could make its own scientists available to the other, and the scientists as a group could resolve their differences. There would be no need for a third-party arbitrator or adjudicator. This can and does happen. But there are problems of strategic behavior. One state might withhold some information (for example, old land title records) that would favor the other side. Or it could withhold some scientific studies that reveal aspects of the river’s prior course. Or it could conceal records of the treaty negotiations that might shed light upon an ambiguous treaty provision. The tribunal can, if given the right powers, overcome these problems by hiring its own scientists, conducting its own research, demanding records from either side, and so forth.

The tribunal’s function is to provide information. If the information is good, the states will comply with the tribunal’s judgment for the same reason that they were willing to cooperate when there was no ambiguity: to avoid retaliation. To be sure, the states might not comply with the tribunal’s judgment; if the judgment is biased, or extreme, or a state’s interests have changed in the meantime, then compliance will not necessarily occur.<sup>52</sup> But if the states believe that the tribunal is neutral, their interests remain

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<sup>52</sup> In the Chamizal Tract arbitration itself, for example, the arbitral commission granted the United States that portion of the territory that had occurred due to erosion, but held that changes in the tract caused by the 1864 flood should benefit Mexico. The United States refused to accept the award because it claimed that the arbitrators had disobeyed their orders. 1911 For.Rel. U.S. 598.

constant, and the distribution of power between the states has not shifted, then they have roughly the same incentive to comply with the judgment of the tribunal as they did when they made the original agreement to cooperate.

It is important to understand what it means to say that the tribunal serves the states' interests. We mean *ex ante* interests. *Ex post*—after the dispute begins—only one state can win, and the tribunal cannot please both states by declaring that both are winners. But think of the tribunal as a response to the problem of treaty interpretation. When the U.S. and Mexico signed the treaty (actually, treaties) resolving their border dispute, they could not write every contingency into the treaty. One can imagine the jointly value-maximizing treaty that allocates obligations for all contingencies, just as we can imagine a contract that allocates obligations for every possible contingency.<sup>53</sup> Just as parties cannot describe all contingencies in their contracts, states cannot describe all contingencies in their treaties. Just as a domestic court can reduce the transaction costs of writing contracts by enforcing the hypothetical optimal contract, an arbitrator can reduce the transaction costs of writing treaties by enforcing the hypothetical optimal treaty. Such a judgment will meet with compliance as long as the losing state seeks to maintain a reputation for complying with treaties, or to maintain a cooperative relationship with the other state.

In sum, there are two important assumptions that make international adjudication possible. First, the states can create and divide a surplus—in our hypothetical case, dividing a disputed piece of territory without resort to a destructive war—only by cooperation, and the present value of the payoffs from continued cooperation exceeds the short-term gains from cheating. Second, states have imperfect information about whether an action is consistent with a treaty, and the tribunal can reveal information about whether the action is consistent with the treaty.

## 2. Information Disclosure in Customary International Law Disputes

States frequently come into conflict in ways that are not governed by treaties, and when they do so, they invoke what is variously called custom, convention, or customary international law. Customary international law is typically defined as custom that states follow from a sense of legal obligation; more helpfully, it can be thought of as value-generating patterns of behavior that states have acquiesced in. When states otherwise inclined to comply with customary international law come into conflict, they are sometimes willing to resolve their conflict by appealing to customary international law. When the law or the underlying facts are ambiguous or hidden, international adjudication may help resolve the dispute.

We can give this theory more context by examining the customary international law governing the acquisition of territorial sovereignty.<sup>54</sup> In prior centuries, western nations considered much of the world “unoccupied”—that is, not controlled by powerful

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<sup>53</sup> This is standard contract law theory; see, e.g., Steven Shavell, *Foundations of Economic Analysis of Law*, ch. 13 (2003).

<sup>54</sup> This area of law was addressed recently in the *Western Sahara Case*, 1975 ICJ 12.



states. States would obtain sovereignty over these areas by “discovering” them and then announcing their claim to the rest of the world. Although states frequently fought over newly discovered territory, a convention arose through which states would respect each other’s prior claims as long as these claims conformed to an always shifting and frequently ambiguous set of rules. These rules governed such issues as: how a claim would be made—did the discovering state need to plant a flag, set up a police station, or just sail by the territory in question? How far could sovereignty extend—could the discovering state claim an entire continent by planting a flag on a corner of it?<sup>55</sup>

We refer to these rules as conventions. There are various theories about how such conventions could evolve.<sup>56</sup> We do not have the space to discuss the general theories, but the basic idea in the present context is that when there is plenty of land, states do better—they come into less conflict while still obtaining territory—by respecting old claims and searching for unclaimed territory, than by contesting old claims while leaving unclaimed territory empty. The strategic problem is one of coordination, and once enough states adopt the strategy of respecting old claims, no state can benefit from deviating from this strategy, and the conventions are self-enforcing.

So far, we have not needed tribunals. But tribunals can have a role in this game. Suppose that two states disagree about two things: (1) the scope of existing conventions; and (2) the facts regarding the states’ compliance with the conventions. The first disagreement can arise because conventions evolve in a decentralized way as states independently adjust their strategies in response to developments in technology or changes in the environment, and states have different sources of information about what conventions are stable and value-maximizing. The second disagreement can arise because states have different sources of information about what they have done in the past.

As an example, consider the Island of Palmas Case.<sup>57</sup> This dispute involved claims by the United States and Holland over an island between the Philippines, an American colony at the time, and some Dutch possessions. The United States claimed the island through a treaty with Spain, which had discovered the island many centuries earlier. Holland claimed that it had exerted control over the island in the meantime and that Spain had not. The legal issue was whether the Spanish discovery was enough to give Spain title to the island, and hence the United States, or whether Spain forfeited sovereignty to Holland by failing to exercise control over the island. The arbitrator held in favor of Holland on the ground that territorial sovereignty must be maintained through a display of authority.

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<sup>55</sup> See generally R. Y. Jennings, *The Acquisition of Territory in International Law* (1963); Surya Sharma, *Territorial Acquisition, Disputes and International Law* (1997).

<sup>56</sup> See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 *U. Chi. L. Rev.* 1113 (1999); Jack L. Goldsmith & Eric A. Posner, *A Theory of International Law* ch. 2 (forthcoming 2004); Ginsburg & McAdams, *supra* note \_\_, discuss how tribunals may help develop customary international law.

<sup>57</sup> *Island of Palmas Case*, P.C.A., 2 *U.N. Rep. Int’l Arb. Awards* 829 (1928). Also discussed in Ginsburg and McAdams, *supra* note \_\_.

The arbitrator did two things. He decided whether the law required continuous control, and he decided whether Spain exerted continuous control. His first decision was apparently based on the assumption that, in the absence of continuous control, conflict between states over territory would be more common. His second decision was based on an assessment of the facts. Thus, on both questions the arbitrator was revealing information that one or both states did not have. On the former question, the arbitrator brought to bear expert knowledge on the likely effects of different rules concerning the acquisition of territorial sovereignty, and chose the one that reduced the system-wide costs that would have resulted from more conflict.<sup>58</sup> On the latter question, he was able to reveal information by evaluating the factual claims made by both sides of the dispute.

As with treaty disputes, we might again ask why the states needed the tribunal. Couldn't they have consulted their own historians and legal experts, and come to the same conclusion? The answer is that each state has only partial information, and they also have strategic incentives to withhold information that might benefit the other state. The tribunal can collect information, and provide a neutral judgment. As in the case of treaties, the judgment is, in effect, a disclosure of information, and if the tribunal is competent and neutral, and the states' payoffs have not changed sufficiently since the establishment of the tribunal, the states have an incentive to comply with the judgment.

### 3. The Dispute Resolution Mechanism

Our two arguments are versions of one idea. When states interact with each other repeatedly over time, they can cooperate. Their cooperation can result from explicit agreements (treaties) or the unilateral adoption of strategies that permit reciprocal, value-generating behavior (convention or customary international law). Tribunals have a similar role in the two models. In the model of treaties, tribunals are used to discover and reveal information about each state's compliance with its treaty obligations. In the model of convention, tribunals are used to reveal each state's compliance with a convention. Tribunals can be effective only if the state that loses is (usually) willing to comply with the judgment. If the loser is the defendant, then it pays reparations or takes any other action required by the tribunal. If the loser is the complainant, then it drops its claim against the defendant, and does not pursue it any further through other forums, diplomatic channels, or the threat of force.

Why would the loser comply with the judgment? The cost of complying with the judgment—paying reparations, yielding territory, and so forth—provides an incentive to violate the judgment. But there is a benefit from compliance as well. A state that complies retains the option to rely on tribunals in the future, for a state that routinely violated judgments would not credibly be able to propose international adjudication as a way of resolving a dispute with another state. Thus, a state will comply with the judgment if the cost of compliance is less than the future benefits of continued use of adjudication. The future benefits of adjudication can be high only if the tribunal performs well—and this means resolving the dispute neutrally as between the disputing states; that

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<sup>58</sup> Compare Ginsburg and McAdams, *supra* note \_\_\_. Their model assumes complete information, but otherwise the point is the same.

is, interpreting the treaty or convention in a way that maximizes its (ex ante) value to the two parties.<sup>59</sup> There may be a range of possible outcomes that the states would jointly accept: jargon refers to this range as the “win set” between the two states’ reservation prices, that is, the minimum they will accept as an alternative to impasse or war. States therefore will use international adjudication only if the tribunal, over time, provides an accurate (or politically sensitive) judgment (that is, a judgment within the win set). If the tribunal violates its instructions and/or allows the personal preferences, ideological commitments, or national loyalties of its members to influence the judgment too much, then compliance might not occur. States will comply with judgments, and will use tribunals in the first place, only if they believe that the judgments will be unbiased.<sup>60</sup>

Under what conditions will the tribunal render an unbiased decision? Let us suppose that the tribunal consists of a single individual. We might fear that each state will offer to bribe the tribunal to provide a judgment in its favor. The bribe could be cash, but it could be something subtler. Either state might promise to support the adjudicator’s reappointment to the tribunal or appointment to some other international body after the case is over. Or, even if the states do not make the promise explicitly, it might be in either state’s interest to provide benefits to judges or arbitrators who have ruled in their favor in the past. Thus, judges and arbitrators know that if they rule in favor of their own state or the state that appoints them, they can expect lucrative positions or other forms of career advancement. Finally, when a judge or arbitrator is a national of one state, or the national of a friend of one state, the implicit bribe might take the form of a domestic political position or other benefit. In sum, we might suppose that the tribunal—or the various members—will sell the judgment to the higher bidder.

If tribunals regularly did this, however, states would never use them. The state that expects to lose the “auction” for the judges’ votes will refuse to consent to the tribunal in the first place. To obtain business, tribunals must establish a reputation for neutrality. They can do this initially by drawing their members from the pool of individuals who occupy relevant positions of trust—domestic judges, for example—and then by turning down bribes and rendering neutral judgments. In short, arbitrators or judges have an incentive to rule within the range of outcomes acceptable to the states—in other words, acting according to their instructions or according to the ex ante boundaries of cooperation—because such decisions make it more likely that they will be used again. The tribunal’s incentives to render an unbiased judgment are reputational. If it renders a biased judgment, then the losing state might not comply with it. Although other states might infer that the loser is at fault, and not the tribunal made a poor judgment, if enough noncompliance occurs, then other states will eventually assume that the tribunal is biased or defective and refuse to use it themselves.

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<sup>59</sup> A state that wants to breach an agreement may reward members of a tribunal that finds in its favor; thus, tribunals may be tempted to find in favor of whichever state is wealthier or more powerful. This may happen, but panel members who obtain a reputation for holding in favor of the more powerful state will not be used again, because the weaker state in future disputes will refuse to consent to them.

<sup>60</sup> Guzman, *supra* note \_\_, at 326.

In sum, third party dispute resolution is possible when:

1. Two (or more) states gain from cooperation because they expect to interact in the future and place sufficient weight on payoffs from future cooperation on the same issue.
2. A dispute arises as a result of asymmetric information: each state has private information about its own past actions or different beliefs about the meaning of a treaty or convention.
3. The tribunal has the right kind of expertise or information, or the ability to generate information, and it is sufficiently unbiased, because (a) it has sufficient business; (b) its decisionmakers care about future payoffs; and (c) its decisionmakers do not have strong ideological or national preferences that result in biased outcomes.

But we need to say more about how the third party dispute resolution mechanism can be designed to ensure that it is informed and unbiased. This is the subject of the next section.

### *B. The Design of Dispute Resolution Mechanisms*

States do not need a tribunal if the law and the facts are clear enough—when the treaty or convention clearly governs the dispute, and the states have the same information about the relevant facts, there is nothing a tribunal can contribute to the resolution of the dispute. When these conditions are not met, the question is how states can avoid conflict by relying on tribunals. In this section, we discuss different institutional designs and how they relate to the purposes served by international adjudication discussed above.

#### 1. The Single Arbitrator

The simplest tribunal is a single person.<sup>61</sup> The two states cannot resolve the dispute, but they can agree on appointing a person to resolve the dispute. This might seem like a paradox. States that cannot agree on whether a treaty was violated would seem unlikely to agree on the appointment of a person to decide the same question. However, the paradox is only superficial. Suppose that the states have better information about the proposed arbitrator than they do about the law or facts of the dispute. To agree on an arbitrator, the states need to know that the individual is neutral and has the relevant expertise. To settle the dispute, without seeking the intervention of a third party, states need to have the same information about the underlying facts and agree on the interpretation of a treaty or convention. As long as there are cases in which the first condition is met and the second is unmet, states will sometimes agree on an arbitrator when they cannot otherwise settle the dispute.

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<sup>61</sup> Cf. Shapiro, Courts, *supra* note \_\_, at 1-5 (discussing the logic of the triad for adjudication).

Frequently, the arbitrator is the head, or some other important official, of a state that has friendly relations with the disputing states. For example, Czar Alexander of Russia arbitrated a claim arising from a disputed provision in the Treaty of Ghent which ended the War of 1812 between Britain and the U.S.<sup>62</sup> Because the arbitrator knows that he will have to deal with both states in the future, he does not want to risk alienating either of them, as this may create suspicion or provoke retaliation. Thus, the arbitrator has an incentive to render a neutral judgment.

A neutral and expert arbitrator is always an appealing means for resolving a dispute. But it is not always the case that such an arbitrator exists, or can be identified, and there is always the risk that the arbitrator who is chosen may turn out to be biased or incompetent. In deciding whether to go to arbitration, each state weighs the benefits (avoidance of conflict) against the costs (a biased outcome). On the cost side, a biased outcome will injure one state, and it may not be willing to comply with the judgment. The same is true when the arbitrator simply errs. The state harmed by the error may not comply with the judgment. Ex ante, the parties will avoid arbitration, and rely on diplomacy backed by the threat of war, if they cannot find, and agree on, an arbitrator who is sufficiently likely to be neutral and expert.

## 2. Three (or More) Arbitrators

With the single-arbitrator configuration as background, we can understand the three-arbitrator configuration. Under this system, each state appoints one arbitrator; then the two state arbitrators jointly appoint a third arbitrator. The states expect their appointees to represent their interests, but expect the third arbitrator to be neutral. The most plausible explanation for this approach is that the “states”—that is, the foreign minister or other official who addresses international conflicts—do not know much about the nature of the dispute, and the qualifications of potential neutral arbitrators. To solve this problem, states delegate to an appointee the power to agree on a neutral tie-breaker. The appointee is an agent; his task is to ensure that the third arbitrator is not biased in favor of the other side. If both appointees have this task, and they perform their tasks well, then the third arbitrator will be neutral as between the states.

The problem is that whenever a principal relies on an agent, it incurs the risk that the agent will perform inadequately. If the state’s own ministers do not choose the single neutral arbitrator, but instead rely on their appointee to pick a third arbitrator, they take the chance that the appointee will agree to the selection of an arbitrator biased against the state. An appointee might be outwitted by the arbitrator on the other side, or he might take insufficient care in choosing the third arbitrator. This is the problem of agency slack. Because of agency slack, it is more likely that a three arbitrator tribunal will render a judgment that is biased (or erroneous) than a one arbitrator tribunal will. If the bias is high enough, it could result in judgments that are outside the win set and therefore incapable of procuring compliance. For that reason, single arbitrator tribunals should obtain a higher level of compliance than three arbitrator tribunals will, holding constant the level of expertise. But this is not to say that three arbitrator tribunals are useless.

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<sup>62</sup> Stuyt, *supra* note \_\_, at 26.

States will use them when they cannot find a single neutral and informed arbitrator, and prefer the three party system to the alternative—diplomacy, impasse, and possible conflict or war.

### 3. From Arbitration to Courts

One problem with arbitration is that the decisionmakers are picked anew each time. Although states will find themselves choosing from a relatively small pool of experienced experts, it is difficult (though not impossible) for a jurisprudence to develop. States maintain control over the arbitration by stipulating the question for the arbitrator to answer; but by the same token they lose the benefit of being able to rely on a coherent set of rules emerging from the repeated examination of similar issues by a discrete, relatively permanent group of people—a proper judiciary. This forces states to incur the additional cost of establishing new rules for each dispute, and creates unpredictability.

Some international tribunals have sought to solve this problem without adopting all of the features of true courts. The Permanent Court of Arbitration, for example, was, in essence, a pool of arbitrators-in-waiting. It was thought that by supplying a ready pool of arbitrators, the PCA would make arbitration more attractive. But if parties could choose among the pool of PCA arbitrators, they could also decline to use the system. It thus did not solve the problem. To enhance the value of international adjudication, one needed not only a pool of potential adjudicators, but a group of actual adjudicators, whom states would be required to use. Only in this way might a coherent jurisprudence arise.

But now the question is, how can states be compelled to bring their disputes to a particular tribunal? What prevents a state from simply refusing to appear before the tribunal in response to a suit by another state? The legal answer is compulsory jurisdiction: once a state submits to the jurisdiction of a tribunal, it cannot withdraw without violating international law except by giving substantial notice.

Rational states will not submit to compulsory jurisdiction unless they believe that they will benefit from it. The benefit is the right to force other states to appear,<sup>63</sup> but the cost is that they might be forced to appear as defendants, against their wishes. One necessary condition for the benefits to exceed the costs is that the international law over which the court has jurisdiction produces a net benefit for all states that are involved—and this is certainly possible, especially for treaties that states voluntarily enter. The other condition, which is far more difficult, is the neutrality of the tribunal. If jurisdiction is compulsory, then states cannot withhold consent to a tribunal whose members they do not trust. If the tribunal is to have jurisdiction over the disputes of many different states, then it will have to consist of judges from diverse states, and not just those whom two states involved in a dispute consent to, as in the case of arbitration.

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<sup>63</sup> States always require reciprocity: they will not allow themselves to be sued by states that do not allow *themselves* to be sued for the same sorts of things. See ICJ statute, *supra* note \_\_, art. 36(3), which authorizes this practice.

The inability of disputing states to veto tribunals or panels that they do not trust is the first characteristic of the independent tribunal. At this point, the question arises, if judges no longer need to please particular states in order to obtain repeat business, why should they ensure that their judgment falls within the win set of the two states that happen to have a dispute? The judges might indulge personal biases; or they might try to develop the law in a way that benefits all states, including states that are not parties to the dispute. The state parties to the dispute will be unhappy if the judgment does not match their *ex ante* interests and positions, and instead benefits uninvolved states through its influence on the development of the law. If this becomes the general practice, then states will refuse to consent to the jurisdiction of an independent tribunal, or will eventually withdraw their consent or refuse to comply with its judgments.<sup>64</sup>

Reflecting this concern, tribunals with compulsory jurisdiction are often staffed with nationals from the states subject to their jurisdiction, and usually a state party will have the right to insist that one of the judges on a panel be a national. But this is not the same as the three arbitrator case, where the national's consent to a neutral third arbitrator was needed before the arbitration could go forward. In the court systems, the national can vote in favor of the state party but can always be outvoted by judges who have no connection with the state party.

In sum, states may achieve practical advantages by establishing relatively independent tribunals. These tribunals, unlike classic arbitration panels, can develop an institutional memory, are available at the time of a dispute, and need not be created anew. These advantages could outweigh the costs of independence, but they might not: this is an empirical question.

There is another important reason why states might create independent tribunals. Ordinary citizens and elected officials have from time to time sought to replace war with adjudication. This powerful ideal can have great attraction, especially after times of conflict, and politicians either believe that the ideal can be achieved or are rewarded by constituents who have the same hope. The great international courts have all followed great conflicts: the PCIJ after World War I; the ICJ after World War II. The flurry of tribunal-making in the 1990s followed the end of the Cold War. All of these tribunals were created in a heady atmosphere of fear that the earlier conflict would recur mixed with hope that conflict could be replaced with adjudication. The question is whether tribunals created in such an atmosphere can endure the assaults of normal international politics once the temporary unity among the victors fades.

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<sup>64</sup> Unless the states prefer the system as a whole; but as the number of states increases, the free rider problem becomes increasingly significant.

#### 4. Measuring Independence

A tribunal can be more or less independent of the two states that happen to appear before it at a given time.<sup>65</sup> At one extreme, the single arbitrator is heavily dependent: he is jointly chosen by the two states, and if one or both of the states are unhappy with his judgment, they may never use him again (or they may even retaliate against him in other ways). At the other extreme is the permanent judicial body: it is appointed in advance and has compulsory jurisdiction. The advantage of the independent tribunal is that its jurisdiction cannot easily be evaded by a state that has violated its obligations, it has a more predictable body of law to apply, and it can quickly render a judgment. Its disadvantage is that it is less likely to be neutral as between the two states. Judges on the body cannot be easily disciplined if they allow ideology, sentiment, or their own interests or national loyalties, to influence their decisions.

Table 1: Tribunal Independence

Characteristic	Dependent	Independent
Term	Duration of the Dispute	Permanent
Jurisdiction	Dispute/Treaty	Area of Law
Initiation	Victim	Independent Party
Number of States	Bilateral	Multilateral/Intervention Right
State Consent to Jurisdiction	After Dispute Occurs	Before Dispute Occurs
Source of Panel Members	Chosen by States in Dispute	Chosen by Nonparty States, Other Third Party

Table 1 contains the factors we have mentioned, and adds a few more. Starting with the first row, a dependent tribunal lasts only as long as the dispute; an independent tribunal is permanent. (Although its members are replaced after fixed terms, these terms do not coincide with any particular dispute.) A dependent tribunal has only the jurisdiction that the disputing parties give it; an independent tribunal has fixed jurisdiction over an area of law such as trade. A dependent tribunal can be invoked only by the consent of the states after a dispute; an independent tribunal can be invoked by a third party such as a prosecutor (like the ICC). A dependent tribunal resolves a dispute only between two states or sometimes a small number; an independent tribunal is available to a large number of states, the states that are party to the treaty that created it; and an affected state that is not a part of the initial dispute may have a right to intervene. A dependent tribunal comes into existence after the dispute arises, and only with the consent of the disputing states; an independent tribunal must also trace its existence to consent, but the consent comes earlier, *before* the dispute, when the states enter into a treaty or declare themselves subject to the tribunal's jurisdiction, and states cannot withdraw from the jurisdiction of the tribunal without losing the ability to invoke it.

<sup>65</sup> Keohane and his coauthors also focus on independence. For their discussion, which has influenced ours, see Keohane et al., *supra* note \_\_, at 455-60. They also look at access and legal embeddedness, factors from which we abstract.



Finally, the judges of a dependent tribunal are chosen by the disputing states; the judges of an independent tribunal are appointed by state parties to the treaty that creates it but these state parties do not have control over the judges who hear their case when a dispute arises. Note that independence is a continuous variable, and the design of different tribunals reflects a range of values.

In sum, independence is a measure of a tribunal member's vulnerability to the state that appoints him. Tribunals composed of dependent members have a strong incentive to serve the joint interests of the disputing states. Tribunals composed of independent members have a weaker incentive to serve those states' interests, and are more likely to allow moral ideals, ideological imperatives, or the interests of other states to influence their judgments.

## 5. Implications

We can now draw together the threads. The conventional wisdom holds that a tribunal's *effectiveness* and *independence* are positively correlated. This hypothesis can be falsified by showing that independent tribunals are less effective than dependent tribunals. This is our main purpose. Our thesis is that effectiveness and independence are uncorrelated. We will also argue that, if anything, the correlation is negative. However, the evidence for the negative correlation is relatively weak. So our main conclusion is that effectiveness and independence are most likely uncorrelated, but as between positive and negative correlation, the evidence favors negative correlation.

To make this argument, we need to measure "effectiveness." Unfortunately, this is difficult. There are three possible measures.

First, one could look at compliance. A tribunal is effective if states comply with its judgments. Compliance can be measured in terms of compliance rate: the number of complied-with judgments divided by the total number of judgments. Conventional wisdom holds that independent tribunals have a higher compliance rate than do dependent tribunals.

One problem with this measure is that compliance can be hard to observe. Sometimes, states comply with a judgment but only after a very long delay (years, decades), and in the meantime conditions have changed. Should this kind of behavior count as compliance? More serious, compliance rates are subject to selection effects. States might submit politically sensitive cases to more effective tribunals and easier, less sensitive cases to less effective tribunals. But then effective tribunals might have compliance rates that are no better than those of weak tribunals—because of the nature of the dispute, not because of the design of the tribunal.

Second, one could look at usage. If a tribunal is ineffective, states will stop using it. Usage can be measured in gross terms or in more refined terms. One might look at the number of states that use a tribunal, the number of cases, the number of cases per year,

the number of cases per state per year, and so on, depending on the importance of a precise measurement.<sup>66</sup>

A problem with this measure is usage can reflect other things aside from effectiveness; for example, the importance of the area of international law that the tribunal governs. If trade disputes are more important and numerous than maritime disputes, then a less effective trade court might be used more often than an effective maritime court. More serious, usage rates, like compliance rates, are subject to selection effects. States might settle their disputes in the shadow of an effective court because they can anticipate its judgment and compliance by the loser. If ineffective courts are unpredictable, they might be used more often.

Third, one could look at the overall success of the treaty regime that established the court. Consider trade again. The international trade system is supposed to enhance international trade flows. Suppose that trade flows are at a given level, and that the adjudication system is converted from a dependent tribunal to an independent tribunal. Whether or not the new tribunal is used or complied with more often, a jump in trade flows after this change would be a good indication of an effective court, everything else equal. The problem is that everything else is never equal. Did international cooperation increase after the ICJ was established? This kind of question is impossible to answer.

We will use all three measures of effectiveness in the next Part, but it is important to keep in mind that they are all highly imperfect. One could make the case that selection effects undermine any effort to find a causal relationship between independence and effectiveness, at least for usage and compliance. If so, we can do no better than establish our weak thesis—that there is no evidence for the conventional wisdom that independent tribunals are more effective than dependent tribunals are.<sup>67</sup>

### III. THE PRACTICE OF INTERNATIONAL ADJUDICATION

In this Part, we examine various international tribunals for evidence that sheds light on the relationship between independence and effectiveness. There are currently a dozen or more international tribunals in existence. Some of these tribunals are regarded as successes, others as failures. Some of these tribunals are “dependent,” in our technical sense, others independent. Thus, we have the variation we need to test the conventional wisdom that independent tribunals outperform dependent tribunals. We begin our evaluation of the evidence with a discussion of the ad hoc arbitration system that prospered during the nineteenth century. This system is not itself a “tribunal,” and therefore comparing it to the later twentieth century tribunals is problematic. But arbitration is the purest example of dependence, and so it provides a useful baseline against which to evaluate the other tribunals.

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<sup>66</sup> Cf. Keohane et al., *supra* note \_\_, at 475. These usage statistics are misleading because they do not control for membership and other factors.

<sup>67</sup> As we discuss below, however, there are some efforts to deal with selection problems in studies of GATT and WTO.

## *A. Arbitration*

When states resolve disputes without the aid of a formal international court, they often rely on various more informal mechanisms, including arbitration. Arbitration is as old as diplomacy. It was practiced by the ancient Greeks, by feudal lords during the middle ages, and by the leaders of the emerging European states in the early modern period.<sup>68</sup> Modern arbitration is conventionally dated to the Jay Treaty, which provided that outstanding claims arising from the revolutionary war would be submitted to arbitration. Arbitration became more common after the Napoleonic Wars and was flourishing by the second half of the nineteenth century. It has continued to the present day, even as more formal tribunals have sprung up and attracted disputes that once would have been submitted to arbitration.

Arbitration comes in many forms, but in essence it involves the appointment of one or more individuals to hear and resolve a dispute between two (or sometimes more than two) states. Sometimes the states agree on a single arbitrator; more often, each state appoints one (or more) arbitrators, and then these state-appointed arbitrators jointly appoint an equal number of neutral arbitrators. The states instruct the arbitrators to decide a usually narrow legal or factual issue. The arbitrators may invent their own rules of procedure and evidence; frequently they draw on conventional or codified rules. All of these characteristics are those of a highly dependent tribunal: the tribunal is appointed *ex post*; only the disputing states can appear before it; and the tribunal lasts only as long as necessary to resolve the disputes.

### 1. Ad Hoc International Arbitration

In order to get a feel for the popularity and effectiveness of arbitration, we collected data on arbitrations from 1794 to 1989. Our source is a book by A.M. Stuyt, who provides information on every arbitration during that period.<sup>69</sup> We consider only those arbitrations for which Stuyt provides the identities of both parties and the starting date; for many but not all of the arbitrations he provides other important information, including: the year of the judgment, whether the arbitration was performed by a commission or by a head of state or other official; the nature of the dispute; the identity of the winner; the judgment; and whether compliance occurred.

There were 467 arbitrations during the period, though many were closely related or stemming from a single dispute. The frequency of arbitration rose gradually and peaked in the decade before World War I. Table 2 provides the number of arbitrations by twenty year period (excluding the last 10 years of the data set and arbitrations for which no starting year was given). It shows that the absolute number of arbitrations increased until World War I, and then never fully recovered. If we confine ourselves to arbitrations involving two Great Powers or one Great Power and the United States,<sup>70</sup> we can see that

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<sup>68</sup> Jackson H. Ralston, *International Arbitration from Athens to Locarno* (2004).

<sup>69</sup> A.M. Stuyt, *Survey of International Arbitrations 1794-1989* (3d ed. 1990).

<sup>70</sup> The Great Powers include Britain, Russia, France, Prussia (Germany after 1870), Italy after 1870, Japan after 1904. Conventionally, the United States is excluded before 1898, but since the United States was a

even within this limited pool of states the rate of arbitration increased; thus, the increase was not driven solely by growth in the number of independent states during the nineteenth century. The failure of the arbitration rate to recover even after the end of World War II may have been due to the rise of other dispute resolution mechanisms.

Table 2: Arbitrations by Twenty Year Periods<sup>71</sup>

Years	All States	Involving Two Great Powers or U.S.
1794–1819	23	*
1820–1839	9	2
1840–1859	29	3
1860–1879	48	6
1880–1899	116	17
1900–1919	101	16
1920–1939	80	5
1940–1959	18	0
1960–1979	16	4

Note: 1900–1914, there were 86 arbitrations; 1915–1919, there were 5.

\*No great power data.

Most arbitrations involved two states. The most common topics were, in order, borders (90), personal claims (68), maritime seizures (36), arbitrary acts (29), treaty interpretation (26), war damages (15), indemnity (12), mutual claims (12), civil insurrection (11), and military action (8). These are Stuyt’s classifications, and are not transparent, but they give one a sense of the landscape. Of the arbitrations for which this information was given, 306 (about 2/3) involved a commission of three people or more, and 145 involved a single arbitrator or mediator, typically a head of state. Commissions were popular for civil insurrections, war damages, and personal claims; heads of state were popular for arbitrary acts and maritime seizures.

It is well known that Britain and the United States were early champions of arbitration, and the numbers bear out the conventional wisdom. But there are also some surprises. Table 3 lists the main users of arbitration.

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major maritime power throughout the nineteenth century, it seems appropriate to include it. See Norman Rich, *Great Power Diplomacy 1814-1914*, at 213-23 (1992).

<sup>71</sup> Compiled from Stuyt, *supra* note \_\_.

Table 3: Arbitration by State<sup>72</sup>

UK	116
USA	106
France	81
Germany	50
Chile	33
Italy	32
Peru	29
Venezuela	24
Mexico	20
Spain	20
Colombia	19
Portugal	18
Brazil	16
Netherlands	15
Ecuador	13
Austria	11
Argentina	11
Russia	9
Bolivia	8
Canada	8
China	5
Japan	4

The rough pattern that emerges is that large countries—not necessarily Great Powers—use arbitration frequently, as one would expect; and that Latin American countries have a special preference for arbitration. But there are problems of selection bias. Large countries should use arbitration more often because they have more interactions than small countries do. The Latin American countries are older than similar smaller countries in Africa and Asia; they came into existence prior to the heyday of arbitration in the early to mid nineteenth century. Still, it does appear that the Latin American nations have relied on arbitration more than other states have, and the historical evidence suggests that American influence played a role.<sup>73</sup> There is little evidence that democracy plays a role in the choice to arbitrate; many of the prominent users of arbitration—Germany, Chile, Italy—were not democracies during the relevant periods.<sup>74</sup>

<sup>72</sup> Compiled from Stuyt, *supra* note \_\_.

<sup>73</sup> Ralston, *supra* note \_\_.

<sup>74</sup> Raymond claims that democracies choose arbitration more often than mediation, because arbitration is more legalistic, and democracies care more for the rule of law. See Gregory A. Raymond, *Democracies, Disputes and Third-Party Intermediaries*, 38 *J. Conflict Res.* 24 (1994). His regression, which uses the Stuyt database, does show that pairs of democracies are more likely to use arbitration (that is, “commissions”) than mediation (that is, “heads of state), but not that democracies are more likely to use either of these procedures than an alternative like diplomacy or war. In addition, he interprets the head of state cases as not involving legal judgments; this appears to be wrong. The one party cases seem to be formal arbitrations.

In the abstract, we cannot say that the usage of arbitration is high or low. But it is telling that the popularity of arbitration increased steadily through the nineteenth century, suggesting that states were pleased with the results. Usage can be measured in various ways, as we discuss below. For now, it is useful for baseline purposes to observe that arbitrated disputes peaked just prior to World War I at six per year. A more precise measure—arbitrated disputes per state per year—is 0.06 for the period 1860-79, 0.15 for the period 1880-1899, and 0.14 for the period 1900-1914.<sup>75</sup> The significance of these figures will become clearer when we compare tribunals in Part III.E.

As noted above, Stuyt provides data on compliance for some of the cases, but the data are difficult to interpret. Of the 220 cases for which Stuyt provides compliance data, he says that compliance occurred in 206 cases, for a very high 94 percent compliance rate. However, Stuyt does not explain how he defined and measured compliance. Further, it is possible that the cases with compliance information are a biased sample. If it is harder to collect information about noncompliance than information about compliance, then it could be that all or most of the 247 cases for which there is no information should be treated as noncompliance cases. If the no information cases are cases of noncompliance, the compliance rate is 44 percent.

We were able to run some regressions that shed light on our hypothesis. Recall that about 2/3 of the cases involved a commission of three people or more; and about 1/3 involved a single person such as a head of state. In our terms, the single arbitrator is more “dependent” than the commission because there is less agency slack. Therefore, we predict that states are more likely to comply with the judgment of the single arbitrator than with the judgment of the commission. Using the broader interpretation of Stuyt’s data—where observations with no information about compliance are treated as cases of no compliance—we find strong evidence for this hypothesis. With and without various controls (participation of great powers, democracies, and year), the commission’s judgment is less likely to meet with compliance, at or around the one percent level of statistical significance (coefficient is around 0.7 with all controls) than the single arbitrator’s judgment is. (See Table 4 for a tabulation.) However, if we exclude the no information cases, the results, not surprisingly, disappear (and the sign is the other direction, but not at a statistically significant level).<sup>76</sup>

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<sup>75</sup> We used the numbers for arbitrations from Table 2. During both periods there were on average 38 independent states. Data for number of states per year are from the Correlates of War Project, available at <http://www.umich.edu/~cowproj/dataset.html#States>. The website contains the definition of states.

<sup>76</sup> Another interpretation is that commission arbitrations are less likely to produce judgments for which compliance records are kept; a third is that states send more difficult cases to commissions; but these interpretations seem unlikely. The head of state cases seem more sensitive, not less. But here is a reason for doubting our results. It is plausible that the U.S. and the UK, as the chief proponents and users of arbitration, kept better records of arbitration than other states did or were less likely to keep the results of an arbitration secret. This is supported by the data. In 60 percent of the cases involving the U.S. or the UK, there is information on compliance; for all other states, there is information in only 31 percent of the cases. But if you just look at the U.S. or UK cases, then the compliance rate is higher (95 percent) rather than lower. This suggests that no information cases should not be classified as no compliance cases.

Table 4: Compliance with Commissions versus Individuals<sup>77</sup>

	No Compliance	Compliance	Total
Commission	192	114	306
Individual	71	75	146
Total	263	189	452

It is probably wiser to treat arbitrations involving commissioners or heads of state as a single class. Treating arbitration as a baseline against which to compare the more formal tribunals, we have a compliance rate of 44 to 94 percent, and a usage rate of 0.14 disputes per states per year at its height at the turn of the nineteenth century.

## 2. A Recent Example: The Iran-U.S. Claims Tribunal

The Iran-U.S. Claims Tribunal was created in the aftermath of the Iranian Revolution of 1979, and the takeover of the American embassy in Tehran by student militants.<sup>78</sup> The U.S. responded by freezing Iran's assets. After negotiations through an intermediary, Iran agreed to release the American hostages, the U.S. agreed to unfreeze Iranian assets, and both states agreed to resolve outstanding commercial and interstate disputes through arbitration.<sup>79</sup> As part of the agreement, the U.S. transferred a portion of Iran's assets to an account in a foreign bank, which was instructed to release those assets as necessary to satisfy judgments issued by the Tribunal. The Tribunal began operation in 1981.<sup>80</sup>

The Tribunal has considerable resources, has decided many cases over the course of more than two decades, and has generally experienced full compliance with its decisions. For these reasons, one might think of the Tribunal as an authentic international court, on a par with the ICJ. In fact, however, the Tribunal is an example of classic ad hoc arbitration. The Tribunal was given a very specific jurisdiction over disputes between the U.S. and Iran that existed prior to its creation. Its jurisdiction was thus clearly *ex post*. The composition of the Tribunal followed the classic pattern. Each state appointed one third of the judges (3 each) and these judges jointly appointed the "neutral" third. So there were a total of 9 judges: 3 Americans, 3 Iranians, and 3 nationals from other states. The judicial body was not permanent or continuing in the normal sense: it did not exist before the Iranian revolution and the hostage crisis, and it will last only as long as is necessary to resolve the claims that have been assigned to it. Third states have no right to intervene in the proceedings. In sum, the Tribunal is highly dependent, similar to the classic ad hoc arbitration system.

It is widely agreed that the Tribunal has been a success, and several objective measures confirm this view. The agreement provided that parties had to file their claims by January 1982. Approximately 3,800 claims were filed, and nearly all have been

<sup>77</sup> Compiled from Stuyt, *supra* note \_\_.

<sup>78</sup> See Caron, *supra* note \_\_.

<sup>79</sup> For a discussion of the Algiers Accords, which ended the Iranian Hostage crisis and established the Claims Tribunal, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>80</sup> Background Information: Iran-United States Claim Tribunal, [www.iusct.org/background-english.html](http://www.iusct.org/background-english.html).

resolved.<sup>81</sup> United States claimants have been awarded more than \$2 billion, and Iranian claimants have been awarded about \$1 billion.

In sum, the Iran-U.S. Claims Tribunal harks back to nineteenth century ad hoc arbitrations that resolved a mass of (mainly) private claims that arose after a civil disturbance in which a government was complicit. The pattern is the same: the two states agree ex post to an ad hoc arbitration scheme, the arbitrators issue awards, and the awards are paid. The independence of the tribunal is low and compliance is high.

### *B. The International Court of Justice*

A striking contrast to the success of the Iran-U.S. Claims Tribunal can be found at the other end of the adjudicatory spectrum—the International Court of Justice. The ICJ was created by a treaty, the 1946 Statute of the International Court of Justice, which is part of the Charter of the United Nations.<sup>82</sup> It describes itself as the “principal judicial organ of the United Nations,” and its function is to settle legal disputes under international law that are submitted to it by states. It also may issue advisory opinions on legal questions referred to it by a selected group of international organizations. The ICJ replaced the Permanent Court of International Justice, which had been established in 1922, and the ICJ statute was based on the organizing statute of the PCIJ.<sup>83</sup> The ICJ is a permanent international organization whose existence is not dependent on the resolution of any particular dispute.<sup>84</sup>

The ICJ is considered the model of a permanent international court. It has a substantial administrative bureaucracy, a broad jurisdiction, and is considered by many to have the final word on questions of international law. It is composed of 15 judges who are selected by the U.N. General Assembly and the Security Council, and serve terms of nine years; no two judges are permitted from the same nation. One third of the seats come open every three years, with the possibility of reappointment of judges whose terms have expired. If a state party in a case does not have a judge of its nationality on the Court, it may appoint an ad hoc judge of its choice for that case.<sup>85</sup> According to the ICJ, the General Assembly and the Security Council have sought to represent different regions and legal traditions on the Court,<sup>86</sup> but other sources make clear that powerful countries control individual seats, so that the United States, for example, has always had a judge of its nationality on the Court.<sup>87</sup>

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<sup>81</sup> Iran-United States Claims Tribunal, Communique, 14 April 2003, [www.iusct.org/communique-english.pdf](http://www.iusct.org/communique-english.pdf)

<sup>82</sup> Statute of the International Court of Justice, June 26, 1945, 59 Stat 1055.

<sup>83</sup> Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 LNTS 390.

<sup>84</sup> See generally International Court of Justice, 1946-1996, available at <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>.

<sup>85</sup> ICJ Statute, art. 31(3).

<sup>86</sup> Id. art. 9; See generally Stephen M. Schwebel, National Judges and Judges Ad Hoc of the International Court of Justice, 48 Int'l & Comp. L.Q. 889 (1999).

<sup>87</sup> “Since the ICJ’s founding, the tradition has been for each of the five permanent member states of the United Nations Security Council to have a seat on the Court. The text of the Statute says nothing in this regard but that is the reality of power politics. The other ten members of the ICJ are then chosen, again not based on any wording in the Statute but on a long-standing, negotiated compromise that governs the mix of



Only states may bring contentious (as opposed to advisory) cases. The Statute of the ICJ gives the Court three types of jurisdiction.<sup>88</sup> First, states may submit a dispute to the Court by special, that is, ad hoc agreement: both states must agree to such a submission. Second, a treaty may contain a jurisdictional clause that submits disputes under the treaty to the ICJ for resolution. Many bilateral friendship, commerce, and navigation treaties between the United States and other nations of the world contain such a clause, as do some multilateral treaties such as the Vienna Convention on Consular Rights. Third, states may declare consent to the “compulsory” jurisdiction of the Court; this means that they agree to submit to the ICJ all international legal disputes with another nation that has also accepted compulsory jurisdiction under similar conditions. Today, approximately 64 nations have agreed to such jurisdiction.

The ICJ has many of the characteristics of an independent court: it is a permanent institution with a continuous body of judges. However, its level of independence turns on the type of jurisdiction. To the extent states use its ad hoc jurisdiction, the ICJ is dependent. If states do not like the way that the ICJ resolves ad hoc disputes, they can refrain from submitting future disputes to it, and the ICJ will lose business. If the ICJ wants to maintain its relevance and power, it must resolve these disputes consistently with the interests of the disputing parties. To the extent that states submit to compulsory (ex ante) jurisdiction, the ICJ is relatively independent. Although states can withdraw if they do not like ICJ judgments, withdrawal incurs political costs and delay, and in the meantime they cannot stop other states from bringing them to court. To the extent that treaties provide the basis for the jurisdiction, the ICJ’s independence is moderate. Old treaties cannot easily be revised, but if states do not like the ICJ’s decisions, they can refrain from giving it jurisdiction in subsequent treaties.

Let us examine some usage and compliance statistics. Table 5 contains the numbers for each type of jurisdiction.

Table 5: ICJ Compliance and Usage<sup>89</sup>

	Compliance Rate	Disputes	Disputes/Year
Special Agreement	85.7%	15	.27
Treaty	60%	47	.84
Compulsory	40%	30	.54
Total or Average	64.1% (ave.)	92 (total)	1.64 (total)

Note: advisory jurisdiction excluded; we include only disputes that have resulted in a judgment.

Usage of the ICJ has fluctuated but never reached a significant level. This has led to complaints by international legal academics about the relatively low usage rate of the

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the UN Security Council as well, with three members from African states, two from Latin American states, two from Asian states, and three from European states (traditionally two from the West and one from the East of Europe).” Davis Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 ASIL Proc. 277, 278 (2003).

<sup>88</sup> ICJ Statute, arts. 36-37, 65

<sup>89</sup> Compiled from Ginsburg and McAdams, *supra* note \_\_, at appendix: Special agreement: 12 Yes; 2 No; 1 N/A. Treaty: 9 Yes; 6 No; 32 N/A. Compulsory: 4 Yes; 6 No; 20 N/A.

ICJ and proposals for reform.<sup>90</sup> During the 1950s, roughly two or three cases were submitted each year. During the 1960s, the ICJ fell into virtual disuse, with no new cases submitted from July 1962 to January 1967, and from February 1967 to August 1971. Between 1972 and 1985, usage returned to about one to three cases per year, and in the last 10 years the rate has been roughly two cases per year. This seems like a paltry amount for a court of first instance from which there is no appeal, which has jurisdiction over virtually all issues of international law and may be used by nearly every state in the world.

The low usage rate no doubt stems in part from the reluctance of countries to agree to compulsory jurisdiction. Only 64 of the 191 members of the UN currently accept the compulsory jurisdiction of the ICJ.<sup>91</sup> This is a participation rate of about 34 percent. By contrast, 34 of 57 UN members (60 percent) accepted compulsory jurisdiction in 1947.<sup>92</sup> Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the U.S., and Russia have not (nor has Germany). Among the states that do accept compulsory jurisdiction, they almost always hedge their consent with numerous conditions. That is a sign that state parties to the U.N. Charter have chosen not to make use of the Court because they cannot control its outcomes.<sup>93</sup>

As for compliance, the McAdams and Ginsburg study finds that in compulsory jurisdiction cases states comply with the judgment of the ICJ only 40 percent of the time.<sup>94</sup> As Table 5 shows, when the Court becomes more dependent, its compliance rate rises. When the dispute arises under a treaty, compliance rises to 60 percent. When the jurisdiction comes from special agreement, state compliance with ICJ decisions rises to 85.7 percent. In short, the more closely tied the jurisdiction is to consent of the parties that are involved, the more likely that the parties will comply with the judgment.<sup>95</sup>

An examination of a few cases demonstrates the difficulties that the ICJ has experienced in achieving compliance with its decisions. One famous example is the case

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<sup>90</sup> See, e.g., John Merrills, *International Dispute Settlement*, 164-66, 285-311 (1998); Heidi K. Hubbard, Note, *Separation Of Powers Within The United Nations: A Revised Role for the International Court of Justice*, 38 *Stan. L. Rev.* 165, 168 (1985); Arthur Rovine, in 1 *The Future of the ICJ* (Leo Gross, ed. 1976); Gerald Fitzmaurice, in 2 *The Future of the ICJ* 461-98 (Leo Gross ed., 1976); *Judicial Settlement of International Disputes* (H. Mosler & R. Bernhardt eds., 1974); L.V. Prott, *The Future of the ICJ*, 33 *Y.B. World Aff.* 284 (1979).

<sup>91</sup> These numbers are drawn from documents provided by the ICJ on its website. See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>.

<sup>92</sup> *International Court of Justice Yearbook, 1947-1948*.

<sup>93</sup> See, e.g., Richard Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 *Va. J. Int'l L.* 1, 2-4 (1982); Richard Falk, *Realistic Horizons for International Adjudication*, 11 *Va. J. Int'l L.* 315, 321-22 (1971). Even as early as 1955, international legal academics were concerned about the decline in the use of the compulsory jurisdiction clause and the many reservations that nations used to leave open the option of withdrawing from the ICJ's jurisdiction if another nation brought a case which they opposed. See C.H.M. Waldock, *Decline of the Optional Clause*, 32 *Brit. Y.B. Int'l L.* 244 (1955).

<sup>94</sup> Ginsburg & McAdams, *supra* note \_\_\_\_.

<sup>95</sup> As usual, there is a problem of selection effects: maybe states submit only simple or low-stakes cases by special agreement and the harder cases arise only under treaties or customary international law.

between Nicaragua and the United States, *Military and Paramilitary Activities in and Against Nicaragua*.<sup>96</sup> In 1984 Nicaragua instituted proceedings against the United States, claiming that it had violated the U.N. Charter and customary international law, by, among other things, engaging in attacks on Nicaraguan facilities, and mining Nicaraguan ports, assisting the *contra* rebels. Both the United States and Nicaragua had accepted the compulsory jurisdiction of the ICJ under Article 36 of the Court's statute. Three days before the filing of the application by Nicaragua on April 9, 1984, Secretary of State George Shultz declared that the U.S.'s acceptance of the compulsory jurisdiction of the ICJ would not apply to any disputes arising out of Central America. The Court rejected this attempt to modify the U.S.'s acceptance of the ICJ's compulsory jurisdiction, because in making its declaration accepting the jurisdiction in 1946, the U.S. had stated that it would give six months notice before any withdrawal could take effect.<sup>97</sup> The United States then withdrew completely from the compulsory jurisdiction of the ICJ. The Court's decision on the merits, which appeared in 1986, found the United States breached its international obligations by attacking Nicaragua and supporting the *contras*. The United States ignored the decision.

Refusal to comply with the ICJ has also taken less confrontational forms. In two cases in the last five years, the United States has refused to comply with ICJ decisions concerning the rights of foreign citizens who are capital murder defendants to consult with consular officials after their arrest.<sup>98</sup> Under the Vienna Convention on Consular Relations, the United States had an obligation to notify foreign defendants, at the time of arrest, that they have a right to contact their consulate. The United States is a party to an optional protocol that vests jurisdiction in the ICJ to resolve disputes over the Convention between parties that have ratified the protocol. In 1998, Paraguay initiated proceedings against the United States on behalf of a capital defendant, Angel Breard, who was to be executed by the state of Virginia.<sup>99</sup> After noting jurisdiction but before reaching the merits, the ICJ issued a provisional measure—akin to a temporary restraining order—which ordered that “the United States should take all measures at its disposal to ensure that [Breard] is not executed pending final decision in these proceedings.”<sup>100</sup> When the Supreme Court took up the case, the United States argued that the ICJ order was not binding and that the execution could proceed. The Supreme Court denied the petition for a stay of execution and Breard was executed.<sup>101</sup> The United States simply refused to obey the ICJ's order.

The United States again refused to comply when the same issue arose in a dispute with Germany. This time, two German brothers had been convicted of first-degree murder and sentenced to death in Arizona without notification of their Vienna Convention rights. After one of the brothers was executed, Germany instituted proceedings against the United States in the ICJ, and again the ICJ issued an order the

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<sup>96</sup> 1986 I.C.J. 14.

<sup>97</sup> See 1984 I.C.J. 392.

<sup>98</sup> Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 I.C.J. 248.

<sup>99</sup> See *Breard v. Greene*, 523 U.S. 371 (1998).

<sup>100</sup> *Id.* at 374.

<sup>101</sup> See generally *Agora: Breard*, 92 Am. J. Int'l L. 666-712 (1998).

United States to “take all measures at its disposal” to stop the execution while it heard the case on the merits. The executive branch again opposed a stay of execution before the Supreme Court, the Court denied the petition, and the execution proceeded.<sup>102</sup> Nonetheless, the case proceeded to the merits before the ICJ, which held that the United States had violated the Vienna Convention and the ICJ’s order, and that the United States in future was to allow the “review and reconsideration” of the convictions and sentences in cases where a Vienna Convention violation has occurred.<sup>103</sup> While it could be argued that “review and reconsideration” is sufficiently broad to be satisfied by a state clemency process, the United States to date has not stopped an execution because of a Vienna Convention defect.

Failure of the ICJ to achieve compliance is not limited to cases involving the United States. In the first contentious case to be decided by the Court, the Corfu Channel case, the losing party refused to comply with the Court’s judgment.<sup>104</sup> After warships of the British Royal Navy struck mines in the Corfu Channel between Albania and Greece, Great Britain brought a case for damages against Albania, which had agreed to the Court’s jurisdiction. After the Court issued judgment against Albania, Albania refused to participate in proceedings on damages and refused to pay the amount decided. Great Britain responded by withholding Albanian gold recovered from the Nazis, and it was not until 1992, with a change in regime in Albania, that a settlement was reached and the gold returned.<sup>105</sup> In 1951, Great Britain sued Iran because of the latter’s nationalization of the assets of the Anglo-Iranian Oil Co.<sup>106</sup> The Court indicated provisional measures to protect the company and its property, which Iran ignored. Eventually, the Court found it had no jurisdiction in the case. In 1955, Portugal brought suit against India after India suspended rights of passage to two remaining Portuguese enclaves in the Indian subcontinent.<sup>107</sup> The Court ruled in 1960 that Portugal had a right under international law to passage to its enclaves, but India annexed the territories the following year.<sup>108</sup> Even Iceland, by no means a powerful country, has refused to comply with the Court’s rulings. In 1972, Great Britain brought proceedings against Iceland for its expansion of its exclusive fisheries zone.<sup>109</sup> Iceland refused to appear and disregarded provisional measures; in 1972-1973, Icelandic and British patrol vessels engaged in the “cod war” over the fisheries zone.<sup>110</sup> Several other cases followed in which states refused to comply with orders of the ICJ. These include France in a case involving its nuclear weapons testing in the Pacific,<sup>111</sup> Iran and its taking of American diplomatic personnel hostage,<sup>112</sup> and Serbia in its support for genocide against the inhabitants of Bosnia-Herzegovina.<sup>113</sup>

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<sup>102</sup> *Stewart v. LaGrand*, 526 U.S. 115 (1999).

<sup>103</sup> *LaGrand Case (Germany v. United States)*, 40 ILM 1069, 1100 (2001).

<sup>104</sup> Shabtai Rosenne, *The World Court: What it is and how it Works* 155-58 (5th ed. 1995).

<sup>105</sup> *Id.* at 44, 181-82.

<sup>106</sup> *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 1952 I.C.J. 93.

<sup>107</sup> *Right of Passage Over Indian Territory (Portugal v. India)*, 1960 I.C.J. 6.

<sup>108</sup> Rosenne, *supra* note \_\_, at 189.

<sup>109</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 1974 I.C.J. 3.

<sup>110</sup> Rosenne, *supra* note \_\_, at 207.

<sup>111</sup> *Nuclear Tests (France v. New Zealand)*, (*France v. Australia*), 1974 I.C.J. 253.

<sup>112</sup> *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3.

<sup>113</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 1993 I.C.J. 1.

### *C. Inter-American Court on Human Rights*

In 1969, several American states adopted the American Convention of Human Rights, which established the Inter-American Court on Human Rights (IACHR).<sup>114</sup> The Convention, which entered into force in 1978, protects primarily political and civil rights, such as the right to life, liberty, personal integrity, due process, privacy, property, equal protection, and freedom of conscience and expressions. The IACHR started operating in 1979; it is a permanent court.<sup>115</sup>

Before the adoption of the Convention, human rights in the Americas had been the subject of the American Declaration on the Rights and Duties of Man, a non-binding declaration that was adopted at the same time as the creation of the Organization of American States (OAS).<sup>116</sup> The Inter-American Commission on Human Rights monitored compliance with the Declaration, primarily by conducting visits of nations and issuing country reports about their human rights performance.

Not all members of the OAS are parties to the American Convention. The United States and Canada, for example, are state parties to the OAS but have not ratified the American Convention and therefore are not subject to the jurisdiction of the IACHR. The American Convention has been ratified by 25 of the 35 American states; of these states, 21 have accepted compulsory jurisdiction.<sup>117</sup> The IACHR may hear petitions alleging a violation brought by either the Inter-American Commission on Human Rights or by a state party to the Convention, but not by an individual. Under the American Convention, the decisions of the IACHR are legally binding and not subject to appeal.<sup>118</sup>

The IACHR is composed of seven judges nominated by state parties to the Convention and elected by majority vote of the state parties.<sup>119</sup> The judges serve for six-year terms and may be re-elected once. Ad hoc judges ensure representation on the court for parties before it.

Contentious cases between state parties may arise in one of three ways. A state may accept the jurisdiction of the IACHR through a general acceptance of compulsory jurisdiction; a limited acceptance of reciprocal jurisdiction in suits brought by countries that take on the same obligation; or ad hoc acceptance of jurisdiction in an individual case.<sup>120</sup> Individuals and NGOs have no authority to bring a suit before the Court directly, but by bringing a matter to the attention of the Commission, they might prod the Commission—after investigating, issuing a report, and seeking a settlement—to submit the case to the Court on their behalf. The Court may hear only cases involving a claimed

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<sup>114</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123 (entered into force July 18, 1978).

<sup>115</sup> See Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79).

<sup>116</sup> OAS Res XXX (1948).

<sup>117</sup> Inter-American Commission of Human Rights, available at [www.cidh.oas.org/what.htm](http://www.cidh.oas.org/what.htm); Sands et al., *supra* note \_\_, at 217.

<sup>118</sup> American Convention, arts. 67 & 68.

<sup>119</sup> IACHR Statute arts. 4-6

<sup>120</sup> American Convention arts. 61-64.

violation of the American Convention. It has the authority to order remedial actions or compensation for violations. In sum, the IACHR is relatively independent.

The Court has heard relatively few contentious cases. As of 2000, it appears to have heard only 32 contentious cases, and issued only 15 judgments.<sup>121</sup> This is a usage rate of 0.07 cases per state per year (completed). As we will see, this usage rate is much lower than usage of the European Court on Human Rights. As one scholar on the IACHR has written, “whereas the European system has during its forty year history generally regulated democracies with independent judiciaries and governments that observe the rule of law, the history of much of the Americas since 1960 has been radically different, with military dictatorships, the violent repression of political opposition and of terrorism and intimidated judiciaries for a while being the order of the day in a number of countries.”<sup>122</sup> As a result of the recent political history, “human rights issues in the Americas have often concerned gross, as opposed to ordinary, violations of human rights. They have been much more to do with the forced disappearance, killing, torture and arbitrary detention of political opponents and terrorists than with particular issues concerning, for example, the right to a fair trial or freedom of expression that are the stock in trade” of the ECHR.<sup>123</sup> There are many cases, it is fair to say, that have arisen in Latin America in the last 25 years over which there is little or no dispute that grievous violations of the American Convention have occurred.<sup>124</sup>

Compliance with IACHR decisions is mixed. The IACHR often orders two types of remedies in a case: the trial and punishment of offenders within a state party and changes in domestic law, and monetary compensation for the complainant. It appears that states routinely ignore the requirement that they try and punish offenders or change their domestic laws, but that they will often pay financial compensation. We have found only one case in which a nation has fully complied with an IACHR decision. Even in that decision, the *Honduran Disappeared Persons* case, the defendant state, Honduras, did not pay the award until eight years after the Court had rendered its final judgment. In all the other cases, it appears that nations have not fully complied and the Court continues to “supervise” compliance.<sup>125</sup> This amounts to an approximately 5 percent compliance rate. Interestingly, the Inter-American Commission, which only issues non-binding country reports that seek to convince nations to change their human rights policies, reports a 4 percent rate of full compliance with its reports.<sup>126</sup> Thus, not only is there a low compliance rate with the decisions of the permanent, independent IACHR, but it does not

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<sup>121</sup> See Sands et al., *supra* note \_\_, at 217. We counted 55 from the annual reports, but trust the Sands figure more than our own effort. See, e.g., 1999 Annual Report of the Inter-American Court of Human Rights, OEA/SerL/V/III.47, doc. 6 (2000).

<sup>122</sup> David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *The Inter-American System of Human Rights* 1, 2 (David Harris & Stephen Livingstone eds. 1998).

<sup>123</sup> *Id.*

<sup>124</sup> Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in *The Inter-American System of Human Rights*, *supra* note \_\_, at 31, 33-34.

<sup>125</sup> See Harris, *supra* note \_\_, at 25 & n. 131; Dinah Shelton, *Reparations in the Inter-American System*, in *The Inter-American System of Human Rights*, *supra* note \_\_, at 151, 158.

<sup>126</sup> *Id.*

achieve a significantly higher degree of compliance than a body that does not even hear cases and has no binding legal authority under international law.

As for awards of monetary compensation, states have made full financial compensation in 23.6 percent of the cases, and in 14.5 percent of cases no compensation was found necessary. In the rest of the cases, slightly greater than 60 percent, states have engaged in either no or partial compliance.<sup>127</sup>

There are the usual problems with selection effects. But given the low usage and compliance rates, we can be reasonably confident in concluding that the IACHR has not been an effective tribunal.

#### *D. GATT and WTO Adjudication Systems*

GATT was created in 1947. It was initially intended as a temporary framework for international trade negotiations, but was indefinitely extended when the treaty creating the International Trade Organization was not ratified by the United States. GATT's charter did not provide for formal adjudication of trade disputes, and instead states submitted their disputes to arbitration under the GATT secretariat's auspices.

The informal panel system handled hundreds of disputes over nearly 40 years. However, the system did not always work well. States could block or delay the establishment of panels and the adoption of judgments, and often did. Frustration with these practices led to evasion of the system. States would rely on unilateral retaliation and during many years did not use the GATT dispute mechanism at all. Dissatisfaction with the arbitration system, as well as with other aspects of GATT, prompted member states to establish the WTO in 1995. The Dispute Resolution Understanding of that year created a more formal, court-like adjudication system.<sup>128</sup>

*GATT.* The GATT system was essentially a formalized arbitration system. If consultations fail, a party may request the creation of a panel. Because GATT acts by consensus, either party can block the creation of a panel; therefore, as in an ordinary arbitration, a panel will be appointed only if both parties consent. The two parties must agree to the members of the panel, and much delay can occur before agreement is reached. After the panel hears the case and renders a judgment, the GATT members decide by consensus whether the panel's judgment will be adopted. Again, because both parties' consent is needed, the losing party can block adoption of the panel's judgment.

If a panel's judgment is adopted by GATT members, but the losing party does not comply with it, the winner can again seek GATT authorization for the implementation of

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<sup>127</sup> Id.

<sup>128</sup> For detailed discussions, see Robert Jackson et al., *Legal Problems of International Relations* 259-67 (2002); William J. Davey, *The WTO Dispute Settlement System*, in *Trade, Environment and the Millennium* 119-42 (Gary P. Sampson and Bradness Chambers eds., 2d ed. 2001); Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997).

sanctions. The loser again has the opportunity to block such authorization. This happened in every case but one.<sup>129</sup> Thus, although losing states did not usually block adoption of a panel's judgment against them, they almost always blocked authorization of sanctions against them. The winning party would then have to decide whether or not to implement unilateral sanctions, which would be a technical violation of GATT. The United States frequently engaged in unilateral retaliation.

In 1989, the GATT system was revised; the most important innovation was the elimination of the right to veto a panel. However, because the right to veto adoption of the panel report was retained, the GATT system remained highly dependent, as we define the term.

*WTO.* The 1995 Dispute Settlement Understanding created a system much closer to a court. After consultations fail, the complaining party has a right to request the Dispute Settlement Body (DSB) to appoint a panel. If such a request is made, the DSB, which consists of all members of the WTO, must create a panel unless all DSB members agree *not* to. Since the complaining state would not ordinarily agree to the dismissal of its own complaint, this consensus rule effectively makes appointment of the panel automatic. And although the parties can recommend individuals for the panel, the WTO Director-General may appoint a panel if the parties cannot agree. Because of this, strategic delay of the formation of the panel is difficult. The panel consists of three people who are *not* nationals of the disputing parties, unless the parties agree otherwise. After the panel hears the case and renders a judgment, the judgment is adopted by the DSB unless there is a consensus *against* doing so. Again, because the winner is a member of the DSB, and thus can block any effort to refuse to adopt the judgment, the adoption of the judgment is effectively automatic.

The DSU created an appellate procedure. A standing appellate body consists of seven members drawn from the WTO membership. They have four year terms. Appellate panels usually consist of three of the members of the appellate body drawn at random. As a result, a national of one of the state parties will not necessarily hear the case. The appellate body's decision is adopted by the DSU unless all members agree otherwise.

If the losing party does not comply with a judgment that has been adopted by the DSU, the DSU may authorize sanctions. Here again, the consensus rule applies against the losing party. It can avoid sanctions only if all members of the DSB, including the winner, agree. Thus, sanctions are effectively automatic.

Because the GATT and WTO dispute resolution systems apply to the same subject matter—international trade—they provide a valuable opportunity for evaluating our hypotheses. The GATT system is highly dependent, in our terms: the WTO system is highly independent. The members of GATT abandoned the GATT system because they believed that it could be improved, and the WTO system was the result. But has it been more effective?

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<sup>129</sup> Netherlands Measures of Suspension of Obligations to the United States, Basic Instruments & Selected Documents, Article XXIII, Supp. 32 (1952).



Our first test of effectiveness is usage. A tribunal that is used is more successful than a tribunal that is not used. A first look at usage statistics suggests that the WTO system is superior to the GATT system. There were 432 complaints under GATT from 1948 to 1994; there have been 227 disputes under WTO from 1995 through 2000. The GATT system, then, handled 9.2 disputes per year; the WTO system has handled 37.9 disputes per year.<sup>130</sup>

However, a fair comparison of the two systems must control for diverse factors. The membership in GATT/WTO has increased rapidly over this time period, and one reason for the increase in the number of disputes has been the increase in membership. In addition, the GATT system as a whole, not just the adjudication system, took a while to develop, and has been subject to various crises—for example, in the decade following the establishment of the EC, when Europe effectively withdrew from GATT while it consolidated its gains.<sup>131</sup> If we limit our comparison to, say, 1989-1994, GATT's usage statistics look better, with 20.3 complaints per year.<sup>132</sup> If we control for membership (GATT's mean membership for this period was 105, WTO's was 132),<sup>133</sup> and look at complaints per state per year, we find, 0.19 complaints per state per year for GATT, and 0.29 complaints per state per year for WTO. Finally, if we control for state pairs,<sup>134</sup> we find 0.0037 complaints per state pair per year for GATT, and 0.0044 complaints per state pair per year for WTO. The difference between these rates is not statistically significant.

Disputes also should arise more frequently as interaction increases. So we should also control for subject matter and trade volume. The Uruguay round produced, in addition to the WTO, an extension of international trade law to include intellectual property and services. Thus, there could be disputes about these topics during the WTO era; there could not be such disputes before 1995. And, even within the subject matter areas that remained constant, the increasing volume of world trade created new opportunities for clashes. The volume of international trade for merchandise among WTO members increased from 3 trillion dollars in 1991, to 48 trillion dollars in 1997.<sup>135</sup> One would suppose that if the GATT system had never been changed, usage would have increased on account of this greater volume of trade, though not necessarily in a linear

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<sup>130</sup> Busch and Reinhardt, *Evolution*, supra note \_\_ at 151. Note that they define a dispute as a case in which a complaint is filed (excluding disputes that are resolved before the filing of a dispute), and they limit disputes to dyads (so 3-state disputes count as 2 disputes).

<sup>131</sup> Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 12-13 (1993).

<sup>132</sup> The higher usage rate after 1989 could be due to the adoption of the 1989 dispute resolution improvements, which eliminated the power to veto panels. But the power to veto the adoption of panel reports was retained, so the reduction of dependence, if any, was small.

<sup>133</sup> Sources: WTO membership: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). GATT membership: [http://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm).

<sup>134</sup> The formula is  $n! / [2 * (n - 2)!]$ . To understand why state pairs provide the appropriate baseline, compare possible interactions between 2 states (W and X), and 4 states (W, X, Y, and Z). Among 2 states, there is only one potential state conflict: between W and X. Among 4 states, there are 6: W-X, W-Y, Y-Z, X-Y, X-Z, and Y-Z. The number of state pairs, and thus the number of potential conflicts, bears a nonlinear relationship with membership. For GATT, there were 5,460 state pairs. For WTO, there were 8,646.

<sup>135</sup> Source: WTO statistics: [http://www.wto.org/english/res\\_e/statis\\_e/webpub\\_e.xls](http://www.wto.org/english/res_e/statis_e/webpub_e.xls) (nominal dollars.)

fashion. Conservatively supposing there were twice as many opportunities for disputes in 1997 as in 1991, usage measured as complaints per state per year per dollar of trade would favor GATT over WTO.

There is one statistical study comparing usage rates of GATT and WTO. Eric Reinhardt found in a study of 704 dispute initiations from 1948 to 1998 that the probability that a developed state initiated a dispute against another developed state was higher under WTO than under GATT. However, he did not control for the total increase in world trade, nor for the expansion of international trade law to include services and intellectual property.<sup>136</sup> As we saw, the second factor is of considerable significance, and ought to be included in a regression. Focusing just on the traditional users of the international trade system—the developed countries—Reinhardt found no difference in the probability of a dispute under the two systems, after controlling for membership, size of economy,<sup>137</sup> and similar factors, including possible bandwagon and feedback effects.<sup>138</sup> Again, the regression lacked controls for total world trade and the expansion of international law, and so was probably biased in favor of the WTO. In sum, usage did not increase, and may have declined.

Let us turn to compliance. Between 1995 and 2000, the WTO adjudication mechanism ruled unambiguously in favor of complainants in 41 cases. Of these cases, the defendant complied fully 73 percent of the time; and complied either fully or partially 88 percent of the time. In 68 GATT cases between 1980 and 1994 the defendant complied fully 54 percent of the time; and complied either fully or partially 76 percent of the time.<sup>139</sup> The differences between the WTO statistics and the GATT statistics do not pass standard hypotheses tests.

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<sup>136</sup> Reinhardt did find a substantial (more than threefold) increase in the probability of a dispute after the 1989 improvements. Reinhardt, *supra* note \_\_. However, this is in tension with Busch's finding that 1989 improvements did not increase concessions at consultation stage, did not increase concessions after panel, and did not increase the likelihood that a panel would be established. See Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes under GATT*, 44 *J. Conflict. Res.* 425 (2000)

<sup>137</sup> Horn et al. find that more active traders use dispute resolution mechanisms more frequently. See Henrik Horn et al., *Is the Use of the WTO Dispute Settlement System Biased?*, in CEPR Discussion Paper 2340-9 (1999).

<sup>138</sup> Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiations, 1948-1998* (2000). On the other hand, see Eric Reinhardt, *To GATT or Not to GATT: Which Trade Disputes Does the U.S. Litigate, 1975-1999?*, unpub. m.s. (2003) (finding that U.S. is more likely to use GATT/WTO rather than unilateral section 301 mechanism with increased judicialization; holding other variables at their mean, 24% more likely to use IL after GATT 1989, and an additional 23% more likely after WTO 1995). See also Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in The Political Economy of International Trade Law: Essays in Honor of Robert Hudec 457* (D.M. Kennedy and J.D. Southwick eds. 2002).

<sup>139</sup> We thank Eric Reinhardt for supplying us with these data; they are based on his and Marc Busch's evaluation of compliance, which supplements Hudec's earlier work on GATT compliance. Looking at all GATT cases from 1948 to 1994, full compliance after a ruling for the plaintiff occurred 42 percent of the time; partial compliance occurred 27 percent of the time; and noncompliance occurred 31 percent of the time. Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 *J. Conflict Res.* 174, 177 (2001). For reasons given earlier, the 1980-1994 data provide a better basis of comparison.

A study confined to EU-U.S. trade disputes found that compliance was *lower* under the WTO than under the GATT. Looking just at those cases in which a ruling was issued in favor of the complainant, compliance under GATT occurred 63 percent of the time (10 of 16), while compliance under WTO occurred 33 percent of the time (2 of 6).<sup>140</sup>

Although these statistics are suggestive—and suggest that the WTO system is no better, and possibly worse, than the GATT system was—they are hampered by selection effects. When states decide whether to file a complaint or settle, they take into account the likelihood that a complaint would lead to a judgment, and that this judgment would cause the defendant to bring its behavior into compliance with trade law. A better system might produce compliance statistics that are equal to those of a worse system, because under the better system the easier cases are settled and only the harder and more politically sensitive cases make it to judgment.<sup>141</sup>

One way to minimize selection problems is to look farther back in the dispute procedure, at settlement as well as compliance. Although a better system and worse system might have equal compliance rates, the better system should produce more settlements, and this effect should be reflected in greater rates of concession, both in the aggregate and during the period in which settlement may occur. Here are data for concessions granted in response to complaints (settlements as well as complied-with judgments):

Table 6: Concessions in the GATT and WTO Systems<sup>142</sup>

	<b>None</b>	<b>Partial</b>	<b>Full</b>	<b>Total</b>
GATT	85 (38%)	54 (24%)	87 (38%)	226
WTO	32 (20%)	20 (13%)	102 (66%)	154
Total	117 (30%)	74 (19%)	189 (50%)	380

Note: All GATT/WTO disputes from 1980 through 2000 for which the authors have outcomes (77% of cases, 380 out of 496 complaints made during this period, in total).

WTO beats GATT for every level of concession. WTO achieves full concessions, for example, in 66 percent of the cases, whereas GATT achieves full concessions in only 38 percent of the cases.

Busch and Reinhardt point out, however, that at the same time that the WTO dispute mechanism was created, trade law was expanded to include services and intellectual property (as we noted above). They argue that when the scope of trade law is expanded, states will initially bring the easiest disputes—the low-hanging fruit—and

<sup>140</sup> Marc L. Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in *Transatlantic Economic Disputes: The EU, the U.S. and the WTO* 465, 580-81 (Ernst-Ulrich Petersmann and Mark A. Pollack eds. 2004).

<sup>141</sup> For an effort to control for domestic political considerations such as election year and the political power of affected industries, see Todd Allee, *Legal Incentives and Domestic Rewards: The Selection of Trade Disputes for GATT/WTO Dispute Resolution* (unpub. m.s. 2003).

<sup>142</sup> Compiled from Marc L. Busch and Eric Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, *J. World Trade* 24, tble. 1 (forthcoming 2004).

these disputes are most likely to result in substantial concessions. Their hypothesis that the expansion of trade law accounts for the greater success of the WTO is confirmed by a regression that shows that cases involving services and intellectual property are resolved at a much higher rate than the other cases in the WTO system, and a dummy variable measuring whether the cases is brought under GATT or WTO no longer predicts a higher level of concessions at a statistically significant level.<sup>143</sup> In other words, the dispute resolution procedures of WTO cannot be credited for the enhanced levels of concessions. An additional study involving only disputes between the EU and the U.S. produces similar results.<sup>144</sup>

The concession data, then, do not show that either system is better than the other: they are about the same. However, one must worry again about selection effects. Busch and Reinhardt assume that settlements occur after a complaint is filed, and so their data include only post-complaint settlements. But it is also possible that an injured state and a violator will settle prior to the filing of a complaint. It is theoretically possible that one system produces greater concessions at the pre-complaint stage.<sup>145</sup>

A possible solution is to look instead at overall trade flows starting prior to the dispute. The theory here is that if a state either loses an adjudication and complies with the judgment, or eliminates an illegal trade barrier because of the threat of a complaint, then its behavior should be reflected in the volume of imports from the complainant. When the illegal barrier is removed, the volume should increase.

Chad Bown conducts a test using this proxy on a set of disputes involving allegations of excessive import protection from 1973 to 1998.<sup>146</sup> The dependent variable is the log growth rate of the defendant's imports from plaintiff in the disputed sector from 1 year before to 3 years after the dispute. He finds no evidence that the WTO adjudication procedures were more effective than the GATT procedures. His main finding is that an adjudication is more likely to be successful (in the sense of increasing trade flows) when the complainant has a large share of the defendant's exports. The retaliatory capacity of the injured state, rather than the details of the adjudication regime, drives compliance with international trade law.

Our brief discussion of research on trade adjudication cannot do justice to the complexity of the subject, and the research itself is at an early stage, as is experience with the WTO system. The safest conclusion so far is that WTO adjudication procedures have increased neither the probability that states will use adjudication to resolve trade disputes, nor the probability that states will obey trade law. However, we think that once the massive increase in world trade is taken into account, the WTO usages statistics look meager, and the case for GATT's superiority becomes stronger.

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<sup>143</sup> Id.

<sup>144</sup> Busch and Reinhardt, *Transatlantic*, supra note \_\_\_\_.

<sup>145</sup> Busch and Reinhardt argue that this is unlikely. See Busch and Reinhardt, supra note \_\_\_\_ [Testing], for a discussion.

<sup>146</sup> Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, Rev. Econ. Stat. (forthcoming 2003).

Busch and Reinhardt blame the WTO's legalism for its lack of progress. The GATT panels were adjuncts to diplomacy; the WTO's procedures encourage states to litigate. They emphasize WTO's greater reliance on rules.<sup>147</sup> However, there is no reason to think that rules by themselves should increase litigation. If the removal of the veto makes litigation more attractive because the defendant cannot block it, the increased likelihood of noncompliance must make litigation less attractive. We have emphasized instead that the increase in independence from GATT to WTO should reduce usage and compliance, and have found some suggestive—but currently inconclusive—evidence for this view.

### *E. Comparison of Tribunals*

In this section, we try to compare the tribunals more directly. We want to show that independence and effectiveness are uncorrelated (our weak thesis) or negatively correlated (our strong thesis), against the conventional wisdom that they are positively correlated. To do so, we need to assign numbers to our two variables, independence and effectiveness.

To measure independence, we construct a five point scale, with one point for each of the five characteristics that distinguish an independent tribunal from a dependent tribunal. These are: (1) compulsory jurisdiction; (2) no right to a judge being a national; (3) permanent body; (4) judges having fixed terms; and (5) right of third parties to intervene. Table 7 summarizes this information as well as providing the dates for the start and (if applicable) termination of the tribunal, and the nature of its jurisdiction. We also supply information for the European courts, the International Tribunal for the Law of the Sea, and the International Criminal Court, for purpose of comparison.

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<sup>147</sup> See Busch and Reinhardt, *Transatlantic*, supra note \_\_, at 482-83; see also Marc L. Busch and Eric Reinhardt, *The Evolution of GATT/WTO Dispute Settlement*, in *Trade Policy Research* 143 (John M. Curtis and Dan Ciuriak eds. 2003); Karen J. Alter, *Resolving or Exacerbating Dispute?: The WTO's New Dispute Resolution System*, 79 *Inter. Affairs* 783 (2003) (blaming the WTO's legalistic dispute resolution system for increasing conflict in international trade).

Table 7: Independence of Tribunals<sup>148</sup>

Court	Start	End	Juris.	Compul. Juris.	No Right to Nationals	Permanen t Body of Judges	Term of Judges	3d Party Interv.	Indep. Score**
Arb.	1792 *	1979 *	specific dispute	no	no	no	ad hoc	no	0
PCA	1899		general	no	no	no	ad hoc	no	0
PCIJ	1919	1945	general	yes	no	yes	9	no	3
ICJ–Comp	1946		general	yes	no	yes	9	yes	4
ICJ–Other	1946		specific dispute or treaty	no	no	yes	9	no	2
GATT	1947	1995	trade	no	no	no	ad hoc	no	0
ECJ	1952		general	yes	no	yes	6	yes	4
ECHR	1959		human rights	yes	no	yes	6	yes	4
IACHR	1979		human rights	yes	no	yes	6	no	3
WTO (App)	1995		trade	yes	yes	yes	4	yes	5
ITLOS	1996		maritime	yes	no	yes	9	yes	4
ICC	not yet		intern'l crimes	yes	no	yes	9	yes	4

\* Stuyt's sample; ad hoc arbitration has existed since ancient times, and continues to the present day.

\*\* 1 point for each of: state can be bound to ruling without its consent to adjudication; possible that no national on panel that hears dispute; judges form permanent body; judges' terms extend beyond a given dispute; third parties may intervene: maximum of 5.

Next we turn to effectiveness. Table 8 contains information about usage and compliance for all of the tribunals.

<sup>148</sup> The information in this table is compiled from Sands, et al., supra note \_\_; the PICT website (<http://www.pict-pcti.org/>); and updated where necessary from the tribunals' own websites.

Table 8: Usage and Compliance Rates<sup>149</sup>

Court	Years	Cases Begun	Subject States	Cases/Year	Cases/Year*States ***	Compliance Reputation	Full Compliance Rate
Arb.	—	—	—	0.15	0.007	good	44-94%
PCA	104	33	88	0.32	0.004	—	—
PCIJ	26	36	63	1.38	0.022	bad/mixed	—
ICJ–Comp	57	30	62	0.53	0.008	bad	40%
ICJ–Other	57	62	187	1.09	0.017	—	72%
GATT	48	298	128*	6.21	0.05	mixed	38%
ECJ	51	12,800	15	251	17	good	82%
ECHR	44	1000s	44	—	—	good	80%
IACHR	24	32**	21	1.33	0.06	bad	4%
WTO	8	213**	146	27	0.18	mixed	66%
ITLOS	9	10	145	1.11	0.008	—	—
ICC	1	0	92	—	—	—	—

\* as of 1994.

\*\* as of 2000.

\*\*\* mean used when membership changed over time.

Note: for ICJ, PCIJ we exclude advisory cases; unless otherwise indicated, data as of 2003 or (for subject states) end of period of operation; ECHR: data omitted because of importance of 1998 changes; usage is very high; ad hoc arbitration data for 1880-1899.

The evidence is hard to interpret for many reasons. We have already discussed the problem of selection effects. There are also many problems of comparison. Is a tribunal that is used rarely but also has a limited jurisdiction more or less effective than a tribunal that is used more frequently but also has a broader jurisdiction? With these problems in mind, we forge ahead and combine the tables, as follows.

Table 9: Relationship between Independence and Effectiveness

		Independence		
		Low (0–1)	Medium (2–3)	High (4–5)
Effectiveness	Low	[PCA]	PCIJ, IACHR	ICJ–Comp
	High	Arb., GATT	ICJ–Other	[ECJ], [ECHR], WTO

As the PCA was essentially redundant with the ad hoc arbitration system, it should be excluded. It was not used much because it did not add anything to the arbitration system. For reasons that we discuss in the next Part, the ECJ and ECHR should be excluded as

<sup>149</sup> Sources are as follows. For arbitration, see Stuyt, *supra* note \_\_. For PCA and PCIJ, see Butler, *supra* note \_\_. For ICJ, see Ginsburg and McAdams, *supra* note \_\_. For GATT and WTO, see Busch and Reinhardt, *supra* note \_\_. For ECJ, see Stacy Nyikos, *The European Court of Justice and National Courts: Strategic Interaction within the EU Judicial Process*, <http://law.wustl.edu/igls/Conconfpapers/Nyikos.pdf>. For ECHR, see our discussion in Part IV.B., *infra*. For ITLOS, see [www.itlos.org](http://www.itlos.org). For ICC, see <http://www.icc-cpi.int/php/show.php?id=home&l=EN>. For ICJ, PCIJ we exclude advisory cases; unless otherwise indicated, data as of 2003 or (for subject states) end of period of operation; ECHR: data omitted because of importance of 1998 changes; usage is very high; ad hoc arbitration data for 1880-1899.

well. The WTO, then, is the best evidence for the view that independence and effectiveness is correlated; however, as we argued, the WTO has been no more effective, and arguably less effective, than the GATT during its last ten years.<sup>150</sup> At a minimum, there is no evidence for positive correlation between independence and effectiveness. This is our weak thesis.

Our strong thesis—that the correlation is in fact negative—is supported by arbitration and GATT (dependent, effective tribunals); by the ICJ’s compulsory jurisdiction (independent, ineffective); the absence of a real example of a dependent, ineffective tribunal; and the absence of a real example of an independent, effective tribunal, once the European courts are excluded, and the WTO is put aside. Further supporting our strong thesis is the (partial) evidence of increasing effectiveness of the trade tribunal from GATT to WTO; and the evidence of superior performance of the ICJ when its jurisdiction is consensual rather than compulsory.

A final proxy for effectiveness is the budget. States can starve tribunals that they do not like by denying them funds; in addition, a small budget may indicate that the tribunal has mainly a symbolic purpose. Table 10 provides the figures (with some American court systems thrown in for purposes of comparison).

Table 10: Budgets of Tribunals<sup>151</sup>

<b>Tribunal</b>	<b>Budget*</b>
ICJ	20.2 (2001)
ITLOS	5.8
WTO	1.3 <sup>152</sup>
ICTY	64.8
ICTR	56.7
ECHR	25.3
IACHR	1.1
ECJ	141.1
U.S. Federal Judiciary	4,060 (1999)
U.S. Supreme Court	40 (2002)

\* FY 1998 unless otherwise indicated; in millions of U.S. dollars (rounded).

These budgetary figures are hard to compare for various reasons but they should give pause to those who claim that international adjudication has great significance. Only the ECJ has a significant budget. It is striking that the budgets for the Yugoslavia and Rwanda tribunals, whose jurisdictions are microscopic, are 2-3 times greater than that of

<sup>150</sup> Table 8’s data on GATT are for the entire period; as we discussed earlier, GATT’s last five or ten years provide better comparison. See *supra*.

<sup>151</sup> Sources are PICT ([www.pict-pecti.org/matrix/Matrix-main.html](http://www.pict-pecti.org/matrix/Matrix-main.html)) for the foreign tribunals; OMB (<http://www.whitehouse.gov/omb/>) for American courts.

<sup>152</sup> This figure is from the PICT website. The WTO’s entire budget is over \$100 million, but the WTO does more than resolve disputes; this figure must refer to only the dispute resolution mechanism, although this is not entirely clear.



the ICJ, which, recall, is a court of original jurisdiction with no appeal. The budgetary figures imply that states do not believe that they gain much from international adjudication; if they did, they would invest more in it.

#### IV. EUROPE AND INTEGRATION

European international courts pose a challenge to our account of international tribunals. The widespread belief that the ECJ and the ECHR are both independent and effective lies behind the conventional wisdom that independence is the key to success for international tribunals. In this Part, we argue that the European courts are more like domestic courts than like international courts. Independent courts can be effective if they exist within a political community. Europe has such a community (keeping in mind, of course, that the ECJ and the ECHR encompass different sets of nations, with only the former a part of the European Union); the rest of the world does not. Therefore, the ECJ and the ECHR cannot be models for international tribunals.

##### *A. Integration*

Domestic judges in advanced liberal democracies are generally regarded as independent of the parties who appear before them. Their independence is not due solely to lifetime tenure: most judges, even in the U.S., do not have lifetime tenure. In the United States, many state judges are elected; and judges in foreign countries can belong to a bureaucracy that is subordinate to elected officials. The reason that judges are independent is that the parties that appear before them do not pay their salaries or exercise any control over them. In a well-functioning state, parties are too weak to influence judges. Only when the government is a party do judges feel pressure to abandon their stance of neutrality, pressure that many but not all judges are able to resist.

If parties cannot influence judges, then they cannot be sure that judges will decide disputes in an unbiased way. Judges might instead apply ideological commitments, personal policy preferences, or other criteria that prevent a decision within the parties' win set. Why then do parties voluntarily submit their disputes to judges when they could otherwise rely on nonlegal mechanisms such as nonbinding arbitration? Nonbinding arbitration is the domestic analogue to international arbitration, because in both cases no third party enforcement mechanism ensures compliance with the judgment, and arbitrators must please parties if they want to be used again. However, domestic courts can offer parties something that international tribunals cannot: a judgment that will be enforced by marshals and police. Domestic parties thus face a tradeoff: courts can offer enforcement but judges are not as dependent as arbitrators are, and thus can be counted on to provide less accurate judgments. Parties frequently split the difference by relying on binding arbitration; courts enforce the awards but refrain from second guessing arbitrators and review their judgments only for abuse.

Domestic courts can call on the executive branch (in the U.S.) to enforce their judgments only because the executive branch is willing to enforce courts' judgments. If it

were not, then domestic courts would be helpless and they would rarely be used. It is not entirely clear why the executive branch obeys the orders of courts, but part of the reason is surely that courts are reasonably reliable and enforce the law rather than their own preferences; and this, in turn, is due to the training and attitudes of judges. Judges are chosen from the mainstream political community and share the values of the main political parties. Elected officials also retain power over judges: they control their resources, their jurisdiction, and other elements of their positions.

By contrast, international courts cannot rely on third party enforcement. There is no world “executive branch” that can enforce judgments. If, as we have argued, states comply with international judgments only when they are within the states’ win sets, then compliance will occur only within the context of the parties’ continuing relationship.

A second difference between domestic and international courts is the legislature. If domestic courts interpret laws badly, misinterpret custom, overlook important social and economic changes, and so forth, legislatures can correct them—both by changing the law and by modifying the court system. By contrast, there is no world “legislative branch” that can reliably correct the errors of international tribunals. Instead, these errors can be changed only through consensus, or occasionally unilateral action by a powerful state.

We argue that tribunals can be effective only in an institutional setting where external agents will enforce their judgments and correct their errors. This setting can be found in many states, but not in all; it is rarely found in international affairs. But there is an important middle case: when a group of states form a union or confederation of some sort.

The European Union is not the first such group of states. Germany prior to unification in 1871 was a confederation, as were the confederated states of America prior to union in 1788. A confederation or union can be distinguished from the international realm by the existence of law for which individuals (or elites or interest groups) within the union feel loyalty, in a way that transcends their national loyalties. When a confederation has such a political community, it also can frequently legislate new rules and execute judgments. Only then can there be a relatively independent judiciary that is also effective.

The members of the EU have developed their own law—European Community law—that governs their relationships and no others.<sup>153</sup> Most legislation is proposed by the European Commission (which consists of delegates from each member of the EU) and adopted by the Council of the European Union (which consists of ministers from each member of the EU, the composition depending on the issue) and an increasingly influential European Parliament filled with representatives who are directly elected by the

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<sup>153</sup> There is an enormous literature on the European Union and its legal system. A useful introduction is George Bermann, et al., *Cases and Materials on European Union Law* (West 2002).

EU's citizens.<sup>154</sup> The voting system is a combination of unanimity and majority rule, depending on the topic. And a large bureaucracy, the Commission, further implements the decisions of the Council and Parliament. Although these institutions are far from those of a regular federal state, they are also far (in the other direction) from the institutions that are used for normal interstate governance. The main point of similarity is the absence of enforcement through an executive agency.

## *B. European Tribunals*

### 1. The European Court of Justice

The European Court of Justice (ECJ) was established in 1952 as the judicial body for the European Coal and Steel Community.<sup>155</sup> It has remained the principal judicial organ for members of the European Community even as they have evolved from a loose collection of several communities<sup>156</sup> into the European Union<sup>157</sup> under the 1992 Treaty of European Union<sup>158</sup> and the 1997 Amsterdam Treaty.<sup>159</sup> Its purpose is to settle disputes between the different actors of the European Union, which includes member states, EU institutions such as the Commission, Council, and Parliament, and sometimes private parties. It also functions to ensure the uniform interpretation of European law, and national courts may refer questions of European law to it.<sup>160</sup> The substantive law derives from the treaties that have formed the European Communities and the European Union, the regulations and directives issued by European Community institutions in exercising the powers conferred to them by the treaties, and treaties to which the Community is a party.<sup>161</sup> It is a permanent court that hears disputes concerning the interpretation and

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<sup>154</sup> On the institutions of the European Union see Neill Nugent, *The Government and Politics of the European Union* 463-493 (5th ed. 2003). A brief overview is also provided by the European Commission, *How the European Union works. A citizen's guide to the EU institutions* (European Documentation 2003), available at [http://europe.eu.int/comm/publications/booklets/index\\_en.htm](http://europe.eu.int/comm/publications/booklets/index_en.htm).

<sup>155</sup> A number of books are dedicated to the organization and functioning of the European Court of Justice. See, in particular, Richard Plender, *European Courts Practice and Procedure* (Sweet and Maxwell, 2d ed. 2000, loose leaf); Anthony Arnall, *The European Union and its Court of Justice* (1999); *The European Court of Justice* (Gráinne de Burca & J.H.H. Weiler eds. 2001).

<sup>156</sup> The European Coal and Steel Community (ECSC) set up by the Treaty of Paris in 1951, the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), set up by the treaties of Rome in 1957. Texts of these founding treaties are available at [http://europe.eu.int/comm/publications/booklets/eu\\_documentation/index\\_en.htm](http://europe.eu.int/comm/publications/booklets/eu_documentation/index_en.htm).

<sup>157</sup> The three European Communities form the first pillar of the European Union. The second pillar of the European Union is the common foreign and security policy and the third pillar the cooperation in justice and home affairs. Only the first pillar embodies Community jurisdiction in its most highly developed form, as described in this paper.

<sup>158</sup> Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1, 31 I.L.M. 247 (1992).

<sup>159</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997).

<sup>160</sup> In detail Arnall, *supra* note 155, at 21-69.

<sup>161</sup> For an outline on the sources of Community Law, see Borchart, *supra* note \_\_\_, at 58-71.

application of the European Community treaties and secondary laws created under their authority.<sup>162</sup>

The ECJ is composed of 15 judges,<sup>163</sup> the same as the number of member states. They are appointed for renewable six year terms by the unanimous consent of the member states. By tradition, each member state has one representative on the bench. Parties cannot raise objections, based on nationality, to the membership of a chamber that hears the case.<sup>164</sup>

The jurisdiction of the ECJ covers mainly three types of cases.<sup>165</sup> First are claims brought against member states by the Community for violations of EC law;<sup>166</sup> second are claims brought against Community institutions;<sup>167</sup> and third are referrals from member states' domestic courts concerning questions of EC law.<sup>168</sup> Cases against member states for violations of EC law can be brought by other member states, but this occurs rarely; cases are ordinarily brought by the European Commission.<sup>169</sup> Cases under the second found of jurisdiction can be brought by member states, other EC institutions, or individuals that have a direct and particular interest in the outcome. The third type of jurisdiction occurs when a question of EC law arises in the domestic proceedings of a member state's national court. Although it is the decision of the national court whether to seek the referral, the individual parties to the case may participate in the ECJ proceedings. If a question of EC law arises in the national court of last resort, it has an obligation to refer the issue to the ECJ.<sup>170</sup> Member states and the Commission may intervene in all cases, and private parties may intervene in cases involving other private parties, with some exceptions.<sup>171</sup> The member states have an obligation to ensure that

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<sup>162</sup> For useful discussions of the role of the ECJ, see De Burca & J.J.H. Weiler, *The European Court of Justice* (2002); Anne-Marie Slaughter et al., *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (1998).

<sup>163</sup> The court is assisted by eight advocates general. Their role is to present reasoned opinions on the cases brought before the court. Article 222 TEC (Treaty establishing the European Community).

<sup>164</sup> L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* 19-21 (5<sup>th</sup> ed. 2000).

<sup>165</sup> It also hears cases by EC staff, inter-state disputes brought by special agreement as provided for by one of the EC treaties, contract disputes with the Community, among others.

<sup>166</sup> Proceedings for failure to fulfill an obligation under Article 226 and 227 TEC.

<sup>167</sup> Proceedings for annulment of acts adopted by Community institutions under Article 230 TEC and proceedings for failure to act of Community institutions under various provisions of the different Community treaties. However latter proceedings are now usually dealt with by the Court of First Instance.

<sup>168</sup> It also hears cases by EC staff, inter-state disputes brought by special agreement as provided for by one of the EC treaties, contract disputes with the Community, among others.

<sup>169</sup> Brown and Kennedy, *supra* note \_\_ at 115).

<sup>170</sup> In detail on the question who can, respectively has and what can be referred under this proceeding see Arnall, *supra* note 155, at 51-60.

<sup>171</sup> In 1989, the Communities created a Court of First Instance, composed also of 15 judges, one each from each member state, appointed to six year terms by unanimous approval of the member states. The CFI hears cases that arise in the original jurisdiction of the ECJ in the staff, coal and steel, competition, and certain trademark cases. Since 1994, all cases against the Community by individuals are first heard in the CFI. The European Council decides which classes of cases should be transferred to the CFI. The ECJ sits as an appellate body over cases first heard in the CFI.

ECJ judgments are enforced within their domestic legal systems.<sup>172</sup> Each member state must designate a national authority whose function it is to enforce ECJ judgments. These characteristics—compulsory jurisdiction, judges with fixed terms, a continuing body, and so forth—are those of an independent tribunal.

The ECJ receives approximately 500 new cases each year and disposes of roughly that amount, with 907 cases still pending as of 2002. From 1998 through 2002, the most recent figures available, the largest number of cases were referrals for preliminary rulings on EC law by national judiciaries, of which there were 241 in 2002, with the next largest class direct actions, of which there were 215 in 2002. While the number of preliminary ruling cases has remained fairly constant, the number of direct actions has steadily risen from 136 in 1998.<sup>173</sup>

Compliance by EU member states with ECJ decisions appears to be significant. One study finds that noncompliance with ECJ decisions by national judiciaries from 1961 to 1995 occurred in only 0.6 percent of cases, and efforts at evasion of compliance occurred in 2.9 percent of cases (through referring the question again, or by reinterpreting the ECJ decision). In 40.9 percent of the cases, the litigants voluntarily agreed to forgo further proceedings leading to a national court decision and immediately implemented the ECJ decision.<sup>174</sup>

However, there is reason for doubting these figures.<sup>175</sup> Apparently, it is common in some countries to conceal evasion with ECJ decisions or to plead problems with implementation.<sup>176</sup> At the end of the first decade of common market integration under the Treaty establishing the European Economic Community (EEC),<sup>177</sup> the ECJ heard a series of cases challenging existing trade quotas on agricultural products among member states, which, after a transition period ending in 1969, were to be abolished and replaced with EU-wide marketing organizations.<sup>178</sup> In one of these cases, France appears to have defied an ECJ decision requiring elimination of an import quota on bananas; in another, France even announced before the ECJ had rendered its decision (which it lost) that it would refuse to comply with a decision requiring it to eliminate a quota on mutton.<sup>179</sup> States that have refused to comply also have sought other means of resistance other than outright defiance, such as supporting other governments that defy ECJ rulings or seeking

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<sup>172</sup> In the words of one scholar, “the member governments of the EU (multiple principals) assign to the Commission and the Court (supervisors) the task of enforcing the implementation of and compliance with EC law, as delegated to the individual member states (multiple agents).” See Jonas Tallberg, *Making States Comply. The European Commission, the European Court of Justice and the Enforcement of the Internal Market* 77 (1999).

<sup>173</sup> See the Statistics concerning the judicial work of the European Court of Justice of the Annual Report 2002, available at <http://www.curia.eu.int/en/instit/presentationfr/rapport.htm>.

<sup>174</sup> Stacy Nyikos, *The European Court of Justice and National Courts: Strategic Interaction within the EU Judicial Process*, <http://law.wustl.edu/igls/Conconfpapers/Nyikos.pdf>.

<sup>175</sup> See, e.g., Hjalte Rasmussen, *The European Court of Justice* (1998).

<sup>176</sup> Garrett, *The Politics of Legal Integration in the European Union*, 49 *Int'l Org.* 171, 177 (1995).

<sup>177</sup> Signed 1958 in Rome as amended by the treaty establishing the European Community (EC Treaty).

<sup>178</sup> For a brief history of the Internal Market initiatives see Tallberg, *supra* note \_\_\_\_.

<sup>179</sup> *Charmasson v. Minister for Economic Affairs and Finance*, Case 48/74, ECR 1383 (1983) (banana quota); *Commission v. France*, Case 232/78, ECR 2729 (Sheep Meat case).

collective efforts to constrain the ECJ either through secondary EC legislation or even proposals to change the basic EC treaties.<sup>180</sup> One scholar argues that noncompliance with ECJ decisions has increased in response to efforts by the European Commission and the ECJ to strengthen enforcement mechanisms during the period of the deepening of the European internal market in the 1990s.<sup>181</sup>

According to figures supplied by the European Commission,<sup>182</sup> states had neglected judgments of the ECJ in infringement cases—cases where the Commission claims a member state has failed to implement an EU directive—30 times by the early 1980s, and more than 80 times by the late 1980s. The Commission reported in 1989, in regard to member state implementation of the EU’s internal market measures, that “a fundamental problem is compliance with ECJ judgments; that the increase in infringement proceedings is reflected not only in a less satisfactory implementation of Community law, but also and more particularly in a growing number of non-enforced judgments, gives real cause for concern . . . The burden of non-implementation of the ECJ decisions is particularly felt in the internal market domain.”<sup>183</sup> While international legal scholars commonly like to say that the ECJ has an almost perfect rate of compliance, it seems that noncompliance is less rare than commonly thought. It does not appear at present that a comprehensive empirical examination of compliance with ECJ decisions has been done.<sup>184</sup>

Nonetheless, we think it reasonable to conclude that the ECJ is an independent tribunal that has relatively high usage and compliance rates. Indeed, this correlation is the source of the conventional wisdom that international tribunals’ effectiveness increases with their independence. But the reason for this is that the ECJ is not truly an “international court” for purposes of comparison with the ICJ, arbitral tribunals, and other courts.

The special character of the ECJ, compared to other courts, can be seen in its daily workings. Virtually none of the ECJ’s direct action cases involve suits between

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<sup>180</sup> Garrett, Kelemen, Schulz, *The ECJ, National Governments, and Legal Integration in the European Union*, 52 *Int’l Org.* 149 (1998).

<sup>181</sup> Jonas Tallberg, *European Governance and Supranational Institutions* 34 (2003).

<sup>182</sup> European Commission, *First Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law* (1983). COM (84) 191 final 11.4.1984, pp. 27-30.

<sup>183</sup> European Commission, *Communication from the Commission on Implementation of the Legal Acts Required to Build the Single Market*, quoted in *id.* at 52-53.

<sup>184</sup> There are two primary sources for ECJ compliance data. The first is the Annual Reports of the Commission on the Monitoring of the Application of Community Law. These reports are available at <[http://europa.eu.int/comm/secretariat\\_general/sgb/droit\\_com/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm)>. The second source of data is provided by the European University Institute’s Robert Schuman Centre for Advanced Studies. Their compliance data is available at <<http://www.iue.it/RSCAS/Research/Tools/ComplianceDB/>>. The European Commission’s annual report lists 105 judgments of the Court of Justice that have not been implemented. Of these judgments, 53 were issued within a year prior to the Annual Report. Of the other 52 judgments, 24 were from 2000, while the other 28 were from years dating back to 1991. While France, Greece, and Italy account for about one-half of the non-compliance, virtually all of the EU members have failed to comply with at least one ECJ judgment, and a majority of the EU members have failed to comply with at least five judgments.

member states, much as there are very few inter-state lawsuits in the U.S. system. Rather, most of the direct lawsuits are brought by the institutions of the European Union itself, particularly the European Commission, against Member States for failure to comply with their treaty obligations.<sup>185</sup> Further, the close integration of the ECJ with the member states' national judiciaries—in which EU questions are referred by the domestic courts to the ECJ and ECJ decisions are often directly implemented by domestic courts<sup>186</sup>—more closely resembles the relationship between local and national courts in a federal system, than international dispute resolution.<sup>187</sup> The “great bulk of the court’s case load is generated by preliminary references from national judges responding to claims made by private actors.”<sup>188</sup> Indeed, the close interrelationship between national and EC law is reflected in the acceptance by most of the member states, of the principle of the supremacy of Community law to national law as articulated by the ECJ’s decisions.<sup>189</sup> However the level of compliance differs throughout the European Union due to the different constitutional traditions of the Member States.<sup>190</sup>

The distinctive character of the ECJ has led several observers to characterize the ECJ as a “constitutional court” for the European Communities, with the supreme law being the various EC treaties.<sup>191</sup> These scholars view the ECJ’s primary function, through the preliminary reference system, of promoting a consistent interpretation and application of EC law throughout Europe. This has arisen, however, not through direct actions between member states, but through the mechanism of preliminary references, which have created an indirect method for private actors to bring lawsuits challenging member state or EC decisions.<sup>192</sup> Indeed, although the French or German government were willing to ignore ECJ judgments against them, they were not willing to ignore their own domestic courts, which would order the government to comply with the ECJ judgment. The governments did not provoke a domestic constitutional crisis by rejecting the judgments of their own courts, because they shared with their courts and many domestic interest groups the goal of European integration.<sup>193</sup> If the ECJ embraced integration, it was with the acquiescence of the European governments.

Thus, while we acknowledge that the ECJ provides the best case against our strong hypothesis, and for the competing hypothesis that independence increases the effectiveness, we argue that this latter view does not take account of the special circumstances of Europe. In an integrated “state” or union, unity comes from the

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<sup>185</sup> Brown & Kennedy, *supra* note \_\_, at 115.

<sup>186</sup> David W.K. Andersen & Marie Demetriou, *References to the European Court* (2d ed. 2002).

<sup>187</sup> See Tallberg, *supra* note \_\_, at 98-99.

<sup>188</sup> Alex Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 *Amer. Pol. Sci. Rev.* 63, 65 (1998).

<sup>189</sup> Paul Craig, *The ECJ, National Courts and the Supremacy of Community Law* (2002), available at <<http://www.ecln.net/rome2002/craig.pdf>>.

<sup>190</sup> Derek Beach, *Between Law and Politics: The Relationship Between the European Court of Justice and EU Member States* (2001).

<sup>191</sup> Martin J. Shapiro & Alex Stone, *The New Constitutional Politics*, 26 *Comp. Pol. Stud.* 397 (1994); Weiler, *supra* note \_\_.

<sup>192</sup> See Schepel & Blankenburg, *supra* note \_\_, at 29.

<sup>193</sup> Alter, *supra* note \_\_, at 217-21.

common interests and backgrounds of citizens and subnational groups, not from the states themselves. This system cannot be a model for international courts, where relationships between states are thin and fraught with conflict.<sup>194</sup>

## 2. European Court of Human Rights (ECHR)

The ECHR was established by the European Convention of Human Rights in 1953, which was created by the member states of the Council of Europe.<sup>195</sup> The ECHR was established to monitor compliance by the member states with the Convention's substantive terms. The Convention protects individual rights, such as the right to life, the prohibition on torture, freedom of expression and thought, as well as more ambiguous liberties, such as the right to education and the right to private and family life. Initially, the Convention established a two-stage process, in which cases were filtered by the ECHR, which decided whether to attempt mediation of the dispute or whether to refer the case to the Committee of Foreign Ministers of the Council of Europe. If a referral was made, the complaining state or person could seek binding adjudication before the Court. In 1998, the Commission was eliminated and the Court was established as the only institution that hears complaints under the Convention.<sup>196</sup>

The ECHR is composed of judges equal in number to the member states to the Convention, which currently numbers 44. The judges serve for renewable six-year terms.

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<sup>194</sup> International relations scholars have different views about the high member state compliance with the ECJ. Some of these scholars view the ECJ's decisions as consistent with member state interests, and have argued that the ECJ promotes these interests (or, in some arguments, the interests of France and Germany) by solving monitoring and incomplete contracting problems for the member states. See Garrett, *International Cooperation & Institutional Choice*, 46 *Int'l Org.* 533 (1992); Garrett & Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in *Ideas and Foreign Policy* 173 (Judith Goldstein & Robert Keohane, eds. 1993). The justices of the ECJ, subject as they are to renewable terms, wish to increase their power through the expansion of EC law, but will not issue decisions that deviate from the strong preferences of the most powerful member states.

Other scholars argue that EC institutions have a more active role. See Mattli & Slaughter, *Revisiting the European Court of Justice*, 52 *Int'l Org.* 177 (1998); Martin Shapiro, *The Politics of Legal Integration in the European Union*, in *Euro-Politics: Institutions and Policymaking in the New European Community*, 123 (A. Sbragia ed. 1991); Joseph Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403 (1991). These scholars see an alliance of sorts between the ECJ, the national judiciaries, and private parties that benefit from supranational EC rules; this group is the driving force behind the expansion in the ECJ's power and jurisdiction. The ECJ's decisions are not necessarily consistent with the interests of the member states, but the member states have been unwilling to contain its expansion of authority. See also Karen Alter, *Establishing the Supremacy of European Law* (2001).

This argument is distinct from our concern with the dependence of international tribunals; both arguments assume that the ECJ is independent enough to resist short-term pressures either to violate the incomplete contract (in the first case) or to refrain from nation-building (in the second case).

<sup>195</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, Sept. 3, 1953, 213 *U.N.T.S.* 221. For secondary literature on the Convention see in particular Francis Jacobs & Robin White, *The European Convention on Human Rights* (3d ed. 2002); P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3d ed. 1998); J.G. Merrills & A.H. Robertson, *Human Rights in Europe. A study of the European Convention on Human Rights* (4th ed. 2001).

<sup>196</sup> This new institutional machinery is based on the provisions of Protocol No. 11 of the European Convention on Human Rights. For detail on these changes, see Merrills & Robertson, *supra* note \_\_, at 297-325.



Each state party may nominate three candidates, who may or may not be nationals; they are elected by the Parliamentary Assembly of the Council of Europe.<sup>197</sup> There is no guarantee that every member state will have a national on the Court, and no restriction on the number of judges of each nationality. Nonetheless, it appears that each member state has one representative, whether its national or not (an ad hoc judge<sup>198</sup>), on the Court.<sup>199</sup>

The jurisdiction of the Court is broad. Any state party, individual, group, or NGO may bring a suit claiming a human rights violation against one of the member states, as long as domestic remedies have been exhausted.<sup>200</sup> Originally, a member state could choose not to allow jurisdiction over itself in cases brought by non-states, but in 1998—at the same time as the elimination of the Commission—the Court’s jurisdiction was made compulsory as to all state parties as to all complaints.<sup>201</sup> In sum, the judges are relatively independent, similar to the judges of the ECJ.

Usage of the ECHR has increased steadily since its inception, in response to the expansions in jurisdiction by amendment to the Convention. By the time of the 1998 expansion in compulsory jurisdiction of the Commission, the annual number of applications had increased from 404 in 1980 to 4750 in 1997. The number of cases referred to the Court itself had risen from 7 in 1981 to 119 in 1997. In the three years since the 1998 changes, the number of applications rose from 5,979 in 1998 to 13,858 in 2001. In 2002, the Court received 28,255 applications and delivered 844 judgments.<sup>202</sup> Almost all of this activity involves cases brought by individuals against their own state, rather than state-to-state disputes. Unfortunately, it is impossible to compare these usage numbers with those for other international tribunals, which do not permit individuals to bring cases (for the most part).

The Convention does not require that member states follow any specific process for bringing their laws or actions into compliance with ECHR decisions.<sup>203</sup> The EHCR has no method of enforcement in cases where a state party to a case refuses to comply.<sup>204</sup> States have responded in several different ways, including administrative rulemaking, implementation by national judiciaries, enactment of conforming legislation, and even changes to domestic constitutions. The great majority of state responses, close to 80 percent, involve legislative enactments, and both legislative and administrative responses amount to 91 percent of the cases where a change is sought.<sup>205</sup>

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<sup>197</sup> Registrar of the European Court of Human Rights, *The European Court of Human Rights: Historical Background, Organization, and Procedure* (2003), available at <http://www.echr.coe.int/Eng/Edocs/HistoricalBackground.htm>.

<sup>198</sup> European Court of Human Rights, *supra* note \_\_. Jacobs & White, *supra* note \_\_, at 396-400.

<sup>199</sup> Although currently the seats of judges in respect of Azerbaijan, Armenia, and Bosnia and Herzegovina are currently vacant.

<sup>200</sup> *Id.* Articles 34, 35(1) of the Convention.

<sup>201</sup> Article 34 of the Convention. Formerly individual applications had to be accepted separately under Art 25 of the original Convention.

<sup>202</sup> Registrar of the European Court of Human Rights, *Survey of Activities 2002*, available at <<http://www.echr.coe.int/Eng/Edocs/2002SURVEY.pdf>>.

<sup>203</sup> *Swedish Engine Drivers Union Case*, 20 Eur. Ct. H.R. (1976).

<sup>204</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 72 (1978).

<sup>205</sup> *Stone Sweet and Brunell*, *supra* note \_\_.

Although some commentators suggest that levels of compliance with ECHR rulings are high,<sup>206</sup> there is in fact no good compliance data that we have found.<sup>207</sup> By the middle of 1999, the Court had addressed more than 1,000 petitions, nearly all of them initiated by private parties. More than 670 were adjudicated on the merits with more than 460 resulting in a finding of a violation of the Convention. The Court claims that member states have consistently paid damages when ordered to, but it also reports only 294 cases in which states have altered their domestic laws in compliance with an ECHR decision. This would mean, if each merits decision required a change in domestic law, a compliance rate of roughly 64 percent. This figure is highly imprecise, as it is unclear what percentage of human rights violations, if any, might be the result of actions of government officials that are *ultra vires* of existing law.

Another means of judging compliance is through the Article 41 action, which permits plaintiffs who do not receive full compensation from the losing member state after an ECHR decision to seek additional compensation. According to one study covering the years 1960 through 1995, Article 41 claims occurred in 48 out of 292 cases in which the ECHR found a violation of the Convention (16.4 percent). The percentage of cases that generated Article 41 claims was initially quite high: in 1970, more than 50 percent of all cases that found a violation of the Convention were followed by Article 41 claims, and that number hovered around 50 percent until the early 1980s. That number dropped below 24 percent by 1995, but during that period a procedural change occurred which combined Article 41 claims into the actual merits decision, so it is difficult to determine what the actual level of noncompliance is now.

To sum up, we do not know whether compliance with ECHR judgments has been high or low. We also cannot say whether usage has been high or low compared to that of international tribunals. Although the ECHR caseload of hundreds compares favorably to, say, the IACHR's caseload of dozens, millions of people may file cases with the ECHR, whereas only a handful of states may file claims with the IACHR. The usage *rate* for the ECHR might therefore seem comparatively paltry. For these reasons, we do not think the

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<sup>206</sup> See Andrew Drzemczewski & Jens Meyer-Ladewig, Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994, 15 Human Rights L.J. 81, 82-83 (1993) (citing examples of compliance); Jörg Polaciewicz and Valérie Jacob-Foltzer, The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect Is Given to the Convention, 12 Human Rights L.J. 65 (1991) (same); Andrew Moravcsik, Explaining International Human Rights Regimes: Liberal Theory and Western Europe, 1 Eur. J. Inter'l Relations 157, 171 (1995). For more formal efforts to measure compliance, see Christopher Zorn & Steven R. Van Winkle, Explaining Compliance with the European Court of Human Rights (unpub. m.s., 2000); Christopher Zorn & Steven R. Van Winkle, Government Responses to the European Courts of Human Rights (unpub. m.s., 2001). We find the data more ambiguous than they do. The first paper has a regression in which the dependent variable is whether a person brings a claim for compensation against a state; not whether a state complies or not. The second paper's regression measures state's choices among responses to a finding of noncompliance – administrative, legislative, judicial, or constitutional – but not whether the response was adequate rather than merely formal.

<sup>207</sup> The ECHR provides some statistical data on its caseload and judgments but does not attempt to measure compliance. For a general discussion of the difficulty of measuring compliance, see Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1935 (2002).

ECHR provides strong evidence for the conventional wisdom that ties independence and effectiveness.

### *C. Summary*

We know that independent tribunals—in our technical sense, tribunals that do not depend on the good will of the parties that appear before them—can be effective within a state. When the government has a monopoly on the legitimate use of force; when it will use this monopoly in order to enforce judicial orders; and when it can legislate in cases where judicial lawmaking goes awry, independent tribunals can do much good. These conditions are not met in the interstate case, where nothing prevents a state from ignoring tribunals except a general concern for reputation and fear of retaliation from cooperative partners. The ECJ (not the ECHR) poses a challenge to our argument only if it is properly considered an adjudicator of truly interstate disputes rather than the adjudicator of disputes that arise within a state-like union or confederation. We believe that the relationship between states within the European Union are closer to the relationship between, say, Illinois and Indiana, than the relationship between Indonesia and Peru. European states share a legislative body, a bureaucracy, and a decades-long commitment to political unity. Other states do not.

In our view, the degree of political unity is the causal factor. When states are not unified, only dependent adjudicators can be effective. As states become more unified, greater independence for adjudicators becomes possible.<sup>208</sup> The conclusion of Andrew Moravcsik, although only about human rights enforcement, is general: “[t]he most effective institutions for international human rights enforcement rely on prior sociological, ideological and institutional convergence toward common norms.”<sup>209</sup> Although there are surely complex feedback effects, the weight of the evidence supports our story. The ICJ has not brought the world together; why should we think that the ECJ has brought Europe together?

## V. IMPLICATIONS FOR NEWER TRIBUNALS

In this Part, we draw on our earlier conclusions to predict the fate of two relatively new international tribunals whose effectiveness cannot yet be gauged: the International Criminal Court (ICC) and the International Tribunal on the Law of the Sea (ITLOS). Designers of new international tribunals seem to have taken the opinions of international legal scholars to heart, and have sought to further increase the institutional independence of new courts in the hopes of increasing their legitimacy and ultimately their ability to achieve compliance. As we have indicated in Part III, however, we believe

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<sup>208</sup> Garrett & Weingast, *supra* note \_\_, argue that the ECJ has been willing to serve the interests of powerful European states because its judges have renewable terms and thus have an incentive to please their masters. As we would put it, the judges are sufficiently dependent on the good will of the parties, albeit much less than conventional arbitrators are. Because Europe is relatively integrated, adequate judicial performance requires less dependence than in the interstate case.

<sup>209</sup> Moravcsik, *supra* note \_\_, at 178 (emphasis omitted).

that these efforts to guarantee independence through permanent judges and compulsory jurisdiction, will only lead to low rates of use and compliance by state parties.

### *A. International Criminal Court (ICC)*

The ICC was created by the Statute of Rome, which was opened for signature in 1998 and entered into force on July 1, 2002 when the required number of 60 states had ratified.<sup>210</sup> Under the treaty, the ICC has jurisdiction over war crimes, crimes against humanity, genocide, and, after further negotiations are completed, aggression. The ICC would hear cases, for example, of the deliberate targeting of civilians by commanders, the torture and execution of prisoners of war, or the systematic effort to destroy a national, racial, or ethnic group. Until establishment of the ICC, enforcement of the laws of war relied primarily upon domestic legal systems, and states generally have been reluctant to punish their leaders or former leaders for war crimes.<sup>211</sup>

Rather than resolving disputes between states, the Court adjudicates prosecutions of individual defendants. The prosecutions are brought by a special international prosecutor. The ICC exercises its jurisdiction over crimes i) committed by a national of a state party or ii) that occur on the territory of a state party when committed by the national of a non-state party. While focused on individual conduct, the Rome Statute makes an important nod to states. It incorporates the principle of “complementarity,” which provides that the Court will not hear a case if a state party with jurisdiction investigates or prosecutes the conduct in good faith.<sup>212</sup> If, however, the prosecutor can show that the state has conducted its investigation or prosecution in bad faith, it can bring the case to the ICC.

The Court is composed of eighteen permanent judges who are elected by an assembly of the state parties for nonrenewable terms of six or nine years, or renewable three year terms. They must be nationals of the state parties. The office of the prosecutor is also filled with a person selected by the state parties, for a nonrenewable nine year term. The state parties have no control over the prosecutor’s decision as to what investigations to undertake, what prosecutions to bring, and how to conduct the trial. The prosecutor’s decisions on these matters are, however, subject to review by the Court itself.<sup>213</sup>

The ICC is apparently independent of the United Nations Security Council. Recent war crimes tribunals, such as the ad hoc tribunals for the former Yugoslavia and Rwanda, were created by the Security Council. Proponents of the ICC believed, however, that the veto enjoyed by the permanent members of the Security Council (China, France, Great Britain, Russia, and the United States) would undermine the universality of

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<sup>210</sup> See Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm>. A useful reference work is William A. Schabas, *An Introduction to the International Criminal Court* (2001).

<sup>211</sup> Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 160, 168 (2001).

<sup>212</sup> Rome Statute, art. 17(1)(a).

<sup>213</sup> *Id.* at art. 15(4), Rome Statute, Rules of Procedure and Evidence, 110(2).

international criminal justice by allowing them to exempt themselves and their allies from the jurisdiction of a new court.<sup>214</sup> While the Security Council may refer cases to the ICC prosecutor, and it may delay prosecutions for renewable 12-month terms, it may not actually prevent an ICC case from going forward.

However, the ICC, like all other international tribunals, relies on the good will of states. The ICC prosecutor has no independent authority to conduct investigations, gather evidence, interview witnesses, and arrest suspects on the territory of state parties. Instead, the prosecutor must ask state parties to perform these functions for it. In addition, the prosecutor must request that state parties surrender individual defendants for transfer to the seat of the Court. A good example of the difficulties on this point is presented by the ICTY's ability to gain jurisdiction over Slobodan Milosevic. It was not the ICTY's demands that led to his apprehension and transfer, but the United States' military and diplomatic pressure on Serbia, including a threat to withhold a half a billion dollars in IMF and U.S. economic aid, that led to his transfer to the ICTY in the Hague.<sup>215</sup> The Rome Statute does not provide for any sanction if a state party obstructs the prosecutor's efforts. This has led some commentators to observe that the ICC prosecutor's institutional weakness could undermine the Court.<sup>216</sup>

We predict that the ICC will not prove to be an effective court. Although the Rome Statute is aimed at individual defendants, the ICC's jurisdiction strikes at the heart of state interests. Prosecutions will inevitably raise questions concerning both the legality of a decision by a state to use force and the legality of the tactics used by a state under international law (both *jus in bellum* and *jus ad bello*). As Madeline Morris has observed, "In ICC cases in which a state's national is prosecuted for an official act that the state maintains was lawful or that the state maintains did not occur, the lawfulness or the occurrence of that official state act . . . would form the very subject matter of the dispute."<sup>217</sup> In addition, states with military forces that operate abroad will fear that soldiers and their commanders, including the highest political authorities responsible for military activities, will be dragged in front of an international court for war crimes prosecution, and be inconvenienced and embarrassed even if not prosecuted and punished. And then, because the definitions of international crimes are so vague, soldiers and officials might find themselves punished for activities that they consider legal and routine.<sup>218</sup> Because of these concerns, the United States not only has withdrawn its signature from the Statute of Rome, but it has launched an aggressive diplomatic campaign to protect American soldiers and civilians from its reach.<sup>219</sup>

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<sup>214</sup> Jack L. Goldsmith, *The Self-Defeating ICC*, 70 *U. Chi. L. Rev.* 89, 90 (2003).

<sup>215</sup> Goldsmith, *supra* note \_\_, at 93.

<sup>216</sup> See Alison Danner, *Navigating Law and Politics*, 55 *Stan. L. Rev.* 1633, 1648-49 (2003); Leila Sadat & Richard Carden, *The New International Criminal Court*, 88 *Geo. L.J.* 381, 415 (2000).

<sup>217</sup> Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *L. & Contemp. Probs* 13, 21 (2001).

<sup>218</sup> See Goldsmith, *supra* note \_\_; Ruth Wedgwood, *The Irresolution of Rome*, 64 *L. & Contemp. Probs.* 193, 194 (2001)

<sup>219</sup> See Human Rights Watch, *Bilateral Immunity Agreements* (2003), available at <http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf>.

The withdrawal of the United States, which can be traced directly to the independence of the court (that is, the lack of an American veto that could be used to block prosecution of Americans or the nationals of allies) was a blow to the ICC. As the nation that has taken the lead in conducting peacekeeping and humanitarian missions throughout the world (currently averaging 100 U.S. missions), the activities of the United States would have been particularly vulnerable to the jurisdiction of the ICC. The other major states that conduct military activities, or have strong military concerns have also refused to ratify the Rome Statute. These states include China, Russia, India, Pakistan, and Israel.<sup>220</sup> Like the United States, these states will pressure state parties not to extradite their nationals to the seat of the ICC if those nationals are found on the state parties' territory. Although not all states will bow to this pressure, those that do will be in violation of their obligations under the Rome Statute; indeed, those that have signed bilateral immunity agreements with the United States arguably are already failing to comply with the Rome Statute.<sup>221</sup>

We predict that as time passes and more states put pressure on other states to violate their obligations under the ICC, the only remaining state parties will be states that do not conduct significant military activities on foreign territory, and that most state parties will not comply with the extradition requirements. War criminals will appear before the ICC only in those rare cases where they are nationals of a defeated state whose new government seeks to acquire international legitimacy. Operations like those performed by the Yugoslavia and Rwanda tribunals—classic *ex post* tribunals whose jurisdictions and powers are defined after the events, so that the states that establish them may immunize themselves—may in future be performed by the ICC, but this is just to say that with its wings clipped the ICC will become just another dependent international tribunal.

### *B. International Tribunal for the Law of the Sea (ITLOS)*

The International Tribunal for the Law of the Sea (ITLOS) was created by the United Nations Convention on the Law of the Sea (UNCLOS), which was concluded in 1982 and went into force in November, 1994.<sup>222</sup> The ITLOS first sat two years later. UNCLOS, which currently has 143 parties, creates two related international regimes: one governs the development of the resources of the international seabed through an international organization, the International Seaboard Authority; the second deals with the traditional uses of the sea, such as navigation rights and rights in territorial seas.

The ITLOS is a permanent court with jurisdiction over all questions arising under the UNCLOS. State parties generally have consented to compulsory jurisdiction of disputes. The Tribunal consists of 21 independent members, who are elected for renewable nine-year terms by the state parties to the Convention. Judges are to represent the world's different legal systems and geographic regions. If a state party to a dispute

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<sup>220</sup> Human Rights Watch, Rome State Ratifications, available at [www.hrw.org/campaigns/icc/ratifications.htm](http://www.hrw.org/campaigns/icc/ratifications.htm).

<sup>221</sup> Human Rights Watch, Bilateral Immunity Agreements, *supra* note \_\_\_\_.

<sup>222</sup> See generally Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (2000).

does not have a judge of its nationality on the tribunal, it may—as with the ICJ—appoint an ad hoc judge for purposes of that case.

Under Article 287 of the UNCLOS, nations may choose among four mechanisms for resolution of law of the sea disputes: ITLOS, the ICJ, arbitration, or resort to a special arbitration panel. Upon acceding to the UNCLOS, state parties must file a declaration choosing the forum for adjudication of disputes under the Convention. If all the parties to a dispute have chosen ITLOS as its forum, then they have effectively chosen compulsory jurisdiction and any one of the parties may then send the dispute to the Tribunal. State parties may also reach an ad hoc agreement to submit a particular dispute, ex post, or an ex ante class of disputes governed by a treaty, to the ITLOS. State parties with a legal interest in a dispute between two other parties may move to intervene in the adjudication.

Articles 297 and 298 permit nations to make exceptions to their declarations accepting the jurisdiction of the Tribunal. These include cases involving violations of the Convention that are authorized under international law, which clearly is meant to encapsulate the right to self-defense, military activities, and law enforcement activities. There are two categories of cases, however, in which accession to the UNCLOS creates mandatory jurisdiction over a dispute between state parties. Under Article 292 of the Convention, one state party may seek adjudication in the ITLOS if another state party has detained its vessel and crew in violation of the Convention. Under Article 187, the ITLOS has compulsory jurisdiction over seabed disputes.

There has been little activity during the Court's seven years of operation. There is only a single pending case that appears to be currently active on the ITLOS docket.<sup>223</sup> The Court has heard only ten disputes overall, five of which were claims for prompt release of a nation's crew or vessel that fall within the ITLOS compulsory jurisdiction.<sup>224</sup> Although the Court has been in existence for only seven years, given the large number of state parties and the potentially broad jurisdiction—theoretically, every detention of a ship or crew by a state party could give ground for a suit—the usage rate so far is extremely low. We do not yet have compliance rates for the ITLOS.

These current statistics are an early indication that the ITLOS will not be effective. Our explanation should by now be familiar. Because of the independence of the tribunal, states have little influence over how it resolves disputes. Thus, they cannot expect widespread compliance. If compliance is likely to be weak, there is little point in using the tribunal in the first place.

### *Conclusion*

Scholars who favor the trend toward the judicialization of international law argue that international dispute resolution bodies should become more “court-like.” Some, such

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<sup>223</sup> Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community), Case No. 7.

<sup>224</sup> These cases are listed on the ITLOS website, [www.itlos.org](http://www.itlos.org). Although the website lists 12 numbered cases, two of them appears to involve the same parties and subject matters as others.

as Thomas Franck, adjudication by authentic international courts contributes to the legitimacy of international law, without which international cooperation is difficult or impossible to achieve.<sup>225</sup> Harold Koh argues that international adjudication contributes to internalization of international law by domestic political actors, part of what he calls “transnational legal process.”<sup>226</sup> Helfer and Slaughter argue that international tribunals are effective when they decide cases based “on principle rather than power.”<sup>227</sup> These scholars are just a few members of an academic consensus that holds that expanding the use of independent international tribunals enhances their effectiveness and the spread of the rule of law in international affairs.

We believe that this thesis is exaggerated and dangerously optimistic. We have found no evidence that independent tribunals are more effective than dependent tribunals, and some evidence that the reverse true: that independent tribunals are less effective than dependent tribunals. The primary difference between our view and the conventional wisdom can be summarized as a dispute about direction of causation. The conventional wisdom holds that independent tribunals lead to political unification. We argue that political unification makes independent tribunals possible. In the international realm, where there is no political unification, international tribunals cannot be both independent and effective. This is not to claim, as some have, that international tribunals themselves serve no useful purpose. As we have explained, international tribunals can help states resolve disputes by providing information on the facts or rules of conduct, so long as the tribunals act consistently with interests of the states that create them.

Our arguments also explain why international adjudication is fragmented rather than unified like a domestic legal system, to the enduring disappointment of international legal scholars.<sup>228</sup> By limiting the jurisdiction of international tribunals, states maintain control over how they decide cases. When particular adjudicators and tribunals act against the interest of states, the latter can pressure them or stop using them without bringing down the whole system and affecting adjudications in other areas of international relations, as would be the case if a single international supreme court controlled the entire system.

Why has the conventional wisdom gone astray? A possible answer is that international legal scholars have mistakenly seized on Europe as a model whose lessons can be easily generalized to the international sphere. We suspect that this mistake has been compounded by a false domestic analogy. It is often argued that the U.S. Supreme Court forged a nation by asserting its supremacy in *Marbury v. Madison*, and then enforcing federal power against the centrifugal tendencies of the states. Although this story has been widely criticized, it has retained its power over the legal mind, which

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<sup>225</sup> Thomas Franck, *The Power of Legitimacy Among Nations* 24 (1990).

<sup>226</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *Yale L.J.* 2347, 2398-400 (1991).

<sup>227</sup> *Id.* at 314. See also J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 *Comp Pol Stud* 510, 520-21 (1994); Franck, *Power of Legitimacy*, *supra* note \_\_, at 152; J.G. Merrills, *The Development of International Law by the European Court of Human Rights* 12 (2d ed 1993).

<sup>228</sup> See text accompanying *supra* note \_\_.



aspires to solve political conflicts as much possible through the rule of law.<sup>229</sup> International law scholars seized on this analogy, and claimed to find a similar process occurring in Europe through the ECJ.<sup>230</sup> The final step has been to argue that international courts can perform the same function for the whole world.<sup>231</sup> This logic is flawed. What *might* have happened in a small, homogenous republic at the beginning of the nineteenth century can hardly be expected to repeat itself (even if it did happen here) at the international level.

Much depends on whether the conventional wisdom is correct or we are. Taking independence as the causal variable, Slaughter and Helfer reason that ineffective international institutions such as the UN human rights committees should be transformed into courts. Although they acknowledge the existence of constraints, they believe that more independent, court-like committees would be more effective than the existing committees.<sup>232</sup> By contrast, we argue that granting international tribunals independence before political unification has been achieved can only weaken them and prevent them from accomplishing the modest good that they can otherwise do. This is not just an academic argument. The creators of the new international courts of broad jurisdiction—the ICC, the WTO, and the ITLOS—have followed the conventional wisdom and sought to guarantee their success by granting them independence. Our analysis suggests that these three courts will have diminished chances of success, as already indicated by steps being taken by states to avoid or weaken their jurisdiction. Although it is too soon to tell whether these institutions will succeed or fail, and their success or failure will depend on many factors, we argue that weakening their independence would, while limiting their potential for doing great things, also increase the chance that they will survive long enough to do some modest good.

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<sup>229</sup> See Alexander Bickel, *The Least Dangerous Branch* (1962); Larry Kramer, Foreword: We the Court, 115 *Harv. L. Rev.* 4 (2001). But see Sai Prakash & John Yoo, *The Origins of Judicial Review*, 70 *U. Chi. L. Rev.* 887 (2003).

<sup>230</sup> See Weiler & Mancini, *supra* note \_\_; see also Alter, *Establishing the Supremacy of European Law*, *supra* note \_\_, at 19.

<sup>231</sup> A recent and typical example of this view is Martinez, *supra* note \_\_.

<sup>232</sup> Slaughter and Helfer, *supra* note \_\_.

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