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## Judicial Independence in International Tribunals

Eric A. Posner<sup>†</sup> and John C. Yoo<sup>‡</sup>

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# Judicial Independence in International Tribunals

Eric A. Posner and John C. Yoo

*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 are dependent tribunals. We argue that the evidence does not support this view, and, moreover, that the evidence is more consistent with the contrary thesis: the most successful tribunals are dependent. We also 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 skeptical predictions about the International Criminal Court and the International Tribunal for the Law of the Sea, the newest international tribunals.*

## INTRODUCTION

In the last few years, international dispute resolution has assumed an unprecedented prominence in international politics. Linked in the interwar years to quixotic efforts to achieve peace through nonviolent settlement of disputes, international courts proliferated in the aftermath of World War II, with a noticeable acceleration after the end of the Cold War. Now, international courts issue binding decisions that solve multibillion dollar trade disputes between the world’s major 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>1</sup>

International courts have also affected American foreign and domestic policy. Appellate panels of the World Trade Organization (WTO) have ruled that favorable tax treatment for American exporters and American tariffs on steel imports are illegal.<sup>2</sup> At the end of 2003, President Bush terminated the steel tariffs, and Congress was considering new legislation to bring the tax code into harmony with WTO requirements.<sup>3</sup> The International Court of Justice (ICJ) has issued multiple judgments against the United States with respect to the execution of foreign nationals.<sup>4</sup> Although the U.S. Supreme Court and involved states have long refused to delay executions to allow international law claims to be raised, this may be changing.<sup>5</sup> More than one hundred nations throughout the world have joined the International Criminal Court (ICC), pledging themselves to bring war criminals to justice wherever they are found. While the United States has rejected the ICC because it violates 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.<sup>6</sup>

Prominent Americans have criticized the move toward formal international adjudication as a threat to American values and U.S. foreign policy. Under Secretary of State John Bolton has 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>7</sup> Judge Robert Bork sees international courts as institutions that inexorably expand liberal ideologies:

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1. See generally Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (2000).

2. WTO Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, 249, 251-254, 258, & 259/AB/R (Nov. 10, 2003), [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) (last visited Aug. 25, 2004) (regarding steel tariffs); WTO Report of the Appellate Body, United States-Tax Treatment for Foreign Sales Corporations, WT/DS108/AB/R (Feb. 24, 2000), <http://docsonline.wto.org/DDFDocuments/t/WT/DS/108abr.doc> (last visited Aug. 25, 2004) (regarding tax treatment).

3. See President's Statement on Steel (Dec. 4, 2003), at <http://www.whitehouse.gov/news/releases/2003/12/20031204-5.html> (last visited May 20, 2004).

4. See, e.g., *LaGrand Case* (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27, 2001); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

5. See, e.g., *Breard v. Greene*, 523 U.S. 371 (1997); Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1 ("Oklahoma attorney general asked a state appeals court in November to stay execution 'out of courtesy' to the international court.").

6. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 179, 200 (2003); see also U.S. Department of State's Office of International Information Programs, *Countries Who Have Signed Article 98 Agreements*, at <http://usinfo.state.gov/topical/rights/law/03061209.htm> (June 12, 2003).

7. John R. Bolton, Under Secretary for Arms Control and International Security, American Justice and the International Criminal Court, Remarks at the American Enterprise Institute (Nov. 3, 2003), at <http://www.state.gov/t/us/rm/25818.htm> (last visited May 16, 2004).

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>8</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.” That concept “has spread with extraordinary speed and has not been subject to systematic debate.”<sup>9</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 hunts.”<sup>10</sup> These views parallel those of international relations scholars of the realist school, who regard international adjudication as futile and irrelevant in an anarchic world.<sup>11</sup>

In contrast, international law scholars have welcomed the turn to international dispute resolution.<sup>12</sup> Noting the success of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) in achieving compliance with their decisions, Professor Laurence Helfer and Dean Anne-Marie Slaughter have created a “checklist” of the attributes of these courts and argue that other international courts should adopt these same characteristics.<sup>13</sup> They claim that international courts modeled on the ECJ and ECHR could create “global communities of law,” just as the ECJ and the ECHR have contributed to the establishment of a European legal community.<sup>14</sup>

What are the attributes of a successful international court? In Helfer and Slaughter’s view, effective international tribunals are *independent*: they are composed of senior, respected jurists with substantial terms; they have an independent fact-finding capacity; their decisions are binding as

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8. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 10 (2003).

9. HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY* 273 (2002).

10. *Id.*

11. See, e.g., John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5 (1995). The older tradition begins with Carr’s and Morgenthau’s critique of interwar international legalism. See EDWARD HALLETT CARR, *THE TWENTY YEARS’ CRISIS, 1919 - 1939* (1962); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (1st ed. 1948).

12. 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.

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

14. *Id.* at 391. Their view is qualified; they do not believe that effective supranational adjudication is possible unless certain domestic conditions are met.

international law; they make decisions on the basis of “principle rather than power”; and they engage in high-quality legal reasoning.<sup>15</sup>

Helfer and Slaughter concede that the success of an international tribunal sometimes depends on factors outside a court’s control, including the relationship of the state parties and their domestic political institutions.<sup>16</sup> But advocates of formal international dispute resolution believe that international adjudication can serve a causal role: it not only reflects existing international relationships but can also strengthen them. To make this point, Slaughter and Professors Robert Keohane and Andrew Moravcsik distinguish *interstate dispute resolution*, where the adjudicators, their agenda, and the enforcement of decisions are all subject to veto by the individual national governments,<sup>17</sup> from *transnational dispute resolution*, where tribunals are more independent, private parties have access, and domestic legal systems enforce the tribunals’ judgments.<sup>18</sup> Keohane and 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>19</sup> When states move from interstate dispute resolution to transnational dispute resolution, the increasingly court-like nature of the tribunal leads to stronger ties between the states.<sup>20</sup>

We argue that the story is more complicated than both the skeptics and the international lawyers have recognized. Contrary to the views of skeptics like Bork, international adjudication can play a useful role by enabling states to overcome a limited set of cooperation problems in international affairs. States in bilateral relationships can obtain a number of benefits from international tribunals as long as the tribunals are neutral and render judgments that reflect the interests of the states at the time they submit the dispute to the tribunal. For example, states that wish to settle a boundary dispute may prefer a range of adjudicated outcomes to war or other costly coercive measures. A blanket indictment of international courts overlooks the helpful functions that they can provide in limited circumstances.

Despite this argument in favor of international tribunals, we are skeptical of the claims of international legal academics. We view tribunals as simple, problem-solving devices. They do not transform the interests of

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15. *Id.* at 300-14; see also THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 152 (1990); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 *COMP. POL. STUD.* 510, 520-21 (1994).

16. Helfer & Slaughter, *supra* note 13, at 328-36.

17. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, in *LEGALIZATION AND WORLD POLITICS* 73, 84-85 (Judith Goldstein et al. eds., 2001).

18. *Id.* at 85.

19. *Id.* at 104. This occurs because more court-like transnational adjudication provides benefits to groups within states subject to a tribunal, which increases the costs to governments of noncompliance.

20. See *id.*

states; nor do they cause states to ignore their own interests 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, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute.<sup>21</sup>

The difference between our view and the conventional wisdom centers on the role of tribunal independence. A tribunal is independent when its members are institutionally separated from the state parties—when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction. Conventional wisdom holds that independence at the international level, like independence at the domestic level, is the key to the rule of law as well as the success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence *prevents* international tribunals from being effective.

The goals of this Article are twofold. First, we aim to present the theoretical case against tribunal independence. We will show that the institutional setting in which international tribunals operate is fundamentally different from the one in which domestic courts function. This difference makes independence an undesirable feature for international tribunals. Second, we intend to test our theory with empirical observations. We have collected performance data for several international tribunals: the International Court of Justice (ICJ), the Inter-American Court of Human Rights (IACHR), the panel system of the General Agreement on Tariffs and Trade (GATT), the Dispute Resolution Mechanism (DSM) of the World Trade Organization (WTO), the European Court of Justice (ECJ), and the European Court of Human Rights (ECHR). Our analysis of the data shows that greater independence does not improve the performance of international tribunals and may, in fact, hinder their success.

This Article is organized as follows. Part I 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. We also review contemporary attempts to increase the number and authority of international courts. Part II presents our theory of independence. We discuss why states resort to formalized adjudication to resolve disputes, and, in light of this analysis, examine what design features of international tribunals make the most sense. Part III

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21. For this reason, tribunals should not allow themselves to be influenced by other 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)).



analyzes data on the performance of international tribunals and relates their effectiveness to their design characteristics. Part IV addresses the counter-examples to our thesis provided by the European experience. Relatively independent courts in Europe have comparatively high success rates, and we will explain why this is not inconsistent with our theory. Part V concludes with some tentative predictions about the future of international adjudication.

Before starting, we should clarify our use of terms. By “tribunal” we mean any panel of individuals that has 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; indeed, dependency is a continuous variable. A more dependent tribunal is an “arbitrator,” and a less dependent tribunal is a “court.” States set up tribunals at many points 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>22</sup> but we rely on it because international usage is not internally consistent.

## I

### BACKGROUND ON INTERNATIONAL DISPUTE RESOLUTION

States can choose from a range of dispute resolution methods that fall short of force or coercive sanctions. These include diplomacy, mediation or conciliation, arbitration, and adjudication.<sup>23</sup> While the distinctions between these categories are not sharp, scholars traditionally separate arbitration and adjudication from negotiation and mediation. The former processes lead to formally binding decisions based on legal rules, while the latter do not.<sup>24</sup>

International lawyers date the modern era of arbitration to the Jay Treaty of 1795.<sup>25</sup> In a traditional arbitration case, two states involved in a dispute each appointed a single arbitrator, the two arbitrators then jointly appointed a third, and the three arbitrators heard arguments and delivered a judgment.<sup>26</sup> Hundreds of arbitrations have occurred over the last two centuries, and they continue to the present. For example, the Iran-United States Claims Tribunal, which was created to hear and adjust claims for damages

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22. See Romano, *supra* note 1, at 711-23.

23. See generally J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (3d ed. 1998).

24. 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).

25. See Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116. For a discussion of the Jay Treaty, see John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2071-82 (1999).

26. MERRILLS, *supra* note 23, at 88-91.

arising from the Iranian Revolution in 1979, falls within this tradition and remains in operation today.<sup>27</sup> Interstate arbitrations have covered a wide range of disputes, from controversies over borders and damage to property during wars to collisions between ships at sea.

While different in many respects, international arbitration shares a key characteristic with international adjudication: reliance on third parties to resolve a dispute between two states. Third-party dispute resolution has many attractions, including the introduction of a (theoretically) neutral body of arbitrators whose views are not colored by interest or passion.<sup>28</sup> Arbitration limits the involvement of the third party: 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. In contrast, a full-fledged international court has, among other features, (1) compulsory jurisdiction (the court has 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 are not renegotiated from dispute to dispute.<sup>29</sup> In principle, these features should overcome the weaknesses of arbitration, and are widely viewed as improvements.

The end of the nineteenth century witnessed the first tentative steps towards the ideal of formal international adjudication. 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> Given its modest goal of encouraging states to use arbitration, the PCA provided a set of procedures for choosing arbitrators from a group of people identified in advance as potential candidates. Parties did not use the PCA as much as its advocates hoped, however, and it fell into desuetude.<sup>31</sup>

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27. See, e.g., David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 129-57 (1990) (discussing similarities and differences of Iran-United States Claims Tribunal and international arbitration process).

28. See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

29. Cf. Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, 155-57 (Lori Fisler Damrosch ed., 1987); MERRILLS, *supra* note 23, at 293-97 (discussing formal characteristics of international adjudication).

30. See generally Permanent Court of Arbitration, General Information, <http://www.pca-cpa.org/ENGLISH/GI/> (last visited Aug. 28, 2004).

31. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 710 (4th ed. 1990). Of the twenty-five cases considered by the court, it disposed of twenty-one within its first thirty years, and ruled on only four cases thereafter, with the last one in 1970. William E. Butler, *The Hague Permanent*

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; in theory, they were at least partly independent of the influence of states. In addition, states could submit to compulsory jurisdiction by making unilateral declarations, and many did. The failure of the League of Nations system 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 PCIJ. As we will discuss, compliance with ICJ judgments has been more than occasional, but not routine.

At roughly the same time that the ICJ began to operate, drafters were putting the finishing touches on GATT, a legal framework for international trade that eventually resulted in a relatively systematic form of arbitration.<sup>34</sup> After several decades of activity, during which 298 cases were heard, GATT arbitration gave way in 1995 to the more court-like Dispute Settlement Mechanism of the World Trade Organization.<sup>35</sup> Unlike standard arbitration systems like GATT's, the DSM has compulsory jurisdiction, and states are (as a practical matter) unable to block the creation of tribunals and their adjudication of a dispute.

In addition to these "global" courts, several regional courts cropped up in the latter half of the twentieth century. The European Court of Justice (1952) resolves disputes arising under European law.<sup>36</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>37</sup> The Inter-American Court of Human Rights (1979) hears cases involving the 1969 American Convention on Human Rights.<sup>38</sup> Other

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*Court of Arbitration*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 43, 43-44 (Mark W. Janis ed., 1992).

32. See Statute of the Permanent Court of International Justice, at <http://www.mfa.gov.tr/grupe/ed/eda/eda15e.htm> (last visited Aug. 25, 2004).

33. See International Court of Justice, *General Information*, at <http://www.pca-cpa.org/ENGLISH/GI/> (last visited Aug. 25, 2004).

34. GATT came into being in 1947. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

35. See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 273-355, 367-608 (1993).

36. See The Court of Justice of the European Communities, *The Institution*, at [http://www.curia.eu.int/en/instit/presentationfr/index\\_cje.htm](http://www.curia.eu.int/en/instit/presentationfr/index_cje.htm) (last visited Aug. 25, 2004).

37. See European Court of Human Rights, *Historical Background, Organization and Procedure*, at <http://www.echr.coe.int/Eng/General.htm> (Sept. 2003).

38. See Inter-American Court of Human Rights, *History*, at [http://www.corteidh.or.cr/general\\_ing/history.html](http://www.corteidh.or.cr/general_ing/history.html) (last visited Aug. 25, 2004).

courts deal with human rights and commercial relationships in other parts of the world.<sup>39</sup>

Recent developments include the 1996 creation of the International Tribunal for the Law of the Sea (ITLOS), which has jurisdiction over a range of maritime disputes governed by the United Nations Convention on the Law of the Sea (UNCLOS).<sup>40</sup> ITLOS has compulsory jurisdiction and an independent, permanent group of judges. Another area of growth in international adjudication involves war crimes. The Nuremberg tribunal after World War II was followed, after a long hiatus, by the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).<sup>41</sup> All three of these tribunals were established 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, which would be open to proceedings brought by a permanent prosecutor.<sup>42</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. The ICC has not yet heard its first case.

In this mass of detail about international dispute resolution we can identify two trends. First, international tribunals have become more powerful as a matter of formal law 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, specialized, and, in a sense, fractionalized. 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>43</sup>

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39. See, e.g., Treaty Creating the Court of Justice of the Andean Community, 18 I.L.M. 1203 (1979); Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, OHADA Overview, at [http://www.juriscope.org/infos\\_ohada/traite/pdfgb/presentation-tgb.pdf](http://www.juriscope.org/infos_ohada/traite/pdfgb/presentation-tgb.pdf) (last visited Aug. 30, 2004); see also Romano, *supra* note 1, at 716-17.

40. U.N. Convention on the Law of the Sea, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

41. See, e.g., U.N. Security Resolution 955, Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994); 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 I.L.M. 1203 (1993).

42. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90, at <http://www.un.org/law/icc/statute/rome.htm> (last visited Aug. 25, 2004) [hereinafter Rome Statute].

43. The fragmented development of international courts worries international law scholars who favor a unitary international legal system but not others. See generally, e.g., Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998); Robert Jennings, *The Role of the International Court of Justice in the Development of*

Fundamental questions underpin these developments in international adjudication. How do international courts work? Why do states create and confer jurisdiction on them? Do states obey them, and if so, why? How can international courts be improved? What explains their popularity and their fragmentation? In short, why do states use international tribunals? We tackle these questions and develop our thesis in the next Part of this Article.

## II

### INDEPENDENCE AND THE ROLE OF INTERNATIONAL TRIBUNALS

#### A. *Independence in the Domestic and International Spheres*

As 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. That recent scholarship has made the connection between effectiveness and independence is understandable. A distinctive feature of domestic courts in advanced countries is their separation from politics. While not completely immune to political influence, such courts are less prone to manipulation by elected officials than are ordinary government institutions. Domestic courts are, in a word, independent, and that independence helps distinguish successful market-based liberal democracies from authoritarian regimes and failed democracies in which corruption is the norm and markets are weak.<sup>44</sup>

International law scholars have transferred the logic of independence from the domestic arena to the international sphere. They argue that when international tribunals are dependent on the goodwill of particular states, their judges will be regarded as political, as tools of the various parties, and not as legitimate.<sup>45</sup> Legitimacy can be achieved by granting international judges a level of 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 are not necessarily, the nationals of a state party to the dispute; when the judges observe regular, predetermined rules of procedure; and when *stare decisis* and other legal conventions are observed. In addition, jurisdiction must be compulsory, or states will simply deny jurisdiction of a court when they believe they are likely to lose. This conventional wisdom has intuitive appeal and some

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*International Environment Protection Law*, 1 RECIEL 240 (1992); Philip C. Jessup, *Do New Problems Need New Courts?*, 65 AM. SOC'Y INT'L L. PROC. 261 (1971); W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 9 (1996).

44. See, e.g., Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004).

45. See Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-First Century*, 35 N.Y.U. J. INT'L L. & POL. 291, 296 (2003).

empirical support. Domestic courts are more successful when judges are independent—that, anyway, is the American experience.<sup>46</sup> In addition, the most successful supranational court is the ECJ, and that court is relatively independent. Apparently influenced by these considerations, states 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 on force and a legislature that enacts rules binding on all citizens. Domestic courts are usually unified, functioning within a legal system that has universal scope within a state's boundaries and a powerful supreme court at the apex of the judicial hierarchy. By contrast, international tribunals do not operate as part of a coherent and unified world government. They exist in an interstitial legal system that lacks a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change. International tribunals are more like domestic arbitrators than domestic courts because nothing prevents disputants from ignoring them if they do not believe that submitting disputes to tribunals serves their interest.

To understand the significance of these differences, imagine that the United States had a court system but lacked an executive and a legislature. People could bring their disputes to the courts, but there would be no executive to enforce a judgment.<sup>47</sup> The courts would only enforce customs, conventions, and agreements between people. The customs and conventions would be determined by the courts, and disagreement with court interpretations would be futile, since citizens could not appeal to a legislature to change the law. Although some citizens would occasionally use courts to resolve private disputes, it is hard to believe that courts would have much power and legitimacy. The international setting more closely resembles this hypothetical picture than it resembles the modern United States.

Independent judges are tolerated in domestic settings because citizens who become judges share most of the values and expectations of the politi-

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46. See, e.g., John Yoo, *Bush v. Gore: 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, JR., *THE WARREN COURT AND AMERICAN POLITICS* 160-78 (2000); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

47. There was once danger that the U.S. Supreme Court might find itself powerless to enforce its decisions. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 756-61 (1922) (discussing state resistance to Marshall Court decisions). While the possibility continues to be of academic interest, it does not appear to be likely today. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) (arguing that the president's constitutional authority includes discretion to refuse to enforce Supreme Court decisions, but admitting that the argument is radical).

cal community. When they do not, they can be removed; deprived of funds; or regulated through changes in jurisdiction, modification of the laws they enforce, or appointment of new judges. Trial judges are also controlled by appellate judges and Supreme Court Justices, who are usually integrated into the political community. There is no such political community at the international level acting to keep judges in line. Thus, we think that until the evidence shows to the contrary, one should interpret the activities of international adjudicators with caution, and that one should be skeptical of the claim that states would submit disputes to judges over whom they have no influence.

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

The characteristics of international tribunals outlined in the previous section raise several questions. If states do not have to comply with an adverse judgment, why would they? If they do not comply, why would other states ever resort to an international tribunal to resolve a 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 relevant to a particular dispute. This occurs in two settings. First, tribunals may play a role in producing valuable information for states involved in treaty disputes. States come into conflict when they take actions that violate, or appear to violate, treaties. Tribunals can help resolve such conflicts 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, help develop new rules, or apply existing rules to new or unanticipated circumstances.<sup>48</sup> We will analyze each of these scenarios.

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48. For a closely related argument, see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004). In addition, Professor Andrew 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, 304 (2002). Our focus is different from, but consistent with, that of these scholars: we are concerned with the question of 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 of international claims) may decrease international cooperation, see Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion* (2004) (unpublished manuscript, on file with the authors).

### 1. *Information Disclosure in Treaty Disputes*

States frequently enter treaties, and many states comply with their treaty obligations despite the absence of a centralized enforcement mechanism in the international legal system. However, states 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 a treaty or its application. In such situations, tribunals 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 states A and 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, but neither will *necessarily* obey the treaty. Suppose that each state covets territory on the other side of the river but also wants to hold onto the territory on its own side of the river. Although A would be better off if it had some of B's territory, A also knows that any effort to seize that territory will be met with military force and perhaps a counterattack on A's territory. Similarly, B knows that if it tries to grab some of A's territory, A will retaliate.

This strategic problem has the structure of the familiar prisoner's dilemma, and the solution is repeat play, i.e., the ongoing mutual threat of retaliation. 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 one state 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>49</sup> The treaty formalizes cooperation between states A and B and helps them escape the prisoner's dilemma.<sup>50</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 a conflict will be uncertain, either because the treaty is ambiguous or because the facts are unclear. If each state has different beliefs about the meaning of the treaty or about the facts, then the states will have different interpretations of their obligations under the agreement. In such a case, an

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49. 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.

50. For a discussion, see Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 *V.A. J. INT'L L.* 113 (2003).



impasse may 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>51</sup> After the Mexican-American War of 1848, the two countries agreed that their border would follow the Colorado and Rio Grande rivers.<sup>52</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 change. The course can shift slowly, as the current erodes one bank and deposits alluvium on the other side, and the course can move quickly: after a flood the channel may be miles away from its old location. This is called avulsion. Treaties between the United States and Mexico stated that the border would shift with the river if the shift was due to erosion. The border would remain in place if it shifted from avulsion.<sup>53</sup>

In 1864, the Rio Grande flooded. When the floodwaters receded, the course of the Rio Grande was different from what it had been at the end of the Mexican-American War. Because of a lack of records, the location of the river before the flood was unclear. It may have been at or near its original location at the time of the treaty. Or it may have 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 and disagreed about the application of the treaty, which was silent on how to handle such a contingency.

Suppose that each state had its own scientific experts, and that these experts provided judgments about the pre-flood location of the river that favored their own governments. In this situation, participation by a neutral third party could be valuable. A 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

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51. *In re International Title to the Chamizal Tract (U.S. v. Mex.)* (Int'l Boundary Comm'n, June 15, 1911), reprinted in 5 AM. J. INT'L L. 782 (1911).

52. Treaty of Peace, Friendship, Limits, and Settlement Between the United States and the Mexican Republic, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]; Gadsden Treaty, Dec. 30, 1853, U.S.-Mex., 10 Stat. 1031.

53. Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where It Follows the Bed of the Rio Grande and the Rio Colorado, Nov. 12, 1884, U.S.-Mex., 24 Stat. 1011 [hereinafter Treaty of 1884].

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 that would favor the other side. For example, it could withhold land title records, scientific studies that reveal aspects of the river's prior course, or records of the treaty negotiations that might shed light upon an ambiguous provision. A 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 it is biased or extreme or if a state's interests have changed in the meantime.<sup>54</sup> But if the states believe that the tribunal is neutral, their interests remain 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 establish the tribunal.

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 them both winners. But think of the tribunal as a response to the problem of treaty interpretation. When the United States and Mexico signed the treaties resolving their border dispute, they could not incorporate provisions to cover every contingency. Indeed, states can no more describe all contingencies in their treaties than private parties can address all contingencies in their contracts. But 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's desire to maintain a reputation for complying with treaties or to maintain a

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54. 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 instructions. *In re* International Title to the Chamizal Tract, *supra* note 51, at 783.

cooperative relationship with the other state outweighs any loss it suffers from an unfavorable judgment.

In sum, there are two conditions that make international adjudication possible. First, the states have a surplus to divide—in our case, the disputed piece of territory—and the present value of the payoffs from continued cooperation exceeds the short-term gains from cheating. Second, the states have imperfect information about whether an action is consistent with a treaty, and the tribunal can help bring that information to light.

## 2. *Information Disclosure in Customary International Law Disputes*

States frequently come into conflict in ways that are not governed by treaties, and in such circumstances, 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.<sup>55</sup> 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. International adjudication may help resolve disputes by clarifying the facts and the pertinent customary international law.

We can give this theory more context by examining the customary international law governing the acquisition of territorial sovereignty.<sup>56</sup> In prior centuries, Western nations considered much of the world “unoccupied”—that is, not controlled by powerful 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 those 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? And how far could sovereignty extend—could the discovering state claim an entire continent by planting a flag on a corner of it?<sup>57</sup>

There are various theories about how such conventions could evolve,<sup>58</sup> 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

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55. See generally Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (explaining how customary international law works).

56. This area of law was addressed recently in *Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

57. See generally R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (1963) (discussing factors in determining acquisition of territory); SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* (Developments in International Law, vol. 26, 1997).

58. See, e.g., Goldsmith & Posner, *supra* note 55; JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (forthcoming 2005) (ch. 2); Ginsburg & McAdams, *supra* note 48, at 1321 (discussing how tribunals may help develop customary international law).

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: 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 they 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 their past actions.

As an example, consider the Island of Palmas Case.<sup>59</sup> This dispute involved claims by the United States and the Netherlands 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. The Netherlands 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, and hence the United States, title to the island or whether Spain had forfeited sovereignty to the Netherlands by failing to exercise control over the island. The arbitrator held in favor of the Netherlands on the ground that territorial sovereignty must be maintained through a display of authority.

The arbitrator did two things. He decided whether the law required continuous control, and he decided whether Spain had exerted continuous control. His first decision may have been 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 lacked. 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 he chose the one that reduced the systemwide costs that would have resulted from more conflict.<sup>60</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, one might again ask why the states needed the tribunal. Why not consult their own historians and legal experts and come

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59. *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); *see also* Ginsburg & McAdams, *supra* note 48, at 1297-300.

60. *See* Ginsburg & McAdams, *supra* note 48, at 1298-301.

to the same conclusion? The answer is that each state has only partial information, and each also has 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 (conventions 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 the meaning of the treaty and each state's compliance with its treaty obligations. In the model of convention, tribunals are used to interpret customary international law and determine each state's compliance with it.<sup>61</sup> 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 compliance—paying reparations, yielding territory, and so forth—may be significant. 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 by resolving the dispute neutrally as between the disputing states. In other words, the tribunal must interpret the treaty or convention in a way that maximizes its (ex ante) value to the two parties.<sup>62</sup> There may be a range of possible outcomes that the states would jointly accept as an alternative to impasse or war;

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61. See generally *id.* Ginsburg and McAdams also argue that an international tribunal may solve a coordination problem even when information is complete. *Id.* at 1262-71.

62. 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. But panel members who obtain a reputation for holding in favor of the more powerful state will not be used again because in future disputes the weaker state will refuse to consent to them.

jargon refers to this range as the “win set” between the two states’ reservation prices. States, therefore, will use international adjudication only if the tribunal, over time, provides an accurate (or politically sensitive) judgment within the win set. If the tribunal violates its instructions and 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 use tribunals and comply with their judgments only if they believe that the judgments will be unbiased.<sup>63</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 or something subtler. For instance, 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, they might make a practice of providing benefits to judges or arbitrators who have ruled in their favor in the past. Thus, judges and arbitrators know that if they rule for a certain state, 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. Although other states might infer that the loser is at fault and not that the tribunal made a poor judgment, if enough noncompliance occurs, then other states will eventually conclude that the tribunal is biased or defective and refuse to use it themselves.

To summarize, third-party dispute resolution is possible when all three of the following conditions prevail:

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63. See Guzman, *supra* note 48, at 326.

1. Two (or more) states gain enough from future cooperation that they are able to refrain from cheating in the present.
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 neutral, because (a) it has sufficient business, (b) its members care about future payoffs, and (c) its members do not have strong ideological or national preferences.

Thus far, we have assumed that a third-party dispute resolution mechanism can be designed in such a way to ensure that it is informed and unbiased. In the next section we will explain this assumption and the conditions under which it holds.

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

States do not need a tribunal if the law and the facts are clear. When a treaty or convention clearly governs the dispute and states have the same information about the relevant facts, there is nothing a tribunal can contribute to the resolution of the dispute. But when the law or facts are unclear, and when the requirements for international adjudication are satisfied, states may be able to avoid conflict by relying on tribunals. In this section, we discuss different dispute resolution structures and how they relate to the purposes served by international adjudication discussed above.

#### 1. *The Single Arbitrator*

The simplest tribunal consists of a single person.<sup>64</sup> The two states cannot resolve the dispute, but they can agree on appointing a person to do so. 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. The states may have better information about the proposed arbitrator than they do about the law or facts of the dispute. Indeed, to agree on an arbitrator, the states need to know only 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.

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

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64. Cf. SHAPIRO, *supra* note 28, at 1-5 (discussing the logic of the triad for adjudication).

and the United States.<sup>65</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 such an arbitrator cannot always be identified, and there is always the risk that the chosen arbitrator 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 risks (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. *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 model. Under this system, each state appoints one arbitrator, and then the two state arbitrators jointly appoint a third arbitrator. The states expect their appointees to represent their interests and 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 that 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 tiebreaker. 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 or self-interestedly. If the state’s own ministers do not choose the single neutral arbitrator but instead rely on their appointee to do so, they take the chance that the appointee will agree to the selection of a biased arbitrator. An appointee might be outwitted by the arbitrator on the other side, or he might take insufficient care in choosing the third arbitrator, or he might receive a private benefit by agreeing to a biased selection. This is the problem of agency slack. Because of this risk, a three-arbitrator tribunal is more likely to render a judgment that is biased than a single-arbitrator tribunal. If the bias is high enough, it could result in judgments that are outside the range of outcomes that are acceptable to both parties and therefore incapable of procuring compliance.

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65. A.M. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS, 1794-1970*, 26 (3d ed. 1990).



For that reason, single-arbitrator tribunals should enjoy a higher level of compliance than three-arbitrator tribunals, holding constant the level of expertise and information. But this is not to say that three-arbitrator tribunals are useless. States will use them when they cannot identify a neutral and informed arbitrator, and they 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 decision makers 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 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 reflect an effort to solve this problem without adopting all of the features of true courts. The Permanent Court of Arbitration (PCA), for example, was, in essence, a pool of arbitrators-in-waiting. In theory, the PCA, by providing a ready pool of arbitrators, made arbitration more attractive. But while the pool reduces the transaction costs of finding a generally able and reputable arbitrator, the states do not necessarily have a guarantee that any particular arbitrator will be able or willing to maximize the *ex ante* value of the agreement between them. The transaction costs of finding an arbitrator are a relatively small deterrent compared with the risk of selecting a biased or incompetent one. And because each dispute involves a unique combination of interests, facts, and treaty provisions, expertise cannot be generalized. Confidence can come only as the parties repeatedly and successfully use a particular arbitrator or the pool. But why should the states repeatedly take this risk rather than rely on their own information to select an arbitrator? This reluctance to “enter the pool” prevents resources such as the PCA from being successful. A coherent jurisprudence can only arise when states are required to use the same body for dispute resolution.

But 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. But then the question is why states would submit to compulsory jurisdiction.

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 before a tribunal.<sup>66</sup> The cost is that a state might be forced to appear as a defendant against its 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. This is certainly possible, especially for treaties that states voluntarily enter. The other condition, which is far more difficult to ensure, 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.

The inability of disputing states to veto tribunals or panels that they do not trust is the first characteristic of the independent tribunal. This characteristic raises the following question: if judges no longer need to please particular states to obtain repeat business, why should they ensure that their judgment falls within the win set of the two disputing states? The judges might indulge personal biases or try to develop the law in ways that benefit all states, including those that are not parties to the dispute. If judges routinely fail to satisfy the parties' *ex ante* interests, then states may withdraw their consent to the tribunal's jurisdiction or refuse to comply with its judgments.

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.<sup>67</sup> But this is not the same as the three-arbitrator panel, where the national's consent to a neutral third arbitrator was necessary for the arbitration to go forward. In courts, the national can always be outvoted by judges who have no connection to his or her state.

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—including the inability to ensure that a tribunal makes a decision satisfactory to both parties—but they might not: this is an empirical question.

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66. 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 types of harm. *See* Statute of the International Court of Justice, June 26, 1945, art. 36, para. 3, 59 Stat. 1055, 1060 (authorizing this practice).

67. *See, e.g., id.* at art. 31, para. 3.

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.<sup>68</sup> This powerful ideal can have great attraction, especially after times of conflict when politicians either believe that the ideal can be achieved or are rewarded by constituents who have the same hope. Many international courts have been created in the aftermath of great conflicts, including the PCIJ after World War I and 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.

#### 4. *Measuring Tribunal Independence*

A tribunal can be more or less independent of the two states that happen to appear before it at a given time.<sup>69</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: its members are appointed in advance, and the tribunal has compulsory jurisdiction. States cannot easily evade its reach, it can develop and apply a more predictable body of law, and it can quickly render a judgment.

Table I: Tribunal Independence

<b>characteristic</b>	<b>dependent</b>	<b>independent</b>
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

68. See SHABTAI ROSENNE, *WHAT IT IS AND HOW IT WORKS* 1-8 (Terry D. Gill ed., 6th ed. 2003).

69. Keohane and his coauthors also focus on independence. For their discussion, which has influenced ours, see Keohane et al., *supra* note 17, at 75-78. They also look at access and legal embeddedness, factors from which we abstract. *See id.* at 78-82 (access), 82-84 (legal embeddedness).

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.<sup>70</sup> 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 few states; an independent tribunal is available to all states that are parties 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 exists *before* the dispute, beginning when the states enter into a treaty or consent to its jurisdiction. States cannot withdraw from the jurisdiction of an independent tribunal without losing the ability to invoke it. Finally, disputing states choose the judges for a dependent tribunal. State parties to a treaty also appoint the judges for an independent tribunal, but they have no 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.

#### D. *Measurements of Effectiveness*

We can now draw together the threads of our argument. The conventional wisdom holds that a tribunal's *effectiveness* and *independence* are positively correlated.<sup>71</sup> This assumption derives from the success of independent courts in a domestic setting. What it ignores is the radical difference in the institutional environments in which domestic and international courts operate. The latter have no direct enforcement mechanism, and, because international law is relatively difficult to change, are less constrained by the threat of legislative overrides. These observations bring into focus the limits of international tribunals. They can help states solve cooperation problems by providing information and delivering unbiased

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70. Although its members are replaced after fixed terms, these terms do not coincide with any particular dispute.

71. See *supra* Introduction.

opinions. But they cannot issue judgments that run contrary to the interests of the parties to a dispute. If they do so, their rulings will be ignored and states will use them less often. And therein lies the problem. More independent tribunals are less likely to issue decisions that are satisfactory to all state parties to a dispute. So making a tribunal independent may actually undermine its effectiveness. For these reasons, we argue that effectiveness and independence are, at best, uncorrelated and may be negatively correlated.

To make this argument on empirical grounds, we need to measure "effectiveness." While this is difficult, we have identified 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 a compliance rate: the number of complied-with judgments divided by the total number of judgments.

One problem with this measure is that compliance can be hard to observe. Sometimes states comply with a judgment after years or even decades; 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. If this occurs, then effective tribunals might have compliance rates that are no better than those of weak tribunals, not because of the design of the tribunal but because of the nature of the dispute.

Second, one could measure effectiveness through usage. If a tribunal is ineffective, states will stop using it. Usage can be measured in either gross or 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>72</sup>

A problem with this measure is that usage can reflect factors other than effectiveness, such as 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. Additionally, 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.

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72. *Cf. id.* at 91 (measuring the average annual caseloads of six international tribunals since founding). Keohane's usage statistics are misleading because they do not control for membership and other factors.

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 trade flows. Imagine 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, all else being equal. The problem is that everything else is never equal, and often the indicator of success is obscure. 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 that independent tribunals are more effective than dependent tribunals.<sup>73</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 hypothesis 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, so it provides a useful baseline against which to evaluate the other tribunals. We continue with a look at some well-known, relatively independent tribunals: the ICJ, the IACHR, and GATT and the WTO’s dispute resolution mechanism.

##### *A. Arbitration*

Arbitration is as old as diplomacy. The ancient Greeks practiced it, as did feudal lords during the Middle Ages and leaders of the emerging

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73. As we discuss below, however, there are some efforts to deal with selection problems in studies of GATT and the WTO.

European states in the early modern period.<sup>74</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.<sup>75</sup> Arbitration became more common after the Napoleonic Wars and was flourishing by the second half of the nineteenth century.<sup>76</sup> It has continued to the present day, even as more formal tribunals have sprung up and attracted disputes that once may have been submitted to arbitration.

Arbitration comes in many forms, but in essence it involves the appointment of one or more individuals to decide a usually narrow legal or factual issue. The arbitrators may invent their own rules of procedure and evidence, and they frequently 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 dispute.

### 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 Professor A.M. Stuyt, which contains information on every arbitration during that period.<sup>77</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 stemmed from a single dispute. Table 2 provides the number of arbitrations by twenty-year periods (excluding the last ten years of the data set and arbitrations for which no starting year was given). The absolute number of arbitrations increased until just before World War I and diminished thereafter. If we confine ourselves to arbitrations involving two Great Powers or one Great Power and the United States,<sup>78</sup> the pattern of arbitrations was the same. Thus, the increase was not driven solely by

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74. JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* 153-89 (1929).

75. *Id.* at vii; see also Treaty of Amity, Commerce and Navigation, *supra* note 25.

76. RALSTON, *supra* note 74, at vii; see also Mark W. Janis, *The International Court, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 13-14 (Mark W. Janis ed., 1992); J. GILLIS WETTER, *THE INTERNATIONAL ARBITRATION PROCESS: PUBLIC AND PRIVATE* 9 (1979).

77. STUYT, *supra* note 65.

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

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>79</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

\*No Great Power data.

\*\*Note: 1900-1914, there were eighty-six arbitrations; 1915-1919, there were fifteen.

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 a sense of the landscape. Of the arbitrations for which this information was given, 306 (about two-thirds) 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.<sup>80</sup>

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.

79. Compiled from STUYT, *supra* note 65.

80. *See id.*



Table 3: Arbitration by State<sup>81</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 and Latin American countries have a special preference for arbitration. These observations can tentatively be explained. Large countries should use arbitration more often than small countries because they have more foreign interactions, which creates an increased risk of disputes with other nations. 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. The historical evidence suggests that the United States encouraged them to rely on arbitration.<sup>82</sup> There is little evidence that democracy affects the choice to arbitrate. Many of the prominent users of arbitration—Germany, Chile, Italy—were not democracies during the relevant periods.<sup>83</sup>

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81. Compiled from *id.*

82. RALSTON, *supra* note 74, at 142-46.

83. 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 RESOL. 24, 34, 37-38 (1994). His regression, which uses the Stuyt database, does show that pairs of democracies are more likely to

In the abstract, we cannot say that the usage of arbitration is high or low. But it is telling that the frequency of arbitration increased steadily throughout 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 to 1879, 0.15 for the period 1880 to 1899, and 0.14 for the period 1900 to 1919.<sup>84</sup> The significance of these figures will become clearer when we compare tribunals in Part III.E.

Stuyt provides data on compliance—our second measure of effectiveness—for 220 disputes, but the figures are difficult to interpret. Of the 220 cases, he says that compliance occurred 206 times, for a very high (94%) compliance rate.<sup>85</sup> 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 represent noncompliance, then the compliance rate is 44%.

## 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>86</sup> The United States responded by freezing Iran's assets.<sup>87</sup> After negotiations through an intermediary, Iran agreed to release the American hostages, the United States agreed to unfreeze Iran's assets, and both states agreed to resolve outstanding commercial and interstate disputes through arbitration.<sup>88</sup> As part of the agreement, the United States transferred a portion of Iran's assets to an account in a

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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. *See id.* at 34 tbl.2. In addition, he interprets the head-of-state cases as not involving legal judgments. *See id.* at 28 (noting that "[i]nternational mediation differs from arbitration in that it is a political rather than judicial form of conflict resolution"). This appears to be wrong. The one-party cases seem to be formal arbitrations.

84. We used the numbers for arbitrations from Table 2. During all three periods, there were on average thirty-eight independent states. Data for the number of states per year are from the Correlates of War Project, Data Sets, at <http://www.umich.edu/~cowproj/dataset.html#States> (last visited Aug. 27, 2004). The website contains the definition of states.

85. *See* STUYT, *supra* note 65.

86. *See* Caron, *supra* note 27, at 104 n.1.

87. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 17 (May 24).

88. For a discussion of the Algiers Accords, which ended the Iranian Hostage Crisis and established the Iran-U.S. Claims Tribunal, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

foreign bank and instructed the bank to release those assets as necessary to satisfy judgments issued by the Tribunal.<sup>89</sup> The Tribunal began operation in 1981.<sup>90</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.<sup>91</sup> For these reasons, one might think of the Tribunal as an authentic international court on par with the ICJ. In fact, however, the Tribunal exemplifies classic ad hoc arbitration. The Tribunal is not permanent; it did not exist before the Iranian Revolution and the hostage crisis; it will last only as long as is necessary to resolve the claims that have been assigned to it. Third-party states have no right to intervene in the proceedings. The composition of the Tribunal followed the traditional pattern of an ad hoc dispute resolution system. Each state appointed three judges, and those judges jointly appointed three “neutrals.” So there were a total of nine judges: three Americans, three Iranians, and three nationals from other states. The Tribunal, like the classic ad hoc arbitration system, is highly dependent.

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 3900 claims were filed, and nearly all have been resolved.<sup>92</sup> United States claimants have been awarded more than \$2 billion, and Iranian claimants have been awarded about \$1 billion.<sup>93</sup> The independence of the tribunal is low, and compliance has been high.

### B. *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 the 1946 Statute of the International Court of Justice, which is part of the Charter of the United Nations.<sup>94</sup> The ICJ describes itself as the “principal judicial organ of the United Nations,”<sup>95</sup> and its primary function is to settle legal disputes under international law that are submitted to it by states.<sup>96</sup> It also may issue

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89. See Caron, *supra* note 27, at 129.

90. For background information, see Iran-United States Claims Tribunal, at [www.iusct.org/background-english.html](http://www.iusct.org/background-english.html) (last visited Aug. 27, 2004).

91. See generally THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION: A STUDY BY THE PANEL ON STATE RESPONSIBILITY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (David D. Caron & John R. Crook eds., 2000).

92. Iran-United States Claims Tribunal, Communiqué, Doc. No. 04/1 (Jan. 20, 2004), at [www.iusct.org/communique-english.pdf](http://www.iusct.org/communique-english.pdf) (last visited Aug. 27, 2004).

93. *Id.*

94. Statute of the International Court of Justice, *supra* note 66.

95. *Id.* at art. 1.

96. *Id.*

advisory opinions on legal questions referred to it by a selected group of international organizations. The Statute of the ICJ was based on the organizing statute of the Permanent Court of International Justice, which the ICJ replaced.<sup>97</sup> The ICJ is a permanent international organization whose existence is not dependent on the resolution of any particular dispute.<sup>98</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.<sup>99</sup> The U.N. General Assembly and the Security Council select the fifteen judges who compose the Court,<sup>100</sup> and the judges serve terms of nine years.<sup>101</sup> No two judges are permitted from the same nation.<sup>102</sup> One-third of the seats come open every three years,<sup>103</sup> with the possibility of reappointment of judges whose terms have expired.<sup>104</sup> 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>105</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>106</sup> but other sources make clear that powerful countries control individual seats; the United States, for example, has always had a judge of its nationality on the Court.<sup>107</sup>

The Statute of the ICJ gives the Court three types of jurisdiction.<sup>108</sup> First, states may submit a dispute by special, that is, ad hoc agreement:

97. U.N. CHARTER art. 92.

98. For background information, see International Court of Justice, 1946-1996, at <http://www.icj-cij.org/icjwww/igeneralinformation/ibook/Bbookframepage.htm> (last visited Aug. 27, 2004).

99. See, e.g., Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791; U.N. Charter arts. 92-96; Report of the ICJ, 1 Aug. 2002-31 July 2003 to the U.N. General Assembly, at [http://www.icj-cij.org/icjwww/igeneralinformation/igeninf\\_Annual\\_Reports/ijc\\_annual\\_report\\_2002-2003.pdf](http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/ijc_annual_report_2002-2003.pdf) (last visited Aug. 31, 2004).

100. Statute of the International Court of Justice, *supra* note 66, art. 4, para. 1. (regarding U.N. appointment of judges); *id.* at art. 3, para. 1 (regarding the number of judges).

101. *Id.* at art. 13, para. 1.

102. *Id.* at art. 3, para. 1.

103. See *id.* at art. 13, para. 1.

104. *Id.*

105. *Id.* at art. 31, para. 3.

106. *Id.* at 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).

107. 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 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 R. Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 AM. SOC'Y INT'L L. PROC. 277, 278 (2003).

108. Statute of the International Court of Justice, *supra* note 66, arts. 36-37, 65.

both states must agree to such a submission. Second, a treaty may contain a jurisdictional clause that submits disputes 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 Relations.<sup>109</sup> Third, states may declare consent to the “compulsory” jurisdiction of the Court. Consenting states agree to submit to the ICJ all international legal disputes with other states that also have accepted compulsory jurisdiction under similar conditions. Today, sixty-four nations have agreed to such jurisdiction.<sup>110</sup>

Although the ICJ has some of the characteristics of an independent court—it is a permanent institution with a continuous body of judges—its level of independence turns on the type of jurisdiction. To the extent states use the Court’s 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. To maintain its relevance and power, the ICJ must resolve these disputes in a manner consistent 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; meanwhile, withdrawing states cannot stop other states from bringing them to court. To the extent that treaties provide the basis for 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.

To determine the effectiveness of the ICJ, let us examine some usage and compliance statistics. Table 4 contains the compliance rates and number of disputes for each type of jurisdiction.

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109. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 1, 21 U.S.T. 77, 596 U.N.T.S. 261, <http://www.un.org/law/ilc/texts/consul.htm> (last visited Aug. 20, 2004).

110. International Court of Justice, Declarations Recognizing as Compulsory the Jurisdiction of the Court, at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicdeclarations.htm> (last visited Aug. 27, 2004) [hereinafter *Declarations of Recognition*].

Table 4: ICJ Compliance and Usage<sup>111</sup>

	Compliance Rate	Disputes	Disputes/Year
Special agreement	85.7%	15	.27
Treaty	60%	47	.84
Compulsory	40%	30	.54
Total or average	61.9% (average)	92 (total)	1.65 (total)

Note: This table excludes the ICJ's advisory jurisdiction; it shows only disputes that have resulted in a judgment.

Usage of the ICJ has fluctuated but never reached a significant level. 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 or from February 1967 to August 1971. Between 1972 and 1985, usage returned to about one to three cases per year, and in the last ten 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 which may be used by nearly every state in the world. Indeed, international legal academics have complained about the relatively low usage rate of the ICJ and proposed reforms.<sup>112</sup>

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 U.N. currently accept the compulsory jurisdiction of the ICJ.<sup>113</sup> This is a participation rate of about 34%. By contrast, thirty-four of fifty-seven

111. Compiled from Ginsburg & McAdams, *supra* note 48, 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. Date range: 1947-2003. Jonathan Charney conducted a similar study in 1987 but did not provide complete figures on noncompliance. See Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 288-319 (Lori F. Damrosch ed., 1987). Nonetheless, Charney found that in ten out of twenty-eight contentious cases (35.7%), states refused to participate in or comply with an ICJ decision. *Id.* at 297. Charney did not, however, distinguish between cases involving compulsory jurisdiction and jurisdiction by treaty or special agreement, and his figures do not include cases decided after 1986.

112. See, e.g., Sir Gerald Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 461-98 (Leo Gross ed., 1976); MERRILLS, *supra* note 23, at 164-66, 285-331; MAX PLANCK, *INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION* (1974); Arthur W. Rovine, *The National Interest and the World Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 31 (Leo Gross ed., 1976); 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); Lyndel V. Prott, *The Future of the International Court of Justice*, 33 *Y.B. WORLD AFF.* 284 (1979).

113. These numbers are drawn from documents provided by the ICJ on its website. See *Declarations of Recognition*, *supra* note 110.

U.N. members (60%) accepted compulsory jurisdiction in 1947.<sup>114</sup> Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the United States, and Russia have not (nor has Germany).<sup>115</sup> Among the states that do accept compulsory jurisdiction, almost all hedge their consent with numerous conditions.<sup>116</sup> That suggests that state parties to the U.N. Charter have chosen not to make use of the Court because they cannot control its outcomes.<sup>117</sup>

As for compliance, the Tim McAdams and Tom Ginsburg study finds that in compulsory jurisdiction cases, states comply with the judgment of the ICJ only 40% of the time.<sup>118</sup> As Table 4 shows, when the Court becomes more dependent, its compliance rate rises. When the dispute arises under a treaty, compliance rises to 60%. When the jurisdiction comes from special agreement, compliance leaps to 85.7%. In short, the more closely tied the jurisdiction is to the consent of the involved parties, the more likely it is that the parties will comply with the judgment.<sup>119</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 between Nicaragua and the United States, *Military and Paramilitary Activities in and Against Nicaragua*.<sup>120</sup> In 1984, Nicaragua instituted proceedings at the ICJ, claiming that the United States violated the U.N. Charter and customary international law, by, among other things, engaging in attacks on Nicaraguan facilities and mining Nicaraguan ports.<sup>121</sup> Both the United States and Nicaragua had accepted the compulsory jurisdiction of the ICJ under Article 36 of the Court's statute.<sup>122</sup> But three days before Nicaragua filed its application on April 9, 1984, Secretary of State George Shultz declared that the United States would not accept the ICJ's compulsory jurisdiction over any disputes

114. INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1947-1948.

115. See Declarations of Recognition, *supra* note 110.

116. See *id.* For examples of hedging, see the declarations of Australia and India.

117. See, e.g., Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1, 2-4 (1982); Richard A. Falk, *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L L. 314, 321-22 (1971). Even as early as 1955, international legal academics were concerned about the decline in the use of the ICJ's 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*, 1957 BRIT. Y.B. INT'L L. 244.

118. Ginsburg & McAdams, *supra* note 48, at 1309-10.

119. 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.

120. (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (deciding merits).

121. *Id.* at 22.

122. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 441 (Nov. 26) (deciding jurisdiction).

arising out of Central America.<sup>123</sup> The Court rejected the U.S. attempt to modify its acceptance of compulsory jurisdiction; when it accepted the jurisdiction in 1946, the United States had stated that it would give notice six months before any withdrawal could take effect.<sup>124</sup> The United States then withdrew completely from the compulsory jurisdiction of the ICJ.<sup>125</sup> The Court's decision on the merits, which appeared in 1986, found the United States in breach of its international obligations for attacking Nicaragua and supporting the Contras.<sup>126</sup> The United States ignored the decision.

Refusal to comply with the ICJ has also taken less confrontational forms. Recently, the United States ignored two ICJ decisions under the Vienna Convention on Consular Relations.<sup>127</sup> Under the Convention, the United States had an obligation to notify foreign defendants, at the time of arrest, that they had a right to contact their consulate.<sup>128</sup> 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, a Paraguayan national, who was to be executed by the state of Virginia.<sup>129</sup> After affirming its jurisdiction but before reaching the merits, the ICJ issued a provisional measure—akin to a temporary restraining order—which ordered the United States to “take all measures at its disposal to ensure that [Breard] is not executed pending the final decision in these proceedings.”<sup>130</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.<sup>131</sup> The Supreme Court denied the petition for a stay of execution, and Breard was executed.<sup>132</sup> The United States simply refused to obey the ICJ's order.<sup>133</sup>

The United States again refused to comply when the same issue arose in a dispute with Germany. In that case, two German brothers had been convicted of first-degree murder and sentenced to death in Arizona without

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123. See *id.* at 398; see also Abraham D. Sofaer, State Dept. Legal Advisor, Statement to Senate Foreign Relations Committee (Dec. 4, 1985), 86 DEP'T. ST. BULL. 67 (1986).

124. See *Nicaragua*, 1984 I.C.J. at 398.

125. 24 I.L.M. 1742-45 (1985).

126. *Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (deciding merits).

127. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); *LaGrand Case* (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27, 2001).

128. *Vienna Convention*, 1998 I.C.J. at 249 (quoting *Vienna Convention*, 1998 I.C.J. at 258).

129. *Id.* at 248; see *Breard v. Greene*, 523 U.S. 371, 371 (1998).

130. *Breard*, 523 U.S. at 374.

131. *Id.* at 371.

132. *Id.*

133. For a discussion, compare Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998) with Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998).



notification of their Vienna Convention rights.<sup>134</sup> After one of the brothers was executed, Germany instituted proceedings against the United States in the ICJ, and again the ICJ issued an order to the United States to take all measures at its disposal to stop the execution while it heard the case on the merits.<sup>135</sup> The executive branch opposed a stay of execution before the Supreme Court, the Court denied the petition, and the execution proceeded.<sup>136</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 the future, was to allow the "review and reconsideration" of the convictions and sentences in cases where a Vienna Convention violation has occurred.<sup>137</sup> While it could be argued that "review and reconsideration" is sufficiently broad to be satisfied by a state clemency process, the United States has not stopped an execution because of a Vienna Convention defect.<sup>138</sup>

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, *Corfu Channel*, Albania refused to comply with the Court's judgment.<sup>139</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.<sup>140</sup> After the Court issued judgment against it, Albania refused to participate in proceedings on damages and did not pay the amount decided. Great Britain responded by withholding Albanian gold recovered from the Nazis, and it was not until 1992, with a change of regime in Albania, that a settlement was reached and the gold was returned.<sup>141</sup> In 1951, Great Britain sued Iran because Iran nationalized the assets of the Anglo-Iranian Oil Company.<sup>142</sup> The Court mandated provisional measures to protect the company and its property, which Iran ignored. Eventually, the Court found it had no jurisdiction in the case.<sup>143</sup> In 1955, Portugal brought suit against India after India suspended rights of passage to two remaining Portuguese enclaves in the Indian subcontinent.<sup>144</sup> The Court ruled in 1960 that

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134. *LaGrand* (F.R.G. v. U.S.), 40 I.L.M. 1069, 1076-77 (June 27, 2001).

135. *LaGrand*, 40 I.L.M. at 1100-01.

136. *F.R.G. v. United States*, 526 U.S. 111 (1999).

137. *LaGrand*, 40 I.L.M. at 1100.

138. In 2004, the ICJ ruled in a third case that "review and reconsideration" required U.S. courts to provide a forum for review of violations of the Vienna Convention. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 43 I.L.M. 581 (Mar. 31, 2004).

139. (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 155-58 (5th ed. 1995) (noting that even though the ICJ, in *Corfu Channel*, ordered Albania to pay reparations, Albania "never paid the reparation awarded").

140. *Corfu Channel*, 1949 I.C.J. at 4.

141. ROSENNE, *supra* note 139, at 44, 181-82.

142. *Anglo-Iranian Oil Co.* (U.K. v. Iran), 1952 I.C.J. 93 (July 22).

143. *Id.* at 115.

144. *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12).

Portugal had a right, under international law, to passage to its enclaves, but India annexed the territories the following year.<sup>145</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 because Iceland expanded its exclusive fisheries zone.<sup>146</sup> Iceland refused to appear and disregarded provisional measures.<sup>147</sup> Several other cases followed in which states refused to comply with orders of the ICJ. These states include France in a case involving its nuclear weapons testing in the Pacific,<sup>148</sup> Iran and its taking of American diplomatic personnel hostage,<sup>149</sup> and Serbia in its support for genocide against the inhabitants of Bosnia-Herzegovina.<sup>150</sup>

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

The Inter-American Court on Human Rights (IACHR) is another prominent international tribunal that has had trouble securing compliance with its decisions. In 1969, several American states adopted the American Convention on Human Rights, which established the IACHR.<sup>151</sup> The Convention entered into force in 1978 and protects primarily political and civil rights, such as the rights to life, liberty, personal integrity, due process, privacy, property, equal protection, and freedom of conscience and expression.<sup>152</sup> The IACHR started operating in 1979.<sup>153</sup>

Before the adoption of the American Convention, human rights in the Americas were the subject of the American Declaration on the Rights and Duties of Man, a nonbinding statement that was adopted at the same time as the creation of the Organization of American States (OAS).<sup>154</sup> The Inter-American Commission on Human Rights monitored compliance with the Declaration, primarily by visiting nations and issuing reports about countries' human rights performance.<sup>155</sup>

Of the thirty-five American states, twenty-five have ratified the American Convention, and of those, twenty-one have accepted compulsory

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145. ROSENNE, *supra* note 139, at 189.

146. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

147. ROSENNE, *supra* note 139, at 207.

148. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

149. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

150. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 470 (Oct. 7).

151. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

152. American Convention, *supra* note 151, at arts. 3, 4, 5, 6, 7, 8, 11, 12, 13, 21, 24.

153. See Statute of the Inter-American Court on Human Rights [hereinafter IACHR Statute], reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/ser.L./V./I.4, rev. 9 (2003), available at <http://www.cidh.oas.org/basic.eng.htm>.

154. OAS Int'l Conf. of Am. States, 9th Conf., reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, *supra* note 153.

155. See Inter-American Comm'n on Human Rights, What are the Functions and Powers of the Commission?, at <http://www.cidh.org/what.htm> (last visited Aug. 28, 2004).

jurisdiction.<sup>156</sup> The United States and Canada have not ratified the Convention and are not subject to the jurisdiction of the IACHR. The IACHR is a permanent, relatively independent court. It 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.<sup>157</sup> Under the American Convention, the decisions of the IACHR are legally binding and not subject to appeal.<sup>158</sup> The Court is composed of seven judges nominated by state parties to the Convention and elected by majority vote.<sup>159</sup> The judges serve for six-year terms and may be reelected once. A state party to a case may appoint an ad hoc judge to ensure its interests are represented.<sup>160</sup>

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>161</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 only hear cases involving a claimed violation of the American Convention. It has the authority to order remedial actions or compensation for violations.<sup>162</sup>

The Court has presided over relatively few disputes. As of 2000, it appears to have heard only thirty-two contentious cases and issued only fifteen judgments.<sup>163</sup> This is a usage rate of 0.07 cases per state per year. As we will see, this usage rate is much lower than usage of the European Court on Human Rights. Differing histories may help to explain this discrepancy. 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

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156. Inter-American Comm'n on Human Rights, Brief History of the Inter-American Human Rights System, at <http://www.cidh.oas.org/what.htm> (last visited Aug. 28, 2004); PHILLIPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 217 (1999).

157. American Convention, *supra* note 151, art. 61 (regarding jurisdiction).

158. *Id.* at arts. 67-68.

159. IACHR Statute, *supra* note 153, at arts. 4-6.

160. *Id.* at art. 10.

161. American Convention, *supra* note 151, at art. 62.

162. See Inter-American Comm'n on Human Rights, *supra* note 155.

163. See SANDS ET AL., *supra* note 156, at 217. We counted fifty-five from the annual reports, but we trust the Sands figure more than our own. See, e.g., 1999 Annual Report of the Inter-American Court of Human Rights, OEA/ser. L./V./III.47, doc. 6 (2000), at <http://www1.umn.edu/humanrts/iachr/Annuals/annual-99.html> (last visited June 4, 2004).

the Americas since 1960 has been radically [sic] 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. [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>164</sup>

There are many cases that have arisen in Latin America in the last twenty-five years where all should agree that grievous violations of the American Convention have occurred.<sup>165</sup>

Compliance with IACHR decisions has been mixed. The IACHR often orders two types of remedies in a case: (1) the trial and punishment of offenders within a state party along with changes in domestic law, and (2) monetary compensation for the complainant. From our survey of the IACHR's cases, it appears that while states routinely ignore the requirement that they punish offenders or change their laws, they have often paid 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.<sup>166</sup> In all the other cases, it appears that nations have not fully complied, and the Court continues to supervise compliance.<sup>167</sup> This amounts to a compliance rate of approximately 5%. Interestingly, the Inter-American Commission, which issues only nonbinding country reports that seek to convince nations to change their human rights policies, reports a 4% rate of full compliance with its reports.<sup>168</sup> Thus, not only is there a low compliance rate with the decisions of the permanent, independent IACHR, but it does not 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.

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164. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 2 (David J. Harris & Stephen Livingstone eds., 1998) (internal citations omitted).

165. 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 164, at 31, 33-34.

166. See Harris, *supra* note 164, at 25 & n.131; see also Antonio Augusto Cancado Trindade, *The Operation of the Inter-American Court of Human Rights*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, *supra* note 164, at 133, 138.

167. Harris, *supra* note 164, at 25 & n.131.

168. See Annual Report of the Inter-American Commission on Human Rights 2003, OEA/ser.L./V./II.118, doc. 5, rev. 2 (2003), at <http://www.cidh.org/annualrep/2003eng/chap.3f.htm> (last visited Aug. 28, 2004).

If we limit our analysis to the monetary component of IACHR judgments, compliance rates rise, but not to an impressive level. By our count, states have made full financial compensation in 23.6% of the cases; in 14.5% of cases, no compensation was awarded. In the rest of the cases, slightly greater than 60%, states have engaged in either no or only partial compliance.<sup>169</sup>

There are the usual problems with selection effects. Nevertheless, 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*

The General Agreement on Tariffs and Trade (GATT) entered into force in 1947. Initially conceived as a temporary framework for international trade negotiations, GATT was indefinitely extended when the United States failed to ratify the treaty creating the International Trade Organization. GATT's charter did not provide for formal adjudication of trade disputes. Instead, states submitted conflicts to arbitration under the auspices of the GATT secretariat.

While the informal arbitration system handled hundreds of disputes over nearly fifty years, it was not always effective. States could block or delay the establishment of arbitration panels and the adoption of judgments, and although outright blocking was relatively rare, delay occurred frequently. 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 in 1995 to establish the WTO. The WTO's Dispute Settlement Understanding created a more formal, court-like adjudication system.<sup>170</sup>

##### 1. *Dispute Resolution Under GATT*

The GATT system was essentially a formalized arbitration system. If private consultations between disputing states failed, a party could request the creation of a panel. Because GATT acted by consensus, either party could block the creation of a panel. Therefore, as in an ordinary arbitration, a panel would be appointed only with both parties' consent. The two parties had to agree on the members of the panel, and that could lead to significant delay. After the panel heard the case and rendered a judgment, the

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169. This is based on our review of the cases as reported by the IACHR's annual reports.

170. For detailed discussions, see William J. Davey, *The WTO Dispute Settlement System, in TRADE, ENVIRONMENT, AND THE MILLENNIUM* 145-74 (Gary P. Sampson & W. Bradness Chambers eds., 2d ed. 2002); ROBERT JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL RELATIONS* 259-67 (2002); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997).

GATT members decided by consensus whether the judgment would be adopted. Again, because both parties' consent was needed, the losing party could block adoption of the panel's decision.

If a panel's judgment was adopted by GATT members, but the losing party did not comply, the winner could seek GATT authorization for the implementation of sanctions. The loser again had the opportunity to block such authorization. This happened in every case but one.<sup>171</sup> Thus, although losing states did not usually block adoption of a panel's judgment against them, they almost always blocked authorization of sanctions. The winning party would then have to decide whether to implement unilateral sanctions, which was a technical violation of GATT. The United States frequently threatened unilateral sanctions but rarely implemented them.

In 1989, GATT members eliminated the right to veto the creation of a panel. However, they retained the right to veto adoption of panel reports, and the GATT system remained highly dependent, as we define the term.<sup>172</sup>

## 2. *Dispute Resolution Under the WTO*

The 1995 Dispute Settlement Understanding (DSU) created a system much closer to a court than the system under GATT. If private consultations fail, the complaining party can request that the Dispute Settlement Body (DSB) appoint a panel. If such a request is made, the DSB, which consists of all member states of the WTO, must create a panel unless all DSB members agree *not* to. Since the complaining state would not ordinarily agree to dismiss its own complaint, this consensus rule effectively makes appointment of a panel automatic. Although the parties to a dispute can recommend individuals for the panel, the WTO's Director-General can appoint a panel if the parties cannot agree. As a result, strategic delay of the formation of the panel is difficult.

Panels consist of three people who are *not* nationals of the disputing parties unless the parties agree otherwise. After a panel hears a case and renders a judgment, that judgment is adopted by the DSB unless there is a unanimous consensus *against* doing so. Again, because the winner is a member of the DSB and thus can stop any effort to block the judgment, adoption of the judgment is effectively automatic.

The DSU created an appellate procedure. A standing appellate body consists of seven individuals who are nationals of different WTO members. They serve four year terms. Appellate panels usually consist of three of the members of the appellate body drawn at random. Thus, 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.

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171. Netherlands Measure of Suspension of Obligations to the United States, Nov. 8, 1952, GATT B.I.S.D. (1st Supp.) at 32 (1953).

172. Support for this section, Part III.D.1, can be found in PETERSMANN, *supra* note 170, at 89.

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, obtaining multilateral authorization for sanctions is effectively automatic.<sup>173</sup>

### 3. *Effectiveness of GATT and the WTO Compared*

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, while the WTO system is highly independent. States adopted the WTO system because they believed, among other things, that its adjudication system represented an improvement over GATT. Were they right?

Our first test of the relative effectiveness of GATT and the DSU is usage. A tribunal that is used often is more successful than a tribunal that is used rarely. 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 313 disputes under the WTO from 1995 through 2003. The GATT system, then, handled an average of 9.2 disputes per year; the WTO system has handled an average of 34.7 disputes per year.<sup>174</sup>

Although these raw figures strongly favor the WTO, a fair comparison of the two systems must control for various factors. The membership in GATT/WTO has increased rapidly over this time period, and presumably this led to an increase in the number of disputes. 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, Europe effectively withdrew from GATT while it consolidated its gains.<sup>175</sup> If we limit our comparison to, say, 1989 to 1994, GATT's usage statistics look better, with 21.2 complaints per year.<sup>176</sup> If we control for membership (GATT's mean membership from 1989 to 1994 was 105, while the WTO's was 132),<sup>177</sup> and look at

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173. For the details, see PETERSMANN, *supra* note 170, at 177-91.

174. Marc L. Busch & Eric Reinhardt, *The Evolution of GATT/WTO Dispute Settlement*, in TRADE POLICY RESEARCH 143, 151 (John M. Curtis & Dan Ciuriak eds., 2003). Note that Busch and Reinhardt 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 three-state disputes count as two disputes). The data analyzed in the article extend only through 2000, but Marc Busch has generously supplied us with data through 2003, and the figures are accordingly updated.

175. HUDEC, *supra* note 35, at 12-13.

176. 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.

177. World Trade Organization, Members and Observers, at [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) (last updated Apr. 23, 2004); World Trade Organization, The 128

complaints per state per year, we find 0.20 complaints per state per year for GATT, and 0.28 complaints per state per year for the WTO. Finally, if we control for state pairs,<sup>178</sup> we find 0.0039 complaints per state pair per year for GATT, and 0.0042 complaints per state pair per year for the WTO. The difference between these rates is not statistically significant.<sup>179</sup>

Disputes should arise more frequently as interaction increases so we should also control for subject matter and trade volume. In addition to producing the WTO, the Uruguay round greatly strengthened the international trade law relating to intellectual property and services. Thus, these topics were more likely to arise in legal disputes during the WTO era. And, even within the subject matter areas that remained constant, the increasing volume of world trade created new opportunities for clashes. Trade among GATT/WTO members increased by about 38% between 1991 and 1997.<sup>180</sup>

In a statistical study comparing usage rates of GATT and the WTO, Professor Eric Reinhardt found in a study of 704 dispute initiations from 1948 to 1998 that the probability that a developed state would initiate a dispute against another developed state was higher under the WTO than under pre-1989 GATT.<sup>181</sup> However, because the expansion of international trade law relating to services and intellectual property occurred at the same time, one would expect disputes to increase independent of the effects of the change in the adjudication system.<sup>182</sup> Insofar as the traditional users of the dispute settlement system—the developed countries—are concerned, Professor Reinhardt found no difference in the probability of a dispute under the two systems after controlling for membership, size of economy,<sup>183</sup>

countries that had signed GATT by 1994, at [http://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm) (last visited Aug. 28, 2004).

178. The formula is  $n! / [2 * (n - 2)!]$ . To understand why state pairs provide the appropriate baseline, compare possible interactions between two states (*W* and *X*), and four states (*W*, *X*, *Y*, and *Z*). Among two states, there is only one potential state conflict: between *W* and *X*. Among four states, there are six potential conflicts: *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 to membership. For GATT, there were 5460 state pairs. For the WTO, there were 8646.

179. The *t* statistic is -0.52 (*probability* >  $|t| = 0.61$ ). In contrast, the difference in means for cases per state per year is significant, at the 10% level. Thus, readers who think that cases per state-year is a more appropriate measure than cases per state-pair-year should conclude that the WTO system did increase usage—not counting the expansion of trade volume, as discussed subsequently. The data set consists of filings per year from 1989 through 2003.

180. Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Agreements*, 57 INT'L ORG. 829 (2003) (noting an increase from 6.5 to 9 trillion in 1995 dollars).

181. Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiations, 1948–1998*, at 19 (2000) (unpublished manuscript, on file with authors).

182. Reinhardt did find a substantial (more than threefold) increase in the probability of a dispute after the 1989 improvements. *See id.*

183. 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?*, Centre for Economic Policy Research Discussion Papers, <http://www.cepr.org/pubs/dps/DP2340.asp> (1999).



and similar factors, including possible bandwagon and feedback effects.<sup>184</sup> 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 forty-one cases. Of these cases, the defendant complied fully 73% of the time and complied either fully or partially 88% of the time. In sixty-eight GATT cases between 1980 and 1994, the defendant complied fully 54% of the time and complied either fully or partially 76% of the time.<sup>185</sup> The differences between the WTO statistics and the GATT statistics are not significant.<sup>186</sup>

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% of the time (ten of sixteen), while compliance under WTO occurred 33% of the time (two of six).<sup>187</sup>

Although these statistics suggest that the WTO system is no better, and may be worse, than the GATT system, 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 the judgment would cause the defendant to bring its behavior into compliance with trade law. As a result, a superior system could actually have lower compliance rates than an inferior system. Under the superior system, the easier cases settle, and only the harder and more politically sensitive cases make it to judgment.<sup>188</sup>

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184. Eric Reinhardt, *supra* note 181, at 17-21. *But see* Eric Reinhardt, To GATT or Not to GATT: Which Trade Disputes Does the US Litigate, 1975-1999? 1, 16 (2003), at <http://userwww.service.emory.edu/~erein/research/tg.pdf> (unpublished manuscript). Reinhardt finds that as judicialization increases, the United States becomes more likely to use GATT/WTO rather than the unilateral section 301 mechanism. Holding other variables at their mean, the United States is 24% more likely to use IL after 1989 (GATT), and an additional 23% more likely after 1995 (WTO). *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* 457 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

185. 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% of the time; partial compliance occurred 27% of the time; and noncompliance occurred 31% of the time. *See* Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 J. CONFLICT RESOL. 174, 177 (2001). For reasons given earlier, the 1980 to 1994 data provide a better basis for comparison.

186. We thank Eric Reinhardt for conducting this test for us on his data set. The chi-squared statistic is 3.9 (*probability* > *chi-squared* = 0.14).

187. Marc L. Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO* 465, 480-81 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003).

188. 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* (2003) (unpublished manuscript, on file with authors).

One way to minimize selection problems is to look further back in the dispute procedure—at settlement as well as compliance. Although two systems might have equal compliance rates, the better system should produce more settlements, and this effect should be reflected in greater rates of concession. Table 5 contains data for concessions granted in response to complaints. These concessions resulted from settlements as well as complied-with judgments.

Table 5: Concessions in the GATT and WTO Systems<sup>189</sup>

	None	Partial	Full	Total
GATT	85 (38%)	54 (24%)	87 (38%)	226
WTO	32 (21%)	20 (13%)	102 (66%)	154
Total	117 (31%)	74 (19%)	189 (50%)	380

The WTO seems superior to GATT. A greater portion of WTO cases result in full concessions, and a smaller portion result in no concessions.

As noted, however, at the same time that the DSU was created, the reach of laws governing trade in services and intellectual property expanded. When the scope of trade law grows, states might initially bring the easiest disputes—the low-hanging fruit—and these disputes are most likely to result in substantial concessions. The study from which Table 5 was compiled does not test this hypothesis, but a more limited study of disputes between the European Union and the United States did. In the latter study, the statistical significance of the correlation between the operation of the WTO and the rise in concession rates disappeared after controlling for cases involving services and intellectual property.<sup>190</sup> If these results hold up in more complete studies of more member states, it will be difficult to credit the enhanced levels of concessions to the DSU.

The concession data, then, do not show that either system is better than the other. However, one must worry again about selection effects. Busch and Reinhardt assume that settlements occur after a complaint is filed, so their data include only post-complaint settlements. But it is possible that an injured state and a violator will settle prior to the filing of a complaint. Suppose that a superior dispute resolution mechanism results in substantial trade concessions prior to the filing of a complaint because the threat of litigation is credible. Under such a system, only the most difficult and politically sensitive cases would proceed beyond the filing stage. An inferior system might be associated with a higher level of post-complaint

189. Compiled from Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 725 tbl.1 (2003). These data reflect 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).

190. Busch & Reinhardt, *supra* note 187, at 474-75.

concessions simply because the normal diplomatic bargaining—which sometimes results in concessions—continues after the complaint, unaffected by the parallel legal proceedings. Thus, the system with the higher post-complaint concession rate would not necessarily be the better system. This selection problem might seem unlikely, and Busch and Reinhardt test for several sources of selection bias and find them insignificant, but the possibility cannot be dismissed.<sup>191</sup>

A final, potential solution is to consider overall trade flows starting prior to the dispute. The theory 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 conducted a test using this proxy on a set of disputes involving allegations of excessive import protection from 1973 to 1998.<sup>192</sup> The dependent variable is the logarithmic growth rate of the defendant's imports from plaintiff in the disputed sector from one year before to three years after the dispute. Bown found no evidence that the WTO adjudication procedures were more effective than the GATT procedures. His main finding was 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 likelihood that states will obey trade law. Accounting for the increase in world trade and changes in substantive law makes the WTO usage statistics look meager, and the case for GATT's superiority becomes stronger.

There are many possible explanations for the lack of progress from GATT to the WTO, and we do not have the space to discuss and evaluate them.<sup>193</sup> Instead, we would like to suggest one possible new hypothesis: the WTO's court-like dispute settlement system does not necessarily improve behavior under international trade law and may make it worse.

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191. Busch and Reinhardt argue that this is unlikely. *Id.* at 478-82.

192. Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 *REV. ECON. STAT.* 811 (2004).

193. See Busch & Reinhardt, *supra* note 187, at 482-83; see also Busch & Reinhardt, *supra* note 174; Karen J. Alter, *Resolving or Exacerbating Disputes: The WTO's New Dispute Resolution System*, 79 *INT'L AFF.* 783 (2003) (blaming the WTO's legalistic dispute resolution system for increasing conflict in international trade).

*E. Comparison of Tribunals*

In this section, we try to compare the tribunals more directly. We aim to show that independence and effectiveness are uncorrelated (our weak thesis) or negatively correlated (our strong thesis). 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 6 summarizes this information and provides 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 purposes of comparison.

Table 6: Independence of Tribunals<sup>194</sup>

Court	Start	End	Juris.	Compul. Juris.	No Right to Nationals	Permanent Body of Judges	Term of Judges	3d Party Interv.	Indep. Score **
Arbitration	1792*	1799*	specific dispute	no	no	no	ad hoc	no	0
PCA	1899	N/A	general	no	no	no	ad hoc	no	0
PCIJ	1919	1945	general	yes	no	yes	9	no	3
ICJ-comp	1946	N/A	general	yes	no	yes	9	yes	4
ICJ-other	1946	N/A	specific dispute or treaty	no	no	yes	9	no	2
GATT	1947	1995	trade	no	no	no	ad hoc	no	0
ECJ	1952	N/A	general	yes	no	yes	6	yes	4
ECHR	1959	N/A	human rights	yes	no	yes	6	yes	4
IACHR	1979	N/A	human rights	yes	no	yes	6	no	3
WTO (app)	1995	N/A	trade	yes	yes	yes	4	yes	5
ITLOS	1996		maritime	yes	no	yes	9	yes	4
ICC	not yet		int'l crimes	yes	no	yes	9	yes	4

\*This sample is from STUYT, *supra* note 65. Ad hoc arbitration has existed since ancient times and continues to the present day.

\*\* One point is assigned to each tribunal for each of the following attributes: 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 score is five points.

194. The information in this table is compiled from SANDS, *supra* note 156; the Project on International Courts and Tribunals website (<http://www.pict-pecti.org/>); and, where necessary, updated from the tribunals' websites.

Next we turn to effectiveness. Table 7 contains information about usage and compliance for all of the tribunals.

Table 7: Usage and Compliance Rates<sup>195</sup>

Court	Years of Operation	Cases Filed	Subject States	Cases / Year	Cases/ State-Years ***	Compliance Reputation	Full Compliance Rate
Arbitration	—	—	—	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	9	313**	146	34.7	0.28	mixed	66%**
ITLOS	9	10	145	1.11	0.008	—	—
ICC	1	0	92	—	—	—	—

\* As of 1994.

\*\* Through 2000.

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

195. Sources are as follows: For arbitration, see STUYT, *supra* note 65. For PCA and PCIJ, see Butler, *supra* note 31. For ICJ, see Ginsburg & McAdams, *supra* note 48. For GATT and the WTO, see Busch & Reinhardt, *supra* note 184. For ECJ, see Stacy Nyikos, *The European Court of Justice and National Courts: Strategic Interaction Within the EU Judicial Process*, at <http://law.wustl.edu/igls/Conconfpapers/Nyikos.pdf> (last visited Aug. 28, 2004). For ECHR, see our discussion in Part IV.B. For ITLOS, see <http://www.itlos.org> (last visited Aug. 28, 2004). For ICC, see <http://www.icc-cpi.int/php/show.php?id=home&l=EN> (last visited Aug. 30, 2004). For ICJ and PCIJ we exclude advisory cases; unless otherwise indicated, data are as of 2003 or (for subject states) the end of period of operation. ECHR data is omitted because of the importance of the 1998 changes. Ad hoc arbitration data are for 1880 to 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 8: Relationship Between Independence and Effectiveness

		Independence		
		Low (0-1)	Medium (2-3)	High (4-5)
Effectiveness based on compliance and usage	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 well. The WTO, then, is the best evidence for the view that independence and effectiveness are 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>196</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 between independence and effectiveness is negative—is supported by arbitration and GATT (dependent, effective tribunals); by the ICJ's compulsory jurisdiction (independent, ineffective); by the absence of a real example of a dependent, ineffective tribunal; and by 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 the decreasing effectiveness of the trade tribunal from GATT to the WTO and the evidence of superior performance of the ICJ when its jurisdiction is consensual rather than compulsory.

#### IV

##### EUROPE AND INTEGRATION

European courts pose a challenge to our account of international tribunals. The widespread belief that the ECJ and the ECHR are both

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196. The data on GATT in Table 7 are for the entire period of its existence. As we discussed earlier, GATT's last five or ten years provide a better comparison. See *supra* text accompanying notes 175-79.

independent and effective lies behind the conventional wisdom that independence is the key to success. In this Part, we argue that the European courts are more like domestic courts than international courts. Independent courts can be effective if they exist within a political community. Europe has such a community<sup>197</sup>; 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 United States, 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 who 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 United States) 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

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197. One must keep in mind, of course, that the ECJ and the ECHR encompass different sets of nations, with only the former being part of the European Union.



is surely that courts are reasonably reliable and rule based on the law rather than their own preferences. 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.<sup>198</sup>

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, through unilateral action by a powerful state.

We argue that independent tribunals can be effective only in an institutional setting where external agents such as executive and legislative branches of government enforce their judgments and correct their errors. This setting exists in many states, but it is rarely found in international affairs. There is, however, an important middle case: when a group of states forms a union or confederation.

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 1789. A confederation or union can be distinguished from the international realm. In the former, individuals, elites, or interest groups within the union feel loyalty to their counterparts in other nations in a way that transcends their national loyalties. When a confederation has such a political community, it can often legislate new rules and execute judgments. Only then can a relatively independent judiciary be effective.

The members of the European Union have developed their own law—European Community law—to govern their relationships.<sup>199</sup> Most legislation is proposed by the European Commission (consisting of delegates from each member of the European Union) and adopted by the Council of the European Union (consisting of ministers from each member of the

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198. See JESSE CHOPER ET AL., *CONSTITUTIONAL LAW* 47-48 (9th ed. 2001) (collecting sources).

199. 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* (2d ed. 2002).

European Union, the composition of which varies by issue) and an increasingly influential European Parliament (consisting of representatives that are directly elected by the European Union's citizens).<sup>200</sup> Depending on the topic, the voting system operates on unanimity or majority rule. A large bureaucracy, the European Commission, 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 EU is most like other interstate institutions in that it lacks enforcement through an executive agency. In the following sections we analyze the effectiveness of European tribunals against this backdrop.

## B. *European Tribunals*

### 1. *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>201</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>202</sup> into the European Union.<sup>203</sup> The ECJ settles 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. The ECJ also functions to ensure the uniform interpretation of European law, and national courts may refer questions of European law to it.<sup>204</sup> Substantive European 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. The ECJ is a

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200. 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), at [http://europe.eu.int/comm/publications/booklets/index\\_en.htm](http://europe.eu.int/comm/publications/booklets/index_en.htm) (June 2003).

201. A number of books are dedicated to the organization and functioning of the European Court of Justice. See, in particular, *EUROPEAN COURTS PROCEDURE* (Richard Plender ed., 2d ed. 2001); ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (1999); *THE EUROPEAN COURT OF JUSTICE* (Gráinne de Burca & J.H.H. Weiler eds., 2001).

202. See Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140, available at <http://europa.eu.int/abc/obj/treaties/en/entoc29.htm>; Treaty Establishing the European Economic Community (EEC), Mar. 25, 1957, 298 U.N.T.S. 11, available at <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>.

203. 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 is 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.

204. See ARNULL, *supra* note 201, at 21-69.

permanent court that hears disputes concerning the interpretation and application of the European Community treaties and secondary laws created under their authority.<sup>205</sup>

Fifteen judges compose the ECJ,<sup>206</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 a case.<sup>207</sup>

The jurisdiction of the ECJ mainly covers three types of cases:<sup>208</sup> claims brought against member states by the Community for violations of EC law,<sup>209</sup> claims brought against Community institutions,<sup>210</sup> and referrals from member states' domestic courts concerning questions of EC law. 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>211</sup> Cases under the second fount of jurisdiction can be brought by member states, other EC institutions, or individuals that have a direct and particular interest in the outcome.<sup>212</sup> 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 the national court decides 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>213</sup> Member states and the Commission may intervene in all cases, and, with some exceptions, private parties may intervene in cases involving other private parties.<sup>214</sup> The member states have an obligation to ensure that

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205. For useful discussions of the role of the ECJ, see ARNULL, *supra* note 201 and THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter et al. eds., 1998).

206. The court is assisted by eight advocates general. Their role is to present reasoned opinions on the cases brought before the court. Treaty Establishing the European Community, Feb. 7, 1992, art. 222, O.J. (C 224) 1 (1992) [hereinafter TEEC].

207. L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 19-21 (5th ed. 2000).

208. It also hears cases by EC staff, interstate disputes brought by special agreement as provided for by one of the EC treaties, and contract disputes with the Community, among others.

209. Proceedings for failure to fulfill an obligation under TEEC, *supra* note 206, at arts. 226, 227.

210. Proceedings for annulment of acts adopted by Community institutions under TEEC, *supra* note 206, at art. 230, and proceedings for Community institutions' failure to act under various provisions of the different Community treaties. The latter proceedings are now usually dealt with by the Court of First Instance.

211. See BROWN & KENNEDY, *supra* note 207, at 115.

212. See *supra* note 210.

213. For details on this issue, see ARNULL, *supra* note 201, at 51-60.

214. In 1989, the Communities created a Court of First Instance (CFI), composed also of fifteen judges, one 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 staff, coal and steel, competition, and certain trademark areas. 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

ECJ judgments are enforced within their domestic legal systems.<sup>215</sup> Each member state must designate a national authority whose function is to enforce ECJ judgments. These characteristics—compulsory jurisdiction, judges with fixed terms, and a continuing body—make the ECJ 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.<sup>216</sup> 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, with the next largest class being direct actions.<sup>217</sup> Direct actions refer to suits before the ECJ challenging a national measure as a violation of the European Union treaties. While the number of preliminary ruling cases has remained fairly constant, the number of direct actions has steadily risen from 136 in 1998 to 215 in 2002.<sup>218</sup>

Compliance by EU member states with ECJ decisions appears to be significant. One study found that noncompliance with ECJ decisions by national judiciaries from 1961 to 1995 occurred in only 0.6% of cases, and efforts to evade compliance by referring the question again or by reinterpreting the ECJ decision occurred in only 2.9% of cases.<sup>219</sup> In 40.9% of the cases, the litigants voluntarily agreed to forgo further proceedings at their national courts and immediately implemented the ECJ decision.<sup>220</sup>

Although the compliance rates seem significant at first blush, there is reason for doubt.<sup>221</sup> Some countries commonly conceal evasion with ECJ decisions or plead problems with implementation.<sup>222</sup> At the end of the first decade of integration under the treaty establishing the European Economic Community (EEC),<sup>223</sup> the ECJ heard a series of cases challenging existing trade quotas on agricultural products among member states. After a

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the CFI. The ECJ sits as an appellate body over cases first heard in the CFI. See CURIA, The Court of First Instance, [http://www.curia.eu.int/en/instit/presentationfr/index\\_tpi.htm](http://www.curia.eu.int/en/instit/presentationfr/index_tpi.htm) (last visited Aug. 28, 2004).

215. 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 & THE ENFORCEMENT OF THE INTERNAL MARKET 77 (1999).

216. See THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, 2002 ANNUAL REPORT, STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE COURT OF JUSTICE, at <http://www.curia.eu.int/en/instit/presentationfr/rapport/stat/st02cr.pdf> (last visited Aug. 28, 2004).

217. *Id.*

218. *See id.*

219. Nyikos, *supra* note 195, at 29.

220. *Id.*

221. *See, e.g.*, HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE (1998).

222. Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT’L ORG. 171, 177 (1995).

223. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by the TEEC, *supra* note 206.

transition period ending in 1969, the quotas were to be abolished and replaced with EU-wide marketing organizations.<sup>224</sup> Empirical data, however, on noncompliance is difficult to assemble. There is some anecdotal evidence and commentary that suggest that noncompliance may be more widespread than the numbers suggest. In one case, France appears to have defied an ECJ decision requiring elimination of an import quota on bananas; in another, France announced before the ECJ ruled against it that it would refuse to comply with a decision requiring it to eliminate a quota on mutton.<sup>225</sup> States have sought means of resistance other than outright defiance, such as supporting other governments that defy ECJ rulings or seeking collective efforts to constrain the ECJ either through secondary EC legislation or even proposals to change the basic EC treaties.<sup>226</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 deepening of the European internal market in the 1990s.<sup>227</sup>

According to figures supplied by the European Commission,<sup>228</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—thirty times by the early 1980s and more than eighty times by the late 1980s. In regard to member state implementation of the European Union's internal market measures, the Commission in 1989 reported 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>229</sup>

Although international law scholars commonly say that the ECJ has an almost perfect rate of compliance, noncompliance is not, in fact, that rare.

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224. For a brief history of the Internal Market initiatives see JONAS TALLBERG, *EUROPEAN GOVERNANCE AND SUPRANATIONAL INSTITUTIONS* 108-34 (2003).

225. Case 48/74, *Charmasson v. Minister for Economic Affairs and Finance*, [1974] E.C.R. 1383 (banana case); Case 232/78, *Commission v. French Republic*, [1979] E.C.R. 2729 (mutton case).

226. Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 *INT'L ORG.* 149 (1998).

227. TALLBERG, *supra* note 224 at 34.

228. First Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law, COM(84)181 final at 27-30.

229. European Commission, Communication from the Commission on Implementation of the Legal Acts Required to Build the Single Market, *in id.* at 52-53.

To date, no comprehensive empirical examination of compliance with ECJ decisions has been carried out.<sup>230</sup>

Despite anecdotal evidence of noncompliance, 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 because of the strong bonds among EU members, the ECJ is not truly an "international court" for purposes of comparison with the ICJ, arbitral tribunals, and other courts. The value of tribunal independence in Europe does not carry over to other international tribunals, and the relative effectiveness of the ECJ does not disprove our thesis.

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 member states. 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>231</sup> Further, the close integration of the ECJ with the member states' national judiciaries—questions of EC law are referred by the domestic courts to the ECJ, and ECJ decisions are often directly implemented by domestic courts<sup>232</sup>—more closely resembles the relationship between local and national courts in a federal system than international dispute resolution. The "greater bulk of the court's case load is generated by preliminary references from national judges responding to claims made by private actors."<sup>233</sup> Indeed, most of the member states accept the supremacy of EC law, as articulated by the ECJ's decisions, to national law; this reflects the close interrelationship between national and EC law.<sup>234</sup> However, the level of compliance differs throughout the

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230. There are two primary sources for ECJ compliance data. The first is the Commission's Annual Reports on Monitoring 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) (last updated Aug. 25, 2004). The second source of data is provided by the European University Institute's Robert Schuman Centre for Advanced Studies. These compliance data are available at <http://www.iue.it/RSCAS/Research/Tools/ComplianceDB/> (last updated Apr. 14, 2004). The European Commission's annual report lists 105 judgments of the Court of Justice that have not been implemented. Of these judgments, fifty-three were issued within a year prior to the Annual Report. Of the other fifty-two judgments, twenty-four were from 2000, while the other twenty-eight were from years dating back to 1991. While France, Greece, and Italy account for about one-half of the noncompliance, 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.

231. See BROWN & KENNEDY, *supra* note 207, at 115.

232. DAVID W.K. ANDERSEN & MARIE DEMETRIOU, *REFERENCES TO THE EUROPEAN COURT* (2d ed. 2002).

233. Alec 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).

234. Paul Craig, *The ECJ, National Courts and the Supremacy of Community Law* (2002), at <http://www.ecln.net/rome2002/craig.pdf> (last visited Aug. 28, 2004).

European Union due to the different constitutional traditions of the member states.<sup>235</sup>

The distinctive character of the ECJ has led several observers to characterize it as a “constitutional court” for the European Communities, with the supreme law being the various EC treaties.<sup>236</sup> These scholars view the ECJ’s primary function as promoting a consistent interpretation and application of EC law throughout Europe. This has arisen 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>237</sup> Indeed, although the French government, for example, was willing to ignore ECJ judgments against it, it is not willing to ignore its own domestic courts, which can 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>238</sup> If the ECJ promoted integration, it was with the acquiescence of the European governments.

Thus, while we acknowledge that the ECJ provides the best foil for our thesis and supports the competing hypothesis that tribunal independence increases effectiveness, we argue that the latter view does not take account of the special circumstances of Europe. The institutional setting in which the ECJ operates more closely resembles that of a domestic court than that of a traditional international court. Moreover, in an integrated “state” or union, unity comes from the 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>239</sup>

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235. DEREK BEACH, *BETWEEN LAW AND POLITICS: THE RELATIONSHIP BETWEEN THE EUROPEAN COURT OF JUSTICE AND EU MEMBER STATES* (2001).

236. Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 *COMP. POL. STUD.* 397 (1994).

237. See Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE* 227, 227-28 (Anne-Marie Slaughter et al. eds., 1998).

238. KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* 217-21 (2001).

239. 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 Geoffrey Garrett, *International Cooperation & Institutional Choice: the European Community’s Internal Market*, 46 *INT’L ORG.* 533 (1992); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in *IDEAS AND FOREIGN POLICY* 173 (Judith Goldstein & Robert O. 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.

## 2. *European Court of Human Rights*

The European Convention on Human Rights, which was created by the member states of the Council of Europe, established the ECHR in 1953.<sup>240</sup> The ECHR monitors compliance by member states with the Convention's substantive terms. The Convention protects individual rights, such as the right to life, the prohibition on torture, and the 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.<sup>241</sup> Initially, the ECHR filtered cases, deciding whether to attempt mediation or to refer the case to the Commission 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 became the only institution to hear complaints under the Convention.<sup>242</sup>

The ECHR comprises judges equal in number to the member states to the Convention, which currently is forty-four.<sup>243</sup> The judges serve for renewable six-year terms. Each state party may nominate three candidates, who may or may not be nationals, and they are elected by the Parliamentary Assembly of the Council of Europe.<sup>244</sup> There is neither a guarantee that every member state will have a national on the Court nor a

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Other scholars argue that EC institutions have a more active role. See Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998); Martin Shapiro, *The European Court of Justice*, in EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE NEW EUROPEAN COMMUNITY 123 (Alberta M. Sbragia ed., 1992); J.H.H. 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 ALTER, *supra* note 237, at 41-43.

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).

240. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221 (modified Nov. 1, 1998) [hereinafter European Convention]. For secondary literature on the Convention, see, in particular, P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 1998); FRANCIS JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 2002); J.G. MERRILLS & A.H. ROBERTSON, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (4th ed. 2001).

241. See generally European Convention, *supra* note 240.

242. 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 240, at 297-325.

243. European Convention, *supra* note 240, at art. 20.

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



restriction on the number of judges of each nationality. Nonetheless, it appears that each member state has one representative on the Court.<sup>245</sup>

The jurisdiction of the Court is broad. After domestic remedies have been exhausted, any state party, individual, group, or NGO may bring a suit claiming a human rights violation against one of the member states.<sup>246</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 for all complaints.<sup>247</sup> In sum, the ECHR, like the ECJ, is relatively independent.

Usage of the ECHR has increased steadily in response to the expansions in jurisdiction created through amendments to the Convention. The annual number of applications had increased from 404 in 1980 to 4750 in 1997.<sup>248</sup> The number of cases submitted to the Court itself rose from 7 in 1981 to 119 in 1997.<sup>249</sup> In the three years following the 1998 changes, the number of applications rose from 5979 to 13,858.<sup>250</sup> In 2002, the Court received 28,255 applications and delivered 844 judgments.<sup>251</sup> Almost all of this activity involves cases brought by individuals against their own state, not state-to-state disputes.<sup>252</sup> These usage statistics cannot be compared to those for other international tribunals, which generally do not permit individuals to bring cases.

The Convention does not require member states to follow any specific process for bringing their laws or actions into compliance with ECHR decisions.<sup>253</sup> States have responded to ECHR judgments in several different ways, including administrative rulemaking, implementation by national judiciaries, enactment of conforming legislation, and even changes to domestic constitutions.<sup>254</sup> The great majority of state responses, close to 80%, involve legislative enactments, and legislative and administrative responses

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245. JACOBS & WHITE, *supra* note 240, at 396-400. Currently, the seats of judges in respect of Latvia and Lithuania are vacant.

246. European Convention, *supra* note 240, at arts. 34, 35(1).

247. *Id.* at art. 34. Formerly, individual applications had to be accepted separately under Article 25 of the original Convention.

248. Registrar of the European Court of Human Rights, Survey of Activities 2002, at <http://www.echr.coe.int/Eng/Edocs/2002SURVEY.pdf> (last visited Aug. 28, 2004).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Swedish Engine Drivers' Union v. Sweden, 1 Eur. H.R. Rep. 617, 618 (1976).

254. Case studies describing the various means of implementing ECHR decisions include DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1997). Implementation is also discussed in J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 12 (2d ed. 1993) and VAN DIJK & VAN HOOF, *supra* note 240.

together amount to 91% of the state responses.<sup>255</sup> The ECHR has no method of enforcement in cases where a state party to a case refuses to comply.<sup>256</sup>

Although some commentators suggest that the ECHR enjoys high levels of compliance,<sup>257</sup> we cannot find good data to corroborate these assertions.<sup>258</sup> By the middle of 1999, the Court had addressed more than 1000 petitions, nearly all of them initiated by private parties.<sup>259</sup> More than 670 were adjudicated on the merits, with more than 460 resulting in a finding of a violation of the Convention.<sup>260</sup> The Court claims that member states have consistently paid damages when ordered to do so, but it also reports only 294 cases in which states have altered their domestic laws to comply with an ECHR decision.<sup>261</sup> If each decision on the merits required a change in domestic law, these figures imply a compliance rate of roughly 64%. This estimation is highly imprecise; 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 so-called Article 41 action, which permits plaintiffs who do not receive full compensation from the losing member state to seek additional redress.<sup>262</sup> According to one study covering the years 1960 through 1995, Article 41 claims occurred in 48 out of 292 cases (16.4%) in which the ECHR found a

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255. Christopher Zorn & Steven R. Van Winkle, *Government Responses to the European Courts of Human Rights* 10 (2001), at [http://www.polisci.emory.edu/zorn/papers/zorn\\_istanbul.pdf](http://www.polisci.emory.edu/zorn/papers/zorn_istanbul.pdf) (last visited Aug. 18, 2004).

256. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 25 (1978).

257. 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 HUM. RTS. L.J. 81, 82-83 (1994) (citing examples of compliance); Jörg Polaciewicz & 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 HUM. RTS. L.J. 65 (1991) (same); Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L REL. 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* (2000), available at <http://www.polisci.emory.edu/zorn/papers/zvwpsa.pdf> (last visited Aug. 28, 2004). 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 states' choices among responses to a finding of noncompliance—administrative, legislative, judicial, or constitutional—but not whether the response was adequate rather than merely formal.

258. 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).

259. ECHR Survey of Activities 2003, at 34, available at <http://www.echr.coe.int/eng/edocs/2003surveycourt.pdf> (last visited Aug. 28, 2004).

260. *Id.*

261. *Effects of Judgments or Cases, 1959-1998*, at <http://www.echr.coe.int/eng/edocs/effectsofjudgments.html> (last visited Aug. 28, 2004).

262. European Convention, *supra* note 240, at art. 41.

violation of the Convention.<sup>263</sup> The percentage of cases that generated Article 41 claims was initially quite high: in 1970, more than 50% of all judgments finding a violation were followed by Article 41 claims, and that number hovered around 50% until the early 1980s.<sup>264</sup> That number dropped below 24% by 1995.<sup>265</sup> But, in the interim, a procedural change combined Article 41 claims into the actual merits decision,<sup>266</sup> so it is difficult to determine contemporary levels of compliance.

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

### C. Summary

We know that independent tribunals—tribunals that do not depend on the goodwill 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 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 conflicts that arise within a state-like union or confederation. We believe that the relationship between states within the European Union is 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>267</sup> The conclusion of Andrew Moravcsik, although only

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263. See Zorn & Van Winkle, *supra* note 255, at 5.

264. *Id.*

265. *Id.*

266. *Id.*

267. Garrett & Weingast, *supra* note 239, at 178-87, 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

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>268</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: the International Criminal Court (ICC) and the International Tribunal on the Law of the Sea (ITLOS). Designers of these tribunals seem to have taken the opinions of international legal scholars to heart and have sought to provide them with a high degree of institutional independence. The aim is to increase the courts’ legitimacy and ultimately their ability to achieve compliance. As indicated in Part III, we believe that these efforts to guarantee independence through permanent judges and compulsory jurisdiction will lead to low rates of usage and compliance.

#### A. *International Criminal Court*

The ICC was created by the Rome Statute, which was opened for signature in 1998 and entered into force on July 1, 2002, when the required sixty states had ratified.<sup>269</sup> Under the treaty, the ICC has jurisdiction over war crimes, crimes against humanity, and genocide. After further negotiations are completed, it will have jurisdiction over aggression.<sup>270</sup> The ICC could hear cases, for example, on 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. Prior to the establishment of the ICC, enforcement of the laws of war depended primarily on domestic legal systems, and states generally have been reluctant to punish their leaders or former leaders for war crimes.<sup>271</sup>

Rather than resolving disputes between states, the Court adjudicates prosecutions of individual defendants. The prosecutions are brought by a

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incentive to please their masters. As we would put it, the judges are sufficiently dependent on the goodwill 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.

268. Moravcsik, *supra* note 257, at 178 (emphasis omitted).

269. See Rome Statute, *supra* note 42. A useful reference work is WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001).

270. Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L. L. 124, 125 (2001).

271. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 160, 168 (2d ed. 2001).

special international prosecutor, who can pursue crimes (1) committed by a national of a state party or (2) committed by the national of a non-state party that occur on the territory of a state party.<sup>272</sup> 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>273</sup> If, however, the prosecutor can show that the state has conducted its investigation or prosecution in bad faith, he or she can bring the case to the ICC.

The Court is composed of eighteen permanent judges that are elected by an assembly of the state parties for nonrenewable terms of six or nine years or renewable terms of three years.<sup>274</sup> All judges must be nationals of the state parties.<sup>275</sup> The prosecutor is selected by the state parties for a non-renewable, nine-year term.<sup>276</sup> The state parties have no control over what investigations the prosecutor undertakes, what prosecutions he or she brings, or how trials are conducted. The prosecutor’s decisions on these matters are, however, subject to review by the Court itself.<sup>277</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<sup>278</sup> and Rwanda,<sup>279</sup> 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 international criminal justice by allowing them to exempt themselves and their allies from the jurisdiction of a new court.<sup>280</sup> While the Security Council may refer cases to the ICC prosecutor and may delay prosecutions for renewable twelve-month terms, it may not actually prevent an ICC case from going forward.<sup>281</sup>

Despite the trappings of autonomy, the ICC, like all other international tribunals, relies on the goodwill of states. The ICC prosecutor has no independent authority to conduct investigations, gather evidence, interview witnesses, or arrest suspects on the territory of state parties. Instead, the prosecutor must ask state parties to perform these functions on its

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272. Rome Statute, *supra* note 42, at art. 12(2).

273. *Id.* at art. 17(1)(a).

274. *Id.* at art. 36.

275. *Id.* at art. 36(4)(b).

276. *Id.* at art. 42.

277. *Id.* at arts. 15(4), 110(2) (Rules of Procedure and Evidence).

278. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993).

279. S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994).

280. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 90 (2003).

281. Rome Statute, *supra* note 42, at art. 16 (permitting deferral of investigation or prosecution).

behalf.<sup>282</sup> In addition, the prosecutor must request that state parties surrender individual defendants for transfer to the seat of the Court.<sup>283</sup> The efforts by the International Criminal Tribunal for the former Yugoslavia (ICTY) to gain jurisdiction over Slobodan Milosevic illustrate the difficulties on this point. It was not the ICTY's demands that led to his apprehension and transfer but rather the United States' military and diplomatic pressure on Serbia, including a threat to withhold a half-billion dollars of aid from the International Monetary Fund and the United States.<sup>284</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 argue that the ICC prosecutor's institutional weakness could undermine the Court.<sup>285</sup>

We predict that the ICC will not be an effective tribunal. 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 about 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 Professor Madeline Morris has observed, "[i]n 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>286</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 will, at a minimum, be inconvenienced and embarrassed. Indeed, 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>287</sup> Because of these concerns, the United States not only has withdrawn its signature from the Rome Statute but also has launched an aggressive diplomatic campaign to protect American soldiers and civilians from its reach.<sup>288</sup>

The withdrawal of the United States, a blow to the ICC, can be traced directly to the independence of the court; the lack of an American veto that

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282. See Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1648-49 (2003).

283. Rome Statute, *supra* note 42, at art. 89.

284. Goldsmith, *supra* note 280, at 93.

285. See Danner, *supra* note 282, at 1648-49; Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415 (2000).

286. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 21 (2001) (internal quotations omitted).

287. See Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 194 (2001).

288. See Human Rights Watch, *Bilateral Immunity Agreements* (2003), available at <http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf> (last visited Aug. 28, 2004).

could be used to block prosecution of Americans or the nationals of allies was decisive.<sup>289</sup> As the nation that has taken the lead in conducting peace-keeping and humanitarian missions throughout the world, 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>290</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 their commitments.<sup>291</sup>

As time passes and more states put pressure on other states to violate their ICC obligations under the ICC, we predict that the only remaining state parties will be states that do not conduct significant military activities on foreign territory. We also predict 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 the future be performed by the ICC. But this simply means that, with its wings clipped, the ICC will become just another dependent international tribunal.

### B. *International Tribunal for the Law of the Sea*

The ITLOS was created by the United Nations Convention on the Law of the Sea (UNCLOS), which concluded in 1982, and went into force in November 1994.<sup>292</sup> The ITLOS first sat in 1996. UNCLOS, which currently has 143 parties, created two related international regimes: one governs the development of the resources of the international seabed through an organization, the International Seaboard Authority; and the second deals with the traditional uses of the sea, such as navigation rights and rights in territorial seas.<sup>293</sup>

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289. Leigh, *supra* note 270, at 126-29.

290. Human Rights Watch, Rome State Ratifications (May 3, 2004), at <http://www.hrw.org/campaigns/icc/ratifications.htm>.

291. Human Rights Watch, Bilateral Immunity Agreements, *supra* note 288.

292. See U.N. Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS]. For background, see generally GUDMUNDUR EIRIKSSON, *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* (2000).

293. See generally UNCLOS, *supra* note 292.

The ITLOS is a permanent court with jurisdiction over all questions arising under the UNCLOS. The Tribunal consists of twenty-one independent members, who are elected for renewable nine-year terms by the state parties to the Convention.<sup>294</sup> Judges are to represent the world's different legal systems and geographic regions. If a state party to a dispute does not have a judge of its nationality on the tribunal, it may—as with the ICJ—appoint an ad hoc judge for that case.<sup>295</sup>

Under Article 287 of the UNCLOS, nations must file a declaration that commits them to a mechanism for resolution of disputes regarding the laws of the sea. They can choose from four options: the ITLOS, the ICJ, arbitration, or resort to a special arbitration panel.<sup>296</sup> If every party to a dispute has chosen the ITLOS as its forum, then the group has effectively opted for compulsory jurisdiction, and any one of the parties may send the dispute to the Tribunal.<sup>297</sup> State parties may also reach an ad hoc agreement to submit a particular dispute ex post, or class of disputes ex ante, to the ITLOS.<sup>298</sup> State parties with a legal interest in a dispute between two other parties may move to intervene in the adjudication.<sup>299</sup>

Articles 297 and 298 permit nations to make exceptions to their declarations accepting the jurisdiction of the Tribunal. The exceptions 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.<sup>300</sup>

There has been little activity during the Court's seven years of operation. There is only a single active case pending on the ITLOS docket.<sup>301</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

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294. Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 3 & 5), [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last modified July 1, 2004) [hereinafter ITLOS].

295. *Id.*

296. UNCLOS, *supra* note 292, at art. 287. Special arbitration refers to arbitration over specified types of disputes. *Id.* at annex VIII.

297. *Id.* at art. 287(4).

298. *Id.* at art. 288(2).

299. ITLOS, *supra* note 294, at art. 31.

300. UNCLOS, *supra* note 292, at art. 187.

301. Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community), Case No. 7, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Nov. 24, 2004).



Tribunal's compulsory jurisdiction.<sup>302</sup> Although the ITLOS has existed 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—one would expect to see a higher usage rate. We do not yet have compliance rates for the ITLOS.

Early indicators suggest that the ITLOS will not be an effective international tribunal. Our explanation should by now be familiar. Because of the independence of the tribunal, states have little influence over how it resolves disputes. They cannot expect outcomes that are satisfactory to both parties, and 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 as Professor Thomas Franck, claim that adjudication by authentic international courts contributes to the legitimacy of international law, without which international cooperation is difficult or impossible to achieve.<sup>303</sup> Helfer and Slaughter argue that international tribunals are effective when they decide cases based “on principle rather than power.”<sup>304</sup> These scholars are just a few members of an academic consensus that holds that independence enhances the effectiveness of international tribunals and spreads the rule of law in international affairs.

We believe that this reasoning is based on inadequate evidence. We have found no evidence that independent tribunals are more effective than dependent tribunals, and some evidence that the reverse is 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 the 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 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. But they must act consistently with the interests of the states that create them.

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302. These cases are listed on the ITLOS website, <http://www.itlos.org> (last modified July 1, 2004). Although the website lists twelve numbered cases, two of them appear to involve the same parties and subject matters as two others.

303. See FRANCK, *supra* note 15, at 29-33.

304. Helfer & Slaughter, *supra* note 13, at 314.

Our arguments also explain why international adjudication is fragmented rather than unified like a domestic legal system. 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, states can pressure them or stop using them without bringing down the whole system and affecting adjudications in other areas of international relations. This would be impossible if a single international supreme court controlled the entire international legal system.

Why has the conventional wisdom gone astray? A possible answer is that international law 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 helped bring about national unity by asserting its supremacy in *Marbury v. Madison*.<sup>305</sup> Although this story has been criticized, it retains power over the legal mind, which aspires to solve political conflicts as much possible through the rule of law.<sup>306</sup> International law scholars seized on this analogy and claimed to find a similar process occurring in Europe through the ECJ.<sup>307</sup> The final step has been to argue that international courts can perform the same function for the whole world.<sup>308</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 at the international level. Likewise, Europe's experience with the ECJ cannot be replicated in a world that lacks the European Union's institutions and the shared ambitions of its members.

Much depends on this debate. Taking independence as the causal variable, Helfer and Slaughter reason that ineffective international institutions such as the U.N. 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>309</sup> By contrast, we argue that granting international tribunals independence before political unification has been achieved is likely to 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

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305. 5 U.S. (1 Cranch) 137.

306. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). But see Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

307. See G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989); see also ALTER, *supra* note 238, at 19.

308. A recent example of this view is Martinez, *supra* note 21, at 436-45.

309. Helfer & Slaughter, *supra* note 13, at 388-89.

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, and the steps being taken by states to avoid or weaken their jurisdiction supports our claim. 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.