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International Judicial Lawmaking

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# International Judicial Lawmaking

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## **Abstract**

Judges at the international level make law in the course of resolving disputes. The scope of this lawmaking power depends on the ability of states to constrain judicial actors. While formal mechanisms to over-rule international judges are relatively difficult to exercise, states have at their disposal various informal mechanisms to communicate their views to judges. This paper utilizes a framework of exit, voice and loyalty to consider these powers, as well as the features conducive to international judicial lawmaking.

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Judges at the international level, like judges in national legal systems, frequently make law in the course of resolving disputes. Yet to date we have little positive theory about the extent or power of this lawmaking at the international level. This paper provides a first attempt. It argues that international judges play an important role in generating law in the course of dispute resolution. This role, however, is and should be constrained by the interests of states.

Despite the oft-discussed proliferation of international judicial fora in the past decade,<sup>1</sup> there has been little sustained scholarly examination of lawmaking. Most

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<sup>1</sup> See *Symposium, The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999) and Cesare P. Romano, *The Proliferation of International*

scholarly attention has been devoted to the internal consistency of the body of legal rules, namely whether the proliferation of tribunals threatens the coherence of international law.<sup>2</sup> In other words, scholars assume the legitimacy of international judicial lawmaking, and seek to render it more effective and coherent within the broader corpus of international law. Public discussion, on the other hand, tends to raise concern that lawmaking power is being abrogated by an unaccountable international judiciary that increasingly has the ability to strike domestic regulations enacted for legitimate governmental purposes. Both scholarly and public discourse, then, treat international judicial lawmaking as potentially problematic, though for quite different reasons-- scholars worry about the integrity of international law, while national publics worry about the integrity of their own law.

This debate parallels debates about judicial activism in domestic constitutional contexts. The growing phenomenon of judicialization in domestic systems has called some to decry activism, and others to worry about whether we are heading toward “juristocracy.”<sup>3</sup> Domestic judges would seem to be *more* constrained than international judges, for they operate within constitutional systems that provide strategic limitations on lawmaking. Some would argue that, without a central sovereign or a hierarchy of appeals

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*Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999), and <http://www.pict-pcti.org/synoptic/chart.html>.

<sup>2</sup> 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, 792 (1999); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS 101 (1998); Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT’L & COMP. L.Q. 121, 122 (2001); Shane Spelliscy, *The Proliferation Of International Tribunals: A Chink In The Armor*, 41 COLUM. J. TRANSNAT’L L. 143 (2001); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160 (2000).

<sup>3</sup> Ran Hirschl, *TOWARDS JURISTOCRACY* (2004).

courts, the potential scope of lawmaking is greater at the international level and hence ought to be of greater concern.

A related critique of international courts has been developed in a recent article by Professors Posner and Yoo.<sup>4</sup> They argue that international tribunals are least effective when they are “independent,” by which they mean permanent, staffed by judges with fixed terms, and enjoying compulsory jurisdiction over certain kinds of disputes, among other criteria. Independent courts, argue Posner and Yoo, will impose rules on states and constrain sovereignty, leading to ineffectiveness.<sup>5</sup>

I argue that there is less to worry about than critics contend. I build on insights developed by positive political theory on strategic constraints on judges. Many of these have analogues in the international context that as I demonstrate below, operate effectively in many cases. The article thus develops the notion that international courts wield *interdependent* lawmaking power, meaning that they are constrained by the preferences of states and other actors in interpreting international law. Calling attention to the constraints on lawmaking serves to ameliorate many of the concerns about runaway courts. So long as these constraints are genuinely effective, judicial lawmaking ought to be accepted as a necessary feature of international life.

This study draws on positive theories of courts and law that see the law as the product of interactions among various political institutions.<sup>6</sup> Courts are assumed to maximize exogenously defined substantive values, and in doing so can be considered

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<sup>4</sup> Eric Posner and John Yoo, *A Theory of International Adjudication* \_\_ Cal. L. Rev. \_\_ (2005), draft on file with author. Laurence Helfer and Anne-Marie Slaughter respond to Posner and Yoo in *Of States, Bargains and Judges: A Response to Professors Posner and Yoo* [forthcoming, Cal L. Rev.]

<sup>5</sup> See also Jack Goldsmith and Eric Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>6</sup> See, e.g., LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

rational institutions in the narrow sense of attempting to reach their goals. However, courts are not the only lawmaking institutions in a political system, so their ability to achieve particular outcomes is in part dependent on the preferences of other actors. In domestic legal systems, a legislature can over-rule a judicial interpretation of a particular statute by passing a subsequent statute.<sup>7</sup> Legislatures also signal information about their reactions to courts, such that explicit overruling is not always necessary. This study suggests that analogous mechanisms can operate at the international level. States can both over-rule and discipline tribunals that adopt rules outside the scope of state interests. The approach suggests that the debate over the merits of “independent” and “dependent” courts is less helpful than a contextual examination of the constraints under which all international courts operate.

The ability to constrain international courts is differentially distributed in the international system, so that more powerful states are able to exercise greater control over tribunals. The analysis suggests that in international adjudication, as in domestic contexts, the “haves come out ahead.”<sup>8</sup> There is no small irony in the fact that American scholars have been among the most vocal critics of international courts, for the analysis of this article suggests that in the long run, the United States is likely to have inordinate influence in the design, funding and operation of international tribunals

## **I. International Judicial Lawmaking**

### ***A. The Inevitability of Judicial Lawmaking***

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<sup>7</sup> Robert Cooter and Tom Ginsburg, *Comparing Judicial Discretion: An Empirical Test of Economic Models*, 16 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 295 (1996) *reprinted in* CONSTITUTIONAL POLITICAL ECONOMY (Stefan Voigt, ed., 2003).

<sup>8</sup> Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. SOC. REV. 95 (1974).

As has been often observed, judicial lawmaking inheres in the incompleteness of any system of rules.<sup>9</sup> The judge is supposed to resolve disputes in accordance with pre-existing legal rules, but quite often pre-existing legal rules do not provide a definitive answer.<sup>10</sup> When confronted with this common situation where there is no clear pre-existing rule, the judge must make a new rule. But because abhorrence of retroactive law is so great, judges and parties are reluctant to admit that judicial lawmaking fills the gaps in the pre-existing rules.<sup>11</sup> As the late Judge Robert Jennings once wrote of the ICJ: "[P]erhaps the most important requirement of the judicial function [is to] be seen to be applying existing, recognized rules, or principles of law" even when it "creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction..."<sup>12</sup> Jennings thus elucidates the inevitability of the gap between the reality of judicial lawmaking and the way judges talk about what they do.<sup>13</sup> Martin Shapiro put it more bluntly: when confronted with a gap in the law, the judge has no choice but to make up an answer and lie about it.<sup>14</sup>

Making up a rule to apply to two disputants before the judge is not exactly the same as making general law in the legislative sense. Shapiro notes that incremental decision-making tends to create systems of precedent, whether acknowledged or not.

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<sup>9</sup> MARTIN SHAPIRO, *COURTS* (1981); in the context of international law, see Vaughan Lowe, *The Politics of Lawmaking: Are the Method and Character of Norm Creation Changing?* in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 214-15 (Michael Byers, ed., 2000).

<sup>10</sup> Indeed, to the extent that pre-existing rule do provide clear answers, parties will generally resolve disputes without third party assistance.

<sup>11</sup> Martin Shapiro, *Judges as Liars*, 17 *HARV. J.L. & PUB. POL'Y*, 155, 155 (1994).

<sup>12</sup> MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 232 (1996).

<sup>13</sup> See SHAHABUDEEN, *supra* note [121210](#) at 75, 83, 84-85 for other examples of ICJ judges denying their power.

<sup>14</sup> Shapiro, *supra* note [11119](#).

Even in continental legal systems that lack precedent, the notion of alternatively randomizing between two rules in like cases is unattractive. The pressure to follow previous decisions and decisions of superior authorities is too great. Judges thus tend to follow earlier decisions and to package their decisions as self-evident, deductive extensions of pre-existing law.<sup>15</sup> Following precedent enhances predictability for the lawyers and parties who must argue before the court, and who must look to cues given in existing case law in developing litigation strategies.

That international judicial lawmaking exists is explicitly acknowledged in state practice. States in their pleadings before international courts often exhibit a concern with the possible rule-creating functions of international judicial decisions. For example, the United States in its pleadings in *Oil Platforms* expressed concern that a decision of the International Court of Justice might restrict its ability to protect merchant shipping around the world.<sup>16</sup> Further evidence is found in the fact that states often at various times sought the power to intervene in cases to which they were not an immediate party, but might be affected should the principle at issue become law.<sup>17</sup> Earlier instances of American and British cooperation with international institutions reflected reluctance to delegate lawmaking authority to international institutions.<sup>18</sup> Thus, in the early 20<sup>th</sup>

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<sup>15</sup> Martin Shapiro, *A Theory of Stare Decisis*, 1 J. LEG. STUD. 125 (1972); Alec Stone Sweet, *Judicial Authority and Market Integration in Europe*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 93, 99 (Tom Ginsburg and Robert Kagan, eds., 2005); Lowe, *supra* note [997](#), at 215.

<sup>16</sup> David Kaye, *Adjudicating Self-Defense: On Perception, Discretion and the Resort to Force Under International Law* (draft on file with author).

<sup>17</sup> International judicial practice and treaty regimes sometimes allow third parties to intervene in specific cases to which they are not a party. See, e.g., Statute of the International Court of Justice, Arts. 62 and 63. See generally, CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* (1993).

<sup>18</sup> SHAHABUDEEN, *supra* note [121210](#) AT 13.

century, Lord Balfour noted that, whether by design or not, judges of the permanent international court would make law, and therefore suggested that states ought to have some mechanism to protest against the downstream impact of particular decisions.<sup>19</sup> Balfour's proposal was not adopted,<sup>20</sup> and mechanisms of explicit control are very unusual in international law.<sup>21</sup> As we shall see, however, states do retain a number of implicit controls on international tribunals.

### ***B. Explicit Judicial Lawmaking-Judicial Decisions as a Source of Law***

The international legal system falls somewhere between the common law and civil law systems in terms of its explicit acknowledgement of precedent.<sup>22</sup> The international system certainly treats judicial decisions as a source of international law, albeit a supplemental one subject to limitations. Article 38(1) of the Statute of the International Court of Justice provides that judicial decisions and the writings of publicists are a supplemental source of rules to be applied by the Court.<sup>23</sup> This definition of the sources of international law has been widely adopted as canonical, and although it technically applies only to the ICJ, judges and scholars have not been reluctant to suggest that it has a general character.<sup>24</sup> The use of Article 38(1) would seem to be qualified by Article 59, which provides that precedent is not a formally binding source of law and that

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<sup>19</sup> Id at 56.

<sup>20</sup> GENNADY DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 254 (1993) (framers of the P.C.I.J. Statute “did not want to endow the future Court with law-making authority”).

<sup>21</sup> But see *infra* Section IV.

<sup>22</sup> This problem is extensively analyzed in SHAHABUDEEN, *supra* n. [121210](#).

<sup>23</sup> Art 38 is subject to Art 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”)

<sup>24</sup> SHAHABUDEEN, *supra* note [121210](#); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 20 (5<sup>th</sup> ed. 1998) (“(I)t is obvious that a unanimous, or almost unanimous, decision has a role in the progressive development of international law.”)

"a decision of the ICJ has no binding force except between the parties and in respect of the particular case."<sup>25</sup>

Whatever the formal role of precedents in the international system, a glance at the decisions of international tribunals shows a tendency to reference and abide by earlier decisions.<sup>26</sup> The Permanent Court of International Justice for example, remarked that it had "no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound."<sup>27</sup> In another case, the same court referred to "the precedent afforded by its Advisory Opinion" in an earlier case.<sup>28</sup> Citation to earlier decisions by the ICJ itself (not identical to following precedent, but an indication of the role of previous decisions as a source of law) occurred in 26 percent of cases between 1948 and 2002; citation to cases decided by the Permanent Court of International Justice occurred in 22 percent.<sup>29</sup> This not insignificant reliance on prior decisions suggests that precedent may have a practical role, if not a formal one.

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<sup>25</sup> Some have argued that strictly speaking Article 59 was not a necessary limitation, instead inserted "out of an abundance of caution". Robert Jennings, *General Course on Principles of International Law*, II RECUEIL DE COURS 341 (1967), cited and discussed in SHAHABUDEEN, *supra* note [121210](#), AT 64; see generally SHAHABUDEEN, *supra* note [121210](#), at 99-105.

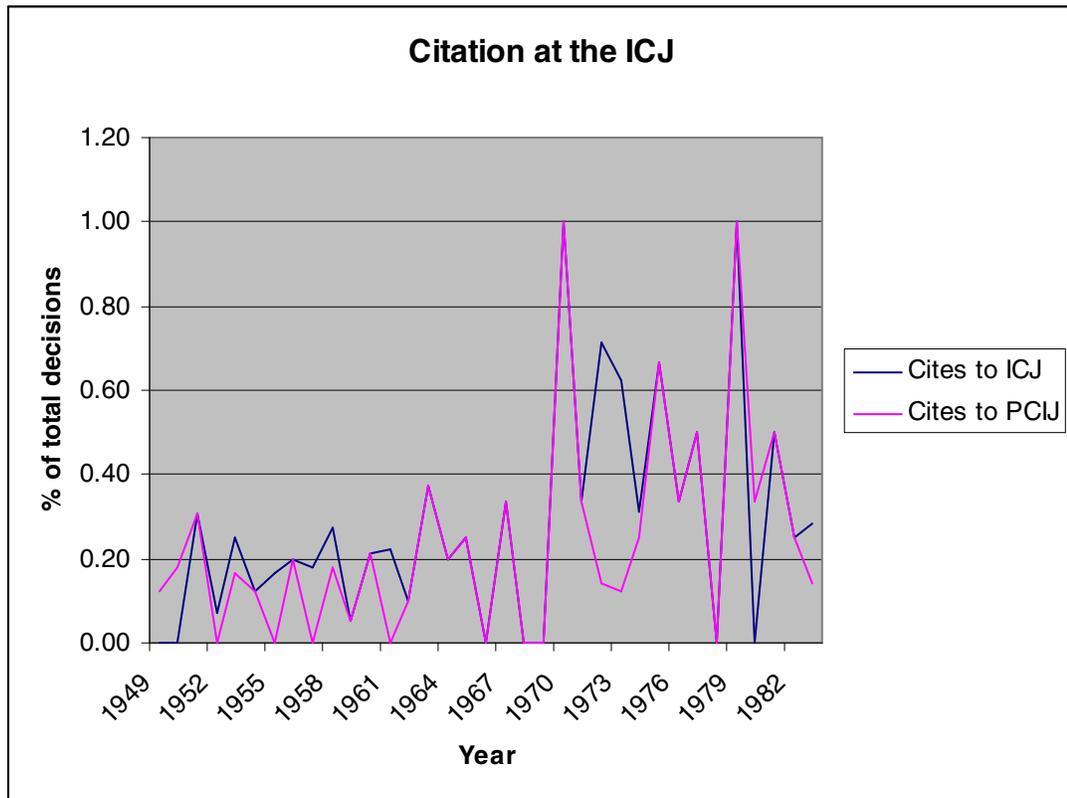
<sup>26</sup> SHAHABUDEEN, *supra* note [121210](#).

<sup>27</sup> Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction, 1927 PCIJ Reports Series A, No. 11, at 18. See generally SHAHABUDEEN, *supra* note [121210](#), at 16-29.

<sup>28</sup> Exchange of Greek and Turkish Populations, (1925) PCIJ Ser B, no. 10, p. 21, discussed in Brownlie, *supra* note [242422](#), at 21.

<sup>29</sup> Statistics on file with the author.

**Figure 1: Self-Citation at the ICJ**



***C. Implicit Judicial Lawmaking-The Interpretation of Treaties and the Finding of Custom***

Besides the use of judicial decisions as an *explicit* source of international law, international judges also frequently make law in the course of their declarations as to the state of existing law. It would be difficult to assess the total proportion of international lawmaking that is done by judicial actors, but it is sure to be high. The primary and least controversial source of international law, treaty law, is produced by states that voluntarily undertake mutual commitments. These primary rules are clearly binding on the parties, but most do not purport to make law binding on the whole world community except for a few treaties whose membership is nearly universal, such as the United Nations Charter, the World Trade Organization, and the International Labor Organization, and certain

human rights treaties that declare *jus cogens* obligations such as the Genocide Convention. Judicial decisions interpreting treaty law are nominally binding on the parties to the treaty, and only those parties.

Customary international law, too, is nominally made by state actors undertaking actions with a sense of legal obligation. In practice, however, customary law is often declared by courts.<sup>30</sup> Judges will declare, on the basis of state practice and *opinio juris*, that a given norm has at some point demonstrated sufficient usage to have “crystallized” into a rule of customary international law. Again, courts say they are merely finding the law in a field of state practice, but they are often in fact declaring new law, based on the incremental accretion of state practice. Judicial decisions can be utilized as authoritative statements of the state of customary international law at the time. An example from the field of maritime delimitation is found in the *Jan Mayen* case.<sup>31</sup> Relying solely on an early ICJ Chamber decision, the *Gulf of Maine*,<sup>32</sup> rather than on an examination of state practice, the Court found that the rule that delimitation should begin with a provisional median line constituted customary international law.<sup>33</sup>

While states can avoid being bound by a custom should they persistently object to it, the judicial decision announcing a custom puts the burden on the derogating state—a state that is silent in the face of a judicial declaration of custom will be considered bound.

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<sup>30</sup> GENNADY DANILENKO, *supra* note [202018](#), at 257 (1993). On vagueness of custom see Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems* 15 Eur. J. Int'l L. 523 (2004) (indeterminacy of custom); but see Michael Byers, *CUSTOM, POWER AND THE POWER OF RULES* (1999) (documenting strategic development of customary international law by states).

<sup>31</sup> *Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Den. v. Nor.), 1993 ICJ Rep. 38 (June 14).

<sup>32</sup> *Delimitation of the Maritime Boundary in the Gulf of Main Area*, 1984 ICJ Rep. 246 (Oct. 12).

<sup>33</sup> See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 122-23 (1999).

It would thus be fair to characterize much customary international law as actually being declared by judicial bodies rather than arising from the explicit agreement of states. It seems apparent that the scope of international judicial lawmaking is vast, even within the orthodox sources of international law.

Also worth mentioning is a growing tendency among municipal judges to look to decisions of other courts and of international courts in determining the law. In this way, judicial declarations of international law, even if not treated as formally binding at the international level, have a large influence in local jurisdictions. It is hard to know what to make of this: it can be characterized as a relatively benign global “conversation” among judges,<sup>34</sup> or as an agglomeration of lawmaking power by a professional epistemic community. Indeed, even the advocates of judicial discourse and the “new world order” acknowledge some difficulty in holding these lawmakers accountable.<sup>35</sup> What cannot be denied is that international lawmaking has an impact on municipal systems as well as at the international level.

## **II. Three Kinds of Lawmaking Situations**

The discussion above acknowledges that international judicial lawmaking is inevitable. But under what conditions should we consider it to be successful? It will be useful to distinguish three kinds of lawmaking situations: explicit delegation, implicit delegation, and non-consensual. Judicial lawmaking is likely to be most successful when

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<sup>34</sup> Symposium, *Globalization and the Judiciary: Key Issues of Economic Law, Business Law, and Human Rights Law*, 39 TEX. INT’L L.J. 347 (2003).

<sup>35</sup> Anne Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan J Int’l L 283 (2004)

it is derived from an explicit delegation by states. I argue that it is least likely to be successful when it is non-consensual.

### A. *Judicial Lawmaking as Delegated Legislation*

At the international level, the residual lawmaking capacity of judges may well be part of the intended design of the treaty regime.<sup>36</sup> The argument begins with a paradigm case of a treaty negotiated between two parties. Treaties will sometimes, though not always designate a third party adjudicator.<sup>37</sup> In deciding whether to include such a designation, states will likely consider a whole range of issues: whether they want the agreement to be enforced at all, or simply serve as cheap talk; whether enforcement should be carried out by the parties themselves through retaliation in repeated play games; and whether reputational sanctions provide a viable third party source of enforcement.<sup>38</sup> Their design of the particular combination of enforcement mechanisms is likely to reflect the stakes of the issue, the cost and effectiveness of the various alternative enforcement mechanisms, and the trust in any particular third party that might be called upon to help the states resolve conflicts. Only in a sub-class of treaties will explicit third party enforcement make sense from the parties' point of view.

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<sup>36</sup> Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999); Laurence Helfer, *Constitutional Analogies in the International Judicial System*, 37 LOYOLA L.A. L. REV. 193, 197 (2003); Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Theory of Constrained Independence*, \_\_ CAL. L. REV. \_\_ (2005).

<sup>37</sup> Andrew T. Guzman, *The Design of International Agreements*, paper available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=487662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=487662); Kal B. Raustiala, *Form and Substance in International Agreements*, forthcoming, *American Journal of International Law*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=505842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=505842)

<sup>38</sup> Robert Scott and Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (2004).

Even when a third-party adjudicator has been identified, states face a choice about whether to explicitly delegate lawmaking power to the third party. Explicit delegation occurs when the states empower the tribunal to make certain types of rules. One example is the United Nations Security Council resolutions that created the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was given explicit power in its statute to decide rules of evidence and procedure, which of course can be outcome determinative.<sup>39</sup> ICTY has therefore had to create much of international criminal law in the context of specific cases, with little explicit guidance from the Security Council.<sup>40</sup> For example, the Tribunal had to consider whether or not there is a journalistic privilege to avoid testifying at the international level.<sup>41</sup> With no answer apparent in either its Statute or Rules of Procedure and Evidence, the Tribunal apparently believed that had no choice but to make up a rule as best it could in the context of the specific case. Explicit delegation facilitated a solution. Such delegation was perhaps a necessary functional feature of a regime that required accommodation between the adversarial and inquisitorial modes of criminal procedure found in municipal systems.<sup>42</sup> The treaty

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<sup>39</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), 32 I.L.M. 1159, 1192, Art 15 ("[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.")

<sup>40</sup> Megan A. Fairlie, *Rulemaking from the Bench: A Place for Minimalism at the ICTY*, 39 TEX. INT'L L.J. 257 (2004).

<sup>41</sup> Prosecutor v. Brdjanin, Decision on Interlocutory Appeal, Case No. IT-99-36-AR73.9 (ICTY App. Chamber Dec. 11, 2002). For a critique, see Megan A. Fairlie, *International Decisions*, 98 Am. J. Int'l L. 805, 805-09 (2004).

<sup>42</sup> See generally, SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS (GABRIELLE KIRK McDONALD &

regime explicitly delegates to the third party adjudicator the power to make “internal” rules that have substantial substantive impact. Like an administrative agency, the judges, prosecutors and professors who staff the highest levels of the ICTY had the expertise to refine general principles into specific rules. This can economize on negotiation costs for those setting up the regime in the first place.<sup>43</sup>

More common is *implicit* delegation to interpret the treaty. One reason states may wish to identify a third party adjudicator in the treaty is to resolve disputes about interpretation. Richard McAdams and I have argued elsewhere that the role of international adjudicators in such circumstances is to help parties resolve coordination problems that arise.<sup>44</sup> Two parties may develop explicit or implicit conventions in the course of repeated interactions. (By conventions, we mean not formal treaties but patterns of expected behavior developed in repeat interactions over time.) These conventions may be incomplete in a number of ways. In our language, conventions may be “fuzzy” with regard to the definition of their underlying conditions, or they may be “potentially incomplete” with regard to whether a particular factual situation falls within the convention or not. Even if clear and complete, conventions can be subject to disputes when they are applied to ambiguous facts, when it is unclear whether a particular

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OLIVIA SWAAK-GOLDMAN EDS., 2000); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Penn. L. Rev. 1 (2002)..

<sup>43</sup> Another example concerns the United Nations Compensation Commission, empowered by the Security Council to make rules to guide the payment of compensation to those harmed in Iraq’s 1990 invasion and occupation of Kuwait. The Commission was not a court per se, but it did utilize a mechanism of delegated lawmaking, wherein a Governing Council was empowered to make rules and procedures for processing of claims in accordance with United Nations Security Council Resolutions. See generally see Lea Carol Owen, Note, [Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims](#), 31 Vand. J. Transnat’l L. 499 (1998).

<sup>44</sup> Tom Ginsburg and Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

state of the world exists or does not. In such situations of legal and factual disputes, we argue that the pronouncements of third-party legal decision-makers – adjudicators – can influence state behavior, even without explicit sanctions, by providing “focal points” that clarify ambiguities in the convention and “signals” that cause parties to update their beliefs about facts. Even without the power of sanctions or legitimacy, an adjudicator’s focal points and signals influence the parties’ behavior. This will be true in situations of multiple equilibria where the parties, despite disagreement over which equilibrium should prevail, mutually prefer to coordinate to avoid conflict.

Our analysis helps to understand why it is that states establish tribunals in the first place. States may have an interest in specifying a particular third party to help resolve coordination problems that will arise in future interactions under conventions. I will call this function of tribunals that of “downstream coordination.” Like explicit delegation of lawmaking power, setting up a downstream coordinator allows states to economize on negotiation costs. Negotiating detail in any legal document requires cost and time, and states may rationally wish to balance the costs of additional specificity against the likely benefits.

There are several reasons states may wish to implicitly delegate lawmaking power. Certain conditions which would effect the convention may be low probability events, not worth the cost of specifying explicitly. States might also believe that issues of law are best clarified in the context of actual cases. In other circumstances, vagueness may allow treaty parties to claim the text means different things to their respective domestic constituencies. Leaving treaties vague may also make sense when parties are unsure

which side of a dispute they will be on, so that they want to reserve the right to argue for different positions of law in the future.<sup>45</sup>

For all of these reasons, self-interested states will sometimes leave detail vague, in which case international adjudicators become delegated lawmakers. Judicial lawmaking serves an interest of the parties in reducing transaction costs of negotiating the details of a treaty. When the states can agree in advance as to the precise scope of the delegation, they may *explicitly* endow the tribunal with lawmaking power. When states are unsure about the precise type of issue that will arise, a more common circumstance given transaction costs of specificity, they will *implicitly* empower the tribunal to resolve disputes and clarify conventions.

This discussion assumes, however, that the third party acts as an effective agent of the parties, and does not impose its own preferences on them. This is the familiar problem of principal and agent, and will likely affect the parties' willingness to designate *any* third party to resolve disputes. We ought to expect states party to a treaty to designate third parties to interpret the agreement when the expected policy losses resulting from the agency problem are outweighed by the joint benefits to the parties from enhanced coordination.<sup>46</sup>

Once a designated third party is actually confronted with disputes about the underlying convention between the parties, its job is to resolve coordination problems by providing focal points and signals. In turn, these focal solutions can generate reliance on

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<sup>45</sup> Parties that have left an issue vague can argue that the intention was that there be no rule, so that courts ought to declare a non-liquet.

<sup>46</sup> One might argue that the presence of individual opinions allows competition, within the court, about the setting of the focal point. On individual opinions see generally SHAHABUDEEN, *supra* note ~~124210~~, at 177-208; IJAZ HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT (1984).

the new pattern, such that deviations from the new norm serve no state's interest. For example, an ICJ declaration that a border lies on a particular line allows the states to coordinate their strategies, and may be self enforcing. We have presented evidence that ICJ decisions in coordination games generate a high degree of compliance.<sup>47</sup>

So far the discussion has focused on situations involving two states engaged in a bilateral dispute. What about third states, not party to the convention? How can focal points created in the context of bilateral disputes be broadly effective as law for other states? First, to the extent that the interactions between the two disputants involve pure coordination issues, there is no reason for third states to deviate from the announced rule.<sup>48</sup> If two states use a third party to delimit a common border, it is hard to imagine what benefit a third state would gain by failing to recognize that border as between the disputing parties. Even if the issue involves something that directly affects the third state, such as rules about international air traffic, there may be little incentive to deviate from the judicially pronounced rule. If the rule articulated by the court resolves a pure coordination issue, the fact that two states are already coordinating will usually make it rational for other states to cooperate. To analogize to a familiar coordination problem, if the first two drivers both start driving on the right side of the road, subsequent drivers will have an incentive to do the same, or risk accidents.

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<sup>47</sup> Ginsburg and McAdams, *supra* note [444441](#). Note that the ICJ may be a particularly focal adjudicator within international law. See Lowe, *supra* note [997](#), at 219 (“If the ICJ articulates the interstitial norm, the validity of the norm will usually be generally recognized. It would be less persuasive if Greenpeace, rather than the Court, were to announce, for example, that sustainable development is the norm that resolves conflicts between a right to development and a duty to protect the environment.”)

<sup>48</sup> Cf. Jack Goldsmith and Eric Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1129-1131 (1999) (coordination more difficult as more parties become involved).

One might consider the *Fisheries Jurisdiction* Case in this context.<sup>49</sup> This case involved a dispute between the United Kingdom and Norway concerning a fishing rights in coastal waters. The rule generated by the case--allowing islands to be used as base points for straight baselines in demarcating maritime boundaries under a coastal state's jurisdiction--became adopted in the 1958 Law of the Sea Convention.<sup>50</sup> Here a rule that developed as a focal point between two states quickly emerged as a general rule of international law that was explicitly chosen by states in a multilateral treaty.<sup>51</sup>

Sometimes the focal point solution developed by an international adjudicator will be *rejected* by other states as inappropriate for a general rule. One example comes from the famous *Lotus Case* between Turkey and France. The Court announced a rule for objective jurisdiction in a collision on the high seas allowing Turkish jurisdiction over a French captain whose boat had struck a Turkish vessel.<sup>52</sup> This was rejected in the 1958 Law of the Sea Convention.<sup>53</sup> In this case, the solution developed by the PCIJ obviously did not serve state interests, and hence marked a failed case of lawmaking.

Besides their interest in following rules that arise in the course of dispute resolution, third states face a coordination problem in enforcing norms. Third states that

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<sup>49</sup> Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 134 (Dec. 18)

<sup>50</sup> Law of the Sea: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 1608.

<sup>51</sup> Danilenko, *supra* note [202018](#), at 258-59 (mentioning Fisheries case and providing other examples). Another example of the move from focal point to rule comes from an old case before the PCIJ, the *Oder Commission*. Territorial Jurisdiction of the River Oder Commission (U.K., Czech., Den., Fr., Germany, Swed. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 19 -22 (Sept. 10). In that case, the six governments in the case requested the Court to follow its previous decisions with regard to the rules of interpretation, so that *travaux prepatoire* would not be resorted to.

<sup>52</sup> P.C.I.J. Ser. A, No 10 (1927).

<sup>53</sup> Convention on the High Seas 1958 (450 U.N.T.S. 82) Art 11 (no disciplinary proceedings against ship personnel except by flag state or state of nationality).

observe a dispute between two disputants may wish to sanction the party that is in the wrong, either by reducing their assessment of that party's reputation<sup>54</sup> or by imposing some direct costs on that party. But on their own, third states may be unable to determine which party is in the wrong. Third states can coordinate their sanctioning behavior based on the pronouncement of dispute resolvers.<sup>55</sup> Coordination in sanctioning behavior may in turn reduce the perceived benefit from violating the norm in the future. In short, the results of dispute resolution can affect other states' calculus of the costs and benefits of violating a norm. Expectations of other states' willingness to enforce a rule can create stability in legal rules. As states adjust their strategies, legal rules may become stable over time.

Consider an example from the famous ICJ case of *Corfu Channel*, which involved Albanian positioning of explosive mines in a channel through which safe passage was guaranteed.<sup>56</sup> The mines damaged British warships. The ICJ decided that Albania had violated international law and owed Britain compensation. Albania initially refused to pay, and in fact waited several decades before finally compensating Britain. The case is often considered to be a case of non-compliance with an ICJ decision because of the delay, but the decision appears to have had some affect on subsequent Albanian strategy and clarified an ambiguity in international law. To generalize, the case suggests that the declaration of a legal rule, such as "do not mine channels where shipping has a right of passage" may lead states to adjust their military strategies. Regardless of whether or not

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<sup>54</sup> Andrew Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

<sup>55</sup> Richard McAdams, *The Expressive Power of Adjudication*, \_\_ U. ILL. L. REV. \_\_ (2005)

<sup>56</sup> *Corfu Channel* case, (UK v. Alb.), 1949 ICJ REP. 4 (Apr. 9). See generally IL YUNG CHUNG, LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT (1959).

the mine-laying state pays the other party in a particular conflict, enunciation of the rule is likely to cause the state to adjust its future strategy so as not to suffer further claims and reputational losses. It might invest less resources in mines and more in monitoring technology to observe passage in the channel. In this way, legal rules can affect state strategy in future cases even if not enforced in past cases. Even an unenforced decision can change the expected costs of norm violation. If enough states change their strategy in response to a judicial decision, the legal rule may become a new equilibrium of customary international law, even if the particular party to the dispute does not comply. The mechanism is not coercion but coordination, followed by states adjusting their strategies.

### ***B. Non-consensual Lawmaking***

Another lawmaking situation, only partly involving delegation, is one I characterize as non-consensual. In this instance, the parties seeking to make law will not be particularly affected by the decision. An illustration is certain cases brought under the Advisory Jurisdiction of the International Court of Justice. The Advisory Jurisdiction allows certain UN bodies and international organizations to refer legal questions to the Court for a declaratory statement of the relevant law. This jurisdiction has been used successfully by international organizations to resolve disputes about their own scope of assignment and powers. For example, the case of *Reparations for Injuries Suffered in the Service of the United Nations* established a principle that staff of international

organizations have necessary and implied powers, including the power to recover for damages caused by states.<sup>57</sup>

The Advisory Jurisdiction has been less successful, however, when parties have sought to use it to impose externalities on others. One of the more controversial cases before the International Court was brought by the World Health Organization to determine whether or not the use of nuclear weapons would be a violation of international law.<sup>58</sup> This case did not involve a genuine dispute in any way; rather, it concerned an effort by international organizations to shape state behavior on an issue of core importance to international security. In this particular instance, the ICJ ducked the decision, finding it impossible to say that the use of nuclear weapons was a *per se* violation of international law.<sup>59</sup>

Nonconsensual lawmaking is in my view likely to be less effective than lawmaking that occurs in the course of concrete disputes involving states. States that face genuine coordination problems, especially in factual situations likely to be repeated over time, have a genuine interest in having the ICJ provide focal points that can guide subsequent behavior. States that are subject to lawmaking that does not involve coordination are less likely to comply because they have less interest in the court producing a pronouncement at all. Such situations do not involve coordination problems between disputants but rather an attempt by non-disputants to impose costs on other

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<sup>57</sup> 1948 I.C.J. 174 (Apr.11).

<sup>58</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Rep. 1996.

<sup>59</sup> *Id.* at para. \_\_\_.

actors. It is not obvious from a rationalist perspective why states would comply with such decisions.<sup>60</sup>

One might respond that there is little harm in nonconsensual lawmaking. After all, states are always free not to comply with “bad” rules articulated by international courts. The problem is that international courts have reputations, and the ability of any particular adjudicator to generate useful focal points may depend in part on its reputation for doing so. In the anarchic world of international law, without a central enforcer of judgments, compliance with decisions of any given court depends in part on each states’ belief that other states will comply with decisions.<sup>61</sup> This in turn will likely be affected by the tribunal’s reputation for quality and for generating compliance in earlier cases. A court that engages in nonconsensual lawmaking may hinder its ability to generate compliance in cases where states have an interest in judicial generation of new rules. This suggests that nonconsensual lawmaking actually can hinder international cooperation.<sup>62</sup>

### **III. Two Illustrations: Analytic Narratives of Judicial Lawmaking**

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<sup>60</sup> Coordination theory can help explain why it is that states seek to use international tribunals to impose costs on other states. International tribunals exercising nonconsensual lawmaking power are able to help third states coordinate their sanctioning behavior by identifying the precise scope of the legal obligations of the target state.

<sup>61</sup> Ginsburg and McAdams, *supra* note [444441](#).

<sup>62</sup> This is consistent with Guzman, *supra* note [Error! Bookmark not defined.Error! Bookmark not defined](#).<sup>45</sup>

This section illustrates the argument about international judicial lawmaking. It uses the technique of “analytic narrative,” explicating the development of judicial lawmaking institutions in light of the theory advanced in Part II.<sup>63</sup>

#### A. World Trade Organization

To illustrate the necessity of judicial lawmaking, we will consider WTO dispute resolution. From the perspective of game theory, trade can be described as an iterated prisoner’s dilemma.<sup>64</sup> The theory of comparative advantage holds that any two states will be better off if they can agree to open borders between them. But domestic interest groups pressure politicians to restrain trade so as to protect domestic industries from competition and domestic workers from adjustment costs. As a result, each state would like to restrict imports from other states, while freely exporting to other countries. Thus both parties, if calculating the costs and benefits of protectionism in a single iteration, are likely to end up in the suboptimal, high protection-low trade equilibrium in which both choose protectionist policies.

The WTO has numerous institutions to help states overcome this prisoners’ dilemma and to coordinate. Most important for present purposes is the WTO Dispute Settlement Understanding, the core of WTO enforcement.<sup>65</sup> This set of rules is administered by the WTO Dispute Settlement Body which can establish panels, adopt reports and authorize the administration of sanctions when it is found that one party has nullified or impaired benefits granted under the WTO agreements.

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<sup>63</sup> ROBERT H. BATES ET AL., *ANALYTIC NARRATIVES* (1998); DANI RODRIK, ED., *IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH* (2003).

<sup>64</sup> Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *NW. U. J. INT’L L. & BUS.* 398, 453 (1997).

<sup>65</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 *INT’L LEG. MAT.* 112 (1994).

Panels may be established unless a consensus exists *not* to form one (reversing the long-standing GATT requirement that a consensus exist in favor of a panel before establishment.) Panel reports, which are supposed to be (though rarely are) issued within six months of their formation, may be appealed to a seven-member Appellate Body, each member serving a four year term. This system has been quite successful, with over 320 cases initiated to date.<sup>66</sup> A careful empirical assessment has found that most filings have led to successful resolution by settlement either before or after the adoption of a panel report, and that 83% of panel reports have generated compliance.<sup>67</sup>

Dispute settlement has two functions in the WTO regime. Its primary role is to help parties coordinate their behavior in the sanctions regime, which can be characterized as one of authorized self-help. Enforcement in the WTO system is limited to the withdrawal of concessions previously granted by other states. When an adopted panel report (either from the initial panel or the Appellate Body) finds that a party has “nullified or impaired” benefits of another party under the WTO Agreement, the WTO Dispute Settlement Body will authorize the harmed party to withdraw “substantially equivalent” concessions from the other party.<sup>68</sup> The actual level of sanctions is set by arbitration conducted by the original panel.

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<sup>66</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)

<sup>67</sup> William Davey, *The WTO Dispute Settlement System: The First Ten Years*, \_\_ J. Int’l Econ. L. \_\_, 28 (2005) (draft on file with author) (“it appears that most disputes are settled or become moot because the measure complained ceases to exist.”) See also Young Duk Park and Marion Panizzon, *WTO Dispute Settlement 1995-2001: A Statistical Analysis*, 5 J. Int’l Econ. L. 221, 229 (2002); Jason E. Kearns and Steve Charnovitz, *Adjudicating Compliance at the WTO: A Review of DSU Article 21.5*, 5 J. INT’L ECON. L 321, 334 (2002). These statistics are hard to square with Posner and Yoo’s claim that the independent WTO is likely to be ineffective.

<sup>68</sup> Schwartz and Sykes have argued that this scheme is designed to allow parties to engage in “efficient breach” of their WTO obligations. Warren Schwartz and Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEG. STUD. S179, S200 (2002). This argument does not explain why many WTO disputes are settled

A secondary role is to clarify and articulate rules. Sometimes there will be genuine disagreement as to what is required by the WTO agreement. Many of the violations of WTO obligations involve domestic regulations that may be directed at health and safety or other legitimate regulatory interests, but the particular details of the regulation are alleged to violate WTO rules on national treatment. In these circumstances, the parties will be in dispute as to whether or not a particular course of action should be counted as a defection or cooperation in the ongoing repeated prisoner's dilemma. The parties need to coordinate their understanding of whether or not the action is within the scope of the convention. This can be because of uncertainty as to the scope of the convention, uncertainty as to the effects of the rule in question, or both. In such circumstances, the WTO Dispute Settlement Understanding provides a *downstream coordinator* for resolving ambiguities or establishing facts. The panel provides a signal to the parties as to the state of the world, and the parties can coordinate accordingly.

When the Appellate Body authorizes sanctions, it is playing a coordinating role by setting a focal level of retaliation.<sup>69</sup> Without an established level of acceptable retaliation, the complaining state might over-retaliate, leading to a response from the violating state and the unraveling of the trade regime. The iterated prisoners dilemma game requires coordination not only to identify what actions count as cooperation or not, but to set levels of compensation so that the self-help regime does not unravel. Just as judges in medieval Iceland set prices of compensation that would be implemented

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at the panel stage and do not end up involving sanctions. While much attention has been given to a handful of WTO disputes in which compliance (typically by the United States or European Union) has not been forthcoming, the vast majority are indeed settled amicably.

<sup>69</sup> Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 761 n. 267 (2002)

through self-help, so the WTO helps parties coordinate self-help in a world without centralized enforcement.<sup>70</sup>

How do these activities constitute lawmaking? As in international law generally, there is no understanding that previous panel reports can make law at the WTO. Nevertheless, there are strong pressures to follow earlier decisions. Raj Bhala has sought to demonstrate not only that WTO adjudication requires precedent, but also that panels in fact follow it.<sup>71</sup> Take the high-profile 1997 WTO decision finding that the European Union's banana importation regime violated several provisions of the GATT.<sup>72</sup> It is inconceivable that a panel constituted under the DSU would reach a different result if confronted with a regime operated by Japan that was identical to the EU Bananas regime. What if, however, the hypothetical Japanese regime concerned rice rather than bananas?

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<sup>70</sup> See Ginsburg and McAdams, *supra* note [444444](#), for discussion of Iceland. See also DAVID FRIEDMAN, *LAW'S ORDER* 263-67 (2000); Richard Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1496-97 (1992) (review of WILLIAM I. MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND* (1990)). Interestingly, another feature of medieval Iceland's system—the right to sell claims—has been proposed for the WTO by Mexico. See JOHN JACKSON, WILLIAM DAVEY AND ALAN SYKES, *INTERNATIONAL ECONOMIC LAW* \_\_ (5<sup>TH</sup> ED. 2000).

<sup>71</sup> Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)* 9 J. TRANSNAT'L L AND POL'Y 1 (1999); see also Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)* 14 AM. U. INT'L L. REV. 845 (1999), and Raj Bhala, *The Power Of The Past: Towards De Jure Stare Decisis In WTO Adjudication (Part Three Of A Trilogy)* , 33 GEORGE WASHINGTON INT'L L. REV. 873 (2001)

<sup>72</sup> In July 1993, the European Union (EU), adopted an EU-wide regime on banana imports that required import licenses and gave preferential treatment to bananas from the EU's overseas territories and former colonies. This led a number of U.S.-owned companies operating in Latin America to claim that they lost millions of dollars. In May 1996 the United States and a number of Latin American countries filed a request with the World Trade Organization (WTO) asking for the establishment of a dispute settlement panel. The United States argued that the EU's banana regime violated several provisions of the General Agreement on Tariffs and Trade (GATT). The EU believed that the regime was GATT-legal. In 1997 the WTO ruled that the import licensing scheme discriminated against growers and marketing companies outside the preferred countries. The EU modified its scheme but the US continued to object. After another complaint to the WTO, the Appellate Body found that the EU was not in compliance with its obligations and authorized retaliatory sanctions.

The panel would have to decide whether the new conventional understanding applied in this particular case--that is whether the distinction between rice and bananas mattered. No doubt it would carefully consider the earlier ruling in deciding such a case.

The Dispute Settlement Understanding explicitly denies the ability of panels to make law through interpretation (though it allows the panels to “clarify” the agreements.)<sup>73</sup> In spite of this, commentators have observed that there has been an expansion in judicial lawmaking under the WTO.<sup>74</sup> In part, this reflects a simple shift in the constraints on judges. Under the GATT regime, unanimity was required in order to adopt a panel report: any state could veto. The fact that few panel reports were vetoed suggests that (1) states found that the long-term benefits from the regime outweighed costs imposed by particular reports, and (2) rules generated through this decision-making process were considered to serve state interests.<sup>75</sup>

The adoption of the WTO agreement in 1994 shifted from a regime in which unanimity was required to adopt a report toward a regime in which unanimity was required to reject a report. Since reports typically involve a winner and loser, and winners are unlikely to believe that the decision renders them worse off from the status quo ante, it is very doubtful that unanimity can be obtained to reject a panel report.<sup>76</sup> This

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<sup>73</sup> DSU Art 3.2 (“Recommendations and rulings of the DB cannot add to or diminish the rights and obligations provided in the covered agreements.”)

<sup>74</sup> Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247 (2004); Helfer, *supra* note [363634](#), at 202 (describing the Appellate Body as a proto-constitutional court); see also John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

<sup>75</sup> Steinberg, *supra* note [747469](#), 263 (noting that the US blocked the adoption of panel reports that made bad rules.)

<sup>76</sup> The only imaginable scenario where this might occur is where the loser values the entitlement so highly so as to be willing to pay the winner to block adoption, i.e. by transferring an amount greater than the amount of concessions awarded by the Panel. This might occur when the loser

shift meant that the potential for judicial lawmaking expanded dramatically with the 1994 rules. As panel reports are adopted, they tend to shape downstream expectations of the parties to the particular dispute and third parties. This is true as a practical matter regardless of the legal question of whether precedential decisions formally bind other panel makers.

Schwartz and Sykes offer a similar view in their account of the WTO dispute settlement system.<sup>77</sup> The system provides for no sanction so long as an identified violator remedies its behavior within a “reasonable time.”<sup>78</sup> This would seem to encourage violations: a party can gain the domestic political benefit of violating the rules, and will get away with it until another party (1) has enough of an interest to bring a case under the DSU; (2) wins the case; (3) possibly goes through an arbitration establishing a reasonable period of time; and (4) shows that the first party has not remedied the situation. Schwartz and Sykes speculate that the bulk of disputes under the WTO involve good-faith differences over interpretation. By encouraging defendants to litigate all the way to a resolution, the WTO system will provide continuous refinement of ambiguous terms in the treaty. In their view, then, lawmaking is built into the DSU by design.

The WTO example illustrates the relationship between dispute resolution and lawmaking at the international level. Third parties must decide particular cases and provide focal points to the parties. These focal points inevitably create expectations among third states about reputational sanctions: the “winner” is likely to be supported by

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feels that the long run losses from the rule vis-à-vis other trading partners are such that it is worth the higher price to avoid the rule.

<sup>77</sup> Schwartz and Sykes, *supra* note [686863](#).

<sup>78</sup> WTO DSU Art. 21(3).

other states, while the “loser” is likely to be punished. This information, in turn, might make those third states adjust their own strategies in light of the original decision to which they were not a party. Dispute resolution leads to governance.<sup>79</sup>

### ***B. Iran-United States Claims Tribunal: General Lawmaking from Bilateral Dispute Resolution***

As a second example, consider the Iran-United States Claims Tribunal (“the Tribunal”), one of the most prolific international courts ever.<sup>80</sup> Established as part of the machinery to end the hostage crisis following the Iranian Revolution in 1979, the Tribunal was set up to resolve disputes between the two countries, as well as claims by citizens of one country against the other country. The vast majority of claims involved property of American citizens (including, controversially, dual Iranian-American nationals) that had been expropriated by Iran in the Revolution. Since 1981, the Tribunal has resolved several thousand claims.

No doubt the Tribunal has been an effective tool for resolving disputes between the two countries. Perhaps its greatest successes, however, had nothing to do with the parties at all. Dealing with the last great expropriation of the twentieth century, the Tribunal was able to hear a class of important cases that involved issues of general importance in international law. These included the standard of expropriation; the test for

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<sup>79</sup> Stone Sweet, *supra* note [3434](#)~~32~~.

<sup>80</sup> See generally CHARLES BROWER AND JASON BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996); GEORGE ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996); DAVID CARON AND JOHN CROOK, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* (2000).

determining when non-state actors were subject to state control such that their acts ought to be attributable to the state, and many other legal issues.<sup>81</sup>

The Tribunal thus made a significant contribution to general international law, providing a positive externality to non-parties. Two elements of institutional design were crucial in this regard, *individuation* and *publicity*. By *individuation*, I mean the decision taken early on in the Tribunal's life to hear most claims individually. Although it consolidated certain small classes of cases for reasons of judicial economy, the Tribunal provided fully individualized hearings in several hundred cases, allowing extensive opportunity for claimants to present their cases. Individualized factual contexts provided an opportunity for the Tribunal to develop a refined jurisprudence, testing principles in a wide variety of factual settings.

The second element is *publicity*. Opinions in ad hoc arbitrations between states are sometimes published, but they need not be. Contrast the private international arbitration regime, where a lack of publicity makes it impossible to know whether decision makers, even identical panels, are deciding like cases alike. Opinions in ad hoc arbitrations between companies or individual are almost never published. Empirical research on arbitration is thus difficult to conduct, since the only cases we learn about are those that are reported for some reason or are appealed.<sup>82</sup> Indeed, much of what we do know about arbitration is from these presumably aberrant cases. Although certain

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<sup>81</sup> See ALDRICH, *id.*.

<sup>82</sup> See Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT'L ARB. 23, 24 (2003) (empirical studies are few but growing in number); ICC ARBITRAL AWARDS 1971-85 (SIGVARD JARVIN & YVES DERAIS, EDS, 1990); ICC ARBITRAL AWARDS 1986-90 (SIGVARD JARVIN, ET AL., EDS., 1994) AND ICC ARBITRAL AWARDS 1991-95 (JEAN-JACQUES ARNALDEZ ET AL, EDS, 1997); CHRISTOPHER DRAHOZAL AND RICHARD NAIMARK, *EMPIRICAL RESEARCH ON INTERNATIONAL COMMERCIAL ARBITRATION* (forthcoming 2005)

sources for arbitral decisions exist, such as Mealey's Arbitration Reporter and the ICC redacted awards, they are but a tip of the iceberg. In contrast, the public nature of the Tribunal opinions provided significant spillover effects, guiding future dispute resolvers and guiding states trying to coordinate their behavior, before disputes arise. In short, the public, individuated caselaw of the Tribunal helped transform what was essentially a dispute resolution exercise into a source of international law.<sup>83</sup>

Again, the contrast between my account and that of Posner and Yoo is significant. They assert that "dependent" tribunals that focus exclusively on the disputant parties are ideal. Private arbitration is the paradigm of a "dependent" tribunal in their view. Private arbitration, however, does not generate public law. The public nature of arbitration that involves states, such as the Iran-United States Claims Tribunal, provides a positive externality to future disputants and potential disputants in the form of useful rules. We see that there may be more to international tribunals than simple dispute resolution, and evaluating effectiveness requires attention to the lawmaking function.<sup>84</sup>

#### **IV. Strategic Limits on Judicial Lawmaking**

So far I have argued, hopefully uncontroversially, that international judges make a good deal of law. I root this claim primarily in the nature of dispute resolution but have also suggested that there are circumstances when judges make law as agents of states that

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<sup>83</sup> One might ask why it is that states would be interested in publicity. Publishing an arbitral award means that the information on state behavior is available to domestic constituencies. If the state loses, at least it can point to the decision to say it tried. If the state wins, it presumably gets reputational benefit and political benefit from having fought well. It is perhaps no surprise that states involved in arbitration do make the decisions public, with the result that private disputants can free ride off public ones in whose disputes law is made.

<sup>84</sup> There may be a bias in the content of these rules that results from the fact that one of the parties is likely to be a repeat player. See Galanter, *supra* note [889](#)

delegate authority to interpret a treaty. We now turn to the next part of the argument, concerning mechanisms to control these agents, so that judicial lawmakers do not have an incentive to run amok. I argue that international judges exercise bounded discretion in their lawmaking.

Characterizing judicial decision-making as delegated lawmaking requires consideration of the agency problem that results from any delegation. States will be reluctant to delegate lawmaking authority when they believe it will not serve their interest. Thus the availability of constraints on judicial lawmaking is crucial to states' willingness to assign third parties dispute resolution power.<sup>85</sup> States must have, implicitly or explicitly, mechanisms for limiting the agency problem in order to get the benefit of dispute resolution.

Recent scholarship on American constitutionalism emphasizes the interactive character of the interpretive process.<sup>86</sup> These analysts trace the interactions between the Supreme Court and other actors in shaping the interpretation of laws and the constitution, suggesting that the exercise of judicial power is directly affected by the preferences of other branches. In other words, judges may wish to decide cases in certain ways, but can be prevented from doing so by their awareness of the preferences of other branches.

Because judicial review is the exercise of an interdependent lawmaking power, courts

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<sup>85</sup> W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ARBITRATION AND ADJUDICATION 2-3 (1992).

<sup>86</sup> See, e.g., NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); STEPHEN GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS (1996); EPSTEIN AND KNIGHT, *supra* note 665; Barry Friedman, *Dialogue And Judicial Review*, 91 MICH. L. REV. 577 (1993); Walter Murphy, *Constitutions, Constitutionalism And Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg *et al.* eds., 1993); WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); and William Eskridge, *The Judicial Review Game*, 88 NW. U. L. REV. 382 (1993).

ultimately behave strategically; they must seek to achieve their goals while taking into account the probable response of other actors to their choices. A rational court must be conscious of other actors in the political system.

What are the sources of constraint on judges? Albert Hirschmann's classic framework of Exit, Voice and Loyalty provides a suitable tool for understanding the options.<sup>87</sup> A party unhappy with a court decision can abandon the organization by exiting the court's jurisdiction. Alternatively, the unhappy state can comply with the decision it does not like, remaining loyal to the formal requirements of the regime. Most conventional normative scholarship on international law proceeds on the assumption that this will and always should be the case, and there is a corresponding sense of great frustration in the writing of traditional international lawyers about compliance. Finally the unhappy state can exercise various forms of voice, remaining loyal to the regime but seeking to modify the ruling it does not like. We treat each in turn.

### *A. Exit*

The ultimate constraint, exit, is unavailable in domestic constitutional systems but is available at the international level.<sup>88</sup> The decisions by France and the United States to exit the Optional Clause regime of the International Court of Justice after adverse decisions provide two high profile illustrations. The Optional Clause regime, under Article 36(2) of the ICJ Statute, allows states to file declarations that accept as compulsory the general jurisdiction of the Court vis-à-vis any other state that has made a

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<sup>87</sup> ALBERT HIRSCHMANN, EXIT VOICE AND LOYALTY (1970); see also Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1990).

<sup>88</sup> Laurence Helfer, *Exiting Treaties*, draft on file with author.

similar declaration. As with international obligations generally, these declarations can be withdrawn, and that is exactly what happened after the famous *Nicaragua* case when the Court rejected the preliminary objections of the United States.<sup>89</sup> Many treaties allow states to exit easily without more than notice to other state parties.<sup>90</sup> Some treaties require specified notice periods before withdrawal. Others also allow temporary escape clauses, allowing suspension of treaty obligations.

One prominent instance of exit was a decision by several Caribbean states to exit the jurisdiction of the Privy Council in London, in response to decisions implementing European Court of Human Rights prohibitions against the death penalty.<sup>91</sup> These states established a new Caribbean Court of Justice to replace the appellate jurisdiction of the Privy Council and to interpret the Treaty Establishing the Caribbean Community. Proponents of the new Court argued that European judges were imposing their own preferences on Caribbean societies. Helfer interprets this incident as an instance of exit in response to human rights adjudicators' ignoring the preferences of states.<sup>92</sup>

Often states will use exit to communicate displeasure with a regime. Indonesia withdrew from the United Nations in 1965 in response to the seating of Malaysia in the Security Council, rejoining some 15 months later. The United States and United Kingdom withdrew from UNESCO in 1984, rejoining in 2002 and 1997 respectively

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<sup>89</sup> U.S. Department of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, reprinted in 24 I.L.M 246 (1985)

<sup>90</sup> See e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, Art. XXIV, 27 U.S.T. 1087, 1116, 995 U.N.T.S. 243, 257 (12 months notice).

<sup>91</sup> Pratt and Morgan v. Jamaica [1994] 2 App. Cas. 1 (P.C. 1993); see generally Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM L. REV. 1832 (2002); Joanna Harrington, *The Challenge To The Mandatory Death Penalty in the Commonwealth Caribbean*, 98 AM. J. INT'L L. 126 (2004).

<sup>92</sup> Helfer, *Id.*

after reforms to the organization. Exit can substitute for voice.

Costs of exit are not uniform across states within a given regime. Relatively free exit from international regimes will allow small numbers of states that are powerful in the issue area to threaten to leave and establish new mechanisms. As an example of how the threat of exit can empower strong states, Steinberg notes that the EU and US successfully concluded the final deal of the Uruguay Round by virtue of their enormous market power. Once the two of them agreed to the changes, they simply withdrew from GATT 1947 and established a new regime, to which developing countries had to accede or else lose preferential tariff concessions.<sup>93</sup> This example suggests that future threats of EU-US withdrawal might force concessions from other states, allowing amendment without the formal legislative process.<sup>94</sup> We see that the “haves” in international dispute resolution may come out ahead, simply because of the relative costs of exit.

### ***B. Voice***

Conversely, when exit is difficult, states will seek to exercise voice.<sup>95</sup> Joseph Weiler’s classic article, *The Transformation of Europe*, argued that as exit from the European Communities was closed as a legal, economic and political matter, state demands for voice increased.<sup>96</sup> We consider several ways in which states can exercise voice, divided into two types of mechanisms: mechanisms that operate at the level of

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<sup>93</sup> Richard Steinberg, *In the Shadow of Law or Power? Consensus-Bargaining at the GATT/WTO*, 56 INT’L ORG 340 (2002).

<sup>94</sup> Posner and Yoo characterize the WTO DSU as the most independent of international courts, and hence likely to be ineffective. See *supra* note [Error! Bookmark not defined.](#)[Error! Bookmark not defined.](#)<sup>4</sup>.

<sup>95</sup> Weiler, *supra* note [878781](#), at 2412-2428.

<sup>96</sup> *Id.*

individual decisions, and mechanisms that operate at more general levels. In the former category, states can communicate to the court by *ignoring* a particular decision, and hope that whatever powers the court or other institutions have to enforce the decision will not be effective. States can also seek to *over-rule* the court interpretation, through amending the treaty regime or engaging in formal interpretation when it is provided for. More general mechanisms include the ability to *attack* the court, either explicitly by communicating displeasure, or implicitly by trying to limit the court's jurisdiction, composition, or effective power in future cases. States can also seek to limit lawmaking by promoting an attitude of judicial passivity on the part of judges.<sup>97</sup>

### *1. Ignore*

States can in some cases simply ignore the rules pronounced by courts. For example, Nigeria has taken the position in a recent case involving its border with Cameroon that it neither accepts nor rejects the ICJ decision.<sup>98</sup> Iran ignored an ICJ decision requiring it to release hostages held in Tehran in 1980.<sup>99</sup> Such actions will tend to undermine the general application of the rules pronounced in the cases at issue, though this is not always the case. In the case involving *United States Diplomatic and Consular Staff in Tehran* there was little doubt on the part of the international community that Iran had violated international law, and Iran no doubt suffered a severe reputational sanction

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<sup>97</sup> Judges also have internalized norms. The doctrine of *non liquet*, which provides that judges can declare a gap in the law such that there is no given answer in international law, provides for minimalism when judges wish it, though is controversial in international law. Judges also can find certain issues nonjusticiable, or emphasize judicial economy.

<sup>98</sup> See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AM. J. INT'L L. 434, 450 (2004).

<sup>99</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Rep. (1980).

for its behavior. A more powerful state's decision to ignore the ruling of an international tribunal, however, might be seen as undercutting the likelihood that the relevant principle would emerge as generally focal for a variety of states. In any case, ignoring a decision is at bottom a communicative act expressing displeasure with a court ruling.

## 2. *Overrule*

In domestic constitutional systems, legislatures can over-rule wayward court decisions by passing subsequent legislation. In the international arena, the difficulty of formal treaty amendment makes this option less effective. There are several reasons for the relative rarity of amendment of treaty provisions to "correct" interpretation of a judicial decision in the international arena. First of all, to the extent that consent-based treaty regimes require accordance of *all* states to amend the regime, an adverse judicial decision for one party is usually a beneficial decision for another. In bilateral settings, this fact alone makes it unlikely that both parties will agree to overturn a judicial decision. Even if the judicial decision is considered pareto-inferior by the parties, they may simply choose to ignore it or conclude a side deal without formally amending the treaty.

In multilateral settings, the analysis is more complicated. Multiple parties typically do not build easy amendment into the treaty design, and the more parties involved the more difficult any amendments will be to conclude. The WTO Treaty, for example, involves multisectoral tradeoffs of commitments by over a hundred countries. For this reason, the treaty is amended only as a package on the basis of multi-year negotiating rounds. The transaction costs of any amendment to multilateral treaties are

intentionally high: in order to make the commitments effective, it is necessary that they be difficult to escape. This makes the potential scope of lawmaking capacity greater in multilateral settings, and is a source of concern about runaway lawmakers.

Against the difficulty of formal amendment must be weighed the residual power of states parties to interpret international trade agreements. The fact that they have retained this residual power suggests that states have taken the possibility of judicial lawmaking seriously. The North American Free Trade Agreement (NAFTA) provides an illustrative example. First, to minimize the imposition of externalities on the third treaty party in the event of bilateral disputes, non-disputing parties can submit their interpretations of law to the panel. Second, and more importantly, NAFTA establishes a Free Trade Commission, composed of cabinet-level officials from each of the parties, empowered to issue interpretations of the Treaty.<sup>100</sup> The Commission has the power to "(a) supervise the implementation of [the] Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement; . . . and (e) consider any other matter that may affect the operation of this Agreement." This interpretive function, distinct from the dispute settlement system, serves as a constraint on panels. Chapter Eleven of NAFTA provides that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."<sup>101</sup>

A successful example of this process concerned panel interpretation of the standard of expropriation in NAFTA and its relation with general international law.

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<sup>100</sup> Art 2001(1).

<sup>101</sup> Id. art. 1131(2).

Article 1105 provides that “[e]ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Some early NAFTA panels had suggested that the standards for ‘fair and equitable treatment’ and ‘full protection and security’ were different under NAFTA than under general international law.<sup>102</sup> In an effort to clarify the meaning of Article 1105, the Free Trade Commission issued an interpretive statement in 2001 that “the concepts of ‘fair and equitable’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary standard of treatment of aliens.”<sup>103</sup> Following this interpretive statement, the arbitral tribunal in *Loewen v. United States*, an ICSID arbitration brought by a Canadian funeral home operator, declared that “‘fair and equitable treatment’ and ‘full protection and security’ are not free-standing obligations. Rather, they constitute obligations of the host State only to the extent that they are recognized by customary international law.”<sup>104</sup> The *Loewen* tribunal also stated that to the extent earlier NAFTA tribunals in cases such as *Metalclad Corp. v. United Mexican States*, *S.D. Myers v. Government of Canada*, and *Pope & Talbot v. Government of Canada* “may have expressed contrary views, those views must be disregarded.”<sup>105</sup>

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<sup>102</sup> See *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (2001) at ¶¶ 100-01. States were concerned that ‘fair and equitable’ would become a license for arbitrators to award damages in any case where the arbitrators viewed the government action as unfair.

<sup>103</sup> See NAFTA Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), art. B(2). These notes of interpretation also clarified that other NAFTA treaty norms, which are themselves international law, do not by the terms of Article 1105 become subject to Chapter 11 dispute resolution. See Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Resolve their Legitimacy Crisis*, 17 GEO. INT'L ENV'T'L L REV. 51, 61 (2004)

<sup>104</sup> See *Loewen v. the United States*, Award, ICSID Case No. ARB(AF)/98/3, ¶ 125.

<sup>105</sup> *Loewen* award (merits), *supra* note 2, paras. 124-28; compare *Pope & Talbot, Inc. v. Canada*,

This pattern shows that states were able to discipline a prominent dispute settlement system on a core issue, requiring the panels to apply a relatively clear body of international law rather than to create a new potentially conflicting body. This “correction” of the judicial panels has been controversial. The late Sir Robert Jennings, former president of the International Court of Justice, criticized this as a quasi-legislative intervention violating “the most elementary rules of due process of justice.”<sup>106</sup> Many international lawyers no doubt prefer a world of expanded judicial lawmaking. But they do not take into account that states will be reluctant to delegate *any* authority to dispute resolvers when judges resist political control.

Another theme which has been subject to some attention in the trade context is that of submissions by non-state actors. Non-governmental organizations have sought to submit *amicus curie* briefs to WTO and NAFTA panels. While this practice might be able to provide additional information to the panels, it is puzzling why states would wish that this information be provided directly to the panels rather than be channeled through states themselves, which could filter out undesirable views and allow the state to collect rents from non-governmental groups.

While a NAFTA panel decision to allow amici briefs was confirmed by the Free Trade Commission,<sup>107</sup> the WTO saw a heated dispute over the issue. In 2001, the WTO

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Damages, para. 47 (NAFTA Ch. 11 Arb. Trib. May 31, 2002), 41 ILM 1347, 1356 (2002) (“were the Tribunal required to make a determination whether the Commission’s action is an interpretation or an amendment, it would choose the latter”).

<sup>106</sup> See Methanex (Second Opinion of Robert Y. Jennings) at [www.international-economic-law.org/Methanex](http://www.international-economic-law.org/Methanex)

<sup>107</sup> Unofficial Statement of the Free Trade Commission on non-disputing party participation, Oct. 7, 2003, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file660\\_6893.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf) (last visited Nov. 22, 2004). For example, in *United Parcel Service of America v. Canada*,

Appellate Body announced a procedure for filing of amicus curie briefs in the EC-Asbestos case.<sup>108</sup> The case concerned a Canadian challenge to a French import ban on asbestos. The Appellate body ruled that it would accept submissions from NGOs, corporations and professional societies. The General Council, the WTO's plenary body, in effect attempted to over-rule the Appellate Body.<sup>109</sup> Commentators have criticized this incident,<sup>110</sup> but there seems to be no principled reason that states can not demand that non-state actors channel their views through the states parties.

Compared with NAFTA, which has three states parties, formal over-ruling of the Appellate Body's interpretations is more difficult because of the large number of parties to the WTO. While the WTO's Ministerial Conference and the General Council already have the formal power to adopt binding interpretations of the WTO Agreements by three-fourths majority vote, in practice the WTO relies on norms of consensus.<sup>111</sup> Even when

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available at <http://www.state.gov/documents/organization/6033.pdf> (last visited Mar. 23, 2004), the Chapter 11 tribunal accepted written briefs by non-disputing parties. *See also NAFTA Commission Statement on Amicus Curie Participation in Arbitrations*, 98 AM. J. INT'L L. 841 (2004).

<sup>108</sup> WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 12 March 2001.

<sup>109</sup> Steinberg, *supra* note [747469](#), at 266. He also notes that the officials of the WTO Secretariat have met with the Appellate Body to urge restraint in lawmaking.

<sup>110</sup> David A. Wirth, *Book Review: International Organizations and International Dispute Settlement: Trends and Prospects* (Ed. Laurence Boisson de Chazournes et al., 2002) 97 AM. J. INT'L L. 1002 (2003), at 1003 (incident "raises serious and troubling questions not only concerning judicial independence, but also concerning the appropriate roles of the organization's principal organs."); Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS (Ed. Laurence Boisson de Chazournes et al., 2002); CLAUDE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001). *See generally*, Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L COMP. L. Q. 861 (2004) (calling for enhancing case management powers of panels to resolve the issue).

<sup>111</sup> Art. IX (2) of the WTO Agreement.

the formal WTO treaty allows voting, states parties have resisted it.<sup>112</sup> The difficulty of reaching consensus, and the need for such consensus to block the adoption of panel reports, in turn greatly empowers the dispute resolution system. Some have proposed allowing the DSB to adopt panel reports in part; others have proposed making legislation and amendment easier in practice, and any successful attempt to make lawmaking easier will lead to a corresponding reduction in the discretion of judicial lawmakers. Indeed, even the proposal may have some affect, as a court might take the threat of modification seriously enough to tone down its decisions. The point is that the states do have some explicit mechanisms for correcting erroneous interpretations of trade agreements, though they may not always choose to exercise them.

### 3. *Control*

Besides these explicit mechanisms for signaling preferences to an international adjudicator in reaction to particular cases, states can utilize more general measures to try to control courts. These mechanisms include control over appointments and budget power. In the WTO, for example, members of the Appellate Body are proposed by a special committee and selected by consensus. Major players in the trade arena, however, have informal veto powers, which serves to ensure that a certain degree of consent as to the third party decision maker.<sup>113</sup> The ICJ process requires majority votes in both the General Assembly and the Security Council, and the system has evolved in such a way so that powerful states have an informal right to nominate judges for a seat on the Court.

Short of leaving the regime or ignoring a decision, states have a wide variety of mechanisms to communicate their displeasure with judicial decisions, and are not hesitant

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<sup>112</sup> Bartels, *supra* note [110110104](#), at 864-65.

<sup>113</sup> Steinberg, *supra* note [747469](#), at 264.

to utilize them. Many international courts are embedded in broader international organizations, such as the UN or WTO. Even stand-alone courts such as the International Criminal Court are embedded in broader meetings of the states parties. Regular meetings of the international organization or states parties allow states to signal displeasure in a formal way. States regularly criticize the ICJ at the UN General Assembly, for example.<sup>114</sup> These type of signals can be very important in preventing runaway courts. To the extent that the entire international organization's reputation is bundled with that of the dispute resolution mechanism, the secretariat has an incentive to monitor and restrain the court. The embeddedness of certain international courts in broader organizations can thus bundle the legitimacy of the court with the legitimacy of the organization, providing a constraint on the court. Furthermore, mobilizing public opinion against the court is a possibility. The sustained United States attacks against the International Criminal Court before it has even been created illustrate the effectiveness of this strategy.

Even standing bodies are subject to budgetary constraints. States and international organizations can punish courts for negative decisions or reward them for positive ones through material incentives. For example, the United States Congress did not increase the budgets of the U.S. Federal Courts in the 1960s during the wave of judicial activism by the Warren Court.

Consider the International Court of Justice. Its budget, drafted biennially by the Court and approved by the UN General Assembly, is paid indirectly by the Member States of the United Nations, of which the United States is the largest single contributor. Figure 1 presents the ICJ budgets since its inception, calculated in constant 1946 dollars.

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<sup>114</sup> See, e.g., statement of U.S. after Nicaragua case.

Broadly speaking, the ICJ has had a budget that increased steadily since the late 1960s, a time when the Court issued its decision in the *South-West Africa* cases, a decision highly unpopular with the third world nations that dominated the General Assembly but seen as favoring rich nations like the United States.

Beginning in 1994 there has been a decline in the constant budget even while the ICJ's docket has continued to expand. What is the explanation? One possibility concerns one of the most controversial ICJ cases, the Advisory Opinion concerning the Legality of Nuclear Weapons, the request for which was originally filed in mid-1993.<sup>115</sup> As discussed above, the Case originated with a request from the World Health Organization, a UN body which sought to utilize the law to advance a policy agenda, and was also put to the ICJ by the General Assembly, the vast majority of whose members do not possess nuclear weapons. Like all advisory opinions, it did not purport to have binding force but simply declared rights and duties, nominally as a matter of existing law. Lawmaking did not arise out of a situation involving coordination of state interests. The case generated broad derision in the United States upon its filing, notwithstanding the qualified nature of the ultimate conclusion of the Court that it was not possible to say as a matter of law that possession of nuclear weapons was illegal. It is certainly plausible that the derision led to a decline in the budget of the ICJ, either alone or as part of a general crisis of United Nations institutions with which the Court was bundled.<sup>116</sup>

My assertion is only that it is at least plausible that the fluctuations in funding

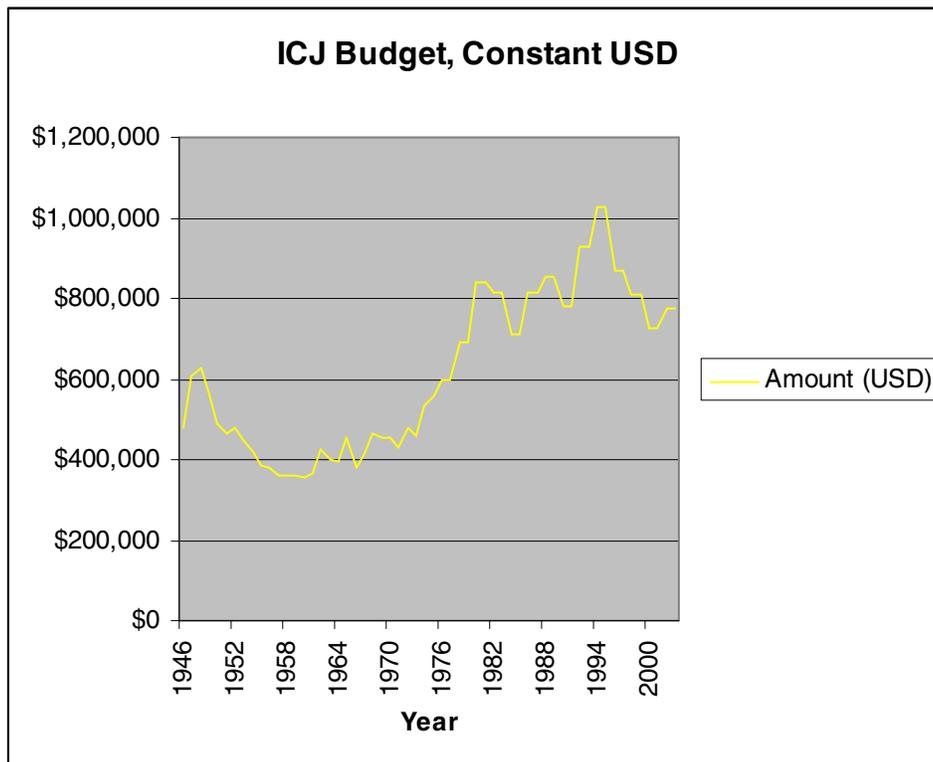
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<sup>115</sup> See Request for Advisory Opinion, available at [http://www.icj-cij.org/icjwww/icasess/ianw/ianw\\_pleadings/ianw\\_iapplication\\_19930514\\_requestopinion.pdf](http://www.icj-cij.org/icjwww/icasess/ianw/ianw_pleadings/ianw_iapplication_19930514_requestopinion.pdf) See also Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (July 8).

<sup>116</sup> We do know that the United States Senate, in particular the Chair of the Foreign Relations Committee, withheld funds from the UN as a whole because of perceived anti-American biases.

reflect political decisions, though such connections are difficult to prove and require further research. The point is that states do have in budgetary control a mechanism for signaling displeasure.<sup>117</sup>

**Figure 2**



Source: ICJ Yearbooks; General Assembly Resolutions

One conclusion we *can* draw is that ICJ budgets have been dwarfed by those of

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<sup>117</sup> One might ask why budgetary declines did not begin around the time of the famed Nicaragua case, which was highly unpopular in the United States. One speculative answer is that the United States had another mechanism for signaling displeasure, namely the public withdrawal from Optional Clause jurisdiction.

newer arrivals on the dispute resolution scene. As mentioned above, the most recent ICJ budget called for a two-year expenditure of roughly \$26 million. By contrast, the International Criminal Tribunal for the former Yugoslavia (ICTY), also funded by the Security Council and General Assembly, received a budget for the same two years of \$248.9 million. (See Figure 3 below.) This disparity has led the ICJ Justices to demand greater resources.<sup>118</sup> While some of the disparity is explained by the very different tasks of the two organizations, it cannot be explained by caseload. The entire docket of the ICTY, including cases being appealed and indictments of persons still unarrested, has 41 cases. The current ICJ docket has around 20 cases.

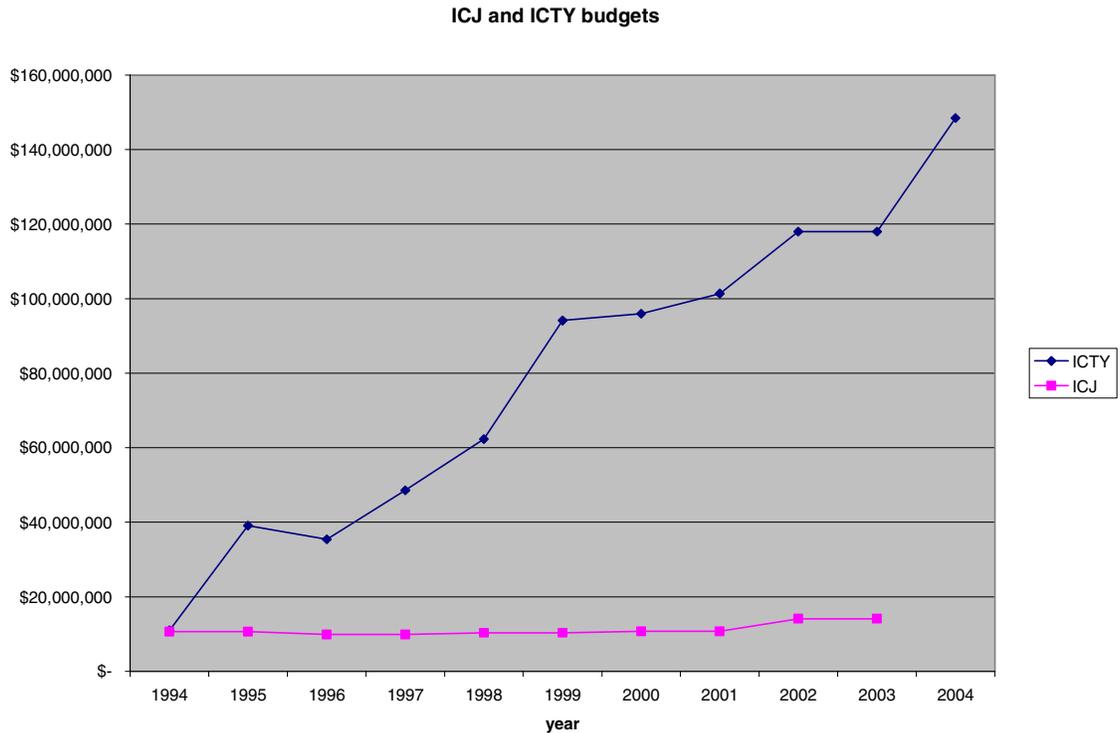
The most plausible explanation for the disparity is that the ICTY is serves the interests of powerful states in a way the ICJ is not. The ICTY essentially exercises delegated lawmaking functions. Its job is to articulate international criminal law in the context of punishing a discrete set of identified wrongdoers. The law it makes may have some spillover effects into arenas of interest to powerful states, but for the most part will only directly affect a group of Serbs. In contrast, the lawmaking functions of the ICJ are more diffuse and difficult to control for powerful states. This has not been helped by the ideological orientation of many judges toward constraining powerful states.<sup>119</sup> In short, the ICTY has been very well funded, a sign of approval by powerful states of its delegated lawmaking role.<sup>120</sup> The ICJ's funding has depended on political vagaries of the

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<sup>118</sup> Judge Gilbert Guillaume, then-President of the International Court of Justice, to the United Nations General Assembly: "It is for you to decide whether the Court is to die a slow death or whether you will give it the wherewithal to live", available at [http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident\\_Guillaume\\_GA55\\_20001026.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_GA55_20001026.htm)

<sup>119</sup> See, e.g., *Oil Platforms (Iran v. U.S.) (Merits)*, 2003 I.C.J. para. 39 (Nov. 6), <http://www.icj-cij.org/icjwww/idecisions.htm> (Separate Opinion of Judge Simma).

court, and has fluctuated, but has never approached that of its newer cousin.



Note: ICTY Annual Report, available at <http://www.un.org/icty/publications/annrep.htm> .

ICJ data comes from the annual ICJ Yearbooks, except for 2002-03 which comes from the UN General Assembly budget resolution. Through 2001, the ICTY budget was on an annual basis. Both institutions now use a biennial budget; annual figures were obtained by dividing the biennial budget in half.

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<sup>120</sup> It should be mentioned, however, that the Security Council is now pressuring the ICTY and its fellow tribunal for Rwanda, the ICTR, to speed up the processing of cases, and has secured agreement that they will close by 2010. This reflects, in part, concerns about the large budgets of the tribunals.

### *C. Dependence, Independence, and Lawmaking Power*

My argument is that strategic constraints, though less apparent in the international context than in domestic lawmaking, provide important limits on judicial discretion. Many different mechanisms exist in the international arena to ensure limitations on judicial lawmaking. I am not asserting that these will always be apparent: to the extent they are effective, we will simply observe less active lawmaking. Indeed, much of the rhetoric of international tribunals is devoted to limiting their decisions to the scope of the particular *compromis* or norms at issue: many judges appear to have internalized a limited conception of their lawmaking role.<sup>121</sup>

One implication of my analysis is that state abilities to constrain courts are not evenly distributed. Clearly the United States has played a dominant role in many international organizations, and it should not be surprising that we see that the *scope* of dispute resolution may be largely responsive to its interests, even though individual decisions may be decided mainly on “proper” legal grounds. This suggests that in fact the “haves” may come out ahead in international dispute resolution, not simply because they are repeat players that can choose what cases to hear and what to settle, but because their preferences are inordinately represented in the design of dispute resolution and in the various constraints exercised *ex post*.<sup>122</sup>

It is worthwhile to compare my analysis with that of Posner and Yoo, whose recently articulated theory of international adjudication focuses on the binary distinction

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<sup>121</sup> Internalization is a general mechanism of controlling agency costs. Tom Ginsburg, *Comparative Administrative Procedure: Evidence from Northeast Asia*, 13:3 CONST. POL. ECON. 247-64 (2002).

<sup>122</sup> Cf. Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. SOC. REV. 95 (1974).

between dependent and independent courts.<sup>123</sup> Dependent courts, according to Posner and Yoo, are those appointed by two parties to a particular dispute after it has arisen, with adjudicators chosen by the parties themselves. The paradigm here is ad-hoc arbitration. Independent courts are standing bodies, with compulsory jurisdiction over a certain class of disputes, whose judges have fixed terms and salaries and are likely not chosen by the parties to a dispute.<sup>124</sup> They tend to serve a large number of states, and sometimes include a right of initiation for nonstates (such as the ICC prosecutor or citizens.) Posner and Yoo argue that effectiveness and independence are not positively correlated and may in fact be negatively correlated.<sup>125</sup> That is, while most public international lawyers argue that independent courts will be better able to generate compliance and will be more utilized, Posner and Yoo suggest that dependent courts will be more effective.<sup>126</sup>

I am broadly in sympathy with their point that international courts must take state interests into account to be effective. However, my analysis suggests that they have the wrong criteria for operationalizing independence. There is nothing about permanence, or what might be called institutionalization, which will necessarily render standing courts ineffective. Posner and Yoo argue that domestic courts, unlike international courts, are

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<sup>123</sup> Posner and Yoo, *supra* note [Error! Bookmark not defined.](#)[Error! Bookmark not defined.](#)<sup>4</sup>; see also Laurence Helfer and Anne-Marie Slaughter, *Of States, Bargains and Judges: A Response to Professors Posner and Yoo* \_\_ CAL L. REV. \_\_ (1995)

<sup>124</sup> Their criteria are compulsory jurisdiction, no right to appoint a judge, permanent body, judges with fixed terms, right of third parties to intervene. Posner and Yoo, *supra* note [Error! Bookmark not defined.](#)[Error! Bookmark not defined.](#)<sup>4</sup>, at 44. By their measure the WTO Appellate Body is the most independent. *Id.* at 45. It is followed by the ICJ's compulsory jurisdiction, ITLOS, the ECJ and ECHR all tied.

<sup>125</sup> See also David A. Wirth, *Book Review: International Organizations and International Dispute Settlement: Trends and Prospects* (Ed. Laurence Boisson de Chazournes et al., 2002) 97 AM. J. INT'L L. 1002 (2003).

<sup>126</sup> Posner and Yoo, *supra* note [Error! Bookmark not defined.](#)[Error! Bookmark not defined.](#)<sup>4</sup>, at 25.

subject to mechanisms of political control.<sup>127</sup> I argue that the differences are only of degree rather than kind. Every international dispute resolver is subject to constraints. Certainly one can imagine bodies that are appointed for the purpose of resolving a particular dispute and are able to exercise substantial independence, while conversely there may be standing bodies that are substantially constrained.<sup>128</sup>

From the point of view of judicial lawmaking, standing tribunals may be *more* effective than those appointed for a particular dispute. To the extent that they see a stream of cases presenting similar issues over time, standing tribunals may develop mechanisms of signal and interaction with their political principals that may make them more effective delegates. Standing bodies may develop proficiency in determining state interests and preferences as they see the same parties in a series of disputes over time. They may be better able to establish creative focal points that maximize disputant payoffs; indeed their reputation for choosing effective rules may itself generate compliance in future cases.<sup>129</sup> They may create rules that will discourage future disputes--in other words, effective precedent. This suggests that tribunal usage, another criteria used by Posner and Yoo to indicate effectiveness, may be insufficient. A very good tribunal might be effective in preventing disputes by providing clear law.<sup>130</sup>

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<sup>127</sup> Posner and Yoo *supra* note [Error! Bookmark not defined.](#)[Error! Bookmark not defined.](#)4, at 49.

<sup>128</sup> My account takes some issue with the recent trend in international legal scholarship to put Europe at the center of the analysis. Slaughter, ASIL Proceedings. It is NAFTA, not the EU, that best illustrates the dynamic of constrained lawmaking. But see Posner and Yoo, with whom I agree on the point that the EU may be somewhat sui generis.

<sup>129</sup> Ginsburg and McAdams, *supra* note [\\*\\*\\*](#).

<sup>130</sup> See McAdams, *The Expressive Power of Adjudication*, draft, at 77-85. A tribunal that is able to generate good precedent will not be utilized precisely because it is providing useful rules to help states coordinate their behavior. A related point concerns predictability. Only when states are unable to predict the decision that will come from the tribunal will they proceed to litigation.

Certain factors in the design of dispute resolution tend to lead to greater discretion on the part of international tribunals. I will conclude this paper by asserting three propositions about institutional design and the scope of judicial lawmaking, drawn from comparative work in national contexts.<sup>131</sup> First, lawmaking power increases with the number of parties to a regime. Second, lawmaking power increases with the difficulty of amending the treaty or over-ruling the lawmakers. Third, lawmaking power increases with the cost of exiting the regime.

These propositions imply that multilateral regimes tend to be more conducive to judicial discretion than bilateral regimes, because the difficulty of obtaining agreement to revise or amend the treaty increases with the number of parties that must negotiate change. WTO panels likely have more lawmaking discretion than NAFTA panels because of the larger membership and the unanimity norm. Although the WTO Dispute Resolution Body and the NAFTA Free Trade Commission both have the power to override panel interpretations of their respective treaties, only the latter has provided a genuine constraint in the sense of clear effect on panel jurisprudence.

The third proposition is that the more costly and difficult it is for states to exit a regime, the greater the discretion of the court. One of the factors that makes exit costly is long time horizons. The European Court was able to exercise a good deal of lawmaking power because of the high cost of exiting an increasingly integrated market. The Iran-United States Claims Tribunal has lasted over twenty years, and the long stream of cases meant that the United States had little incentive to exit the regime, even when it was

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<sup>131</sup> See Robert Cooter and Tom Ginsburg, *Comparing Judicial Discretion: An Empirical Test of Economic Models*, 16 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 295 (1996) reprinted in CONSTITUTIONAL POLITICAL ECONOMY (Stefan Voigt, ed., 2003).

unhappy with particular decisions. More generally, trade regimes may be especially conducive to international judicial lawmaking because trade regimes tend to be pareto-improving for all states parties, even though they create localized costs to particular interest groups.

Table 1 arrays prominent international tribunals along dimensions that will contribute toward lawmaking power. The table represents an obvious over-simplification. Obviously the costs of exiting any given regime are not constant across states: they will depend on state integration with other states, relative power, availability of alternative partners, and other factors. Nevertheless, we can make some general observations across regimes. Trade regimes which lead to greater integration tend to have high exit costs and have treaties that are difficult to amend; but they often also allow interpretation by inter-state bodies, which can serve as a check on judicial lawmaking.

The table illustrates the inter-relationship between submission of disputes to international tribunals and mechanisms for state control. Where jurisdiction is essentially consensual, as in ad-hoc arbitration and in what Posner and Yoo consider 'dependent' tribunals, there are few mechanisms for over-ruling because control is exercised in the delegation phase. In contrast, mandatory jurisdiction is associated with explicit and implicitly delegated lawmaking power and with mechanisms for ex post control. In other words, where states seek a downstream coordinator to help resolve interpretive disputes, there is less likely to be case-by case control over their submissions to the court, but states may set up an explicit mechanism to constrain rogue interpretations, short of treaty amendment.

It may well be the case that the very features of independence identified by Posner and Yoo as associated with ineffective dispute resolution are the same features that make courts effective lawmakers. Independent, standing bodies ought to be better at making general rules than dependent, temporary ones. Because of this, states that create standing bodies will seek to develop mechanisms to constrain lawmaking at its outer boundaries. This serves their interest in having tribunals serve as delegated lawmakers, while ensuring political safeguards.

**Table 1: Lawmaking power of tribunals**

	Case by case consent by both states over submissions?	Cost of exiting regime	Explicit mechanism for state control of interpretation?	Ease of amending treaty regime or over-ruling	<b>Level of lawmaking discretion</b>
ECJ-unanimity	No	High-no explicit provision	No	Very Difficult	“unlimited”
WTO	No	High-but legal	Yes	Very Difficult	Very high
ECJ-QMV	No	High	No	Difficult	Very high
NAFTA	No	High-but legal	Yes	Medium-only three parties	Medium
ICJ-optional clause	No	Low	No	Difficult	Medium
ICJ-other	Yes	Consensual	No	Depends on regime; but	Low

				only two parties to most disputes so relatively easy	
Ad-hoc arbitration	Yes	Zero-no regime	No	Easy; states can cooperate in <i>compromis</i> and post- dispute implementation	Low

My argument brackets concerns about the democratic deficit of international organizations. Scholars have raised valid concerns about the relative slack of international agents. Professor Swaine, for example, has characterized international delegations as broader and different in kind than domestic delegations, for example to courts and administrative agencies.<sup>132</sup> International delegations have been criticized as undemocratic. It is certainly the case that international delegation has the potential to alter internal constitutional balances of power within states and federalisms. To the extent, then, that one adopts an internal constitutional perspective, my arguments about state constraint may remain unconvincing.

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<sup>132</sup> Edward T. Swaine, *Resisting International Delegations*, 98 AM. SOC. INT’L L. PROC. 343 (2004); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

## **Conclusion**

International judges exercise lawmaking power. This is not only inherent in any system of dispute resolution, but frequently an explicit strategy of states that leave treaties vague. Judicial lawmaking exists in specific contexts in which judges are subject to various formal and informal constraints. The formal constraints include the possibility of states over-riding their decisions; the informal constraints concern a whole range of subtle and not so subtle devices states can use to signal displeasure with adjudicative decisions.

Because of these constraints, many of the concerns about judicial lawmaking are overblown, especially in powerful states like the U.S.. There is no small irony that many of the criticisms of international tribunals emanate from American scholars. Powerful states like the United States, and groups of less powerful states, retain means of controlling and cajoling international judges. These mechanisms are not perfect. States retain the ultimate decisions, however, to comply with decisions, to pay the judges, and to delegate residual lawmaking authority in the first place.